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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

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. 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 <u>trial or</u> 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 <u>felony trials or</u> 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; s*ee 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 $4000 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 2000 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 $7500 and expenses at $2500, 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 C.F.R. § 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 post-conviction 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 affirmance 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.

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Attorney General.

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