

**EFFECTIVE DEATH PENALTY AND POST CONVICTION REFORM
CONSTITUTIONAL AMENDMENT
5/8/08 CRC MEETING**

PURPOSE: The proposed constitutional amendment is the second and final necessary step to restore the Post-Conviction Remedies Act's ideal balance between providing convicted persons with a generous opportunity to seek relief for serious constitutional errors in their convictions or sentences and giving to the State and crime victims the finality and closure to which they are entitled. ¹

BACKGROUND:

Overview: In the past ten years, the review process in death-penalty cases has slowed to a crawl. The problem is especially acute in the state review that begins after a capital conviction and death sentence have been affirmed on direct appeal. State funding for counsel and litigation expenses intended to speed review at both the state and federal levels instead has slowed that review. In addition, Utah Supreme Court decisions have impaired the use of procedural bar and time bar rules to streamline the state review. None of these delays facilitate review of serious issues about a petitioner's innocence: a claim that the State never has and never would argue is beyond the courts' authority to address.

Process:

TRIAL: The United States Constitution and the Utah Constitution guarantee all persons charged with a crime the right to a jury trial, along with other attendant rights designed to assure fairness and prevent convicting and imprisoning innocent persons. U.S. Const. Amend. 6; Utah Const. Art. 1, § 12. Indigent defendants have a federal constitutional right to taxpayer funds for counsel and for litigation expenses, such as investigators and expert witnesses, to defend against criminal charges.

FIRST REVIEW LEVEL: After the trial ends, the Utah Constitution further creates the right for a convicted person to appeal his conviction and sentence. Utah Const. Art. I, § 12. Although the United States Constitution creates no right to an appeal in State court, it does give indigent defendants the right to taxpayer funds to prosecute the appeal when, as in Utah, the state creates the right to appeal.

¹ The first step was the statutory reform detailed in the materials presented to this committee at the October 11 and November 15, 2007, meetings. The Legislature passed those reforms, with some modifications, in the 2008 session. The State and the legislative sponsors chose not to pursue the constitutional amendment during this session to give this committee time to complete its evaluation. However, as explained later in the text, the PCRA's goals cannot be realized without the constitutional amendment.

SECOND REVIEW LEVEL: If the appellate court affirms the conviction and sentence on direct appeal, the criminal case ends. However, the review process does not. At that point, the convicted person may begin the post-conviction review process in state court. Even though the process is a review of a criminal conviction and sentence, this process is civil. The convicted person is the equivalent of a civil plaintiff suing the State for relief from the conviction and sentence. He bears the burden of proof and the responsibility to move the case forward.

Both the State and the federal government have post-conviction review remedies. Generally, a convicted person begins the process in State district court. Either party may appeal the outcome to the appropriate state appellate court.

THIRD REVIEW LEVEL: If the state district and appellate courts affirm the conviction and sentence at the second (post-conviction) review level, the convicted person may begin the process over in the federal courts. He begins by filing a petition for relief in the United States District Court for the District of Utah. Either party may appeal the outcome to the United States Court of Appeals for the Tenth Circuit.

The present problem: In theory, the review should narrow and move more quickly at each progressive stage. That is, a convicted person generally should not be allowed to seek post-conviction relief on claims that he raised and lost in the criminal process. He should not be allowed to seek relief on claims that he could have, but did not raise in that process unless he can show that his counsel's failure to raise them fell below federal constitutional standards. He should not be allowed to file untimely claims challenging a conviction or sentence based on alleged errors that raise no serious issue about his factual innocence.

In order to assure that the system of post-conviction review works as it should, the Legislature, in 1996, passed the Post-Conviction Remedies Act. The Act was designed to strike an ideal balance between the State's and victims' interest in the finality of convictions and sentences, and a reasonable opportunity for the convicted person to obtain relief based on overlooked, serious constitutional errors or newly discovered evidence that calls the conviction or sentence into substantial doubt.

However, that balance has been upset. Recent decisions have impaired relying on the PCRA's time- and procedural- bars to streamline the post-conviction review process. In *Adams v. State*, 2005 UT 62, 123 P.3d 400, the Utah Supreme Court effectively neutralized the Legislature's time-bar. Under *Adams*, a convicted person may avoid the time bar if his claim is sufficiently meritorious no matter how long he delays bringing it and even though it raises no serious issue about his

factual innocence. In two recent death-penalty cases, *Adams* has necessitated and will necessitate hundreds of pages of briefing on the merits of claims filed years too late.

In *Menzies v. Galetka*, 2006 UT 81, 150 P.3d 480, the supreme court held that the Legislature intended the statutory right to appointed counsel for indigent petitioners in death-penalty post-conviction cases to incorporate a right to the effective assistance of counsel that is co-extensive with the Sixth and Fourteenth Amendment rights that the petitioner already enjoyed during the criminal process. The supreme court relied on that newly created right to send *Menzies*' post-conviction case back to its by then eleven-year-old starting point. At least one death-row inmate has returned to state court for a second round of state post-conviction review and relied on *Menzies* as a basis for allowing full merits review of his repetitive bid for state relief.

The 2008 PCRA reform overruled both *Menzies* and *Adams*. Under present law, however, statutory reform is not enough. In *Gardner v. Galetka*, 2004 UT 42, 94 P.3d 263, the Utah Supreme Court held that it had state constitutional authority for post-conviction review of a criminal conviction and sentence independent of the Post-Conviction Remedies Act. That holding allows the court to bypass statutory limits, including the 2008 reform, by relying on the authority that it has concluded the constitution bestows on the courts.

Gardner is an example. There, the supreme court bypassed the existing PCRA statutory limits by holding that the pre-PCRA, court-created rules retain their "constitutional significance." *Id.* at 15. Those rules are so broad that federal courts have begun to reach the merits of claims that should have been deemed procedurally defaulted and not subject to merits review. This, of course, causes additional delay at the federal level. Because *Gardner* relies on constitutional interpretation, it can be addressed only through a constitutional amendment.

STATUTORY AMENDMENTS:

As stated, the statutory amendments proposed in the October and November 2007 materials have passed (with some negotiated modifications). In the floor votes, only one legislator voted against the amendments.

PROPOSED CONSTITUTIONAL AMENDMENTS, WITH ANNOTATIONS:

Utah Const. Art. VIII, § 3, Jurisdiction of Supreme Court:

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause. The Supreme Court's jurisdiction to collaterally review criminal convictions and sentences shall be exercised as limited by statute.

Utah Const. Art. VIII, § 5, Jurisdiction of district court and other courts -- Right of appeal:

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause. The jurisdiction of all courts to collaterally review criminal convictions and sentences shall be exercised as limited by statute.

ANNOTATIONS:

The proposed constitutional amendments are intended to complete the process of restoring the PCRA's balance between the victims', State's, and convicted person's legitimate interests . While they recognize that the courts have constitutional jurisdiction over post-conviction review, they also authorize the legislature to implement policy determinations of the breadth and processes of that review.