EXPEDITED REVIEW OF CAPITAL POST-CONVICTION CLAIMS: IDAHO'S FLAWED PROCESS

Joan M. Fisher*

While some states are imposing moratoriums on executions[1] and even entertaining abolition of the death penalty[2] due to recently-discovered prosecutorial misconduct and death sentences imposed on innocent people, other states are searching for ways to expedite the process. For example, Florida Governor Jeb Bush has called on legislators to adopt a "unitary review"[3] system of appeal in capital cases which is designed to shorten the time between conviction and execution of sentence.[4] A unitary system

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* Supervising Attorney, Capital Habeas Unit, Federal Defenders of Eastern Washington and Idaho.

1. *See, e.g.*, Dirk Johnson, *Illinois Study of Death Row Errors Turns to "Inadequate" Defense*, ARK. DEMOCRAT-GAZETTE, Feb. 6, 2000, at A6 (discussing Illinois Governor George Ryan's "moratorium on executions" following the release of a thirteenth inmate from death row determined to have been improperly convicted and sentenced to death). Governor Ryan's announced moratorium has apparently influenced calls for reexamination of the death penalty in other states. For example, Kansas Governor Bill Graves called for re-evaluation of that state's capital process on February 17, 2000. Death Penalty Information Center, *What's New* (visited Mar. 1, 2000) <http:www.essential.org/dpic/whatsnew.html>. The Catholic Archbishop of Philadelphia called for a moratorium on executions in Pennsylvania, supported by the Philadelphia City Council. *Id.* The Charlottesville, Virginia, City Council called for a moratorium on executions in Virginia in a January 18, 2000 resolution. *Id.* Similarly, the House of Delegates of the Louisiana State Bar Association called for a moratorium on Louisiana legislation by a vote of two to one on January 21, 2000, based on concern that death row inmates have appropriate means to present their claims to the courts for review before execution. *Id.*

2. A bill has been introduced in the New Hampshire state legislature to abolish the state's death penalty supported by a former state representative whose father was murdered and who now leads a victims' support group which argues that capital punishment perpetuates a cycle of violence. Death Penalty Information Center, *What's New* (visited Mar. 1, 2000) <http:www.essential.org/dpic/whatsnew.html>. A Vermont state senator who previously sponsored and supported death penalty legislation has now reversed his position based upon concerns about mistakes made in the criminal justice system. *Id.*

3. 28 U.S.C. § 2265(a) (West Supp. 1999).

4. Governor Bush threatened to block a special session to change the manner of executions from lethal injection unless the legislature considers proposed amendments to

essentially consolidates the direct appeal and state post-conviction process to eliminate the additional time involved in consideration of collateral attacks typically brought after the direct appeal has been resolved.

Adoption of unitary systems by states has been encouraged with Congress's passage of the Anti-Terrorism and Effective Death Penalty Act[5] ("the Act" or "AEDPA"), signed into law by President Clinton on April 26, 1996. An important impetus for passage of this legislation is the federal effort to expedite litigation in capital cases. Chapter 154 of the Act invites states to avail themselves[6] of expedited federal review of constitutional claims raised by state inmates in capital cases by adopting post-conviction measures that provide for competent and adequately compensated counsel.[7]

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shorten the appeals process. Governor Bush's top policy adviser, Brad Thomas, was quoted as describing the goals of the expedited process: "What I hope is that we become more like Texas. Bring in the witnesses, put them on a gurney, and let's rock and roll." Death Penalty Information Center, *What's New* (visited Mar. 1, 2000) <http:www.essential.org/dpic/whatsnew.html>.

5. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2241-2255; inserting new section codified at 28 U.S.C.A. §§ 2261-2266 (West Supp. 1999)).

6. *See, e.g.*, ARK. R. CRIM. P. 37.5(a), which expressly provides: "The intent of this rule is to comply with the provisions of 28 U.S.C. § 2261 *et seq.*"

7. Section 2261 provides:

> (a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.
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> (b) This chapter is applicable if a State established by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards for competency for the appointment of such counsel.
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> (c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—
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> > (1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable to competently decide whether to accept or reject the offer;
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> > (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or
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> > (3) denying the appointment of counsel upon a finding that the prisoner is

In the wake of public and judicial criticism of the length of time often involved in litigation that may delay execution of capital sentences,[8] some states have adopted unitary systems for expediting state post-trial process designed to reduce the overall time period for disposition of capital cases. Because capital cases typically offer significant potential for post-conviction challenges, particularly with regard to allegations of ineffective assistance of counsel, the unitary system expedites the review process by triggering post-conviction process prior to resolution of the direct appeal. Although the unitary system theoretically does, and in practice actually may, expedite state appellate review, the problems associated with development of ineffective assistance and newly-discovered evidence claims raise ethical, legal, and moral questions regarding the sufficiency of the review afforded.

Idaho has had an expedited and consolidated appeal process in capital cases since 1984. Consideration of the Idaho experience, as well as the experience of other jurisdictions adopting unitary systems, reveals that if a unitary system successfully expedites the process, a proposition subject to some doubt, it does so at the expense of the careful review purportedly demanded in death penalty cases.[9] Fifteen years after Idaho's adoption of the consolidated, or unitary, process for review of capital cases, operation of this system suggests serious due process concerns, some of which are inherent in the approach, others undoubtedly idiosyncratic to Idaho.

This article focuses on the operation of expedited capital post-conviction review procedure in Idaho and addresses issues that may be common to other state systems of consolidated appellate and post-conviction review process in capital cases. While pre-AEDPA adoption of consolidated review may have reflected a political response to age-old criticism of delay

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not indigent.

8. For example, former Chief Justice Burger criticized the delay involved in capital cases, observing that the argument that the death penalty involves "cruel and unusual punishment is dwarfed by the cruelty of 10 years on death row inflicted on this guilty defendant by lawyers seeking to turn the administration of justice into a sporting contest." Sullivan v. Wainwright, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring in per curiam order denying stay of execution); *see also* Delo v. Stokes, 495 U.S. 320, 322 (1990) (Kennedy, J., concurring) (encouraging prosecutors to challenge stays of execution ordered on abusive writ applications); Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (Burger, C.J., concurring) (criticizing "11th hour" petitions).

9. *See, e.g.*, Beck v. Alabama, 447 U.S. 625 (1980).

between imposition of sentence and execution, states recently adopting or considering expedited procedures are undoubtedly influenced by the promise of expedited federal post-conviction review afforded by passage of the AEDPA in 1996. Despite the inclination of states to adopt expedited process for review, it is not clear that the statutes effect their purpose, or, more importantly, comport with constitutional concerns for heightened scrutiny in capital cases.

I. THE STRUCTURE OF POST-CONVICTION REVIEW IN GENERAL

Post-conviction remedies available in state court systems include diverse statutory and common law processes, such as writs of habeas corpus,[10] writs of coram nobis,[11] writs of error,[12] motions for new trial and out-of-time motions for new trial,[13] motions or petitions for reduction of sentence,[14] remittitur,[15] or statutory post-

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10. Tennessee, for example, recognizes the continuing validity of the common law habeas corpus remedy in addition to the statutory remedy, which includes a three-year statute of limitations. *See* Potts v. State, 833 S.W.2d 60, 61-62 (Tenn. 1992) (holding that TENN. CODE ANN. § 40-30-102 does not provide exclusive remedy for challenging conviction in light of state constitutional provision, TENN. CONST. art. 1, § 15 (which provides that the "writ of Habeas Corpus shall not be suspended") and pointing out that "the two avenues of collateral attack are theoretically and statutorily distinct").

11. *See, e.g.*, United States v. Morgan, 346 U.S. 502, 512 (1954); Penn v. State, 670 S.W.2d 426 (Ark. 1984).

12. Alabama continues to recognize the writ of error by statute, *see* ALA. CODE § 12-22-220 (1995), although the traditional writ of coram nobis has now been abolished by court rule, *see* ALA. R. CIV. P. 60(b). Review by writ of error applies to review of those errors apparent on the face of the record. *See Ex parte* Salter, 520 So. 2d 213, 215-16 (Ala. Crim. App. 1987).

13. The out-of-time motion for new trial is recognized as a post-conviction remedy in Texas for certain errors that arguably are not subject to review by writ of habeas corpus. *See* Tuffiash v. State, 878 S.W.2d 197, 199-200 (Tex. Ct. App. 1994) (permitting filing of out-of-time motion for new trial where newly discovered evidence demonstrated likelihood that testimony of forensic serologist was false, but not necessarily attributable to prosecutor under Texas law for purposes of misconduct claim).

14. A Missouri defendant may petition the trial court of conviction for reduction of a sentence not subject to statutory exclusion. MO. ANN. STAT. § 558.046 (West 1999); *see, e.g.*, State v. Stout, 960 S.W.2d 535, 536-37 (Mo. Ct. App. 1998) (appellate court lacks jurisdiction to review trial court's denial on motion to reduce sentence).

15. New York procedure recognizes remittitur ordered by appellate court in returning case to jurisdiction of the trial court to determine claim on the merits. *See* People v. Owens, 450 N.Y.S.2d 517 (App. Div. 1982) (case returned to trial court for determination of defendant's claim that prior felony conviction was obtained in violation of constitutional rights).

conviction remedies.[16] Although post-conviction process may technically be construed to include any proceedings following judgment of conviction, such as conventional motions for new trial filed and disposed of prior to the direct appeal, the term is also used generically to include all forms of collateral attack not encompassed by the direct appeal.[17]

The review process for capital cases typically includes the direct appeal, mandatory in most jurisdictions,[18] and post-conviction review following affirmance of the conviction or sentence or both on direct appeal in state and federal courts. A majority of the thirty-eight states which authorize the death penalty rely on a direct appeals process that includes an automatic sentence review by the state court of last resort[19] and direct appellate review of trial and sentencing error, followed by a state habeas corpus or post-conviction process.[20] At the conclusion of state proceedings, an inmate usually raises claims of federal constitutional violations through petition for writ of certiorari to the United States Supreme Court followed by a petition for federal habeas corpus relief in a United States district court. A majority of death-penalty jurisdictions do not have any special rules to give these cases priority over other appeals,[21] although in some

16. *E.g.*, TEX. CODE CRIM. P. ANN. art. 11.07, § 1 (West Supp. 2000), providing: "This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death."

17. *See* JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 6.1, at 253 (3d ed. LEXIS Law Publ'g 1998).

18. In *Gilmore v. Utah*, 429 U.S. 1012 (1976) and *Whitmore v. Arkansas*, 495 U.S. 149 (1990) the Supreme Court rejected attempts by "next friends," litigating on behalf of death row inmates facing execution to force state courts to engage in appellate review despite the knowing and intelligent waivers of appeal entered by the inmates. The Arkansas Supreme Court has recently concluded that appellate review of death sentences will be mandatorily undertaken, despite the Supreme Court's approval of waivers of appeal in *Whitmore*. State v. Robbins, 5 S.W.3d 51, 55 (Ark. 1999).

19. For example, article 37.071, § 2(h) of the Texas Code of Criminal Procedure provides that in capital cases, "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals." *See also* Guidry v. State, 9 S.W.3d 133, 138 (Tex. Crim. App. 1999) ("Direct appeal to this Court is automatic.").

20. Only California, Colorado, Idaho, and Texas have post-conviction activities before final adjudication on direct appeal. *See* CAL. PENAL CODE § 190.6 (West Supp. 1999); CAL. S. CT. POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH, Policy 3, *Standards Governing Filing of Habeas Corpus Petitions*; CAL. APP. R. 76.6; COLO. REV. STAT. §§ 16-12-201 to -210 (1999); COLO. R. CRIM. P. 32.2; IDAHO CODE § 19-2719 (1997); TEX. CODE CRIM. P. ANN. art. 11.071 (West Supp. 2000).

21. Although the Supreme Court has declined to hold that post-trial proceedings must

jurisdictions, capital cases are heard directly by the highest court,[22] rather than first being addressed by intermediate courts of appeals.[23]

II. IDAHO'S CONSOLIDATED APPEAL AND EXPEDITED POST-CONVICTION PROCESS

A. *Evolution of Idaho Post-Conviction Process*

1. *The Statutory Scheme*

Until 1984, post-conviction remedies in Idaho's capital and non-capital cases were governed by the Uniform Post Conviction Procedure Act ("UPCPA"). The UPCPA contains two issue preclusion sections: Section 19-4901(b) bars litigation of any issue in post-conviction that could have been raised on direct appeal;[24] section 19-4908 imposes a procedural bar to litigation of claims

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have different standards for death penalty cases, Arizona, Florida, Idaho, Louisiana, and Oklahoma all now apply different post-conviction relief rules in death penalty cases. *See, e.g.*, ARIZ. R. CRIM. P. 32.4; FLA. R. CRIM. P. 3.850, 3.851; IDAHO CODE § 19-2719 (1997); LA. CODE CRIM. PROC. ANN. art. 930.8 (West Supp. 2000); OKLA. STAT. tit. 22, § 1089 (West Supp. 2000).

22. *See, e.g.*, ARK. R. SUP. CT. & CT. APP. 1-2(a) which provides, in pertinent part:

> All cases appealed shall be filed in the Court of Appeals except that the following cases shall be filed in the Supreme Court: . . .
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> 2. Criminal appeals in which the death penalty or life imprisonment has been imposed.

23. For instance, the Alabama Court of Criminal Appeals, an intermediate appellate court, reviews death penalty cases before they are eligible for review on petition for writ of certiorari in the Alabama Supreme Court. *See, e.g.*, Tarver v. State, 500 So. 2d 1232 (Ala. Crim. App. 1986), *aff'd*, 500 So. 2d 1256 (Ala. 1986).

24. Idaho Code § 19-4901(b) (1997) provides:

> This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction. Any issue that could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier. Except as otherwise provided in this act, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

based on a petitioner's "knowing, intelligent and voluntary waiver."[25] The UCPCA also imposes a one-year statute of limitations for filing post-conviction actions.[26]

In 1984, Idaho enacted a new statute establishing special proceedings in capital cases, a "[s]pecial appellate and post-conviction procedure for capital cases" which expressly "shall be interpreted to accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence."[27] In furtherance of that purpose, subsection (3) of the statute provides that "[a] defendant must file any legal or factual challenge to the sentence of conviction that is known or reasonably should be known" within forty-two days of the filing of the judgment.[28] Failure to seek relief "within the time limits specified" is deemed a waiver of "such claims for relief as were known, or reasonably should have been known."[29] After expiration of the 42-day period, Idaho courts have no authority to consider any claims for relief that have been waived or grant any relief. The Idaho Supreme Court has described section 19-2719 as affording a death-sentenced defendant "one opportunity to raise all challenges to the conviction and sentence."[30]

2. *Implementation of Section 19-2719's Expedited Process for Capital Cases*

Review of Idaho decisions regarding enforcement of the procedural limitations included in section 19-2719 demonstrates the lack of a consistent or regular application of these legislatively-imposed limitations to warrant recognition of an acceptable theory of procedural default. Significantly, these provisions apply only to the post-conviction process for capital cases. This fact may explain why the Idaho Supreme Court has failed to adopt a coherent approach to the restriction on capital post-conviction litigation contemplated by section 19-2719.

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25. *See* IDAHO CODE § 19-4908 (1997).

26. *See* IDAHO CODE § 19-4902 (1997) (amended in 1996, the statute previously imposed a five-year statute of limitations).

27. IDAHO CODE § 19-2719 (1997).

28. *See id.*

29. *See id.*

30. *See* Paz v. State, 852 P.2d 1355, 1356 (Idaho 1993).

For example, prior to enactment of section 19-2719, the state supreme court consistently recognized that while the post-conviction statute permitted only one petition for relief, a second petition would be allowed if the petitioner had been prevented from raising claims in his first petition because of ineffective assistance of appellate or prior post-conviction counsel.[31] In *Palmer v. Dermitt*, the court carefully emphasized the federal basis supporting its "waiver" decision, distinguishing it from that of other jurisdictions whose default rules emphasized procedural necessity to assure finality of judgment.[32] The court thus distinguished between adoption of a waiver rule, which emphasizes the importance of a knowing and intelligent decision to relinquish a right that bars further consideration of the claim on the merits, from concern for finality, in which the state's interest in concluding litigation results in a rule of default being applied without consideration of the merits of the claim. Relinquishment thus implies a constitutionally-based rejection of a claim, while forfeiture based on procedural default merely implicates state law grounds for rejection.

Interestingly, the Idaho court's view in *Palmer*, which recognized that ineffectiveness of post-conviction counsel would serve to excuse default such that a defaulted claim would be

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31. *See* Palmer v. Dermitt, 635 P.2d 955 (Idaho 1981).

32. *Id.* at 957-58. The court differentiated between the voluntary relinquishment of a right and its loss through a procedural error in failing to preserve the right:

> Essential to the difference between these two types of waiver is that one, the finality rule, is an attribute of the procedural law of judgments, while the other, the voluntary relinquishment rule, is a corollary of the law creating the underlying right. The distinction between these is clearly visible when a federal constitutional right is considered in the context of a state post-conviction proceeding: what constitutes a waiver-voluntary-relinquishment is a question of federal constitutional law; the question of the scope of a prior judgment is a question of state procedural law. If the state court denies relief on the grounds that the applicant intelligently and understandingly waived the right in question, it has rendered a decision on a question of federal constitutional law. On the other hand, if the state court denies relief on the ground that the applicant should have raised the question at some earlier proceeding, it has rendered a decision on a question purely of state law. Where it is found that an applicant has relinquished a right, the decision is tantamount to holding that the right was never violated. The decision, thus, is directly on the merits. Where the foreclosure by judgment rule is applied, the court refuses to reach the merits of the asserted denial of the constitutional right.

Id. at 958-59 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, POST-CONVICTION REMEDIES, § 6.1 commentary).

addressed in a subsequent proceeding, proved to be more charitable than the construction given by the United States Supreme Court. In 1991 in *Coleman v. Thompson,*[33] the Court ruled that the Sixth Amendment guarantee of effective assistance of counsel does not extend to post-conviction proceedings. Consequently, as a matter of federal constitutional law, ineffectiveness rendered in a prior post-conviction proceeding will not excuse procedural default.

While section 19-2719 provides that a defendant must assert claims that "were known or reasonably should be known," that language is the starting point of the waiver issue, not its end. The critical question, one that remains unanswered, is how the courts determine whether a petitioner knew or should have known of a claim. Because the statute does not specify the types of claims covered under its broad language, including ineffective assistance of counsel claims, judicial interpretation was required.

In *State v. Aragon,*[34] following affirmance on direct appeal, the Idaho Supreme Court interpreted the then-new capital post-conviction procedure, issuing a Remittitur and Order granting the defendant a 42-day delay before issuance of the death warrant so the defendant could file a post-conviction petition pursuant to section 19-2719.[35] The court's order presumed that the new statute would apply to the disposition of Aragon's claims, even though the conviction occurred well before enactment of section 19-2719.[36] It did not interpret the language of the statute. Despite finding that the new provisions would apply, the court ultimately failed to follow its own order in disposing of those claims.

Following the court's announcement in *Aragon I* that section 19-2719 would apply to petitions challenging convictions obtained prior to enactment of the new post-conviction statute, and despite the legislative mandate that the new procedures control all capital post-conviction proceedings, the court did not apply the statute

33. 501 U.S. 722 (1991).

34. State v. Aragon, 690 P.2d 293 (Idaho 1984) ("*Aragon I*").

35. *Id.* at 317. The court issued a Remittitur and Order on November 26, 1984, which ordered that there be a 42-day delay before the issuance of the death warrant to enable the defendant to file a post-conviction petition pursuant to section 19-2719. The court ordered that all further proceedings would be held under the new procedures enacted in 1984. *Id.*

36. 690 P.2d at 317.

consistently to then-pending capital cases.[37] Its discretionary approach therefore effectively abrogated whatever notice the statute might have been said to give.

The first challenge to the new statute arose in the context of an appeal from the denial of a motion for new trial and post-conviction proceeding in its second review of claims raised in *State v. Beam.*[38] There, the issues were found to be barred, not by section 19-2719, but by the doctrine of res judicata incorporated in section 19-4901(a)(1).[39] Beam raised no substantive issues that were not defaulted under that provision, other than the constitutionality of section 19-2719 itself. The state supreme court addressed the merits of this claim.[40]

Two months after rejecting the constitutional challenge in *Beam II*, the Idaho Supreme Court decided the appeal of Aragon's post-conviction petition in *Aragon II*,[41] but made no mention of section 19-2719. Instead, it affirmed the trial court's denial of Aragon's petition based on section 19-4901.[42] Notwithstanding the legislative mandate included in sections 19-2719(5)[43] and 19-2719(11)[44], the court expressly noted the availability of further post-conviction proceedings upon the discovery of new evidence or change in law under section 19-4901.[45]

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37. *See, e.g.*, State v. Fain, 774 P.2d 252 (Idaho 1989); State v. Windsor, 716 P.2d 1182 (Idaho 1985); State v. Scroggins, 716 P.2d 1152 (Idaho 1985); State v. Stuart, 715 P.2d 833 (Idaho 1985) ("*Stuart I*"); State v. Beam, 710 P.2d 526 (Idaho 1985); State v. Fetterly, 710 P.2d 1202 (Idaho 1985).

38. 766 P.2d 678 (Idaho 1988) ("*Beam II*").

39. *Id.* at 680, 684.

40. *Id.* at 680-81.

41. Aragon v. State, 760 P.2d 1174 (Idaho 1988) ("*Aragon II*").

42. *Id.* at 1182.

43. Idaho Code § 19-2719(5) provides, in pertinent part:

> If the defendant fails to apply for relief as provided in this section and within the time limits specified, he shall be deemed to have waived such claims for relief as were known, or reasonably should have been known. The courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.

44. Idaho Code § 19-2719(11) (1997) provides, in pertinent part:

> Any successive petition for post-conviction relief not within the exception of subsection (5) of this section shall be dismissed summarily. Notwithstanding any other statute or rule, the order of dismissal shall not be subject to any motion to alter, amend or reconsider. Such order shall not be subject to any requirement for the giving of notice of the court's intent to dismiss. The order of dismissal shall not be appealable.

45. *Aragon*, 760 P.2d at 1182 n.12.

The appellate and post-conviction saga of another capital defendant, Gene Stuart, bears on the validity of state procedural bar based upon section 19-2719.[46] Never—in seventeen years and four post-conviction hearings in the state courts—has the Idaho Supreme Court invoked section 19-2719 to apply the doctrine of procedural default to Stuart's claims, despite the State's argument, in response to his rehearing motion from the affirmance of his direct appeal in *Stuart I,* that the court should recognize a strict application of procedural default principles.[47] The argument did not persuade the court.[48]

In June 1986, following the court's disposition of his direct appeal, Stuart filed his first state post-conviction petition more than four months following issuance of the opinion on rehearing in the direct appeal.[49] In deciding *Stuart II*, the court applied only section 19-4901 and did not mention section 19-2719.[50]

In 1990, the court decided *Stuart III*.[51] The court found "true" allegations in the pleadings that the facts giving rise to a second petition were only "recently discovered" and were thus "unknown" at the time of the first petition.[52] The court did not find that these claims were barred under section 19-2719, long after its adoption. However, while there was no direct discussion of section 19-2719, the court used the exact language of the statute's waiver provision: "Any grounds for relief not raised are permanently waived if the grounds *were known or should have been known* at the time of the first petition."[53] Under this doctrine, the court then concluded that "there is no absolute prohibition against successive petitions for relief."[54]

As late as 1990, the Idaho Supreme Court continued to apply *Palmer* to capital cases and to equate the standards imposed under sections 19-4908 and 19-2719 governing availability of post-conviction relief in capital cases. Under any circumstance, the

46. 715 P.2d 833 (Idaho 1985) ("*Stuart I*").

47. *See* State v. Stuart, 715 P.2d 833 (Idaho 1985) (Bistline, J., dissenting).

48. *Id.*

49. Stuart v. State, 801 P.2d 1216 (Idaho 1990) ("*Stuart II*").

50. *Id.* at 1218.

51. Stuart v. State, 801 P.2d 1283 (Idaho 1990) ("*Stuart III*").

52. *Id.* at 1284.

53. *See id.*

54. *See id.* at 1285 (citing Palmer v. Dermitt, 635 P.2d 955 (Idaho 1981)).

Stuart cases stand for the principle that section 19-2719 has not been consistently applied in a fashion rendering it an acceptable basis for procedural default sufficient to preclude federal habeas review of ineffective assistance of counsel claims. The state court's later attempt to distinguish *Stuart III* as having been decided under prior law ignores the definition of the waiver requirement adopted by the court in *Stuart III* itself.

It was not until November 1991 that the Idaho Supreme Court first hinted that a different rule would be applied to capital cases. In *State v. Rhoades*,[55] a direct appeal which did not raise a claim of ineffectiveness of counsel, the court, in dicta, stated that a claim of ineffectiveness is "one of those claims that should reasonably be known immediately upon the completion of the trial, and one that can be raised in a [timely filed] post-conviction proceeding."[56] This view of ineffectiveness claims stood in sharp contrast to the great weight of authority nationally, and it sharply diverged from Idaho's own precedent in *Palmer*.

The *Rhoades* court cited six cases from other state courts that ostensibly supported its proposition.[57] An examination of those cases, however, shows that they simply do not support the proposition that ineffective assistance claims are the kind that should be known immediately after trial and within the 42-day time limit of section 19-2719. In fact, one of those cases, *Sims v. State*, was earlier cited in *Palmer* for precisely the opposite proposition, permitting a second post-conviction petition when counsel on a prior appeal or post-conviction motion had been ineffective.[58]

Shortly after deciding *Rhoades*, the state supreme court decided *Fetterly v. State*,[59] considering whether a decision rendered subsequent to Fetterly's appeal would be applied retroactively.[60] In his successive post-conviction petition, Fetterly

55. 820 P.2d 665 (Idaho 1991).

56. *See id.* (dictum) (citing In re Cordero, 756 P.2d 1370 (Cal. 1988) (habeas corpus); People v. Bean, 760 P.2d 996 (Cal. 1988) (habeas corpus); Bundy v. Deland, 763 P.2d 803 (Utah 1988); Daniels v. State, 688 P.2d 315 (Nev. 1984); Sims v. State, 295 N.W.2d 420 (Iowa 1980); Commonwealth v. Russell, 383 A.2d 866 (Pa. 1978)).

57. *Id.*

58. *See* Palmer v. Dermitt, 635 P.2d 955, 960 (Idaho 1981) (citing Sims v. State, 295 N.W.2d 420 (Iowa 1980)).

59. 825 P.2d 1073 (Idaho 1991).

60. *Id.* at 1073.

alleged that his counsel was ineffective for failing to raise, on direct appeal, or in Fetterly's first state post-conviction proceeding, a claim that would indisputably have resulted in relief.[61] The court reached the merits of the issue by holding that the change in the law was not subject to retroactive application.[62] However, in dicta, the *Fetterly* majority observed that the ineffectiveness claim should have been known upon completion of trial, and, therefore, was waived.[63] Justice Bistline dissented from the denial of rehearing, arguing:

> The majority apparently does not realize that Fetterly's counsel during his direct appeal and first petition was the same attorney who Fetterly now claims was ineffective. The majority cannot really expect Fetterly's former counsel to have argued he was ineffective in the first petition. Such a situation would be an obvious conflict of interest.[64]

Not until 1993 did the Idaho Supreme Court bar a second post-conviction petition under the new statute, refusing to reach the merits of the claim. In *Paz v. State*,[65] the petitioner attempted to raise ineffective assistance of counsel in a second post-conviction motion.[66] The court denied the petition by citing the "should immediately be known" language from *Rhoades*.[67] Once again Justice Bistline, invoking "common sense," vigorously dissented.[68] He traced the decisions in *Rhoades* and *Fetterly* and decried the majority's new reasoning, which, he claimed "utterly fails to explain the reason by which Paz could have alleged that his trial counsel . . . was ineffective *where Paz was represented by [the same attorney] on both his [direct] appeal and his first petition*."[69]

61. *Id.* at 1074.

62. *Id.* at 1074-75.

63. *Id.* at 1075 (dictum). In direct contrast, in *Stuart II*, the state supreme court reached the *merits* of an identical claim which was presented to the court for the *first time*, without ever discussing whether the claim should be subject to default, in a petition for rehearing in the Idaho Supreme Court's review of a post-conviction petition. Stuart v. State, 801 P.2d 1283, 1284-85 (Idaho 1990).

64. *See id.* at 1080.

65. 852 P.2d 1355, 1357 (Idaho 1993).

66. *Id.* at 1357.

67. *See id.* at 1356-57.

68. See *id.* at 1357 (Bistline, J., dissenting).

69. *See id.* at 1358.

The Idaho Supreme Court's failure to consistently apply the principles of section 19-2719 in a series of cases decided after the creation of this different procedural framework applicable in capital cases not only undermined the legislature's intent in attempting to expedite death penalty litigation, it also sent inconsistent signals to counsel regarding the availability of post-conviction process to capital defendants. The net effect of the court's inconsistency was clearly to afford some capital defendants additional process not intended by the legislature. In failing to strictly apply the limitations on successive petitions and time limits for filing incorporated in section 19-2719, the court permitted some capital defendants additional process likely quite favorable to them. However, it also permitted the court to avoid construction of the statutory limitations in terms that would have exposed certain weaknesses in the process contemplated by those limitations. For instance, the court avoided determining which claims might reasonably be said to permit successive petitions for relief. It also avoided having to immediately consider the reasonableness of the statute's requirement that capital defendants assert ineffective assistance claims within the 42-day time limit from the end of trial, a period of time in which many potential ineffectiveness claims might not be subject to full investigation, particularly when trial counsel who might have rendered defective representation continue to represent the defendant during that same time period.

B. Constitutional or Procedural Flaws in the Expedited Process

1. Idaho's Unitary System Does Not Provide a Fair Opportunity to Litigate Important Constitutional Rights

To sustain state default in federal court precluding federal review, which is the ultimate goal of expedited statutes, there must be some clearly defined method by which a criminal defendant may reasonably seek state court review of his claims.[70]

70. *See* Young v. Ragen, 337 U.S. 235, 239 (1949).

As the Ninth Circuit has noted, "When no such method is available to a criminal defendant, or he cannot reasonably comply with the state procedural requirements, his noncompliance with state procedures will not be an adequate bar to habeas relief."[71] The court further explained that "failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court."[72]

Under this principle, even where state requirements are facially constitutional, if, "in practice, those requirements prevent [a] petitioner from obtaining review of his claims, state process [is] ineffective and he [is] excused from complying with it."[73] When the Idaho Legislature passed section 19-2719, it was understood that trial counsel would continue on the appeal and would also handle the special post-conviction proceedings set out in section 19-2719.[74] The 42-day period corresponds with the time to file only the notice of appeal, which does not have to include all the issues that will actually be raised on appeal.[75] The Idaho Supreme Court also contemplated that the same counsel would remain on the case throughout the appeal.[76] The benefit of retaining counsel on post-conviction between trial and appeal, given their familiarity with the case and the issues for appeal, is obvious in light of the 42-day statute of limitations, for only counsel intimately familiar with the pre-trial, trial, and sentencing proceedings could comply with such a short time restriction. However, counsel at trial and sentencing cannot be expected to recognize or raise their own ineffectiveness because of the obvious conflict of interest.[77]

Most of the pre-1995 capital petitioners were represented in the state courts on section 19-2719 direct appeal proceedings by the same court-appointed lawyer who represented them at trial

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71. *See* Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992).

72. *See id.* at 1462.

73. *See id.* (citing Kim v. Villalobos, 799 F.2d 1317, 1321 (9th Cir.1986)).

74. *See* 1984 Idaho Sess. Laws 159, Minutes, Senate Judiciary and Rules Committee, Feb. 27, 1984, at 2 (Senator Smyser stating that this "bill would have the defense attorney, within the 42 days he now has, present all potential areas of appeal at the initial appeal.")

75. *See* IDAHO APP. R. 17(f).

76. *See* State v. Rhoades, 820 P.2d 665, 676 (Idaho 1991).

77. *See* Kimmelman v. Morrison, 477 U.S. 365, 378 (1986).

and sentencing in the district court.[78] Only four defendants, who did not have the benefit of new counsel to inform them of their right to pursue ineffectiveness claims and to assist in a post-conviction application during the 42-day limit immediately following sentencing, remain at risk.[79] The inherent conflict of interest obviously prevents trial counsel from evaluating their own performance and accusing themselves of ineffectiveness. Without the benefit of conflict-free counsel to assist in identifying and raising claims of ineffective assistance of counsel, the death row petitioner has been deprived of the opportunity to "obtain a decision at all—much less a favorable decision—on the merits of [his constitutional claims]."[80]

2. *Idaho Code § 19-2719 Is Not an Independent Rule Precluding Federal Review*

A rule is considered "independent" if it is not interwoven with federal law or dependent upon a federal constitutional ruling.[81] "[T]he mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent [review of] the federal claim: 'The state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'"[82]

For a state procedural rule to be independent, the state law ground for decision must not be "interwoven with the federal

78. The petitioners were Charles Fain, Albert Ray Beam, Michael Scroggins, Donald Fetterly, Karla Windsor, Bryan Lankford, Mark Lankford, David Card, Max Hoffman, Paul Rhoades, and Timothy Dunlap.

79. Those defendants are Mark Lankford, Maxwell Hoffman, Paul Rhoades, and David Card. Keith Wells was executed in an expedited voluntary procedure. *See* State v. Wells, 864 P.2d 1123, 1124 (Idaho 1993). Gerald Pizzuto and Charles Fain were permitted to raise ineffective assistance of trial counsel in federal court, despite the Idaho Supreme Court's finding of a bar. *See* Pizzuto v. Arave, No. CV-92-0241-S-AAM, at 83 (D. Idaho June 24, 1996); Fain v. Arave, No. CV-93-0007-S-BLW, at 12-17 (D. Idaho Feb. 2, 1998).

The remaining defendants obtained relief on other grounds and were sentenced to life. *See generally* Lankford v. Idaho, 500 U.S. 110 (1991); Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993); Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993); State v. Ivey, 844 P.2d 706 (Idaho 1992); State v. Windsor, 716 P.2d 1182 (Idaho 1985); State v. Scroggins, 716 P.2d 1152 (Idaho 1985).

80. *See* Evitts v. Lucey, 469 U.S. 387, 394-95 n.6 (1985).

81. *See* Ake v. Oklahoma, 470 U.S. 68, 75 (1985).

82. *See* Harris v. Reed, 489 U.S. 255, 261-62 (1989) (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)).

law."[83] Otherwise, the state court may fairly be said to have examined the federal claim. A state law ground is so interwoven if "the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed."[84]

Idaho Code section 19-2719 is applicable only to death penalty cases and is thus unique in its application and focus. The constitutionality of the statute and its enforcement necessarily includes a recognition and incorporation of Eighth Amendment jurisprudence. The Idaho Supreme Court recognized this in *Beam III*, clearly and unequivocally incorporating constitutional concerns for non-arbitrary death sentences into concerns for finality in death penalty proceedings. The court said:

> The provision we are dealing with, [Idaho Code] § 19-2719(3), which specifically provides for challenges to a sentence of death, is an absolutely fundamental and integral part of chapter 27, title 19, Idaho Code. Without a provision for challenging a sentence of death, a person who has received a sentence of death might be denied due process of law under the Constitution of the State of Idaho and the United States Constitution. Furthermore, [Idaho Code] § 19-2719(3) provides the finality required by the United States Supreme Court in order for a person sentenced to death in the state of Idaho to bring federal habeas actions in the United States District Court. *See Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). The purposes served by [Idaho Code] § 19-2719(3) "ensure that death sentences are not carried out so as to arbitrarily deprive a defendant of his [or her] life." *State v. Rhoades*, 121 Idaho 63, 72, 822 P.2d 960, 969 (1991) . . . Because of the unique nature of the death penalty, . . . as well as the stringent constitutional protections afforded to a person sentenced to death, we hold that [Idaho Code] § 19-2719(3), *which, in turn, creates, defines, and regulates a primary right,* is a substantive rule.[85]

83. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); *see also Harris*, 489 U.S. at 265 (applying *Long* to federal habeas cases).

84. *Ake*, 470 U.S. at 75.

85. *See* Beam v. State, 828 P.2d 891 (Idaho 1992) (emphasis added) ("*Beam III*").

Construed in light of the mandatory review provisions of section 19-2827,[86] the Idaho Supreme Court's affirmance of a death sentence necessarily includes not only a determination that none of the claims raised have merit but also that the sentence is not based on any arbitrary factor. Reviewing its application of section 19-2719, the court concludes that the death sentence is "valid."[87] Thus, application of the procedural bar depends upon an antecedent determination of federal law and does not constitute an independent and adequate state ground.

The federal questions that encompass the intent and purpose of section 19-2719 deprive the statute of the required "independence" of the state ground. Without that independence, the state bar cannot deprive death row inmates of federal review.

3. Idaho Arguably Creates a Proceeding in Which Death Row Petitioners Are Constitutionally Guaranteed Counsel at Idaho's § 19-2719 Proceedings

By its terms, Idaho's statute enacts a "*special appellate procedure*" for capital cases, mandating that an appeal "begin[s] to run when the death warrant is filed."[88] The death warrant is filed either forty-two days after the judgment and sentence is filed, "or in the event a post-conviction challenge to the conviction or sentence is filed, [when] the order deciding such post-conviction challenge is filed."[89] If a defendant wants to appeal from any post-conviction order, that order "must be *part of any appeal* taken from the conviction or sentence. All issues relating to the conviction, sentence and post-conviction challenge [are] considered in the same appellate proceeding."[90] An automatic stay of execution is in effect *during* the "*special appellate procedures*" and automatic review.[91]

Though called a "post-conviction" statute, section 19-2719 is a capital appellate procedure statute. It is designed and

86. In relevant part, IDAHO CODE § 19-2827(c)(1) (1997) reads: "With regard to the sentence the court shall determine: (1) [w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor . . . ."

87. IDAHO CODE § 19-2719 (1997).

88. *Id.* § 19-2719(1) (emphasis added).

89. *Id.* § 19-2719(2).

90. *Id.* § 19-2719(6) (emphasis added).

91. *Id.* § 19-2719(12) (emphasis added).

interpreted to serve "an integral and fundamental role in challenges to the death penalty" and it "creates, defines, and regulates a primary right."[92] Section 19-2719(3) "ensure[s] that death sentences are not carried out so as to arbitrarily deprive a defendant of his [or her] life."[93]

While the United States Supreme Court has held in *Pennsylvania v. Finley* that there is no *per se* Sixth Amendment right to the effective assistance of post-conviction counsel,[94] section 19-2719 is dramatically different from the system of collateral review at issue in *Finley*. In *Finley*, the court found that there was no constitutional right to counsel in post-conviction proceedings to attack a conviction that "has long since become final upon exhaustion of the appellate process."[95] The Court thus distinguished that situation from its holding in *Evitts v. Lucey*,[96] in which it held that effective assistance of counsel on appeal is guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The procedures established in sections 19-2719 and 19-4904 create a right to representation that is controlled by the principles relied upon in *Evitts*, and that are markedly different from the situation in *Finley*. For example, section 19-2719(6) mandates that the appeal from the denial of relief "must be part of any appeal taken from the conviction or sentence." In *Evitts* the Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. Although the Constitution does not require the states to permit appeals as of right to criminal defendants seeking to review alleged trial errors,[97] "[n]onetheless, if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the

92. *See* State v. Rhoades, 822 P.2d 960, 969 (Idaho 1991).
93. *See* State v. Beam, 766 P.2d 678 (Idaho 1988).
94. 481 U.S. 551 (1987).
95. *Id.* at 555.
96. 469 U.S. 387 (1985).
97. McKane v. Durston, 153 U.S. 684, 687 (1894).

demands of the Due Process and Equal Protection Clauses of the Constitution."[98] The Court observed:

> Our cases dealing with the right to counsel—whether at trial or on appeal—have often focused on the defendant's need for an attorney to meet the adversary presentation of the prosecutor. *See, e.g., Douglas v. California,* 372 U.S. 353, 358, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963) (noting the benefit of "counsel's examination into the record, research of the law, and marshalling of arguments on [client's] behalf."). Such cases emphasize the defendant's need for counsel in order to obtain a *favorable* decision. The facts of this case emphasize a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant *to obtain a decision at all—much less a favorable decision*—on the merits of the case.[99]

The capital appellate procedures established by section 19-2719, which include post-conviction challenges, entitle capital petitioners to the effective assistance of counsel in that proceeding under the Sixth Amendment. Indeed, the language of the Idaho courts declaring that section 19-2719 "creates, defines, and regulates a primary right" mirrors the language of *Evitts.*[100] As noted above, in *Coleman*, the United States Supreme Court recognized the possibility of an exception to the general rule that there is no independent Sixth Amendment right to the effective assistance of counsel in post conviction proceedings.[101] Idaho's capital post-conviction statutes create that exception.

Idaho has elected to confer substantive rights on a capital defendant in its unique appellate post-conviction challenge. It must then also provide procedures attendant to those rights—effective assistance of counsel that comports with Due Process and Equal Protection. Securing to a petitioner the right to constitutionally effective assistance of counsel creates the need for subsequent review, which necessarily fails to "expedite"

98. *See Evitts*, 469 U.S. at 393 (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956)).

99. *See id.* at 394 n.6 (emphasis added).

100. *See id.*. at 393 (citation omitted).

101. *See supra* discussion accompanying note 32; Coleman v. Thompson, 501 U.S. 722, 725 (1991) (citing Murray v. Carrier, 477 U.S. 478, 488 (1986)).

proceedings. The expedited post-conviction statute, thus, undermines the express purpose of the rule.

4. *Application of the 42-Day Statute in Idaho's Capital Post-Conviction Petitions Denies the Petitioner Equal Protection and Due Process of Law*

The United States Supreme Court has held that the denial of procedural rights to similarly situated persons violates the Equal Protection Clause of the Fourteenth Amendment.[102] Despite this principle, Idaho engages in disparate treatment by operation of section 19-2719, which singles out capital defendants sentenced to be executed. For these defendants, Idaho has made it all but impossible to raise claims of ineffective assistance of counsel in state post-conviction proceedings.

Until 1995, indigent defendants sentenced to death were automatically represented on post-conviction and appeal by trial counsel. The Idaho Supreme Court has held that ineffective assistance of counsel must be raised within the 42-day time frame. Therefore, within the 42-day limit for filing a petition, which is coincidentally the time for *filing* the notice of appeal, the inmate has no other counsel to represent him.[103] Non-capital defendants are permitted to pursue their direct appeal and then file a post-conviction petition after the appeal is final.

The Idaho Supreme Court has held that the statute does not violate due process because

> [a]ll that counsel is required to do is to organize all challenges and issues that arose during trial and are appropriate for appeal within 42 days. That is not an unduly burdensome task. The statute provides adequate notice to the defendant of exactly what is required of him, and sufficient opportunity for all challenges to be heard. In

102. *See* Jackson v. Indiana, 406 U.S. 715, 730 (1972) (holding that differential treatment for incompetent criminal defendants versus those civilly committed is violative of equal protection); Baxstrom v. Herold, 383 U.S. 107, 108 (1966) (holding that it is a violation of equal protection not to permit jury trial or judicial determination of mental illness for prison inmates as opposed to others being civilly committed);.

103. The Idaho Supreme Court has since issued a rule that appoints separate counsel for the purpose of filing the post-conviction petition even though trial counsel may continue on the direct appeal. *See* IDAHO CRIM. R. 44.2 (effective Aug. 8, 1995).

> addition, it serves the purpose of the legislature by preventing the unnecessary delays that occur with so much frequency in capital cases.[104]

While the Idaho Supreme Court claims to find a rational basis for the legislature's distinctive treatment of the two groups, the court has not analyzed the drastic differential in the two time periods. In essence, not only are capital defendants treated unequally, the extent of the disparate treatment is overwhelming. Coupled with the failure to appoint separate conflict-free counsel, the statute violates both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In addition, the court's description of the limited task of the filing requirement is erroneous. The Idaho Supreme Court has held that a defendant must review the record for ineffective assistance of trial counsel claims. This review is impossible, first, because the trial transcripts are not even prepared until the appeal is filed, and second, because the attorney responsible for identifying these claims is trial counsel, a person who is unlikely to recognize the ineffectiveness of his or her own representation. Additionally, counsel is unlikely to raise such a claim because of his own self-preservation interests.[105]

In contrast, trial counsel may file his client's notice of appeal, which is due within the same time frame, without identifying all issues that are to be raised on appeal.[106] A rule similar to the limitation in section 19-2719, in the context of the direct appeal, would forbid raising any issue on direct appeal not listed somewhere within the time to file the notice of appeal. Idaho has no such rule, precisely because it would violate established notions of due process and fundamental fairness. As Justice Bistline noted in his dissent in *State v. Paz*,[107] the 42-day time limit

> does not afford defendants anywhere near adequate time to [find all appealable issues]. The statute's time limit is yet another enhancement of the risk that an arbitrary and capricious decision to impose the death penalty will be

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104. *See* State v. Rhoades, 820 P.2d 665, 676 (Idaho 1991).

105. *See, e.g.*, Robinson v. Norris, 60 F.3d 457, 459-60 (8th Cir. 1995); Ciak v. United States, 59 F.3d 296, 303 (2d Cir. 1995).

106. IDAHO APP. R. 17(f).

107. 798 P.2d 1, 22 (Idaho 1990) (Bistline, J., concurring and dissenting).

made and carried out. As such, the time limit violates the eighth and fourteenth amendments to the United States Constitution.

In *Mathews v. Eldridge*,[108] the Supreme Court identified three general factors in the examination of due process:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[109]

Here, the private interest is the greatest in our system of justice: the defendant's life. The risk of erroneous deprivation is great because the defendant will be barred forever from seeking relief from a sentence of death based on at least one type of claim, that of ineffective assistance of counsel. Against this risk must be examined the interest of the state in limiting such petitions to claims known within 42 days. That interest is obviously limited. The direct appeal in capital cases often takes years. Requiring the filing of the post-conviction claims within this 42-day period has not shortened the length of time of the appeal process or the review of capital cases. Indeed, the Idaho Supreme Court has put in place a system of the appointment of separate counsel that has effectively ended the 42-day rule, except for those few people on death row who were not given separate counsel after the enactment of section 19-2719 in 1984. Thus, the government's interest has been minimized by the rule-making power of the Idaho Supreme Court. To apply this law to the few capital defendants caught in the failed experiment of the legislative attempt to "rush to judgment" is the ultimate violation of the principles of equal protection and due process. Indeed, the opportunity for meaningful appellate review is one of the hallmarks of the statutory death penalty schemes the Supreme Court has found to be constitutional.[110]

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108. 424 U.S. 319 (1976).

109. *See id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970)).

110. *See, e.g.*, Pulley v. Harris, 465 U.S. 37, 54 (1984) (Stephens, J., concurring); Gregg v. Georgia, 428 U.S. 153, 195 (1976).

Idaho's brief time period for asserting post-conviction claims is the shortest in the nation. In comparison, most states permit such challenges *after* the appeal has been determined. Even the new federal habeas law contemplates such filings after the direct appeal, as the statute provides that the time during which a properly filed post-conviction petition is considered tolls the federal statute of limitations.[111]

Courts have acknowledged that some limitation for state collateral relief might be too short,[112] and that some state procedural rules may raise an insuperable barrier to vindication of federal rights.[113] Idaho's 42-day rule is too short to comport with the fundamental fairness required in capital cases.

Murray v. Giarratano[114] held that there was no federal constitutional right to counsel for indigent death-row inmates seeking post-conviction relief. In contrast, in Idaho, the post-conviction statute in effect in 1984 guaranteed the appointment of counsel in all post-conviction cases, whether capital or non-capital.[115] Thus, notwithstanding that the federal constitution does not require appointment of counsel, it is a violation of due process for the state to establish an appointment requirement with one statute and remove its applicability to capital cases in another.[116]

As the Idaho statute continues to wind its way through the courts, with over fifteen years without a definitive ruling on the constitutional adequacy of its expedited consolidated capital case review, it can hardly be argued that the process has in any way "improved" the state's capital system.

III. IMPACT OF EXPEDITED REVIEW ON CAPITAL REVIEW PROCESS IN GENERAL

Jurisdictions other than Idaho have attempted to limit post-conviction litigation. In one extreme example, the Arkansas Supreme Court abolished its post-conviction remedy altogether in

111. *See* 28 U.S.C. § 2244(d)(2).
112. Whiddon v. Dugger, 894 F.2d 1266, 1267 (11th Cir. 1990).
113. Michel v. Louisiana, 350 U.S. 91, 92 (1955).
114. 492 U.S. 1 (1989).
115. IDAHO CODE § 19-4904 (subsequently amended in 1993).
116. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

1989.[117] Instead, the rule governing motions for new trial required the trial court to ask about a defendant's desire to raise an ineffectiveness-of-counsel claim, while also admonishing the defendant that such a motion needed to be filed within thirty days following pronouncement of judgment and sentence.[118]

The effect of the state supreme court's action was to foreclose challenges to convictions obtained in state courts, permitting defendants to seek relief from such convictions on federal constitutional grounds by filing petitions for habeas corpus relief in federal courts pursuant to 28 U.S.C. § 2254. One consequence was that inmates obliged to present ineffectiveness claims within thirty days of judgment were effectively denied assistance of counsel at this step of the direct appeal process, ultimately resulting in Sixth Amendment violations.[119] Abolition of post-conviction relief by rule also meant that Arkansas defendants were freed from the additional burdens of exhaustion[120] and deference to state court fact-finding[121] on those claims raised initially in federal proceedings.

The court then reversed its position on state post-conviction relief in another per curiam order, issued in 1990,[122] in which it reestablished post-conviction process[123] and abolished the procedure for raising ineffective assistance claims it had previously incorporated in the rule governing motions for new trial.[124] The court explained its action:

> [T]he primary reason for abolishing Rule 37 was our concern that post-conviction remedies were drawn out

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117. *In re* Abolishment of R. 37 and Revision of Ark. R. Crim. P. 36, 770 S.W.2d 148 (Ark. 1989) (Rule 37 had set forth the procedure for seeking post-conviction relief).

118. *Id.* at 148 (revising ARK. R. CRIM. P. 36.4).

119. Robinson v. Norris, 60 F.3d 457, 459 (8th Cir. 1995).

120. *See* Rose v. Lundy, 455 U.S. 509 (1982) (state prisoner's application for federal habeas relief must be dismissed if it contains issues not previously raised on litigated in state proceedings).

121. *See* Townsend v. Sain, 372 U.S. 293 (1963) (requiring federal habeas court to engage in fact-finding on federal constitutional claims unless state courts have first afforded petition full and fair hearing on claims). *Townsend* was subsequently overruled in part by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992) (limiting the evidentiary hearing authority of federal habeas courts and requiring deference to state fact-finding unless a fact-finding failure was attributable to lack of fair process in state proceedings).

122. *In re* Post-Conviction Procedure, 797 S.W.2d 458 (Ark. 1990).

123. *Id.* at 458; *see* ARK. R. CRIM. P. 37.1.

124. *In re Post-Conviction Procedure*, 797 S.W.2d at 458.

> extensively, and unnecessarily, before cases were concluded. It was our thought to accelerate post-conviction procedures and at the same time have a system which protects the defendant's constitutional and fundamental rights. Rule 36.4 was amended to provide a means by which a convicted defendant could assert claims of ineffective assistance of counsel within thirty days of judgment. Rule 36.4 also provided a procedure to consolidate the direct appeal of a judgment with the appeal of the denial by the trial court of post-conviction relief. (We would add that other states, such as Missouri, have adopted a similar consolidated direct appeal/post-conviction procedure in an attempt to expedite criminal appeals and post-conviction procedures.) The scope of the remedy afforded by Rule 36.4 was more limited than that which had been afforded by Rule 37.[125]

The court's explanation demonstrates its concern over protracted post-conviction litigation, and its reinstatement of rule 37.1 as the vehicle for post-conviction relief includes a limitations period designed to limit delay occasioned by post-conviction litigation.[126] Yet the court also noted the need to ensure that convicted defendants retain a means of asserting constitutional rights.[127]

The brief history of the Arkansas court's extreme reform of post-trial process, including abolition of post-conviction remedies, demonstrates the frustration evidenced by appellate courts in dealing with protracted collateral challenges. But it also reflects the need to ensure that "reform" does not compromise procedural rights traditionally afforded convicted defendants.

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125. *Id.*

126. *Id.* The procedure is embodied in a modification of Rule 37 which, while it embraces the scope of Rule 37, places some limitations on the remedy which were not formerly a part of the rule; in particular, it reduces the time for filing a petition for post-conviction relief from three years to ninety days where the defendant pleaded guilty or did not elect to appeal and to sixty days where the defendant appealed.

127. *Id.*

A. State Experience with the Unitary Review Approach

Other states provide examples of different methods of expediting the appeals process. In recent years, many states have attempted to shorten the time period involved in their death penalty appeals process by placing deadlines on filing appeals, habeas petitions, and briefs, and on issuing court decisions. Thus far, only a handful of death-penalty states have created systems consolidating claims raised by direct appeal and habeas corpus in one court proceeding.[128]

1. Rejection of Unitary Review Systems

At least three states that have experimented with a unitary review process have either (1) eventually abandoned that approach after some period of experience, as in the case of Missouri; or (2) suffered almost preemptive rejection by the state's highest court in the initial round of challenge by litigation. The Pennsylvania and Florida Supreme Courts moved rather quickly to avoid many of the problems posed by expedited review systems based on the Idaho model.

a. Missouri. The Missouri unitary appeal experience offers perhaps as much insight into the undesirable qualities of the consolidated appeals as does Idaho's continuing saga. Missouri was one of the first states to adopt a special procedure for post-conviction review.[129] The court adopted former rule 27.26, patterned after federal law, in 1952; it provided a means for state prisoners to challenge the validity of their conviction or sentence. Rule 27.26 was adopted even though there was no federal constitutional requirement that a state provide a means of post-conviction review.[130] Effective January 1, 1988, Missouri replaced rule 27.26, which had no time limits, and attempted to expedite post-conviction review by establishing pre-appeal post-conviction process in two new rules: rule 29.15 (relating to post-conviction review of conviction after trial) and rule 24.035

128. *See supra* note 20.

129. Day v. State, 770 S.W.2d 692, 693 (Mo. 1989) (en banc).

130. Williams v. Missouri, 640 F.2d 140, 143 (8th Cir. 1981).

(relating to post-conviction review of convictions secured by a guilty plea).[131] Rule 29.15 required that if an appeal was taken, any motion to vacate, set aside, or correct a judgment or sentence must be filed "within thirty days after the filing of the transcript in the appeal."[132] If no appeal was taken, the motion had to be filed "within ninety days of the date the person is delivered to the custody of the department of corrections."[133] Failure to file a motion within the time provided "constitute[s] a complete waiver of any right to proceed under this Rule 29.15."[134]

In *Day v. State*,[135] the Missouri Supreme Court found that the main reason for replacing rule 27.26 was to avoid delay and prevent litigation of stale claims. "These [time] limits place an increased responsibility on the *movant*, his *counsel*, and the *courts* to promptly litigate claims."[136] These time limitations are valid, reasonable, and mandatory.[137]

Missouri attempted to avoid the pitfalls Idaho has met. First, the Missouri rules were applicable to capital and non-capital cases alike,[138] avoiding the equal protection and due process concerns raised by Idaho's capital-specific statute.[139] Second, the Missouri courts strictly construed the rules, leaving little argument about inconsistent application.[140] Third, the Missouri courts made clear the rules were procedural, not substantive.[141]

Notwithstanding the improvements on Idaho's scheme, rules 29.15 and 29.035 were nonetheless subject to criticism and

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131. MO. R. CRIM. P. 24.035, 29.15.

132. *Id.*

133. *Id.*

134. *See Day*, 770 S.W.2d at 694.

135. *Id.* at 693.

136. *See* Sloan v. State, 779 S.W.2d 580, 581 (Mo. 1989) (en banc) (citing John M. Morris, *Postconviction Practice Under the "New 27.26,"* 43 J. MO. B. 435, 439 (1987)) (emphasis added).

137. *Day*, 770 S.W.2d at 695.

138. *See* MO. R. CRIM. P. 24.035(a), 29.15(a).

139. *See supra* Part II.B.4.

140. *See Day*, 770 S.W.2d at 695 (Mo. 1989).

141. *See* Schleeper v. State, 982 S.W.2d 252, 254 (Mo. 1998) (en banc), *reh'g denied* (1999); State v. Reese, 920 S.W.2d 94, 95 (Mo. 1996) (en banc); Wiglesworth v. Wyrick, 531 S.W.2d 713, 722 (Mo. 1976) (en banc).

uncertainty. Dissenting from the majority's strict application of rule 29.15 time limits, in *Reuscher v. State*,[142] Justice Thomas emphasized the conflict of interest inherent in the time limits imposed:

> The primary fault for the untimeliness of the motion falls upon Reuscher's trial attorney who also functioned as his counsel for the direct appeal. His representation to Reuscher that he was obtaining an extension to July 1, 1991 within which to file the transcript on appeal was unequivocal and unconditional in form. Given this representation and the attorney's knowledge that the date of filing of the transcript is the critical factor in establishing the due date for the Rule 29.15 motion, it was inexcusable that the attorney did not immediately notify Reuscher that he only received an extension until May 15, 1991. Moreover, the attorney was at fault for failing to notify Reuscher when the transcript was in fact filed on May 15, 1991.
>
> The majority questions whether the attorney could ethically honor a request by Reuscher to prepare his rule 29.15 motion. This is an acknowledgment that the trial attorney has a potential conflict of interest with respect to a rule 29.15 motion, which almost always raises issues of incompetency of trial counsel and does so in this case. Despite this well-known likely conflict of interest and the fact that the date of the filing of the transcript is critical for the timely filing of a rule 29.15 motion, this Court's rules do not provide for notice to the defendant of the date of filing. The majority is holding Reuscher to the unrealistic standard that he should have foreseen the failure to notify by his attorney and assumed that the transcript would be filed earlier than he had been told.[143]

Interestingly, the dissenting justice noted

> an additional benefit that would flow from this proposal. This procedure should actually shorten, rather than lengthen, the time period between conviction and the carrying out of the sentence in the only cases it would

142. 887 S.W.2d 588, 593 (Mo. 1994) (en banc).

143. *See id.* at 592 (Thomas, J., dissenting; Price, J., concurring in dissent) (citation omitted).

apply to—cases where the timeliness of the Rule 29.15 motion is in issue.[144]

Most telling of the difficulties raised by the pre-appeal post-conviction process is the simple fact that the Missouri rule was amended on January 1, 1996. It now provides for the filing of all post-conviction motions "within ninety days after the date the mandate of the appellate court is issued."[145]

b. Pennsylvania. In 1995, the Pennsylvania legislature passed its Capital Unitary Review Act, which, like Idaho's system, established a detailed procedure for the courts' administration of capital cases, from the imposition of the sentence of death to its execution.[146] The statute established a simultaneous, though bifurcated, post-trial review process at the trial court level for post-sentence motions and collateral appeal and a single appellate proceeding for the direct appeal and collateral appeal.[147] In sustaining its suspension of the rule, the Pennsylvania Supreme Court found the legislation violated the express mandate of Article V, Section 10 of the state constitution by "directly conflicting with existing procedural rules duly promulgated by" the court, noting that "the end desired by the legislature—an expeditious process of review in capital cases—will be achieved by the . . . 1995 amendments to the [Pennsylvania Post Conviction Relief Act]."[148]

c. Florida. Florida's recently-enacted Death Penalty Reform Act[149] declared the legislature's intent "to reduce delays

144. *See id.*

145. *See* MO. R. CRIM. P. 29.15(b). In 1997, the General Assembly passed Missouri Revised Statute section 547.360. It was approved by the governor on July 7, 1997, and became effective August 28, 1997. Section 547.360 codified the language of amended Missouri Supreme Court Rule 29.15 almost verbatim. *See Schleeper*, 982 S.W.2d at 253-54.

146. 42 PA. CONS. STAT. ANN. §§ 9570–9579 (West 1998).

147. 42 PA. CONS. STAT. ANN. §§ 9571(b), 9577(a) (suspended by Order of Aug. 11, 1997); *see also In re* Suspension of Capital Unitary Review Act, 722 A.2d 676 (Pa. 1999) (discussing court's continuing decision to suspend the act).

148. *In re Suspension of Capital Unitary Review Act*, 722 A.2d at 680; *see* 42 PA. CONS. STAT. ANN. § 9545(b) (retaining the sequential order of appeal and post-conviction, but imposing a one-year statute of limitations following final judgment).

149. 2000 Fla. Sess. Law Serv. Ch. 00-3 (West).

in capital cases and to ensure that all appeals and post-conviction actions in capital cases are resolved within 5 years after the date a sentence of death is imposed in the circuit court."[150] This new legislation required trial judges to appoint appellate counsel within fifteen days of the imposition of a death sentence, unless the defendant declines such representation by appointment, in which case the state will not provide post-conviction counsel.[151] The court would appoint private counsel only in the event that the state's "capital collateral regional counsel" files a motion to withdraw from representation due to conflict of interest or other good cause or otherwise informs the court of that office's inability to comply with the requirements of the statute.

The Death Penalty Reform Act barred post-conviction actions unless they were initiated within 180 days after the defendant filed a direct appeal of his conviction and sentence to the Florida Supreme Court.[152] Such a post-conviction action must have raised all constitutional claims, including claims arguing ineffective assistance of counsel, allegations of innocence, or the prosecution's withholding of evidence favorable to the defendant.[153] Regardless of the date of sentencing, any successive post-conviction action could only be maintained if filed "within 90 days after the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence."[154]

On April 14, 2000, the Florida Supreme Court unanimously struck down the legislature's overhaul of the appeals process for death row inmates.[155] The state supreme court, like the Pennsylvania Supreme Court, found the legislation "an unconstitutional encroachment on this Court's exclusive power to 'adopt rules for the practice and procedure in all courts.'"[156] Although the holding "is based on the separation of powers

150. *Id.* § 5 (substantially amending FLA. STAT. ANN. § 924.055).

151. *Id.* § 6(1)(a).

152. *Id.* § 6(3)(a).

153. *Id.*

154. *Id.* § 6(5).

155. Allen v. Butterworth, Nos. SC00-113, SC00154, SC00410, 2000 WL 381484 (Fla. Apr. 14, 2000).

156. *Id.* at *1 (citing FLA. CONST. art. V, § 2(a)).

claim," the Florida court also found that the sections applying to successive motions "violate due process and equal protection."[157] The court also, however, announced its intention to adopt two new rules consistent with the "the Legislature's express intent that a sentence of death 'be carried out in a manner that is fair, just, and humane and that conforms to constitutional requirements,' and that there 'be a prompt and efficient administration of justice following any sentence of death.'"[158]

2. *State Approval of Unitary Review*

While Missouri, Pennsylvania, and Florida have rejected unitary review systems, at least three other states experimenting with this approach have continued to find it a viable alternative to the traditional approach in which collateral proceedings commence only after the conclusion of the direct appeal. California,[159] Colorado,[160] and Texas[161] have adopted unitary systems and continue to operate within frameworks designed to expedite the post-conviction process by having direct appeals and collateral process overlap.

a. California. In one of the very few pre-AEDPA unitary systems, the California Supreme Court presumes a state habeas petition is timely filed if it is filed ninety days after the due date of the reply brief or twenty-four months after appointment of counsel.[162] Because courts generally appoint separate trial, appellate, and post-conviction counsel, the ineffective assistance of counsel issues inherent in Idaho's statute are not as egregious in California, and they have thus not been sympathetically received by the federal courts.[163] Recent amendments to the

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157. *Id.*

158. *Id.* at *12 (citing 2000 Fla. Sess. Law Serv. Ch. 00-3, preamble, at 3, and proposing amendments to FLA. R. CRIM. P. 3.851 and 3.852).

159. CAL. PENAL CODE § 190.6 (West 1999);); CAL. S. CT. POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH, Policy 3, *Standards Governing Filing of Habeas Corpus Petitions* ; CAL. APP. R. 76.6.

160. COLO. REV. STAT. §§ 16-12-201 to -210 (1999); COLO. R. CRIM. P. 32.2.

161. TEX. CODE CRIM. P. ANN. art. 11.071 (West Supp. 2000).

162. CAL. S. CT. POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH, Policy 3, *Standards Governing Filing of Habeas Corpus* § 1-1.1.

163. *See, e.g.*, Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996); Bonin v. Calderon, 77

California act[164] attempt to meet the guidelines of AEDPA's Chapter 154 "opt-in" provisions,[165] but the issue has not yet been finally determined by the courts.[166]

b. Colorado. Attempting to qualify for the shorter time limits under AEDPA, in 1997 Colorado incorporated a unitary review system into its death penalty appeals process.[167] Under the Act, automatic review by the Colorado Supreme Court is combined with all other appeals; if a defendant seeks direct review and post-conviction appeal from a trial court decision, the Colorado Supreme Court consolidates the issues.[168] The supreme court gives priority to capital cases over all others, except as otherwise required by the state constitution.[169] The statute directs the court to adopt procedural rules for the unitary appeal process.[170] Accordingly, the Colorado unitary review process includes tight time limits for pursuing post-conviction review,[171] requires that all post-conviction review motions be filed within 150 days, and permits no more than three weeks for the delivery of transcripts.[172] Provisions are incorporated for the appointment of appeal and post-conviction counsel other than trial counsel.[173] Ineffectiveness of counsel during post-conviction review is not a basis for relief.[174] All proceedings must be completed within two years after the date the death sentence is

F.3d 1155 (9th Cir. 1996).

164. *See* CAL. PENAL CODE § 190.6 (West 1999); CAL. APP. R. 39.50; CAL. APP. R. 76.6 (regarding attorney qualifications); CAL. S. CT. POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH, Policy 3, *Standards Governing Filing of Habeas Corpus Petitions* § 2-1 (appointment of habeas counsel simultaneously with appellate counsel.)

165. *See* 28 U.S.C.A. §§ 2261-2265 (West Supp. 1999).

166. In *Ashmus v. Calderon*, the Ninth Circuit Court of Appeals held that California did not meet AEDPA requirements, but the Supreme Court ruled that the issue was not properly before the courts and overturned the decision. *See* Ashmus v. Calderon, 123 F.3d 1199 (9th Cir. 1997), *rev'd*, 523 U.S. 740 (1998).

167. *See* COLO. REV. STAT. §§ 16-12-201 to -210 (1999); COLO. R. CRIM. P. 32.2.

168. COLO. REV. STAT. § 16-12-207(2) (1999).

169. COLO. REV. STAT. § 16-12-101.5(1) (1999).

170. *See* COLO. REV. STAT. § 16-12-208 (1999).

171. COLO. REV. STAT. § 16-12-204 (1999).

172. COLO. R. CRIM. P. 32.2(b)(3).

173. *Id.*

174. COLO. REV. STAT. § 16-12-205(5) (1999).

imposed, and no extensions are permitted.[175] No further post-conviction review is available unless the defendant shows cause.[176] A notice to appeal all post-conviction review decisions must be filed with the supreme court within five days of the trial court's order on post-conviction review motions.[177]

c. Texas. Though its number of executions is greater than any other state,[178] Texas has also adopted a unitary appeal and post-conviction system.[179] Texas now requires the court to appoint reasonably compensated, competent counsel for indigents in the state habeas phase of criminal appeals.[180] Under new rules of court promulgated to effectuate the statute's directives, the convicting court is prohibited from appointing an attorney who represented the defendant at trial or direct appeal unless both the defendant and the attorney request the appointment or the court finds good cause to make the appointment.[181] An application for writ of habeas corpus and any amendments or supplements to the petition must be filed within 180 days of the appointment of counsel or within forty-five days after the brief on direct appeal is filed.[182] An untimely or subsequent petition cannot be considered on the merits until the Court of Criminal Appeals rules that good cause exists for the filing out of time.[183]

Idaho's experience illustrates the reality of the new Florida legislation and the current Colorado and Texas schemes—that the unitary appellate systems are likely to lengthen the process rather than shorten it. Beyond the additional time and cost, any

175. COLO. REV. STAT. § 16-12-208(3) (1999).

176. COLO. REV. STAT. § 16-12-209 (1999).

177. COLO. R. CRIM. P. 32.2(c)(1).

178. Death Penalty Information Center (visited Dec. 16, 1999) <http://www.essential.org/dpic/>. (Texas has executed a total of 199 people since 1976, thirty-five of whom were executed in 1999).

179. TEX. CODE CRIM. P. ANN. art. 11.071 (West Supp. 2000). The Texas Court of Criminal Appeals upheld article 11.071 against a series of state and federal constitutional challenges in *Ex parte Davis*, 947 S.W.2d 216, 218-21 (Tex. Crim. App. 1997).

180. TEX. CODE CRIM. P. ANN. art. 11.071, § 2(f) (West Supp. 2000).

181. TEX. CRIM. APP. R. FOR APPOINTMENT OF ATTORNEYS AS COUNSEL UNDER ART. 11.071, § 2(D) (adopted by per curiam order of Aug. 2, 1999).

182. TEX. CODE CRIM. P. ANN. art. 11.071, § 4 (West Supp. 2000).

183. *Id.* § 4A(a).

effort "to further expedite [appeals] is going to cause a litigation train wreck down the road," as a frequent issue is the ineffectiveness of defense counsel, an issue that could not be raised if both appeals were handled simultaneously.[184]

B. Federal Decisions Reviewing State Procedures Designed to "Opt-In" to Expedited Federal Habeas Review in Capital Cases

Other states have attempted to meet AEDPA guidelines and to qualify for the stricter time limits on filing federal habeas petitions by providing post-conviction counsel to indigents. As an incentive to states that are interested in speeding up the appeals process overall, AEDPA shortens the deadlines for filing federal habeas petitions, and therefore also state petitions, if a state implements a program to provide counsel to indigents in state post-conviction proceedings. AEDPA allows six months, instead of one year, for filing a federal habeas petition, and allows up to an additional thirty days for "good cause."[185] AEDPA places further limits on the issues that may be raised, and it imposes time limits on the district and circuit courts for making decisions.[186]

The final question is whether the states that have revised and amended their statutory schemes, at some risk to the constitutional review of the same, will ultimately benefit from the promises made by AEDPA.[187] Though AEDPA does not expressly promote the unitary system, its codification of the same seemed to breathe new life into an otherwise rare statutory scheme.[188] The Special Habeas Corpus Procedures in Capital Cases provisions under Title 28 of the United States Code provide an expedited disposition of habeas cases in states that "opt in" by complying with its provisions.[189] To opt in, a state must establish procedures "for the appointment, compensation,

184. *See* Randolph Pendleton, *Slowdown on Expediting Appeals*, FLORIDA TIMES-UNION, Dec. 2, 1999, at B1 (quoting Bill White, Chief Assistant Public Defender in Jacksonville, Fla.).

185. *See* 28 U.S.C.A. § 2263 (West Supp. 1999).

186. *See* 28 U.S.C.A. §§ 2264, 2266 (West Supp. 1999).

187. *See* 28 U.S.C.A. § 2265 (West Supp. 1999).

188. *See* 28 U.S.C.A. §§ 2261, 2265 (West Supp. 1999).

189. 28 U.S.C.A. § 2261(a) (West Supp. 1999).

and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent capital defendants."[190] Three and one-half years after the effective date of the Act, there is no definitive finding that any state has successfully "opted in."[191] Though some courts have declined to address whether the various jurisdictions' mechanisms for the "appointment, compensation, and payment of reasonable litigation expenses of competent counsel" satisfy the opt-in provisions of AEDPA," the early determinations were all answered in the negative.[192] Even though AEDPA includes unitary review in its opt-in provisions, it is unlikely that unitary review systems with inherent conflict of counsel difficulties, not adequately addressed by statute, will fare better.

IV. CONCLUSION

Idaho's efforts at expedited review under a unitary system have failed. So too have Missouri's and California's. It is clear from Idaho's difficulties, Missouri's retreat, and California's lengthy processes that the unitary system is not likely to expedite and may well create delay, unnecessary costs, and unquestionably inadequate review.

In any event, an expedited state process is unnecessary. Excessive delay has been significantly curtailed by substantive amendments to federal habeas jurisdiction, procedural default rules, and state executions.[193] Expedited review undoubtedly

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190. *See id.*; *see also* Breard v. Netherland, 949 F. Supp. 1255, 1261 (E.D. Va. 1996) (summarizing Satcher v. Netherland, 944 F. Supp. 1222, 1238 (E.D. Va. 1996)).

191. *See* Ashmus v. Calderon, 523 U.S. 740 (1998); *see also* Bennett v. Angelone, 92 F.3d 1336, 1342-43 (4th Cir.) (declining to determine whether the procedures established by Virginia for the appointment, compensation, and reasonable compensation for competent counsel satisfy the "opt-in" requirements), *cert. denied*, 519 U.S. 1002 (1996).

192. *See, e.g.*, Williams v. French, 146 F.3d 203, 206 n.1 (4th Cir. 1998) (noting that North Carolina "does not maintain that it has satisfied the opt-in requirements of Chapter 154 such that those provisions of AEDPA apply"); Breard v. Pruett, 134 F.3d 615, 618 (4th Cir. 1998); Ashmus v. Calderon, 123 F.3d 1199, *rev'd*, 523 U.S. 740 (1998); Death Row Prisoners v. Ridge, 106 F.3d 35, 36 (3d Cir.1997) (concluding that Pennsylvania is not an "opt-in" state for purposes of AEDPA and that therefore AEDPA's amendments to Chapter 154 of Title 28 do not apply to habeas petitions in capital cases from Pennsylvania).

193. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1998 (Dec. 1999).

jeopardizes the quality of decisions by requiring inadequate preparation time by post-conviction counsel and by constraining deliberation by appellate courts. Innocent persons may be executed who might otherwise be saved by reasonable delay in execution through newly-discovered evidence.[194] In light of recent events in the State of Illinois in which thirteen persons on death row were ultimately found to be innocent, international concerns regarding the inhumane use of the death penalty in the United States, and decreasing public support for the death penalty, those entities supporting retention of the death penalty as a viable criminal sanction ought to take heed and urge care rather than haste in the review of death sentences. Fairness is in the interest of the state as well as the individual. Expedited review processes in state courts are unfair, likely leading to unjust conclusions in at least some cases.

194. Innocent inmates spent an average of 7.5 years on death row. Death Penalty Information Center, *Innocence: Freed from Death Row* (visited Mar. 9, 2000) <http://www.essential.org/dpic/Innocentlist.html>.