

ARIZONA SUPREME COURT

In the Matter of

RULES 31.2, 31.4, 31.13, 32.4, 32.6 and
32.9, RULES OF CRIMINAL
PROCEDURE

No. R-14-0010

**Petitioner's Response to Request for
Additional Comments**

In response to this Court's reopening of this matter for additional comments "providing general information, data, or studies regarding the administration of capital cases in states with a unitary review procedure similar to that proposed by the amended petition," Petitioner has identified nine states that, since 1988, have utilized some form of a unitary review procedure, generally for capital cases only. At least five of these states have adopted some form of unitary review system similar to that proposed by the amended petition, in which a post-conviction proceeding in the trial court follows immediately after a capital trial and the appeal from that proceeding is combined with the direct appeal of the conviction and sentence. Those states include California, Colorado, Idaho, Ohio, and Texas. *See Hoffman v. Arave*, 236 F.3d 523, 534 n.18 (9th Cir. 2001); Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. App. Prac. & Process 347, 393 (2003) ("So-called unitary review systems . . . are currently in force in Colorado, Texas, Ohio, and Idaho . . ."); *see also* Col. Rev. Stat. § 16-12-201 to -210; Colo. R. Crim. P.

32.2(c)(1); Idaho Code Ann. § 19–2719; Ohio Rev. Code Ann. § 2953.21(A)(2); Tex. Code Crim. Proc. art. 11.071. Three of those states—California, Ohio, and Texas—have not imposed mandatory unitary systems such as that proposed here. Instead, only Colorado and Idaho appear to have implemented a mandatory unitary review system similar to that proposed here.

Four other states utilized unitary review systems at one time, but no longer do so. Arkansas and Missouri implemented unitary review systems for periods of time but later reverted to the system in which collateral review follows the completion of direct appeal. In Florida and Pennsylvania, the courts struck down legislatively enacted unitary review systems on separation of powers grounds.

The following is a brief review of the procedures in those states that have utilized unitary review for capital or all criminal cases:

ARKANSAS: Between 1989 and 1991, Arkansas had a form of unitary review. *See Matter of Abolishment of Rule 37 & the Revision of Rule 36 of the Ark. Rules of Crim. P.*, 770 S.W.2d 148 (Ark. 1989) and *In Matter of Reinstatement of Rule 37 of Ark. Rules of Crim. P.*, 797 S.W.2d 458 (Ark. 1990). During this period, Arkansas effectively did away with post-conviction review proceedings in an attempt to address the concern that “post-conviction remedies were drawn out extensively, and unnecessarily, before cases were concluded. It was [the Arkansas Supreme Court’s] thought to accelerate post-conviction procedures and at the same

time have a system which protects the defendant's constitutional and fundamental rights." *In re Post-Conviction Procedure*, 797 S.W.2d 458, 458 (Ark. 1990); *see also Whitmore v. State*, 771 S.W.2d 266, 267–69 (Ark. 1989) (describing difficulties in expeditious review of post-conviction petitions, especially in capital cases).

Under that briefly implemented system, a defendant could assert an ineffective-assistance-of-counsel ("IAC") claim against trial counsel within 30 days of entry of judgment. *In re Post-Conviction Procedure*, 797 S.W.2d at 458. The direct appeal would then be consolidated with the appeal of the trial court's denial of post-conviction relief. *Id.* The Arkansas Supreme Court noted that "the scope of the remedy afforded [by this procedure] was more limited than that which had been [previously] afforded." *Id.* After approximately 15 months under this limited form of unitary review, the Arkansas Supreme Court went back to its prior system of post-conviction review, albeit it with stricter time limits than had previously been imposed. *Id.*; *see also In Matter of Reinstatement of Rule 37*, 797 S.W.2d at 459–60.

CALIFORNIA: Although its system has been characterized as "unitary review," *see Calderon v. Ashmus*, 523 U.S. 740, 743 n.1 (1998), California—like Texas—has never implemented a mandatory unitary system like the one proposed here, but rather utilized a procedure that *could* operate as a unitary review

depending on the attorney's actions. As a practical matter, the California Supreme Court rarely reviewed collateral claims together with the direct appeal, had no standards concerning the consolidation of the two types of claims, and did not authorize payment for appointed counsel to investigate all claims. *Ashmus v. Calderon (II)*, 935 F.Supp. 1048, 1069–70 (N.D. Cal. 1996). Originally, the same attorney was appointed to do both the direct appeal and the post-conviction [“habeas” in California] proceeding, an arrangement which proved unworkable. *See Report and Recommendations on the Administration of the Death Penalty in California*, 51 & 51 n.67 (Cal. Comm’n on the Fair Admin. of Justice, June 30, 2008), available at:

<http://ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>. Now, although separate attorneys are appointed, appointment of

habeas counsel lags so far behind the appointment of appellate counsel that the two proceedings are no longer considered together. *Id.* at 52. One result of the ensuing delay in the factual investigation of post-conviction claims is that, “Inevitably, records are lost, witnesses become unavailable, and memories fade,” *id.*, an observation that supports one of Petitioner’s main reasons for pursuing the amended procedures proposed here.

COLORADO: Colorado’s system, in contrast to California, functions as true unitary review. Under the Colorado procedure, within 7 days of imposing a

death sentence, the trial court must hold an advisement hearing at which it appoints new counsel for the direct appeal and PCR proceeding, orders the prosecutor to provide new counsel with all discoverable material within 7 days, orders trial counsel to provide new counsel with the trial file within 7 days, and orders transcripts to be provided within 21 days. Colo. R. Crim. P. 32.2(b)(3). Any PCR motion must be filed within 22 weeks (154 days) of the advisement hearing. *Id.* 32.2(b)(3)(V). Any evidentiary hearing on the PCR motion must occur within 63 days of the motion. *Id.* 32.2(b)(4). The trial court must render a decision within 35 days of the hearing or of the filing of the PCR motion if there is no hearing. *Id.*

A unitary notice of appeal for the direct appeal and PCR must be filed no later than 7 days after the trial court's order in the PCR; the trial court then has 21 days to deliver the record on appeal to the Colorado Supreme Court. *Id.* 32.2(b)(5), (c)(1). The opening brief (limited to 79,250 words) is due 182 days (26 weeks) after filing of the notice of appeal, the answering brief 126 days (18 weeks) after filing of the opening brief, and any reply 63 days (9 weeks) after the answering brief. *Id.* 32.2(c)(2). Extensions for the filing of the appellate briefs "will not be granted except on a showing of extraordinary circumstances that could not have been foreseen and prevented." *Id.* The rule additionally allows the trial court and supreme court to impose sanctions on counsel for "willful failure" to comply with its provisions. *Id.* 32.2(d).

The Legislature intended that the unitary appeal process would take no longer than two years, including opportunities for extensions based on “extraordinary circumstances.” See Colo. Rev. Stat. § 16–12–208(3). However, the Colorado Supreme Court found that “the failure of this court to include in its rules an *inflexible* two-year time limit on any aspect of the unitary review process means that *no such practice limit exists.*” *People v. Owens (I)*, 228 P.3d 969, 972 (Colo. 2010) (emphasis added). Thus, the system did not prevent trial courts from granting extensions of time necessitated by extraordinary circumstances. *Id.* at 973.

Although the Colorado system is in large part similar to that proposed here, Colorado currently has only 3 inmates under capital sentence.¹ See Current Death Row Roster, Colo. Dep’t of Corr., available at <http://www.doc.state.co.us/death-row>. Litigation under Colorado’s unitary review system has involved the scope of the prosecutions’ disclosure obligations, *People v. Owens (II)*, 330 P.3d 1027 (Colo. 2014); *People v. Ray*, 252 P.3d 1042 (Colo. 2011); and the availability of extensions beyond the legislature’s two-year limit, *Owens I*, 228 P.3d 969. Petitioner previously addressed the federal district court’s dismissal of conflict claims alleged between trial, PCR, and appellate counsel in *Owens v. Office of Dist. Attorney for Eighteenth Judicial Dist.*, 896 F. Supp. 2d 1003, 1006 (D. Colo.

¹ In contrast, Arizona currently has 118 inmates under a sentence of death and 52 pending capital post-conviction cases.

2012), in the Amended Petition.

FLORIDA: Effective January 2000, the Florida Legislature enacted new PCR procedures that, among many other provisions, gave capital prisoners 180 days (with no possibility of extensions) after the filing of the initial direct appeal brief to file a PCR petition and imposed strict time limits on the adjudication of PCR petitions. *See Allen v. Butterworth*, 756 So.2d 52, 55–57 (Fla. 2000). The legislation further required all appeals and PCR actions in capital cases to be resolved within 5 years of imposition of the death sentence and limited death row inmates to “only one postconviction action in a sentencing court and [] only one appeal of that action to” the Florida Supreme Court. *Id.* at 56. The Florida Supreme Court struck down these changes as violating “the constitutional separation of powers and this Court’s constitutional rule-making responsibility.” *Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.993*, 772 So.2d 488, 490 (Fla. 2000) (citing *Allen*, 756 So.2d 52).

IDAHO: Idaho’s unitary review system for capital cases provides a 42-day window after the filing of the judgment imposing a death sentence in which to file a PCR motion. Idaho Code § 19–2719(3). After this time period elapses, any claims “not known or which could not have reasonably been known within 42 days of judgment” must be asserted within a “reasonable” time after they reasonably could have been known, or are deemed waived. *Stuart v. State*, 232 P.3d 813, 819

(Idaho 2009). Claims “not known or which could not have reasonably been known within 42 days of judgment” have been interpreted to include claims of appellate counsel’s ineffectiveness. *See Paz v. State*, 852 P.2d 1355, 1357 (Idaho 1993); *see also Leavitt v. Arave*, 383 F.3d 809, 840 (9th Cir. 2004).

Originally, the same attorney could represent a defendant at trial, in the PCR, and on direct appeal. *See Joan M. Fisher, Expedited Review of Capital Post-Conviction Claims: Idaho’s Flawed Process*, 2 J. App. Prac. & Procedure 85, 99 (2000) [hereafter “Fisher”]. However, in 1995, the Idaho Supreme Court promulgated Idaho Criminal Rule 44.2, which requires the trial court in a capital case to appoint at least one attorney other than trial counsel to represent the defendant in the PCR proceedings. Additionally, the newly-appointed lawyer may also be appointed to represent the defendant in the direct appeal. Idaho Crim. R. 44.2(1). The Idaho Legislature similarly enacted Idaho Code § 19–2720, which authorized trial judges to appoint a new PCR attorney where there was a reasonable basis to litigate an IAC claim.

Idaho’s system has been criticized for its strict time limits since these provisions make it difficult, if not impossible, to raise claims of trial counsel’s ineffectiveness. *See Fisher* at 98–100, 105–08. In contrast, the amendments proposed here would grant capital defendants a full year after completion of the record on appeal to file a PCR petition. Although Idaho’s system is similar to that

proposed here in most other respects, Idaho, like Colorado, has a much lower volume of capital litigation than Arizona.² See http://www.idoc.idaho.gov/content/prisons/death_row [11 prisoners on Idaho's death row].

MISSOURI: In 1988, Missouri tried to expedite post-conviction review in all criminal cases with a pre-appeal process for review of felony convictions. See *Cupp v. State*, 988 S.W.2d 49, 50 (Mo. App. S.D. 1999). If an appeal was taken, the PCR had to be filed with 30 days after the filing of the transcripts in the appeal. Rule 29.15(1) required that the appeals be consolidated. See *State v. Dodd*, 944 S.W.2d 584, 585 (Mo. App. S.D. 1997). By July 1997, the Missouri Supreme Court reverted to its prior system, requiring the PCR be filed either 90 days after the appellate mandate, or *if no appeal* was taken, 180 days after the prisoner is delivered to the custody of department of corrections. See Fisher at 111–14.

OHIO: In Ohio, a PCR petition must be filed “no later than” 180 days after the trial transcripts are filed in the appellate court in the direct appeal. Ohio Rev. Code § 2953.21(A)(2). A person under a sentence of death is entitled to the appointment of a new death-qualified attorney for the PCR. *Id.* § 2953.21(1)(2). However, there does not appear to be any requirement that the direct appeal and

² In March 2014, the Idaho Legislature released a report entitled “Financial Costs of the Death Penalty.” Office of Performance Evaluations, Idaho Legislature, “Financial Costs of the Death Penalty” (March 2014), available at <http://www.legislature.idaho.gov/ope/publications/reports/r1402.pdf>. However, the report does not specifically address the administration of Idaho's unitary review system. Petitioner did not discover similar reports from any of the other unitary review states.

appeal from the PCR proceeding be consolidated for appellate review. In fact, Ohio Appellate Rule 6 suggests just the opposite, *i.e.*, that the two proceedings are pending simultaneously.

PENNSYLVANIA: Effective January 1996, the Pennsylvania Legislature established the Capital Unitary Review Act, which provided for unitary review in capital cases. *See In re Suspension of Capital Unitary Review Act*, 722 A.2d 676, 677 (Pa. 1999). Among other provisions, the legislation provided that a judgment became final only after the PCR proceeding was resolved and that the direct appeal and appeal from the PCR would occur simultaneously in one appellate proceeding. *Id.* The Pennsylvania Supreme Court struck down the unitary review portion of the legislation as conflicting with a state constitutional provision granting the supreme court sole authority to promulgate procedural rules. *Id.* at 680.

TEXAS: In 1995, the Texas Legislature created a system of virtually simultaneous direct appeal and PCR habeas proceedings. Texas Code Crim P. art. 11.071 (2000). Counsel to represent a prisoner in the post-conviction proceeding (called “habeas corpus” in Texas) is appointed almost immediately after imposition of the death sentence, and habeas counsel begins work immediately upon appointment, “before and after the appellate record is filed in the court of criminal appeals.” Tex. Code Crim. P. art. 11.071(2), (3)(a). A state habeas petition must be filed in the trial court either 180 days after appointment of post-conviction counsel

or 45 days after the state’s original brief was filed on direct appeal, whichever is later. *Id.* 11.071(4)(a). The trial court may grant one 90–day extension “for good cause shown.” *Id.* 11.071(4)(b). However, like in Ohio, it does not appear that the direct appeal and appeal from the state court habeas proceeding are consolidated. *See id.* 11.071(11) (describing procedure for appellate review of trial court’s ruling on habeas application).

FINAL REMARKS

Although it appears that two states—Colorado and Idaho—utilize unitary review systems similar to the one proposed in the amended petition, no state has implemented a form of unitary review identical to that proposed here. However, nothing in the above review of other states’ procedures above suggests that the proposed amendments will not achieve the stated goal of increased reliability in capital post-conviction relief proceedings by assessing claims closer in time to the trial, thereby making the investigation of PCR claims easier and more efficient and combating the effect of fading memories and lost evidence.

It is not just Petitioner that has noted problems associated with holding post-conviction proceedings after the direct appeal, particularly with respect to ineffective assistance of counsel claims:

First, there is the problem of delay. In most jurisdictions, state postconviction proceedings only start once direct appellate review ends. A defendant’s inability to reinvestigate the case and demonstrate that the trial attorney was ineffective dwindles with time.

Witnesses die or disappear. Evidence is lost. Memories fade. With direct appeals taking more than four years in some jurisdictions, the delay drastically decreases the likelihood that defendants will be able to mount effective challenges to their trial attorneys' performance.

Eve Bensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIM. JUST. 24, no. 3, Fall 2009, at 7. As proposed here, a solution to this problem is to hold post-conviction proceedings immediately after the trial, before the direct appeal. As Petitioner has previously stated, this proposal offers substantial advantages: "When the claims are raised closer to the time of the trial, witnesses and evidence are more likely to be available, and the state's interest in finality is not nearly as compromised by the need for a retrial." *Id.* at 12.

Finally, the comment filed on January 9, 2015, by the State Bar of Arizona does not respond to this Court's request for comments providing general information, data, or studies regarding unitary review systems in other states, but simply repeats the argument, made in prior comments, regarding claims of ineffective assistance of appellate counsel. *See* Comment of the State Bar of Arizona in Opposition, available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/141519780971.pdf.

Petitioner responded to this argument in its Reply, filed on July 7, 2014, and will not do so again. *See* Reply to Comments to Amended Petition at 5–6, available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/177262741371.pdf.

Petitioner respectfully requests that this Court adopt the proposed amendments to Rules 31 and 32 of the Arizona Rules of Criminal Procedure.

Respectfully submitted,

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