

No. 20-1144

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IN THE  
**United States Court of Appeals for the  
District of Columbia Circuit**

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FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF  
ARIZONA; SAMMANTHA ALLEN; STEVE BOGGS; JOHNATHAN  
BURNS; ALAN CHAMPAGNE; MIKE GALLARDO; RODNEY  
HARDY; ALVIE KILES; ANDRE LETEVE; BRAD NELSON;  
STEVEN PARKER; WAYNE PRINCE; AND PETE ROGOVICH,  
*Petitioners,*

*v.*

WILLIAM P. BARR, UNITED STATES ATTORNEY  
GENERAL; UNITED STATES OF AMERICA,  
*Respondents.*

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On Petition for Review of The Attorney General's  
April 14, 2020 Decision Certifying The State of  
Arizona's Capital Counsel Mechanism Under  
28 U.S.C. §§ 2261-2265

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**PETITIONERS' MOTION FOR STAY PENDING  
JUDICIAL REVIEW AND  
REQUEST FOR ADMINISTRATIVE STAY**

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## INTRODUCTION

On April 14, 2020, the Department of Justice certified Arizona as the first state in the nation to qualify for expedited capital habeas proceedings under Chapter 154 of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. §§ 2261-2265. *See Certification of Arizona Capital Counsel Mechanism*, 85 Fed. Reg. 20,705 (Apr. 14, 2020); Add1-17.<sup>1</sup>

The certification's effects are profound. When a state is certified, death-sentenced defendants in the state are subject to Chapter 154's never-before-applied provisions, which restrict federal habeas review in myriad ways. Most prominently, Chapter 154 imposes tightened time limits on filing for federal habeas relief. Chapter 153 of AEDPA, 28 U.S.C. §§ 2241-2255, which governs absent a state's certification under Chapter 154, provides a one-year time limit for filing a federal habeas petition, 28 U.S.C. § 2244(d). But Chapter 154 cuts that time in half, providing for a reduced, 180-day deadline, while also adding new, restrictive tolling rules. 28 U.S.C. § 2263.

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<sup>1</sup> "Add \_\_" refers to the attached, page-stamped addendum. For the Court's convenience, we include 28 U.S.C. §§ 2261-2266 and 28 C.F.R. §§ 26.20-26.23 in the Addendum.

By statute, DOJ may certify a state's capital counsel mechanism under Chapter 154 only if the state demonstrates that it provides for the timely appointment and adequate compensation of competent state postconviction counsel for death-sentenced prisoners, among other requirements. 28 U.S.C. § 2265; 28 C.F.R. §§ 26.21-26.23. The record in this case, including an almost 200-page administrative comment by Petitioner Arizona Federal Defender's Office (FDO-AZ), Add56-224, shows that Arizona's system for appointing postconviction counsel is uniquely dysfunctional and does not come close to satisfying the applicable statutory and regulatory certification requirements. Indeed, DOJ agrees that Arizona does not meet the benchmark provisions for attorney competency and compensation, and has no timeliness rules at all. DOJ nevertheless granted Arizona's certification request, among other things dismissing the voluminous evidence of real-world deficiencies as irrelevant to the inquiry.

As detailed in this motion, this sudden change to habeas litigation forces immediate decisions on death-sentenced prisoners and their counsel. For example, FDO-AZ client Gilbert Martinez must file a case management statement by May 13, 2020, addressing whether Chapter

153 or 154 applies to his habeas petition. Ex. A (Decl. of Dale Baich)

¶24.

DOJ issued its certification decision during the ongoing COVID-19 pandemic. Given the dire nature of the public health crisis, courts around the country, including the Supreme Court, have issued broad extensions of filing deadlines. DOJ's certification decision takes the opposite tack, apparently viewing this difficult time as the appropriate juncture to impose a drastic curtailment of court filing deadlines for incarcerated, death-row prisoners.

Certification decisions under Chapter 154 are reviewed "de novo" by this Court. 28 U.S.C. § 2265(c). In its comment to DOJ opposing certification, FDO-AZ urged DOJ to stay any certification decision pending this Court's review. Add221-24. DOJ's certification expressly declines stay relief. Add17. On April 16, 2020, within two days of the decision, FDO-AZ submitted to DOJ a renewed stay request, noting the disruption that the absence of a stay would inflict on the judiciary (both state and federal), and emphasizing that, especially under the circumstances of the ongoing COVID-19 crisis, staying the first-ever Chapter 154 certification pending this Court's statutorily-prescribed

judicial review was plainly called for. Add18-22. On April 30, 2020, the day after we emailed DOJ a courtesy copy of our petition for review filed on April 29, 2020, DOJ for the first time acknowledged receipt of our renewed stay request and indicated that a response is forthcoming, but it has not otherwise acted on the request.

We have filed in this Court a petition for review of DOJ's certification. Dkt. 1. Respectfully, this Court should now stay DOJ's decision pending judicial review. The Court should also grant an administrative stay pending its consideration of this motion, particularly in light of upcoming litigation deadlines in ongoing habeas cases.

## **BACKGROUND**

1. AEDPA governs federal habeas review of state criminal judgments. AEDPA's Chapter 153, 28 U.S.C. §§ 2241-2255, establishes general requirements and conditions for such habeas petitions, including a one-year statute of limitations for filing a petition, 28 U.S.C. § 2244(d).

This case involves AEDPA's Chapter 154. Compared to Chapter 153, Chapter 154 places additional substantive and procedural

restrictions on federal habeas review of state capital convictions and sentences. But those restrictions apply only to prisoners who were sentenced to death by states that reasonably guarantee that death-sentenced indigent prisoners will be appointed timely, competent, adequately resourced counsel for the state postconviction review that precedes federal habeas review. *See* Certification Process for State Capital Counsel System, 78 Fed. Reg. 58,165 (Sept. 23, 2013); Add229-253. Chapter 154 specifies that a state must apply to the U.S. Attorney General to take advantage of Chapter 154, and the Attorney General must certify that the state meets applicable requirements in order for Chapter 154 to apply. 28 U.S.C. §§ 2261, 2265.

Where the Attorney General certifies a state's capital counsel mechanism, Chapter 154 cuts in half the statute of limitations to file a federal habeas petition—to just 180 days, instead of a year—and limits the circumstances in which tolling is permitted. 28 U.S.C. § 2263.

Chapter 154 also severely limits a petitioner's ability to raise procedurally defaulted claims, *id.* § 2264(a), amend a habeas petition, *id.* § 2266(b)(3)(B), or obtain a stay of execution from a federal court, *id.*

§ 2262(c). And it places specific limits on the time that district courts and courts of appeals have to rule on capital habeas cases. *Id.* § 2266.

2. Prior to this case, no state had ever qualified under Chapter 154. Until 2005, federal district courts decided whether a state met Chapter 154's requirements. In every case presenting the issue, federal courts held that states either did not have an adequate appointment mechanism or failed to appoint counsel pursuant to an adequate mechanism. Casey C. Kannenberg, *Wading Through the Morass of Modern Federal Habeas Review of State Capital Prisoners' Claims*, 28 *Quinnipiac L. Rev.* 107, 129-38 (2009). In 2005, Congress transferred the initial determination of states' Chapter 154 eligibility from the courts to the Attorney General. 28 U.S.C. § 2265.

3. In 2013, Arizona submitted a four-page application to DOJ seeking certification applicable to cases dating back to 1998, so that the newly restrictive Chapter 154 parameters would apply even to cases where state postconviction counsel was appointed more than 20 years ago. Add225-28. Four years later, in 2017, DOJ published the application and called for public comment. Notice of Request for

Certification of Arizona Capital Counsel Mechanism, 82 Fed. Reg. 53,529 (Nov. 16, 2017).

Petitioner FDO-AZ undertook an exhaustive review of Arizona's system for appointing capital postconviction counsel, and submitted a comprehensive comment detailing the many significant ways in which that system did not meet Chapter 154's requirements. Add56-224. The individual petitioners in this case also submitted comments opposing Arizona's application. *See* Exs. B-I.

On April 14, 2020, DOJ granted Arizona's application and published its certification decision in the Federal Register. Add1-17. DOJ alluded to the documented problems with the competence of Arizona's appointed capital postconviction counsel, but dismissed such evidence of real-world shortcomings as legally irrelevant. Add7-8. DOJ also deemed insignificant the numerous ways that Arizona's appointment system failed to meet the benchmarks that the certification regulations (28 C.F.R. §§ 26.20-26.23) provide to guide certification decisions. DOJ proceeded to approve Arizona's capital counsel appointment mechanism based largely on a 20-year-old case, *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002), which addressed, under

the pre-2005 version of Chapter 154, Arizona's then-existing counsel appointment scheme. Add3-5. That appointment scheme was materially different from the scheme currently at issue, and DOJ had not yet issued controlling certification regulations at the time of *Spears*.

FDO-AZ's comment opposing Arizona's certification request urged DOJ that any decision to certify should be accompanied by a stay pending this Court's review. Add221-24. DOJ's certification decision expressly declined any stay relief, and stated that the certification was effective as of May 19, 1998, meaning that any death-sentenced prisoner appointed postconviction counsel on or after that date is potentially subject to Chapter 154's limitations. Add17. On April 16, 2020, FDO-AZ promptly renewed its stay request to DOJ, noting among other things that making immediately effective Chapter 154's shortened court filing deadlines in the midst of the COVID-19 crisis would plainly contravene the public interest. Add18-22. FDO-AZ and the individual petitioners timely filed a petition for review of the certification decision on April 29, 2020. Dkt. 1.

## ARGUMENT

This Court considers four factors when deciding whether to grant a stay pending judicial review: (1) petitioners' likelihood of success on merits; (2) whether petitioners will suffer irreparable injury absent a stay; (3) whether other parties will suffer harm if the stay is granted; and (4) the public interest. *See* Cir. R. 18(a)(1); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). Each factor strongly favors a stay here.

On its merits, DOJ's decision certifying Arizona is fundamentally flawed. If put into effect, the certification will inflict considerable harm on death-row prisoners, their counsel, and the judiciary itself. A stay would prejudice no one and will simply enable this Court to exercise its statutorily-prescribed judicial review in an orderly fashion.

The timing of this certification also supports a stay. The COVID-19 pandemic has caused significant disruption to the litigation process nationwide. From any objective standpoint, there is no worse time than now to implement a novel regime for capital habeas litigation featuring significantly shortened filing deadlines and innumerable unresolved issues. Ex. A ¶¶38-43. Especially against this backdrop, the traditional

stay factors overwhelmingly support a stay while this Court's review of the underlying certification runs its proper course.

**A. Petitioners have a substantial case on the merits.**

A stay is warranted because petitioners have a “substantial case on the merits” and are likely to prevail in their petition for review. *Wash. Metro.*, 559 F.2d at 843. And because this case raises novel legal issues arising from statutory provisions that have never been applied, this case presents the kind of “serious, substantial” legal questions that especially justify preserving the status quo pending judicial review. *Id.* at 844.

As a threshold matter, the regulations under which DOJ certified Arizona are themselves invalid, as the only court to have considered the question has expressly held. *Habeas Corpus Res. Ctr. v. United States Dep't of Justice*, No. C 13-4517 CW, 2014 WL 3908220 (N.D. Cal. Aug. 7, 2014) (finding 28 C.F.R. §§ 26.20-26.23 invalid under the Administrative Procedure Act), *vacated and remanded on standing grounds*, 816 F.3d 1241 (9th Cir. 2016). Petitioners are currently challenging the underlying regulations in a separate APA suit. *Boggs v. US DOJ*, 19-cv-05238 (D. Ariz. Sept. 20, 2019); see *Nat'l Ass'n of Mfrs. v.*

*Dep't of Def.*, 138 S. Ct. 617, 623 (2018) (challenges to final rules to “be filed in federal district courts”).<sup>2</sup>

As for the substance of DOJ’s certification decision, the agency erred by ignoring or discounting the multiple ways that Arizona’s system for appointing capital postconviction counsel falls short of meeting the key prerequisites for Chapter 154 certification. Under any standard of review—but particularly under the *de novo* standard applicable here—petitioners present a substantial case on the merits justifying a stay.

Among other requirements, a state may be certified under Chapter 154 only if it adopts a system for appointing (1) competent attorneys (2) in a timely manner, who are (3) adequately compensated and (4) provided with sufficient litigation resources. 28 C.F.R. §§ 26.21-22; 28 U.S.C § 2265. Arizona’s mechanism for appointing capital postconviction counsel fails to meet any of these requirements.

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<sup>2</sup> In prior litigation, DOJ has maintained that challenges to the regulations governing certification should be heard in this Court as part of the review of a certification decision, *see* Opening Brief, *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. CR14-16928 (9th Cir. Feb. 11, 2015), at 24, although DOJ’s certification now asserts that challenges to the regulations “do not bear on th[e] certification,” Add17.

**Competence:** Most essential for certification, a state must ensure that the attorneys it appoints are competent to engage in capital postconviction work. 28 C.F.R. § 26.22(b). “Providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing, and execution of capital defendants.” Add124 (citation omitted).

Arizona’s mechanism lacks proper competency standards. As detailed throughout FDO-AZ’s comment, Arizona’s lack of such standards has repeatedly led to the appointment of unqualified attorneys, including attorneys previously found incompetent and disciplined by the State Bar, and attorneys who were denied trial-level capital appointments. Add144-181. DOJ’s decision fails meaningfully to engage with this documented litany of incompetent appointed counsel, and instead improperly dismisses these proven realities as mere case-specific challenges not pertinent to certification. Add7-8.

But DOJ’s decision to certify in these circumstances is at odds with the governing regulations. Chapter 154’s implementing regulations establish that a state’s competency requirements are presumptively adequate only if they meet either of two specified

benchmarks. 28 C.F.R. § 26.22(b)(1). Arizona's standards meet neither specified benchmark, and DOJ did not conclude otherwise. Add5-6.

For example, the first (and principal) benchmark provides that an appointment system is presumptively adequate if it requires appointed counsel to “have been admitted to the bar for at least five years *and have at least three years of postconviction litigation experience.*” 28 C.F.R. § 26.22(b)(1)(i) (emphasis added). Arizona's mechanism fails that benchmark because, conspicuously, it requires *no* postconviction litigation experience *at all*. Add125-130; *see* Ariz. R. Crim. P. 6.8; Add5 (DOJ acknowledging Arizona requires no postconviction litigation experience).

Recognizing that Arizona failed to meet either benchmark, DOJ nevertheless found that Arizona satisfied the regulations' catchall provision, believing its mechanism “otherwise reasonably assure[s] a level of proficiency appropriate for State postconviction litigation in capital cases.” 28 C.F.R. § 26.22(b)(2). It does not.

DOJ concluded that Arizona met the catchall provision because its competency requirements are consistent with federal capital appointment requirements under 18 U.S.C. § 3599, which do not specify

postconviction experience. Add5. Indeed, DOJ went so far as to assert that “[p]ostconviction litigation experience is ... not an essential element of adequate counsel competency standards under [DOJ’s] interpretation of this aspect of chapter 154.” Add6. But both the regulations governing certification and the preamble to those regulations have already rejected that conclusion.

The regulations make clear that certification requires more than the § 3599 standards. *See* Add42-44 (FDO-AZ Supplemental Comment). An early version of the proposed regulations imported the § 3599 requirements and allowed a state appointment mechanism to qualify as presumptively adequate if it required counsel to possess “three years of felony litigation experience, without specification of the stage or stages of litigation at which the experience was obtained.” Add238. But after receiving public comments, DOJ changed course and determined that “postconviction litigation experience would be a better measure of competency for State postconviction proceedings than general felony litigation experience because of the difficult and unique demands that postconviction law and procedure place on attorneys who litigate those cases.” *Id.* Accordingly, the Final Rule “adapt[ed]” the “[§] 3599

standard” and required instead “three years of postconviction litigation experience, rather than three years of any sort of felony litigation experience as in the proposed rule.” *Id.*

In other words, DOJ already concluded that meeting the 18 U.S.C. § 3599 standards, without more, is not enough to meet the competency requirement under the governing regulations. Yet DOJ now determines, self-contradictorily, that compliance with the § 3599 requirements justifies certifying Arizona under the catchall provision. Add6. DOJ’s incoherence on this point is only heightened by the fact that a separate part of the regulations—governing attorney *compensation*, not *competence*—does fully incorporate 18 U.S.C. § 3599 as a relevant standard. 28 C.F.R. § 26.22(c)(1)(i).

DOJ also asserts that Arizona’s appointment mechanism is adequate based on the Ninth Circuit’s decision in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002). DOJ’s resort to *Spears* is likewise misplaced and fares no better than its inapt reliance on § 3599.

*Spears* is an almost twenty-year-old case. It was decided prior to the amendments to Chapter 154 that vested certification decisions with the Attorney General. It was decided prior to numerous changes to

Arizona's attorney appointment system. And it was decided prior to DOJ's promulgation of its regulations that now govern certification. DOJ was plainly wrong in resting so heavily on a hotly disputed case from an earlier and different era. *See Spears*, 283 F.3d at 996-1007 (opinions regarding denial of rehearing en banc). That is all the more so given that the Arizona competency standards considered in *Spears* required postconviction experience, 283 F.3d at 1011, 1013—an essential requirement that Arizona's current scheme abandons.

***Timeliness:*** Also essential for certification under Chapter 154, a state's appointment system must provide postconviction counsel "in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review." 28 C.F.R. § 26.21. The timeliness requirement is vital to the logic of Chapter 154: If state postconviction counsel is not appointed in a timely fashion, prisoners can lose their entire 180-day filing period before their state postconviction review process and/or federal habeas process even begins. Add13.

Arizona's application does not so much as mention how the state meets the timeliness requirement. *See* Add225-28. In fact, the state has *no* timeliness requirement at all. Add197-201.

DOJ acknowledges that Arizona has no timeliness requirement, but maintains that Arizona may timely appoint counsel because the state's rules "currently allow[] for the appointment of counsel as soon as the Arizona Supreme Court affirms the conviction and sentence." Add13. The lack of a mandatory rule is not a problem, according to DOJ, because it "expect[s] that the federal courts will interpret and apply section 2263 fairly." Add14. DOJ further speculates that courts will interpret statutory language in Chapter 154 (§ 2263, referring to a "petition" for postconviction relief), to mean the same thing as different statutory language in Chapter 153 (§ 2244(d), referring to an "application" for postconviction relief). Add14.

In other words, DOJ finds Arizona entitled to expedited habeas because it *might* comply with the timeliness requirement, provided Arizona continues its current permissive appointment practices and courts interpret Chapter 154's distinct statutory language to mean the same thing as Chapter 153. This speculation does not change the fact

that Arizona has no timeliness requirement for postconviction appointments and has plainly failed to satisfy this requirement for certification.

DOJ's reasoning on timeliness is also inconsistent with its analysis of competence. As noted, in assessing the competence of appointed attorneys, DOJ says the demonstrated deficiencies in how the scheme works in practice are legally irrelevant. Add7-8. But in assessing the timeliness of attorney appointments, DOJ says Arizona's having no timeliness requirement is saved by looking at claimed real-world practices (and by assuming those will continue under a new and different statute). Add14. DOJ can't have it both ways.

***Attorney Compensation:*** Chapter 154 also requires that a state provide "sufficient financial incentives to secure the appointment of competent counsel in sufficient numbers to timely provide representation." Add242; *see* 28 U.S.C. § 2265(a)(1)(A).

Arizona pays postconviction attorneys a *maximum* rate of \$100 per hour, with no statutory minimum. Ariz. Rev. Stat. § 13-4041(F). That rate has not changed in more than twenty years. *See* Ariz. Rev. Stat. § 13-4041(G) (1998). Not even for inflation. And Arizona judges,

experts, and policymakers have consistently lamented the insufficiency of the compensation rate and recommended increasing it, to no avail.

*See* Add182-191.

Arizona's \$100-maximum-per-hour rate does not come close to meeting the compensation benchmarks that the regulations deem presumptively adequate. *See* 28 C.F.R. § 26.22(c)(1). As just two examples, the rate is well behind the \$195-per-hour paid to federal capital habeas counsel, *see* U.S. District Ct., District Ariz., <http://www.azd.uscourts.gov/attorneys/cja/rates> (last visited Apr. 29, 2020), and well below the market rate for retained, experienced criminal defense counsel in Arizona, *see* Add188-89. DOJ does not contend that Arizona meets the benchmarks under § 26.22(c)(1).  
Add10.

In nonetheless certifying Arizona, DOJ again relies on *Spears*. Add9. But *Spears* did not address whether \$100-per-hour was adequate even in 1998; it addressed only whether the presumptive 200-hour cap on compensation was reasonable. 283 F.3d at 1015. And it obviously said nothing about whether \$100-per-hour remains adequate in 2020, nor did it address the numerous declarations and other evidence

presented here explaining why \$100-per-hour does not meet Chapter 154's requirements. Add182-191. DOJ ignored all of that evidence by calculating that an attorney working 2,000 hours per year at \$100-per-hour could make \$200,000 (minus, of course, overhead). Add9-10. Yet DOJ points to no evidence that any attorney *does* receive such a salary, and refers to total amounts spent on cases that span multiple years. Add10. DOJ also points to defense attorneys employed by state offices—which accounts for less than 10% of cases, *see* Add102, 104-05—as meeting the catchall provision in 28 C.F.R. § 26.22(c)(2). Add10. A system that meets less than 10% of the demand for qualified counsel cannot be “reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency.” 28 C.F.R. § 26.22(c)(2).<sup>3</sup>

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<sup>3</sup> Arizona's appointment system also fails to “provide for payment of reasonable litigation expenses of appointed counsel.” 28 C.F.R. § 26.22(d). Arizona simply provides that “[t]he trial court *may* authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate” certain claims. Ariz. Rev. Stat. § 13-4041(I) (emphasis added); *see* Add11 (DOJ acknowledging permissive language in § 13-4041(I)). In practice, Arizona's system for funding basic litigation expenses like experts and forensic testing is ad hoc, with great variability from county to county, administrator to administrator, court to court, and year to year.

\* \* \*

Petitioners have, at the very least, presented a “substantial case on the merits” supporting a stay. *Wash. Metro.*, 559 F.2d at 843. That showing is only strengthened by the novelty of the issues presented. Until now, no state has ever been certified under Chapter 154, and no court has reviewed a Chapter 154 certification decision. A stay is merited while this Court does so for the first time.

**B. Petitioners will suffer irreparable harm absent a stay.**

A stay is also warranted to prevent irreparable harm. *See Wash. Metro.*, 559 F.2d at 842. Without a stay, Arizona may immediately seek to apply Chapter 154’s shortened deadlines and other limitations. That prospect will upend habeas litigation and, in the process, irreparably injure prisoners and their counsel. Appended to this stay motion is the declaration of the head of FDO-AZ’s capital habeas unit, and multiple declarations of individual death-row prisoners, articulating in detail the irreparable harms that would flow absent a stay of DOJ’s certification. *See Ex. A, Exs. B-I.*

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Add191-197. Arizona’s failure to provide for adequate litigation funding also precludes certification.

**1. The certification decision irreparably harms death-row prisoners, including the individual petitioners here.**

Arizona currently has 92 death-row prisoners potentially subject to Chapter 154's habeas restrictions—for whom state postconviction counsel was or will be appointed on or after the certification's effective date, May 19, 1998. Ex. A ¶19. The individual petitioners are among them. *See* Exs. B-I. Each of the individual petitioners stands to be harmed absent a stay of DOJ's decision.

Regardless of the stage of their cases, prisoners and their counsel will need to immediately investigate and prepare to litigate whether and how Chapter 154 applies to them. For instance, Petitioner Sammantha Allen is awaiting the Arizona Supreme Court's decision on direct review of her death sentence. Exs. H ¶7, A ¶31. Because of the uncertainty surrounding the interpretation of Chapter 154's deadlines, her lawyers will need to act protectively and file any petition for writ of certiorari in the U.S. Supreme Court, and then an initial petition for postconviction review in state court, as quickly as possible to minimize the time potentially lost from Ms. Allen's 180-day statute of limitations. Exs. H ¶¶11-15, A ¶31; *see* 28 U.S.C. § 2263(b)(1), (2).

For prisoners currently in state postconviction review, the certification also means preparing to litigate how Chapter 154's new timing provisions apply to their cases and understanding never-before-applied restrictions to their forthcoming habeas petitions, with an eye towards trying to satisfy, to the extent possible, the more stringent Chapter 154 deadlines. *See* Exs. C ¶¶11-17, G ¶¶12-20 (declarations from petitioners Champagne and Prince). Some representative examples are instructive. Under Chapter 153's existing one-year statute of limitations, Petitioner Wayne Prince will have 337 days to file his federal habeas petition if the Arizona Supreme Court denies his petition for review regarding postconviction relief. Ex. G ¶14. Absent a stay, depending on how the courts interpret Chapter 154's tolling provisions, Mr. Prince could already be entirely out of time for federal habeas relief. *Id.* ¶13. Mr. Prince's lawyers will need to investigate and prepare to litigate how Chapter 154's statute of limitations and tolling provisions apply to Arizona's postconviction procedures to protect Mr. Prince's ability to file a federal habeas petition. *Id.* ¶¶18-20. Alan Champagne is in a similar predicament—he may have already lost a

significant number of days from Chapter 154's 180-day statute of limitations. Ex. C ¶¶12.

Likewise, death-sentenced prisoner and FDO-AZ client Gilbert Martinez recently entered federal habeas and has not yet filed his petition for writ of habeas corpus. He must file a case management statement by May 13, 2020, addressing what deadlines will apply to his case. Ex. A ¶24. His FDO-AZ lawyers must promptly investigate whether and how Chapter 154 applies to him, and prepare to litigate the application of Chapter 154's deadlines and tolling provisions. *Id.*

And even for FDO-AZ's several dozen clients who have already filed their federal habeas petitions, the immediate enforcement of Chapter 154 will have consequences. For instance, as described above, Chapter 154 limits petitioners' ability to pursue defaulted claims and amend their petitions. 28 U.S.C. §§ 2264, 2266(b)(3)(B). The state may seek to enforce those restrictions immediately absent a stay. Prisoners already in federal habeas proceedings will therefore have to litigate whether and how Chapter 154 applies to their cases and could face motions to dismiss their petitions as untimely (*see Spears*, 283 F.3d at 1008), motions to expedite their habeas proceedings (*see Rogovich v.*

*Stewart*, No. 00-1896 (D. Ariz. Jan. 29, 2001), ECF No. 35), and/or restrictions on amendments (*see* 28 U.S.C. § 2266(b)(3)(B)). *See* Exs. D ¶¶15-17, E ¶¶15-17, I ¶¶15-17 (declarations from petitioners Gallardo, Kiles, and Hardy). Even prisoners who have already completed litigation over their initial habeas petitions now face end-stage litigation under Chapter 154's restrictions on stays of execution. 28 U.S.C. § 2262; Ex. F ¶¶13-17 (declaration regarding petitioner Rogovich).

These injuries to prisoners are irreparable. Resources spent trying to mitigate harms from Chapter 154 cannot be recovered if certification is vacated on judicial review. And to the extent that prisoners are forced to file rushed petitions for certiorari in the U.S. Supreme Court, initial postconviction petitions in state court, or habeas petitions in federal court, there is no after-the-fact remedy that can compensate prisoners who because of undue time constraints lose the opportunity to present a constitutional claim challenging their death sentence.

## 2. Certification also imposes irreparable harm on FDO-AZ.

The irreparable harm extends to defense counsel. FDO-AZ represents 44 federal-habeas-stage prisoners sentenced to death by Arizona and who were appointed postconviction counsel after May 19, 1998. Ex. A ¶22. FDO-AZ is also tracking 48 additional potential Chapter 154 cases where individuals have been sentenced to death in Arizona and their cases are still in direct review or state postconviction review. *Id.* ¶26. The certification affects FDO-AZ with respect to all of these cases.

Absent a stay, certification of Arizona will substantially and irreparably harm the office. In incoming cases, Chapter 154 will shorten the amount of time that defenders have to file habeas petitions, and in both incoming and existing cases it will force defenders to investigate and prepare to litigate whether cases are subject to Chapter 154's provisions in the first place. *Id.* ¶20-32.

Certification will require defenders to redirect resources to cases potentially subject to Chapter 154. *Id.* ¶32-33. If the certification decision is not stayed, the defenders preparing those petitions will be forced to seek additional resources or potentially curtail their

investigations and forego the development of meritorious claims to file petitions before the shortened deadlines. *Id.* ¶20. If claims are not fully investigated and adequately presented, prisoners could be executed without having had a full and fair review of their conviction and sentence.

These harms are irreparable. If this Court were ultimately to set aside the certification decision, the efforts expended investigating and preparing to litigate the threshold application of Chapter 154 in pending cases will be for naught. And in cases where defenders were forced to rush investigations to meet Chapter 154's tightened deadlines, case teams will likely need to revisit their work to ensure nothing was missed in the rushed investigation. *Id.* ¶25.

Nothing can compensate an attorney for having to divert time from one client's case to another; no amount of "[m]onetary relief in the future" can make up for the "foregone planning" and preparatory work "essential" to FDO-AZ's mission and operation. *Massachusetts Law Reform Inst. v. Legal Servs. Corp.*, 581 F. Supp. 1179, 1188 (D.D.C. 1984), *aff'd*, 737 F.2d 1206 (D.C. Cir. 1984).

**C. A stay will not harm DOJ, Arizona, or other interested parties, and the public interest strongly favors a stay.**

A stay would cause no countervailing harm. A stay will simply “maintain the status quo” that has governed for decades. *Wash. Metro.*, 559 F.2d at 844. Federal habeas proceedings in Arizona have been governed by AEDPA’s Chapter 153 for more than 20 years. Arizona’s certification request was pending for more than six years before DOJ issued its decision granting it. The certification decision posits harm to the State and crime victims, but in context, putting that certification on hold for an additional modest period, while this Court conducts its statutorily-prescribed review, will materially prejudice no one.

The certification of Arizona is the first time the Attorney General has certified any state’s capital counsel mechanism under Chapter 154. The certification implicates a host of novel and critical questions. If allowed to go into effect, parties will have to litigate, and the courts will have to adjudicate, a range of unresolved issues regarding the retroactive effect of the certification decision, the interpretation of Chapter 154’s new and never-before-litigated timing provisions, and the effect of the certification on individual cases. *See Add7-8* (DOJ acknowledging case-specific questions that will be resolved in individual

cases). These issues will likely arise, moreover, in numerous cases, in both state and federal court. The imposition on the judiciary that the absence of a stay would thus entail is yet another consideration supporting a stay. Unleashing a flood of complex litigation on the courts regarding the effect of DOJ's certification, before this Court has the opportunity in the normal course to exercise its judicial-review responsibilities to pass upon the certification's legality, does not serve the public interest, especially during the ongoing public health crisis. Ex. A ¶¶38-43.

### CONCLUSION

This Court should stay DOJ's certification pending judicial review, and should issue an administrative stay pending its consideration of this motion.

Respectfully submitted,

*/s/Elizabeth R. Moulton*

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May 1, 2020

## CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 32(g) and Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,199 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point font.

Date: May 1, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

*/s/ Elizabeth R. Moulton*

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Elizabeth R. Moulton

*Counsel for Petitioners*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system on May 1, 2020.

I further certify that the following recipient was served via Federal Express:

The Honorable William P. Barr  
United States Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

Date: May 1, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Elizabeth R. Moulton

Elizabeth R. Moulton  
*Counsel for Petitioners*

**CERTIFICATE AS TO PARTIES AND AMICI CURIAE**

In accordance with D.C. Circuit Rules 18(a)(4), 27(a)(4) and 28(a)(1)(A), Petitioners certify that the following persons are parties, intervenors, or amici curiae in this Court:

**Parties**

Petitioners are Federal Public Defender For The District Of Arizona, Sammantha Allen, Steve Boggs, Johnathan Burns, Alan Champagne, Mike Gallardo, Rodney Hardy, Alvie Kiles, Andre Leteve, Brad Nelson, Steven Parker, Wayne Prince, and Pete Rogovich.

Respondents are William Barr, Attorney General, United States Attorney General, and the United States of America.

**Intervenors**

At present, no parties have moved to intervene in this action.

**Amici Curiae**

At present, no parties have moved for leave to participate as *amici curiae*.

Date: May 1, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Elizabeth R. Moulton

Elizabeth R. Moulton  
Counsel for Petitioners

## **RULE 26.1 DISCLOSURE**

Counsel for Petitioners Office of the Federal Public Defender for the District of Arizona, et al. certifies the following:

1. The full name of every party or amicus represented by me is:  
Office of the Federal Public Defender for the District of Arizona,  
Sammantha Allen, Steve Boggs, Johnathan Burns, Alan Champagne,  
Mike Gallardo, Rodney Hardy, Alvie Kiles, Andre Leteve, Brad Nelson,  
Steven Parker, Wayne Prince, and Pete Rogovich.
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me: None.
3. All parent corporations and any publicly held companies that own ten percent or more of the stock of the parties represented by me are: None.
4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Orrick, Herrington & Sutcliffe: Shasha Zou (no longer with the firm).

Date: May 1, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

*/s/ Elizabeth R. Moulton*

Elizabeth R. Moulton

*Counsel for Petitioners*

## TABLE OF EXHIBITS

Exhibit A Declaration of Dale A. Baich

Exhibit B Declaration of Steve Boggs

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Exhibit G Declaration of Wayne Prince

Exhibit H Declaration of Sammantha Allen

Exhibit I Declaration of Rodney Hardy

# Ex. A: Declaration of Dale Baich in support of stay motion

1                                   **DECLARATION OF DALE A. BAICH IN SUPPORT OF**  
2                                   **PETITION FOR REVIEW AND STAY OF**  
3                                   **THE UNITED STATES ATTORNEY GENERAL'S APRIL 14, 2020 ORDER**  
4                                   **CERTIFYING ARIZONA'S CAPITAL COUNSEL MECHANISM**  
5                                   **UNDER CHAPTER 154**

6                   I, Dale A. Baich, hereby declare that I have personal knowledge of the matters set forth  
7                   herein and the following information is true to the best of my knowledge and belief:

8                                   **BACKGROUND OF FDO-AZ**

9                   1.       The Office of the Federal Public Defender for the District of Arizona ("FDO-AZ")  
10                  is a Federal Defender organization that operates under the authority of the Criminal Justice Act of  
11                  1964, 18 U.S.C. § 3006A(g). FDO-AZ provides legal representation to indigent men and women,  
12                  including those individuals sentenced to death. The mission of FDO-AZ includes ensuring  
13                  enforcement of the right to the effective assistance of counsel guaranteed by the Sixth  
14                  Amendment and the Criminal Justice Act within the District of Arizona. FDO-AZ is a petitioner  
15                  in the above-captioned petition for review in this Court.

16                  2.       I am an assistant federal public defender and the supervisor of the Capital Habeas  
17                  Unit of FDO-AZ. I have been an assistant federal public defender for over twenty-three years,  
18                  and I have been the supervisor of FDO-AZ's Capital Habeas Unit since 2000. Prior to my current  
19                  role as an assistant federal public defender, for eight years I served as an assistant state public  
20                  defender in the Death Penalty Unit in the Office of the Ohio Public Defender.

21                  3.       FDO-AZ currently represents fifty-six prisoners who have been sentenced to death  
22                  by the State of Arizona and who also have instituted federal habeas corpus proceedings.<sup>1</sup>

23                  4.       Along with the direct representation of clients, the United States District Court for  
24                  the District of Arizona has authorized FDO-AZ "to provide assistance, consultation, information  
25                  and other related services to eligible persons and appointed attorneys" who are engaging in  
26                  federal habeas corpus litigation. *See* Plan for Composition, Administration and Management of

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27                  <sup>1</sup> In total, the Capital Habeas Unit of FDO-AZ currently represents eighty-two death-sentenced prisoners in  
28                  federal habeas corpus proceedings, including a number of individuals sentenced to death by other States. The unit  
                  also represents two prisoners with non-capital sentences. FDO-AZ, of course, also represents many individuals  
                  prosecuted by the federal government in non-capital cases at various stages of their proceedings.

1 the Panel of Private Attorneys Under the Criminal Justice Act, Gen. Order 16-22, § VII (D. Ariz.  
2 Oct. 19, 2016). The court also requires FDO-AZ to: (1) track capital cases in Arizona state and  
3 federal courts; (2) “coordinate with other state and national organizations providing legal  
4 assistance to death-sentenced individuals and counsel representing such individuals”; and (3)  
5 provide training for those attorneys representing clients in federal habeas proceedings. *Id.*

6 5. FDO-AZ is currently, concretely, and significantly harmed by the United States  
7 Attorney General’s decision to certify Arizona pursuant to Chapter 154 of the Antiterrorism and  
8 Effective Death Penalty Act of 1996 (“AEDPA”). Chapter 154’s shortened statute of limitations  
9 to file federal habeas petitions, among other restrictions, will require FDO-AZ to expend  
10 resources and take immediate steps—including investigating, preparing for, and commencing  
11 litigation in federal district court—to determine the application of Chapter 154 in individual cases  
12 and otherwise to properly represent its clients in ongoing proceedings. FDO-AZ will be forced to  
13 shift existing resources to cases most affected by certification, and also to try to secure substantial  
14 additional resources needed to adequately represent all existing and future clients, as explained  
15 below in this declaration. The certification decision has an immediate, substantial, and concrete  
16 effect on how the organization must structure its functions and deploy its resources to properly  
17 carry out its critical mission of representing criminal defendants who have been sentenced to  
18 death.

#### 19 **FDO-AZ’S PARTICIPATION IN THE RULEMAKING PROCESS**

20 6. Given FDO-AZ’s recognition that certification would have a significant impact on  
21 the office, the office was heavily involved in the process by which the Department of Justice  
22 (“DOJ”) promulgated the underlying Final Rule that governs its certification decisions, 28 C.F.R.  
23 §§ 26.20 *et seq.* FDO-AZ submitted comments on both the original proposed rule and the  
24 supplemental notice of proposed rulemaking. *See* Ex. A, Letter from Jon M. Sands, Federal  
25 Public Defender, to DOJ Regulations Docket Clerk (June 1, 2011); Ex. B, Letter from Jon M.  
26 Sands, Federal Public Defender, to DOJ Regulations Docket Clerk (March 14, 2012). In addition,  
27 FDO-AZ coordinated and joined with the rulemaking comments submitted by all Federal Public  
28 and Community Defenders. *See* Ex. C, Federal Public Defenders’ Comments on Proposed Rule

1 (May 31, 2011); Ex. D, Comments by Federal Public Defenders and Community Defenders re:  
2 Supplemental Notice of Proposed Rulemaking (March 14, 2012). These comments and others  
3 pointed out serious deficiencies in the Final Rule and the process that led to it.

4 7. After the DOJ issued the Final Rule, FDO-AZ and the Habeas Corpus Resource  
5 Center (“HCRC”) filed a complaint in the United States District Court for the Northern District of  
6 California alleging that DOJ violated the Administrative Procedure Act in issuing the Final Rule.  
7 *Habeas Corpus Res. Ctr. v. Dep’t of Justice*, Case No. 13-cv-4517, ECF No. 1 (N.D. Cal. Sept.  
8 20, 2013). FDO-AZ and HCRC largely prevailed on summary judgment before the district court.  
9 *Habeas Corpus Res. Ctr. v. Dep’t of Justice*, 2014 WL 3908220 (N.D. Cal. Aug. 7, 2014). The  
10 Ninth Circuit, however, vacated the district court’s decision on standing and ripeness grounds,  
11 holding that no case or controversy existed because DOJ had not yet issued an actual certification  
12 decision. *Habeas Corpus Res. Ctr. v. Dep’t of Justice*, 816 F.3d 1241 (9th Cir. 2016).

13 **FDO-AZ’S PARTICIPATION IN AGENCY PROCEEDINGS TO CONSIDER**  
14 **ARIZONA’S APPLICATION FOR CHAPTER 154 CERTIFICATION**

15 8. Arizona applied for certification on April 18, 2013. The application consisted of a  
16 perfunctory 4-page letter that was accompanied by no background materials. *See*  
17 <https://www.justice.gov/olp/page/file/1011626/download>.

18 9. More than four years later, on November 16, 2017, DOJ published notice of  
19 Arizona’s application and instituted a limited public comment period of 60 days. 82 Fed.  
20 Reg. 53,529.

21 10. Also on November 16, 2017, DOJ sent a letter directly to the Arizona Attorney  
22 General to “confirm that the materials [Arizona] previously submitted are still current.” *See*  
23 <https://www.justice.gov/olp/page/file/1014286/download>. FDO-AZ was not copied on this letter,  
24 and DOJ did not disclose the letter on its public website until November 28, 2017.

25 11. On November 21, 2017, FDO-AZ requested that DOJ (1) extend the comment  
26 period by 120 days, to a total of 180 days, (2) follow notice-and-comment rulemaking procedures,  
27 (3) provide procedural protections consistent with other administrative decisions reviewable  
28 under the Hobbs Act, and (4) disclose all information on which DOJ is relying in evaluating

1 Arizona's application. *See* Ex. E, Letter from Elizabeth R. Moulton, Att'y for Office of the Fed.  
2 Pub. Def. for D. of Ariz., to Laurence Rothenberg, Office of Legal Policy, Dep't of Justice (Nov.  
3 21, 2017).

4 12. On November 27, 2017, Arizona responded to DOJ's November 16 letter,  
5 acknowledging that its application was incomplete and out of date, and purporting to provide  
6 correct information. *See* <https://www.justice.gov/olp/page/file/1019741/download>. The Arizona  
7 Attorney General's Office provided a courtesy copy to FDO-AZ on the same day, but DOJ did  
8 not publish the letter to the public until December 21, 2017.

9 13. On December 18, 2017, FDO-AZ sent a second letter to DOJ, again requesting an  
10 extension of time to comment on Arizona's certification application in light of the additional  
11 information the state provided in its supplemental letter, and the substantial and continuing  
12 deficiencies in that information. *See* Ex. F, Letter from Elizabeth R. Moulton, Att'y for Office of  
13 the Fed. Pub. Def. for D. of Ariz., to Laurence Rothenberg, Office of Legal Policy, U.S. Dep't of  
14 Justice (Dec. 18, 2017).

15 14. On December 27, 2017, DOJ extended the comment period to February 26, 2018,  
16 which was a substantially shorter extension than what FDO-AZ originally requested. *See* 82 Fed.  
17 Reg. 61,329. DOJ refused to implement notice-and-comment rulemaking procedures or provide  
18 the additional protections that FDO-AZ had requested.

19 15. On February 22, 2018, FDO-AZ filed a detailed and comprehensive comment  
20 opposing Arizona's certification application and explaining the multiple ways that Arizona had  
21 failed—and failed egregiously—to meet Chapter 154's requirements for certification. The  
22 comment's text itself was 163 pages long, and there were hundreds of pages of additional  
23 attachments. *See* <https://www.regulations.gov/document?D=DOJ-OLP-2017-0009-0126>.

24 16. To prepare that comment, FDO-AZ and its attorneys undertook an exhaustive  
25 examination of Arizona's system to appoint post-conviction counsel in capital cases—examining  
26 both the history of that system on paper and the ways the system has actually functioned in  
27 practice. To that end, FDO-AZ and its attorneys analyzed thousands of pages of court and  
28 administrative records, committee reports, legislative history, and expert analysis. It interviewed

1 dozens of stakeholders. It examined national standards and appointment systems in other states.  
2 And it prepared thousands of pages of exhibits, including obtaining multiple sworn declarations  
3 from knowledgeable criminal defense and post-conviction counsel and others, that showed with  
4 precision how Arizona's appointment system in every material respect has fallen far short of the  
5 controlling statutory requirements that Chapter 154 established in 28 U.S.C. §§ 2261-66.

6 **CERTIFICATION WILL CAUSE FDO-AZ AND ITS CLIENTS IMMEDIATE AND**  
7 **IRREPARABLE HARM**

8 17. If it is allowed to go into effect, the Attorney General's decision to certify Arizona  
9 under Chapter 154 will cause immediate and irreparable harm to FDO-AZ and its death-sentenced  
10 clients.

11 18. Pursuant to 28 U.S.C. § 2261(b)(1), once the United States Attorney General  
12 "certifies that a State has established a mechanism for providing counsel," Chapter 154's  
13 shortened 180-day statute of limitations and accompanying tolling restrictions, restrictions on  
14 amendments of habeas petitions, and limits on overcoming procedural defaults, among other  
15 restrictions, can take effect if "counsel was appointed pursuant to that mechanism, petitioner  
16 validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent,"  
17 § 2661(b)(2).

18 19. FDO-AZ currently represents clients in or is otherwise tracking 92 cases affected  
19 by DOJ's certification order, including cases currently in federal habeas proceedings and those  
20 making their way through the Arizona state courts in direct review proceedings and/or state post-  
21 conviction review proceedings.

22 20. If allowed to take effect, DOJ's certification order will have significant and, in  
23 many cases, immediate effects for death-sentenced prisoners at all stages of litigation. Given  
24 Chapter 154's stringent statutory time and tolling restrictions and the current lack of certainty  
25 about the specific events that start and stop the statutory time periods, prisoners pursuing relief on  
26 *direct appeal* in the Arizona court system will have to hurriedly file any petition for a writ of  
27 certiorari in the United States Supreme Court, and, if certiorari is denied, may then have to  
28 prepare and submit any petition for state post-conviction review as soon as practicable, to avoid

1 the prospect of losing time in which to prepare a federal habeas petition. Likewise, prisoners  
2 seeking *state post-conviction review* will either have to curtail their investigation of potentially  
3 meritorious claims in order to avoid losing the opportunity for federal court review, or will have  
4 to secure additional resources to assist in preparing their cases. And prisoners currently in *federal*  
5 *habeas review* may face a severely curtailed filing deadline, new restrictions on the types of  
6 claims that can be pursued, and restrictions on the amendment of petitions, among other new  
7 limitations that Chapter 154 imposes.

8 21. Given Chapter 154's consequences, all prisoners, no matter the phase of litigation,  
9 will have to expend significant resources now or in the near future evaluating and preparing to  
10 litigate whether specific provisions of Chapter 154 apply to their particular cases after the  
11 certification order, including the applicability of a shortened statute of limitations and more  
12 restrictive tolling provisions.

13 22. The certification decision also has significant consequences for FDO-AZ. If the  
14 certification order is not stayed pending judicial review, FDO-AZ will have to promptly  
15 investigate and litigate (or at minimum prepare to litigate) whether Chapter 154 applies to each  
16 case. FDO-AZ represents 44 current death-sentenced clients in federal habeas proceedings in  
17 Arizona who were appointed post-conviction counsel after May 19, 1998, and are thereby  
18 affected by certification. FDO-AZ will need to investigate the procedures and processes used to  
19 appoint state post-conviction counsel for each of those 44 clients; investigate whether counsel  
20 was appointed "pursuant to" the state's certified mechanism; investigate whether Chapter 154's  
21 restrictions on habeas litigation may apply to each client's case; investigate and prepare to litigate  
22 whether and how the tolling provisions in Chapter 154 apply in each case; investigate and prepare  
23 to litigate whether any equitable tolling arguments exist to extend the statute of limitations; and  
24 investigate and prepare to litigate whether and how Chapter 154's restrictions may apply  
25 retroactively to each client's case. Undertaking this investigation and preparing for litigation is a  
26 huge undertaking for FDO-AZ's attorneys and staff.

27

28

1           23. To date, no court has interpreted how Chapter 154's provisions apply in individual  
2 cases. FDO-AZ will therefore need to investigate and prepare to litigate multiple novel legal  
3 questions.

4           24. For example, FDO-AZ was recently appointed to represent the death-sentenced  
5 prisoner Gilbert Martinez in his capital habeas proceedings. The district court has ordered the  
6 parties in Mr. Martinez's case to file a joint case management statement by May 13, 2020, and the  
7 court set a status conference for May 21, 2020. In the joint statement, we are expected to address  
8 the statute of limitations that will apply to Mr. Martinez's petition for writ of habeas corpus,  
9 include a proposed briefing schedule, and alert the court as to any issues that may affect the  
10 timely filing of the petition. If Chapter 154 were to apply to his case, Mr. Martinez would be  
11 subject to 28 U.S.C. § 2263(a)'s shortened 180-day statute of limitations to file his federal habeas  
12 petition. That statute of limitations runs from the "final state court affirmance" of a "conviction  
13 and sentence on direct review." 28 U.S.C. § 2263(a). If the deadline was not tolled during his  
14 time spent preparing a petition for a writ of certiorari for filing with the United States Supreme  
15 Court, Mr. Martinez will have already lost a significant number of days. And if the time from  
16 filing Mr. Martinez's Notice for Postconviction Relief until filing his Petition for Postconviction  
17 Relief is not tolled or if equitable tolling does not apply to his case, Mr. Martinez's entire 180-day  
18 statute of limitations may have already passed. FDO-AZ will therefore need to promptly  
19 investigate whether and how Chapter 154 applies to his case—an investigation that will require  
20 the office to expend significant resources, and which the office would not undertake absent  
21 certification.

22           25. Meanwhile, in cases where defenders are forced to rush investigations to meet  
23 Chapter 154's deadlines, case teams will likely need to revisit their work to ensure nothing was  
24 missed in the first investigation.

25           26. FDO-AZ projects that substantially all of the forty-eight capital cases that we are  
26 currently tracking in Arizona state court—both in direct and post-conviction review—will  
27 eventually enter federal court, where FDO-AZ will represent most of the prisoners. (For a variety  
28 of reasons, *e.g.*, conflicts between co-defendants, FDO-AZ cannot represent all indigent prisoners

1 sentenced to death in Arizona.) Because of Chapter 154's shortened statute of limitations, new  
2 tolling provisions, and limitations on raising certain claims, FDO-AZ will need to begin to the  
3 process of obtaining litigation files and conducting investigations before a client's state post-  
4 conviction proceeding is complete. Otherwise, FDO-AZ may not have enough time to fully  
5 investigate and prepare a client's federal habeas petition under the shortened statute of  
6 limitations. And as discussed below, under possible interpretations of Chapter 154's tolling  
7 provisions, some prisoners will have significantly fewer than 180 days in which to file a federal  
8 habeas petition. FDO-AZ will have to expend significant resources not just to begin preparing  
9 federal habeas petitions as soon as possible but also to investigate Chapter 154's timing and  
10 tolling provisions and develop legal arguments to protect prisoners' full opportunity to seek  
11 federal habeas review.

12         27. Just as with prisoners already in federal habeas proceedings (*see* ¶ 22), FDO-AZ  
13 will have to determine, with respect to these prisoners whose proceedings are currently still in  
14 state court, who will be subject to Chapter 154's limitations. This will require investigation and  
15 potential litigation to decide, among other things, whether state post-conviction counsel was  
16 actually appointed pursuant to the mechanism that DOJ has certified—and which is the subject of  
17 this petition for review. The litigation will involve both novel legal questions and highly fact-  
18 specific determinations. Given the significant problems with Arizona's appointment mechanism,  
19 FDO-AZ will have a reasonable basis for disputing the application of the new scheme to many of  
20 its clients. For example, many clients did not receive timely appointment of state post-conviction  
21 counsel. Further, the Arizona Supreme Court has appointed attorneys who do not appear on the  
22 list of qualified attorneys, in contravention of Arizona's certified mechanism. *See* A.R.S. § 13-  
23 4041 (requiring the Arizona Supreme Court to maintain a list of qualified lawyers and appoint  
24 lawyers from that list). In other cases, Arizona has otherwise appointed attorneys who do not  
25 meet basic competency standards. FDO-AZ will have to investigate and litigate whether such  
26 appointments qualify as appointments "pursuant to" Arizona's certified mechanism. These  
27 problems, in addition to numerous others with individual appointments, mean that nearly every  
28 prisoner will be required to investigate and prepare to litigate the application of DOJ's

1 certification order to his or her case to determine if the Chapter 154 provisions, even on their own  
2 terms, are actually applicable.

3 28. That investigation and litigation will invariably require the investment of  
4 additional substantial resources by FDO-AZ, the Arizona Attorney General's Office, state courts,  
5 and the district courts. Attorneys with FDO-AZ will need to investigate state post-conviction  
6 counsel's qualifications, obtain the attorney's appointment application to the Arizona Supreme  
7 Court, confirm the attorney's past appointments, review disciplinary records, and investigate the  
8 unique circumstances surrounding the appointment in the client's case. FDO-AZ attorneys will  
9 also need to investigate post-conviction counsel's compensation and funding for experts and other  
10 specialists to determine whether the appointment complied with Arizona's certified mechanism.  
11 Some of this information is best obtained through public records requests to Arizona state courts  
12 and agencies. And the district courts will then have to spend considerable time determining  
13 whether an appointment was "pursuant to" Arizona's mechanism and therefore qualifies for  
14 Chapter 154's restrictions.

15 29. While that litigation is pending, FDO-AZ will need to prepare every case as if  
16 certification applies, in order to preserve the petitioner's federal habeas rights. What this means  
17 as a practical matter is that FDO-AZ will need to prepare to file habeas petitions under a vastly  
18 reduced timeframe, with uncertain deadlines because of Chapter 154's yet to be litigated timing  
19 and tolling provisions. It is possible, depending on the State's arguments, that some petitioners  
20 may have less than 90 days (perhaps even far less) to file their federal habeas petitions. FDO-AZ  
21 attorneys and investigative teams are often actively working on multiple cases at the same time  
22 due to the caseload of the office. Preparing a federal habeas petition in 90 days is a nearly  
23 impossible task for a single case, let alone when combined with other cases that the same team  
24 may be handling at the same time.

25 30. FDO-AZ will also need to more closely monitor and advise on state proceedings to  
26 ensure a client's interests are properly protected. For example, the terms of Chapter 154 state that  
27 the 180-day statute of limitations is tolled "from the date that a petition for certiorari is *filed*." 28  
28 U.S.C. § 2263(b)(2) (emphasis added). In other words, it is possible the State will argue that the

1 new 180-day deadline for filing a federal habeas petition runs while a prisoner prepares a petition  
2 for certiorari with the U.S. Supreme Court to challenge the state court judgment on direct review.  
3 Prisoners seeking to overturn their convictions on direct appeal will therefore need to file any  
4 petition for writ of certiorari with the U.S. Supreme Court as quickly as possible in order to  
5 minimize the time potentially lost from Chapter 154's 180-day statute of limitations for federal  
6 petitions. The same is true for the period between a denial of certiorari and the filing of a petition  
7 for post-conviction review in state court, and, likewise, the period between a final denial of state  
8 post-conviction review and the filing of a federal habeas petition. 28 U.S.C. § 2263(b). FDO-AZ  
9 will have to advise and coordinate with state post-conviction counsel to ensure that, in these  
10 multiple respects, prisoners preserve as much time to prepare their federal habeas petitions as  
11 possible.

12 31. For instance, FDO-AZ is currently tracking the case of Sammantha Allen, a death-  
13 sentenced prisoner whose conviction and sentence are on direct review at the Arizona Supreme  
14 Court. If the Arizona Supreme Court affirms Ms. Allen's conviction and sentence on direct  
15 review, her 180-day federal habeas deadline under Chapter 154, if applicable, may run while she  
16 prepares a petition for certiorari with the United States Supreme Court to challenge the state  
17 court's decision. And once her direct appeal in state court is resolved, the potential application of  
18 Chapter 154 might require her to rush to file a petition for state post-conviction relief to preserve  
19 the time available to file a federal habeas petition. Meanwhile, FDO-AZ will need to begin to  
20 investigate and prepare to litigate whether and how Chapter 154 applies to Ms. Allen's case, if  
21 and when Ms. Allen is appointed state post-conviction counsel.

22 32. All of this litigation and investigation will place an enormous burden on FDO-  
23 AZ's resources. FDO-AZ will be forced to immediately reallocate resources to triage existing  
24 cases. To handle all of its current cases plus this additional Chapter 154 related litigation without  
25 placing extraordinary strains on existing resources, FDO-AZ will need to hire additional attorneys  
26 and support personnel to protect its clients' rights. Even more resources will be required to  
27 handle future cases, or FDO-AZ will be in the position of declining appointments. Trying to do  
28

1 something in half the time often requires more than twice the resources, and the cost of each case,  
2 in terms of total resources, is likely to increase dramatically.

3 33. To address those increased demands, FDO-AZ anticipates needing more than a  
4 dozen additional fulltime employees (FTEs), including lawyers, paralegals, investigators,  
5 mitigation specialists, and IT support before the end of the current fiscal year on September 30,  
6 2020. FDO-AZ projects a need to hire a total of forty additional staff over the next several fiscal  
7 years. FDO-AZ has informed the Defender Services Office of the Administrative Office of the  
8 U.S. Courts of the projected staffing needs in the event Arizona were certified under Chapter 154.

9 34. Finally, as described above and pursuant to the Criminal Justice Plan in the  
10 District of Arizona, FDO-AZ also tracks all Arizona capital cases in state and federal court,  
11 consults with counsel representing clients on direct appeal and in state post-conviction  
12 proceedings on issues relating to future federal habeas corpus proceedings, and provides training  
13 on these topics. FDO-AZ will also require additional resources to perform that work given the  
14 host of novel questions that certification presents.

15 35. In short, the certification decision if allowed to go into effect will impose an  
16 extraordinary, immediate, and significant burden on FDO-AZ's resources, requiring the office to  
17 reallocate existing resources and restructure its operations, and requiring it to seek additional  
18 resources in order to try to continue to properly fulfill its vital life-or-death mission. And  
19 certification will result in a large influx of litigation in state and federal courts, again placing an  
20 enormous burden on FDO-AZ, its clients, and the judiciary.

21 36. The stay pending judicial review that FDO-AZ and other petitioners have  
22 requested would obviate much of this extraordinary disruption while this Court exercises in an  
23 orderly fashion its statutory responsibility to review the underlying legality of the certification  
24 order. There is no reason to burden FDO-AZ and the courts with complex, novel, and  
25 voluminous litigation under Chapter 154 while there is the very real possibility that Arizona's  
26 certification will be overturned on review and all of these questions will therefore become moot.

27 37. The immediate impact of certification absent a stay will also be significant in state  
28 courts. Without a stay, FDO-AZ will have to advise state post-conviction counsel in pending

1 cases to treat each case as if Chapter 154 applies until a federal court rules otherwise. This likely  
2 will result in a rush to file protective petitions in state court, increased demands on the state  
3 courts, and significant confusion about how counsel can best represent their clients.

4 **COVID-19 WILL EXACERBATE THE IMMEDIATE AND IRREPARABLE HARM TO**  
5 **FDO-AZ, ITS CLIENTS, AND THE COURTS**

6 38. The irreparable harm that certification will cause FDO-AZ, its clients, and the  
7 courts is exacerbated by the fact that the Attorney General issued the certification during the  
8 current public health crisis. In Arizona as across the country, the ongoing COVID-19 pandemic  
9 has both impaired communication between attorneys and clients and injected new uncertainty and  
10 delay into the judicial system.

11 39. The United States District Court for the District of Arizona, beginning on March  
12 18, 2020, issued a series of general orders recognizing the pandemic, continuing court  
13 appearances, and requiring emergency measures such as social distancing. FDO-AZ CHU staff  
14 began teleworking March 16, 2020.

15 40. All clients sentenced to death in Arizona are housed in the Arizona Department of  
16 Corrections, Rehabilitation & Reentry in Florence, Arizona or Perryville, Arizona. The prison  
17 has suspended visiting privileges during the pandemic, including legal visits. While phone calls  
18 are permitted, many clients are reluctant to use the phone because proper disinfecting procedures  
19 are not being employed. In addition, some clients are wary of legal mail because the prison has  
20 not implemented proper sanitation practices during mail distribution. As of April 28, 2020, at  
21 least nine death-row prisoners out of 117 have tested positive for COVID-19 and are in  
22 quarantine or hospitalized. Numerous other clients are experiencing symptoms consistent with  
23 COVID-19.

24 41. Due to the pandemic, Arizona's governor declared a state of emergency on March  
25 11, 2020, and issued a stay-at-home order for Arizona's citizens beginning on March 31, 2020, at  
26 5 pm. Governors in other states have issued similar orders. Due to these restrictions and the  
27 national recommendations to avoid discretionary travel and practice social distancing, FDO-AZ  
28 has halted travel and field investigation. For the same reasons, in combination with restrictions at

1 the prison, client visits and interviews have been postponed and expert witnesses have been  
2 unable to conduct the usual testing or evaluations of clients. FDO-AZ has continued to attempt  
3 record collection, but results are limited based on agency closures, teleworking personnel, and  
4 staffing shortages.

5 42. Meanwhile, other courts around the country, including the Supreme Court of the  
6 United States, have slowed the pace of litigation in response to COVID-19. Among other  
7 measures, they have issued blanket extensions for filing deadlines, extensions that include, as  
8 specifically relevant to this context, the time within which to file a petition for a writ of certiorari  
9 in the Supreme Court. *See* 3/19/20 Order, 589 U.S. \_\_\_ ; 28 U.S.C. § 2263(b)(1).

10 43. Against this backdrop, instituting the sweeping Chapter 154 changes to the capital  
11 habeas system—before judicial review of the underlying certification is able to run its course—  
12 would add to the irreparable injury FDO-AZ and its clients face. They would have to navigate  
13 shortened filing deadlines, confront legal questions of first impression, and attempt to engage in  
14 fact investigations necessary to determine the applicability of Chapter 154 to individual cases,  
15 among a host of other issues, all while simultaneously confronting an unprecedented public health  
16 crisis that has made even routine litigation complex and challenging.

17 44. A stay pending judicial review would help obviate that harm.

18  
19 I declare under penalty of perjury under the laws of the United States of America and  
20 Arizona that the foregoing is true and correct and that I have signed this declaration on April 30,  
21 2020.

22  
23 

24 \_\_\_\_\_  
25 Dale A. Baich  
26  
27  
28

# EXHIBIT A

**FEDERAL PUBLIC DEFENDER**

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850 West Adams Street, Suite 201  
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**JON M. SANDS**  
Federal Public Defender

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800-758-7053

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**TRANSMITTED ELECTRONICALLY**

June 1, 2011

Regulations Docket Clerk  
Office of Legal Policy  
Department of Justice  
950 Pennsylvania Avenue, NW., Room 4234  
Washington, D.C. 20530

Re: Comments on OAG Docket No. 1540  
Certification Process for State Capital Counsel Systems

To Regulations Docket Clerk:

I am writing in regard to the Proposed Rule on the certification process for state capital counsel systems published by Attorney General Eric Holder on March 3, 2011. The Proposed Rule establishes procedures for determining whether an individual state complies with the requirements of Chapter 154 of Title 28 of the United States Code, and can therefore invoke its procedures in capital habeas corpus proceedings in federal court.

Pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, the Federal Public Defender for the District of Arizona represents fifty-three clients with state-imposed death sentences in their federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254. Our representation of these clients has given us detailed knowledge of the long-term and ongoing problems in Arizona's mechanism for the appointment of state post-conviction counsel in capital cases. In regard to global concerns with the Proposed Rule, we expressly join in the entirety of the comments submitted by the Federal and Community Defenders, the Habeas Corpus Resource Center, the American Civil Liberties Union, and the Legal Ethics Professors and Professional Responsibility Lawyers, among others. However, we would like to specifically highlight those comments that address two key areas in which the Proposed Rule entirely fails to safeguard the rights of Arizona prisoners.

First, the proposed rule does not require a state to prove that it actually complies with the terms of its submitted mechanism. As discussed in detail in the comment we submitted on April

6, 2009, Arizona has consistently failed to appoint state post-conviction counsel for capital prisoners at the time required by the “mechanism” in place. *See* Ariz. R. Crim. P. 32.4 (requiring appointment of counsel “[a]fter the [state] Supreme Court has affirmed a defendant’s conviction and sentence in a capital case”). This problem continues in Arizona to this day; capital prisoners generally wait more than a year and a half after affirmance of their conviction and sentence for state post-conviction counsel to be appointed. In addition, the current screening process for attorneys interested in representing clients in capital post-conviction proceedings lacks a “thorough qualitative assessment” of that attorney before they are approved for appointment,<sup>1</sup> and contains no procedure for assessment of attorney performance after an attorney has been placed on the list.<sup>2</sup> The comment submitted by the Habeas Corpus Resource Center directly addresses the Proposed Rule’s failure to address these issues in the section entitled “**The Regulations Must Require a State Mechanism to Ensure that Appointed Counsel Actually Provide Competent Representation**” at pages 8 through 15 and the section entitled “**The Attorney General Must Define Key Terms to Implement the Requirements of 28 U.S.C. Sections 2261(c) and (d)**” on pages 15 through 17. We ask the Attorney General to carefully consider these comments and to make those changes necessary to ensure that a certified mechanism actually provides the state protections contemplated by Chapter 154.

Second, the Proposed Rule does not provide an adequate process for contesting a state’s application for certification. Instead, the rule contemplates only that an application will be made “publically available” and that public comment will be solicited. Such a process does not comport with constitutional due process standards, and does not provide an adequate forum for parties to contest a state’s application. The ability to contest a state’s application for certification is especially important to Arizona prisoners, due to Arizona’s consistent failure to comply with the mechanism it has established. The comment submitted by the Habeas Corpus Resource Center discusses this issue in the section entitled “**The Certification Process Must Establish Fair Procedures to Gather Relevant Information and Ensure Reliable and Transparent Decision Making**” at pages 18 through 20. The comment submitted by the Legal Ethics Professors and Professional Responsibility Lawyers also addresses this issue in the section entitled “**Procedures to Govern the Certification Process**” at pages 5 through 6. Again, because this section is of particular interest to our clients with Arizona death sentences, we urge the Attorney General to carefully review these comments and provide the process necessary to ensure that the application process is thorough enough to allow a fully-informed decision to be made regarding a state’s compliance with the strictures of Chapter 154 prior to a certification decision.

For the foregoing reasons and the reasons offered by the Federal and Community Defender Offices, the Habeas Corpus Resource Center, the American Civil Liberties Union, and the Legal Ethics Professors and Professional Responsibility Lawyers, we ask that our comments be fully

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<sup>1</sup>Ariz. Sup. Ct. Capital Case Oversight Comm., Progress Report of the Capital Case Oversight Comm. to the Arizona Judicial Council, at 13 (Nov. 2010), *available at* [http://www.azcourts.gov/Portals/74/CCOC/2010.CCOSC.final.report\(11.15.2010\).pdf](http://www.azcourts.gov/Portals/74/CCOC/2010.CCOSC.final.report(11.15.2010).pdf).

<sup>2</sup>*Id.*

considered and we urge that the Proposed Rule be reconsidered both to require actual compliance with the mechanism before a state can be certified pursuant to Chapter 154, and to allow an adequate process for a state's application to be challenged prior to certification.

Sincerely,

s/ Jon M. Sands

Jon M. Sands  
Federal Public Defender  
District of Arizona

JMS/jyg

# EXHIBIT B

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**TRANSMITTED ELECTRONICALLY**

March 14, 2012

Regulations Docket Clerk  
Office of Legal Policy  
Department of Justice  
950 Pennsylvania Avenue, NW., Room 4234  
Washington, D.C. 20530

**Re:                   Comments on OAG Docket No. 1540**  
**Certification Process for State Capital Counsel Systems**

To Regulations Docket Clerk:

I am writing in regard to the Supplemental Notice of Proposed Rulemaking regarding the certification process for state capital counsel systems. Pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, the Federal Public Defender for the District of Arizona represents fifty-seven clients with state-imposed death sentences in their federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254. Our representation of these clients has given us detailed knowledge of the long-term and ongoing problems in Arizona's mechanism for the appointment of state post-conviction counsel in capital cases. While we incorporate all our previous comments here, and expressly join in the entirety of the comments submitted by the Federal and Community Defenders, we would like to briefly highlight a few areas of specific concern for Arizona prisoners.

First, Arizona's standard of qualification for attorneys to represent prisoners in state post-conviction proceedings is inadequate. In fact, Arizona relaxed the qualifications for appointed counsel in these cases in 2010, and the changes took effect January 1, 2011. *See* Ariz. R. Crim. P. 6.8(c)(2). As a result, many attorneys appointed to handle these cases lack prior post-conviction experience and/or experience in capital litigation, fail to attend available training seminars, and perform deficiently in representing their clients. It is also important to note that the standards in place in Arizona do not include any kind of qualitative assessment of attorney performance in these

cases, either prior to or after appointment.

Therefore, as outlined in Proposed Changes 1 and 2, we welcome both the addition of post-conviction litigation experience as a requirement instead of the more general requirement of felony litigation experience in section 26.22(b)(1), and the incorporation of additional elements of the Innocence Protection Act into section 26.22(b)(2). These changes are crucial to ensure the appointment of experienced counsel who understand both the intricacies of state post-conviction litigation and the ramifications of such litigation on a client's federal habeas corpus proceedings. However, the proposed changes are only to the first two subsections of the Proposed Rule, leaving available an option in section 26.22(b)(3) allowing the use of any other standards that "reasonably assure a level of proficiency appropriate for State post-conviction litigation in capital cases." The availability of this considerably less-stringent standard undermines the improvements in the two previous sections, and heightens the risk that a state could be certified as an opt-in state without providing any of the safeguards envisioned by Congress when it enacted 18 U.S.C. § 3599 as incorporated into section 26.22(b)(1), and the Innocence Protection Act, 42 U.S.C. § 14163, as incorporated into section 26.22(b)(2). Accordingly, we urge the Attorney General to eliminate section 26.22(b)(3) as an option for states to avoid the much higher standards for attorney qualifications now included in sections 26.22(b)(1) and 26.22(b)(2).

In addition, we are in favor of Proposed Change 3, regarding the timely provision of competent counsel. As discussed at length in our previous comments, Arizona has a long history of failing to appoint counsel in the time and manner required by statute. As a result, many petitioners have waited for a period of years between affirmance of their conviction and sentence on direct appeal and appointment of counsel to represent them in their state post-conviction proceedings. The recognition that a state cannot make a meaningful offer of counsel without providing such counsel in a timely manner is welcome and this change should be implemented.

In regard to Proposed Change 4, we have urged the Attorney General in several previous comments to implement a process by which evidence can be introduced reflecting that a particular state's mechanism may appear to comply with Chapter 154's requirements on paper, but fail to meet the necessary benchmarks in practice. The changes proposed to this section are welcomed, and the need for a process to rebut the presumption of certification is acute, but the changes as discussed in the Supplemental Notice of Proposed Rulemaking do not contain enough detail for meaningful comment by interested parties and the public. The notice does not specify the process by which the presumption of certification can be challenged, and does not specify which entity carries the burden of proof as to the evidence introduced in rebuttal. We agree that the Attorney General does have latitude to consider state-specific circumstances prior to making a certification decision, but we ask that prior to publication of a Final Rule adopting these changes, the Attorney General publish an amended Proposed Rule that contains the actual language incorporating the proposed changes, and establishing a process that comports with constitutional due process standards, and provides an adequate forum for parties to contest a state's application.

Further, we urge the Attorney General to create express provisions requiring actual notice to interested parties upon a state's application. Those parties should include the Federal

Public Defender for any relevant districts, in addition to affected prisoners, their counsel, and any other relevant organization or agency. In Arizona, for example, the federal district court's Criminal Justice Act plan charges the Federal Public Defender for the District of Arizona with specific responsibilities for monitoring and tracking capital cases in Arizona state and federal courts, and for coordinating with and providing training to counsel representing death-row prisoners. *CJA Plan for the District of Arizona*, General Order 07-08, § VII (D. Ariz. May 7, 2007). These responsibilities, coupled with the Federal Public Defender's direct representation of affected individuals, mandate that the office and other interested parties be provided with actual notice of a state's application as opposed to the current provision for notice through publication in the Federal Register.

Finally, we are also in favor of Proposed Change 5, creating a five-year term for certification. This change is crucial to allow interested parties to submit evidence subsequent to any re-certification that certification is no longer appropriate. And, we recognize the need for a term long enough to provide states with the ability to rely upon a certification decision for a certain term. However, we urge the Attorney General to include specific procedures for re-certification and de-certification if necessary, to ensure that those procedures comport with constitutional due process standards and provide an adequate forum for contesting re-certification if such circumstances arise, and to publish those procedures in an amended Proposed Rule prior to issuance of a Final Rule.

For the foregoing reasons, we ask that our comments be considered in conjunction with those submitted by the Federal and Community Defenders, and we urge the Attorney General to adopt the proposed changes to the Proposed Rule after making the modifications discussed herein.

Sincerely,

s/ Jon M. Sands

Jon M. Sands  
Federal Public Defender  
District of Arizona

JMS/jyg

# EXHIBIT C

## Federal Public Defenders' Comments on Proposed Rule

### Statement of Interest

On behalf of the federal public defender and community defender offices in the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam, we offer the following comments on the Proposed Rule – OAG Docket number 1540 – regarding the state certification system for state capital counsel systems.

Federal public defender offices and community defender organizations represent indigent criminal defendants pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. Thirty-five states currently have the death penalty. Federal public defenders and community defenders in a number of those states represent indigent death row prisoners in federal habeas corpus actions challenging state court judgments. Specifically, defenders in the following districts have capital habeas units with staff dedicated to the representation of federal capital habeas petitioners who are directly affected by the regulations proposed by the Attorney General: Middle District of Alabama; District of Arizona; District of Arkansas; Central District of California; Eastern District of California; District of Delaware; Northern District of Georgia; District of Idaho; District of Nevada; Northern District of Ohio; Southern District of Ohio; Western District of Oklahoma; Eastern District of Pennsylvania; Middle District of Pennsylvania; Western District of Pennsylvania; Eastern District of Tennessee; and Middle District of Tennessee.

Defenders with the capital habeas units in these districts represent 627 petitioners in federal habeas corpus actions challenging state court death judgments. These districts are located in eight of the top thirteen states ranked by number of death row inmates, and well over one-half of death-sentenced prisoners are located in these states. (According to an October 1, 2006 study, California ranks first in the number of state death row inmates, Pennsylvania fourth, Alabama sixth, Arizona eighth, Tennessee ninth, Georgia tenth, Oklahoma eleventh, and Nevada thirteenth.) Defenders in these districts also give advice and training to private attorneys representing federal habeas petitioners challenging state death judgments. Thus, through their representation of state death row inmates, and in the advice they give to private attorneys working on behalf of the same class of clients, these defenders have a direct stake in the regulations proposed by the Attorney General.

Federal public defender and community defender offices located in states with the death penalty, but who do not have staff dedicated to representing capital habeas petitioners challenging state court judgments, also have an interest in the Attorney General's Proposed Regulations. Some defender offices in these districts represent death-sentenced inmates in federal habeas proceedings on an individual basis; in fact, defender offices in these states represent an additional 27 petitioners in federal habeas corpus actions challenging state court death judgments. Additionally, defenders in these districts often receive inquiries from state death row inmates seeking federal habeas counsel and advice on their cases. These defenders often have to locate private counsel to represent such inmates in federal capital habeas corpus actions, and frequently have to advise these inmates on issues such as the statute of limitations (significantly shortened under Chapter 154) and claim filing (different under Chapter 154, for example, to the extent that the ability to amend a petition is

significantly constrained once the state files an answer).

Defenders located in the fifteen states and other jurisdictions that do not have the death penalty are also affected by the Attorney General's Proposed Regulations. In a number of these states, legislation is pending to reinstate the death penalty. Defenders in these jurisdictions, like the defenders in the thirty-five death penalty states, have unique expertise and experience in dealing with the United States Attorney General and attorneys under his jurisdiction. The Final Rule, relying primarily on comments by two legislators in support of the Act, depict the Attorney General as a neutral arbiter who is capable of promulgating rules that will fairly guide the process for determining whether a state qualifies for Chapter 154 benefits. Defenders in these jurisdictions have unique and important insight to give on the question of the Attorney General's purported neutrality and objectivity in deciding the issues assigned for him/her to determine under the Act and in formulating the Proposed Regulations implementing the Act.

We offer these comments on behalf of our clients, the persons on death rows in our jurisdictions, and those who may become our clients.

#### **I. Section 26.20, Purpose**

One preliminary matter is that section 26.20, which describes the purpose of the Attorney General's rule, contains incorrect statements about the effect of certification under 28 U.S.C. § 2265. The rule states that "If certification is granted, section 2262, 2263, 2264, and 2266 of chapter 154 of title 28 apply in relation to Federal habeas corpus review of capital cases from the State." 76 Fed. Reg. 11,705, 11,712 (Mar. 3, 2011). Section 2261, however, sets forth two requirements for the application of Chapter 154, one of which is certification by the Attorney General. 28 U.S.C. § 2261(b)(1). The statute provides that "[t]his chapter is applicable if" the Attorney General certifies a state "and ... counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent." 28 U.S.C. § 2261(b)(2) (emphasis added). Thus, the provisions of Chapter 154 do not apply in an individual case absent a determination under § 2262(b)(2) by the federal courts. *See, e.g.*, Barron, David J., Acting Assistant Attorney General, *Memorandum Opinion for the Attorney General* (Dec. 16, 2009) ("Barron Memo") (noting that the Attorney General's certification is a factor for federal courts to consider "in determining whether the expedited procedures apply").

#### **II. Section 26.21, Definitions: Appropriate State Official**

28 U.S.C. section 2265(a)(1) provides that certification must be "requested by an appropriate State official," and the Proposed Regulations define "appropriate State official" as "the State Attorney General, except that, in a state in which the State Attorney General does not have responsibility for Federal habeas corpus litigation, it means the Chief Executive thereof." This definition presents a number of problems that we previously addressed.

First, where the State Attorney General is responsible for Federal habeas corpus litigation, it will be in his or her interest to receive the benefits of Chapter 154. As an advocate for the State, the State Attorney General will want the expedited review and other procedural advantages

conferred by Chapter 154. This interest in the outcome of the certification process makes the State Attorney General precisely the wrong person to be responsible for applying for certification. A State Attorney General will be faced with an impermissible conflict of interest if he or she is aware that the state post-conviction mechanism is failing in practice to provide competent and adequately funded post-conviction counsel to the State's indigent death row inmates, but also believes that the mechanism might qualify for certification if one looked only to a description of the mechanism's components. A State Attorney General who is responsible for Federal habeas corpus litigation will also be prone to present the State's post-conviction procedures in a manner most likely to achieve certification irrespective of how the procedures at issue were really intended to function. Because of the State Attorney General's role as an advocate, an unbiased decision about whether to seek certification is impossible.

A second reason why the State Attorney General responsible for Federal habeas corpus litigation should not be designated as the "appropriate State official" for purposes of Section 2265(a)(1) is that the State Attorney General's role as a party in Federal habeas corpus litigation often means that the State Attorney General does not have access to information critical to determining whether the State's mechanism complies with Chapter 154's qualifying requirements. Funding requests and orders are confidential in many state post-conviction proceedings. While some State officials may have access to the information about litigation expenditures, the State Attorney General very well may not. Similarly, State Attorney Generals are likely to be ignorant about the qualifications of the attorneys actually appointed in state post-conviction proceedings given that they are not a party to the appointment process. Without knowledge about whether adequate funding and qualified counsel are being provided in practice, the State Attorney General is ill-suited to be the State official designated to apply for certification.

This proposed definition also is contrary to congressional intent and exceeds the Attorney General's statutory authority. The phrase "appropriate State official" is used by Congress to describe an official designated by the appropriate state law. *See, e.g.*, H.R. Rep. No. 107-479, reprinted in 2002 U.S.C.C.A.N. 827, 830 (2002) (changing the statutory phrase "State officer designated by the appropriate State law to make such certification" to "appropriate state official" in order "to eliminate unnecessary words"). Leaving the designation of this official to state law and policy also is in accordance with Congress's intent to establish a statutory scheme consistent with "the federal-state balance." Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases Comm. Report, 135 Cong. Rec. S13471-04, S13483 (Oct. 16, 1989) ("Powell Committee Report").

The Attorney General may not construe the statute to infringe on state power unless Congress makes its intent to alter the usual constitutional balance between States and the Federal Government "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *see also Parker v. Brown*, 317 U.S. 341, 351 (1943) ("[A]n unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

Because the statutory language in 28 U.S.C. § 2265 does not indicate any intent to interfere in state policy decisions, the Attorney General exceeds his statutory authority by seeking to dictate

which state official may apply for certification, preempts state law limitations on the powers of the state Attorney General and/or precludes application by states in which the state Attorney General does not have authority under state law to request certification. Moreover, the Proposed Regulations create a prohibited conflict by designating the state Attorney General, usually counsel the opposing party to a petitioner's federal habeas litigation, as the official responsible for describing the adequacy of the state system for appointing competent counsel and for providing adequate compensation and expenses for that same petitioner.

Notwithstanding these considerations, the Attorney General justifies the definition of "appropriate State official" by reference to the role state attorneys general played in seeking certification under the prior version of Chapter 154. *See* 76 Fed. Reg. at 11,707. Importantly, however, under the prior version of the statute, no state attorney general could seek the benefits of Chapter 154 in federal proceedings unless a qualifying state mechanism had been established "by statute, rule of its court of last resort, or *by another agency authorized by State law.*" Barron Memo at 11 (quoting 28 U.S.C. § 2261(b) (2000)) (emphasis added). The predicate for any state attorney general to invoke Chapter 154 was the existence of state law authorizing the mechanism. Leaving states the discretion to designate an appropriate official to seek certification continues this respect for states authorizing such action by their own law.

The proposed rule also reasons that "State attorneys general continue in most instances to be the officials with the capacity and motivation to seek chapter 154 certification for their States." 76 Fed. Reg. at 11,707. This motivation to act is part of the problem we have identified: state attorneys general who are motivated to obtain the benefits of chapter 154 have a significant conflict of interest in fairly representing state compliance with requirements aimed at strengthening defense functions. Furthermore, state prosecutors frequently do not have knowledge or experience in the appointment, compensation, expenses, and competency standards for defense counsel. In terms of ability to collect relevant information to demonstrate objectively whether a state is in compliance with Chapter 154, it is the officials and administrators regularly involved in appointment and oversight of defense counsel and in the payment of their expenses and fees who have the "capacity" to seek certification.

The Attorney General's definition overrides state discretion by designating a specific state official to seek certification. Particularly given the fiscal implications of certification for state institutions—prosecution, defense, and judicial entities that must mobilize sufficient staff to comply with expedited timelines imposed by Chapter 154—as well as for those in the corporate community unable to complete civil litigation due to the precedence of capital cases, the authority for designating an official to seek certification should be left to state policy makers. A prosecutor's motivation to obtain the benefits of certification is not equivalent to authority conferred by state law to do so after reasoned consideration of its impacts on a variety of state functions.

### III. Sections 26.22(A), 2261 (c) and (d)

Section 26.22(a) contains requirements from 28 U.S.C. §§ 2261 (c) and (d), some of which previously have been interpreted by the federal courts. Congress's decision not to overturn these judicial interpretations or change the terms of the requirements demonstrates congressional

acceptance of them. See Barron Memo at 8 (noting that “it is significant that [amendments to Chapter 154 in 2006] did not alter the terms of the substantive requirements that States had to meet in order to qualify for those procedures.”); *id.* at 12 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987), and explaining that traditional tools of statutory construction dictate that judicial precedent is a source for giving content to federal standards). These interpretations should be reflected in the minimum federal standards included in the Attorney General’s regulations.

Existing judicial interpretations establish that the provision that a state mechanism “must offer counsel” requires an affirmative offer that does not depend on the actions or initiative of an individual prisoner or counsel,<sup>1</sup> and must be “meaningful” in that it actually results in the immediate appointment of counsel.<sup>2</sup> Courts determined that providing for the appointment of counsel “upon a finding that the prisoner is indigent,” similarly requires timely appointment of counsel.<sup>3</sup> The

<sup>1</sup> See, e.g., *Hall v. Luebbers*, 341 F.3d 706, 712 (8th Cir. 2003) (holding that Missouri procedure did not comply with the “offer component” of Chapter 154 because statute only offered the appointment of counsel “to indigent prisoners under a capital sentence who file a petition for post-conviction relief, not all prisoners under a capital sentence”); *Satcher v. Netherland*, 944 F. Supp. 1222, 1243-44 (E.D. Va. 1996) (stating that among the reasons Virginia failed to qualify for Chapter 154 was that it “did not require the State affirmatively to offer counsel to all prisoners, and . . . [t]hus, the Virginia statutory scheme provided no protection to prisoners who either did not know how to go about obtaining counsel for state habeas proceedings”), *rev’d in part on other grounds* by 126 F.3d 561 (4th Cir. 1997); *Zuern v. Tate*, 938 F. Supp. 468, 471 (S.D. Ohio 1996) (stating that among the reasons Ohio failed to qualify for Chapter 154 was failure to “offer” counsel as required because “a prisoner might well have to prepare his or her own § 2953.21 petition and hope for appointment thereafter, yet preparation of the petition itself is subject to important technical pleading requirements under Ohio case law”).

<sup>2</sup> See, e.g., *Hill v. Butterworth*, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996) (stating that “any offer of counsel pursuant to Section 2261 must be a meaningful offer. That is, counsel must be immediately appointed after a capital defendant accepts the state’s offer of postconviction counsel. The present backlog of unrepresented capital defendants who are in a position to seek post-conviction review, demonstrates that Florida has not made the requisite meaningful offer of counsel.”).

<sup>3</sup> See, e.g., *Ashmus v. Calderon*, 123 F.3d 1199, 1204, 1208 (9th Cir. 1997) (“*Ashmus I*”) (concluding that California was not in compliance with Chapter 154, *inter alia*, because counsel had not been appointed for “over 130 of the condemned California inmates,” and “that counsel often is not appointed until years after a prisoner accepts the offer of counsel”); *Brown v. Puckett*, 2003 WL 21018627, \*3 (N.D. Miss. 2003) (unpublished order) (“The timely appointment of counsel at the conclusion of direct review is an essential requirement in the opt-in structure. Because the abbreviated 180-day statute of limitations begins to run immediately upon the conclusion of direct review, time is of the essence. Without a requirement for the timely appointment of counsel, the system is not in compliance.”); *Mills v. Anderson*, 961 F. Supp. 198, 201 n.4 (S.D. Ohio 1997) (observing that the timing of appointment of counsel, where Ohio statute provided for appointment of counsel after the post-conviction petition had been filed, “might well” preclude the application

provision that counsel must be offered to “all prisoners” was found to require strict, rather than substantial compliance, with the requirements of Chapter 154.<sup>4</sup>

In keeping with well-established law, the requirement of a “finding, . . . that the prisoner rejected the offer of counsel . . . with an understanding of its legal consequences,” 28 U.S.C. § 2261(c)(2), must include case-specific findings sufficient to establish a knowing, intelligent, and sufficiently informed decision. *See, e.g., Iowa v. Tovar*, 541 U.S. 77, 89 (2004) (“The information a defendant must possess in order to make an intelligent election . . . will depend on a range of case-specific factors, including the defendant’s education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceedings”).

Similarly, the Attorney General must provide a definition of section 2261(d) – which prohibits the appointment of trial counsel for postconviction representation “unless the prisoner and counsel expressly request continued representation,” 28 U.S.C. § 2261 (d) – that includes an opportunity for the prisoner to make a knowing and intelligent determination regarding trial counsel’s conflict, and have a full understanding of the potential conflict, and the assistance of independent counsel to explain the risks of the conflict. *See, e.g., United States v. Kliti*, 156 F.3d 150, 153 n.4 (2d Cir. 1998); *United States v. Martin*, 965 F.2d 839, 843 (10th Cir. 1992); *United States v. Allen*, 831 F.2d 1487, 1501-02 (9th Cir. 1987). By not having the type of rigorous process described in the cases, there is a significant chance that violations of the Sixth Amendment right to effective assistance of counsel at trial will not be raised and vindicated.

States seeking certification bear the burden of affirmatively establishing compliance with 2261(c) and (d) as well as other certification requirements. *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (holding that invoking the procedures of Chapter 154 constitutes an affirmative defense employed by the state in habeas corpus proceedings); *Hunter v. Bryant*, 502 U.S. 224, 233 (1991) (holding that government officials bear the burden of establishing their affirmative defenses). The

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of Chapter 154); *Hill*, 941 F. Supp. at 1147 (“counsel must be immediately appointed after a capital defendant accepts the state’s offer of postconviction counsel”); *Ashmus I*, 935 F. Supp. at 1074-75 (“The failure to appoint counsel after an indigent prisoner has accepted such an offer contravenes the express requirement of § 2261(c), . . . see also 1991 Analysis, 137 Cong. Rec. at S3220 (‘*At a minimum, the immediate benefits to defendants would include the requirement that states electing these procedures actually appoint counsel for the collateral proceedings . . .*’).”).

<sup>4</sup> *See, e.g., Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1183 (N.D. Cal. 1998) (“*Ashmus II*”) (stating that “the language of the qualifying procedures and the *quid pro quo* structure of Chapter 154 demand strict rather than substantial compliance with all preconditions”); *Satcher v. Netherland*, 944 F. Supp. 1222, 1242, 1244-45 (E.D. Va. 1996) (“[S]trict interpretation” of the opt-in requirements is not “mere formalism,” but rather is necessary in order to meaningfully effectuate the *quid pro quo* arrangement which lies at the core of Chapter 154.”); *id.* (“If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so. However, it elected not to do.”); *Zuern*, 938 F. Supp. at 472 (“Congress did not write § 2261 in terms of substantial compliance”).

Attorney General's regulations therefore should make it clear that states that apply for certification must document how the state mechanism accomplishes each requirement of §§ 2261 (c) and (d), as established through existing judicial interpretations of the statutory terms. *See, e.g., Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993) (ruling that an agency official exceeds his constitutional power by "refusing to recognize the conclusive effect of the judgment [of an Article III court]" and "insisting that [he] is entitled to decide anew questions decided by the courts.") (citing 5 U.S.C. § 706(2)(B)).

#### **IV. Section 26.22(b), Competent counsel**

Section 26.22(b) conflates two different inquiries: (1) whether the state has established a mechanism for the appointment of competent counsel, and (2) whether state standards utilized in the appointment of counsel are in keeping with federal minimum standards for counsel competence. These two different questions will be discussed below in turn.

##### **A. Mechanism for the appointment of competent counsel**

Whether the state has established a mechanism for the appointment of competent counsel as set forth in 28 U.S.C. § 2265(a)(1)(A), "may reasonably be construed to require the Attorney General to determine whether a particular state mechanism would, *in fact*, ensure appointment of competent counsel ... [and] enable those attorneys to provide their capital clients with competent legal representation." Barron Memo at 13 (emphasis added). This is in keeping with "[t]he express purpose of the structure envisioned by the Powell Committee Report ... to ensure that collateral review of capital convictions would 'be fair, thorough, and the product of capable and committed advocacy.'" *Id.* at 9 (quoting the Powell Committee Proposal, 135 Cong. Rec. 24,696 (1989)); *see also id.* (quoting Senator Kyl and stating that "the Powell Committee Report's recommendations are what is now chapter 154").

The Attorney General's proposed rule fails to expressly provide for his evaluation of these fundamental components of a state mechanism for the appointment of competent counsel.

##### **1. Whether a state mechanism enables attorneys to provide their clients with competent legal representation.**

A state mechanism to provide fair and thorough review must be free of procedural obstacles that prevent otherwise competent counsel from providing competent legal representation. This is directly related to the purpose of Chapter 154, and also has been recognized by the federal courts. *See, e.g., Ashmus I*, 123 F.3d at 1204, 1208 (holding that a state mechanism that limits counsel's responsibility fails to comply with Chapter 154).

Obstacles to competent representation occur in many different ways. For example, in some states, severe time limits on when a habeas petition may be presented leave counsel just months to investigate, develop, and present federal constitutional claims for the first time in state post-

conviction proceedings.<sup>5</sup> Rules that prohibit counsel from supplementing or amending petitions within a reasonable period of time also prevent counsel from presenting relevant evidence in support of federal claims. In some states that appear to compensate and provide expenses to counsel, fees and funding are not approved or paid at the time when counsel are working to preparing the state habeas petition, leaving them unable to expend the time or utilize expert and investigative services needed to develop and present their federal claims.<sup>6</sup> Some state jurisdictions even refuse to treat some federal constitutional claims as cognizable in state post-conviction proceedings, a clear barrier to counsel's ability to obtain fair review in those tribunals.<sup>7</sup>

The regulations must therefore provide for the evaluation of state procedures that undermine the purpose of the state mechanism defined in Chapter 154. Some simple measures can accomplish this. In the federal system, one clear indication of incomplete proceedings in the state courts is the development and presentation of claims for the first time in federal court. In some states, this results in a return to state court for exhaustion. In others, where no state remedy exists for exhaustion, procedural default analysis may occur. *See, e.g., Williams v. Thaler*, 602 F.3d 291, 305 (5th Cir. 2010) (stating that a claim of ineffective assistance of counsel that was not exhausted in state court was procedurally defaulted); *Castillo v. McFadden*, 399 F.3d 993 (9th Cir. 2005) (holding that a claim of due process violation related to admission of confession was procedurally defaulted for failure to exhaust). Asking a state seeking certification to tally the number of cases in which federal habeas counsel develop and present new claims for relief will provide a good starting point for understanding whether the state mechanism enables attorneys to provide their clients with competent legal representation. Other inquiry should include the number of cases in which a state evidentiary hearing is conducted, time limits on the presentation of evidence in state court, and the availability of discovery, fees, and funding at a timely stage of the proceedings.

## 2. Whether a state mechanism ensures the appointment of

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<sup>5</sup> *See* Missouri Supreme Court Rule 29.15 (providing 60 days for counsel to submit a petition for post-conviction relief, which may be extended by only one 30-day period); *State v. White*, 873 S.W.2d 590, 594 (1994) (reiterating strict adherence to requirement that all claims not timely filed are waived); *Oliver v. Smith*, 2008 WL 2813330 (E.D. Mo. 2008) (unpublished) (stating that under Missouri law, the state court lacks jurisdiction to consider claims raised in an untimely motion for post-conviction relief).

<sup>6</sup> The Virginia Supreme Court, which has exclusive original jurisdiction over capital habeas petitions, takes the position that it has no jurisdiction until a petition is filed, and therefore refuses to authorize investigative and expert expenses prior to the filing of the petition. As a practical matter, however, it is impossible to amend a petition in Virginia to include facts discovered after its initial filing. *See* Comment of the Virginia Capital Representation and Resource Center, Docket No. DOJ-OAG-2008-0029-0018.1 (April 6, 2009).

<sup>7</sup> *See, e.g., Granger v. Norris*, Case No. 08-979 (Nov. 13, 2008) (unpublished order) (reiterating ruling that an ineffective assistance of counsel claim is not cognizable by writ of habeas corpus).

**competent counsel in fact.**

The mere existence of state requirements for the appointment, compensation, and expenses of competent counsel does not ensure that they are applied and enforced in practice. The history and purpose of Chapter 154 demonstrate that enforcement of state requirements is a necessary element of a state mechanism. Existing judicial interpretations bear this out. See *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000) (ruling that South Carolina did not qualify for Chapter 154 provisions and stating that, “a state must not only enact a ‘mechanism’ and standards for post-conviction review counsel, but those mechanisms and standards must in fact be complied with before the state may invoke” Chapter 154); *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) (Maryland did not qualify for Chapter 154 provisions because the state’s competency standards were not applied in the appointment process and stating that “[c]ompetency standards are meaningless unless they are actually applied in the appointment process”); *Ashmus II*, 202 F.3d at 1168 n.13 (stating that California must abide by its competency standards when appointing counsel); *Oken v. Nuth*, 30 F. Supp. 2d 877, 880 n.3 (D. Md. 1998) (stating that Chapter 154 requires state to have *and apply* selection criteria).

The true measure of counsel competence, however, is his or her actual performance. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (measuring counsel competence by performance according to prevailing professional norms). To ensure appointment of competent counsel, a state mechanism must utilize well-established performance standards, such as the American Bar Association’s Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, (rev. ed. 2003), 31 Hofstra L. Rev. 913 (2003), as a guide to evaluating counsel performance. See Barron Memo at 12 n.7 (explaining that minimum federal standards for counsel competency may be informed by ABA Guidelines, which have been recognized by the United States Supreme Court as a guide to reasonable performance).

Appointed counsel must be able to competently perform *all* duties included in “postconviction proceedings.” 28 U.S.C. § 2265 (stating that a mechanism must provide for the “appointment, ... of competent counsel in State postconviction proceedings.”). Because the regulations define “postconviction proceedings” as “State collateral proceedings,” 72 Fed. Reg. at 31,219, § 22.61, counsel’s qualifications and performance must be sufficient to provide competent representation in recognized collateral proceedings such as competency to be executed, see *Giarratano*, 492 U.S. at 9-10, motions for DNA testing, see, e.g., *McDonald v. Smith*, No. 02-CV-6743 (JBW), 03-MISC-0066 (JBW), 2003 WL 22284131, \*5-6 (E.D.N.Y. Aug. 21, 2003) (unpublished order); 18 U.S.C. § 3600(a) (describing the procedures for post-conviction motions for DNA testing in federal court), and other potentially specialized areas in which counsel must be proficient.

To ensure appointment of competent counsel, the state mechanism must also provide for the removal of counsel who do not provide competent representation. Congress adopted 28 U.S.C. § 2261(e), which dictates that incompetence of post-conviction counsel is not a ground for relief in a federal habeas corpus proceeding, because it determined that “[t]he effectiveness of state and federal post-conviction counsel is a matter that can and must be dealt with in the appointment process.” Powell Committee Report, 135 Cong. Rec. at S13484; 28 U.S.C. § 2261 (e); see also

*Menzies v. Galeika*, 150 P.3d 480, 508 (Utah 2006) (acknowledging that an attorney may meet statutory requirements for appointment but still fail to provide effective assistance of counsel and holding that petitioner was entitled to set aside the dismissal of his post-conviction petition where his post-conviction counsel, who was appointed pursuant to Utah’s mechanism, provided “grossly negligent” and ineffective assistance).

**3. Whether state standards utilized in the appointment of counsel are in keeping with federal minimum standards for counsel competence.**

An additional issue in determining whether the state mechanism appoints competent counsel is whether the competency standards utilized for the appointment of counsel adhere to minimum federal standards for counsel competency. See Barron Memo at 12 (concluding that section 2265(a)(1) permits the Attorney General to certify “only those state mechanisms that provide for the appointment of counsel who meet a minimum federal threshold of competency”). The proposed rule claims that the “specific minimum standards set forth in [26.22(b)] are based on judgments by Congress in federal laws concerning adequate capital counsel competency standards and on judicial interpretation of the counsel competency requirements of chapter 154. As discussed in detail below, there are numerous ways in which the options for counsel competency ignore critical elements congressional or judicial judgments on these standards, and thus involve an unreasonable interpretation of the requirements of Chapter 154.

The options also fail to establish minimum criteria sufficient to ensure that the Attorney General’s certification determination is fair and not arbitrary. The APA requires implementing regulations to provide sufficient criteria or “definitional content” for the statutory terms used to guide an agency’s action. *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (noting that “this proposition is squarely rooted in the prohibition under the APA that an agency not engage in arbitrary and capricious action”); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (stating that an agency action is arbitrary and capricious if agency is not able to “articulate a satisfactory explanation for its action”); *United States v. Atkins*, 323 F.2d 733, 742 (5th Cir. 1963) (stating that “uniform objective standards” are necessary “to furnish a rejected applicant a definite basis upon which to seek proper judicial review ... [and to] furnish reviewing courts something definite to act upon in ascertaining whether [the applicant has] been arbitrarily or unjustly denied”); *S. Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974) (stating that a vague standard invited arbitrary and unequal application). In addition, the requirements for certification must include clear objective standards and criteria so that states wishing to invest in a mechanism to comply with Chapter 154 have sufficient guidance to do so. See, e.g., *id.* at 670 (stating that the vague standard discussed above left the prospective applicants “utterly without guidance”). Finally, the failure to clearly define the standards and criteria that will apply to certification determinations deprives interested persons of sufficient information about the manner in which the Attorney General intends to implement the certification procedures and permit meaningful public comment. See, e.g., *Am. Med. Ass’n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989) (stating that interested persons must be able to “participate in the rulemaking in a meaningful and informed manner.”).

**B. Competency based on 18 U.S.C. section 3599**

The current regulations propose as one measure of counsel competency the federal standards for appointment of counsel in capital cases contained in 18 U.S.C. section 3599. Section 3599 addresses both pre-judgment and post-judgment appointments. Although the proposed regulation addresses the appointment of counsel for state post-conviction proceedings, it utilizes the federal requirement for pre-trial appointments found in 18 U.S.C. section 3599 (b). The correct equivalent instead would be the federal requirement that counsel appointed post-judgment “must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.” 18 U.S.C. § 3599(c).

The proposed regulations also omit the additional guidelines governing federal appointments in capital cases set forth in the Guide to Judiciary Policy—Volume 7: Defender Services, Guidelines for Administering the CJA and Related Statutes, *Chapter 6: Federal Death Penalty and Capital Habeas Corpus Representations*, available at <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/GuideToJudiciaryPolicyVolume7.aspx> (“Guidelines”). The Guidelines provide the following Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings:

In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney’s experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications identified in § 620.30 and § 620.60.20.

Guidelines at § 620.50.

The additional relevant qualifications for the appointment of counsel in capital post-conviction proceedings in federal courts include the following:

- (1) minimum experience standards set forth in 18 U.S.C. § 3599(b)-(d), 18 U.S.C. § 3005, and other applicable laws or rules;
- (2) qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases;
- (3) recommendations of other federal public and community defender organizations, and local and national criminal defense organizations;
- (4) proposed counsel’s commitment to the defense of capital cases; and
- (5) availability and willingness of proposed counsel to accept the appointment and to represent effectively the interests of the client.

*Id.* at § 620.30(c). These qualifications include the requirement that counsel be “learned in the law applicable to capital cases.” 18 U.S.C. § 3005. The Guidelines explain that learned counsel “should

have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high-quality representation.” *Id.* at § 620.30(e).

Finally, the Guidelines direct the courts to “ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training, and commitment, to serve as counsel in this highly specialized and demanding litigation.” *Id.* at § 620.30(d). The Guidelines also require courts to consider the recommendation of a defender entity that “should consult with counsel (if counsel has already been appointed or retained) and the court regarding the facts and circumstances of the case to determine the qualifications which may be required to provide effective representation.” *Id.* at §§ 620.30 (a), (b).

As a report for the Judicial Conference Committee on Defender Services has stated, “[h]eighted standards are required to ensure that representation in federal death penalty cases is both cost-effective and commensurate with the complexity and high stakes of the litigation. Counsel in a federal death penalty case must not only be skilled in defending the charged offense, *e.g.*, a homicide, but also must be thoroughly knowledgeable about a complex body of constitutional law and special procedures that do not apply in other criminal cases.” Gould, Jon B., Greenman, Lisa, *Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (Sept. 2010) (“Cost and Quality of Defense Representation”) at 92.

This report reiterates previous findings endorsed by the Judicial Conference. In 1998, a subcommittee of the Judicial Conference evaluated the quality and availability of defense representation in federal death penalty cases by conducting “extensive interviews with lawyers and judges representing a wide range of perspectives, and covering more than half of the judicial districts in which a federal death penalty prosecution has been authorized.” Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Recommendations Concerning the Cost and Quality of Defense Representation* (Spencer Report, May 1998). Its findings included the following:

Federal death penalty cases require knowledge of the extensive and complex body of law governing capital punishment and the intricacies of federal criminal practice and procedure. Neither one alone is sufficient to assure high quality representation. Lawyers and judges recounted cases in which seasoned federal criminal lawyers who lacked death penalty experience missed important issues. For example, one judge described a situation in which experienced and highly esteemed felony trial lawyers who had no capital experience simply did not know how to pursue the mitigation investigation required by the case.

Spencer Report, Analysis and Findings, Section C.1. *Importance of “Learned” Counsel.*

Federal appointments thus require capital as well as post-conviction experience, a necessity also recognized by courts interpreting Chapter 154. *See Wright v. Angelone*, 944 F. Supp. 460, 467

(E.D. Va. 1996) (holding that Virginia’s standards were inadequate because they did not require capital or state habeas corpus experience); *Austin v. Bell*, 927 F. Supp. 1058, 1062 (D. Tenn. 1996) (finding Tennessee’s standards of competency insufficient because, “[t]hat an attorney has passed the Tennessee bar examination does not mean that the attorney is competent to handle a habeas petition in a capital case”); *Colvin-El v. Nuth*, No. Civ.A. AQ 972520, 1998 WL 386403, \*6 (D. Md. 1998) (unpublished) (holding that standards that required experience participating in at least two capital cases at the trial level would be insufficient because, “[g]iven the extraordinarily complex body of law and procedure unique to post-conviction review, an attorney must, at a minimum, have some experience in that area before he or she may be deemed ‘competent’”). Federal appointments also require consideration of qualifications endorsed by bar associations, recommendations of defense entities, training, and the performance and distinctions of counsel in the past.

Any minimum standard for counsel competency based on federal appointments of counsel must include the full range of factors that apply in that context.

### **C. Competency based on the Innocence Protection Act**

A second option for counsel competency is based on the Innocence Protection Act. The proposed rule explains that rather than establishing specific qualifications that apply to the appointment of counsel, that statute “assumes that the specifications regarding the nature of the appointment or selection authority and the associated requirements for establishment of qualifications can be relied on to provide appropriate competency standards.” 76 Fed. Reg. at 11,708. Although the Attorney General recognizes that the Innocence Protection Act provisions function as a whole to ensure competency, the proposed rule inexplicably omits the vast majority of them.

The proposed rule requires state to comply only with 42 U.S.C. §§ 14163(e)(1) and (e)(2)(A). Those provisions require certain types of programs or entities to be responsible for appointment of counsel, 42 U.S.C. §§ 14163(e)(1), and that those programs or entities “establish qualifications for attorneys who may be appointed to represent indigents in capital cases,” 42 U.S.C. §§ 14163(e)(2)(A). This directive to have particular entities establish “qualifications” without further requirement or guidance fails to establish any minimum standard to guide the Attorney General’s certification determination or provide objective guidance to potential applicants who may wish to seek certification. The omitted provisions of the Innocence Protection Act scheme for the appointment of competent counsel are as follows:

(B) establish and maintain a roster of qualified attorneys;

(C) except in the case of a selection committee or similar entity described in paragraph (1)(C), assign 2 attorneys from the roster to represent an indigent in a capital case, or provide the trial judge a list of not more than 2 pairs of attorneys from the roster, from which 1 pair shall be assigned, provided that, in any case in which the State elects not to seek the death penalty, a court may find, subject to any requirement of State law, that a second attorney need not remain assigned to represent the indigent to ensure competent representation;

- (D) conduct, sponsor, or approve specialized training programs for attorneys representing defendants in capital cases;
- (E) (i) monitor the performance of attorneys who are appointed and their attendance at training programs; and
- (ii) remove from the roster attorneys who –
- (I) fail to deliver effective representation or engage in unethical conduct;
- (II) fail to comply with such requirements as such program, entity, or selection committee or similar entity may establish regarding participation in training programs; or
- (III) during the past 5 years, have been sanctioned by a bar association or court for ethical misconduct relating to the attorney's conduct as defense counsel in a criminal case in Federal or State court; and
- (F) ensure funding for the cost of competent legal representation by the defense team and outside experts selected by counsel, ...

42 U.S.C. § 14163(e)(2).

Notably, a key element of the Innocence Protection Act scheme are detailed provisions for the monitoring and removal of attorneys who fail to deliver effective representation or participate in specialized training. If the Innocence Protection Act is to serve as a model for state standards, these additional requirements must be included in the Attorney General's regulations.

#### **D. Competency based on other standards reasonably assuring proficiency**

In the interest of providing increased flexibility to states, the proposed regulation includes an option for state competency standards that requires only "Appointment of counsel satisfying qualification standards that reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases." 76 Fed. Reg. at 11,712. As with the Innocence Protection Act standard that similarly requires only some type of undefined qualifications, this option fails to establish any minimum standard to guide the Attorney General's certification determination or otherwise provide objective guidance his interpretation of minimum standards of competency required under Chapter 154.

Any federal minimum standard must include, at the very least, requirements for experience in post-conviction as well as capital proceedings, specialized training, demonstrated competence

according to well-established performance standards, and removal of capital post-conviction counsel who fail to provide effective representation.

#### **V. Section 26.22(c), Compensation**

Although the preamble to the proposed rule discusses the need to ensure that a state authorizes compensation beyond any presumptive limits, this is not contained in the rule the Attorney General proposes to adopt. The Attorney General's regulations must explicitly provide that any compensation mechanism may not set caps on attorney fees and shall compensate at an hourly rate for all time actually worked. *See* 18 U.S.C. § 3599(g)(1) (directing compensation without caps or distinctions between in-court and out-of-court time); 42 U.S.C. § 14163(e)(2)(F)(II) (stating that an effective system of capital representation is one where defense attorneys are "compensated for actual time and service, computed on an hourly basis"); ABA Guidelines § 9.1(B), 31 Hofstra L. Rev. at 981 (discouraging caps and recommending that no distinction be made between time spent in or out of court).

A state mechanism may undermine effective representation when the types of activities for which counsel may be compensated are restricted. A state mechanism for compensation must be sufficient "to enable [appointed] attorneys to provide their capital clients with competent legal representation." Barron Memo at 14. Therefore, the Attorney General's regulation also should explicitly state that a state mechanism must provide compensation for representation that meets well-established professional norms. This requirement must apply across all compensation options, as in many states the compensation level of retained or agency lawyers that serves as a benchmark in sections 26.22(c)(1)(ii)-(iv) is woefully inadequate to ensure competent representation.

As with competency options that fail to establish any minimum standard to guide the Attorney General's certification determination, section 26.22(c)(2) abandons any effort to provide objective guidance for the payment of attorney compensation and should be removed. At the very least, the Attorney General should provide in the rule itself the measures and benchmarks listed in the preamble that will guide the evaluation of compliance with this option, including experience, knowledge, skills, training, education, and the benchmarks provided by federal appointment guidelines, including judicial policy requirements, and *all* the relevant provisions of the Innocence Protection Act.

#### **VI. Section 26.22(d), Reasonable litigation expenses**

As with compensation, litigation expenses must be adequate to enable counsel to provide competent representation for their capital post-conviction clients. Although the proposed regulation requires that there must be means to authorize "payment of necessary expenses" above any presumptive limits, it fails to provide any object criteria or guidelines for what expenses are necessary to competent representation. The federal courts have endeavored to answer this question. A 2010 report endorsed by the Judicial Conference Committee on Defender Services identified several key areas of expert services frequently relied upon in capital cases. Interviews with judges and lawyers further detailed the significance of these expert services in capital cases and the

necessity of the costs associated with them. *See Cost and Quality of Defense Representation* at 71 (noting that “both the prosecution and the defense make more extensive use of investigators, expert witnesses, and other case-related services than they do in non-capital cases”). In terms of necessary guilt phase expenses, the report found that

[t]o investigate, prepare, and present evidence of guilt, the government most often is able to rely on salaried employees of such agencies as the Federal Bureau of Investigation, the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and others. Defense counsel, however, must retain, and courts therefore must authorize payment for, private individuals to carry out similar functions. Likewise, with respect to the many types of specialized forensic science expertise that may be relevant during the guilt phase (e.g., ballistics, DNA, serology, narcotics), the prosecution often can utilize salaried members of law enforcement agencies, while the defense generally must hire experts who charge an hourly rate for their services. Fact investigators and forensic science evaluators are common in both capital and non-capital cases.

*Id.* at 72.

Other types of routine expert services mental health experts, including psychologists, neuropsychologists, psychiatrists, and others, which were found to be “relied upon to a much greater extent in capital than in non-capital matters” by both defense and prosecution. *Id.* at 72. Mitigation specialists, who have “a graduate level degree as well as extensive training and experience in the defense of capital cases,” victim liaisons, and prison condition experts, were among the other expert services regularly utilized in capital cases. *Id.* at 74-77.

The Attorney General’s regulation should include minimum guidelines for what constitutes necessary expenses for competent representation. As indicated above, this would include fact investigators, mitigation specialists, and mental health and forensic science experts. *See also* 42 U.S.C. § 14163(e)(2)(F)(ii)(III) (Innocence Protection Act requiring compensation of non-attorney members of the team, including “investigators, mitigation specialists, and experts”); ABA Guidelines § 9.1(C), 31 Hofstra L. Rev. at 981-82 (recommending funding for investigators, mitigation specialists, and experts services).

## VII. Section 26.23, Certification process

The proposed regulations fail to place any burden on the state to establish its entitlement to the benefits of Chapter 154. There is no requirement that the state official provide any information about the state mechanism or why the state official believes that the mechanism qualifies under Chapter 154. This is contrary to congressional intent. Prior judicial interpretations of Chapter 154 eligibility require the state seeking eligibility to bear the burden of demonstrating compliance with Chapter 154 and make an affirmative showing of strict compliance with the statute’s requirements. *See, e.g., Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1182-83 (N.D. Cal. 1998) (stating that “as the party seeking to obtain the benefit of Chapter 154’s expedited review provision, the burden is properly placed on the state to demonstrate that all of the qualifying procedures have been

established. As the Powell Committee Report commented, it is entirely the states' decision whether to opt-in—by so choosing the states are properly allocated the burden of proving compliance”); *Satcher v. Netherland*, 944 F. Supp. 1222, 1242, 1244-45 (E.D. Va. 1996) (“If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so. However, it elected not to do so.”); *see also Lavine v. Milne*, 424 U.S. 577, 584 (1976) (stating that there is a “normal assumption that an applicant is not entitled to benefits unless and until he proves his eligibility.”). Absent clear language in the statute to the contrary, the Attorney General’s regulations must implement the certification process in keeping with these prior judicial interpretations. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 212 (1993); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

Although the Proposed Regulations provide for a state’s request for certification to be subject to public notice and comment, the failure to require any information upon which the certification determination will be made, including ex parte contacts, denies the public notice of and deprives interested persons the opportunity to participate in the certification determination in a meaningful and informed manner and violates due process. Notice “not only allows adversarial critique of the agency but is perhaps one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion.” *Home Box Office. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977); *see also Am. Med. Ass’n*, 887 F.2d at 767 (stating that notice must apprise “interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner”).

The Attorney General’s regulations should include an application that requires states to provide specific information that allows the Attorney General whether the state mechanism in fact provides for the appointment, compensation, and reasonable litigation expenses of competent counsel, including the adequacy of state competency standards, including the following questions:

- 1, What is the state authority by which the official seeking certification is authorized to submit an application?
2. Document how the state mechanism accomplishes the following requirements provided by 28 U.S.C. §§ 2261(c), (d):
  - A. Ensures that counsel is offered to all prisoners under sentence of death in state post-conviction proceedings
  - B. Determines whether counsel previously represented the prisoner at trial and if so, whether the prisoner and counsel expressly requested continued representation
  - C. Provides appointment of counsel at the time indigence is established
  - D. Determines whether prisoners are competent to accept or

- reject an offer of counsel
- E. Finds that prisoners who reject counsel made the decision with an understanding of its legal consequences
  - F. Concludes that a prisoner is not indigent
3. Provide the source of and describe state standards for competency, including the following:
- A. If the state mechanism utilizes different standards, describe each.
  - B. The official or entity responsible for ensuring compliance with state standards in the appointment process.
  - C. If your state permits appointment of attorneys who do not meet specified experience and/or training requirements based on a determination that the attorneys are nevertheless qualified to provide competent representation, provide the percentage of appointments in which this occurs.
  - D. If your state has specified experience and/or training requirements for appointed counsel, provide the percentage of appointments which did not meet the requirements.
4. Provide the source for and describe the compensation of counsel, including the following:
- A. If the state mechanism compensates counsel differently in different settings, describe each type of compensation.
  - B. If there is a cap on compensation, the process for allowing compensation to exceed the cap and the percentage of requests to exceed the cap that are approved entirely and the percentage that are approved in part.
  - C. If flat fees are provided, the resulting average hourly rate of compensation.
  - D. Duties of counsel for which compensation is provided and limitations on the compensation of counsel.
  - E. If time and fees are subject to revision by a state entity prior to approval of compensation, the percentage of cases in which

compensation is reduced and the average difference between requested compensation and compensation paid.

5. Provide the source for and describe the payment of litigation expenses, including the following:
  - A. The process for requesting, revising, approving, and denying expenses.
  - B. The entity responsible for approving, reducing, or denying requests for funding.
  - C. Guidelines for the approval, reduction, or denial of funding requests.
  - D. Whether approval and payment of expenses occur before or after the filing of a habeas petition.
  - E. Whether there are limits on the type of assistance that the mechanism will fund, e.g., attorney experts.
  - F. Whether there are rate or fee caps for investigators and experts and what those caps are.
  - G. Percentage of requested expenses approved for payment of investigative services.
  - H. Percentage of requested expenses approved for payment of forensic experts and testing.
  - I. Percentage of requested expenses approved for payment of mental health experts.
  - J. Percentage of requested expenses approved for payment of a mitigation specialist.
  - K. Percentage of funding requests reduced and the average difference between requested and approved funds.
  - L. Percentage of funding requests that are denied.
  - M. The average expenses provided for investigative services.
  - N. The average expenses provided for forensic experts and testing.
  - O. The average expenses provided for mental health experts.

- P. The average expenses provided for mitigation specialists.
6. Provide the following to establish how the appointment mechanism monitors the effectiveness of capital post-conviction counsel:
- A. Description of how the appointing entity monitors counsel performance
  - B. Description of the mechanisms for removing counsel from a specific case and/or precluding future appointments
  - C. Percentage of petitions filed that contain only record-based claims
  - D. Percentage of petitions filed that are 50 pages long or shorter
  - E. Percentage of cases in which post-conviction counsel seek discovery
  - F. Percentage of cases in which counsel seek funding for investigation
  - G. Percentage of cases in which counsel seek funding for forensic experts and testing
  - H. Percentage of cases in which counsel seek funding for mental health experts
  - I. Percentage of cases in which counsel seek funding for a mitigation specialist
  - J. Percentage of cases in which an inmate has sought removal of counsel
  - K. Percentage of cases in which counsel have been removed from a specific case
  - L. Percentage of cases in which qualified counsel have been denied further appointments based on past performance
  - M. Circumstances that have justified removal of counsel
7. Provide the following information related to the adequacy of state review of capital post-conviction claims:

- A. Any time limits on the development, presentation, and/or resolution of state post-conviction claims;
  - B. Any page limits on the post-conviction petition and/or any subsequent filings;
  - C. Availability of and any limitations on discovery in post-conviction proceedings;
  - D. Case law or other limitations on the cognizability of federal constitutional claims in state proceedings;
  - E. Case law or other limitations on the challenges that appointed counsel can raise related to the capital conviction and/or sentence, e.g., bringing a collateral attack on a prior conviction used as a factor in aggravation at the capital trial.
  - F. Procedures related to the presentation of evidence, such as amending or supplementing the habeas petition and the ability to call and cross-examine witnesses;
  - G. Percentage of cases in which a state evidentiary hearing is conducted;
  - H. Percentage of initial federal habeas petitions filed by capital inmates in your state that were found to contain claims that had not been exhausted in state post-conviction proceedings.
8. The effective date of the mechanism you seek to certify

Given the important issues raised and the direct impact on individuals sentenced to death, the Attorney General should provide actual notice of a state application, at the very least to state defenders and federal defenders for that jurisdiction, whose identities and addresses easily are ascertainable.

### **VIII. The Attorney General's conflict of interest**

As the chief law enforcement officer for the United States Government, the Attorney General enforces the law of the United States, defends against challenges to federal criminal prosecutions, regularly cooperates with, and provides training, funding, and support for, local law enforcement, and participates directly in joint law-enforcement operations with the states. Given these roles, the Attorney General's decisionmaking inherently involves the risk of bias. *See, e.g., Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428 (1995) (stating that under a statute that required the Attorney General to certify plaintiff was injured in the scope of employment – where the result was to shield the government from liability – the Attorney General “[i]nvariably . . . will feel a strong tug to certify, even when the merits are cloudy” and “his interest would certainly bias his judgment”)

(internal quotation omitted).

Due process applies to administrative decision making such as that required of the Attorney General under § 2265. In particular, due process requires the Attorney General's certification decision making to be "impartial and disinterested." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980); *see also Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (holding that the right to "a fair trial in a fair tribunal" is a basic requirement of due process that applies to administrative decision making) (internal quotation omitted). In addition to prohibiting actual bias, the Due Process Clause operates "to prevent even the probability of unfairness." *Withrow*, 421 U.S. at 47; *see also Wildberger v. Am. Fed'n of Gov't Emps., AFL-CIO*, 86 F.3d 1188, 1196 (D.C. Cir. 1996) (stating that the Due Process Clause prohibits procedures based "not just on actual bias, but also on circumstances that could create a significant risk of actual bias"). In situations in which bias or the appearance of impropriety may infect a decision, procedural protections, such as adversarial proceedings, cross-examination, and insulation from political pressures, are critical. *See, e.g., In re Murchison*, 349 U.S. at 138 (finding bias where judgment was based in part on prior impression, "the accuracy of which could not be tested by adequate cross-examination").

As we have suggested before, designating the Office of the Inspector General to conduct evaluations of the adequacy of state mechanisms is one way to minimize the appearance of bias and diminish the effect of the Attorney General's conflict. Another way is to address many of the flaws in the requirements that we have discussed above. Although the Attorney General has stated that he intends to provide minimum federal standards to govern certification determinations, the requirements in the proposed regulations are vague and leave the determination of adequacy of a state mechanism almost entirely to the Attorney General's discretion. Clear, detailed, and objective standards to govern certification requirements, together with a detailed application requiring specific showings by the state, not only creates a fairer process but also establishes criteria for the certification determination that are needed for agency decision making and public notice.

## IX. Conclusion

Changes to the Proposed Rule implementing Chapter 154 are necessary prior to initiation of this policy initiative and are, in fact, required by law. For all of the foregoing reasons, we ask that our comments be fully considered and we urge the Attorney General to move forward in developing a new proposed rule in a comprehensive, objective, and transparent manner to faithfully carry out the *quid pro quo* scheme of Chapter 154.

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# EXHIBIT D

**Comments by Federal Public Defenders and Community Defenders  
re: Supplemental Notice of Proposed Rulemaking**

On behalf of the federal public defender and community defender offices in the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam, we offer the following comments on the Supplemental Notice of Proposed Rulemaking – OAG Docket number 1540 – regarding the certification process for state capital counsel systems.

**Statement of Interest**

Federal public defender offices and community defender organizations represent indigent criminal defendants pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. Thirty-four states currently have the death penalty. Federal public defenders and community defenders in a number of those states represent indigent death row prisoners in federal habeas corpus actions challenging state court judgments. Specifically, defenders in the following districts have capital habeas units with staff dedicated to the representation of federal capital habeas petitioners who are directly affected by the regulations proposed by the Attorney General: Middle District of Alabama; District of Arizona; District of Arkansas; Central District of California; Eastern District of California; District of Delaware; Northern District of Georgia; District of Idaho; District of Nevada; Northern District of Ohio; Southern District of Ohio; Western District of Oklahoma; Eastern District of Pennsylvania; Middle District of Pennsylvania; Western District of Pennsylvania; Eastern District of Tennessee; and Middle District of Tennessee. An additional capital habeas unit has been authorized in the Northern District of California, but it is not yet operational.

Defenders with the capital habeas units in these districts represent 685 petitioners in federal habeas corpus actions challenging state court death judgments. These districts are located in eight of the top thirteen states ranked by number of death row prisoners, and well over one-half of death-sentenced prisoners are located in these states. (According to an October 1, 2006 study, California ranks first in the number of state death row prisoners, Pennsylvania fourth, Alabama sixth, Arizona eighth, Tennessee ninth, Georgia tenth, Oklahoma eleventh, and Nevada thirteenth.) Defenders in these districts also give advice and training to private attorneys representing federal habeas petitioners challenging state death judgments. Thus, through their representation of state death row prisoners, and in the advice they provide to private attorneys working on behalf of the same class of clients, these defenders are directly and critically affected by the regulations proposed by the Attorney General.

Federal public defender and community defender offices located in states with the death penalty, but who do not have staff dedicated to representing capital habeas petitioners challenging state court judgments, also have an interest in the regulations. Some defender offices in these districts represent death-sentenced prisoners in federal habeas proceedings on an individual basis: at this time, there are 36 additional federal capital habeas corpus cases handled by federal defender or community defender offices without a designated capital habeas unit. Additionally, defenders in

these districts often receive inquiries from state death row prisoners seeking federal habeas corpus counsel and advice on their cases. These defenders often locate private counsel to represent such prisoners in federal capital habeas corpus actions, and frequently advise these prisoners on issues such as the statute of limitations (significantly shortened under Chapter 154) and claim filing (different under Chapter 154, for example, to the extent that the ability to amend a petition is significantly constrained once the state files an answer).

Defenders located in the fifteen states and other jurisdictions that do not have the death penalty are also affected by the Attorney General's Proposed Regulations. In a number of these states, legislation is pending to reinstate the death penalty. Defenders in these jurisdictions, like the defenders in the thirty-four death penalty states, have unique expertise and experience in dealing with the United States Attorney General and attorneys under his jurisdiction. The Final Rule, relying primarily on comments by two legislators in support of the Act, depict the Attorney General as a neutral arbiter who is capable of promulgating rules that will fairly guide the process for determining whether a state qualifies for Chapter 154 benefits. Defenders in these jurisdictions have unique and important insight to give on the question of the Attorney General's purported neutrality and objectivity in deciding the issues assigned for him/her to determine under the Act and in formulating the Proposed Regulations implementing the Act.

We offer these comments on behalf of our clients, the persons on death rows in our jurisdictions, and those who may become our clients.

## **Comments on Proposed Changes**

### **I. Proposed Change 1**

The Department of Justice proposal to replace “felony litigation” experience in the counsel competency requirements contained in section 26.22(b)(1) of the proposed rule, with the requirement of “postconviction litigation” experience, is an important improvement to the requirements a state must meet prior to certification under Chapter 154 of Title 28. *Certification Process for State Capital Counsel Systems, Supplemental notice of proposed rulemaking*, 77 Fed. Reg. 7559, 7560 (Feb. 13, 2012) (“supplemental notice”); *Certification Process for State Capital Counsel Systems, Proposed rule*, 76 Fed. Reg. 11705 (Mar. 3, 2011) (“proposed rule”). The change appropriately acknowledges that the demands of post-conviction litigation differ from other aspects of criminal defense representation and require unique expertise.

The requirements for section 26.22(b)(1), however, still are less demanding than the minimum federal requirements for capital post-conviction counsel that apply to appointments made pursuant to 18 U.S.C. section 3599, on which section 26.22(b)(1) of the rule is based. The rule to implement Chapter 154 must be further improved to reflect minimum Federal standards.

As the Department acknowledges, the Federal guidelines for the appointment of capital post-conviction counsel include experience in *capital* post-conviction proceedings. *See* 77 Fed. Reg.

at 7560 (citing Judicial Conference of the United States, Committee on Defender Services, Subcommittee on Federal Death Penalty Cases, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (May 1998) (“1998 Recommendations”)). The 1998 Recommendations explain that “Federal death penalty cases require knowledge of the extensive and complex body of law governing capital punishment and the intricacies of federal criminal practice and procedure. Neither one alone is sufficient to assure high quality representation.” 1998 Recommendations at 11 (emphasis in original).

Requirements for the appointment of capital post-conviction counsel in federal cases are based not only on the requirements set forth in 18 U.S.C. section 3599, but also on those in 18 U.S.C. section 3005, which requires the appointment of counsel “learned in the law applicable to capital cases.” 18 U.S.C. § 3005. The Federal guidelines for appointment of counsel in capital cases, define “learned counsel” in the following way: “Ordinarily, ‘learned counsel’ (see: 18 U.S.C. § 3005) should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high-quality representation.” Guide to Judiciary Policy-Volume 7: Defender Services, *Guidelines for Administering the CJA and Related Statutes, Chapter 6: Federal Death Penalty and Capital Habeas Corpus Representations*, Procedures for Appointment of Counsel in Federal Death Penalty Cases, § 620.30(e), <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter6.aspx> (“Federal Guidelines”). See also *id.* at § 620.50 (mandating that when “appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney’s experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications identified in § 620.30 and § 620.60.20.”).

The requirement of capital experience is warranted for many, well-established reasons, including the fact that there is no equivalent for post-conviction litigation that involves the penalty phase of a capital case. As the 1998 Recommendations summarized, “Lawyers and judges recounted cases in which seasoned federal criminal lawyers who lacked death penalty experience missed important issues. For example, one judge described a situation in which experienced and highly esteemed felony trial lawyers who had no capital experience simply did not know how to pursue the mitigation investigation required by the case.” 1998 Recommendations at 11-12.

Mastery of state procedural default rules and Federal statutes of limitation for capital cases are other areas of expertise that are essential to ensuring full and fair review of potentially meritorious claims of constitutional violation. We have seen, for example, that appointed post-conviction counsel who lack capital experience and are not well versed in federal procedural requirements fail to comply with Federal deadlines for filing or preserve claims while in state court, thus forfeiting Federal review of potentially meritorious claims for relief from a capital conviction. See, e.g., Comment of Mark Olive, Dept. of Justice Docket No. DOJ-OAG-2011-0004-0013 (June 1, 2011) at 2-4. In several jurisdictions, state post-conviction counsel do not continue their representation into Federal court; in that context counsel are even more likely to be unfamiliar with

critical Federal procedures and deadlines-including those of Chapter 154 should their state become certified.

Requiring a state mechanism to provide for the appointment of counsel with capital post-conviction experience therefore is a necessary component of any standard for ensuring competent counsel. We continue to maintain, as we detailed in our prior comments, that any measure of experience alone is insufficient to ensure the appointment of counsel who perform competently. Any federal minimum standard must include, at the very least, requirements for experience in capital and post-conviction capital proceedings, as well as specialized training, demonstrated competence according to well-established performance standards, and removal of capital post-conviction counsel who fail to provide effective representation.

## II. Proposed Change 2

The Department of Justice proposal to include additional provisions of the Innocence Protection Act (“IPA”) in section 26.22(b)(2) that are “integral elements of the IPA’s comprehensive approach to counsel qualifications,” also is an improvement to the requirements a state must meet prior to certification under Chapter 154. 77 Fed. Reg. at 7560. As we noted above, the requirements of specialized training, performance monitoring, and removal of inadequately performing attorneys contained in the IPA are important elements of any federal minimum standard to ensure counsel competency.

It is not apparent from the supplemental notice, however, which of the IPA elements the Department is considering including in the rule. The supplemental notice identifies 42 U.S.C. sections 14163(e)(2)(B), (D), and (E) as specific provisions to incorporate into the rule, but also states that “to the extent that the rule uses the IPA standard as a benchmark for counsel competency, it would incorporate all directly relevant elements of that Act.” 77 Fed. Reg. at 7560. Because the supplemental notice does not provide specific proposed amendments to the existing language of section 26.22(b)(2), it is impossible to determine what the Department considers to be “directly relevant elements” of the IPA, and we are unable to comment on the scope of the possible change.

The failure to include 42 U.S.C. section 14163(e)(2)(C) along with the other subsections of 14163(e)(2) in the supplemental notice suggests that the Department does not consider the appointment of two attorneys to be “integral” to the counsel qualifications of the IPA. This omission is inappropriate. Federal guidelines counsel that “[d]ue to the complex, demanding, and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two attorneys.” Federal Guidelines, § 620.10.20 (addressing the number of counsel to appoint in Federal habeas corpus proceedings). Because certification results in expedited and limited proceedings in the Federal courts, full representation by two qualified attorneys during state post-conviction proceedings should be required of any state mechanism.

As we indicated in the prior section, IPA requirements of specialized training, performance monitoring, and removal of inadequately performing attorneys, along with requirements for

experience in capital and post-conviction capital proceedings, should be part of any federal minimum standard to ensure counsel competency. By allowing states to use measures of experience only, as in section 26.22(b)(1), or to avoid specific measures of any kind, as in section 26.22(b)(3), the Department fails to establish minimum Federal guidance to ensure counsel competency that Congress intended the Attorney General to provide.

### III. Proposed Change 3

As the Department of Justice recognizes, Federal courts previously have determined that timely provision of competent counsel is one of the most important aspects of the Chapter 154 scheme. 77 Fed. Reg. at 7561 (citing Federal court interpretations of Chapter 154 as requiring timely appointment of counsel). This is necessary not only to ensure full and fair development of potentially meritorious claims prior to state and Federal deadlines for filing such claims, but also to preserve critical physical evidence, records, witnesses, and memories. The requirement of “timely” provision of competent counsel therefore should be considered not only in terms of state and federal procedural deadlines, but also in terms of proximity to the capital trial and conviction.

### IV. Proposed Change 4

The Department of Justice proposes the addition of presumptive certification to the final rule, but there is no indication how this might be accomplished, or specifically what it would require of state applicants or those seeking to challenge state applications for certification. The supplemental notice states that the Department of Justice is considering amending sections 26.22 (b) and (c) of the proposed rule, but does not include the amended sections for consideration or disclose the language that would comprise the final rule. As a result, we are unable to understand or meaningfully comment on, the full range of potential issues raised by this suggested change.

The Department of Justice proposal of “presumptively” certifying states that meet certain requirements recognizes that a state that appears in a written application to meet Chapter 154 requirements may not be adequate “in the context of the State in which it operates.” 77 Fed. Reg. at 7561. Thus, the Department seems to acknowledge that defense counsel must be allowed to raise the inadequacy of the mechanism during the state application for certification or in individual cases in federal court. *See id.* (noting that “the Department remains of the view that whether a State has complied with its mechanism in an individual case is a question the statute assigns to the Federal habeas courts”). Though opportunities to challenge a state’s assertion of compliance with Chapter 154 are necessary features of any certification scheme, they must not be the only means of ensuring compliance with the statute’s requirements.

First, states seeking certification bear the burden of affirmatively establishing compliance with 2261(c) and (d) as well as other certification requirements. *See Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (holding that invoking the procedures of Chapter 154 constitutes an affirmative defense employed by the state in habeas corpus proceedings); *Hunter v. Bryant*, 502 U.S. 224, 233 (1991) (stating that government officials bear the burden of establishing their affirmative defenses).

The Attorney General's regulations therefore must make it clear that states that apply for certification must document how the state mechanism accomplishes each requirement of certification. This should include a showing of the average length of time from a capital conviction to the appointment of post-conviction counsel, and the qualifications, compensation rates, and paid litigation expenses of specific counsel appointed under the mechanism prior to an application for certification.

In order to hold state applicants to their burden of proof, the Attorney General must also provide a measure for how he will determine whether a state mechanism is likely to result in the timely provision of competent counsel. The Attorney General may require appointments to comply with Chapter 154 in all, most, or a majority of cases in a particular period of time, or could use a variety of other measures of a state mechanism's effectiveness. State applicants and defense interests responsible for responding to a state application must know what measures will be applied to evaluate the effectiveness of the state mechanism so that they can evaluate their respective positions and efforts regarding certification.

Allowing for presumptive certification without requiring a specific initial showing of compliance by state applicants leaves Federal courts to correct the systemic failure of the state's mechanism in all individual cases affected by it. This approach impermissibly allows states to insist on compliance with Chapter 154 until a court determines otherwise, and frustrates Congress's intent of having systematic review of a state mechanism by amending Chapter 154 and placing the authority for state certification with the Attorney General.

Finally, it is not appropriate to provide notice of a state application for certification only through the Federal Register. Affected individuals and defense counsel and organizations must receive actual notice when a state applies for certification, especially if they are expected to provide critical information about whether the state mechanism functions effectively in a sufficient number of cases. Federal Defender offices in states applying for certification should be included among the organizations immediately notified of a state application so that they may help ensure that appropriate notice of relevant application materials and deadlines reaches interested parties.

## **V. Proposed Change 5**

The Department of Justice proposes changes to the proposed rule that require periodic renewal of state certification. This change appropriately recognizes the potential for changes in a state mechanism, or a state's ability to comply with its mechanism, that may require regular regulatory attention. There should also be included in the rule procedures for decertification if necessary prior to renewal of certification. Barring specific provisions for decertification, the Department should clarify that in making Proposed Change 5, it is not attempting to preclude other standard procedures for requesting agency action that are granted by the Administrative Procedure Act.

### Conclusion

We urge the Attorney General to implement these additional comments and concerns, and to provide the full text of proposed changes raised in the supplemental notice for full consideration by the public prior to issuance of a final rule.

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# EXHIBIT E



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November 21, 2017

*Via FedEx and Regulations.gov*

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Re: Docket No. OLP 166: State of Arizona's Application For Opt-in under 28 U.S.C. § 2265(a)

Dear Mr. Rothenberg:

I am writing in regard to the State of Arizona's Application for Opt-in under 28 U.S.C. § 2265(a), published November 16, 2017, in which the State of Arizona requests certification of its mechanism for appointing counsel to represent capital defendants in state postconviction review. I represent the Office of the Federal Public Defender for the District of Arizona (FDO-AZ) in opposing the State of Arizona's application.

FDO-AZ is a federal defender organization that operates under the authority of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(g). FDO-AZ's mission includes ensuring, on behalf of those who are unable to afford retained counsel, the right to the effective assistance of counsel guaranteed by the Sixth Amendment and the Criminal Justice Act. FDO-AZ's Capital Habeas Unit represents death-sentenced prisoners in federal habeas corpus proceedings as well as federal prisoners sentenced to death under federal law. FDO-AZ currently represents 80 capital prisoners in federal habeas corpus or related proceedings. FDO-AZ's work comes after state postconviction review is complete and involves investigation of counsel's work in state postconviction review. As such, FDO-AZ has a vested interest in the State of Arizona's application and extensive knowledge of the quality of counsel appointed in Arizona postconviction review proceedings.

I write to request that the Department of Justice (Department or DOJ) (1) follow the notice-and-comment rulemaking procedures set out in the Administrative Procedure Act (APA), 5 U.S.C. § 553, (2) allow for fact development before the agency by following procedures consistent with administrative actions reviewed under Chapter 158 of Title 28 (28 U.S.C. §§ 2341-51), and (3) extend the comment period on Arizona's application to 180 days. In



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In addition, I request that the Department disclose and publish all communications with the State of Arizona regarding the opt-in regulations, Arizona's application, and all information on which the Department is relying in its evaluation of Arizona's application. I am also filing a Freedom of Information Act request concurrently with this letter.

**I. *The Department Should Follow The APA's Notice-And-Comment Requirements For Rulemaking.***

The Department should follow the procedures laid out in 5 U.S.C. § 553, including providing notice of the Department's proposed decision on Arizona's application, an opportunity to comment on the proposed decision through the submission of written "data, views, or arguments," and reasoned consideration of those comments. These notice-and-comment procedures are needed to facilitate effective public participation in the certification decision, as required by the Final Rule. 28 C.F.R. § 26.23(b)(3). The Attorney General's August 22, 2017 Memorandum on Guidance for Certification of State Capital Council Mechanisms indicates that the Department does not intend to follow these procedures. Instead, the Memorandum indicates that only *final* decisions will be published. This deprives the public of the ability to comment on the Department's proposed decision and is inconsistent with Chapter 154's requirements.

First, the Department's certification decisions are rulemakings governed by 5 U.S.C. § 553(c), which requires notice-and-comment procedures. A certification decision does more than resolve disputes among specific individuals in specific cases; certification affects every capital defendant in the certified state. It is therefore "an agency statement of general or particular applicability and future effect," i.e., it meets the definition of a "rule" under the APA. 5 U.S.C. § 551(4); *see also Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (concluding that a HUD determination that Washington's eviction procedures comply with HUD due process requirements was a rulemaking). Indeed, by requiring the Department to consider the effectiveness of a given state's mechanism on a state-by-state basis in a way that will affect all future cases, *see* 28 U.S.C. § 2265, Congress has required the Department to proceed by rule. Accordingly, § 553(c) and its requirements—particularly that the agency provide notice and a meaningful opportunity to comment on the proposed certification decision—are required here.

As the Department saw in the prior litigation between FDO-AZ and the Department, there is a risk that any certification that is not compliant with § 553 will be thrown out. In that litigation, FDO-AZ and the Habeas Corpus Resource Center challenged the Final Rule under the APA. *See Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. 13-CV-4517-CW (N.D. Cal. filed Sept. 30, 2013) ("*HCRC v DOJ*"). The United States District Court for the Northern District of California ruled that the Department's certification proceedings must be treated as rulemakings and not adjudications. *See HCRC v. DOJ*, 2014 WL 3908220, at \*9 (N.D. Cal. Aug. 7, 2014), *vacated and remanded on standing grounds*, 816 F.3d 1241 (9th Cir. 2016). The



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district court rejected the Department's arguments that certification decisions could be resolved by adjudication because "certification decisions are rule-making actions that affect the rights of broad classes of individuals." *Id.* at \*8. The district court's decision was vacated and remanded by the Ninth Circuit on standing and ripeness grounds, *see* 816 F.3d 1241, but the district court's reasoning remains sound.

Second, there can be no doubt that the Department is authorized to engage in additional notice-and-comment procedures in the form FDO-AZ seeks here. The Final Rule implementing the Chapter 154 certification process requires notice and an opportunity to comment on any state's initial request for certification, *see* 28 C.F.R. §26.23(b)-(c), and then contemplates the Department will seek additional comments based on developments in the certification process, *id.* § 26.23(c). The preamble to the Final Rule also acknowledges that "the Attorney General may permit more than one period for comment to allow the requesting State or any interested parties further opportunity for submission of views or information" in order to obtain "the information needed for [certification] determinations." Certification Process for State Capital Counsel System, 78 Fed. Reg. 58,174 (Sept. 23, 2013); *see also* *Habeas Corpus Res. Ctr v. U.S. Dep't of Justice*, 816 F.3d 1241, 1254 n.17 (9th Cir. 2016) ("The Attorney General may very well afford the Defender Organizations all the [notice-and-comment rulemaking] procedural protections they seek.").

## **II. *The Department Should Allow For Factual Development, Consistent With Proceedings Reviewed Under Chapter 158.***

In order to facilitate judicial review, the Department should allow and encourage fact development at the agency. The Department's decision on Arizona's application will be reviewed pursuant to Chapter 158 of Title 28. *See* 28 U.S.C. § 2265(c); *id.* §§ 2341 through 2351. Using procedures consistent with other agency decisions reviewed under Chapter 158, FDO-AZ and other interested parties should be given the opportunity to develop a factual record in an effort to facilitate reasoned decision-making by the Department.<sup>1</sup> *See* Court of Appeals –

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<sup>1</sup> By way of example, immigration removal orders, 8 U.S.C. § 1252(a)(1), and Equal Employment Opportunity Commission orders regarding state employee rights violations, 42 U.S.C. § 2000e-16c(c), are reviewed under Chapter 158 after an evidentiary hearing at the agency. *See* 8 U.S.C. § 1229a(b) (providing procedures for immigration removal proceedings); 42 U.S.C. § 2000e-16c(b)(1) (providing adjudication for state employee complaints according to the formal hearing requirements of the APA). Final orders under the "Perishable Agricultural Commodities Act," 7 U.S.C. § 499a(a), are made after a full investigation, the filing of a complaint, and hearings. *See* 7 U.S.C. § 499m (providing for subpoenas, depositions, oral testimony, and examination of witnesses among other things). Final orders under Section 812 of the Fair Housing Act require a hearing on the record before an impartial ALJ, including



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Review of Certain Administrative Orders, H. Rep. No. 81-2122 (1950), *as reprinted in* (1950 U.S.C.C.A.N. 4303, 4306) (Congress anticipated that Chapter 158's review procedures would be sufficient because the record before the agencies "will be made in such a way that all questions for the determination of the courts on review, and the facts bearing upon them, will be presented and the rights of the parties will be fully protected.").

The Department should provide procedures that allow for fact-finding and a complete record, including but not limited to:

- Timely discovery from Arizona about its mechanism for appointing postconviction counsel in capital cases, including but not limited to: production of all documents related to the creation or amendment of the mechanism sought to be certified; all documents related to the functioning of the mechanism, including any documents related to the approval or appointment of post-conviction attorneys; a list of all pending cases where Arizona asserts that it appointed counsel pursuant to its mechanism; all filings, orders, fee requests and payments, for each such case; and comprehensive information about Arizona's funding of the mechanism, including payment of attorney's fees and litigation expenses;
- Timely discovery from the Department including all information provided by Arizona in relation to its application, and any correspondence between DOJ and Arizona related to the application or the Final Rule;
- The ability to submit materials under seal (for example, documents pertaining to a defendant's requests for fees and expenses are confidential and cannot be disclosed to the State);
- An evidentiary hearing on Arizona's application;
- Pre- and post-hearing briefing;

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presentation of evidence, testimony from witnesses, and discovery. 28 U.S.C. § 2342(6); 42 U.S.C. § 3612(b)-(d). Final orders of the Surface Transportation Board require discovery (including depositions, requests for admission, and interrogatories), and several hearings. 49 CFR Parts 1100-29. The process typically takes over one year. 49 C.F.R. § 1111.8 (scheduling orders).



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- Notice to all identifiable interested parties (including persons capitolly sentenced or charged, attorneys representing persons capitolly sentenced or charged, agencies that represent persons capitolly sentenced or charged, and federal defenders offices);
- An opportunity to appear through counsel and present evidence by all interested parties, including the opportunity to challenge evidence through cross-examination or rebuttal; and
- A complete, reasoned decision that addresses the information presented to the Department. *See* 28 C.F.R. § 26.23(c) (“The review will include consideration of timely public comments ...”).

By providing for these proceedings, the Department may avoid needlessly prolonging these certification proceedings upon a court determining that additional fact-finding is necessary. *See* 28 U.S.C. § 2347(b)-(c) (requiring additional fact-finding when agency has failed to conduct a hearing or otherwise sufficiently develop the record).

### **III. *The Department Should Extend The Comment Period(s) To 180 Days***

To facilitate effective comments on Arizona's application and the sort of fact-finding necessary for judicial review, a 180-day comment period is appropriate. The 60-day comment period set out by the Department is inadequate given the importance of certification under Chapter 154 and the complexity of the Final Rule, the difficulty in responding to Arizona's barebones application, and the circumstances of those most directly affected by Arizona's application: death-sentenced prisoners who have limited access to the information needed to meaningfully comment on the application.

***The importance of opt-in and complexity of the Final Rule:*** The opt-in scheme and the Final Rule are undeniably important and controversial. Certification under Chapter 154 would upend capital postconviction litigation throughout Arizona, and likely throughout the country as counsel in other states prepare for the fallout of certification in those states. Over the six years it took the Department to issue the Final Rule, the public submitted thousands of comments across multiple comment periods, totaling 286 days. *See* 78 Fed. Reg. 58,161 (procedural history of Final Rule). The Department litigated the Final Rule through March 2017.

The Final Rule itself is complex. The Department must review whether Arizona meets at least four independent requirements for certification. 28 C.F.R. § 26.22. Three of those requirements have various subparts. Additional requirements, such as the requirement that counsel be timely appointed, are included in the Final Rule. 28 C.F.R. § 26.21. Reviewing and



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analyzing Arizona's application in light of those requirements will take a considerable amount of time.

***Arizona's inadequate application:*** Arizona's application, submitted four and half years ago and barely 4 pages long, requests certification dating back to 1998, yet contains no information about what mechanism was in place in 1998 or whether the mechanism has undergone any changes during that time. The application does not compare Arizona's mechanism(s) with the Final Rule, leaving the public to guess how Arizona meets each of the four independent requirements for certification in 28 C.F.R. § 26.22. The public cannot meaningfully comment on Arizona's application.

This alone should sink Arizona's application, but assuming the Department wishes to proceed notwithstanding Arizona's failure to establish compliance with the regulations, this deficiency counsels in favor of granting the public additional time to comment. To adequately respond to Arizona's application, FDO-AZ must investigate Arizona's appointment mechanism, trace its history back to 1998, and evaluate the mechanism's impact on both state postconviction proceedings and federal habeas litigation. Because Arizona has provided no explanation of how its mechanism meets the requirements listed in the Final Rule, this investigation is especially wide-ranging. This includes evaluating postconviction counsel's qualifications, appointment process, and performance in over 100 cases. It also includes investigating the state's payment of litigation expenses and attorney's fees in these cases to determine if the state is adequately funding postconviction review. Some documents pertaining to older cases have been destroyed or are time consuming and difficult to obtain.

***Ability of death-sentenced prisoners to comment:*** A 60-day comment period is not sufficient to allow adequate participation by death-sentenced prisoners. Prisoners have limited, if any, access to the Federal Register and do not have the ability to review Arizona's application online or submit comments online. *See* 28 C.F.R. § 26.23(b) ("the Attorney General will make the request publicly available on the Internet...").<sup>2</sup> They will need to work with their attorneys to review Arizona's application and submit comments, which takes time. The Department must consider these circumstances in evaluating whether a comment period is sufficient. *See Boddie*

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<sup>2</sup> The Arizona Department of Correction's Order 902 (Inmate Legal Access To The Courts), effective July 6, 2013, *available at* [https://corrections.az.gov/sites/default/files/policies/900/0902-effective\\_070613.pdf](https://corrections.az.gov/sites/default/files/policies/900/0902-effective_070613.pdf), does not indicate that prisoners have any access to the Federal Register. On November 9, 2017, I submitted a public records request to the Arizona Department of Corrections seeking records related to capitally sentenced prisoners' ability to access the Federal Register. The request is currently pending.



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*v. Connecticut*, 401 U.S. 371, 380 (1971) (noting that a generally valid notice procedure may fail to satisfy due process because of the particular circumstances of the defendant, and citing an example where notice that would be sufficient for “a normal person” was not sufficient where the interested person is “a known incompetent”); *In re Kendavis Holding Co.*, 249 F.3d 383, 387 (5th Cir. 2001) (citing *Boddie*, and noting that “[w]e therefore assess the sufficiency of notice against the backdrop of the factual circumstances in each case”); *Perales v. Reno*, 48 F.3d 1305, 1313 (2d Cir. 1995) (regarding notice to an immigrant population, noting that “the legislative goal of reaching an uneducated and fearful alien population, sets a more stringent standard than the general due process notice requirements for potential recipients of government benefits”).

In addition, some Arizona prisoners are foreign nationals. Foreign governments are entitled to address the Department to protect the interests of their citizens. *See, e.g.*, Consular Convention, U.S.-Mex., art. 6(2), August 12, 1942, 57 Stat 800; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77. Extending the time period for comments is necessary to permit foreign governments whose nationals have been sentenced to death to review and comment on Arizona's application. The additional time is needed to translate Arizona's application and circulate it to interested officials in foreign governments so that they may solicit and draft comments, which may need to be translated into English for submission to the Department.

#### **IV. *The Department Must Disclose All Communications And Information Regarding Arizona's Request For Certification.***

Regardless of the procedures the Department employs in evaluating Arizona's application, the Department should immediately disclose and publish all communications and information that it possesses regarding Arizona's request for certification, including communications between Arizona and the Department about the Final Rule or Arizona's application, and all information on which the Department is relying in its evaluation of Arizona's appointment mechanism. Such disclosure is required by the Final Rule. The Department's ex parte communications with Arizona officials or reliance on information which the public has not had the opportunity to review severely interferes with the public's ability to make informed comments on Arizona's application for certification.

The Final Rule requires the Department make Arizona's application, “including any supporting materials included in the request,” available for public comment. 28 C.F.R. § 26.23(b) (emphasis added). Likewise, the preamble to the Final Rule implementing Chapter 154 indicates that “States will be free to present any and all information they consider relevant or useful to explain how the mechanism for which they seek certification satisfies” Chapter 154's requirements. 78 Fed. Reg. 58,174. The Final Rule—consistent with the APA's notice requirements—clearly contemplates public comment on any information Arizona has provided in support of its application. *See also Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*,



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419 U.S. 281, 288 n.4 (1974) (“the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation”); *Air Transp. Ass’n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (“the most critical factual material that is used to support the agency’s position on review must have been made public *in the proceeding* and exposed to refutation”).

Additionally, any information that the Department might rely on in evaluating Arizona’s application and making its decision must be included in the administrative record for judicial review. Chapter 158 requires that the record on review contain “*all* of the evidence before the agency,” unless the parties stipulate the information is “wholly immaterial.” 28 U.S.C. § 2112(b) (emphasis added); 28 U.S.C. § 2346 (record on review must comply with 28 U.S.C. § 2112); *see also* 28 U.S.C. § 2347(a)-(b). The APA similarly requires the reviewing court be provided with “the whole record” regarding the Department’s certification decision. 5 U.S.C. § 706. This includes “everything that was before the agency pertaining to the merits of [the] decision.” *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993). Considering that the entire record will be made public during judicial review, there is no reason to withhold from the public information that the Department already has and permit public comment on it.

We are already aware of *ex parte* communications between the Department and the Arizona Attorney General. When Arizona submitted its application four and a half years ago, the application was not published by the Department, but came to light through a press release issued by the Arizona Attorney General’s Office. FDO-AZ then requested that the United States Attorney General notify FDO-AZ of any correspondence or communication between the Department and the Arizona Attorney General’s Office. *See* Attachment A. The Department did not acknowledge or comply with FDO-AZ’s request. Instead, more than two months prior to the publication of the Final Rule, the Department sent a letter to the Arizona Attorney General stating that it would begin reviewing Arizona’s application to “help speed up the ultimate determination of the certification.” FDO-AZ was not copied on the Department’s response to Arizona and did not receive an acknowledgment of a response to its letter. *See* Attachment B.

In the *HCRC v. DOJ* litigation, the Northern District of California found that these “*ex parte* communications severely interfere with the public’s ability to make informed comment on any application for certification.” 2014 WL 3908220, at \*13. If there have been further communications between the Department and the State of Arizona, they should be disclosed immediately.

In addition to these preliminary procedural requests, FDO-AZ and Arizona death-row prisoners will be submitting comments on Arizona’s application for certification.



State of Arizona's Chapter 154 Application  
November 21, 2017  
Page 9

Respectfully,

A handwritten signature in black ink, appearing to read "Elizabeth R. Moulton". The signature is fluid and cursive, with a large initial "E" and "M".

Elizabeth R. Moulton

Attachments

# Attachment A

**Jon M. Sands**  
Federal Public Defender

**direct line:** (602) 382-2816  
**email:** Dale\_Baich@fd.org

June 4, 2013

The Honorable Eric H. Holder, Jr.  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001

RE: Arizona Attorney General Tom Horne's April 18, 2013 correspondence

Dear Mr. Attorney General:

I am writing in regard to the letter sent to you by Arizona Attorney General Tom Horne on April 18, 2013, in which he discussed certification of Arizona's capital post-conviction mechanism to allow Arizona to opt into the expedited federal habeas corpus procedures pursuant to 28 U.S.C. §§ 2261-2266. Our office represents a substantial portion of Arizona death-row prisoners in their federal habeas corpus proceedings. Accordingly, I formally request that we are notified of any correspondence or communication between the Department of Justice and the Arizona Attorney General's Office regarding this letter or the subjects addressed therein.

Thank you very much for your assistance in this matter, and please let me know if you need any additional information or have any questions regarding this request.

Sincerely,

Dale A. Baich  
Supervisor  
Capital Habeas Unit

DAB/jyg



# Attachment B



## U.S. Department of Justice

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Washington, D.C. 20530

RECEIVED

JUL 19 2013

ATTORNEY GENERAL  
EXECUTIVE OFFICE

JUL 16 2013

The Honorable Tom Horne  
Attorney General  
Office of the Attorney General  
State of Arizona  
1275 West Washington Street  
Phoenix, AZ 85007-2926

Dear General Horne:

This responds to your letter to the Attorney General dated April 18, 2013, requesting certification of the State of Arizona under 28 U.S.C. § 2265.

The Department has been and remains engaged in a rulemaking process in connection with the requirements of Section 2265. *See Certification Process for State Capital Counsel System*, 76 Fed. Reg. 11705 (Notice of Proposed Rulemaking, or NPRM); *Certification Process for State Capital Counsel System*, 77 Fed. Reg. 7559 (Supplemental Notice of Proposed Rulemaking, or SNPRM). The NPRM proposed a certification procedure by which the Department would solicit and consider public comments on any request for certification with the goal of enabling the Attorney General to make sound certification decisions on the basis of a robust record that takes into account views of all interested parties. The NPRM also proposed defining, within reasonable bounds, Chapter 154's requirements for certification, in part to provide notice to interested parties of the standards that the Attorney General would apply in making certification decisions.

In formulating the final rule, the Department has given careful consideration to the comments submitted by interested parties. We continue to make progress on the rulemaking—as our recent submission of the final rule for review under Executive Order 12866 indicates. We expect that the final rule will be issued in the near future. In the meantime, the Department will begin reviewing now Arizona's request for certification on the expectation that it may help speed up the ultimate determination of the certification you requested. As part of that review, we will seek to ascertain whether there is any additional information that you can provide now, even though it may not be possible for us to immediately determine all information that is needed.

While we cannot provide at this time a precise date certain by which a decision will be made, please do not hesitate to contact this office should you or another attorney in your office have any questions about the status of the Department's progress in this area. If there is any updated information we are then in a position to provide, we will be glad to provide it.

Sincerely,

A handwritten signature in black ink that reads "Alexa Chappell". The signature is written in a cursive style with a large, prominent initial "A".

Alexa Chappell  
Intergovernmental Liaison

# EXHIBIT F



Orrick, Herrington & Sutcliffe LLP

1000 Marsh Road  
Menlo Park, CA 94025

+1 650-614-7400

orrick.com

December 18, 2017

*Via FedEx and Regulations.gov*

Laurence Rothenberg  
Office of Legal Policy  
Department of Justice  
950 Pennsylvania Avenue, N.W., Room 4234  
Washington, D.C. 20530

Elizabeth R. Moulton

E emoulton@orrick.com

D +1 650-614-7679

F +1 650-614-7401

Re: Docket No. OLP 166: State of Arizona's Application For Opt-in under 28 U.S.C. § 2265(a)

Dear Mr. Rothenberg:

I represent the Office of the Federal Public Defender for the District of Arizona (FDO-AZ) in opposing the State of Arizona's application. I am writing to again request that the Department of Justice extend the comment period on Arizona's application. I previously requested an extension on November 17, 2017, but did not receive a response.

On November 28, 2017, the Department published a letter sent to the State of Arizona seeking to "confirm that the materials [Arizona] previously submitted are still current" and offering Arizona the opportunity to "supplement, modify, or update its request for certification." Although the Department sent the letter to Arizona on November 16, 2017, the letter was not publicly posted until November 28, 2017. On November 27, 2017, the State of Arizona responded to the Department's letter and acknowledged that its published application was inaccurate and incomplete. Attachment A. Despite receiving the letter, the Department has yet to publish it or otherwise inform the public of its existence. FDO-AZ only knew of the letter because the Arizona Attorney General sent FDO-AZ a courtesy copy.

The Department should immediately publish Arizona's letter and extend the comment period in light of Arizona's admission that its original application was inaccurate and incomplete. I again ask that the comment period be extended for 120 days. At a minimum, the comment period should be extended so that the public has a full 60 days to comment on the revised appointment mechanism that Arizona describes in its November 27 letter.

The Department's refusal to engage in a transparent and open administrative process is disturbing. See *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4



State of Arizona's Chapter 154 Application

December 18, 2017

Page 2

(1974) (“the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation”); *Air Transp. Ass’n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (“the most critical factual material that is used to support the agency’s position on review must have been made public *in the proceeding* and exposed to refutation”). I remind the Department that the Northern District of California has already found that these “ex parte communications severely interfere with the public’s ability to make informed comment on any application for certification.” *HCRC v. DOJ*, 2014 WL 3908220, at \*13 (N.D. Cal. Aug. 7, 2014), *vacated and remanded on standing grounds*, 816 F.3d 1241 (9th Cir. 2016).

Such interference in the public comment process is particularly egregious here, where Arizona’s undisclosed letter admits inaccuracies in its published application for certification. Arizona tries to minimize those inaccuracies as “minor” and claims that its appointment mechanism has “remained mostly the same” as the mechanism it described in its published application. Attachment A at 1. This is not true. As just one example, Arizona’s 2013 published application bases its description of the state’s appointment mechanism on an outdated version of Arizona Rule of Criminal Procedure 6.8, which provides the competency and experience standards that counsel must meet to qualify for appointment. The version of Rule 6.8(c) that Arizona cites in its published application required that counsel have some postconviction experience before he or she was qualified for appointment. Arizona, however, amended Rule 6.8(c) in 2011—two years before Arizona’s application—and removed the requirement that postconviction counsel have *any prior postconviction experience*. Arizona’s undisclosed November 27 letter now cites the current version of Rule 6.8, but incorrectly asserts that Arizona meets the benchmark in 28 C.F.R. § 26.22(b)(1) that postconviction counsel have “at least three years of postconviction experience.” Arizona plainly does not meet this requirement, and the public should be given a full opportunity to review and comment on the changes in Arizona’s appointment mechanism based on the correct version of Rule 6.8 that is included in the state’s undisclosed November 27 letter.

The Department should therefore extend the comment period on Arizona’s application to 180 days, or, at a minimum, a full 60 days after the Department discloses and publishes Arizona’s November 27 letter. I also renew the procedural requests in my November 17, 2017 letter.

Respectfully,

Elizabeth R. Moulton

Attachment

**ATTACHMENT A**



Mark Brnovich  
Attorney General

**Office of the Arizona Attorney General**  
Solicitor General's Office/Capital Litigation Section

Lacey Stover Gard  
(520) 628-6654  
Lacey.gard@azag.gov

November 27, 2017

Stephen E. Boyd  
Assistant Attorney General  
Office of Legislative Affairs  
United States Department of Justice  
Main Justice Building, Room 1145  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

**RE: Arizona's opt-in certification under 28 U.S.C. § 2265(a)**

Dear Mr. Boyd:

I write in response to your recent letter notifying Arizona Attorney General Mark Brnovich that the Department of Justice has published a notice in the Federal Register of Arizona's request for certification under 28 U.S.C. § 2265 of its system for providing counsel in postconviction proceedings for prisoners subject to capital sentences. While Arizona's system has remained mostly the same since former Attorney General Tom Horne's April 18, 2013, certification request, I provide below updated information that takes into consideration the Department of Justice's regulations, promulgated after the prior certification request, as well as a few minor changes to Arizona's system for providing postconviction counsel in capital cases.

The statutory requirements under Section 2261 require a State seeking certification to (1) "establish[] a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death," 28 U.S.C. § 2265(a)(1)(A); (2) "offer counsel to all State prisoners under capital sentence," and ensure that the offered counsel did not also represent the prisoner at trial, unless the prisoner and counsel expressly request continued representation, 28 U.S.C. § 2261(c), (d); and (3) provide for the entry of an order by a court of record that (a) appoints counsel upon finding either that the defendant is indigent and accepts the offer of counsel or that the defendant is unable competently to accept or reject the offer, § 2261(c)(1); (b) finds that the defendant declined the offer of counsel with an understanding of its legal consequences, § 2261(c)(2); or (c) denies the appointment of counsel upon finding the defendant is not indigent, § 2261(c)(3).

In 1998, Arizona established procedures to appoint qualified counsel in capital post-conviction proceedings. Pursuant to both statute and rule, after the Arizona Supreme Court has affirmed an

indigent capital defendant's conviction and sentence on direct appeal, post-conviction counsel is automatically appointed. A.R.S. § 13-4041(B); Ariz. R. Crim. P. 32.4(c). As required by 28 U.S.C. § 2261(d), appointed counsel cannot have previously represented the defendant at trial or on direct appeal, unless both counsel and the defendant expressly request continued representation and waive all potential issues foreclosed by continued representation. A.R.S. § 13-4041(C)(3).

Arizona additionally provides for reasonable compensation for appointed counsel as required by 28 U.S.C. § 2265(a)(1)(A). Section 2265(a)(1)(A) sets no requirements for compensation and does not define "reasonable litigation expenses." Department of Justice regulations, however, provide that compensation is presumptively adequate for certification if it is comparable to or exceeds the compensation of:

1. Appointed counsel pursuant to 18 U.S.C. § 3599 in Federal habeas corpus proceedings reviewing State capital cases;
2. Retained counsel in State post-conviction proceedings in capital cases who meet State standards of competency;
3. Appointed counsel in State appellate or trial proceedings in capital cases; or
4. Attorneys representing the State in State post-conviction proceedings in capital cases, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses.

28 C.F.R. § 26.22(c)(1)(i)-(iv). Arizona is not required to meet these regulatory requirements to be certified under 28 U.S.C. § 2265 because they do not appear in the statute, and "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter." 28 U.S.C. § 2265(a)(3). But in any event, Arizona's mechanism for appointment of counsel provides for compensation that is more than adequate under the regulations.

Indigent capital defendants in Arizona are represented during post-conviction proceedings either by the Public Defender or other publicly-funded offices, or by appointed private counsel. A.R.S. § 13-4041(A), (B) & (C). Counsel employed by publicly-funded offices are compensated by salary. *See* A.R.S. § 13-4041(A). Appointed private counsel are compensated at an hourly rate of up to \$100 per hour. A.R.S. § 13-4041(F); Ariz. R. Crim. P. 6.7(a), (b). That rate meets 28 C.F.R. § 26.22(c)(1)(iii)'s requirements because \$100 per hour is also the rate payable to appointed counsel in Arizona appeals in capital cases. (Attachment, excerpt from Maricopa County Office of Public Defense Services, Contract for Indigent Representation.)

Further, the trial court overseeing the post-conviction proceeding is required to review and approve "all reasonable fees and costs." A.R.S. § 13-4041(G). And Arizona provides for payment of all reasonable litigation expenses, such as for investigative and expert assistance, as required by 28 U.S.C. § 2265(a)(1)(A) and 28 C.F.R. § 26.22(d). *See* A.R.S. § 13-4041(I) ("The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by § 13-4232.") Arizona regularly spends well over \$200,000 in attorney fees and litigation costs in capital post-conviction cases, and has spent over \$500,000 in more than one case.

Section 2265 also requires a State to appoint “competent” counsel in post-conviction proceedings. 28 U.S.C. § 2265(a)(1)(A). While the statute leaves “competent” undefined, Department of Justice regulations state that competency standards are presumptively adequate if they provide for appointment of counsel that:

1. Have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience; however, for good cause, a court may appoint other counsel whose background, knowledge, or experience otherwise enables them to properly represent the prisoner, with due consideration of the seriousness of the penalty and unique and complex nature of the litigation; or
2. Meet qualifications standards established in conformity with 42 U.S.C. § 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. § 14163(e)(2)(B), (D), and (E) are also satisfied.

28 C.F.R. § 26.22(b)(1)(i), (ii). The regulations further provide that standards not satisfying the first listed criteria are adequate only if they otherwise reasonably assure a level of proficiency appropriate for State post-conviction litigation in capital cases. 28 C.F.R. § 26.22(b)(2).

Once again, Arizona need not meet the regulation’s competency standards to be certified under 28 U.S.C. § 2265 since the statute does not define what qualifies as “competent” counsel and specifically states that “[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.” 28 U.S.C. § 2265(a)(3). But in any event, Arizona’s strict competency standards for appointed counsel exceed those of 28 C.F.R. § 26.22(b)(1).

To be eligible for appointment in an Arizona capital post-conviction proceeding, counsel must:

1. Have been member in good standing of the State Bar of Arizona for at least five years immediately preceding appointment;
2. Have practiced state criminal litigation for three years immediately preceding appointment;
3. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases;
4. Within three years immediately preceding appointment, have been lead counsel in a trial in which a death sentence was sought, or in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, *and* have prior experience as lead counsel in the appeal of at least three felony convictions and a trial or post-conviction proceeding with an evidentiary hearing. Alternatively, the attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which included first or second-degree murder convictions, *and* lead counsel in at least two felony trials or post-conviction proceedings with evidentiary hearings;

5. Have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense; and
6. Be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases.

Ariz. R. Crim. P. 6.8(a), (c).<sup>1</sup> These competency requirements, mandated by the Arizona Supreme Court, exceed more general competency requirements set out in A.R.S. § 13-4041(C) and 28 C.F.R. § 26.22(b)(1).

In 2002, before Congress amended 28 U.S.C. § 2265 to require the Attorney General of the United States to determine whether a State met the requirements for certification, the United States Court of Appeals for the Ninth Circuit found that, as of July 17, 1998, Arizona's postconviction procedures for capital defendants established a qualified procedure under 28 U.S.C. §§ 2261-65. *Spears v. Stewart*, 283 F.3d 992, 1007 (9th Cir. 2002). The court declined, however, to apply the expedited procedures in that case due to delay in the appointment of postconviction counsel.

As the court of appeals concluded more than 15 years ago, it is clear that Arizona's post-conviction mechanism for appointing qualified counsel in capital cases meets the statutory requirements for certification. Given the Ninth Circuit's finding that Arizona satisfies Congress' requirements, Arizona should be certified to have "opted-in" to the accelerated capital-case review procedures provided by AEDPA. I would be happy to address any questions you may have regarding Arizona's mechanism for appointing counsel in capital post-conviction proceedings.

Sincerely,



Lacey Stover Gard  
Chief Counsel  
Capital Litigation Section  
Office of the Arizona Attorney General

Attachment  
# 6622833

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<sup>1</sup> In exceptional circumstances, and with consent of the Arizona Supreme Court, attorneys who do not meet these requirements may be appointed, provided that the attorney's experience, stature, and record enables the court to conclude that the attorney's ability significantly exceeds the standards set forth above and that the attorney associates with a lawyer who meets the rule's standards. Ariz. R. Crim. P. 6.8(d). However, all appointed counsel must be familiar with, and guided by, the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases. *Id.*

# ATTACHMENT

SERIAL 09020 – ROQ

## SECTION IV CONSIDERATION

**\*\* Effective June 1<sup>st</sup>, 2016 all NEW assignments will adhere to the new payment schedule. Any assignments prior to June 1<sup>st</sup>, 2016 will be compensated at the previous pricing fees. On cases being paid on an hourly basis, all work performed on June 1<sup>st</sup>, 2016 or after, will be compensated at the new rate.**

### 1. COMPENSATION

The following is the schedule of payments for each of the areas of practice and the cases within those areas of practice:

#### CAPITAL OFFENSES

- Lead Counsel ~~\$125~~ **\$140** per hour
- Co-Counsel ~~\$95~~ **\$105** per hour

#### MAJOR FELONY OFFENSES

- First Degree Murder ~~\$70~~ **\$77** per hour
- Second Degree Murder ~~\$70~~ **\$77** per hour
- Manslaughter ~~\$70~~ **\$77** per hour
- Negligent Homicide ~~\$70~~ **\$77** per hour
- All other Offenses ~~\$70~~ **\$77** per hour

#### FELONY OFFENSES

- Class 1, 2 and 3 ~~\$1,250~~ **\$1375**
- Class 4, 5, and 6 ~~\$900~~ **\$1000**
- Felony DUI ~~\$900~~ **\$1000**
- Probation Violation ~~\$250~~ **275**
- RCC/EDC ~~\$400~~ **450**
- Misdemeanors ~~\$400~~ **\$450**
- Witness representation ~~\$300~~ **\$330**

#### APPEALS and PETITION FOR POST-CONVICTION RELIEF

- Capital Appeals ~~\$20,000~~ **\$100 per hour**
- Appeals ~~\$2,000~~ **\$2200**
- Appeal of Misdemeanor Conviction ~~\$1,250~~ **\$1375**
- PCR from Trial ~~\$2,000~~ **\$2200**
- PCR from Plea ~~\$500~~ **\$550**

### 2. MULTIPLE CASES

If a contractor is assigned multiple cases for the same defendant, the contractor shall be paid for the case that would result in the highest payment. If the cases are resolved with plea agreements, either at the same time or different times, the contractor will be paid an amount equal to one-half

## Ex. B: Declaration of Steve Boggs in support of stay motion



1           9.       On September 29, 2010, the Arizona Supreme Court appointed me capital  
2 postconviction counsel—Stephen Duncan—pursuant to Arizona Rule of Criminal Procedure  
3 6.8(d). I was without postconviction counsel for 835 days following issuance of the Arizona  
4 Supreme Court’s opinion affirming my conviction and sentence on direct appeal.

5           10.       I filed my petition for postconviction relief on March 15, 2012, and filed an amended  
6 petition on August 31, 2012.

7           11.       The Maricopa County Superior Court denied my petition for postconviction relief  
8 on January 30, 2013. The Superior Court denied my motion for rehearing of the petition on June  
9 21, 2013. The Arizona Supreme Court affirmed the Superior Court’s decision September 24, 2014  
10 (No. CR-14-0074-PC).

11           12.       The Office of the Federal Public Defender for the District of Arizona was appointed  
12 as my federal habeas counsel on October 2, 2014.

13           13.       I filed a petition for writ of habeas corpus in the United States District Court for the  
14 District of Arizona on September 4, 2015. *See Boggs v. Ryan*, No. 14-CV-2165 (Snow, J.,  
15 presiding). My petition was timely filed under the statute of limitations applicable to my petition  
16 under Title 28, Chapter 153, 28 U.S.C. § 2244 (d)(1), (2).

17           14.       The district court denied my habeas petition on March 27, 2020. *See Boggs v. Shinn*,  
18 2020 WL 1494491 (D. Ariz. March 27, 2020). My deadline to appeal that decision has not yet  
19 passed.

20           15.       I stand to be significantly harmed by the United States Attorney General’s decision  
21 to certify Arizona pursuant to Chapter 154. Many of those harms are imminent if the certification  
22 decision is not stayed pending judicial review.

23           16.       At the outset, I will need to promptly investigate and prepare to litigate whether  
24 Chapter 154 applies to my case. I would not undertake that investigation absent the certification  
25 of Arizona. By statute, Chapter 154’s restrictions apply to my case only if, among other things, my  
26 postconviction counsel was appointed “pursuant to” the state’s now-certified mechanism for  
27 appointing postconviction counsel. 28 U.S.C. § 2261(b)(2). The Department’s Order certifying  
28 Arizona provides that “[a]scertaining whether counsel was appointed pursuant to the certified

1 mechanism” is a matter to be determined in a prisoner’s federal habeas proceedings. 85 Fed. Reg.  
2 20,711; *see also id.* at 20,712 (“Whether [counsel has been appointed pursuant to the certified  
3 mechanism] is . . . a matter to be decided by the federal habeas court to which the case is  
4 presented.”); *id.* at 20,716 (“[T]he current provisions of chapter 154 assign the determination  
5 whether a State has appointed counsel in compliance with its own system in a particular case to the  
6 federal habeas court presented with the case.”).

7 17. Specifically, I will therefore need to investigate the qualifications of my  
8 postconviction counsel, the circumstances of his appointment to my case, the information contained  
9 in his original application for postconviction appointments with the Arizona Supreme Court, and  
10 the process by which the Arizona Supreme Court evaluated his qualifications. I will also need to  
11 investigate my attorney’s other capital post-conviction appointments. That investigation is  
12 necessary to determine whether my postconviction counsel was appointed “pursuant to” Arizona’s  
13 mechanism. I would not undertake that investigation absent certification, because whether my  
14 attorney’s appointment was pursuant to Arizona’s now-certified mechanism for appointment is not  
15 relevant to habeas litigation under Chapter 153.

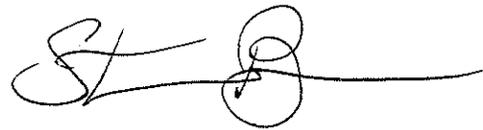
16 18. If a court finds that my capital postconviction attorney was appointed pursuant to  
17 Arizona’s mechanism, I will then have to litigate how Chapter 154’s restrictions apply to my case.  
18 If I prevail in challenging the denial of my federal habeas petition, I will have to prepare to litigate  
19 whether I can then amend my petition or pursue certain claims that the State may contend are  
20 defaulted or were not “decided on the merits in the State courts,” 28 U.S.C. § 2264(a). The  
21 Department’s Order states (at 85 Fed. Reg. 20,711-12) that questions about the specific application  
22 of Chapter 154 to an individual’s case are matters for federal habeas courts, and my attorneys will  
23 need to devote resources to prepare to litigate these questions.

24 19. Even if I do not succeed in challenging the district court’s denial of my habeas  
25 petition, Chapter 154 would still potentially affect my case. For instance, Chapter 154 changes the  
26 availability of stays of execution. Pursuant to 28 U.S.C. § 2262(c), no federal court may enter a  
27 stay of execution unless certain conditions are present. If the state court enters a warrant or order  
28

1 sets an execution date, I will likely have to litigate the application of § 2262(c) to my case. I would  
2 not have to undertake that litigation absent the Attorney General's certification.

3 20. In short, the application of Chapter 154 to my case would have significant,  
4 immediate, and far-ranging consequences for me. I have therefore joined with the other petitioners  
5 in bringing this Petition for Review of the Attorney General's decision certifying Arizona under  
6 Chapter 154.

7 I declare under penalty of perjury under the laws of the United States of America and  
8 Arizona that the foregoing is true and correct and that I have signed this declaration on this  
9 \_\_\_\_\_ day of April, 2020.



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Steve Boggs

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# EXHIBIT A

**Comment Opposing Arizona's Certification as an Opt-in State pursuant to 28 U.S.C. § 2265 et seq.**

My name is Steve Alan Boggs, and I was sentenced to death by the Maricopa County Superior Court in May 2005. I am currently imprisoned on Arizona's death row. After my direct appeal was over, I did not receive appointment of state post-conviction counsel for 903 days—two-and-a-half years. If Arizona was an opt-in state at that time, the statute of limitations for federal habeas proceedings would have run out long before I even had a lawyer.

After that delay, Stephen Duncan was appointed to represent me, and his representation of me was deficient in almost every way. If Arizona's mechanism is certified, it would seriously impair my ability to present my federal constitutional claims to the federal courts, especially because Duncan did not raise many of the claims he should have pursued while he represented me.

My trial counsel, Herman Alcantar and Nate Carr, are notorious in Arizona for their poor legal representation in capital cases. Because they handled my trial, I have numerous claims of constitutional violations that occurred at trial, but almost none of these were presented by Duncan. Duncan acted like he knew what he was doing, but actually performed almost none of the necessary work. His job was to investigate and present new, extra-record evidence to the state post-conviction court, but with the exception of one affidavit, all of the evidence he submitted to the court consisted of transcripts that were already part of the state-court record. And, while he represented me, he was suspended or on probation from the state bar based on disciplinary proceedings for lying to a client in another case.

Based on the numerous problems with my state post-conviction lawyer, I oppose Arizona's attempt to be certified. I know that Arizona's system does not work because my lawyer was not competent to represent me. As a result, many of my significant constitutional claims were not presented until my federal habeas petition was filed. Because of Duncan's ineffectiveness, I did not receive a hearing on the claims that were raised in my post-conviction proceedings, and as a result, almost no new evidence was presented there. I also agree with the comment submitted by the Office of the Federal Public Defender for the District of Arizona, and join it fully.

Thank you for considering my comments.



Steve Alan Boggs, ADC # 195143



PHOENIX  
AZ 852  
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Federal Public Defender  
APR 22 2020

Capital Habeas Unit  
Phoenix, Arizona

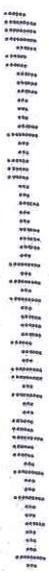
ATTN: *Jennifer Garcia*  
Capital Habeas Unit  
Office of the Federal Public Defender  
850 West Adams Street, Suite 201  
Phoenix, AZ 85007

Steve Boggs, #195143  
ASPC - Florence - Central Unit  
P.O. Box 8200  
Florence, AZ 85132

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Phoenix, Arizona

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85007-27555

# Ex. C: Declaration of Alan Champagne in support of stay motion



1           9.       On September 19, 2019, the Arizona Supreme Court appointed me capital  
2 postconviction counsel, Tim Agan.

3           10.       I filed my initial petition for postconviction relief on March 17, 2020.

4           11.       I stand to be gravely harmed by the United States Attorney General's decision to  
5 certify Arizona pursuant to Chapter 154. Many of those harms are imminent if the certification  
6 decision is not stayed pending judicial review.

7           12.       If Chapter 154 is found to apply to my case, I would be subject to 28 U.S.C. §  
8 2263(a)'s shortened 180-day statute of limitations to file a federal habeas petition. If the deadline  
9 is not tolled during my time spent preparing and filing my petition for a writ of certiorari from the  
10 United States Supreme Court, I will have already lost 159 of the 180 days.

11           13. \*       Even assuming I will have the full 180-day period allowed by Chapter 154 to file  
12 my federal habeas petition, that deadline is half what it was under Chapter 154. The shortened  
13 deadline will significantly curtail my ability to investigate, develop, and present claims in that  
14 petition. At the outset of my federal habeas proceedings, I will have to make decisions about  
15 which claims to pursue without the benefit of having a complete investigation of all potentially  
16 meritorious claims.

17           14.       Further, the application of Chapter 154 to my habeas proceedings would strictly  
18 limit my ability to raise procedurally defaulted claims and to amend my habeas petition, pursuant  
19 to 28 U.S.C. § 2264(a) and 28 U.S.C. § 2266(b)(3)(B).

20           15.       The application of Chapter 154 to my case would also entail an expedited review  
21 process by the judiciary. The federal district court would have to enter final judgment on my  
22 habeas petition either within 450 days of my filing it, or within 60 days after the petition is  
23 submitted for decision—whichever is earlier. 28 U.S.C. § 2266(b). A federal court of appeals  
24 would then have to hear and render a final determination of any appeal I bring under Chapter 154  
25 not later than 120 days after the filing date of my reply brief or, if I choose not to file a reply  
26 brief, the appellee's answering brief. 28 U.S.C. § 2266(c)(1)(A). That shortened review timeline  
27 would significantly impact the depth and quality of judicial review of the claims I raise in my  
28 petition. Under Chapter 153, I would not be subjected to such expedited review of my claims.

1           16.     Given those stakes, I will need to promptly take steps to determine whether and how  
2 Chapter 154 applies to my case, including investigating and preparing to litigate novel legal  
3 questions. By statute, Chapter 154's restrictions apply to my case only if, among other things, my  
4 postconviction counsel were appointed "pursuant to" the state's now-certified mechanism for  
5 appointing such counsel. 28 U.S.C. 2261(b)(2). The Department's Order certifying Arizona  
6 provides that "[a]scertaining whether counsel was appointed pursuant to the certified mechanism"  
7 is a matter to be determined in a prisoner's federal habeas proceedings. 85 Fed. Reg. 20,711; *see*  
8 *also id.* at 20,712 ("Whether [counsel has been appointed pursuant to the certified mechanism] is  
9 . . . a matter to be decided by the federal habeas court to which the case is presented"); *id.* at 20,716  
10 ("[T]he current provisions of chapter 154 assign the determination whether a State has appointed  
11 counsel in compliance with its own system in a particular case to the federal habeas court presented  
12 with the case.").

13           17.     Specifically, I will therefore need to investigate the qualifications of my  
14 postconviction counsel once he or she is appointed, the circumstances of that appointment, the  
15 information contained in the attorney's original application for postconviction appointments with  
16 the Arizona Supreme Court, and the process by which the Arizona Supreme Court evaluated my  
17 attorney's qualifications. I will also need to investigate my attorney's other capital post-conviction  
18 appointments. That investigation is necessary to determine whether my postconviction counsel  
19 was appointed "pursuant to" Arizona's mechanism. I would not undertake that litigation  
20 preparation absent certification, because whether my attorney's appointment was pursuant to  
21 Arizona's now-certified mechanism for appointment is not relevant to habeas litigation under  
22 Chapter 153. And that investigation and litigation preparation would take away resources that  
23 could have been spent investigating potentially meritorious claims to raise in both my state  
24 postconviction review petition and in my federal habeas petition.

25           18.     In short, the application of Chapter 154 to my case would have serious  
26 consequences for me. I have therefore joined with the other petitioners in bringing this Petition  
27 for Review of the Attorney General's decision certifying Arizona pursuant to Chapter 154.  
28

1 I declare under penalty of perjury under the laws of the United States of America and  
2 Arizona that the foregoing is true and correct and that I have signed this declaration on this  
3 24th day of April, 2020.

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6 Alan Champagne

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# EXHIBIT A

**Comment Opposing the State of Arizona's Application for  
Certification as an Opt-in State (Docket No. OLP 166)**

My name is Garrett Simpson and I am writing on behalf of my client Alan Champagne, who is a prisoner on Arizona's death row and was sentenced to death September 6, 2017, by the Superior Court of Maricopa County, Arizona. The Arizona Supreme Court appointed me as appellate counsel in Mr. Champagne's case on September 6, 2017.

I am writing to you today on Mr. Champagne's behalf and with his permission in response to Arizona's application for certification as an "opt-in" state. Mr. Champagne opposes this request for certification.

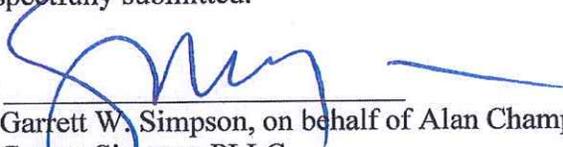
As explained below, Arizona's mechanism is not adequate. Should the United States Attorney General certify Arizona's inadequate mechanism, Mr. Champagne's ability to develop claims and obtain relief in federal habeas proceedings would be at serious risk. Certification would force him to make immediate decisions regarding the development and presentation of his claims for relief in state and federal court.

Certification would also require Mr. Champagne to engage in an additional layer of federal litigation to determine whether the opt-in provisions apply in his case.

Arizona has not established an adequate mechanism for the appointment, compensation, and payment of reasonable litigation expenses of counsel in state capital postconviction proceedings. Arizona's mechanism does not meet any of the competency benchmarks and fails to create alternative standards that would assure competent counsel. Arizona's mechanism simply is not the robust state appointment system envisioned by the Powell Committee and Congress. Certification of Arizona's mechanism would undermine habeas protections for death-row prisoners in Arizona. As a result, Arizona should not be certified under 28 U.S.C. section 2265.

For these reasons, and the reasons identified in the comment of the Arizona Federal Public Defender, my client opposes Arizona's application.

Respectfully submitted.

By 

Garrett W. Simpson, on behalf of Alan Champagne ADOC #078291  
Garrett Simpson PLLC  
Attorney for Alan Champagne



Alan Champagne  
ADC # 078291  
ASPC, Florence-Central Unit  
P. O. Box 8200  
Florence, AZ 85132

*Unit Eyman/Browning*

PHOENIX  
AZ 852

ARIZONA DEPARTMENT  
OF CORRECTIONS  
LEGAL MAIL

LEGAL &  
CONFIDENTIAL

ATTN: Jennifer Garcia  
Capital Habeas Unit  
Office of the Federal Public Defender  
850 West Adams Street, Suite 201  
Phoenix, AZ 85007

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Federal Public Defender  
Phoenix, Arizona

85007-275551



# Ex. D: Declaration of Mike Gallardo in support of stay motion



1           9.       On February 3, 2011, the Arizona Supreme Court appointed me capital  
2 postconviction counsel in the Maricopa County Public Defender’s Office, pursuant to Arizona  
3 Revised Statute 13-4041. I was without postconviction counsel for 65 days following issuance of  
4 the Arizona Supreme Court’s opinion affirming my conviction and sentence on direct appeal.

5           10.       I filed my petition for postconviction relief on April 6, 2011, and filed an amended  
6 petition on March 22, 2013.

7           11.       The Maricopa County Superior Court denied my petition for postconviction relief  
8 on April 5, 2016. The Superior Court then denied my motion for rehearing of the petition on April  
9 26, 2016. The Arizona Supreme Court affirmed the trial court’s decision on May 8, 2018.

10          12.       The Office of the Federal Public Defender for the District of Arizona was appointed  
11 as my federal habeas counsel on May 21, 2018.

12          13.       I filed a petition for writ of habeas corpus in the United States District Court for the  
13 District of Arizona on September 26, 2018. *See Gallardo v. Ryan*, No. 18-CV-01500 (Logan, J.,  
14 presiding). My petition was timely filed under the statute of limitations applicable to my petition  
15 under Title 28, Chapter 153. The petition remains pending in district court.

16          14.       I stand to be significantly harmed by the United States Attorney General’s decision  
17 to certify Arizona pursuant to Chapter 154. Many of those harms are imminent if the certification  
18 decision is not stayed pending judicial review.

19          15.       At the outset, I will need to promptly investigate the application of Chapter 154 to  
20 my case. I would not undertake that investigation absent the certification of Arizona. By statute,  
21 Chapter 154’s restrictions apply to my case only if, among other things, my postconviction counsel  
22 were appointed “pursuant to” the state’s now-certified mechanism for appointing such counsel. 28  
23 U.S.C. § 2261(b)(2). The Department’s Order certifying Arizona provides that “[a]scertaining  
24 whether counsel was appointed pursuant to the certified mechanism” is a matter to be determined  
25 in a prisoner’s federal habeas proceedings. 85 Fed. Reg. 20,711; *see also id.* at 20,712 (“Whether  
26 [counsel has been appointed pursuant to the certified mechanism] is . . . a matter to be decided by  
27 the federal habeas court to which the case is presented.”); *id.* at 20,716 (“[T]he current provisions  
28

1 of chapter 154 assign the determination whether a State has appointed counsel in compliance with  
2 its own system in a particular case to the federal habeas court presented with the case.”).

3 16. Specifically, I will therefore need to investigate the qualifications of my  
4 postconviction counsel, the circumstances of their appointment to my case, the information  
5 contained in their original application for postconviction appointments with the Arizona Supreme  
6 Court, and the process by which the Arizona Supreme Court evaluated their qualifications. I will  
7 also need to investigate my attorneys’ other capital postconviction appointments. That  
8 investigation is necessary to determine whether my postconviction counsel were appointed  
9 “pursuant to” Arizona’s mechanism. I believe I have a strong argument that my postconviction  
10 counsel were *not* appointed “pursuant to” Arizona’s mechanism because Arizona Rule of Criminal  
11 Procedure 6.8 does not provide for the appointment of a public defender office, but rather requires  
12 appointment of individual counsel from a list of pre-approved attorneys. I would not undertake  
13 that investigation absent certification, because whether my attorneys’ appointment was pursuant to  
14 Arizona’s now-certified mechanism for appointment is not relevant to habeas litigation under  
15 Chapter 153.

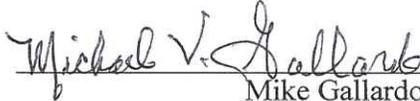
16 17. If a court finds that my capital postconviction attorneys were appointed pursuant to  
17 Arizona’s mechanism, I will then have to litigate whether and how Chapter 154’s restrictions apply  
18 to my case. I will have to prepare to litigate, for example, whether Chapter 154 can apply  
19 retroactively to my case; the Attorney General’s decision sets out May 19, 1998 as the effective  
20 date of the certification under 28 U.S.C. 2265(a)(2). 85 Fed. Reg. 20,718-19. I will similarly have  
21 to prepare to litigate whether my federal habeas petition, which, as noted, was timely filed under  
22 Chapter 153, was not timely filed under Chapter 154 given Chapter 154’s different timing  
23 provisions. *See* 28 U.S.C. § 2263; 85 Fed. Reg. 20,719 (acknowledging “uncertainty” about how  
24 Chapter 154’s time limits will apply). I will also have to investigate whether I can amend my  
25 petition, pursue certain claims that the State may contend are defaulted or were not “decided on the  
26 merits in the State courts,” 28 U.S.C. § 2264(a), or receive certain stays of execution under Chapter  
27 154. The Department’s Order states (at 85 Fed. Reg. 20,711-12) that questions about the specific  
28

1 application of Chapter 154 to an individual's case are matters for federal habeas courts, and my  
2 attorneys will need to devote resources to prepare to litigate these questions.

3 18. In addition, the application of Chapter 154 to my case would entail an expedited  
4 review process by the judiciary. The federal district court would have to enter final judgment on  
5 my habeas petition either within 450 days of my filing it, or within 60 days after the petition is  
6 submitted for decision—whichever is earlier. 28 U.S.C. § 2266(b). A federal court of appeals  
7 would then have to hear and render a final determination of any appeal I bring under Chapter 154  
8 not later than 120 days after the filing date of my reply brief or, if I choose not to file a reply brief,  
9 the appellee's answering brief. 28 U.S.C. § 2266(c)(1)(A). That shortened review timeline would  
10 significantly impact the depth and quality of judicial review of the claims I raise in my petition.  
11 Under Chapter 153, I would not be subjected to such expedited review of my claims.

12 19. In short, the application of Chapter 154 to my case would have significant,  
13 immediate, and far-ranging consequences for me. I have therefore joined with the other petitioners  
14 in bringing this Petition for Review of the Attorney General's decision certifying Arizona under  
15 Chapter 154.

16 I declare under penalty of perjury under the laws of the United States of America and  
17 Arizona that the foregoing is true and correct and that I have signed this declaration on this  
18 27 day of April, 2020.

19  
20  
21   
22 Mike Gallardo

# EXHIBIT A

**Comment Opposing the State of Arizona's Application for Certification as an Opt-in State.**

My name is Michael Gallardo and I was sentenced to death by an Arizona court. I remain a prisoner on Arizona's death row.

The Arizona Supreme Court appointed postconviction counsel in my case on February 3, 2011. I waited 65 days for the appointment of postconviction counsel following the Arizona Supreme Court's opinion affirming my conviction and sentence on direct appeal.

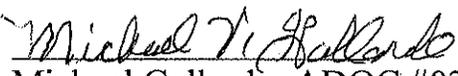
I am writing to you today, because Arizona applied to be certified as an "opt-in" state. I oppose this request for certification.

As explained below, Arizona's mechanism is not adequate. Should the United States Attorney General certify Arizona's inadequate mechanism, my ability to develop claims and obtain relief in federal habeas proceedings would be at serious risk. Certification would force me to make immediate decisions regarding the development and presentation of my claims for relief in state and federal court. Certification would also require me to engage in an additional layer of federal litigation to determine whether the opt-in provisions apply in my case.

Arizona has not established an adequate mechanism for the appointment, compensation, and payment of reasonable litigation expenses of counsel in state capital postconviction proceedings. Arizona's mechanism does not meet any of the competency benchmarks and fails to create alternative standards that would assure competent counsel. Arizona's mechanism simply is not the robust state appointment system envisioned by the Powell Committee and Congress. Certification of Arizona's mechanism would undermine habeas protections for death-row prisoners in Arizona. As a result, Arizona should not be certified under 28 U.S.C. section 2265.

For these reasons, and the reasons identified in the comment of the Arizona Federal Public Defender, I oppose Arizona's application.

Respectfully submitted.

  
Michael Gallardo, ADOC #036366



PHOENIX AZ 852  
27 APR 2020 PM 3 L

INMATE MAIL: ARIZONA DEPARTMENT OF CORRECTIONS

Inmate Michael V. Sallard  
ADC# 036366  
Arizona State Prison Complex Phoenix  
Unit Central P.B. 8200  
City Phoenix AZ 85132

Legal Mail

*Charlotte Merrill*  
*Federal Public Defender*  
*District of Arizona*  
*Capital Towers North*  
*850 W. Adams St, Suite 201*  
*Phoenix, Arizona*

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**APR 28 2020**  
**Federal Public Defender**  
**Phoenix, Arizona**

85007-2730

85007-2730

# Ex. E: Declaration of Alvin Kiles in support of stay motion



1           9.       On August 8, 2011, the Arizona Supreme Court appointed me capital  
2 postconviction counsel—Kerrie Droban and Sharmila Roy—pursuant to Arizona Rule of  
3 Criminal Procedure 6.8(c). I was without postconviction counsel for 448 days following issuance  
4 of the Arizona Supreme Court’s opinion affirming my conviction and sentence on direct appeal.

5           10.       I filed my petition for postconviction relief on November 24, 2014.

6           11.       The Yuma County Superior Court denied my petition for postconviction relief on  
7 February 3, 2016. The Arizona Supreme Court affirmed the trial court’s decision on October 17,  
8 2017.

9           12.       The Office of the Federal Public Defender for the District of Arizona was appointed  
10 as my federal habeas counsel on November 9, 2017.

11           13.       I filed a petition for writ of habeas corpus in the United States District Court for the  
12 District of Arizona on September 26, 2018. *See Kiles v. Ryan*, No. 17-CV-4092 (Snow, J.,  
13 presiding). My petition was timely filed under the statute of limitations applicable to my petition  
14 under Title 28, Chapter 153. The petition remains pending in district court.

15           14.       I stand to be significantly harmed by the United States Attorney General’s decision  
16 to certify Arizona pursuant to Chapter 154. Many of those harms are imminent if the certification  
17 decision is not stayed pending judicial review.

18           15.       At the outset, I will need to promptly investigate the application of Chapter 154 to  
19 my case. I would not undertake that investigation absent the certification of Arizona. By statute,  
20 Chapter 154’s restrictions apply to my case only if, among other things, my postconviction counsel  
21 were appointed “pursuant to” the state’s now-certified mechanism for appointing postconviction  
22 counsel. 28 U.S.C. § 2261(b)(2). The Department’s Order certifying Arizona provides that  
23 “[a]scertaining whether counsel was appointed pursuant to the certified mechanism” is a matter to  
24 be determined in a prisoner’s federal habeas proceedings. 85 Fed. Reg. 20,711; *see also id.* at  
25 20,712 (“Whether [counsel has been appointed pursuant to the certified mechanism] is . . . a matter  
26 to be decided by the federal habeas court to which the case is presented.”); *id.* at 20,716 (“[T]he  
27 current provisions of chapter 154 assign the determination whether a State has appointed counsel  
28

1 in compliance with its own system in a particular case to the federal habeas court presented with  
2 the case.”).

3 16. Specifically, I will therefore need to investigate the qualifications of my  
4 postconviction counsel, the circumstances of their appointment to my case, the information  
5 contained in their original applications for postconviction appointments with the Arizona Supreme  
6 Court, and the process by which the Arizona Supreme Court evaluated their qualifications. I will  
7 also need to investigate my attorneys’ other capital postconviction appointments. That  
8 investigation is necessary to determine whether the attorneys were appointed “pursuant to”  
9 Arizona’s mechanism. I would not undertake those investigations absent certification, because  
10 whether my attorneys appointment was pursuant to Arizona’s now-certified mechanism for  
11 appointment is not relevant to habeas litigation under Chapter 153.

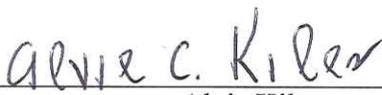
12 17. If a court finds that my capital postconviction attorneys were appointed pursuant to  
13 Arizona’s mechanism, I will then have to litigate whether and how Chapter 154’s restrictions apply  
14 to my case. I would not undertake that litigation absent certification. I will have to litigate, for  
15 example, whether Chapter 154 can apply retroactively to my case; the Attorney General’s decision  
16 sets out May 19, 1998 as the effective date of the certification under 28 U.S.C. 2265(a)(2). I will  
17 similarly have to prepare to litigate whether my federal habeas petition, which, as noted, was timely  
18 filed under Chapter 153, was not timely filed under Chapter 154 given Chapter 154’s different  
19 timing provisions. *See* 28 U.S.C. § 2263; 85 Fed. Reg. 20,719 (acknowledging “uncertainty” about  
20 how Chapter 154’s time limits will apply). I will also have to investigate whether I can amend my  
21 petition, pursue certain claims that the State may contend are defaulted or were not “decided on the  
22 merits in the State courts,” 28 U.S.C. § 2264(a), or receive certain stays of execution under Chapter  
23 154. The Department’s Order states (at 85 Fed. Reg. 20,711-12) that questions about the specific  
24 application of Chapter 154 to an individual’s case are matters for federal habeas courts, and my  
25 attorneys will need to devote resources to prepare to litigate these questions.

26 18. In addition, the application of Chapter 154 to my case would entail an expedited  
27 review process by the judiciary. The federal district court would have to enter final judgment on  
28 my habeas petition either within 450 days of my filing it, or within 60 days after the petition is

1 submitted for decision—whichever is earlier. 28 U.S.C. § 2266(b). A federal court of appeals  
2 would then have to hear and render a final determination of any appeal I bring under Chapter 154  
3 not later than 120 days after the filing date of my reply brief or, if I choose not to file a reply brief,  
4 the appellee’s answering brief. 28 U.S.C. § 2266(c)(1)(A). That shortened review timeline would  
5 significantly impact the depth and quality of judicial review of the claims I raise in my petition.  
6 Under Chapter 153, I would not be subjected to such expedited review of my claims.

7 19. In short, the application of Chapter 154 to my case would have significant,  
8 immediate, and far-ranging consequences for me. I have therefore joined with the other petitioners  
9 in bringing this Petition for Review of the Attorney General’s decision certifying Arizona under  
10 Chapter 154.

11 I declare under penalty of perjury under the laws of the United States of America and  
12 Arizona that the foregoing is true and correct and that I have signed this declaration on this  
13 20th day of April, 2020.

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17 Alvie Kiles  
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# EXHIBIT A

**Comment in response to Arizona's Opt-in Application.**

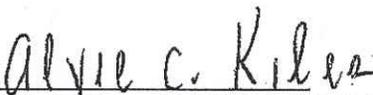
My name is Alvie Kiles and I was sentenced to death by an Arizona court. I remain a prisoner on Arizona's death row. The Arizona Supreme Court affirmed my conviction and death sentence on direct appeal. The Court took 721 days to appoint postconviction counsel in my case. Postconviction counsel was ultimately appointed on August 1, 2011.

The Arizona Attorney General requests certification of Arizona's mechanism for appointing postconviction counsel in capital cases. I oppose certification of Arizona's inadequate mechanism. Certification of Arizona's ineffective mechanism would put my ability to seek and obtain remedies in federal habeas proceedings at serious risk. The shortened statute of limitations and limitations on relief and amendment applicable under 28 U.S.C. sections 2265-2266 would burden my efforts to investigate and raise meritorious claims. Certification would also result in a significant burden because I would have to litigate whether the opt-in provisions apply in my particular case. In addition, I would have to make difficult decisions regarding the development and presentation of my claims for relief in both state and federal postconviction proceedings.

Arizona does not meet the requirements for certification as an opt-in state. Arizona's mechanism does not uniformly guarantee the payment of reasonable litigation expenses because payment of such expenses is at the discretion of state courts and county agencies and practices vary from county to county. Arizona's application also raises retroactivity concerns that are fatal to certification. Arizona's postconviction review procedures, in combination with the alternative tolling provisions applicable in opt-in states, may result in prisoners losing their entire 180-day federal statute of limitations before even entering state postconviction review. The United States Attorney General should not certify such a mechanism.

For these reasons, I oppose Arizona's application.

Thank you,

  
Alvie Kiles, ADOC # 058243



PHOENIX  
AZ 852  
21 APR 20  
PM 10:1

Alvie Kiles #058243  
ASPC Florence - Central Unit  
P.O. Box 8500  
Florence, AZ 85132

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APR 22 2020

Federal Public Defender  
Phoenix, Arizona

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Phoenix, AZ 85007

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Federal Public Defender

APR 22 2020

Capital Habeas Unit  
Phoenix, Arizona



85007-275551

Ex. F: Declaration of Thomas J.  
Phalen on behalf of Pete Rogovich in  
support of stay motion

1           **DECLARATION OF THOMAS J. PHALEN ON BEHALF OF PETE ROGOVICH**  
2           **IN SUPPORT OF PETITION FOR REVIEW AND STAY OF**  
3           **THE UNITED STATES ATTORNEY GENERAL'S APRIL 14, 2020 ORDER**  
          **CERTIFYING ARIZONA UNDER CHAPTER 154, 28 U.S.C. §§ 2261-2266**

4           I, Thomas J. Phalen, hereby declare that I have personal knowledge of the matters set  
5 forth herein and the following information is true to the best of my knowledge and belief:

6           1.       I currently represent Arizona death-row prisoner Pete Rogovich in his ongoing  
7 Arizona state postconviction proceedings.

8           2.       Mr. Rogovich is a petitioner in the above-captioned petition for review of the  
9 Department of Justice's April 14, 2020 Order (AG Order No. 4666-2020) certifying Arizona  
10 under Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 ("Chapter 154"),  
11 28 U.S.C. §§ 2261-2266. *See* 85 Fed. Reg. 20,705 ("Certification of Arizona Capital Counsel  
12 Mechanism").

13          3.       Mr. Rogovich is indigent and suffers from schizoaffective disorder, bipolar type,  
14 which means he is both schizophrenic and manic-depressive. Because of Mr. Rogovich's severe  
15 mental illness, I have concerns about his ability to make legal decisions.

16          4.       Given those concerns, I submit this comment on Mr. Rogovich's behalf in support  
17 of the petition for review and motion to stay the Department's Order.

18          5.       Mr. Rogovich has a concrete and significant stake in Arizona's application for  
19 certification and the Attorney General's decision now granting the application.

20          6.       On March 7, 2018, I filed an administrative comment on Mr. Rogovich's behalf,  
21 opposing Arizona's request for certification under Chapter 154. That comment is attached as  
22 Exhibit A.

23          7.       During the administrative rulemaking process leading to issuance of the  
24 regulations governing certification (28 C.F.R. Part 26, Subpart B), the Federal Public Defender  
25 for the District of Arizona submitted comments on Mr. Rogovich's behalf opposing the proposed  
26 regulations.

27          8.       Mr. Rogovich was convicted and sentenced to death on June 9, 1995, in Maricopa  
28 County Superior Court (No. CR 92-02443).

1           9.       The Arizona Supreme Court affirmed Mr. Rogovich's conviction and sentence on  
2 direct review on February 4, 1997 (No. 95-0288-AP).

3           10.       Mr. Rogovich filed a petition for writ of certiorari with the United States Supreme  
4 Court on May 2, 1997 (No. 96-9012). The Supreme Court denied the petition on October 6,  
5 1997. 522 U.S. 829 (1997).

6           11.       On February 4, 1999, the Arizona Supreme Court appointed Mr. Rogovich capital  
7 postconviction counsel, Treasure VanDreumel. Mr. Rogovich was without postconviction  
8 counsel for 730 days following issuance of the Arizona Supreme Court's opinion affirming his  
9 conviction and sentence on direct appeal.

10          12.       Mr. Rogovich is currently in state postconviction proceedings, where he is litigating  
11 a successive postconviction petition.

12          13.       Although Mr. Rogovich has already completed one round of federal habeas review,  
13 he still stands to be significantly harmed by the United States Attorney General's decision to certify  
14 Arizona pursuant to Chapter 154. Many of those harms are imminent if the certification decision  
15 is not stayed pending judicial review.

16          14.       For example, Chapter 154 changes the availability of stays of execution. Pursuant  
17 to 28 U.S.C. § 2262(c), no federal court may enter a stay of execution unless certain conditions are  
18 present. If the state court denies Mr. Rogovich's petition for postconviction relief and enters a  
19 warrant or order setting an execution date, he will likely have to litigate the application of § 2262(c)  
20 to his case. He would not have to undertake that litigation absent the Attorney General's  
21 certification.

22          15.       Mr. Rogovich will therefore need to promptly investigate and prepare to litigate  
23 whether Chapter 154 applies to his case. He would not undertake this investigation absent the  
24 Attorney General's certification. By statute, Chapter 154's restrictions apply to his case only if,  
25 among other things, his postconviction counsel were appointed "pursuant to" the state's now-  
26 certified mechanism for appointing postconviction counsel. 28 U.S.C. § 2261(b)(2). Mr. Rogovich  
27 will therefore need to investigate the qualifications of his postconviction counsel, the circumstances  
28 of their appointment to his case, the information contained in their original application for

1 postconviction appointments with the Arizona Supreme Court, and the process by which the  
2 Arizona Supreme Court evaluated their qualifications. He will also need to investigate his  
3 attorneys' other capital postconviction appointments. This investigation will take resources away  
4 from Mr. Rogovich's ability to investigate other potentially meritorious claims.

5 16. If a court finds that his capital postconviction attorneys were appointed pursuant to  
6 Arizona's mechanism, Mr. Rogovich will then have to litigate whether and how Chapter 154's  
7 restrictions apply to his case. Again, he would not undertake that litigation absent certification.

8 17. In short, the application of Chapter 154 to Mr. Rogovich's case would have  
9 significant, immediate, and far-ranging consequences for him. Mr. Rogovich has therefore joined  
10 with the other petitioners in bringing this Petition for Review of the Attorney General's decision  
11 certifying Arizona.

12 I declare under penalty of perjury under the laws of the United States of America and  
13 Arizona that the foregoing is true and correct and that I have signed this declaration on this  
14 19 day of April, 2020.

15  
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17 */s/ Thomas J. Phalen*  
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19 Thomas J. Phalen  
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# EXHIBIT A

### Comment in response to Arizona's Opt-in Application.

My name is Tom Phalen, and I currently represent Arizona death-row prisoner Pete Rogovich. Mr. Rogovich suffers from schizoaffective disorder, bipolar type, which means he is both schizophrenic and manic-depressive. Because of Mr. Rogovich's severe mental illness, I have concerns about his ability to make legal decisions. I submit this comment on Mr. Rogovich's behalf in opposition to Arizona's application for certification under 28 U.S.C. § 2265(a).

Mr. Rogovich was sentenced to death by an Arizona court on June 9, 1995. His sentence was affirmed by the Arizona Supreme Court on February 4, 1997. He filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 6, 1997. The Arizona Supreme Court issued the mandate affirming his conviction and sentence on February 4, 1999, and he was appointed counsel for his state post-conviction proceedings on the same day. Seven-hundred and thirty days (730) passed between the time his conviction and sentence were affirmed by the Arizona Supreme Court and the time he was appointed counsel for his post-conviction proceedings.

The Arizona Attorney General seeks certification of Arizona's mechanism dating back to July 17, 1998. If Arizona is certified as an opt-in state, Mr. Rogovich's ability to develop claims and access remedies in federal habeas proceedings would be at risk. Certification would also result in a significant burden because Mr. Rogovich would have to litigate whether the opt-in provisions apply in his particular case.

Arizona should not be certified under 28 U.S.C. § 2265(a) because it has not established an adequate mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state capital post-conviction proceedings. Importantly, Arizona's mechanism fails to ensure competent post-conviction counsel because it does not require any prior post-conviction experience and does not involve any real vetting or review of counsel's work. The United States Attorney General should not certify Arizona's inadequate mechanism.

The inadequacies in Arizona's post-conviction mechanism are evident in Mr. Rogovich's post-conviction proceedings. Notably, Mr. Rogovich's post-conviction counsel, Treasure VanDreumel, lacked the requisite experience to serve as lead counsel in his post-conviction proceeding. While Jonathan Young was appointed as "experienced" counsel, Ms. VanDreumel asked that he be replaced because he did not provide any assistance to her on the case. Also, in addition to the lengthy delay in the appointment of post-conviction counsel, Ms. VanDreumel was not able to immediately obtain the trial transcripts. Ms. VanDreumel requested that Mr. Rogovich's case be tolled on this basis from the time of her appointment until the time the transcripts were received. Her request was granted.

There is evidence that at the time of the crime Mr. Rogovich was in a psychotic mental state as the result of the early onset of a schizophrenic disorder. Prior to trial, a competency evaluation was performed that found Mr. Rogovich to be grossly psychotic

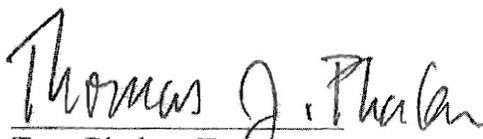
and paranoid. By the time of sentencing, Mr. Rogovich was taking medicine to manage symptoms of psychosis, depression, and anxiety.

While Mr. Rogovich's trial counsel raised an insanity defense, he did so ineffectively. Trial counsel's ineffectiveness in raising an insanity defense was never raised as a claim for relief during Mr. Rogovich's post-conviction proceedings. Trial counsel presented an expert who opined that at the time of the offense Mr. Rogovich was suffering from a psychotic mental condition with paranoid psychosis marked by visual and auditory hallucinations. However, trial counsel failed to rebut the State's expert's testimony that Mr. Rogovich's state of mind at the time of the crime was the result of PCP intoxication. Given the diagnoses and treatment Mr. Rogovich was receiving while he was in custody, it would have been easy for his counsel to present further experts to testify that his mental state at the time of the crime was, in fact, due to serious mental illness.

Despite obvious indications of Mr. Rogovich's severe mental illness that were underdeveloped at trial, Mr. Rogovich's post-conviction counsel never raised a claim of ineffective assistance of trial counsel related to a failure to adequately investigate Mr. Rogovich's severe mental illness and insanity. Mr. Rogovich's post-conviction counsel raised only three claims and failed to support these claims with any evidence to demonstrate their merit. Post-conviction counsel failed to request any experts, investigators, or funding in order to investigate the claims she did raise. Moreover, she did not even request an evidentiary hearing until her reply to the post-conviction petition. It is not surprising, in light of her lack of diligence, that an evidentiary hearing was never granted.

Because of post-conviction counsel's failure to raise a claim of ineffective assistance of counsel for failing to properly address the insanity defense in Mr. Rogovich's case, no court has ever considered the merits of this claim. Additionally, because of post-conviction counsel's failure to substantiate the claims raised, the post-conviction court found there was no evidence to support the post-conviction claims and denied an evidentiary hearing. Mr. Rogovich's experience in post-conviction demonstrates that Arizona's mechanism for the appointment of post-conviction counsel is inadequate and fails to protect the constitutional rights of death-sentenced prisoners. On Mr. Rogovich's behalf, I urge the United States Attorney General not to certify Arizona as an opt-in state.

Respectfully,



Tom Phalen, Esq.  
Counsel for Pete Rogovich

# Ex. G: Declaration of Wayne Prince in support of stay motion



1           9.       On June 29, 2012, The Arizona Supreme Court appointed me capital  
2 postconviction counsel—Richard Parrish—pursuant to Arizona Rule of Criminal Procedure  
3 6.8(c). I was later appointed different capital postconviction counsel—Amy Armstrong and  
4 Natman Schaye—pursuant to Arizona Rule of Criminal Procedure 6.8(d). I was without  
5 postconviction counsel for 420 days following issuance of the Arizona Supreme Court’s opinion  
6 affirming my conviction and sentence on direct appeal.

7           10.       I filed my petition for postconviction relief on July 24, 2012. I filed amended  
8 petitions on December 12, 2014 and April 6, 2017. My original petition was filed 445 days after  
9 the Arizona Supreme Court affirmed my conviction and sentence on direct review. Removing the  
10 number of days my petition for writ of certiorari was pending at the United States Supreme Court,  
11 386 days passed from “final State court affirmance of [my] conviction and sentence on direct  
12 review” until “the date on which [my] first petition for post-conviction review” was filed. 28  
13 U.S.C. § 2263(a), (b)(2).

14           11.       My state postconviction proceedings are ongoing.

15           12.       I stand to be gravely harmed by the United States Attorney General’s decision to  
16 certify Arizona pursuant to 28 U.S.C. § 2265. Many of those harms are imminent if the certification  
17 decision is not stayed pending judicial review.

18           13.       If Chapter 154 is found to apply to my case, I would be subject to 28 U.S.C. §  
19 2263(a)’s shortened 180-day statute of limitations to file my federal habeas petition. That statute  
20 of limitations runs from the “final state court affirmance” of a “conviction and sentence on direct  
21 review.” 28 U.S.C. § 2263(a). If the deadline was not tolled during my time spent preparing and  
22 filing my petition for a writ of certiorari from the United States Supreme Court, I will have lost 123  
23 of the 180 days. And if the time from filing my Notice for Postconviction Relief until filing my  
24 Petition for Postconviction Relief is not tolled or if equitable tolling does not apply to my case, my  
25 entire 180-day statute of limitations may have already passed.

26           14.       Under the current statute of limitations under Chapter 153 of AEDPA, I would  
27 have 337 days to file my federal habeas petition. *See* 28 U.S.C. § 2244 (d)(1), (2).

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1           15. Even assuming I had the full 180-day period allowed by Chapter 154 to file my  
2 federal habeas petition, that shortened period would significantly curtail my ability to investigate,  
3 develop, and present claims in that petition. At the outset of my federal habeas proceedings, I  
4 will have to make decisions about which claims to pursue without the benefit of having a  
5 complete investigation of all potentially meritorious claims.

6           16. Further, the application of Chapter 154 to my habeas proceedings would strictly  
7 limit my ability to raise procedurally defaulted claims and to amend my habeas petition, pursuant  
8 to 28 U.S.C. § 2264(a) and 28 U.S.C. § 2266(b)(3)(B).

9           17. The application of Chapter 154 to my case would also entail an expedited review  
10 process by the judiciary. The federal district court would have to enter final judgment on my  
11 habeas petition either within 450 days of my filing it, or within 60 days after the petition is  
12 submitted for decision—whichever is earlier. *See* 28 U.S.C. § 2266(b). A federal court of  
13 appeals would then have to hear and render a final determination of any appeal I bring under  
14 Chapter 154 not later than 120 days after the filing date of my reply brief or, if I choose not to file  
15 a reply brief, the appellee’s answering brief. 28 U.S.C. § 2266(c)(1)(A). That shortened review  
16 timeline would significantly impact the depth and quality of judicial review of the claims I raise  
17 in my petition.

18           18. Given those stakes, I need to promptly take steps to determine whether and how  
19 certification applies to my case, including investigating and preparing to litigate novel legal  
20 questions. By statute, Chapter 154’s restrictions apply to my case only if, among other things, my  
21 postconviction counsel was appointed “pursuant to” the state’s now-certified mechanism for  
22 appointing postconviction counsel. 28 U.S.C. § 2261(b)(2). The Department’s Order certifying  
23 Arizona provides that “[a]scertaining whether counsel was appointed pursuant to the certified  
24 mechanism” is a matter to be determined in a prisoner’s federal habeas proceedings. 85 Fed. Reg.  
25 20,711; *see also id.* at 20,712 (“Whether [counsel has been appointed pursuant to the certified  
26 mechanism] is . . . a matter to be decided by the federal habeas court to which the case is  
27 presented.”); *id.* at 20,716 (“[T]he current provisions of chapter 154 assign the determination  
28

1 whether a State has appointed counsel in compliance with its own system in a particular case to the  
2 federal habeas court presented with the case.”).

3 19. Specifically, I will therefore need to investigate the qualifications and appointment  
4 processes for my attorneys in an effort to develop arguments that Chapter 154 should not apply  
5 to my case. That investigation will take away resources that could have been spent investigating  
6 potentially meritorious claims to raise in my habeas petition. I will also need to devote resources  
7 to preparing legal arguments about the interpretation of Chapter 154’s tolling provisions—and  
8 equitable tolling—to ensure that I have at least some time to file my federal habeas petition. *See*  
9 28 U.S.C. § 2263; 85 Fed. Reg. 20,719 (acknowledging “uncertainty” about how Chapter 154’s  
10 time limits will apply). This will require significant resources, in part because no court has  
11 interpreted Chapter 154’s statute of limitations, tolling provisions, or interpreted whether a  
12 postconviction attorney was appointed “pursuant to” a State’s certified appointment mechanism.

13 20. Unless a stay is granted pending judicial review of the Attorney General’s  
14 certification decision, I will need to promptly begin the investigations and preparations outlined  
15 in paragraph 19. This will require me to secure additional resources or to redirect resources from  
16 my postconviction review proceedings. If the Chapter 154 certification is vacated on de novo  
17 review, I cannot recover those resources. Meanwhile, obtaining additional resources is extremely  
18 difficult. Because I am indigent, it is unlikely I can retain private counsel. To obtain court-  
19 appointed counsel, a federal habeas lawyer would have to seek appointment to begin investigating  
20 and preparing arguments about whether and how Chapter 154 applies to my case. To my  
21 knowledge, the United States District Court for the District of Arizona does not appoint lawyers  
22 to represent capially-sentenced prisoners before the conclusion of their state postconviction  
23 proceedings.

24 21. In short, the application of Chapter 154 to my case would have serious  
25 consequences for me. I have therefore joined with the other petitioners in bringing this Petition  
26 for Review of the Attorney General’s decision certifying Arizona under Chapter 154.

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I declare under penalty of perjury under the laws of the United States of America and Arizona that the foregoing is true and correct and that I have signed this declaration on this 27 day of April, 2020.

*Wayne B. Prince*  
\_\_\_\_\_  
Wayne Prince

# EXHIBIT A

### **Comment Opposing the State of Arizona's Application for Certification as an Opt-in State.**

My name is Amy Armstrong, and I represent Wayne Prince in his on-going state postconviction proceedings. Mr. Prince has been sentenced to death by the Arizona state courts and is currently a prisoner on Arizona's death row. In Arizona, postconviction counsel is appointed by the Arizona Supreme Court. The Court appointed initial postconviction counsel, Richard Parrish, to represent Mr. Prince on April 19, 2012, 349 days after the Court affirmed Mr. Prince's conviction and sentence on direct appeal. Mr. Prince was concerned about the quality of Mr. Parrish's representation in a contemporaneous capital postconviction proceeding, where Mr. Parrish filed a 24-page postconviction petition with only a single supporting exhibit. Mr. Parrish was subsequently removed from that case. Mr. Prince filed a motion to appoint new counsel expressing his concerns with Parrish's representation. The Maricopa County Superior Court granted Mr. Prince's motion and removed Parrish. The Arizona Supreme Court subsequently appointed undersigned counsel to represent Mr. Prince on June 29, 2012.

I submit this comment on Mr. Prince's behalf to oppose Arizona's application for certification under 28 U.S.C. § 2265(a). Certification of Arizona's ineffective mechanism would put Mr. Prince's ability to seek and obtain remedies in federal habeas proceedings at serious risk. The shortened statute of limitations and limitations on relief and amendment applicable under 28 U.S.C. sections 2265-2266 would burden his efforts to investigate and raise meritorious claims. In addition, certification would require Mr. Prince to investigate and litigate the applicability of the opt-in provisions in his case, and would force him to make urgent decisions regarding the claims for relief he will raise in state and federal court.

The mechanism Arizona has developed does not guarantee that competent postconviction counsel are appointed in a timely manner, that attorneys are adequately compensated, or that cases are adequately funded. Arizona's mechanism also does not uniformly guarantee the payment of reasonable litigation expenses because payment of such expenses is at the discretion of state courts and county agencies and practices vary from county to county. Finally, Arizona's application raises retroactivity concerns that are fatal to certification. Arizona's postconviction review procedures, in combination with the alternative tolling provisions applicable in opt-in states, may result in prisoners losing their entire 180-day federal statute of limitations before even entering state postconviction review. The United States Attorney General should not certify such a mechanism.

For these reasons, and the reasons identified in the Federal Public Defender for the District of Arizona's comment, I oppose Arizona's certification as an opt-in state on Mr. Prince's behalf. Mr. Prince also joins in the Arizona Federal Public Defender's comment.

Respectfully,



Amy Armstrong, Counsel for Wayne Prince  
On behalf of Wayne Prince, ADOC #151897

Wayne Prince, #151897  
ASPC - Florence - Central Unit, 5-611  
P.O. Box 8200  
Florence, Arizona 85132

PHOENIX  
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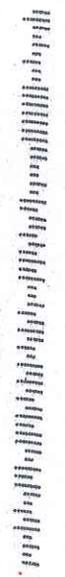
ATTN: Jennifer Garcia  
Capital Habeas Unit  
Office of the Federal Public Defender  
850 West Adams Street, Suite 201  
Phoenix, AZ 85007

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Federal Public Defender  
Phoenix, Arizona

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# Ex. H: Declaration of Sammantha Allen in support of stay motion



1 8. I stand to be gravely harmed by the United States Attorney General’s decision to  
2 certify Arizona pursuant to Chapter 154. Many of those harms are imminent if the certification  
3 decision is not stayed pending judicial review.

4 9. Specifically, there are six primary ways that Chapter 154 may harm me.

5 10. **First**, if Chapter 154 is found to apply to my case, I would be subject to 28 U.S.C.  
6 § 2263(a)’s shortened 180-day statute of limitations to file a federal habeas petition if my  
7 conviction is upheld in state review. I am informed that this dramatically shortened deadline may  
8 likely result in forcing me to forgo potential remedies in order to preserve my time to file a  
9 federal habeas petition.

10 11. If the Arizona Supreme Court affirms my conviction and sentence on direct  
11 review, the 180-day federal habeas deadline may run while I prepare a petition for certiorari with  
12 the United States Supreme Court to challenge the state court’s decision. 85 Fed. Reg. 20,719  
13 (acknowledging “uncertainty” about how Chapter 154’s time limits will apply). This is because  
14 under Chapter 154, the 180-day statute of limitations is tolled “from the date that a petition for  
15 certiorari is *filed*.” 28 U.S.C. § 2263(b)(1) (emphasis added). To date, no court has interpreted  
16 the statute of limitations and tolling provisions in Chapter 154.

17 12. Certification therefore will leave me with an immediate choice to make. My case  
18 is still on direct review in the state court. Once the decision on direct appeal is filed, I can either  
19 rush to file a petition for certiorari in order to trigger the tolling in § 2263(b)(1) and preserve my  
20 shortened federal habeas time, or alternatively I can request a process never before granted in  
21 Arizona: additional resources so that I can prepare the petition for certiorari while simultaneously  
22 litigating my direct appeal, and immediate appointment of postconviction counsel to begin  
23 investigating claims for my initial state petition for postconviction review.

24 13. The harm from rushing to file a petition for certiorari is irreparable. Rushing risks  
25 missing important constitutional claims. And even if Arizona’s Chapter 154 certification is later  
26 overturned, I cannot file an amended petition for certiorari or recover the resources I and my team  
27 will have unnecessarily spent expediting that petition at the expense of my direct appeal and  
28 federal habeas petition. Likewise, redirecting my current resources to preparing the petition for

1 certiorari risks detracting from my counsel's preparation of my direct appeal. And obtaining  
2 additional resources to prepare the petition for certiorari or appointment of postconviction counsel  
3 to begin investigating and preparing my petition for post-conviction review is very difficult if  
4 achievable at all. The Arizona Supreme Court's usual practice is to delay appointment of  
5 postconviction review counsel until after the United States Supreme Court denies certiorari. I am  
6 not aware of any capital prisoner in Arizona who obtained appointment of additional counsel on  
7 direct review in order to prepare a petition for certiorari or to commence investigation in  
8 preparation of postconviction review.

9 14. *Second*, after my direct appeal in state court is resolved, the potential application  
10 of Chapter 154 might well require me to rush to file my petition for state postconviction relief to  
11 preserve the time available to file a federal habeas petition. Although the Attorney General's  
12 certification order—citing decisions of the Ninth Circuit Court of Appeals—concedes that the  
13 automatic filing of a Notice of Post Conviction Relief tolls the 180-day deadline to file a federal  
14 petition for habeas corpus set forth in 28 U.S.C. § 2263(b)(2) while I investigate and prepare the  
15 state postconviction petition, whether the filing of the Notice of Post Conviction Relief as  
16 opposed to the merits Petition itself tolls the federal statute remains debatable. *See* 85 Fed. Reg.  
17 20,718. By its terms, § 2263(b)(2) tolls the deadline only “from the date on which the first  
18 petition for post-conviction review or other collateral relief is filed.” To absolutely ensure  
19 preservation of my federal habeas time, I would therefore need to rush to file an initial petition for  
20 state postconviction relief. To accomplish this, I would need to either secure additional resources  
21 or divert resources from my direct appeal and secure appointment of postconviction counsel  
22 (which Arizona will not do) in order to promptly begin to prepare my initial petition for state  
23 postconviction relief.

24 15. Having sufficient time to investigate and develop claims in state postconviction  
25 proceedings is essential to meaningful administration of justice. Ineffective assistance of counsel  
26 cannot be raised on direct review in Arizona and must be brought for the first time in a  
27 postconviction petition. In my case, the trial attorneys admitted my guilt to the jury absent my  
28 knowledge or consent in violation of *McCoy v. Louisiana*, and failed to recognize that by all

1 accounts born of the evidence of record I was merely present during my co-defendant's crimes  
2 but did not personally participate in any way in those crimes nor was I convicted as an  
3 accomplice. Thus, I was convicted and sentenced to death for crimes which I neither myself  
4 committed nor was I found by a jury to be an accomplice. Failure to know the law is the  
5 quintessential example of ineffective assistance of counsel. Moreover, whether my attorneys  
6 failed to conduct an adequate mitigation investigation and present discoverable mitigation  
7 evidence during the sentencing phase of my trial remains uninvestigated and unknown at this  
8 juncture. Once appointed, my postconviction review attorneys will need to conduct a complete  
9 mitigation investigation, which takes significant time and resources. Rushing that investigation  
10 will gravely and irreparably harm me, implicating the guarantees afforded by the Eighth  
11 Amendment and the Due Process Clause of the United States Constitution. Any claims or issues  
12 that my state postconviction attorneys fail to raise may be lost forever.

13 16. *Third*, if I do not prevail in state court and am forced to turn to federal court for  
14 habeas relief, appointed counsel will be required to devote substantial resources at the outset to  
15 investigating and litigating whether and how Chapter 154 applies to my case. By statute, Chapter  
16 154's restrictions apply to my case only if, among other things, my postconviction counsel were  
17 appointed "pursuant to" the state's now-certified mechanism for appointing such counsel. 28  
18 U.S.C. § 2261(b)(2). The Department's Order certifying Arizona provides that "[a]scertaining  
19 whether counsel was appointed pursuant to the certified mechanism" is a matter to be determined  
20 in a prisoner's federal habeas proceedings. 85 Fed. Reg. 20,711; *see also id.* at 20,712 ("Whether  
21 [counsel has been appointed pursuant to the certified mechanism] is . . . a matter to be decided by  
22 the federal habeas court to which the case is presented."); *id.* at 20,716 ("[T]he current provisions  
23 of chapter 154 assign the determination whether a State has appointed counsel in compliance with  
24 its own system in a particular case to the federal habeas court presented with the case."). So I will  
25 have to investigate whether my postconviction attorneys were appointed "pursuant to" Arizona's  
26 mechanism in the first place, for purposes of 28 U.S.C. 2261(b)(2). Appointed counsel must also  
27 investigate how Chapter 154's tolling provisions, 28 U.S.C. § 2263, and equitable tolling apply to  
28 my case. *See* 85 Fed. Reg. 20,718. These are novel issues of statutory interpretation that will

1 require careful consideration by my attorneys. Preparing for litigating those potentially critical  
2 timing issues would take away resources that could be spent investigating potentially meritorious  
3 claims to raise in my habeas petition. While litigating these issues, my team will have to proceed  
4 as if Chapter 154's shortened deadlines apply to my case.

5 17. *Fourth*, if after spending litigation resources challenging the application of  
6 Chapter 154, Chapter 154's shortened deadlines are nonetheless found to apply to my case, I  
7 would have substantially less time to investigate, develop, and present claims in federal court. At  
8 the outset of my federal habeas proceedings, I would have to make decisions about which claims  
9 to pursue without the benefit of having a complete investigation of all potentially meritorious  
10 claims on which to base that decision.

11 18. *Fifth*, the application of certification to my habeas proceedings would strictly limit  
12 my ability to raise procedurally defaulted claims and to amend my habeas petition, pursuant to 28  
13 U.S.C. § 2264(a) and 28 U.S.C. § 2266(b)(3)(B).

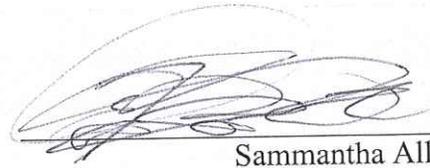
14 19. *Sixth and finally*, certification will entail an expedited review process by the  
15 federal judiciary. The federal district court would have to enter final judgment on my habeas  
16 petition either within 450 days of my filing it, or within 60 days after the petition is submitted for  
17 decision—whichever is earlier. 28 U.S.C. § 2266(b). A federal court of appeals would then have  
18 to hear and render a final determination of any appeal I bring under Chapter 154 not later than  
19 120 days after the filing date of my reply brief or, if I choose not to file a reply brief, the  
20 appellee's answering brief. 28 U.S.C. § 2266(c)(1)(A). That shortened review timeline would  
21 significantly impact the depth and quality of judicial review of the claims I raise in my petition.

22 20. In sum, through no fault of my own and due to procedural mechanisms entirely  
23 beyond my control, I will suffer both immediate and long-term harms if Arizona's certification is  
24 upheld—and if the agency's certification order is not stayed pending judicial review.

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I declare under penalty of perjury under the laws of the United States of America and Arizona that the foregoing is true and correct and that I have signed this declaration on this \_\_\_\_\_ day of April, 2020.



---

Sammantha Allen

# EXHIBIT A

## Comment Opposing Certification of Arizona as an Opt-in State under 28 U.S.C. Section 2265.

My name is Sammantha Allen and I was recently sentenced to death by an Arizona court. I am appealing my conviction and death sentence. If necessary, I intend to pursue further remedies in both state and federal postconviction proceedings.

In 2013, the Arizona Attorney General applied for certification as an opt-in state. I submit this comment in order to voice my concerns about Arizona's mechanism and oppose Arizona's application for certification.

As explained below, Arizona's mechanism is not adequate. Should the United States Attorney General certify Arizona's inadequate mechanism, my ability to develop claims and obtain relief in federal habeas proceedings would be at serious risk. Certification would force me to make immediate decisions regarding the development and presentation of my claims for relief in state and federal court. Certification would also require me to engage in an additional layer of federal litigation to determine whether the opt-in provisions apply in my case.

Arizona's mechanism does not guarantee the appointment of competent counsel or adequate compensation or funding in state postconviction proceedings. Arizona's compensation rate fails to meet the benchmarks identified in the regulations and has remained stagnant since it was initially set in 1998. Arizona's mechanism simply is not the robust state appointment system envisioned by the Powell Committee and Congress. Certification of Arizona's mechanism would undermine habeas protections for death-row prisoners in Arizona. As a result, Arizona should not be certified under 28 U.S.C. section 2265.

Arizona's mechanism for the appointment of postconviction counsel is inadequate both as written and as implemented. For the reasons identified here, and the numerous reasons identified in the Arizona Federal Defender's comment, I strenuously oppose certification.

Signed,

  
\_\_\_\_\_  
Sammantha Allen, ADOC # 320757

LAW OFFICE OF TREASURE VANDREUMEL, PLC  
801 N. 1st Ave  
Phoenix, Arizona 85003

PHOENIX  
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Federal Public Defender  
Phoenix, Arizona

Ms. Jennifer Y. Garcia  
Office of the Federal Public Defender  
Capital Habeas Unit  
850 W. Adams Street #201  
Phoenix, Arizona 85007

LEGAL MAIL

85007-27555

# Ex. I: Declaration of Rodney Hardy in support of stay motion



1           9.     On February 8, 2013, the Arizona Supreme Court appointed me capital  
2 postconviction counsel—Sharmila Roy—pursuant to Arizona Rule of Criminal Procedure 6.8(c).  
3 I was without postconviction counsel for 176 days following issuance of the Arizona Supreme  
4 Court’s opinion affirming my conviction and sentence on direct appeal.

5           10.    I filed my petition for postconviction relief on May 16, 2016, and filed an amended  
6 petition on November 6, 2016.

7           11.    The Superior Court denied my petition for postconviction relief on November 2,  
8 2016, and denied my amended petition on December 15, 2016. The Arizona Supreme Court  
9 affirmed the Superior Court’s decision on July 24, 2018.

10          12.    The Office of the Federal Public Defender for the District of Arizona was appointed  
11 as my federal habeas counsel on August 24, 2018.

12          13.    I filed a petition for writ of habeas corpus in the United States District Court for the  
13 District of Arizona on July 12, 2019 *See Hardy v. Ryan*, No. 18-CV-2494 (Tuchi, J., presiding).  
14 My petition was timely filed under the statute of limitations applicable to my petition under Title  
15 28, Chapter 153, 28 U.S.C. § 2244(d)(1), (2). That petition remains pending in district court.

16          14.    I stand to be significantly harmed by the United States Attorney General’s decision  
17 to certify Arizona pursuant to Chapter 154. Many of those harms are imminent if the certification  
18 decision is not stayed pending judicial review.

19          15.    At the outset, I will need to promptly investigate the application of Chapter 154 to  
20 my case. I would not undertake that investigation absent the certification of Arizona. By statute,  
21 Chapter 154’s restrictions apply to my case only if, among other things, my postconviction counsel  
22 was appointed “pursuant to” the state’s now-certified mechanism for appointing postconviction  
23 counsel. 28 U.S.C. § 2261(b)(2). The Department’s Order certifying Arizona provides that  
24 “[a]scertaining whether counsel was appointed pursuant to the certified mechanism” is a matter to  
25 be determined in a prisoner’s federal habeas proceedings. 85 Fed. Reg. 20,711; *see also id.* at  
26 20,712 (“Whether [counsel has been appointed pursuant to the certified mechanism] is . . . a matter  
27 to be decided by the federal habeas court to which the case is presented.”); *id.* at 20,716 (“[T]he  
28 current provisions of chapter 154 assign the determination whether a State has appointed counsel

1 in compliance with its own system in a particular case to the federal habeas court presented with  
2 the case.”).

3 16. Specifically, I will therefore need to investigate the qualifications of my state  
4 postconviction counsel, the circumstances of her appointment to my case, the information contained  
5 in her original application for postconviction appointments with the Arizona Supreme Court, and  
6 the process by which the Arizona Supreme Court evaluated her qualifications. I will also need to  
7 investigate my attorney’s other capital postconviction appointments. That investigation is  
8 necessary to determine whether the attorney was appointed “pursuant to” Arizona’s mechanism. I  
9 would not undertake that litigation preparation absent certification, because whether my attorney’s  
10 appointment was pursuant to Arizona’s now-certified mechanism for appointment is not relevant  
11 to habeas litigation under Chapter 153.

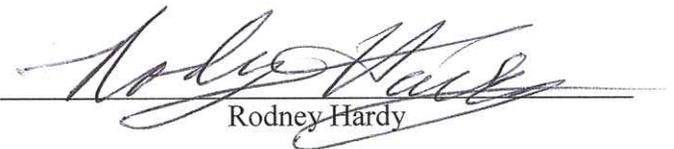
12 17. If a court finds that my capital postconviction attorney was appointed pursuant to  
13 Arizona’s mechanism, I will then have to litigate whether and how Chapter 154’s restrictions apply  
14 to my case. I will have to litigate, for example, whether Chapter 154 can apply retroactively to my  
15 case; the Attorney General’s decision sets out May 19, 1998 as the effective date of the certification  
16 under 28 U.S.C. 2265(a)(2). 85 Fed. Reg. 20,718-19. I will similarly have to prepare to litigate  
17 whether my federal habeas petition, which, as noted, was timely filed under Chapter 153, was not  
18 timely filed under Chapter 154 given Chapter 154’s different timing provisions. *See* 28 U.S.C. §  
19 2263; 85 Fed. Reg. 20,719 (acknowledging “uncertainty” about how Chapter 154’s time limits will  
20 apply). I will also have to investigate whether I can amend my petition, pursue certain claims that  
21 the State may contend are defaulted or were not “decided on the merits in the State courts,” 28  
22 U.S.C. § 2264(a), or receive certain stays of execution under Chapter 154. The Department’s Order  
23 states (at 85 Fed. Reg. 20,711-12) that questions about the specific application of Chapter 154 to  
24 an individual’s case are matters for federal habeas courts, and my attorneys will need to devote  
25 resources to prepare to litigate these questions.

26 18. In addition, the application of Chapter 154 to my case would entail an expedited  
27 review process by the judiciary. The federal district court would have to enter final judgment on  
28 my habeas petition either within 450 days of my filing it, or within 60 days after the petition is

1 submitted for decision—whichever is earlier. 28 U.S.C. § 2266(b). A federal court of appeals  
2 would then have to hear and render a final determination of any appeal I bring under Chapter 154  
3 not later than 120 days after the filing date of my reply brief or, if I choose not to file a reply brief,  
4 the appellee’s answering brief. 28 U.S.C. § 2266(c)(1)(A). That shortened review timeline would  
5 significantly impact the depth and quality of judicial review of the claims I raise in my petition.  
6 Under Chapter 153, I would not be subjected to such expedited review of my claims.

7 19. In short, the application of Chapter 154 to my case would have significant,  
8 immediate, and far-ranging consequences for me. I have therefore joined with the other petitioners  
9 in bringing this Petition for Review of the Attorney General’s decision certifying Arizona under  
10 Chapter 154.

11 I declare under penalty of perjury under the laws of the United States of America and  
12 Arizona that the foregoing is true and correct and that I have signed this declaration on this  
13 24 day of April, 2020.

14  
15  
16   
Rodney Hardy

# EXHIBIT A

**Comment Objecting to Arizona's Application for Certification  
under 28 U.S.C. § 2265(a).**

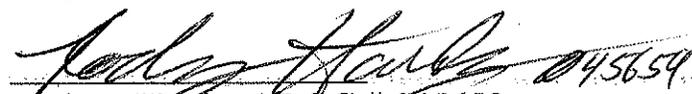
My name is Rodney Hardy. I have been sentenced to death by the Arizona state courts and am currently a prisoner on Arizona's death row. My postconviction counsel was appointed by order of the Arizona Supreme Court on 2/8/2013. I was without postconviction counsel for 176 days following the Arizona Supreme Court's opinion affirming my conviction and death sentence.

I write to oppose Arizona's application for certification under 28 U.S.C. § 2265(a). If the United States Attorney General certifies Arizona's inadequate mechanism, my ability to develop claims and access remedies in federal habeas proceedings would be at serious risk as a result of the limitations and restrictions on capital habeas cases applicable in certified states. Certification would also result in a significant burden because I would have to litigate whether the opt-in provisions apply in my particular case. In addition, I would have to make difficult decisions regarding the development and presentation of my claims for relief in both state and federal postconviction proceedings.

Arizona does not meet the statutory and regulatory requirements to warrant certification. Arizona's compensation rate fails to meet the benchmarks identified in the regulations and has remained stagnant since it was initially set in 1998. The mechanism that Arizona uses is far from the system that the opt-in provisions were designed to reward and certification here would undermine habeas and the constitutional rights of death-row prisoners.

Arizona's mechanism for the appointment of postconviction counsel is inadequate both as written and as implemented. For the reasons identified here, and the numerous reasons identified in the Arizona Federal Defender's comment, I strenuously oppose certification.

Respectfully,

  
Rodney Hardy, ADOC #045659



PHOENIX  
AZ 852  
29 APR '20  
PM 5 L

Rodney Hardy #045659  
ASPC, Florence-Central Unit  
P. O. Box 8200  
Florence AZ 85132

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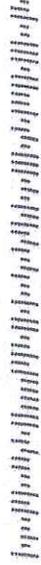
ATTN: Kush Govani  
Capital Habeas Unit  
Office of the Federal Public Defender  
850 West Adams Street, Suite 201  
Phoenix, AZ 85007

Federal Public Defender  
Phoenix, Arizona

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**LEGAL MAIL**  
ARIZONA DEPARTMENT OF CORRECTIONS

85007-275351



**ADDENDUM**

Final Decision, certifying Arizona for expedited capital habeas proceedings under chapter 154 of AEDPA, 28 U.S.C. §§ 2261-65, 85 Fed. Reg. 20,705, dated April 14, 2020 .....Add1

Letter from E. Moulton to Laurence Rothenberg, Office of Legal Policy, Dep’t of Justice, Request to Stay Certification Decision pending Judicial Review, dated April 16, 2020 .....Add18

Supplemental Comment by the Office of the Federal Public Defender for the District of Arizona in Opposition to the State of Arizona’s Application for Opt-in under 28 U.S.C. § 2265(a), filed January 7, 2019<sup>1</sup> .....Add23

Comment filed by the Office of the Federal Public Defender for the District of Arizona in Opposition to the State of Arizona’s Application for Opt-in under 28 U.S.C. § 2265(a), filed February 22, 2018<sup>2</sup> .....Add56

Letter from Tom Horne, Att’y Gen. State of Arizona, Requesting Certification for “opt-in” under 28 U.S.C. § 2265(a), dated April 18, 2013 .....Add225

Certification Process for State Capital Counsel System, 78 Fed. Reg. 58,160 (Sept. 23, 2013) .....Add229

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<sup>1</sup>The supplemental comment and exhibits are also available on the regulations.gov website, <https://www.regulations.gov/document?D=DOJ-OLP-2018-0016-0010>.

<sup>2</sup>The comment and exhibits are also available on the regulations.gov website, <https://www.regulations.gov/document?D=DOJ-OLP-2017-0009-0126>.

Title 28, Chapter 154 Special Habeas Corpus Procedures in Capital Cases

28 U.S.C. § 2261 Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment .....Add254

28 U.S.C. § 2262 Mandatory stay of execution; duration; limits on stays of execution; successive petitions.....Add254

28 U.S.C. § 2263 Filing of habeas corpus application; time requirement; tolling rules.....Add255

28 U.S.C. § 2264 Scope of Federal review; district court adjudications .....Add255

28 U.S.C. § 2265 Certification and judicial review ..Add255

28 U.S.C. § 2266 Limitations periods for determining applications and motions .....Add255

Code of Federal Regulations – Part 26 Death Sentence Procedures

28 C.F.R. § 26.20 Purpose .....Add258

28 C.F.R. § 26.21 Definitions .....Add258

28 C.F.R. § 26.22 Requirements .....Add258

28 C.F.R. § 26.23 Certification Process .....Add259

Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**Pete Gaynor,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2020-07841 Filed 4-13-20; 8:45 am]

BILLING CODE 9111-23-P

## DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA-2020-0006]

### Notice of the President's National Infrastructure Advisory Council Meeting

**AGENCY:** Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

**ACTION:** Notice of Federal Advisory Committee Act (FACA) meeting; request for comments.

**SUMMARY:** CISA announces a public meeting of the President's National Infrastructure Advisory Council (NIAC). To facilitate public participation, CISA invites public comments on the agenda items and any associated briefing materials to be considered by the council at the meeting.

**DATES:** *Meeting Registration:* Individual registration to attend the meeting by phone is required and must be received no later than 5:00 p.m. EST on May 18, 2020.

*Speaker Registration:* Individuals may register to speak during the meeting's public comment period must be received no later than 5:00 p.m. EST on May 18, 2020.

*Written Comments:* Written comments must be received no later than 5:00 p.m. EST on May 18, 2020.

*NIAC Meeting:* The meeting will be held on Thursday, May 21, 2020 from 1:00 p.m.—4:00 p.m. ET.

**ADDRESSES:** The meeting will be held via conference call. For access to the conference call bridge, information on services for individuals with disabilities, or to request special assistance to participate, please email [NIAC@hq.dhs.gov](mailto:NIAC@hq.dhs.gov) by 5:00 p.m. ET on May 18, 2020.

*Comments:* Written comments may be submitted on the issues to be considered by the NIAC as described in the

**SUPPLEMENTARY INFORMATION** section

below and any briefing materials for the meeting. Any briefing materials that will be presented at the meeting will be made publicly available *before the meeting* at the following website: <https://www.dhs.gov/national-infrastructure-advisory-council>.

Comments identified by docket number "CISA-2020-0006" may be submitted by any of the following methods:

- **Federal eRulemaking Portal:** [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting written comments.
- **Email:** [NIAC@hq.dhs.gov](mailto:NIAC@hq.dhs.gov). Include docket number CISA-2019-0017 in the subject line of the message.
- **Mail:** Ginger K. Norris, Designated Federal Officer, National Infrastructure Advisory Council, Cybersecurity and Infrastructure Security Agency, Department of Homeland Security, 245 Murray Lane, Mail Stop 0612, Arlington, VA 20598-0612.

*Instructions:* All submissions received must include the agency name and docket number for this notice. All written comments received will be posted without alteration at [www.regulations.gov](http://www.regulations.gov), including any personal information provided. For detailed instructions on sending comments and additional information on participating in the upcoming NIAC meeting, see the "PUBLIC PARTICIPATION" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket and comments received by the NIAC, go to [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Ginger K. Norris, 202-441-5885, [ginger.norris@cisa.dhs.gov](mailto:ginger.norris@cisa.dhs.gov).

**SUPPLEMENTARY INFORMATION:** The NIAC is established under Section 10 of E.O. 13231 issued on October 16, 2001. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix (Pub. L. 92-463). The NIAC shall provide the President, through the Secretary of Homeland Security, with advice on the security and resilience of the Nation's critical infrastructure sectors.

The NIAC will meet in an open meeting on May 21, 2020, to discuss the following agenda items.

#### Agenda

- I. Call to Order
- II. Opening Remarks
- III. CICC Study Update
- IV. Work Force Panel Discussion
- V. COVID-19 Panel Discussion
- VI. Public Comment
- VII. New NIAC Business

VIII. Closing Remarks

IX. Adjournment

### Public Participation

#### Meeting Registration Information

Requests to attend via conference call will be accepted and processed in the order in which they are received. Individuals may register to attend the NIAC meeting by phone by sending an email to [NIAC@hq.dhs.gov](mailto:NIAC@hq.dhs.gov).

#### Public Comment

While this meeting is open to the public, participation in FACA deliberations are limited to council members. A public comment period will be held during the meeting from approximately 3:30 p.m.—3:45 p.m. ET. Speakers who wish to comment must register in advance and can do so by emailing [NIAC@hq.dhs.gov](mailto:NIAC@hq.dhs.gov) no later than Monday, May 18, 2020, at 5:00 p.m. EST. Speakers are requested to limit their comments to three minutes. Please note that the public comment period may end before the time indicated, following the last call for comments.

#### Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact [NIAC@hq.dhs.gov](mailto:NIAC@hq.dhs.gov) as soon as possible.

**Ginger K. Norris,**

*Designated Federal Official, National Infrastructure Advisory Council, Cybersecurity and Infrastructure Security Agency, Department of Homeland Security.*

[FR Doc. 2020-07851 Filed 4-13-20; 8:45 am]

BILLING CODE 9110-9P-P

## DEPARTMENT OF JUSTICE

[Docket No. OAG-167; AG Order No. 4666-2020]

### Certification of Arizona Capital Counsel Mechanism

**AGENCY:** Office of the Attorney General, Department of Justice.

**ACTION:** Notice.

**SUMMARY:** Federal law makes certain procedural benefits available to States in federal habeas corpus review of capital cases, where the Attorney General certifies that the State has established a postconviction capital counsel mechanism satisfying the chapter's requirements. The Attorney General certifies in this notice that Arizona has such a mechanism, which was established on May 19, 1998.

**DATES:** Pursuant to 28 U.S.C. 2265(a)(2), the effective date of the certification in this notice is May 19, 1998.

**FOR FURTHER INFORMATION CONTACT:** Laurence Rothenberg, Deputy Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530; telephone (202) 532-4465.

*Certification:* Chapter 154 of title 28, United States Code, provides special federal habeas corpus review procedures for state capital cases where (i) the Attorney General has certified that the State has established a postconviction counsel appointment mechanism for indigent capital defendants that meets the requirements stated in the chapter, and (ii) counsel was appointed pursuant to the certified mechanism, the defendant validly waived or retained counsel, or the defendant was not indigent. 28 U.S.C. 2261(b). Chapter 154 directs the Attorney General to determine, if requested by an appropriate state official, whether the State has established a qualifying mechanism for appointment of postconviction capital counsel, the date on which the mechanism was established, and whether the State provides standards of competency for such appointments. *Id.* § 2265(a).

Having considered the relevant statutes, rules, and policies in Arizona, submissions by the Arizona Attorney General, and the extensive public comments thereon, and exercising the authority conferred on me by 28 U.S.C. 2265, I determine and certify that Arizona has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state postconviction proceedings brought by indigent prisoners who have been sentenced to death, including provision of standards of competency for the appointment of counsel in such proceedings, which satisfies the requirements of chapter 154. I further determine and certify that Arizona had an established capital counsel mechanism satisfying the requirements of chapter 154 as of May 19, 1998, and that Arizona has continuously had a capital counsel mechanism satisfying the requirements of chapter 154 since that date. Arizona has not requested certification of its postconviction capital counsel mechanism as it was prior to May 19, 1998, and this certification reflects no judgment or opinion whether Arizona had a postconviction capital counsel mechanism satisfying the requirements of chapter 154 before that date.

**SUPPLEMENTARY INFORMATION:** The remainder of this notice explains the background of, and reasons for, my certification of Arizona’s postconviction capital counsel mechanism under the following headings:

- I. Procedural History
- II. Assessment of Arizona’s Mechanism Under Chapter 154
  - A. Chapter 154—As Enacted in 1996 and As Amended in 2006
  - B. Appointment Requirement and Procedures
  - C. Counsel Competency
  - D. Compensation of Counsel
  - E. Payment of Reasonable Litigation Expenses
  - F. Timeliness of Appointment
- III. Date the Mechanism Was Established
- IV. Other Matters
  - A. Time Limits under Chapter 154
  - B. Validity of the Implementing Rule
  - C. Request for a Stay

**I. Procedural History**

Chapter 154 applies to cases arising under 28 U.S.C. 2254 brought by prisoners in State custody who are subject to a capital sentence if “(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265,” and “(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.” 28 U.S.C. 2261(b). Where the chapter applies, federal habeas review is conducted in conformity with special provisions relating to stays of execution, the time available for federal habeas filing, the scope of federal habeas review, and the time for completing the adjudication of federal habeas petitions. *See* 28 U.S.C. 2262–66.

Chapter 154 derives from a proposal developed in 1989, under the leadership of Justice Lewis F. Powell, to address the problem of protracted and repetitive litigation in capital cases and to fill a gap in representation for capital defendants at the stage of state postconviction review. The proposal contemplated that more expeditious procedures would apply, with greater finality, in federal habeas corpus review of capital cases in States that appoint counsel for indigent capital defendants in state collateral proceedings. *See* 135 Cong. Rec. 24694–98 (1989); 137 Cong. Rec. 6012–14 (1991); H.R. Rep. 104–23, at 10–11 (1995) (House Judiciary Committee Report).

Congress enacted chapter 154 as part of the Antiterrorism and Effective Death Penalty Act of 1996. *See* Public Law 104–132, sec. 107(a), 110 Stat. 1214, 1221–26. Under chapter 154 in its

original form, federal habeas courts determined the applicability of chapter 154’s expedited federal habeas review procedures in the context of adjudicating federal habeas petitions filed by state capital defendants. Litigation relating to States’ satisfaction of chapter 154’s requirements ensued in various States, resulting in a substantial body of district court and court of appeals precedent interpreting chapter 154, as well as a related decision by the Supreme Court in *Calderon v. Ashmus*, 523 U.S. 740 (1998).

In relation to Arizona, in particular, the Ninth Circuit Court of Appeals, in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002), considered the question with which I am now presented—whether Arizona has established a postconviction capital counsel mechanism that satisfies chapter 154’s requirements. The Ninth Circuit answered that question in the affirmative. *See id.* at 1008–18. However, the court concluded that chapter 154’s expedited federal habeas review procedures would not apply in the case before it because Arizona had not appointed counsel for petitioner in conformity with the mechanism. *See id.* at 1018–19.

In 2006, Congress enacted amendments that brought chapter 154 into its current form. *See* Public Law 109–177, sec. 507, 120 Stat. 250, 250–51 (codified in part at 28 U.S.C. 2265). The amendments transferred responsibility for determining a State’s satisfaction of chapter 154’s requirements from the regional federal courts to the Attorney General, subject to de novo review by the D.C. Circuit Court of Appeals. *See* 28 U.S.C. 2265. Under the revised scheme, the Attorney General, if requested by an appropriate state official, makes a determination and certification whether the State has established a postconviction capital counsel mechanism satisfying the chapter’s requirements, with exclusive review of the certification by the D.C. Circuit. *See* 28 U.S.C. 2265(a), (c).

The 2006 amendments reflected a legislative judgment that the Attorney General and the D.C. Circuit would best be able to make disinterested determinations regarding state counsel systems’ satisfaction of chapter 154. The amendments also added a provision stating that there are no requirements for certification or application of chapter 154 other than those expressly stated in the chapter, 28 U.S.C. 2265(a)(3), reflecting congressional concern that some courts had declined to apply chapter 154 on grounds going beyond those Congress had deemed to be warranted in its formulation of

chapter 154, *see* 152 Cong. Rec. 2441, 2445–46 (2006) (remarks of Sen. Kyl); 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake).

Chapter 154 directs the Attorney General to promulgate regulations to implement the certification procedure. 28 U.S.C. 2265(b). Attorney General Mukasey in 2008 issued an initial implementing rule for chapter 154. *See* 73 FR 75327, 75327–39 (Dec. 11, 2008). The original rule tracked chapter 154's express requirements in light of 28 U.S.C. 2265(a)(3)'s specification that “[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.” Attorney General Holder rescinded the original rule and replaced it in 2013 with the current rule. *See* 28 CFR 26.20–26.23; *see also* 78 FR 58160, 58160–84 (Sept. 23, 2013).

The regulations provide for the Attorney General to publish a notice in the **Federal Register** of a State's requests for chapter 154 certification, to include solicitation of public comment on the request, and for the Attorney General to review the request and consider timely public comments received in response to the notice. 28 CFR 26.23(b)–(c). The certification procedure was delayed for a number of years because a district court enjoined the regulations from taking effect. The Ninth Circuit later vacated the injunction, allowing the regulations to take effect. *See Habeas Corpus Resource Ctr. v. U.S. Dep't of Justice*, 816 F.3d 1241 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1338 (2017).

Arizona has requested that the Attorney General certify its capital counsel mechanism under chapter 154. The materials relating to Arizona's request are available at [www.justice.gov/olp/pending-requests-final-decisions](http://www.justice.gov/olp/pending-requests-final-decisions). The main occurrences in the certification process relating to Arizona have been as follows:

Arizona initially requested chapter 154 certification by letter from its Attorney General dated April 18, 2013. After the Ninth Circuit vacated the injunction against the certification process, the Department of Justice (“Department”) published a notice in the **Federal Register** inviting public comment on Arizona's request for certification and providing a 60-day comment period. 82 FR 53529 (Nov. 16, 2017). Because of the passage of time since Arizona's original request, the Department sent a letter to the Arizona Attorney General dated November 16, 2017, advising of the publication, seeking confirmation that the materials previously submitted by the State were still current, and asking whether the

State wished to supplement, modify, or update its request for certification. The Arizona Attorney General responded by letter of November 27, 2017, which provided updated information. The Department then published a second notice, which noted the updated request from Arizona and provided 60 days for public comment running from publication of the notice. 82 FR 61329 (Dec. 27, 2017).

The Department received 140 comments from organizations and individuals in response to these solicitations. The most extensive comment was from the Federal Public Defender for the District of Arizona (AFPD), consisting of a 163-page document and voluminous exhibits. Other organizational commenters included the Arizona Capital Representation Project, the American Bar Association, the Innocence Project, the Arizona Justice Project, Federal Public Defenders, Arizona Voice for Crime Victims, the Phillips Black Project, the American Civil Liberties Union, and Arizona Attorneys for Criminal Justice. Many comments were also received from persons under sentence of death in Arizona or their lawyers.

On June 29, 2018, the Department sent a letter to the Arizona Attorney General requesting that the State provide additional information about its postconviction capital counsel mechanism, based on questions that had arisen during the Department's review of the State's request for certification and the public comments received. The Arizona Attorney General sent a responsive letter on October 16, 2018. The following month, the Department published a third notice to provide an opportunity for public comment with respect to the additional information the Arizona Attorney General had submitted. 83 FR 58786 (Nov. 21, 2018). The Department received 17 comments during the 45-day comment period in response to this notice.

The ensuing section of this statement explains the basis for granting chapter 154 certification to Arizona. I discuss initially certain issues with cross-cutting significance and then analyze Arizona's capital counsel mechanism in relation to the elements required by chapter 154, including appointment, competency standards, compensation, and payment of reasonable litigation expenses for postconviction capital counsel. With respect to each element, I (i) identify the statutory basis of the requirement and the pertinent Arizona laws and policies, (ii) review judicial precedent and its continuing relevance (or not) given later changes in Arizona's

mechanism and chapter 154, and (iii) explain the interpretation of chapter 154's requirements in the Department's regulations and Arizona's satisfaction of these requirements as construed in the regulations. The concluding section discusses additional matters, including objections to certification of Arizona's mechanism based on time limitation rules appearing in chapter 154, the validity of the implementing rule, and a request that I stay the certification.

## II. Assessment of Arizona's Mechanism Under Chapter 154

### A. Chapter 154—As Enacted in 1996 and As Amended in 2006

Chapter 154 directs the Attorney General, if requested by an appropriate state official, to determine (i) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state postconviction proceedings brought by indigent prisoners who have been sentenced to death, and (ii) whether the State provides standards of competency for the appointment of such counsel. 28 U.S.C. 2265(a). Additional specifications relating to the appointment of postconviction counsel appear in 28 U.S.C. 2261(c)–(d).

As noted above, I do not write on a clean slate in addressing Arizona's request for certification. Prior to 2006, the Attorney General was not involved in chapter 154 determinations, which were instead made by the federal courts entertaining federal habeas petitions filed by state prisoners under sentence of death. In particular, in 2002, the Ninth Circuit concluded that Arizona had established a capital counsel mechanism satisfying chapter 154's requirements. *See Spears*, 283 F.3d at 1007–19.

The analysis in *Spears* remains relevant because Arizona's capital counsel mechanism has remained largely the same since the Ninth Circuit's decision in that case, and the elements of an adequate state capital counsel mechanism as required by chapter 154 are largely the same as those required by chapter 154 at the time of that decision. Moreover, the case law under chapter 154, and particularly *Spears*, provided the background for the development of the Department's implementing regulations for chapter 154 that I now apply. The judicial precedent accordingly elucidates and supports many aspects of the Department's rule in its application to Arizona. *See, e.g.*, 78 FR at 58170, 58172, 58178, 58180.

Discussion of *Spears* and other decisions was also prominent in the public comments on Arizona’s request for certification. The comments argued that aspects of the judicial decisions that would support Arizona’s certification should be considered no longer relevant or applicable, based on changes in Arizona’s capital counsel mechanism over time or for other reasons, but they pointed to other aspects of the decisions as still pertinent and as implying that certification should be denied. I accordingly discuss below, in relation to each required element of an adequate state capital counsel mechanism under chapter 154, to what extent later changes affect the relevance of the Ninth Circuit’s decision and other judicial interpretations of chapter 154.

Before turning to the analysis of particular issues, I should address public comments on Arizona’s request for certification which suggested that the Ninth Circuit’s determination regarding Arizona’s capital counsel mechanism should be dismissed as dictum. The basis for the objection is that the court in *Spears* found that Arizona’s mechanism satisfies chapter 154’s requirements, but it nevertheless denied the State the benefit of chapter 154’s review procedures on the ground that the State had not fully complied with its rules for appointing counsel in that case. In *Railroad Companies v. Schutte*, 103 U.S. 118 (1880), the Supreme Court explained the precedential weight of decisions of this nature:

It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended . . . . If the decision is not conclusive on us, it is of high authority under the circumstances, and we are not inclined to disregard it. *Id.* at 143.

The Supreme Court’s discussion in *Schutte* fits exactly the Ninth Circuit’s decision in *Spears*. I similarly view the Ninth Circuit’s determination that Arizona’s mechanism satisfies chapter 154 as persuasive authority of substantial weight and I am “not inclined to disregard it,” *id.*

At the same time, I note a change in chapter 154 that makes my analysis different in an important respect from the preceding judicial consideration of

these issues. Public comments opposing Arizona’s request for certification have noted judicial decisions that held that a State could not receive the procedural benefits of chapter 154 in a particular case if the State did not comply with the requirements of its capital counsel mechanism in that case. *See, e.g., Spears*, 283 F.3d at 1018–19 (failure to appoint counsel within time required by state mechanism); *Tucker v. Catoe*, 221 F.3d 600, 604–05 (4th Cir. 2000) (failure to appoint counsel meeting state competency standards). Based on these decisions, the comments argued, I should deny Arizona’s request for certification if, for example, the State’s competency standards for appointment have not been consistently satisfied.

Judicial decisions of this nature, however, reflected the pre-2006 version of chapter 154, under which requests to apply chapter 154’s procedures were presented to federal habeas courts in particular cases. In that posture, courts could consider both the general question whether the State had established a mechanism satisfying chapter 154 and, if so, whether counsel for the petitioner in the particular case had been appointed in compliance with that mechanism. Following the 2006 amendments to chapter 154, however, only the general certification function is assigned to the Attorney General, *see* 28 U.S.C. 2265, and ascertaining whether counsel was appointed pursuant to the certified mechanism, as provided in section 2261(b)(2), is reserved to federal habeas courts. *See* 78 FR at 58162–63, 58165. Consequently, comments supposing that I must undertake case-specific review of the operation of Arizona’s mechanism, and deny certification based on asserted deficiencies in practice, misapprehend the current division of labor under chapter 154 between the Attorney General and federal habeas courts.

#### *B. Appointment Requirement and Procedures*

Subsection (c) of 28 U.S.C. 2261 provides that a qualifying capital counsel mechanism must offer postconviction counsel to all prisoners under capital sentence and provide for court orders appointing such counsel for indigent prisoners (absent waiver). Subsection (d) provides that postconviction counsel may not be the trial counsel unless the prisoner and trial counsel expressly request continued representation. The Department’s implementing regulations for chapter 154, 28 CFR 26.22(a), track these statutory requirements.

Arizona’s capital counsel mechanism satisfies these requirements. Its statutes

and rules provide for the appointment by court order of postconviction counsel for prisoners under sentence of death, unless waived, and provide that postconviction counsel cannot be the same as trial counsel unless the defendant and counsel expressly request continued representation. *See* Ariz. Rev. Stat. 13–4041(B)–(E) (“[T]he supreme court . . . or . . . the presiding judge . . . shall appoint counsel to represent the capital defendant in the state postconviction relief proceeding . . . . Counsel . . . shall . . . [n]ot previously have represented the capital defendant . . . in the trial court . . . unless the defendant and counsel expressly request continued representation . . . . [T]he capital defendant may . . . waive counsel . . . . [i]f . . . knowing and voluntary . . . .”); *id.* 13–4234(D) (“All indigent state prisoners under a capital sentence are entitled to the appointment of counsel to represent them in state postconviction proceedings. A competent indigent defendant may reject the offer of counsel with an understanding of its legal consequence.”); Ariz. R. Crim. P. 6.5(a) (“The court must appoint counsel by a written order . . . .”); *id.* 32.4(b) (“After the Supreme Court has affirmed a capital defendant’s conviction and sentence, it must appoint counsel [for postconviction proceedings] . . . . If the presiding judge makes an appointment, the court must file a copy of the appointment order with the Supreme Court.”).

In *Spears*, the Ninth Circuit concluded that the relevant Arizona provisions, which did not differ significantly from their current versions with respect to the 28 U.S.C. 2261(c)–(d) requirements, satisfied this aspect of chapter 154. *See* 283 F.3d at 1009–12, 1017. I agree that this continues to be the case.

#### *C. Counsel Competency*

Subsection (a) of 28 U.S.C. 2265 requires the Attorney General to determine whether a State has established a mechanism for the appointment of competent postconviction capital counsel and whether it provides standards of competency for the appointment of such counsel.

Analysis of this issue includes consideration of federal and state law on counsel competency standards, prior judicial assessment of Arizona’s standards, and various issues raised in the public comments on Arizona’s request for certification.

### 1. Counsel Competency Standards Under State and Federal Law

Arizona statutory provisions, in effect since 1996, regarding eligibility for appointment as postconviction capital counsel, have required that counsel (i) be a member in good standing of the state bar for at least five years immediately preceding the appointment, and (ii) have practiced in the area of state criminal appeals or postconviction proceedings for at least three years immediately preceding the appointment. *See* Ariz. Rev. Stat. 13–4041(C). The statute directs the Arizona Supreme Court to maintain a list of eligible attorneys and authorizes the Arizona Supreme Court to establish by rule more stringent standards of competency. *See id.* At the time of the decision in *Spears*, there was also a provision—since repealed—allowing the Arizona Supreme Court to appoint non-list counsel if no qualified counsel were available. *See Spears*, 283 F.3d at 1009–10.

The experience requirements of the Arizona statute are similar to counsel competency standards that Congress has adopted for federal court proceedings in capital cases, including both federal habeas corpus review of state capital cases and collateral proceedings under 28 U.S.C. 2255 in federal capital cases. *See* 18 U.S.C. 3599. The federal standard for post-conviction counsel is not less than five years of admission to practice and three years of experience in handling felony appeals. Exceptions are allowed as provided in section 3599(d), which permits the court, for good cause, to appoint other attorneys whose background, knowledge, or experience would otherwise enable them to properly represent capital defendants. Under the regulations implementing chapter 154 that I apply, and as a matter of common sense, it is significant that a State has adopted experience requirements similar to those that Congress has adopted for federal court proceedings, because it is implausible that Congress would have deemed inadequate under chapter 154 standards that it has deemed adequate for the corresponding federal proceedings. *See* 78 FR at 58170.

In addition, the Arizona Supreme Court has adopted a rule, Ariz. R. Crim. P. 6.8, that sets more stringent counsel competency standards than those appearing in the state statute that emulates the federal competency standards. At the time of the appointment considered in *Spears*, the rule required appointed counsel: (i) To have been a member in good standing of the Arizona Bar for at least five years

immediately before appointment; (ii) to have practiced state criminal litigation for three years immediately before appointment; (iii) to have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate for capital cases; (iv) within three years immediately before appointment, to have been lead counsel in an appeal or postconviction proceeding in a capital case, and have prior experience as lead counsel in the appeal of at least three felony convictions and at least one postconviction proceeding with an evidentiary hearing or have been lead counsel in the appeal of at least six felony convictions, including at least two appeals from murder convictions, and lead counsel in at least two postconviction proceedings with evidentiary hearings; and (v) to have attended and successfully completed within one year of appointment at least 12 hours of relevant training or educational programs in the area of capital defense. *See Spears*, 283 F.3d at 1010–11. The rule further provided that postconviction capital counsel not fully satisfying these qualifications may be appointed in exceptional circumstances, but only if: (i) The Arizona Supreme Court consents, (ii) the attorney’s experience, stature, and record establish that the attorney’s ability significantly exceeds the full suite of qualifications, and (iii) the attorney associates with a lawyer who does meet the rule’s qualifications. *See Spears*, 283 F.3d at 1010–11.

The Ninth Circuit concluded in *Spears* that these counsel competency standards were sufficient under chapter 154. *See id.* at 1013–15. The court noted that Congress did not envision any specific competency standards but, rather, “intended the states to have substantial discretion to determine the substance of the competency standards.” *Id.* at 1013. The court dismissed an objection based on the rule’s exception allowing the appointment of lawyers not meeting its specific criteria, noting that the exception required that such a lawyer significantly exceed those criteria and that the lawyer associated with one who did meet the rule’s qualifications. *See id.* The court also dismissed an objection that the competency standards were insufficient because they allowed appointment of lawyers without experience defending a capital case, reasoning that “[n]othing in 28 U.S.C. 2261(b) or in logic requires that a lawyer must have capital experience to be competent.” *Id.* Finally, the court dismissed an objection based on the

statutory allowance of other counsel if qualified counsel were unavailable, because the Arizona Supreme Court had bound itself by the rule it adopted to appoint counsel meeting the rule’s standards. *See id.* at 1012–15.

Arizona’s postconviction capital counsel competency standards have changed in some particulars during the period considered in this certification. An amendment adopted in 2000—before the decision in *Spears* but after the appointment considered in that case—changed the training requirement to successful completion within one year before initial appointment of at least six hours of relevant training or education in the area of capital defense, and successful completion within one year before any later appointment of at least 12 hours of relevant training or education in the area of criminal defense. A requirement was later added that counsel be familiar with and guided by the American Bar Association guidelines for capital defense counsel. And an amendment adopted in 2011 modified the detailed litigation experience requirements in Rule 6.8, in places where the text had required postconviction litigation experience, to require instead trial or postconviction litigation experience.

As modified, Arizona’s postconviction counsel competency standards have continued to exceed the standards of 18 U.S.C. 3599, which Congress has deemed adequate for postconviction counsel in federal court proceedings in capital cases. Nevertheless, public comments on Arizona’s request for certification have questioned the current relevance of *Spears* with respect to Arizona’s counsel competency standards, focusing mainly on the change in 2011 affecting the requirement of postconviction litigation experience. These comments were based on the 2011 amendment’s addition of the following language in Rule 6.8, underlined below in the current text of Rule 6.8(d):

(d) Post-Conviction Counsel. To be eligible for appointment as post-conviction counsel, an attorney must meet the qualifications set forth in (a) and the attorney must:

(1) Within 3 years immediately before the appointment, have been lead counsel in a trial in which a death sentence was sought or in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and prior experience as lead counsel in the appeal of at least three felony convictions and a *trial or* post-conviction proceeding with an evidentiary hearing; or

(2) have been lead counsel in the appeal of at least 6 felony convictions, including two appeals from first- or second-degree murder convictions, and lead counsel in at least two

felony trials or post-conviction proceedings with evidentiary hearings.

Nothing in *Spears* suggests that the modifications of Rule 6.8 since 1998—and in particular, the rule’s allowance of trial or postconviction litigation experience—place the rule beyond Arizona’s “substantial discretion to determine the substance of the competency standards.” *Spears*, 283 F.3d at 1007. Indeed, in an earlier case, the Ninth Circuit considered this very question and concluded that postconviction litigation experience is not a necessary element of adequate counsel competency standards under chapter 154. *See Ashmus v. Calderon*, 123 F.3d 1199, 1208 (9th Cir. 1997), *rev’d on other grounds*, 523 U.S. 740 (1998). Responding to a challenge to California’s standards because they did not require any familiarity with or experience in postconviction litigation—referred to as “habeas corpus” in California—the court observed that “[m]any lawyers who could competently represent a condemned prisoner would not qualify under such a standard. We conclude a state’s competency standards need not require previous experience in habeas corpus litigation.” *Ashmus*, 123 F.3d at 1208.

2. Counsel Competency in the Department’s Regulations

Postconviction litigation experience is also not an essential element of adequate counsel competency standards under the Department’s interpretation of this aspect of chapter 154. The Department’s regulations address counsel competency in 28 CFR 26.22(b), which says that a State’s “mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments.” To aid in the determination regarding this requirement, section 26.22(b)(1) provides two benchmark criteria and says that a State’s standards of competency are presumptively adequate if they meet or exceed either of the benchmarks. Section 26.22(b)(2) further states that competency standards not satisfying the benchmark criteria will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

In applying section 26.22(b)(2), the benchmark criteria continue to function as reference points in the evaluation. State competency standards that are likely to result in significantly lower levels of proficiency than the benchmarks risk being found inadequate under chapter 154, while state

competency standards that are likely to result in similar or even higher levels of proficiency than the benchmarks weigh in favor of a finding of adequacy under chapter 154. *See* 78 FR at 58172, 58179.

The first benchmark criterion, appearing in section 26.22(b)(1)(i), is appointment of counsel “who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience.” The basic standard is subject to the proviso that “a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation.” 28 CFR 26.22(b)(1)(i).

Arizona’s standards of competency for appointment, appearing in Arizona Rule of Criminal Procedure 6.8(a)–(e), compare favorably to section 26.22(b)(1)(i). Section 26.22(b)(1)(i) could be satisfied, for example, by a lawyer admitted to the bar for five years who handled one or two postconviction proceedings in which the litigation continued over three years. It could be satisfied even if the postconviction proceedings concerned offenses dissimilar from capital murder offenses and even if the postconviction proceedings did not involve evidentiary hearings. By comparison, Arizona requires, in addition to five years of bar admission and three years of recent criminal litigation practice: (i) Demonstrated proficiency and commitment exemplifying the quality of representation appropriate for capital cases; (ii) relevant training or education in the area of capital defense and other criminal defense; (iii) familiarity with the American Bar Association guidelines for capital defense counsel; and (iv) recent experience as lead counsel in capital litigation with prior experience as lead counsel in at least three felony appeals and a trial or postconviction proceeding with an evidentiary hearing or experience as lead counsel in at least six felony appeals, including two murder conviction appeals, and experience as lead counsel in at least two felony trials or postconviction proceedings with evidentiary hearings. *See* *Ariz. R. Crim. P.* 6.8(a), (d).

The nature and extent of Arizona’s standards of competency justify the conclusion that they are “likely to result in even higher levels of proficiency,” 78 FR at 58172, than the benchmark set forth in 28 CFR 26.22(b)(1)(i). The same was true of earlier iterations of Arizona’s counsel competency

standards, which have evolved in some respects as discussed above. It follows that Arizona’s capital counsel mechanism provides (and has provided) adequate standards of competency for appointments. *See* 28 CFR 26.22(b)(2); *see also* 78 FR at 58172.

A number of public comments argued that Arizona’s standards are inadequate because, following the 2011 amendments to Rule 6.8, they do not require postconviction litigation experience. These comments are of a piece with those, discussed above, that attempted to distinguish *Spears* on this ground. In relation to section 26.22(b)(2), the objection assumes that postconviction litigation experience is critical, if not essential, under the Department’s rule.

The comments misunderstand the regulation. As explained above, in applying section 26.22(b)(2), the benchmark criteria of section 26.22(b)(1) serve as reference points. The “section 26.22(b)(1)(i) [benchmark] is based on the qualification standards Congress has adopted in 18 U.S.C. 3599 for appointment of counsel in Federal court proceedings in capital cases” and “[t]he formulation of the benchmark . . . does not take issue . . . with Congress’s judgments regarding counsel competency standards that are likely to be adequate.” 78 FR at 58169. The federal statutory competency standards are themselves appropriate reference points in assessing the adequacy of corresponding state standards, because it is implausible that Congress would have deemed inadequate for state postconviction proceedings standards similar to those it has deemed adequate for federal postconviction proceedings. *See* 78 FR at 58169–70. Significantly, 18 U.S.C. 3599 does not require prior postconviction litigation experience. Rather, it deems sufficient having prior experience in the litigation of felony appeals. *See id.* As detailed above, Arizona’s standards throughout the timeframe of this certification have required substantial experience litigating felony appeals.

Moreover, Arizona’s competency standards do not deem appellate experience alone to be sufficient but rather also require postconviction litigation experience or trial experience. Where that element of the standard is satisfied by trial experience rather than postconviction experience, it remains relevant to postconviction litigation, equipping postconviction counsel to assess the adequacy of trial counsel’s performance and enhancing his ability to raise in postconviction proceedings claims of ineffectiveness of trial counsel and other claims relating to the trial

proceedings. And, as discussed above, Arizona's standards have consistently involved other requirements, going beyond both the section 22.62(b)(1)(i) benchmark and 18 U.S.C. 3599, which are relevant to counsel's ability to provide competent representation in capital postconviction proceedings.

### 3. Specific Criticisms

Some public comments objected that Arizona's qualification standards are inadequate because Arizona Rule of Criminal Procedure 6.8(e) (formerly 6.8(d)) allows the appointment of counsel who do not meet some of the qualification standards, an allowance that the comments say has been relied on in nearly 25 percent of capital cases in Arizona. However, the proviso in Rule 6.8(e) is similar to language in 28 CFR 26.22(b)(1)(i) and 18 U.S.C. 3599(d) that allows the court, for good cause, to appoint counsel not satisfying the basic standard if the attorney's background, knowledge, or experience would otherwise enable him to properly represent the defendant. Indeed, the Rule 6.8(e) proviso is narrower in some respects than the proviso in the federal provisions in that it requires that: (i) The Arizona Supreme Court consent to the appointment; (ii) the attorney satisfy certain of Rule 6.8's requirements, including successful completion of relevant training or educational programs; (iii) the attorney's experience, stature, and record establish that the attorney's ability significantly exceeds the full set of qualification standards; and (iv) the attorney associate with an attorney appointed by the court who fully meets the standards of Rule 6.8. Ariz. R. Crim. P. 6.8(e)(1)–(4). Put simply, Rule 6.8(e) requires more to ensure that appointed counsel will provide competent representation than do its federal counterparts, and this has been true throughout the timeframe of this certification.

Some comments argued that Arizona's counsel competency standards are insufficient because they lack an appropriate appointing authority, adequate training requirements, adequate qualitative evaluation, an adequate system for monitoring the performance of counsel following appointment, and adequate means to terminate the eligibility of counsel whose performance is inadequate or who engages in misconduct. States can qualify for chapter 154 certification by establishing capital counsel mechanisms that incorporate elements addressing these matters. See 78 FR at 58170–71. But neither the terms of chapter 154 and the implementing regulations nor judicial precedent

support the notion that these things are required. Congress intended that States have substantial discretion in defining competency standards under chapter 154. See *Spears*, 283 F.3d at 1012–13; 78 FR at 58170, 58172. Arizona's competency standards are well within the bounds of its discretion, as measured against 18 U.S.C. 3599(d), 28 CFR 26.22(b), and the judgment in *Spears*.

Finally, some public comments argued that Arizona's competency standards should be deemed inadequate in practice, alleging that many appointed postconviction counsel in Arizona do not perform competently, that some had not been considered proficient by a Maricopa County selection committee for trial and appellate capital counsel, and that the qualification requirements for appointment are not consistently enforced. Comments of this nature also pointed to language in the rule preamble that observed that a State may fail to establish in practice a necessary element of its capital counsel mechanism and to judicial decisions (preceding the transfer of the certification function to the Attorney General) that concluded that States must comply with their capital counsel mechanisms to have the benefit of the chapter 154 review procedures.

Arizona disagrees that there are systemic problems relating to the competency of the State's appointed postconviction capital counsel. Arizona asserts that the critical comments largely focus on 12 attorneys out of 86, none of whom have been disciplined, removed from cases, or judicially determined to be incompetent based on their alleged deficiencies. Arizona also asserts that the Arizona Supreme Court need not agree with or defer to a committee of defense lawyers in Maricopa County and can instead reasonably appoint postconviction counsel who satisfy the State's competency standards in its own judgment. Furthermore, regarding the comments' presentation of criticisms by counsel involved in later stages of capital case litigation, Arizona asserts that “[r]arely . . . is there a capital case in which habeas counsel does not raise new claims or fault the work of earlier lawyers as flawed and ineffective” but “the strategy has never succeeded” with respect to “any of the 12 attorneys at issue.” Letter from Office of the Arizona Attorney General, Oct. 16, 2018, at 8–10.

The critical comments on this issue misunderstand the allocation of responsibilities under the current version of chapter 154 and the Attorney

General's function in making certification decisions.

Regarding a State's compliance with its own capital mechanism, the current statutory scheme does not call for or allow case-specific oversight by the Attorney General. As discussed above, following the amendments that Congress enacted in 2006, chapter 154 includes only two preconditions to its applicability in a particular case: “The Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265,” 28 U.S.C. 2261(b)(1); and “counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent,” *id.* 2261(b)(2). Only the general certification function referenced in section 2261(b)(1), and set forth fully in section 2265, is assigned to “the Attorney General of the United States.” Ascertaining whether counsel was appointed pursuant to the certified mechanism, as provided in section 2261(b)(2), is reserved to federal habeas courts, “which can address individual irregularities and decide whether the Federal habeas corpus review procedures of chapter 154 will apply in particular cases.” 78 FR at 58162.

In this regard, the current law differs from chapter 154 as it was prior to the 2006 amendments, when requests to apply the chapter 154 federal habeas review procedures were presented to federal habeas courts in the context of particular cases they were reviewing. Courts in that posture considered whether the State had established a mechanism satisfying chapter 154, and if so, whether counsel for the petitioner in the particular case before the court had been appointed in compliance with that mechanism. Consequently, if counsel had not been appointed on collateral review in a particular case, or if the attorney provided did not satisfy the State's competency standards for such appointments, the courts could find chapter 154 inapplicable on that basis, regardless of whether the State had established a capital counsel mechanism that otherwise satisfied the requirements of chapter 154. See 78 FR at 58162–63, 58165; see also, *e.g.*, *Tucker*, 221 F.3d at 604–05 (“We accordingly conclude that a State must not only enact a ‘mechanism’ and standards for postconviction review counsel, but those mechanisms and standards must in fact be complied with before the State may invoke the time limitations of 28 U.S.C. 2263.”).

In contrast, in entertaining a State's request for chapter 154 certification

under the current law, the Attorney General has no individual case before him and is not responsible for determining whether a State has complied with its mechanism in any particular case. Rather, as discussed above, 28 U.S.C. 2261(b)(1) assigns to the Attorney General the general certification function under chapter 154, which makes him responsible for determining whether an appointment mechanism has been established by the State and whether the State provides standards of competency. If the state mechanism is certified, appointment of counsel pursuant to the certified mechanism (absent waiver or retention of counsel or a finding of non-indigence) continues to be a further condition for the applicability of chapter 154. Whether that has occurred in any individual case is, under 28 U.S.C. 2261(b)(2), a matter to be decided by the federal habeas court to which the case is presented, not the Attorney General. *See* 78 FR at 58162–63, 58165.

Likewise, the contention that the Attorney General should certify a State’s mechanism only if he is satisfied with the actual performance of postconviction counsel following appointment misconceives the Attorney General’s role under the current law. Chapter 154 provides that the Attorney General “shall determine” whether a State “has established a mechanism for the appointment . . . of competent counsel” in state capital postconviction proceedings, and whether the State “provides standards of competency for the appointment of counsel” in such proceedings. 28 U.S.C. 2265(a). The statute does not provide that the Attorney General is to inquire into counsel’s performance following appointment in all or even some cases. Instead, it frames its requirements regarding counsel competency as matters relating to appointment, contemplating an inquiry into whether a State has standards determining eligibility for appointment. *See* 78 FR at 58162–63, 58165. This understanding is supported by the Powell Committee Report, the original reform proposal from which chapter 154 derives. The report explained that federal review would examine whether a State’s mechanism for appointing capital postconviction counsel comports with the statutory requirements “as opposed to [examining] the competency of particular counsel.” 135 Cong. Rec. at 24696. It further explained that, in contrast to the focus on “the performance of a capital defendant’s trial and appellate counsel,” “[t]he effectiveness of State and Federal

postconviction counsel is a matter that can and must be dealt with in the appointment process.” *Id.*; *see* 78 FR at 58162–63, 58165.

Regarding the “establishment” of a mechanism meeting chapter 154’s requirements, 28 U.S.C. 2265(a), the rule’s preamble posited that the Attorney General might need to address situations involving “a wholesale failure to implement one or more material elements of a mechanism described in a State’s certification submission, such as when a State’s submission relying on section 26.22(b)(1)(ii) in the rule points to a statute that authorizes a State agency to create and fund a statewide attorney monitoring program, but the agency never actually expends any funds, or expends funds to provide for monitoring of attorneys in only a few of its cities.” 78 FR at 58162–63. (The section 26.22(b)(1)(ii) benchmark referenced in the example involves a state post-appointment monitoring system, *see* 34 U.S.C. 60301(e)(2)(E)(i).) One could imagine similar situations in connection with other chapter 154 requirements—for example, if a state statute authorizes appointment and compensation of postconviction capital counsel for indigent prisoners, but the state legislature never appropriates any funds that can lawfully be used for that purpose.

As the preamble discussion makes clear, however, “a wholesale failure” to implement a necessary element under chapter 154 is an extreme situation, and no such situation exists or has existed with respect to Arizona’s appointment of postconviction counsel. “Other than in these situations, should they arise, questions of compliance by a State with the standards of its capital counsel mechanism will be a matter for the Federal habeas courts.” 78 FR at 58163.

4. The Arizona Capital Postconviction Public Defender Office

Some comments suggested that Arizona’s mechanism does not satisfy chapter 154’s counsel competency requirements because Arizona had, between 2007 and 2011, a public postconviction capital counsel agency—the Arizona Capital Postconviction Public Defender Office—and counsel employed by that agency did not have to satisfy the standards of competency for appointment under Rule 6.8. *See* Letter from Martin Lieberman, Dec. 27, 2018; Letter from AFPD, Feb. 22, 2018, at 38–41. This agency, which the commenters describe as inadequately funded and ultimately unsuccessful, was created by legislation enacted in 2006 that provided for the agency’s termination on July 1, 2011. 2006 Ariz.

Legis. Serv. Ch. 369, sec. 3, 4, 6. During the limited period of its existence, the agency did not supplant Arizona’s general capital counsel mechanism, which continued to provide counsel for postconviction representation outside of the few cases handled by the agency. The comments relating to the agency do not go to the question whether Arizona had a capital counsel mechanism adequate under chapter 154 before the agency’s establishment or after its termination, but at most to whether there was an intermediate period in 2007 to 2011 in which it did not.

With respect to that period, the comments amount to a claim that agency counsel were not appointed pursuant to the mechanism I now certify in the few cases the agency handled, because the agency counsel were not required to satisfy state standards of competency. *Cf. Tucker*, 221 F.3d at 604. Under the current formulation of chapter 154, such a claim could be presented to the federal habeas court under 28 U.S.C. 2261(b)(2) in the cases in which the agency provided postconviction representation and, if found to have merit, it could provide a basis for finding chapter 154’s review procedures inapplicable in those cases. It does not have implications outside of those cases or affect my determination that Arizona has had a mechanism for appointment of postconviction counsel satisfying chapter 154’s requirements continuously since May 19, 1998.

I also conclude that Arizona has had a capital counsel mechanism adequate under chapter 154 continuously since May 19, 1998, because Arizona’s capital counsel mechanism in the period between 2007 and 2011 comprised its general mechanism established in 1998 together with the provision for representation by the public agency. Arizona law required that the agency’s Director meet or exceed the Rule 6.8 competency standards. 2006 Ariz. Legis. Serv. Ch. 369, sec. 7. The Director in turn hired experienced attorneys who operated under his supervision. *See* Letter from Martin Lieberman, Apr. 5, 2009, at 3. With respect to the agency’s staff counsel, hiring and employment by a dedicated office whose function is capital postconviction representation, under a Director having those qualifications, is a reasonable means of ensuring proficiency appropriate for such representation. I therefore find that this aspect of Arizona’s mechanism satisfies section 26.22(b)(2).

The comments’ criticisms relating to the public agency’s funding do not impugn this conclusion. Nor do they show a failure by Arizona to satisfy chapter 154’s other requirements,

relating to compensation and payment of reasonable litigation expenses, which are fully discussed in the ensuing portions of this notice. Rather, the information in the comments indicates that the agency was generally able to limit its caseload to a level compatible with its resources. Its attorneys were compensated by salary, which is allowed under chapter 154 for public defender personnel. *See Spears*, 283 F.3d at 1010 (requirement regarding hourly rate of compensation inapplicable to counsel in publicly funded offices); 78 FR at 58180 (such counsel may be compensated by salary). Litigation expenses were paid from the agency's budget with the possibility of requesting additional funds from the court. The comments state that a budgetary shortfall in 2009 resulted in delay in the processing of two cases. *See Decl. of Martin Lieberman*, Dec. 26, 2017, at 2–4; Letter from Martin Lieberman, Apr. 5, 2009, at 3–4. But chapter 154 does not condition certification on all cases being processed without delay.

#### 5. International Issues

Beyond the general comments regarding Arizona's counsel competency standards, the Government of Mexico submitted a comment asserting that the Attorney General should deny certification because Arizona has no provision ensuring that foreign national defendants receive competent representation. *See Letter from Amb. José Antonio Zabalgoitia*, Jan. 5, 2017. The comment states that attorneys representing foreign nationals need expertise specific to such clients, including expertise regarding international law. *See id.* at 2–3. The comment further asserts that foreign nationals present other special needs affecting the requirements for competent representation, including defense teams that can communicate in the defendant's native language, culturally competent experts who can understand the defendant's cultural background and work with him and his family in appropriate ways, and foreign travel to investigate the defendant's circumstances and life in his home country. *See id.*

The comment does not provide a basis for denying certification. Prisoners under sentence of death could be divided into many subcategories, each of which might benefit from representation by lawyers with special expertise. But chapter 154 does not require that a State define special competency standards for lawyers with respect to each such class. Instead, it provides that a State must provide

standards of competency for appointment. *See* 28 U.S.C. 2265(a)(1)(C).

The comment provides no persuasive reason to believe that lawyers satisfying Arizona's standards for appointment will be unable to handle competently any legal issues involved in representing foreign clients. The counsel competency standards Congress has enacted for federal court proceedings in capital cases, 18 U.S.C. 3599, impose no special requirements for cases involving foreign defendants. It is implausible that Congress intended to impose such requirements with respect to state postconviction proceedings under chapter 154. Likewise, the implementing rule for chapter 154 does not require special counsel competency standards for cases involving foreign defendants. Neither of the section 26.22(b)(1) benchmark criteria require special competency standards for counsel representing foreign clients, and there is no basis for reading such a requirement into the section 26.22(b)(2) authorization of standards that otherwise reasonably assure a level of proficiency appropriate for state capital postconviction litigation.

Other matters raised in this comment—relating to language skills, culturally competent experts, and foreign travel—go to the question whether Arizona provides for payment of reasonable litigation expenses. I answer that question in the affirmative for reasons discussed in Part II.E of this notice.

#### D. Compensation of Counsel

Chapter 154 requires the Attorney General to determine whether a state has established a mechanism for the compensation of appointed postconviction capital counsel. 28 U.S.C. 2265(a). Throughout the period considered in this certification, Arizona Revised Statutes section 13–4041 has provided that “[u]nless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state postconviction relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour.” Ariz. Rev. Stat. 13–4041(F). The statute has also consistently required the court (or the court's designee) to approve reasonable fees and costs, and has provided for recourse through a special action with the Arizona Supreme Court where the attorney believes that the court has set an unreasonably low hourly rate or the court found that the hours the attorney spent were unreasonable. *See Ariz. Rev. Stat. 13–4041(G)*. The statute formerly required that counsel establish good

cause to receive compensation for more than 200 hours of work—amounting to a presumptive \$20,000 cap on compensation at the maximum hourly rate of \$100—but legislation enacted in 2013 eliminated this limitation. *See* 2013 Ariz. Legis. Serv. Ch. 94.

#### 1. Judicial Assessment of Compensation Under Chapter 154

In *Spears*, the Ninth Circuit “conclude[d] that Arizona's compensation mechanism complied with Chapter 154.” 283 F.3d at 1015. The court rejected petitioner's argument that the then-existing 200-hour limit was “unduly burdensome to appointed counsel,” reasoning that “to receive compensation for hours beyond the threshold, the lawyer need[ ] only to establish that he or she worked more than 200 hours on the case and that the time expended was reasonable.” *Id.* The court observed that “[n]othing in Chapter 154 suggests that the mechanism to ensure compensation must be a blank check. The statute simply requires that the appointment mechanism reasonably compensate counsel.” *Id.* Consequently, consistent with chapter 154, “a state can require an appointed lawyer to account for the reasonableness of the number of hours worked before it compensates that lawyer.” *Id.*

Considering the State's submissions and the public comments thereon, there appears to be agreement that the Arizona Supreme Court consistently orders compensation at the maximum hourly rate of \$100. The comments noted, however, that the \$100 hourly rate has not been changed since 1998, during which time its real value has been eroded by inflation. The comments pointed to recommendations that the hourly rate be increased, with \$125 sometimes mentioned as a more appropriate figure.

As an initial matter, the reduction of the value of \$100 by inflation during the period of the certification does not imply that it is now an inadequate maximum hourly rate. A State may establish a rate of compensation high enough that it is adequate at the outset and continues to be adequate even after inflation's erosion of its real value over time. The hourly rate established by Arizona, in particular, continues to be adequate under chapter 154.

Simple computation allows a general assessment of the remuneration postconviction capital counsel may be afforded in Arizona. Assuming that a regular work week is 40 hours, and that a regular work year consists of about 50 weeks, the number of hours in a full year of work is 2000. Applying

Arizona’s maximum hourly rate of \$100, postconviction counsel would receive \$4,000 for a week of full-time work on a capital case, and would receive \$200,000 for a year’s work.

Judicial precedent finding state compensation inadequate under chapter 154 has involved much more restrictive compensation provisions than Arizona’s. In *Baker v. Corcoran*, 220 F.3d 276 (4th Cir. 2000), the Fourth Circuit concluded that Maryland’s scheme failed to satisfy chapter 154. *Id.* at 287. Maryland at the time compensated postconviction capital counsel \$30 per hour for out-of-court time and \$35 per hour for in-court time, subject to an overall cap of \$12,500. *Id.* at 285. Examining attorney overhead costs and the effects of the hourly rates and fee cap, the court concluded that accepting postconviction capital cases resulted in a net loss to attorneys. *Id.* The court stated that “[a] compensation system that results in substantial losses to the appointed attorney or his firm simply cannot be deemed adequate.” *Id.* at 285–86.

The compensation scheme at issue in *Baker* bears no resemblance to Arizona’s system, which, as discussed above, may compensate postconviction capital counsel \$200,000 for a year’s work (reckoned as 2,000 hours). Even assuming overhead costs of 40% of revenue for private counsel, as a commenter suggested, the net authorized income for a year of postconviction work in Arizona would be \$120,000 (= \$200,000 – 40% × \$200,000). This is far from the concern reflected in *Baker* regarding attorneys having to operate at a substantial loss. *See* 220 F.3d at 285–86; *see also Mata v. Johnson*, 99 F.3d 1261, 1266 (5th Cir. 1996) (finding that Texas’s mechanism, which capped compensation at \$7,500 and expenses at \$2,500, satisfied chapter 154 for those elements), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997).

Arizona’s submissions provided extensive information about how appointed counsel are compensated in practice. Arizona’s 2017 application letter explained that “[c]ounsel employed by publicly-funded offices are compensated by salary” and that “[a]ppointed private counsel are compensated at an hourly rate of up to \$100 per hour,” as provided by statute. Letter from Office of the Arizona Attorney General, Nov. 27, 2017, at 2. The application further reported that “Arizona regularly spends well over \$200,000 in attorney fees and litigation costs in capital post-conviction cases, and has spent over \$500,000 in more than one case.” *Id.* In 2018, Arizona

provided additional information and documentation, including identifying a number of cases in which the State paid over \$500,000 in attorney fees and litigation costs. Letter from Office of the Arizona Attorney General, Oct. 16, 2018. Arizona reported that the average compensation of postconviction capital counsel in Maricopa County exceeds \$165,000, that the average compensation in Pima County exceeds \$110,000, and that even smaller counties spend significantly more than \$20,000 per case.

Public comments on Arizona’s submissions state that Arizona’s examples and data are variously irrelevant, ambiguous, unrepresentative, misleading, incomplete, and inaccurate; that the average and high-end case figures mask or highlight variations among counties and cases, which may involve relatively low levels of compensation; and that use of the median instead of the mean yields lower representative figures.

I do not find it necessary to resolve the conflicting factual claims because I find Arizona’s compensation mechanism to be adequate under chapter 154, as the Ninth Circuit concluded in *Spears*, on uncontroverted grounds discussed above, and for additional reasons I discuss below in connection with the Department’s regulations.

## 2. Counsel Compensation in the Department’s Regulations

Turning to the implementing regulations for chapter 154, 28 CFR 26.22(c) provides that a State’s “mechanism must provide for compensation of appointed counsel.” The regulation provides four benchmark criteria and says that a State’s provision for compensation is presumptively adequate if it is comparable to or exceeds any of the benchmarks. The benchmarks are: (i) Compensation of appointed capital federal habeas counsel; (ii) compensation of retained state postconviction capital counsel meeting state standards of competency; (iii) compensation of appointed state capital trial or appellate counsel; and (iv) compensation of state attorneys in state capital postconviction proceedings, taking account of relative overhead costs. *See* 28 CFR 26.22(c)(1).

The rule further states in section 26.22(c)(2) that provisions for compensation not satisfying the benchmark criteria will be deemed adequate only if the state mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet state standards of competency sufficient under section

26.22(b). *See* 78 FR at 58172–73, 58179–80 (further explaining the regulatory provisions). The rule preamble explains that section 26.22(c)(2) recognizes that compensation provisions “have been deemed adequate for purposes of chapter 154 . . . independent of any comparison to the benchmarks in paragraph (c)(1),” citing the *Spears* decision and Arizona’s hourly rate of up to \$100 by way of illustration. 78 FR at 58180.

Arizona’s 2017 letter says that postconviction capital representation is provided by two classes of lawyers who are compensated differently. *See* Letter from Office of the Arizona Attorney General, Nov. 27, 2017, at 2. This is consistent with the rule. *See* 78 FR at 58180 (“A State may . . . provide for compensation of different counsel or classes of counsel in conformity with different standards.”).

One of the classes is “[c]ounsel employed by publicly-funded offices” who “are compensated by salary.” Letter from Office of the Arizona Attorney General, Nov. 27, 2017, at 2. This is adequate under section 26.22(c)(2); such personnel do not require financial incentives beyond their salaries to provide representation in capital postconviction proceedings. *See* 78 FR at 58180 (noting, in relation to section 26.22(c)(2), that “a State may secure representation for indigent capital petitioners in postconviction proceedings by means not dependent on any special financial incentive for accepting appointments, such as by providing sufficient salaried public defender personnel to competently carry out such assignments as part of their duties”).

With respect to private counsel, the information I have received from the State and public comments is insufficient to enable me to determine whether Arizona’s mechanism for compensation has satisfied the benchmarks of section 26.22(c)(1) because it does not include comparative information for the benchmarks’ reference points—such as compensation of trial and appellate counsel, and compensation of attorneys representing the State in postconviction proceedings—for all parts of the State throughout the period of the certification. I accordingly consider whether the mechanism is reasonably designed to ensure the availability for appointment of counsel meeting the State’s standards of competency for appointment, as provided in section 26.22(c)(2).

Some comments maintained that Arizona’s provision for compensation is inadequate because between 1998 and

2013 there was a presumptive limit of 200 compensable hours, implying a \$20,000 limit on total compensation at the maximum \$100 hourly rate. That presumptive limit is consistent with the rule, however, because there were means for authorizing compensation beyond the presumptive maximum. Indeed, the rule preamble cited the Ninth Circuit's approval in *Spears* of Arizona's presumptive 200-hour limit because, as the Ninth Circuit observed, compensation was available for work beyond that limit if reasonable. 78 FR at 58180.

Variations in compensation among cases and counties, which were noted in the State's submissions and the public comments, do not call into question the adequacy of Arizona's compensation mechanism under the rule's standard. It would be unreasonable to expect attorneys' compensation to be similar in all cases, because different cases require different amounts of work, depending on their particular issues and characteristics. Aggregate and average compensation may vary in different geographic areas because of differences among counties in the nature and number of capital cases or other factors. Whatever the reasons for such variations, Arizona's mechanism has authorized and does authorize, on a statewide basis, compensation of counsel at a rate of up to \$100 an hour, with no inflexible limit on the number of hours that can be compensated. Chapter 154 does not require greater statewide uniformity in compensation and there are no requirements for certification beyond those that chapter 154 states. See 28 U.S.C. 2265(a)(3).

Finally, some commenters argued that section 26.22(c)(2) is not satisfied on the ground that Arizona's \$100 hourly rate has been inadequate to attract counsel who perform adequately in practice. As discussed above, the State disputes the commenters' claims of systemic inadequacies in the performance of counsel, and reviewing counsel's performance in particular cases is not among the Attorney General's functions under chapter 154. Moreover, the criterion under section 26.22(c)(2) is whether the State's provision for compensation is "reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency sufficient under [section 26.22(b)]," which refers to the standards for appointment under the State's capital counsel mechanism. Arizona has been able to recruit attorneys who were found by the appointing authority to satisfy these standards. Commenters maintain that such counsel have been appointed only

after excessive delays, but timeliness of appointment is a different issue that I discuss separately below.

Accordingly, I find that Arizona's provision for compensation of appointed postconviction capital counsel satisfies the requirements of chapter 154.

#### *E. Payment of Reasonable Litigation Expenses*

Chapter 154 requires the Attorney General to determine whether a State has established a mechanism for payment of reasonable litigation expenses of appointed postconviction capital counsel. 28 U.S.C. 2265(a). Arizona's mechanism provides for the payment of reasonable litigation expenses in Arizona Revised Statutes sections 13-4041(G), (I), and 13-4013(B).

In *Spears*, the Ninth Circuit found that Arizona's provisions for payment of reasonable litigation expenses—which have not changed in the intervening years in any material respect—were adequate under chapter 154. See 283 F.3d at 1016. The Ninth Circuit reasoned that chapter 154 requires "only that the state mechanism provide for the payment of reasonable litigation expenses" and "assumes that a state can assess reasonableness as part of its process." *Id.* Nothing has transpired since *Spears* that calls this conclusion into question, notwithstanding comments claiming that expense payments in Arizona are too low and that the level of such payments varies among cases and in different parts of the State. Chapter 154 has not at any time required payment of any particular quantum of expenses and it has not provided that a State lacks a qualifying mechanism if different amounts of expenses are found to be reasonable in different areas or cases. Differences among cases may result from different needs for investigation, expert witnesses, and other resources, depending on the characteristics of the individual case. Differences among counties may result from differences in the nature and number of capital cases, differences in cost-of-living and wages, and other factors. Whatever the reasons for such variations, Arizona Revised Statutes sections 13-4041(G), (I), and 13-4013(B) provide for payment of reasonable litigation expenses on a statewide basis, which satisfies chapter 154's requirement. *Spears* did not go beyond chapter 154 to require more definite criteria or greater statewide uniformity in the payment of litigation expenses, and adding to chapter 154's express requirements is now barred. See 28 U.S.C. 2265(a)(3).

A frequent point of criticism in the public comments was that Arizona's provisions regarding payment of litigation expenses include both mandatory and permissive language. Compare Ariz. Rev. Stat. 13-4041(G) (court "shall" review and approve all reasonable fees and costs) *with id.* 13-4041(I) (court "may" authorize additional monies to pay for reasonably necessary investigative and expert services). The same variation in language existed when the Ninth Circuit decided *Spears*, however, and the court understood these provisions to "requir[e] the payment of reasonable costs, as well as reasonable fees to investigators and experts, whenever the court deemed them reasonably necessary." 283 F.3d at 1016. Chapter 154 requires a mechanism for payment of reasonable litigation expenses but does not say that all of a State's provisions relating to the matter must use facially mandatory language. Notably, in the same act that added chapter 154 to title 28 of the United States Code, Congress changed the wording of the provision for payment of reasonably necessary litigation expenses in federal capital cases, and in federal habeas corpus review of state capital cases, from "shall" to "may." See *Ayestas v. Davis*, 138 S. Ct. 1080, 1087, 1094 (2018) (regarding 18 U.S.C. 3599(f), formerly designated 21 U.S.C. 848(q)(9)). It is implausible that Congress, in chapter 154, would have rejected the propriety of the term "may" while at the same time using the term "may" in a nearby, related provision. Arizona denies that the variation in language is significant, and it has not been shown that Arizona courts interpret the term "may" to afford boundless discretion to refuse to pay for expenses that are reasonably necessary.

Consequently, I find no basis for doubting the continuing validity of the Ninth Circuit's determination in *Spears* that Arizona has a mechanism for payment of reasonable litigation expenses of postconviction capital counsel as required by chapter 154. Nor do the Department's regulations provide any basis for a contrary conclusion. Following the statutory requirement, paragraph (d) of 28 CFR 26.22 provides that a state capital counsel mechanism must provide for payment of reasonable litigation expenses of appointed counsel. The paragraph provides a nonexhaustive list of types of litigation expenses. It further states that presumptive limits on payment are allowed but only if means are authorized for payment of necessary expenses above such limits.

Arizona has explained that it “provides for payment of all reasonable litigation expenses, such as for investigative and expert assistance, as required by 28 U.S.C. 2265(a)(1)(A) and 28 CFR 26.22(d).” Letter from Office of the Arizona Attorney General, Nov. 27, 2017, at 2. This is correct. Arizona’s provisions for payment of reasonable litigation expenses do not exclude payment for any types of reasonable litigation expenses, including those listed in section 26.22(d), and do not have presumptive limits on the amount of payment. *Ariz. Rev. Stat.* 13–4041(G), (I); *id.* 13–4013(B).

Some comments objected that judges have denied postconviction counsel’s requests for payment of litigation expenses in some cases, that county expense systems may fail to provide adequate resources, and that there are no more definite standards to ensure statewide uniformity in payment of litigation expenses. However, the rule does not require state judges or other authorities to agree in all instances that the litigation expenses counsel wants are reasonably necessary, and it does not authorize or require the Attorney General to second-guess their determinations.

Rather, it is sufficient under the rule if the capital counsel mechanism provides for payment of reasonable litigation expenses in general terms. In this connection, the rule preamble observed that the statutory directive to the Attorney General is to determine whether the State has established a mechanism for the “payment of reasonable litigation expenses.” 28 U.S.C. 2265(a)(1)(A). The preamble noted that there was no persuasive reason why a State should be denied chapter 154 certification if its mechanism requires the payment of reasonable litigation expenses in terms similar to chapter 154 itself, or at some other level of generality less specific than that urged by commenters on the rule. The rulemaking cited the Ninth Circuit’s reasoning in *Spears*, discussed above, that chapter 154 “requires only that the state mechanism provide for the payment of reasonable litigation expenses. The federal statute thus assumes that a state can assess reasonableness as part of its process.” 78 FR at 58173 (quoting *Spears*, 283 F.3d at 1016).

The submissions concerning Arizona’s current request for certification provided extensive information about the practical operation of the State’s mechanism for payment of reasonable litigation expenses. Arizona’s submissions pointed to a number of cases in which

payment of fees and litigation expenses exceeded \$500,000, and advised that the average reimbursement for litigation expenses was over \$140,000 per case in Maricopa County and over \$50,000 per case in Pima County. The rejoinder in public comments was similar to that concerning compensation, characterizing Arizona’s examples and data as variously irrelevant, ambiguous, unrepresentative, misleading, incomplete, and inaccurate; stating that the average and high-end case figures mask or highlight variations among counties and cases, which may involve relatively low levels of expense payment; and that use of the median instead of the mean yields lower representative figures.

As with compensation, I find it unnecessary to resolve these factual disputes regarding the amounts attorneys have received for litigation expenses, and how these payments have varied among different cases and different parts of the State. For the reasons explained above, Arizona’s mechanism provides for the payment of reasonable litigation expenses in a manner that satisfies chapter 154’s requirements.

#### F. Timeliness of Appointment

Chapter 154 does not specify a timeline for appointment of postconviction capital counsel. Nevertheless, the issue of timeliness has come up in judicial decisions, in the Department’s regulations, and in the public comments on Arizona’s request for certification.

##### 1. Historical Assessment of Timeliness

In *Spears*, the court acknowledged that “the text of the statute does not specify how soon after affirmance of a defendant’s conviction and sentence the state must extend its offer of postconviction counsel.” 283 F.3d at 1016. Nevertheless, the court believed that a requirement to offer counsel “expeditiously” was implicit in the context of chapter 154 and its legislative history. *Id.* The court then concluded that this implicit requirement was satisfied by an Arizona statutory provision, existing at the time of the appointment considered in that case, that required appointment of postconviction capital counsel within 15 days of the filing of the notice of postconviction relief. *See* 283 F.3d at 1016–18.

Arizona law no longer requires appointment of postconviction counsel within a 15-day period. The change could lead some to question whether Arizona is now in compliance with the implicit timeliness requirement

discerned by the court in *Spears*. Chapter 154 has since been amended, however, to specify that “[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.” 28 U.S.C. 2265(a)(3). Hence, whether Arizona’s statutes in their current form would satisfy the implicit timeliness requirement discerned in *Spears* is irrelevant to whether Arizona’s capital counsel mechanism satisfies chapter 154’s current requirements.

The court in *Spears* also concluded that Arizona was not entitled to the benefit of chapter 154’s expedited review procedures in the case before it, notwithstanding its determination that Arizona had in place a system meeting the chapter 154 criteria, because “a state must appoint counsel in compliance with its own system before a federal court will enforce the Chapter 154 time line on its behalf in a particular case.” 283 F.3d at 1018. The court noted that counsel had not been appointed within the then-existing 15-day timeframe under Arizona’s statutes. *Id.* at 1018–19. As discussed above, however, the current provisions of chapter 154 assign the determination whether a State has appointed counsel in compliance with its own system in a particular case to the federal habeas court presented with the case. It is not part of the Attorney General’s determination whether the State has established a capital counsel mechanism satisfying the requirements of chapter 154. *See* 28 U.S.C. 2261(b); 78 FR at 58166. Hence, this aspect of *Spears* is also not relevant to my determination whether Arizona’s capital counsel mechanism satisfies chapter 154’s current requirements.

##### 2. Timeliness Under Current Chapter 154

The regulations implementing chapter 154 define the term “appointment” to include a timeliness requirement. *See* 28 CFR 26.21. Arizona’s mechanism satisfies this requirement.

Specifically, section 26.21 defines “appointment” to mean “provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.” *Id.* The regulatory interpretation of “appointment” is related to chapter 154’s time limit for applying for federal habeas corpus review. As provided in 28 U.S.C. 2263, an application for habeas corpus under chapter 154 must be filed not later than 180 days from the date the conviction and sentence become final on direct

review, subject to tolling (i) during the pendency of a petition for certiorari in the Supreme Court, (ii) “from the date on which the first petition for postconviction review or other collateral relief is filed until the final State court disposition of such petition,” and (iii) for an additional period not exceeding 30 days on a showing of good cause. 28 U.S.C. 2263. The second ground for tolling allows the 180-day time limit to run until a state postconviction petition is filed and allows it to resume upon the conclusion of state postconviction proceedings. This effectively limits the time available both to initiate state postconviction proceedings and to file for federal habeas corpus review thereafter.

Against this background, the Department’s rulemaking reflected a concern that appointment of counsel may not be meaningful unless it is reasonably prompt. For if it is delayed, little or no time may remain for the prisoner to file a petition for state postconviction review with the assistance of counsel, and little or no time may remain for the prisoner to apply for federal habeas corpus review after the conclusion of state postconviction review. The rule accordingly provides that appointment in the context of chapter 154 means appointment that is reasonably timely in light of the time limitations for seeking state and federal postconviction review and the time required for developing and presenting related claims. *See* 78 FR 58165–67, 58176–77.

Assessment of this issue in relation to Arizona’s capital counsel mechanism requires consideration of its procedures relating to applications for postconviction relief and appointment of counsel. In a capital case, the time limit for filing a state postconviction petition begins to run with the filing of a notice of postconviction relief. The clerk of the Arizona Supreme Court files the notice after the court issues its mandate affirming the conviction and sentence. The mandate is not issued until the conclusion of any proceedings for certiorari from the U.S. Supreme Court. *See* Ariz. Rev. Stat. 13–4243(D); Ariz. R. Crim. P. 31.22(c), 32.4(a)(2)(B), (c)(1); *see also* *Spears*, 283 F.3d at 1011–12, 1018.

The timing rules concerning appointment of postconviction capital counsel have existed in three forms during the period considered in this certification. Initially, the rules required appointment of counsel within 15 days from the filing of the notice of postconviction relief. An amendment preceding the *Spears* decision removed the 15-day time frame. The current rules

direct appointment of counsel after the Arizona Supreme Court’s affirmation of the conviction and sentence. *See* Ariz. Rev. Stat. 13–4041(B); Ariz. R. Crim. P. 32.4(b)(1); *Spears*, 283 F.3d at 1000, 1012, 1018.

Thus, Arizona law currently allows for the appointment of counsel as soon as the Arizona Supreme Court affirms the conviction and sentence. This precedes the issuance of the Arizona Supreme Court’s mandate and the filing of the notice of postconviction relief, which are deferred pending any petition for certiorari from the U.S. Supreme Court. If suitable counsel is not available for appointment at that time, the Arizona Supreme Court may avoid prejudice to the defendant with respect to the time available for seeking state postconviction relief by delaying the notice of postconviction relief or staying the time limit for applying for postconviction relief. *See* Letter from the Office of the Arizona Attorney General, Oct. 16, 2018, at 10–11. The materials submitted by the State and public commenters include numerous Arizona Supreme Court orders that show that the time limit for seeking state postconviction relief was suspended pending the appointment of counsel.

Whether this process results in timely appointment of counsel, as defined in the Department’s regulations, presents different issues in relation to state postconviction filing and federal habeas filing. I discuss these matters separately.

### 3. State Postconviction Filing

Comments on the issue of timeliness in appointment agree that any delays in the appointment of counsel in Arizona do not prevent timely filing of state postconviction petitions. *See* Letter from AFPD, Nov. 5, 2018, at 16–17 (commenter “agrees that Arizona’s delays in appointing postconviction counsel will not prevent a prisoner from filing a first *state* petition for postconviction review”); Letter from AFPD, Jan. 7, 2019, at 27 (commenter “does not generally disagree” that “delays in appointing postconviction counsel will not prevent a prisoner from filing a timely first *state* petition for postconviction review”). The comments nevertheless contend that “Arizona’s customary practice” of appointing counsel in a manner allowing the timely filing of state postconviction petitions “cannot substitute for a valid statewide mechanism that mandates timely appointment” because “[a] practice can change at any time and is not governed by rule or statute.” *Id.* at 27–28 n.15.

Chapter 154 does not require that the elements of a qualifying capital counsel

mechanism be adopted or articulated in any particular manner or form. Chapter 154 originally included language that made the chapter applicable if a State established a qualifying capital counsel mechanism by “statute” or by “rule of its court of last resort.” *See* 28 U.S.C. 2261(b), 2265(a) (1996). In two decisions, the Ninth Circuit deemed California’s capital counsel mechanism inadequate under chapter 154 because it was not fully articulated in a “statute” or “rule,” dismissing as insufficient other “policy,” “practice,” or “compliance in practice” by the California Supreme Court. *See Ashmus v. Woodford*, 202 F.3d 1160, 1165–66, 1169 (9th Cir. 2000); *Ashmus v. Calderon*, 123 F.3d at 1207–08. Congress reacted by amending chapter 154 to eliminate the statute-or-rule language. *See* Public Law 109–177, sec. 507, 120 Stat. at 250–51; *see also* 152 Cong. Rec. at 2446 (remarks of Sen. Kyl) (“The ‘statute or rule of court’ language construed so severely by *Ashmus* is removed, allowing the States flexibility on how to establish the mechanism within the State’s judicial structure.”); 78 FR at 58164–65; 73 FR at 75332, 75334. Consequently, conceding that Arizona appoints counsel in a manner that allows prisoners to file timely state postconviction petitions, but characterizing this aspect of Arizona’s system as a “customary practice,” does not negate the State’s satisfaction of chapter 154’s requirements.

Moreover, the comment that customary practices can change at any time does not establish a material difference from rules and statutes, because rules and statutes can also change over time, by action of the rulemaking authority or the legislature. If such a change occurs, its significance may be addressed in a future request for recertification of the State’s mechanism. *See* 78 FR at 58181; 28 CFR 26.23(d). Regardless of the form of the relevant policy, speculation that a future change in Arizona’s mechanism will deny prisoners adequate time to seek state postconviction review because of delay in the appointment of counsel does not bear on my determination that Arizona’s existing mechanism is consistent with chapter 154’s requirements as interpreted in the Department’s regulations. Arizona has in fact “established a mechanism for the appointment . . . of . . . counsel,” 28 U.S.C. 2265(a)(1)(A), “in a manner that is reasonably timely in light of the time limitation[] for seeking State . . . postconviction review,” 28 CFR 26.21.

4. Federal Habeas Filing

I next consider the question of timely appointment of counsel with respect to the time available for seeking state and federal postconviction review under 28 U.S.C. 2263.

In assessing this question, I start with the Ninth Circuit’s decision in *Isley v. Arizona Department of Corrections*, 383 F.3d 1054 (9th Cir. 2004). In that case, the court considered a similar issue in relation to the general time limit for federal habeas filing under 28 U.S.C. 2244(d). Section 2244(d) parallels 28 U.S.C. 2263 in relevant respects, providing that its limitation period normally starts to run at the conclusion of direct review, but is tolled during the time period in which “a properly filed application for State post-conviction or other collateral review . . . is pending.” 28 U.S.C. 2244(d)(2). The question presented was whether the relevant application for state postconviction review is the defendant’s “notice of post-conviction relief” or his later-filed petition for post-conviction relief. *See Isley*, 383 F.3d at 1055–56.

The court concluded that the earlier notice of postconviction relief was the relevant filing that stopped the clock. The court reasoned that the notice of postconviction relief is “a critical stage” that “set[s] in motion” Arizona’s postconviction review mechanism and begins the running of the time limit for filing the formal petition for postconviction relief. *Id.* at 1055–56. Consequently, “*Isley*’s state petition was ‘pending’ within the meaning of 28 U.S.C. 2244(d)(2),” and he was entitled to tolling, from the date the notice of postconviction relief was filed. *Id.* at 1056.

In capital cases, Arizona does not place on the defendant the burden of filing the notice of postconviction relief that initiates postconviction review proceedings. Instead, it directs the clerk of the Arizona Supreme Court to file the notice of postconviction relief once the Arizona Supreme Court has issued its mandate affirming the conviction and sentence in capital cases. *See* Ariz. Rev. Stat. 13–4041(B), 13–4234(D). It is this filing that commences the state postconviction proceedings and tolls the federal habeas time limit. *See Isley*, 383 F.3d at 1056.

The *Isley* understanding of the trigger for tolling the federal habeas time limit is logical whether the applicable time limit is provided by section 2244(d) or section 2263. It resolves the concern that delay in the appointment of counsel, and consequent delay in filing a clock-stopping formal petition, will result in the erosion or expiration of the

time to seek federal habeas relief, which would bring into play the timeliness concerns underlying the definition of appointment in 28 CFR 26.21.

As noted above, comments on this issue “agree that Arizona’s delays in appointing postconviction counsel will not prevent a prisoner from filing a first state petition for postconviction relief,” but they question whether the same is true with respect to filing a federal habeas petition. Letter from AFPD, Nov. 5, 2018, at 16–18. The underlying concern is that, under *Isley*, “the Notice tolls the [federal] statute of limitations” but “it is unclear whether it does the same under Chapter 154.” Letter from AFPD, Feb. 22, 2018, at 138. The comments point in this connection to a statement in *Spears*, 283 F.3d at 1017, that “the statute does not provide for the [statute of limitations] to be tolled during the time a petitioner is awaiting appointment of counsel.” Letter from AFPD, Feb. 22, 2018, at 138; *see id.* at 157–58.

However, the court in *Spears* did not consider the possibility that, in the context of Arizona’s system, it is the notice of postconviction relief, rather than a later filing presenting the defendant’s claims for relief, that commences state postconviction proceedings and tolls the federal time limit. When the Ninth Circuit was presented with this question two years later in *Isley*, it held that the notice is the critical filing. As discussed above, it would be illogical to distinguish between section 2244(d) and section 2263 in this regard, and there is no reason to believe that federal habeas courts will do so.

More broadly, I expect that the federal courts will interpret and apply section 2263 fairly so as to afford prisoners under sentence of death a reasonable amount of time to seek state and federal postconviction review, as they have done with the general federal habeas time limit under section 2244(d) and the corresponding time limit for motions by federal prisoners under 28 U.S.C. 2255. *See, e.g., Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir. 1998). Speculation to the contrary provides no ground for concluding that Arizona’s mechanism fails to satisfy the rule’s requirement of reasonably timely appointment.

Many of the public comments provided information about the time required for appointment of postconviction capital counsel in Arizona. Prisoners under sentence of death in Arizona often stated, in their comments, how long it took to appoint counsel in their individual cases. AFPD advised that the average delay in

appointment of counsel from the Arizona Supreme Court’s decision affirming a capital case to the appointment was 711 days from 2000 to 2011 and 256 days from 2011 to the present. *See* Letter from AFPD, Feb. 22, 2018, at 140.

These figures are uninformative, however, regarding satisfaction of 28 CFR 26.21’s timeliness requirement, because the time limits for state and federal postconviction review do not run continuously from the date of the Arizona Supreme Court’s decision affirming a capital conviction and sentence. Ascertaining whether Arizona’s mechanism provides for reasonably timely appointment, considering the time limits for seeking state and federal postconviction review and the time required for developing and presenting related claims, requires a more discriminating analysis of the rules and policies affecting the time available for filing postconviction petitions and their interaction with the timing of the appointment of counsel. This analysis, as set forth above, indicates that Arizona’s mechanism does provide for appointment of counsel that is reasonably timely in the relevant sense.

Finally, there is no concern about executions being carried out in Arizona during delay in the appointment of postconviction counsel, because Arizona does not carry out executions prior to the conclusion of the initial state postconviction proceedings. *See* Ariz. Rev. Stat. 13–759(A).

Consequently, Arizona’s capital counsel mechanism comports with the definition of appointment in section 26.21, including its timeliness requirement.

**III. Date the Mechanism Was Established**

Arizona has requested that I determine that it established its qualifying capital counsel mechanism as of July 17, 1998, referring to the date of appointment of postconviction counsel for the defendant in *Spears*, the case in which the Ninth Circuit determined that Arizona had established a mechanism satisfying the requirements of chapter 154. However, the elements of the mechanism approved by the Ninth Circuit in *Spears* were in place as of May 19, 1998. Specifically, the final element was the amendment of Arizona Revised Statutes section 13–4041 relating to compensation and payment of litigation expenses, which became effective on May 19, 1998. *See* 1998 Ariz. Sess. Laws, Ch. 120, sec. 1. Consequently, I determine that the date

Arizona established the mechanism I now certify is May 19, 1998.

#### IV. Other Matters

Some of the public comments opposed certification of Arizona's mechanism on grounds that amounted to criticisms of chapter 154 itself, often relating to chapter 154's time limit for federal habeas filing or its time limits for federal habeas courts to complete the adjudication of capital habeas petitions. Granting certification as requested by the State, they maintained, with the resulting applicability of chapter 154's federal habeas review procedures, would have unconstitutional or unfair effects on capital defendants in Arizona.

My responsibility under chapter 154 is to determine whether a State has established a postconviction capital counsel mechanism that satisfies the chapter's requirements. It is not to entertain constitutional challenges or policy objections to the underlying statutes. Nevertheless, I will address these objections because they have been raised as grounds for denying certification to Arizona and because they misrepresent chapter 154 itself and the Constitution as it bears on the validity of chapter 154.

Before turning to particular issues, I note by way of background that, at the time of the Powell Committee Report in 1989, the average delay between imposition and execution of a capital sentence was about 8 years. Since that time, the average delay between imposition and execution of a capital sentence has increased, standing at around 20 years (243 months) at the end of 2017. In relation to Arizona, in particular, the submissions elicited by the State's request for chapter 154 certification show capital cases in which the litigation has continued for more than 20 years. On a nationwide basis, there were 2,703 prisoners under sentence of death at the end of 2017—and 23 executions were carried out in that year. *See* Bureau of Justice Statistics, *Capital Punishment, 2017: Selected Findings*, at 2 tbl. 1; *id.* at 4 tbl. 3. Thus, the litigation problems to which chapter 154 is addressed have compounded over time, with profound effects on the justice system's ability to use the sanction of capital punishment for the gravest crimes.

##### A. Time Limits Under Chapter 154

As noted above, the criticisms of chapter 154 in the public comments largely relate to the chapter's time limitation rules for federal habeas litigation in capital cases.

##### 1. Time Limit for Federal Habeas Filing

Some commenters objected to the 180-day time limit for federal habeas filing under 28 U.S.C. 2263, which is shorter than the 1-year period under 28 U.S.C. 2244(d). The possibility that a shorter time limit might apply to pending cases following a certification, commenters stated, creates difficulty in advising clients and leads to the hasty filing of pro forma petitions for protective reasons. They expressed the concern that application of the reduced time limit may result in retrospective determinations that federal habeas filings, though consistent with the currently applicable section 2244(d) time limit, were untimely under section 2263 and subject to dismissal on that basis. Consequently, they maintain, certifying Arizona's capital counsel mechanism may deny prisoners due process or result in the execution of prisoners who would have obtained relief had their claims been heard. Commenters also raised other objections to section 2263, including that its time limit is too short to allow adequate investigation and preparation of claims or to secure evidence of their clients' innocence, or that the section 2263 time limit's starting point will leave insufficient time for seeking postconviction review when taken in conjunction with the timing rules for the U.S. Supreme Court's certiorari process.

Regarding uncertainty about the time limit that will apply, that possibility is inherent in Congress's design of the statutory scheme for federal habeas review and the fact that Congress sometimes decides to make changes. Essentially the same issue was presented by the enactment in 1996 of 28 U.S.C. 2244(d), which created a 1-year time limit for federal habeas filing, where there had previously been no time limit for federal habeas filing. Courts did not apply the new section 2244(d) time limit so as to unfairly bar petitions filed in existing cases, but rather ensured the availability of the 1-year period to all petitioners. *See, e.g., Calderon v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1287 (9th Cir. 1997); *see also Calderon v. Ashmus*, 523 U.S. at 748 & n.3 (explaining that uncertainty about applicable time limit does not confer standing to challenge application of chapter 154); *Habeas Corpus Resource Ctr.*, 816 F.3d at 1250 (same, regarding challenge to regulations implementing chapter 154). I expect that the federal courts will similarly apply the chapter 154 time limit, where it is newly applicable, in a manner that ensures fundamental

fairness. However the courts address this issue, it is not a matter under the control of the Attorney General or the State of Arizona, and it does not bear on whether Arizona has established a capital counsel mechanism satisfying the requirements of chapter 154.

The same is true regarding such matters as the adequacy of the time provided for federal habeas filing under chapter 154. Congress evidently regarded the 180-day period for federal habeas filing under 28 U.S.C. 2263, subject to tolling, as adequate and warranted, considering the availability of counsel to the petitioner throughout the state court litigation, and the unique problem of litigation delay in capital cases. *See* 137 Cong. Rec. at 6013; 135 Cong. Rec. at 24694–95, 24697–98 (Powell Committee Report). Congress has broad authority under the Constitution to determine federal habeas procedure. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (“judgments about the proper scope of the writ are ‘normally for Congress to make’”) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)). Even if I were to agree—and I do not—that such adjustments of federal habeas procedure are problematic on constitutional or prudential grounds, I have no authority to overrule Congress's decisions in these matters. Nor do I have authority to add to chapter 154's express requirements, *see* 28 U.S.C. 2265(a)(3), which forecloses requiring the State to waive chapter 154's time limits—as some commenters may wish—as a condition of certification.

Noting that section 2263(b)(1) does not provide for tolling until a petition for certiorari is filed or the time for seeking certiorari expires, some comments expressed a concern that much of the limitation period may be consumed if the defendant does not petition for certiorari soon after “final State court affirmance of the conviction and sentence on direct review.” 28 U.S.C. 2263(a). However, the comments recognized that this will not occur if the triggering event under section 2263(a) is understood to be the Arizona Supreme Court's issuance of its mandate—which does not occur until after the U.S. Supreme Court's certiorari process. The interpretation of section 2263 on this point is a matter under the control of the federal courts, not the Attorney General or the State of Arizona, and it does not conflict with my determination that Arizona has established a qualifying capital counsel mechanism under chapter 154.

2. Time Limits for Federal Habeas Adjudication

Beyond the criticisms of the chapter 154 time limit for federal habeas filings, some comments objected that the 28 U.S.C. 2266 time limits for federal district courts and courts of appeals to adjudicate federal habeas petitions are unfair and unconstitutional, contrasting them to the longer periods of time that federal courts typically take now in adjudicating federal habeas petitions in capital cases. Like the other constitutional and policy critiques of chapter 154 appearing in the public comments, these comments do not bear on the question I am charged with answering: Whether Arizona has established a capital counsel mechanism satisfying chapter 154’s requirements. And like the other criticisms of chapter 154, these objections are not well founded.

Defining rules of federal judicial procedure is an exercise of legislative power that the Constitution vests in Congress. *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (“Congress has undoubted power to regulate the practice and procedure of federal courts”) (footnote omitted). Congress may delegate some rulemaking authority to the courts, as it has done in the Rules Enabling Act, 28 U.S.C. 2071–77, and courts may decide such matters in default of legislative action—neither of which detracts from Congress’s paramount authority in this area. *See id.*; *see also, e.g., Mistretta v. United States*, 488 U.S. 361, 386–88 (1989); *Palermo v. United States*, 360 U.S. 343, 345–48 (1959). That includes the authority to determine the procedures for federal review of state prisoners’ applications for habeas corpus. *See Felker*, 518 U.S. at 664; *Lonchar*, 517 U.S. at 323.

The principal timing rules for adjudications under chapter 154 are as follows: Section 2266(a) provides that federal habeas applications subject to chapter 154 are to be given priority by the district court and by the court of appeals over all noncapital matters. Section 2266(b) provides that a district court is to complete its adjudication of a capital habeas petition within 450 days of filing or 60 days of submission for decision, subject to a possible 30-day extension. Section 2266(c) provides that appellate panels are to render their decisions within 120 days of completion of briefing, that requests for rehearing or rehearing en banc are to be decided within 30 days of the request or a responsive pleading, and that a rehearing or rehearing en banc is to be

decided within 120 days of the date it is granted.

The public comments provided no persuasive reason why these time periods for adjudication should be considered unreasonable or beyond Congress’s authority over matters of judicial procedure. Nor did the comments provide any persuasive reason to reach such a conclusion with respect to the application of these time limits to pending cases. In relation to such cases, the sponsor of the 2006 amendments to chapter 154 explained the application of the amendments’ effective-date provision, appearing in section 507(d) of Public Law 109–177, as starting the time limits when the Attorney General certifies that the State has established a qualifying capital counsel mechanism. So understood, they will not impose impossible requirements on courts to conclude the adjudication of pending capital cases within time frames that have already passed. *See* 152 Cong. Rec. at 2449 (remarks of Sen. Kyl); *cf. Br. for Appellants at 22–23, Habeas Corpus Resource Ctr. v. U.S. Dep’t of Justice*, 816 F.3d 1241 (9th Cir. 2016) (No. 14–16928) (explaining similar application of section 2244(d) time limit to pending cases).

Because protracted collateral litigation impedes the execution of capital sentences, it is reasonable for Congress to provide that courts are to prioritize these proceedings and to set limits on their duration. *See* 152 Cong. Rec. at 2441–48 (2006) (remarks of Sen. Kyl); 151 Cong. Rec. at E2639 (extension of remarks of Rep. Flake); 137 Cong. Rec. at 6013–14 (legislative history); 135 Cong. Rec. at 24694–95 (Powell Committee Report). If petitioners believe that the time limits for adjudicating petitions are unconstitutional as applied to their cases, they may so argue to the federal habeas courts that adjudicate their petitions. However the courts may rule on such claims, it has no bearing on the question whether Arizona has established a capital counsel mechanism satisfying the requirements of chapter 154.

3. Litigation Burdens

In addition to criticisms based on the differences between the chapter 154 time limits and the time now required for capital federal habeas litigation, public comments expressed concerns about novel litigation burdens under chapter 154, such as having to litigate under 28 U.S.C. 2261(b)(2) the question whether the defendant’s state postconviction counsel was appointed pursuant to the certified state mechanism. But litigation of this nature

will not necessarily be common or burdensome. *See* 152 Cong. Rec. at 2446 (remarks of Sen. Kyl) (discussing limited nature of inquiry).

Moreover, the critical comments did not consider the ways in which the application of chapter 154 may reduce burdens for defense counsel. *See* 73 FR at 75336 (“the chapter 154 procedures eliminate a number of burdens that defense counsel would otherwise bear”). The differences include the automatic stay provisions of 28 U.S.C. 2262, which should reduce the need to engage in litigation over stays of execution. Chapter 154 also provides, in section 2264, clearer and tighter rules concerning claims cognizable in federal habeas review. This will relieve federal habeas counsel of the need to develop and present claims that may be cognizable under the general habeas rules but are not cognizable under chapter 154. *See* 152 Cong. Rec. at 2448–49 (remarks of Sen. Kyl). Federal habeas counsel will not need to litigate questions concerning the exhaustion of state remedies, and will be relieved of other burdens incident to the movement of cases between the state courts and the federal courts resulting from the exhaustion requirement of 28 U.S.C. 2254(b)–(c), because it does not apply under chapter 154. *See* 28 U.S.C. 2264(b) (“Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.”); *see also* 152 Cong. Rec. at 2447–48 (remarks of Sen. Kyl); 135 Cong. Rec. at 24695, 24698 (Powell Committee Report).

Likewise, chapter 154 reduces or eliminates a number of burdens and causes of delay for federal habeas courts. The automatic stay provision reduces the need to adjudicate requests for stays of execution. Courts will not need to review and decide claims that are disallowed under section 2264. Adjudication of questions concerning exhaustion of state remedies will not be required because the exhaustion requirement does not apply under chapter 154. For the same reason, delays that result from sending unexhausted claims back to state court for exhaustion of state remedies will no longer occur.

Consequently, the time required under currently applicable law for counsel to prepare federal habeas petitions, and for federal habeas courts to complete their adjudications, are not reliable indicators of how much time will be needed under the chapter 154 procedures. Objections to certification of Arizona’s mechanism premised on the assumption that the time requirements in either case must be similar are not well-founded.

**B. Validity of the Implementing Rule**

Some comments challenged the implementing rule for chapter 154, Subpart B of 28 CFR part 26, arguing that it is invalid on procedural and substantive grounds. These criticisms are not well founded and in any event do not bear on this certification. See Br. for Appellants at 28–49 and Reply Br. for Appellants at 15–28, *Habeas Corpus Resource Ctr. v. U.S. Dep’t of Justice*, 816 F.3d 1241 (9th Cir. 2016) (No. 14–16928).

**C. Request for a Stay**

Some comments asked that I stay my certification of Arizona’s mechanism pending judicial review of my determination, arguing the matter on the terms a court would consider in deciding whether to order a stay—likelihood that the determination will be overturned on judicial review, alleged irreparable harm to the commenters and their clients, alleged lack of harm to Arizona and other interested parties, and the public interest. Chapter 154 creates no requirement that I grant a stay, however, and I decline to do so.

Chapter 154 conditions its applicability on the Attorney General’s determination that a State has established a capital counsel mechanism satisfying its requirements—not on the completion of judicial review of my determination. See 28 U.S.C. 2261(b), 2265. Also, 28 U.S.C. 2265(a)(1)(B), (a)(2) directs me to determine the date on which the state capital counsel mechanism was established and makes that date the effective date of the certification. Thus, chapter 154 applies to cases in which postconviction counsel was appointed pursuant to the mechanism, though the appointment occurred prior to the publication of this notice. See 152 Cong. Rec. at 2449 (remarks of Sen. Kyl) (explaining effect of section 2265(a)(2)); 151 Cong. Rec. at E2640 (extension of remarks of Rep. Flake) (same); *Habeas Corpus Resource Ctr.*, 816 F.3d at 1245 (“[t]he certification is effective as of the date the Attorney General finds the state established its adequate mechanism”). A stay would mean, however, that the certification would not yet be effective in relation to cases in which state postconviction counsel was appointed on or after May 19, 1998—notwithstanding my determination that Arizona established a capital counsel mechanism satisfying chapter 154 on that date—but would only take effect at some unpredictable future time when litigation relating to the certification has run its course.

Moreover, the commenters’ arguments for a stay were not convincing. It is not likely that a challenge to the certification will prevail on the merits because Arizona has in fact established a mechanism satisfying the requirements of chapter 154, as explained in this notice. The Ninth Circuit’s determination in *Spears* that Arizona has established a capital counsel mechanism satisfying the requirements of chapter 154—a mechanism that has not changed materially since the time of that decision—makes it particularly unlikely that another court will reach a different conclusion.

Even if there were a likelihood of a challenge succeeding on the merits, there is no public interest, or prospect of irreparable injury, that justifies a stay. The commenters’ claims on these points largely relate to a concern that the time available to seek federal habeas review will be severely curtailed or eliminated if the time limit of 28 U.S.C. 2263 becomes applicable. This concern is not well founded and does not bear on the validity of the certification as explained above. Commenters also raised, in this connection, criticisms of other aspects of chapter 154, including provisions of 28 U.S.C. 2264 and 2266 that limit review of procedurally defaulted claims and amendment of petitions, and the provisions that set time limits for federal habeas courts to conclude their review of state capital cases. These features of chapter 154 are legislative responses to the unique problems of delay in capital litigation and are within Congress’s constitutional authority over matters of judicial procedure in federal habeas review, as discussed above. The litigation and adjudication of cases in conformity with the applicable legal rules are not sources of “injury” supporting a stay. All of these claims amount to criticisms of chapter 154 itself. They may arise in future habeas corpus litigation, but they do not bear on the question before me. See *Calderon v. Ashmus*, 523 U.S. at 746–49.

On the other side of the ledger, Arizona will be harmed if it is denied the benefits of the chapter 154 review procedures, to which it is legally entitled based on its establishment of a capital counsel mechanism satisfying the requirements of chapter 154. The survivors of victims murdered by persons under sentence of death in Arizona will be harmed by a stay, prolonging their suffering and further denying them the closure of a final disposition of the cases that concern them. See 152 Cong. Rec. at 2441–47 (remarks of Sen. Kyl); 151 Cong. Rec. at E2639 (extension of remarks of Rep.

Flake). There will also be harm to any persons under sentence of death in Arizona who would be granted relief on a final disposition of their federal habeas petitions, but whose cases now linger for years or decades because there is no requirement that the cases be accorded priority or concluded within any time frame. As noted above, the submissions elicited by Arizona’s request for certification show instances in which the litigation of Arizona capital cases has continued for over 20 years. Staying the remediation Congress has adopted, to which Arizona is entitled, would be harmful to many and not in the public interest.

Consequently, I do not stay my certification of Arizona’s postconviction capital counsel mechanism and the effective date of the certification is May 19, 1998, in conformity with 28 U.S.C. 2265(a)(2).

Dated: April 6, 2020.

**William P. Barr,**  
*Attorney General.*

[FR Doc. 2020–07617 Filed 4–13–20; 8:45 am]

**BILLING CODE 4410–19–P**

**DEPARTMENT OF LABOR**

**Office of the Secretary**

**Agency Information Collection Activities; Submission for OMB Review; Comment Request; Student Data Form**

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting this Occupational Safety and Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before May 14, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of



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April 16, 2020

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***Via FedEx and email***

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**Re: Certification of Arizona Capital Counsel Mechanism**

Dear Mr. Rothenberg:

We represent the Office of the Federal Public Defender for the District of Arizona (FDO-AZ) and several individual prisoners in connection with Arizona's application for certification under Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2261-2266. On April 14, 2020, the Department of Justice published its certification of Arizona as the first state in the country to qualify for expedited federal habeas review in capital cases under Chapter 154. *See* 85 F. Reg. 20705. FDO-AZ and individual petitioners plan to promptly file a petition for review of the Department's decision.

Consistent with Federal Rule of Appellate Procedure 18(a), FDO-AZ and the individual petitioners hereby respectfully renew their request that the Department stay the certification decision pending judicial review in the United States Court of Appeals for the District of Columbia Circuit. *See* 28 U.S.C. 2349(b). The certification substantially changes a long-existing status quo and, given its impact, should not be put into effect while its legality is being challenged in court pursuant to orderly and Congressionally-prescribed procedures. And immediately instituting significant changes to federal habeas procedures, including shortening court filing deadlines, would be particularly disruptive in the midst of the COVID-19 outbreak, which among many other effects makes it extremely difficult if not impossible for

lawyers to visit with incarcerated clients, let alone engage in post-conviction investigations in a normal and timely fashion. If ever there were a time for not making immediately effective an acceleration of court filing deadlines, we hope you will agree that surely this is it.

In any event, even apart from the pandemic, Arizona's certification warrants a stay pending judicial review under normal stay standards. The D.C. Circuit considers four factors in determining whether a stay is warranted: "(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." Circuit Rule 18(a)(1); *see Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). All four of these factors strongly support a stay. Under the circumstances, the Department should stay the certification order on its own authority to avoid needless pre-merits litigation and to prevent significant disruption in the courts.

1. The certification decision presents the kind of "serious, substantial, [and] difficult" legal questions that justify a stay pending judicial review. *Washington Metro.*, 559 F.2d at 843-45. As detailed throughout its 163-page comment submitted on February 22, 2018, FDO-AZ presents a substantial case that Arizona should not have been certified and that the decision will not be upheld on de novo review. *See* FDO-AZ Comment; 28 U.S.C. § 2265(c)(3). The Department may grant a stay even though it disagrees with the petitioners on the merits where, as here, petitioners at a minimum present a "substantial case on the merits" or "an admittedly difficult legal question and . . . the equities of the case suggest that the status quo should be maintained." *Washington Metro.*, 559 F.2d at 843-45. The Department does not dispute the seriousness of the issues presented in its certification decision.

2. If the certification decision goes into effect, it will irreparably harm FDO-AZ and individual petitioners. The certification decision allows Arizona to immediately seek to impose Chapter 154's habeas limitations, including shortened filing deadlines, on the dozens of death-sentenced prisoners in Arizona for whom state postconviction counsel were appointed on or after May 19, 1998.

Those prisoners and their counsel need to immediately investigate and prepare to litigate whether and how Chapter 154 applies their cases. Capital defendants who are still in state direct review proceedings will have to consider whether possible certiorari petitions to the U.S. Supreme Court may have to be prepared and filed sooner than they otherwise would, in light of the newly-applicable timing and tolling provisions in 28 U.S.C. § 2263. For prisoners

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currently in state postconviction review, the new regime also means preparing to litigate how Chapter 154's different tolling provisions apply to their cases, in addition to understanding never-before-applied restrictions to their forthcoming habeas petitions. And prisoners who are in habeas proceedings may face motions to dismiss to their petitions as untimely, as did the petitioner in *Spears v. Stewart*, 283 F.3d 992, 1008 (9th Cir. 2002), or restrictions on amendments, 28 U.S.C. § 2266(b)(3)(B). Even prisoners who have already completed litigation over their initial habeas petitions now face end-stage litigation under Chapter 154's restrictions on stays of execution. 28 U.S.C. § 2262. And lawyers will have to divert resources from some cases to investigate and prepare to defend their clients against the application of Chapter 154 in dozens of already pending cases, and triage incoming cases that are subject to the new habeas deadlines. Of course, the imposition of Chapter 154's shortened deadlines and the inherent uncertainty about how Chapter 154 will apply in individual cases will take place in the midst of the ongoing COVID-19 crisis, which severely hinders, among many other things, attorneys' ability to communicate with their incarcerated clients and properly investigate and litigate their clients' cases.

These harms are irreparable. There is no after-the-fact remedy that can compensate a capably-sentenced prisoner who loses a viable constitutional claim because his attorney did not have the time or resources to investigate it. See *Washington Metro.*, 559 F.2d at 844 n.2. And there is nothing that can compensate an attorney for having to divert time from one client's case to another. See *Massachusetts Law Reform Inst. v. Legal Servs. Corp.*, 551 F. Supp. 1179 (D.D.C. 1984), *aff'd*, 737 F.2d 1206 (D.C. Cir. 1984). The certification order dismisses these harms as "criticisms of Chapter 154," 85 F. Reg. 20,719, but, respectfully, they flow directly from the certification decision itself.

3. In context, a stay will not harm Arizona, the United States, or "other parties interested in the proceedings." *Washington Metro.*, 559 F.2d at 844. The certification order posits that the State, crime victims, and prisoners with potentially meritorious claims will be harmed if the certification decision is not implemented immediately. 85 F. Reg. 20,721. But capital habeas petitions have been governed by Chapter 153 of the Antiterrorism and Effective Death Penalty Act for the past 20-plus years. Arizona's certification request was itself filed years ago. The sole effect of a stay will be to preserve the longstanding status quo for a few more months pending the D.C. Circuit's orderly and Congressionally-prescribed judicial review of Arizona's certification.

4. The public interest broadly favors granting prisoners an adequate opportunity to challenge the fairness of their convictions and sentences. *Cf. Arizona v. Washington*, 434 U.S. 497, 516 (1978) (recognizing "the public's interest in fair

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trials designed to end in just judgments” (citation omitted)). Absent a stay, FDO-AZ and other postconviction counsel will be faced with either curtailing their investigation of prisoners’ claims in order to meet Chapter 154’s tightened filing deadlines or immediately seeking additional resources to investigate and prepare their client’s habeas petition. Federal habeas petitions could be filed without raising potentially meritorious claims. And prisoners could be executed without having a full and fair review of their conviction and sentence.

In addition, allowing the certification order to go into immediate effect before its legality has been tested in court will inflict serious disruption on the judiciary. Some prisoners will have no choice but to rush to file petitions for postconviction review in state court to preserve the maximum time available for a potential federal petition. Rushed briefing on issues of this magnitude—whether a capital sentence is constitutionally sound—does not assist the courts in resolving a case on the merits. And federal courts will have to wrestle with whether and how Chapter 154’s restrictions apply to individual cases pending before them, all before the judicial system has a chance to pass upon the underlying validity of the Department’s decision in the first place. These disruptions can be avoided, and the public interest better served, by staying the certification decision for a modest period pending the orderly litigation of its legality that Congress has expressly provided for.

And to reiterate, we ask the Department to consider, in this extraordinary time for our nation, that putting the certification decision into immediate effect is particularly contrary to the public interest in the midst of the COVID-19 outbreak. The pandemic, apart from its many other truly tragic ramifications across the country, has already caused significant disruption to the litigation process nationwide, making it difficult for courts to conduct business and for attorneys to communicate with clients, even in ordinary, run of the mill cases. These realities have driven many courts, including the Supreme Court of the United States, to issue blanket extensions for filing deadlines, extensions that include, as specifically relevant to this context, the time within which to file a petition for a writ of certiorari in the U.S. Supreme Court. *See* 3/19/20 Order, 589 U.S. \_\_ ; 28 U.S.C. § 2263(b)(1). From any objective standpoint, there is no worse time than now to implement a novel regime for capital habeas litigation with significantly shortened filing deadlines and innumerable unresolved issues. Especially against this backdrop, we hope you will agree that the public interest would be better served by, for now, avoiding imposing needless disruption on the capital habeas system while the statutorily prescribed process of judicial review of the underlying certification decision is allowed simply to run its course in the court of appeals.

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April 16, 2020

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For the foregoing reasons, we hereby renew our request that the Department stay its certification decision pending judicial review.

Respectfully submitted,

/s/ Elizabeth R. Moulton

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January 7, 2019

*Submitted via Regulations.gov*

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**Re: Docket No. OLP 168: Supplemental Information Regarding Arizona  
Capital Counsel Mechanism**

**Comment by the Federal Public Defender for the District of Arizona**

The Office of the Federal Public Defender for the District of Arizona (FDO-AZ) submits this supplemental comment in opposition to the State of Arizona's application for certification under 28 U.S.C. § 2265(a), published November 16, 2017. On February 26, 2018, FDO-AZ submitted its initial comment (FDO-AZ Comment) opposing the state's application. Given the concerns that FDO-AZ's comment and other comments raised, the Department of Justice ("Department") requested that the Arizona Attorney General's Office provide additional information in support of its application.<sup>1</sup> On October 16, 2018, the Arizona Attorney General's Office submitted a letter responding to the Department's request.<sup>2</sup> FDO-AZ asked

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<sup>1</sup> Letter from Jessica Hart, Office of Legislative Affairs, Intergovernmental Affairs and Public Liaison, Dep't of Justice, to Hon. Mark Brnovich, Attorney General, Office of Ariz. Att'y Gen. (June 29, 2018) ("DOJ Letter").

<sup>2</sup> Letter from Lacey Stover Gard, Chief Counsel, Capital Litigation Section, Office of Ariz. Att'y Gen., to Jessica Hart, Office of Legislative Affairs, Intergovernmental Affairs and Public Liaison, Dep't of Justice (Oct. 16, 2018) ("Ariz. AG Letter"). Arizona supplemented its October 16, 2018 letter on November 27, 2018. *See* Letter from Lacey Stover Gard, Chief Counsel, Capital Litigation Section, Office of Ariz.



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the Department to reopen the comment period for 60 days so that interested parties could respond to new information and assertions in the state's letter.<sup>3</sup> The Department granted that request in part and reopened the comment period for 45 days. 83 Fed. Reg. 58,786 (Nov. 21, 2018).

FDO-AZ now submits this supplemental comment to again urge the Department to deny Arizona's application because the state has not established that it meets the requirements of Chapter 154. *Infra* § I.<sup>4</sup> Of the more than 100 comments the Department has received to date, *not one* contends that Arizona's mechanism is adequate for certification.<sup>5</sup> The Attorney General's Office's supplemental 11-page letter, with mostly cursory assertions, does not meaningfully dispute any of the facts painstakingly detailed in those comments.

The state's supplemental letter confirms why certification would be improper, for multiple reasons. It (a) improperly urges the Department to disregard the Final Rule; (b) misrepresents the history of significant changes to the state's appointment mechanism since 1998; (c) fails to establish that the state provides adequate compensation for appointed counsel; (d) does not meaningfully rebut the numerous ways that the state's mechanism fails to assure appointment of competent counsel; and (e) does not support the assertion that the state's mechanism guarantees *timely* appointments.

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Att'y Gen., to Matthew G. Whitaker, Acting Att'y Gen., Dep't of Justice (Nov. 27, 2018) ("Ariz. AG Supp.").

<sup>3</sup> See Ex. 1, Letter from Elizabeth Moulton, Att'y for FDO-AZ, to Laurence Rothenberg and Jessica Hart, Dep't of Justice (Nov. 5, 2018).

<sup>4</sup> This comment incorporates and expands on concerns FDO-AZ raised in its November 5, 2018 letter. FDO-AZ also reasserts the concerns raised in its initial comment.

<sup>5</sup> The group Arizona Voice For Crime Victims submitted a comment in support of certification because certification "would reduce delays in capital cases." The comment contains no argument that Arizona actually meets any of the requirements for certification.



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FDO-AZ also writes to inform the Department of proposed changes to Arizona’s appointment mechanism. *Infra* § II. The Arizona Capital Case Oversight Committee (CCOC)—comprised of judges, prosecutors, defense attorneys, and other advocates and experts—recently issued its 2018 report with formal recommendations to significantly change how Arizona compensates and appoints capital postconviction counsel. *See Ex. 2, Progress Report of the Capital Case Oversight Committee to the Arizona Judicial Council, Capital Case Oversight Committee* (Dec. 2018), <https://tinyurl.com/yc53lg53> (“CCOC Report”).

The CCOC recommendations confirm what is widely known: Arizona’s appointment mechanism is inadequate to guarantee the provision of competent, sufficiently compensated and resourced counsel. As described below, the CCOC recommends that (1) the Legislature amend Arizona Revised Statute § 13-4041 to convert the statutory compensation cap of \$100 per hour to a *minimum* rate; (2) the Arizona Supreme Court delegate appointment authority to the superior courts on a case-by-case basis and allow counties to conduct independent screening of applicants on the Arizona Supreme Court’s list of “qualified” postconviction counsel; and (3) Arizona Rule of Criminal Procedure 6.8(e) be amended to require that unqualified appointed counsel “meaningfully” associate with qualified counsel. *See Ex. 2 at 5-6*. While FDO-AZ does not believe that these recommended changes would be sufficient to “fix” Arizona’s mechanism, they confirm several of the deficiencies FDO-AZ has identified in Arizona’s current mechanism.

Given the wealth of information demonstrating that the state has not established its entitlement to the benefits of Chapter 154, the Department should deny Arizona’s application. In the alternative, the Department should stay consideration of Arizona’s application because the Department lacks authority to act on the application until a lawfully appointed U.S. Attorney General assumes office. The designation of Matthew Whitaker as acting U.S. Attorney General violates the Appointments Clause’s requirement that “Officers of the United States” serve only “by and with the Advice and Consent of the Senate.” U.S. Const. art. II, § 2, cl. 2. It also violates the Attorney General Succession Law, 28 U.S.C. § 508(a), which dictates that the Deputy Attorney General automatically assumes the duties of Attorney General when a vacancy arises. *Infra* § III.

For all of these reasons, certification of the state’s postconviction mechanism is unwarranted, and the Department should deny the state’s application.



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**I. The Arizona Attorney General’s Office’s Letter Confirms Why The Department Should Deny Arizona’s Application.**

**A. The Arizona Attorney General’s Office wrongly asserts that the Final Rule does not govern these proceedings.**

As a threshold matter, the Arizona Attorney General’s Office repeatedly suggests that the Final Rule is not controlling and “not relevant” to whether the state meets Chapter 154’s certification requirements. Ariz. AG Letter at 5 (asserting that the Final Rule’s benchmarks are “not relevant to Chapter 154’s requirement that a state have a mechanism for the compensation of post-conviction counsel in a capital case”); *see also, e.g., id.* at 2 (“[N]othing in Chapter 154 requires a lawyer to have capital experience or even post-conviction experience.”); *id.* at 5 (“the amount of compensation is not a factor for determining whether Arizona has complied with Chapter 154 in having a mechanism to compensate post-conviction attorneys”); *id.* at 6 (“Again the regulations cannot expand the statutory requirements for certification.”); *id.* (calling the denial of litigation funding requests “not relevant to the certification question”); *id.* at 6 n.8 (“The State continues to believe that regulations imposing additional requirements beyond those contained in Chapter 154 are ultra vires and unenforceable.”); *id.* at 8 (asserting that changes in Arizona’s appointment mechanism since 1998 “are immaterial to certification under Chapter 154 because the State has maintained a mechanism for appointment of post-conviction counsel continuously over the past two decades”); *id.* at 9 (“To the extent that the regulations alter Congress’ requirements for certification of the mechanism, the regulations are not controlling.”).

The Arizona Attorney General’s Office is mistaken. Congress expressly commanded: “The Attorney General shall promulgate regulations to implement the certification procedure.” 28 U.S.C. § 2265(b). The Department’s Final Rule, by its terms, sets out to implement Chapter 154’s statutory requirements. Of course, the state, like any party affected by a rulemaking, may choose to challenge the validity of the final regulations in a separate action. Indeed, FDO-AZ has brought such a challenge before, and reserves the right to do so again. *See* FDO-AZ Comment at 10-11. But agency regulations, insofar as they are valid and reasonable, “authoritatively construe the statute itself.” *Anderson v. Sandoval*, 532 U.S. 275, 284 (2001); *see also* FDO-AZ Comment at 55. And “it is elementary that an agency must adhere to its own rules and regulations.” *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). The regulations—unless withdrawn—control these



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certification proceedings and Arizona must prove that it meets the Final Rule's requirements.

The Arizona Attorney General's Office's disregard of that blackletter law is improper and makes plain the office's own understanding that the state's appointment mechanism does not meet the Final Rule's certification requirements.

**B. Fundamental changes to Arizona's appointment mechanism since 1998 foreclose the state's certification request.**

The Arizona Attorney General's Office's letter clarifies that the state requests certification of its mechanism for appointing capital postconviction counsel as of July 17, 1998. Ariz. AG Letter at 1. The office makes no alternative request. *Id.* It bases the 1998 date on the Ninth Circuit's decision in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002). The court in *Spears* stated in dicta that the appointment mechanism in place when the state appointed Mr. Spears's postconviction counsel met Chapter 154's requirements. *See* FDO-AZ Comment at 142. The Attorney General's Office contends that Arizona's mechanism has not materially changed since that time. Ariz. AG Letter at 2-4.

As an initial matter, even if Arizona's mechanism had undergone no changes since 1998, *Spears* does not control the Department's certification decision. *See* FDO-AZ Comment at 141-43. In 2005, Congress stripped courts of the authority to make certification decisions, vested that authority in the Attorney General, and required the Attorney General to promulgate regulations to govern the certification process. *See* FDO-AZ Comment at 9. The Attorney General then promulgated the Final Rule that describes what a state mechanism must contain to satisfy the statutory requirements. If a state does not meet those requirements, its application fails. *Spears* simply does not address the question whether Arizona has satisfied the rule's standards.

Moreover, Arizona's mechanism has changed sweepingly since 1998—a fact that is irrefutable in the historical record. *See* FDO-AZ Comment at 27-48, 141-42. The changes to the mechanism and its implementation include:

- (1) the disbandment of an independent committee tasked with screening applications for appointment, leaving appointment decisions in the hands of the Arizona Supreme Court—contravening the recommendations of Arizona capital defense experts and American Bar Association guidelines stating that



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the judiciary should not control appointments to capital cases (*see* FDO-AZ Comment at 30-33; AMERICAN BAR ASSOCIATION, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (“2003 ABA Guidelines”), Guideline 3.1(B), (E));

- (2) the state’s 2006 abandonment of a private appointment mechanism and replacement of that mechanism with a state public defender’s office (*see* FDO-AZ Comment at 37-39);
- (3) the elimination of the requirement that counsel have *actual postconviction experience* before appointment to a capital postconviction proceeding (*see* FDO-AZ Comment at 44-46, 64-69);
- (4) the reduction in the number of training hours required for an initial appointment (*see* FDO-AZ Comment at 32);
- (5) the Arizona Supreme Court’s repeated reliance on Rule 6.8(e)—formerly Rule 6.8(d)—to appoint counsel who do not meet the state’s reduced competency standards, without any finding that “exceptional circumstances” exist or that counsel is otherwise qualified (*see* FDO-AZ Comment at 31, 77-83);
- (6) the recurring decision to not increase compensation for appointed counsel—even to account for inflation or cost of living—since 1998 (*see* FDO-AZ Comment at 126-27);
- (7) the repeal of the requirement that postconviction counsel be appointed within 15 days of either the United States Supreme Court’s denial of certiorari or the expiration of the 90-day period provided for seeking a writ of certiorari (*see* FDO-AZ Comment at 32, 137-39).

The state does not dispute that each of those changes occurred. To the extent it even acknowledges them, the state summarily asserts that they are “minor” and “[im]material.” Ariz. AG Letter at 2, 4, 8. For example, the Attorney General’s Office claims, without any citation or supporting material, that the state’s adoption of a statewide capital postconviction public defender’s office in 2006 was “an experiment[]” that did not “chang[e] the mechanism for appointing post-conviction counsel in capital cases.” Ariz. AG Letter at 4. That is simply not so. *See* FDO-AZ Comment at 37; Lieberman Decl. in Support of FDO-AZ Comment at 1-2. The



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statewide office was unambiguously instituted as a *replacement* for the private-appointment mechanism, and the statute that created it *required* the Supreme Court to appoint counsel from the office absent extenuating circumstances. FDO-AZ Comment at 37-38.<sup>6</sup>

The state Attorney General's Office makes no effort to establish that each of the significant variations of the postconviction appointment mechanism Arizona has used from 1998 to today meets the Final Rule's requirements. The state's failure to properly address the substantial changes in its mechanism over time in and of itself precludes certification.

**C. Arizona insufficiently compensates appointed counsel and does not adequately fund postconviction litigation expenses.**

The Arizona Attorney General's Office does not contend that the level of compensation paid to appointed capital postconviction counsel—a maximum hourly rate of \$100 *that has not changed since 1998*—is sufficient to attract and retain competent counsel. *See* Ariz. AG Letter at 4-7. Nor could it, given the exhaustively documented history of criticism of that compensation rate, as expressed by judges, politicians, lawyers, experts, *and the Attorney General's Office itself*. *See* FDO-AZ Comment at 126-30 and accompanying declarations; Ex. 2 at 5. As the state capital oversight committee report discussed below states, increasing the rate of compensation “is a perennial recommendation of the Oversight Committee,” and

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<sup>6</sup> The creation of the statewide public defender's office also belies the Arizona Attorney General's Office's claim that “the Arizona Supreme Court has always retained ultimate authority to decide whether an attorney is competent to represent a capital defendant in post-conviction litigation.” Ariz. AG Letter at 2. When Arizona created the public defender's office in 2006, the Arizona Legislature directed the Arizona Supreme Court to “appoint counsel from [that] office unless a conflict exists or the court makes a finding that the office cannot represent the defendant.” Ariz. Rev. Stat. § 13-4041(B) (2007). The Arizona Supreme Court did not have the authority to determine whether the attorneys employed by the public defender's office were competent to represent clients in capital postconviction proceedings. Indeed, no attorney employed by the statewide office appeared on the Arizona Supreme Court's list of qualified postconviction attorneys and none of the office's staff attorneys met Rule 6.8's qualification requirements. *See* Lieberman Decl. in Support of FDO-AZ Comment at 3.



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even “[t]he Attorney General’s office ... supports a higher amount than currently prescribed to encourage competent counsel to apply for appointments on capital cases.” Ex. 2 at 5. Nor does the Attorney General’s Office dispute that litigation funding is left to the discretion of individual judges in individual cases. *See infra* p.20.

The Arizona Attorney General’s Office instead maintains that the actual rate and amount of compensation is irrelevant so long as “Arizona has a mechanism to compensate competent counsel for their services in representing indigent capital defendants in post-conviction proceedings,” including “reimburse[ment of] appointed counsel’s reasonable litigation expenses.” Ariz. AG Letter at 4; *see also id.* at 5.

That wholly formalistic proposition is incorrect. As for attorney compensation, the Final Rule explains that the critical determination under Chapter 154 is whether a state provides “sufficient financial incentives to secure the appointment of competent counsel in sufficient numbers to timely provide representation to capital petitioners in State collateral proceedings.” 78 Fed. Reg. 58,160, 58,173 (Sept. 23, 2013). And as for reasonable litigation expenses, the Final Rule expressly recognizes the critical role that investigators, mental health and forensic experts, and other non-attorney personnel play in capital postconviction cases, and the Final Rule therefore requires reimbursement of reasonable litigation expenses to fund these necessary services. *Id.* Ultimately, the Final Rule requires more than just a paper “mechanism” by which counsel may be inadequately compensated and litigation expenses may be insufficiently funded.

FDO-AZ has detailed the uniform and considered assessments by diverse stakeholders over two decades that Arizona’s compensation rate is not adequate to attract competent counsel. *See FDO-AZ Comment* at 121-30. The Attorney General’s Office does not even try to show how that compensation rate compares to private market compensation benchmarks, how it compares to federal compensation of appointed capital habeas counsel, how it compares to capital postconviction compensation rates in other states, or how many attorneys have been willing to accept cases at the specified compensation rate—just to articulate a few avenues of analysis that are relevant to determining whether a state’s compensation is adequate.

The Department asked the Arizona Attorney General’s Office to address five areas of concern related to the state’s attorney compensation and funding of litigation expenses in capital postconviction cases. The state’s answers confirm that



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Arizona's mechanism does not assure the adequate compensation and funding of capital postconviction proceedings on a statewide basis.

**Question 1.** The Department asked the state to provide information “relevant to the[] criticisms of Arizona’s mechanism with respect to compensation and payment of expenses.” DOJ Letter at 2. In response, the Arizona Attorney General’s Office’s letter provides a cursory and flawed analysis of raw amounts paid to appointed counsel for attorney’s fees and litigation expenses in a handful of cases in only a few counties.<sup>7</sup>

An analysis of the individual cases the Attorney General’s Office highlights, the underlying raw data, and the state’s cursory analysis of that data, shows that the state cannot possibly support the contention that it provides sufficient compensation and resources to reasonably assure the retention of competent postconviction counsel.<sup>8</sup>

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<sup>7</sup> Eight of Arizona’s fifteen counties have funded an initial capital postconviction case since July 17, 1998. In its letter and exhibits, the Arizona Attorney General’s Office presented information on only six of the eight counties.

<sup>8</sup> The Arizona Attorney General’s Office provided FDO-AZ with courtesy copies of the native Excel files of the Maricopa and Pima County data submitted to the Department. This aided FDO-AZ’s review of the underlying data. The way the Department published that data, however, made it difficult (or impossible) for the public to review. For example, the Department appears to have omitted some of the Maricopa County data when publishing that exhibit. *See* Ariz. AG Letter at Exhibit B1 (listing cases alphabetically from *Adams, James* through *McCray, Frank* and omitting *McGill, Leroy* through *Womble, Brian*). And for the Pima County data, the Department provided the data in PDF format, breaking up the data tables across pages. *See* Ariz. AG Letter at Exhibit B3. This made it very difficult to align the invoice dates, payments, and invoice numbers. In analyzing the Maricopa and Pima County data submitted by the Arizona Attorney General’s Office, FDO-AZ relied on the native Excel files.



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***The individual cases cited by the Attorney General's Office do not support certification.***

The Arizona Attorney General relies on a small handful of cases as “example[s]” of Arizona adequately compensating capital postconviction counsel. Ariz. AG Letter at 5. The first three cases the Arizona Attorney General’s Office cites as showing that “Arizona has been compensating attorneys ... exceedingly reasonably,” *id.*, are cases in which the American Bar Association recruited *out-of-state, pro bono law firms* to represent prisoners when Arizona was unable to secure counsel through its mechanism. In other words, the lead cases the Attorney General’s Office relies on for the adequacy of compensation of appointed attorneys involved counsel who *received no compensation* from the state, much less attorneys appointed pursuant to Arizona’s mechanism.

In the very first case the state cites as supporting the adequacy of compensation, *State v. Andriano*, the attorneys who represented Ms. Andriano in Maricopa County appeared pro bono, did not appear on the Supreme Court’s list of approved counsel, and no compensation was paid to them by the state or county. Ex. 3, Order, *State v. Andriano*, No. CR-05-0005-AP (Ariz. Nov. 2, 2009) (the Supreme Court’s statement that “all of these attorneys will represent Ms. Andriano *pro bono* and are not seeking appointment to represent her”). Further, Ms. Andriano signed a statement acknowledging “that the [Supreme] Court has not determined whether any of her attorneys are qualified under Rule 6.8(c).” *Id.* The case, therefore, has no relevance to Arizona’s appointment mechanism generally, or to the compensation paid to appointed counsel specifically. The pro bono attorneys in *Andriano* did receive county-level reimbursement for significant investigative and expert expenses. *See* Ariz. AG Letter, Exh. B1 at 18.<sup>9</sup> But those expenses say nothing about whether the rate of compensation paid to appointed attorneys under the state’s mechanism is adequate to attract and retain competent counsel.

Similarly, the second case the state cites, *State v. Garza*, No. CR1999-017624 (Maricopa County), involved pro bono representation by Covington & Burling, with appointed co-counsel Thomas Phalen. *See* Ex. 4, Order Re: Ex-Parte Motion To Associate Counsel Pro Hac Vice, *State v. Garza*, No. CR1999-017624 (Ariz. Super.

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<sup>9</sup> Page numbers refer to the page number of the 260-page PDF posted on the Department’s website at <https://www.justice.gov/olp/page/file/1113346/download> (last accessed January 6, 2019).



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Ct. Aug. 16, 2010). Like in *Andriano*, the American Bar Association Death Penalty Representation Project secured pro bono counsel in *Garza*. As the former director of that project has explained, the ABA's involvement in finding counsel was necessary due to the inability of Arizona's appointment mechanism to consistently attract and retain competent counsel. Maher Decl. in Support of FDO-AZ Comment, at 3-4. And the majority of the \$500,000 in case expenses was for experts and other litigation resources secured by Covington & Burling, not the compensation of Mr. Phalen. See Ariz. AG Letter, Ex. B1 at 18. Mr. Phalen himself has stated in these certification proceedings that he believes the state's compensation of appointed counsel is woefully inadequate to attract and retain competent counsel. Phalen Decl. in Support of FDO-AZ Comment, at 8-9.

The third Maricopa County case the Attorney General's Office cites—*State v. Carreon*—is also largely irrelevant. See Ariz. AG Letter at 5. Mr. Carreon was principally represented by an out-of-state pro bono law firm—Manatt, Phelps, & Phillips—that was not appointed pursuant to the state's mechanism. See Ex. 5, Orders Re: Pro Hac Vice Admission, *State v. Carreon*, No. CR2001-090195-A (Ariz. Super Ct. Apr. 23, 2007); Ex. 6, Hearing Transcript at 11, *State v. Carreon*, No. CR2001-090195-A (Ariz. Super Ct. Mar. 12, 2007). Arizona attorney Thomas Gorman was "solicited by the law firm to provide expert consulting advice and was provided their work product and included in their tactical discussions." Gorman Decl. in Support of FDO-AZ Comment, at 5. In total, almost all county funds were for litigation expenses like expert fees, with only \$63,000 going to attorney compensation—much of that likely to attorney Patrick McGillicuddy, who was removed from Mr. Carreon's case after a superior court judge found Mr. McGillicuddy could not competently represent capital-charged defendants. See Ariz. AG Letter, Ex. B1 at 18; FDO-AZ Comment at 85-86. Mr. Gorman himself has explained in these proceedings that the state's compensation of appointed attorneys is "simply insufficient" to attract competent counsel. Gorman Decl. in Support of FDO-AZ Comment, at 3.

Notably, the Attorney General's Office also cites the Maricopa County case of *State v. Speer* as another supposed example of adequate compensation. Ariz. AG Letter at 5. Attorney Nathaniel Carr was appointed under Rule 6.8(d) to represent Mr. Speer, until Carr was suspended from practicing law due to fraudulent billing practices. See FDO-AZ Comment at 115-16. In the Arizona Bar's consent order, Carr admitted to submitting bills to Maricopa County's Office of Public Defense Services for work not actually performed and work specifically excluded by his



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contract. *Id.* (citing Meyer Decl. Ex. 132, Decision and Order Accepting Discipline by Consent, *In re Carr*, No. PDJ 2016-9041 (Ariz. Dec. 8, 2016), at 2).<sup>10</sup> Carr was not appointed under Rule 6.8(c), and Mr. Speer's case is not a reliable example of Arizona funding a *competent* postconviction attorney.

The Attorney General's Office also relies in its letter on the Yuma County case of *State v. Kiles*. See Ariz. AG Letter at 5. *Kiles* involved two separate postconviction proceedings—one beginning before 1998 and one beginning in 2011. See *State v. Kiles*, 213 P.3d 174, 178 (Ariz. 2009) (explaining that Mr. Kiles's first capital postconviction proceeding resulted in a grant of relief and a retrial); FDO-AZ Comment, Moulton Decl., Exs. 248-51 (reflecting the appointment of postconviction counsel in the capital postconviction proceedings following resentencing). The information provided by the Arizona Attorney General's Office reflects funds paid to the attorneys appointed in the second postconviction proceeding—Kerrie Droban and Sharmila Roy. Ariz. AG Letter, Ex. B7 at 254. But the total also includes attorneys' fees paid to "Capital Case Project." *Id.* The "Capital Case Project" was not appointed to Mr. Kiles 2011 postconviction review proceeding. The group "Capital Case Project" may refer to the Arizona Capital Representation Project, which represented Mr. Kiles in the pre-1998 proceeding. See Ex. 7, Order Appointing Co-counsel Denise Young of Capital Representation Project, *State v. Kiles*, No. C-15444/15577 (Ariz. Super. Ct. Feb. 7, 1994). Including payments from two separate postconviction proceedings would artificially inflate the compensation total. Further, the amount of compensation listed as paid to counsel in *Kiles* is *more than five times* the amount spent in any other Yuma County case. Ariz. AG Letter, Ex. B7 at 254.

***The underlying raw county data provided by the Attorney General's Office is inaccurate, irrelevant, and unreliable.***

Turning to the underlying county data on which the Attorney General's Office relies in arguing for certification, the data is inaccurate, irrelevant, and unreliable in many respects.

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<sup>10</sup> We are currently unaware of evidence that Carr submitted fraudulent billing requests in Mr. Speer's case, but the time period in which the Arizona Bar found Carr engaged in fraudulent billing overlaps with his representation of Mr. Speer.



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For instance, the Pima County data includes several cases that are irrelevant to the question of certification under Chapter 154. *State v. Ruben Estevan Archunde*, CR2008-1054, for example, is not a capital case. *State v. Christopher Bo Huerstel*, CR64663, involved a capital direct appeal, but did not involve a *capital* postconviction review because the death sentence was vacated on direct appeal. See *State v. Huerstel*, 75 P.3d 698 (Ariz. 2003). And *State v. Jasper Newton McMurtrey*, CR1833, involved a retrial and resentencing, not a postconviction review.

The Pima County data also includes cases in which postconviction counsel was appointed before July 1998 (before the period for which Arizona seeks certification), as in *State v. Ignacio A. Ortiz*, CR00284, *State v. Karl Hinze Lagrand*, CR07426, and *State v. Angel Medrano*, CR23865.<sup>11</sup> The Attorney General's Office does not explain how those cases are relevant to the showing that Arizona adequately compensates counsel under the mechanism Arizona seeks to certify.

In yet other cases, the data appears to combine costs from the defendant's direct appeal with costs from the postconviction case, inflating the total amount attributed to the postconviction proceedings. See, e.g., *State v. Scott Douglas Nordstrom*, CR55947, Ariz. AG Letter, Ex. B3 at 30-31 (showing payments to Ms. Sharmila Roy, counsel on direct appeal); *State v. Jason Eugene Bush*, CR20092300-003, Ariz. AG Letter, Ex. B3 at 25-26 (showing payments to Ms. Carla Ryan, counsel on direct appeal). Likewise, in other cases the data appears to combine initial and successor postconviction cases into a single total, inflating the amount spent in capital postconviction proceedings. See, e.g., *State v. David Scott Detrich*, CR29267, Ariz. AG Letter, Ex. B3 at 27 (showing payments from Fiscal Years 1998 to 2003 combined with payments in Fiscal Years 2016 to 2019); *State v. Martin Raul Soto-Fong*, CR39599, Ariz. AG Letter, Ex. B3 at 28-29 (showing payments from Fiscal Years 1999 to 2003 combined with payments from Fiscal Years 2005 to

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<sup>11</sup> Pima County also included cases in which counsel for the defendant's initial postconviction review was appointed before 1998 and counsel for successor postconviction petitions was appointed after 1998, even though Arizona does not contend these cases would qualify for treatment under Chapter 154 if Arizona were certified. See *State v. Robert Smith Douglas*, CR05669; *State v. Jose Jacobo Amaya-Ruiz*, CR15155; *State v. Thomas West*, CR21715; *State v. Richard Harley Greenway*, CR23911; *State v. Joseph Rudolph Wood III*, CR28449; *State v. George Adam Lopez*, CR28657; *State v. Claude Eric Maturana*, CR31484; *State v. Robert Lee Walden*, CR34752.



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2009); *State v. Levi Jaimes Jackson*, CR40896, Ariz. AG Letter, Ex. B3 at 29 (showing payments from Fiscal Years 1998 to 2002 combined with payments from Fiscal Years 2006 to 2019); *State v. Charles Bradley Rienhardt*, CR51263, Ariz. AG Letter, Ex. B3 at 30 (showing payments from Fiscal Years 2000 to 2007 combined with payments from Fiscal Years 2016 to 2019).

This hodgepodge of inapt cases and mixed-up data cannot possibly be sufficient for the state to make its required showing.

Even assuming that the Arizona Attorney General's Office presented data about the right set of cases, there are pervasive problems with the data's accuracy and reliability. Other than saying the data was provided in response to public records requests, the Attorney General's Office does not explain how the compensation and expense-related data it presents was gathered. The compensation-related data sometimes separates attorney compensation and litigation expenses, and sometimes does not, without indicating whether particular data is or is not broken down in this manner. The data is occasionally broken out by year or attorney, and sometimes not. The data for many cases is missing or incomplete, as noted by the submitting counties.

And some of the data includes obvious inaccuracies. For example:

- In Pima County, Emily Skinner is listed as having received more than \$89,000 to represent Ronald Schackart. Ariz. AG Letter, Ex. B3 at 23. Ms. Skinner, however, was never appointed to Mr. Schackart's case. Attorney Matt Newman represented Mr. Schackart. See FDO-AZ Comment, Case Chart and Moulton Decl. Ex. 392.
- The data provided by Pima County includes duplicate (or quadrupled or sextupled) payments to attorneys. Ex. 8, Emails regarding corrected Pima County data; Ex. 9, Corrected funding data provided by Pima County. Payments for the representation of Charles Rienhardt are consistently doubled, inflating the cost by \$67,439.90. Payments—on the same date, with the same invoice number, and for the same amount—to David Darby for representation of Scott Clabourne are consistently quadrupled, inflating the cost by \$85,871.52. And several payments—again for the same date, invoice number, and amount—for the representation of Martin Soto-Fong are listed six times, inflating the cost by *over \$450,000* (\$455,607). See, e.g., Ariz. AG Letter, Ex. B3



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at 37 (listing four payments for *Clabourne* with invoice number 1554801; six payments for *Soto-Fong* with invoice number 1671462); *id.* at 64 (listing corresponding invoice amounts for those payments); *see* Ex. 9 (listing corrected data).

- Maricopa County data provided by the Attorney General's Office includes several cases where the data does not match billing records that FDO-AZ has separately received from the Maricopa County Office of Public Defense Services. Because Maricopa County did not provide funding information broken down by year, attorney, etc., FDO-AZ was unable to determine the basis of these discrepancies.

Together, these basic data integrity problems show that the Department cannot reasonably rely on the data submitted by the Arizona Attorney General's Office to determine whether or not Arizona has a statewide mechanism that actually results in adequately funded capital postconviction review. In many cases, the data provided is simply insufficient for FDO-AZ (or other members of the public) to confirm even its basic accuracy. In instances in which the county did provide specific data (as in Pima County), FDO-AZ's analysis has revealed serious, concrete problems, including, as outlined above, cases that combine multiple proceedings into a single total, cases with duplicate billing, and cases reflecting payments to attorneys who were never appointed in the case. To the extent the Attorney General's Office simply forwarded data provided by the counties without any analysis or quality review, Arizona has not met its burden of showing that it qualifies for certification. The proper funding of death penalty representation is a serious question that deserves much more serious treatment than the state's careless and casual attention to data reveals.

***The Attorney General's Office's analysis of the data is flawed.***

Even accepting the underlying data at face value, the Arizona Attorney General's Office's summary analysis of that data is flawed. *See* Ariz. AG Letter at 5. The office purports to provide a numerical "average" of the compensation and expense amounts for only two counties (Maricopa and Pima). But those compensation and litigation expense "averages" are mean averages or simple arithmetic averages (as opposed to medians) and are significantly inflated by a few outlier cases, and are thus misleading. These outlier cases, including irrelevant cases represented by pro bono counsel outside of Arizona's mechanism like *Andriano*, *Garza*, and *Carreon*, create an unevenly distributed dataset with a mean



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severely skewed by the extreme outliers. As a result, the mean average is not representative of typical expenditures in capital postconviction cases.<sup>12</sup>

For example, looking at the litigation expenses (i.e., excluding attorney compensation) data from Maricopa County, the Attorney General's Office reported an average expenditure in Maricopa County of more than \$140,000 per case. Ariz. AG Letter at 5. But more cases received *less than \$20,000* in litigation expenses than received greater than or equal to the Attorney General's reported "average." See Ariz. AG Letter, Ex. B1. In fact, the majority of cases in Maricopa County received total litigation expense payments of less than \$39,000.

In contrast to the state's reliance on the mean, the *median* average, which represents the point at which there is an equal number of observations above and below that point, controls for the impact of a few extreme outliers and is the accepted standard figure to use in the current circumstances.<sup>13</sup> The median average litigation expenses in Maricopa County postconviction capital cases, \$37,809.50, is only a fraction of the reported "average" payment provided by the Attorney General's Office, and is a much more realistic figure on which to base the consideration of adequacy here.

The same logic applies to the Attorney General's Office's figures on attorney compensation in Maricopa County. Although the Attorney General's Office reported an "average of more than \$165,000 per case" in attorney compensation, the median average is significantly lower. See Ariz. AG Letter, Ex. B1. Attorneys in capital postconviction proceedings in Maricopa County are just as frequently compensated

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<sup>12</sup> See Paul Bolton, *How to Spot Spin and Inappropriate Use of Statistics – Statistical Literacy Guide* (House of Commons Library, July 2010) at 3-4 (explaining how the ambiguous use of averages in uneven distributions is misleading).

<sup>13</sup> See Sarah Boslaugh, *Statistics in a Nutshell* ch. 4 (2d ed. 2012) (recommending the use of median as measure of central tendency for data that is "asymmetric" or contains outliers); see generally David Freedman, Robert Pisani & Roger Purves, *Statistics* 61-65 (3d ed. 1998) (description of median and use in histograms); Anthony McCluskey & Abdul Ghaaliq Lalkhen, *Statistics II: Central Tendency and Spread of Data*, Continuing Education in Anaesthesia, Critical Care & Pain vol. 7, 4 (2007) at 127-30 (explaining basic differences between median and mean).



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\$60,000 or less as they are compensated at or above the “average” presented by the Arizona Attorney General’s Office. *See id.*

There are similar problems with the Arizona Attorney General’s Office’s analysis of “averages” in the data for Pima County. *See* Ariz. AG Letter at 5. The Pima County data shows that capital postconviction attorneys are compensated \$0-\$20,000 more frequently than they are compensated at or above the purported “average” compensation rate of \$110,000.<sup>14</sup> *See* Ariz. AG Letter, Ex. B3. The data on litigation funding is just as stark: postconviction counsel in Pima County receive litigation expenses of \$0-\$10,000 more frequently than they receive the purported average of \$50,000 or more. *See id.*

In sum, even if the state’s data were accurate and analyzed appropriately, it does not rebut FDO-AZ’s showing that Arizona has no statewide mechanism for adequately compensating competent postconviction counsel and funding postconviction litigation expenses. At best, the cases Arizona cites simply highlight the disparities in compensation between and within counties. For instance, the letter asserts that Maricopa County has paid more than \$500,000 in compensation in a handful of cases (including *Andriano*, *Garza*, and *Carreon*). Ariz. AG Letter at 5. And it then states that smaller counties “spend significantly more than \$20,000” per case. *Id.* But the significant disparities in compensation levels between counties may independently foreclose certification, insofar as they show that there is no adequate *statewide* mechanism for compensation such that the state should be afforded the quid-pro-quo benefits of expedited habeas procedures. *See* FDO-AZ Comment at 134-36 (describing county-by-county variability in funding litigation expenses).

**Question 2.** The Department also asked the Arizona Attorney General’s Office to identify how Arizona’s mechanism “meets or exceeds each of the [Final Rule’s compensation] benchmarks on a statewide basis.” DOJ Letter at 2. In response, the Arizona Attorney General’s Office asserts that the benchmarks are not relevant. Ariz. AG Letter at 5. And the office does not contend that the state meets three of the four benchmarks. Ariz. AG Letter at 5-6.

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<sup>14</sup> The Arizona Attorney General’s reported “average” was based on Pima County’s artificially inflated compensation data. *See* Ex. 9. The average based on Pima County’s corrected data is \$95,587, and the median is \$39,606.



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The Attorney General's Office asserts only that it meets the benchmark in 28 C.F.R. § 26.22(c)(1)(iii), which provides that a mechanism is "presumptively adequate if the authorized compensation is comparable to or exceeds" compensation provided to capital trial or appellate counsel. The Attorney General's Office does not dispute that the benchmark must be based on authorized *statewide* rates, as the Department recognized in its question. *See* FDO-AZ Comment at 123; 78 Fed. Reg. at 58,180; DOJ Letter at 2. Yet the Attorney General's Office acknowledges that there is *no statewide rate* for appointed appellate counsel in capital cases, and cites only the rate paid to capital appellate counsel in Maricopa County. The Attorney General's Office therefore bases its assertion that Arizona meets the appellate benchmark entirely on the rate that one of 15 Arizona counties is presently paying capital appellate counsel. *See* Ariz. AG Letter at 6. And even that comparison fails: Maricopa County has no statutory cap on the rate paid to capital appellate counsel, *unlike the statewide cap on compensation for capital postconviction counsel*.

The Maricopa County information is plainly insufficient to show that Arizona as a whole meets or exceeds the § 26.22(c)(1)(iii) benchmark. And even if it did meet the benchmark, that would only establish a presumption of adequacy. *Id.* There is not a single comment in the record averring that the amount Arizona pays appointed capital postconviction counsel is sufficient to consistently attract competent counsel. On the contrary, comments are unanimous that it is not. The historical record is equally unambiguous. And, as discussed below, the Attorney General's Office itself agreed last month that additional compensation is needed to attract a pool of competent counsel. *Infra* p.29 (discussing the CCOC final report).

**Question 3.** The Department further inquired of the state Attorney General's Office whether, assuming it did not meet the benchmarks, its compensation was "otherwise reasonably designed to ensure the availability" of competent counsel. DOJ Letter at 2 (quoting 28 C.F.R. § 26.22(c)(2)). The Arizona Attorney General's Office's letter offers no information suggesting that the state's compensation meets that standard. Instead, the letter repeats that "the regulations cannot expand the statutory requirements for certification." Ariz. AG Letter at 6. It then notes again the hourly rate that the Arizona Supreme Court has been providing. *Id.* It points to the flawed and irrelevant raw compensation data provided by some counties. *Supra* pp.10-15. It asserts (in one sentence) that the state mechanism's former 200-hour cap on compensation "does not appear to play a significant role" in compensation, despite the undisputed historical evidence that the 200-hour cap did affect compensation and significantly diminished attorneys'



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ability and willingness to accept postconviction appointments. Ariz. AG Letter at 6; FDO-AZ Comment at 46-47, 129-30. And it entirely fails to provide the Department with the requested “average number of compensated hours worked since the removal of the” 200-hour cap. See DOJ Letter at 2; Ariz. AG Letter at 6.

For the reasons previously stated, the new county-level compensation and funding information that the Attorney General’s Office has provided is incomplete, inaccurate, and, even if it were complete and accurate, insufficient to show that Arizona’s compensation rate is adequate to retain competent counsel.

**Question 4.** The Arizona Attorney General’s Office was also asked to provide “any additional information you believe to be relevant regarding the payment of defense fees and costs in capital postconviction proceedings, including the average amount requested and the average amount paid, distinguishing, if possible, between the amount of attorney compensation and the amount of covered expenses.” DOJ Letter at 3. In response, the Attorney General’s Office restates, yet again, that such information is “not relevant to the certification question.” Ariz. AG Letter at 6. Once more, the Arizona Attorney General’s Office chooses to disregard the governing regulations. The regulations require that a “mechanism must provide for payment of reasonable litigation expenses of appointed counsel,” and that “[s]uch expenses may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel.” 28 C.F.R. § 26.22(d). Understanding what expenses are routinely denied in Arizona is therefore essential to the inquiry.

The Arizona Attorney General’s Office, however, provides no details concerning the denials of requests for reasonably necessary litigation expenses. Instead, it reports: “This office forwarded [the request for information concerning denials of funding] to the county officials who would have the information and learned that it is not readily available.” Ariz. AG Letter at 6. But the office omits that Maricopa County invited it to review the expense records for denials. Ex. 10, Email from Merri Plummer, Contract Administrator at Office of Contract Counsel, to John Todd, Office of Ariz. Att’y Gen. (Oct. 1, 2018). The Attorney General’s Office has not claimed that it made any further effort to obtain the information that the Department requested.

On the other hand, FDO-AZ in its comment described the repeated denial of requests for essential litigation expenses. FDO-AZ Comment at 132-33. FDO-AZ also described the dearth of qualified mitigation specialists in Arizona and the



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inadequacy of the contractual rate for mitigation specialists in Maricopa County. *Id.* at 133-34. The Arizona Attorney General's Office does not dispute the accuracy of that account.

**Question 5.** Finally, the Department asked Arizona to clarify whether A.R.S. § 13-4041(I) requires the payment of reasonable litigation expenses, or whether it permits trial courts to deny those requests. The state concedes that there is no mandate for the payment of such expenses. Ariz. AG Letter at 7. That violates the requirement that a state's mechanism provide such a guarantee. 28 C.F.R. § 26.22(d). FDO-AZ's initial comment described in detail the variability of funding for reasonable litigation expenses between counties and within counties over time. FDO-AZ Comment at 133-36. The Attorney General's Office does not dispute those findings.

In sum, the Attorney General's Office's supplemental letter falls woefully short of showing that the state's appointment mechanism adequately compensates postconviction counsel or sufficiently funds reasonable litigation expenses.

**D. Arizona does not reasonably assure the competency of appointed capital postconviction counsel.**

Even if Arizona provided adequate compensation and resources for appointed counsel, a state must still assure that counsel it appoints are competent to handle capital postconviction cases. 28 C.F.R. § 26.22(b). That is because no amount of money can make up for the lack of qualified counsel. The Department asked the state Attorney General's Office to address six areas of concern regarding the state's standards of competency for appointed counsel. The state's answers confirm that its mechanism does not (and cannot) reasonably assure that appointed counsel are even minimally competent. Arizona's failure to ensure competent postconviction counsel dooms its application.

**Question 1.** The Department asked the Arizona Attorney General's Office to address concerns expressed by commenters about "(i) the lack of a categorical postconviction litigation experience requirement in Ariz. R. Crim. P. 6.8 (following its amendment in 2011), (ii) Rule 6.8's provision allowing appointment of counsel not meeting its specified experience requirements under certain conditions, and (iii) lack of qualitative evaluation." DOJ Letter at 3.



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The Attorney General's Office provides a *two-paragraph response* to these questions, which are critical to any assessment of whether Arizona's mechanism assures the appointment of qualified, competent postconviction counsel. The office almost entirely relies on the contention that Arizona's mechanism is sufficient because it is purportedly consistent with 18 U.S.C. § 3599(c), which does not require postconviction experience for federal capital appointments and, according to the Attorney General's Office, does not involve a qualitative evaluation. Ariz. AG Letter at 7-8.

The Department has already rejected *that exact argument* during rulemaking, and no proper ground exists to reconsider it now. In promulgating the Final Rule, the Department expressly considered whether to follow § 3599(c) and not include postconviction experience in the Final Rule's competency benchmark. *See* 78 Fed. Reg. at 58,169. It explicitly rejected that approach. As the Department explained, § 3599 governs trial, appellate, and postconviction appointments, but only includes specifically tailored experience requirements for trial and appellate counsel. *Id.* The Department then looked to "the Criminal Justice Act (CJA) guidelines promulgated by the Judicial Conference of the United States[,] [which] counsel courts to consider postconviction experience when making appointments under 18 U.S.C. 3599." *Id.* The Department also looked to numerous comments it received "suggest[ing] that postconviction litigation experience would be a better measure of competency for State postconviction proceedings than general felony litigation experience because of the difficult and unique demands that postconviction law and procedure place on attorneys who litigate those cases." *Id.* The Department found those comments "persuasive." *Id.* "The adaptation of the section 3599 standard in the final rule accordingly specifies three years of postconviction litigation experience, rather than three years of any sort of felony litigation experience as in the proposed rule." *Id.*

In short, the Attorney General's Office impermissibly asks the Department to reverse course and ignore the Final Rule in its certification deliberations. The Department may not do so absent a new rulemaking. *Supra* § I.A.

Similarly, the Attorney General's Office asserts that Arizona's lack of any qualitative assessment of counsel is irrelevant because § 3599 requires no qualitative assessment for federally-appointed counsel. That, however, ignores the CJA federal appointment guidelines. Section 620.30 of the guidelines concerns Procedures for Appointment of Counsel in Federal Death Penalty Cases. Subsection (c) provides that:



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In evaluating the qualifications of counsel considered for appointment, the federal defender organization or AO's Defender Services Office should consider the:

- (1) minimum experience standards set forth in 18 U.S.C. § 3599(b)-(d), 18 U.S.C. § 3005, and other applicable laws or rules;
- (2) qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases;
- (3) recommendations of other federal public and community defender organizations, and local and national criminal defense organizations;
- (4) proposed counsel's commitment to the defense of capital cases; and
- (5) availability and willingness of proposed counsel to accept the appointment and to represent effectively the interests of the client.

In short, the CJA guidelines recommend *both* a quantitative and qualitative assessment—which is precisely what Arizona's mechanism lacks by relying solely on quantitative metrics to determine eligibility for appointment.

Finally, the Arizona Attorney General's Office disregards the Department's request for information about Rule 6.8(d) (now renumbered Rule 6.8(e)), which allows for the appointment of counsel not meeting specified experience requirements. *See* Ariz. AG Letter at 7-8. In its comment, FDO-AZ explained in detail why the state's habitual use of Rule 6.8(d) to circumvent any specific experience requirements independently forecloses certification. FDO-AZ Comment at 77-83. The Attorney General's Office does not even attempt to defend Rule 6.8(d), explain how "exceptional circumstances" justified appointments under it, or explain how the appointed attorneys "ability significantly exceeds the standards set forth" elsewhere in Rule 6.8, as Rule 6.8(d) requires. The Arizona Supreme Court's repeated use of Rule 6.8(d) to appoint counsel without even the minimal qualifications spelled out in Rule 6.8(c) requires a denial of Arizona's application, because it shows that the state has not actually "implemented" standards consistent with Chapter 154's requirements. 78 Fed. Reg. at 58,162; *see Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000) ("[A] state must not only enact a 'mechanism' and standards for postconviction review counsel, but those mechanisms and standards



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must in fact be complied with before the state may invoke” the Chapter 154 provisions.); FDO-AZ Comment at 77-78.

**Question 2.** The Department asked the Arizona Attorney General’s Office to provide details about Rule 6.8’s “requirement[] ... that an attorney ‘must have demonstrated the necessary proficiency and commitment’ exemplifying the ‘quality of representation appropriate to capital cases.’” DOJ Letter at 3 (quoting Rule 6.8). The Department specifically asked “how attorneys would meet the requirement and what quality of representation they would be expected to exemplify.” *Id.*

The Arizona Attorney General’s Office offers *no response*. It states that the “office is not privy to how the Arizona Supreme Court evaluates defense attorneys under this requirement and thus cannot comment.” Ariz. AG Letter at 8. The state, therefore, cannot explain how a key part of its mechanism functions, and it cannot even say what “quality of representation” an attorney must exemplify to qualify for appointment in the state. It is axiomatic that a state must be able to explain and defend the significant aspects of the mechanism it seeks to certify. The state’s failure to do so here requires denial of its application.

**Question 3.** The Department further asked the Attorney General’s Office to describe whether counsel has been appointed that does not meet Rule 6.8’s standards of competency, and, if so, to provide details, including “the number of appointments in which that occurred.” DOJ Letter at 3. The Attorney General’s Office acknowledges in its letter that such appointments occur and does not dispute FDO-AZ’s assessment that “the Supreme Court appointed counsel outside of Rule 6.8(c) in 40 of 109 cases.” FDO-AZ Comment at 31-32 n.16. Instead, the Attorney General’s Office asserts “there is no reason to believe that the [Arizona Supreme Court] did not consider an appointed attorney qualified to represent a capital defendant in post-conviction proceedings.” Ariz. AG Letter at 8.

In fact, there *is* reason to believe that the Arizona Supreme Court does not meaningfully consider the qualifications of appointed postconviction counsel. FDO-AZ filed a public records request with the Arizona Supreme Court, seeking all public records relating to the application, screening, and appointment process for capital postconviction counsel. FDO-AZ Comment at 72-73. The Arizona Supreme Court did not produce *any records* indicating that it has any written process or guidelines for evaluating postconviction counsel. *Id.* And, as detailed in FDO-AZ’s Comment, review of the attorneys who were appointed reveals serious shortcomings in their representation.



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In essence, the Attorney General's Office believes that the Department should blindly trust a state court's appointment decisions, and that a state should qualify for certification even when it routinely deviates from its own specified competency and experience standards. The Final Rule does not sanction that result. It establishes benchmarks that a state must typically meet to be certified, and it allows for appointments of attorneys who do not meet those benchmarks "only in exceptional cases." 78 Fed. Reg. at 58,178. The Arizona Attorney General's Office would have the Department effectively rewrite the Final Rule to allow for the unchanneled discretion of appointing entities in appointment decisions.

That is not the law. Nor is it consistent with best practices. For instance, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases explain why judicial appointing bodies are *not inherently reliable*, and why "the authority for training, assigning, and monitoring capital defense lawyers" should be vested in "one or more entities independent of the judiciary and wholly devoted to fostering high quality legal defense representation." 2003 ABA Guidelines, Commentary to Guideline 3.1; *see also* 2003 ABA Guideline 3.1(B) ("The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases."); 2003 ABA Guidelines, Commentary to Guideline 2.1 (An "acceptable" appointment mechanism "must assure that individual lawyers are not subject to formal or informal sanctions (e.g., through the denial of future appointments, reductions in fee awards, or withholding of promotions in institutional offices) for engaging in effective representation.").

The Attorney General's Office again simply urges the Department to assume—without any evidence—that the Arizona Supreme Court monitors and removes incompetent counsel that the court appointed (and in many cases re-appointed) to capital postconviction cases despite clear indications that counsel were not qualified. *See* Ariz. AG Letter at 8 (asserting that the Supreme Court would "take remedial steps if it became aware of an appointed attorney failing to comply with the terms of his appointment"); FDO-AZ Comment at 83-120. But the attorneys highlighted in FDO-AZ's Comment show, unfortunately, that the Supreme Court has failed to monitor the attorneys it appoints and reappoints, including attorneys who have been deemed unqualified for capital trial or appellate work by an independent Maricopa County screening committee, and attorneys who have been subject to discipline for unethical or unprofessional conduct. *See* FDO-AZ Comment at 75-77, 83-120. As described further below (at p.26), the Arizona



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Attorney General's Office does not dispute any of the descriptions of those attorneys' performance, other than to call complaints against them "unverified." The Arizona Attorney General's Office could have conducted its own review of the performance of appointed postconviction counsel—aided by the primary documents FDO-AZ painstakingly gathered, analyzed, and attached to its public comment. It has chosen not to do so.

And FDO-AZ is not alone in its conclusion that simply vesting unfettered discretion in the Arizona Supreme Court has not guaranteed effective or competent representation. As discussed below, the state capital oversight committee's 2018 final report has recommended that appointments increasingly be made by superior court judges instead of the Supreme Court to improve the quality of capital postconviction representation. *Infra* p.30.

**Question 4.** Regarding the regulations' formal competency benchmarks, the Department asked the Attorney General's Office to explain the office's prior assertion that it exceeded those benchmarks. DOJ Letter at 4. In response, the Attorney General's Office contends that it meets 28 C.F.R. § 26.22(b)(1)(i) because that benchmark, according to the office, allows a mechanism that requires no specified experience so long as the appointing entity concludes that counsel's "background, knowledge, or experience" would permit competent representation. Ariz. AG Letter at 9 (emphasis in original).

That is a plain misreading of the regulation, and it ignores the Department's equally plain interpretation of it. Section 26.22(b)(1)(i) establishes that a state's mechanism is presumptively adequate if it requires appointed counsel to "have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience." If a state establishes such a mechanism, a court may still "for good cause ... appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation." *Id.* As the Department's preamble to the Final Rule explains in no uncertain terms, "[t]he rule in paragraph (b)(1)(i) accordingly does not require the imposition of a five-year/three-year minimum experience requirement in all cases, but allows States *that generally impose such a requirement* to permit the appointment of other counsel who would qualify for appointment" based on their "background, knowledge, or experience." 78 Fed. Reg. at 58,178 (emphasis added). Arizona imposes no such requirement. And the state does not contend that it meets any other competency benchmark.



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**Question 5.** In the event that Arizona does not meet the Final Rule’s competency benchmarks, the Department asked the Attorney General’s Office to “provide [] analysis” as to whether the “state’s competency requirements are likely to result in similar or even higher levels of proficiency than a benchmark criterion,” such that they meet 28 C.F.R. § 26.22(b)(2). DOJ Letter at 4; 78 Fed. Reg. at 58,179. The Attorney General’s Office responds in one sentence that “[t]he mechanism also satisfies (b)(2) as it reasonably assures an appropriate level of proficiency.” Ariz. AG Letter at 9. That is no analysis at all.

In the end, the state does not dispute the numerous and comprehensive comments and declarations that the Department has received that explain why Arizona’s appointment mechanism fails to assure the appointment of competent counsel.

**Question 6.** Finally, the Department asked the Attorney General’s Office to respond to comments detailing instances when appointed counsel provided inadequate and ineffective representation. DOJ Letter at 4. The office asserts that none have provided ineffective assistance, because no court has found them ineffective under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Ariz. AG Letter at 10. But the office does not dispute that the Ninth Circuit has remanded more than 20 cases involving appointed Arizona capital postconviction attorneys for district courts to determine whether their performance was ineffective pursuant to *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). See FDO-AZ Comment at 26. Many of those cases remain pending. See, e.g., FDO-AZ Comment at 108 (discussing the ineffective representation provided by Jess Lorona).

Further, the Arizona Attorney General’s Office does not dispute that the independent Maricopa County screening committee—the same committee that has repeatedly offered to screen counsel for postconviction appointments, see FDO-AZ Comment at 74—has found that many of the attorneys who have received capital postconviction appointments are not qualified or competent for capital trial and appellate appointments. Nor does the office offer any analysis of the actual representation provided by any of the attorneys identified by commenters as performing ineffectively.

In sum, the Attorney General’s Office has not come close to meeting its burden to establish that the state’s appointment mechanism reasonably assures the appointment of competent counsel.



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**E. Arizona’s appointment mechanism does not assure *timely* appointment of capital postconviction counsel.**

The Final Rule requires the appointment of counsel “in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.” 28 C.F.R. § 26.21; *see* DOJ Letter at 4; FDO-AZ Comment at 136-39, 156-60. Given concerns with whether Arizona’s appointment mechanism meets that requirement, the Department asked the state Attorney General’s Office to provide three categories of additional information. The state’s responses do not support its assertion that its appointments are sufficiently timely.

**Question 1.** The Department asked the Attorney General’s Office to clarify the operation of Arizona Rule of Criminal Procedure 32.4(c)(1) and whether “there are existing measures that stay the time limit pending the appointment of postconviction counsel or other measures which prevent delays in the appointment of counsel from eroding or eliminating the time available for filing a first petition under Rule 32.4(c)(1).” DOJ Letter at 5. In response, the Attorney General’s Office explains why delays in appointing postconviction counsel will not prevent a prisoner from filing a timely first *state* petition for postconviction review. Ariz. AG Letter at 10-11. FDO-AZ does not generally disagree with that position, although it has concerns that severe delays in appointments impact a prisoner’s ability to conduct an effective postconviction investigation as memories fade, records are lost, and witnesses become unavailable.

The Department’s question, however, ignores the issue of whether delays in postconviction appointments are permissible “in light of the time limitations for seeking ... *[f]ederal* postconviction review.” 28 C.F.R. § 26.21 (emphasis added).<sup>15</sup>

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<sup>15</sup> In considering whether the appointment of postconviction counsel is timely in light of the time limitations for seeking *state* postconviction review, FDO-AZ disagrees with the Arizona Attorney General’s representation that “an appointed attorney is assigned [to] the case months prior to the starting of the timeliness clock.” Ariz. AG Letter at 10. Since 1998, the Arizona Supreme Court appointed postconviction counsel before issuing the Notice of Postconviction Relief in less than one-third of cases. *See* Attachment B (Case Chart) to FDO-AZ Comment. Instead, an attorney is typically appointed after the Notice is issued and the time for filing a



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FDO-AZ detailed in its initial comment how Arizona's delays in appointing counsel may severely impact a capital prisoner's time to file a *federal* habeas petition. *See* FDO-AZ Comment at 157-58. The Attorney General's Office has no response.

**Question 2.** The Department asked whether “the Arizona Supreme Court’s issuance of its opinion (as opposed to its mandate) triggers the time limits for subsequent filings,” and whether the Arizona Supreme Court’s practice of delaying issuance of its mandate or the notice for postconviction review “prejudices defendants with respect to the time available for seeking state *and federal* postconviction review.” DOJ Letter at 5 (emphasis added). The Attorney General’s Office response is limited to whether delaying the issuance of the mandate prejudices a defendant’s ability to secure *state* postconviction review. *See* Ariz. AG Letter at 10-11. Arizona makes no effort to address a defendant’s ability to secure *federal* postconviction review.

As FDO-AZ explained in its comment, no court has decided whether the term “final State court affirmance” in 28 U.S.C. § 2263(a) runs from issuance of the Arizona Supreme Court’s opinion, denial of a motion for reconsideration, expiration of time for filing a motion for reconsideration, or from issuance of the mandate. *See* FDO-AZ Comment at 157; *Spears*, 283 F.3d at 1017. If the 180-day period for filing a federal habeas petition runs from the Arizona Supreme Court’s issuance of its opinion (or any time before issuance of the mandate), a defendant may lose 150 of his 180 days simply by following the statutory procedures for seeking a writ of certiorari. FDO-AZ Comment at 158. Arizona Rule 32.4 does nothing to alleviate this concern. Thus, the delay in appointing counsel following issuance of the Arizona Supreme Court’s opinion on direct review seriously prejudices a defendant’s ability to seek federal postconviction review.

As FDO-AZ explained in its initial comment, Arizona’s serious delays in appointing counsel are the result of its complete lack of a timeliness requirement in its mechanism. FDO-AZ Comment at 138-39. Arizona has no “policy for the timely

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state postconviction review petition has begun to run. Further, Arizona’s customary practice cannot substitute for a valid statewide mechanism that mandates timely appointment. A practice can change at any time and is not governed by rule or statute.



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appointment of competent counsel,” as contemplated by the Final Rule and therefore cannot be certified. 78 Fed. Reg. at 58,166.

**Question 3.** The Department further asked the state Attorney General’s Office to “advise whether Arizona has measures in place that ensure defendants cannot be executed during periods of delay in the appointment of postconviction capital counsel.” DOJ Letter at 5. FDO-AZ agrees with the Attorney General’s Office that, pursuant to Arizona Revised Statute § 13-759(A), a warrant of execution is not issued until “[a]fter a conviction and sentence of death are affirmed and the first post-conviction relief proceedings have concluded.” However, as explained above (at pp.27-28), a defendant’s time for filing a federal habeas petition may have expired, foreclosing federal court review of the defendant’s conviction and sentence.

## **II. State Judges, Prosecutors, Defense Attorneys, And Experts Have Now Recommended Significant Changes To Arizona’s Appointment System.**

After the Arizona Attorney General’s Office submitted its supplemental letter, the state capital oversight committee—the CCOC—issued a final report recommending significant changes to the state’s compensation and appointment of postconviction counsel. *See* Ex. 2. Of the five recommendations the CCOC has made for changes to Arizona capital case administration in the coming year, three concern changes to the capital postconviction appointment mechanism.

First, the CCOC unanimously recommended removing the \$100 per hour statutory cap on compensation for appointed postconviction counsel and making \$100 per hour the statutory *minimum* that counties can exceed. Ex. 2 at 5. Increasing the compensation rate for appointed counsel “is a perennial recommendation of the Oversight Committee.” *Id.* The final report states that “[t]he Attorney General’s office, among others, supports a higher amount than currently prescribed to encourage competent counsel to apply for appointments on capital cases.” *Id.* (emphasis added). The CCOC declined to recommend a specific hourly amount for compensation but explained that “[a]n increase to \$125 per hour might be inadequate to attract well-qualified counsel, and an increased hourly rate of \$150 might be appropriate.” *Id.* The committee further noted the substantial disparity between the rate Arizona currently pays appointed capital postconviction counsel and both the federal rate for habeas counsel and the rate for county-level capital trial work. *Id.*



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Second, the CCOC unanimously recommended the Arizona Supreme Court delegate appointment authority to county criminal presiding judges “on a case-by-case” basis. *Id.* at 5-6. Since the inception of Arizona’s private appointment mechanism, the Arizona Supreme Court has made all postconviction appointments. *See id.* at 5. Due to concerns with the competency of counsel appointed by the Supreme Court, the CCOC has recommended that the Supreme Court exercise its authority to delegate appointments to the trial courts. *Id.* As the committee’s report explains:

[T]he trial court has more knowledge about attorneys who appear in that court for capital post-conviction proceedings. The pleadings are presented to the trial court, and any evidentiary hearing is before that court. The trial court is more familiar with the qualifications of post-conviction counsel and it should appoint counsel in these proceedings.

*Id.* at 6.

In cases where the Supreme Court delegates appointment authority to the trial court, the county criminal presiding judges would appoint counsel from the Arizona Supreme Court’s list of qualified postconviction counsel, but could conduct additional vetting of attorney applicants prior to appointment. *Id.* The CCOC recommendation specifically anticipates that an independent screening committee—the Maricopa County Capital Defense Review Committee—may conduct an “independent review” of proposed postconviction counsel, at least in cases where appointment authority is delegated to Maricopa County trial court judges. *Id.* That follows years of consensus recommendations that an independent screening committee, such as the Maricopa County committee, should vet applicants for appointment. *See* FDO-AZ Comment at 69-76 (describing the consistent recommendation that an independent committee screen applicants).<sup>16</sup>

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<sup>16</sup> While FDO-AZ welcomes the additional screening of postconviction appointments, FDO-AZ has serious concerns with an ad hoc system in which the level of review applied to postconviction appointments depends on the county in which the defendant is tried and convicted. For example, if counsel in Maricopa County undergo additional screening, the attorneys that the Maricopa County Capital Defense Review Committee deems unqualified to represent defendants in



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Third, the CCOC recommended amending Rule 6.8(e)—formerly Rule 6.8(d). Rule 6.8(e) permits in “exceptional circumstances” the appointment of counsel who does not meet the rule’s objective qualification requirements when the Supreme Court “conclude[s] that the attorney’s ability significantly exceeds the standards set forth in this rule and that the attorney associates with ... a lawyer who does meet the standards set forth in th[e] rule.” As FDO-AZ’s initial comment explained, the Supreme Court has failed to require that those attorneys meaningfully associate with qualified counsel. FDO-AZ Comment at 77-82. The CCOC similarly “received anecdotal information that some associated attorneys do an insufficient amount of work on a case.” Ex. 2 at 6. Therefore, the committee proposed a “one-word amendment” to Rule 6.8(e) to “require counsel to ‘*meaningfully*’ associate with a qualified lawyer.” *Id.* (emphasis added).

The weight and credibility of the CCOC recommendations is unmistakable when one considers the composition of the committee—a true cross-section of the Arizona criminal justice system. The roster comprises:

- Hon. Ronald Reinstein, Judge of the Superior Court in Maricopa County (ret.)
- Hon. Kent Cattani, Judge of the Court of Appeals, Division One
- Ms. Donna Hallam, Staff Attorney, Arizona Supreme Court
- Hon. Kellie Johnson, Judge of the Superior Court in Pima County
- Ms. Michele Lawson, Maricopa County Office of the Public Advocate
- Mr. Dan Levey, Arizona Crime Victim Rights Law Group
- Mr. Martin Lieberman, Maricopa County Legal Defender
- Mr. William Montgomery, Maricopa County Attorney
- Hon. Samuel Myers, Judge of the Superior Court in Maricopa County
- Mr. Daniel Patterson, Office of the Maricopa County Legal Advocate
- Ms. Christina Phillis, Maricopa County Office of Public Defense Services

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postconviction review may end up disproportionately representing defendants from other counties. This is a particular concern in light of (1) the extremely limited pool of qualified postconviction counsel willing to accept appointments at \$100 per hour and (2) the Maricopa County Capital Defense Review Committee’s history of deeming attorneys who appear on the Supreme Court’s list of appointed counsel unqualified to represent capital defendants. *See* FDO-AZ Comment at 75.



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- Mr. David Rodriguez, Office of the Pinal County Attorney
- Mr. Natman Schaye, Arizona Capital Representation Project
- Ms. Lacey Stover Gard, Office of the Arizona Attorney General

Ex. 2 at i.

On December 13, 2018, the Arizona Judicial Council—the policymaking body that oversees the state judicial system—approved the first two CCOC recommendations concerning compensation and the delegation of appointment authority to trial courts. Ex. 11, Email from Mark Meltzer, Admin. Off. of the Courts, to Hon. Ron Reinstein (Ret.), et al., (Dec. 14, 2018). The change to compensation will require legislation to convert the current statutory cap to a compensation floor. The judicial council did not adopt the recommended amendment to Rule 6.8(e). It provided no reason for that decision and did not dispute the CCOC’s reasons for recommending the change.

In short, some of the most respected Arizona judges, attorneys, and experts agree that Arizona’s current appointment mechanism needs fixing.

Moreover, if the Department certifies Arizona’s current mechanism, the proposed changes to the mechanism may require Arizona to submit a new application for the Department to determine whether the amended mechanism meets the Chapter 154 requirements, with interested parties able to comment on that question. See 28 C.F.R. § 26.23(d) (“A state may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State’s certified capital counsel mechanism.”). Approving Arizona’s certification application now may result in the piecemeal consideration of the state’s appointment mechanism, requiring the Department to decide the adequacy of that mechanism in separate proceedings. The fact that the mechanism is likely to soon change in important respects is yet another reason why Arizona’s certification application should not be granted.

### **III. The Department Should Stay These Proceedings Pending The Lawful Appointment Of A United States Attorney General.**

The Department at this time lacks authority to issue any certification decision because acting Attorney General Whitaker is not lawfully serving in that role. Not only does Mr. Whitaker’s appointment violate the Appointments Clause’s



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requirement that “Officers of the United States” serve only “by and with the Advice and Consent of the Senate.” U.S. Const. art. II, § 2, cl. 2, but the appointment also violates the AG Succession Law, 28 U.S.C. 508(a), which dictates that the Deputy Attorney General automatically assumes the duties of Attorney General when a vacancy arises.

As the Department is aware, the question of Mr. Whitaker’s authority is currently being litigated in multiple cases around the country. *See, e.g., Blumenthal v. Whitaker*, No. 18-CV-02664 (D.D.C. filed Nov. 19, 2018); *Maryland v. United States*, No. 18-CV-02849 (D. Md. filed Sept. 13, 2018); *O.A. v. Trump*, No. 18-CV-02718 (D.D.C. filed Nov. 20, 2018). Moving forward on Arizona’s certification application before that litigation is resolved would force the courts and the Department to unwind those proceedings should Mr. Whitaker be determined to not be acting lawfully. *See, e.g., 5 U.S.C. § 3348(d)(2)* (actions of officials not qualified under Vacancies Act “may not be ratified” later).

\* \* \*

For the reasons explained above, in FDO-AZ’s initial comment, and in the dozens of other public comments from interested persons, the Department should deny Arizona’s application for certification under Chapter 154. The requirements for certification are simply not met here. In the event, however, that the Department were to approve Arizona’s application, FDO-AZ renews its request that it stay enforcement of that decision pending judicial review by the D.C. Circuit and, as applicable, by the U.S. Supreme Court. *See* FDO-AZ Comment at 160-63. The extensive comments the Department has received, and the Department’s own questions in response to those comments, establish that FDO-AZ and others have, at a minimum, a substantial case on the merits that supports a stay, and that a balance of harms and other applicable considerations plainly militate in favor of holding the status quo in place pending judicial review as well. *See id.*

Respectfully,

/s/ Elizabeth R. Moulton

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February 22, 2018

*Via FedEx*

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Re: Docket No. OLP 166: State of Arizona's Application For Opt-in Under 28 U.S.C. § 2265(a)

Dear Mr. Rothenberg:

I represent the Office of the Federal Public Defender for the District of Arizona (FDO-AZ) in opposing the State of Arizona's application for opt-in under 28 U.S.C. § 2265(a).

As explained fully in the attached comment, declarations, and exhibits, Arizona does not qualify for expedited federal habeas review. The Department should promptly deny Arizona's application. In addition, the Department should withdraw the Final Rule (28 C.F.R. §§ 26.20-26.23) and issue new regulations that comply with the Administrative Procedure Act.

Respectfully,

A blue ink signature of Elizabeth R. Moulton, consisting of a stylized, cursive script.

Elizabeth R. Moulton

A blue ink signature of Paul David Meyer, consisting of a stylized, cursive script.

Paul David Meyer

A blue ink signature of Shasha Y. Zou, consisting of a stylized, cursive script.

Shasha Y. Zou

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## I. STATEMENT OF INTEREST

The Office of the Federal Public Defender for the District of Arizona (FDO-AZ) submits this comment in opposition to the State of Arizona's application for certification under 28 U.S.C. § 2265(a), published November 16, 2017. Arizona's application seeks certification of its mechanism for appointing postconviction counsel dating to 1998. *See Meyer Decl., Ex. 1, Request For Certification from Tom Horne, Att'y Gen. of Ariz., to Eric H. Holder, Jr., Att'y Gen. of the United States (Apr. 18, 2013) (Application).*

Arizona is one of 31 states that permit the imposition of death as a punishment. Federal public defenders represent indigent criminal defendants pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. In some districts that encompass states with the death penalty, including the District of Arizona, defender offices include a capital habeas unit with attorneys dedicated to representing petitioners in federal habeas corpus actions challenging state-court death sentences.

FDO-AZ currently represents 80 indigent death-row prisoners in their federal habeas or related proceedings, including 54 prisoners sentenced to death by Arizona.

Certification of Arizona's appointment mechanism pursuant to Chapter 154, 28 U.S.C. §§ 2261-2266, would substantially affect FDO-AZ's ability to do its work by shortening the amount of time to file federal habeas petitions and by requiring defenders to engage in additional investigation and proceedings at the outset of every case to determine whether that case is subject to Chapter 154's limitations. *Baich Decl. at ¶ 23.* If the Attorney General certifies Arizona's appointment mechanism, FDO-AZ will have to divert resources from some clients to tend to other clients facing Chapter 154's shortened deadlines to file habeas petitions. *Id. at ¶ 22.*

Filing a federal habeas petition is a significant undertaking. Habeas counsel must analyze the court record and files from every attorney, paralegal, investigator, and expert witness that worked or consulted on a case to properly evaluate whether errors were made in the state-court proceedings. Habeas counsel must also independently investigate potentially meritorious claims that were not sufficiently investigated or raised during the state-court proceedings. *Id. at ¶¶ 14-21.* For FDO-AZ's current clients, the problems with Arizona's mechanism and the risk that opt-in provisions could apply to current clients will result in extensive litigation in each of the office's 42 Arizona cases where opt-in potentially applies based on Arizona's requested certification date. *Id. at ¶ 24.* As a result, there is a serious risk that FDO-AZ will have to obtain additional resources to continue to provide

high-quality federal habeas representation to each client, or will have to withdraw from some representations.

FDO-AZ has unique insights into the history and effectiveness of Arizona's mechanism to appoint counsel in capital postconviction proceedings. FDO-AZ's Capital Habeas Unit has closely monitored changes to the Arizona rules governing state postconviction appointments and has commented on proposed rule changes. As part of its direct representation of clients in federal habeas proceedings, the Capital Habeas Unit routinely examines and analyzes the work of state postconviction counsel to determine whether counsel performed ineffectively and to identify potentially meritorious claims that were not raised, or not adequately raised, in state court. *Id.* at ¶¶ 14-18 (explaining the process for investigating and filing a federal habeas petition). Along with the direct representation of clients, the Capital Habeas Unit "provide[s] assistance, consultation, information and other related services to eligible persons and appointed attorneys" regarding habeas litigation. *See Plan for Composition, Administration and Management of the Panel of Private Attorneys Under the Criminal Justice Act*, Gen. Order 16-22 at 4 (D. Ariz. Oct. 19, 2016).

Relying on that experience and expertise, we offer these comments on behalf of ourselves, our clients, and those who may become our clients.<sup>1</sup>

## II. INTRODUCTION

These certification proceedings implicate two competing interests that animate the history of the writ of habeas corpus. On the one hand, "the great and efficacious writ" constitutes the most fundamental safeguard against "intolerable restraints" and unjust conditions of punishment. *Harris v. Nelson*, 394 U.S. 286, 291 (1969) (internal quotation marks omitted). "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Id.* at 292.

Nowhere is that safeguard more important than in capital proceedings. Since 1973, more than 155 prisoners have been exonerated and released from death row nationwide. Death Penalty Information Center, 2018 Fact Sheet, <https://deathpenaltyinfo.org/documents/FactSheet.pdf>. And during that time, more

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<sup>1</sup> In addition to clients in Arizona, FDO-AZ represents death-row prisoners in California, Texas, Utah, Nevada, Oklahoma, Ohio, and Missouri. FDO-AZ also represents three clients sentenced to death under federal law. All FDO-AZ clients stand to be harmed by a decision approving Arizona's application for certification, because certification will require FDO-AZ to reallocate resources to triage cases potentially subject to Chapter 154's shortened deadlines. *See Baich Decl.* ¶¶ 3, 22.

than 1,700 death sentences have been overturned. U.S. Department of Justice, Bureau of Justice Statistics, Capital Punishment, 2013—Statistical Tables, at 19 (Table 16), <https://www.bjs.gov/content/pub/pdf/cp13st.pdf>. In Arizona alone, at least 120 death-row prisoners have had their conviction or sentence overturned. *Id.* at 20 (Table 17).

On the other hand, some courts, elected officials, and academics have long expressed concern with the significant resources that habeas litigation requires and the delay in punishment that such litigation may cause. Federal habeas actions are intended to be a check on state postconviction proceedings, and the questions presented in both forums may be the same. That concern over resources and finality motivated the United States Supreme Court in 1988 to form a committee chaired by former Associate Justice Lewis Powell to examine “the necessity and desirability of legislation directed toward avoiding delay and lack of finality in capital cases.” Judicial Conference of the U.S., Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases Committee Report (1989) (reprinted in 135 Cong. Rec. S13471-04, S13482 (Oct. 16, 1989)) (“Powell Committee Report”).

The Powell Committee Report became the foundation of Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)—representing Congress’s attempt to reconcile the competing interests at the heart of habeas litigation. *See* Effective Death Penalty Act of 1995, Antiterrorism and Effective Death Penalty Act of 1996, Committee on the Judiciary Report, H.R. Rep. No. 104-23 (1995), 1995 WL 56412, \*8. To balance those interests, Congress established a quid pro quo: If states would guarantee competent, adequately compensated counsel to fully investigate and raise a defendant’s potentially meritorious claims in state court, then the scope of federal habeas review could be curtailed in those cases. But as the Powell Committee Report and Chapter 154 recognize, truncated federal habeas review is only appropriate when a state assures the timely provision of competent counsel armed with sufficient litigation resources to effectively represent clients. *See Lindh v. Murphy*, 521 U.S. 320, 331 (1997) (noting that Chapter 154 applies when a state has “done its part to promote sound resolution of prisoners’ petitions in just the way Congress sought to encourage”).

The Department of Justice (the “Department”) has sought to implement Chapter 154’s bargain with the states through regulations (the “Final Rule”) that guide the Department’s evaluation of whether a state’s mechanism to appoint capital postconviction counsel qualifies it to take advantage of more limited federal habeas review. *See* 78 Fed. Reg. 58,160. As the Final Rule reiterates, a state may only qualify under Chapter 154 when it provides indigent prisoners with timely appointed, competent counsel, and when it provides counsel with the resources needed for effective representation.

Arizona is not such a state.

Far from it.

Arizona's appointment mechanism does not meet a single one of the benchmarks that the Final Rule describes as presumptively adequate. Arizona, for instance, imposes no requirement that appointed capital postconviction counsel have *any* postconviction experience, much less the three years of such experience that the Final Rule's benchmark requires. Arizona does not require timely appointment of postconviction counsel, potentially robbing prisoners of their time for filing a federal habeas petition while they await appointment of state postconviction counsel. Arizona does not guarantee the payment of reasonable litigation expenses in capital postconviction proceedings. And Arizona compensates appointed counsel at a rate that was criticized as inadequate when it was adopted in 1998, and that has not changed *in 20 years*.

The functioning of Arizona's mechanism in practice only confirms the deficiencies that exist on paper. As described below, *infra* § VIII(D), there are cases where lawyers have been deemed qualified for appointment after being suspended or put on probation by the State Bar for unethical and unprofessional conduct. In other cases, lawyers have been chastised by state and federal judges for their shoddy work. And in case after case, the lawyers' work has been cursory, incomplete, and, at times, unintelligible. In each of those cases, the lawyer was appointed through Arizona's formal appointment mechanism—the mechanism Arizona now contends is adequate to guarantee competent representation. And in each of those cases, the burden fell on federal habeas counsel to fully investigate the defendant's case for the first time and attempt to remedy the errors committed by appointed state trial and postconviction counsel.

Chapter 154's quid pro quo demands far more. The Attorney General should deny Arizona's application for eight independent reasons.

**First**, as a procedural matter, Arizona's application is simultaneously premature and stale, in addition to being inaccurate. The Arizona Attorney General submitted the application on April 18, 2013—five months before the Department published the Final Rule that specified the now-governing application procedures and standards on September 23, 2013. Still more problematic, Arizona's application does not even accurately describe the state's appointment mechanism as it existed at the time Arizona filed the application. Instead, the 2013 application relies on a critical state competency requirement that was *removed from the relevant state standards in 2011*.

On November 27, 2017, Arizona submitted a letter to the Department acknowledging that the state's appointment system has changed in recent years but failing to acknowledge the inaccuracies in the state's 2013 application. The letter did not cure the deficiencies in Arizona's application, and Arizona has not withdrawn its application or filed a new one. As such, there is no adequate

application currently pending before the Department, and the public's ability to submit informed comments based on accurate information has been severely undermined.

**Second**, Arizona seeks to have its appointment mechanism certified back to 1998. Yet the state has modified its mechanism several times since 1998—both on paper and in practice. Remarkably, Arizona's application and supplemental letter fail to describe any of those changes or provide the public with the information it needs to evaluate the adequacy of the state's appointment mechanism through the years.

**Third**, Arizona's appointment mechanism fails to meet any of the competency benchmarks that the regulations describe as presumptively adequate. Even when a state does not meet those benchmarks, it retains "some leeway" to adopt robust alternative standards that "reasonably assure" the availability and appointment of competent counsel. 78 Fed. Reg. 58,162. The lodestar is whether the state scheme adequately guarantees the provision of competent counsel in postconviction proceedings such that federal habeas review may be dramatically curtailed without risk that potentially meritorious claims will go unraised. Arizona has implemented no such alternative standards. Certification of Arizona's mechanism would place the Department's imprimatur on a state system that applies inadequate standards to appointed state capital postconviction counsel.

**Fourth**, the compensation that Arizona provides appointed capital postconviction counsel fails to meet the benchmarks the regulations regard as presumptively adequate. In 1998, the state legislature established a maximum compensation rate of \$100 per hour. In 2018, the state compensation rate remains a maximum of \$100 per hour, even though judges, attorneys, and criminal justice experts agree that such funding is significantly inadequate to attract sufficient numbers of competent counsel. Moreover, until 2013, Arizona imposed a 200-hour cap on the amount of work that postconviction counsel could be compensated for, a cap that could only be exceeded upon a "showing of good cause." That cap is woefully insufficient in the context of capital cases.

**Fifth**, Arizona's mechanism does not uniformly guarantee the payment of reasonable litigation expenses. The payment of such expenses is left up to the discretion of state courts and county agencies, reimbursement practices are highly variable from one county to the next, and, in some counties, elected judges oversee payments that come from local funds. In practice, Arizona postconviction counsel often do not receive the resources they need to effectively represent their clients.

**Sixth**, Arizona's mechanism fails to guarantee the timely appointment of counsel. At one time, Arizona arguably did require timely appointments. Arizona Rule of Criminal Procedure 32.4(c) once provided that postconviction counsel would be appointed within 15 days following the issuance of a notice for postconviction

review. Arizona very rarely met that requirement, and defendants frequently waited more than one year for the appointment of postconviction counsel. In 2000, Arizona repealed the 15-day appointment requirement. There is no longer *any* timeliness requirement mandated by any binding Arizona authority.

***Seventh***, the Final Rule governing these certification proceedings is legally invalid. It is inconsistent with Chapter 154, is arbitrary and capricious, and was issued in violation of the Administrative Procedure Act's notice-and-comment procedures.

***Eighth and finally***, Chapter 154 is unconstitutional as a matter of law. It violates separation of powers, violates due process, and is unconstitutionally retroactive.

In short, Arizona's mechanism is a far cry from the robust state appointment systems envisioned by the Powell Committee Report and Congress. Certification of such a mechanism would eviscerate habeas protections for indigent defendants in Arizona who face the gravest of punishments. FDO-AZ respectfully requests that the Attorney General deny Arizona's application.<sup>2</sup>

### III. COMMENT OVERVIEW

This comment proceeds as follows:

- Part IV describes the history of Chapter 154, the Final Rule, and Arizona's application for certification.
- Part V provides an overview of the unique and complex nature of capital litigation in Arizona—from the filing of a complaint through federal habeas review.
- Part VI describes both the history of Arizona's mechanism for appointing capital postconviction counsel and the state's current mechanism. That history reveals that Arizona's appointment mechanism has changed repeatedly and in critical aspects since 1998.
- Part VII explains why Arizona's certification application is procedurally inadequate insofar as it was submitted before publication of the Final Rule and contains inaccurate and incomplete information that deprives the public of the ability to comment in an informed manner about the state's appointment mechanism.

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<sup>2</sup> If the Department does certify Arizona's appointment mechanism, it should stay its certification decision pending judicial review for the reasons described later in this comment. *Infra* § XV.

- Part VIII explains why Arizona’s appointment mechanism does not meet the Final Rule’s competency benchmarks and does not otherwise assure the appointment of competent counsel on paper or in practice.
- Part IX describes why Arizona’s appointment mechanism does not meet the Final Rule’s compensation benchmarks and does not otherwise provide sufficient compensation to attract and retain competent attorneys.
- Part X explains how Arizona’s mechanism fails to guarantee the payment of reasonable litigation expenses in capital postconviction proceedings.
- Part XI shows that Arizona’s mechanism does not guarantee timely appointment of capital postconviction counsel.
- Part XII addresses the Ninth Circuit’s 2002 decision *Spears v. Stewart* and explains why *Spears* does not inform the Department’s certification decision.
- Part XIII renews AZ-FDO’s arguments that the Final Rule is not valid.
- Part XIV explains why Chapter 154 is unconstitutional on its face and as applied to Arizona.
- Part XV requests that the Department stay enforcement of any adverse certification decision pending judicial review.

#### **IV. THE HISTORY OF CHAPTER 154 AND ARIZONA’S APPLICATION FOR CERTIFICATION**

##### **A. Congress enacted Chapter 154 to induce states to guarantee the timely provision of competent postconviction counsel.**

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA’s Chapter 153 limited federal habeas relief in both capital and non-capital cases, most notably by imposing a one-year statute of limitations for federal habeas petitions and prohibiting relief unless a state court’s decision was factually or legally unreasonable or contrary to federal law.

AEDPA’s Chapter 154 further limits federal habeas review in certain capital cases. Chapter 154 was enacted largely in response to the Powell Committee Report that addressed both an interest in more expeditious federal habeas review in capital cases and the “pressing need for qualified counsel to represent inmates in [state] collateral review” of capital cases. Powell Committee Report, 135 Cong. Rec.

S13471-04, S13482 (1989).<sup>3</sup> In enacting Chapter 154, Congress attempted to reconcile those competing concerns through a quid pro quo: If a state could assure the timely appointment of competent, adequately compensated and funded counsel in capital postconviction proceedings, then that state could take advantage of fast-track habeas review. *See* 28 U.S.C. § 2261(a), (b) (2006); Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. Crim. L. & Criminology 467, 482-88 (2000).

Chapter 154 permits expedited habeas review of state convictions only when a state has established a mechanism for timely providing capital prisoners with counsel who are competent, adequately compensated, and adequately resourced. Upon a state's application for Chapter 154 certification, the Attorney General must determine "whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. § 2265(a)(1)(A).

Once a state mechanism is certified, Chapter 154 applies to cases where "counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent." 28 U.S.C. § 2261(b)(2). In every case that could be subject to Chapter 154's curtailed habeas procedures, federal habeas counsel must investigate, and in many cases will have to litigate, whether the appointment of state postconviction counsel was made "pursuant to" a state's mechanism. Baich Decl. at ¶ 24.

When the Attorney General certifies a state appointment mechanism under Chapter 154, and when postconviction counsel is appointed pursuant to that mechanism, the statute of limitations for filing a habeas petition in federal court is cut in half—from one year to 180 days. 28 U.S.C. § 2263(a). The 180-day deadline may be tolled in limited circumstances, as discussed further below. *See infra* § XIV(C). Chapter 154 also strictly limits a petitioner's ability to raise procedurally defaulted claims, to amend his or her habeas petition, and to obtain a stay from a federal court. 28 U.S.C. § 2264(a); 28 U.S.C. § 2266(b)(3)(B); 28 U.S.C. § 2262(c).

Apart from the effect on petitioners, Chapter 154 places additional burdens on the judiciary. Under the chapter, a federal district court must enter final judgment on a habeas petition either within 450 days of the filing of the petition or

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<sup>3</sup> One perspective on the issue of delays in habeas proceedings was provided in a comment filed on January 18, 2018, by the group Arizona Voice for Crime Victims. *See* <https://www.regulations.gov/document?D=DOJ-OLP-2017-0009-0020>. The comment supports Arizona's application for Chapter 154 certification, but it does not address the issue in this proceeding: whether Arizona guarantees the timely appointment of competent, adequately compensated and resourced postconviction counsel.

60 days after it is submitted for decision—whichever is earlier. 28 U.S.C. § 2266(b)(1)(A). A federal court of appeals must then hear and render a final determination of any appeal brought under Chapter 154 not later than 120 days after the filing date of the appellant's reply brief or, if no reply is filed, the appellee's answering brief. 28 U.S.C. § 2266(c)(1)(A).

**B. In 2005, Congress transferred authority from federal courts to the Attorney General to decide whether to certify a state's appointment mechanism.**

Until 2005, federal district courts decided whether a state appointment mechanism met the Chapter 154 requirements. And federal courts uniformly found that states either did not have a mechanism that met Chapter 154's requirements or failed to appoint counsel pursuant to the designated mechanism. See Casey C. Kannenberg, *Wading Through the Morass of Modern Federal Habeas Review of State Capital Prisoners' Claims*, 28 Quinnipiac L. Rev. 107, 130-38 (2009) (collecting cases from states with mechanisms found to be inadequate for Chapter 154 purposes).<sup>4</sup>

The USA PATRIOT Improvement and Reauthorization Act of 2005 (PATRIOT Act) stripped the judiciary's authority to determine states' eligibility for expedited habeas review under Chapter 154. 28 U.S.C. § 2265. The Act transferred that authority to the Attorney General and also charged the Attorney General with promulgating regulations to implement the certification process in accordance with the Administrative Procedure Act (APA). 28 U.S.C. § 2265(b).

The Department first published a proposed rule to govern certification determinations in 2007. See 72 Fed. Reg. 31,217 (proposed June 6, 2007). That rule never went into effect, and the Department withdrew it altogether in November 2010. 75 Fed. Reg. 71,353 (Nov. 23, 2010) (to be codified at 28 C.F.R. pt. 26).

On March 3, 2011, the Department of Justice published a new notice of proposed rulemaking for the certification regulations. 76 Fed. Reg. 11,705. During the comment period, FDO-AZ and others submitted comments identifying significant problems with numerous provisions in the proposed rule. See Meyer Decl. Ex. 186, Comment from Jon M. Sands, Fed. Pub. Def., D. Ariz., to Danica Szarvas-Kidd, Policy Advisor for Adjudication, Office of Justice Programs, U.S. Dep't of Justice, OJP Docket No. 1464 (July 23, 2007); *id.* Ex. 187, Comment on Certification Process for State Capital Counsel Systems from Jon M. Sands, Fed. Pub. Def., D. Ariz., to Regulations Docket Clerk, Office of Legal Policy, Dep't of

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<sup>4</sup> As discussed further below, the Ninth Circuit's opinion in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002), stated in dicta that Arizona's 1998 appointment mechanism was adequate under Chapter 154, but that Arizona did not actually appoint counsel under that mechanism.

Justice, OAG Docket No. 1540 (June 1, 2011); *id.* Ex. 188, Comment on Certification Process for State Capital Counsel Systems from Jon M. Sands, Fed. Pub. Def., D. Ariz., to Regulations Docket Clerk, Office of Legal Policy, Dep't of Justice, OAG Docket No. 1540 (Mar. 14, 2012); *id.* Ex. 189, Selected Comments from Rulemaking Proceedings on 28 C.F.R. §§26.20-26.23 (June 24, 2007 to Mar. 14, 2012). The Department then published a supplemental notice of rulemaking to solicit further comment on five potential changes to the proposed rule, including changes related to competency standards for counsel, the requirement of timely appointments, and the renewal of certifications. 77 Fed. Reg. 7559.

More than five months before the Department published the Final Rule, Arizona submitted its request for certification to the Department. *See* Meyer Decl. Ex. 1, Application at 1. FDO-AZ learned of this submission through a press release and promptly requested notice of any further communications between Arizona and the Department. Meyer Decl. Ex. 2, Letter from Dale A. Baich, Supervisor, Office of the Fed. Pub. Def. for the Dist. of Ariz., to Eric H. Holder, Jr., Att'y Gen. of the United States (June 4, 2013). Nonetheless, the Department responded privately to Arizona on July 16, 2013, stating in an ex parte letter that it would begin reviewing the state's application immediately to "help speed up the ultimate determination of the certification," despite the fact that the rulemaking process was still ongoing and the Final Rule establishing application procedures had not issued. Meyer Decl. Ex. 3, Letter from Alexa Chappell, Intergovernmental Liaison, U.S. Dep't of Justice, to Tom Horne, Att'y Gen. of Ariz. (July 16, 2013).

The Department published the Final Rule on September 23, 2013. *See* 78 Fed. Reg. 58,160. In it, the Attorney General revealed for the first time that he intended to treat certification decisions as orders not subject to the APA's rulemaking provisions. 78 Fed. Reg. 58,160, 58,174. Similarly, the Attorney General indicated for the first time that he would make certification decisions based on information he privately collected from state attorneys general. *Id.*

After publication of the Final Rule, FDO-AZ and another public defender organization brought an action in district court challenging the rulemaking process and the Final Rule itself. *Habeas Corpus Res. Ctr. v. United States Dep't of Justice*, No. C 13-4517 CW, 2014 WL 3908220, at \*1 (N.D. Cal. Aug. 7, 2014) (*HCRC I*), *vacated and remanded sub nom. Habeas Corpus Res. Ctr. v. United States Dep't of Justice*, 816 F.3d 1241 (9th Cir. 2016) (*HCRC II*), *cert. denied*, 137 S. Ct. 1338 (2017). The action alleged that defendants violated the APA by (1) not providing notice during the rulemaking process of their belief that certification determinations constituted orders not subject the APA's rulemaking procedures, (2) failing to respond to significant public comments during the rulemaking process, (3) publishing a Final Rule with multiple procedural deficiencies, and (4) publishing a Final Rule with inadequate substantive criteria to govern certification determinations. Meyer Decl. Ex. 4, Complaint and Request for Injunctive Relief,

*Habeas Corpus Res. Ctr. v. United States Dep't of Justice*, No. C 13-4517 CW (N.D. Cal. Sept. 30, 2013).

The district court agreed with many of the plaintiffs' arguments and enjoined the Attorney General from implementing the Final Rule. The Ninth Circuit, however, vacated the district court's ruling after concluding (1) that the plaintiffs lacked standing to bring suit and (2) that any challenge to the regulations was not yet ripe for review because the Attorney General had yet to make any certification decisions. *HCRC II*, 816 F.3d at 1244. The Ninth Circuit did not opine on the merits of the plaintiffs' challenge to the regulations.

The Department of Justice published notice of Arizona's Application on November 16, 2017. The Application is the same one that Arizona first filed on April 18, 2013.

Also on November 16, 2017, the Department sent a letter to the Arizona Attorney General to "confirm that the materials [Arizona] previously submitted are still current." Moulton Decl. Ex. 572, Letter from Stephen E. Boyd, Ass't Att'y Gen., Office of Leg. Affairs, U.S. Dep't of Justice to Hon. Mark Brnovich, Att'y Gen., Ariz. (Nov. 16, 2017). The Department asked Arizona to respond within 30 days. *Id.* FDO-AZ was not copied on this letter, and the Department did not disclose the letter on its public website until November 28, 2017.

On November 21, 2017, FDO-AZ requested that the Department (1) extend the comment period by 120 days, to a total of 180 days, (2) follow notice-and-comment rulemaking procedures, (3) provide procedural protections consistent with other administrative decisions reviewable under the Hobbs Act, and (4) disclose all information on which the Department is relying in evaluating Arizona's application. *See* Moulton Decl. Ex. 576, Letter from Elizabeth R. Moulton, Att'y for Office of the Fed. Pub. Def. for D. of Ariz. to Laurence Rothenberg, Office of Legal Policy, Dep't of Justice (Nov. 21, 2017).

On November 27, 2017, Arizona responded to the Department's November 16 letter and acknowledged that "Arizona's system for providing postconviction counsel in capital cases" had undergone "a few minor changes." Moulton Decl. Ex. 574, Letter from Lacey Stover Gard, Chief Counsel, Capital Litigation Section, Office of Ariz. Att'y Gen., to Stephen E. Boyd, Ass't Att'y Gen., Office of Leg. Affairs, U.S. Dep't of Justice (Nov. 27, 2017) (Ariz. Supplemental Letter). The Arizona Attorney General's Office provided a courtesy copy to FDO-AZ on the same day, but the Department did not immediately publish the letter.

On December 18, 2017, FDO-AZ sent a second letter to the Department, again requesting an extension of time. Moulton Decl. Ex. 581, Letter from Elizabeth R. Moulton, Att'y for Office of the Fed. Pub. Def. for D. of Ariz. to Laurence Rothenberg, Office of Legal Policy, U.S. Dep't of Justice (Dec. 18, 2017).

FDO-AZ pointed out that the public needed time to comment on Arizona's Supplemental Letter and the important changes in Arizona's mechanism revealed in the letter. *Id.*

On December 21, 2017, the Department published Arizona's Supplemental Letter. On December 27, 2017, recognizing that the public needed additional time to comment on Arizona's supplemental information, the Department extended the comment period to February 26, 2018, which was a substantially shorter extension than what FDO-AZ originally requested. *See* 82 Fed. Reg. 61,329.

## V. CAPITAL PROCEDURES IN ARIZONA

A general understanding of the five stages of capital litigation is critical to appreciating the central role played by state postconviction counsel and the importance of federal habeas proceedings in the administration of the death penalty. The stages are (1) pretrial proceedings, (2) trial and sentencing, (3) direct appellate review, (4) state postconviction review, and (5) federal habeas review. Each is described in turn.

### A. Pretrial

A capital case in Arizona begins when the prosecutor files a notice of intent to seek the death penalty. Ariz. R. Crim. P. 15.1(i)(1). The prosecutor has discretion to seek the death penalty only in cases where the accused is charged with first-degree premeditated murder or felony murder. Ariz. Rev. Stat. § 13-1105.

When a prosecutor chooses to seek the death penalty, he or she must disclose additional materials to defense counsel, including the materials the state intends to use to support the finding of any aggravating factor that would justify a death sentence. Ariz. R. Crim. P. 15.1(i)(2)-(4). Aggravating factors include prior serious offenses and certain circumstances of the crime, like the age of the victim. *See* Ariz. Rev. Stat. § 13-751(F).<sup>5</sup>

Capital cases also impose special pretrial responsibilities on defense counsel. At the outset, defense counsel must prepare for both the guilt and sentencing phases of trial. To do so, the ABA recommends that the defense team consist of no fewer than two qualified attorneys, an investigator, a mitigation specialist, and at least one person qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. AMERICAN BAR

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<sup>5</sup> Arizona's capital sentencing scheme includes so many aggravating circumstances that virtually every defendant convicted of first-degree murder is eligible for death. A challenge to the constitutionality of that scheme is currently pending at the United States Supreme Court. *Hidalgo v. Arizona*, No. 17-251 (cert. pet. filed August 14, 2017).

ASSOCIATION, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (“2003 ABA Guidelines”), Guideline 4.1.<sup>6</sup> Arizona also requires two qualified attorneys on a capital trial defense team. Ariz. R. Crim. P. 6.2(b).

To prepare for the guilt phase, defense counsel have a duty to undertake a comprehensive investigation of all circumstances of the crime and the evidence—testimonial, forensic, or otherwise—purporting to inculcate the client. 2003 ABA Guidelines 1.1. This includes finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses and searching for lay and expert witnesses and experts who may challenge the prosecution’s version of events. *Id.* It also includes investigating possible defenses, such as self-defense or insanity. *Id.*

To prepare for the sentencing phase, defense counsel must fully investigate their client’s biopsychosocial history. “[T]he fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality). To that end, counsel must hire and supervise mitigation specialists whose responsibility is to uncover any mitigating factors that support a finding that death is not an appropriate punishment in a defendant’s case. 2003 ABA Guidelines 4.1; *see also* Phalen Decl. at ¶¶ 60-64; Armstrong Decl. at ¶¶ 20-21; Hammond Decl. at ¶¶ 48, 54; Durand Decl. at ¶ 3; Shaw Decl. at ¶¶ 3-5. In Arizona, that work is guided by a nonexhaustive statutory list of factors that are considered mitigating for purposes of assessing whether the death penalty is appropriate in an individual case, including “any aspect of the defendant’s character, propensities or record.” Ariz. Rev. Stat. §§ 13-751(G), 13-752(G).

A mitigation specialist compiles a comprehensive biopsychosocial history of the client and analyzes the significance of that history on the defendant’s development, personality, and behavior. 2003 ABA Guidelines 4.1. Compiling that history includes an investigation of the defendant’s medical history, mental health history, family and social history, educational history, military service, employment and training history, and prior experience in the corrections system. *Id.*; *see* Durand Decl. at ¶ 3; Shaw Decl. at ¶ 4.

In consultation with the mitigation specialist, defense counsel must also assemble a team of other experts needed to assess a defendant’s mental health, test forensic evidence, and perform other specialized analyses necessary to determine what mitigating factors exist in a defendant’s case. 2003 ABA Guidelines 10.7. That work must be completed before trial begins because the same jury presides

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<sup>6</sup> The 2003 ABA Guidelines updated and expanded the 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

over the guilt and sentencing phases. See *Ring v. Arizona*, 536 U.S. 584 (2002) (affirming a defendant's right to have a jury determine the aggravating factors necessary for imposing the death penalty). And mitigation evidence uncovered by the defense team could influence the guilt-phase proceedings and strategy, especially if there is evidence of insanity at the time of the crime, incompetency to stand trial, or a character trait for impulsivity on the part of the defendant. See 1989 ABA Guidelines 11.8.3 A; 2003 ABA Guidelines 1.1.

## **B. Trial and sentencing**

Capital trials are significantly more complicated and high stakes than other criminal trials. Robin M. Maher, AMERICAN BAR ASSOCIATION, *The Death Penalty and Reform in the United States* at 4, [http://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/maher\\_dp\\_reform\\_english.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/maher_dp_reform_english.authcheckdam.pdf). “Defense counsel competency is perhaps the most critical factor in determining whether a capital offender/defendant will receive the death penalty.” Meyer Decl. Ex. 5, Report, Am. Bar Ass’n, *Evaluating Fairness & Accuracy in State Death Penalty Systems: The Arizona Death Penalty Assessment Report* (July 2006) (ABA Arizona Report), at 123.

In Arizona, as previously described, capital trials proceed in two distinct phases. In the guilt phase, the trier of fact determines whether the state has proven beyond a reasonable doubt that the defendant is guilty of first-degree murder. If a unanimous 12-person jury finds the defendant guilty beyond a reasonable doubt, the case proceeds to sentencing. In Arizona, the same trier of fact may determine a defendant's guilt and appropriate sentence. Ariz. Rev. Stat. § 13-752(C). That trier of fact is a jury unless both the defendant and the state waive their jury rights. Ariz. Rev. Stat. § 13-752(S)(1).

The sentencing proceeding has two components: aggravation and penalty. In the aggravation phase, the prosecution bears the burden of proving that one or more of the statutory aggravating circumstances alleged in the notice of intent to seek the death penalty are present beyond a reasonable doubt. Ariz. Rev. Stat. § 13-752(B), (C); *State v. Kayer*, 984 P.2d 31, 41 (Ariz. 1999). The trier of fact must make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. *Id.* § 13-752(E).

If the trier of fact finds that at least one aggravating factor is established, the aggravation phase proceeds immediately to the penalty phase. At the penalty phase, the defendant bears the burden of establishing the presence of mitigating circumstances by a preponderance of the evidence. Ariz. Rev. Stat. §§ 13-751(G)(1)-(5); 13-752(G); *State v. Djerf*, 959 P.2d 1274, 1286 (Ariz. 1998). Based on all the evidence, the trier of fact determines whether the mitigation evidence is sufficiently substantial to call for leniency. Ariz. Rev. Stat. § 13-752(D). If the trier of fact finds

“there are no mitigating circumstances sufficiently substantial to call for leniency,” they must impose a sentence of death. Ariz. Rev. Stat. § 13-751(E) (“The trier of fact shall impose a sentence of death if ...”). Where the trier of fact is a jury, it must return a unanimous verdict at both phases of the sentencing proceeding to impose the death penalty. Ariz. Rev. Stat. § 13-752(H).

### C. Direct review

All death sentences are automatically appealed to the Arizona Supreme Court. Ariz. Rev. Stat. §§ 13-755, 13-756. Appellate counsel is limited to raising claims of error based on the four corners of the trial court record—such as claims that the evidence was insufficient to sustain a guilty verdict or to support the sentence—and appellate counsel typically may not raise extra-record claims like ineffective assistance of counsel. See *State v. Ring*, 65 P.3d 915, 933 (Ariz. 2003); *State v. Henderson*, 115 P.3d 601, 608 (Ariz. 2005); *State v. White*, 982 P.2d 819, 829 (Ariz. 1999); *State v. Torres*, 93 P.3d 1056, 1060-61 (Ariz. 2004).

For cases in which the crime occurred before August 1, 2002, the Arizona Supreme Court “independently review[s] the trial court’s findings of aggravation and mitigation and the propriety of the death sentence.” Ariz. Rev. Stat. § 13-755; *State v. Stuard*, 863 P.2d 881, 897 (Ariz. 1993) (noting that the Arizona Supreme Court “has a duty not only to review the support for the trial court’s findings but also to independently review the sentence’s propriety”). In cases where the crime occurred on or after August 1, 2002, the court reviews the death sentence for an abuse of discretion. Ariz. Rev. Stat. § 13-756; *State v. Morris*, 160 P.3d 203, 219-20 (Ariz. 2007) (explaining that under the abuse-of-discretion review standard, the Arizona Supreme Court will uphold a death sentence “if there is any reasonable evidence in the record to sustain” the aggravating circumstances findings) (internal quotation marks omitted)).

If the Arizona Supreme Court denies an appeal and affirms a death sentence, the defendant may petition for certiorari at the United States Supreme Court. The defendant has 90 days to petition, subject to extensions. If the petition is denied, or the time for filing certiorari expires, the Arizona Supreme Court issues a mandate affirming the conviction and death sentence.

### D. State collateral review

After the Arizona Supreme Court issues the mandate, “the Supreme Court clerk must expeditiously file a notice of post-conviction relief with the trial court.” Ariz. R. Crim. P. 32.4(a)(2)(B). The notice triggers the collateral postconviction review process. Postconviction proceedings are generally held before the same trial court that convicted and sentenced the defendant. Ariz. Rev. Stat. § 13-4234(I).

If the defendant is indigent, the Arizona Supreme Court appoints counsel to represent him or her during postconviction proceedings. Ariz. Rev. Stat. §§ 13-

4041(B), 4234(D) (2006); Ariz. R. Crim. P. 32.4(b)(1). That appointment process is the crux of Arizona's application for certification under Chapter 154, and it is described in detail below.

The postconviction review process is critical to ensure that defendants are not convicted or sentenced to death in violation of state or federal law. “[C]onstitutional violations occurring outside the trial court record must be presented to the postconviction court pursuant to Arizona Rule of Criminal Procedure 32.” Armstrong Decl. at ¶ 5. It is critical that postconviction counsel “fully investigate potential postconviction claims, particularly those requiring investigation outside the trial record and relating to the penalty phase, such as ineffective assistance of counsel, juror misconduct, and government suppression of evidence favorable to the defense.” Meyer Decl. Ex. 191, Judicial Conference of the United States, Committee on Defender Services, Subcommittee on Federal Death Penalty Cases, *Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (September 2010), at 88. For instance, postconviction review is the first and only opportunity to raise claims of ineffectiveness of trial counsel before the state courts, and postconviction counsel must fully investigate and develop those claims. *State v. Torres*, 93 P.3d 1056, 1060-61 (Ariz. 2004); *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002).

“If an Arizona capital post-conviction lawyer fails to investigate, discover, and present constitutional claims for relief supported by facts outside the record (collateral facts), such facts and claims are not properly exhausted for federal habeas review.” Armstrong Decl. at ¶ 5. *See also* Meyer Decl. Ex. 5, ABA Arizona Report at 171-72; Ariz. R. Crim. P. 32.1. Postconviction counsel must therefore ensure that viable claims are properly preserved for federal habeas review—a responsibility that requires detailed knowledge of the applicable federal law, including constitutional law, and the relevant procedural bars in state postconviction and federal habeas proceedings.

Thus, as detailed below, postconviction counsel must perform multiple tasks, often at the same time, including (1) reinvestigating a case and reviewing the work of trial counsel, the trial mitigation specialists, and appellate counsel; (2) developing new legal claims and drafting a postconviction review petition based on extra-record evidence that trial counsel did not discover or present; and (3) navigating state and federal substantive law and procedural rules to ensure claims are properly raised and exhausted. *See* Armstrong Decl. at ¶ 14 (“[I]n Arizona, capital post-conviction counsel’s overarching role can be viewed as investigating, discovering, presenting, federalizing, and exhausting any extra-record constitutional violations occurring at the three stages of the capital trial, and on, or subsequent to, direct appeal.”); Phalen Decl. at ¶¶ 47-64; Hammond Decl. at ¶¶ 53-54; Darby Decl. at ¶¶ 14-15; Maher Decl. at ¶¶ 18-19; Gorman Decl. at ¶¶ 15, 19. Performing all of these duties requires highly qualified, specialized postconviction counsel.

The following are summaries of each task that postconviction counsel must perform.

1. *Investigating the case*

At the outset, postconviction counsel must reinvestigate a case to ensure that trial and appellate counsel investigated and raised all potentially meritorious claims relevant to innocence or mitigation.<sup>7</sup> The investigation is essential to identifying any claims missed by trial or appellate counsel and showing that a prisoner was prejudiced by trial and appellate counsel's performance. To show prejudice, a petitioner must establish that the outcome of his or her trial would have been different if the additional claims were raised or the additional evidence was presented. "Where a post-conviction petitioner simply repeats what was presented at trial, he cannot prove prejudice." Armstrong Decl. at ¶ 6.

As recognized by the American Bar Association Guidelines, this process requires interviewing the defendant, reading the entire trial record, inspecting the evidence, obtaining and reading the files of trial and appellate counsel, interviewing all critical witnesses, completing the defendant's biopsychosocial history to determine if all mitigation factors were raised, and assessing whether additional psychological and forensic testing must be performed. 2003 ABA Guidelines 1.1. See also Durand Decl. at ¶ 14. The record, including prior counsel's files, may total more than 50,000 pages, and postconviction counsel may have to spend more than one thousand hours to complete their review. Armstrong Decl. at ¶ 17.<sup>8</sup>

Regarding the sentencing phase specifically, because trial counsel often works with limited resources, investigation by postconviction counsel often reveals important information not previously discovered, including new evidence of innocence and previously undiscovered mitigating factors in a defendant's life history. CELESTINE RICHARDS MCCONVILLE, *The Right to Effective Assistance of*

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<sup>7</sup> As the Comment to ABA Guideline 10.15.1 elaborates: "Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses."

<sup>8</sup> The task of obtaining the complete files from former defense attorneys and the prosecutor's office may itself require a substantial amount of time. See Kimerer Decl. ¶ 25 ("Sometimes you get [the files], sometimes you get blocked and have to fight to get access. And sometimes that process can take months.").

*Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31, 91 (2003).

Discovering that information often first requires building a working relationship with a client—a process that can take weeks if not months depending on whether the client is mentally ill or is distrustful of counsel due to negative experiences with prior attorneys. See Phalen Decl. at ¶ 54; Armstrong Decl. at ¶ 16. “[I]n Arizona, death row is housed at least one hour from any major metropolitan area and offers limited legal visitation, which often must be arranged months in advance. Legal calls are limited in time and privacy, and must also be prescheduled. ... Thus, it can take longer for capital post-conviction counsel to establish the necessary trust with her client as it is logistically more difficult to see or otherwise communicate with the client frequently.” Armstrong Decl. at ¶ 16.

The reinvestigation of a case may also require a cadre of experts, such as investigators, mitigation specialists, psychiatrists, attorney experts, forensics experts, crime scene reconstructionists, ballistics specialists, and false confession experts. See AMERICAN BAR ASSOCIATION, *Understanding the Costs of Capital Postconviction Representation*, [http://www.americanbar.org/content/dam/aba/migrated/DeathPenalty/RepresentationProject/PublicDocuments/costs\\_of\\_representation.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/DeathPenalty/RepresentationProject/PublicDocuments/costs_of_representation.authcheckdam.pdf). While not every case requires a large cabinet of experts, an adequate postconviction review petition invariably requires the involvement of at least one expert witness. See Phalen Decl. at ¶¶ 48, 60-64; Armstrong Decl. at ¶¶ 15, 21, 23; Hammond Decl. at ¶¶ 9, 53-54; Darby Decl. at ¶¶ 10, 14; Maher Decl. at ¶ 23; Gorman Decl. at ¶¶ 22-23. “[A] complete, parallel tracks, reinvestigation of [a] capital client and his case that will survive summary dismissal takes years to complete.” Armstrong Decl. at ¶ 24. The Arizona Capital Representation Project, a non-profit legal service organization, has monitored postconviction petitions over the last 10 years “and has found it takes, on average, 2.5 years to investigate and prepare a post-conviction petition.” *Id.*

## 2. *Preparing the postconviction review petition*

### a) State procedural requirements

Once postconviction counsel has identified which claims to raise, they must draft a petition for postconviction review. Arizona Rule of Criminal Procedure 32 establishes the procedural requirements for preparing and filing the petition. Postconviction counsel must be an expert in those procedural rules, among others, that can limit or deny the defendant’s right to relief. See Phalen Decl. at ¶ 49 (“At the outset, a PCR attorney must have an encyclopedic understanding of the relevant state rules. Some of the most important provisions of Arizona Rule of Criminal Procedure 32 are buried in lengthy paragraphs, and the practitioner must have a nuanced understanding of them.”); Darby Decl. at ¶¶ 12-13; Armstrong Decl. at ¶ 24; Meyer Decl. Ex. 266, Minute Entry Denying Postconviction Relief, *State v.*

*Clabourne*, No. CR-06824 (Ariz. Super. Ct. Dec. 12, 2002), at 2 (“Rule 32.5 of the Arizona Rules of Criminal Procedure requires that a petitioner include all grounds for relief in his petition, and certify that he has done so. Despite the unambiguous mandate of the rule, this Court has yet to receive a certification meeting the requirements of the rule.”).

Until 2014, Rule 32 required that a postconviction review petition be filed within 120 days of the notice for postconviction review, unless an extension was granted. *See Meyer Decl. Ex. 301*, Ariz. R. Crim. P. 32.4(c)(1) (2013).<sup>9</sup> An amendment extended the deadline to 12 months. *See Ariz. R. Crim. P. 32.4(c)(1)(A)*.

If counsel needs additional discovery to support claims, the postconviction court will only authorize such discovery upon a showing of “good cause.” To establish good cause, courts require that a petitioner file his petition for postconviction review before requesting discovery. *Meyer Decl. Ex. 5*, ABA Arizona Report at 181; *Canion v. Cole*, 115 P.3d 1261, 1262-63 (Ariz. 2005). Furthermore, Rule 32 limits postconviction review petitions to 80 pages unless a motion for enlargement is filed, and the rule requires that any affidavits, records or other evidence in support of the allegations are attached as an appendix. Ariz. R. Crim. P. 32.5(b).<sup>10</sup> While a procedurally defective petition will be returned to petitioner for correction, if the petitioner does not refile the revised petition within 30 days of receipt, the court will dismiss the petition *with prejudice*. Ariz. R. Crim. P. 32.5(e). Counsel must be familiar with a particular judge’s willingness to grant motions for extensions of time, motions to amend, motions for additional funding, and motions to exceed page limits, and understand the appropriate procedures for securing that relief if needed.

If a petitioner’s postconviction review petition omits critical elements, Rule 32 permits amendment only on a showing of good cause. Ariz. R. Crim. P. 32.6(c). Arizona allows for consideration of new claims brought in successive postconviction petitions only in narrow circumstances, such as where a claim could not have been raised or litigated in the first proceeding or where an intervening court decision changes the law to allow for a claim that was previously precluded. *See State v. Bennett*, 146 P.3d 63, 67 (Ariz. 2006); *State v. Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009). Even where a change in the law occurs, claims raised in successive petitions may still be barred due to the application of strict retroactivity rules. For example, intervening changes in federal law do not apply retroactively if they are deemed procedural as opposed to substantive. *State v. Towery*, 64 P.3d

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<sup>9</sup> Empirically, Arizona courts grant extensions fairly regularly. However, extensions remain at the discretion of the court.

<sup>10</sup> Before the 2018 amendments to Rule 32, the petition was limited to 40 pages. *See Meyer Decl. Ex. 303*, Ariz. R. Crim. P. 32.5 (2017). Courts routinely extended the 40-page limit for postconviction review petitions.

828, 833, 835 (Ariz. 2003) (holding that the intervening decision of *Ring v. Arizona*, 536 U.S. 584 (2002), establishing that the Sixth Amendment right to a jury applies to sentencing proceedings, was a procedural rule that did not apply retroactively).

b) Preservation of federal claims for habeas proceedings

One of state postconviction counsel's core responsibilities is to ensure that all claims are preserved for federal habeas review. *See* Armstrong Decl. at ¶¶ 5, 10 (“Competent state post-conviction counsel may not simply raise claims for relief, but must understand federal habeas law and their duty to properly preserve their post-conviction clients’ claims for habeas relief.”); Darby Decl. at ¶ 15; Gorman Decl. at ¶ 15. Due to exhaustion requirements in federal court, petitioners must first raise any existing federal claims in state proceedings. 28 U.S.C. §§ 2254(b)(1) (Chapter 153 cases), 2264(a) (Chapter 154 cases). “Competent post-conviction counsel must understand these rules of preclusion, raise all non-precluded claims, and make all potentially meritorious arguments for raising claims that may appear subject to preclusion on their face.” Armstrong Decl. at ¶ 8. *See also* McConville, *supra*, at 89-91; *White v. Ryan*, No. CV-08-08139-PCT-SPL, 2015 WL 4173343, at \*17 (D. Ariz. July 10, 2015) (finding claims were not properly exhausted “because Petitioner did not allege violations of federal constitutional law.”); *Spears v. Ryan*, No. CV-00-1051-PHX-SMM, 2009 WL 2998937, at \*3 (D. Ariz. Sept. 14, 2009) (“Exhaustion requires that a petitioner clearly alert the state court that he is alleging a specific federal constitutional violation.”). Postconviction counsel must also develop and present the factual basis for those federal claims. *Id.*

The failure to exhaust federal claims during state postconviction proceedings generally forecloses bringing those claims in federal habeas proceedings, subject to limited exceptions. The federal habeas proceedings in *Greene v. Schriro*, No. CV 03-605-TUC-FRZ (D. Ariz.) are instructive. In that case, an Arizona death row prisoner, Beau Greene, raised a number of claims challenging his conviction in his state postconviction petition for review. *See* Meyer Decl., Ex. 284, Amended Petition for Post Conviction Relief, *State v. Greene*, No. CR 48730 (Ariz. Super. Ct., Dec. 17, 2001). Those claims included various guilt-phase and sentencing challenges grounded in alleged violations of state law. *See id.* at 2-6. Greene’s postconviction attorney, however, often failed to allege federal constitutional violations resulting from the same alleged trial-court errors. *See id.* at 2-6, 24-41.

Greene then tried to raise those federal claims and others in his subsequent federal habeas petition, including claims that his federal constitutional rights were violated because the prosecution failed to disclose certain evidence, the trial court improperly allowed specific testimony from the victim’s wife, and insufficient evidence supported Greene’s conviction for robbery such that his felony murder conviction could not stand. *See* Meyer Decl., Ex. 285, Order Re: Motions for Record Expansion, Discovery, and an Evidentiary Hearing, No. 03-CV-00605, *Greene v. Schriro*, (D. Ariz., Oct. 2, 2006), at 6-29. The district court held that those claims

and a number of others were procedurally barred, even though Greene had raised state-law versions of many of the claims during state postconviction proceedings. *See id.* As the court explained, “[t]o properly exhaust state remedies, the petitioner must ‘fairly present’ his claims to the state’s highest court in a procedurally appropriate manner,” and such a ‘fair presentation’ includes describing “the federal legal theory on which” the claims are based. *Id.* at 2-3 (citation omitted). Greene’s failure to do so was fatal to his unexhausted federal claims.

Because it is the postconviction counsel’s duty to make sure all federal claims are preserved, counsel must have sufficient time to fully investigate and present those claims. A full postconviction review petition takes hundreds of hours to investigate and prepare. *See* Phalen Decl. at ¶¶ 51-63; Armstrong Decl. at ¶ 24; Darby Decl. at ¶ 26; Gorman Decl. at ¶ 12. In many cases, that number is substantially higher. *See* Armstrong Decl. at ¶ 24 (explaining that the investigation of claims and preparation of a petition “can require in the range of 7,500-10,000 defense team hours”); Darby Decl. at ¶ 26. Meanwhile, state postconviction counsel must ensure that there is enough time remaining under the federal statute of limitations for the defendant to file a federal habeas petition at the conclusion of state postconviction review. Armstrong Decl. at ¶ 10 (“Further, state post-conviction counsel must understand federal statutes of limitations because the timing of their filings, such as filing a petition for certiorari after direct appeal or filing an initial post-conviction petition, have implications for statutory tolling in federal court.”).

In response to uncertainty about how federal courts will interpret Chapter 154’s tolling provisions, *see infra* § XIV(C), diligent practitioners in Arizona have begun to file initial petitions as soon as possible upon appointment in order to toll the possible Chapter 154 deadline, and then file an amended petition after a full investigation of their client’s case. *See, e.g.,* Meyer Decl. Ex. 210 Initial Petition for Post-Conviction Relief, *State v. Nordstrom*, No. CR55947 (Ariz. Super. Ct. Mar. 27, 2013); Meyer Decl. Ex. 211 Initial Petition for Post-Conviction Relief, *State v. Rose*, No. CR2007-149013-002 (Ariz. Super. Ct. Jan. 22, 2014).<sup>11</sup>

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<sup>11</sup> The success of this strategy depends on two things. First, the state courts and state attorney general must permit (or not object to) amendment of the initial petition. If not, the state court could dismiss the initial petition, or the state could file an answer to the initial petition, before the petitioner has a chance to amend. The consequences would be devastating to federal habeas review. Second, Arizona must appoint postconviction counsel at essentially the same time (or preferably before) the conclusion of the prisoner’s direct appeal—before any time begins to run on the Chapter 154 statute of limitations.

### 3. *Conducting an evidentiary hearing*

After reviewing the petition, response, reply, and supporting documentation, the state court determines whether there are any colorable claims entitling petitioners to a hearing. Ariz. R. Crim. P. 32.6(d)(2); Ariz. Rev. Stat. § 13-4238; *State v. Runnigeagle*, 859 P.2d 169, 173 (Ariz. 1993). During this hearing, the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence. Ariz. R. Crim. P. 32.8(c); Ariz. Rev. Stat. § 13-4238(C). If the petitioner meets this burden, then the state must demonstrate that the defect was harmless beyond a reasonable doubt. *Id.* The hearing is governed by the Arizona Rules of Evidence, except that the petitioner may be called to testify. Ariz. R. Crim. P. 32.8(b); Ariz. Rev. Stat. § 13-4238(B).

### 4. *Preparing the petition for review*

After the Superior Court rules on the petition for postconviction review, either party may petition for review with the Arizona Supreme Court within 30 days. Ariz. R. Crim. P. 32.9(c). The trial court may grant an extension of the deadline to file the petition. *Id.* The petition must include a discussion of the trial court's ruling, the issues the petitioner wishes to present for review, facts material to those issues, and reasons why the petition should be granted. Ariz. R. Crim. P. 32.9(c)(4)(B). "Arizona law requires that a petitioner present the issues and material facts supporting a claim in a petition for review." *Wood v. Ryan*, 693 F.3d 1104, 1117 (9th Cir. 2012). Any claims not raised in the petition for review are not exhausted for federal habeas purposes. *See Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999).<sup>12</sup>

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<sup>12</sup> Some Arizona postconviction lawyers do not follow this black letter law. For example, Stephen Newell's attorney failed to raise all issues in his petition for review. *Compare* Meyer Decl. Ex. 125, Petition for Review from Denial Post-Conviction Relief, *State v. Newell*, No. CR-12-0065 (Ariz. Feb. 10, 2012), at 1-2 (only raising two specific ineffective assistance of counsel issues) *with* Moulton Decl. Ex. 328, Petition for Post-Conviction Relief (*Excerpted*), *Arizona v. Newell*, No. CR2001-009124 (Ariz. Super. Ct. May 4, 2009), at 1-3 (raising seven specific ineffective assistance of counsel issues, a challenge to Arizona's sentencing scheme, and preserving other issues). Newell himself attempted to supplement the petition for review in order to exhaust the issues for his federal habeas proceedings. Meyer Decl. Ex. 126, Supplement Petition for Review and Request for Orders, *State v. Newell*, No. CR-12-0065-PC (Ariz. July 13, 2012), at 2. The Arizona Supreme Court summarily denied the Petition for Review. Meyer Decl. Ex. 127, Order, *State v. Newell*, No. CR-12-0065-PC (Ariz. Sept. 25, 2012). The same lawyer has repeated this mistake in other cases. *Compare* Meyer Decl. Ex. 130, Petition for Review from Dismissal Post-Conviction Relief, *State v. McGill*, No. CR2003-005315-001 DT (Ariz.

If the Arizona Supreme Court grants review, it may order oral argument and grant any relief it deems necessary and proper. Ariz. R. Crim. P. 32.9(f).

If the Court declines to hear the petition or affirms the lower court's decision, the petitioner may file a petition for certiorari with the United States Supreme Court. At the same time, the petitioner may initiate federal habeas proceedings. See Ariz. R. Crim. P. 31.23(a) (specifying that the Arizona Supreme Court may issue a warrant of execution if "the defendant has not initiated habeas corpus proceedings in federal district court within 15 days after the Supreme Court's denial of a petition for review seeking review of the denial of the defendant's first Rule 32 petition for post-conviction relief").

### **E. An exemplar postconviction representation**

To better understand the duties and critical importance of state postconviction counsel in Arizona, it is helpful to walk through what a competent representation looks like. The case of Kyle Sharp provides that perspective.

Sharp was sentenced to death for murder. Moulton Decl. Ex. 399, Petitions for Post-Conviction Relief (*Excerpted*), *State v. Sharp*, No. CR-95-271 (Ariz. Super. Ct. Oct. 31, 2000 and Jan. 17, 2002), at 7. At trial, Sharp was defended by two lawyers, neither of whom had handled a death penalty case. *Id.* at 8. They presented no defense during the guilt phase of Sharp's trial—a choice not based on any strategic deliberation, but based on their failure to understand the law on premeditation. *Id.* at 3-4 (citing trial counsel declarations).

Defense counsel's unfamiliarity with capital cases was especially apparent when the case entered the mitigation phase. Trial counsel did not hire a mitigation investigator, nor conduct any investigation into the full extent of the abuse Sharp suffered over his life. Meyer Decl. Ex. 7, Decision and Order in *State v. Sharp*, No. CR95000271 (Ariz. Super. Ct. July 29, 2010), at 29. Though Sharp had told his lawyers about brutal childhood abuse by his stepbrother and mother, trial counsel made no effort to develop the evidence needed to corroborate Sharp's account. See *id.* Under then-prevailing law, Arizona courts gave less weight to a defendant's uncorroborated self-reports of abuse. See *id.* Because trial counsel failed to develop

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Dec. 5, 2011), at 1 (raising a single issue regarding ineffective assistance of counsel for failing to retain experts on cognitive impairment) *with* Moulton Decl. Exs. 276, Petition in Support of Post-Conviction Relief with Request for Leave to Amend, *Arizona v. McGill*, No. CR2003-005315-001 DT (Ariz. Super. Ct. Aug. 4, 2009), at 1-27 (identifying 18 claims); 277, Petition for Post-Conviction Relief, *Arizona v. McGill*, No. CR2003-005315-001 DT (Ariz. Super. Ct. June 1, 2010), at 2 (identifying 4 claims). That attorney remains on the roster of those the Supreme Court has deemed qualified for future capital postconviction appointments. See Moulton Decl. Ex. 487 (Attorney Rosters).

that evidence, the trial judge discounted it and found that trial counsel failed to establish any mitigating circumstances. *See id.*

Counsel Thomas Gorman led Sharp's postconviction review team. At the time, Gorman had represented one capitally charged defendant at trial and had handled two capital habeas cases and one state capital postconviction case. Moulton Decl., Ex. 517, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Thomas A. Gorman to Donna Hallam, Staff Att'y, Ariz. Sup. Ct. (Oct. 22, 1999); *see also* Gorman Decl. at ¶ 5.

Gorman thoroughly investigated trial counsel's performance, developed mitigation evidence, and sought the appointment of experts to develop his claims of ineffective assistance of counsel and identify the mitigation evidence trial counsel failed to present. *See* Moulton Decl. Ex. 399, Petitions for Post-Conviction Relief (*Excerpted*), *State v. Sharp*, No. CR-95-271 (Ariz. Super. Ct. Oct. 31, 2000 and Jan. 17, 2002). Gorman initially sought the appointment of seven experts: a legal expert to assist in developing his ineffective assistance of counsel claims, a neuropsychologist, a toxicologist, a psychologist with expertise in sexual abuse, an addiction specialist, a forensic expert in psychiatry and neurology, and a mitigation specialist. Moulton Decl. Ex. 399, Petition for Post-Conviction Relief, *State v. Sharp*, No. CR-95-271 (Ariz. Super. Ct. Oct. 31, 2000), at 112-129. Prior to the filing of the petition for postconviction relief, the court denied all of the expert requests except for the requests for a mitigation specialist and neuropsychologist. *See* Moulton Decl. Ex. 573, Decision, *State v. Sharp*, No. CR95000271 (Ariz. Super. Ct. May 9, 2001); *see also* Gorman Decl. at ¶ 23.

Because there had been *no* mitigation investigation done at the trial level, the postconviction mitigation specialist spent extensive time interviewing—for the first time—scores of Sharp's family members, former teachers, and other acquaintances to uncover the circumstances of Sharp's life. Meyer Decl. Ex. 7, Decision and Order in *State v. Sharp*, No. CR95000271 (Ariz. Super. Ct. July 29, 2010), at 11; *id.* at 32-41 (detailing the mitigation specialist's work in the postconviction investigation). Gorman uncovered extensive evidence that would have corroborated (1) Sharp's self-reported claims of childhood sexual abuse, psychological abuse and violent physical abuse; and (2) claims of childhood mental illness, multiple suicide attempts, blackouts, head injuries, and chronic alcohol and drug abuse. Moulton Decl. Ex. 399, Petitions for Post-Conviction Relief (*Excerpted*), *State v. Sharp*, No. CR-95-271 (Ariz. Super. Ct. Oct. 31, 2000 and Jan. 17, 2002), at 11. This evidence included 15 fact witnesses who corroborated Sharp's reports of abuse and past mental health treatment, plus school and medical records documenting Sharp's history of blackouts, mental health issues, social impairment, drug abuse, and physical trauma. Meyer Decl. Ex. 7, Decision and Order in *State v. Sharp*, No. CR95000271 (Ariz. Super. Ct. July 29, 2010), at 32-41.

Sharp's lawyers established that all of these witnesses and records had been available during Sharp's trial, but defense counsel had failed to present any of them, even though Sharp's mother had voluntarily traveled to Arizona from Indiana to offer her assistance. *Id.* at 41-42. Gorman also discovered that trial counsel's psychological expert advised trial counsel on more than one occasion to retain a "specialist in the area of neuropsychology" and investigate "whether there be evidence of neurological impairment." Moulton Decl. Ex. 399, Petitions for Post-Conviction Relief (*Excerpted*), *State v. Sharp*, No. CR-95-271 (Ariz. Super. Ct. Oct. 31, 2000 and Jan. 17, 2002), at 4-5. Trial counsel failed to follow through on that recommendation, even though neurological impairment is a defense to the crimes Sharp was charged with and highly relevant to mitigation. In postconviction review, Gorman retained a neuropsychologist and, after several motions to the court, obtained funding for the necessary diagnostic tests. *Id.* at 6.

Using that evidence, Gorman developed a robust claim for ineffective assistance of counsel at the mitigation phase, supported by extensive evidence supporting both prongs of *Strickland's* ineffective assistance of counsel test: deficient performance and prejudice. The postconviction review court concluded that the evidence showed Sharp's incapacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law, and showed that Sharp was significantly impaired—all mitigating factors that were "sufficiently substantial as to call for leniency." Meyer Decl. Ex. 7, Decision and Order in *State v. Sharp*, No. CR95000271 (Ariz. Super. Ct. July 29, 2010), at 47-49. In the words of the Superior Court, "Kyle Sharp never had a mitigation specialist nor anyone, with any job title, who did the work of a mitigation specialist, until after he was sentenced to death. He was entitled to someone who could, and would, have done the work of a mitigation specialist in connection with the sentencing phase of his trial in 1997." *Id.* at 11; *see also id.* at 23.

Accordingly, the court vacated Sharp's death sentence. *Id.* at 50.

While the court's decision was on review at the Arizona Supreme Court, the State of Arizona decided to no longer seek the death penalty and Sharp was resentenced to life in prison. Meyer Decl., Ex. 8, Docket, *State v. Sharp*, Case No. S0200CR95000271, at 1 (entries dated 8/1/2012 and 9/7/2012).

#### **F. Federal habeas review**

After state postconviction review proceedings are complete, a defendant may file a federal habeas petition challenging his or her state conviction and sentence. Preparing a habeas petition requires substantial time and resources. For death-row prisoners who were represented by ineffective state trial and postconviction counsel, federal habeas proceedings are their only meaningful chance to establish their innocence or ineligibility for the death penalty. *Cf. Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (recognizing that federal habeas may be the first opportunity for a petitioner

to raise ineffective assistance of trial counsel claims if the petitioner's postconviction counsel was also ineffective).

Under AEDPA, habeas relief is only available if a state-court decision is contrary to or unreasonably applies clearly established federal law, or results in a decision based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d); *see also* Baich Decl. at ¶ 18. Habeas counsel's investigation, therefore, must proceed from that perspective. To prepare a habeas petition, counsel must first reinvestigate the trial, direct appeal, and postconviction proceedings to evaluate the performance of defense counsel and to determine if potentially meritorious claims exist that were not raised in state court. Baich Decl. at ¶ 18.

Given endemic problems with the competency of state postconviction counsel, habeas counsel must often contend with claims that may be procedurally barred because they were not fully raised in state court. *See Murray v. Schriro*, No. CV991812PHX-DGC, 2006 WL 988133, at \*4 (D. Ariz. Apr. 13, 2006) (denying a death penalty defendant's claims in a habeas petition because they were not presented to the state court); *Lee v. Schriro*, No. CV-01-2178-PHX-EHC, 2009 WL 32743, at \*8-9 (D. Ariz. Jan. 6, 2009) (denying a death penalty defendant's claim as to cumulative error in habeas petition because it was not raised in state court). As one Arizona expert has explained, one of her "single greatest frustrations as a capital habeas lawyer in Arizona was the failure of state post-conviction counsel to investigate, discover, present, and exhaust such collateral constitutional claims and supporting facts that were apparent based on a basic review of the record and rudimentary investigation." Armstrong Decl. at ¶ 5.

Even when a claim is not exhausted in state court, limited exceptions to procedural default may nonetheless allow the federal court to review the merits of the claim. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 485 (1986) (discussing the cause and prejudice exception); *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995) (discussing the miscarriage of justice exception); *Valerio v. Crawford*, 306 F.3d 742, 774-75 (9th Cir. 2002) (en banc) (holding that district court erred in finding claims procedurally defaulted when the state court did not "specify which claims were barred for which reasons").

One such exception to procedural default is when the ineffectiveness of state postconviction counsel was the cause of a failure to raise a claim of ineffective assistance of trial or appellate counsel. *See Martinez*, 566 U.S. at 9. FDO-AZ is aware of more than 20 cases involving Arizona capital prisoners that the Ninth Circuit has remanded to district court based on *Martinez* for the district court to consider whether state postconviction counsel was ineffective. Habeas counsel therefore must investigate and develop a detailed understanding of the performance of state postconviction counsel.

A final habeas petition generally includes between ten and 50 claims, and comprises several hundred pages representing hundreds of hours of work by counsel on the case. Baich Decl. at ¶ 18.

## **VI. THE HISTORY OF ARIZONA'S MECHANISM FOR APPOINTING CAPITAL POSTCONVICTION COUNSEL FROM 1998 TO PRESENT**

The history of Arizona's mechanism for appointing capital postconviction counsel reveals the intractable failing of that mechanism to consistently provide indigent defendants with competent representation. As the history confirms, the current version of the state's appointment mechanism is merely a weaker version of a mechanism the Arizona legislature scrapped in 2006 because it was so ineffective in attracting and retaining competent attorneys. At that time, Arizona replaced its appointment system with a state postconviction public defender's office—a solution that experts had urged for years to ensure competent and timely representation. But that solution was ill-fated and short-lived. The public defender's office was never adequately funded, and the Legislature disbanded it entirely in 2011. In its place, Arizona reverted to the private appointment mechanism that experts and policymakers had previously deemed a failure.

The results have been predictable.

The following history summarizes the repeated failures of Arizona's appointment mechanism and describes the version of the mechanism that the state currently uses.

### **A. In 1996, the Arizona Legislature and Arizona Supreme Court first attempted to establish a system to appoint postconviction counsel in capital cases.**

In 1996, hoping to take advantage of Chapter 154's quid pro quo, the Arizona Legislature attempted to establish a mechanism for appointing state postconviction counsel in capital cases. At the time, policymakers considered two options for the provision of such counsel. First, they contemplated establishing a state postconviction public defender's office to guarantee that indigent prisoners would receive counsel with specialized expertise and training in capital postconviction proceedings. *See* Meyer Decl. Ex. 10, Senate Bill, S. 1349, 42nd Leg., 2nd Reg. Sess. (Ariz. 1996); *see also* Meyer Decl. Ex. 11, House Bill, H.R. 2135, 43rd Leg., 1st Reg. Sess. (Ariz. 1997). That mechanism was the consensus recommendation of criminal justice experts in Arizona, including the Arizona Special Indigent Defense Task Force Committee, which was formed to improve capital representation and help the Arizona Supreme Court and Arizona Legislature develop rules for the appointment of counsel in capital cases. *See* Meyer Decl. Ex. 12, John A. Stookey & Larry A. Hammond, *Arizona's Crisis in Indigent Capital Representation*, 34 Ariz. Att'y 16, 38, 40 n.22 (Mar. 1998); Meyer Decl. Ex. 13, John A. Stookey & Larry A. Hammond,

*Rethinking Ariz.'s Sys. of Indigent Representation*, 33 Ariz. Att'y 28, 33 (Oct. 1996); Meyer Decl. Ex. 14, Minutes, Ariz. House Comm., H.R., Comm. on Appropriations, 47th Leg., 2nd Reg. Sess. (Ariz. Mar. 29, 2006); Hammond Decl. at ¶ 32. The governor, however, vetoed a 1996 bill that would have created the state postconviction public defender's office due to budgetary concerns and a disagreement over how the public defender would be selected. See Meyer Decl. Ex. 15, Howard Fischer, *Symington's 6 Vetoes Set Personal Record*, Ariz. Daily Star, May 3, 1996; Meyer Decl. Ex. 13, John A. Stookey & Larry A. Hammond, *Rethinking Ariz.'s Sys. of Indigent Representation*, 33 Ariz. Att'y 28, 31-32 (Oct. 1996).

The Legislature then enacted, and the governor signed, a bill providing for the appointment of private counsel in capital postconviction proceedings. Arizona Revised Statute § 13-4041 codified the appointment mechanism. To be eligible for appointment, § 13-4041 required counsel to have:

- (1) Been a member in good standing of the State Bar for at least five years;
- (2) Practiced in the area of state criminal appeals or postconviction proceedings for at least three years before appointment; and
- (3) Not previously represented the defendant in the case either in trial court or on direct appeal, absent consent from the client.

Ariz. Rev. Stat. § 13-4041(B) (1996). The Legislature created no exceptions to those competency requirements.<sup>13</sup>

The statute designated the Arizona Supreme Court as the gatekeeper in the appointment process. Ariz. Rev. Stat. § 13-4041(C) (1996). Section 13-4041(C) required the Court to compile and administer a list of qualified attorneys, from which the Court would appoint counsel to particular cases. Ariz. Rev. Stat. § 13-4041(C) (1996). The statute also allowed the Supreme Court to create stricter eligibility requirements for appointments than those laid out in subpart B. Ariz. Rev. Stat. § 13-4041(C) (1996).

To those ends, the Arizona Supreme Court created the Indigent Defense Standards Committee to recommend “standards for appointment of counsel for

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<sup>13</sup> For reasons discussed further below, Arizona's original competency requirements would not have met the presumptive benchmarks for competency described in the current regulations implementing Chapter 154's certification procedure, most notably because they did not require any postconviction experience. See *Infra* § VIII(A).

indigent defendants in all stages of capital litigation.” See Meyer Decl. Ex. 16, Petition and Committee Comment, *In re Petition to Adopt Rule 6.8, Ariz. Rules of Criminal Procedure*, No. R-96-0030 (Ariz. Oct. 17, 1996). Based on those recommendations, the Supreme Court approved a new rule of criminal procedure, Rule 6.8, containing additional competency requirements. See Meyer Decl. Ex. 17, Order and Rule 6.8, *In re Petition to Adopt Rule 6.8, Ariz. Rules of Criminal Procedure*, No. R-96-0030 (Ariz. June 25, 1997). Rule 6.8 went into effect January 1, 1998.<sup>14</sup> For counsel seeking postconviction appointment in capital cases, the rule required that the attorney have:

- 1) Been in good standing in the State Bar for at least five years immediately preceding the appointment;
- 2) Practiced in the area of state criminal defense litigation for three years immediately preceding the appointment;
- 3) Demonstrated proficiency and commitment which exemplify the quality of representation appropriate to capital cases;
- 4) Within three years immediately preceding the appointment, been lead counsel in an appeal or postconviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one postconviction proceeding that resulted in an evidentiary hearing. Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two postconviction proceedings that resulted in evidentiary hearings; and
- 5) Attended and successfully completed, within one year of appointment, at least 12 hours of relevant training or educational programs in the area of capital defense.

Meyer Decl. Ex. 298, Ariz. R. Crim. P. 6.8(a), (c) (1998).

The 1998 version of Rule 6.8 also included a limited exception, Rule 6.8(d), that allowed for appointment of counsel who did not meet the above requirements “[i]n exceptional circumstances” where the Court could “conclude that the attorney’s ability significantly exceeds the standards set forth in this rule and that the

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<sup>14</sup> An earlier version of Rule 6.8 had been previously approved on emergency basis, with an effective date of November 1, 1996. See Meyer Decl. Ex. 17, Order and Rule 6.8, *In re Petition to Adopt Rule 6.8, Ariz. Rules of Criminal Procedure*, No. R-96-0030 (Ariz. June 25, 1997); Meyer Decl. Ex. 298, Ariz. R. Crim. P. 6.8 (1996).

attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule.” Meyer Decl. Ex. 298, Ariz. R. Crim. P. 6.8(d) (1998).

To screen and recommend attorney applicants for appointments, the Supreme Court created the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases. See Meyer Decl. Ex. 297, *Administrative Order, In re Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases*, No. 96-63 (Ariz. Dec. 27, 1996); Meyer Decl. Ex. 12, John A. Stookey & Larry A. Hammond, *Arizona’s Crisis in Indigent Capital Representation*, 34 Ariz. Att’y 16, 18 (Mar. 1998).

Of the first 16 attorneys to submit applications, the committee deemed four qualified for appointment. See Meyer Decl. Ex. 18, Letter from Michael D. Ryan, Judge, Ariz. Ct. App., to Thomas A. Zlaket, Chief Justice, Ariz. Sup. Ct. (June 10, 1997), at 1-2 (describing the committee’s early work and recommendations). Of the remaining applicants, some were deemed unqualified due to a failure to meet Rule 6.8’s objective requirements. *Id.* Committee members deemed others unqualified due to their “personal knowledge of the applicants’ work.” *Id.* at 2.

**B. To attract more lawyers, Arizona then weakened its appointment standards, raised compensation, and disbanded the screening committee.**

Quickly faced with a shortage of competent attorneys willing to take cases at the statutory compensation levels, the Legislature and Supreme Court came up with a solution: weaken the appointment requirements and routinely appoint attorneys whom the screening committee had deemed unqualified for appointment.

In 1998, the Legislature adopted two changes to § 13-4041. First, it added a provision that allowed the Supreme Court to appoint counsel from “outside the list of qualified candidates”—as defined by § 13-4041 and Rule 6.8—if no counsel met the established qualifications for competency or no “qualified counsel is available to serve.” Ariz. Rev. Stat. § 13-4041(D)(1-2) (1998). Second, the amendments raised compensation for appointed counsel to “an hourly rate of not to exceed one hundred dollars,” with a presumptive cap of 200 hours of work that could only be exceeded upon a showing of good cause. Ariz. Rev. Stat. § 13-4041(G), (H) (1998).

Notably, that hourly rate did not guarantee any minimum level of compensation. And even at the maximum allowance of \$100 per hour, the rate was below the federal compensation rate for habeas counsel, below the rate adopted by California for capital postconviction appointments, and below what Arizona experts had stated was needed to attract qualified counsel. See Cal. Govt. Code § 68656 (West 1997) (establishing the rate paid to California postconviction counsel as \$125 per hour in 1997); Meyer Decl. Ex. 12, John A. Stookey & Larry A. Hammond, *Arizona’s Crisis in Indigent Capital Representation*, 34 Ariz. Att’y 16, 39 (Mar. 1998)

(recommending a similar rate in Arizona); <http://www.azd.uscourts.gov/attorneys/cja/rates> (describing the \$125 per hour rate for lead counsel in federal habeas cases in 1997). Section 13-4041 also required counsel to complete and file a timely petition for postconviction review *before* they could request compensation for any work performed. Ariz. Rev. Stat. § 13-4041(G)(1) (1998).

Arizona Rule of Criminal Procedure 6.8(d) continued to allow the Supreme Court, in “exceptional circumstances,” to appoint an attorney “who does not meet the qualifications set forth in ... this rule, providing that the attorney’s experience, stature and record enable the Court to conclude that the attorney’s ability significantly exceeds the standards set forth in this rule and that the attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule.” The Rule did not define to what extent an unqualified attorney must “associate with” a qualified attorney, and the Court did not establish any standard for what constitutes an “exceptional circumstance.” *See Meyer Decl. Ex. 298, Ariz. R. Crim. P. 6.8(d) (1998); Maynard Decl. at ¶ 5.*

As it would turn out, “exceptional circumstance[s]” became routine, and the Supreme Court repeatedly appointed counsel pursuant to Rule 6.8(d) without making any express finding that exceptional circumstances existed or that the appointed attorney’s qualifications “exceed[ed] the standards” of Rule 6.8(c). From July 1998 to present, 25% of all appointed counsel were appointed pursuant to 6.8(d),<sup>15,16</sup> and their association with counsel who met the requirements of Rule

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<sup>15</sup> The Case Chart attached as Attachment A represents our best effort to identify first capital postconviction review petitions filed after state court affirmance of the sentence on direct review where postconviction counsel was appointed from July 1998 to present. It does not include second or successive petitions, which Arizona does not assert fall within its mechanism. The sole exception is Jason Bush, who filed a petition for postconviction review before the conclusion of his direct appeal at the direction of the Arizona Supreme Court. *See Case Chart at 2.*

<sup>16</sup> The Arizona Supreme Court appointed the postconviction attorney under Rule 6.8(d) in 28 out of 109 cases from July 1998 to present. *See Case Chart (Anderson, Frank; Boggs, Steve; Carlson, Michael; Chappell, Derek; Dann, Brian; Detrich, David; Dickens, Gregory; Soto-Fong, Martin; Garcia, Alfredo; Hernandez, Robert; Jones, Danny; Joseph, Ronnie; Laird, Kenneth; Lee, Chad; McKinney, James; Miller, William; Nordstrom, Scott; Ovante, Manuel; Parker, Steven; Prince, Wayne; Rogovich, Pete; Rose, Edward; Spears, Anthony; Speer, Paul; Tankersley, Bobby; VanWinkle, Pete; Velazquez, Juan; Womble, Brian).* This does not include cases where the Supreme Court did not specify whether it was appointing counsel under Rule 6.8(c) or 6.8(d) (as in the cases of Boyston, Eric; Gallardo, Mike; Hurler, Richard; Jackson, Levi; Johnson, Ruben; Lee, Darrell; Miles, Kevin; Murray, Roger;

6.8(c) was often little more than cursory. *See, e.g.*, Meyer Decl. Ex. 19, Motion to Withdraw Jess Lorona as Associate Counsel and Request for Appointment as First Chair of New Counsel Qualified Under Rule 6.8, *State v. Dickens*, No. CR 93-0543-AP (Ariz. July 6, 1999), at 3; Meyer Decl. Ex. 20, Defendant's Second Motion for 30-Day Extension, *State v. Dickens*, No. CR 18454 (Ariz. Super. Ct. June 30, 1999), at 4 n.1 (6.8(d) counsel explaining that associate counsel "has been in trial for such protracted periods since the appointment of Rule 32 counsel that he and undersigned counsel have had almost no contact concerning the preparation of Mr. Dickens' case"); Meyer Decl. Ex. 21, Letter from Conrad Baran, Att'y, to Michael D. Ryan, Judge, Ariz. Ct. App. (Feb. 15, 2001), at 3; *see also* Maynard Decl. at ¶¶ 13-16; Gorman Decl. at ¶ 20; Phalen Decl. at ¶¶ 42-44.

Further, a 2000 amendment to Rule 6.8 reduced the amount of capital defense training that an attorney needed to have to qualify for a capital postconviction appointment. The original version of the rule required "at least twelve hours" of capital defense training within one year of a postconviction appointment. *See* Meyer Decl. Ex. 298, Ariz. R. Crim. P. 6.8(c)(2) (1998). The 2000 amendment reduced that initial training requirement to six hours.<sup>17</sup> Meyer Decl. Ex. 298, Ariz. R. Crim. P. 6.8(c)(2) (June 1, 2000).

Not only did Arizona weaken its qualification requirements for appointed postconviction counsel, but it also relaxed the Rule governing how quickly counsel must be appointed. Until 2000, Arizona Rule of Criminal Procedure 32.4(c) required that postconviction counsel be appointed within 15 days following the issuance of the notice for postconviction review, which, itself, would issue "expeditiously" upon either (1) the Supreme Court's denial of certiorari or (2) the expiration of the 90-day period for filing for certiorari. Meyer Decl. Ex. 299, Ariz. R. Crim. P. 32.4 (1999). In 2000, Arizona amended the Rule to remove any requirement that the Supreme Court appoint postconviction counsel in a timely fashion. As amended, Rule 32.4(b) (2018) states simply: "After the Supreme Court has affirmed a capital defendant's conviction and sentence, it must appoint counsel who meets the standards of Rules 6.5 and 6.8 and [Ariz. Rev. Stat.] § 13-4041. Alternatively, the Supreme Court may authorize the presiding judge of the county where the case originated to appoint counsel. If the presiding judge makes an

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Patterson, Isiah; and Villalobos, Joshua) or cases where the Supreme Court "waived" a requirement of Rule 6.8(c) (as in the cases of Eugene Doerr and Barry Jones). Accounting for those cases, the Supreme Court appointed counsel outside of Rule 6.8(c) in 40 of 109 cases (37%).

<sup>17</sup> The 2000 amendment also required that an attorney seeking a subsequent appointment complete "at least twelve hours of relevant training or educational programs in the area of criminal defense." Meyer Decl. Ex. 298, Ariz. R. Crim. P. 6.8(c)(2) (June 1, 2000).

appointment, the court must file a copy of the appointment order with the Supreme Court.”

Further, after routinely ignoring the recommendations of the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, the Supreme Court disbanded the Committee in 2001. *See In re Disbanding the Committee on Appointment of Counsel for Indigent Defendants in Capital Cases*, Adm. Order No. 2001-55 (Ariz. May 9, 2001). In its place, a Supreme Court staff attorney was largely responsible for recruiting attorneys, processing and performing an initial screening of attorney applications, maintaining a roster of appointment-eligible attorneys, and forwarding applications to the Supreme Court justices for appointment orders. *See* Phalen Decl. at ¶ 10; Hammond Decl. at ¶ 55; Darby Decl. at ¶¶ 18, 22. To the best of FDO-AZ’s knowledge, there was no institutional, standardized vetting of attorney applications, and attorneys were appointed without being asked to update prior applications. *See* Phalen Decl. at ¶¶ 4-5, 10; Darby Decl. at ¶¶ 18-22.

**C. A significant increase in capital cases filed in Arizona caused the appointment mechanism to break down entirely.**

Even with the weakened competency and training requirements—and the less rigorous screening of applicants—Arizona struggled to find qualified counsel willing to accept the statutory compensation rate and the presumptive 200-hour cap on compensation for postconviction work. As one postconviction lawyer recounted, “[t]he Arizona Supreme Court was desperate for lawyers to appoint, and I was a live body. That is just how it went for a time.” *See* Darby Decl. at ¶ 20.

In 2000, Arizona Attorney General Janet Napolitano instituted the Capital Case Commission to “study key issues and make recommendations to try to ensure that the death penalty process in Arizona is just, timely, and fair to defendants and victims.” Meyer Decl. Ex. 22, Office of the Att’y Gen. State of Arizona, *Capital Case Commission Final Report* (Dec. 31, 2002), at 1. “The Commission quickly realized that Arizona’s system for appointing capital postconviction lawyers had deep and systemic problems, including the regular appointment of unqualified lawyers, insufficient compensation of appointed lawyers, and inadequate litigation resources being provided to lawyers. Those factors conspired to dissuade competent, experienced, attorneys from seeking appointment, and to create a pool of unqualified applicants that the Supreme Court appointed from.” Kimerer Decl. at ¶ 16. The Commission also found that appointments were still being unreasonably delayed, including cases where “defendants had been waiting for over 18 months for a lawyer to be appointed to represent them at the PCR stage.” Meyer Decl. Ex. 22, Office of the Att’y Gen. State of Arizona, *Capital Case Commission Final Report* (Dec. 31, 2002), at 14. Further, the Commission’s research identified 19 Arizona capital defendants who “received a reversal, remand or modification in their case based on ineffective assistance of counsel” for cases from 1974 through 2000. *Id.* at

17. That figure highlighted the need for competent postconviction counsel to investigate trial-level ineffectiveness.

Echoing years of recommendations, the Commission called for the creation of a state capital public defender's office to represent capital defendants in postconviction review proceedings. *Id.* at 14. "We believed that a statewide office was essential to guarantee timely appointments and to ensure that appointed attorneys knew what they were doing and would have adequate resources to provide constitutionally effective representation for their clients in postconviction proceedings." Kimerer Decl. at ¶ 19. The Commission noted that legislation to create a state postconviction public defender's office was defeated in 2001 and 2002, and the Commission "deeply regret[ed] that the Legislature did not address this need and urge[d] the Legislature to pass legislation appropriating monies for capital litigation resources." Meyer Decl. Ex. 22, Office of the Att'y Gen. State of Arizona, *Capital Case Commission Final Report* (Dec. 31, 2002), at iii; *see also* Hammond Decl. at ¶ 32.

Competent attorneys were not the only resource in short supply in the early 2000s. "There was a severe shortage of qualified mitigation specialists to take all the pre-trial, trial, and post-conviction cases pending in Maricopa County." Durand Decl. at ¶ 4. As more and more cases entered the capital pipeline, "courts appointed attorneys and mitigation specialists without the necessary qualifications for capital work." *Id.* at ¶ 6. Maricopa County consistently underfunded its mitigation investigations, paying mitigation specialists less than half the rate of other counties. *Id.* at ¶ 8 ("Maricopa County paid mitigation specialists only \$30 per hour, while other counties paid \$75 per hour."). In 2002, the Mitigation Coordinator for the Maricopa County Office of Contract Counsel sent a letter to all attorneys with capital clients notifying them "that the work required of mitigation specialists for the Office of Contract Counsel cannot be completed under current conditions." *Id.* at ¶¶ 2, 9; Durand Decl. Attachment 1 at 1. The office risked having to turn down "new assignments as we are severely understaffed and underfunded and we do not have local resources to complete this complex and difficult work." Durand Decl. Attachment 1 at 1.

Instead of devoting more resources to capital postconviction representation, the Arizona Legislature left the existing private-appointment system intact. Predictably, the crisis grew.

The crisis crescendoed after the 2004 election of Andrew Thomas as Maricopa County Attorney. *See* Meyer Decl. Ex. 23, Andrew Thomas, *Arizona Logjam Makes Mockery of Death Penalty*, Ariz. Republic (Feb. 18, 2007), at V2-V3 (describing the increased filing rate of capital cases after Thomas took office); Meyer Decl. Ex. 24, Ariz. Supreme Court Capital Case Task Force, *Report of Recommendations to the Ariz. Judicial Council* (Sept. 2007), at 5 & n.4. Under Thomas's direction, Maricopa County became a national leader in the number of pending capital trial cases, as the

county attorney's office "nearly doubled the number of times that [it] ... sought the death penalty." Meyer Decl. Ex. 25, Jennifer Steinhauer, *Death Penalty Cases Swamp Ariz. Pub. Defs.*, Houston Chronicle (Mar. 25, 2007); Meyer Decl. Ex. 26, Jahna Berry, *Death-Penalty Backlog Strains Justice Sys.*, Ariz. Republic (Feb. 22, 2007).<sup>18</sup> In 2004, Maricopa County sought the death penalty in 28 of 108 eligible cases. In 2006, that number rose to 44 out of 89 eligible cases. See Meyer Decl. Ex. 27, Jennifer Steinhauer, *Policy Shift on Death Penalty Overwhelms Ariz. Court*, N.Y. Times (Mar. 5, 2007), at 2. By 2008, 155 capital cases were pending. See Meyer Decl. Ex. 28, Capital Case Oversight Comm., *Joint Report of the Capital Case Oversight Comm. & Maricopa County Superior Court to the Arizona Judicial Council* (Nov. 2008).

The dramatic rise in the number of capital prosecutions brought more cases into the capital postconviction pipeline. Arizona's postconviction appointment mechanism buckled under the pressure, as the ongoing shortage of qualified counsel willing to work at the statutory compensation levels caused defendants to wait months for appointments. See *id.* at 3, 19-20; see also Meyer Decl. Ex. 217, Administrative Order, No. 2007-92, *In re Establishment of the Capital Case Oversight Committee* (Ariz. Dec. 6, 2007) (noting the "unprecedented number of capital cases" pending in Arizona); Meyer Decl. Ex. 24, Ariz. Supreme Court Capital Case Task Force, *Report of Recommendations to the Ariz. Judicial Council* (Sept. 2007), at 4, 20-21 (describing the backlog of cases and the lack of state resources devoted to capital representation); Darby Decl. at ¶ 20. As the director of the Arizona Capital Representation Project (ACRP) recounted, "inmates frequently waited two or three years between their direct appeal and the appointment of post-conviction counsel[.] ACRP staff and interns were the only source of information about the status of their case and the prospect of the appointment of post-conviction counsel. In some cases, ACRP even took possession of the inmate's file to safeguard it until post-conviction counsel could be appointed. While these inmates waited years for the appointment of counsel, their cases went without investigation and, in some cases, valuable evidence was lost. In one case, the trial mitigation specialist died while the client awaited the appointment of post-conviction counsel." Armstrong Decl. at ¶¶ 3, 43.

Examples of the long delays in appointing postconviction counsel are numerous. John Cruz waited 799 days from issuance of the Arizona Supreme Court's opinion to appointment of 6.8(c) counsel. Julius Moore waited 682 days. Frank McCray waited 915 days. Alvie Kiles waited 721 days. Derek Chappell waited 454 days. Wayne Prince waited 349 days. Steve Boggs waited 835 days. See Case Chart; see also Darby Decl. at ¶ 20. Brent Graham was appointed to two postconviction review cases *on the same day*: Shad Armstrong had already waited 860 days, and Patrick Bearup 507 days. See Case Chart.

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<sup>18</sup> Thomas was disbarred in May 2012 for actions he took while county attorney.

Arizona's consistent failure to timely appoint competent postconviction counsel in capital cases drew national attention. The ABA Death Penalty Representation Project "targeted Arizona as a state that particularly needed attention in part because of the horror stories [the Project] had consistently heard about ineffective lawyers being appointed in the state to handle all stages of capital proceedings, including post-conviction proceedings." Maher Decl. at ¶ 8; *see also id.* at ¶ 9 (tracing the shortage of qualified Arizona postconviction counsel to "the fact that compensation for appointed lawyers was inadequate, appointed lawyers were given insufficient resources to prepare post-conviction petitions, and lawyers received inadequate training"). At the time, "[a]s a result of the poor quality of post-conviction representation at the state level, many potentially meritorious federal constitutional claims were not being raised and preserved in state court." *Id.* at ¶ 11; *see also id.* at ¶ 10 ("When I was recruiting counsel for Arizona death-sentenced prisoners, the competency standards that existed in Arizona for appointed post-conviction counsel were almost meaningless. They did not reflect in any meaningful way the skills and experience that were needed to competently represent a person in capital post-conviction proceedings.").

In 2006, the ABA Death Penalty Representation Project worked with Arizona lawyers to petition the Arizona Supreme Court to amend Rule 6.8 to include a mandatory requirement that appointed counsel follow the ABA Guidelines for effective representation. Maher Decl. at ¶¶ 12-13. That recommendation was echoed by the Arizona State Bar and other advocates. *Id.* at ¶ 14. In the end, however, the Supreme Court refused to make compliance mandatory and instead amended Rule 6.8 to provide that counsel must "be familiar with and guided by the performance standards" described in the Guidelines. Meyer Decl. Ex. 298, Ariz. R. Crim. P. 6.8(c)(3) (2007). The Court has not enforced or otherwise institutionalized that amended language. *See* Maher Decl. at ¶ 16. In the words of the former director of the ABA Death Penalty Representation Project:

[M]y understanding is that Arizona continues to appoint unqualified and ineffective attorneys in capital post-conviction proceedings, and that the state fails to monitor the attorneys it appoints to ensure that they are following the Guidelines. I am also aware of no state effort to train attorneys based on the Guidelines or to otherwise ensure that appointed attorneys have the requisite knowledge of the practices and performance standards in the Guidelines.

Maher Decl. at ¶ 16.

**D. Declaring the private-appointment mechanism a failure, the Legislature created a state postconviction public defender's office in 2006.**

In 2006, the Legislature finally heeded years of recommendations from criminal justice experts and created the State Capital Postconviction Public Defender Office to address the repeated failure of the state's private-appointment mechanism to guarantee the timely appointment of qualified counsel. *See* Ariz. Rev. Stat. §§ 13-4041, 41-4301 (2006); Lieberman Decl. at ¶ 4 (“At the time the Arizona Legislature created the Postconviction Public Defender Office, statewide issues with the timely appointment of competent counsel were widely known.”). At the time, there were at least four capital cases that the Arizona Supreme Court had been unable to appoint postconviction counsel for, and another 20 capital cases in the pipeline on direct appeal. *See* Meyer Decl. Ex. 29, Fact Sheet, S.B. 1376, 47th Leg., 2nd Reg. Sess. (Ariz. Feb. 2, 2006). As the bill's Senate sponsor confirmed, “[t]here [were] death penalty cases where it [had] not been possible to contract with lawyers to meet the standards of [AEDPA]” and the state was at risk of not being able to take advantage of Chapter 154's provisions. Meyer Decl. Ex. 30, Ariz. House Comm. Minutes, Ariz. H.R. Comm. on Appropriations, 47th Leg., 2nd Reg. Sess. (Mar. 29, 2006), testimony of Senator John Huppenthal; *see also* Hammond Decl. at ¶ 49 (“After it became apparent that Arizona's mechanism for appointing private lawyers to capital post-conviction cases had systematically failed to attract and retain competent private attorneys, the Legislature in 2006 finally created the State Capital Postconviction Public Defender Office.”).

At the Appropriations Committee hearing on the bill, Arizona Supreme Court Justice Michael Ryan agreed that “the best and most effective way of defending someone was through the public defender's office.” Meyer Decl. Ex. 30, Ariz. House Comm. Minutes, Ariz. H.R. Comm. on Appropriations, 47th Leg., 2nd Reg. Sess. (Mar. 29, 2006). Justice Ryan was also asked at the hearing whether the private-appointment mechanism's inability to consistently appoint competent counsel could be remedied if the state would simply “pay fair market compensation.” *Id.* Justice Ryan agreed that compensation of up to \$100 per hour “was too low” and that inadequate compensation was responsible for Arizona's consistent inability to appoint competent counsel. The Justice also noted that “paying \$200 or \$300 per hour for counsel to take these cases would double or perhaps triple the cost of the cases.” *Id.* Absent state funding for that level of compensation, Justice Ryan believed that a public defender's office was needed to guarantee competent representation. *Id.*

The Legislature anticipated that the newly minted public defender's office would handle almost all postconviction capital cases. Arizona Revised Statute § 13-4041(B) therefore mandated that “the [Supreme Court] *shall* appoint counsel from the state capital postconviction public defender office unless a conflict exists or the court makes a finding that the office cannot represent the defendant.” Ariz. Rev.

Stat. § 13-4041(B) (2006) (emphasis added). But the statute left the private-appointment system in place for circumstances when the public defender's office could not handle a case. Ariz. Rev. Stat. § 13-4041(C) (2006); Meyer Decl., Ex. 29, Fact Sheet, S.B. 1376, 47th Leg., 2nd Reg. Sess. (Ariz. Feb. 2, 2006). Notably, the 2006 amendment to § 4041 deleted subpart (D), which had permitted the Supreme Court to appoint private counsel who did not appear on the list of approved attorneys and who did not meet established competency requirements. Arizona Rule of Criminal Procedure 6.8, however, was not amended to remove the similar provision in that Rule.

The 2006 legislation established a Nomination, Retention and Standards Commission on Indigent Defense to nominate individuals to head the office. Meyer Decl. Ex. 304, S.B. 1376, 47th Leg., 2nd Reg. Sess. (Ariz. June 21, 2006). The legislation also included a sunset provision to disband the office on July 1, 2011, and repeal the statute creating the office on January 1, 2012. *Id.*

The postconviction public defender's office quickly became a case study in how an appointment mechanism written on paper is not the mechanism in practice. Despite the clear statutory charge that the office would take nearly all appointments, the reality showed that goal to be a paper-thin aspiration. *See* Kimerer Decl. at ¶ 21. In total, the office received approximately \$650,000 per year for the first two years of its operation. Lieberman Decl. at ¶ 7. And § 41-4301(G)(2) limited staffing in the office to a director, three attorneys and four other employees. As the director of the office, Martin Lieberman, stated after his appointment “[w]e are therefore unable, even if adequately funded, to represent more than a handful of clients. The funding we have received, and which, now, continuously decreases, does not allow us to approach this meager level of staffing.” Meyer Decl. Ex. 31, Comment on Proposed Regulations Pursuant to 28 U.S.C. §2265(b) from Martin Lieberman, Director, Office of the State Capital Postconviction Pub. Def., to Ben Groban, U.S. Dep’t of Justice, OJP Docket No. 1464 (Apr. 5, 2009), at 2-3; *see also* Lieberman Decl. at ¶ 7 (“From the outset, it was clear that the Postconviction Public Defender Office would not be able to meet its statutory directive of handling the majority of capital postconviction cases in the state.”).

When Lieberman took over as director, he envisioned that the office would also serve as a resource for training private attorneys to competently handle capital postconviction cases. Lieberman Decl. at ¶¶ 13-15. That training, Lieberman believed, was critical to ensure that private attorneys being appointed to cases had the background knowledge in federal habeas law to perform at a constitutionally effective level in state postconviction proceedings. *Id.* at ¶ 14. As Lieberman believed at the time, “there were capital postconviction lawyers who did not understand what they needed to do to perform effectively.” *Id.*

But plans to provide training related to capital postconviction appointments “never materialized.” Lieberman Decl. at ¶ 16. At the outset, § 41-4301(F)

prohibited the public defender's office from "sponsor[ing] or fund[ing] training" for private attorneys and prohibited the office from "provid[ing] outside counsel to any other attorney." Ariz. Rev. Stat. § 41-4301(F) (4), (5) (2006). Even though Lieberman was able to remove the statutory restriction on training outside counsel, the office never had the resources to conduct or fund such training. Lieberman Decl. at ¶ 16. Even at its most robust staffing levels, the office included just two attorneys (in addition to the director), one fulltime mitigation specialist, one part-time investigator, one part-time paralegal, and an administrative support specialist. *Id.* at ¶ 8. The two staff attorneys were not qualified under Rule 6.8(c). *Id.*

As the Arizona Supreme Court's Capital Case Task Force concluded not long after the public defender office opened, the office could not "be expected to handle all of these cases with its current budget and staffing restrictions." Meyer Decl. Ex. 6, Ariz. Supreme Court Capital Case Task Force, *Report of Recommendations to the Ariz. Judicial Council* (Sept. 2007), at 20. The task force determined that "[g]iven the expected caseload and lack of additional resources, the State Capital Postconviction Public Defender's Office will need more funding to employ more attorneys and support staff." *Id.* at 21. The task force recommended (1) increasing staff for the office; (2) increasing the hourly rate for private appointments from \$100 to \$125; and (3) amending Arizona Revised Statute § 41-4301 to allow members of the postconviction public defender's office to consult with private lawyers representing defendants in postconviction proceedings so that private lawyers could benefit from the state office's specialized skills and knowledge. *Id.* at 20-22.

Those recommendations went largely unheeded, and the Supreme Court's Capital Case Oversight Committee (a successor to the Capital Case Task Force) repeated them in the subsequent years as it became clearer that the office "lack[ed] the staff necessary to accomplish its statutory directive." Meyer Decl. Ex. 28, Capital Case Oversight Comm., *Joint Report of the Capital Case Oversight Comm. & Maricopa County Superior Court to the Arizona Judicial Council* (Nov. 2008), at 3, 19-20; Lawson Decl. at ¶ 9. In November 2008, 15 capital defendants were awaiting the appointment of postconviction counsel, and two of those defendants had been waiting more than a year and a half. Meyer Decl. Ex. 28, Capital Case Oversight Comm., *Joint Report of the Capital Case Oversight Comm. & Maricopa County Superior Court to the Arizona Judicial Council* (Nov. 2008), at 11. Given that backlog, the Oversight Committee found "no rationale for the provision in [Arizona Revised Statute] § 41-4301 limiting the [public defender's office] to three deputies and four other employees." *Id.* at 20.

Still, the Legislature failed to increase the staffing levels or funding for the postconviction public defender's office. In 2009, the Legislature cut the office's budget by 12.8%, requiring a 30% monthly budget reduction for the final five months of the fiscal year. Meyer Decl. Ex. 267, Report to the Capital Case Oversight Committee, Office of the State Capital Post Conviction Defender (Oct. 30, 2009), at 2; Lieberman Decl. at ¶ 9. All but one employee in the office experienced a

furlough or pay reduction, and Lieberman was forced to eliminate the part-time paralegal position, reduce attorneys' hours by approximately 25 percent, eliminate the office's training fund, and suspend work by expert witnesses—causing a significant delay in processing cases assigned to the office. *See* Meyer Decl. Ex. 267, Report to the Capital Case Oversight Committee, Office of the State Capital Post Conviction Defender (Oct. 30. 2009); Meyer Decl. Ex. 31, Comment on Proposed Regulations Pursuant to 28 U.S.C. §2265(b) from Martin Lieberman, Director, Office of the State Capital Post-Conviction Pub. Def., to Ben Groban, U.S. Dep't of Justice, OJP Docket No. 1464 (Apr. 5, 2009), at 2-5; Lieberman Decl. at ¶ 9. As Lieberman stated at the time, “given the obstacles facing the Office, and the inability of the Court to attract private practitioners to accept these cases, *it cannot be said that Arizona has an adequate system of appointing and compensating competent counsel.*” Meyer Decl. Ex. 31, Comment on Proposed Regulations Pursuant to 28 U.S.C. §2265(b) from Martin Lieberman, Director, Office of the State Capital Post-Conviction Pub. Def., to Ben Groban, U.S. Dep't of Justice, OJP Docket No. 1464 (Apr. 5, 2009), at 5 (emphasis added).

In response to the budget cuts, Lieberman proposed a statutory change to provide the office with additional funds. Under Arizona Revised Statute § 41-4301(H), the office was required to bill the county from which a conviction arose for half of the expenses of representation, up to a maximum of \$30,000. *See* Meyer Decl. Ex. 267, Report to the Capital Case Oversight Committee, Office of the State Capital Post Conviction Defender (Oct. 30. 2009), at 4-5; Lieberman Decl. at ¶ 11. But those funds went to the general treasury and not the public defender's office. *Id.* Lieberman proposed that the office receive those funds to help alleviate the budget cuts, and proposed raising the counties' share from \$30,000 to \$50,000. *Id.* Neither proposal was adopted.

By 2010, Arizona was still systematically unable “to attract qualified attorneys to represent death row inmates in post conviction proceedings.” Meyer Decl. Ex. 32, Comment of the State Capital Post Conviction Public Defender, *In the Matter of Amended Sua Sponte Petition to Amend Rule 6.8(a) and (c), Arizona Rules of Criminal Procedure*, No. R-09-0033 (Ariz. May 19, 2010), at 1; Lawson Dec. at ¶¶ 8-9. Lieberman reiterated that “[t]he office established to represent inmates in [postconviction proceedings] is severely underfunded and only able to represent a few clients at a time. The budget crisis in Arizona has intensified the problem. The PCR office has suffered a budget reduction of 33% within a two year period. It has been forced to implement an inordinate number of furloughs ... and has run out of funds for experts before the end of the fiscal year.” Meyer Decl. Ex. 32, Comment of the State Capital Post Conviction Public Defender, *In the Matter of Amended Sua Sponte Petition to Amend Rule 6.8(a) and (c), Arizona Rules of Criminal Procedure*, No. R-09-0033 (Ariz. May 19, 2010), at 1; *see also* Lieberman Decl. at ¶¶ 9-10.

Lieberman resigned as director in 2011. Lieberman Decl. at ¶ 20. After a lengthy delay, Governor Jan Brewer convened a committee to recommend his

replacement. Shortly after the committee made its recommendation, the Legislature defunded the office and the enabling statute was repealed. *See* Ariz. Rev. Stat. § 41-4301, *repealed by* Ariz. Laws 2012, Ch. 302, § 13. The Legislature scrubbed all references to the public defender's office from § 13-4041, and Arizona tried to return to the private-appointment mechanism that had failed for years to provide competent counsel. *See* Ariz. Rev. Stat. § 13-4041 (2012). In total, over the five years of its existence, the postconviction public defender was appointed to just five capital postconviction cases. Lawson Decl. at ¶ 7; Case Chart (Glassel, Richard; Tucker, Eugene; Anderson, Frank; Johnson, Ruben; Cromwell, Robert).

**E. Arizona returned to the private-appointment mechanism that had failed for years to assure the provision of competent counsel.**

Contemporaneous to the demise of the State Capital Postconviction Public Defender's Office, the Supreme Court rejected a proposal to strengthen the screening of private attorneys seeking capital postconviction appointments. In October 2011, the Capital Case Oversight Committee created a working group comprised of Lieberman, Assistant Attorney General Kent Cattani, and the Supreme Court staff attorney, Donna Hallam, who was in charge of managing and initially reviewing applications for appointment. Lieberman Decl. at ¶ 23. Recognizing the need for an independent committee to take over the vetting of applicants from the Court, the working group unanimously recommended the creation of an advisory committee to rigorously screen applicants and make appointment recommendations to the Supreme Court. Lieberman Decl. at ¶ 23; *see* Meyer Decl. Ex. 37, Capital Case Oversight Comm., *Progress Report of the Capital Case Oversight Comm. to the Ariz. Judicial Council* (Dec. 2015), at 9 (noting the "unanimous recommendation" by the Oversight Committee for a separate "screening committee" to vet attorney applicants and make recommendations); Meyer Decl., Ex. 32, Comment of the State Capital Post Conviction Public Defender, *In the Matter of Amended Sua Sponte Petition to Amend Rule 6.8(a) and (c), Arizona Rules of Criminal Procedure*, No. R-09-0033 (Ariz. May 19, 2010), at 4-5. The working group then formally made its proposal to the full Capital Case Oversight Committee. Lieberman Decl. at ¶ 24. On February 29, 2012, the full committee—comprised of judges, prosecutors, and defense attorneys—unanimously recommended the creation of the screening panel. *Id.* The Arizona Judicial Council and the Arizona Supreme Court, however, rejected the proposal, with Justice Scott Bales stating that "it would be premature to set up [the committee] given the drop in capital cases." Moulton Decl. Ex. 582, Arizona Judicial Council December 2012 Minutes at 6; Lieberman Decl. at ¶ 24. At the same meeting, Justice Bales also "noted the need to increase the hourly rate [for appointed attorneys] on the higher side." Moulton Decl. Ex. 582, Meeting Minutes of the Arizona Judicial Council (Dec. 13, 2012), at 6.

In contrast to the Supreme Court's 2012 decision not to use an independent screening committee to evaluate applicants for capital postconviction appointments, Maricopa County decided the same year to institute such a committee to evaluate applicants for capital trial and direct appeal appointments. In 2012, Superior Court Administrative Order 2012-118 created the Maricopa County Capital Defense Review Committee to comprehensively review attorney applicants and recommend appointments. Per the administrative order, the Committee is comprised of judges and experienced lawyers who conduct a detailed objective and subjective review of every application for trial and direct appeal appointments in capital cases. *See* Arizona Superior Court Administrative Order 2012-118; Arizona Superior Court Administrative Order 2014-101 (currently governing the Committee's work); Guidelines for Operation of Capital Defense Review Committee Established by Administrative Order 2012-118; Chapman Decl. at ¶ 6; Maher Decl. at ¶ 17; Lieberman Decl. at ¶ 26. As described in further detail below, *infra* 73-74, that review process includes (1) reviewing an applicant's prior work, references, and writing samples; (2) speaking with references and other judges and attorneys familiar with the applicant; (3) conducting an in-person interview with the applicant, and (4) deliberating extensively before making a recommendation.

The Arizona Supreme Court chose not to follow that model after the closing of the public defender's office, causing Arizona's postconviction appointment mechanism to revert to the same private-appointment system that had failed for years. *See* Kimerer Decl. at ¶ 21 ("Arizona was then forced to rely on the same private appointment system that had performed so poorly for years.").

At the same time, the Supreme Court needed to appoint new counsel for defendants previously represented by the public defender's office. At that point, the public defender's office had been without a director for over a year, and the attorneys who remained at the office had limited experience with capital, appellate, or postconviction cases. Lawson Decl. at ¶¶ 11-12; Lieberman Decl. at ¶¶ 21-22. Because some of the office's staff moved to other public defender offices including the Maricopa County Office of the Public Advocate, the Supreme Court began appointing those offices to some postconviction cases. *See, e.g.*, Moulton Decl. Ex. 33, Order, *State v. Boyston*, No. CR-10-0052-AP (Ariz. July 29, 2013) (appointing Office of Public Advocate); Moulton Decl. Ex. 63, Orders, *State v. Cota*, No. CR-09-0218-AP (Ariz. Sup. Ct. Oct. 12, 2012 and Nov. 5, 2012) (same); Moulton Decl. Ex. 317 Order, *State v. Naranjo*, No. CR-11-0151-AP (Ariz. Sept. 11, 2014) (same); Moulton Decl. Ex. 347, Orders, *State v. Patterson*, No. CR-09-0342-AP (Ariz. Feb. 4, 2013, May 28, 2013 and Mar. 24, 2014) (same); Moulton Decl. Ex. 294, Order, *State v. Miller*, No. CR-11-0331-AP (Ariz. Jan. 8, 2014) (same); Moulton Decl. Ex. 442, Order, *State v. Villalobos*, No. CR-08-0098-AP (Ariz. Feb. 3, 2011) (appointing Maricopa County Public Defender); Moulton Decl. Ex. 130, Order filed in *State v. Gallardo*, No. CR-09-0171-AP (Ariz. Feb. 3, 2011) (same); *see also* Lawson Decl. at ¶¶ 6, 15, 20.

The appointed attorneys in Arizona public defender offices did not appear on the list of qualified counsel that the Supreme Court maintained for capital postconviction appointments. *See* Moulton Decl. Ex. 487, compiled lists of approved attorneys from Arizona Supreme Court production.<sup>19</sup> And unlike appointments to the State Capital Postconviction Public Defender's Office, no statutory authority existed for the Supreme Court to make appointments to other offices. Instead, § 13-4041(C) specified (as it continues to specify) that the Supreme Court "shall" appoint postconviction counsel from a list that it "establish[es] and maintain[s]" "of persons who are qualified to represent capital defendants in postconviction proceedings." Ariz. Rev. Stat. § 13-4041(C). Section 13-4041 does not include any exceptions to this requirement (unlike the pre-2006 version of § 13-4041(D)).

Also contrary to § 13-4041(C)'s mandatory language, the Supreme Court has appointed private lawyers who did not appear on the list of approved counsel. *See* Moulton Decl. Ex. 43, Order, *State v. Carlson*, No. CR-12-0464-AP (Ariz. Oct. 6, 2015); Moulton Decl. Ex. 157, Order, *State v. Goudeau*, No. CR-11-0406-AP (Ariz. July 13, 2016); Moulton Decl. Ex. 351, Order, *State v. Payne*, No. CR-09-0081-AP (Ariz. Mar. 19, 2014). In some cases, the Supreme Court has expressly "waived" the requirements of Rule 6.8 in its appointment orders. *See* Moulton Decl. Ex. 222, Order, *State v. Jones*, No. CR-95-0342-AP (Ariz. Sept. 22, 1999); Moulton Decl. Ex. 447 Order, *State v. White*, No. CR-96-0716-AP (Ariz. Jan. 8, 2001). In total, out of 109 Arizona capital postconviction appointments since 1998, the Supreme Court has appointed counsel who did not appear on the list of approved attorneys in 18 cases.<sup>20</sup>

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<sup>19</sup> Exhibit 487 is a compilation of the Arizona's Supreme Court's rosters of approved attorneys from 1988 to 2018. According to the Arizona Supreme Court, no list was maintained from 2013 to 2016. Meyer Decl. Ex. 268, Email from Brandon Powell, Ariz. S. Ct., to Paul Meyer, Att'y for FDO-AZ (Dec. 20, 2017).

<sup>20</sup> These 18 cases include appointments to public defender offices: Boyston, Eric (Office of Public Advocate); Burns, Johnathan (Garret Simpson was appointed in 2014 but did not appear on the list until 2017); Carlson, Michael (Dan Cooper was appointed in 2015 but did not appear on the list until 2017); Cota, Benjamin (Office of Public Advocate); Gallardo, Michael (Maricopa County Public Defender); Goudeau, Mark (John Mills applied in 2013, was appointed in 2016, but did not appear on the list until 2017); Hargrave, Christopher (Richard Parrish applied in 2011, was appointed in 2011, but did not appear on the 2011 list; Statia Peakheart was later added as co-counsel but does not appear on the list); Johnson, Ruben (Arizona Postconviction Review Public Defender originally appointed, but then transferred to Office of Public Advocate/Office of the Legal Defender); Jones, Robert Glen (co-counsel Jennifer Sparks does not appear on the Supreme Court's list); Kayer, George (co-counsel Phillip Seplow does not appear on the Supreme Court's

In other instances, the Supreme Court appointed and has continued to appoint private attorneys from the roster it maintains pursuant to § 13-4041(C) and Rule 6.8. A Supreme Court staff attorney still maintains that roster. *See* Phalen Decl. at ¶¶ 4, 10; Hammond Decl. at ¶ 55; Darby Decl. at ¶¶ 20, 22. To the best of FDO-AZ's knowledge, there remains no institutionalized, standardized vetting of attorney applications. *See* Phalen Decl. at ¶¶ 4, 10; Darby Decl. at ¶¶ 18, 20, 22; *infra* 72-73 (describing public records request to the Arizona Supreme Court).

**F. In 2011, the Arizona Supreme Court further weakened Arizona's appointment mechanism by removing the requirement that counsel have postconviction experience to qualify for appointment under Rule 6.8(c).**

In 2011, the private-appointment mechanism underwent a further substantial change in its attorney-qualification standards. The Arizona Supreme Court amended Rule 6.8(c) to no longer require that an attorney have *any* postconviction experience to be appointed as postconviction counsel in capital cases. Notably, Arizona's now pending application for certification—filed two years after the 2011 amendment to Rule 6.8(c)—fails to mention the change and instead relies on the former version of Rule 6.8. *See also infra* § VII(B).

The following is a comparison of the original and amended versions of the Rule:<sup>21</sup>

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list); Manuel, Jahmari (Carla Ryan does not appear on the Supreme Court's list); Miller, William (Office of Public Advocate); Morris, Cory (Harley Kurlander applied in 2013, was appointed in 2013, but does not appear on the Supreme Court's list until 2017); Naranjo, Israel (Office of Public Advocate); Ovante, Manuel (Vikki Liles applied in 2013, was appointed in 2013, but does not appear on the Supreme Court's list until 2017); Patterson, Isiah (Harley Kurlander applied in 2013, was appointed in 2013, but does not appear on the Supreme Court's list until 2017); Payne, Christopher (Michael Meehan applied in 2013, was appointed in 2014, but does not appear on the Supreme Court's list until 2017; co-counsel Laura Udall does not appear on the Supreme Court's list); Tucker, Eugene (Arizona Postconviction Review Public Defender originally appointed, then transferred to Office of the Public Advocate); Villalobos, Joshua (Maricopa County Public Defender).

<sup>21</sup> As explained below, *infra* 47, on January 1, 2018, a new version of the Arizona Rules of Criminal Procedures went into effect. The restyled Rule renumbers Rule 6.8 subsections (c) and (d). The competency standards in the 2018 version of Rule 6.8 are substantively the same. We cite to the 2011-2017 version of Rule 6.8 throughout the Comment, unless otherwise noted.

<b>Original Rule 6.8(c) (pre-2011 amendment) (emphasis added)</b>	<b>Amended Rule 6.8(c) (2011-2017) (emphasis added)</b>
<p>Within three years immediately preceding the appointment[,]</p> <p>[the attorney shall] have been lead counsel in an appeal or postconviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions <b>and at least one postconviction proceeding</b> that resulted in an evidentiary hearing.</p> <p>Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, <b>and lead counsel in at least two postconviction proceedings</b> that resulted in evidentiary hearings.</p>	<p>Within three years immediately preceding the appointment,</p> <p>the attorney shall have been lead counsel in a trial in which a death sentence was sought, or in an appeal <b>or postconviction</b> proceeding in a case in which a death sentence was imposed, and have prior experience as lead counsel in the appeal of at least three felony convictions and a trial <b>or postconviction</b> proceeding with an evidentiary hearing.</p> <p>Alternatively, the attorney must have been lead counsel in the appeal of at least six felony convictions, including two appeals from first or second degree murder convictions, and lead counsel in at least two felony trials <b>or postconviction</b> proceedings with evidentiary hearings.</p>

See Meyer Decl. Ex. 298, History of Ariz. R. Crim. P. 6.8.

The amendment therefore allowed for general felony experience to substitute for postconviction experience in determining competency.

To put Arizona's current competency standards in practical terms, the following attorneys would indisputably qualify for appointment under Rule 6.8(c), without the need for the Court to resort to the ad hoc appointment mechanism described in Rule 6.8(d):

- (1) An attorney who was (i) lead counsel in a single murder case where the death penalty was sought, (ii) counsel for three appeals of felony convictions for personal possession of marijuana (a felony in Arizona), and (iii) trial counsel in a Driving Under the Influence (DUI) case; and
- (2) An attorney who was (i) counsel for four appeals of DUI felony convictions, (ii) counsel for two appeals of second-degree murder

convictions stemming from DUI-related deaths, and (iii) lead trial counsel in two felony bank robbery trials.

As both examples show, an attorney may qualify under Rule 6.8(c) without any postconviction experience. And as the second example shows, an attorney could qualify under Rule 6.8(c) without any capital *or* postconviction experience.

Experts widely opposed the 2011 amendment to Rule 6.8(c) that removed the postconviction experience requirement. As Martin Lieberman, the state postconviction public defender at the time, commented: “This proposal permits counsel with no post-conviction experience to be appointed in a capital post-conviction case so long as she has the requisite number of appeals and trials. An attorney with no post conviction experience should not be appointed to a capital post conviction case.” Meyer Decl. Ex. 32, Comment of the State Capital Post Conviction Public Defender, *In the Matter of Amended Sua Sponte Petition to Amend Rule 6.8(a) and (c), Arizona Rules of Criminal Procedure*, No. R-09-0033 (Ariz. May 19, 2010), at 3. Lieberman further explained that “[t]he proposed rule change does not address the need for quality control and permits, on numbers alone, the appointment of counsel with no capital experience and/or with no post conviction experience. There is no mechanism to supervise or to assess the work product.” *Id.* at 4-5. And Lieberman noted the Supreme Court’s ongoing failure to institute an independent committee or panel to review attorney applications for appointment—an approach that he concluded was even more important in light of the lowered competency requirements. *Id.* at 5.

Those comments, and others like them, went unheeded.

**G. In 2013, the Arizona legislature removed the presumptive cap on an attorney’s compensated hours, but kept the compensation rate unreasonably low.**

From 1998 until 2013, § 13-4041(F) presumptively limited postconviction counsel to 200 hours of compensated work on a case—dramatically below the average number of hours required to draft and litigate a postconviction petition during that time. Ariz. Rev. Stat. § 13-4041(F) (1998-2012); *see* Meyer Decl. Ex. 28, Capital Case Oversight Comm., *Joint Report of the Capital Case Oversight Comm. & Maricopa County Superior Court to the Arizona Judicial Council* (Nov. 2008), at 19 (observing that “a petition for postconviction relief in a capital case can rarely be presented with only 200 hours of preparation,” and concluding that the 200-hour presumptive cap did “a disservice to the judicial system” by “dissuad[ing] an attorney from accepting an appointment on a PCR”); *see also* Phalen Decl. at ¶¶ 21-24, 52; Hammond Decl. at ¶ 60.

Only upon a “showing of good cause” would a trial court approve compensation for additional hours, and that money came from county funds, not the

state. Ariz. Rev. Stat. § 13-4041(G) (2012). Good cause was not always proven. For example, the law firm Bryan Cave represented a capital defendant for several years while working more than 2,381.2 hours on the case. *See* Meyer Decl. Ex. 34, Petition for Review, *State v. Herrera, Jr.*, No. CR-03-0022 PR (Ariz. Ct. App. Jan. 08, 2003), at 9; Order, *State v. Herrera, Jr.*, No. CR 1988-006483 (Ariz. Super. Ct. Dec. 10, 2002). After submitting a request for reimbursement, the law firm was awarded only \$70,000, or about \$152,000 less than if it had been paid the statutory maximum of \$100 per hour. *See* Meyer Decl. Ex. 34, Petition for Review, *State v. Herrera, Jr.*, No. CR-03-0022 PR (Ariz. Ct. App. Jan. 08, 2003); Order, *State v. Herrera, Jr.*, No. CR 1988-006483 (Ariz. Super. Ct. Dec. 10, 2002).

As remains the case today, if an attorney believed that the court had set an unreasonably low hourly rate, or if the court found that the hours the attorney spent over the 200-hour cap were unreasonable, the attorney could file a special action with the Arizona Supreme Court. Ariz. Rev. Stat. § 13-4041(G) (2012). Filing a special action, however, required complete briefing, which necessitated further hours of uncompensated work. As an example of the need to go through that process, two appointed Arizona attorneys, Thomas Phalen and Gilbert Levy, were once forced to file a special action with the Supreme Court of Arizona to receive more than \$28,000 in compensation and expenses they were owed, after the superior court denied their request. Phalen Decl. at ¶¶ 21-24. In that case, the trial court had ruled that counsel had to file their petition for postconviction review before the court would decide whether the additional hours counsel worked were justified—effectively forcing counsel to work for months with no guarantee that the time would be compensated. *Id.* at ¶ 23. Counsel then filed their Special Action and the Supreme Court ruled in counsel’s favor. *Id.* at ¶ 24; Phalen Decl. Ex. 2, Petition for Special Action. These proceedings required counsel to continue litigating without compensation. *See* Phalen Decl. at ¶ 23.

In 2013, the Arizona Legislature finally lifted the presumptive 200-hour cap on an attorney’s work. Meyer Decl. Ex. 305, House Bill, H.R. 2307, 51st Leg., 1st Reg. Sess. (Ariz. Apr. 11, 2013). The Legislature failed, however, to increase the maximum compensation rate of \$100 per hour, which was originally set in 1998.

The 2013 Legislation represents the last substantive change to Arizona’s appointment mechanism.

On January 1, 2018, a new version of Rule 6.8 that renumbers subsections (c) and (d) went into effect. The competency standards in the 2018 version of Rule 6.8 are substantively the same as the 2011-2017 version. The 2011-2017 version of Rule 6.8(c) included subparts (1) for appellate counsel and (2) for postconviction counsel. The 2018 version of Rule 6.8 separates the appellate and postconviction counsel requirements into 6.8(c) and 6.8(d), respectively, and creates new subsection 6.8(e) (formerly 6.8(d)).

Because no postconviction counsel have been appointed under the 2018 version of Rule 6.8, we cite to the prior version throughout this comment for consistency with the records we discuss, unless otherwise noted. Arizona's Supplemental Letter also cites to the prior version of Rule 6.8.

**H. Arizona's current mechanism for appointing postconviction counsel is a weakened version of the mechanism that the state once deemed a failure.**

Arizona's current appointment mechanism, at least on paper, is still described by Arizona Revised Statutes §§ 13-4041 and -4234 and Arizona Rule of Criminal Procedure 6.8.

The relevant provisions of each (including both the 2011-2017 and 2018 versions of Rule 6.8) are as follows:

**Ariz. Rev. Stat. § 13-4041**

B. After the supreme court has affirmed a defendant's conviction and sentence in a capital case, the supreme court or, if authorized by the supreme court, the presiding judge of the county from which the case originated shall appoint counsel to represent the capital defendant in the state postconviction relief proceeding.

C. The supreme court shall establish and maintain a list of persons who are qualified to represent capital defendants in postconviction proceedings. The supreme court may establish by rule more stringent standards of competency for the appointment of postconviction counsel in capital cases than are provided by this subsection. The supreme court may refuse to certify an attorney on the list who meets the qualifications established under this subsection or may remove an attorney from the list who meets the qualifications established under this subsection if the supreme court determines that the attorney is incapable or unable to adequately represent a capital defendant. The court shall appoint counsel from the list. Counsel who are appointed from the list shall meet the following qualifications:

1. Be a member in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.
2. Have practiced in the area of state criminal appeals or postconviction proceedings for at least three years immediately preceding the appointment.
3. Not previously have represented the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation.

F. Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state postconviction relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour. Monies shall not be paid to court appointed counsel unless either:

- (1) A petition is timely filed.
- (2) If a petition is not filed, a notice is timely filed stating that counsel has reviewed the record and found no meritorious claim.

G. The trial court shall compensate appointed counsel from county funds. The court or the court's designee shall review and approve all reasonable fees and costs. If the attorney believes that the court has set an unreasonably low hourly rate or if the court finds that the hours the attorney spent are unreasonable, the attorney may file a special action with the Arizona supreme court. If counsel is appointed in successive postconviction relief proceedings, compensation shall be paid pursuant to § 13-4013, subsection A.

H. The county shall request reimbursement for fees it incurs pursuant to subsections F, G and I of this section arising out of the appointment of counsel to represent an indigent capital defendant in a state postconviction relief proceeding. The state

shall pay a portion of the fees incurred by the county out of monies appropriated to the supreme court for these purposes. The total amount that may be spent in any fiscal year by this state for indigent capital defense in a state postconviction relief proceeding may not exceed the amount appropriated in the general appropriations act for this purpose, together with additional amounts appropriated by any special legislative appropriation for indigent capital defense. The supreme court shall approve county requests for reimbursement after certification that the amount requested is owed.

I. The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by § 13-4232.

**Arizona Rule of Criminal Procedure 6.8 (Effective January 1, 2011 to December 31, 2017)**

a. General. To be eligible for appointment in a capital case, an attorney

(1) Shall have been a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment;

(2) Shall have practiced in the area of state criminal litigation for three years immediately preceding the appointment; and

(3) Shall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

If an attorney is a member in good standing of the State Bar of Arizona, an attorney's practice in a federal jurisdiction or

another state may be considered for purposes of satisfying the requirements of subsections (1) through (3).

...

c. Appellate and Post-conviction Counsel. To be eligible for appointment as appellate or post-conviction counsel, an attorney must meet the qualifications set forth in section (a) of this rule and the following:

(1) Post-conviction counsel. Within three years immediately preceding the appointment, the attorney shall have been lead counsel in a trial in which a death sentence was sought, or in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and have prior experience as lead counsel in the appeal of at least three felony convictions and a trial or post-conviction proceeding with an evidentiary hearing. Alternatively, the attorney must have been lead counsel in the appeal of at least six felony convictions, including two appeals from first or second degree murder convictions, and lead counsel in at least two felony trials or post-conviction proceedings with evidentiary hearings.

(2) The attorney shall have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense.

(3) The attorney shall be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

d. Exceptional Circumstances. In exceptional circumstances and with the consent of the Supreme Court, an attorney may be

appointed who does not meet the qualifications set forth in sections (a)(1) and (2), (b) and (c) of this rule, providing that the attorney's experience, stature and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in this rule and that the attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule. Section (b)(1)(iii) and (c)(3) shall apply to attorneys appointed under this section.

**Arizona Rule of Criminal Procedure 6.8 (Effective January 1, 2018)**<sup>22</sup>

**(a) Generally.** To be eligible for appointment in a capital case, an attorney must:

- (1) have been a member in good standing of the State Bar of Arizona for at least 5 years immediately before the appointment;
- (2) have practiced criminal litigation in Arizona state courts for 3 years immediately before the appointment;
- (3) have demonstrated the necessary proficiency and commitment that exemplifies the quality of representation appropriate to capital cases;
- (4) have successfully completed, within one year before the initial appointment, at least 6 hours of relevant training or educational programs in the area of capital defense; and successfully completed within one year before any later appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense;
- (5) be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death

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<sup>22</sup> We include the 2018 version of Rule 6.8 for completeness, but as explained above, we cite and refer to the 2011-2017 version of Rule 6.8 throughout this comment.

Penalty Cases, and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.

If an attorney is a member in good standing of the State Bar of Arizona, the attorney's practice in a federal jurisdiction or in another state may be considered for purposes of satisfying the requirements of (a)(1) and (a)(2).

...

**(d) Post-Conviction Counsel.** To be eligible for appointment as post-conviction counsel, an attorney must meet the qualifications set forth in (a) and the attorney must:

(1) within 3 years immediately before the appointment, have been lead counsel in a trial in which a death sentence was sought or in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and prior experience as lead counsel in the appeal of at least 3 felony convictions and a trial or post-conviction proceeding with an evidentiary hearing; or

(2) have been lead counsel in the appeal of at least 6 felony convictions, including two appeals from first- or second-degree murder convictions, and lead counsel in at least two felony trials or post-conviction proceedings with evidentiary hearings.

**(e) Exceptions.** In exceptional circumstances, a court may appoint an attorney who does not meet the qualifications set forth in this rule if:

(1) the Supreme Court consents;

(2) the attorney meets the requirements set forth in (a)(3)--(5);

(3) the attorney's experience, stature, and record establishes that the attorney's ability significantly exceeds the standards set forth in this rule; and

(4) the attorney associates with a lawyer who meets the qualifications set forth in this rule and the associating attorney is appointed by the court for this purpose.

## VII. ARIZONA'S APPLICATION IS NOT PROCEDURALLY ADEQUATE.

As a threshold matter, the Department should reject Arizona's application because it was premature, does not correctly describe Arizona's then-current and now-current appointment mechanism, and does not otherwise contain enough information for the public to meaningfully comment on whether Arizona should be certified. Arizona's Supplemental Letter to the Department does not cure those defects or explain how Arizona's appointment mechanism meets the requirements of Chapter 154 and the Final Rule.

### A. Arizona's application is premature and incomplete.

Arizona submitted its application to the Department on April 18, 2013, over five months before the Final Rule was published. *See* 78 Fed. Reg. 58,160 (Final Rule published September 23, 2013); Meyer Decl. Ex. 1, Application at 1. At the time of the application, the Department's first rule had been enjoined and withdrawn, *see* 75 Fed. Reg. 71,353, and the Department had issued a new proposed rule and supplemental notice of proposed rulemaking. 76 Fed. Reg. 11,705 (proposed rule); 77 Fed. Reg. 7559 (supplemental notice of proposed rulemaking).

Arizona must show that it meets *both* the statutory and regulatory requirements for certification. *See Chrysler v. Brown*, 441 U.S. 281, 295 & n.18 (1979) (“[P]roperly promulgated, substantive agency regulations have the ‘force and effect of law.’”). Arizona's 2013 application makes no effort to show how its mechanism meets the regulations (nor could it, because Arizona submitted its application before the Final Rule had issued). *See* Meyer Decl. Ex. 1, Application. Likewise, the application does not “request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart,” as required by 28 C.F.R. § 26.23(a). Instead it simply asserts that “Arizona meets the statutory requirements for opt-in status.” Meyer Decl. Ex. 1, Application at 1.

It is unclear from the application whether Arizona believes it meets any of the benchmark criteria listed in 28 C.F.R. § 26.22(b)(1), or if Arizona is asserting that its mechanism “otherwise reasonably assure[s] a level of proficiency appropriate for State postconviction litigation in capital cases” under § 26.22(b)(2). Likewise, it is unclear on what basis Arizona believes it adequately compensates counsel under § 26.22(c).

Arizona's Supplemental Letter asserts that its mechanism meets the regulations, but it fails to support that assertion, as explained below. *See infra* §§ VIII-XI. Arizona also claims that it "is not required to meet these regulatory requirements [in the Final Rule] to be certified under 28 U.S.C. § 2265 because they do not appear in the statute, and '[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.' 28 U.S.C. § 2265(a)(3)." *See* Moulton Decl. Ex. 574, Ariz. Supplemental Letter at 2-4. This argument gets administrative law backwards. "[R]egulations, if valid and reasonable, authoritatively construe the statute itself." *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001). The Department's Final Rule explains Chapter 154's statutory requirements; it does not add new requirements. Arizona itself acknowledges that Chapter 154 requires the timely appointment of competent, adequately paid and resourced postconviction counsel. Moulton Decl. Ex. 574, Ariz. Supplemental Letter at 1 (citing 28 U.S.C. §§ 2261(c), 2265(a)(1)(A)).

Arizona's supplemental letter also limits its assertions to Arizona's *present day* mechanism. *See* Moulton Decl. Ex. 574, Ariz. Supplemental Letter. Of course, Arizona is not just seeking certification of the current mechanism (mis)described in its application. Instead, Arizona seeks certification from 1998 onwards. From 1998 until today, Arizona has made a number of significant changes to its mechanism for appointing postconviction counsel, as described above, *supra* § VI. If Arizona is seeking certification of each iteration of its mechanism, it must specify and justify that request with specific citations to the Department's regulations and specific reference to the contours of Arizona's mechanism as it existed and changed over time. *See Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (holding that invoking the procedures of Chapter 154 constitutes an affirmative defense employed by the state in federal habeas corpus proceedings); *Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1183 (N.D. Cal. 1998) ("[I]t is entirely the states' decision whether to opt-in—by so choosing the states are properly allocated the burden of proving compliance.") *aff'd*, 202 F.3d 1160 (9th Cir.), *cert. denied*, 531 U.S. 916 (2000). And to the extent the Department is considering whether to certify each of those iterations, the Department should disclose that to the public along with whatever information the Department is relying on to inform its decision. Withholding that information impedes the public's ability to meaningfully comment on whether Arizona's mechanism ensured competent and adequately compensated counsel at all times from 1998 to present. *See also* Moulton Decl. Ex. 576 Letter from Elizabeth R. Moulton, Att'y for Office of the Fed. Pub. Def. for D. of Ariz. to Laurence Rothenberg, Office of Legal Policy, Dep't of Justice (Nov. 21, 2017).

The Department should require Arizona to submit a new application pursuant to 28 C.F.R. § 26.23(a) that explains the bases on which Arizona believes it currently meets and has met in the past each of the requirements of the Final Rule.

**B. Arizona's application is inaccurate.**

Still more remarkable, Arizona's 2013 application baldly misstates the Rule governing the state's appointment mechanism. The application relies on the pre-2011 version of Rule 6.8 that required that appointed counsel have some postconviction experience before they qualified for appointment. That requirement was removed *two years before Arizona filed its application*. See *supra* § VI(F). In other words, Arizona's application was not even correct when filed. And today it is hopelessly outdated.

A bedrock premise of any administrative process involving public comment is that the process will accurately and completely disclose the subject matter at issue to allow for meaningful comment. The public is "entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 289 n.4 (1974) (citing *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937), and *United States v. Abilene & S.R. Co.*, 265 U.S. 274, (1924)). See also *Williston Basin Interstate Pipeline Co. v. F.E.R.C.*, 165 F.3d 54 (D.C. Cir. 1999); *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) ("the most critical factual material that is used to support the agency's position on review must have been made public *in the proceeding* and exposed to refutation"); *Asarco, Inc. v. U.S. Evtl. Prot. Agency*, 616 F.2d 1153, 1162 (9th Cir. 1980) (vacating and remanding an EPA order because of a failure to provide a meaningful opportunity to respond to findings).

By presenting plainly inaccurate information, Arizona's application denies the public the ability to meaningfully comment on Arizona's mechanism since 1998 and whether it should be certified. By failing to include an accurate description of Arizona's current (or even then-current) mechanism, the application does not put the public on notice of precisely what mechanism Arizona seeks to certify, and it deprives the public of an adequate opportunity to comment. Worse still, the application affirmatively misrepresents to the Department and the public what Arizona's current mechanism requires.

Arizona's misrepresentation is particularly significant given the importance that the Final Rule places on the requirement of postconviction experience. Not requiring postconviction experience means that an attorney's *first* postconviction case could be one in which their client faces execution. Considering "the complexity of postconviction representation and the risk of irremediable procedural default," that is entirely inappropriate—as the Department recognized during the rulemaking process. See 77 Fed. Reg. 7560.

At the time Arizona submitted its application, the Department had published its Supplemental Proposed Rulemaking, in which the Department explained that it was considering whether a state appointment mechanism must require that an appointed attorney have postconviction experience for the mechanism to qualify for certification under Chapter 154. *See id.* In response to its 2011 Proposed Rule, which allowed for the appointment of counsel “who have been admitted to the bar for at least five years and have at least three years of felony litigation experience,” 76 Fed. Reg. 11,712, the Department received a number of comments explaining why *postconviction* experience was essential. *See, e.g.,* Moulton Decl. Ex. 575, Fed. Pub. Defenders’ Comments on Proposed Rule, Statement of Interest (June 1, 2011), at 12-13 (noting that “Federal appointments thus require capital as well as postconviction experience, a necessity also recognized by courts interpreting Chapter 154”); Meyer Decl. Ex. 42, Letter from Michael Laurence, Exec. Dir., Habeas Corpus Resource Center, to Regulations Docket Clerk, Office of Legal Policy, Dep’t of Justice (June 1, 2011), at 9 n.7 (“requirements must at the very least include experience in capital and postconviction litigation”). *See also* Meyer Decl. Ex. 170, Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services, Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (Sept. 2010), at 88 (noting the view of postconviction specialists that there is “little time available for inexperienced counsel to ‘learn the ropes,’ and no safety net if they fail”). The Department found these comments persuasive and noted the “difficult and unique demands that postconviction law and procedure place on attorneys who litigate those cases.” 78 Fed. Reg. 58,169. The Final Rule therefore includes a benchmark requirement of postconviction experience. *See* 28 C.F.R. § 26.22(b)(1)(i).

Against that backdrop, Arizona’s failure to accurately describe its mechanism is particularly troubling. By suggesting that its appointment mechanism requires postconviction experience, Arizona misleads the Department and the public into believing that the mechanism meets one of the key benchmarks for competency.

### **C. Arizona’s supplemental letter does not cure those defects.**

Arizona’s terse supplemental letter does not cure the application’s defects or give the public adequate, or even accurate, information to effectively comment on whether Arizona can be certified under Chapter 154. Instead, the letter sows more confusion. Arizona states in the letter that its mechanism has undergone “a few minor changes” since the state’s 2013 application. Moulton Decl. Ex. 574, Ariz. Supplemental Letter at 3. But the letter fails to describe the nature of those changes and fails to acknowledge that the 2013 application was inaccurate in critical ways when filed.

If that were not enough to reject Arizona’s application on procedural grounds, the supplemental letter then inexplicably *again suggests that Arizona requires appointed attorneys have postconviction experience.* *Id.* The letter does that by

asserting that Arizona’s mechanism “exceed[s]” the “competency requirements set out in . . . 28 C.F.R. §26.22(b)(1).” Section 26.22(b)(1)(i), however, includes the benchmark requirement that appointed counsel have “at least three years of postconviction litigation experience”—something which Arizona does not require.<sup>23</sup>

Arizona further asserts that its mechanism “provides for payment of *all* reasonable litigation expenses.” Moulton Decl. Ex. 574, Ariz. Supplemental Letter at 2 (emphasis added). The relevant Arizona statute, however, unambiguously leaves to the discretion of the trial court the decision whether to pay reasonable litigation expenses. *See* Ariz. Rev. Stat. § 13-4041(1) (“The trial court *may* authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by section 13-4232.” (emphasis added)).

Arizona’s application and supplemental letter are therefore not just incomplete. They are affirmatively misleading, thereby depriving the public of the ability to provide informed comments based on accurate and complete information. At a minimum, the Department should require Arizona to submit an application that thoroughly describes its current mechanism and changes to its mechanism since 1998. Only then will the public have adequate information to comment on whether Arizona’s mechanism meets Chapter 154’s requirements. The APA and the Due Process Clause require at least that much.

## **VIII. ARIZONA’S MECHANISM DOES NOT GUARANTEE THE APPOINTMENT OF COMPETENT COUNSEL.**

### **A. Arizona’s mechanism does not meet the Final Rule’s presumptive benchmarks.**

Under the Final Rule, a state’s competency requirements are presumptively adequate if they meet one of two benchmarks. 28 C.F.R. § 26.22(b)(1). Arizona’s requirements meet neither.

#### *1. Arizona’s mechanism does not meet the benchmark in 28 C.F.R. § 26.22(b)(1)(i).*

The first benchmark establishes that competency standards are presumptively adequate if they provide for the appointment of counsel who “have been admitted to the bar for at least five years and *have at least three years of*

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<sup>23</sup> Arizona has nowhere suggested that it meets the § 26.22(b)(1)(ii) benchmark, which is described in detail below.

*postconviction litigation experience.*” 28 C.F.R. § 26.22(b)(1)(i) (emphasis added).<sup>24</sup> Arizona’s mechanism fails to meet that benchmark because it does not require “three years of postconviction litigation experience.” As described above, *supra* § VI(H), Arizona Revised Statute § 13-4041(C) requires that all attorneys who are appointed as postconviction counsel must (1) be a member of good standing of the state bar of Arizona for at least five years immediately preceding the appointment; (2) have practiced in the area of state criminal appeals *or* postconviction proceedings for at least three years immediately preceding the appointment; and (3) not previously have represented the capital defendant unless waiver is obtained. Ariz. Rev. Stat. § 13-4041(C).<sup>25</sup> While this meets the benchmark’s requirement of bar membership, it does not mandate the requisite postconviction experience, or, indeed, any postconviction experience at all.

Arizona Rule of Criminal Procedure 6.8 sets forth additional requirements but no longer requires postconviction experience. From 1998 to 2011, the rule required that all attorneys appointed as capital postconviction counsel must (1) have been lead counsel in an appeal or postconviction proceeding in a capital case, have served as lead counsel in the appeal of three felony convictions, and had at least one postconviction proceeding that resulted in an evidentiary hearing “[w]ithin three years immediately preceding the appointment”; or (2) have been lead counsel in the appeal of at least six felony convictions (at least two of which are appeals for first- or second-degree murder convictions) and lead counsel in at least two postconviction proceedings that resulted in evidentiary hearings. *See Meyer Decl. Ex. 298, History of Ariz. R. Crim. P. 6.8.* Although the 1998-2011 version of Rule 6.8 required *some* postconviction experience, there was no requirement that the attorney have “*three years of postconviction litigation experience,*” as required by the presumptive benchmark in 28 C.F.R. § 26.22(b)(1)(i).

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<sup>24</sup> 28 C.F.R. § 26.22(b)(1)(i) provides that “a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation.” That “otherwise adequate” provision applies only if the state sets out a minimum standard of five years of practice and three years of postconviction experience. *See* 78 Fed. Reg. 58,178 (“The rule in paragraph (b)(1)(i) accordingly does not require the imposition of a five-year/three-year minimum experience requirement in all cases, but *allows States that generally impose such a requirement to permit the appointment of other counsel who would qualify for appointment...*”) (emphasis added)).

<sup>25</sup> These requirements have remained the same since 1998. From January 1, 2007, to August 1, 2012, § 13-4041 was amended to account for appointments from the short-lived state capital postconviction public defender’s office. But the requirements did not change for private counsel appointed during that time.

In 2011, the Arizona Supreme Court revised Rule 6.8(c) to eliminate the requirement that capital postconviction counsel have *any* prior postconviction experience. Arizona now requires that all attorneys who are appointed as capital postconviction counsel (1) “have been lead counsel in a trial in which a death sentence was sought, **or** in an appeal **or** post-conviction proceeding in a case in which a death sentence was imposed, and have prior experience as lead counsel in the appeal of at least three felony convictions and a trial **or** post-conviction proceeding with an evidentiary hearing”; or (2) “have been lead counsel in the appeal of at least six felony convictions, including two appeals from first-or-second degree murder convictions, and lead counsel in at least two felony trials **or** post-conviction proceedings with evidentiary hearings.” Ariz. R. Crim. P. 6.8(c)(1). By failing to require *any* postconviction experience, much less three years of postconviction experience, Arizona’s mechanism does not meet the first presumptive benchmark.

Even if Rule 6.8(c) did require three years of postconviction experience, which it does not, Rule 6.8(d) provides a gaping loophole. Rule 6.8(d) states that “[i]n exceptional circumstances and with the consent of the Supreme Court, an attorney may be appointed who does not meet the qualifications set forth in [section c] of this rule, providing that the attorney’s experience, stature and record enable the Court to conclude that the attorney’s ability significantly exceeds the standards set forth in this rule and that the attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule.” Ariz. R. Crim. P. 6.8(d). As discussed further below, the Arizona Supreme Court has deployed this exemption to regularly allow for the appointment of unqualified counsel who do not meet the requirements of Rule 6.8(c). *See infra* § VIII(C). Both as written and in practice, Rule 6.8(d) therefore obviates any threshold requirements that Rule 6.8(c) purports to impose.

2. *Arizona’s mechanism does not meet the benchmark in 28 C.F.R. § 26.22(b)(1)(ii).*

Nor does Arizona’s mechanism meet the second benchmark the Final Rule describes. Under that benchmark (28 C.F.R. § 26.22(b)(1)(ii)), a state’s competency standards for appointed capital postconviction counsel are presumptively adequate if they provide for counsel who meet the standards for federal appointments provided in 42 U.S.C. § 14163(e)(1), (2)(A), (2)(B), (D) and (E).<sup>26</sup> The cited federal standards are part of the Innocence Protection Act that provides capital representation improvement grants to states that have established systems for the appointment of qualified attorneys to represent indigent defendants. To be eligible

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<sup>26</sup> Effective September 1, 2017, 42 U.S.C. § 14163 was recodified as 34 U.S.C. § 60301. We cite to 42 U.S.C. § 14163 unless otherwise noted.

for a grant, an appointment system must be one that “invests the responsibility for appointing qualified attorneys to represent indigents in capital cases:

(A) in a public defender program that relies on staff attorneys, members of the private bar, or both, to provide representation in capital cases;

(B) in an entity established by statute or by the highest State court with jurisdiction in criminal cases, which is composed of individuals with demonstrated knowledge and expertise in capital cases, except for individuals currently employed as prosecutors; or

(C) pursuant to a statutory procedure enacted before October 30, 2004, under which the trial judge is required to appoint qualified attorneys from a roster maintained by a State or regional selection committee or similar entity; ...”

42 U.S.C. § 14163(e)(1).

Further, the state appointment mechanism must be one that, among other things, “establish[es] qualifications for eligible attorneys,” “establish[es] and maintain[s] a roster of qualified attorneys,” “monitor[s] the performance of attorneys who are appointed and their attendance at training programs,” provides “specialized training programs for attorneys representing defendants in capital cases,” and “remove[s] from the roster attorneys who fail to deliver effective representation or engage in unethical conduct,” fail to comply with training requirements, or “have been sanctioned by a bar association or court” in the past five years “for ethical misconduct relating to the attorney’s conduct as defense counsel in a criminal case in Federal or State court.” 42 U.S.C. § 14163(e)(2)(A), (2)(B), (D) and (E). Those requirements “are integral elements” of a qualifying program. 78 Fed. Reg. 58,171.

Arizona’s mechanism falls short of this benchmark in at least four ways.

**First**, Arizona does not delegate appointment decisions to any of the entities described by 42 U.S.C. § 14163(e)(1)(A-C). For starters, the Arizona Supreme Court is directly responsible for appointment decisions, rendering the appointment mechanism incapable of meeting subsections (A) or (C). And under subsection (B), the Court has not established any responsible committee “composed of individuals with demonstrated knowledge and expertise in capital cases.” 42 U.S.C. § 14163(e)(1)(B). Indeed, as discussed further above and below, the Arizona Supreme Court has *rejected* repeated entreaties for the Court to allow a “selection committee” to screen and recommend attorney applicants for postconviction appointments. *Supra* 41.

**Second**, Arizona does not require its Supreme Court to monitor the performance of appointed attorneys or their attendance at training programs. *See*

42 U.S.C. § 14163(e)(2)(E). Nor does the Supreme Court do so in practice. As described further below, in response to a public records request that FDO-AZ filed, the Arizona Supreme Court did not produce any records indicating that the Court has any process for monitoring attorney performance or compliance with training requirements. *See infra* 72-73; Meyer Decl. Ex. 41, Letter from Paul David Meyer, Att’y, Orrick, Herrington & Sutcliffe LLP, to Custodian of Records, Ariz. Sup. Ct. (Feb. 16, 2017). In addition, as described below, the Arizona Supreme Court has repeatedly appointed counsel who have performed deficiently in prior proceedings. *See infra* VIII(D).

**Third**, Arizona similarly does not require its Supreme Court to “conduct, sponsor, or approve specialized training programs for attorneys representing defendants in capital cases.” 42 U.S.C. § 14163(e)(2)(D). In response to FDO-AZ’s public records request, the Arizona Supreme Court did not produce any records indicating that the Court provides training for postconviction attorneys. *See infra* 72-73; Meyer Decl. Ex. 41, Letter from Paul David Meyer, Att’y, Orrick, Herrington & Sutcliffe LLP, to Custodian of Records, Ariz. Sup. Ct. (Feb. 16, 2017). Further, FDO-AZ is not aware of any capital postconviction training programs provided by the Arizona Supreme Court.

**Fourth**, Arizona does not require its Supreme Court to remove from its roster attorneys who have performed ineffectively, acted unethically, or been sanctioned by a bar association or court. *See* 42 U.S.C. § 14163(e)(2)(E)(ii). Indeed, attorneys have been reappointed or permitted to remain on the Supreme Court’s roster of qualified counsel after serious performance and disciplinary issues, including suspension and censure, came to light. *See, e.g., infra* 77, 90.

Arizona’s mechanism therefore fails to meet any of the benchmarks that the Final Rule considers presumptively adequate.

**B. Arizona’s mechanism does not include alternative competency standards that excuse its failure to meet the presumptive benchmarks.**

When a state does not meet the objective “benchmark” competency standards just described, the Final Rule allows for certification of a state’s mechanism “only if [the mechanism’s competency standards] otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.” 28 C.F.R. § 26.22(b)(2). Arizona’s mechanism fails to provide that reasonable assurance.

The lodestar of a § 26.22(b)(2) analysis is whether the state scheme adequately guarantees the provision of competent counsel in postconviction proceedings such that federal habeas review may be dramatically curtailed without the risk that potentially meritorious claims will go uninvestigated and unraised.

After all, “[p]roviding qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing, and execution of capital defendants.” Meyer Decl. Ex. 43, The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (July 2005), at 5.

Section 26.22(b)(2) describes the narrow circumstances in which the Attorney General may certify a state’s appointment mechanism despite the mechanism’s failure to meet any of the presumptive competency benchmarks. As the section makes clear, the Department did not want to foreclose states’ ability to pursue “innovative efforts” involving “robust standards, even standards that would unquestionably result in the timely appointment of competent counsel.” 78 Fed. Reg. 58,172.

Equally clear, however, is that Section 26.22(b)(2) is not intended to weaken the protections and assurances that the presumptive benchmarks otherwise provide. Quite the opposite. The regulations explain that the presumptive benchmarks “do not simply identify two competence standards that will entitle a State that adopts them to a presumption of adequacy; they also serve as a point of reference in judging the adequacy of other counsel qualification standards that States may establish and offer for certification by the Attorney General.” 78 Fed. Reg. 58,172. As such, any departure from the “specified experience requirement” in the Final Rule may “occur only in exceptional cases.” 78 Fed. Reg. 58,178.

Given that fact, “[a] state mechanism that does not incorporate the benchmark standards will naturally require closer examination by the Attorney General to ensure that it satisfies the statutory standards, and while it is possible to conceive of a variety of alternative competency measures that would satisfy chapter 154’s requirements, State competency standards that appear likely to result in significantly lower levels of proficiency compared to the benchmark levels risk being found inadequate under chapter 154.” 78 Fed. Reg. 58,172. “Hence, for example, a State system may pass muster by requiring that appointed counsel either satisfy an experience standard sufficient under paragraph (b)(1)(i) or satisfy an alternative standard sufficient under paragraph (b)(2) involving more limited experience but an additional training requirement.” 78 Fed. Reg. 58,178. Or, by way of further example, a state mechanism may still qualify for certification if it allows courts in “exceptional circumstances” “to appoint an attorney who is a law professor with expertise in capital punishment law and training in capital postconviction litigation to represent a prisoner under sentence of death, even if the attorney has less than three years of relevant litigation experience.” 78 Fed. Reg. 58,178.

Arizona has no such appointment mechanism. Instead, its mechanism substantially weakens the requirements of the presumptive benchmarks without any alternative measures that provide equal or greater safeguards.

1. *Rule 6.8(c)'s failure to require postconviction experience means that it cannot reasonably guarantee the provision of competent postconviction counsel.*

The most significant way that Arizona's appointment system fails to provide standards that functionally meet or exceed those of the regulatory benchmarks is through the system's failure to require that appointed capital postconviction lawyers have *any postconviction experience*. That failure is all the more conspicuous given Arizona's earlier requirement that appointed counsel have such experience.

- a) Until 2011, Rule 6.8(c) required that appointed capital postconviction counsel have postconviction experience, experience that is reasonably necessary for counsel to perform competently.

As previously described, *supra* § VI(A), Arizona once recognized the critical importance of postconviction experience in ensuring competent capital postconviction representation. To that end, Arizona required that attorneys appointed pursuant to Rule 6.8(c) have some postconviction experience, even if not the three years of postconviction experience that the Final Rule's benchmark requires. *Supra* § VI(A).

Former Rule 6.8(c)'s postconviction experience requirement was critical given the fact that capital postconviction practice is unlike any other, requiring an attorney to have a unique skill set and doctrinal expertise. Unlike conventional trial and appellate work, a postconviction attorney must conduct an investigation outside of the record to develop entirely new claims based on extra-record evidence, while also navigating technical state procedural rules and federal habeas rules to ensure that claims are properly raised and exhausted. *Supra* § V(D); Armstrong Decl. at ¶¶ 14, 38-41; Phalen Decl. at ¶¶ 48-49; Gorman Decl. at ¶¶ 15-16; Hammond Decl. at ¶¶ 53-54. A postconviction lawyer must also be well versed in legal claims like ineffective assistance of counsel that do not necessarily arise in more typical trial or appellate practice. *See supra* 16. As one preeminent Arizona criminal defense attorney has explained:

The easiest way to understand the critical nature of specialized post-conviction experience is in considering a claim for ineffective assistance of trial counsel. In Arizona, like most states, ineffective assistance of counsel claims are only brought in post-conviction proceedings, and they require extensive, specialized knowledge of the standards established by *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. Attorneys with exclusively trial or appellate experience would likely have no or very limited experience with *Strickland*-based claims. Ineffective assistance of counsel claims also require extensive expertise in how to factually develop the claim: from interviews with the trial lawyers, to interviewing experts, to the investigation of potentially

meritorious claims that were not raised at trial. Such experience cannot be developed through trial or appellate representation. Similarly, an attorney with only trial or appellate experience will likely have little knowledge of how to investigate and present other paradigmatic post-conviction claims like prosecutorial misconduct and the withholding of *Brady* evidence—claims that require an ability to investigate issues that are outside of the record. I have often witnessed attorneys with extensive appellate experience treat post-conviction cases as a second appeal, and thereby neglect to investigate such claims.

Hammond Decl. at ¶ 53; *see also* Meyer Decl. Ex. 32, Comment of the State Capital Post Conviction Public Defender, *In the Matter of Amended Sua Sponte Petition to Amend Rule 6.8(a) and (c), Arizona Rules of Criminal Procedure*, No. R-09-0033 (Ariz. May 19, 2010), at 3-5. And, more practically speaking, a postconviction lawyer must have the experience to put together the right team of mitigation specialists, experts, and investigators to gather the evidence needed to raise those claims. *See* 2003 ABA Guidelines 10.4 (requiring counsel to assemble a team that includes, at minimum, co-counsel, a mitigation specialist, a fact investigator, and a paralegal); Armstrong Decl. at ¶ 23; Phalen Decl. at ¶¶ 48, 64; Gorman Decl. at ¶¶ 22-23; Maher Decl. at ¶ 23 ; *see also supra* 12-14.

In the words of the former director of the ABA Death Penalty Representation Project, who has extensive knowledge of Arizona’s appointment system, “it is essential that appointed capital post-conviction counsel have actual and meaningful post-conviction experience. Lawyers who have experience in other areas of the law, or with other stages of capital proceedings, will not have the experience and skills necessary for competent post-conviction representation. Simply put, death penalty cases are not the kinds of cases that are appropriate for learning on the job, and a prisoner’s poverty should never be the reason for the appointment of counsel who are not up for the job. Poor people are not training wheels for inexperienced lawyers, and courts should not appoint inexperienced counsel to cases where the stakes are literally life and death.” Maher Decl. at ¶ 20; *see also* Kimerer Decl. at ¶ 28 (“In my habeas practice, I have repeatedly seen state postconviction attorneys fail to raise and exhaust potentially meritorious issues.”).

These concerns are no mere abstractions. Indeed, they were all too real for Arizona death-row prisoners Daniel Cook and Scott Clabourne. At Cook’s clemency proceeding before his execution, Michael Terribile, a well-respected Arizona capital trial attorney, explained how his inexperience with postconviction review and federal habeas law led to a failure to preserve important constitutional claims, including ineffective assistance of counsel claims and claims of judicial bias. Moulton Decl. Ex. 577, Declaration of Michael Terribile, Mar. 30, 2009, at ¶¶ 6-8. David Darby, meanwhile, acknowledged a similar failure in his postconviction representation of Scott Clabourne. Clabourne was Darby’s first postconviction case. Darby Decl. at ¶ 9. Darby failed to hire a mitigation specialist, did not try to obtain

co-counsel, did not conduct a “proper investigation,” and repeatedly filed petitions for postconviction review that were procedurally improper. Darby Decl. at ¶¶ 10, 12-13; *see also* Meyer Decl. Ex. 266, Minute Entry Denying Postconviction Relief, *State v. Clabourne*, No. CR-06824 (Ariz. Super. Ct. Dec. 12, 2002), at 2 (“Rule 32.5 of the Arizona Rules of Criminal Procedure requires that a petitioner include all grounds for relief in his petition, and certify that he has done so. Despite the unambiguous mandate of the rule, this Court has yet to receive a certification meeting the requirements of the rule.”). Darby now recognizes that he lacked the experience necessary to competently represent his client:

At the time, I had no postconviction experience. I only had trial experience. Frankly, I did not know what I was doing as a postconviction lawyer, and my prior experience with trial cases was woefully inadequate to prepare me for the unique complexities of a capital postconviction proceeding. As a result, I was significantly unprepared to identify, investigate, and present possible meritorious claims in a petition for postconviction relief. In retrospect, there are many things I would have done differently to conduct a proper investigation and prepare the necessary claims. ...

I attempted to overcome my shortcomings in experience through hard work and talking with other attorneys. But, evaluating my performance with the benefit of hindsight, my lack of specific postconviction experience significantly affected the quality of my representation.

Darby Decl. at ¶¶ 10-11.

- b) To increase the pool of attorneys eligible for appointment, Arizona removed Rule 6.8(c)’s postconviction experience requirement, creating an appointment system that the Department has already branded inadequate.

In 2011, Arizona removed the requirement of postconviction experience from Rule 6.8(c) and allowed felony experience to serve as a proxy. The result is that an attorney can now qualify for appointment under Rule 6.8(c) without *any* capital or postconviction experience. *Supra* § VI(F) (providing examples of attorneys who qualify under Rule 6.8(c)); Meyer Decl. Ex. 32, Comment of the State Capital Post Conviction Public Defender, *In the Matter of Amended Sua Sponte Petition to Amend Rule 6.8(a) and (c), Arizona Rules of Criminal Procedure*, No. R-09-0033 (Ariz. May 19, 2010), at 3 (“The proposal permits counsel with no post-conviction experience to be appointed in a capital post-conviction case so long as she has the requisite number of appeals and trials. An attorney with no post conviction experience should not be appointed to a capital post conviction case.”); Lieberman Decl. at ¶ 32 (“In my informed opinion, it is obvious that to be qualified to undertake a capital postconviction case, one must have actually handled a

postconviction representation in the past.”); Armstrong Decl. at ¶ 25; Phalen Decl. at ¶¶ 47-49; Gorman Decl. at ¶¶ 15-16; Hammond Decl. at ¶ 53; Maher Decl. at ¶ 20; Darby Decl. at ¶¶ 10-16.

The Department has already confirmed the inadequacy of Arizona’s post-2011 competency standards. In drafting the regulations, the Department unequivocally rejected an approach that allows for felony litigation experience to substitute for postconviction experience. An earlier version of the proposed regulations had allowed a state-appointment mechanism to qualify as presumptively adequate if it required counsel to possess “three years of felony litigation experience, without specification of the stage or stages of litigation at which the experience was obtained.” 78 Fed. Reg. 58,169. The Department, however, agreed with the criticism that “postconviction litigation experience would be a better measure of competency for State postconviction proceedings than general felony litigation experience because of the difficult and unique demands that postconviction law and procedure place on attorneys who litigate those cases.” 78 Fed. Reg. 58,169.

As noted in the regulations themselves, that conclusion is consistent with the pre-PATRIOT Act holdings of courts agreeing that postconviction experience is critical to assuring competent representation in postconviction proceedings. *See* 78 Fed. Reg. 58,169 (citing *Colvin-El v. Nuth*, No. Civ.A. AW 97-2520, 1998 WL 386403, at \*6 (D. Md. July 6, 1998)). “Given the extraordinarily complex body of law and procedure unique to postconviction review, an attorney must, at minimum, have some experience in that area before he or she is deemed ‘competent.’” *Colvin-El*, WL 386403, at \*6; *see Wright v. Angelone*, 944 F. Supp. 460, 466-67 (E.D. Va. 1996) (finding Virginia competency standards “grossly inadequate” because they required neither habeas experience nor capital experience, and concluding that “[a] state cannot satisfy [Chapter 154] unless the state imposes binding or mandatory standards of competency, and requires counsel to have experience and demonstrated competence in bringing habeas petitions”); *Austin v. Bell*, 927 F. Supp. 1058, 1062 (D. Tenn. 1996) (concluding that Tennessee’s appointment mechanism failed because it merely required an attorney to be competent and licensed in the state); *Hill v. Butterworth*, 170 F.R.D. 509, 520-21 (N.D. Fla. 1997) (noting deficiencies in Florida’s competency standards and explaining that those deficiencies “become particularly evident when compared to the American Bar Association’s guidelines for postconviction counsel”); *see also* Casey C. Kannenberg, *Wading Through the Morass of Modern Federal Habeas Review of State Capital Prisoners’ Claims*, 28 *Quinnipiac L. Rev.* 107, 130-38 (2009) (cataloging courts that have rejected state-appointment schemes on the ground that those schemes failed to implement adequate competency safeguards).

Similarly, courts that have interpreted 18 U.S.C. § 3599(d), which sets out the requirements for federal capital defense appointments, have agreed that a postconviction lawyer must have actual postconviction experience before she

possesses the requisite “background, knowledge, or experience” for an appointment. *See, e.g., Stopher v. Simpson*, No. 3:07MC-22-H, 2007 WL 4300616, at \*2 (W.D. Ky. Dec. 4, 2007) (focusing on attorneys’ postconviction training and experience in concluding that they had sufficient “background, knowledge, or experience” to serve as habeas counsel for capital defendants).

As the Final Rule affirms, such prior judicial interpretations “remain[] generally informative” when it comes to construing Chapter 154’s requirements. 78 Fed. Reg. 58,164; *see also, e.g.*, 78 Fed. Reg. 58,165-66 (citing prior case law interpreting the requirement that counsel be appointed in a timely manner). Further, the widely held view of postconviction specialists is that “there is little time available for inexperienced counsel to ‘learn the ropes’ [in postconviction proceedings], and no safety net if they fail.” Meyer Decl. Ex. 170, Gould & Greenman, *supra*, at 88.<sup>27</sup> Therefore, “for a state to satisfy the competency standard under 28 U.S.C. § 2261(b), the mechanism must provide a detailed structure, without ambiguity and without unfettered discretion in a decision-maker, that demands counsel to have explicit experience in collateral proceedings.” Cristina Stummer, *To Be or Not to Be: Opt-in Status Under the Antiterrorism and Effective Death*, 25 Vt. L. Rev. 603, 630 (2001).

Consistent with that commonsense conclusion, the regulations approvingly detail how “several States have also incorporated this guidance into their appointment standards” and now require postconviction experience prior to appointment. 78 Fed. Reg. 58,169 (citing La. Admin. Code tit. 22, 915(D)(1)(e)(i) (“requiring that qualified postconviction lead counsel shall ‘have at least five years of criminal postconviction litigation experience’”); Miss. R. App. P. 22(d)(5) (“generally requiring prior experience in at least one postconviction proceeding for appointment”); Mo. Ann. Stat. § 547.370(2)(3) (“requiring at least one of two appointed counsel to have ‘participated as counsel or co-counsel to final judgment in at least five postconviction motions involving class A felonies in either state or federal trial courts’”)).

And if there were any lingering doubt, Arizona experts themselves agree that postconviction experience is critical for competent representation in state postconviction proceedings, particularly given the web of complex and often opaque Arizona procedural rules that attorneys must be fluent in or risk defaulting claims in state court (and therefore also failing to exhaust them for federal habeas review).

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<sup>27</sup> Gould & Greenman recommend that “post-conviction lawyers for federal death penalty cases should be selected based on an individualized assessment of the requirements of the case, the stage of the litigation, and the defendant. Habeas corpus practice is a complex subspecialty of capital representation. A lawyer qualified to be learned counsel in a federal capital trial or on appeal will not necessarily have such expertise.” Meyer Decl. Ex. 170, Gould & Greenman, *supra*, at 96.

See Phalen Decl. at ¶¶ 47-49; Armstrong Decl. at ¶ 24-25; Hammond Decl. at ¶¶ 53-54; Darby Decl. at ¶¶ 10-16; Maher Decl. at ¶ 20; Gorman Decl. at ¶ 15; Lieberman Decl. at ¶ 32; Kimerer Decl. at ¶ 23. As one veteran practitioner has cogently observed regarding Arizona practice specifically:

PCR practice is *sui generis*; it requires a skill set that is not intuitive, that is not obvious. In fact, the basket of tasks that a PCR lawyer must complete is probably larger than that of a lawyer in any other stage of a capital case. And, practically speaking, a competent PCR lawyer must be experienced enough to assemble a deep and talented team of experts, mitigation specialists, and co-counsel.

At the outset, a PCR attorney must have an encyclopedic understanding of the relevant state rules. Some of the most important provisions of Arizona Rule of Criminal Procedure 32 are buried in lengthy paragraphs, and the practitioner must have a nuanced understanding of them. PCR counsel must also possess a facile and quick understanding of the rules of preclusion, and have an arsenal of defenses against the state's allegations of preclusion.

Phalen Decl. at ¶¶ 48-49.

Of course, as the regulations' second competency benchmark establishes, it is possible to conceive of a qualifying state-appointment regime that requires fewer than three years of postconviction experience but also implements a robust training and monitoring regime while requiring extensive capital trial and direct appellate experience. Arizona is not that state. Instead, Arizona (1) requires *neither* postconviction nor capital experience; (2) has no formalized system to monitor the performance of appointed attorneys, or even to verify attorney qualifications or attendance at continuing education programs; (3) institutes no specialized training regime for appointed attorneys; and (4) does not provide for the exclusion of attorneys who have failed to effectively represent their clients in postconviction proceedings. Equally telling, whereas the first presumptive benchmark requires three years of postconviction experience, Arizona's mechanism only requires three years of criminal litigation experience *total* before an attorney may be qualified for a capital postconviction appointment. Ariz. R. Crim. Proc. 6.8(a). In sum, a critical failure of Arizona's proffered mechanism is that it imposes no requirement that appointed attorneys have any postconviction experience.

2. *Arizona has not created alternative safeguards that compensate for the failure to require postconviction experience.*

One potential way that Arizona's appointment mechanism could have assured an appropriate level of attorney proficiency was through the screening committee that the Supreme Court first established in 1996 to examine and

recommend applicants for postconviction appointment. See Meyer Decl. Ex. 297, Administrative Order, *In re Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases*, No. 96-63 (Ariz. Dec. 27, 1996). The Committee, comprised of judges and respected practitioners, performed a quantitative and qualitative assessment of each applicant—a process that included speaking with references, scrutinizing the quality of prior work, and considering the reputation of the applicant in the relevant legal community. Meyer Decl. Ex. 18, Letter from Michael D. Ryan, Judge, Ariz. Ct. App., to Thomas A. Zlaket, Chief Justice, Ariz. Sup. Ct. (June 10, 1997); Hammond Decl. at ¶¶ 36-37, 56. And the standards that the Committee held applicants to were high. As described above, of the first 16 attorneys to submit applications, the committee deemed four qualified for first-chair appointment.<sup>28</sup> See Meyer Decl. Ex. 18, Letter from Michael D. Ryan, Judge, Ariz.

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<sup>28</sup> Attorney Harriette Levitt is an example of an attorney who qualified for appointment under Rule 6.8(c) and who was excluded from appointments as the result of the screening committee's work. Levitt had extensive experience in capital trial, appellate, and postconviction representations, and she met the purely quantitative criteria of Rule 6.8(c). Moulton Decl. Ex. 529, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Harriette P. Levitt to Donna Hallam, Staff Att'y, Ariz. Sup. Ct. (July 16, 1998). Levitt's history of poor performance, however, resulted in the screening committee recommending against her appointment. In a prior case, Levitt had submitted a capital postconviction review petition that the Ninth Circuit later characterized as "cursory." *Stokley v. Ryan*, 659 F.3d 802, 810 (9th Cir. 2011). Stokely was later executed. In another capital postconviction case, Levitt filed a petition that was barely 13-pages long and contained no extra-record evidence. Meyer Decl. Ex. 218, Petition for Post-Conviction Relief, *State v. Walden*, No. CR-34752, (Ariz. Super. Ct. Jan. 9, 1998). Despite her performance, the Supreme Court appointed Levitt in 1998 to represent another death-row prisoner in postconviction proceedings—resulting in another cursory petition. Moulton Decl. Ex. 244, Orders, *Arizona v. Kemp*, No. CR-93-0332-AP (Ariz. July 14, 1997, Aug. 27, 1998, and Sept. 11, 1998); Meyer Decl. Ex. 66, Petition for Post-Conviction Relief, *State v. Kemp, Jr.*, No. CR-38826 (Ariz. Super Ct. Feb. 12, 1999). Kemp was later executed.

After these postconviction appointments, the Committee on Appointment of Counsel for Indigent Defendants in Capital Cases found Levitt technically qualified under Rule 6.8 and Arizona Revised Statute § 13-4041, but the Committee agreed by consensus that Levitt should not be appointed in a future case, with several committee members "express[ing] strong opinions" that she should not be appointed based on their evaluations of her work. Meyer Decl. Ex. 61, Letter from Michael D. Ryan, Judge, Ariz. Ct. App., to Thomas A. Zlaket, Chief Justice, Ariz. Sup. Ct. (Oct. 27, 1998), at 3. The Committee recommended that the Supreme Court not appoint Levitt even when no other qualified counsel are available, stating that despite her technical qualifications, the "Committee doesn't recommend her in any way."

Ct. App., to Thomas A. Zlaket, Chief Justice, Ariz. Sup. Ct. (June 10, 1997), at 1-2 (describing the committee's early work and recommendations).

Yet the Supreme Court routinely ignored Committee recommendations, and the Supreme Court disbanded the Committee altogether in 2001. *See supra* 33; Meyer Decl. Ex. 44, Administrative Order, *In the Matter of Disbanding of the Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases*, No. 2001-55 (Ariz. May 9, 2001). In its place, a Supreme Court staff attorney processes attorney applications and forwards them to the Supreme Court justices for appointment decisions and orders—without any apparent standardized institutional vetting of an applicant's qualifications or any qualitative review of past work. *See* Phalen Decl. at ¶¶ 4, 10; Gorman Decl. at ¶ 21; Darby Decl. at ¶¶ 18, 20, 22.

That system has been repeatedly criticized, and the need for an independent screening or advisory committee has been repeatedly raised. *See* Maher Decl. at ¶ 21 (“[A] private-appointment model can assure the provision of competent counsel when the appointment decisions are made by a body or office that is independent from the state judiciary or political processes. Such an independent body must have full responsibility for making decisions about who is qualified, providing funding, investigating complaints about attorneys, and removing ineffective lawyers from the list of those eligible for future appointments.”); Chapman Decl. at ¶¶ 17-18; Hammond Decl. at ¶¶ 55-58; Phalen Decl. at ¶ 45. As Arizona's former head of the state postconviction public defender's office has explained:

The Supreme Court used to maintain a panel to qualitatively assess applications from lawyers who sought appointments to these cases. That panel should exist under the current rule, but does not . . . The number of trials, appeals, or hearings [an attorney has conducted] does not make an attorney qualified, nor does it inform anyone whether the attorney is dedicated to or has a history of providing high quality legal services as required by Rule 6.8(c) and the ABA Guidelines.

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Meyer Decl. Ex. 62, Notes, *Comm. on the Appointment of Counsel for Indigent Defendants in Capital Cases* (Sept. 25, 1998) (emphasis in original). The Arizona Supreme Court nevertheless *did not remove Levitt from cases she was handling at the time*. And, approximately two weeks after the Committee recommended against her appointment, the Pima County Superior Court appointed Levitt as advisory counsel to Don Miller in his postconviction proceedings. *See* Moulton Decl. Ex. 290, Minute Entry, *State v. Miller*, No. CR-38383 (Ariz. Super. Ct. Nov. 13, 1998). And in August 2017, the Yuma County Office of the Conflict Administrator appointed Levitt to represent a capital defendant on direct review and notified the Arizona Supreme Court. *See* Meyer Decl. Ex. 269, Notice of Appointment of Counsel, *State v. Strong*, No. S1400CR201400685 (Ariz. Super. Ct. Aug. 31, 2017).

Meyer Decl. Ex. 32, Comment of the State Capital Post Conviction Public Defender, *In the Matter of Amended Sua Sponte Petition to Amend Rule 6.8(a) and (c), Arizona Rules of Criminal Procedure*, No. R-09-0033 (Ariz. May 19, 2010), at 5; *see also* Lieberman Decl. at ¶ 18 (“[T]he Supreme Court’s approach appears to focus primarily on whether an attorney’s application meets quantitative benchmarks, such as the raw number of cases the attorney has handled. That approach, however, neglects a more important qualitative evaluation that comprehensively examines the quality of the applicant’s prior work.”). “Rule 6.8’s emphasis on quantity over quality has resulted in the Arizona Supreme Court regularly appointing lawyers who have represented a high volume of clients, without regard to their professional reputations, their quality of work, or the outcomes they have achieved.” Armstrong Decl. at ¶ 29.

The 2003 ABA Guidelines similarly counsel that “lawyer selection should not be performed by the judiciary or elected officials.” 2003 ABA Guidelines 3.1. Guideline 3.1(E) specifies that an independent committee or agency should be tasked to “(1) recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases; (2) draft and periodically publish rosters of certified attorneys; (3) draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases; (4) assign the attorneys who will represent the defendant at each stage of every case; (5) monitor the performance of all attorneys providing representation in capital proceedings; (6) periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines; (7) conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and (8) investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.”

Arizona’s mechanism for capital postconviction appointments does none of those things. *See e.g.*, Meyer Decl. Ex. 45, Email from Donna Hallam, Staff Att’y, Ariz. Sup. Ct., to Deirdre Gorman (Feb. 7, 2012); Meyer Decl. Ex. 46, Email from Donna Hallam, Staff Att’y, Ariz. Sup. Ct. (July 26, 2011). On February 16, 2017, counsel for FDO-AZ filed a public records request with the Arizona Supreme Court, requesting all public records related to the application, screening, and appointment process for capital postconviction counsel. *See* Meyer Decl. Ex. 41, Letter from Paul David Meyer, Att’y, Orrick, Herrington & Sutcliffe LLP, to Custodian of Records, Ariz. Sup. Ct. (Feb. 16, 2017). In response to counsel’s request, the Arizona Supreme Court did not produce any public records indicating that it has:

- Any written, formalized process or guidelines for confirming the qualifications of counsel before they are added to the roster of those qualified for postconviction appointment;<sup>29</sup>
- Any written, formalized process or guidelines for the monitoring of the performance of counsel or the handling of complaints;
- Any written guidelines for what constitutes “exceptional circumstances” permitting an appointment under Rule 6.8(d);
- Any written guidelines establishing the role of associated counsel described in Rule 6.8(d); and
- Any program for conducting, sponsoring, or approving training for postconviction attorneys since January 2000.

See Meyer Decl. Ex. 41, Letter from Paul David Meyer, Att’y, Orrick, Herrington & Sutcliffe LLP, to Custodian of Records, Ariz. Sup. Ct. (Feb. 16, 2017).<sup>30</sup>

Unlike capital postconviction appointments, capital trial and direct appeal appointments are made directly by individual Arizona counties. Maricopa County uses an independent committee—the Capital Defense Review Committee (CDRC)—to conduct a detailed objective and subjective review of every application for capital trial and direct appeal appointments. *See supra* 42. The CDRC was established in 2012 and “addressed concerns with the number of unqualified and, at times, incompetent lawyers who were being appointed to represent capital defendants at trial.” Chapman Decl. at ¶ 6. Maricopa County Superior Court Administrative Order No. 2014-101 specifies that the CDRC must be made up of individuals who “have substantial experience in the defense of capital cases or experience presiding over capital trials”—including the director of the Office of Public Defender Services, a Maricopa County Superior Court judge, and four members of the criminal defense

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<sup>29</sup> In the absence of any formalized screening process, a single staff attorney and a retired superior court judge currently process applicants for appointment. *See* Meyer Decl. Ex. 39, Capital Case Oversight Comm., *Draft Minutes* (June 30, 2017), at 3. That evaluation, however, is not subject to any written guidelines or standards.

<sup>30</sup> To the extent those records exist but were not disclosed, Arizona’s Public Records Law (Ariz. Rev. Stat. §§ 39-121 to 39-161) required the custodian of records furnish an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld from the requesting person. *See* Ariz. Rev. Stat. § 39-121.01(D)(2). The custodian did not provide any index or other indication that additional records exist but were withheld.

bar. *See* Meyer Decl. Ex. 47, Administrative Order, *In re Adopting a Plan for Review of Appointed Def. Counsel*, No. 2014-101 (Ariz. Super. Ct. Aug. 6, 2014), at 3.

The CDRC's rigorous approach to screening applicants is spelled out in the administrative order establishing it and the order that now governs it. *See* Meyer Decl. Ex. 47, Administrative Order, *In re Adopting a Plan for Review of Appointed Def. Counsel*, No. 2014-101 (Ariz. Super. Ct. Aug. 6, 2014); Meyer Decl. 270, Guidelines for Operation of Capital Defense Review Committee Established by Administration Order 2012-118, Ariz. Super. Ct., Maricopa Cty. (undated); Chapman Decl. at ¶¶ 7-15. "Early on, the [CDRC] recognized that it is impossible to determine the qualifications and competency of an attorney from the face of his or her paper application, and that a deeper review is essential." Chapman Decl. at ¶ 9. To that end, an individual CDRC member conducts a detailed initial review of an attorney applicant—including reviewing past work product and writing samples, speaking with every reference listed, and speaking with judges that the attorney has appeared before, along with mitigation specialists and co-counsel that the attorney has worked with. Chapman Decl. at ¶ 10. The CDRC also requests and views jail visitation records "to verify that the attorney has been in consistent communication with his or her clients." Chapman Decl. at ¶ 10.

That "initial review normally takes dozens of hours over several weeks." Chapman Decl. at ¶ 11. The CDRC then conducts a detailed in-person interview with the applicant, and it deliberates extensively before making a recommendation. Chapman Decl. at ¶¶ 12-13; Lieberman Decl. at ¶ 26.

The work of the CDRC has helped assure the provision of competent capital trial and appellate counsel in Maricopa County "by providing a rigorous, comprehensive, and consistent process to screen applicants." Chapman Decl. at ¶ 16; Maher Decl. at ¶ 17; Hammond Decl. at ¶ 57. And the CDRC has at least twice offered to perform a similar screening of applicants for capital postconviction appointments statewide. Chapman Decl. at ¶ 18; Lieberman Decl. at ¶¶ 29-30; Hammond Decl. at ¶ 58. The Supreme Court has refused that offer—most recently in June 2017—and has made no modifications to its screening and monitoring practices. *See* Meyer Decl. Ex. 39, Capital Case Oversight Comm., *Draft Minutes* (June 30, 2017), at 3; Chapman Decl. at ¶ 17 ("[I]t is my informed belief that the Arizona Supreme Court's system of screening applicants for capital postconviction appointments is substantially less standardized and comprehensive than the Committee's established procedures for evaluating applicants for capital trial and appellate appointments."); Hammond Decl. at ¶ 58; *see also* Phalen Decl. at ¶ 45 (describing a similar failed initiative to institute an independent screening committee).

Given the ad hoc nature of Arizona's postconviction appointment practices—and the lack of any independent monitoring or training—the results have been entirely predictable. *See* Kimerer Decl. at ¶ 30 ("I believe [problems with the

competency of counsel] can be fairly traced to the longstanding shortcomings in screening and monitoring applicants for capital postconviction appointment.”). As the examples below show, at least seven attorneys whose applications have been rejected by the CDRC for capital trial or appellate appointments have been appointed by the Supreme Court in capital postconviction proceedings. Those attorneys are:

- Randall Craig (rejected by CDRC in 2014<sup>31</sup>; appointed as capital postconviction counsel in 2011, 2013, and 2015, and remains on Supreme Court roster of qualified attorneys);
- Ken Countryman (rejected by CDRC in 2014<sup>32</sup>; appointed as capital postconviction counsel in 2010 and 2012, and remains on Supreme Court roster of qualified attorneys);
- Steve Duncan (rejected by CDRC in 2014<sup>33</sup>; appointed as capital postconviction counsel in 2010, 2012, and 2013, and remains on Supreme Court roster of qualified attorneys);
- Nicole Farnum (rejected by CDRC in 2015<sup>34</sup>; appointed as capital postconviction counsel in 2010, 2012, and 2014, and remains on Supreme Court roster of qualified attorneys);
- Kerrie Droban (rejected by CDRC in 2014<sup>35</sup>; appointed as capital postconviction counsel in 2006, 2008, 2009, 2011, 2012, and 2014, and remains on Supreme Court roster of qualified attorneys);
- Nathaniel Carr (rejected by CDRC in 2013<sup>36</sup>; appointed as capital postconviction counsel in 2011);
- Michael Dew (rejected by CDRC in 2013<sup>37</sup>; appointed as capital postconviction counsel in 2009 and remains on Supreme Court roster of qualified attorneys).

See Attachment B (Chart of Postconviction Appointments); Moulton Decl. Ex. 487, list of approved attorneys for postconviction appointments; *see also* Chapman Decl.

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<sup>31</sup> Meyer Decl. Ex. 271, Capital Def. Review Comm., *Meeting Minutes* (2014), at 3.

<sup>32</sup> Meyer Decl. Ex. 271, Capital Def. Review Comm., *Meeting Minutes* (2014), at 6.

<sup>33</sup> Meyer Decl. Ex. 271, Capital Def. Review Comm., *Meeting Minutes* (2014), at 4.

<sup>34</sup> Meyer Decl. Ex. 272, Capital Def. Review Comm., *Meeting Minutes* (2015), at 3.

<sup>35</sup> Meyer Decl. Ex. 271, Capital Def. Review Comm., *Meeting Minutes* (2014), at 4.

<sup>36</sup> Meyer Decl. Ex. 274, Capital Def. Review Comm., *Meeting Minutes* (2013), at 1.

<sup>37</sup> Meyer Decl. Ex. 274, Capital Def. Review Comm., *Meeting Minutes* (2013), at 1.

at ¶ 17; Lieberman Decl. at ¶ 28. As detailed below, *infra* § VIII(D), many of those attorneys have performed deficiently in their capital postconviction representations.

3. *The Arizona Supreme Court has failed to enforce the appointment requirements that exist under Rule 6.8(c), and has failed to monitor appointed attorneys.*

The Arizona Supreme Court's failure to enforce the competency requirements and monitor attorneys' work also prevents Arizona's mechanism from functionally meeting or exceeding the standards established by the regulatory benchmarks. For instance, the Arizona Supreme Court has repeatedly failed to enforce the requirement of Rule 6.8(c)(2) that an appointed attorney shall "have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or education programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense." When an attorney does not meet that requirement, the Supreme Court has nonetheless appointed him or her with the understanding that he or she will complete the requirement *after the appointment date*—effectively providing a capital defendant with an appointed attorney who Arizona's own regulations do not deem qualified at the time of appointment. *See* Meyer Decl. Ex. 219, Email from Donna Hallam, Staff Att'y, Ariz. Sup. Ct., to Mike Meehan, postconviction relief counsel (Apr. 24, 2013) (approving Mike Meehan's application for appointment while "require[ing] that within six months after the appointment, you complete 'at least six hours of relevant training or educational programs in the area of capital defense'").

In another case, the Court informed an attorney that his appointment application would be approved after he completed the Rule 6.8 training requirement, but the Court then failed to verify the attorney's compliance. Meyer Decl. Ex. 48, Email from Donna Hallam, Staff Att'y, Ariz. Sup. Ct., to Richard Parrish, Att'y (Sept. 1, 2011). In that case, the Court specifically proposed that the attorney attend a capital postconviction seminar offered by FDO-AZ. *Id.* After the attorney then told the Court that he had completed the training, the Court began to appoint him to represent postconviction defendants, *without verifying his attendance*. Months later, after the attorney's deficient performance prompted a state judge to remove him from a postconviction proceeding (*see infra* 111), it came to light that the attorney had not completed the training. Meyer Decl. Ex. 49, Letter from Dale Baich, Supervisor Capital Habeas Unit, Office of the Fed. Pub. Def., to Ron Reinstein, Judicial Consultant, Ariz. Sup. Ct. (May 7, 2012); Meyer Decl. Ex. 50, Declaration of David Euchner (Apr. 9, 2012); Meyer Decl. Ex. 51, Declaration of Jennifer Y. Garcia (Apr. 27, 2012).

In addition, as the staff attorney in charge of maintaining the roster of appointment-eligible counsel has acknowledged, the Arizona Supreme Court "do[es] not take an attorney off the list until he or she specifically so requests by letter or

phone call.” Moulton Decl. Ex. 487 at 9, Email from Donna Hallam, Staff Att’y, Ariz. Sup. Ct., (Oct. 20, 2008). This creates problems beyond failing to ensure that attorneys have completed the yearly CLE requirements and have the required experience within the time periods mandated by Rule 6.8. Attorneys have been allowed to remain on the roster even after being disciplined by the Arizona State Bar. For instance, Stephen Duncan was suspended for practicing law for 60 days and placed on probation for a year. *Infra* 90. The conduct occurred during the time that he represented one capital postconviction client, and the suspension occurred during the time that he represented another capital postconviction client. *Id.* Yet Duncan was not removed from the cases, and he remains on the list of qualified counsel eligible to receive a postconviction appointment. *Infra* 90-91. Similarly, David Lipartito was censured and placed on probation for one year on November 27, 2006, but he later (after the probationary period) appeared on the list of qualified counsel to receive a postconviction appointment. Meyer Decl. Ex. 275, *Disposition Summary*, David E. Lipartito, S. Ct. No. SB-06-0164-D (Nov. 27, 2006); Moulton Decl. Ex. 487, 2008 list of approved attorneys. *See also* Meyer Decl. Ex. 276, Email from Donna Hallam, Staff Att’y, Ariz. S. Ct., to Patrick Coppen, Att’y (March 15, 2011) (noting that the Supreme Court had decided “not to grant or deny your application” and would “reconsider your application after your probation in State Bar matter 08-0020 has concluded, and after you have completed the six hours of CLE in the area of capital defense pursuant to Rule 6.8(c)(3)”; Meyer Decl. Ex. 277, *Disposition Summary*, Patrick C. Coppen, S. Ct. No. SB-10-0028-D (April 2, 2010).

The end result is that Arizona may appoint attorneys with only three years of criminal law experience, with no capital or postconviction experience, with no proper training, and who may have performed woefully in prior felony cases. Such an appointment mechanism is a far cry from what Congress intended in enacting Chapter 154, from what the Powell Report first envisioned, and from what the Department has established as adequate in its regulations. Arizona’s request for certification fails to meet applicable requirements, and it should be denied.

### **C. Rule 6.8(d) destroys any protections that Rule 6.8(c) provides.**

Even if Rule 6.8(c) included standards that met Chapter 154’s requirements, which it does not, Arizona’s habitual use of Rule 6.8(d) to evade those standards in a wholesale manner would be an independent ground to deny certification. Since 1998, *nearly 25% of appointed attorneys* were appointed under Rule 6.8(d). This situation has not improved in recent years: Since 2011, *30% of appointed attorneys* were appointed under Rule 6.8(d).

“The requirement of having ‘established’ a mechanism consistent with chapter 154 presupposes that the State has adopted *and implemented* standards consistent with the chapter’s requirements concerning counsel appointment, competency, compensation, and expenses.” 78 Fed. Reg. 58,162 (emphasis added). As courts have emphasized, “the mere promulgation of a ‘mechanism’ is not

sufficient to permit a state to invoke the capital-specific provisions of AEDPA. ... [A] state must not only enact a ‘mechanism’ and standards for postconviction review counsel, but those mechanisms and standards must in fact be complied with before the state may invoke the time limitations of 28 U.S.C. § 2263.” *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000); *see also Baker v. Corcoran*, 220 F.3d 276, 286-87 (4th Cir. 2000); *Ashmus v. Woodford*, 202 F.3d 1160, 1167-68 (9th Cir. 2000); *Wright*, 944 F. Supp. at 467; *Booth v. Maryland*, 940 F. Supp. 849, 854 (D. Md. 1996), *vacated on other grounds*, 112 F.3d 139 (4th Cir. 1997). That conclusion is “consistent with common sense: It would be an astounding proposition if a state could benefit from the capital-specific provisions of AEDPA by enacting, but not following, procedures promulgated pursuant to 28 U.S.C. § 2261.” *Catoe*, 221 F.3d at 605; *see also* Kannenberg, *supra*, at 143-44.

In short, any competency requirements must actually be imposed and be “binding and mandatory” before a state may use them to take advantage of Chapter 154’s provisions to dramatically curtail federal habeas review. *Ashmus*, 202 F.3d at 1167; *see also Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on reh’g on unrelated grounds*, 105 F.3d 209 (5th Cir. 1997) (rejecting Texas’s appointment system because it provided discretion to appoint counsel that did not meet “explicit standards of competency”). Therefore, even if an adequate mechanism is said to exist on paper, the state will still have failed to establish any mechanism if it does not actually implement the mechanism’s elements. 78 Fed. Reg. 58,162.

Arizona’s claimed mechanism presents precisely such a case. On its face, Rule 6.8(d) is one of severely circumscribed application—allowing the Arizona Supreme Court to appoint counsel who does not meet Rule 6.8(c) only in “exceptional circumstances” when the Court “conclude[s] that the attorney’s ability significantly exceeds the standards set forth in this rule and that the attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule.”

As such, at least by its plain language, one would not think Rule 6.8(d) was intended to provide the Supreme Court with wide discretion to appoint unqualified counsel whenever it cannot find qualified counsel willing to accept a case at the maximum compensation rate of \$100 per hour. Yet that is precisely how the Rule has been used. And unabashedly so. The Supreme Court staff attorney responsible for administering the list of attorneys qualified for appointment has termed Rule 6.8(d) “an exceptions clause for counsel who don’t meet all the technical requirements” of Rule 6.8(c). Meyer Decl. Ex. 52, Email from Donna Hallam, Staff Att’y, Ariz. Sup. Ct., to Deirdre Gorman (Feb. 07, 2012). And in both its formal appointment orders and its informal emails to counsel notifying them of appointments under Rule 6.8(d), the Supreme Court has consistently failed to make any specific findings of “exceptional circumstances” or any findings that the qualifications of counsel “significantly exceed[]” the requirements of Rule 6.8(c).

Instead, the Court has simply used Rule 6.8(d) to vest it with unchanneled discretion to appoint lawyers who do not otherwise qualify for appointment. *See, e.g., Meyer Decl. Ex. 53, Email from Donna Hallam, Staff Att’y, Ariz. Sup. Ct., to Jennifer Prescott (Jan. 10, 2011).*

The data bears this out. Of the 109 prisoners who were appointed postconviction counsel since 1998, 27 attorneys (25%) were appointed pursuant to Rule 6.8(d). And since the disbandment of the state public defender’s office in 2011, 17 of 56 appointments (30%) have been pursuant to Rule 6.8(d). And, as noted, those appointments have apparently been made without any of the requisite findings that Rule 6.8(d) requires.

A review of the relevant applications for appointment confirms that most attorneys appointed under Rule 6.8(d) do not have any special experience that could be said to “exceed” the Rule 6.8(c) competency requirements. Each of the following attorneys were appointed under Rule 6.8(d):

- Stephen Duncan had no postconviction experience, capital or otherwise, and no capital appeals experience. Moulton Decl. Ex. 510, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Stephen L. Duncan to Donna Hallam, Staff Att’y, Ariz. Sup. Ct. (Aug. 30, 2010).
- Christian Ackerley had capital experience as a second chair in one jury trial and no capital appeal or postconviction experience. Moulton Decl. Ex. 488, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Christian C. Ackerley to Donna Hallam, Staff Att’y, Ariz. Sup. Ct. (Sept. 21, 2011).
- Tamara Brooks-Primera had no postconviction experience, capital or otherwise, and had handled only one capital appeal that was “frankly ... so old that I cannot remember the case name.” Moulton Decl. Ex. 493, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Tamara Brooks-Primera to Donna Hallam, Staff Att’y, Ariz. Sup. Ct. (July 5, 2013).
- Daphne Budge had no capital trial, appellate, or postconviction experience. Moulton Decl. Ex. 496, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Daphne Budge to Donna Hallam, Staff Att’y, Ariz. Sup. Ct. (Sept. 18, 1998).
- Randall Craig had completed four capital trials, and many felony trials, but had no experience with appeals or postconviction review. Moulton Decl. Ex. 503, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Randall J. Craig to Donna Hallam, Staff Att’y, Ariz. Sup. Ct. (Jan. 10, 2011).

- Jamie McAlister had been co-counsel on one death penalty trial and assisted at one clemency hearing, but had no other capital experience. Moulton Decl. Ex. 538, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Jamie McAlister to Donna Hallam, Staff Att’y, Ariz. Sup. Ct. (Sept. 18, 1998).

Experienced Arizona attorneys and advocates agree that the Supreme Court has used Rule 6.8(d) as an ad hoc appointment device that is subject to few if any standards and no oversight. *See* Gorman Decl. at ¶ 20 (explaining that “the Supreme Court has used Rule 6.8(d) to appoint attorneys who do not meet Rule 6.8 (c)’s requirements and who are not competent to try postconviction cases”); Phalen Decl. at ¶ 44 (“Through Rule 6.8(d), I believe the Arizona Supreme Court is dumbing down the system to make it as easy as possible to appoint unqualified lawyers, and to make it as easy as possible for associated qualified lawyers to really not have to do anything.”).

One competency safeguard that Rule 6.8(d) is supposed to provide for is the requirement that any lawyer appointed under its terms must “associate” with a lawyer qualified under Rule 6.8(c). Yet there is no requirement that the associated counsel provide meaningful, or even substantive, guidance, and the Supreme Court has not developed standards for the role of advisory counsel in assisting lead counsel. *See* Armstrong Decl. at ¶ 42 (“While the Arizona Supreme Court appoints advisory counsel pursuant to Rule 6.8(d), neither the Supreme Court nor the Superior Court has developed standards or provides any oversight of advisory counsel’s role.”). As one experienced Arizona defense attorney has explained, “[t]o this day, I don’t know what an ‘associated lawyer’ is and I do not believe that such an animal exists.” Phalen Decl. at ¶ 43; *see also* Armstrong Decl. at ¶ 42; Maynard Decl. at ¶ 19 (“I analogize the situation to that of having Michael Jordan stand on the sideline watching an amateur shoot free throws. He can offer advice, but he cannot make the shot. Capital litigation is not a training ground for the inexperienced.”). Indeed, the “association” is, by its plain meaning, an elastic term that in theory could include participating more fully in the preparation of papers and oral argument, but in actuality comes closer to the formality of merely lending one’s name to the pleadings.

In practice, associated attorneys in Arizona often have little interaction with one another, leaving the Rule 6.8(d) attorney tasked with handling a case for which he or she is too often unprepared and unqualified. For example, in *State v. Dickens*, Daphne Budge was appointed as Dickens’s postconviction counsel under Rule 6.8(d). Moulton Decl. Ex. 96, Order, *State v. Dickens*, No. CR-93-0543-AP (Ariz. Feb. 2, 1999). It was Budge’s first postconviction case, and Jess Lorona was appointed as “associate counsel.” *Id.* During the course of the postconviction proceeding, Lorona provided almost no help, and Budge asked the Supreme Court to withdraw his appointment and to appoint a new associate counsel who would assume a first-chair role. Meyer Decl. Ex. 19, Motion to Withdraw Jess Lorona as Associate Counsel and

Request for Appointment as First Chair of New Counsel Qualified Under Rule 6.8, *State v. Dickens*, No. CR 93-0543-AP (Ariz. July 6, 1999). Budge explained that Lorona provided “no meaningful assistance” and had “failed his client.” *Id.* at 3. In particular, she alleged that Lorona did not discuss any substantive issues of Dickens’s case and that her minimal contact with him consisted of six phone calls about “house-keeping matters.” *Id.* Lorona, in his reply motion, chastised Budge for an alleged lack of candor regarding “her inability to handle a case of this magnitude” and asserted that Budge should not have accepted the appointment “if she felt she was not capable” of doing so. Meyer Decl. Ex. 54, Response to Motion to Withdraw, *State v. Dickens*, No. CR-93-0543-AP (Ariz. July 14, 1999), at 2. The court ordered a hearing to resolve the matter, and eventually ordered that Budge remain lead counsel on Dickens’s case, and that she continue to associate with Lorona, as the court considered his role “solely an advisory role.” Meyer Decl. Ex. 55, Order, *State v. Dickens*, No. CR-93-0543-AP (Ariz. July 21, 1999), at 2. Thus, even when appointed postconviction counsel acknowledged the need for a more qualified and engaged associate counsel and tried to comply with Rule 6.8(d), the request was denied.

In another example of Rule 6.8(d)’s failure to require meaningful association between counsel, attorney Daniel Maynard was appointed as associate counsel for David Detrich after the Court appointed Conrad Baran as lead counsel under Rule 6.8(d). Moulton Decl. Ex. 91, Order, *State v. Detrich*, No. CR-95-0085-AP (Ariz. Feb. 8, 1999). Maynard and Baran did not know each other. Maynard Decl. at ¶ 6. One lived and worked in Flagstaff; the other in Phoenix. *Id.* And association between the attorneys was minimal. Maynard Decl. at ¶¶ 7-16 (describing Maynard’s limited interaction with Baran); Meyer Decl. Ex. 56, Petitioner’s Brief Pursuant to *Martinez v. Ryan, Detrich v. Ryan*, No. Civ-03-00229-TUC-DCB (D. Ariz. Aug. 21, 2015) (explaining Baran’s ineffective representation); Meyer Decl. Ex. 21, Letter from Conrad Baran, Att’y, to Michael D. Ryan, Judge, Ariz. Ct. App. (Feb. 15, 2001), at 3 (acknowledging that an associate at Baran’s firm, and not Maynard, “did most of the co-counsel work in this case”). Maynard reviewed the case file and wrote a memo of issues that he believed Baran should investigate and raise. Maynard Decl. at ¶ 11 (“The memo recommended the testing of certain evidence, additional avenues of investigation to explore, and numerous federal constitutional claims to be raised.”). Maynard only met with Baran once. Maynard Decl. at ¶ 9. And according to Maynard, Baran never solicited Maynard’s advice, never asked him to review drafts before filing, and did not heed Maynard’s recommendations about issues to raise or funding to request. Maynard Decl. at ¶¶ 13-16; Meyer Decl. Ex. 56, Petitioner’s Brief Pursuant to *Martinez v. Ryan, Detrich v. Ryan*, No. Civ-03-00229-TUC-DCB (D. Ariz. Aug. 21, 2015), at 22. Further, Maynard never received any guidance from the Arizona Supreme Court or others about what his role should be. Maynard Decl. at ¶ 5 (“Rule 6.8(d) does not specify the role of associated counsel, nor did the Supreme Court provide any guidance after my appointment.”). Rule 6.8(d), therefore, did little in practice to ensure that Baran’s lack of

qualifications were compensated for by the appointment of experienced associate counsel.

In yet another case, the failure of Rule 6.8(d) counsel to associate with an experienced capital postconviction attorney led subsequent counsel to withdraw the previously filed petition for postconviction relief and refile a new petition. *See* Meyer Decl. Ex. 278, Motion for Leave to Withdraw and Replace Petition for Post-Conviction Relief, *State v. Dann*, No. CR1999-003536 (Aug. 3, 2015); Meyer Decl. Ex. 279, Minute Entry, *State v. Dann*, No. CR1999-003536 (Aug. 17, 2015). In that case, Brian Dann's first postconviction attorney, Mark Tallan, "did not associate himself with a death-penalty qualified attorney and instead prepared [Dann's] petition without qualified guidance." Meyer Decl. Ex. 278, Motion for Leave to Withdraw and Replace Petition for Post-Conviction Relief, *State v. Dann*, No. CR1999-003536 (Aug. 3, 2015), at 3. Tallan later withdrew for health reasons, and the Arizona Supreme Court appointed new postconviction counsel, Matthew Newman. *Id.* After Newman reviewed Tallan's work, he "determined that he cannot endorse the work of prior counsel" and moved for permission to refile Dann's petition. *Id.* at 4. The postconviction court granted the motion to withdraw the petition filed by Tallan and replace it with a new petition for postconviction relief. Meyer Decl. Ex. 279, Minute Entry, *State v. Dann*, No. CR1999-003536 (Ariz. Super. Ct. Aug. 17, 2015), at 1.

Cases like *Detrich*, *Dann* and *Dickens* reveal that the requirements of association in Rule 6.8(d) are largely meaningless. *See* Maynard Decl. at ¶ 20 ("Rule 6.8(d) is particularly problematic because the inexperienced lawyer can simply ignore the advice of qualified counsel and make it impossible for qualified counsel to provide meaningful input in a case."); *see also* Meyer Decl. Ex. 99, Declaration of David Goldberg at ¶¶ 6-11 (Apr. 10, 2017) (discussing a failure to meaningfully associate with an attorney appointed under Rule 6.8(d)). And Arizona criminal defense experts have long recognized the need for improving Rule 6.8(d) appointments. As early as 2011, the consensus of members of the Capital Case Oversight Committee was "that improvements are needed in the appointment and training of Rule 6.8(d) counsel." Meyer Decl. Ex. 33, Capital Case Oversight Comm., *Minutes* (Oct. 5, 2011), at 2; *see also* Gorman Decl. at ¶ 20. No such improvements have taken place.<sup>38</sup>

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<sup>38</sup> Nor does Arizona require second-chair appointments in capital postconviction cases. The Arizona Supreme Court appoints only a single attorney under Rule 6.8(c), and the superior courts then decide whether to appoint a second-chair attorney. *See* Lieberman Decl. at ¶ 33. As the former Director of the State Postconviction Public Defender Office has explained: "Consistent with the American Bar Association Guidelines, appointment of a second-chair attorney must be a part of any adequate system of representation. Capital postconviction work is some of

In short, Arizona’s mechanism, via Rule 6.8(d), vests nearly unlimited discretion in the Supreme Court to appoint counsel who have no capital experience, no postconviction experience, do not meet the felony experience requirements of Rule 6.8(c), and do not meaningfully associate with an attorney who is qualified. *See* Kimerer Decl. at ¶ 27 (“[I]n Arizona there remains really no standard for the quality of attorneys engaged in postconviction work. The provisions of Rule 6.8 are incredibly broad and give the Arizona Supreme Court wide discretion to appoint attorneys who do not meet any formal criteria.”). “The requirement of competent counsel at all stages of the proceedings would be eviscerated if the decision to follow the standards were left to the discretion of a court or guideline administrator.” *Ashmus*, 202 F.3d at 1168; *see also Baker*, 220 F.3d at 286 (holding that Maryland did not qualify for Chapter 154 provisions because the state’s competency standards were not actually applied and “[c]ompetency standards are meaningless unless they are actually applied in the appointment process”). That is what has happened in Arizona.

The Department should therefore reject Arizona’s application based on the state’s use of Rule 6.8(d) to circumvent the standards that Rule 6.8(c) provides, standards that even on their terms are legally insufficient to begin with. In terms of appointed counsel’s requisite qualifications, Rule 6.8(c) sets a bar that is legally too low at the outset, and Rule 6.8(d) compounds the problem by allowing the bar to be lowered even further.

**D. Examples of Arizona’s mechanism in practice only confirm its deficiencies.**

To prepare this comment, FDO-AZ has comprehensively reviewed the performance of state capital postconviction attorneys who have been appointed pursuant to Arizona’s mechanism since 1998. An understanding of the actual performance of appointed attorneys is helpful to confirm and better appreciate the mechanism’s inability to “reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.” 28 C.F.R. § 26.22(b)(2).

The following are profiles of 12 attorneys appointed pursuant to Arizona’s mechanism. Taken together, the profiles reveal systemic failures to screen, monitor, and timely remove ineffective attorneys, in addition to confirming the deficiencies in Arizona’s attorney qualification requirements to begin with. As such, the cases are not presented for the Attorney General to undertake a case-by-case assessment of the performance of counsel, *see* 78 Fed. Reg. 58,163, but instead as part of the evaluation of whether Arizona’s mechanism can ensure the appointment of competent postconviction counsel. The individual cases and profiles are offered as symptoms of systemic dysfunction. *See* Armstrong Decl. at ¶ 29 (describing

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the most important and complex litigation there is, and you need two heads thinking about it and dividing the immense burden of the work.” *Id.*

examples of constitutionally ineffective representation resulting from Rule 6.8's "emphasis on quantity over quality").

### ***Patrick McGillicuddy***

Patrick McGillicuddy has been appointed to four capital postconviction cases. McGillicuddy first applied for a postconviction appointment in 2000. Moulton Decl. Ex. 539, Applications for Appointment as Counsel in Capital Post-Conviction Proceedings from Patrick E. McGillicuddy to Donna Hallam, Staff Att'y, Ariz. Sup. Ct. (July 18, 2000; Dec. 21, 2012). In his application, he acknowledged a 1998 bar allegation of malpractice in a personal injury case that he settled. *Id.* (July 18, 2000 Application), at 2. He reported serving as lead counsel in one death penalty jury trial, three capital federal habeas appeals, and two capital postconviction proceedings. *Id.* at 3. Despite his experience on paper, some members of the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases expressed concern that McGillicuddy's work in two federal habeas cases "raise[d] a serious question" about his ability to competently represent prisoners in postconviction proceedings. Meyer Decl. Ex. 71, Letter from Denise I. Young, Comm. on Appointment of Counsel for Indigent Defendants in Capital Cases, to Hon. Michael D. Ryan, Judge, Ariz. Ct. App. (Sep. 26, 2000), at 2. One Committee member expressed concerns that McGillicuddy had failed to conduct a minimally adequate mitigation investigation and that his work in previous cases raised serious concerns about his understanding of the postconviction review process. *Id.* at 2-3. Another Committee member noted a similar concern based on McGillicuddy's failure to conduct "critical mitigation investigation," and did not support McGillicuddy's addition to the appointments list. Meyer Decl. Ex. 220, Email from Natman Schaye to Michael Ryan, Judge, Ariz. Ct. App. (Sept. 29, 2000). The Committee was disbanded before it acted on McGillicuddy's application, and the Supreme Court staff attorney informed McGillicuddy of his postconviction appointments shortly thereafter. Meyer Decl. Ex. 72, Letter from Donna Hallam, Staff Att'y, Ariz. Supreme Court, to Patrick McGillicuddy, Att'y (May 21, 2001); Meyer Decl. Ex. 44, *In re Disbanding the Committee on Appointment of Counsel for Indigent Defendants in Capital Cases*, Adm. Order No. 2001-55 (Ariz. May 9, 2001).

In his first case, McGillicuddy was appointed to represent James Adams. Moulton Decl. Ex. 1, Order, *State v. Adams*, No. CR-97-0471-AP (Ariz. Oct. 19, 2001). Adams had waited more than two years from the Arizona Supreme Court's denial of his direct appeal for the appointment of postconviction counsel. McGillicuddy filed Adams' postconviction petition just seven months after his appointment. Moulton Decl. Ex. 4, Petition for Post-Conviction Relief (Excerpted), *State v. Adams*, No. CR-97-0471-AP (Ariz. Super. Ct. May 29, 2002). The postconviction court found that McGillicuddy's petition failed to present "an iota of information related to mitigation in any of his pleadings," as required to show prejudice and support an ineffective assistance of trial counsel claim. Meyer Decl.

Ex. 73, Minute Entry Dismissing Petition, *State v. Adams*, No. CR 1996-002618 (Ariz. Super. Ct. Sept. 30, 2003), at 3. The petition was summarily denied. *Id.*

In his second case, the Supreme Court appointed McGillicuddy to represent Albert Martinez Carreon in his postconviction proceedings. Moulton Decl. Ex. 48, Order, *State v. Carreon*, No. CR-03-0160-AP (Ariz. Mar. 18, 2005). Almost one year after his appointment, McGillicuddy filed Carreon's postconviction petition with no affidavits or supporting evidence attached to the petition, instead citing only to the trial record and making vague references to a "Public Defender file." Meyer Decl. Ex. 74, Petition for Post Conviction Relief, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. Mar. 13, 2006); *id.* at 10 (referencing file); *id.* at 28 (asserting prejudice but providing no extra-record evidence); *id.* at 32 (same); *id.* at 44 (same). After filing Carreon's petition, McGillicuddy filed a motion for appointment of a mitigation specialist, which he supported with an expert affidavit that mistakenly referred to James Adams, his prior client. Meyer Decl. Ex. 75, Motion to Appoint Mitigation Specialist, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. Jun. 13, 2006), at 13. Noting that "defendant does not explain why he has delayed in requesting the assistance of a mitigation specialist," the court granted the request but required McGillicuddy to submit the name of a different mitigation specialist to the court for approval. Meyer Decl. Ex. 76, Minute Entry, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. July 17, 2006). On September 1, 2006, McGillicuddy filed Carreon's reply and claimed that there was no limitation on his right to investigate further and present additional facts. Meyer Decl. Ex. 78, Reply Memorandum, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. Sept. 1, 2006), at 3-4. Despite asserting that he "recently obtained the services of a licensed private investigator" and state mitigation expert, McGillicuddy did not incorporate any extra-record evidence into the reply brief or attempt to amend the original postconviction review petition to include any work relating to a mitigation investigation. Meyer Decl. Ex. 78, Reply Memorandum, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. Sept. 1, 2006), at 5. The postconviction court summarily denied the petition. Meyer Decl. 83, Minute Entry, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. Oct. 19, 2006).

On December 20, 2006, while a motion to reconsider was pending, McGillicuddy was hospitalized. *See* Meyer Decl. Ex. 79, Minute Entry, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. Dec. 25, 2006). During a status conference concerning the hospitalization the director of the Office of Contract Counsel reported that McGillicuddy had "an episode of behavior that concerned a couple of judges in the U.S. District Court" and that, out of concern for his welfare, McGillicuddy was taken to a hospital by a member of the U.S. Attorney's Office. Meyer Decl. Ex. 80, Transcript of Proceedings, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. Jan. 4, 2007), at 7. When the director tried to visit McGillicuddy at his home, he found a "box of what appeared to be file materials from a federal habeas corpus case sitting in [McGillicuddy's] driveway." *Id.* at 8. Because of McGillicuddy's serious illness and present inability to represent his

clients, the court relieved him of all four of his then-pending state court cases. *Id.* at 10-11.

Carreon described to the judge the breakdown in his relationship with McGillicuddy, including that McGillicuddy had filed his motion for reconsideration without telling him and without responding to any of Carreon's letters. Meyer Decl. Ex. 81, Transcript of Proceedings, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. Mar. 12, 2007), at 12-15. As a result, McGillicuddy was permanently removed from Carreon's case on March 12, 2007. *Id.* at 16. The court allowed new counsel to file an amended postconviction petition because McGillicuddy "was ordered removed as incompetent to act as postconviction review counsel" and McGillicuddy's "deficient performance constitutes good cause for Defendant to submit an amended petition supported by evidence." Meyer Decl. Ex. 82, Ruling, *State v. Carreon*, No. CR 2001-090195 (Ariz. Super. Ct. Aug. 5, 2008), at 2.

Following his hospitalization, McGillicuddy was also removed from a capital federal habeas case. See Meyer Decl. Ex. 291, Motion to Appoint Counsel, *Spencer v. Schriro*, No. CIV 98-0068 (D. Ariz. Dec. 21, 2006), ECF No. 218. FDO-AZ was appointed shortly after the district court denied the habeas petition filed by McGillicuddy. Meyer Decl. Ex. 292, Order Appointing Counsel, *Spencer v. Schriro*, No. CIV 98-0068 (D. Ariz. Dec. 22, 2006), ECF No. 219; Meyer Decl. Ex. 293, Order Denying Petition For Writ Of Habeas Corpus, *Spencer v. Schriro*, No. CIV 98-0068 (D. Ariz. Dec. 20, 2006), ECF No. 215. With expert assistance, FDO-AZ determined that the defendant was intellectually disabled. McGillicuddy, who represented the petitioner in both state and federal postconviction proceedings, had failed to present any evidence to support petitioner's intellectual disability in any prior proceeding. See Meyer Decl. Ex. 293, Order Denying Petition For Writ Of Habeas Corpus, *Spencer v. Schriro*, No. CIV 98-0068 (D. Ariz. Dec. 20, 2006), ECF No. 215 at 24. As a result of FDO-AZ's investigation, the Arizona Attorney General stipulated to the petitioner's intellectual disability and the petitioner's death sentence was vacated. See Meyer Decl. Ex. 294, Minute Entry, *State v. Spencer*, CR1989-005385 (Ariz. Super. Cr. Dec. 2, 2010) ("The State informs the Court that the Defendant has been found and meets the definition of mental retardation by the State's expert" and setting resentencing hearing).

Remarkably, the year after McGillicuddy's representation of Carreon ended—and just months after the Maricopa County Superior Court had roundly criticized McGillicuddy's performance—the Arizona Supreme Court appointed him to a third case. See Moulton Decl. Ex. 113, Order, *State v. Ellison*, No. CR-04-0073-AP (Ariz. Nov. 3, 2008). When the court appointed McGillicuddy to represent Charles Ellison under Rule 6.8(c), FDO-AZ wrote a letter to the Justices of the Arizona Supreme Court expressing concern about the appointment given the Maricopa County Superior Court's findings that McGillicuddy was incompetent to represent his clients. Meyer Decl. Ex. 280, Letter from Dale A. Baich, Supervisor, Capital Habeas Unit, Ariz. Fed. Defender's Office, to Chief Justice Ruth V. McGregor, et al., Ariz.

Supreme Court (Nov. 19, 2008). McGillicuddy subsequently withdrew from the case. *See* Meyer Decl. Ex. 289, Order Granting Motion to Withdraw, *State v. Ellison*, No. CR-04-0073-AP (Ariz. Dec. 1, 2008). Ellison had been waiting one year and nine months for postconviction counsel. After McGillicuddy withdrew, Ellison waited another three months for counsel. *See* Moulton Decl. Ex. 113, Order Appointing Sharmila Roy, *State v. Ellison*, No. CR-04-0073-AP (Ariz. March 20, 2009).

In 2013, the Arizona Supreme Court appointed McGillicuddy to represent Pete VanWinkle. Moulton Decl. Ex. 433, Order, *State v. VanWinkle*, No. CR-09-0322-AP (Ariz. Jan. 30, 2013). The Court did not reference McGillicuddy's prior performance, and it did not specify whether it was appointing McGillicuddy under Rule 6.8(c) or (d), but it appointed supervisory counsel. *Id.*

At an initial conference, the trial court questioned McGillicuddy about his capital postconviction qualifications. The court ordered status conferences every 60 days and ordered McGillicuddy to discuss his progress with associate counsel before each hearing. Meyer Decl. Ex. 221, Minute Entry, *State v. VanWinkle*, No. CR2008-128068-001-DT (Ariz. Super. Ct. Feb. 14, 2013), at 2.

In 2015, during the course of this representation, McGillicuddy was suspended from the practice of law for failing to complete his CLE requirements, and his co-counsel wrote the Arizona Supreme Court to notify it of McGillicuddy's suspension and to discuss how to proceed. Meyer Decl. Ex. 85, Email from Gilbert Levy, Att'y, to Donna Hallam, Staff Att'y, Ariz. Supreme Court (Apr. 25, 2015); Meyer Decl. Ex. 141, Letter from Carolyn de Looper, Manager, Membership Admin. And Servs., Ariz. State Bar, to Janet Johnson, Clerk of the Court, Ariz. Supreme Court (Feb. 27, 2015). Only then was McGillicuddy removed from the case. Meyer Decl. Ex. 290, Minute Entry, *State v. VanWinkle*, No. CR2008-128068-001-DT (Ariz. Super. Ct. May 15, 2015). McGillicuddy is currently on disability status with the Arizona State Bar.

### ***Stephen Duncan***

Stephen Duncan appears on the Supreme Court's 2018 roster of attorneys qualified for postconviction appointment under Rule 6.8. Moulton Decl. Ex. 487, Appointment Lists. Duncan first applied for an appointment in 2010, reporting experience with four death penalty jury trials but no experience with capital appellate cases and no experience in either capital or noncapital postconviction cases. Moulton Decl. Ex. 510, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Stephen L. Duncan to Donna Hallam, Staff Att'y, Ariz. Supreme Court (Aug. 30, 2010), at 3. The Committee on Appointment of Counsel in Capital Postconviction Proceedings no longer existed at the time of Duncan's application, and no retained records exist showing if and how his application was vetted.

Without any documented findings of exceptional circumstances or exceptional qualifications, the Arizona Supreme Court appointed Duncan under Rule 6.8(d) to represent Steve Alan Boggs in postconviction proceedings on September 29, 2010, nearly one year and nine months after it issued Boggs's Notice for Postconviction Relief. Moulton Decl. Ex. 28, Order, *State v. Boggs*, No. CR-05-0174-AP (Ariz. Sept. 29, 2010); Moulton Decl. Ex. 30, Notice for Post-Conviction Relief filed in *State v. Boggs*, No. CR-05-0174-AP (Ariz. Sup. Ct. Dec. 30, 2008). Although the court ordered Duncan to associate with an attorney qualified under Rule 6.8(c), it does not appear that Duncan did so. Moulton Decl. Ex. 28, Order, *State v. Boggs*, No. CR-05-0174-AP (Ariz. Sept. 29, 2010).

Duncan then failed to comprehensively investigate Boggs's case, and he submitted a deficient petition for postconviction review. Meyer Decl. Ex. 86, Petition for Post-Conviction Relief, *State v. Boggs*, No. CR2002-009759 (Ariz. Super. Ct. Mar. 15, 2012). The initial petition, filed on March 15, 2012, had no exhibits or attachments of any kind, despite Arizona Rule of Criminal Procedure 32.5's prescription that "[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it." Duncan requested time to amend the petition, ostensibly in order to attach unspecified reports, affidavits, and exhibits to "provide documentation as to the claims already asserted therein." Meyer Decl. Ex. 87, Motion for Leave to Amend Petition for Post-Conviction Relief, *State v. Boggs* (Ariz. Super. Ct. Apr. 3, 2012), at 2. He received several additional months, but the amended petition again failed to include necessary affidavits, exhibits, or reports. See Meyer Decl. Ex. 89, Amended Petition for Post-Conviction Relief, *State v. Boggs*, No. CR2002-009759 (Ariz. Super. Ct. Aug. 31, 2012). Although Duncan had a completed report from a neuropsychologist, he failed to attach it to the amended petition. Meyer Decl. Ex. 88, Declaration of Maria De La Rosa (Feb. 02, 2017), at ¶ 17. Duncan also failed to attach any social history records, including any medical, juvenile, mental health, or family records in his possession. *Id.* at ¶ 21. Instead, Duncan attached 55 trial-transcript excerpts that were already part of the record and a single uncorroborated fact affidavit from Boggs's grandmother. Meyer Decl. Ex. 89, Amended Petition for Post-Conviction Relief, *State v. Boggs*, No. CR2002-009759 (Ariz. Super. Ct. Aug. 31, 2012).

Indeed, the record later showed that Duncan did not follow up on a number of leads that could have provided valuable evidence and affidavits. For example, Duncan's investigator, Maria De La Rosa, conducted a number of interviews of Boggs's family members and found evidence suggesting that Boggs's mother was an alcoholic when pregnant with Boggs. Meyer Decl. Ex. 88, Declaration of Maria De La Rosa (Feb. 02, 2017), at ¶ 9 ("Steve Sr. told me that his ex-wife Karen was an alcoholic who drank Jim Beam during her pregnancy with [Boggs]").

Duncan failed to follow up on potentially compelling mitigating factors. The team did no investigation into the possibility of Fetal Alcohol Syndrome (FAS) and never formally evaluated Boggs for FAS, even though the neuropsychologist Duncan

hired recognized the possibility that Boggs had FAS. *Id.* at ¶ 19. The neuropsychologist lacked the qualifications to do an FAS evaluation herself. *Id.* Likewise, the team did not investigate Boggs's alleged prior militia involvement and how that might tie into a mental health disorder. *Id.* at ¶¶ 20-21.

The substance of Boggs's amended postconviction review petition included only one paragraph of factual background, raised claims based on undeveloped legal arguments, relied largely on the trial record, and often failed to argue that the errors identified had prejudiced Boggs's case. *See, e.g.,* Meyer Decl. Ex. 89, Amended Petition for Post-Conviction Relief, *State v. Boggs*, No. CR2002-009759 (Ariz. Super. Ct. Aug. 31, 2012), at 4, 23, 47. The superior court summarily denied the petition without a hearing, Meyer Decl. Ex. 90, Minute Entry, *State v. Boggs*, No. CR 2002-009759 (Ariz. Super. Ct. Feb. 1, 2013), and the Supreme Court denied his subsequent petition for review, Meyer Decl. Ex. 229, Order, *State v. Boggs*, No. CR-14-0074-PC (Ariz. Sept. 24, 2014). In its ruling, the superior court noted Duncan's failure to provide any affidavits, reports, or other evidence to support the petition's various claims for relief. *See* Meyer Decl. Ex. 90, Minute Entry, *State v. Boggs*, No. CR 2002-009759 (Ariz. Super. Ct. Feb. 1, 2013), at 6 ("Petitioner has neither attached a copy of the police reports nor indicated what relevance they might have..."); *id.* at 9 ("Although Petitioner now claims ineffective assistance because trial counsel failed to establish [a nexus between the offense and the mitigating circumstances], he provides no affidavits or any other evidence suggesting how counsel could have established such a connection.").

Furthermore, Duncan appears to have made misrepresentations to the court on a number of occasions. As one example, he informed the court in a February 23, 2011, hearing that the mitigation specialist, De La Rosa, had "already met with Mr. Boggs down in Florida [sic, Florence] to make sure that relationship will be cooperative and kosher." Meyer Decl. Ex. 91, Transcript of Proceedings, *State v. Boggs*, No. CR2002-009759 (Ariz. Super. Ct. Feb. 23, 2011), at 4:11-15. In reality, according to visitation logs, De La Rosa had not yet met with Boggs. Meyer Decl. Ex. 92, Visitors Log, *Boggs v. Ryan*, No. 14-cv-2165 (D. Ariz. Feb. 3, 2017), at 20-21 (reflecting that De La Rosa first visited Boggs April 21, 2011). Similarly, in a subsequent May 11, 2011, hearing, Duncan informed the court that De La Rosa had met with Boggs "a number of times now." Meyer Decl. Ex. 93, Transcript of Proceedings, *State v. Boggs*, No. CR2002-009759 (Ariz. Super. Ct. May 11, 2011), at 4:23-25. Visitation logs show that De La Rosa had met with Boggs only once by the May hearing. Meyer Decl. Ex. 92, Visitors Log, *Boggs v. Ryan*, No. 14-cv-2165 (D. Ariz. Feb. 3, 2017), at 20-22 (De La Rosa's second visit was not until May 31, 2011).

In May 2012, the Arizona Supreme Court again appointed Duncan to a capital postconviction case, this time to represent Brad Lee Nelson. Moulton Decl. Ex. 321, Order, *State v. Nelson*, No. CR-09-0343-AP (Ariz. May 2, 2012). Duncan worked on the case for more than three years when Nelson requested that Duncan withdraw. Meyer Decl. Ex. 223, Motion to Stay and Request to Appoint New

Counsel, *State v. Nelson*, No. CR20060904, (Ariz. Super. Ct. Oct. 29, 2015). After Nelson asked to end his postconviction proceedings and volunteer for execution, the trial court granted a stay of the proceedings and ordered Duncan withdrawn as attorney of record. Meyer Decl. Ex. 225, Order Granting Stay, *State v. Nelson*, No. CR20060904 (Ariz. Super. Ct. Oct. 29, 2015); Meyer Decl. Ex. 226, Order Granting Motion to Withdraw, *State v. Nelson*, No. CR20060904 (Ariz. Super. Ct. Oct. 29, 2015).

In December 2015, the Arizona Supreme Court appointed Sharmila Roy to represent Nelson for the remainder of his postconviction proceedings. Moulton Decl. Ex. 321, Order, *State v. Nelson*, No. CR-09-0343-AP (Ariz. Dec. 29, 2015). Roy apparently met Duncan before accepting the appointment and was assured that she would only need to “tweak” his draft petition, which had been mostly written. Meyer Decl. Ex. 228, Motion to Withdraw, *State v. Nelson*, No. CR20060904 (Ariz. Super. Ct. May 16, 2016), at ¶ 2. After obtaining the draft petition that Duncan had prepared, however, Roy determined that the petition was deficient in its presentation of issues related to the guilt-phase of Nelson’s trial, because Duncan had performed an inadequate investigation pertaining to guilt and had directed his investigator to stop his investigation at a certain point. *Id.* at ¶ 3. Roy also determined that additional mitigation investigation was required. *Id.* at ¶ 4. As a result, she concluded that she could not prepare Nelson’s postconviction petition in less than two years, and moved to withdraw from the case. *Id.* at ¶¶ 4-5. The Arizona Supreme Court then appointed Harley Kurlander to take Roy’s place. Moulton Decl. Ex. 321, Order, *State v. Nelson*, No. CR-09-0343-AP (Ariz. May 20, 2016). Nelson’s postconviction proceedings are ongoing.

In September 2013, while Duncan was preparing Nelson’s postconviction petition, the Supreme Court appointed Duncan to represent Trent Benson in his postconviction proceedings. Moulton Decl. 24, Order, *State v. Benson*, No. CR-11-0344-AP (Ariz. Sept. 17, 2013). During his representation of Benson, Duncan was disciplined by the State Bar for ethical violations. In November 2015, a formal bar complaint was filed against him, alleging that he had made misleading statements to a client and fraudulently billed the client during a criminal representation in 2014. Meyer Decl. Ex. 94, Complaint, *In re Duncan*, No. PDJ 2015-9069 (Ariz. Jul. 23, 2015), at 2-3. Duncan entered into a voluntary discipline agreement in which he conditionally admitted that his conduct violated ethical rules. Meyer Decl. Ex. 95, Agreement for Discipline by Consent, *In re Duncan*, No. PDJ 2015-9069 (Ariz. Nov. 12, 2015), at 7. As a result, Duncan was suspended from practicing law for 60 days, was put on probation for a year, and agreed to attend CLE classes relating to billing and collecting fees. *Id.* at 8. A subsequent modification to the disciplinary order also required Duncan to complete six hours of CLE training in the duty of candor. Meyer Decl. Ex. 97, Final Judgment and Order, *In re Duncan*, No. PDJ 2015-9069 (Ariz. Dec. 7, 2015). During his suspension, Duncan associated with Randall Craig (*see infra* 112). Moulton Decl. Ex. 24, Notice of Association During Pendency of Suspension, *State v. Benson*, No. CR2008-130121-001 DT (Ariz. Super. Ct. Nov. 13,

2015). After receiving a number of extensions, Duncan filed Benson's postconviction petition on June 6, 2017. Moulton Decl. Ex. 27, Petition for Post-Conviction Relief, *State v. Benson*, No. CR2008-130121-001 SE (Ariz. Super. Ct. June 6, 2017). Briefing on the petition is not yet complete. Shortly after Duncan filed the petition, Benson asked the court to appoint new counsel, alleging that Benson was forced to sign the Rule 32.5 affidavit attached to his petition. Meyer Decl. Ex. 291 (8-24-2017 ME). The court granted Benson's motion for new counsel, finding the relationship between Duncan and Benson "irreparably broken." Meyer Decl. Ex. 292 (9-28-17 ME). In November 2017, the court appointed Gil Levy as Benson's postconviction counsel. Meyer Decl. Ex. 293, Minute Entry, *State v. Benson*, No. CR2008-130121-001 SE (Ariz. Super. Ct. Nov. 22, 2017). Levy is currently reviewing Duncan's work and considering whether a new petition will need to be filed. *Id.* at 2.

Despite his performance in capital postconviction cases, his rejection by the Maricopa County Capital Defense Review Committee, *supra* 75, his removal from Benson and Nelson's cases, and being disciplined by the Arizona State Bar, Duncan remains on the Supreme Court's appointment list, and there are no records indicating that the Supreme Court has monitored or investigated his prior performance. Moulton Decl. Ex. 487 (Appointment List).

### ***Christian Ackerley***

Christian Ackerley is on the Supreme Court's 2018 roster of attorneys qualified for postconviction appointment under Rule 6.8. Moulton Decl. Ex. 487, Appointment List. Ackerley first applied for a postconviction appointment in September 2011. Moulton Decl. Ex. 488, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Christian C. Ackerley to Donna Hallam, Staff Att'y, Ariz. Sup. Ct. (Sept. 21, 2011). He had served as second-chair counsel in one death penalty trial prior to his application, and he had no experience with capital or felony appeals and no experience in capital postconviction cases or any postconviction cases arising from first or second degree murder charges. *Id.* at 3.

Without any express finding of extraordinary circumstances or exceptional qualifications, the Arizona Supreme Court appointed Ackerley pursuant to Rule 6.8(d) to represent Derek Chappell in October 2011, over seven months after Chappell's notice for postconviction review was issued. Moulton Decl. Ex. 53, Order, *State v. Chappell*, No. CR-07-0384-AP (Ariz. Oct. 31, 2011); Moulton Decl. Ex. 55, Notice for Post-Conviction Relief, *State v. Chappell*, No. CR-07-0384-AP (Ariz. Mar. 1, 2011). The order required that Ackerley associate with attorney David Goldberg. Moulton Decl. Ex. 53, Order, *State v. Chappell*, No. CR-07-0384-AP (Ariz. Oct. 31, 2011). At the initial status conference, the court confirmed the appointments and ordered that Goldberg "should take an active role in assisting and advising Mr. Ackerley." Meyer Decl. Ex. 98, Minute Entry for Informal Conference, *State v. Chappell*, No. CR2004-037319-001 SE (Ariz. Super. Ct. Nov. 16, 2011), at 2.

As Goldberg later recounted in federal habeas proceedings, Ackerley failed to seek any meaningful help or advice from Goldberg. Meyer Decl. Ex. 99, Declaration of David Goldberg (Apr. 10, 2017), at ¶ 7-10. Goldberg quickly came to believe that Ackerley did not fundamentally understand “what was necessary to adequately present and preserve federal constitutional issues in state court postconviction review proceedings.” *Id.* at ¶ 7.

To prepare the postconviction review petition, Ackerley focused primarily on issues of juror misconduct. On October 3, 2012, Ackerley filed a shell petition “for the purpose of tolling a possibly applicable statute of limitations governing federal habeas corpus cases, and for the purpose of facilitating court-involved discovery about and from the Jurors who deliberated Mr. Chappell’s Case.” Meyer Decl. Ex. 100, Initial Petition for Post-Conviction Relief, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. Oct. 3, 2012), at 1-2. Ackerley sought juror contact information and permission to contact jurors regarding possible juror misconduct. Meyer Decl. Ex. 101, Motion for Release of Juror Biographical and Contact Information and for Court’s Permission to Contact Jurors, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. Apr. 9, 2012). The state responded that a shell petition did not entitle Ackerley to discovery on juror misconduct because it contained merely general allegations and did not specifically allege ineffective assistance of counsel claims with respect to failure to investigate juror misconduct. Meyer Decl. Ex. 102, Transcript of Proceedings, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. Nov. 13, 2012), at 9:9-10:4. Ackerley agreed to file an amended petition, *id.* at 19:12-16, and did so a month later, *see* Meyer Decl. Ex. 103, Amended Initial Petition for Post-Conviction Relief, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. Dec. 15, 2012). However, the amended petition still neglected to allege that trial counsel’s failure to investigate juror misconduct rose to the level of ineffective assistance. *Id.* at 17 (arguing Chappell did not receive a fair trial). The court denied Ackerley’s renewed motion to contact jurors, ruling that the amended petition still provided “no context concerning how these allegations state a colorable claim on which PCR relief may be granted.” Meyer Decl. Ex. 104, Ruling, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. Feb. 4, 2013), at 3.

On July 30, 2013, Ackerley filed Chappell’s final postconviction petition, which suffered from a number of deficiencies and was denied in a cursory order. Meyer Decl. Ex. 105, Petition for Post-Conviction Relief, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. July 30, 2013); Meyer Decl. Ex. 281, Minute Entry Denying Postconviction Relief, *State v. Chappell*, No. CR2001-037319-001 (Ariz. Super. Ct. June 9, 2014). The petition was disorganized and included numerous pieces of irrelevant or unexplained evidence. For instance, the petition included a brain imaging report showing that Chappell had brain damage which was barely discussed in the body of the petition. *Id.* at 36-37; Meyer Decl. Ex. 106, Appendix 2 [Part 8] to Accompany Petition for Post-Conviction Relief, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. Aug. 7, 2013). Further, the petition referenced an attorney standard-of-care expert affidavit, but no such

affidavit was included as an exhibit. Meyer Decl. Ex. 105, Petition for Post-Conviction Relief, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. July 30, 2013), at 33. That missing affidavit was eventually filed after the *State* filed its response, pointing out the omission. Meyer Decl. Ex. 107, Response to Petition for Post-Conviction Relief, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. Jan. 29, 2014), at 10; Meyer Decl. Ex. 108, Declaration of Vikki M. Liles, *State v. Chappell*, No. CR 2004-037319-001 (Ariz. Super. Ct. Jan. 31, 2014). The superior court denied the petition in a terse order after concluding that “no colorable claim exists mandating an evidentiary hearing.” Meyer Decl. Ex. 281, Minute Entry Denying Postconviction Relief, *State v. Chappell*, No. CR2001-037319-001 (Ariz. Super. Ct. June 9, 2014), at 3.

Goldberg later noted that he believed that Ackerley waited until the last minute to prepare documents, despite Goldberg’s request to review the documents earlier. Meyer Decl. Ex. 99, Declaration of David Goldberg (Apr. 10, 2017), at ¶ 8. As a result of that practice, Goldberg believed the final postconviction review petition was not properly supported by adequate facts or federal constitutional arguments. *Id.* Goldberg also noted that he believed Ackerley had failed to include all of the relevant claims in the postconviction review petition; he was particularly surprised that Ackerley had not investigated Chappell’s organic brain damage despite having many conversations with Goldberg about Chappell’s mental health history. *Id.* at ¶¶ 9-10.

Notwithstanding Ackerley’s performance in Chappell, the Arizona Supreme appointed him on August 27, 2014, to represent Shawna Forde in her capital postconviction review proceedings. Moulton Decl. Ex. 126, Order, in *State v. Forde*, No. CR-11-0043-AP (Ariz. Aug. 27, 2014). In October 2015, over a year after his appointment, Ackerley requested an extension of time from the court, noting that he was still “at least a year away” from being able to file a final postconviction petition on behalf of Forde. Meyer Decl. Ex. 234, Motion for Second Extension of Deadline to File Petition, *State v. Forde*, No. CR2009-2300-001 (Ariz. Super. Ct. Oct. 28, 2015), at 1. Ackerley failed to mention in his motion that he had been put on a year-long probation by the Arizona State Bar just two months prior. The Arizona State Bar had placed Ackerley on a year-long probation and admonished him as a result of his 2015 performance in two noncapital cases. Meyer Decl. Ex. 109, Letter from Hunter F. Perlmeter, Staff Bar Counsel, State Bar of Ariz., to Christian C. Ackerley, Law Office of Christian Ackerley PLLC (Aug. 25, 2015) (enclosing Order of Admonition, Probation, (LOMAP), and Costs). By unanimous vote, the Attorney Discipline Probable Cause Committee of the Arizona Supreme Court found that Ackerley violated several rules by failing to comply with court ordered deadlines and failing to reasonably communicate with his clients. *Id.* at 3.

Ackerley ultimately filed Forde’s petition for postconviction review in December 2016—after his probation had terminated—and an amended petition in January 2017. Moulton Decl. Ex. 129, Petition for Post-Conviction Relief

(*Excerpted*), *State v. Forde*, No. CR 2009-2300-001 (Ariz. Super. Ct. Dec. 16, 2016); Meyer Decl. Ex. 282, Amended Petition for Post-Conviction Relief (*Excerpted*), *State v. Forde*, No. CR 2009-2300-001 (Ariz. Super. Ct. Jan. 17, 2017). The court has not yet ruled on the petition.

Despite being disciplined by the Arizona State Bar, Ackerley remains on the Supreme Court's postconviction appointment list, and there are no records indicating that the Supreme Court has monitored or investigated his prior performance. *See* Moulton Decl. Ex. 487 (2018 Appointment List).

### ***Jamie McAlister***

The Arizona Supreme Court appointed Jamie McAlister as postconviction counsel in two capital cases. McAlister applied for appointment in September 1998. Moulton Decl. Ex. 538, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Jamie McAlister to Donna Hallam, Staff Att'y, Ariz. Supreme Court (Sept. 18, 1998). At the time of her application, she had not served as lead counsel in a single completed capital case, and had been involved as counsel in only one postconviction clemency proceeding, and no postconviction proceedings that resulted in a petition for review. *Id.* at 2. On October 27, 1998, the Committee on Appointment of Counsel in Capital Post-Conviction Proceedings issued a recommendation on McAlister's application. Meyer Decl. Ex. 61, Letter from Michael D. Ryan, Judge, Ariz. Court Appeals, to Thomas A. Zlaket, Chief Justice, Ariz. Supreme Court (Oct. 27, 1998). The Committee found that McAlister did not meet the requirements under Rule 6.8(c), and recommended that she be considered for "second chair" appointments so that she could "obtain the necessary qualifications to qualify ... fully under" Rule 6.8(c). *Id.* at 3.

Despite the Committee's recommendation, the Arizona Supreme Court appointed McAlister as lead postconviction counsel on February 2, 1999, on behalf of James McKinney. Moulton Decl. Ex. 278, Order, *State v. McKinney*, No. CR-93-0362-AP (Ariz. Feb. 2, 1999). McAlister was appointed under Rule 6.8(d), with Jess Lorona serving as associate counsel. *Id.* (Jess Lorona's appointment history is described *infra* 104-09.)

McAlister filed both a petition for postconviction relief and an amended petition on McKinney's behalf. Meyer Decl. Ex. 110, Amended Petition for Post-Conviction Relief, *State v. McKinney*, No. CR 91-90926 (Ariz. Super. Ct. Nov. 17, 1999). McAlister submitted a single extra-record exhibit: a "Sample Bibliography of Neurobehavioral Outcome and Management Authorities." *See id.* Ex. 18. Although McAlister asserted that trial counsel was ineffective in failing to establish that McKinney suffered a brain injury and that there is a link between brain injury and violent behavior, McAlister failed to offer *any* supporting evidence of McKinney's brain injury. *See id.* at 32-38. The failure to submit such extra-record evidence hamstrung McAlister in demonstrating that trial counsel's failure to

present evidence of brain injury resulted in prejudice under *Strickland*, thereby undermining the ineffective assistance of counsel claims.

Before the court ruled on the petition, McAlister was forced to withdraw as McKinney's counsel in December of 2002 because her license to practice law was suspended due to multiple disciplinary actions. Meyer Decl. Ex. 111, Motion for Appointment of Counsel, *State v. McKinney*, No. CR-02-0038-PC (Ariz. Nov. 25, 2002); *see also In re McAlister*, SB-02-1023-D, 2002 Ariz. LEXIS 188 (Ariz. 2002). McAlister's disciplinary record reflected a host of issues that culminated with her license suspension. In March 2000, a potential client met with McAlister and another attorney and attempted to hire McAlister for a noncapital postconviction review petition. Meyer Decl. Ex. 112, Letter from Ruby O. Boswell to Ralph Adams, Staff Bar Counsel, State Bar of Ariz. (May 19, 2000), at 1. Although the two attorneys initially took the case, they subsequently separated and McAlister retained the potential client's file. *Id.* The former potential client alleged that McAlister told her that "she didn't feel qualified enough to handle" a *non-capital postconviction review case* and referred it to another lawyer. *Id.* As alleged by the potential client, McAlister then apparently lost the client's file and continually failed to send necessary documents to the new lawyer until the potential client's mother repeatedly contacted her. *Id.* at 2. McAlister's delay, according to the allegations, resulted in the potential client's postconviction review petition being filed late. *Id.* The Arizona Bar credited the allegations and found there was probable cause that McAlister had violated the Arizona Rules of Professional Conduct, Ariz. Rev. Stat. Sup. Ct. Rule 42 (Ethical Rules 1.3 and 1.4) governing a lawyer's duties to act with reasonable diligence and to promptly comply with reasonable requests for information. Meyer Decl. Ex. 113, Order of Referral to Diversion, *In re McAlister*, No. 99-2403 Boswell (Ariz. State Bar Aug. 11, 2000). The Bar referred the matter to a diversion program.

Then, in 2002, the Arizona State Bar again referred McAlister to a diversion program, this time for trust account issues. Meyer Decl. Ex. 114, Order of Diversion, *In re McAlister*, No. 01-0661, (Ariz. State Bar Mar. 27, 2002). Later that year, Judge Jonathan H. Schwartz of the Superior Court of Maricopa County filed a bar complaint against McAlister, concerned with her "lack of candor" in a case before him and with the "ethical implications" of a conversation McAlister had with a co-defendant without permission from his attorney. Meyer Decl. Ex. 115, Letter from Jonathan H. Schwartz, Judge, Ariz. Superior Court, to Kendra Diegan, State Bar of Ariz. (Nov. 15, 2001). In response, the Arizona Bar issued an informal reprimand. Meyer Decl. Ex. 116, Order of Informal Reprimand and Costs, *In re McAlister*, No. 02-0086 (Ariz. State Bar Oct. 24, 2002).

Finally, in October 2002, McAlister was suspended from practicing law for six months and put on probation for two years because she (1) hired an investigator on a case and then refused to disclose the investigator's identity to the client's new attorney, and (2) converted over \$28,000 in her IOLTA account to her personal use.

*In re McAlister*, No. SB-02-0123-D, 2002 Ariz. LEXIS 188, at \*7-11 (Ariz. Oct. 31, 2002). In the course of this disciplinary proceeding, McAlister stated that she had experienced a prolonged manic phase, extending from December 1999 to December 2000. *Id.* at \*10-11. The State Bar's Disciplinary Commission Report indicated that her conduct would normally result in disbarment. *Id.* at \*19. Instead of disbarment, McAlister was suspended due to her mental illness, lack of previous disciplinary problems, the restitution she made, and her expressions of remorse. *Id.* at \*17-19.

Prior to her suspension and after her representation of McKinney, the Arizona Supreme Court appointed McAlister as postconviction review counsel for Richard Djerf on February 29, 2000, under Rule 6.8(c). Moulton Decl. Ex. 105, Order, *State v. Djerf*, No. CR-96-0296-AP (Ariz. Feb. 29, 2000).

McAlister's work on Djerf's postconviction raises questions regarding her ability to represent capital clients. On August 31, 2000, McAlister asked for leave to file an amended petition and for leave to appoint a neurological expert. Meyer Decl. Ex. 236, Motion for Appointment of Expert, *State v. Djerf*, No. CR 93-07792 (Ariz. Super. Ct. Aug. 31, 2000); Meyer Decl. Ex. 237, Motion for Order Allowing Contact Visit of Expert, *State v. Djerf*, No. CR 93-07792 (Ariz. Super. Ct. Aug. 31, 2000); Meyer Decl. Ex. 238, Motion for Leave to File Amended Petition, *State v. Djerf*, No. CR 93-07792 (Ariz. Super. Ct. Aug. 31, 2000). The court granted both requests. Meyer Decl. Ex. 239, Order, *State v. Djerf*, No. CR 1993-07792 (Ariz. Super. Ct. Sept. 18, 2000). Although the court had ordered McAlister to file the amended petition by September 30, 2000, without requesting any further extensions, she did not file until November 16, 2000. Moulton Decl. Ex. 108, Amended Petition for Post-Conviction Relief, *State v. Djerf*, No. CR 93-07792 (Ariz. Super. Ct. Nov. 16, 2000). The amended petition asserted that trial counsel was ineffective for failing to adequately investigate mitigating factors, including investigating a head injury Djerf suffered as a child. *Id.* at 14. However, McAlister failed to attach any new neurological evaluation of Djerf, or any indication that any expert had in fact evaluated Djerf for purposes of developing additional evidence to demonstrate trial-level ineffectiveness. *Id.* (referring to Dr. Marc Walter, a psychologist who examined Djerf prior to sentencing); *see also* Meyer Decl. Ex. 119, Minute Entry, *State v. Djerf*, No. CR 1993-007792 (Ariz. Super. Ct. June 15, 2001), at 4 ("The only evidence defendant presents to support this claim are psychiatric and psychological evaluations of defendant done either before the entry of the plea or before sentencing.").<sup>39</sup> Much of the petition was an exact duplicate of the petition

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<sup>39</sup> In fact, the neurological expert that McAlister hired for Djerf's postconviction review petition (but never used) was the same neurological expert who McAlister retained during her state bar disciplinary proceedings and who diagnosed McAlister with bipolar disorder. Meyer Decl. Ex. 240, Petitioner's Supplemental Brief on

she filed on behalf of McKinney a couple of years earlier.<sup>40</sup> The court dismissed the postconviction review petition without an evidentiary hearing on June 15, 2001. Meyer Decl. Ex. 119, Minute Entry, *State v. Djerf*, No. CR 1993-007792 (Ariz. Super. Ct. June 15, 2001).

According to McAlister's own admissions outlining the issues she was experiencing during this time period, her mental illness seriously interfered with her representation of her clients during the time she represented both McKinney and Djerf. *In re McAlister*, No. SB-02-0123-D, 2002 Ariz. LEXIS 188, at \*10-11 (Ariz. Oct. 31, 2002).

### ***Kenneth Countryman***

Despite Kenneth Countryman's documented failures to communicate with his clients and unwillingness or inability to develop a productive attorney-client relationship, Countryman remains on the Supreme Court's roster of attorneys qualified for postconviction appointment under Rule 6.8. See Moulton Decl. Ex. 487 (2018 Appointment List). He first applied for a postconviction appointment in April 2010. Moulton Decl. Ex. 502, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Kenneth S. Countryman to Donna Hallam, Staff Att'y, Ariz. Supreme Court (Apr. 9, 2010). According to his application, he had no capital postconviction experience, but was "advisory counsel" in one death penalty trial and second chair in another. *Id.* at 3. Countryman reported other noncapital postconviction experience. *Id.*

In May 2010, the Arizona Supreme Court appointed Countryman under Rule 6.8(c) as postconviction counsel for Ruben Garza. Moulton Decl. Ex. 144, Order, *State v. Garza*, No. CR-04-0343-AP (Ariz. May 26, 2010). Within a month, he was replaced by Thomas Phalen. Moulton Decl. Ex. 144, Order, *State v. Garza*, No. CR-04-0343-AP (Ariz. June 28, 2010); Phalen Decl. at ¶ 27. Despite the fact that Countryman no longer represented Garza, he sent a letter to Garza nearly three months after his original appointment order. Meyer Decl. Ex. 147, Letter from Kenneth S. Countryman, Esq., to Ruben Garza, Ariz. State Prison Complex, *State v. Garza*, No. CR1999-017624 (Aug. 24, 2010); Phalen Decl. at ¶ 29. Countryman's letter indicated that he did not understand that Garza had been sentenced to death or that Garza's direct appeal was complete. See Meyer Decl. Ex. 147, Letter from

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Martinez v. Ryan, Djerf v. Ryan, No. CV 02-0358-PHX-JAT (D. Ariz. Apr. 17, 2015), at 13.

<sup>40</sup> Compare Moulton Decl. Ex. 108, Petition for Post-Conviction Relief, *Arizona v. Djerf*, No. CR 93-07792 (Ariz. Super. Ct. Nov. 16) at (a) 7-9, (b) 15-26, (c) 27-30, (d) 30-32, (e) 32-34 with Meyer Decl. Ex. 110, Amended Petition for Post-Conviction Relief, *State v. McKinney*, No. CR 91-90926 (Ariz. Super. Ct. Nov. 17, 1999) at (a) 38-42, (b) 57-76, (c) 47-51, (d) 53-57, (e) 77-80.

Kenneth S. Countryman, Esq., to Ruben Garza, Ariz. State Prison Complex, *State v. Garza*, No. CR1999-017624 (Aug. 24, 2010), at 2 (explaining that if the sentence was less than two years long, it may be advisable to pursue postconviction review during the pendency of the direct appeal). The letter also asked Garza to identify the issues to be raised in his postconviction petition and to provide copies of the trial records. *Id.* at 1; Phalen Decl. at ¶ 29. Phalen, Garza's appointed counsel, was sufficiently concerned about Countryman's letter that he wrote a letter to the Arizona Supreme Court to inform them about it. Meyer Decl. Ex. 148, Letter from Thomas J. Phalen, Att'y at Law, to Donna Hallam, Staff Att'y, Ariz. Sup. Ct., *State v. Garza*, No. CR1999-017624 (Sept. 9, 2010); Phalen Decl. at ¶ 31. Phalen noted that Countryman's letter reflected a "bewildering ignorance" about the basic procedural facts of the case, such as the completion of Garza's direct appeal, and did not even state the correct due date for the postconviction petition. Meyer Decl. Ex. 148, Letter from Thomas J. Phalen, Att'y at Law, to Donna Hallam, Staff Att'y, Ariz. Supreme Court, *State v. Garza*, No. CR1999-017624 (Sept. 9, 2010).

The Arizona Supreme Court took no action and continued to appoint Countryman to new cases.

In June 2010, less than a month after appointing Countryman to Garza's case, the Arizona Supreme Court appointed Countryman under Rule 6.8(c) as the postconviction review counsel for Darrel Pandeli. Moulton Decl. Ex. 338, Order, *State v. Pandeli*, No. CR-06-0143-AP (Ariz. June 15, 2010). Countryman never contacted the mitigation specialist who handled Pandeli's trial investigation. Durand Decl. at ¶ 14. Despite this, the postconviction court vacated Pandeli's death sentence after an evidentiary hearing. Meyer Decl. Ex. 242, Minute Entry, *State v. Pandeli*, No. CR 1993-008116 (Ariz. Super. Ct. Mar. 12, 2015).

At the conclusion of the evidentiary hearing, the postconviction court invited Countryman to submit findings of fact and conclusions of law. *Id.* The postconviction court adopted Countryman's findings and conclusions nearly as written. See Meyer Decl. Ex. 243, Petitioner's Amended Proposed Findings of Fact and Conclusion of Law, *State v. Pandeli*, No. CR 1993-008116 (Ariz. Super. Ct. Feb. 27, 2015).

The State petitioned for review and the Arizona Supreme Court reversed the trial court because the findings of fact and conclusions of law prepared by Countryman and adopted by the postconviction court were wholly inadequate: "[T]he PCR court made few specific findings and failed to connect them to its conclusions on many of the issues presented. The court failed to make findings for some claims at all. Most problematic, the postconviction review court did not explain how Pandeli suffered prejudice from any of the acts or omissions it deemed to constitute ineffective assistance of counsel or to violate due process." Meyer Decl. Ex. 244, Opinion, *State v. Pandeli*, No. CR 15-0270-PC (Ariz. May 15, 2015), at ¶ 3. Indeed, Countryman's proposed findings of fact and conclusions of law contained a

single paragraph addressing prejudice, which simply stated the legal conclusion with no analysis: “The Court finds that the Petitioner has established prejudice, by demonstrating that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Meyer Decl. Ex. 243, Petitioner’s Amended Proposed Findings of Fact and Conclusion of Law, *State v. Pandeli*, No. CR 1993-008116 (Ariz. Super. Ct. Feb. 27, 2015), at ¶ 58. The Arizona Supreme Court thereafter reinstated Pandeli’s death sentence. Meyer Decl. Ex. 244, Opinion, *State v. Pandeli*, No. CR 15-0270-PC (Ariz. May 15, 2015), at ¶ 81.

In 2012, the Arizona Supreme Court appointed Countryman under Rule 6.8(c) as postconviction counsel for Gilbert Martinez. Moulton Decl. Ex. 263, Order, *State v. Martinez*, No. CR-10-0177-AP (Ariz. Dec. 13, 2012). Both Countryman and Martinez asked for appointment of a second chair to assist with the petition. Meyer Decl. Ex. 149, Motion to Appoint Second Chair, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Mar. 8, 2013); Meyer Decl. Ex. 150, Motion for Appointment of Co-Counsel, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. July 23, 2013). Both motions were denied. Meyer Decl. Ex. 151, Minute Entry, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Mar. 14, 2013); Meyer Decl. Ex. 152, Minute Entry, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Sep. 16, 2013). Martinez separately moved for appointment of new counsel. Meyer Decl. Ex. 153, Defendant Motion for the Appointment of a New Conflict-Free Counsel, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Aug. 5, 2013). In support of the motion, Martinez stated that Countryman inappropriately waived Martinez’s presence at hearings, consistently missed appointments, and refused to return e-mails or phone calls from Martinez’s family members. *Id.* at 2-3. The court also denied that motion. Meyer Decl. Ex. 152, Minute Entry, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Sep. 16, 2013).

In June 2014, Countryman asked again for a second chair, citing, among other reasons, the substantial number of documents and witnesses in the case. Meyer Decl. Ex. 154, Second Motion to Appoint Second Chair, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. June 24, 2014), at 3. The court denied the motion after expressing displeasure with Countryman’s diligence, stating: “Of concern to the Court is the fact that . . . counsel was aware of the complexity of this matter, and yet appears to have continued to accept substantial criminal work.” Meyer Decl. Ex. 155 Ruling Denying Second Motion to Appoint Second Chair, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Aug. 22, 2014), at 2. The court also expressed concern with the volume of work remaining to be done, which included more than “simply assisting with drafting the petition,” and noting that despite several extensions, Countryman had yet to file Martinez’s petition. *Id.* at 3.

Countryman filed Martinez’s petition in January 2015—more than two years after his appointment and nearly a month *after* the court’s extended deadline for

filing. Meyer Decl. Ex. 156, Minute Entry, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Jan. 30, 2015) (noting prior request for extension of time to file postconviction petition to January 9, 2015, with Countryman advising the court the postconviction petition will be filed “today,” i.e. January 12, 2015<sup>41</sup>); Moulton Decl. Ex. 266, Petition for Post-Conviction Relief, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Feb. 6, 2015). Countryman’s failure to file a timely petition risked waiving all of Martinez’s postconviction claims and default of any federal habeas claims. The court accepted the late filed petition, Meyer Decl. Ex. 158, Minute Entry, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Mar. 12, 2015), and Countryman filed an amended petition ten months later, Meyer Decl. Ex. 159, Amended Petition for Post-Conviction Relief, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Dec. 2, 2016). The amended petition failed in many instances to include facts and case-specific argument within the claim. *See, e.g., id.* at 54 (asserting that appellate counsel did “not properly present numerous issues on appeal” with no analysis). In addition, portions of the petition appear to be copied and pasted from other filings and reference other defendants and the facts of unrelated cases. *See, e.g., id.* at 36 (“In this case, Mr. Kuhs [sic] attorneys took from him his right to have the court determine the voluntariness of his ‘confession.’ He should be given a new trial.”). As a result, some claims were not supported by argument specific to Martinez’s case.

The court found Countryman failed to raise any colorable claim and denied Martinez’s petition. Meyer Decl. Ex. 160, Petition for Post Conviction Relief Dismissed, *State v. Martinez*, No. CR2006-007790-001 DT (Ariz. Super. Ct. Mar. 7, 2017).

The Ninth Circuit recently commented on Countryman’s lawyering, detailing Countryman’s failings in his trial court representation of Guadalupe Velazquez. *United States v. Velazquez*, 855 F.3d 1021, 1024 (9th Cir. 2017). The Ninth Circuit recounted Velazquez’s consistent complaints of Countryman’s failure to communicate with her—including a failure to communicate a plea deal offered by the state. *Id.* at 1025-29. Velazquez also repeatedly alleged that Countryman did not know even the basic facts about the charges against her, and that he missed various deadlines. *Id.* at 1025. She also accused Countryman’s paralegal—a disbarred attorney—of intimidation and harassment. *Id.* at 1026. Although Velazquez filed several motions to remove Countryman as her counsel, the district court refused to do so. *Id.* at 1024-30. The Ninth Circuit found that it was an abuse of discretion for the district court to have refused to inquire into Velazquez’s “specific, serious allegations ... about her counsel.” *Id.* at 1035.

In support of its finding that there was a breakdown in the attorney relationship, the Ninth Circuit noted Velazquez’s “December 10 motion before the

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<sup>41</sup> The Minute Entry details a hearing held on January 12, 2015 but the Minute Entry was not filed under January 30, 2015.

district court contained multiple specific, troubling allegations of a breakdown in communications, a failure to independently investigate the case, lies about deadlines and filings, and intimidation and harassment,” and that “Countryman admitted to cutting meetings short because Velazquez yelled at him; they openly bickered in court. Countryman did not help Velazquez present her motions to substitute counsel. At times he actually argued against her position by trying to convince the magistrate judge that he had adequately advised her. He also made gratuitous statements about there being a mountain of evidence against her and the fact that the prosecutor would have ‘no problem with her getting 38 to 42 years, none whatsoever.’” *Id.* at 1036.

The Ninth Circuit ultimately concluded that the denial of Velazquez’s requests to substitute counsel resulted in “a constructive denial of counsel” that required the court to vacate her guilty plea. *Id.* at 1037.

Despite these examples of Countryman’s failure to adequately represent his clients, Countryman remains on the Arizona Supreme Court’s list of attorneys that may be appointed to future capital postconviction cases. *See* Moulton Decl. Ex. 487, 2018 Appointment List. Meanwhile, in 2014, the Maricopa County Capital Defense Review Committee denied Countryman’s application for capital trial appointments. *Supra* 75.

### ***Daphne Budge***

Daphne Budge applied for appointment as postconviction review counsel in September 1998. Moulton Decl. Ex. 496, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Daphne Budge to Donna Hallam, Staff Att’y, Ariz. Supreme Court (Sept. 18, 1998). At the time of her application, Budge had no experience as lead counsel or co-counsel in completed death penalty trials, no experience handling murder appeals, and no experience with postconviction proceedings that resulted in a petition for review or an evidentiary hearing. *Id.* at 2. The Committee on Appointment of Counsel in Capital Post-Conviction Proceedings reviewed Budge’s application and concluded that she did not meet the requirements of either Rule 6.8(c) or 6.8(d) and should only be considered for “second chair” appointments. Meyer Decl. Ex. 61, Letter from Michael D. Ryan, Judge, Ariz. Ct. App., to Thomas A. Zlaket, Chief Justice, Ariz. Sup. Ct. (Oct. 27, 1998).

Despite the Committee’s recommendation, on February 2, 1999, the Arizona Supreme Court appointed Budge as postconviction review counsel for Gregory Dickens. Moulton Decl. Ex. 96, Order filed in *State v. Dickens*, No. CR-93-0543-AP (Ariz. Feb. 2, 1999). The Court appointed Budge as lead counsel under Rule 6.8(d) and Jess Lorona as associate counsel. *Id.* Jess Lorona is discussed *infra* 105.

Dickens was Budge's first postconviction case, and Budge was, by her own admission, overwhelmed by the task at hand. For instance, Budge justified a request for an extension by stating that she did not possess the qualifications set forth in Rule 6.8 or Ariz. Rev. Stat. § 13-4041 and that she had had "almost no contact concerning the preparation of Mr. Dickens' case" with Lorona. Meyer Decl. Ex. 245, Defendant's Second Motion for 30-Day Extension, *State v. Dickens*, No. CR 18454 (Ariz. Super. Ct. June 30, 1999), at 4 n.1, 5. A few days later, Budge asked the Supreme Court to withdraw Lorona's appointment and appoint a new attorney to serve as first chair; the filing suggested that Budge would stay on the case as second chair. Meyer Decl. Ex. 19, Motion to Withdraw Jess Lorona as Associate Counsel and Request for Appointment as First Chair of New Counsel Qualified Under Rule 6.8, *State v. Dickens*, No. CR 93-0543-AP (Ariz. July 6, 1999). Budge complained that Lorona had given her "no meaningful assistance," he had "failed his client," and Budge and Lorona were in only limited contact and had never had any discussions about the substantive issues in Dickens's case. *Id.* at 3. In response, Lorona chastised Budge for her lack of candor and "her inability to handle a case of this magnitude," and asserted that Budge should not have accepted the appointment if she felt she was not capable of doing so. Meyer Decl. Ex. 246, Response to Motion to Withdraw, *State v. Dickens*, No. CR 93-05473-AP (Ariz. July 14, 1999), at 2. The Arizona Supreme Court ordered a hearing to resolve the matter, and ultimately ordered that Budge remain lead counsel on Dickens' case and that she continue to associate with Lorona, as the court considered his role "solely an advisory" one. Meyer Decl. Ex. 247, Order, *State v. Dickens*, No. CR-93-0543-AP (Ariz. July 21, 1999).

Ordered to continue as postconviction review counsel despite her own concerns and her advisor's admission that she was unqualified, Budge filed Dickens' postconviction petition on July 30, 1999. Moulton Decl. Ex. 99, Petition for Post-Conviction Relief (*Excerpted*), filed in *State v. Dickens*, No. CR 18454 (Ariz. Super. Ct. July 30, 1999). The court denied most of the claims in the petition, but ordered an evidentiary hearing on the claims of ineffective assistance of counsel. Meyer Decl. Ex. 248, Order, *State v. Dickens*, No. S1400CR9218454 (Ariz. Super. Ct. Aug. 31, 2000), at 11. Budge represented Dickens in the hearing. Lorona did not enter an appearance at the hearing. *See* Meyer Decl. Ex. 249, Transcript of Evidentiary Hearing, *State v. Dickens*, No. 92 C 18454 (Ariz. Super. Ct. Oct. 3, 2000), at 2. Budge acknowledged at the hearing that her petition failed to address the prejudice prong under *Strickland*. *Id.* at 32-33. Despite this acknowledgement, she never made any attempt to rectify that omission either at the hearing or in post-hearing briefing, and the court denied relief. Meyer Decl. Ex. 250, Findings of Fact and Conclusions of Law and Order, *State v. Dickens*, No. S1400CR9218454 (Ariz. Super. Ct. Oct. 6, 2000), at 24 ("Petitioner has failed to demonstrate that he was prejudiced by any performance of defense counsel" at sentencing).

Further, the two experts Budge presented at the hearing were seemingly underprepared. Mary Durand was retained as an expert witness as to the

effectiveness of trial counsel, but she stated that she was only asked to testify as an expert a few days before the hearing, that she only began to review the records the weekend before the hearing, and that she had not been able to review *any* trial transcripts. Meyer Decl. Ex. 251, Transcript of Evidentiary Hearing, *State v. Dickens*, No. 92 C 18454 (Ariz. Super. Ct. Oct. 3, 2000), at 66-70. Furthermore, although Durand testified that all of her conclusions about trial counsel's lapses were drawn from reviewing the trial record, she was unaware that many records were lost. *Id.* at 71, 89-90. In fact, trial counsel testified at the same hearing that "at least two-thirds of his notes were missing." Meyer Decl. Ex. 250, Findings of Fact and Conclusions of Law and Order, *State v. Dickens*, No. S1400CR9218454 (Ariz. Super. Ct. Oct. 6, 2000), at 23. The court denied Dickens's remaining postconviction review claims, noting in its opinion that the "foundational preparation of Mary Durand ... was lacking to such an extent as to minimize the weight to be given her testimony rendered at the evidentiary hearing." *Id.* at 23.

After the conclusion of his postconviction review proceedings, Dickens filed a federal habeas petition. *See Dickens v. Ryan*, 740 F.3d 1302, 1309 (9th Cir. 2014) (en banc). In federal court, Dickens (represented by different counsel) alleged that trial counsel was deficient in failing to present evidence that showed that Dickens suffered from fetal alcohol syndrome (FAS) and organic brain damage. *Id.* Because Budge had failed to include those claims or the basis for those claims in Dickens's state postconviction review petition, the district court initially concluded that they were precluded for failure to exhaust. *Id.* However, the Supreme Court then issued its decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), and the Ninth Circuit reexamined Dickens's habeas claims. *Id.* at 1316-1322. As previously noted, *Martinez* held that the ineffective assistance of a defendant's postconviction review attorney may excuse the procedural default of an unexhausted claim. *Martinez*, 566 U.S. at 9. In Dickens's case, the Ninth Circuit concluded that a remand was appropriate for the district court to determine whether Budge was ineffective under *Martinez*. *Id.* at 1322. Dickens passed away shortly after the remand. Meyer Decl. Ex. 253, Respondents-Appellees' Motion to Stay Mandate in Order to Vacate this Court's Opinion and Dismiss the Petition For Writ of Habeas Corpus as Moot, *Dickens v. Ryan*, No. 08-99017 (9th Cir. Jan. 29, 2014), at 1.

After Budge's performance representing Dickens, the Arizona Supreme Court appointed her in January 2001 pursuant to Rule 6.8(c) to represent Michael White in his postconviction proceedings. Moulton Decl. Ex. 447, Order, *State v. White*, No. CR-96-0716-AP (Ariz. Jan. 8, 2001). Acknowledging that Budge did not meet Rule 6.8(c)'s experience requirements, the Supreme Court waived the Rule's requirements and concluded that Budge had unspecified "compensating experience" to merit an appointment. *Id.*

White had already gone through one round of postconviction proceedings, and his case was remanded for resentencing. Meyer Decl. Ex. 254, Minute Entry, *State v. White*, No. CR12855 (Ariz. Super. Ct. Dec. 19, 1995). White was resentenced to

death and Budge was appointed to represent him in his second postconviction review proceeding. Moulton Decl. Ex. 447, Order, *State v. White*, No. CR-96-0716-AP (Ariz. Jan. 8, 2001). Budge remained White's postconviction review counsel for over three years. In that time, she filed an initial postconviction review petition on July 5, 2001, and then requested *30 extensions of time* to file an Amended Petition. Meyer Decl. Ex. 255, Motions for 30-Day Extension to File Supplemental Rule 32 Petition for Post Conviction Relief, *State v. White*, No. CR12855 (Ariz. Super. Ct. Aug. 23, 2001 through March 3, 2004) (docket entries 212, 218, 221, 222, 224, 227, 230, 233, 237, 240, 241, 243, 245, 247, 249, 254, 260, 262, 264, 266, 268, 270, 272, 274, 276, 279, 283, 286, 288, and 291). In her fifth request in February 2002, Budge informed the court that crucial portions of the file had been somehow misplaced, including trial counsel's entire file. Meyer Decl. Ex. 256, Motion for 30-Day Extension to File Supplemental/Amended Petition for Post Conviction Relief, *State v. White*, No. CR12855 (Ariz. Super. Ct. Feb. 4, 2002), at 2-3. Two years later, she withdrew from the case without filing the Amended Petition. Meyer Decl. Ex. 257, Motion to Continue Due Date for Petition for Post Conviction Relief with Proposed Order, *State v. White*, No. CR12855 (Ariz. Super. Ct. Mar. 26, 2004).

David Goldberg replaced Budge in March 2004 as White's postconviction counsel to handle the amended petition. Meyer Decl. Ex. 258, Notice of Appearance (Petition for Post Conviction Relief-Capital Case) and Initial Due Date and Request for Informal Conference, *State v. White*, No. CR12855 (Ariz. Super. Ct. Mar. 26, 2004). In June 2004, Goldberg requested an extension, explaining that (1) "inadequate funding had been requested by prior PCR counsel for the necessary expert witnesses to litigate this PCR," (2) despite "regularly exhibit[ing] bizarre behaviors, [White] ha[d] never been examined by any mental health professional in the course of this litigation," and (3) the mitigation specialist was unable to complete his work due to lack of funding from Yavapai County. Meyer Decl. Ex. 259, Motion to Continue Due Date for Petition for Post Conviction Relief and Proposed Order, *State v. White*, No. CR12855 (Ariz. Super. Ct. June 8, 2004), at 1; *see also* Meyer Decl. Ex. 260, Motion for Additional Funding for Mitigation Specialist and Proposed Order, *State v. White*, No. CR12855 (Ariz. Super. Ct. May 11, 2004). Accordingly, Goldberg requested funding and approval for new experts, including a mitigation specialist, neuropsychologist, and rehabilitation expert, and also requested additional time for them to complete their duties. Meyer Decl. Ex. 259, Motion to Continue Due Date for Petition for Post Conviction Relief and Proposed Order, *State v. White*, No. CR12855 (Ariz. Super. Ct. June 8, 2004), at 2. The Court granted the request for additional time and denied his requests for funding and experts, except for the request for additional funding for the mitigation specialist. Meyer Decl. Ex. 235, Order, *State v. White*, No. CR12855 (Ariz. Super. Ct. June 4, 2004); Meyer Decl. Ex. 232, Order Approving Funding for Expert Witness Services (Mitigation Specialist), *State v. White*, No. CR12855 (Ariz. Super. Ct. June 4, 2004); Meyer Decl. Ex. 231, Order Re: Funding for Neuropsychologist, *State v. White*, No. CR12855 (Ariz. Super. Ct. Apr. 19, 2005).

In the end, the court dismissed White's postconviction review petition, and the Arizona Supreme Court denied the petition for review, and issued a warrant for execution. Meyer Decl. Ex. 230, Order Denying Petition for Post Conviction Relief, *State v. White*, No. CR12855 (Ariz. Super. Ct. Feb. 7, 2008); Meyer Decl. Ex. 288, Order Denying Petition for Review and Warrant of Execution, *State v. White*, Ariz. Sup. Ct. No. CR-96-0716-AP (Ariz. Sup. Ct. Oct. 28, 2008). White was never evaluated by a qualified mental health expert in state postconviction proceedings. After White entered federal court, FDO-AZ requested a competency determination of White, and the Arizona Attorney General ultimately stipulated that White was not competent to assist his counsel.

### ***Jess Lorona***

After the passage of Arizona Revised Statute § 13-4041, Jess Lorona applied for appointment as postconviction review counsel in December 1996. According to his application for appointment, Lorona had served as lead counsel in two death penalty jury trials, one capital appeal, and five capital postconviction proceedings. Moulton Decl. Ex. 534, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Jess A. Lorona to Donna Hallam, Staff Att'y, Ariz. Supreme Court (Dec. 17, 1996), at 2. Lorona's ineffectiveness as a trial and postconviction lawyer had been documented at the time of his application. In *State v. Romers*, for instance, the Superior Court found that Lorona's decision not to call a key witness at trial in a felony case had no "reasoned basis" and "fell below prevailing professional norms." Meyers Decl. Ex. 167, Memorandum Decision, *State v. Romers*, No. CR95-0591-PR (Ariz. Ct. App. June 25, 1996), at 7-9. And a federal habeas court later described Lorona's 1994 postconviction work for capital defendant Clinton Lee Spencer, explaining that Lorona "did nothing to develop the facts in support of his claims," and that there was no record that Lorona requested an investigator to develop mitigation evidence and no record of any attempt to interview friends and family to offer supporting affidavits. *Spencer v. Schriro*, No. CIV 98-0068-PHX-SRB, 2006 WL 8422970, at \*9 (D. Ariz. Dec. 20, 2006).<sup>42</sup>

When Lorona applied for appointment as capital postconviction counsel in 1996, a majority of the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases<sup>43</sup> found Lorona not qualified based on "personal knowledge of [his] work." Meyer Decl. Ex. 227, Letter from Michael D. Ryan, Judge of the Court of Appeals, Chair of Comm. on the Appointment of Counsel for Indigent

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<sup>42</sup> Clinton Lee Spencer was later represented by Patrick McGillicuddy in state postconviction proceedings, *supra* 85-86. Due to the work of FDO-AZ during federal habeas review, Spencer's death sentence was vacated in federal court when the State stipulated to Spencer's intellectual disability.

<sup>43</sup> The Committee later became known as the Committee on Appointment of Counsel in Capital Post-Conviction Proceedings.

Defendants in Capital Cases, to Thomas A. Zlaket, Chief Justice, Ariz. Supreme Court (June 10, 1997), at 2.

Nonetheless, the Arizona Supreme Court appointed Lorona as Anthony Spears's postconviction review attorney in August 1997. Moulton Decl. Ex. 409, Order, *State v. Spears*, No. CR-93-0139-AP (Ariz. Nov. 26, 1997). Just three months later, Lorona withdrew as counsel due to his busy trial schedule, and the Court recalled its mandate. Meyer Decl. Ex. 168, Motion to Withdraw as Counsel, *State v. Spears*, No. CR93-0139-AP (Ariz. Sept. 9, 1997); Meyer Decl. Ex. 169, Order, *State v. Spears*, No. CR-93-0139-AP (Ariz. Nov. 25, 1997). The Court reappointed Lorona to the case again in July 1998. Moulton Decl. Ex. 409, Order, *State v. Spears*, No. CR-93-0139-AP (Ariz. July 17, 1998).

Billing and jail visitation records confirm that Lorona had little to no contact with Spears while preparing his postconviction review petition. Meyer Decl. Ex. 222, Billing Records of Jess A. Lorona, faxed from Peggy Nichols, Office of Court Appointed Counsel, Maricopa Cty. Ariz., to Angela (Sept. 20, 2000); Meyer Decl. Ex. 216, Visitor Log for Inmate Anthony M. Spears (Aug. 15, 2000); Meyer Decl. Ex. 171, Motion for Permission to File Motion to Reconsider Order Denying Petition For Review and to Quash Warrant of Execution and to Remand for Evidentiary Hearing, *State v. Spears*, No. CR-93-0139-AP (Ariz. May 30, 2000), at 2-3.

Spears's wife stated that Lorona did not discuss any of the issues in Spears's case with Spears, even though Lorona did discuss them with her. Meyer Decl. Ex. 172, Declaration of Janet M. Spears (Oct. 15, 2003), at ¶ 13, 20; Meyer Decl. Ex. 222, Billing Records of Jess A. Lorona, faxed from Peggy Nichols, Office of Court Appointed Counsel, Maricopa Cty. Ariz., to Angela (Sept. 20, 2000). Spears's wife had served as the foreperson on the jury that convicted him and sentenced him to death. Meyer Decl. Ex. 172, Declaration of Janet M. Spears (Oct. 15, 2003), at ¶ 2. After the conviction, she contacted Spears and his trial counsel and eventually formed a relationship with Spears. *Id.* at ¶¶ 3-4. She later informed Lorona that she knew the jurors had improperly considered outside evidence they were not entitled to use to reach the guilty verdict. *Id.* at ¶ 22. Despite this information, Lorona failed to interview any other jurors. *See* Meyer Decl. Ex. 222, Billing Records of Jess A. Lorona, faxed from Peggy Nichols, Office of Court Appointed Counsel, Maricopa Cty. Ariz., to Angela (Sept. 20, 2000); Meyer Decl. Ex. 172, Declaration of Janet M. Spears (Oct. 15, 2003), at ¶¶ 22-23. Indeed, it appears that Lorona and his investigator did not interview anyone to investigate and develop evidence relating to mitigation or Spears's social history. *See* Meyer Decl. Ex. 222, Billing Records of Jess A. Lorona, faxed from Peggy Nichols, Office of Court Appointed Counsel, Maricopa Cty. Ariz., to Angela (Sept. 20, 2000); Meyer Decl. Ex. 172, Declaration of Janet M. Spears (Oct. 15, 2003), at ¶ 18.

Although Spears, through his wife, informed Lorona that a "forensic entomologist could be crucial to proving [his] innocence," Lorona did not attempt to

find one, stating only that there was no money to hire one. Meyer Decl. Ex. 171, Motion for Permission to File Motion to Reconsider Order Denying Petition For Review and to Quash Warrant of Execution and to Remand for Evidentiary Hearing, *State v. Spears*, No. CR-93-0139-AP (Ariz. May 30, 2000), at 2-3. Spears's friends and family members, instead, hired an expert with their own money. *Id.* The expert's report indicated that the victim had been killed six days after Spears left Arizona. *Id.* at 3-4. Lorona, however, did not include that information in Spears's postconviction review petition that he filed on January 28, 1999. Moulton Decl. Ex. 412, Petition for Post-Conviction Relief, *State v. Spears*, No. CR 92-90457 (Ariz. Super. Ct. Jan. 28, 1999).

Subsequently, Spears's wife averred that Lorona had allowed her to write many of the legal arguments in Spears's filings. Meyer Decl. Ex. 172, Declaration of Janet M. Spears (Oct. 15, 2003) ¶¶ 7-34. Lorona's billing records support that account, revealing, for instance, that Lorona billed for reviewing Spears's wife's work on the petition for review. Meyer Decl. Ex. 222, Meyer Decl. Ex. 222, Billing Records of Jess A. Lorona, faxed from Peggy Nichols, Office of Court Appointed Counsel, Maricopa Cty. Ariz., to Angela (Sept. 20, 2000), at 1-2.

Spears's petition for postconviction review was unsuccessful. Meyer Decl. Ex. 190, Order, *State v. Spears*, No. CR 1992-090457 (Ariz. Super. Ct. Jul. 2, 1999). The superior court noted myriad deficiencies in the petition, including the petition's failure to outline what mitigation evidence it claimed trial counsel should have presented or make any argument as to prejudice. *Id.* at 9.

After the conclusion of Spears's postconviction proceedings, Spears filed a federal habeas petition raising, among other claims, the ineffective assistance of trial counsel in failing to investigate and present relevant mitigation. *Spears v. Ryan*, No. CV-00-1051-PHX-SMM, 2009 WL 2998937, at \*29 (D. Ariz. Sept. 14, 2009). The district court noted that Lorona failed to present mitigating evidence in support of the claim in state court, and that the state court reasonably determined that Spears had not shown prejudice. *Id.* at \*35, 38-40. Following the district court's decision that Spears was not entitled to relief, the United States Supreme Court issued its decision in *Martinez v. Ryan*, recognizing that the ineffective assistance of postconviction counsel can establish cause sufficient to excuse the procedural default of a claim of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 9. Reviewing Lorona's representation in the context of *Martinez*, the Ninth Circuit remanded the case for the district court to determine whether Lorona's ineffectiveness established cause and prejudice sufficient to overcome procedural default. Meyer Decl. Ex. 161, Order, *Spears v. Ryan*, No. 09-99025 (9th Cir. Feb. 22, 2016), at 1-3. The remand for an evaluation of Lorona's representation under *Martinez* is currently pending in district court.

While Lorona was still representing Spears in June 1999, the Arizona Supreme Court appointed him as Chad Alan Lee's postconviction review counsel.

Moulton Decl. Ex. 457, Order, *State v. Lee*, No. CR-94-0367-AP (Ariz. June 30, 1999). Lorona never met with Lee. Meyer Decl. Ex. 174, Visitor Log for Inmate Chad A. Lee (Jan. 8, 2002). When pressed by Lee for an update as to his progress on the postconviction review petition seven days before it was due, Lorona merely assured Lee that he had “interviewed several witnesses” and “reviewed the entire file.” Meyer Decl. Ex. 166, Letter from Jess Lorona, Att’y, to Chad Allen Lee (March 8, 2000). The petition Lorona eventually filed was deficient in substance, was not properly paginated, and misnumbered issues. Meyer Decl. Ex. 173, Petition for Post-Conviction Relief, *State v. Lee*, No. CR 92-04225 (Ariz. Super. Ct. Mar. 15, 2000). Of the thirty claims raised, it included sixteen claims supported by less than two sentences of discussion (some claims consisted of only a heading, without any argument at all). *See, e.g., id.* at 35, 37.

The petition also failed to request an evidentiary hearing. *Id.* However, *the State* requested that the court give Lorona 30 days to explain how his ineffective assistance of counsel claims were colorable. Meyer Decl. Ex. 176, Response to Petition for Post-Conviction Relief, No. CR-92-04225, *State v. Lee* (May 1, 2000), at 1. Although Lorona later filed for, and received, an extension to file his reply or amend the ineffective assistance of counsel claim, he never filed any reply or amendment. Meyer Decl. Ex. 177, Motion to Extend Time to File Amended Petition, No. CR 92-04225, *State v. Lee* (Ariz. Super. Ct. June 2, 2000); Meyer Decl. Ex. 178, Order Extending Time For Filing PCR, *State v. Lee*, No. CR 92-04225 (Ariz. Super. Ct. June 27, 2000); Meyer Decl. Ex. 179, Minute Entry, *State v. Lee*, No. CR 92-04225 (Ariz. Super. Ct. Dec. 29, 2000), at 1 (“Defendant elected not to file a Reply.”). The court denied all of the claims in the postconviction review petition, noting that for one of the ineffective assistance of counsel claims, Lorona had “not only failed to specify his reasons in his Petition, or by way of affidavit, he has not proven or even alleged any prejudice.” Meyer Decl. Ex. 179, Minute Entry, *State v. Lee*, No. CR 92-04225 (Ariz. Super. Ct. Dec. 29, 2000), at 6.

In Lee’s pending federal habeas proceedings, the Ninth Circuit remanded Lee’s case under *Martinez* for the district court to determine whether Lorona provided ineffective assistance. Meyer Decl. Ex. 180, Order, *Lee v. Schriro*, No. 09-99002 (9th Cir. Dec. 1, 2014), at 1. The remand for an evaluation of Lorona’s representation under *Martinez* is currently pending in district court.

Even after his handling of Lee, the Arizona Supreme Court continued to appoint Lorona in postconviction review cases. In January 2001, the court appointed Lorona as George Russel Kayer’s postconviction review counsel. Moulton Decl. Ex. 239, Order, *State v. Kayer*, No. CR-97-0280-AP (Ariz. Jan. 25, 2001). Lorona, however, never filed a postconviction review petition before the deadline to do so, and the court dismissed Kayer’s postconviction review proceeding with prejudice. Meyer Decl. Ex. 181, Order, *State v. Kayer*, No. CR94-0694 (Ariz. Super. Ct. Aug. 13, 2001); Phalen Decl. at ¶ 8. Fortunately for Kayer, the Arizona Supreme Court reversed the dismissal on review. Meyer Decl. Ex. 182, Order, *State*

*v. Kayer*, No. CR-02-0048-PC (Ariz. Sept. 26, 2002). Upon Kayer's request, Lorona withdrew as counsel, noting that the Arizona Capital Representation Project had advised Kayer that Lorona was not qualified to receive either lead-counsel appointments or second-chair appointments. Meyer Decl. Ex. 183, Motion to Withdraw, *State v. Kayer*, No. CR-94-0694 (Ariz. Super. Ct. Feb. 28, 2003). The Court eventually appointed Thomas Phalen and Philip Seplow to represent Kayer in his new postconviction review proceedings. Moulton Decl. Ex. 239, Order, *State v. Kayer*, No. CR-97-0280-AP (Ariz. July 17, 2003); Meyer Decl. Ex. 185, Order, *State v. Kayer*, No. CR94-0694 (Ariz. Super. Ct. Aug. 11, 2004).

After Phalen and Seplow took over from Lorona, the superior court held Lorona in contempt for repeatedly failing to provide new counsel with Kayer's file. Phalen Decl. at ¶ 15. And once Phalen and Seplow reviewed Lorona's work, they concluded that he had "done very little for Mr. Kayer" and "had not requested any investigators or expert witnesses prior to filing the petition." *Id.*

Lorona's long history of ineffectiveness has generated many formal complaints. *See, e.g.*, Meyer Decl. Ex. 138, Letter from Stella A. Salinas, Investigator, to State Bar of Ariz. (Aug. 17, 2000). Notably, some of the complaints have been made not by disgruntled clients but by the mitigation specialists who have worked with Lorona. One example is a bar complaint submitted by Mary Durand based on his representation in a death-eligible trial case in which she served as the mitigation specialist. Durand Decl. at ¶ 13. Durand also wrote a letter to the trial court explaining her concerns about Lorona. *Id.* Despite concluding early on that the defendant had mental impairments and experts were required to evaluate the cause and scope of those impairments, it took Lorona "several years" to provide Durand with information she asked him for and to request an expert to assist her. *Id.* Durand was concerned that "Lorona was disengaged, disorganized, and unable to devote sufficient time to the case." *Id.* The subsequent proceedings eventually led to Lorona withdrawing from the case. *Id.* The defendant was later found intellectually disabled and sentenced to 8 years. *Id.*

### ***Michael Dew***

Michael Dew appears on the Supreme Court's 2018 roster of attorneys qualified for postconviction appointment under Rule 6.8. *See* Moulton Decl. Ex. 487, 2018 Appointment List.

Dew applied for appointment as postconviction counsel on August 8, 2006. Moulton Decl. Ex. 507, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Michael J. Dew to Donna Hallam, Staff Att'y, Ariz. Sup. Ct. (Oct. 27, 2009). At that time, he reported extensive experience with felony appeals and postconviction petitions, but reported very little capital experience: he served as second-chair counsel in two currently pending death penalty jury trials and two capital appeals. *Id.* at 5. Despite his extensive appellate experience, in

2013, the Maricopa County Capital Defense Review Committee chose to not recommend Dew for appellate appointments in capital cases based on his previous performance in several capital appeals. Meyer Decl. Ex. 165, Letter from Michael P. O'Connor, Chair, Capital Defense Review Comm., to Joseph C. Welty, Judge, Ariz. Super. Ct. (May 9, 2013).

The Arizona Supreme Court appointed Dew to represent Joe Clarence Smith in postconviction proceedings in November 2009. Smith had waited one year and five months for representation. Moulton Decl. Ex. 400, Order, *State v. Smith*, No. CR-04-0208-AP (Ariz. Nov. 5, 2009); Moulton Decl. Ex. 402, Notice for Post-Conviction Relief, *State v. Smith*, No. CR-04-0208-AP (Ariz. Dec. 7, 2007).

While representing Smith, Dew received a letter from Smith's trial counsel listing nine issues appellate counsel should have raised on direct review. Meyer Decl. Ex. 163, Letter from Dawn R. Sinclair, Deputy Legal Defender, to Michael J. Dew, Att'y (June 15, 2010). Although the noted issues would have supported numerous claims of ineffective assistance of appellate counsel, Dew raised only two of the nine issues identified. *See* Moulton Decl. Ex. 403, Petition for Post-Conviction Relief, *State v. Smith*, No. CR 0000-095116 (Ariz. Super. Ct. June 7, 2011). Dew also obtained expert evidence that Smith suffered from an organic brain injury, which was highly relevant to *trial counsel's* ineffective mitigation presentation. *Id.* at 21. Although postconviction proceedings are an Arizona criminal defendant's opportunity to raise claims of ineffective assistance of trial counsel, Dew raised no claims of trial counsel's ineffectiveness and instead raised the evidence of brain damage only as a claim of newly discovered material evidence. *Id.* at 21-22.

The court denied Smith's 23-page postconviction petition on September 9, 2011, without granting an evidentiary hearing. Meyer Decl. Ex. 164, Ruling, *State v. Smith*, No. CR 0000-095116 (Ariz. Super. Ct. Sept. 13, 2011).

Despite his work for Smith and the Maricopa County Capital Defense Review Committee's recommendation that Dew not be appointed to capital appeals, Dew remains on the Supreme Court's postconviction appointment list, and there are no records indicating that the Supreme Court has monitored or investigated his prior performance.

### ***Richard Parrish***

Richard Parrish applied to be appointed as postconviction review counsel on August 15, 2011. Moulton Decl. Ex. 544, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Richard Parrish to Donna Hallam, Staff Att'y, Ariz. Sup. Ct. (Aug. 15, 2011). At the time, he did not meet Rule 6.8(c)(3)'s CLE requirements, and the Arizona Supreme Court indicated it would deny his application. Meyer Decl. Ex. 140, Email from Donna Hallam, Staff Att'y, Ariz. Supreme Court, to Richard Parrish (Sept. 1, 2011). After trying "a little

negotiation” to avoid the CLE requirement, Parrish agreed to attend a capital postconviction review seminar offered by FDO-AZ and several other state and county public defender offices. *Id.* Parrish certified to the State Bar and the Supreme Court that he attended that training, but that turned out to be false. Meyer Decl. Ex. 139, Email from Donna Hallam, Staff Att’y, Ariz. Sup. Ct., to Jim Logan, Director, Public Defense Services (May 4, 2012). Before that falsehood came to light, Parrish was appointed to two postconviction cases: Christopher Hargrave and Wayne Prince.

Parrish’s representation of Hargrave was short-lived. In October 2011, the Arizona Supreme Court appointed Parrish under Rule 6.8(c) to represent Christopher Hargrave in postconviction review proceedings. Moulton Decl. Ex. 186, Order, *State v. Hargrave*, No. CR-06-0061-AP (Ariz. Oct. 27, 2011). Parrish filed Hargrave’s postconviction review petition in April 2012; the petition was only 24 pages long and attached a single new piece of evidence—the results of a psychological examination. Moulton Decl. Ex. 189, Petition for Post-Conviction Relief (*Excerpted*), *State v. Hargrave*, No. CR-2002-009759-002 DT (Ariz. Super. Ct. Apr. 06, 2012).

In response, Hargrave filed a letter to the court asking that Parrish be removed from his case. Meyer Decl. Ex. 142, Letter from Christopher Hargrave, to Hon. Douglas Rayes, Judge, Ariz. Superior Court, *State v. Hargrave*, No. CR-2002-009759 (Ariz. Super. Ct. Apr. 23, 2012). He noted that he had no knowledge of the contents of the postconviction review petition that Parrish filed, that he had only met with Parrish once and spoken on the phone with him for “two minutes” one time, that no mitigation development was done, no mitigation specialist was approved, and that he had had no input into his postconviction review claims. *Id.* at 2-3. As a result, the postconviction court removed Parrish as postconviction review counsel, finding “good cause” to do so given the United States Supreme Court ruling in *Martinez* that “inadequate assistance of counsel ... may establish cause for a [federal habeas] prisoner’s procedural default of a claim of ineffective assistance at trial.” Meyer Decl. Ex. 143, Minute Entry, *State v. Hargrave*, No. CR2002-009759 (Ariz. Super. Ct. May 4, 2012), at 2. The court also struck the postconviction review petition, finding that the petition failed to comply with Rule 32.5, which required the defendant’s certification that he has included every ground known to him for bringing the petition and also required the attachment of affidavits, records, or other evidence in support of the petition. *Id.* In July 2013, the Arizona Supreme Court appointed Julie Hall to replace Parrish. Moulton Decl. Ex. 186, Order, *State v. Hargrave*, No. CR-06-0061-AP (Ariz. July 23, 2013). The case is ongoing.

Just weeks before Parrish was removed from Hargrave’s case, the Supreme Court appointed him to represent Wayne Prince in his postconviction review proceedings. Moulton Decl. Ex. 360, Order, *State v. Prince*, No. CR-09-0019-AP (Ariz. Apr. 19, 2012). Within a month, Prince heard of Parrish’s reputation and

wrote a letter to the court requesting new postconviction review counsel in light of Parrish's performance in Hargrave's case. Meyer Decl. Ex. 144, Request to Change Counsel, *State v. Prince*, No. CR1998-004885 (Ariz. Super. Ct. May 1, 2012). Prince expressed concern that Parrish would file a short petition and spend very little time on his case. Parrish immediately requested to withdraw from Prince's case. Meyer Decl. Ex. 145, Email from Richard L. Parrish, Att'y at Law, to Donna Hallam, Staff Att'y, Ariz. Supreme Court, and Mary Farmer (May 6, 2012). The court granted his request. Meyer Decl. Ex. 146, Minute Entry in *State v. Prince*, No. CR 1998-004885 (Ariz. Super. Ct. May 14, 2017).

Around the same time that Parrish was removed from representing Hargrave and Prince, FDO-AZ was informed that there were concerns over Parrish's qualifications for capital appointments. The concerns prompted FDO-AZ to look into whether Parrish had attended the required CLE training. Meyer Decl. Ex. 49, Letter from Dale Baich, Supervisor Capital Habeas Unit, Office of the Fed. Pub. Def., to Ron Reinstein, Judicial Consultant, Ariz. Sup. Ct. (May 7, 2012). FDO-AZ determined that Parrish attended only a short portion of the training, and informed the Arizona Supreme Court. *Id.*; see also Meyer Decl. Ex. 139, Email from Donna Hallam, Staff Att'y, Ariz. Sup. Ct., to Jim Logan, Director, Public Defense Services and Ron Reinstein (May 4, 2012); Meyer Decl. Ex. 50, Declaration of David Euchner (Apr. 9, 2012); Meyer Decl. Ex. 51, Declaration of Jennifer Y. Garcia (Apr. 27, 2012).

### ***Randall Craig***

Randall Craig applied for a postconviction review appointment in January 2011. Moulton Decl. Ex. 503, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Randall J. Craig to Donna Hallam, Staff Att'y, Ariz. Supreme Court (Jan. 10, 2011). At the time, Craig had extensive experience in death penalty trials, but no postconviction or appellate experience. *Id.* at 3.

Craig was first briefly appointed to represent Paul Speer under Rule 6.8(d) and ordered to associate with qualified counsel. Moulton Decl. Ex. 413, Order, *State v. Speer*, No. CR-07-0103-AP (Ariz. Feb. 23, 2011). At that point, Speer had waited eleven months from the Supreme Court's Notice of Postconviction Review to Craig's appointment. Moulton Decl. Ex. 415, Notice, *State v. Speer*, No. CR-07-0103-AP (Ariz. Mar. 18, 2010). The trial court removed Craig just two months later, explaining:

The Court addresses Randall Craig's current caseload and availability to devote time to the PCR matter. Mr. Craig is due to start the Mark Goudeau Capital Trial in April. That trial will last at least nine months. Despite Mr. Craig's statement that he will spend 2 hours after each day of the Goudeau trial working on this PCR,

THE COURT FINDS that Mr. Craig will not have adequate time to devote to this PCR.

IT IS ORDERED removing Mr. Craig as counsel.

Meyer Decl. Ex. 57, Minute Entry, *State v. Speer*, No. CR 2002-010926 (Ariz. Super. Ct. Apr. 4, 2011). Speer then waited another month for the Supreme Court to appoint Nate Carr to represent him. Moulton Decl. Ex. 413, Order, *State v. Speer*, No. CR-07-0103-AP (Ariz. May 10, 2011). As detailed below, Carr was eventually suspended from practicing law for fraudulent billing. *Infra* 115-16.

While Goudeau's capital trial was still pending, the Supreme Court appointed Craig to represent Alfredo Garcia and again ordered Craig to associate himself with an attorney that met the requirements of Rule 6.8(c). Moulton Decl. Ex. 140, Order, in *State v. Garcia*, No. CR-07-0438-AP (Ariz. Oct. 12, 2011); Meyer Decl. Ex. 58, Minute Entry, *State v. Goudeau*, No. CR2007-005449-001 DT (Ariz. Super. Ct. Nov. 30, 2011). Craig associated with Stephen Duncan. See Moulton Decl. Ex. 140, Minute Entry, *State v. Garcia*, No. CR-2002-016160 (Ariz. Super. Ct. Nov. 4, 2011). Craig's postconviction petition was based almost exclusively on the trial record and showed that Craig had failed to conduct the necessary extra-record investigation. See Moulton Decl. Ex. 143, Petition for Post-Conviction Relief (*Excerpted*), *State v. Garcia*, No. CR 2002-016460A (Ariz. Super. Ct. Dec. 10, 2012). In the petition, Craig focused on the ineffectiveness of Garcia's trial counsel for failing to call various expert witnesses during the penalty proceedings and failing to present adequate mitigation evidence, but Craig failed to develop sufficient evidence of prejudice, as necessary to prove an ineffective assistance of counsel claim. See Meyer Decl. Ex. 137, Ruling, *State v. Garcia*, No. CR 2002-016160 (Ariz. Super. Ct. Aug. 5, 2013), at 17-26.

After the trial court and Arizona Supreme Court denied Garcia's petition, FDO-AZ was appointed for Garcia's federal habeas proceedings. When Garcia's federal habeas attorneys began to investigate Garcia's case, it became apparent that Craig had failed to properly maintain his case file and the files of prior counsel. Numerous items were missing from the file, including all attorney work-product from the postconviction review proceedings. Meyer Decl. Ex. 136, Motion to Compel Production of State-Court File and/or Motion for Order to Show Cause, *State v. Garcia*, No. CR-14-0179-PC & CR-07-0438-AP (Ariz. Sept. 15, 2015), at 3-4. Arizona law is clear that Craig had a duty to preserve the file in Garcia's case. See Ariz. R. of Crim. Pro. 6.3(d). To this day, the state-court file remains incomplete. Furthermore, investigation by habeas counsel revealed the problems with Craig's work in state court. Meyer Decl. Ex. 135, Petition for Writ of Habeas Corpus, *Garcia v. Ryan*, No. CV-15-0025-PHX-DGC (D. Ariz. Dec. 16, 2015). As detailed in Garcia's federal habeas petition, Craig failed to raise seven claims, some with numerous subclaims, in postconviction review that were later identified and raised in federal habeas, including several significant ineffective assistance of trial counsel

claims and a challenge to the accuracy and admissibility of unreliable ballistics and DNA evidence presented at Garcia's trial. *See, e.g., id.* at 67, 75, 99. Garcia's petition remains pending in federal court.

The Arizona Supreme Court appointed Craig to represent John Fitzgerald shortly after Garcia's postconviction petition was denied. Moulton Decl. Ex. 117, Order, *State v. Fitzgerald*, No. CR-10-0307-AP (Ariz. Sept. 4, 2013). After obtaining several extensions, Craig filed Fitzgerald's petition three years after his appointment to the case. Moulton Decl. Ex. 120, Petition for Post-Conviction Relief (*Excerpted*), *State v. Fitzgerald*, No. CR 2005-111543 (Ariz. Super. Ct. Oct. 21, 2016). In dismissing the postconviction petition, the court noted several instances where Craig had failed to develop or support an asserted claim. *See Meyer Decl. Ex. 134, Ruling, State v. Fitzgerald*, No. CR2005-111543-001 DT (Ariz. Super. Ct. May 19, 2017). For example, Craig alleged ineffective assistance of counsel for failing to present "additional neuropsychological evidence," but then "failed to identify or present additional testing that could or should have been conducted that with a reasonable probability would have changed the outcome," as required to meet the prejudice prong of *Strickland*. *See id.* at 34; *id.* at 76 (dismissing a claim that trial counsel was ineffective in failing to present evidence related to head injuries after finding that Craig failed to provide credible evidence that Fitzgerald suffered any head injuries). Craig also litigated a special action on Fitzgerald's behalf in the Arizona Supreme Court; the Arizona Supreme Court accepted jurisdiction but denied relief, noting several times in the opinion that Craig had not raised any state or federal constitutional arguments in support of his claim and had thus waived them. *Fitzgerald v. Myers*, 402 P.3d 442, 446 & n.2, 450-51 (Ariz. 2017); *see also id.* at 453-54 & n.4 (Vasquez, J., concurring).

Craig's most recent appointment was a brief stint as associate counsel for Trent Benson after Benson's prior attorney, Stephen Duncan, was suspended from legal practice for 60 days, *supra* 90. Moulton Decl. Ex. 24, Notice of Association During Pendency of Suspension, *State v. Benson*, No. CR2008-130121-001 DT (Ariz. Super. Ct. Nov. 13, 2015); Meyer Decl. Ex. 133, Notice of Appearance and Request for Termination of Association, *State v. Benson*, No. CR2008-130121-001 DT (Ariz. Super. Ct. Feb. 10, 2016).

In 2014, the Maricopa County Capital Defense Review Committee denied Craig's application for capital trial appointments. *Supra* 74. Yet, Craig remains on the Supreme Court's list of approved postconviction attorneys. *See Moulton Decl. Ex. 487, 2018 Appointment List.*

### ***Nathaniel Carr***

Nathaniel Carr applied for a postconviction review appointment in March 2011. Moulton Decl. Ex. 497, Application for Appointment as Counsel in Capital Post-Conviction Proceedings from Nathaniel J. Carr III to Donna Hallam,

Staff Att’y, Ariz. Supreme Court (Mar. 15, 2011).<sup>44</sup> He reported no postconviction experience in either capital or felony cases, although he stated that he had first-chaired six capital jury trials. *Id.* at 3. Carr was appointed to one postconviction case before his fraudulent billing practices led to a four-year suspension from the bar. Meyer Decl. Ex. 132, Final Judgment and Order, *In re Carr*, No. PDJ 2016-9041 (Ariz. Dec. 8, 2016), at 1.

On May 10, 2011, the Arizona Supreme Court appointed Carr to represent Paul Speer as postconviction review counsel under Rule 6.8(d). Moulton Decl. Ex. 413, Order, *State v. Speer*, No. CR-07-0103-AP (Ariz. May 10, 2011); Meyer Decl. Ex. 131, Email from Donna Hallam, Staff Att’y, Ariz. Supreme Court, to Nathaniel Carr (May 5, 2011). He was ordered to associate with counsel that met the standards of Rule 6.8(c). *Id.* In June 2012, he associated with Brent Graham. See Meyer Decl. Ex. 129, Motion to Withdraw, *State v. Speer*, No. CR2002-010926(A) (Ariz. Super. Ct. Aug. 8, 2012), at 1.

When the trial court ordered Graham to take a more active role in the case, Graham moved to withdraw. *Id.* at 1-2. Shortly thereafter, Carr informed the court that he was “currently responding to a bar complaint and has no time to contribute to this matter.” Meyer Decl. Ex. 128, Minute Entry, *State v. Speer*, No. CR 2002-010926 (Ariz. Super. Ct. Oct. 19, 2012), at 2. The court directed Carr to determine whether he would have adequate time to handle the Speer postconviction proceeding while also responding to the bar complaint. *Id.* The court did not immediately address Graham’s Motion to Withdraw. Later, Carr assured the court he would be able to devote more time to Speer’s case, but the court still did not allow Graham to withdraw; instead, Graham was ordered to “stay in touch” with Carr and “stay up to speed.” Meyer Decl. Ex. 124, Minute Entry, *State v. Speer*, No. CR 2002-010926 (Ariz. Super. Ct. Nov. 16, 2012), at 2.

Carr filed Speer’s amended postconviction review petition on September 26, 2014, over two years after his appointment. Moulton Decl. Ex. 417, Petition for Post-Conviction Relief (*Excerpted*), *State v. Speer*, No. CR2002-010926 (A) (Ariz. Super. Ct. Sept. 26, 2014). Notably, Carr did not raise a claim seeking to vacate the judgment based on the fact that the State presented inconsistent theories of the crime at the trials of Speer and his co-defendant. *Id.*; see also Meyer Decl. Ex. 123, Petition for Writ of Habeas Corpus (*Excerpts*), *Speer v. Ryan*, No. CV-16-04193 (Oct. 6, 2017). The postconviction petition was denied in May 2015. Meyer Decl. Ex. 122, Post Relief Conviction Denied, *State v. Speer*, No. CR 2002-010926 (Ariz. Super. Ct. May 21, 2015).

Despite the evidence of Carr’s improper billing practices and surrounding publicity beginning in 2012, Carr remained on Speer’s case through its conclusion in

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<sup>44</sup> Carr later applied for capital trial appointments, but the Maricopa County Capital Defense Review Committee denied his application in 2013. *Supra* 75.

2016. See, e.g., Meyer Decl. Ex. 120, Paul Rubin, *Death-Penalty Lawyers Are Making a Killing Off Maricopa Taxpayers*, Phoenix New Times, July 19, 2012, <http://tinyurl.com/yde5ctyd>. In December 2014, two months after Carr filed the amended petition for postconviction review in Speer's case, the Attorney Discipline Probable Cause Committee of the Arizona State Bar found probable cause to file a complaint against Carr. Meyer Decl. Ex. 118, Letter from Shauna R. Miller, Senior Bar Counsel-Litigation, State Bar of Ariz., to Nancy A. Greenlee (Dec. 23, 2014).

In February 2015, an attorney for the State of Arizona emailed the Arizona Supreme Court staff attorney responsible for maintaining the list of postconviction attorneys to ensure that she was aware of the allegations against Carr, remarking that if they were true, he did not understand how Carr was "still practicing law" and "still representing capital defendants." Meyer Decl. Ex. 117, Email from John Todd, Office of Ariz. Att'y Gen., to Donna Hallam, Staff Att'y, Ariz. Supreme Court (Feb. 6, 2015).

On February 27, 2015, Carr was suspended for failure to comply with mandatory continuing legal education requirements. Meyer Decl. Ex. 96, Letter from Carolyn de Looper, Manager, Membership Admin. and Servs., State Bar of Ariz., to Janet Johnson, Clerk of the Court, Ariz. State Courts (Feb. 27, 2015), at 2. Carr was reinstated on April 7, 2015. Carr continued to practice law, and continued to represent Speer, during the time he was suspended. See Meyer Decl. Ex. 84, Motion to Amend Petition Claim, *State v. Speer*, No. CR2002-010926 (A) (Ariz. Super. Ct. Mar. 20, 2015); Meyer Decl. Ex. 70, Reply to State's Response to Petition for Post-Conviction Relief, *State v. Speer*, No. CR2002-010926 (A) (Ariz. Super. Ct. Mar. 20, 2015). Despite the ongoing bar investigation, the 2014 probable cause finding, and Carr's temporary 2015 suspension, the Arizona Supreme Court never took any action to remove Carr from his capital postconviction representation of Speer. In December 2016, one month after the Arizona Supreme Court dismissed Speer's petition for review, Carr was suspended from the practice of law for four years. Meyer Decl. Ex. 132, Final Judgment and Order, *In re Carr*, No. PDJ 2016-9041 (Ariz. Dec. 8, 2016), at 1. In the Bar's Decision And Order Accepting Discipline By Consent, Carr admitted to submitting bills to Maricopa County's Office of Public Defense Services that "were replete with statements of client confidences." Meyer Decl. Ex. 132, Decision and Order Accepting Discipline by Consent, *In re Carr*, No. PDJ 2016-9041 (Ariz. Dec. 8, 2016), at 2. Carr also billed for work not actually performed and work specifically excluded by his contract. *Id.* He also admitted to failing to oversee "the work of the mitigation expert to assure the work for the mitigation phase of trial was performed" in a capital trial. *Id.* Last but not least, Carr admitted to continuing to practice law after receiving a notice of suspension for failing to report his continuing legal education. *Id.*

### ***Conrad Baran***

Conrad Baran applied for a capital postconviction appointment in 1998. Moulton Decl. Ex. 491, Applications for Appointment as Counsel in Capital Post-Conviction Proceedings from Conrad J. Baran to Donna Hallam, Staff Att’y, Ariz. Sup. Ct. (Jan. 9, 1997; Aug. 8, 1998). He reported serving as lead counsel in a handful of death penalty jury trials, but in no capital appeals or capital postconviction proceedings. *Id.* at 2. On October 27, 1998, the Committee on Appointment of Counsel in Capital Post-Conviction Proceedings found that Baran did not meet the requirements of Rule 6.8(c) and recommended that he only be considered for “second chair” appointments. Meyer Decl. Ex. 61, Letter from Michael D. Ryan, Judge, Ariz. Ct. App., to Thomas A. Zlaket, Chief Justice, Ariz. Sup. Ct. (Oct. 27, 1998), at 3.

The Arizona Supreme Court appointed Baran in April 1999 as David Detrich’s postconviction review counsel under Rule 6.8(d) and ordered him to associate with Daniel D. Maynard. Moulton Decl. Ex. 91, Order, *State v. Detrich*, No. CR-95-0085-AP (Ariz. Feb. 8, 1999). From the start, Baran did not meaningfully associate with Maynard. *See* Meyer Decl. Ex. 21, Letter from Conrad Baran, Att’y, to Michael D. Ryan, Judge, Ariz. Court of Appeals (Feb. 15, 2001), at 3; Meyer Decl. Ex. 69, Declaration of Daniel D. Maynard, *Detrich v. Ryan*, No. 4:03-cv-00229-DCB (D. Ariz. Aug. 21, 2015); *See also* Maynard Decl. at ¶¶ 7-16. Maynard later noted that his interactions with Baran were limited to two phone calls, totaling 2.2 hours, and a single 2.5-hour in-person meeting. Meyer Decl. Ex. 69, Declaration of Daniel D. Maynard, *Detrich v. Ryan*, No. 4:03-cv-00229-DCB (D. Ariz. Aug. 21, 2015), at ¶¶ 4, 9. Maynard also wrote a memo and letters to Baran, advising Baran of recommended actions to take and viable issues to raise. *Id.* at ¶ 7; Maynard Decl. at ¶ 11.

There is no evidence that Baran took Maynard’s advice. Meyer Decl. Ex. 69, Declaration of Daniel D. Maynard, *Detrich v. Ryan*, No. 4:03-cv-00229-DCB (D. Ariz. Aug. 21, 2015), at ¶¶ 8, 11; Maynard Decl. at ¶¶ 11, 13-14. On September 24, 1999, Baran filed Detrich’s postconviction review petition. Moulton Decl. Ex. 94, Petition for Post-Conviction Relief (*Excerpted*), *State v. Detrich*, No. CR-29267 (Ariz. Super. Ct. Sept. 24, 1999). While Baran pointed out several instances where trial counsel failed to investigate and present important evidence, Baran presented very little evidence of his own. For instance, he attached declarations from experts ruminating on the possibility of DNA evidence and on potential psychological or neuropsychological issues, but did not attach the results of any independent investigation showing that such DNA or psychological evidence existed. *See id.* at Exhibit 1, Exhibit 7. Baran also failed to raise and exhaust several ineffective assistance of trial counsel claims that federal habeas counsel later identified. *See* Meyer Decl. Ex. 56, Petitioner’s Brief Pursuant to *Martinez v. Ryan* (*Excerpted*), *Detrich v. Ryan*, No. Civ-03-00229-TUC-DCB (D. Ariz. Aug. 21, 2015).

The court dismissed the postconviction petition on June 3, 2002. Meyer Decl. Ex. 68, Order, *State v. Detrich*, No. CR-29267 (Ariz. Super. Ct. June 3, 2002). In Detrich's petition for review to the Arizona Supreme Court, Baran raised only four claims and failed to raise all of the claims identified in the initial postconviction review proceedings—thus failing to exhaust the unraised claims. Meyer Decl. Ex. 60, Petition for Review, *State v. Detrich*, No. CR-29267 (Ariz. July 8, 2002).

Detrich argued in subsequent federal habeas proceedings that Baran's ineffectiveness should excuse the procedural default of claims of ineffective assistance of trial counsel. Meyer Decl. Ex. 56, Petitioner's Brief Pursuant to *Martinez v. Ryan (Excerpted)*, *Detrich v. Ryan*, No. Civ-03-00229-TUC-DCB (D. Ariz. Aug. 21, 2015). In light of *Martinez*, the Ninth Circuit ultimately granted Detrich's motion to remand for the district court to consider whether Baran provided ineffective assistance that excused the default. *Detrich v. Ryan (Detrich V)*, 740 F.3d 1237, 1254, 1257-59 (9th Cir. 2013) (en banc). The case remains in district court.

While still representing Detrich in his postconviction proceedings, Baran accepted another appointment from the Arizona Supreme Court in March 2000 to serve as Graham Henry's postconviction review counsel under Rule 6.8(c). Moulton Decl. Ex. 200, Order filed in *State v. Henry*, No. CR-95-0098-AP (Ariz. Mar. 21, 2000).

Baran believed that Henry was not competent to assist counsel in his postconviction review proceedings, but he failed to take the steps necessary to put the issue of competency before the court. Months before Baran filed the petition for postconviction review, the Superior Court authorized funds for a forensic psychiatrist and indicated its willingness to evaluate Henry's competency within the framework specified by Arizona Rule of Criminal Procedure 11. See Meyer Decl. Ex. 67, Minute Order, *State v. Henry*, No. CR-8286(A) (Ariz. Super. Ct. Aug. 31, 2000), at 2-3. Instead of obtaining an independent psychiatric examination of Henry, on January 18, 2001, Baran filed Henry's postconviction review petition and simultaneously requested a stay of postconviction review proceedings due to Henry's incompetency. Moulton Decl. Ex. 203, Petition Pursuant to Rule 32 Arizona Rules of Criminal Procedure (*Excerpted*), *State v. Henry*, No. CR 8286A (Ariz. Super. Ct. Jan. 16, 2001), at 2. The court ultimately found that Baran had improperly raised Henry's competency without following the Rule 11 procedures that allow for an independent examination of Henry's mental state. Meyer Decl. Ex. 65, Minute Order, *State v. Henry*, No. CR-8286(A) (Ariz. Super. Ct. Feb. 2, 2001), at 1-2. Baran's motions had left the Court unsure "whether counsel is actually requesting that the Defendant be examined pursuant to Rule 11 or whether he is simply citing Rule 11 in an effort to convince the Court that he is entitled to a hearing at which the Defendant could be found to be incompetent without ever having to undergo any sort of mental health examination." Meyer Decl. Ex. 283, Minute Order Denying Motion to Reconsider, *State v. Henry*, No. CR-

8286(A) (Ariz. Super. Ct. April 20, 2001), at 1. The postconviction court later observed that “[d]espite the Court suggesting on several occasions the possibility of having the Defendant examined pursuant to Rule 11, Mr. Baran declined to request that such be done.” Meyer Decl. Ex. 64, Minute Order, *State v. Henry*, No. CR-8286(A) (Ariz. Super. Ct. July 16, 2001), at 3; *see also id.* at 7-8.

The court ultimately denied the petition, and noted Baran’s petition was not organized, forcing the court “[t]o try to bring some order and logic to a determination of the issues raised.” Meyer Decl. Ex. 64, Minute Order, *State v. Henry*, No. CR-8286(A) (Ariz. Super Ct. July 16, 2001), at 4. The court also noted that “[s]everal of the Petition’s issue headings are followed by claims which are in fact completely unrelated to the headings under which they are made” and in “at least some of the claims it is not immediately apparent which attorney’s conduct in which proceeding is being addressed.” *Id.*

Among the claims Baran raised was an ineffective assistance of counsel claim alleging that trial counsel failed to develop mitigation evidence regarding Henry’s mental condition. *Id.* at 6. The court rejected the claim after concluding that Baran failed to present expert evaluations and other evidence necessary to establish Henry’s mental condition. *Id.* at 7-8. Although the psychiatrist hired by Baran concluded in her report that Henry likely suffered from a variety of psychiatric disorders and was incompetent to participate in the proceedings, she had never actually met with Henry and had apparently based her entire report on a review of Henry’s files. Meyer Decl. Ex. 59, Report of Gwen A. Levitt, Diplomate, Am. Bd. of Psychiatry and Neurology, *State v. Henry* (Ariz. Super. Ct. Dec. 23, 2000); *see also* Meyer Decl. Ex. 64, Minute Order, *State v. Henry*, No. CR-8286(A) (Ariz. Super. Ct. July 16, 2001), at 7-8 (noting that the claim was based on the report of a single mental health expert who never spoke with Henry and that the report of a non-evaluating expert was not persuasive). The postconviction court therefore denied the ineffective assistance of counsel claim, noting that it could hardly find trial counsel performed inadequately by failing to subject Henry to an independent mental health examination when Baran himself had done the same thing. Meyer Decl. Ex. 64, Minute Order, *State v. Henry*, No. CR-8286(A) (Ariz. Super. Ct. July 16, 2001), at 8. The court denied the petition in full. *Id.* at 24.

The Arizona Supreme Court appointed Baran yet again in September 2001 to represent Robert Poyson in postconviction review proceedings. Moulton Decl. Ex. 355, Order, *State v. Poyson*, No. CR-98-0510-AP (Ariz. Sept. 24, 2001). In denying the postconviction review petition that Baran filed on behalf of Poyson, the superior court noted many fundamental flaws with the petition. Moulton Decl. Ex. 358, Petition for Post-Conviction Relief (*Excerpted*), *State v. Poyson*, No. CR 96-865 (Ariz. Super. Ct. May 24, 2002); Meyer Decl. Ex. 40, Minute Order, *State v. Poyson*, No.

CR-96-865 (Ariz. Super. Ct. Apr. 30, 2003).<sup>45</sup> First, Baran submitted no transcript of any part of the trial proceedings, forcing the court to rely on its independent recollection of the trial. Meyer Decl. Ex. 40, Minute Order, *State v. Poyson*, No. CR-96-865 (Ariz. Super. Ct. Apr. 30, 2003), at 1-2. Second, the court noted that although it authorized Baran to spend money to investigate possible claims, the petition failed to include statements of facts, affidavits, or similar documentation to support any colorable claims that would justify an evidentiary hearing. *Id.* at 3-6. Third, although Baran argued that sentencing counsel failed to investigate the likelihood that Poyson was brain damaged, Baran appended an expert report that concluded that Poyson was in the normal range of neuropsychological functioning and identified no cognitive impairment. *Id.* at 5-6, 13-14. The expert report was disturbingly similar to a report Baran submitted in Detrich's case, including the same typographical errors and portions that were identical. *See* Meyer Decl. Ex. 38, Opening Brief of Petitioner-Appellant (*Excerpts*), *Poyson v. Ryan*, No. 10-99005 (9th Cir. Dec. 17, 2010), at 57-58 n.15. Fourth, although Baran alleged that Poyson's confession was involuntary, he only attached treatises regarding coercion and persuasion from an "unknown source which the Court assumes to be the Internet," instead of having an expert actually examine Poyson for his tendency to be influenced by coercion, persuasion, or other factors relevant to the voluntariness of a confession. *Id.* at 18.

In January 2018, the Ninth Circuit vacated Poyson's death sentence because "the Arizona Supreme Court denied Poyson his Eighth Amendment right to individualized sentencing by applying an unconstitutional causal nexus test to his mitigating evidence of a troubled childhood and mental health issues," and remanded his case. *Poyson v. Ryan*, 879 F.3d 875, 879 (9th Cir. 2018).

**E. In sum, Arizona's mechanism does not reasonably assure the provision of competent counsel.**

As the Eastern District of Virginia cogently observed more than twenty years ago when considering whether Virginia qualified for Chapter 154's benefits:

Strict interpretation of the stringent opt-in requirements of the Act is not mere formalism. Rather, strict interpretation is necessary to meaningfully effectuate the *quid pro quo* arrangement which lies at the core of Chapter 154. This is critically important because, if a state provides full and fair state habeas proceedings, the federal courts will be able to review cases more quickly and efficiently because they will

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<sup>45</sup> In October 2002, after filing the postconviction petition but prior to the issuance of its decision, the Court allowed Baran to withdraw due to his new position with the Navajo County Public Defender's Office. Meyer Decl. Ex. 36, Order, *State v. Poyson*, No. CR-98-0510-AP (Ariz. Oct. 8, 2002).

have the benefit of a fully developed record of facts and constitutional rulings to review. Congress has determined that competent counsel who will be reasonably compensated and who has the availability of funds for reasonable litigation expenses is essential to full and fair state habeas proceedings. If any one of the safeguards of Section 2261 is not met, but the state is nonetheless provided with the ‘benefits’ of opt-in status anyway, prisoners will be subjected to less than full and fair state habeas review and then truncated federal court review without having the guarantees thought by Congress to warrant the truncated review. This was not Congress’ intent under the Act. More importantly, it is not what Congress explicitly provided in the Act.

*Satcher v. Netherland*, 944 F. Supp. 1222, 1245 (E.D. Va. 1996), *aff’d in part, rev’d in part sub nom. Satcher v. Pruett*, 126 F.3d 561 (4th Cir. 1997).

Those words resonate with equal force when considering Arizona’s mechanism today. *See* Armstrong Decl. at ¶ 29 (cataloguing the repeated failures of Arizona’s appointment mechanism to assure the provision of competent counsel). When a state fails to meet the presumptive benchmarks to assure competent counsel described in the regulations, it must show that it has established and institutionalized an alternative mechanism that guarantees the provision of competent counsel. Arizona fails to do so. Arizona’s mechanism, as written, does not assure that appointed counsel will have sufficient expertise in postconviction proceedings. Arizona makes no systematic effort to screen, monitor, and evaluate the attorneys it appoints to capital postconviction representations. And even if Rule 6.8(c) established sufficient competency requirements, which it does not, the state’s systematic use of Rule 6.8(d) to evade the enforcement of those requirements precludes the state from qualifying for certification under Chapter 154.

## **IX. ARIZONA’S MECHANISM DOES NOT GUARANTEE ADEQUATE COMPENSATION.**

To be certified under Chapter 154, Arizona’s mechanism must also provide for the “compensation[] . . . of competent counsel.” 28 U.S.C. § 2265(a)(1)(A). As the regulations describe, the lynchpin of that analysis is whether a state’s compensation provision provides “sufficient financial incentives to secure the appointment of competent counsel in sufficient numbers to timely provide representation to capital petitioners in State collateral proceedings.” 78 Fed. Reg. 58,173.

The regulations describe two ways that a state may make that showing. First, the state may establish that its mechanism meets presumptive benchmarks described in the regulations, and that the presumption should apply. Second, where a state does not meet those benchmarks, the state may show that its compensation system nonetheless assures compensation that is sufficient to consistently attract and retain competent counsel.

Arizona meets neither standard. In 1998, the state limited compensation by statute to “an hourly rate of not to exceed one hundred dollars per hour.” Ariz. Rev. Stat. § 13-4041(G) (1998). That rate has not changed in twenty years. *See* Ariz. Rev. Stat. § 13-4041(F). Not even for inflation.

**A. Arizona does not meet the presumptive benchmarks for compensation.**

The Final Rule establishes in 28 C.F.R. § 26.22(c)(1) that a state’s compensation mechanism for the appointment of postconviction counsel is presumptively adequate if the authorized compensation is comparable to or exceeds the compensation of: (i) counsel appointed pursuant to 18 U.S.C. § 3599 in federal capital habeas corpus proceedings; (ii) retained counsel in state capital postconviction proceedings who meet the state’s standards of competency; (iii) appointed counsel in state trial or appellate proceedings in capital cases;<sup>46</sup> or (iv) attorneys representing the State in postconviction proceedings of capital cases, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses. 28 C.F.R. § 26.22(c)(1).

Arizona meets none of those benchmarks.

In the Supplemental Letter, the Arizona Attorney General does not contend that the state meets the benchmarks described in (i), (ii), or (iv). Instead, the state’s entire argument as to why its compensation of appointed private counsel meets the regulations consists of one sentence: “That rate meets 28 C.F.R. § 26.22(c)(1)(iii)’s requirements because \$100 per hour is also the rate payable to appointed counsel in Arizona appeals in capital cases.” *See* Moulton Decl. Ex. 574, Ariz. Supplemental Letter at 2.

That argument fails for at least five reasons.

**First**, the statement is false. Arizona has not established any uniform statewide rate for the compensation of capital appellate counsel. Instead, the Arizona Attorney General’s statement relies on the rate paid in 2016 by *Maricopa County*, with no information about rates by other counties. *See id.* As the Final

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<sup>46</sup> Postconviction representation is not comparable with appellate representation and this benchmark is therefore arbitrary and capricious. Appellate representation does not involve the development of extra-record evidence, permit raising ineffective assistance of counsel claims, or require a reinvestigation of the case. Postconviction representation requires an entirely different and wider-ranging skill set. Furthermore, appellate attorneys in Arizona are *not* paid a rate that consistently attracts competent counsel, and a comparable postconviction rate similarly fails to attract competent counsel.

Rule describes, state compensation rates for trial or appellate counsel are only benchmark rates if the state uniformly “authorizes” those rates such that the compensation is mandatory and consistent. 78 Fed. Reg. 58,180. Only then, after all, can the rates be benchmarks for a statewide postconviction rate. And even if the rates paid by individual counties could constitute a benchmark, the Arizona Attorney General has failed to provide the rates for 14 of the 15 counties in Arizona.

**Second**, as described in greater detail below, the \$100 per hour rate specified by § 13-4041(F) for capital postconviction counsel is expressly only *a maximum* rate, and the statute establishes no minimum floor for compensation. As such, Arizona’s application fails the requirement that the elements of its appointment mechanism, including the compensation element, be “binding and mandatory” instead of discretionary or customary. *Ashmus*, 202 F.3d at 1167 (in the context of competency requirements). A “mechanism must be put down in a concrete fashion where it can be seen and relied upon, rather than be something which is subject to the vagaries of differing interpretations of what is done ‘in practice.’” *Satcher*, 944 F. Supp. at 1244. In Arizona’s case, regardless of the Supreme Court’s current practice to compensate capital postconviction lawyers at a rate of \$100 per hour, there is simply no state *requirement* that capital postconviction counsel be paid that rate.

**Third**, from 1998 until 2013, Arizona limited capital postconviction attorneys to compensation for 200 hours of work on a case—an amount that could be exceeded only “[o]n a showing of good cause,” Ariz. Rev. Stat. § 13-4041(H) (1998). If an attorney believed that the court had set an unreasonably low hourly rate or if the court found that the hours the attorney spent were unreasonable, the attorney could file a special action with the Arizona Supreme Court. Ariz. Rev. Stat. § 13-4041(G) (1998). Filing a special action with the Supreme Court, however, required complete briefing, which necessitated further hours of uncompensated work. See *supra* 47. The 200-hour cap on work was removed in 2013, but Arizona’s application for certification covers the period when it still applied. The appellate rate Arizona cites has no limits on the number of hours attorney may work on the case.

**Fourth**, far from establishing the sufficiency of Arizona’s compensation for capital postconviction counsel, the example of Maricopa County confirms that different rates are required in Arizona to attract capital trial, appellate, and postconviction counsel. Although Maricopa County paid \$100 per hour to capital appellate counsel in 2016, the county believed it necessary to pay \$140 per hour to capital trial counsel to attract qualified attorneys. See Moulton Decl. Ex. 574, Ariz. Supplemental Letter, Attachment. And the Arizona Attorney General has provided no information to suggest that \$100 per hour is sufficient to consistently attract qualified postconviction counsel in Maricopa County itself.

**Fifth**, even if Arizona met the benchmark based on the compensation paid to capital appellate counsel, that would only create a rebuttable presumption that

what the state pays capital postconviction counsel is adequate. As the regulations explain, a presumption is just that—a presumption—and the Department must consider the “circumstances presented by a particular State system that indicate that the level of compensation called for in this benchmark is unlikely to function as expected. It is conceivable in the context of a particular State and its distinctive market conditions for legal service, for example, that what normally should be sufficient compensation may not in fact be reasonably likely to make competent lawyers available for timely provision to capital petitioners in State postconviction proceedings.” 78 Fed. Reg. 58,173.

As described above, *supra* 30-33, 37-39, and as detailed in the following section of this comment, Arizona judges, lawyers, and criminal justice experts have been nearly unanimous in their recognition that the rate of \$100 per hour is plainly inadequate in Arizona to attract qualified counsel for postconviction appointments. For twenty years, that conclusion has been memorialized in state reports, meeting minutes, legislative histories, and the accounts of practitioners. *Infra* IX(B).

The Arizona Attorney General is well aware of that history. But the Attorney General ignores it. Arizona’s application provides no evidence that the rate the state pays capital postconviction counsel is sufficient to attract qualified, competent attorneys. Nor does Arizona’s application provide even the most basic information upon which one could form an opinion on the question. The state does not say how many attorneys apply for appointments. The state does not say how many attorneys have been rejected. The state does not describe the qualifications of the applicants. And the state cites to no report, recommendation, or finding—in any forum or context—stating that compensation of \$100 per hour is sufficient.

Therefore, even if Arizona’s postconviction compensation rate met the appellate compensation benchmark, Arizona officials and stakeholders themselves have rebutted any presumption that Arizona’s postconviction compensation rate is adequate.

Arizona does not contend that it meets any of the other benchmarks described in 28 C.F.R. § 26.22(c)(1). An analysis of those benchmarks confirms that Arizona does not meet them and reveals the inadequacy of Arizona’s postconviction compensation rate:

- 28 C.F.R. § 26.22(c)(1)(i) provides that compensation is presumptively adequate if it meets or exceeds the compensation of counsel pursuant to 18 U.S.C. § 3599 in federal capital habeas corpus proceedings. In 2018, lead federal capital habeas counsel received \$185 per hour, and co-counsel also received \$185 per hour. Rates, United States District Court, District of Arizona, <http://www.azd.uscourts.gov/attorneys/cja/rates>. Arizona does not come close to meeting this benchmark. Indeed, even in 1998, lead

federal capital habeas counsel received \$125 per hour, more than what Arizona pays capital postconviction counsel today. *Id.*

- 28 C.F.R. § 26.22(c)(1)(ii) provides that compensation is presumptively adequate if it meets or exceeds the compensation of retained counsel in state capital postconviction proceedings in capital cases who meet state standards of competency. In Arizona, there have been no capital postconviction cases with retained counsel since 1998. Armstrong Decl. at ¶ 26. Notably, however, the rate of retained counsel in other criminal cases is substantially higher than \$100 per hour. In 2016, the median hourly rate for criminal defense lawyers in private practice in Arizona was \$259. Meyer Decl. Ex. 157, Olabisi Onisile Whitney & Rick DeBruhl, *Attorney Survey: Arizona Lawyers Report on Economics of Practice*, Arizona Attorney Sept. 2016, at 20, 25. The median rate for Maricopa County lawyers was \$282. *Id.* See also Maynard Decl. at ¶ 22 (explaining that he charges \$490 per hour for retained criminal cases).
- 28 C.F.R. § 26.22(c)(1)(iv) provides that compensation is presumptively adequate if it meets or exceeds the compensation of attorneys representing the State in capital postconviction proceedings, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses. Arizona makes no showing that it meets this standard. Nor could it. The Section Chief for the Attorney General's Capital Unit received a salary of \$133,727.98. Several other attorneys with the Arizona Attorney General's Office were paid over \$150,000. See <http://www.abc15.com/news/data/arizona-salaries-see-which-state-employees-are-making-the-most-money>. The rate Arizona pays private-appointed attorneys does not meet that level, especially considering a standard 40% overhead cost for solo practitioners or small firms.<sup>47</sup> And as established by the numerous declarations from criminal defense lawyers attached to this comment, private attorneys

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<sup>47</sup> A 40% overhead rate is consistent with studies for small firms or solo practitioners. See, e.g., OH State Bar Ass'n, *The Economics of Law Practice in Ohio in 2013*, <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Libertarian643.pdf>; OH Bar Ass'n, *Consumer Legal Information*, <http://www.okbar.org/public/brochures/lawyerslegalfees.aspx> (rev'd Dec. 2008); Managing Partner Forum, *2012 Survey of Law Firm Economics*, <http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%202012%20Survey%20of%20LF%20Economics%20-%20Exec%20Summary%20-%2009-20-12.pdf>; William F. Brennan, *New Survey Focuses on Law Firm Economics*, (Nov./Dec. 2008), [http://www.altmanweil.com/dir\\_docs/resource/41ff6ad2-da67-406e-9999-ca2aaae63539\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/41ff6ad2-da67-406e-9999-ca2aaae63539_document.pdf).

cannot maintain a practice based solely on a \$100 per hour compensation rate—a rate at which they regularly lose money. *See infra* 127-28.

In sum, the rate at which Arizona compensates capital postconviction counsel does not meet any of the presumptive benchmarks that the Final Rule establishes, and to the extent it does meet the appellate rate benchmark, that presumption has been rebutted.

**B. Arizona’s \$100-per-hour maximum rate is not sufficient to attract a pool of competent lawyers.**

Section 26.22(c)(2) of the Final Rule allows a state limited flexibility to adopt a compensation scheme for appointed counsel that does not meet the regulations’ benchmarks but nonetheless assures sufficient compensation to consistently retain competent counsel. As the relevant language establishes, an alternative approach is permissible “*only if* the State mechanism is otherwise reasonably designed to ensure the availability for appointment of [competent] counsel.” 28 C.F.R. § 26.22(c)(2) (emphasis added). That provision “affords States appropriate discretion to set alternative levels of compensation that will reasonably assure the timely appointment of competent counsel that might otherwise be foreclosed by an overly specific *ex ante* requirement.” 78 Fed. Reg. 58,173. “At the same time ... a State’s latitude to consider alternative compensation standards, and the Attorney General’s assessment of any such standards, is not unbounded” and must be guided by the four benchmarks identified in the Final Rule. *Id.* The key inquiry is whether a state’s compensation provision provides “sufficient financial incentives to secure the appointment of competent counsel in sufficient numbers to timely provide representation to capital petitioners in State collateral proceedings.” *Id.*

Chapter 154 therefore requires two basic, commonsense elements in a state compensation scheme. First, the state scheme must actually guarantee a minimum level of compensation. Chapter 154 “requires a formal, institutionalized commitment to the payment of counsel and litigation expenses.” *Satcher*, 944 F. Supp. at 1242. *See Booth v. Maryland*, 940 F. Supp. 849, 854 & n.6 (D. Md. 1996) (explaining that “at least minimally reasonable compensation is necessary to obtain competent counsel”), *vacated on other grounds*, 112 F.3d 139 (4th Cir. 1997). Otherwise, any compensation mechanism is merely discretionary and nonbinding. Second, the guaranteed minimum level of compensation must be sufficient to secure competent postconviction counsel. 78 Fed. Reg. 58,162; *see also Colvin-El*, 1998 WL 386403 at \*4 (explaining that while a state “need not pay market rates to comply with Chapter 154, it must pay compensation at least sufficient to ensure an adequate supply of competent counsel”).

Arizona’s mechanism fails each requirement. Just as it has since 1998, § 13-4041(F) limits compensation to “an hourly rate of not to exceed one hundred dollars per hour.” Although the current practice of the Arizona Supreme Court is to

appoint attorneys at the maximum rate, there is no floor for compensation. For a mechanism to be established, it must be “binding and mandatory.” *Ashmus*, 202 F.3d at 1167 (in the context of competency).

As for the adequacy of the maximum rate, \$100 per hour was, at the time it was adopted in 1998, below the federal rate for postconviction and habeas proceedings, below the rate at least one other state had adopted, and below the rate that Arizona experts believed was needed to attract competent counsel. *See supra* 30-31; Cal. Govt. Code § 68656 (West 1997) (establishing compensation of postconviction counsel in California at a rate of \$125 per hour in 1997); Meyer Decl. Ex. 12, John A. Stookey & Larry A. Hammond, *Arizona’s Crisis in Indigent Capital Representation*, 34 Ariz. Att’y 16, 39 (Mar. 1998) (recommending that Arizona adopt a rate similar to California); Hammond Decl. at ¶¶ 59-61; Phalen Decl. at ¶ 67.

Through the years, judges, experts, and policymakers consistently lamented the insufficiency of Arizona’s compensation of appointed postconviction counsel and recommended increasing it. *See, e.g.*, Meyer Decl. Ex. 6, Ariz. Supreme Court Capital Case Task Force, *Report of Recommendations to the Ariz. Judicial Council* (Sept. 2007), at 20-21; Meyer Decl. Ex. 14, Minutes, Ariz. House Comm. H.R., Comm. on Appropriations, 47th Leg., 2nd Reg. Sess. (Ariz. Mar. 29, 2006), Justice Ryan Testimony (agreeing that the shortage of competent attorneys willing to take cases could be attributed to the fact that the compensation of appointed attorneys “is too low”). Further, in its 2006 evaluation of Arizona’s administration of the death penalty, the ABA concluded that “[t]he compensation paid to appointed attorneys [in Arizona] who represent capital defendants is insufficient for counsel to meet their obligations under the ABA Guidelines.” Meyer Decl. Ex. 5, ABA Arizona Report at iii, 153-54. By 2007, Arizona’s compensation rate had fallen far behind that of the average criminal defense attorney practicing in the state—less than half of the \$216.00 hourly compensation of the average attorney and only 33 percent of the top Arizona criminal defense attorneys. Meyer Decl. Ex. 162, State Bar of Ariz., *Economics of Law Practice in Arizona* (2007), at 25; *see also* Maynard Decl. at ¶ 22.

Now twenty years after Arizona first set the maximum compensation rate, and eleven years after the ABA’s report, the federal rate for capital habeas counsel has increased to \$185 per hour. *See* <http://www.azd.uscourts.gov/attorneys/cja/rates>. Rates for appointed state capital postconviction counsel in other states have increased in kind. *See* Moulton Decl. Ex. 583, Memorandum from Timothy Young, State Pub. Def., Office of the Ohio Pub. Def. to Cty. Comm’rs, Appointed Counsel, Common Pleas Judges, Appellate Judges (July 11, 2017) (noting that Ohio’s rate is \$125 per hour); Chart of Allowances, Supreme Court of Virginia (July 1, 2017), <http://www.courts.state.va.us/courtadmin/aoc/fiscal/chart.pdf>, § 19.2-163(7) (describing Virginia’s rate of up to \$200 per hour in court and \$150 per hour out of court); California Supreme Court Policies Regarding Cases Arising From Judgments of Death, Cal. S. Ct. (revised March 2012),

<http://www.courts.ca.gov/documents/PoliciesMar2012.pdf>, at 13 (specifying California's rate as \$145 per hour). And the market rate for retained, experienced criminal defense counsel in Arizona has increased further beyond \$200 per hour. Maynard Decl. at ¶ 22 (stating that his rate for retained criminal cases is \$490 per hour); Armstrong Decl. at ¶ 45; Phalen Decl. at ¶ 68; *see also* 2003 ABA Guidelines 9.1(B) ("Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation."). Yet Arizona's rate for appointed capital postconviction counsel has stayed the same.

The regulations themselves anticipate that even when a state's compensation scheme is initially adequate (which Arizona's was not), it will become inadequate with the passage of time unless it is periodically increased. "For example, inflation or changed economic circumstances may mean that provisions authorizing compensation of counsel at a specified hourly rate, which were sufficient at the time of an initial certification decision, are no longer adequate after the passage of years." 78 Fed. Reg. 58,176. Here, twenty years have passed and Arizona has made no such adjustment.

The impact on qualified local attorneys is clear: They often cannot financially sustain a law practice while accepting appointments at \$100 per hour. *See* Phalen Decl. at ¶¶ 67, 69; Armstrong Decl. at ¶ 45; Hammond Decl. at ¶ 59; Darby Decl. at ¶¶ 24-27; Maher Decl. at ¶ 22; Gorman Decl. at ¶¶ 11-14; Maynard Decl. at ¶¶ 22-23; Kimerer Decl. at ¶¶ 32-34. Most Arizona attorneys qualified for appointment are sole practitioners—paying for rent, insurance, taxes, legal research, equipment, and administrative support costs. *See* Phalen Decl. at ¶ 67; Darby Decl. at ¶ 25. And a single postconviction case can consume a law practice for months, if not years—thereby preventing the attorney from taking higher-paying private and appointed cases. *See* Armstrong Decl. at ¶ 24 (explaining that "it takes, on average, 2.5 years to investigate and prepare a post-conviction petition" in Arizona, based on an analysis of a decade of postconviction petitions); Gorman Decl. at ¶ 12; Darby Decl. at ¶ 26 (estimating that he spends 3,500 hours on a postconviction case). "It is nearly impossible to cover those expenses while taking appointed postconviction cases at the \$100 maximum hourly rate." Gorman Decl. at ¶ 11; *see also* Hammond Decl. at ¶ 59 ("[T]he only competent lawyers who agree to take on state capital postconviction cases do so out of a sense of public service or obligation—not because they think it can pay the bills."); Kimerer Decl. at ¶ 32 ("At the state's compensation rate . . . qualified attorneys often will not take cases—especially when the rate for capital trial appointments is \$140 in Maricopa County and the rate for appointed federal habeas counsel is nearly \$180.").

The only way that some practitioners have been able to accept appointment is by having almost no overhead expenses—working from home on a laptop with no administrative support. Darby Decl. at ¶ 25; Gorman Decl. at ¶ 12. The result is that the only attorneys who regularly accept appointments are those "with

insufficient experience or insufficient qualifications to competently represent capital clients in post-conviction proceedings.” Phalen Decl. at ¶ 70; *see also* Gorman Decl. at ¶¶ 11, 14; Lieberman Decl. at ¶ 34 (“If Arizona is genuine in its desire to appoint competent attorneys, the rate should approach the federal level or, at the very least, be equal to what capital trial lawyers make in Maricopa County, \$140 per hour.”). As the former Director of the ABA’s Death Penalty Representation Project has stated, “limiting compensation to \$100 per hour almost guarantees ineffective assistance of counsel, because the only lawyers who will express consistent interest in accepting appointments are those who will not be hired by any other clients.” Maher Decl. at ¶ 22.

Given the widespread recognition that \$100 per hour is inadequate to assure the retention of competent capital postconviction counsel Pima County—which includes Tucson—has started paying appointed attorneys \$120 per hour. Moulton Decl. Ex. 43 Order, *State v. Carlson*, No. CR20093544-001 (Ariz. Super. Ct. Oct. 26, 2015) (appointing Dan Cooper at \$120 per hour and associate counsel Amy Krauss at \$105 per hour). The County, therefore, has decided to disregard § 13-4041(F)’s mandate that compensation be limited to a *maximum* of \$100 per hour.

Apart from the actual rate of compensation, Arizona’s compensation system includes another disincentive for qualified, competent counsel to accept a postconviction appointment. By statute, an appointed attorney may not receive *any* compensation until she timely files a postconviction petition or files a notice that she “has reviewed the record and found no meritorious claim.” Ariz. Rev. Stat. § 13-4041(F). Thus, the statute requires that an appointed attorney complete months of work necessary to investigate, draft, and file a petition without any compensation. *See* Phalen Decl. at ¶ 23.

In some cases, attorneys have been forced to engage in protracted litigation with county administrators before having their compensation approved by courts. The Pima County case of *State v. Jason Bush* (No. CR20092300-003) is instructive. In that case, the Pima County Office of Court Appointed Counsel (“OCAC”) initially refused to pay for months of work that Bush’s counsel, John Saccoman and Brent Graham, had already performed. *See* Meyer Decl. Ex. 264, Ruling Regarding Defendant’s Motion for Approval of Reasonable and Necessary Attorney’s Fees and Costs, *State v. Bush*, No. CR20092300-003 (Ariz. Super. Ct. July 27, 2015). After months of litigation, the Superior Court ordered OCAC to pay the attorneys’ fees, and the court “preapproved” an additional 200 hours of work. Meyer Decl. Ex. 265, Ruling Regarding Contested Billings and Request for Approval of Additional Prepaid Attorney’s Hours, *State v. Bush*, No. CR20092300-003 (Ariz. Super. Ct. Aug. 27, 2015); *see also* Maynard Decl. at ¶ 24 (“[A]ppointed attorneys often do not get paid in a timely fashion, and counties can hold up payments for long periods. That provides a further disincentive for competent counsel to seek and accept a postconviction appointment.”). The prospects of having to engage in litigation to

obtain compensation months after work is performed unquestionably discourages competent counsel from accepting appointments.

The end result in Arizona is a compensation system that is uniformly regarded as incapable of attracting sufficient competent, qualified counsel. Indeed, as the attached attorney declarations confirm, experienced counsel cannot accept appointments at the maximum hourly rate while maintaining a financially sustainable legal practice. See Phalen Decl. at ¶¶ 67, 69-70; Hammond Decl. at ¶ 59; Darby Decl. at ¶¶ 24-27; Maher Decl. at ¶ 22; Gorman Decl. at ¶¶ 9-13; Maynard Decl. at ¶¶ 22-23; Kimerer Decl. at ¶¶ 31-34.

“A compensation system that results in substantial losses to the appointed attorney or his firm simply cannot be deemed adequate.” *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000). Yet, that is exactly what Arizona’s mechanism now entails.

#### **X. ARIZONA’S MECHANISM DOES NOT GUARANTEE THE PAYMENT OF REASONABLE LITIGATION EXPENSES.**

Arizona’s mechanism fails on its face and in practice to guarantee the payment of litigation expenses that are reasonably necessary for appointed counsel to perform competently. That failure is independently fatal to Arizona’s certification application.

Section 26.22(d) of the Final Rule provides that a state’s appointment “mechanism *must* provide for payment of reasonable litigation expenses of appointed counsel.” 28 C.F.R. § 26.22(d). “Such expenses may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel.” *Id.* That requirement is consistent with the ABA Guideline’s description of the tasks that competent postconviction counsel must complete to effectively represent their clients. As the ABA Guidelines describe:

Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments—those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal—are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system. ...

For similar reasons, *collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation* in accordance with Guideline 10.7. (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to

provide either a complete or accurate picture of the facts and issues in the case. That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

2003 ABA Guidelines 10.15.1(B) (emphasis added); *see also* Maher Decl. at ¶ 23.

Fulfilling those responsibilities requires that postconviction counsel assemble a team of experts and specialists to assist in the investigation and analysis of evidence. *Supra* 12-13, 65; Maher Decl. at ¶ 23; Phalen Decl. at ¶ 48.

Experts agree that the cost of postconviction review proceedings can be similar to the costs of preparing for trial: "Costs can be significant because counsel is obligated to thoroughly and independently investigate both phases of the trial to determine whether there are any potential constitutional infirmities." Meyer Decl. Ex. 170, Gould & Greenman, *supra*, at 118. By way of comparison, the mean total defense cost in federal capital cases from 1998-2004 was \$491,905. *Id.* at 25. Expert costs alone accounted for \$128,129. *Id.* at 32. Arizona has not provided that level of financial commitment in capital postconviction review cases. Arizona's Supplemental Letter touts that the state "regularly spends well over \$200,000 in attorney fees and litigation costs in capital post-conviction cases, and has spent over \$500,000 in more than one case." *See* Moulton Decl. Ex. 574, Ariz. Supplemental Letter at 2. Arizona provides no data to support this assertion, gives no indication of the amount of fees *denied* by postconviction courts, and, regardless, the amount Arizona "regularly spends" is well below the amount spent in comparable federal capital cases.

Still more fundamental, Arizona's mechanism is facially inadequate under the Final Rule. The mechanism does not mandate the payment of reasonable litigation expenses at all. Instead, § 13-4041(I) expressly grants discretion to trial courts by providing only that "[t]he trial court *may* authorize additional monies to

pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by § 13-4232.” Ariz. Rev. Stat. § 13-4041(I) (emphasis added). Arizona’s application and its supplemental letter suffer from an elementary confusion between the verbs “must” and “may.” See Moulton Decl. Ex. 574, Ariz. Supplemental Letter at 2. Nothing in Arizona’s mechanism *requires* the payment of litigation expenses, even if those expenses are “reasonable.”

Further, Arizona’s statute articulates no principles to guide the discretion of trial courts in deciding whether to approve requests for litigation expenses. In practice, county officials—whether judges or administrators—have adopted varying approaches to these “investigative and expert services.” Ariz. Rev. Stat. § 13-4041(I). See Hammond Decl. at ¶¶ 62-64 (“[T]here remain stark differences between different counties in Arizona, and different courts within counties, when it comes to the willingness to approve basic, essential post-conviction litigation expenses like the hiring of experts and the testing of evidence.”); Durand Decl. at ¶¶ 8, 10 (noting Maricopa County pays lower rates for mitigation specialists than other counties and the federal rate); Shaw Decl. at ¶¶ 7-9 (same).

Court approval of funding requests for experts and investigators in Arizona is never guaranteed. In many cases, such requests have been denied. In *State v. Fabio Gomez*, for instance, the trial court denied funds to conduct an investigation in the Dominican Republic, where the defendant grew up and where relevant—possibly crucial—mitigation evidence needed to be developed. Meyer Decl. Ex. 199, Motion for Funds, *State v. Gomez*, No. CR2000-090114 (Ariz. Super. Ct. Nov. 19, 2015) (explaining the necessity of travel to Dominican Republic); Meyer Decl. Ex. 200, Review Hearing, *State v. Gomez*, No. CR2000-090114 (Ariz. Super. Ct. Jan. 11, 2016) (order denying the motion for funds).

In another Arizona capital postconviction case, *State v. Medina*, the mitigation investigation revealed potential witnesses in California, Colorado, New York, and Canada. Yet the trial court repeatedly denied requests for funding for travel. See Meyer Decl. Ex. 201, Minute Entry, *State v. Medina*, No. CR1993-008378 (Ariz. Super. Ct. Oct. 2, 2015); Meyer Decl. Ex. 202, Minute Entry, *State v. Medina*, No. CR1993-008378 (Ariz. Super. Ct. Aug. 24, 2015); Meyer Decl. Ex. 204, Order Approving Expenditure of Funds, *State v. Medina*, No. CR1993-008378 (Ariz. Super. Ct. Dec. 8, 2000); Meyer Decl. Ex. 205, Motion to Reconsider Denial of Motion for Funding of Travel, *State v. Medina*, No. CR1993-008378 (Ariz. Super. Ct. Aug. 27, 2015). Further, the court required postconviction counsel to submit motions for the payment of investigators. Meyer Decl. Ex. 203, Second Ex Parte Applications for Funds, *State v. Medina*, No. CR1993-008378 (Ariz. Super. Ct. Dec. 5, 2000).

And in yet another Arizona case, *State v. Detrich*, the judge who presided over the defendant’s trial concluded summarily that based on his “familiar[ity] with

the defendant's file," it was not "appropriate to have [the defendant] examined by a neuropsychologist." Meyer Decl. Ex. 206, Minute Entry, *State v. Detrich*, No. CR-29267 (Ariz. Super. Ct. Aug. 17, 1999). The trial court later relented when Detrich and the State filed a *joint* motion to retain a neuropsychologist. Meyer Decl. Ex. 207, Joint Motion to Vacate Evidentiary Hearing Date and Request for Informal Conference, *State v. Detrich*, No. CR-29267 (Ariz. Super. Ct. Mar. 14, 2000); Ex. 208 Minute Entry, *State v. Detrich*, No. CR-29267 (Ariz. Super. Ct. Apr. 3, 2000).

Even in cases handled by the short-lived Office of the State Capital Post Conviction Defender, funding for reasonable litigation expenses was far from guaranteed. Budget cuts left the office without "the funds needed to conduct the expert review" of critical issues in cases. Meyer Decl. Ex. 209, Motion to Order Payment of Expert Fees or in the Alternative to Vacate the Death Sentence, *State v. Johnson*, No. CR2001-001604 (Ariz. Super. Ct. Mar. 15, 2010), at 8. As the head of the office stated, "without access to the necessary experts, we simply cannot do the job we've been appointed to do and provide competent representation." *Id.* at 16.

Even when a court agrees that investigators are needed and approves funding, attorneys sometimes cannot find qualified mitigation specialists willing to work for the amounts the state is willing to pay. "One of the most common consulting inquiries" received at the Arizona Capital Representation Project "is for recommendations for qualified and available mitigation specialists. The scarcity of qualified mitigation specialists in Arizona has often resulted in delays in post-conviction investigations, and inadequate investigations, at worst." Armstrong Decl. at ¶ 21. The Maricopa County Office of Public Defense Services (OPDS) maintains a list of mitigation specialists who hold contracts with the county, and OPDS pays mitigation specialists very low rates that are less than rates in other Arizona counties and less than half of the federal rate. Meyer Decl. Ex. 196, Memorandum from Wes Baysinger, Chief Procurement Officer, Office of Procurement Services, to All Departments, regarding Contract for Mitigation Specialist (Sept. 10, 2015); Meyer Decl. Ex. 197, list of Maricopa County, Ariz. Service Providers, <https://tinyurl.com/y9a7dyyu> (last visited Jan. 18, 2018) ("Maricopa County maintains contracts with investigators, mitigation specialists, and court appointed advisors. Providers in these areas must be from the approved lists."); Durand Decl. at ¶¶ 8, 10; Shaw Decl. at ¶¶ 7-9; Armstrong Decl. at ¶¶ 21, 46. Many of those specialists "are overcommitted with their workload, and some lack adequate training and experience." Armstrong Decl. at ¶ 21; see *also* Durand Decl. at ¶ 11; Shaw Decl. at ¶ 11.

This problem has been ongoing in Maricopa County, where the majority of capital cases are filed. Durand Decl. at ¶ 11. Compounding the problem, when counsel need to hire particular investigators or mitigation specialists who are not on the list, OPDS has resisted those requests. Counsel then must ask the trial court to order OPDS to appoint the necessary investigator or mitigation specialist. See Meyer Decl. Ex. 198, Motion to Appoint Mitigation Specialist, *State v. Womble*, No.

CR2002-010926 (Ariz. Super. Ct. Oct. 5, 2012). Further, OPDS will not “reimburse mitigation specialists or investigators for travel conducted within the county limits. Maricopa County is one of the largest counties in the United States, with an area greater than 9,000 square miles, and is larger than seven states.” Armstrong Decl. at ¶ 46.

Defense lawyers in other counties face same similar obstacles. The Pima County Office of Court Appointed Counsel (OCAC) enforces a number of billing guidelines that are designed to shift the cost of the defense onto the attorney, particularly for out-of-county attorneys. *See* Meyer Decl. Ex. 263, Appointed Counsel Billing Guidelines, Office of Court Appointed Counsel (effective August 1, 2016), at ¶ 1(e). For example, OCAC reimburses travel “at the lesser of actual time or travel time from downtown” and reimburses travel to Pima County “only upon entry into Pima County, unless otherwise authorized by OCAC.” *Id.* at ¶ 3(b),(h). OCAC prohibits billing for what it considers “non-legal or secretarial tasks” and will reduce attorney billing to a paralegal rate for work “deemed” appropriate for a paralegal. *Id.* at ¶ 2(h), (i). The paralegal rate is \$25 per hour. *Id.* at ¶ 5(c).

In a recent Pima County case, postconviction counsel sought a qualified mitigation specialist but was unable to find an available, local specialist. Meyer Decl. Ex 35, Defendant’s Status Report for Status Conference April 20, 2015, *State v. Payne*, No. CR20070973 (Ariz. Super. Ct. Apr. 15, 2017). Counsel’s inability to find qualified specialists necessitated extensions of time for filing the petition for postconviction review. Meyer Decl. Ex. 9, Order Granting Motion for Extension of Time, *State v. Payne*, No. CR2007-0973 (Ariz. Super. Ct. June 16, 2017).

The process of obtaining payments varies by county. In Maricopa County, attorneys submit an ex parte request for expenditures to the Office of Public Defender Services. If the request is denied, “there is normally a reason provided” and “[t]he attorney can then resubmit the request and address the reason for the denial. If the request is still denied, the attorney might go to the Court and ask that [the Office of Public Defense Services] be ordered to pay for the requested service.” Meyer Decl. Ex. 262, Email from Merri Plummer, Contract Administrator at Office of Contract Counsel, to Elizabeth Moulton, Att’y for FDO-AZ (June 19, 2017). At times this process creates lengthy delays in payment that can interfere with progress on the case. *See* Meyer Decl. Ex. 192, Supplemental Motion to Continue, *State v. Manuel*, No. CR2004-022846-001 (Ariz. Super. Ct. Nov. 15, 2013).

In rural counties, where requests for fees and experts are not made ex parte,<sup>48</sup> the discretion provided to courts can lead to denials or reductions in fee

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<sup>48</sup> *See, e.g.*, Meyer Decl. Ex. 195, Second Motion for Funds for Expert and Investigator, *State v. Kiles*, No. CR-15444/15577 (Ariz. Super. Ct. Oct. 25, 1994) (noting a Yuma County defendant’s objection to the court’s refusal to hear funding requests ex parte).

payments because of budgetary or political pressures to limit expenses. *See* Hammond Decl. at ¶ 63 (“In some more rural and less prosperous counties, budgetary pressures and political realities have functioned to deny attorneys the tools they need to adequately represent their clients.”). For example, a Mohave County judge has expressly cited budgetary considerations in considering a fee request. *See* Meyer Decl. Ex. 194, Minute Order, *State v. Henry*, No. CR-8286(A) (Ariz. Super. Ct. Oct. 10, 2000 (wherein the judge states that he “has certain obligations to safeguard the public purse”). And even public defender offices in rural Arizona counties have had “to beg for money for experts and investigators.” Meyer Decl. Ex. 5, ABA Arizona Report, at 142 (citing information from the National Association of Criminal Defense Attorneys).

As Larry Hammond, a distinguished Arizona criminal defense attorney with deep experience in the state postconviction system, has observed:

In some more rural and less prosperous counties, budgetary pressures and political realities have functioned to deny attorneys the tools they need to adequately represent their clients. In some of those counties, attorneys know that their appointment to future cases depends on staying in the good graces of the county establishment. As a result, they often rely on local experts who have limited value, and they do not ask the county for outside experts or analysis that would require a greater public expense. The result has often been ineffective representation. If the state guaranteed the payment of reasonable litigation expenses, those county-level disparities would not exist, or would be substantially diminished. But so long as Arizona requires the counties to pay for such expenses, the current reality is unlikely to change.

Hammond Decl. at ¶ 63.

The pressure on counties to reduce litigation expenses is driven in part by the extremely limited reimbursements from the state. Under Arizona Revised Statute § 13-4041(H), “[t]he state shall pay a portion of the fees incurred by the county out of monies appropriated to the supreme court for these purposes. The total amount that may be spent in any fiscal year by this state for indigent capital defense in a state postconviction review proceeding may not exceed the amount appropriated in the general appropriations act for this purpose, together with additional amounts appropriated by any special legislative appropriation for indigent capital defense.”

For fiscal years 2014-2018, Arizona has provided just \$90,000 per year to reimburse all counties for amounts spent on capital postconviction relief proceedings. *See* Meyer Decl. Ex. 294, Senate Bill, S. 1522, 53rd Leg., 1st Reg. Sess. (Ariz. 2017); Meyer Decl. Ex. 295, Senate Bill, S. 1526, 52nd Leg., 2nd Reg. Sess. (Ariz. 2016); Meyer Decl. Ex. 296, House Bill, H. 2703, 51st Leg., 2nd Reg. Sess. (Ariz. 2014). That represents a small fraction of what a single county spends per

year on capital postconviction representation expenses. *See, e.g.*, Maricopa County FY 2018 Adopted Budget, <http://www.maricopa.gov/ArchiveCenter/ViewFile/Item/3262>, at 413.

Arizona's lack of commitment to funding capital postconviction representation is consistent with the state's approach to indigent defense funding generally. In recent years, the Arizona Legislature has consistently diverted indigent defense funds to other purposes. For instance, the Legislature has diverted such funds to the Department of Public Safety's "Gang and Immigration Intelligence Team Enforcement Mission Border Security and Law Enforcement subaccount." Ariz. Legislature, Joint Legislative Budget Comm., Arizona Criminal Justice Commission, FY2012, FY2013, <https://www.azleg.gov/jlbc/13baseline/jus.pdf> (last visited Feb. 16, 2018). The Legislature has also diverted such funds *to the Attorney General* to fund the prosecution of capital postconviction review petitions. *See* Ariz. Legislature, Joint Legislative Budget Comm., Arizona Criminal Justice Commission, FY2016, <https://www.azleg.gov/jlbc/17AR/jus.pdf> (Last visited Feb. 16, 2018)). Since Fiscal Year 2012, counties have therefore effectively borne the cost of all indigent defense. *Id.* ("Prior to FY 2012, ACJC was required to distribute the Indigent Defense monies to each county based on a composite index formula using Superior Court felony filings and county population. Since that time, the fund has been used for other purposes.").

Even before 2012, counties bore most of the costs of indigent criminal defense. In FY2008, Arizona counties spent approximately \$120,942,184 on both capital and non-capital indigent defense. The state contributed only \$1,149,300, with \$150,100 from legislative appropriations and the remainder from fines. *See* The Spangenberg Project, The Center for Justice, Law and Society, at 13, [http://www.tidc.texas.gov/media/31120/spangenberg\\_state-and-county-expenditures-fy2008-final-report-3-15-10.pdf](http://www.tidc.texas.gov/media/31120/spangenberg_state-and-county-expenditures-fy2008-final-report-3-15-10.pdf). In 2008, Arizona was one of only 18 states where counties paid more than 50% of the costs of indigent defense, and one of only four states where counties funded 98% or more of costs of indigent defense. *Id.* at 4-6 (listing Nevada, Pennsylvania, and Utah as the other states).

In sum, Arizona has no institutionalized and memorialized mechanism that guarantees the payment of reasonable litigation expenses. Instead, the state relies on an ad hoc system that vests discretion in individual administrators and courts. Such a mechanism contravenes the requirements of Chapter 154 and the Final Rule.

#### **XI. ARIZONA'S MECHANISM DOES NOT GUARANTEE TIMELY APPOINTMENT OF COUNSEL.**

The Department must also deny Arizona's certification application because the state has failed to assure that appointments of counsel are *timely*. The interaction of Arizona's unique postconviction procedures with Chapter 154's tolling

provisions means that postconviction counsel must be appointed as soon as possible—immediately after the direct appeal—to preserve the defendant’s time to file a federal habeas petition. *Infra* § XI(A). But since 2000, Arizona has had no requirement for timely appointment of counsel. *Infra* § XI(B). And in practice, Arizona has failed to appoint counsel in a timely fashion. During the period covered by Arizona’s application for certification, many defendants have waited *multiple years* for appointment of postconviction counsel. *Infra* § XI(C). Meanwhile, to the extent Arizona has been able to timely appoint counsel in recent years, that is because Arizona lowered the qualifications for appointment. *Infra* § XI(C).

**A. Under Chapter 154, a state must appoint counsel as soon as possible following the affirmance of a defendant’s sentence on direct review to protect a defendant’s federal habeas review.**

Section 26.21 of the Final Rule mandates that counsel be provided “in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.” 28 C.F.R. § 26.21. Further, the regulations rely extensively on prior case law establishing the importance of a mechanism’s ability to guarantee timely appointments. *See* 78 Fed. Reg. 58,165-66; *see also Brown v. Puckett*, No. 3:01CV197–D, 2003 WL 21018627, at \*3 (N.D. Miss. Mar. 12, 2003) (“The timely appointment of counsel at the conclusion of direct review is an essential requirement in the opt-in structure. Because the abbreviated 180-day statute of limitations begins to run immediately upon the conclusion of direct review, time is of the essence. Without a requirement for the timely appointment of counsel, the system is not in compliance.”); *Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1187 (N.D. Cal. 1998) (“The quid pro quo would be hollow indeed if compliance by the state was satisfied by merely offering and promising to appoint competent counsel with no element of timeliness.”). As the preamble to the regulations explains, “an adequately functioning mechanism, as described in chapter 154, will *necessarily incorporate a policy for the timely appointment of competent counsel.*” 78 Fed. Reg. 58,166 (emphasis added).

Chapter 154’s tolling provisions interact with Arizona’s unique postconviction procedures in a way that makes timely appointment of postconviction counsel particularly important in Arizona. A timely appointment is one that occurs immediately after direct review and permits the prompt filing of an initial petition in trial court to preserve the possibility of federal habeas review. As explained more fully below, *infra* § XIV(C), Chapter 154’s statute of limitations may begin running as early as the filing of the Arizona Supreme Court’s decision on direct review and may continue to run until a petition for certiorari is filed, and begin running again from the denial of certiorari until the filing of the petition for postconviction review. However, the Arizona Supreme Court generally does not appoint postconviction counsel until *after* the denial of certiorari and the filing of a “Notice for Postconviction Relief” by the clerk of the Arizona Supreme Court. Ariz. R. Crim. P.

32.4(a)(2)(B). A prisoner typically has no postconviction counsel during the period his appellate counsel is preparing the petition for certiorari. Upon the denial of certiorari (or the expiration of the time for filing certiorari), the Arizona Supreme Court files the Notice, triggering a one-year period for filing the postconviction petition, with the possibility for extensions. *See* Ariz. R. Crim. P. 32.4(c)(1)(A), (B).

Under AEDPA's Chapter 153, the Notice tolls the one-year statute of limitations. 28 U.S.C. § 2244(d)(2); *Isley v. Ariz. Dep't of Corr.*, 383 F.3d 1054, 1055-56 (9th Cir. 2004). But it is unclear whether it does the same under Chapter 154. *See infra* § XIV(C). If a court finds that the period between the filing of the Notice and the filing of the petition is not tolled, prisoners who simply comply with the state's one-year deadline for filing their postconviction petition will be completely out of time for filing their federal habeas petitions. *Cf. Spears*, 283 F.3d at 1017 (stating that Chapter 154 "does not provide for the [statute of limitations] to be tolled during the time a petitioner is awaiting appointment of counsel").

To address that concern, diligent Arizona attorneys have begun to file initial postconviction petitions as soon as possible after their appointment. Armstrong Decl. at ¶¶ 11-12 (explaining the Arizona Capital Representation Project's practice of assisting postconviction counsel with promptly filing initial postconviction petitions). The Arizona Capital Representation Project is aware of "at least 31 Arizona cases where post-conviction counsel's failure to promptly file an initial petition may foreclose federal habeas review under Chapter 154." *Id.* at ¶ 38.

**B. Arizona's mechanism does not require timely appointment of postconviction counsel.**

Against that backdrop, Arizona's failure to require timely appointment of postconviction counsel is particularly troubling. At one time, Arizona's mechanism arguably required timely appointments. Arizona Rule of Criminal Procedure 32.4(c) once provided that postconviction counsel must be appointed within 15 days of the issuance of the notice for postconviction review, which, itself, would issue "expeditiously" upon either (1) the Supreme Court's denial of certiorari or (2) the expiration of the 90-day period for filing for certiorari. *See Meyer Decl. Ex. 299*, Ariz. R. Crim. P. 32.4 (1999). Even this scheme would not have preserved the time lost from Chapter 154's statute of limitations while appellate counsel prepared a petition for writ of certiorari, *see* 28 U.S.C. § 2263(b)(1), so fully half of Chapter 154's 180-day statute of limitations could be lost before counsel was appointed. And in practice, Arizona rarely, if ever, complied with the 15-day requirement.

In 2000, Arizona amended Rule 32.4 and removed the 15-day appointment requirement. As it is currently written, Rule 32.4(b)(1) states simply:

After the Supreme Court has affirmed a capital defendant's conviction and sentence, it must appoint counsel who meets the standards of Rules

6.5 and 6.8 and A.R.S. § 13-4041. Alternatively, the Supreme Court may authorize the presiding judge of the county where the case originated to appoint counsel. If the presiding judge makes an appointment, the court must file a copy of the appointment order with the Supreme Court.

As such, there is no longer any “policy for the timely appointment of competent counsel,” 78 Fed. Reg. 58,166, mandated by any Arizona statute or rule. Rule 32.4(a)(2)(B) still requires that the clerk of the Arizona Supreme Court “must expeditiously file a notice of post-conviction relief with the trial court upon the issuance of the mandate,” but that does not adequately protect a prisoner’s federal habeas period.

Notably, Arizona’s Supplemental Letter makes no mention of how Arizona purports to meet the timeliness requirement in the Final Rule. *See* Moulton Decl. Ex. 574, Ariz. Supplemental Letter at 1-2. Instead, it simply claims counsel is “automatically appointed” without addressing the timeliness of appointment. *Id.* at 2.

**C. In practice, Arizona has not timely appointed competent postconviction counsel during the period covered by Arizona’s certification application.**

The history of Arizona’s appointment mechanism confirms that the mechanism has not assured timely appointments.

Before abandoning the 15-day requirement in Rule 32.4(c)(1), “Arizona routinely violated it in capital cases.” *Spears v. Stewart*, 283 F.3d 992, 1001 (9th Cir. 2002) (Reinhart, J., joined by 10 judges and dissenting from denial of hearing en banc). In *Spears*, for instance, counsel was appointed 1 year and 8 months after conclusion of the direct appeal. *Id.* at 999 n.5. The district court had found that Arizona’s delays in appointing postconviction counsel meant that “Arizona has not complied with the timeliness requirement” for certification, and noted several other defendants who had suffered extreme delays in appointment of counsel: “Charles Hedlund waited 2 years and 2 months for post-conviction counsel; Roger Murray waited 1 year and 10 months; Richard Hurles waited 2 years; Danny Jones waited 2 years and 5 months; Darrel Lee waited 1 year and 9 months; Michael Gallegos waited 2 years and 1 month; James McKinney waited 2 years and 6 months; Robert Towery waited 1 year and 10 months; Levi Jackson waited 1 year and 8 months; Kenneth Laird waited 2 years and 1 month; David Hyde waited 1 year and 10 months; Thomas Kemp waited 1 year and 10 months; and Kevin Miles waited 2 years and 1 month.” *Spears*, 283 F.3d at 1001 n.9 (citing *Spears v. Stewart*, No. CV 00–1051–PHX–SMM, at 14 (D. Ariz. filed Nov. 21, 2000)); *see also* Case Chart.

After giving up on the on-paper-only 15-day requirement, Arizona defendants continued to face significant delays in obtaining postconviction counsel. In 2002,

Arizona Attorney General Janet Napolitano's Capital Case Commission found that appointments were being unreasonably delayed, including cases where "defendants had been waiting for over 18 months for a lawyer to be appointed to represent them at the PCR stage." Meyer Decl. Ex. 22, Office of the Att'y Gen. State of Arizona, *Capital Case Commission Final Report* (Dec. 31, 2002), at 14. Four years later, the sponsor of the Senate Bill to create a statewide public defender for postconviction cases confirmed that the private appointment mechanism had been unable to timely appoint counsel and that the state was at risk of not being able to take advantage of Chapter 154. Meyer Decl. Ex. 30, Ariz. House Comm. Minutes, Ariz. H.R. Comm. on Appropriations, 47th Leg., 2nd Reg. Sess. (Mar. 29, 2006), Senator John Huppenthal. And two years after that, 15 capital defendants were still awaiting the appointment of postconviction counsel, with two of those defendants waiting more than a year and a half. Meyer Decl. Ex. 28, Capital Case Oversight Comm., *Joint Report of the Capital Case Oversight Comm. & Maricopa County Superior Court to the Arizona Judicial Council* (Nov. 2008), at 11.

During the period from 2000 to 2011, when Arizona had no 15-day appointment deadline but did require that counsel have postconviction experience for appointment, *see supra* § VI(A)-(E), defendants waited, on average, *nearly 2 years*—711 days—from the Arizona Supreme Court's opinion on direct review to appointment of postconviction counsel. If the Ninth Circuit's dicta in *Spears* that Chapter 154's deadlines are not tolled "during the time a petitioner is awaiting appointment of counsel," 283 F.3d at 1017, is correct, then the deadline to file a federal habeas petition would have expired for 37 of 41 prisoners based solely on the time that elapsed from the filing of the Arizona Supreme Court's opinion on direct review to appointment of postconviction counsel.

In 2011, when Arizona abandoned the requirement that appointed counsel have postconviction experience, there was a slight reduction in appointment delays. Delays have been further reduced by the Maricopa County District Attorney's decision to pursue the death penalty in fewer cases than his predecessor. But even in cases where postconviction counsel was appointed from January 1, 2011, to today, prisoners waited an average of 8.5 months (256 days) from the Arizona Supreme Court's opinion on direct review to appointment of postconviction counsel. Twenty-four of 44 prisoners waited more than 180 days from the Arizona Supreme Court opinion to appointment of counsel.

Chapter 154 and the Final Rule require more than this haphazard system that relies on the exigencies of politics and circumstance to provide timely appointments; they require a binding, institutionalized commitment to timely appointments. No such commitment exists in Arizona—in either statute or rule. The Attorney General must therefore also deny Arizona's application for certification on this ground.

## XII. THE DEPARTMENT SHOULD NOT CERTIFY ARIZONA BASED ON *SPEARS v. STEWART*.

Arizona's application asserts that the Ninth Circuit in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002), "found that as of July 17, 1998, Arizona's postconviction procedures for capital defendants established a qualified procedure under chapter 154." Meyer Decl., Ex. 1, Application at 3. Arizona's Supplemental Letter repeats that contention. Moulton Decl. Ex. 574, Ariz. Supplemental Letter at 4. In *Spears*, the Ninth Circuit in dicta stated that the mechanism Arizona used in 1998 satisfied Chapter 154's requirements for opt-in, but that Arizona did not follow the mechanism in that case, and therefore Arizona was not entitled to curtailed habeas review. *Spears*, 283 F.3d at 1018-19; *see also id.* at 996-97 (Reinhardt, J., dissenting from denial of rehearing en banc) (explaining why the majority's conclusions regarding the adequacy of Arizona's mechanism were dictum).

Any suggestion that the Ninth Circuit's dicta predetermines Arizona's application is wrong. There are at least five reasons why *Spears* does not inform the question of certification that Arizona's application now presents.

**First**, the appointment mechanism that the Ninth Circuit reviewed in *Spears* is substantially different from the mechanism that Arizona uses today. *See supra* § VI. *Spears* examined Arizona's first iteration of its private appointment mechanism, and *Spears* was decided just four years after that mechanism took effect in 1998. It was decided before the Arizona Legislature declared that mechanism a failure and tried to replace it with a statewide public defender's office. *See supra* § VI(D). It was decided before the crisis in the number of Arizona capital cases further revealed the systemic deficiencies of that appointment mechanism. *See supra* § VI(C). It was decided before the Arizona Legislature repealed the requirement that postconviction counsel be appointed within 15 days of either the Supreme Court's denial of certiorari or the expiration of the 90-day time period provided for seeking a writ of certiorari. *See supra* § XI(B). And, perhaps most important, it was decided before Arizona substantially revised its private-appointment mechanism in 2011 to remove the requirement that appointed counsel have actual postconviction experience.<sup>49</sup> *See supra* § VI(F). In short, the changes to Arizona's mechanism since *Spears* was decided confirm that the Ninth Circuit's evaluation of the mechanism in place in 1998 has no application to an examination of Arizona's appointment mechanism since that time.

**Second**, *Spears*'s analysis of whether Arizona provides sufficient compensation to retain competent postconviction counsel no longer applies, even if the opinion was otherwise relevant. At the time *Spears* was decided, Arizona's

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<sup>49</sup> Indeed, *Spears* itself described Arizona's mechanism as requiring "a combination of appellate and post-conviction experience." 283 F.3d at 1013. That is not true today.

compensation rate was a maximum of \$100 per hour. Even at that time, numerous state committees and outside observers concluded that the compensation rate was insufficient to attract a pool of competent counsel. *See supra* 127. Sixteen years later, Arizona's compensation rate remains a maximum of \$100 per hour. For the reasons previously described, even if that rate was reasonable at the time of *Spears*, it no longer is sufficient to consistently attract and retain competent counsel. *See supra* § IX(B).

**Third**, to state the obvious, the Ninth Circuit decided *Spears* before the Department issued the Final Rule under which Arizona now seeks certification. The Final Rule establishes benchmarks and guidance that provide the interpretative framework for determining the adequacy of an appointment mechanism—including a mechanism's competency requirements and mandated compensation. The *Spears* court did not evaluate Arizona's mechanism under the framework that now guides the Department's certification decision.

**Fourth**, as the dissent from the denial of en banc rehearing explained in *Spears*, the opinion's conclusions about the adequacy of Arizona's mechanism were dicta. The *Spears* panel held that Arizona did not actually use its mechanism in that case, so the broader question of the mechanism's adequacy was not at issue. As the dissent correctly explained:

The decision in this case is similar to that in *Bush v. Gore*—good for this case and this case only—except that here the decision is not even good for this case. The three judge panel, consisting of two Ninth Circuit judges and one visiting judge, overrode the Chief District Judge for the District of Arizona (a former prosecutor with many years of experience in Arizona) and determined that although: (a) the question whether Arizona had opted-in to the short-fuse habeas scheme provided in Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. §§ 2261-66, was entirely irrelevant to the outcome of the case before it; (b) the linchpin provision of the procedures by which Arizona had once sought to opt-in under Chapter 154 had already been repealed by the state; (c) the state did not even comply with its own procedures in the case before the panel; (d) Arizona was unquestionably not in compliance with Chapter 154 at the time the appeal was heard; (e) in fact, the state had never at any time effectively complied with its short-lived procedures; and (f) no other state in the nation has ever been held to have successfully opted-in under Chapter 154, the panel would seize this opportunity to issue an advisory opinion stating that the no-longer-existent Arizona procedures were in compliance with Chapter 154's requirements. In doing so, it did not even mention that the critical Arizona provision underlying its “decision” had previously been repealed.

*Id.* at 996-97 (Reinhardt, J.).

**Fifth** and finally, *Spears* was decided without the benefit of any review of how the paper mechanism operated in practice. The past fifteen years of experience with Arizona's appointment mechanism confirm that the mechanism has failed time and time again to assure the provision of competent counsel. *See supra* §§ VI, VIII(D). The Ninth Circuit did not—and could not—consider whether Arizona's scheme qualified for Chapter 154 in light of these deficiencies because the court did not have the benefit of the extensive record presented here. In short, Arizona's actual experience with its appointment mechanism has confirmed the errors in *Spears*'s analysis and conclusions.

*Spears* therefore does not control whether Arizona should be certified under Chapter 154. Nor does it even inform the question.

### **XIII. THE ATTORNEY GENERAL SHOULD DENY ARIZONA'S APPLICATION AND WITHDRAW THE FINAL RULE BECAUSE THE FINAL RULE IS ARBITRARY AND CAPRICIOUS AND VIOLATES THE APA.**

For the many reasons explained above, the Department should deny Arizona's application because of its procedural and substantive deficiencies. Each iteration of Arizona's mechanism since 1998 has failed to ensure the timely appointment of competent and adequately compensated and funded postconviction counsel.

Even apart from those grounds for denial, the Department cannot certify Arizona because the Department has not properly promulgated regulations implementing the Chapter 154 certification process. The Final Rule is substantively inconsistent with Chapter 154, is arbitrary and capricious, and was promulgated in violation of the APA. The Department should withdraw the Final Rule, undertake notice-and-comment rulemaking that complies with the APA, and then require Arizona to submit a new application directed to properly issued opt-in regulations. *See Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, 2014 WL 3908220 (N.D. Cal. Aug. 7, 2014) (*HCRC I*), *vacated by Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, 816 F.3d 1241 (9th Cir. 2016) (*HCRC II*).

As described above, *supra* 10, HCRC and FDO-AZ sued the Department under the APA in 2013, alleging numerous procedural and substantive problems with the Final Rule. Meyer Decl. Ex. 4, Complaint and Request for Injunctive Relief, *Habeas Corpus Res. Ctr. v. United States Dep't of Justice*, No. C 13-4517 CW (N.D. Cal. Sept. 30, 2013). FDO-AZ reasserts its complaint here.

The Department has previously argued that APA challenges to the Final Rule are appropriate in challenges to the certification process. The Department is now estopped from arguing otherwise. Judicial estoppel applies "where a party

assumes a certain position in a legal proceeding, succeeds in maintaining that position, and then, simply because his interests have changed, assumes a contrary position.” *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010) (alterations omitted). *See also Reynolds v. Comm’r of Internal Revenue*, 861 F.2d 469, 474 (6th Cir. 1988) (applying judicial estoppel against the federal government). In the Northern District of California and the Ninth Circuit, the Department repeatedly argued that challenges to the Final Rule should be brought as part of the certification process, not in an independent APA suit, because “Section 2265(c)’s direct review provision affords a full opportunity for judicial review of any cognizable claims arising from the certification process, *including challenges to the underlying regulations.*” Meyer Decl. Ex. 212, Opening Brief, *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, No. CR14-16928 (9th Cir. Feb. 11, 2015), at 24 (emphasis added). The Ninth Circuit agreed that challenges to the Final Rule could be raised in certification proceedings, and found FDO-AZ’s APA claims were not ripe, stating that “[d]elayed judicial review of the Final Regulations is unlikely to cause hardship to capital prisoners.” *HCRC II*, 816 F.3d at 1253-54 (emphasis added). Accordingly, as part of its review of Arizona’s Application, the Department should consider and address FDO-AZ’s objections to the Final Rule itself.

#### **A. The Final Rule is arbitrary and capricious.**

As explained in the Complaint jointly filed by HCRC and FDO-AZ, and by the district court in *HCRC I*, the Final Rule is arbitrary and capricious and should be set aside under 5 U.S.C. § 706(2)(A). A regulation is arbitrary and capricious when the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Here, the Final Rule is arbitrary and capricious for ten reasons.

**First**, the Final Rule erroneously characterizes certification decisions as orders rather than rules and does not provide the required notice-and-comment rulemaking procedures. *HCRC I*, 2014 WL 3908220, at \*9 (“the Court finds that [certification decisions] are more properly characterized as rules rather than orders”). In the Final Rule, the Attorney General asserted that its certification determinations constitute orders, not rules, and therefore are not subject to the APA requirements governing rulemaking or those governing “adjudication required to be made or determined on the record after opportunity for an agency hearing.” 78 Fed. Reg. 58,174. In other words, the Attorney General believes that certification decisions are not subject to the APA’s public notice-and-comment procedures. This is incorrect. The Attorney General’s role in the certification process is to certify states, not to decide whether opt-in applies to a particular prisoner (i.e., adjudication). “[A]djudications resolve disputes among specific

individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals.” *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994). And, in contrast with rulemaking that has a prospective effect on individuals, adjudications “involve concrete disputes” and “have an immediate effect on specific individuals (those involved in the dispute).” *Id.*

A certification decision does not impact a single individual but rather a broad class of people—current as well as future death row litigants in the particular applicant state. *HCRC I*, 2014 WL 3908220, at \*9. Certification decisions are therefore properly characterized as rulemakings, so the Final Rule must provide for notice-and-comment procedures under 5 U.S.C. § 553(b). *Id.* The bare requirement in 28 C.F.R. § 26.23 that the Attorney General publish the application and consider comments is not sufficient. *Honeywell Int’l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (notice must “provide sufficient factual detail and rationale” such that interested parties have an opportunity to “comment meaningfully”) (citation omitted). The Department must also provide notice of its proposed decision and opportunity to comment on the decision. The Attorney General’s August 22, 2017, memo indicates that he does not plan to provide the public with this opportunity. *See Meyer Decl. Ex. 121*, Memorandum from Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice, to the Acting Ass’t. Att’y Gen., Office of Legal Policy (Aug. 22, 2017), at 2 (“After consideration of the recommendation [of the Office of Legal Policy] and all relevant materials, the Attorney General will issue a final decision on each application.”).

**Second**, the Final Rule improperly shifts the burden of proof regarding whether a state qualifies for certification from applicant states to interested parties. Under the Final Rule, a state seeking certification need only submit a “request in writing that the Attorney General determine whether the State meets the requirements for Chapter 154 certification.” 78 Fed. Reg. 58,184. The state is not required to submit any information in support of the application, nor is it required to take any affirmative steps to prove eligibility for certification, such as comparing its mechanism to the benchmarks provided in the regulations. *See id.* at 58,174 (stating that certification decisions “need not be supported by a data-intensive examination of the State’s record of compliance with the established mechanism in all or some significant subset of postconviction cases”).

This is contrary to the structure, history, and purpose of Chapter 154. *See HCRC I*, 2014 WL 3908220, at \*9. A state applying for certification bears the burden of demonstrating that it meets the statute’s requirements, as Congress clearly intended. The Powell Committee Report, a key source for determining the Congressional intent behind Chapter 154, explicitly recognized that “[u]nless a State takes the affirmative steps required” by Chapter 154, it cannot implement the expedited procedures contemplated by the statute; that is, the Powell Committee placed the burden of proving compliance on the state seeking certification. 135 Cong. Rec. S13483. 28 U.S.C. § 2265(a)(1)(A) thus tasks the Attorney General with

determining “whether *the State* has *established* a mechanism” that entitles it to Chapter 154 certification. 28 U.S.C. § 2265(a)(1)(A) (emphasis added).

When reviewing an agency’s construction of a statute, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Further, “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Id.* at 843 n.9. Here, the certification process established by the Final Rule violates Congress’s clear intent by not putting the burden on the state to show compliance with Chapter 154’s requirements. The Final Rule is consequently arbitrary and capricious because it is inconsistent to the requirements of Chapter 154. 5 U.S.C. § 706(2)(A).

**Third**, the Final Rule improperly permits certification of a state that does not actually comply with its mechanism. The idea that the Attorney General would certify a state that is not actually in compliance with its mechanism is wholly irrational. *HCRC I*, 2014 WL 3908220, at \*10 (“Common sense requires that a state must actually comply with its own mechanism, and the history, purpose and exhaustive judicial interpretation of chapter 154 also support this view.”). Actual compliance is a necessary component of certification. A mechanism is not “established” unless it is actually followed in practice. 28 U.S.C. § 2265(a)(1)(A). Without such a requirement, states can write whatever statutes or standards they want, but none of it matters if, in practice, they do not adhere to those standards. In turn, the quid pro quo by which states agreed to provide competent representation becomes nothing more than a false promise. As the Fourth Circuit noted in interpreting the pre-PATRIOT Act version of Chapter 154, “[i]t would be an astounding proposition if a state could benefit from the capital-specific provisions of AEDPA by enacting, but not following, procedures promulgated [to meet Chapter 154 requirements].” *Tucker v. Catoe*, 221 F.3d 600, 605 (4th Cir. 2000). See also *Lindh v. Murphy*, 521 U.S. 320, 326-30 (1997) (explaining that the benefits of Chapter 154 are available “only if the State meets certain conditions” and it has “done its part to promote sound resolution of prisoners’ petitions”).

The PATRIOT Act amendments did nothing to change this requirement. See *Hall v. United States*, 566 U.S. 506, 516 (2012) (“We assume that Congress is aware of existing law when it passes legislation.” (citation omitted)). The Department’s only concession on this issue is to acknowledge that a state’s “wholesale failure to implement one or more material elements of a mechanism described in a State’s certification submission” might be a basis to deny certification. 78 Fed. Reg. 58,162-63. But Congress did not intend that a State that repeatedly fails to comply with its mechanism could be certified so long as that failure is something less than “wholesale”—thereby creating havoc for state and federal postconviction lawyers. By permitting such certifications, the Final Rule violates the APA and is invalid

because, as discussed above, it is “contrary to clear congressional intent.” *Chevron*, 467 U.S. at 843 n.9.

**Fourth**, the Final Rule does not require sufficient information in the state’s certification application to provide for effective public comment. The Attorney General’s use of an undefined “request in writing” as the basis of the certification process does not require a state seeking certification to provide the Attorney General with any information about the state mechanism or the basis of the state’s eligibility for certification—much less specific, relevant facts about the timely appointment of counsel, state competency standards, compensation, payment of litigation expenses, and the functioning of those required features in practice. *HCRC I*, 2014 WL 3908220, at \*9 (finding “the rule as written requires only a bare-bones request” and does not require a state “submit data demonstrating its record of compliance with its mechanism” nor “demonstrate that its procedures are adequate”).

The certification process provides for public comment on a state’s request, 78 Fed. Reg. 58,184, but this is often an impossible exercise because the state’s request need not contain any relevant substance to which the public can respond. The Department has not offered any rational explanation for why it failed to require states to make an affirmative and detailed showing of how their mechanisms meet the individual requirements for certification. By permitting applications without adequate content, the Final Rule is arbitrary and capricious because it “entirely fail[s] to consider an important aspect of the problem,” i.e., how to provide for effective public comment. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43; *see also Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Nat’l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022-24 (2d Cir. 1986) (holding agency action arbitrary and capricious for failure to provide the public with sufficient notice and information relied upon for its conclusions).

**Fifth**, the Final Rule fails to sufficiently define what constitutes competent counsel, particularly in the context of the catchall competency provision in § 26.22(b). Final regulations are arbitrary and capricious when they fail to provide “definitional content” for terms guiding agency action implementing a statute. *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999). An agency is “obliged under the APA” to give content to statutory standards it is tasked with implementing, *id.* at 661, and must not leave a prospective applicant “utterly without guidance as to what he must prove, and how,” *S. Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974). “[I]t must be possible for the regulated class to perceive the principles which are guiding agency action.” *Pearson*, 164 F.3d at 661.

But 28 C.F.R. § 26.22(b)(2) provides no such definition or meaningful standard for determining when a state mechanism assures the provision of competent counsel. Section 26.22(b)(2) permits certification if a state’s competency requirements “otherwise reasonably assure a level of proficiency appropriate for

State postconviction litigation in capital cases.” The Department has never disputed that “the Attorney General can base his certification decision on section 26.22(b) alone.” *HCRC I*, 2014 WL 3908220, at \*11. Yet the section provides no clear guidelines to channel that determination. Where, as here, the failure “to adopt an intelligible decisional standard is so glaring,” courts “can declare with confidence that the agency action was arbitrary and capricious.” *See Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998). If allowed to stand, § 26.22(b)(2) would permit entirely subjective certification decisions. *See Defs. of Wildlife v. Salazar*, 842 F. Supp. 2d 181, 187 (D.D.C. 2012) (holding that an agency’s regulations violated the APA because a relevant definition was “so overbroad as to be absolutely meaningless”).

**Sixth**, the Final Rule fails to address the effect of prior jurisprudence interpreting Chapter 154’s requirements. *See* 78 Fed. Reg. 58,183-84. The Department’s vague statements that prior jurisprudence “remains generally informative” and “supports many features” of the Final Rule only highlight the Final Rule’s lack of guidance as to precisely how such case law will be considered in a certification determination. *Id.* at 58,164. The district court in *HCRC I* agreed, concluding the Final Rule “does not in any way address how prior judicial decisions will inform individual certification decisions.” *HCRC I*, 2014 WL 3908220 at \*12. Prior judicial decisions, a traditional tool of statutory construction, are relevant to whether a state meets the requirements of Chapter 154. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

**Seventh**, the Final Rule is arbitrary and capricious for its failure to address ex parte communications between the United States Attorney General and state officials. Ex parte communications have already infected Arizona’s application. *See supra* 10. The Final Rule has nothing to say about this. The Final Rule merely states that the Attorney General will make any state’s certification request publicly available. Because the public must be fairly apprised of issues before an agency, the Department’s adherence to a policy of ex parte communications runs afoul of the APA. *See Portland Audubon*, 984 F.2d at 1548. In the *HCRC* litigation, the Department’s primary defense to these ex parte communications was based on its erroneous belief that certifications are adjudications and not rulemakings. Meyer Decl. Ex. 212, Opening Brief, *Habeas Corpus Resource Center v. U.S. Dep’t of Justice*, No. CR14-16928 (9th Cir. Feb. 11, 2015), at 48. As explained above, that is incorrect. Regardless, ex parte communications are particularly egregious given that the certification procedure in the Final Rule does not provide for notice and comment on the Attorney General’s certification decision in any form and instead only includes publication and comment on the state application. *HCRC I*, 2014 WL 3908220, at \*13.

**Eighth**, the Final Rule creates unavoidable conflicts of interest and the appearance of bias. Due process requires the Attorney General’s certification decision making to be “impartial and disinterested,” *Marshall v. Jerrico, Inc.*, 446

U.S. 238, 242 (1980), and protects against “even the probability of unfairness,” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). As the chief law enforcement officer for the United States Government, the Attorney General enforces the law of the United States, defends against challenges to federal criminal prosecutions, regularly cooperates with, and provides training, funding, and support for, local law enforcement, and participates directly in joint law-enforcement operations with the states. Given these roles, the Attorney General’s decision making on opt-in inherently involves the risk of bias. *See, e.g., Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428 (1995) (concluding that under a statute that required the Attorney General to certify a plaintiff was injured in the scope of employment—where the result was to shield the government from liability—the Attorney General “[i]nvariably ... will feel a strong tug to certify, even when the merits are cloudy” and “his interest would certainly bias his judgment” (internal quotation marks omitted)); *see also* Meyer Decl. Ex. 214, Comment from Michael Laurence, Exec. Dir., Habeas Corpus Resource Center to Regulations Docket Clerk, Office of Legal Policy, Dep’t of Justice, OAG Docket No. 1540 (June 1, 2011), at 6 (listing amicus briefs in which the Attorney General has advocated for lesser protections for death-row prisoners); Meyer Decl. Ex. 215, Comment from Lawrence J. Fox, Ethics Bureau, Yale Law School, Certification Process for State Capital Counsel Systems, OAG Docket No. 1540 (June 1, 2011), at 3-4. Congress has recognized that, given the Attorney General’s role as a prosecutor, he is not equipped to objectively assess state compliance with a mechanism for supplying competent defense representation. S. Rep. No. 107-315 at 30 (2002) (“The Justice Department is itself a prosecutorial agency with close ties to prosecutorial agencies in the States, and it is unrealistic to expect the Department to be the sole oversight mechanism for a program designed to strengthen the defense function.”); *see also* 34 U.S.C. § 60305 (shielding the Attorney General from direct and sole authority for evaluating state compliance with a grant program designed to fund efforts to provide competent defense counsel). The Final Rule must be withdrawn because it fails to account for the Attorney General’s inherent bias in evaluating whether a state provides competent defense representation.

*Ninth*, the Final Rule does not provide actual notice to those most directly affected by the certification decision—death-sentenced prisoners. “Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (citation omitted). The Final Rule requires the Department to publish notice of the state’s application in the Federal Register and to publish the state’s application and any supporting materials on the internet. 28 C.F.R. § 26.23(b). But Arizona death-sentenced prisoners do not have timely access to the Federal Register and do not have access to the internet. Baich Decl. at ¶ 6. In Arizona, “The Federal Register is not provided or made available to inmates. However, the inmates can request this resource from a family member, friend or an outside vendor assuming it meets the standards and guidelines as detailed in Department Order 914 Inmate Mail.” Meyer Decl. Ex. 261, Email from Arizona Dep’t of Corrections to Elizabeth Moulton,

Att’y for FDO-AZ (Nov. 24, 2017). If prisoners would like to comment, they must rely on “a family member, friend or an outside vendor” to notify them, provide them with relevant materials, and then submit comments on their behalf. *Id.* The Final Rule’s failure to provide notice to death-sentenced prisoners is unlawful, arbitrary and capricious.

**Tenth**, the Final Rule is arbitrary and capricious because it does not include procedures for decertification. There is no process for the public to request that the Attorney General revoke a state’s certification. Just the opposite: Only a “State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State’s certified capital counsel mechanism.” 28 C.F.R. § 26.23(d) (emphasis added). The Final Rule also provides that certification is valid for five years, at which time a state can request recertification. 28 C.F.R. § 26.23(e). But in the meantime, the state may change or abandon its mechanism without losing its “certified” status.

This danger cannot be remedied by allowing district courts to decide on a case-by-case basis that Chapter 154 does not apply to a particular petitioner, because prisoners will have to alter their conduct during state appellate and postconviction proceedings to preserve the statute of limitations under Chapter 154, *see supra* 21, *infra* § XIV(C), and cannot risk missing their filing deadline on the chance that they will manage to convince a district court not to apply the 180-day statute of limitations under Chapter 154. Baich Decl. at ¶ 12 (explaining that federal habeas counsel must “prepare every case as if opt-in applies” and cannot risk filing a petition out of time).

The Department should therefore withdraw the Final Rule and devise a new rule that includes procedures for the public to request decertification of a state.

**B. The Department violated the Administrative Procedure Act in promulgating the Final Rule.**

In addition to being arbitrary and capricious, the Final Rule is invalid due to a number of procedural violations during the rulemaking process, including the Attorney General’s failure to provide adequate notice that he would treat a certification decision as an order rather than a rulemaking.

The APA “requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking ‘either the terms or substance of the proposed rule or a description of the subjects and issues involved.’” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (quoting 5 U.S.C. § 553(b)(3)). When an agency fails to notify interested parties of its position, its notice of proposed rulemaking has not “provide[d] sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully,” *Honeywell Int’l*.

*Inc.*, 372 F.3d at 445 (citation omitted), or “an opportunity to present their objections,” *Jones v. Flowers*, 547 U.S. 220, 226 (2006).

The Attorney General did not notify the public that he viewed certification decisions as adjudications rather than orders until he published the Final Rule. 78 Fed. Reg. 58,174. There is a significant difference between agency rulemaking and informal agency adjudications. See *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-656 (1990) (explaining requirements for informal adjudications under 5 U.S.C. § 555). The Attorney General’s late disclosure of his decision deprived the public of the ability to comment on whether a certification decision should be governed by the APA’s more robust notice-and-comment rulemaking procedures or the requirements for informal adjudications.

The history of the Final Rule confirms that the public was not on notice that the Attorney General would treat certification decisions as adjudications and not rulemakings. In a version of the regulations proposed in 2008, the Attorney General indicated he would treat certifications as orders and not rules. See 73 Fed. Reg. 75,327, 75,333. But that version of the rule was withdrawn and the newer version eliminated the characterization of certification decisions as orders. See 75 Fed. Reg. 71,353; 76 Fed. Reg. 11,705. Interested parties reasonably presumed the Attorney General intentionally removed this provision from the new version of the proposed rule. Indeed, this reasonable interpretation is supported by the fact that the 2011 Proposed Rule and 2012 Supplemental Notice included indicia of rulemaking for the certification decision, namely publication of the application followed by a notice-and-comment period. See 76 Fed. Reg. 11,710.

In light of the prior differing interpretations of the certification process, the Department was obligated to provide notice of its controversial view that rulemaking procedures would not apply to certification proceedings. See *Louis v. U.S. Dep’t of Labor*, 419 F.3d 970, 976 (9th Cir. 2005) (concluding that notice that omitted “potentially controversial subject matter” was insufficient); *Habeas Corpus Res. Ctr. v. U.S. Dept. of Justice*, No. 08-cv-2649, 2009 WL 185423, at \*8 (N.D. Cal. Jan. 20, 2009) (finding in a challenge to the 2008 version of the regulations that notice was inadequate because public commenters were not given sufficient information about the Attorney General’s controversial interpretation of Chapter 154’s requirements).

The district court in *HCRC I* found this error was harmless, because HCRC and FDO-AZ commented on “the lack of full rule-making procedures” in the proposed regulations. 2014 WL 3908220 at \*7. This error was not harmless because there are more than procedural differences between rulemakings and adjudications; rulemakings and adjudications are substantively different. Rulemakings are forward-looking and set out standards that can be applied to more than one case, while adjudications are limited to the facts of a particular case and may not project forward to predetermine future scenarios. See, e.g., Arthur Earl

Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121, 126 (1990). Treating a certification decision as a rulemaking is more likely to ensure uniform treatment across similarly situated states. *Id.* at 130 (“[A]djudication is not an especially appropriate means for the formulation of legal principles that are in fact applicable to a broad class of persons because it permits low visibility, differential agency decisionmaking of an arbitrary or capricious nature.”). Because FDO-AZ was not informed that the Attorney General would treat certification decisions as orders, FDO-AZ could not comment on these differences, and the failure to provide such notice was not harmless.

The Department should therefore withdraw the Final Rule.

#### **XIV. THE DEPARTMENT CANNOT CERTIFY ARIZONA BECAUSE CHAPTER 154 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO ARIZONA’S APPLICATION FOR CERTIFICATION.**

Over and above the problems with Arizona’s mechanism and the Final Rule, Chapter 154 itself is unconstitutional for three reasons: (1) it violates separation of powers by impinging on the judicial power; (2) it violates due process by vesting the certification decision in the Attorney General; and (3) it is unconstitutionally retroactive.

##### **A. Chapter 154 violates separation of powers.**

The Constitution “gives the Federal Judiciary the power not merely to rule on cases, but to *decide* them.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995). Chapter 154 upends that system and permits courts to merely rule on cases, while preventing courts from actually *deciding* them by imposing artificial time limits on the courts’ decision making process. Chapter 154 therefore violates the separation of powers doctrine and is unconstitutional.

Under Chapter 154, district courts must “enter a final judgment” on a capital habeas petition “not later than 450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier.” 28 U.S.C. § 2266(b)(1)(A); *id.* § 2266(b)(1)(C)(i) (permitting 30-day extension of this deadline). A court of appeals must decide an appeal “not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.” *Id.* § 2266(c)(1)(A); *id.* § 2266(c)(1)(B)(i) (permitting a 30-day extension). A state may enforce these deadlines by petitioning for a writ of mandamus in the court of appeals or Supreme Court, as appropriate. *Id.* § 2266(b)(4)(B), § 2266(c)(4)(B).

These deadlines interfere “with the proper performance of the judicial function by effectively conscripting the judiciary as an unwilling coconspirator in

what amounts to the imposition of a legislative fraud on the public,” because Congress announces a rule of decision (here, a review of a prisoner’s conviction and sentence under the standards set forth in 28 U.S.C. § 2264(a)) but then prevents the courts from applying it. *See* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *MERCER L. REV.* 697, 715 (1995). Placing an artificial deadline on habeas petitions leaves the court with no choice but to “hurriedly review” the parties’ briefing and contentions. *See In re Berry*, 521 F.2d 179, 181 (10th Cir. 1975) (discussing the 30-day limit placed on judges deciding appeals under the recalcitrant witness statute, 28 U.S.C. § 1826(b)). Courts have recognized the “serious constitutional problem” that would be created by attempts to enforce binding deadlines for judicial decision making. *In re Grand Jury Proceedings*, 605 F.2d 750, 752 n.1 (5th Cir. 1979) (discussing application of the recalcitrant witness statute).

This problem is only heightened in the context of capital habeas proceedings. These proceedings are extremely complex and involve the highest stakes. *Supra* § V(F). The artificial time limits that Chapter 154 places on capital habeas cases are significantly out of step with the amount of time judges normally require for deciding capital habeas cases. In 2007, a study of capital federal habeas petitions revealed “[t]he average processing time for capital cases in the 13 districts in the study is 1152 days, more than two and a half times as long as the statutory limit [in Chapter 154]. Not one of the 13 districts completed its capital cases in less than 500 days on average, even excluding stayed time.” Moulton Decl. Ex. 584, Nancy J. King, et al., *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, Aug. 21, 2007, at 7. “Any case with at least one claim denied on the merits took, on average, more than twice as long as cases with no merits review,” and capital cases “in which the court granted the writ on any claim took 54% to 74% more days to complete.” *Id.* at 8. Because the time restrictions do not distinguish between cases, they put pressure on a judge to deny claims on procedural grounds and decide cases quickly, rather than on the merits. The time limits therefore encourage unreasoned, arbitrary decision-making.<sup>50</sup>

By interfering with the court’s decision making abilities, Chapter 154 violates separation of powers.

**B. Chapter 154 violates due process by giving the Attorney General authority over certification decisions.**

FDO-AZ and others—particularly death-sentenced prisoners—interested in Arizona’s application are entitled to an “impartial and disinterested” review of

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<sup>50</sup> To the extent these time limits deny defendants the ability to have their claims heard, the time limits also violate due process.

Arizona's application. *Jerrico*, 446 U.S. at 242; *see also Withrow*, 421 U.S. at 46-47 (explaining that the right to "a fair trial in a fair tribunal" is a basic requirement of due process that applies to administrative decision making) (internal quotation marks omitted); *United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) ("Submission to a fatally biased decision making process is in itself a constitutional injury.").

Chapter 154 prevents impartial and disinterested review of Arizona's application by placing the certification decision in the hands of the Attorney General. As previously described, *supra* § XIII(A), the Attorney General is the chief prosecutor of the United States, *see Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985), and operates under a structural, institutional bias against postconviction defendants. *Cf. Alpha Epsilon Phi Tau Chapter Housing Ass'n v. City of Berkeley*, 114 F.3d 840 (9th Cir. 1997) (explaining that due process may be "offended where the decisionmaker, because of his institutional responsibilities, would have 'so strong a motive' to rule in a way that would aid the institution." (citation omitted)). The Attorney General's alliance of interests with the state prosecutor's office creates, at minimum, an appearance of bias that should disqualify him from deciding certification applications. *See Concrete Pipe and Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 618 (1993) ("Justice, indeed, must satisfy the appearance of justice, and this stringent rule may sometimes bar trial even by judges who have no actual bias." (alterations and internal quotation marks omitted)).

The Chapter 154 certification process asks the Attorney General to evaluate whether a state provides timely appointed, competent and adequately resourced defense counsel, but the Department of Justice regularly opposes attempts to standardize criminal defense performance. For example, the Department has filed amicus briefs opposing the adoption of portions of the ABA Guidelines as standards of care for purposes of evaluating ineffective assistance of counsel claims. *See, e.g.,* Brief for the United States as Amicus Curiae Supporting Respondent (Secretary, Pennsylvania Department of Corrections), *Rompilla v. Beard*, 545 U.S. 374 (2005) (No. 04-5462), 2004 WL 2945403 (arguing that the ABA Guidelines "exceed the constitutional minimum of reasonableness and, if viewed as immutable rules, could impose considerable, potentially fruitless, burdens on defense counsel"). The Attorney General has also advocated against robust postconviction review—arguing that "ordinary and reasonable principles of finality" should foreclose a prisoner's ability to make a claim of actual innocence on a second federal habeas petition. Brief for the United States as Amicus Curiae, *Felker v. Warden*, 518 U.S. 651 (1996) (No. 95-8836(A-890), 1996 WL 277112 at \*47-48; *see also* Brief for the United States as Amicus Curiae Supporting Petitioner, *Dretke v. Haley*, 541 U.S. 386 (2004) (No. 02-1824), 2003 WL 22970602 at \*19 (arguing that an "extension of the actual innocence exception to noncapital sentencing would impose unacceptable burdens on finality, comity, and scarce federal judicial resources").

The Attorney General is also directly aligned with state attorneys general in his role defending the United States in § 2255 actions, including capital § 2255 actions. He therefore has a substantial interest in setting standards for the effectiveness of defense counsel. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners (Wardens), *Ryan v. Gonzales*, 568 U.S. 57 (2013) (Nos. 10-930, 11-218), 2012 WL 1979938 at \*2 (asserting an interest in cases relating to state postconviction review because a holding which “affords state capital prisoners a right to competence in federal postconviction proceedings ... would presumably extend to federal capital prisoners”); Brief for the United States as Amicus Curiae Supporting Petitioner (Warden), *Schriro v. Summerlin*, 542 U.S. 348 (2004) (No. 03-526), 2004 WL 96767 at \*1 (asserting a substantial interest in “the standards governing the availability of new rules in collateral attacks on convictions and sentences”). *See also* Meyer Decl. Ex. 214, Comment from Michael Laurence, Exec. Dir., Habeas Corpus Resource Center to Regulations Docket Clerk, Office of Legal Policy, Dep’t of Justice, OAG Docket No. 1540 (June 1, 2011), at 6 (listing amicus briefs in which the Attorney General has advocated for lesser protections for death row prisoners); Meyer Decl. Ex. 215, Comment from Lawrence J. Fox, Ethics Bureau, Yale Law School, Certification Process for State Capital Counsel Systems, OAG Docket No. 1540 (June 1, 2011), at 3-4.

More specifically, claims of ineffective assistance of counsel under the Sixth Amendment are frequently asserted on collateral review in federal criminal cases. Whatever standards the Attorney General sets out in evaluating whether a state provides competent counsel may impact a court’s evaluation of ineffective assistance of counsel claims in § 2255 actions. *See* Brief for the United States as Amicus Curiae Supporting Petitioner (Warden), *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (No. 98-1441), 1999 WL 33611343, at \*1 (asserting an interest in state counsel effectiveness because “similar collateral attacks on federal criminal judgments will generally be adjudicated under the same standards”). Indeed, the Department has recognized that cases involving a state prisoner seeking relief under § 2254 are “likely to affect ineffective-assistance-of-counsel claims brought by federal prisoners under 28 U.S.C. 2255.” Brief for the United States as Amicus Curiae Supporting the Petitioner (Warden), *Bell v. Cone*, 353 U.S. 615 (2003) (No. 01-400), 2002 WL 122621 at \*1-2.

In enacting the Innocence Protection Act, Congress apparently recognized and tried to protect against this conflict of interest. 34 U.S.C. § 60305 provides grants for the improvement of capital representation and gives the Inspector General authority to oversee compliance with the terms of the grant. Congress believed that the Attorney General, “itself a prosecutorial agency,” could not “be the sole oversight mechanism for a program designed to strengthen the defense function.” *See* S. Rep. No. 107-315, at 30 (2002). Congress should have recognized that same institutional bias when amending Chapter 154.

The Attorney General's implementation of the certification process confirms his bias. The Attorney General's August 22, 2017, Memorandum indicates he plans to consult the Capital Case Section of the Criminal Division—a group that assists in the prosecution of federal capital cases and defends against federal capital habeas petitions. Meyer Decl. Ex. 121, Memorandum from Jeff Sessions, Att'y Gen., U.S. Dep't of Justice, to the Acting Ass't. Att'y Gen., Office of Legal Policy (Aug. 22, 2017). The memorandum flies in the face of the district court's finding in the *HCRC* litigation that the Attorney General's consultation with the "chief of the Capital Case Unit in the DOJ's Criminal Division (the agency's prosecutorial branch)" when promulgating the Final Rule "raises serious questions on the matter" of whether the Attorney General's "rule was so tainted by bias that it was not a valid exercise of rulemaking authority." *Habeas Corpus Resource Ctr. v. Dep't of Justice*, 2009 WL 185423 at \*9 (N.D. Cal. Jan. 20, 2009). Consultation with members of the criminal division, particularly the Capital Case Unit, as part of the certification review process presents, at the very least, the appearance of bias.

### **C. Chapter 154 is unconstitutionally retroactive.**

Arizona asserts that it established its appointment mechanism in 1998, and the state asks the Attorney General to certify its mechanism as of that date. Meyer Decl. Ex. 1, Application; 28 U.S.C. § 2265(a)(1)(A); 28 C.F.R. § 26.23. Certification of Arizona's mechanism dating to 1998 would be unconstitutionally retroactive if applied to strip defendants of their ability to pursue federal habeas claims that were previously timely, or would be timely, under Chapter 153. *See Ross v. Artuz*, 150 F.3d 97, 100 (2d Cir. 1998) (explaining that it is "impermissible for a newly enacted or shortened statute of limitations to extinguish existing claims immediately upon the statute's enactment"). That problem is not merely hypothetical; Arizona has already sought to take advantage of the retroactive application of certification. In the *Spears* litigation, Arizona sought to apply the 180-day statute of limitations to dismiss a habeas petition immediately upon a finding that Arizona's mechanism qualified under Chapter 154. *See, e.g., Moulton Decl. Ex 585, Motion to Dismiss, Spears v. Stewart*, No. 00-cv-1051 (D. Ariz. July 24, 2000). The Department must avoid these serious retroactivity concerns by denying Arizona's application for certification.

This is a concern both for defendants already in federal habeas proceedings *and* for defendants currently in state postconviction proceedings. For prisoners who have already entered postconviction review without taking steps to toll their Chapter 154 deadlines, it is possible that "application of a new limitation period [under Chapter 154] would *wholly eliminate* claims for substantive rights or remedial actions considered timely under [Chapter 153]." *See Brown v. Angelone*, 150 F.3d 370, 373 (4th Cir. 1998) (citation omitted). Such an application of Chapter 154 would therefore be "impermissibly retroactive." *Id.*

Chapter 154's statute of limitations and tolling provisions provide (emphases added):

28 U.S.C. § 2263

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after *final State court affirmance* of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be *tolled*--

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first *petition* for post-conviction review or other collateral relief is *filed* until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if--

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

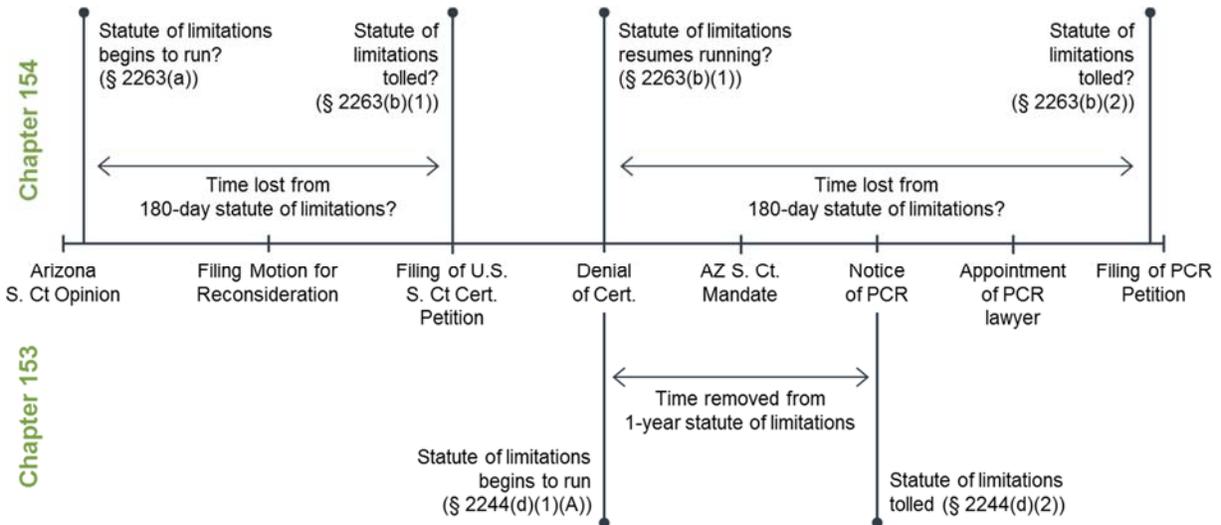
The 180-day period under Chapter 154 begins upon “final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2263(a). Based on Arizona’s capital litigation process, the commencement date could be any of the following: (1) the date that the Arizona Supreme Court affirms a conviction and sentence by written opinion; (2) the date the Arizona Supreme Court denies a defendant’s motion for reconsideration filed pursuant to Arizona Rule of Criminal Procedure 31.20; (3) the date that the defendant’s ability to file a motion for reconsideration expires; or (4) the date the Arizona Supreme Court issues its mandate. Which of these dates applies could alter the beginning of the statute of limitations by a significant amount of time.

Arizona may assert that Chapter 154’s 180-day statute of limitations runs during the time a defendant is preparing and filing a petition for a writ of certiorari

from the United States Supreme Court. Unlike Chapter 153's one-year statute of limitations that runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," Chapter 154's statute of limitations runs from "final *State* court affirmance" of the conviction. 28 U.S.C. § 2244(d)(1)(A); 28 U.S.C. § 2263; *Clay v. United States*, 537 U.S. 522, 525 (2003). Under 28 U.S.C. § 2101(c), defendants have 90 days to file a petition for a writ of certiorari, with an optional 60-day extension for good cause. As with all stages of capital representation, filing of the petition for a writ of certiorari requires care on the part of defense counsel to adequately protect the defendant's rights and to insure that all arguments have been raised. It would not be unusual for the full 150 days permitted under 28 U.S.C. § 2101(c) to pass before the writ of certiorari is filed. Therefore, if a court accepted the argument that Chapter 154's statute of limitations runs from the state supreme court's opinion on direct review until the filing of a petition for certiorari, simply concluding the direct appeal process and moving into state postconviction review could use 150 of a defendant's 180 days to file a habeas petition under Chapter 154.

Once in state postconviction review, the use of the term "petition" in § 2263, versus "application" in § 2244(d)(2), is potentially significant. Postconviction proceedings in Arizona begin when the Clerk of the Arizona Supreme Court files a "Notice of postconviction relief." Ariz. R. Crim. P. 32.4(a)(2)(B). While Arizona's postconviction review statutes and rules do not provide for the filing of an "application," § 2244(d)(2), the Ninth Circuit has held that the Notice tolls Chapter 153's one-year statute of limitations. *Isley v. Ariz. Dep't of Corrs.*, 383 F.3d 1054, 1055-56 (9th Cir. 2004). If Arizona were to argue that Chapter 154—which specifies filing a "petition"—does not toll the statute of limitations upon filing the Notice but only upon filing the prisoner's petition, many prisoners will be completely out of time under the federal statute of limitations before their first state postconviction review petition is even filed. Arizona's rules give postconviction counsel 12 months to file the petition for postconviction review, and permit extension of this time for good cause. *See* Ariz. R. Crim. P. 32.4(c)(1). Therefore, even if state postconviction counsel is immediately appointed and takes no extensions to file the postconviction petition, the prisoner would be left with no time to file his federal habeas petition under Chapter 154. In fact, if that argument were accepted, many prisoners will be out of time before their postconviction counsel is even appointed. *See, e.g., Spears*, 283 F.3d at 1017 (stating that Chapter 154 "does not provide for the [statute of limitations] to be tolled during the time a petitioner is awaiting appointment of counsel").

A comparison of the triggers and tolling periods for Chapter 153 with the possible<sup>51</sup> triggers and tolling periods for Chapter 154 is shown below:



As this chart demonstrates, to be in the best position to preserve a defendant’s federal habeas time, both appellate and postconviction counsel must be aware of whether Chapter 154 could apply to their client’s case. For individuals who have not yet entered state postconviction review, appellate counsel can try to protect at least some of her client’s federal habeas period by promptly filing for certiorari. And postconviction counsel can promptly file an initial petition in state court. *See supra* n.11 (discussing initial petitions).<sup>52</sup> But to promptly file the initial petition, postconviction counsel must be appointed either before or immediately upon issuance of the Arizona Supreme Court’s opinion on direct review—not after the Arizona Supreme Court issues its Mandate and Notice for Postconviction Relief. As explained above, *supra* § XI, Arizona does not comply with this requirement. Without these steps, defendants may lose any ability to challenge their capital sentences in federal court.

Further, retroactivity concerns are not limited to Chapter 154’s statute of limitations and tolling provisions. The retroactive application of Chapter 154’s other restrictions on habeas petitioners—such as restrictions on the ability to

<sup>51</sup> We say “possible” because no court has interpreted the language of § 2263 and FDO-AZ does not concede that § 2263 should be interpreted in this manner, which could leave many capital prisoners with no ability to file a federal habeas petition.

<sup>52</sup> Of course, the state courts and state attorney general must permit (or not object to) amendment of the initial petition. If not, the state court could dismiss the initial petition, or the state could file an answer to the initial petition, before the petitioner has a chance to amend.

amend a petition and request a stay—also present substantial constitutional questions.

The Attorney General should deny Arizona’s application on this independent ground.

**XV. IF THE DEPARTMENT CERTIFIES ARIZONA, THE DEPARTMENT SHOULD STAY ITS CERTIFICATION DECISION PENDING REVIEW BY THE D.C. CIRCUIT AND THE SUPREME COURT.**

FDO-AZ requests that if the Department grants Arizona’s application for certification, the Department stay the decision pending judicial review. 28 U.S.C. § 2349(b); Fed. R. App. Proc. 18(a). A stay will preserve the status quo for death-sentenced prisoners, with Chapter 153’s deadlines and procedures governing their capital habeas petitions.

FDO-AZ meets all four factors the D.C. Circuit considers in determining whether a stay is warranted: “(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest.” Circuit Rule 18(a)(1); see *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). The factors are not considered in isolation but are weighed together, such that a particularly strong showing on one factor can justify a slight deficiency in another. See *Washington Metro.*, 559 F.2d at 843; *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958). In this case, the balance of interests clearly justifies a stay.

**A. FDO-AZ has presented a substantial case on the merits.**

An agency may grant a stay even if it disagrees with the movant on the merits so long as the case presents a “substantial case on the merits” or “an admittedly difficult legal question and ... the equities of the case suggest that the status quo should be maintained.” *Washington Metro.*, 559 F.2d at 843-45 (further explaining that “serious, substantial, difficult and doubtful” legal questions justify a stay). As detailed throughout this Comment, FDO-AZ has presented a substantial case.

As a threshold matter, FDO-AZ has presented a substantial case that the Final Rule should be withdrawn and new regulations governing the certification process must be issued. See *supra* § XIII. The only court to consider this question on the merits, the Northern District of California, agreed. *HCRC I*.

Even if the Final Rule is valid and can be applied to evaluate Arizona’s application, FDO-AZ has presented a substantial case that Arizona’s mechanism does not meet the Rule’s requirements, because it does not meet a single benchmark

set out in the Final Rule and does not qualify under any fallback provisions. *Supra* §§ VIII-XI.

**B. FDO-AZ, its clients, and Arizona death-sentenced prisoners will be irreparably harmed if certification takes effect.**

Under the second prong, if a certification decision is not stayed, FDO-AZ and its clients will suffer irreparable harm. Once Arizona's mechanism is certified, Chapter 154's shortened deadlines and other limitations go into effect. If Chapter 154 is applied to a prisoner's case, prisoners still in state court and entering federal court may find themselves with no time left to file their federal habeas petitions under Chapter 154. *See supra* § XI. Because Arizona does not appoint postconviction attorneys immediately after a direct appeal, even prisoners still on direct review in state court could be harmed by the need to file rushed petitions for certiorari or initial postconviction petitions. *Id.* Filings that attorneys had budgeted months to prepare will now require filing in a matter of days or weeks.

For example, Pete VanWinkle, whose case is currently pending in the Arizona Supreme Court on petition for review, may have as little as 59 days to file a federal habeas petition under Chapter 154 once his case enters federal court, but would have 348 days under Chapter 153.<sup>53</sup> VanWinkle's counsel will have to act immediately if a certification decision is not stayed, and the client's interests will be irreparably harmed.

FDO-AZ currently represents four Arizona death-sentenced clients who have not yet filed habeas petitions. If a certification decision is not stayed, the attorneys preparing those petitions will be forced to immediately seek additional resources or may be forced to curtail their investigations and forego the development of potentially meritorious claims to comply with Chapter 154's shortened deadlines. Baich Decl. at ¶ 13. The teams of mitigation experts, fact investigators, and mental health professionals will also have less time to establish a relationship with the client and evaluate critical issues such as client competency, mental retardation, and mental illness. Baich Decl. at ¶ 21.

Those harms would be irreparable. There is no after-the-fact remedy that can compensate a capitally-sentenced prisoner who loses a viable constitutional

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<sup>53</sup> The Arizona Supreme Court affirmed VanWinkle's conviction and sentence on August 15, 2012. *See* Moulton Decl. Ex. 434, Mandate, *Arizona v. VanWinkle*, No. CR-09-322-AF (Ariz. Jan. 23, 2013). VanWinkle filed a petition for certiorari 50 days later, on October 4, 2012, and the United States Supreme Court denied the petition on January 7, 2013. *Id.* VanWinkle filed an initial postconviction petition 71 days later, on March 19, 2013. *See* Moulton Decl. Ex. 436, Initial Petition for Post-Conviction Relief (*Excerpted*), *Arizona v. VanWinkle*, No. CR-2008-128068-001 DT (Ariz. Super. Ct. Mar. 19, 2013).

claim because his attorney did not have time or resources to investigate it. *See Washington Metro.*, 559 F.2d. at 844 n.2. There is nothing that can compensate an attorney for having to divert time from one client's case to another; "[m]onetary relief in the future" cannot make up for "foregone planning" and preparatory work central to an organization's mission. *Massachusetts Law Reform Inst. v. Legal Servs. Corp.*, 581 F. Supp. 1179, 1188 (D.D.C. 1984), *aff'd*, 737 F.2d 1206 (D.C. Cir. 1984).

Even for FDO-AZ's 38 clients potentially impacted by Chapter 154 who have already filed habeas petitions, Chapter 154 impacts a prisoner's ability to pursue defaulted claims and amend their petition. 28 U.S.C. §§ 2264, 2266(b)(3)(B). For example, Charles Ellison has permission from the district court to amend his habeas petition. *See Meyer Decl. Ex. 286, Order Granting Motion to Amend Scheduling Order, Ellison v. Ryan*, No. CV-16-08303 (D. Ariz., May 19, 2017). If Chapter 154 were applied to his case, however, it would limit his ability to amend his petition. Chapter 154 also affects the availability of stays of execution. 28 U.S.C. § 2262(c). And it places unreasonable constraints on a court's time for resolving the petition on the merits, creating a risk of arbitrary decisions. 28 U.S.C. § 2266; *supra* § XIV(A).

As the district court thus correctly concluded in *HCRC I*, the kinds of losses federal defenders and their clients stand to suffer in the absence of a stay are both "significant and irreparable." *HCRC I*, 2014 WL 3908220, at \*6.

### **C. Other parties will not be harmed by a stay.**

A stay will not harm Arizona or "other parties interested in the proceedings." *Virginia Petroleum*, 259 F.2d at 925. Capital habeas petitions have been governed by Chapter 153 for the past 20-plus years, and a stay will simply preserve the status quo timelines and procedures. Arizona's application for certification, meanwhile, has been pending for over four years. Putting certification on hold for some additional months pending judicial review will not alter Arizona's position or result in any material unfairness.<sup>54</sup> And any injury Arizona could conceivably suffer pales in comparison to the harm a prisoner and his counsel would experience through a failure to stay a certification decision.

### **D. A stay is in the public interest.**

Finally, the public interest broadly favors granting prisoners an adequate opportunity to challenge the fairness of their conviction and sentence. *Cf. Arizona v. Washington*, 434 U.S. 497, 516 (1978) (remarking on "the public's interest in fair trials designed to end in just judgments" (citation omitted)). Absent a stay, FDO-AZ

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<sup>54</sup> Even if Arizona's application is stayed, other states can continue to apply for opt-in status, and the Department can continue to process those applications.

and other postconviction counsel will have to curtail their investigation of prisoners' cases. Federal habeas petitions will be filed without raising potentially meritorious claims. And prisoners could be executed without having had a full and fair review of their conviction and sentence.

The effects of certification are therefore profound and wide-ranging. *HCRC I*, 2014 WL 2908220, at \*8 (recognizing that “certification decisions will affect the rights of broad classes of individuals”). Arizona currently has 102 death-row prisoners who were appointed postconviction counsel after July 17, 1998—42 represented by FDO-AZ—all of whom will be adversely affected by certification. FDO-AZ's other capital clients, noncapital clients, prospective clients, and counsel it advises will also suffer, as attorneys will have to divert limited resources to capital clients with fast-approaching deadlines. Baich Decl. at ¶¶ 27-28.

In short, many individuals will suffer irreparable harm if a certification decision goes into effect. There is no countervailing concern of unfairness to the State. “[T]he equities of the case suggest that the status quo should be maintained.” *Washington Metro.*, 559 F.2d at 843-44.

For all the reasons explained above, we respectfully request that the Department deny Arizona's application. If the Department grants Arizona's certification request, it should stay that decision pending judicial review.

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TOM HORNE  
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
STATE OF ARIZONA

April 18, 2013

Honorable Eric H. Holder, Jr.  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

**RE: Opt-in under 28 U.S.C. § 2265(a)**

Dear General Holder:

I write to request certification that Arizona qualifies for "opt-in" status entitling Arizona to take advantage of the expedited federal habeas corpus review procedures in capital cases under chapter 154, *Special Habeas Corpus Procedures in Capital Cases*, 28 U.S.C. §§ 2261-2266. I believe that Arizona meets the statutory requirements for opt-in status, and that Arizona's system of appointing qualified, well-compensated counsel in state post-conviction proceedings entitles Arizona to qualify to "opt-in" under the statute.

Chapter 154 provides for expedited federal habeas corpus review in capital cases for states that establish a mechanism for providing qualified counsel to indigent capital defendants in state post-conviction proceedings. These procedures have been in place since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2261.

The statutory requirements under Section 2261 provide that a state seeking certification (1) "establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death," 28 U.S.C. § 2265(a)(1)(A); (2) "offer counsel to all State prisoners under capital sentence," 28 U.S.C. § 2261(c); and (3) provide for the entry of an order by a court of record that (a) appoints counsel upon finding either that the defendant is indigent and accepts the offer of counsel or that the defendant is unable competently to accept or reject the offer, § 2261(c)(1); (b) finds that the defendant declined the offer of counsel with an understanding of its legal consequences, § 2261(c)(2); or (c) denies the appointment of counsel upon finding the defendant is not indigent, § 2261(c)(3).

In 1998, Arizona established procedures to appoint qualified counsel in capital post-conviction proceedings. Pursuant to both statute and rule, after the Arizona Supreme Court has affirmed an indigent capital defendant's conviction and sentence, post-conviction counsel is automatically appointed. A.R.S. § 13-4041(B); Ariz. R. Crim. P. 32.4(c). As required by 28 U.S.C. § 2261(d) under

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April 18, 2013  
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the certification process, appointed counsel cannot have previously represented the defendant at trial or on direct appeal, unless both counsel and the defendant otherwise consent. A.R.S. § 13-4041(C)(3).

Arizona provides for the reasonable compensation for appointed counsel as required by 28 U.S.C. § 2265(a)(1)(A). Indigent capital defendants are represented during post-conviction proceedings either by the Public Defender or other publicly funded offices, or by appointed private counsel. A.R.S. § 13-4041(A), (B) & (C). Counsel employed by publicly funded offices are compensated by salary. A.R.S. § 41-4041 (A). Appointed private counsel are compensated at an hourly rate of up to \$100 per hour for up to 200 hours of representation. A.R.S. § 13-4041(F); Ariz. R. Crim. P. 6.7(a), (b). Upon a showing of good cause, appointed counsel may be compensated for representation exceeding 200 hours. A.R.S. § 13-4041(G). In addition, Arizona provides for the payment of reasonable litigation expenses required by 28 U.S.C. § 2265 (a)(1)(A). See A.R.S. § 13-4041(I) ("The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by § 13-4232.") On average, Arizona spends well over \$200,000 in attorney fees and litigation costs for each capital post-conviction case.

The statutory certification also requires the appointment of "competent" counsel in a State's capital post-conviction mechanism. 28 U.S.C. § 2265(A). Arizona requires appointed counsel to meet strict competency standards. Counsel must:

1. Be a member in good standing of the State Bar of Arizona for at least five years immediately preceding appointment;
2. Have practiced criminal litigation for 3 years immediately preceding appointment;
3. Must have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases;
4. Within 3 years immediately preceding appointment, must have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least 3 felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, to be appointed an attorney must have been lead counsel in the appeal of at least 6 felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings;
5. Have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense; and
6. Must be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases.

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Ariz. R. Crim. P. 6.8(a), (c).<sup>1</sup> These competency requirements, mandated by the Arizona Supreme Court, exceed more general competency requirements set out in A.R.S. § 13-4041(C).

Additionally, although not required for opt-in status, Arizona also contemporaneously adopted heightened standards for counsel who handle capital *trials*. Under Arizona law, Rule 6.2, Ariz. R. Crim. P., a defendant charged with capital murder is entitled to two highly qualified attorneys – a procedure that presumably lessens the likelihood of ineffective assistance of trial counsel and makes post-conviction counsel's job easier.

In 2002, the United States Circuit Court of Appeals for the Ninth Circuit found that as of July 17, 1998, Arizona's postconviction procedures for capital defendants established a qualified procedure under chapter 154. *Spears v. Stewart*, 283 F.3d 992, 1007 (9th Cir. 2002). The court declined, however, to apply the expedited procedures due to delay in the appointment of postconviction counsel for *Spears* (notwithstanding any claim of prejudice resulting from the delay).

In 2005, Congress abrogated *Spears* and amended 28 U.S.C. §§ 2261–66 by enacting the USA PATRIOT Improvement and Reauthorization Act of 2005. Senator Kyl, who sponsored the amendments, explained:

In *Spears v. Stewart* . . . the Ninth Circuit held that even though Arizona had established a qualifying system and even though the State court had appointed counsel under that system, the Federal Court could still deny the State the benefit of qualification because of a delay in appointing counsel . . . [T]his bill abrogates . . . th[is] holding and removes the qualification decision to a neutral forum . . . . Paragraph (a)(3) of new section 2265 forbids creation of additional requirements not expressly stated in the chapter, as was done in the *Spears* case.

152 Cong. Rec. S1620, 1624–25 (daily ed. Mar. 3, 2006).

The 2005 amendments did not change the requirement that a qualifying State establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State capital postconviction proceedings. The amendments provide that the Attorney General promulgate regulations to implement the certification procedure. As of this date, the Department of Justice has not promulgated regulations for the certification procedure. The statute permissively allows the Department of Justice to promulgate regulations, but it does not authorize indefinite suspension of the expedited procedures. Nor does the statute require States to wait for the Department of Justice to promulgate regulations prior to seeking certification.

I believe that it is clear that Arizona's post-conviction mechanism for appointing qualified counsel in capital cases meets the statutory requirements for certification. Given the Ninth Circuit's finding that Arizona satisfies what Congress has now confirmed to be the universe of requirements that must be

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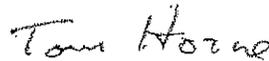
<sup>1</sup> In exceptional circumstances, and with consent of the Arizona Supreme Court, attorneys who do not meet these requirements may be appointed, provided that the attorney's experience, stature and record enables the Court to conclude that the attorney's ability significantly exceeds the standards set forth above. However, all appointed counsel must be familiar with, and guided by, the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases. Ariz. R. Crim. P. 6.8(d).

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met, Arizona should be deemed to have "opted-in" to the accelerated review procedures contemplated under AEDPA.

My staff and I would be happy to address any questions you may have regarding Arizona's capital case procedures. We request that a determination regarding opt-in status be made within 90 days. If we do not receive a decision in 90 days we will treat that as a wrongful denial and seek relief in the United States Court of Appeals for the District of Columbia, which has judicial review under the relevant statute.

Sincerely,



Tom Horne

cc: Eric J. Bistrow, Chief Deputy  
Robert Ellman  
Jeffrey Zick

3206344

written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6006, of FAA Order 7400.9X dated August 7, 2013, and effective September 15, 2013, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

**The Rule**

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E en route domestic airspace extending upward from 1,200 feet above the surface, at the Battle Mountain VORTAC navigation aid, Battle Mountain, NV, to accommodate IFR aircraft under control of Salt Lake City, Oakland and Los Angeles ARTCCs by vectoring aircraft from en route airspace to terminal areas. This action is necessary for the safety and management of IFR operations.

The FAA has determined this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at the Battle Mountain VORTAC, Battle Mountain, NV.

**Environmental Review**

The FAA has determined that this action qualifies for categorical exclusion

under the National Environmental Policy Act in accordance with FAA Order 1050.1E, “Environmental Impacts: Policies and Procedures,” paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

**PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS**

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

**§71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9X, Airspace Designations and Reporting Points, dated August 7, 2013, and effective September 15, 2013 is amended as follows:

*Paragraph 6006 En Route Domestic Airspace Areas.*

\* \* \* \* \*

**ANM NV E6 Battle Mountain, NV [New]**

Battle Mountain VORTAC, NV  
(Lat. 40°34’09” N., long. 116°55’20” W.)

That airspace extending upward from 1,200 feet above the surface within an area bounded by Lat. 41°08’22” N., long. 114°57’44” W.; to Lat. 40°40’40” N., long. 114°28’45” W.; to Lat. 40°06’57” N., long. 114°37’44” W.; to Lat. 39°38’25” N., long. 114°42’19” W.; to Lat. 38°28’04” N., long. 114°21’28” W.; to Lat. 38°19’56” N., long. 114°09’07” W.; to Lat. 38°23’43” N., long. 113°12’48” W.; to Lat. 37°48’00” N., long. 113°30’00” W.; to Lat. 37°49’25” N., long. 113°42’01” W.; to Lat. 37°53’44” N., long. 113°42’03” W.; to Lat. 38°01’00” N., long. 114°12’03” W.; to Lat. 38°01’00” N., long. 114°30’03” W.; to Lat. 37°59’59” N., long. 114°42’06” W.; to Lat. 37°53’00” N., long. 116°11’03” W.; to Lat. 37°53’00” N., long. 116°26’03” W.; to Lat. 37°53’00” N., long. 116°50’00” W.; to Lat. 38°13’30” N., long. 117°00’00” W.; to Lat. 38°13’30” N., long. 117°16’30” W.; to Lat. 37°55’11” N., long. 117°53’37” W.; to Lat. 39°39’28” N., long. 117°59’55” W.; to Lat. 40°04’38” N., long. 118°49’42” W., thence to the point of beginning.

Issued in Seattle, Washington, on September 11, 2013.

**Christopher Ramirez,**  
*Acting Manager, Operations Support Group,  
Western Service Center.*

[FR Doc. 2013–22846 Filed 9–20–13; 8:45 am]

**BILLING CODE 4910–13–P**

**DEPARTMENT OF JUSTICE**

**28 CFR Part 26**

[Docket No. 1540; AG Order No. 3399–2013]

**RIN 1121–AA77**

**Certification Process for State Capital Counsel System**

**AGENCY:** Office of the Attorney General, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** Chapter 154 of title 28, United States Code, provides special procedures for Federal habeas corpus review of cases brought by indigent prisoners in State custody who are subject to a capital sentence. These special procedures are available to States that the Attorney General has certified as having established mechanisms for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by such prisoners, and as providing standards of competency for the appointment of counsel in these proceedings. This rule sets forth the regulations for the certification procedure.

**DATES:** *Effective Date:* This rule is effective October 23, 2013.

**FOR FURTHER INFORMATION CONTACT:** Robert Hinchman, U.S. Department of Justice, Office of Legal Policy, 950 Pennsylvania Avenue NW., Washington, DC 20530, at (202) 514–8059 or *Robert.Hinchman@usdoj.gov*.

**SUPPLEMENTARY INFORMATION:** Chapter 154 of title 28, United States Code, makes special procedures applicable in Federal habeas corpus review of State capital judgments if the Attorney General has certified “that [the] State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265” and “counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.” 28 U.S.C. 2261(b). Section 2265(a)(1) provides that, if requested by an appropriate State official, the Attorney General must

determine “whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State [capital] postconviction proceedings brought by indigent prisoners” and “whether the State provides standards of competency for the appointment of counsel in [such] proceedings.”

Chapter 154 was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law 104–132, section 107, 110 Stat. 1214, 1221–26 (1996), and was amended by the USA PATRIOT Improvement and Reauthorization Act of 2005, Public Law 109–177, section 507, 120 Stat. 192, 250–51 (2006). Before the 2006 amendments, the regional Federal courts in their review of State capital cases determined States’ eligibility for the chapter 154 habeas corpus review procedures. The 2006 amendments re-assigned responsibility for chapter 154 certifications to the Attorney General of the United States, subject to de novo review by the Court of Appeals for the District of Columbia Circuit, and added a provision stating that there are no requirements for certification or for application of chapter 154 other than those expressly stated in the chapter, 28 U.S.C. 2265(a)(3). The effects of the 2006 amendments are explained in an opinion of the Department’s Office of Legal Counsel and, where relevant to a specific provision in the rule, elsewhere in this preamble. See *The Attorney General’s Authority in Certifying Whether a State Has Satisfied the Requirements for Appointment of Competent Counsel for Purposes of Capital Conviction Review Proceedings*, 33 Op. O.L.C. \_\_\_\_, at \*12 (Dec. 16, 2009) (“OLC Opinion”), available at <http://www.justice.gov/olc/opinions.htm>.

Section 2265(b) directs the Attorney General to promulgate regulations to implement the certification procedure under chapter 154. The Attorney General accordingly published a proposed rule in the **Federal Register** on June 6, 2007, to add a new subpart entitled “Certification Process for State Capital Counsel Systems” to 28 CFR part 26. 72 FR 31217. The comment period ended on August 6, 2007. The Department published a notice on August 9, 2007, reopening the comment period, 72 FR 44816, and the reopened comment period ended on September 24, 2007. A final rule establishing the chapter 154 certification procedure was published on December 11, 2008, 73 FR 75327 (the “2008 regulations”), with an effective date of January 12, 2009.

In January 2009, the United States District Court for the Northern District of California enjoined the Department “from putting into effect the rule . . . without first providing an additional comment period of at least thirty days and publishing a response to any comments received during such period.” *Habeas Corpus Resource Ctr. v. U.S. Dep’t of Justice*, No. 08–2649, 2009 WL 185423, at \*10 (N.D. Cal. Jan. 20, 2009) (preliminary injunction); *Habeas Corpus Resource Ctr. v. U.S. Dep’t of Justice*, No. 08–2649, slip op. at 1 (Jan. 8, 2009) (temporary restraining order). On February 5, 2009, the Department solicited further public comment, with the comment period closing on April 6, 2009. 74 FR 6131.

As the Department reviewed the submitted comments, it considered further the statutory requirements governing the regulatory implementation of the chapter 154 certification procedures. The Attorney General determined that chapter 154 gave him greater discretion in making certification determinations than the 2008 regulations would have allowed. Therefore, the Department published a notice in the **Federal Register** on May 25, 2010, proposing to remove the 2008 regulations pending the completion of a new rulemaking process, during which the Department would further consider what procedures were appropriate. 75 FR 29217. The comment period closed on June 24, 2010. On November 23, 2010, the Department published a final rule removing the 2008 regulations. 75 FR 71353.

The Department published a new proposed rule on March 3, 2011. 76 FR 11705. The comment period closed on June 1, 2011. The Department published a supplemental notice of proposed rulemaking on February 13, 2012, which identified a number of possible changes the Department was considering based on comments received in response to the publication of the proposed rule. 77 FR 7559. The comment period closed on March 14, 2012.

#### Summary of Comments

About 60 comments were received on the proposed rule, including both comments received on the initial notice of proposed rulemaking and comments received on the supplemental notice of proposed rulemaking.

Some commenters urged the Department to publish, in effect, a third notice of proposed rulemaking so as to disclose the exact text of the final rule—particularly the language regarding the effect of compliance with benchmarks on certification—before its publication. However, the Department published the

full text of the proposed rule in the original notice of proposed rulemaking. 76 FR 11705. It also published a supplemental notice of proposed rulemaking to provide a further opportunity for public input on changes to the rule under consideration following initial comment. 77 FR 7559. The text of this final rule is the same as that published in the original notice of proposed rulemaking, except for five changes to that text that were precisely described in the supplemental notice, further clarifying amendments (affecting §§ 26.20, 26.21, 26.22(b), (c), and (d), and 26.23(c)), and minor technical changes. All of the changes made to the text directly pertain to subjects and issues identified as under consideration by the terms of the original notice and supplemental notice and are responsive to the public comments received on those notices. The extensive comments received in response to the two publications confirm that interested members of the public were able to comment intelligently on the issues affecting the formulation of the final rule and in fact did so.

In the ensuing summary, comments that concern the general approach of the rule or that affect a number of provisions in the rule are discussed initially, followed by discussion of comments that pertain more specifically to particular provisions in the rule.

#### General Comments

##### *The Basic Approach of the Rule*

Two commenters argued that the Attorney General lacks authority to articulate substantive standards for chapter 154 certification, contending instead that chapter 154 limits the Attorney General to performing ministerial tasks when exercising his or her certification responsibilities. These comments are not well-founded. Chapter 154 is reasonably construed to allow the Attorney General to define within reasonable bounds the chapter’s requirements for certification, and to evaluate whether a State’s mechanism is adequate for purposes of ensuring that it will result in the appointment of competent counsel. The reasons for this conclusion are summarized in the OLC Opinion and elsewhere in this preamble.

Many commenters agreed that the Attorney General may appropriately specify and apply a substantive Federal standard that State mechanisms must meet to satisfy chapter 154’s requirements for certification, and this rule specifies that standard, within the limits of the statutory scheme it implements: (i) *Appointment*—Chapter

154 requires the Attorney General to certify “whether the State has established a mechanism for the appointment . . . of . . . counsel” in State capital collateral proceedings. This rule provides further specification regarding the statutory appointment procedures and discusses the express statutory provisions that require such appointments to occur in a reasonably timely fashion. (ii) *Competent Counsel*—Chapter 154 provides that the Attorney General must determine whether the State has established a mechanism for the appointment of “competent counsel” in State capital collateral proceedings, and “whether the State provides standards of competency for the appointment of counsel” in such proceedings. This rule provides two “benchmark” competency standards that are presumptively sufficient to warrant certification while still leaving States some leeway to adopt other standards so long as they reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases. (iii) *Compensation and payment of reasonable litigation expenses*—Chapter 154 additionally requires the Attorney General to determine whether the State has established a mechanism for the “compensation” and “payment of reasonable litigation expenses” of competent counsel in State capital collateral proceedings. This rule provides four benchmark compensation standards that are presumptively adequate while again leaving States some significant discretion to formulate alternative compensation schemes, if reasonably designed to ensure the availability and timely appointment of competent counsel. And as to all of these matters, this rule provides that the Attorney General will consider a State’s submission requesting certification and any input from interested parties received through a public comment procedure before determining whether certification is warranted.

Several commenters, however, argued that the certification standards and procedures promulgated in this rule (and described in the prior notice and supplemental notice of proposed rulemaking) do not go far enough in dictating the standards States must meet, or in providing for sufficient review and oversight by the Attorney General of State compliance with mechanisms for which certification is sought. For the reasons discussed generally below, and elsewhere in this preamble in the context of specific provisions of the rule, the Department

has not adopted the changes proposed by these commenters.

Some of these commenters urged that the rule incorporate counsel competency provisions that would have the effect of eliminating or largely displacing State discretion to develop, within appropriate bounds, mechanisms for ensuring that competent counsel are appointed. One commenter, for instance, proposed that the rule should prescribe uniform national competency standards that must be adopted by any and all States seeking certification. Other commenters contended that the rule should incorporate measures as to prior experience in capital and postconviction capital proceedings, specialized training, demonstrated competence according to performance standards, and removal of attorneys who fail to provide effective representation—and find deficient, without exception, any State system that does not incorporate *all* of these features. The Department did not accept these comments, believing that they risk conflict with the statutory scheme, which leaves room for States to formulate their own standards so long as they reasonably assure the availability and appointment of competent counsel. See OLC Opinion at \*12–13; see also 135 Cong. Rec. 24696 (1989) (report of the Judicial Conference’s Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (“the Powell Committee report”) from which many of the relevant features of Chapter 154 derive, explaining that giving States “wide latitude to establish a mechanism that complies with [the statutory requirements]” is “more consistent with the federal-state balance”).

Raising another issue, several comments proposed that the rule require a showing of State compliance with its own established mechanism as a condition of certification. As envisioned by these comments, the Attorney General, when presented with a request for certification, would review a State’s record of appointments in individual cases to verify that the appointments were made in conformity with the State’s established mechanism. These comments were not adopted because the statutory scheme does not call for such case-specific oversight by the Attorney General of State compliance with a mechanism it has established.

Chapter 154 in its current formulation states two preconditions for the chapter’s applicability in a particular case: (1) As provided in section 2261(b)(1), “the Attorney General of the United States certifies that a State has established a mechanism for providing

counsel in postconviction proceedings as provided in section 2265”; and (2) as provided in section 2261(b)(2), “counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.” Of these two functions, only the general certification function is assigned to “the Attorney General of the United States.” The case-specific function of ascertaining whether counsel was appointed pursuant to the certified mechanism is reserved to Federal habeas courts, which can address individual irregularities and decide whether the Federal habeas corpus review procedures of chapter 154 will apply in particular cases. If the commenters were correct in asserting that the Attorney General should withhold certification unless he or she finds that the State has complied with its established mechanism in every case, there would have been little need for Congress to have included section 2261(b)(2). Cf. *Ashmus v. Woodford*, 202 F.3d 1160, 1168 & n.13 (9th Cir. 2000) (chapter 154 designed to avoid case-by-case analysis of counsel’s competence by requiring binding appointment standards). Moreover, if a State establishes a new mechanism for appointment of competent counsel (in response to this rule and its articulation of benchmark standards) and requests at the outset that the Attorney General determine its adequacy, chapter 154 should not be read to foreclose certification simply because the Attorney General would not yet have a basis to examine the State’s compliance with the newly established system.

Though the Department rejects the suggestion that the Attorney General’s certification determination should depend on whether a State complies with its own mechanism in isolated cases, the question of whether a State has “established” a mechanism is a conceptually distinct matter that the statutory framework *does* charge the Attorney General with determining, see 28 U.S.C. 2265(a)(1)(A)–(B). The requirement of having “established” a mechanism consistent with chapter 154 presupposes that the State has adopted and implemented standards consistent with the chapter’s requirements concerning counsel appointment, competency, compensation, and expenses. Thus, the rule allows for the possibility that the Attorney General will need to address situations in which there has been a wholesale failure to implement one or more material elements of a mechanism described in a State’s certification submission, such as

when a State's submission relying on § 26.22(b)(1)(ii) in the rule points to a statute that authorizes a State agency to create and fund a statewide attorney monitoring program, but the agency never actually expends any funds, or expends funds to provide for monitoring of attorneys in only a few of its cities. Addressing any such situations would require careful consideration of the specific features of a mechanism presented for certification, and is therefore best left to individual certification decisions. Other than in these situations, should they arise, questions of compliance by a State with the standards of its capital counsel mechanism will be a matter for the Federal habeas courts.

Finally, a few of the comments could be read to suggest that chapter 154 requires the Attorney General to certify a State mechanism only if he or she examines and is satisfied by the actual performance of postconviction counsel following appointment. On such an understanding, an assessment by the Attorney General of the performance of attorneys in State habeas proceedings (e.g., what investigation was done or not done, or what arguments were made or not made in a habeas petition) would inform a decision as to whether the State's mechanism adequately provides for appointment of competent postconviction counsel and, accordingly, whether chapter 154 certification is warranted. To the extent that the comments urged such an interpretation, it was rejected in formulating the rule.

The actual requirements under chapter 154 relating to counsel competency are establishment by a State of "a mechanism for the appointment . . . of competent counsel" in State capital collateral proceedings, and provision by the State of "standards of competency for the appointment of counsel" in such proceedings. Neither of these provisions suggests that the Attorney General is required to inquire into the facts of how counsel performed following appointment in all or some subset of cases. Rather, both frame their requirements regarding counsel competency as matters relating to appointment, and are naturally understood as contemplating an inquiry into whether a State has put in place adequate qualification standards that counsel must meet to be eligible for appointment. This understanding is supported by the Powell Committee report. The report explained that Federal review would examine whether a State's mechanism for appointing capital postconviction counsel comports with the statutory requirements "as

opposed to the competency of particular counsel." 135 Cong. Rec. 24696 (1989). It further explained that, in contrast to the focus on "the performance of a capital defendant's trial and appellate counsel," "[t]he effectiveness of state and federal postconviction counsel is a matter that can and must be dealt with in the appointment process." *Id.*

#### *The Role of the Attorney General*

Some commenters asserted that the Attorney General has an inherent conflict of interest that should disqualify him from making certification determinations under chapter 154. These commenters claimed that the Attorney General's prosecutorial functions and responsibilities would render him unable to objectively evaluate State capital counsel systems. The remediation proposed by these commenters included the suggestion that the Attorney General delegate his functions under chapter 154 to some other official or division within the Department of Justice that the commenters believed would be free of the supposed conflict of interest. Commenters also proposed that the Attorney General only exercise his certification responsibilities on the basis of very specific, inflexible criteria that would leave no room for judgment or discretion by the Attorney General in evaluating a given State system under chapter 154.

As an initial matter, the Attorney General cannot refrain from carrying out the functions assigned to him by chapter 154: The law requires him to discharge those functions. Congress assigned the certification function to the Attorney General after having heard arguments concerning a purported conflict of interest similar to those now advanced by the commenters. *See* 28 U.S.C. 2265(a)(1); *Habeas Reform: The Streamlined Procedures Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 26–27 (2005); *see also id.* at 54 (written statement of Professor Eric M. Freedman on behalf of the American Bar Association) ("The Attorney General is the nation's chief *prosecutor* and thus is hardly an appropriate officer to decide whether a state has kept its part of the 'opt in' bargain."). Moreover, the enactment of chapter 154 is not the first time that Congress has assigned to the Attorney General the task of evaluating State efforts to provide attorney representation to petitioners convicted of a capital crime. For example, the Innocence Protection Act of 2004, Public Law 108–405, Title IV, Subtitle B, 118 Stat. 2260, 2286–92 (2004) ("IPA"), contemplates the administration by the Attorney General

of a program to improve the quality of legal representation provided to indigent petitioners in State capital cases, including the making of grants to States willing to implement federally prescribed capital counsel standards, continuing oversight of the capital defense systems of States that accept funding, and negotiation or direction by the Attorney General of corrective actions needed to secure compliance by those States with the federally prescribed capital counsel requirements. *See* 42 U.S.C. 14163, 14163c–14163d; 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake) (noting as precedent for chapter 154 responsibilities of the Attorney General that "[j]ust last year . . . Congress assigned the Attorney General to evaluate State . . . capital counsel systems" under the IPA).

More fundamentally, there is no sound basis for the claim that the Attorney General has a conflict of interest that would preclude him from fairly carrying out the functions assigned to him by Congress. The criteria the Attorney General will apply in deciding whether a State has satisfied the chapter 154 requirements do not control what will be deemed constitutionally effective or ineffective assistance of counsel in the criminal cases for which the Attorney General is responsible. Addressing questions concerning what constitutes constitutionally effective assistance calls for an assessment of an attorney's performance in a given case, and as already noted, the Attorney General will not make such independent assessments in the context of making certification decisions under chapter 154, which call instead for an evaluation of general competency standards put in place by a State mechanism. Hence, there is no basis to conclude that the determinations that the Attorney General must make when presented with a request for certification of a State mechanism would conflict with the conduct of the Attorney General's prosecutorial functions.

Moreover, the functions performed by the Attorney General in his criminal law enforcement and prosecutorial oversight capacities are only part of the broader, diverse range of duties he regularly performs. The Department, under the Attorney General's supervision, administers and carries out programs for the improvement of indigent criminal defense systems, both generally and with respect to capital cases in particular. *See, e.g.*, Bureau of Justice Assistance, U.S. Dep't of Justice, *Answering Gideon's Call: Improving Indigent Defense Delivery Systems, FY*

2012 *Competitive Grant Announcement* (April 4, 2012); Bureau of Justice Assistance, U.S. Dep't of Justice, *Capital Case Litigation Initiative, FY 2011 Competitive Grant Announcement* (Jan. 11, 2011); Bureau of Justice Assistance, U.S. Dep't of Justice, *Capital Case Litigation Initiative*, [http://www.bja.gov/ProgramDetails.aspx?Program\\_ID=52](http://www.bja.gov/ProgramDetails.aspx?Program_ID=52) (last visited July 23, 2013) (further information on capital case litigation initiative); U.S. Dep't of Justice, *The Access to Justice Initiative*, <http://www.justice.gov/atj> (last visited July 23, 2013) (home page for the Department's Access to Justice Initiative, which seeks to "increase access to counsel and legal assistance," including by advancing "new statutory, policy, and practice changes that support development of quality indigent defense"). The Attorney General leads and convenes the Federal Interagency Reentry Council, a government-wide effort to improve employment, housing, treatment, and educational opportunities for individuals who were previously incarcerated. The Department of Justice also handles much of the Federal government's civil litigation under the Attorney General's authority, in some cases serving as or representing the plaintiff and in others serving as or representing the defendant. In addition, the Attorney General oversees the Department's Community Relations Service, which provides violence prevention and conflict resolution services to State and local governments, private organizations, and community groups. These examples demonstrate that the Attorney General is accustomed to appropriately balancing varied and occasionally competing interests in the exercise of his duties. Thus, even if carrying out the certification function assigned to him by law did affect the Department's criminal enforcement efforts (though it does not), the commenters have made no persuasive showing that the Attorney General would be unable to fairly evaluate a State's certification request.

In addition, discharge of the required chapter 154 functions by the Attorney General is consistent with Rule 1.7(a)(2) of the American Bar Association ("ABA") Model Rules of Professional Conduct (and comparable rules adopted by most State supreme courts), which provides in relevant part that "a lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

The Attorney General has no responsibilities to a client that would materially limit the discharge of the chapter 154 certification function, because the Attorney General's only relevant client is the United States, which through Congress has expressly directed the discharge of that function by law. There is also no reason to believe that the Attorney General has any responsibility to a "former client" or "third person," or any "personal interest," that would materially impair his representation of the United States in the discharge of that function. The Attorney General has a professional obligation to abide by the "client's decisions concerning the objectives of representation," ABA Model Rule 1.2(a), making it difficult to conceive how the Attorney General could have such a disqualifying conflict in representing the United States when it is the United States that has mandated through its laws that the Attorney General carry out the chapter 154 certification function.

Against this background, there is no force to the claim of some commenters that the Attorney General has an inherent conflict of interest in carrying out his legal duties under chapter 154—which potentially affects defense and judicial review functions in criminal cases for which the Attorney General is not responsible—because the Attorney General oversees the conduct of prosecutions in Federal criminal cases, among other duties. Modification of the rule to incorporate the remedial measures proposed by these commenters is accordingly not necessary because the underlying assumption of a conflict of interest is not well-founded. Indeed, the specific remedy suggested by many of these commenters, that the Attorney General address the purported conflict of interest by delegating the certification function to the Department's Inspector General, would itself pose problems. Among others, the task of certifying State capital counsel mechanisms falls outside the current duties, responsibilities, and expertise of the Inspector General and his staff, which focus on fraud, waste, and abuse in the Department of Justice, *see* 5 U.S.C. App. 3 sections 4, 8E.

#### *Relationship to Prior Judicial Interpretation*

Some commenters criticized the rule as inconsistent with the judicial construction of chapter 154. However, prior judicial interpretation of chapter 154, much of which remains generally informative, supports many features of this rule, as this preamble documents. To the extent the rule approaches

certain matters differently from some past judicial decisions, there are reasons for the differences.

One reason judicial decisions could not consistently be followed on some matters in this rule is that the decisions were not in accord with each other on these matters. For example, as discussed below in connection with § 26.22(b) of the rule, some district court decisions regarded prior capital litigation experience as necessary to qualify for appointment under chapter 154, but appellate precedent and other authority permit a more flexible approach that would understand capital litigation experience to be relevant and often helpful, but not indispensable.

Textual changes that Congress has made in chapter 154 are another reason for differences from prior judicial decisions under chapter 154. For example, as explained below in the analysis statement accompanying § 26.21 in this rule, chapter 154 originally had separate provisions for State systems bifurcating direct and collateral review (28 U.S.C. 2261 (2000) (amended 2006)) and State "unitary review" systems in which collateral claims may be raised in the course of direct review (28 U.S.C. 2265 (2000) (amended 2006)). Both sets of provisions included language specifying the form that State standards establishing the required capital counsel mechanism must take. The general provisions in former section 2261(b) required that a State establish the mechanism "by statute, rule of its court of last resort, or by another agency authorized by State law." The provisions in section 2265(a) for unitary review procedures required that a State establish the mechanism "by rule of its court of last resort or by statute." Both sections said that "[t]he rule of court or statute must provide standards of competency for the appointment of . . . counsel."

In *Ashmus v. Calderon*, the court concluded that the State unitary review procedure under review in that case did not satisfy chapter 154, in part because the State's qualification standards for appointment of capital counsel were not set out in a "rule of court" in the relevant sense. 123 F.3d 1199, 1207–08 (9th Cir. 1997). This particular ground for denying chapter 154 certification no longer exists under the current formulation of chapter 154. The amendments to chapter 154 enacted in 2006 replaced the separate provisions for bifurcated and unitary review procedures with uniform requirements that apply to all State systems and eliminated the former language specifying that the relevant standards

were to be provided by rule of court or statute.

This rule accordingly does not include a requirement that relevant State standards must be adopted by any particular means, notwithstanding the judicial application of such a requirement when the statutory language was different. While States still must establish capital counsel mechanisms that satisfy the chapter 154 requirements to be certified, there is no requirement that they do so in any particular form, such as only through standards set out in rules of court. So long as there has been an authoritative adoption or articulation by a State of binding standards, and those standards are not otherwise negated or overridden by State policy, the standards are “established” for the purposes of chapter 154.

Other differences reflect the change in responsibility for chapter 154 certification under the 2006 amendments. Prior to those amendments, requests to invoke the chapter 154 procedures were presented to Federal habeas courts in the context of particular State capital cases they were reviewing. Courts in that posture considered both whether the State had established a mechanism satisfying chapter 154, and if so, whether counsel for the petitioner in the particular case before them had been provided in full compliance with that mechanism. Hence, if counsel had not been appointed on collateral review in a particular case, or if the attorney provided did not satisfy the State’s competency standards for such appointments, for example, the courts could find chapter 154 inapplicable on that basis, regardless of whether the State had established a capital counsel mechanism that otherwise satisfied the requirements of chapter 154. *See, e.g., Tucker v. Catoe*, 221 F.3d 600, 604–05 (4th Cir. 2000) (“We accordingly conclude that a state must not only enact a ‘mechanism’ and standards for postconviction review counsel, but those mechanisms and standards must in fact be complied with before the state may invoke the time limitations of 28 U.S.C. 2263.”).

The result in such a case is not necessarily different under the current formulation of chapter 154, but the route to that result is not the same. In entertaining a State’s request for chapter 154 certification, the Attorney General has no individual case before him and is not responsible for determining whether a State has complied with its mechanism in any particular case. Rather, as discussed above, 28 U.S.C. 2261(b)(1) assigns to the Attorney

General the general certification function under chapter 154, which makes him responsible for determining whether a mechanism has been established by the State and whether the State provides standards of competency. If the State mechanism is certified, appointment of counsel pursuant to the certified mechanism (absent waiver or retention of counsel or a finding of non-indigence) continues to be a further condition for the applicability of chapter 154. But whether that has occurred in any individual case is, under 28 U.S.C. 2261(b)(2), a matter within the province of the Federal habeas court to which the case is presented, not the Attorney General.

#### Section 26.20—Purpose

A comment on this section as drafted in the proposed rule objected that it did not mention the condition for chapter 154’s applicability appearing in 28 U.S.C. 2261(b)(2). While the section 2261(b)(2) requirement was noted in the preamble to the proposed rule, *see* 76 FR at 11706, 11710–11, the objection is well-taken. The final text of § 26.20 reflects explicitly that the applicability of the Federal habeas corpus review procedures of 28 U.S.C. 2262, 2263, 2264, and 2266 in a capital case depends on both certification of the State’s postconviction capital counsel mechanism, as provided in 28 U.S.C. 2261(b)(1), and appointment of counsel pursuant to the certified mechanism (absent waiver or retention of counsel or a finding of non-indigency), as provided in 28 U.S.C. 2261(b)(2).

#### Section 26.21—Definitions

##### *Appointment*

Many comments raised the concern that the proposed rule did not address the timing of counsel appointment. The concern reflected the general importance of the timely availability of counsel in the context of a complex and difficult type of litigation and specific issues arising from chapter 154’s special time limit for Federal habeas filing. *Compare* 28 U.S.C. 2263 (general 180-day time limit under chapter 154) *with* 28 U.S.C. 2244(d) (one-year time limit otherwise applicable).

The Department believes that the concern reflected in these comments is well-founded. Chapter 154 involves a *quid pro quo* arrangement under which appointment of counsel for indigents is extended to postconviction proceedings in capital cases, and in return, subsequent Federal habeas review is carried out with generally more limited time frames and scope. *See, e.g., H.R. Rep. No. 104–23*, at 10 (1995) (noting

the chapter’s “quid pro quo arrangement under which states are accorded stronger finality rules on Federal habeas review in return for strengthening the right to counsel for indigent capital defendants”). The Powell Committee report, from which this essential feature of chapter 154 derives, explained that “[c]apital cases should be subject to one complete and fair course of collateral review in the state and federal system . . . with the assistance of competent counsel for the defendant” and that “[t]he belated entry of a lawyer, under severe time pressure, does not do enough to ensure fairness.” 135 Cong. Rec. 24695 (1989).

The *quid pro quo* arrangement of chapter 154 requires provision of counsel to capital petitioners in State postconviction proceedings in return for Federal habeas review carried out with generally more limited time frames and scope. Against this background, not every conceivable provision for making postconviction counsel available, however belatedly—e.g., only after the deadline for pursuing State postconviction proceedings had passed; or only after the expiration of section 2263’s time limit for Federal habeas filing; or only after such delay that the time available for preparing for and pursuing either State or Federal postconviction review had been seriously eroded—can logically be regarded as providing for appointment of counsel within the meaning of chapter 154. Consistent with such considerations, judicial decisions under chapter 154 that addressed the matter concluded that the State mechanism must provide for timely appointment of counsel. *See, e.g., Brown v. Puckett*, No. 3:01CV197–D, 2003 WL 21018627, at \*3 (N.D. Miss. Mar. 12, 2003) (“The timely appointment of counsel at the conclusion of direct review is an essential requirement in the opt-in structure. Because the abbreviated 180-day statute of limitations begins to run immediately upon the conclusion of direct review, time is of the essence. Without a requirement for the timely appointment of counsel, the system is not in compliance.”); *Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1187 (N.D. Cal. 1998) (“The *quid pro quo* would be hollow indeed if compliance by the state was satisfied by merely offering and promising to appoint competent counsel with no element of timeliness.”); *Hill v. Butterworth*, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996) (“[T]he Court holds that any offer of counsel pursuant to Section 2261 must be a *meaningful offer*. That is, counsel must be immediately appointed after a

capital defendant accepts the state's offer of postconviction counsel."), *rev'd on other grounds*, 147 F.3d 1333 (11th Cir. 1998).

The supplemental notice of proposed rulemaking accordingly proposed specifying more clearly that an adequately functioning mechanism, as described in chapter 154, will necessarily incorporate a policy for the timely appointment of competent counsel. See 77 FR at 7560–61. Section 26.21 of the final rule does so by adding a definition of appointment that clarifies that it entails “provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.” See American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, at 127 (rev. ed. Feb. 2003), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/deathpenaltyguidelines2003.authcheckdam.pdf> (“ABA Guidelines”) (increasingly intertwined nature of State and Federal habeas proceedings means that “although the AEDPA deals strictly with cases being litigated in federal court, its statute of limitations provision creates a de facto statute of limitations for filing a collateral review petition in state court”).

Nevertheless, two comments responding to the supplemental notice objected to this change from the proposed rule as inconsistent with the current version of chapter 154, which provides that “[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.” 28 U.S.C. 2265(a)(3). However, the definition of appointment in § 26.21 does not add to the express requirements for certification. Rather, as explained above, it reflects a contextual understanding of chapter 154’s express requirement of a mechanism for appointment of competent postconviction capital counsel, see 28 U.S.C. 2265(a)(1), to encompass some standard for affording postconviction representation in a manner that is reasonably timely in light of the relevant postconviction review time limitations and the time required for developing and presenting claims. See OLC Opinion at \*8 (“In reasonably construing an ambiguous term in a statute that he is charged with administering, the Attorney General would not be adding to the requirements for certification . . . [but]

merely would be implementing an express statutory provision . . . just as agency officials regularly do in other contexts” under *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984).).

Other features of chapter 154 provide additional textual support for the final rule’s definition of “appointment” and confirm it is consistent with the express statutory scheme, including section 2265(a)(3). Section 2262(a), for instance, provides for an automatic stay of execution, by application to a Federal habeas court, upon entry of an order appointing counsel. If chapter 154 permitted a State to delay appointment of counsel, an execution that is scheduled for a date shortly after the denial of a prisoner’s direct appeal could occur before the prisoner receives the State postconviction counsel and the automatic stay that chapter 154 promises. Likewise, chapter 154 expressly contemplates that States will establish, and the Attorney General will review, standards expected to produce competent representation by appointed counsel. 28 U.S.C. 2265(a)(1)(A), (C). Judgments concerning what competency standards are needed may well vary based on expectations about the amount of time an attorney will have to perform requisite tasks. The need for counsel to be appointed in a reasonably timely fashion, especially in light of the relevant statutory deadlines for seeking habeas relief, sets such expectations and enables the judgments that the statutory framework requires.

The two concerned commenters also cite legislative history evidence, specifically two floor statements criticizing the Ninth Circuit’s decision in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2001), in support of their objection to the articulation in this rule of chapter 154’s requirement that appointments be made in a reasonably timely fashion. See, e.g., 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl, the sponsor of the amendment, including that it “forbids creation of additional requirements not expressly stated in the chapter, as was done in the *Spears* case”); 151 Cong. Rec. E2639 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake). However, the legislators’ criticism of the *Spears* decision does not support the commenters’ objection to the rule’s articulation of chapter 154’s timeliness requirement. *Spears* addressed an issue concerning the timing of appointment of capital collateral counsel in two contexts, finding first that a rule adopted by the Arizona Supreme Court did adequately provide for timely appointment of counsel, but then

declining to apply the chapter 154 Federal habeas review procedures in that particular case on the ground that counsel was not appointed within the time frame called for by the mechanism. Compare *Spears*, 283 F.3d at 1017 (“We conclude that the Arizona statutory mechanism for the appointment of postconviction counsel [requiring appointment within 15 days of notice that the conviction had become final] . . . offered counsel to all indigent capital defendants . . . in a timely fashion.”), with *id.* at 1018–19 (holding that chapter 154 did not apply “in Petitioner’s case” because his attorney was appointed over a year after the mechanism’s deadline). The object of the dissatisfaction expressed in the floor statements upon which the two commenters rely was neither the positive determination in *Spears* regarding the need for a timing component in a State’s mechanism nor the adequacy of Arizona’s timing provision for purposes of chapter 154, but rather the denial to the State of the benefits of chapter 154 in that individual case. See 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl); 151 Cong. Rec. E2639–40 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake).

The Attorney General’s current role under chapter 154 parallels that of the *Spears* court in making the first of these two determinations—whether the mechanism in force in the State adequately provides for the reasonably timely appointment of counsel. Nothing in the present rule would bar the Attorney General from approving, as the *Spears* court did, a State mechanism that provides for timely provision of counsel. Whether and in what circumstances a delay in appointment of counsel would affect chapter 154’s applicability in an *individual* case may be considered by Federal habeas courts in the exercise of their function under 28 U.S.C. 2261(b)(2), and is not a question that the statute assigns to the Attorney General.

In any event, courts ordinarily give floor statements, even statements made by the sponsor of a bill or amendment, relatively limited weight in analyzing Congress’s intent. See, e.g., *Garcia v. United States*, 469 U.S. 70, 76 (1984). This is appropriate in the case of the legislation that added section 2265(a)(3) to chapter 154 because the commenters principally rely on views expressed by a Senator that were not included in the bill’s conference report, compare H.R. Rep. No. 109–333, at 109–10 (2005) (Conf. Rep.) (making no reference to the timing of appointments, and identifying not *Spears*, but a different case that

involved a different issue as being “overruled” by the bill’s provisions), with 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl). See *Ctr. for Sci. in the Pub. Interest v. Regan*, 802 F.2d 518, 523 (D.C. Cir. 1986) (noting that “the contemporaneous remarks of a single legislator, even a sponsor, are not controlling in legislative history analysis; rather, those remarks must be considered along with other statements and published committee reports”). Thus, even if the commenters’ reading of the floor statements’ criticism of *Spears* were correct, the statements should not be treated as controlling or as indicative of congressional intent contrary to the rule’s clarification of a requirement for reasonably timely appointment of counsel.

With respect to a separate but related issue, one commenter suggested that § 26.21’s definition of “appointment” to encompass a timeliness element is unnecessary because courts may alternatively address problems under chapter 154 resulting from delay in providing postconviction counsel by adjusting the operation of the relevant time limits for filing. The commenter cited *Rhines v. Weber*, 544 U.S. 269 (2005), and *In re Morgan*, 50 Cal. 4th 932, 237 P.3d 993 (2010), for support.

As an initial matter, it is unclear to what extent these cited cases apply to the issue at hand. *Rhines*, for example, involved stay-and-abey procedures that may not be available to petitioners under chapter 154, see 28 U.S.C. 2264(b), and *Morgan* focused on the viability of pro se “shell” State habeas petitions—a practice that, even if it were firmly established and accepted by both State and Federal courts, raises significant concerns in the chapter 154 context. As a practical matter, for example, not every State petitioner will be in a position to understand the necessity for filing such a petition and able to file a petition successfully. Moreover, chapter 154 contemplates that in exchange for substantial benefits on Federal habeas review, States will provide not the opportunity for petitioners to file pro se State habeas petitions, but the opportunity for petitioners to file counseled State habeas petitions. See *Mills v. Anderson*, 961 F. Supp. 198, 201 n.4 (S.D. Ohio 1997) (questioning whether State mechanism that provides for appointment of counsel only after filing of pro se petition is inadequate under chapter 154). Thus, the relevance of the procedures discussed in *Rhines* and *Morgan* is uncertain. Even if available in this context, they would at most affect what might be thought necessary to

reasonably assure the timely appointment of counsel. The possible existence of such procedures would not undermine the conclusion that the “appointment” required under chapter 154 must be made in a reasonably timely manner, as reflected in the definition in § 26.21.

Some commenters approved of the rule’s specification of the requirement for timely appointment but stated that it should provide a more definite period of time (e.g., a specific number of days or weeks) within which State mechanisms must appoint counsel. The Department believes, however, that States must have significant latitude in designing mechanisms for ensuring that competent counsel are appointed, see OLC Opinion at \*12–13, and this rule therefore does not define timeliness in terms of a specific number of days or weeks within which counsel is to be provided. Instead, a State need only demonstrate that it has established a mechanism for affording counsel in a manner that is reasonably timely, in light of the time limits for seeking State and Federal collateral review and the effort involved in the investigation, research, and filing of effective habeas petitions, which protect a petitioner’s right to meaningful habeas review.

Additionally, some commenters urged that the rule should require that appointment of postconviction capital counsel be timely in relation to the petitioner’s conviction, not just in relation to the time limits for seeking State and Federal postconviction review and the time required for preparing postconviction claims. The rationale offered for this proposal was that direct review of the judgment in capital cases, occurring between the end of the trial proceedings and the commencement of postconviction proceedings, may take a long time, and that evidence and records that would be useful to the defense in postconviction proceedings may be lost in the meantime. While the Department does not question the value of efforts to avoid spoliation of evidence, consideration can be given only within the statutory framework; to the extent these commenters contemplated requiring that postconviction counsel be appointed even before the conclusion of direct review, such a mandate would appear to go beyond chapter 154’s requirements for appointment of counsel “in State postconviction proceedings.” 28 U.S.C. 2265(a)(1); see *id.* 2261(b)(1).

#### *Appropriate State Official*

Section 26.21 of the rule, in part, defines an “appropriate State official” who may request chapter 154

certification under 28 U.S.C. 2265(a)(1) to mean the State attorney general or the State chief executive if the State attorney general does not have responsibility for Federal habeas corpus litigation. Some commenters objected to the rule’s designation of the State attorney general as the appropriate official to request chapter 154 certification on grounds of conflict of interest, lack of relevant knowledge, interference with State discretion, and exceeding statutory authority.

The comments received provided no persuasive reasons for changing the definition of “appropriate State official” in § 26.21. First, the objection that the State attorney general’s litigation interests may lead him to make unsound judgments whether his State has satisfied chapter 154’s requirements conflates the role of applicant and that of decision-maker. Under this rule, the State attorney general is authorized to request certification, but it will be the U.S. Attorney General who makes a wholly independent determination of whether certification is warranted. In making this determination, the U.S. Attorney General will consider any supporting or contrary information or views that any interested entity may choose to submit through the public comment procedure set out in § 26.23 of the rule, in addition to whatever the State attorney general may offer on the question.

Second, designation of the State attorney general as the “appropriate State official” is consistent with both the original language of chapter 154 and the 2006 amendments. Prior to the 2006 amendments, Federal habeas courts determined whether chapter 154’s requirements were satisfied, so State attorneys general responsible for Federal habeas corpus litigation in capital cases were able to seek determinations that the State capital counsel mechanism satisfied the chapter 154 requirements as part of their litigation functions. The court, not the State attorney general, was the decision-maker on that question, and the court’s decision was informed by hearing the views of others with opposed interests, in addition to those of the State attorney general. The transfer of the chapter 154 certification function from the Federal courts to the U.S. Attorney General does not materially change this framework. The State attorney general is authorized to seek certification; the U.S. Attorney General, not the State attorney general, is the decision-maker; and the U.S. Attorney General will consider any views proffered by others as discussed above.

Third, the Attorney General's decisions regarding chapter 154 certification are subject to de novo review by the D.C. Circuit Court of Appeals, as provided in 28 U.S.C. 2265(c), and seeking such review would commonly be within the litigation authority of the State attorney general, regardless of which official had sought the initial determination from the U.S. Attorney General. It would be odd to deem the State attorney general an inappropriate official to seek chapter 154 certification from the U.S. Attorney General in the first instance, where the statutes interpose no obstacle to State attorneys general seeking the same determination from the D.C. Circuit at a later stage.

Fourth, the objection regarding lack of relevant knowledge by the State attorney general is also unpersuasive. This objection in the comments appears to be premised largely on the belief that States seeking certification will normally submit with their request a set of comprehensive data that demonstrate the operation of the State's collateral review system in capital cases, including such matters as the amount of awards to defense counsel for litigation expenses in particular cases, of which the State attorney general might in some cases be unaware. The proposition that the Attorney General must conduct such a case-by-case review under chapter 154 is not well-founded, for reasons discussed earlier in this preamble. Additionally, the Department finds it significant that none of the commenters identified a person in a State likely to have better knowledge than the State attorney general or chief executive concerning matters relevant to certification. Thus, even if it is accepted that a State attorney general may not have perfectly complete information in every instance, there is no basis to believe that there is an alternative official or individual better suited to the task. Moreover, if at times there is information relevant to the U.S. Attorney General's determination that the State attorney general may not have, any interested person is free to provide such information through the public comment procedure for certification requests set out in § 26.23(b)–(c) in this rule.

Finally, the objection in the present comments regarding potential conflict with State law reflects a misunderstanding of the rule, which does not preempt State law. If State law were to prohibit a State attorney general from requesting chapter 154 certification, then the State attorney general would be barred by State law from making such a request. That has no

bearing on the formulation of § 26.21, which only defines the class of State officials whose request for chapter 154 certification triggers the requirement under 28 U.S.C. 2265(a)(1) that the U.S. Attorney General make a chapter 154 certification decision. Moreover, any concern about potential conflict with State law is purely speculative. No State submitted comments on this rule stating that it has prohibited, wishes to prohibit, or may prohibit the State attorney general from requesting chapter 154 certification on behalf of the State.

**Section 26.22(a)—Statutory Requirements Concerning Appointments**

Section 26.22(a) tracks chapter 154's provisions concerning the procedures for appointment of counsel, appearing in 28 U.S.C. 2261(c)–(d). Some commenters stated that the rule should be modified to provide additional definition concerning these procedures, such as specifying in greater detail what constitutes a sufficient offer of counsel, or what exactly will or will not be deemed a valid waiver of counsel, under these provisions.

The comments received did not provide persuasive reasons for addressing additional interpretive issues in this rule. Chapter 154's legal directive to the Attorney General regarding rulemaking is that the Attorney General "shall promulgate regulations to implement the certification procedure under [section 2265(a)]," 28 U.S.C. 2265(b). Some of the specific matters raised in the comments have been addressed by courts in prior decisions relating to chapter 154, but there is no requirement that the present rule attempt to provide a comprehensive restatement or synthesis of all past judicial decisions under the chapter. Though the Attorney General has provided further definition of the chapter 154 requirements in § 26.22 of this rule, in the interest of affording additional guidance regarding what must be done to qualify for certification under chapter 154 and what criteria will be applied in making certification decisions, that does not oblige the Attorney General to go further and attempt to resolve in this rule (even if it were possible) all possible questions that might arise in the interpretation and application of chapter 154's requirements.

It is uncertain whether particular interpretive questions raised by the commenters will prove to be significant issues in the context of the capital counsel systems of States that actually apply for certification hereafter. If they do not, then little will have been gained

by the Attorney General's attempt to resolve them in advance. If they do prove to be significant issues, considering them in the concrete setting of State systems whose certification is requested is likely to be more conducive to sound resolutions than trying to address them in the abstract.

**Section 26.22(b)–(c)—General Issues**

Paragraphs (b) and (c) in § 26.22 articulate the requirements relating to counsel competency and compensation. Each paragraph consists of "benchmark" provisions identifying standards that presumptively will be considered adequate (§ 26.22(b)(1) for competency and § 26.22(c)(1) for compensation), followed by general provisions for assessing State standards that take other approaches (§ 26.22(b)(2) for competency and § 26.22(c)(2) for compensation).

The text of the rule published in the notice of proposed rulemaking stated without qualification that the Attorney General *will* approve State standards satisfying the benchmark provisions. Many commenters expressed the concern that, under the proposed rule, the Attorney General could have been required to certify a State's mechanism meeting the competence and compensation benchmarks, even if it could be shown that the mechanism is not adequate in the context of the State system in which it operates.

The Department continues to believe that State mechanisms that incorporate the benchmark standards for competency and compensation should be adequate. However, the comments were persuasive that it is not possible to predict with certainty that these benchmarks will be adequate in the context of every possible State system. For example, it is conceivable that a State standard authorizing what normally should be sufficient compensation may not in fact make competent lawyers available for appointment in postconviction proceedings, considering the context of a particular State system and its distinctive market conditions for legal services. *Cf. Baker v. Corcoran*, 220 F.3d 276, 285–86 (4th Cir. 2000) (considering per-attorney overhead costs and effective compensation rates among other factors in finding compensation scheme inadequate under chapter 154). The final rule has accordingly been modified, as discussed in the supplemental notice of proposed rulemaking, to provide that State standards satisfying the benchmarks for competency and compensation are *presumptively* adequate, thereby affording latitude to consider State-

specific circumstances that may establish the contrary—i.e., that standards generally expected to be sufficient in most instances are for some reason not reasonably likely to lead to the timely provision and adequate compensation of competent counsel to habeas petitioners in a particular State. 77 FR at 7561.

Importantly, however, the Department found unpersuasive commenters' separate criticism that the proposed rule fails to provide for oversight of a State's compliance with a chapter 154 mechanism that it has established. As explained earlier in this preamble, the Department remains of the view that chapter 154 is correctly read to assign to the Federal habeas courts—not to the Attorney General—questions concerning whether a State has fully complied in a given case with the requirements of its own established mechanism.

#### **Section 26.22(b)(1)(i)—Counsel Competency Standards Based on 18 U.S.C. 3599**

Section 26.22(b)(1)(i) in the final rule sets forth competency standards requiring at least five years of bar admission and three years of postconviction litigation experience, or if a State mechanism so provides, allowing appointment for good cause in a given case of other counsel whose background, knowledge, or experience would otherwise enable him or her to properly represent the petitioner. Section 26.22(b)(1)(i) is based on the qualification standards Congress has adopted in 18 U.S.C. 3599 for appointment of counsel in Federal court proceedings in capital cases. The formulation of this provision in the final rule to require three years of postconviction litigation experience differs from the corresponding provision in the proposed rule, which required three years of felony litigation experience, without specification of the stage or stages of litigation at which the experience was obtained. The reasons for this change are explained below.

In response to the proposed rule, many commenters suggested that postconviction litigation experience would be a better measure of competency for State postconviction proceedings than general felony litigation experience because of the difficult and unique demands that postconviction law and procedure place on attorneys who litigate those cases. These comments were persuasive.

In construing chapter 154, some courts have concluded that, given the complexity of postconviction law and procedure, a qualifying mechanism for the appointment of competent counsel

should provide for counsel with specialized postconviction litigation experience. *See, e.g., Colvin-El v. Nuth*, No. Civ.A. AW 97–2520, 1998 WL 386403, at \*6 (D. Md. July 6, 1998) (“Given the extraordinarily complex body of law and procedure unique to postconviction review, an attorney must, at minimum, have some experience in that area before he or she is deemed ‘competent.’”); *see also* Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services, Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* 88 (Sep. 2010) (noting the view of postconviction specialists that there is “little time available for inexperienced counsel to ‘learn the ropes,’ and no safety net if they fail”). Several States have also incorporated this guidance into their appointment standards. *See, e.g.,* La. Admin. Code tit. 22, 915(D)(1)(e)(i) (requiring that qualified postconviction lead counsel shall “have at least five years of criminal postconviction litigation experience.”); Miss. R. App. P. 22(d)(5) (generally requiring prior experience in at least one postconviction proceeding for appointment); Mo. Ann. Stat. § 547.370(2)(3) (requiring at least one of two appointed counsel to have “participated as counsel or co-counsel to final judgment in at least five postconviction motions involving class A felonies in either state or federal trial courts”). The adaptation of the section 3599 standard in the final rule accordingly specifies three years of postconviction litigation experience, rather than three years of any sort of felony litigation experience as in the proposed rule.

The formulation of this benchmark in the final rule to require postconviction experience does not take issue, as some commenters claimed, with Congress's judgments regarding counsel competency standards that are likely to be adequate. Rather, both the proposed and final versions reflect necessary adaptation of the standards of 18 U.S.C. 3599 for use in chapter 154 certification decisions. In defining relevant prior litigation experience, 18 U.S.C. 3599(b) and (c) deem prior trial experience relevant for trial appointments, and prior appellate experience relevant for appointments “after judgment.” The statute does not provide an experience requirement tailored specifically to postconviction proceedings, having no separate specification about the experience required for appointments to provide representation “after judgment”

in postconviction proceedings as opposed to representation “after judgment” on appeal. If section 3599's standards were transcribed as literally as possible in § 26.22(b)(1)(i), the rule would state that a State competency standard is presumptively adequate if it normally requires three years of appellate experience as a precondition for appointment in postconviction proceedings. But chapter 154 differs from section 3599 in that chapter 154 deals exclusively with postconviction proceedings. Prior postconviction litigation experience (as opposed to prior appellate experience) is more similar in character to the postconviction litigation for which an attorney would be appointed pursuant to chapter 154, and more likely on the whole to enable the attorney to provide effective representation in postconviction proceedings. The rule accordingly follows the sensible approach of referring to prior postconviction litigation experience in defining an experience standard that will presumptively be considered adequate for appointments in the postconviction proceedings addressed by chapter 154.

The Criminal Justice Act (CJA) guidelines promulgated by the Judicial Conference of the United States counsel courts to consider postconviction experience when making appointments under 18 U.S.C. 3599. *See* 7A Guide to [Federal] Judiciary Policy 620.50 (last rev. 2011) (“CJA Guidelines”), available at <http://www.uscourts.gov>. *Federal Courts/AppointmentOfCounsel/CJAGuidelinesForms/GuideToJudiciaryPolicyVolume7.aspx*. To be sure, the CJA Guidelines are not absolute requirements even in Federal habeas matters; the guidelines are phrased in permissive terms and elaborate in part on 18 U.S.C. 3005, *see* CJA Guidelines 620.10.10(a), 620.30, which concern appointment of counsel for trial representation in Federal capital cases and does not apply to appointments for collateral proceedings in State capital cases. *Compare* 18 U.S.C. 3005 with 18 U.S.C. 3599. However, the Department does agree that the CJA Guidelines may at times help to inform determinations as to appropriate standards for appointment of counsel, and so understood, the Department is ultimately convinced that the guidelines' advice to consider postconviction experience is sound. The final rule therefore avoids the anomaly that would result from an overly formalistic adaptation of 18 U.S.C. 3599 and instead carries out the adaptation in a manner in which the prior litigation

experience requirement is more finely attuned to the nature of the proceedings—i.e., postconviction proceedings—in which appointments are to be made.

The Department was not convinced, however, by commenters who asserted that this benchmark is deficient (or the other counsel competency provisions of the rule are deficient) because it does not require appointed counsel to have prior experience in *capital* postconviction proceedings, or at a minimum, some prior capital litigation experience generally. While prior capital litigation experience is frequently a relevant and valuable asset for an attorney assigned to handle postconviction matters, see *Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996), and is also a factor that the CJA Guidelines say courts should consider in Federal capital cases, the Department was ultimately unpersuaded that prior capital litigation experience must be required categorically as a precondition of competence under chapter 154. When setting competency requirements for appointed counsel in the IPA, see *infra*, Congress has not mandated that appointed attorneys invariably have such experience. 42 U.S.C. 14163(e). Similarly, courts and others have recognized that prior capital case experience should not be regarded as a *sine qua non* of an appropriate competency standard for postconviction counsel. See, e.g., *Spears*, 283 F.3d at 1013 (“Nothing in [chapter 154] or in logic requires that a lawyer must have capital experience to be competent.”); ABA Guidelines, at 37 & n. 109 (noting that “[s]uperior postconviction death penalty defense representation has often been provided by members of the private bar who did not have prior experience in the field” and stating that such counsel should be appointed if the client will receive high quality legal representation).

Next, and more broadly, some commenters contended that any competency measure based solely on prior experience will necessarily be insufficient under chapter 154 and criticized the Section 26.22(b)(1)(i) benchmark (and § 26.22(b)(2)) on that basis. Many of these comments urged the view that a State system that relies on prior experience must also incorporate procedures for monitoring counsel performance following appointment and for removal of poorly performing attorneys. The rule remains unchanged in response to these comments. 18 U.S.C. 3599 reflects a Congressional judgment that sufficiently robust experience requirements alone

can be sufficient. Further, when Congress amended chapter 154 in 2006, it could have required all State mechanisms to adopt monitoring and removal provisions similar to those it required in the IPA in 2004, see 42 U.S.C. 14163(e)(2)(E), if it viewed such provisions as indispensable, but Congress did not do so. Thus, monitoring or removal requirements are not included in the rule’s benchmark based on 18 U.S.C. 3599. *But see* § 26.22(b)(1)(ii) and discussion *infra*. However, their omission should not displace or affect the existence and operation of more generally applicable monitoring or removal procedures (e.g., disbarment) that a State may have in place, nor should it in any way discourage States from choosing to adopt monitoring and removal provisions as a discretionary matter.

One of the comments argued that the standards applicable under section 3599 to Federal habeas counsel should be considered inadequate for appointment of counsel in State collateral proceedings, on the ground that Federal habeas counsel has the benefit of the antecedent work of State collateral counsel in developing and presenting claims, and accordingly need lesser skills. However, the standards of section 3599 apply to Federal habeas counsel regardless of what prior representation or process has or has not been provided in State proceedings. Also, the same standards apply under section 3599 to counsel in Federal court collateral proceedings in Federal capital cases which, like State court collateral proceedings in State capital cases, are normally preceded only by trial and appeal.

Some commenters also objected to the exception language in the section 3599-based benchmark that allows appointment of counsel not meeting its specific litigation experience requirement in some circumstances. This exception appropriates the standard of 18 U.S.C. 3599(d), which allows courts, for good cause, to appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty (i.e., capital punishment) and the nature of the litigation. We expect that allowing this type of departure will not unduly negate or undermine the specific experience requirement of this aspect of the rule, since its formulation limits its applicability to exceptional cases. It requires good cause for the court to appoint counsel other than those satisfying the specific experience requirement, and requires the court to

verify that such counsel have other characteristics qualifying them to meet the demands of postconviction capital punishment litigation. In the rule, as in section 3599, the exception recognizes that insisting on a rigid application of a defined experience requirement could debar attorneys who are well-qualified on other grounds to represent capital petitioners. The comments provided no persuasive reason to deny this latitude in State court collateral proceedings in capital cases, which Congress has deemed appropriate for Federal court collateral proceedings (and other Federal court proceedings) in capital cases. See 18 U.S.C. 3599(d); *cf. Ashmus*, 123 F.3d at 1208 (recognizing that “habeas corpus law is complex and has many procedural pitfalls” but concluding that it is not necessary under chapter 154 that every lawyer have postconviction experience), *rev’d on other grounds*, 523 U.S. 740 (1998).

Though the Department therefore believes there is good reason to retain the availability of the exception to § 26.22(b)(1)(i)’s years of experience requirement that is drawn from 18 U.S.C. 3599(d), the rule is permissive, not mandatory, on this point. If a State decides to omit the exception in its mechanism, such that appointed attorneys will invariably need to have been admitted to the bar for five years and have three years of postconviction litigation experience, that omission will not result in a determination that it has failed to satisfy the § 26.22(b)(1)(i) benchmark.

Finally, some commenters objected to this revision of the benchmark as unduly limiting State discretion regarding the formulation of their counsel competency standards. However, use of this particular standard as a benchmark does not convey or depend on a judgment that other approaches States may choose to adopt are necessarily illegitimate or inadequate for purposes of chapter 154. Rather, other standards may be presented for the Attorney General’s consideration under § 26.22(b)(2), and they will be approved if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

#### **Section 26.22(b)(1)(ii)—Counsel Competency Standards Based on the Innocence Protection Act**

Section 26.22(b)(1)(ii) identifies the establishment of qualification standards for appointment in conformity with the procedures of the IPA as another potential means of satisfying chapter 154.

The text of the rule published in the notice of proposed rulemaking framed the benchmark in terms of “meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) [and] (2)(A).” These provisions concern the nature and composition of capital counsel appointment or selection entities, 42 U.S.C. 14163(e)(1), and provide that the appointing authority or an appropriate designated entity must “establish qualifications for attorneys who may be appointed to represent indigents in capital cases,” 42 U.S.C. 14163(e)(2)(A).

Numerous comments on the proposed rule related to how many of the IPA provisions should be imported into the rule’s benchmark. Commenters noted that the benchmark as formulated in the proposed rule did not capture the full range of IPA provisions bearing on the qualifications counsel must meet to be eligible for appointment. In particular, subparagraphs (e)(2)(B), (D), and (E) in 42 U.S.C. 14163 require maintenance of a roster of qualified attorneys, specialized training programs for attorneys providing capital case representation, monitoring the performance of attorneys who are appointed and their attendance at training programs, and removal from the roster of attorneys who fail to deliver effective representation, engage in unethical conduct, or do not participate in required training. These provisions are integral elements of the IPA qualification standards for appointments, because counsel who fail to measure up under these requirements become ineligible for subsequent appointments.

These comments were persuasive that the IPA-based provision in the proposed rule did not fully reflect the IPA system relating to qualifications for appointment because of the omission of reference to subparagraphs (e)(2)(B), (D), and (E) in the statute. The omission has been corrected in § 26.22(b)(1)(ii) in the final rule.

The supplemental notice of proposed rulemaking included this change in the IPA-based benchmark. See 77 FR at 7560. Some of the commenters responding to the supplemental notice questioned the continued omission of certain other IPA provisions, particularly the IPA requirements relating to appointment of two counsel, and the IPA requirements concerning compensation of counsel. See 42 U.S.C. 14163(e)(2)(C), (F). Counsel compensation is addressed in a different part of this rule, which includes benchmarks similar to the IPA provisions. See § 26.22(c)(1)(ii) and (iv)

in the final rule and the related discussion below.

Regarding the number of counsel, chapter 154 does not require States to appoint more than one attorney (as part of a defense team) for postconviction representation. Rather, the applicable statute frames the potential appointment of multiple postconviction counsel as a discretionary matter. See 28 U.S.C. 2261(c)(1) (State capital counsel mechanism must provide for court order “appointing one or more counsels to represent the prisoner”). The Department believes there is no sound basis to eliminate the discretion chapter 154 contemplates by its own terms through a rule that forecloses certification of State mechanisms that provide for the appointment of only one attorney.

Furthermore, the IPA itself requires appointment of two counsel, with some exception, in the context of counsel standards that do not differentiate between different stages in the litigation of capital cases and that are principally concerned with the trial stage. See 42 U.S.C. 14163(c)–(d) (providing that IPA funding is to be used for effective systems for providing competent legal representation at all stages, with general requirement that at least 75% be used in relation to trial representation and at most 25% in relation to appellate and postconviction representation). In adapting the IPA standards to the context of chapter 154, which concerns only representation in postconviction proceedings, some flexibility on the question whether multiple counsel should be required is appropriate and accords with relevant congressional judgments in related contexts. As noted, chapter 154 itself frames the appointment of multiple postconviction counsel as a discretionary matter. 28 U.S.C. 2261(c)(1). Likewise, in relation to Federal capital cases and Federal habeas corpus review of State capital cases, Congress has required appointment of two counsel at trial but has made appointment of more than one counsel at later stages a discretionary matter. Compare 18 U.S.C. 3005 (court to “assign 2 . . . counsel” for trial representation) with 18 U.S.C. 3599(a) (requiring in provisions applicable at later stages “appointment of one or more attorneys”). The rule takes a similar approach when adapting the IPA standards in the chapter 154 context by permitting, but not requiring, State mechanisms to provide for appointment of two attorneys to represent a capital petitioner on collateral review.

Additionally, § 26.22(b) in the rule articulates the statutory requirement that a State provide for the appointment

of competent counsel in State postconviction proceedings and provide standards of competency for the appointment of such counsel. 28 U.S.C. 2265(a)(1)(A), (C). As discussed above, this means that States must have qualification standards that counsel must meet to be eligible for appointment and that the Attorney General finds adequate. The IPA provisions included in § 26.22(b)(1)(ii) in the final rule fit within this framework because they are integral to the IPA’s specification of qualifications that counsel must meet to be eligible for initial or subsequent appointments. The same would not be true of specifications concerning the number of counsel to be appointed.

As to a separate issue, another comment criticized this benchmark on the ground that it does not prescribe definite qualification standards for appointment of counsel, but rather endorses any standards adopted in conformity with the IPA procedures. However, chapter 154 directs the Attorney General to determine whether the State provides standards of competency for appointment of competent counsel in State capital collateral proceedings, and whether the State’s mechanism incorporating such standards will reasonably assure the appointment of competent counsel. It does not require the Attorney General to specify directly the required content of such standards. The corresponding provisions of the IPA reflect a judgment by Congress that qualification standards adopted in conformity with the IPA procedures will be adequate. This judgment is appropriately adopted in defining one of the means by which States may seek to satisfy the requirements of chapter 154.

#### **Section 26.22(b)(2)—Other Counsel Competency Standards**

Section 26.22(b)(2) in the rule provides that the Attorney General may find other competency standards for the appointment of counsel adequate if they reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases. Some commenters criticized this provision as overly indefinite and urged that the rule should provide for assessment of State capital counsel competency standards only under clearly defined criteria.

Many of these critical comments are premised at least partly on the view that the Attorney General has a conflict of interest under chapter 154. The commenters viewed this alleged conflict as exacerbated by § 26.22(b)(2) and urged that the rule eliminate or drastically limit any opportunity for the Attorney General to exercise judgment

or discretion in evaluating the adequacy of a State capital counsel mechanism. The Department rejects the premise that the Attorney General has a conflict, for reasons discussed above, and therefore finds the comments predicated on that view unpersuasive.

Also, as explained earlier, the Department believes States should retain some significant discretion to formulate and apply counsel competency standards, and § 26.22(b)(2) as drafted appropriately preserves that discretion. There are any number of ways in which a State might adopt measures of experience, knowledge, skills, training, education, or combinations of those considerations in devising a standard that would reasonably assure the appointment of counsel who are competent to conduct postconviction litigation in capital proceedings. Revising § 26.22(b)(2) to provide only very specific, one-size-fits-all criteria is accordingly impractical and would risk foreclosing innovative efforts by States to devise robust standards, even standards that would unquestionably result in the timely appointment of competent counsel.

Furthermore, before Congress reassigned the certification function from the Federal courts to the Attorney General by the 2006 amendments to chapter 154, courts did not assess the adequacy of State counsel competency standards constrained by rigid, pre-announced criteria; they were guided instead by the terms of chapter 154 itself and the facts in a particular case. *See, e.g., Spears*, 283 F.3d at 1012–15; *Ashmus*, 123 F.3d at 1208; *Hill*, 941 F. Supp. at 1142–43. The 2006 amendments changed the decision-maker for purposes of making judgments about the overall adequacy of State systems under chapter 154, but the amendments do not suggest that the Attorney General’s discretion to evaluate the adequacy of State competency standards must be constrained by a one-size-fits-all approach. Had Congress questioned the Attorney General’s ability to exercise discretion soundly or believed that more specific guidance was necessary, it could have amended the statutory scheme to specify more detailed requirements that State mechanisms must meet when it transferred the certification function to the Attorney General—but Congress did not do so.

This is not to say, as some comments contend, that § 26.22(b)(2) affords a State unbounded discretion to establish any sort of competency standards and still obtain certification of its mechanism under chapter 154. The notice and supplemental notice of

proposed rulemaking described the two approaches now reflected in paragraph (b)(1) of the rule as benchmarks, and they function precisely in that manner. That is, the criteria in paragraph (b)(1) do not simply identify two competency standards that will entitle a State that adopts them to a presumption of adequacy; they also serve as a point of reference in judging the adequacy of other counsel qualification standards that States may establish and offer for certification by the Attorney General. A State mechanism that does not incorporate the benchmark standards will naturally require closer examination by the Attorney General to ensure that it satisfies the statutory standards, and while it is possible to conceive of a variety of alternative competency measures that would satisfy chapter 154’s requirements, State competency standards that appear likely to result in significantly lower levels of proficiency compared to the benchmark levels risk being found inadequate under chapter 154. For clarity, the text of the proposed rule has been revised to reflect this understanding, namely, that the paragraph (b)(1) standards function as benchmarks and are relevant to the Attorney General’s assessment of alternative competency standards for which certification would be predicated on § 26.22(b)(2).

This explanation also responds to another comment, which complains that the provision appearing in the final rule as § 26.22(b)(2) is overly restrictive, on the ground that it limits the possibility of approval of State competency standards to situations in which they are “functionally identical to or more stringent than” the particular benchmark standards described in § 26.22(b)(1). This comment reflects a misunderstanding of the rule. The analysis statement in the proposed rule noted in relation to the benchmarks that States’ adoption of competency requirements that are similar or that are likely to result in even higher levels of proficiency will weigh in favor of a finding of adequacy for purposes of chapter 154, *see* 76 FR at 11709, and a statement to the same effect appears in the section-by-section analysis for this final rule. However, it is not similarity in form to the presumptively adequate standards that section (b)(2) contemplates, and the standards need not function in an identical matter. Rather, § 26.22(b)(2) contemplates a close equivalence in terms of the expectation that a proffered mechanism will reasonably assure an appropriate level of proficiency in appointed counsel. As the analysis statement

explained and this preamble repeats, Congress intended the States to have significant discretion regarding competency standards, within reasonable bounds, and the particular benchmarks identified in the rule do not exhaust the means by which States may satisfy chapter 154’s requirements.

#### **Section 26.22(c)—Compensation of Counsel**

Section 26.22(c)(1)(i) refers to the compensation of counsel pursuant to 18 U.S.C. 3599 in Federal habeas corpus proceedings reviewing State capital cases. The Department received no comments that were specifically critical of this standard, which remains unchanged in the final rule.

The compensation standards for appointed capital counsel in State collateral proceedings described in § 26.22(c)(1)(ii) and (iv) in the rule involve compensation comparable to that of retained counsel meeting sufficient competency standards or attorneys representing the State in such collateral proceedings. Some comments were critical of these benchmarks as setting an inadequate level of compensation. However, as explained in the accompanying analysis statement for the rule, these parts of the rule are similar to legislative judgments in the IPA endorsing compensation of capital defense counsel at market rates or at a level commensurate with that of prosecutors. 42 U.S.C. 14163(e)(2)(F)(ii)(I); *see also* ABA Guidelines § 9.1(B)(2), at 49 (same). The comments provided no persuasive reason to reject this legislative judgment in the context of chapter 154, or to believe that compensating appointed capital defense counsel at higher levels than competent retained counsel or counsel representing the State in the same proceedings will generally be necessary to induce a sufficient number of competent attorneys to provide representation.

Section 26.22(c)(1)(iii) in the rule refers to compensation comparable to the compensation of appointed counsel in State appellate or trial proceedings in capital cases. The accompanying explanation in the analysis statement for this rule explains that the compensation afforded for trial and appellate representation is likely to be sufficient to secure the availability of an adequate pool of competent attorneys to provide postconviction representation, because that level of compensation is necessarily sufficient to ensure an adequate number of attorneys are available to provide representation in trials and appeals, where representation by counsel is constitutionally required.

Some commenters criticized this provision as overly permissive on the ground that trial and appellate counsel may be underpaid and that such counsel are sometimes found to have provided constitutionally ineffective assistance. However, that is not an occurrence that can be infallibly guarded against by any level of compensation at any stage of criminal proceedings. Moreover, the proposed rule has been modified to afford the Attorney General latitude to consider any unusual circumstances presented by a particular State system that indicate that the level of compensation called for in this benchmark is unlikely to function as expected. It is conceivable in the context of a particular State and its distinctive market conditions for legal services, for example, that what normally should be sufficient compensation may not in fact be reasonably likely to make competent lawyers available for timely provision to capital petitioners in State postconviction proceedings. *Cf. Baker*, 220 F.3d at 285–86 (considering per-attorney overhead costs and effective compensation rates among other factors in finding compensation scheme inadequate under chapter 154).

Nevertheless, the Attorney General does not exercise limitless discretion to pass judgment on whether State compensation authorizations are sufficiently generous under chapter 154, which provides in relevant part simply that the Attorney General is to determine “whether the State has established a mechanism for the appointment [and] compensation . . . of competent counsel.” 28 U.S.C. 2265(a)(1)(A). The formulation of the rule on this point reads the statutory scheme to allow the Attorney General to review the adequacy of State compensation provisions in the interest of promoting sufficient financial incentives to secure the appointment of competent counsel in sufficient numbers to timely provide representation to capital petitioners in State collateral proceedings. The Attorney General will consider any available relevant information, including the effective hourly rate for appointed attorneys, in evaluating a mechanism’s compensation standards. But the comments critical of the § 26.22(c)(1)(iii) benchmark, which raised concerns with funding for appointment of counsel in particular cases or in particular States, were not sufficiently persuasive that compensation that adequately motivates counsel to accept appointments for the trial and appeal of capital cases (in

which they are held to provision of constitutionally effective assistance) will generally be unlikely to provide sufficient incentives for competent counsel to provide representation in State collateral proceedings satisfying the standards of chapter 154.

Section 26.22(c)(2) in the rule allows approval of other approaches to compensation, but “only if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of [competent] counsel.” Some commenters criticized this provision as vague and urged that the rule be modified so that chapter 154 certification could be granted only if a State’s counsel compensation provisions satisfy definite criteria stated in the rule.

As with the corresponding comments on § 26.22(b)(2), these comments in part reflected an assumption that the Attorney General has a conflict of interest in carrying out his legal duties under chapter 154, and the response is much the same. The underlying assumption of a conflict of interest is not well-founded, for reasons discussed above. Additionally, § 26.22(c)(2) is consistent with the Department’s recognition that a State should have significant latitude in designing a capital counsel mechanism that (among other things) are tailored to the State’s unique characteristics and market conditions. As already noted, the provision affords States appropriate discretion to set alternative levels of compensation that will reasonably assure the timely appointment of competent counsel but that might otherwise be foreclosed by an overly specific *ex ante* requirement. At the same time, as explained above in connection with § 26.22(b)(2), a State’s latitude to consider alternative compensation standards, and the Attorney General’s assessment of any such standards, is not unbounded. The rule identifies four benchmarks that will continue to guide the Attorney General’s evaluation of other proposed standards—as the text of the proposed rule has similarly been revised to clarify.

#### **Section 26.22(d)—Reasonable Litigation Expenses**

Section 26.22(d) in the rule reflects the requirement to provide for payment of reasonable litigation expenses. Some commenters criticized this provision as not sufficiently specific regarding the types of expenses that must be defrayed and the means of evaluating what expenditures are reasonable. They accordingly urged more definite specification concerning these matters in the rule, such as explicitly requiring

payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel, and providing standards for evaluating the reasonableness of compensation for persons in each category.

The comments raise an important issue for consideration. The Department recognizes that investigators, mental health and forensic experts, and other support personnel often contribute critical services in capital postconviction cases. The Department agrees that payment of such individuals, among other expenses that may arise in the context of a particular case, are litigation expenses that should merit reimbursement if reasonable, and the text of § 26.22(d) has been modified in the final rule to clarify this point. *See* ABA Guidelines, at 128 (“[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7 . . . [including] discover[ing] mitigation that was not presented previously, [and] identify[ing] mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.”); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (“[W]e long have referred [to ABA Standards] as guides to determining what is reasonable.”) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (internal quotation marks omitted)).

However, the language of section 2265 does not suggest that the Attorney General must enumerate the universe of litigation expenses that merit reimbursement. Rather, the relevant statutory directive to the Attorney General is to determine whether the State has established a mechanism for the “payment of reasonable litigation expenses.” 28 U.S.C. 2265(a)(1)(A). The comments on this issue did not persuasively establish that a State should be denied chapter 154 certification if its mechanism requires the payment of reasonable litigation expenses in terms similar to chapter 154 itself, or at some other level of generality less specific than that urged by the commenters. *See Spears*, 283 F.3d at 1016 (“[Chapter 154] requires only that the state mechanism provide for the payment of reasonable litigation expenses. The federal statute thus assumes that a state can assess reasonableness as part of its process.”); *see also* Gould & Greenman, *supra*, at 31–32, 78, 122 (2010) (provision for Federal court proceedings in capital cases, which refers generally to fees and expenses for investigative, expert, and other reasonably necessary services,

states that payment for these purposes shall not exceed \$7,500 unless approved for a higher amount by the circuit chief judge or delegee—but the median reimbursable cost that Federal courts approved in capital cases between 1998 and 2004 was \$83,000).

Importantly, though, as with other requirements under chapter 154, satisfaction of the requirement regarding payment of reasonable litigation expenses requires that States have standards in force that so provide. The Attorney General will consider all relevant aspects of State standards in ascertaining whether the statutory requirements have been satisfied. Thus, as § 26.22(d) states, a general provision requiring payment of reasonable litigation expenses would not be sufficient if negated by rigid payment caps with no authorized means for payment of necessary expenses above such limits, and the Attorney General would similarly consider whether such a provision is negated by State policy that precludes payment for certain categories of expenses that may be reasonably necessary. Moreover, as with other requirements, the Attorney General is not dependent on the State's representations, and any interested person or entity believing that State standards overall do not provide for payment of reasonable litigation expenses is free to bring relevant information to the Attorney General's attention through the comment procedure set out in § 26.23 in the rule.

Comments responding to the supplemental notice of proposed rulemaking suggested that satisfaction of § 26.22(d) should only be considered presumptively adequate for purposes of chapter 154, paralleling the "presumptively" qualifier applicable to the benchmark provisions relating to counsel competency and compensation, which appear in § 26.22(b)(1) and (c)(1) in the final rule. The "presumptively" qualifier is neither necessary nor appropriate here because § 26.22(d) incorporates no benchmark provisions. It articulates the requirement relating to payment of litigation expenses under chapter 154, and States that have established mechanisms that meet this requirement have done what chapter 154 requires in this connection. Its proper counterpart is not the benchmark provisions in § 26.22(b)(1) and (c)(1), but the general articulations of the chapter's requirements relating to counsel competency and compensation in § 26.22(b)(2) and (c)(2), which similarly do not need or have a "presumptively" qualifier.

#### Section 26.23(a)–(c)—Certification Procedure

These provisions in the rule specify the procedure for the Attorney General to receive requests for chapter 154 certification, obtain public comment on the requests through Internet posting and **Federal Register** publication, and make and announce the certification decision.

Some commenters objected that the public notice and comment procedure of the rule is inadequate and that the Attorney General must engage in additional fact-finding processes. These objections are premised on an incorrect understanding of the nature and scope of the Attorney General's certification determination, as explained earlier in this preamble. The Attorney General's decision to certify an established State mechanism under chapter 154 need not be supported by a data-intensive examination of the State's record of compliance with the established mechanism in all or some significant subset of postconviction cases; for instance, certification should not be foreclosed for a State that cannot submit the information the commenters identify because it has established new standards that satisfy the statutory requirements but for which there is no pre-existing record of compliance. The comments provided no persuasive reason to believe that the rule's procedure, under which the Attorney General will publish a State's request for certification and invite interested parties and the State seeking certification to be heard via written submissions during one or more public comment periods, will be inadequate to provide the information needed for the determinations that the Attorney General actually must make under chapter 154. Moreover, the Attorney General's certifications under chapter 154 are orders rather than rules for purposes of the Administrative Procedure Act (APA). They are accordingly not subject to the APA's rulemaking provisions, *see* 5 U.S.C. 553, much less to the APA's requirements for rulemaking or adjudication required to be made or determined on the record after opportunity for an agency hearing, *see* 5 U.S.C. 553(c), 554, 556, 557.

The Department does not believe, as some commenters urged, that it is necessary to specify detailed information concerning State capital collateral review systems that States must include in their requests for chapter 154 certification. For the reasons already given, these comments were similarly based on an incorrect understanding of the nature and scope

of the Attorney General's certification determination. Chapter 154 itself and this rule explain what States must do to qualify for chapter 154 certification. Under the procedures of § 26.23, States will be free to present any and all information they consider relevant or useful to explain how the mechanism for which they seek certification satisfies these requirements. Likewise, through the public comment procedure of the rule, any other interested person or entity will be free to submit any information it may wish in support of, or in opposition to, the State's request—including information that the mechanism submitted for certification has not been established because its standards are actually negated or overridden by contrary State policy. Further, the proposed rule has been revised to make clear that the Attorney General may permit more than one period for comment to allow the requesting State or any interested parties further opportunity for submission of views or information. The comments provided no persuasive reason for an across-the-board imposition of more definite informational requirements beyond that.

Comments also proposed that the rule require the Attorney General to give personal notice to certain entities concerning a State's submission of a request for chapter 154 certification, such as capital defense entities in the requesting State. In any particular State, there may be a large number of organizations and individuals who are involved in capital defense work or who would be interested in a State's request for chapter 154 certification for other reasons. It is not feasible for the Attorney General to attempt to identify and personally notify all of them. Nor should the Attorney General be in the position of having to pick and choose, identifying certain persons or organizations as sufficiently interested or important to receive personal notice, when others will not receive such notice. Such personal notice requirements, in any event, are unnecessary, because the State's request will be made publicly available on the Internet and in the **Federal Register** as provided in § 26.23(b).

Section 26.23(c) states that if certification is granted, the certification will be published in the **Federal Register**. Some commenters urged that denials of certification also be published in the **Federal Register**. However, the granting of chapter 154 certification by the Attorney General changes the Federal habeas corpus review procedures applicable in relation to capital cases in the State, so there is a

clear interest in making it indisputable and publicly known that certification has been granted, for which **Federal Register** publication is a convenient and sufficient means. The reasons for publicizing a denial of certification through official publication are less compelling because its legal effect is just to perpetuate the status quo. Publication of a denial of certification might alternatively serve the purpose of providing the predicate for an appeal of the Attorney General's decision to the D.C. Circuit Court of Appeals. However, review by the D.C. Circuit would be pursuant to chapter 158 of title 28, *see* 28 U.S.C. 2265(c), which provides that "[o]n the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules." 28 U.S.C. 2344. So the Attorney General has the option of giving notice by service to the State official who requested certification regarding the denial of the certification, and is not legally required to publish the denial. Considering the foregoing, the comments do not persuasively establish that the rule should be changed to require uniformly that the Attorney General publish denials of certification in the **Federal Register**.

#### **Section 26.23(d)—Post-Certification Occurrences**

Section 26.23(d) in the rule addresses the effect of changes or alleged changes in a State capital counsel mechanism following certification by the Attorney General.

One commenter urged that more of the accompanying explanation regarding this provision in the analysis statement for the proposed rule be contained in the rule itself. The relevant portion of the analysis statement, 76 FR at 11710–11, in part noted that if a State abolishes its capital counsel mechanism following certification by the Attorney General, then 28 U.S.C. 2261(b)(2)'s requirement of appointment of counsel pursuant to the certified mechanism as a condition of chapter 154's applicability cannot thereafter be satisfied, reflecting the obvious point that counsel cannot be appointed pursuant to something that no longer exists. The analysis statement further noted that capital habeas petitioners may present claims to Federal habeas courts that subsequent changes or alleged changes in the certified mechanism effectively converted it into a new and uncertified mechanism, and hence section 2261(b)(2)'s requirement of appointment of counsel pursuant to the certified mechanism was not satisfied in their cases. This observation

reflects no judgment by the Attorney General as to whether certain changes in a certified mechanism would affect the applicability of chapter 154, and, if so, under what circumstances or to what extent. That is a matter that Federal habeas courts may consider if capital petitioners raise claims of this nature under section 2262(b)(2). The rule says no more on this question because resolving it is not any part of the Attorney General's certification functions under chapter 154.

The analysis went on to note that in such circumstances, or in other circumstances in which there has been some change or alleged change in the State mechanism, the State could request a new certification by the Attorney General of its present capital counsel mechanism. That could avoid litigation in Federal habeas courts under 28 U.S.C. 2261(b)(2) over the present status of the State mechanism and ensure that determinations regarding satisfaction of chapter 154's requirements are made by the Attorney General, subject to review by the D.C. Circuit Court of Appeals, as contemplated by 28 U.S.C. 2261(b)(1) and 2265(c)(2). The rule does not need to be changed to make this point because § 26.23(d) in the rule already says that "[a] State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism."

Some comments urged that the rule should be changed to provide a means for decertification of State capital counsel mechanisms that the Attorney General has previously approved. One of the comments pointed in this connection to 5 U.S.C. 553(e), which in part requires agencies to give interested persons the right to petition for the repeal of a rule. However, that provision is inapplicable to chapter 154 certifications, which are orders rather than rules, as noted above.

Decertification could conceivably be effected in one of two ways: (i) through some procedure for examination or oversight of State capital counsel mechanisms following their certification to ascertain whether they continue to measure up under chapter 154's standards, or (ii) through modification of the rule to provide that a certification automatically lapses based on subsequent changes in the capital counsel mechanism or other changed circumstances.

The argument for incorporating some provision for continual oversight and potential decertification of State capital

counsel mechanisms is not persuasive for a number of reasons. First, the proposal conflates the functions assigned to the Attorney General and those reserved to Federal habeas courts under the current formulation of chapter 154, which limits the Attorney General's function to making general certification determinations upon request of an appropriate State official, *see* 28 U.S.C. 2261(b)(1), 2265(a)(1), and reserves case-specific inquiries affecting chapter 154's applicability to Federal habeas courts under 28 U.S.C. 2261(b)(2). Second, the chapter includes provisions that establish when a certification takes effect and direct the Attorney General to promulgate regulations to implement a certification procedure, *see* 28 U.S.C. 2265(a)(2), 2265(b), but no direction to the Attorney General to implement a decertification procedure. These considerations lead to the conclusion that day-to-day oversight and potential decertification of State capital counsel mechanisms are not among the Attorney General's authorized functions under chapter 154.

Regarding the idea that a certification would automatically lapse based on subsequent events, such an approach would pose difficulties in operation, most prominently that certification should not cease to apply merely because the change *might* affect satisfaction of the chapter 154 requirements, and that it is unclear *who* would determine whether a change in the capital counsel system might affect satisfaction of the chapter 154 requirements.

This rule accordingly responds to these difficulties by not including any provision for decertification, but providing in § 26.23(d) that a State may seek a new certification from the Attorney General to resolve uncertainties concerning chapter 154's continued applicability in light of subsequent changes or alleged changes in the State's certified capital counsel mechanism. This approach (i) avoids any question of legal consistency with chapter 154's definition of the Attorney General's authority and functions, and (ii) avoids the difficulties inherent in attempting to define *ex ante* and in the absence of any factual context the conditions and procedures for assessing whether and what changes to a State system should prompt a decertification review, but (iii) affords a means for resolution by the responsible authority under chapter 154 of questions that may arise in practice regarding the continued effectiveness of chapter 154 certifications.

Just as importantly, § 26.23(e), discussed below, provides that

certifications are effective for a period of five years, thereby ensuring that a State capital counsel mechanism's current satisfaction of the chapter 154 requirements will be revisited at reasonable intervals. This addresses concerns about the possibility of subsequent changes in a State's system that could put it out of compliance with chapter 154, further reducing the force of any argument that a decertification procedure is needed.

**Section 26.23(e)—Renewal of Certifications**

Section 26.23(e) provides that certifications remain effective for a period of five years. The addition of this provision, which was not in the proposed rule but was described in the supplemental notice of proposed rulemaking, *see* 77 FR at 7562, is responsive to many comments that pointed out that changed circumstances may affect whether a once-certified mechanism continues to be adequate for purposes of chapter 154. For example, inflation or changed economic circumstances may mean that provisions authorizing compensation of counsel at a specified hourly rate, which were sufficient at the time of an initial certification decision, are no longer adequate after the passage of years. Or changes may occur in the standards constituting a State's postconviction capital counsel mechanism that affect their consistency with chapter 154.

Some commenters on the supplemental notice approved of this change but urged that the rule include more detail concerning the operation of the recertification process and the standards that would be applied in making recertification decisions. This is unnecessary because the process and standards for subsequent certification decisions are the same as those for initial certification decisions under the rule. The standards of § 26.22 will be applied in deciding whether a State's capital counsel mechanism for which recertification is requested satisfies the chapter 154 requirements, and the procedure set forth in § 26.23 will apply in entertaining, obtaining public input concerning, and deciding recertification requests.

Two commenters objected to limiting the duration of certifications on the grounds that chapter 154 does not provide for the termination of certifications and that the sponsor of the 2006 amendments to chapter 154 explained that they were intended to create a system of "one-time certification." *See* 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl). Regarding the statutory

question, the statutory framework is unquestionably premised on the continuing sufficiency of a mechanism once certified by the Attorney General. The quid pro quo that is the core and the animating purpose of chapter 154, procedural "benefits" for States if and only if they meet the statutory criteria, would cease to make sense if a certification were indefinitely and irrevocably effective even if—by virtue of changed circumstances, *see infra* (analysis statement)—the standards first put in place by a State no longer satisfied the statutory requirements. Providing for periodic review of certifications is fully consistent with the statutory text and avoids such an absurd result. If a statute requires an assessment of mutable conditions against legal standards, a reasonable time limit may be imposed on the effectiveness of a certification to ensure its continuing validity, even if the authorizing statute does not explicitly provide for a time limit. *See Durable Mfg. Co. v. U.S. Dep't of Labor*, 578 F.3d 497, 501–02 (7th Cir. 2009) (upholding time limitation of validity of labor certificates in light of possible subsequent changes in economic circumstances affecting consistency with statutory requirements and objectives).

Regarding the statement by the sponsor of the amendment, it reflects a rejection of the idea of a continuing "compliance review" process or "decertification" procedure under chapter 154 in light of (i) "the substantial litigation burdens" that would likely result for States that have been certified, including "the cost of creating opportunities to force the State to continually litigate its chapter 154 eligibility," (ii) the concern that "if such a means of post-opt-in review were created, it inevitably would be overused and abused," and (iii) the judgment that States "are entitled to a presumption that once they have been certified as chapter-154 compliant, they will substantially maintain their counsel mechanisms." 152 Cong. Rec. S1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl). The statement further viewed a decertification procedure as enabling adverse parties to embroil States in challenges to the continued validity of their capital counsel mechanisms under chapter 154 based on case-specific deficits in their operation, such as delay in the appointment of counsel in particular cases for reasons beyond the State's control. *See id.*

Considered as a whole, the sponsor's statement reflects concerns that would be implicated by the creation of a continuing oversight or decertification

procedure for chapter 154. The Department, as discussed above, has not attempted to create such a procedure in the present rule.

The provision adopted in § 26.22(e) in the final rule does not implicate these concerns. It authorizes no person or entity to initiate challenges to the continuing validity of a certification, much less to involve a State in the uncertainty of perpetual litigation about the validity of a certification. Moreover, § 26.22(e) provides that certifications remain effective for an uninterrupted period of five years after the completion of the certification process by the Attorney General and any related judicial review. If recertification is requested at or before the end of that period, the rule provides that the prior certification will remain in effect until the completion of the recertification process by the Attorney General and any related judicial review.

Section 26.22(e) also does not implicate the concern about challenges based on case-specific non-compliance with State capital counsel mechanisms. Recertification decisions by the Attorney General will involve the same standards and procedures as initial certification decisions.

Finally, the inclusion of § 26.22(e) in the rule does not reflect an assumption that States are likely to abolish or materially weaken their chapter 154-compliant capital counsel mechanisms once they have been established. If no changes have occurred that take a State capital counsel mechanism out of compliance with chapter 154, then it will be recertified, and the recertification process will provide a definitive means of establishing continued satisfaction of the chapter's requirements.

**Section-by-Section Analysis**

*Section 26.20*

Section 26.20 explains the rule's purpose of implementing the certification procedure for chapter 154. It is modified from the corresponding provision in the 2008 regulations to describe more fully the conditions for the applicability of chapter 154 under 28 U.S.C. 2261(b).

*Section 26.21*

Section 26.21 defines the terms "appropriate state official" and "state postconviction proceedings" in the same manner as the 2008 regulations, and adds a definition of "appointment" and "indigent prisoners."

Chapter 154 involves a quid pro quo arrangement under which States provide for the appointment of counsel

for indigent petitioners in State postconviction proceedings in capital cases, and in return Federal habeas review is carried out with generally more limited time frames and scope following the State postconviction proceedings in which counsel has been made available. *See* 28 U.S.C. 2261–2266. In this context, not every provision for making counsel available in State postconviction proceedings, however belatedly, can logically be regarded as providing for the appointment of counsel in the sense relevant under the chapter. In particular, that would not be the case if the State capital counsel mechanism provided for the availability of counsel to represent indigent capital petitioners only after the deadline for pursuing State postconviction proceedings had passed; or only after the expiration of the time limit in 28 U.S.C. 2263 for Federal habeas filing; or only after such delay that the time available to prepare for and pursue State or Federal postconviction review had been seriously eroded. Section 26.21 accordingly defines “appointment” to mean “provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.”

Under 28 U.S.C. 2265(a), a certification request must be made by “an appropriate State official.” Prior to the 2006 amendments to chapter 154, Federal courts entertaining habeas corpus applications by State prisoners under sentence of death would decide which set of habeas corpus procedures applied—chapter 153 or chapter 154 of title 28—and State attorneys general responsible for such litigation could request determinations that their States had satisfied the requirements for the applicability of chapter 154. The 2006 amendments to chapter 154 were not intended to disable the State attorneys general from their pre-existing role in this area, and State attorneys general continue in most instances to be the officials with the capacity and motivation to seek chapter 154 certification for their States. *See* 73 FR at 75329–30. Section 26.21 of the rule accordingly provides that the appropriate official to seek chapter 154 certification is normally the State attorney general. In those few States, however, where the State attorney general does not have responsibilities relating to Federal habeas corpus litigation, the chief executive of the State will be considered the appropriate

State official to make a submission on behalf of the State.

Section 26.21 defines “State postconviction proceedings” as “collateral proceedings in State court, regardless of whether the State conducts such proceedings after or concurrently with direct State review.” Collateral review normally takes place following the completion of direct review of the judgment, but some States have special procedures for capital cases in which collateral proceedings and direct review may take place concurrently. Provisions that separately addressed the application of chapter 154 to these systems were replaced by the 2006 amendments with provisions that permit chapter 154 certification for all States under uniform standards, regardless of their timing of collateral review vis-à-vis direct review. *Compare* 28 U.S.C. 2261(b), 2265 (2006) (as amended by the USA PATRIOT Improvement and Reauthorization Act of 2005), *with* 28 U.S.C. 2261(b), 2265 (2000) (as enacted by AEDPA). *See generally* 152 Cong. Rec. S1620 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl) (explaining that the current provisions simplify the chapter 154 qualification standards, “which obviates the need for separate standards for those States that make direct and collateral review into separate vehicles and those States with unitary procedures”).

The definition of “State postconviction proceedings” in the rule reflects the underlying objective of chapter 154 to provide expedited Federal habeas corpus review in capital cases arising in States that have gone beyond the constitutional requirement of providing counsel for indigents at trial and on appeal by extending the provision of counsel to indigent capital petitioners in State collateral proceedings. *See* 73 FR at 75332–33, 75337 (reviewing relevant legislative and regulatory history). The provisions of chapter 154, as well as its legislative history, reflect the understanding of “postconviction proceedings” as specifically referring to collateral proceedings rather than to all proceedings that occur after conviction (e.g., sentencing proceedings, direct review). *See* 28 U.S.C. 2261(e) (providing that ineffectiveness or incompetence of counsel during postconviction proceedings in a capital case cannot be a ground for relief in a Federal habeas corpus proceeding); 28 U.S.C. 2263(a), (b)(2) (180-day time limit for Federal habeas filing under chapter 154 starts to run “after final State court affirmation of the conviction and sentence on direct review or the expiration of the time for seeking such

review” subject to tolling “from the date on which the first petition for postconviction review or other collateral relief is filed until the final State court disposition of such petition”); 152 Cong. Rec. S1620, 1624–25 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl) (explaining that chapter 154 provides incentives for States to provide counsel in State postconviction proceedings, referring to collateral proceedings); 151 Cong. Rec. E2639–40 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake) (displaying the same understanding); *see also, e.g., Murray v. Giarratano*, 492 U.S. 1 (1989) (using the terms postconviction and collateral proceedings interchangeably).

#### Section 26.22

Section 26.22 sets out the requirements for certification that a State must meet to qualify for the application of chapter 154. These are the requirements in 28 U.S.C. 2261(c)–(d) and 2265(a)(1).

Paragraph (a) of § 26.22—Appointment of Counsel

Paragraph (a) of § 26.22 sets out the requirements of chapter 154 concerning appointment of counsel that appear in 28 U.S.C. 2261(c)–(d).

Paragraph (b) of § 26.22—Competent Counsel

Paragraph (b) of § 26.22 explains how States may satisfy the requirement to provide for appointment of “competent counsel” and to provide “standards of competency” for such appointments. 28 U.S.C. 2265(a)(1)(A), (C).

The corresponding portion of the 2008 regulations construed the reference to appointment of “competent counsel” in section 2265(a)(1)(A) as a cross-reference to counsel meeting the competency standards provided by the State pursuant to section 2265(a)(1)(C). It accordingly treated the definition of such standards as a matter of State discretion, not subject to further review by the Attorney General. *See* 73 FR at 75331. However, these provisions may also reasonably be construed as permitting the Attorney General to require a threshold of minimum counsel competency, while recognizing substantial State discretion in setting counsel competency standards. *See generally* OLC Opinion. The latter understanding is supported by cases interpreting chapter 154, *see, e.g., Spears*, 283 F.3d at 1013 (recognizing that “Congress . . . intended the states to have substantial discretion to determine the substance of the competency standards” under chapter 154 while still reviewing the adequacy

of such standards), and by the original Powell Committee proposal from which many features of chapter 154 ultimately derive, *see* 135 Cong. Rec. 24696 (1989). This understanding is adopted in § 26.22(b) of the final rule.

The specific standards set forth in paragraph (b) are based on judgments by Congress in Federal laws concerning adequate capital counsel competency standards and on judicial interpretation of the counsel competency requirements of chapter 154. Section 26.22(b)(1) sets out two approaches that will presumptively be considered adequate to satisfy chapter 154—an option involving an experience requirement derived from the standard for appointment of counsel in Federal court proceedings in capital cases (paragraph (b)(1)(i)), and an option involving qualification standards set in a manner consistent with relevant portions of the IPA (paragraph (b)(1)(ii)). Section 26.22(b)(2) provides that States can satisfy chapter 154’s requirements by reasonably assuring an appropriate level of proficiency in other ways, such as by requiring some combination of experience and training.

As indicated in the introductory language in subsection (b)(1) of § 26.22, State capital counsel mechanisms will be regarded as presumptively adequate in relation to counsel competency if they meet or exceed the benchmark standards identified in the subsection. States will not be penalized for going beyond the minimum required by the rule. Thus, for example, in relation to paragraph (b)(1)(i), State competency standards will be considered presumptively sufficient if they require five years of postconviction experience, rather than three; uniform satisfaction of the five-year/three-year experience requirement rather than allowing some exception as in 18 U.S.C. 3599(d); or training requirements for appointment in addition to the specified experience requirement.

The rule does not require that all counsel in a State qualify under the same standard. Alternative standards may be used so long as the State mechanism requires that all counsel satisfy some standard qualifying under paragraph (b). *Cf.* 18 U.S.C. 3599(d) (allowing exceptions to categorical experience requirement); *Spears*, 283 F.3d at 1013 (finding that alternative standards are allowed under chapter 154). Hence, for example, a State system may pass muster by requiring that appointed counsel either satisfy an experience standard sufficient under paragraph (b)(1)(i) or satisfy an alternative standard sufficient under paragraph (b)(2) involving more limited

experience but an additional training requirement.

Option 1: § 26.22(b)(1)(i)—The Competency Standards for Federal Court Proceedings

As provided in paragraph (b)(1)(i) of § 26.22, a State may satisfy chapter 154’s requirement relating to counsel competency by requiring appointment of counsel “who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience.” This is based on the standard for appointed counsel in capital case proceedings in Federal court. *See* 18 U.S.C. 3599(a)–(e). Because Congress has determined that a counsel competency standard of this nature is adequate for capital cases in Federal court proceedings, including postconviction proceedings, *see* 18 U.S.C. 3599(a)(2), it will also presumptively be considered adequate for chapter 154 purposes when such cases are at the stage of State postconviction review.

The counsel competency standards for Federal court proceedings in capital cases under 18 U.S.C. 3599 do not require adherence to a five-year/three-year experience requirement in all cases, but provide that the court, “for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant,” with due consideration of the seriousness of the penalty (i.e., capital punishment) and the nature of the litigation. 18 U.S.C. 3599(d). For example, a court might consider it appropriate to appoint an attorney who is a law professor with expertise in capital punishment law and training in capital postconviction litigation to represent a prisoner under sentence of death, even if the attorney has less than three years of relevant litigation experience. The rule in paragraph (b)(1)(i) accordingly does not require the imposition of a five-year/three-year minimum experience requirement in all cases, but allows States that generally impose such a requirement to permit the appointment of other counsel who would qualify for appointment under the exception allowed in 18 U.S.C. 3599, i.e., appointment by a court, for good cause, of attorneys whose background, knowledge, or experience would otherwise enable them to properly represent prisoners under sentence of death considering the seriousness of the penalty and the nature of the litigation. This recognizes, as in section 3599, that courts may properly be allowed, for good cause, to depart from the specified experience

requirement, which the Department expects would occur only in exceptional cases.

Option 2: § 26.22(b)(1)(ii)—The Innocence Protection Act Standards

Paragraph (b)(1)(ii) in § 26.22 sets forth a second approach that presumptively satisfies the counsel competency requirements of chapter 154, specifically, by setting qualification standards for appointment of postconviction capital counsel in a manner consistent with the IPA. The IPA directs the Attorney General to provide grants to States to create or improve “effective system[s] for providing competent legal representation” in capital cases, 42 U.S.C. 14163(c)(1), and provides a definition of “effective system” in 42 U.S.C. 14163(e) that is largely based on elements of the ABA Guidelines. *Compare* 42 U.S.C. 14163(e), with ABA Guidelines § 3.1, at 22–23. The IPA specifies that such effective systems are to include appointment of capital counsel (i) by a public defender program, (ii) by an entity composed of individuals with demonstrated knowledge and expertise in capital cases (other than current prosecutors) that is established by statute or by the highest State court with criminal case jurisdiction, or (iii) by the court appointing qualified attorneys from a roster maintained by a State or regional selection committee or similar entity pursuant to a pre-existing statutory procedure. 42 U.S.C. 14163(e)(1).

Under the IPA requirements, the appointing authority or an appropriate designated entity must “establish qualifications for attorneys who may be appointed to represent indigents in capital cases,” “maintain a roster of qualified attorneys,” “conduct, sponsor, or approve specialized training programs,” and monitor and disqualify from subsequent appointment attorneys whose performance is ineffective or unethical or who fail to participate in required training. 42 U.S.C. 14163(e)(2)(A), (B), (D), (E). The IPA does not prescribe the content of the required counsel qualification standards, but assumes that the specifications regarding the nature of the appointment or selection authority—and the associated requirements for post-appointment monitoring and potential disqualification—can be relied on to provide appropriate competency standards.

Paragraph (b)(1)(ii) in § 26.22 follows this legislative judgment in relation to a State’s satisfaction of the counsel competency requirements of chapter

154. Thus, a State's capital counsel mechanism will presumptively be deemed adequate for purposes of chapter 154's counsel competency requirements if it provides for the appointment and qualification (or disqualification) of counsel in State postconviction proceedings in capital cases in a manner consistent with 42 U.S.C. 14163(e)(1) and 14163(e)(2)(A), (B), (D), (E).

#### Option 3: § 26.22(b)(2)—Other Standards Reasonably Assuring Proficiency

In enacting chapter 154, "Congress did not envision any specific competency standards but, rather, intended the states to have substantial discretion to determine the substance of the competency standards." *Spears*, 283 F.3d at 1013. The options described in paragraphs (b)(1)(i) and (ii) in § 26.22 accordingly do not exhaust the means by which States may satisfy chapter 154's requirements concerning counsel competency. Indeed, Congress in formulating chapter 154 rejected a recommendation that States uniformly be required to satisfy standards similar to those for Federal court proceedings in capital cases that currently appear in 18 U.S.C. 3599, *see* 73 FR at 75331, and in amending chapter 154 in 2006 Congress did not modify chapter 154 to require adherence by States to the IPA standards that had been enacted in 2004 but rather continued to use the more general language of chapter 154 relating to counsel competency.

Consequently, as provided in paragraph (b)(2) in § 26.22, the Attorney General will consider whether a State's counsel competency standards reasonably assure appointment of counsel with a level of proficiency appropriate for State postconviction litigation in capital cases, even if they do not meet the particular criteria set forth in paragraph (b)(1)(i) or (b)(1)(ii). As in the courts' consideration of the adequacy of State competency standards prior to the 2006 amendments to chapter 154, no definite formula can be prescribed for this review, and the Attorney General will assess such State mechanisms individually. Measures that will be deemed relevant include standards of experience, knowledge, skills, training, education, or combinations of these considerations that a State requires attorneys to meet in order to be eligible for appointment in State capital postconviction proceedings. *Cf.* 18 U.S.C. 3599(d) (allowing appointment of counsel whose background, knowledge, or experience would otherwise enable such counsel to properly represent the

petitioner); *Spears*, 283 F.3d at 1012–13 (finding that competency standards involving combination of experience, proficiency, and education were adequate under chapter 154); ABA Guidelines § 5.1(B)(2), at 35, § 8.1(B), at 46 (recommending skill and training requirements for capital counsel).

Also, the rule in subparagraphs (b)(1)(i) and (ii) of § 26.22 identifies particular approaches that will be considered presumptively adequate, namely, those of the Federal capital counsel statute, 18 U.S.C. 3599, or the IPA, 42 U.S.C. 14163(e)(1), (2)(A) (B), (D), (E). These approaches accordingly serve as benchmarks, and a State's adoption of competency requirements that are likely to result in similar or even higher levels of proficiency will weigh in favor of a finding of adequacy for purposes of chapter 154. Conversely, State competency standards that appear likely to result in significantly lower levels of proficiency compared to the benchmark levels risk being found inadequate under chapter 154.

#### Paragraph (c) of § 26.22—Compensation of Counsel

Paragraph (c) of § 26.22 explains how a State may satisfy the requirement that it have established a mechanism for the compensation of appointed counsel. 28 U.S.C. 2265(a)(1)(A). The corresponding portion of the 2008 regulations assumed that levels of compensation for purposes of chapter 154 were a matter of State discretion, not subject to review by the Attorney General, because the statute refers simply to "compensation" and imposes no further requirement that the authorized compensation be "adequate" or "reasonable." *See* 73 FR at 75331–32. However, the broader statutory context is the requirement that the State establish a mechanism "for the appointment [and] compensation . . . of competent counsel." 28 U.S.C. 2265(a)(1)(A). This requirement reflects a determination by Congress that reliance on unpaid volunteers to represent indigent prisoners under sentence of death is insufficient, and a State mechanism affording inadequate compensation could similarly fall short in ensuring the availability of competent counsel for appointment. Hence, when a State relies on a compensation incentive to secure competent counsel, chapter 154 is reasonably construed to permit the Attorney General to review the adequacy of authorized compensation. This understanding is adopted in § 26.22(c) of the proposed rule.

Paragraph (c)(1) in § 26.22 describes a number of possible compensation standards that will presumptively be

considered adequate for purposes of chapter 154, generally using as benchmarks the authorizations for compensation of capital counsel that have been deemed adequate in other acts of Congress.

The first option, appearing in paragraph (c)(1)(i), is compensation comparable to that authorized by Congress for representation in Federal habeas corpus proceedings reviewing State capital cases in 18 U.S.C. 3599(g)(1). This level of compensation should similarly be adequate to ensure the availability of competent counsel for appointment in such cases at the stage of State postconviction review.

The second option, appearing in paragraph (c)(1)(ii), is compensation comparable to that of retained counsel who meet competency standards sufficient under paragraph (b). The IPA and the ABA Guidelines similarly endorse reliance on market rates for legal representation to provide adequate compensation for appointed capital counsel. *See* 42 U.S.C.

14163(e)(2)(F)(ii)(II); ABA Guidelines § 9.1(B)(3), at 49. Compensation sufficient to induce competent attorneys to carry out such representation for hire should likewise be sufficient to attract competent attorneys to accept appointments for such representation.

The third option, appearing in paragraph (c)(1)(iii), is compensation comparable to that of appointed counsel in State appellate or trial proceedings in capital cases. *Cf.* 18 U.S.C. 3599(g)(1) (authorization for compensation of capital counsel not differentiating between compensation at different stages of representation). The compensation afforded at the stages of trial and appeal must be sufficient to secure competent attorneys to provide representation because effective legal representation is constitutionally required at those stages. Comparable compensation should accordingly be sufficient for that purpose at the postconviction stage.

The fourth option, appearing in paragraph (c)(1)(iv), is compensation comparable to that of attorneys representing the State in State postconviction proceedings in capital cases. This option also follows the IPA and the ABA Guidelines, which provide that capital counsel employed by defender organizations should be compensated on a salary scale commensurate with the salary scale of prosecutors in the jurisdiction. 42 U.S.C. 14163(e)(2)(F)(ii)(I); ABA Guidelines § 9.1(B)(2), at 49. The rule allows this approach for compensation of both public defenders and private counsel, but recognizes that private

defense counsel may have to pay from their own pockets overhead expenses that publicly employed prosecutors do not bear. The rule accordingly specifies that, if paragraph (c)(1)(iv) is relied on to justify the level of compensation authorized for private counsel, the compensation standard should take account of overhead costs (if any) that are not otherwise payable as reasonable litigation expenses. *Cf. Baker*, 220 F.3d at 285–86 (finding that compensation resulting in substantial losses to appointed counsel was inadequate under chapter 154).

In comparing a State's compensation standards to the benchmarks identified in paragraph (c)(1), both hourly rates and overall limits on compensation will be taken into account. For example, under paragraph (c)(1)(iii), suppose that State law authorizes the same hourly rate for compensation of appointed capital counsel at the appellate stage and in postconviction proceedings, but it specially imposes a low overall limit on compensable hours at the postconviction stage. The compensation authorized at the respective stages may then not be comparable in any realistic sense, and the objective of ensuring the availability of competent counsel for postconviction representation may not be realized, because counsel who accepted such representation would effectively be required to function as uncompensated volunteers to the extent they needed to work beyond the maximum number of compensable hours. This does not mean that State compensation provisions will be deemed inadequate if they specially prescribe presumptive limits on overall compensation at the postconviction stage, but comparability to the paragraph (c)(1) benchmarks may then depend on whether the State provides means for authorizing compensation beyond the presumptive maximum where necessary. *Cf. Spears*, 283 F.3d at 1015 (approving a presumptive 200-hour limit under chapter 154 where compensation was available for work beyond that limit if reasonable); *Mata v. Johnson*, 99 F.3d 1261, 1266 (5th Cir. 1996) (overall \$7500 limit on compensation was not facially inadequate under chapter 154 and was not shown inadequate in the particular case), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997).

As with the counsel competency benchmarks of paragraph (b)(1), the counsel compensation standards of paragraph (c)(1) provide only a floor that States are free to exceed, and not all counsel must be compensated in conformity with a single standard. A State may adopt alternative standards,

each comparable to or exceeding some benchmark identified in paragraph (c)(1), and provide for compensation of different counsel or classes of counsel in conformity with different standards. For example, a State might provide for representation of some indigent capital petitioners in postconviction proceedings by appointed private counsel and some by public defender personnel, compensate the private counsel in conformity with paragraph (c)(1)(iii), and compensate the public defender counsel in conformity with paragraph (c)(1)(iv).

The rule recognizes that the options set out in paragraph (c)(1) of § 26.22 are not necessarily the only means by which a State may provide compensation for competent counsel. State compensation provisions for capital counsel have been deemed adequate for purposes of chapter 154 and other Federal laws independent of any comparison to the benchmarks in paragraph (c)(1). *See* 42 U.S.C. 14163(e)(2)(F)(i) (under the IPA, State may compensate under qualifying statutory procedure predating that Act); *Spears*, 283 F.3d at 1015 (State could compensate at “a rate of up to \$100 an hour, a rate that neither Petitioner nor amici argue was unreasonable”). Also, a State may secure representation for indigent capital petitioners in postconviction proceedings by means not dependent on any special financial incentive for accepting appointments, such as by providing sufficient salaried public defender personnel to competently carry out such assignments as part of their duties. Accordingly, under paragraph (c)(2) in § 26.22, capital counsel mechanisms involving compensation provisions that do not satisfy paragraph (c)(1) may be found to satisfy the statutory requirement if they are otherwise reasonably designed to ensure the availability of competent counsel. As with § 26.22(b)(2) of the rule, mechanisms seeking to qualify under paragraph (c)(2) that appear likely to provide for significantly lesser compensation compared to the benchmark levels risk being found inadequate under chapter 154.

#### Paragraph (d) of § 26.22—Payment of Reasonable Litigation Expenses

Paragraph (d) of § 26.22 incorporates the requirement in 28 U.S.C. 2265(a)(1)(A) to provide for the payment of reasonable litigation expenses. An inflexible cap on reimbursable litigation expenses in capital postconviction proceedings could contravene this requirement by foreclosing the payment of costs incurred by counsel, even if determined by the court to be

reasonably necessary. However, the requirement does not foreclose a presumptive limit if the State provides means for authorizing payment of litigation expenses beyond the limit where necessary. *Cf.* 18 U.S.C. 3599(f), (g)(2) (establishing presumptive \$7500 limit on payment for litigation expenses in Federal court proceedings in capital cases, with authority for chief judge or delegatee to approve higher amounts); *Mata*, 99 F.3d at 1266 (concluding that overall \$2500 limit on payment of litigation expenses was not facially inadequate under chapter 154 and was not shown to be inadequate in the particular case).

#### Section 26.23

Section 26.23 in the rule sets out the mechanics of the certification process for States seeking to opt in to chapter 154.

Paragraph (a) provides that an appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for chapter 154 certification. Paragraph (b) provides that the Attorney General will make the request available on the Internet and solicit public comment on the request by publishing a notice in the **Federal Register**. It requires Internet availability because State requests for certification may include supporting materials not readily reproducible or viewable in the **Federal Register**, such as copies of State statutes, rules, and judicial decisions bearing on the State's satisfaction of chapter 154's requirements for certification.

As provided in paragraph (c), the Attorney General will review the State's request, including consideration of timely public comments received in response to a **Federal Register** notice. The Attorney General will decide whether the State has satisfied the requirements for chapter 154 certification and will publish the certification in the **Federal Register** if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established, as that date is the effective date of the certification. 28 U.S.C. 2265(a)(2).

Paragraph (d) addresses the effect of changes or alleged changes in a State's capital counsel mechanism after that mechanism has been certified by the Attorney General. The paragraph first addresses situations involving changes or alleged changes in a State's capital counsel mechanism prior to State postconviction proceedings in a capital case. Chapter 154's special Federal

habeas corpus review procedures apply in cases in which two conditions are met: (i) the State's capital counsel mechanism has been certified by the Attorney General, 28 U.S.C. 2261(b)(1), and (ii) "counsel was appointed pursuant to that mechanism"—i.e., the mechanism certified by the Attorney General—unless the petitioner "validly waived counsel . . . [or] retained counsel . . . or . . . was found not to be indigent," 28 U.S.C. 2261(b)(2). The first sentence of paragraph (d) therefore notes that certification by the Attorney General under chapter 154 reflects the Attorney General's determination that the State capital counsel mechanism examined in the Attorney General's review satisfies chapter 154's requirements. If a State later discontinues that mechanism before counsel is appointed in a given State postconviction proceeding, then counsel in that case will not have been "appointed pursuant to" the mechanism that was approved by the Attorney General and chapter 154 would accordingly be inapplicable in that case. Similarly, if a State later changes or is alleged to have changed the certified mechanism, litigation before Federal habeas courts may result under 28 U.S.C. 2261(b)(2) as to whether the State has in fact materially changed its mechanism and, if so, whether the change means that counsel (even if appointed) was appointed pursuant to what is effectively a new and uncertified mechanism, rather than the mechanism certified by the Attorney General.

The second sentence of paragraph (d) accordingly provides that a State may seek a new certification by the Attorney General if there is a change or alleged change in a previously certified capital counsel mechanism. If a State wishes to improve on a certified capital counsel mechanism, then certification by the Attorney General of the new or revised mechanism will allow the State to avoid Federal habeas court litigation over whether chapter 154 is applicable to cases involving appointments made pursuant to that mechanism. Similarly, if legal questions are raised about the continued applicability of chapter 154 based on changes or alleged changes in a certified capital counsel mechanism, a State may seek a new certification by the Attorney General that its current mechanism satisfies chapter 154's requirements, ensuring the continued applicability of chapter 154's special Federal habeas corpus procedures. By seeking a new certification of a new or revised capital counsel mechanism, a State may ensure that it is the Attorney

General, subject to review by the DC Circuit Court of Appeals, who determines whether its capital counsel mechanism is in present compliance with chapter 154's requirements, *see* 28 U.S.C. 2261(b)(1), 2265(c)(2), and avoid litigation over that matter in the Federal habeas courts.

The final sentence in paragraph (d) states that subsequent changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in cases in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case. For example, suppose that the Attorney General certifies a State's capital counsel mechanism in 2013, the State postconviction proceedings in a capital case are carried out in 2014 and 2015 with counsel in those proceedings appointed pursuant to the certified mechanism, and Federal habeas corpus proceedings in the case commence in 2016. Suppose further that the State makes some change in 2016 to its counsel competency or compensation standards. Because a certified capital counsel mechanism would have been in place throughout State postconviction review, the prerequisites for expedited Federal habeas corpus review under chapter 154 would be satisfied. *See* 28 U.S.C. 2261(b). That result would not be affected by later changes in the State's postconviction capital counsel mechanism.

Section 26.23(e) provides in part that a chapter 154 certification remains effective for a period of five years. This takes account of the possibility of changes over time in a State's standards constituting its postconviction capital counsel mechanism, and the possibility of other changes in a State that may affect the continuing sufficiency over time of standards initially adopted by a State and certified under chapter 154. For example, a State provision authorizing compensation of counsel at a specified hourly rate may initially be reasonably designed to ensure the availability for appointment of competent counsel, but that may no longer be the case after the passage of years in light of inflation or other changed economic circumstances. *Cf. Durable Mfg. Co.*, 578 F.3d at 501–02 (upholding time limitation of validity of labor certificates in light of possible subsequent changes in economic circumstances affecting consistency with statutory requirements and objectives). Providing for some limitation on the lifespan of certifications and requiring renewal allows questions concerning the continued adequacy of the mechanism's

standards, including whether they continue to apply, to be reexamined at regular intervals, each time with increased information about a State's actual experience with its mechanism, rather than assuming that a once-compliant State system is compliant indefinitely. At the same time, overly stringent limits on the duration of certifications could unduly burden States and undermine the incentive States have under chapter 154 to undertake the effort to establish compliant mechanisms and seek their certification.

Balancing these considerations, § 26.23(e) in the rule provides a basic period of five years during which a certification remains valid, with further provisions regarding the beginning and end of the period to promote the uninterrupted availability of the benefits of chapter 154 to a certified State when seeking recertification. As provided in 28 U.S.C. 2265(a)(2), the effectiveness of a certification is backdated to the date the certified capital counsel mechanism was established, but under the rule the five-year limit on its duration does not begin to run until the completion of the certification process by the Attorney General and any related judicial review. Moreover, the rule provides that a certification remains effective for an additional period extending until the conclusion of the Attorney General's disposition of the State's recertification request and any judicial review thereof, if the State requests recertification at or before the end of the five-year period.

### Regulatory Certifications

#### *Executive Order 13563 and 12866*

As described in Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011), agencies must, to the extent permitted by law, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The Department of Justice has determined that this rule is a "significant regulatory action" under

Executive Order 12866, section 3(f), and, accordingly, this rule has been reviewed by the Office of Management and Budget. The determination that this is a significant regulatory action, however, does not reflect a conclusion that it is “likely to result in a rule that may . . . [h]ave an annual effect on the economy of \$100 million or more” or other effects as described in section 3(f)(1) of the Executive Order.

This rule has no effect on States unless they decide that they wish to qualify for chapter 154 certification. If States do decide to apply for chapter 154 certification, the resulting costs will mainly depend on (i) the number of capital cases these States litigate in State postconviction proceedings, and (ii) the incremental difference (if any) between their current per-case capital litigation costs and the corresponding costs under a system that complies with this rule.

These costs cannot be exactly quantified because (i) we do not know how many States will try to seek certification based on their own analysis of whether it is beneficial on balance to do so; (ii) the rule provides States wide latitude to design their own appointment mechanism; (iii) the rule affords the Attorney General discretion in making certification decisions; and (iv) there are non-quantifiable benefits to providing an opt-in system that may outweigh the costs such as improved fairness and equity in capital counsel systems. Absent a State’s application and public comment, the Department cannot determine whether the Attorney General would decide, in his discretion, to certify that the State’s capital counsel mechanism satisfies this rule.

Moreover, even if the Department could determine at this time that a State’s mechanism fails to meet this rule’s standards, the Department does not have the data necessary to calculate the costs of making the State mechanism compliant and the rule gives States substantial discretion to correct any perceived shortfall in a myriad of ways. Thus, any cost projections would need to be specific to each State and would depend on unknown variables such as how a State will design compensation and competency standards and whether and how the Attorney General will exercise discretion. Against this background, the Department cannot quantify the costs and benefits of this rule.

Despite the impracticability of exact quantification, the Department can confidently project that the annual cost will not exceed \$100 million. At the end of 2010, 36 States held 3,100 prisoners under sentence of death. See Bureau of Justice Statistics, Office of Justice

Programs, U.S. Department of Justice, *Capital Punishment, 2010—Statistical Tables* at 8, table 4 (Dec. 2011), available at <http://www.bjs.gov/content/pub/pdf/cp10st.pdf>. Regarding the costs of satisfying the requirements of this rule, 35 of the 36 States accounting for capital cases in the United States already provide for appointment of counsel in State postconviction proceedings. These States may still fall short of satisfying this rule’s standards, in relation to such matters as payment of litigation expenses or compensation of counsel, but this rule affords States a variety of options that may minimize any resulting increase in costs.

Assuming that all 36 States that currently have the death penalty will upgrade their postconviction capital counsel mechanisms to the extent necessary to satisfy this rule, and that the number of capital cases pending in State postconviction proceedings in a year is 2,000, the total cost for the States to comply with this rule could not reach \$100 million unless the average increase in litigation costs were \$50,000 for each case. While for the reasons explained above we have not estimated the costs for States to satisfy this rule, we have no reason to believe that costs would increase to that degree.

States that obtain certification by the Attorney General under this rule could realize costs savings resulting from chapter 154’s expedited procedures in subsequent Federal habeas corpus review. See 28 U.S.C. 2262, 2264, 2266. Chapter 154’s expedited procedures offer States the benefits of: (i) Definite rules regarding the commencement and expiration of stays of execution, see 28 U.S.C. 2262; (ii) clearer and more circumscribed rules regarding the claims cognizable on federal habeas corpus review, see 28 U.S.C. 2264; (iii) general time frames of 450 days and 120 days respectively for decision of capital habeas petitions by federal district courts and courts of appeals, see 28 U.S.C. 2266(b)(1); and (iv) limited allowances for the amendment of such petitions, see 28 U.S.C. 2266(b)(3). In addition, because the States would more fully defray the costs of representing indigent capital petitioners in State postconviction proceedings, there would be less need for representation by private counsel on a pro bono basis, often arranged through postconviction capital defense projects. Thus, State costs also would be offset by reduced costs for private entities and individuals who otherwise would provide representation, reducing the overall economic effect.

Along with the cost savings States could obtain, this rule also affords

indigent capital petitioners non-quantifiable benefits. If a State chooses to “opt-in” to Chapter 154, an indigent capital petitioner is more likely to be represented by competent counsel in state postconviction proceedings—proceedings in which there is no constitutional right to counsel. The timely appointment of qualified counsel also provides indigent capital petitioners the opportunity to properly and promptly present their challenges in postconviction proceedings without the severe time pressure created by the belated entry of a lawyer. Above all, the rule’s requirement of timely appointment of competent counsel seeks to provide an indigent capital petitioner the benefit of a collateral review that will be fair, thorough, and the product of capable and committed advocacy.

#### *Executive Order 13132—Federalism*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. It provides only a framework for those States that wish to qualify for the benefits of the expedited habeas procedures of chapter 154 of title 28 of the United States Code. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

#### *Executive Order 12988—Civil Justice Reform*

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988.

#### *Regulatory Flexibility Act*

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule provides only a framework for those States that wish to qualify for the benefits of the expedited habeas procedures of chapter 154 of title 28 of the United States Code.

#### *Unfunded Mandates Reform Act of 1995*

This rule will not result in aggregate expenditures by State, local and tribal governments or by the private sector of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under

the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532.

*Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

**List of Subjects in 28 CFR Part 26**

Law enforcement officers, Prisoners.

Accordingly, for the reasons set forth in the preamble, part 26 of chapter I of title 28 of the Code of Federal Regulations is amended as follows:

**PART 26—DEATH SENTENCES PROCEDURES**

■ 1. The authority citation for part 26 continues to read as follows:

**Authority:** 5 U.S.C. 301; 18 U.S.C. 4001(b), 4002; 28 U.S.C. 509, 510, 2261, 2265.

■ 2. A new Subpart B is added to part 26 to read as follows:

**Subpart B—Certification Process for State Capital Counsel Systems**

- Sec. 26.20 Purpose.
- 26.21 Definitions.
- 26.22 Requirements.
- 26.23 Certification process.

**Subpart B—Certification Process for State Capital Counsel Systems**

**§ 26.20 Purpose.**

Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a State has a mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. If the Attorney General certifies that a State has established such a mechanism, sections 2262, 2263, 2264, and 2266 of chapter 154 of title 28 apply in relation to Federal habeas corpus review of State capital cases in which counsel was appointed pursuant to that mechanism. These sections will also apply in Federal habeas corpus review of capital cases from a State with a mechanism certified by the Attorney General in which petitioner validly waived

counsel, petitioner retained counsel, or petitioner was found not to be indigent, as provided in section 2261(b) of title 28. Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.

**§ 26.21 Definitions.**

For purposes of this part, the term—  
*Appointment* means provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.

*Appropriate State official* means the State attorney general, except that, in a State in which the State attorney general does not have responsibility for Federal habeas corpus litigation, it means the chief executive of the State.

*Indigent prisoners* means persons whose net financial resources and income are insufficient to obtain qualified counsel.

*State postconviction proceedings* means collateral proceedings in State court, regardless of whether the State conducts such proceedings after or concurrently with direct State review.

**§ 26.22 Requirements.**

The Attorney General will certify that a State meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines that the State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings that satisfies the following standards:

(a) As provided in 28 U.S.C. 2261(c) and (d), the mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly requested continued representation, and the mechanism must provide for the entry of an order by a court of record—

(1) Appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(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

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

(b) The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments.

(1) A State's standards of competency are presumptively adequate if they meet or exceed either of the following criteria:

(i) Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience. But a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation; or

(ii) Appointment of counsel meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. 14163(e)(2)(B), (D), and (E) are also satisfied.

(2) Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

(c) The mechanism must provide for compensation of appointed counsel.

(1) A State's provision for compensation is presumptively adequate if the authorized compensation is comparable to or exceeds—

(i) The compensation of counsel appointed pursuant to 18 U.S.C. 3599 in Federal habeas corpus proceedings reviewing capital cases from the State;

(ii) The compensation of retained counsel in State postconviction proceedings in capital cases who meet State standards of competency sufficient under paragraph (b);

(iii) The compensation of appointed counsel in State appellate or trial proceedings in capital cases; or

(iv) The compensation of attorneys representing the State in State postconviction proceedings in capital cases, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses.

(2) Provisions for compensation not satisfying the benchmark criteria in paragraph (c)(1) of this section will be deemed adequate only if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency sufficient under paragraph (b) of this section.

(d) The mechanism must provide for payment of reasonable litigation expenses of appointed counsel. Such expenses may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel. Provision for reasonable litigation expenses may incorporate presumptive limits on payment only if means are authorized for payment of necessary expenses above such limits.

**§ 26.23 Certification process.**

(a) An appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart.

(b) Upon receipt of a State's request for certification, the Attorney General will make the request publicly available on the Internet (including any supporting materials included in the request) and publish a notice in the **Federal Register**—

- (1) Indicating that the State has requested certification;
- (2) Identifying the Internet address at which the public may view the State's request for certification; and
- (3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of timely public comments received in response to the **Federal Register** notice under paragraph (b) of this section, or any subsequent notice the Attorney General may publish providing a further opportunity for comment. The certification will be published in the **Federal Register** if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies chapter 154's requirements. A State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.

(e) A certification remains effective for a period of five years after the

completion of the certification process by the Attorney General and any related judicial review. If a State requests re-certification at or before the end of that five-year period, the certification remains effective for an additional period extending until the completion of the re-certification process by the Attorney General and any related judicial review.

Dated: September 11, 2013.

**Eric H. Holder, Jr.,**  
*Attorney General.*

[FR Doc. 2013-22766 Filed 9-20-13; 8:45 am]

**BILLING CODE P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R04-OAR-2009-0140; FRL-9901-10-Region 4]

**Approval and Promulgation of Implementation Plans; North Carolina; Removal of Stage II Gasoline Vapor Recovery Program**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to approve changes to the North Carolina State Implementation Plan (SIP) submitted by the State of North Carolina Department of Environment and Natural Resources (NC DENR), Division of Air Quality on September 18, 2009, for the purpose of removing Stage II vapor control requirement contingency measures for new and upgraded gasoline dispensing facilities in the State. The September 18, 2009, SIP revision also addresses several non-Stage II related rule changes. However, action on the other portions for the September 18, 2009, SIP revision is being addressed in a separate rulemaking action. EPA has determined that North Carolina's September 18, 2009, SIP revision regarding the Stage II vapor control requirements is approvable because it is consistent with the Clean Air Act (CAA or Act).

**DATES:** *Effective Date:* This rule will be effective October 23, 2013.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2009-0140. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For information regarding this action, contact Ms. Kelly Sheckler, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. Ms. Sheckler's telephone number is (404) 562-9222; email address: [sheckler.kelly@epa.gov](mailto:sheckler.kelly@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

- I. Background
- II. Final Action
- III. Statutory and Executive Order Reviews

**I. Background**

EPA, under the CAA Amendments of 1990, designated (pursuant to section 107(d)(1)) and classified certain counties in North Carolina, either in their entirety or portions thereof, as "moderate" ozone nonattainment areas for the 1-hour ozone national ambient air quality standards (NAAQS). Specifically, the Charlotte-Gastonia Area (comprised of Gaston and Mecklenburg Counties); the Greensboro-Winston-Salem-High Point Area (comprised of Davidson, Davis (partial), Forsyth and Guilford Counties); and the Raleigh-Durham Area (comprised of Durham, Granville (partial), and Wake Counties) were all designated as "moderate" ozone nonattainment areas for the 1-hour ozone NAAQS. The designations were based on the Areas' 1-hour ozone design values for the 1987-1989 three-year period. The "moderate" classification triggered various statutory requirements for these Areas including the Stage II vapor recovery requirements pursuant to section 182(b)(3) of the CAA.

Sec.	
2265.	Certification and judicial review.
2266.	Limitation periods for determining applications and motions.

## AMENDMENTS

Pub. L. 109–177, title V, § 507(c)(2), Mar. 9, 2006, 120 Stat. 251, substituted “Certification and judicial review” for “Application to State unitary review procedure” in item 2265.

**§ 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment**

(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.

(b) COUNSEL.—This chapter is applicable if—

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

(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—

(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 competently to decide whether to accept or reject the offer;

(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

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

(Added Pub. L. 104–132, title I, § 107(a), Apr. 24, 1996, 110 Stat. 1221; amended Pub. L. 109–177, title V, § 507(a), (b), Mar. 9, 2006, 120 Stat. 250.)

## AMENDMENTS

2006—Subsec. (b). Pub. L. 109–177, § 507(a), added subsec. (b) and struck out former subsec. (b) which read as follows: “This chapter is applicable if a State estab-

lishes 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 of competency for the appointment of such counsel.”

Subsec. (d). Pub. L. 109–177, § 507(b), struck out “or on direct appeal” after “at trial”.

## EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–177 applicable to cases pending on or after Mar. 9, 2006, with special rule for certain cases pending on that date, see section 507(d) of Pub. L. 109–177, set out as a note under section 2251 of this title.

## EFFECTIVE DATE

Pub. L. 104–132, title I, § 107(c), Apr. 24, 1996, 110 Stat. 1226, provided that: “Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act [Apr. 24, 1996].”

**§ 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions**

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

(Added Pub. L. 104–132, title I, § 107(a), Apr. 24, 1996, 110 Stat. 1222.)

## EFFECTIVE DATE

Section applicable to cases pending on or after Apr. 24, 1996, see section 107(c) of Pub. L. 104–132, set out as a note under section 2261 of this title.

**§ 2263. Filing of habeas corpus application; time requirements; tolling rules**

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

(Added Pub. L. 104-132, title I, § 107(a), Apr. 24, 1996, 110 Stat. 1223.)

**EFFECTIVE DATE**

Section applicable to cases pending on or after Apr. 24, 1996, see section 107(c) of Pub. L. 104-132, set out as a note under section 2261 of this title.

**§ 2264. Scope of Federal review; district court adjudications**

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

(Added Pub. L. 104-132, title I, § 107(a), Apr. 24, 1996, 110 Stat. 1223.)

**EFFECTIVE DATE**

Section applicable to cases pending on or after Apr. 24, 1996, see section 107(c) of Pub. L. 104-132, set out as a note under section 2261 of this title.

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**§ 2265. Certification and judicial review**

(a) CERTIFICATION.—

(1) IN GENERAL.—If requested by an appropriate State official, the Attorney General of the United States shall determine—

(A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;

(B) the date on which the mechanism described in subparagraph (A) was established; and

(C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(2) EFFECTIVE DATE.—The date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.

(3) ONLY EXPRESS REQUIREMENTS.—There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

(b) REGULATIONS.—The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).

(c) REVIEW OF CERTIFICATION.—

(1) IN GENERAL.—The determination by the Attorney General regarding whether to certify a State under this section is subject to review exclusively as provided under chapter 158 of this title.

(2) VENUE.—The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over matters under paragraph (1), subject to review by the Supreme Court under section 2350 of this title.

(3) STANDARD OF REVIEW.—The determination by the Attorney General regarding whether to certify a State under this section shall be subject to de novo review.

(Added Pub. L. 109-177, title V, § 507(c)(1), Mar. 9, 2006, 120 Stat. 250.)

**PRIOR PROVISIONS**

A prior section 2265, added Pub. L. 104-132, title I, § 107(a), Apr. 24, 1996, 110 Stat. 1223, related to the application of sections 2262, 2263, 2264, and 2266 of this title to State unitary review procedures, prior to repeal by Pub. L. 109-177, title V, § 507(c)(1), Mar. 9, 2006, 120 Stat. 250.

**EFFECTIVE DATE**

Section applicable to cases pending on or after Mar. 9, 2006, with special rule for certain cases pending on that date, see section 507(d) of Pub. L. 109-177, set out as an Effective Date of 2006 Amendment note under section 2251 of this title.

**§ 2266. Limitation periods for determining applications and motions**

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any ap-

plication for a writ of habeas corpus brought under this chapter in a capital case not later than 450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be per-

mitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.

(Added Pub. L. 104-132, title I, § 107(a), Apr. 24, 1996, 110 Stat. 1224; amended Pub. L. 109-177, title V, § 507(e), Mar. 9, 2006, 120 Stat. 251.)

AMENDMENTS

2006—Subsec. (b)(1)(A). Pub. L. 109-177 substituted “450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier” for “180 days after the date on which the application is filed”.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109-177 applicable to cases pending on or after Mar. 9, 2006, with special rule for certain cases pending on that date, see section 507(d) of Pub. L. 109-177, set out as a note under section 2251 of this title.

EFFECTIVE DATE

Section applicable to cases pending on or after Apr. 24, 1996, see section 107(c) of Pub. L. 104-132, set out as a note under section 2261 of this title.

CHAPTER 155—INJUNCTIONS; THREE-JUDGE COURTS

Sec.	
[2281.]	Repealed.]
[2282.]	Repealed.]
2283.	Stay of State court proceedings.
2284.	Three-judge district court; when required; composition; procedure. <sup>1</sup>

AMENDMENTS

1976—Pub. L. 94-381, § 4, Aug. 12, 1976, 90 Stat. 1119, struck out item 2281 “Injunction against enforcement of State statute; three-judge court required”, item 2282 “Injunction against enforcement of Federal statute; three-judge court required”, and inserted “when required” after “district court” in item 2284.

[[§ 2281, 2282. Repealed. Pub. L. 94-381, §§ 1, 2, Aug. 12, 1976, 90 Stat. 1119]

Section 2281, act June 25, 1948, ch. 646, 62 Stat. 968, provided that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute on grounds of unconstitutionality should not be granted unless the application has been heard and determined by a three-judge district court.

Section 2282, act June 25, 1948, ch. 646, 62 Stat. 968, provided that an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress on grounds of unconstitutionality should not be granted unless the application therefor has been heard and determined by a three-judge district court.

EFFECTIVE DATE OF REPEAL

Repeal not applicable to any action commenced on or before Aug. 12, 1976, see section 7 of Pub. L. 94-381 set out as an Effective Date of 1976 Amendment note under section 2284 of this title.

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

(June 25, 1948, ch. 646, 62 Stat. 968.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 379 (Mar. 3, 1911, ch. 231, § 265, 36 Stat. 1162).

<sup>1</sup> So in original. Does not conform to section catchline.

An exception as to acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions.

The phrase “in aid of its jurisdiction” was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.

The exceptions specifically include the words “to protect or “effectuate its judgments,” for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See *Toucey v. New York Life Insurance Co.*, 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100. A vigorous dissenting opinion (62 S.Ct. 148) notes that at the time of the 1911 revision of the Judicial Code, the power of the courts, of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change).

Therefore the revised section restores the basic law as generally understood and interpreted prior to the *Toucey* decision.

Changes were made in phraseology.

§ 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days’ notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

(June 25, 1948, ch. 646, 62 Stat. 968; Pub. L. 86-507, § 1(19), June 11, 1960, 74 Stat. 201; Pub. L. 94-381, § 3, Aug. 12, 1976, 90 Stat. 1119; Pub. L. 98-620, title IV, § 402(29)(E), Nov. 8, 1984, 98 Stat. 3359.)

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by the Warden shall conduct an examination of the body of the prisoner to determine that death has occurred and shall inform the Marshal and Warden of his determination. Upon notification of prisoner's death, the Marshal shall complete and sign the Return described in § 26.2(b) or any similar document and shall file such document with the sentencing court.

(h) The remains of the prisoner shall be disposed of according to procedures established by the Director of the Federal Bureau of Prisons.

**§ 26.5 Attendance at or participation in executions by Department of Justice personnel.**

No officer or employee of the Department of Justice shall be required to be in attendance at or to participate in any execution if such attendance or participation is contrary to the moral or religious convictions of the officer or employee, or if the employee is a medical professional who considers such participation or attendance contrary to medical ethics. For purposes of this section, the term "participation" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

**Subpart B—Certification Process for State Capital Counsel Systems**

SOURCE: 78 FR 58183, Sept. 23, 2013, unless otherwise noted.

**§ 26.20 Purpose.**

Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a State has a mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. If the Attorney General certifies that a State has established such a mechanism, sections 2262, 2263, 2264, and 2266 of chapter 154 of title 28 apply in relation to Federal habeas corpus review of State capital cases in which counsel was appointed pursuant to that mechanism. These sections will also apply in Federal habeas corpus review

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of capital cases from a State with a mechanism certified by the Attorney General in which petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent, as provided in section 2261(b) of title 28. Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.

**§ 26.21 Definitions.**

For purposes of this part, the term—  
*Appointment* means provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.

*Appropriate State official* means the State attorney general, except that, in a State in which the State attorney general does not have responsibility for Federal habeas corpus litigation, it means the chief executive of the State.

*Indigent prisoners* means persons whose net financial resources and income are insufficient to obtain qualified counsel.

*State postconviction proceedings* means collateral proceedings in State court, regardless of whether the State conducts such proceedings after or concurrently with direct State review.

**§ 26.22 Requirements.**

The Attorney General will certify that a State meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines that the State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings that satisfies the following standards:

(a) As provided in 28 U.S.C. 2261(c) and (d), the mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly requested continued representation, and the mechanism must provide for the entry of an order by a court of record—

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(1) Appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(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

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

(b) The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments.

(1) A State's standards of competency are presumptively adequate if they meet or exceed either of the following criteria:

(i) Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience. But a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation; or

(ii) Appointment of counsel meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. 14163(e)(2)(B), (D), and (E) are also satisfied.

(2) Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

(c) The mechanism must provide for compensation of appointed counsel.

(1) A State's provision for compensation is presumptively adequate if the authorized compensation is comparable to or exceeds—

(i) The compensation of counsel appointed pursuant to 18 U.S.C. 3599 in Federal habeas corpus proceedings reviewing capital cases from the State;

(ii) The compensation of retained counsel in State postconviction pro-

ceedings in capital cases who meet State standards of competency sufficient under paragraph (b);

(iii) The compensation of appointed counsel in State appellate or trial proceedings in capital cases; or

(iv) The compensation of attorneys representing the State in State postconviction proceedings in capital cases, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses.

(2) Provisions for compensation not satisfying the benchmark criteria in paragraph (c)(1) of this section will be deemed adequate only if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency sufficient under paragraph (b) of this section.

(d) The mechanism must provide for payment of reasonable litigation expenses of appointed counsel. Such expenses may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel. Provision for reasonable litigation expenses may incorporate presumptive limits on payment only if means are authorized for payment of necessary expenses above such limits.

**§ 26.23 Certification process.**

(a) An appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart.

(b) Upon receipt of a State's request for certification, the Attorney General will make the request publicly available on the Internet (including any supporting materials included in the request) and publish a notice in the FEDERAL REGISTER—

(1) Indicating that the State has requested certification;

(2) Identifying the Internet address at which the public may view the State's request for certification; and

(3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of

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timely public comments received in response to the FEDERAL REGISTER notice under paragraph (b) of this section, or any subsequent notice the Attorney General may publish providing a further opportunity for comment. The certification will be published in the FEDERAL REGISTER if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies chapter 154's requirements. A State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.

(e) A certification remains effective for a period of five years after the completion of the certification process by the Attorney General and any related judicial review. If a State requests re-certification at or before the end of that five-year period, the certification remains effective for an additional period extending until the completion of the re-certification process by the Attorney General and any related judicial review.

**PART 27—WHISTLEBLOWER PROTECTION FOR FEDERAL BUREAU OF INVESTIGATION EMPLOYEES**

**Subpart A—Protected Disclosures of Information**

Sec.

27.1 Making a protected disclosure.

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27.2 Prohibition against reprisal for making a protected disclosure.

**Subpart B—Investigating Reprisal Allegations and Ordering Corrective Action**

27.3 Investigations: The Department of Justice's Office of Professional Responsibility and Office of the Inspector General.

27.4 Corrective action and other relief; Director, Office of Attorney Recruitment and Management.

27.5 Review.

27.6 Extensions of time.

AUTHORITY: 5 U.S.C. 301, 3151; 28 U.S.C. 509, 510, 515–519; 5 U.S.C. 2303; President's Memorandum to the Attorney General, Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, 3 CFR p. 284 (1997).

SOURCE: Order No. 2264–99, 64 FR 58786, Nov. 1, 1999, unless otherwise noted.

**Subpart A—Protected Disclosures of Information**

**§ 27.1 Making a protected disclosure.**

(a) When an employee of, or applicant for employment with, the Federal Bureau of Investigation (FBI) (FBI employee) makes a disclosure of information to the Department of Justice's (Department's) Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI-INSD) Internal Investigations Section (collectively, Receiving Offices), the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office, the disclosure will be a "protected disclosure" if the person making it reasonably believes that it evidences:

(1) A violation of any law, rule or regulation; or

(2) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any office or official (other than the OIG or OPR) receiving a protected disclosure shall promptly report such disclosure to the OIG or OPR for investigation. The OIG and OPR shall proceed in accordance with procedures establishing their respective jurisdiction.