



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Ken Paxton
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711

JUN 19 2018

Dear Attorney General Paxton:

I am writing in regard to Texas's request that the Attorney General certify Texas's system for providing counsel in postconviction proceedings for prisoners subject to capital sentences. The Department of Justice (Department) notified the public of Texas's request for certification and Texas's submission of additional information, published the request and supporting information on a publicly accessible website, and invited comment on the request.¹ The Department is reviewing the request and the extensive public comments received thereon.

Based on questions that have arisen during the Department's review, we request that Texas provide additional information about its postconviction capital counsel mechanism. Please provide answers to the questions below as soon as reasonably possible. Responses to any other matters raised in the public comments, but not specified in this letter, are also welcome.

I. Effective Date

Subpart B of part 26 of title 28 of the Code of Federal Regulations provides that the Attorney General shall determine the date the capital counsel mechanism qualifying the State for certification was established. 28 C.F.R. § 26.23(c). Texas requested certification of its mechanism as of September 1, 1995. We would ask that you answer the following questions regarding the requested certification date:

1. In *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996), the Fifth Circuit Court of Appeals held that Texas was not eligible to take advantage of the chapter 154 procedures. Please address the compatibility of your position that Texas has had a qualifying mechanism since September 1, 1995, with that decision.

¹ The public comments are available at www.regulations.gov, Docket # [DOJ-OLP-2017-0010](https://www.justice.gov/olp/pending-requests-final-decisions). The Department has made the request and supporting information available at <https://www.justice.gov/olp/pending-requests-final-decisions>.

2. Subsequent legislation, and an implementing order of the CCA that took effect on September 1, 1999, made changes in Texas's mechanism affecting appointment, compensation, and payment of expenses.² Commenters raised certain criticisms specific to the period preceding those changes, including that Texas appointed a large number of counsel quickly without regard to qualifications or competency and imposed strict caps on compensation and expenses. Please discuss, in relation to these criticisms, Texas's position that it has had a qualifying mechanism since September 1, 1995, or if that may not be the case, please advise whether you believe Texas's mechanism merits certification as of a later date, based on the changes occurring in 1999 or other changes.

II. Counsel Fees and Expenses

1. Commenters asserted that Texas courts often do not comply with Texas's statutory requirements to provide reasonable compensation and expenses to postconviction counsel, for such reasons as reluctance to go beyond the \$25,000 limit on the state contribution to fees and expenses or reluctance to fund postconviction work on matters that judges believe were adequately investigated and litigated at the trial stage. According to the commenters, this resulted in inadequate representation in individual cases and, more broadly, has prevented recruitment of competent lawyers to provide capital postconviction representation.

Does Texas agree that some Texas courts fail to provide reasonable compensation or fail to defray reasonable expenses at the postconviction stage in capital cases? If so, please advise in what proportion of capital postconviction cases this occurs, and in what proportion of such cases does it result in ineffective representation.

2. Commenters asserted that OCFW does not receive adequate funding from the Texas legislature and courts.³ As a result, the commenters assert, OCFW is under-resourced and overworked and is unable to recruit and retain adequately experienced and qualified attorneys and other staff. The alleged effect is that OCFW is unable to provide competent representation in the cases it handles.

Does Texas agree that these criticisms relating to OCFW resources are well-founded? If so, does Texas agree that the result has been ineffective representation by OCFW, and if so, in what proportion of its cases?

3. Subpart B provides four benchmark criteria by which a state may presumptively fulfill the requirement for compensation of counsel. 28 C.F.R. 26.22(c)(1); *see* 78 Fed. Reg. at 58172-73, 58179-80. Please advise whether Texas's mechanism satisfies the four

² "CCA" refers to the Texas Court of Criminal Appeals.

³ "OCFW" refers to the Office of Capital and Forensic Writs, and to the Office of Capital Writs prior to the name change.

benchmarks on a statewide basis and, if so, provide supporting documentation as appropriate.

4. Subpart B allows approval of compensation provisions that do not satisfy any of the benchmark criteria if the state mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet state standards of competency sufficient under the rule. 28 C.F.R. 26.22(c)(2); *see* 78 Fed. Reg. at 58173, 58180. Some of the commenters urged that Texas's capital counsel mechanism should be found inadequate with respect to compensation because it does not provide sufficient compensation to attract and retain competent counsel.

Please provide additional information you believe to be relevant to this criticism or otherwise in support of the proposition that Texas's mechanism is reasonably designed to ensure the availability for appointment of counsel meeting state standards of competency sufficient under the rule.

5. Tex. Code Crim. Proc. art. 11.071 § 3(c) provides that "[t]he court shall grant a request for expenses in whole or *in part* if the request for expenses is timely and reasonable" (emphasis added), while § 3(d) provides that a court "shall order reimbursement of counsel for expenses, if reasonably necessary and reasonably incurred." Section 3(c) could be read to allow partial denial of a reasonable request for payment. Please address the consistency of § 3(c) with Subpart B's requirement to provide for payment of reasonable litigation expenses.

III. Standards of Competency for Appointment

1. Commenters asserted that Texas's mechanism provides no standards of competency for appointment, or none that are adequate under chapter 154, for a number of reasons, including (i) a lack of definite litigation experience requirements as preconditions to appointment, (ii) vagueness or weakness of requirements relating to such matters as proficiency, training, and actual performance, and (iii) the fact that some requirements have emerged in the course of the evolution of Texas's capital counsel mechanism and have not been present during the full period for which Texas requests certification.

Please provide any responses or additional information you believe to be relevant to these criticisms of Texas's mechanism with respect to counsel competency.

2. Subpart B provides two benchmark criteria for standards of competency for appointment that are presumptively adequate. 28 C.F.R. § 26.22(b); *see* 78 Fed. Reg. at 58169-72, 58177-79. Please advise whether you believe that Texas's mechanism meets or exceeds each benchmark with respect to appointment of competent counsel on a statewide basis, and, if so, provide supporting documentation as appropriate.

3. Section 26.22(b)(2) allows approval of competency standards that do not satisfy either of the benchmark criteria if the standards otherwise reasonably assure an appropriate level of proficiency. If a state's competency requirements are likely to result in similar or even higher levels of proficiency than a benchmark criterion, that can support a finding of adequacy under chapter 154. 78 Fed. Reg. at 58179. Please provide your analysis as to whether Texas's mechanism reasonably assures an appropriate level of proficiency as required by § 26.22(b)(2), including whether it is likely to result in similar or higher levels of proficiency than either or both of the benchmark criteria appearing in § 26.22(b)(1).
4. In its request for certification, Texas provided the application form for list counsel which asks for (i) five references able to attest to the applicant's competence in criminal law, including a judge before whom the applicant has appeared in a criminal matter and a lawyer with or against whom the applicant has tried a criminal case within the preceding two years, and (ii) other information about the applicant's criminal litigation experience. Commenters objected that the application form does not require particular answers to those questions to merit inclusion on the list and that the collection of this information does not necessarily ensure the selection of qualified attorneys.⁴ Please explain how the approving authority determines whether the applicant is qualified, based on the information provided in the application form, including any specific minimum experience requirements applied.
5. With respect to OCFW counsel, Texas noted the background and experience of OCFW attorneys, indicated that they are well compensated, and asserted that the agency's caseload is modest. Various commenters dispute that OCFW is able to attract and retain adequately qualified attorneys and deny that Texas sets adequate standards of competency for such attorneys. Please provide additional information you believe to be relevant to this criticism, including explanation of any standards or criteria (other than employment at OCFW) bearing on competency to provide capital postconviction representation that OCFW counsel must satisfy.
6. Commenters asserted that there are objective indicia of ineffectiveness with respect to present or former list counsel, such as missed filing deadlines or judicial replacement or debarment from future representation of counsel based on ineffectiveness.

Do you agree that there have been cases creating objective indicia of ineffectiveness? If so, can you determine or estimate the proportion of all list counsel with respect to whom there have been such findings or actions, and the proportion of all state capital habeas cases under Texas's mechanism in which there have been such findings or actions?

⁴ "List counsel" refers to counsel on the list of attorneys eligible for capital postconviction appointments, maintained initially by the CCA and later by the Regional Presiding Judges.

7. Some commenters asserted that particular list counsel have provided inadequate representation, and asserted that the inadequacy of these counsel evidences a broader systemic failure or breakdown of Texas's mechanism with respect to counsel competency. One such comment identified seven lawyers whose performance was asserted by the commenters to be inadequate.

Do you agree that some or all of the lawyers criticized in the comments, or other counsel, have provided ineffective assistance? If so, what is your response to the criticism that this evidences a broader systemic failure of Texas's mechanism?

8. Commenters asserted that Texas is insufficiently diligent in identifying and removing list counsel who have demonstrably failed to provide adequate representation. Please describe the process for removing attorneys from the list, including information about how many allegations of inadequate representation have been received, how many investigations of those complaints have been initiated, and the results of those investigations, including how many (if any) attorneys have been removed from the list.
9. One commenter asserted that certain statistics show a wholesale failure on the part of Texas to appoint competent counsel in state capital post-conviction proceedings from 1995 to the present.⁵ Specifically, the commenter asserted that, between September 1, 1995, and September 1, 2006, approximately 27 percent of writ petitions presented no extra-record claims and 38 percent failed to include any extra-record materials.
 - a. Are the asserted percentages reasonably accurate? If not, can you determine or estimate the actual percentages?

The same commenter also claimed that between September 1, 2006, and February 23, 2018, approximately 25 percent of initial state habeas applications filed by private counsel raised no extra-record claims and/or failed to include any extra-record materials in support of such claims, based on review of 69 out of 92 initial state habeas applications filed by private counsel in that period.

- b. Is the asserted percentage reasonably accurate? If not, can you determine or estimate the actual percentages?
 - c. Do you agree that the absence of extra-record claims and/or extra-record supporting materials for such claims is indicative of ineffective representation?
 - d. Please provide any additional information you believe to be relevant to these statistics.

⁵ In answering the following questions, you may wish to distinguish between state habeas proceedings arising under Texas's mechanism before and after the reforms adopted in 1999.

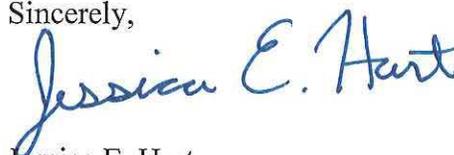
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10. Commenters asserted that there is no assurance that all current list counsel would be eligible for appointment under Texas's current appointment mechanism because when Texas's Procedures Regarding Eligibility for Appointment became effective on January 1, 2010, lawyers who were approved prior to that date were grandfathered into eligibility, without requiring them to reapply or to prove eligibility under the new procedures. Please provide any additional information you believe to be relevant to this criticism.

We appreciate your attention to these questions, which will assist the Attorney General in determining whether Texas has established a capital counsel mechanism satisfying the requirements of chapter 154.

Sincerely,

A handwritten signature in blue ink that reads "Jessica E. Hart". The signature is written in a cursive style with a large initial "J".

Jessica E. Hart

Intergovernmental Affairs & Public Liaison