[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE

United States Court of Appeals for the District of Columbia Circuit

No. 20-1144

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

Petitioners,

v.

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

Respondents,

STATE OF ARIZONA,

Intervenor.

On Petition for Review of the Attorney General's April 14, 2020 Decision Certifying Arizona's Capital Counsel Mechanism Under 28 U.S.C. §§ 2261-2266, Docket No. OAG-167

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Petitioners are the Office of the Federal Public Defender for the District of Arizona, Sammantha Allen, Steve Boggs, Johnathan Burns, Alan Champagne, Mike Gallardo, Rodney Hardy, Alvie Kiles, Andre Leteve, Brad Nelson, Steven Parker, Wayne Prince, Pete Rogovich, and Gilbert Martinez.

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

The State of Arizona is an intervenor.

At present, a group of twenty Capital Habeas Units of Federal Public Defender offices has filed a notice of intent to participate as amicus curiae.

B. Ruling Under Review

The ruling under review is the Attorney General's April 14, 2020 decision certifying Arizona's capital counsel mechanism under 28 U.S.C. §§2261-66, Docket No. OAG-167. The decision is published in the Federal Register at 85 Fed. Reg. 20,705, and is reproduced in the Joint Appendix at JA__**[R.1.85Fed.Reg.20,705]**.

C. Related Cases

There are no other cases involving the same underlying agency order pending in this Court or any other.

There are no other cases, to counsel's knowledge, pending before the agency, this Court, another circuit court, or the Supreme Court which involve substantially the same issues as the instant case. In district court, petitioners filed a complaint in *Boggs v. United States Department of Justice*, No. 19-cv-05238 (D. Ariz.), challenging the DOJ regulations underlying the Attorney General's decision at issue in this case. The district court granted the government's motion to dismiss on August 4, 2020.

D. Corporate Disclosure Pursuant to D.C. Cir. Rule 26.1

This provision is not applicable. Petitioners are not entities required to file disclosure statements under D.C. Cir. Rule 26.1.

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GLOSSARY OF ABBREVIATIONS

ABA	American Bar Association
APA	Administrative Procedure Act
A.R.S.	Arizona Revised Statutes
Chapter 153	28 U.S.C. §§2241-2255
Chapter 154	28 U.S.C. §§2261-2266
CJA	Criminal Justice Act
DOJ	Department of Justice
FDO-AZ	Office of the Federal Public Defender for the District of Arizona
OLC	Department of Justice Office of Legal Counsel
Powell Committee Report	Judicial Conference of the U.S., Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases Committee Report (1989), *reprinted in* 135 Cong. Rec. S13471-04 (Oct. 16, 1989)
Rule 6.8	Arizona Rule of Criminal Procedure 6.8

INTRODUCTION

This case concerns whether the State of Arizona may become the first state in the nation entitled to curtail federal habeas corpus proceedings for its death-row prisoners. The stakes are high. In the past half-century, more than 165 prisoners in the United States have been released from death row,[1] and more than 1,700 death sentences have been overturned.[2] Many individuals obtained their relief though federal habeas review. Federal habeas remains a fundamental "safeguard against imprisonment of those held in violation of the law," *Harrington v. Richter*, 562 U.S. 86, 91 (2011), and "[t]here is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus," *Harris v. Nelson*, 394 U.S. 286, 292 (1969).

In this proceeding, Arizona sought approval from the U.S. Attorney General—subject to this Court's de novo review—to impose

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[1] Death Penalty Information Center, 2020 Fact Sheet, https://deathpenaltyinfo.org/documents/FactSheet.pdf.

[2] U.S. Department of Justice, Bureau of Justice Statistics, Capital Punishment, 2013—Statistical Tables, at 19 (Table 16), https://www.bjs.gov/content/pub/pdf/cp13st.pdf.

special restrictions on federal habeas review in death-penalty cases pursuant to Chapter 154 of Title 28, 28 U.S.C. §§2261-66. Chapter 154 dramatically reduces the time to file a federal habeas petition, from one year to 180 days, among other severe restrictions. *See* 28 U.S.C. §2263. But the statute permits such curtailment only for states that demonstrate that they guarantee their death-row prisoners timely and competent legal representation in the critically important state postconviction review stage that precedes federal habeas review. Specifically, Chapter 154 requires that states provide (1) competent capital postconviction counsel, who are (2) adequately compensated, (3) provided with payment of reasonable litigation expenses, and (4) timely appointed. Only when a state thereby enables prisoners to properly challenge their convictions and death sentences in state court is the state eligible for limited federal habeas review. That is the Chapter 154 *quid pro quo*.

Arizona is ineligible for Chapter 154's habeas curtailment. The state's competency standards for appointed capital postconviction counsel have been roundly found inadequate; the compensation it pays such counsel was insufficient to start with and has not increased in

twenty-two years; it does not mandate payment of essential litigation expenses; and it does not require timely appointments. In fact, Arizona years ago effectively acknowledged its capital postconviction counsel scheme had failed, and tried to replace it with a public defender's office, only to refuse to fund the office and then return to the failed system it still uses today.

Despite the inherent and evident flaws in Arizona's system, the Attorney General in the ruling under review certified the state as meeting Chapter 154's requirements. JA__**[R.1.85Fed.Reg.20,705]**. The Attorney General's decision disputes little about how deficient Arizona's scheme is and has been, deeming irrelevant much of the exhaustive record evidence showing that, in fact, Arizona does not qualify for certification. Instead, the decision rests primarily on a twenty-year-old Ninth Circuit case that examined a now-defunct version of Arizona's system, and that did so more than a decade before DOJ promulgated the current regulations specifying standards that states must meet to be certified under Chapter 154.

Arizona's capital counsel appointment system is deficient on its face and in practice, and the Attorney General's certification of Arizona

fails on its own terms. The certification must also be set aside because, as explained in detail below, the certification process is itself fundamentally flawed, and DOJ's implementing regulations are procedurally and substantively invalid. The certification decision cannot stand.

STATEMENT OF JURISDICTION

This is a petition for review of the Attorney General's April 14, 2020 certification of Arizona's capital counsel mechanism under 28 U.S.C. §§2261-66. JA__**[R.1.85Fed.Reg.20,705]**. Petitioners timely filed the petition for review on April 29, 2020. *See* 28 U.S.C. §2344. This Court has jurisdiction under 28 U.S.C. §2265(c).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Attorney General improperly certified Arizona's mechanism for appointing state capital postconviction counsel under 28 U.S.C. §2265.

2. Whether the Department of Justice regulations governing certification, 28 C.F.R. §§26.20-23, are legally invalid.

PERTINENT STATUTES AND REGULATIONS

Relevant statutes and regulations are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

I. Statutory And Regulatory Background

A. Chapter 154 and Congress's capital habeas bargain

At issue in this case is Chapter 154 of Title 28 of the U.S. Code, codified at 28 U.S.C. §§2261-66. Chapter 154 governs the federal habeas proceedings of death-row prisoners in states certified as providing competent, adequately funded counsel in the state postconviction proceedings that precede federal habeas review. Absent application of Chapter 154, Chapter 153 of Title 28, 28 U.S.C. §§2241-55, governs habeas proceedings.

For convicted capital defendants, the state postconviction review stage is critical. Those proceedings come after direct appeal, and they are where prisoners must first raise many fundamental challenges to their convictions and death sentences. *See* JA__**[R.14.FDO-AZCmt.at15-23]**. For instance, claims of ineffective assistance of counsel and *Brady* claims[3] can often only be raised through postconviction review. Postconviction proceedings are *sui generis* and complex, and competent counsel is essential. JA__**[R.14.FDO-**

[3] *See Brady v. Maryland*, 373 U.S. 83 (1963).

AZCmt.at64-65]; *see infra* 43-44. Indeed, claims raised in federal habeas review must typically be presented first in state appellate or postconviction review. *See* 28 U.S.C. §2254(b)(1).

Federal habeas review, meanwhile, is a prisoner's only opportunity to challenge the constitutionality of a state-imposed conviction and death sentence in federal district court. For prisoners represented by ineffective counsel in state postconviction proceedings, federal habeas is the first meaningful chance to make those challenges. *See Martinez v. Ryan*, 566 U.S. 1, 8-9 (2012).

Against this backdrop, Congress in 1996 enacted Chapter 154 to create a *quid pro quo*: If a state establishes a mechanism for the timely appointment of competent, adequately resourced capital postconviction counsel, then federal habeas proceedings may be expedited and restricted for that state's death-row prisoners. *See* JA__**[R.14.FDO-AZCmt.at2-3, 7-8]** (citing Judicial Conference of the U.S., Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases Committee Report (1989), *reprinted in* 135 Cong. Rec. S13471-04, S13482 (Oct. 16, 1989) (Powell Committee Report)). Specifically, Chapter 154 provides that a state may seek to "establish[] a mechanism for the appointment,

compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. §2265(a)(1)(A).

If a state establishes a qualifying mechanism, thereby assuring that prisoners have a full and fair opportunity to raise claims in state court, Chapter 154 in turn substantially restricts federal habeas proceedings for the state's death-row prisoners. Among other things, it cuts in half the statute of limitations to file a habeas petition from one year to 180 days, 28 U.S.C. §2263(a); limits tolling of that deadline, *id.* §2263(b); and restricts a petitioner's ability to raise procedurally defaulted claims, *id.* §2264(a), amend a habeas petition, *id.* §2266(b)(3)(B), or obtain a stay of execution, *id.* §2262(c). Chapter 154 also imposes specific time limits on district court and court of appeals proceedings in capital habeas cases. *See id.* §2266(b), (c).

Federal habeas courts were initially responsible for determining whether states had established qualifying mechanisms. Following Chapter 154's enactment, at least ten states contended that they met the statute's requirements. Courts uniformly found that the states

either had no adequate mechanism—for instance, because they did not require counsel to have prior postconviction experience—or had not appointed counsel pursuant to an adequate mechanism. *See, e.g.*, *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000); *Baker v. Corcoran*, 220 F.3d 276, 284 (4th Cir. 2000); *Colvin-El v. Nuth*, No. CIV. A. AW 97-2520, 1998 WL 386403, at *6 (D. Md. July 6, 1998); *Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996); *Williams v. Cain*, 942 F. Supp. 1088, 1092 (W.D. La. 1996), *aff'd in part, rev'd in part*, 125 F.3d 269 (5th Cir. 1997); *Hill v. Butterworth*, 941 F. Supp. 1129, 1142 (N.D. Fla. 1996); *Zuern v. Tate*, 938 F. Supp. 468, 471 (S.D. Ohio 1996).

In 2005, Congress amended Chapter 154 to transfer authority to the U.S. Attorney General to determine whether a state has a qualifying mechanism. 28 U.S.C. §2265. The amended statute allows a state to "request" that the Attorney General certify its capital counsel appointment mechanism. 28 U.S.C. §2265(a). The Attorney General may certify the state if he determines its mechanism provides for the timely appointment, adequate "compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings." 28 U.S.C. §2265(a). Congress also directed

that "[t]he Attorney General shall promulgate regulations to implement the certification procedure." 28 U.S.C. §2265(b).

Congress provided for this Court's exclusive judicial review of the Attorney General's certification decisions, under a de novo standard. 28 U.S.C. §2265(c).

B. Regulations governing the Attorney General's certification process

In 2007, DOJ published initial regulations governing the certification process. DOJ withdrew those provisions after they were preliminarily enjoined. *Habeas Corpus Res. Ctr. v. DOJ*, No. 08-cv-2649-CW, 2009 WL 185423 (N.D. Cal. Jan. 20, 2009); JA__**[R.163.75Fed.Reg.71,353-02]**.

In 2011, DOJ began a new rulemaking, which ultimately resulted in the current regulations. JA__**[R.164.76Fed.Reg.11,705; R.150.78Fed.Reg.58,160]**. Along with others, the Office of the Federal Public Defender for the District of Arizona (FDO-AZ), which represents Arizona death-row prisoners in federal habeas proceedings, submitted comments noting significant problems with the proposed regulations. JA__**[R.174.FDO-AZCmt.5.31.11; R.201.FDO-AZCmt.6.1.11; R.231.FDO-AZCmt.3.14.12; R.234.FDO-AZCmt.3.14.12]**. DOJ

published the final regulations on September 23, 2013. 28 C.F.R. §§26.20-23.

The regulations identify standards that states must meet to qualify for Chapter 154 certification, including standards for (1) attorney competency, (2) attorney compensation, and (3) payment of reasonable litigation expenses. 28 C.F.R. §26.22; JA__**[R.150.78Fed.Reg.58,160]**. The regulations also direct that a state's mechanism must provide for timely appointments of counsel. 28 C.F.R. §26.21. For competency and compensation, the regulations specify "presumptively adequate" benchmarks. *Id.* §26.22(b)(1), (c)(1). For competency, a state not meeting the regulatory benchmarks may be certified only if its mechanism "otherwise reasonably assure[s] a level of proficiency appropriate for State postconviction litigation in capital cases." *Id.* §26.22(b)(2). Likewise for compensation, a mechanism meeting no benchmark may be certified only if it is "otherwise reasonably designed to ensure the availability for appointment of counsel who meet" the regulations' competency standards. *Id.* §26.22(c)(2).

FDO-AZ and others challenged the regulations. JA__**[R.14.17.Meyer.Decl.Ex.4]**. The district court for the Northern District of California entered summary judgment for the plaintiffs in 2014 and enjoined the regulations. *Habeas Corpus Res. Ctr. v. DOJ*, No. 13-cv-4517-CW, 2014 WL 3908220 (N.D. Cal. Aug. 7, 2014), *vacated and remanded on justiciability grounds*, 816 F.3d 1241 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1338 (2017) (*HCRC*). The district court concluded the regulations were procedurally and substantively invalid because, among other things, they (1) failed to define certification proceedings as rulemakings warranting notice-and-comment; (2) placed an insufficient onus on states to show that they qualified; and (3) provided insufficient substantive standards for certification. *Id.* at *6-13.

The Ninth Circuit vacated the district court's judgment. The court held that the case was not justiciable on ripeness and standing grounds, emphasizing that the Attorney General had not yet certified any state. 816 F.3d at 1254. The court did not address the underlying merits of plaintiffs' complaint. *See id.* DOJ's 2013 regulations therefore remain in force, and are at issue in this case.

II. Arizona's Capital Counsel Mechanism

Since 1996, Arizona's system for appointing capital postconviction counsel has undergone multiple iterations. The record contains an extensive and largely undisputed account of the history and functioning of the state's system. *See, e.g.*, JA__**[R.14.FDO-AZCmt.at27-54]**.

A. The creation of Arizona's mechanism in 1996

Shortly after Chapter 154's enactment, Arizona first attempted to establish a system for appointing capital postconviction counsel. *See* JA__**[R.14.FDO-AZCmt.at27-30]**. The state legislature passed a bill to create a postconviction public defender's office guaranteeing prisoners competent counsel, but the governor vetoed the bill because of budgetary concerns. *See* JA__**[R.14.FDO-AZCmt.at27-28; R.14.17.Meyer.Decl.Ex.10]**.

As a fallback, the legislature instead enacted procedures for appointing private counsel for capital postconviction representations. The legislation set forth general standards for counsel to meet to qualify for appointment, and authorized the Arizona Supreme Court to develop additional standards and to compile a roster of qualified lawyers. *See* JA__**[R.14.FDO-AZCmt.at27-30]**; Ariz. Rev. Stat. (A.R.S.) §13-4041(B)

(1996). Pursuant to that legislation, the state supreme court established Arizona Rule of Criminal Procedure 6.8 (Rule 6.8), setting out required qualifications for appointed capital postconviction counsel. *See* JA__**[R.14.FDO-AZCmt.at28-29]**. Significantly, Rule 6.8 also allowed (and still allows) the appointment of counsel who meet none of those requirements in "exceptional circumstances," as long as the appointed attorney "associates with" an attorney who does satisfy the rule's standards. Ariz. R. Crim. P. 6.8(e).[4]

To screen attorneys who applied for appointment, the state supreme court created an independent committee, consistent with American Bar Association (ABA) guidelines stating that such screening should not be performed by the judiciary. *See* JA__**[R.241.ABAGuideline3.1]** (Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines), Guideline 3.1). The screening committee approved only four of the sixteen attorneys who initially submitted applications. *See*

[4] In 2018, Arizona revised its criminal rules and made stylistic changes to Rule 6.8, including re-lettering Rule 6.8(c) as 6.8(d), and 6.8(d) as 6.8(e), with no substantive alterations to those provisions. Unless otherwise noted, this brief refers to the current version of Rule 6.8.

JA__**[R.14.FDO-AZCmt.at30]**. Some applicants were deemed unqualified for failing to meet Rule 6.8's objective requirements; committee members found others unqualified from "personal knowledge of the applicants' work." JA__**[R.14.17.Meyer.Decl.Ex.18]**; *see* JA__**[R.14.FDO-AZCmt.at30]**.

B. The weakening and failure of Arizona's mechanism from 1998 to 2006

The system Arizona first established in 1996—a fallback that from the start was unable to consistently furnish competent counsel—was significantly weakened over time. The state legislature in 1998 enacted an amendment permitting the Supreme Court to appoint counsel from "outside the list of qualified candidates." A.R.S. §13-4041(D)(1-2) (1998); *see* JA__**[R.14.FDO-AZCmt.at30]**. At the same time, it imposed a statutory ceiling on counsel's hourly compensation: a maximum rate of $100-per-hour, a statutory cap that remains in place today. A.R.S. §13-4041(G), (H) (1998); *see* JA__**[R.14.FDO-AZCmt.at30-31]**.

Arizona continued to dilute its mechanism. A 2000 amendment to Rule 6.8 lowered the required threshold hours of capital defense training from twelve to six. JA__**[R.14.FDO-AZCmt.at32]**. A separate

2000 amendment abolished the state's statutory requirement that counsel be appointed within fifteen days of the initial notice of postconviction review, leaving the timing of capital postconviction appointments up to the state supreme court's discretion with no mandated period in which appointments must be made. *Id.* In 2001, the Arizona Supreme Court disbanded the independent committee that had screened attorneys for appointment. JA__**[R.14.FDO-AZCmt.at33]**. Instead, a state supreme court staff attorney was made largely responsible for recruiting attorneys, screening attorney applications, maintaining a roster of appointment-eligible attorneys, and forwarding applications to the justices for appointment orders. *Id.* No written procedure was instituted to vet attorney applications or review their work. JA__**[R.14.FDO-AZCmt.at33]**; JA__**[R.14.FDO-AZCmt.at72-73]** (citing JA__**[R.14.17.Meyer.Decl.Ex.41]**); JA__**[R.14.9.Moulton.Decl.Ex.487]** (compiled rosters of eligible attorneys).

In 2002, a commission established by the Arizona Attorney General effectively concluded that the state's mechanism had failed. *See* JA__**[R.14.17.Meyer.Decl.Ex.22at14]** (commission report). "The

Commission quickly realized that Arizona's system for appointing capital postconviction lawyers had deep and systemic problems, including the regular appointment of unqualified lawyers, insufficient compensation of appointed lawyers, and inadequate litigation resources being provided to lawyers. Those factors conspired to dissuade competent, experienced attorneys from seeking appointment, and to create a pool of unqualified applicants that the Supreme Court appointed from." JA__**[R.14.13.Kimerer.Decl.¶16]** (declaration of commission member).

The commission called (again) for the creation of a public defender's office to handle capital postconviction cases. JA__**[R14.17.Meyer.Decl.Ex.22at14]** (commission report), but the recommendation was not enacted.

In the following years, the Arizona Supreme Court invoked Rule 6.8(e)'s "exceptional circumstances" loophole in the Rule's competency requirements to appoint otherwise unqualified counsel in 25 to 30% of cases. JA__**[R.14.FDO-AZCmt.at31-32n.16, 77, 79]**; *see* **[R14.1.appointment.chart]**. Meanwhile, because the scheme provided insufficient financial incentive for qualified lawyers to take on

capital postconviction cases, delays in appointing counsel often extended more than two years. JA__**[R.14.FDO-AZCmt.at35]**.

The ABA Death Penalty Representation Project in 2005 identified "Arizona as a state that particularly needed attention in part because of the horror stories [the Project] had consistently heard about ineffective lawyers being appointed in the state to handle all stages of capital proceedings, including post-conviction proceedings." JA__**[R.14.18.Maher.Decl.¶8]** (declaration of Project director). The Project made several recommendations for Arizona to improve its capital counsel system, which Arizona largely ignored. JA__**[R.14.18.Maher.Decl.¶¶14-16]**.

C. Arizona's creation and closing of a public defender office, and its return in 2011 to the previously failed system

In 2006, the Arizona Legislature sought to alleviate the state's crisis in capital postconviction representation by finally creating a State Capital Postconviction Public Defender Office to address the repeated failure of the state's private-appointment mechanism to guarantee timely appointment of competent counsel. JA__**[R.14.FDO-AZCmt.at37; R.14.18.Maher.Decl.¶9;**

R.14.10.Hammond.Decl.¶45]; *see* A.R.S. §§13-4041, 41-4301 (2006). Supreme Court Justice Michael Ryan stated at the time that a public defender's office was "the best and most effective way of defending someone," and he agreed the state's compensation of private counsel was not "fair market compensation" that could consistently attract competent attorneys. JA__**[R.14.17.Meyer.Decl.Ex.30; R.14.FDO-AZCmt.at37]**. As the bill's senate sponsor confirmed, "[t]here [were] death penalty cases where it [had] not been possible to contract with lawyers to meet [applicable] standards," and the state was at risk of not being able to invoke Chapter 154. JA__**[R.14.17.Meyer.Decl.Ex.30; R.14.FDO-AZCmt.at37]**.

But Arizona funded the public defender's office meagerly, and the office was unable to take on a full caseload. JA__**[R.14.FDO-AZCmt.at38-41]**. "From the outset, it was clear that [the office] would not be able to meet its statutory directive of handling the majority of capital postconviction cases in the state." JA__**[R.14.11.Lieberman.Decl.¶7]**. The state supreme court continued to appoint attorneys from its roster of private counsel, and

the public defender's office ultimately represented a total of only five death-sentenced prisoners. JA__**[R.14.FDO-AZCmt.at41]**.

The legislature then defunded the office entirely in 2011, and Arizona returned to its previous, failed appointment system. JA__**[R.14.FDO-AZCmt.at40-41]**.

Further compounding the failure of that system, the state supreme court in 2011 amended Rule 6.8 to no longer require that attorneys have any postconviction experience to be appointed as capital postconviction counsel. JA__**[R.14.FDO-AZCmt.at44-46]**. The amendment allowed specified felony trial and appellate experience to substitute for postconviction experience, meaning that an attorney could qualify for appointment as capital postconviction counsel without ever having handled a postconviction proceeding, or a capital case. JA__**[R.14.FDO-AZCmt.at44-46]**; *see* Ariz. R. Crim. P. 6.8(d).

In 2018, the Arizona Capital Case Oversight Committee—comprising judges, prosecutors, and defense attorneys—formally recommended changes to the state's mechanism. JA__**[R.140.FDO-AZSupp.Cmt.Ex.2]**. The committee specifically recommended amending Rule 6.8(d) (now Rule 6.8(e)) to require that appointed

counsel not meeting state competency requirements "meaningfully" associate with qualified counsel. JA__**[R.140.FDO-AZSupp.Cmt.Ex.2at6]**. The committee also recommended removing the statutory cap on attorney compensation, noting that raising the compensation-rate ceiling "is a perennial recommendation of the Oversight Committee." JA__**[R.140.FDO-AZSupp.Cmt.Ex.2at5]**. Arizona made no changes to its mechanism, and the mechanism has undergone no material changes since.

III. Certification Proceedings Below

A. Arizona's perfunctory certification request

In 2013, Arizona requested certification of its capital counsel mechanism under 28 U.S.C. §2265. JA__**[R.2.AZapplication]**. The application consisted of a three-and-a-half-page letter reciting the state's statutes and rules and otherwise providing little if any information about the state's scheme. *See* JA__**[R.14.FDO-AZCmt.at56]**.

Four years later, in 2017, after the certiorari denial in *HCRC, supra* 11, DOJ published notice of the request and provided a 60-day comment period. JA__**[R.6.82Fed.Reg.53,529]**. DOJ concurrently sent

a letter to the Arizona Attorney General to "confirm that the materials [Arizona] previously submitted are still current." JA__**[R.5.DOJLettertoAZ]**. Arizona responded with another short letter stating that the state's appointment mechanism had over time undergone "a few minor changes." JA__**[R.115.AZLtr.Nov.27.2017]**.

B. The comment process and FDO-AZ's comment detailing the failure of Arizona's mechanism

DOJ received more than 120 comments. Of those, only one (from Arizona Voice for Crime Victims) favored certification, but even that comment did not purport to show that Arizona met the certification requirements. JA__**[R.10. AzVoiceCrimeVicsCmt.]**. Opposing certification were judges (JA__**[R.121.Judge.BairdCmt.]**), a sitting U.S. senator (JA__**[R.124.Sen.LeahyCmt.]**), criminal justice experts (JA__[**R.17.AACJCmt., R.123.ACLUCmt.]**), the ABA (JA__**[R.120.ABACmt.; R.138.ABASupp.Cmt.]**), other national and local organizations with expertise in the death penalty (JA__**[R.13.Fed.PubDefendersCmt.; R.18.InnocenceProj.&AzJusticeProj.Cmt.; R.125.AzCap.Rep.Proj.Cmt.; R.127.PhillipsBlackProj.Cmt.; R.141.AzCap.Rep.Proj.Supp.Cmt.]**), and Arizona defense attorneys

with capital postconviction experience (JA__**[R.132.GormanCmt.; R.134.SchayeCmt.; R.136.PhalenCmt.; R.142.PhillisCmt.; R.144.HammondCmt.; R.146.LiebermanCmt.]**). The comments detailed Arizona's history of dysfunction, and explained why the state should not be certified.

FDO-AZ submitted its own 163-page comment exhaustively analyzing all aspects of Arizona's mechanism, both present and past. JA__**[R.14.FDO-AZCmt.]**. The office analyzed thousands of pages of court and administrative records, state committee reports, legislative history, and expert analysis. It interviewed dozens of stakeholders. It examined national standards and other states' appointment systems. And it presented sworn declarations from knowledgeable criminal defense and postconviction counsel, comprehensively showing how Arizona's appointment system has at all times fallen short of the certification requirements.

FDO-AZ's comment also provided concrete examples of attorneys appointed (and re-appointed) pursuant to Arizona's mechanism who were deemed to have performed incompetently and who were otherwise unqualified. JA__**[R.14.FDO-AZCmt.at83-120]**. The examples

included attorneys who were formally suspended from practicing law or otherwise disciplined by the Arizona State Bar. *Id.*

In June 2018, DOJ requested additional information from Arizona. *See* JA__**[R.128.DOJ6.29.18Ltr.]**. Arizona tendered a letter that was in significant respects nonresponsive. JA__**[R.129.AZAG10.16.18Ltr.; R.140.FDO-AZSupp.Cmt.]**. As just one example, DOJ had asked Arizona to provide information about how the state assesses whether a lawyer meets Rule 6.8's requirement that "an attorney must have demonstrated the necessary proficiency and commitment exemplifying the quality of representation appropriate to capital cases." *See* JA__**[R.128.DOJ6.29.18Ltr.at3]**. The Arizona Attorney General's office replied that it could not say because it was "not privy to how the Arizona Supreme Court evaluates defense attorneys under this requirement." *See* JA__**[R.129.AZAG10.16.18Ltr.at8; R140.FDO-AZSupp.Cmt.at23]**.

During a short supplemental comment period, FDO-AZ and others explained in detail why Arizona's response did not establish that the state met Chapter 154's requirements. JA__**[R.131.83Fed.Reg.58,786; R.140.FDO-AZSupp.Cmt.]**.

C. The Attorney General's decision certifying Arizona, based largely on the Ninth Circuit's 2002 decision in *Spears v. Stewart*

In April 2020, the Attorney General granted Arizona's certification request, making the state the first in the nation to be certified. JA__**[R.1.85Fed.Reg.20,705]**. The Attorney General determined that Arizona had suitably established a mechanism for the timely appointment, compensation, and payment of reasonable litigation expenses of competent capital postconviction counsel. The Attorney General certified Arizona with an effective date of May 19, 1998, reasoning this was the date when Arizona's mechanism was established. JA__**[R.1.85Fed.Reg.20,718-19]**; *see* 28 U.S.C. §2265(a)(2); 28 C.F.R. §26.23(c).

The Attorney General began with the premise that the question whether to certify Arizona was largely resolved by a nearly twenty-year-old Ninth Circuit case—*Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002)—that considered an early version of Arizona's appointment mechanism before Congress stripped the courts of authority to determine whether states satisfied Chapter 154 and transferred that authority to the Attorney General. *See* JA__**[R.1.85Fed.Reg.20,707-**

10]. The Attorney General did not explain how *Spears* could establish that Arizona met the regulatory standards that were not enacted until more than a decade later, nor did he dispute that there had been a series of changes to Arizona's mechanism since *Spears*—including abolishing the requirement that appointed counsel have postconviction experience, doing away with the independent screening committee, and deleting the state's statutory requirement of timely appointment. *See supra* 14-20. The Attorney General discounted the record evidence since *Spears* demonstrating how Arizona's mechanism has failed over time to assure the provision of competent counsel; the Attorney General deemed such evidence irrelevant to certification. *See* JA__**[R.1.85Fed.Reg.20,709-12]**.

Against that backdrop, the Attorney General determined that Arizona's capital counsel system satisfied the competency, compensation, expense-payment, and timeliness prerequisites for certification. As for competency, the Attorney General recognized that Arizona does not satisfy the regulations' benchmark competency standards, and that Arizona requires neither postconviction nor capital experience for appointed capital postconviction counsel. *See*

JA__**[R.1.85Fed.Reg.20,708-13]**. But the Attorney General concluded that a state's competency standards need not require such experience, that Arizona's standards were otherwise sufficient, and that it does not matter for certification purposes that a quarter of Arizona's appointments have been made under its Rule 6.8(e) loophole allowing ad hoc appointment of counsel who do not meet the state's own competency standards. *Id.*; *see infra* 52-53.

The Attorney General likewise concluded that Arizona satisfies the compensation requirement for certification even though its mechanism does not meet any compensation benchmark. JA__**[R.1.85Fed.Reg.20,713-15]**. The Attorney General acknowledged that Arizona by statute caps capital postconviction counsel's compensation at a maximum rate of $100-per-hour—a ceiling unchanged since 1998—and the Attorney General did not dispute that the record demonstrated a broad consensus that this rate is too low to attract competent counsel. *Id.* The Attorney General asserted, however, that Arizona has been able to recruit persons to take on capital postconviction cases. *Id.* The Attorney General thought this sufficient, despite the record showing that Arizona has been able to

appoint counsel only by sometimes waiting two years or more to do so, *see supra* 17, and despite the fact that private organizations like the ABA have sometimes had to recruit out-of-state pro bono counsel to provide representation because of the state's inability to do so. JA__**[R.138.ABASupp.Cmt.at1-3]**.

Next, the Attorney General determined that Arizona satisfied the requirement that a state pay reasonable litigation expenses. JA__**[R.1.85Fed.Reg.20,715-16]**. The Attorney General acknowledged that the governing Arizona statute provides only that reasonably necessary investigative and expert services "may" be reimbursed. JA__**[R.1.85Fed.Reg.20,715]**. But the Attorney General explained that the statute's permissive language does not foreclose payment of reasonable expenses in any particular case. JA__**[R.1.85Fed.Reg.20,716]**. The Attorney General did not discuss the record showing that Arizona has no system mandating payment of expenses and that Arizona's real-world practice aligns with its permissive statute: Reasonable litigation expenses of capital postconviction counsel are properly paid in some cases, but in many cases they are not. *See infra* 72-73.

Finally, the Attorney General determined that Arizona met the timeliness requirement for certification. JA__**[R.1.85Fed.Reg.20,716-18]**. The Attorney General recognized that, in 2000, Arizona repealed its requirement that counsel be appointed within a specified period, and that since then there has been no specified time period within which such appointments must be made. JA__**[R.1.85Fed.Reg.20,716]**. The Attorney General concluded, however, that Arizona's scheme still meets the timeliness prerequisite, because the Attorney General expected that federal habeas courts in individual habeas proceedings will act "fairly" in trying to mitigate the harms resulting from delayed appointments. JA__**[R.1.85Fed.Reg.20,718]**.

The Attorney General thus certified Arizona under Chapter 154. Petitioners—FDO-AZ and thirteen Arizona death-row prisoners—filed this petition for review on April 29, 2020.

SUMMARY OF ARGUMENT

I. Arizona's procedures for appointing capital postconviction counsel do not meet Chapter 154's certification requirements. To be certified, a state must establish a mechanism that assures death-sentenced prisoners (1) competent postconviction counsel, who are

(2) adequately compensated, (3) provided with payment of reasonable litigation expenses, and (4) timely appointed. Arizona satisfies none of these elements.

In concluding otherwise, the Attorney General misapplied those requirements, disregarded the administrative record, and grounded his certification decision on an outdated and otherwise irrelevant Ninth Circuit case. The decision cannot stand, especially on de novo review.

A. Arizona's procedures do not properly assure attorney competency. The state requires neither postconviction nor capital experience for appointed capital postconviction counsel, and it provides no postconviction litigation training, independent screening, or monitoring of counsel. Its mechanism therefore does not meet the regulations' competency benchmarks triggering a presumption of adequacy.

Nor has Arizona established that its mechanism otherwise reasonably assures attorney proficiency. The mechanism requires no adequate experience, contravenes recognized norms regarding training, screening, and monitoring, and broadly permits the appointment of counsel who do not meet even the state's own competency standards.

Arizona's scheme fails on its face, and Arizona's reality has been the regular appointment of unqualified capital postconviction attorneys—including lawyers disciplined by the state bar, criticized by state and federal judges for their substandard performance, and rejected for capital trial and appellate appointments.

The Attorney General erred in disregarding the facial and real-world failings of Arizona's mechanism and upholding the state scheme based largely on the Ninth Circuit's 2002 decision in *Spears v. Stewart*. The case examined an early version of Arizona's mechanism, and it did so four years before Congress stripped the courts of certification authority, and more than a decade before DOJ issued implementing regulations articulating standards that states must meet to qualify under Chapter 154. Arizona's mechanism has also since *Spears* undergone a series of substantial changes, aggravating even further its longstanding inadequacies. *Spears* is not relevant here, much less controlling.

B. Arizona likewise fails Chapter 154's requirement that the state provide compensation sufficient to secure competent counsel. The state pays appointed capital postconviction attorneys a maximum of $100-

per-hour—a ceiling unchanged for more than twenty years. That rate is now far below the regulations' benchmarks; it is nearly half the comparable federal rate and even further below the Arizona market rate for retained counsel. And the record reveals a broad consensus that, as a practical matter, Arizona's maximum compensation rate of $100-per-hour is woefully inadequate to attract competent capital postconviction counsel. Arizona's deficient compensation precludes certification.

C. Nor does Arizona mandate payment of reasonable litigation expenses, as Chapter 154 requires. Investigators, mitigation specialists, and other experts are indispensable in a capital postconviction case. But Arizona leaves the payment of such expenses to trial court discretion, which, the record shows, often means inadequate payment. The lack of a statewide mandate for payment of reasonable litigation expenses compromises the ability of appointed capital postconviction counsel to effectively represent their clients, and is yet another ground foreclosing certification.

D. Finally, Arizona's mechanism contains no provision regarding the timing of postconviction appointments. Some death-row prisoners

have waited months or even years before obtaining state postconviction counsel. Individuals subject to these delays may lose some or all of their time in which to file a federal habeas petition at the conclusion of state postconviction review. The delays also undermine prisoners' ability to develop potentially meritorious claims—because of lost evidence, fading of memories, and other challenges in reconstructing events. The absence of any requirement that capital postconviction counsel be appointed within a particular time frame also requires denying Arizona's certification request.

II. The Court need proceed no further, but the certification is unsustainable for a second, independent reason: The certification process is itself fundamentally flawed, and DOJ's certification regulations are procedurally and substantively invalid.

A. The regulations erroneously assume that Chapter 154 certifications are adjudicative orders not subject to Administrative Procedure Act (APA) notice-and-comment. But a certification has general application and prospective effect for the habeas cases of capital prisoners. Under well-established principles, it is properly classified as a rulemaking. DOJ was therefore required to publish notice of the

proposed certification and provide the public with an opportunity to comment before issuing it. DOJ did neither, improperly depriving petitioners and other interested persons of the opportunity to respond to the Attorney General's analysis, which in multiple respects rested on reasoning that Arizona had not advanced.

B. The certification process is also deficient because it places no proper onus on the state to establish eligibility for certification. This case is illustrative. At least as applied in this proceeding, the regulations permitted a cursory state request, which did not provide the Attorney General or the public with the information necessary to evaluate the state's claimed mechanism. This meant that public commenters—not the state seeking certification—had to survey the design and practice of Arizona's mechanism and build the relevant record before the Attorney General. FDO-AZ here did just that, conducting its own investigation and furnishing the Attorney General with a comprehensive analysis showing in painstaking detail that Arizona could not properly be certified. That showing forecloses certification, but, at a minimum, placing the burden on the public to disprove certification conflicts with Chapter 154's *quid pro quo* that

permits states to take advantage of its provisions only by demonstrating they have established a qualifying capital counsel mechanism.

C. DOJ's certification regulations also provide insufficient substantive standards to implement the certification process. At least as applied in this case, the regulations countenance evasion of objective competency and compensation benchmark standards through vague and undefined "catchall" provisions. The problem here is magnified because Arizona's scheme also depends, in a significant number of cases, on a broad and undefined state catchall provision that allows appointment of capital postconviction counsel who do not meet even the state's own standards for attorney competency.

The certification of Arizona thus fails on its own terms, and also because the certification regulations are invalid and the certification process itself was fundamentally flawed.

STANDING

Petitioners are presently and concretely harmed by Arizona's certification. The thirteen Arizona death-row prisoners who are petitioners stand to be significantly injured by Chapter 154's restrictions on the timing and scope of capital habeas proceedings. *See*

supra 7. Some of those prisoners are currently in federal habeas proceedings, others are in state postconviction proceedings, and one is in state direct review proceedings. Prisoners in each category have detailed in comprehensive declarations the injuries they face from certification. *See* JA__**[Pet'rsMotforStayExs.A-I; Pet'rsMotforStayReplyExs.A-C]**.

Petitioner FDO-AZ is also immediately and adversely affected by the certification decision. The office currently represents forty-four federal-habeas-stage prisoners sentenced to death by Arizona who were appointed state postconviction counsel after May 19, 1998. *See* JA__**[Pet'rsMotforStayEx.A; Pet'rsMotforStayReplyEx.A]**. The prospect of shortened time limits within which federal habeas petitions must be filed under Chapter 154 is especially consequential for FDO-AZ as well as death-row prisoners, and the office has detailed in a declaration how the "certification decision has an immediate, substantial, and concrete effect on how the organization must structure its functions and deploy its resources to properly carry out its critical mission of representing criminal defendants who have been sentenced to death." JA__**[Pet'rsMotforStayEx.Aat2]**.

Each petitioner submitted comments in the certification proceedings before DOJ. JA__**[R.14.FDO-AZCmt.; R.31.AllenCmt.; R.33.MartinezCmt.; R.52.BurnsCmt.; R.59.NelsonCmt.; R.70.RogovichCmt.; R.76.BoggsCmt.; R.85.HardyCmt.; R.89.GallardoCmt.; R.90.PrinceCmt.; R.94.KilesCmt.; R.96.ChampagneCmt.; R.145.LeteveCmt.; R.148.ParkerCmt.]**. FDO-AZ also submitted comments in the proceedings underlying the promulgation of the certification regulations, on behalf of itself and Arizona death-sentenced prisoners. JA__**[R.174.FDO-AZCmt.5.31.11; R.201.FDO-AZCmt.6.1.11; R.231.FDO-AZCmt.3.14.12; R.234.FDO-AZCmt.3.14.12]**. For all these reasons, petitioners have standing.

STANDARD OF REVIEW

This Court reviews "de novo" the Attorney General's decision to certify Arizona's capital counsel mechanism. 28 U.S.C. §2265(c). The de novo standard is "different from—and less deferential than—typical judicial review of agency action." *HCRC*, 816 F.3d at 1253 n.16 (addressing §2265). It requires this Court "to put itself in the agency's place," and make "a fresh, independent determination of" whether Arizona has satisfied the requirements for certification, with no

"deference due the agency's conclusion." *Doe v. United States*, 821 F.2d 694, 697-98 (D.C. Cir. 1987) (en banc); *see United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 368 (1967) (de novo review of agency action requires the court to "make an independent determination of the issues").

The Chapter 154 implementing regulations are invalid under the APA if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if they were promulgated "without observance of procedure required by law." 5 U.S.C. §§706(2)(A), (D).

ARGUMENT

I. Arizona Does Not Meet Chapter 154's Certification Requirements.

Chapter 154 requires a state to demonstrate that its claimed capital counsel mechanism reasonably guarantees death-sentenced prisoners (1) competent postconviction counsel, who are (2) adequately compensated, (3) provided with payment for reasonable litigation expenses, and (4) timely appointed. 28 U.S.C. §2265(a)(1); 28 C.F.R. §§26.21-22.

Arizona fails each requirement. The state's competency standards are, and for years have been roundly found, inadequate; the state's maximum $100-per-hour compensation rate, insufficient from the start, has not increased in twenty-two years, and is now manifestly too low to attract competent counsel; the state does not mandate payment of reasonable litigation expenses; and Arizona deleted whatever timeliness requirement it had in 2000. Arizona's scheme comprehensively fails to meet the certification prerequisites. And nothing in the Ninth Circuit's 2002 decision in *Spears v. Stewart* dictates otherwise.[5]

A. Arizona's competency standards are inadequate.

1. Arizona does not meet the benchmark competency standards.

The regulations provide two ways a state may demonstrate that it has established sufficient competency standards. The first is by

[5] As DOJ's Office of Legal Counsel (OLC) has explained, Attorney General regulations construing Chapter 154 do not add to the requirements for certification, but merely implement the statutory terms. They are therefore consistent with 28 U.S.C. §2265(a)(3), which provides that "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter." *See* JA__**[R.161.OLCReportat8]**.

showing the state meets objective benchmarks creating a presumption of adequacy. 28 C.F.R. §26.22(b)(1). Arizona fails those benchmarks.

Arizona's competency standards do not require that appointed capital postconviction counsel have any postconviction or capital experience. Instead, Arizona's standards broadly require a background in criminal law, and that counsel:

> (1) within 3 years immediately before the appointment, have been lead counsel in a trial in which a death sentence was sought or in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and prior experience as lead counsel in the appeal of at least 3 felony convictions and a trial or post-conviction proceeding with an evidentiary hearing;
>
> or
>
> (2) have been lead counsel in the appeal of at least 6 felony convictions, including two appeals from first- or second-degree murder convictions, and lead counsel in at least two felony trials or post-conviction proceedings with evidentiary hearings.

Ariz. R. Crim. P. 6.8(d); *see also* A.R.S. §13-4041(C). The mechanism also requires six hours of capital defense training pre-appointment, Rule 6.8(a)(4), and familiarity (though not compliance) with ABA Guidelines—a requirement added in 2006, *id.* (a)(5). And it requires the state supreme court to maintain a list of qualified attorneys from which to make appointments. A.R.S. §13-4041(C).

In a nutshell, Arizona allows for the appointment of capital postconviction counsel who may have general felony litigation experience but who have:

(1) no postconviction litigation experience;

(2) no knowledge or training regarding postconviction practice or investigations; and

(3) no experience with a death-penalty case at any stage.

These standards meet neither competency benchmark. The Attorney General agrees. JA__**[R.1.85Fed.Reg.20,710]**.

Benchmark One requires "[a]ppointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience." 28 C.F.R. §26.22(b)(1)(i). It is undisputed that Arizona's mechanism fails this standard: It does not currently require any postconviction experience, and has never required three years of postconviction experience.[6] *Supra* 19.

[6] If a state requires that appointed counsel have the requisite postconviction experience, then the state may satisfy the first benchmark even if it permits an exception to that requirement "for good cause," as long as appointed counsel has the "background, knowledge, or experience [that] would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty

Benchmark Two requires "meeting qualification standards" set out in the Innocence Protection Act, which provides grants to states with systems for appointing qualified attorneys for indigent defendants. *See* 28 C.F.R. §26.22(b)(1)(ii) (citing 42 U.S.C. §§14163(e)(1), (2)(A), (B), (D), and (E) (now 34 U.S.C. §60301)). That benchmark requires that a state invest appointment authority in a public defender program, an entity composed of individuals with capital expertise, or, pursuant to a statutory procedure established before October 30, 2004, a trial judge. *See* 34 U.S.C. §60301(e)(1). The benchmark also requires, as "integral elements," JA__**[R.150.78Fed.Reg.58,171]**, that a state's mechanism (1) monitor attorney performance, (2) provide "specialized training programs," and (3) "remov[e] from the roster" of qualified attorneys those who are ineffective, "engage in unethical conduct," or fail training requirements, 34 U.S.C. §§60301(e)(2)(D), (E).

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and the unique and complex nature of the litigation." 28 C.F.R. §26.22(b)(1)(i). Because Arizona does not satisfy the benchmark's postconviction-experience requirement, the "good cause" exception is inapplicable. In any event, Arizona does not provide for the appointment of counsel whose "background, knowledge, or experience would otherwise enable them to properly represent" death-row prisoners in capital postconviction proceedings. *See infra* 42-56.

Arizona fails this benchmark too: It does none of those things. Again, the Attorney General did not conclude otherwise.

2. Arizona does not "otherwise reasonably assure" appointment of competent counsel.

When a state does not meet the regulatory competency benchmarks, it has "some leeway," JA__**[R.150.78Fed.Reg.58,162]**, to demonstrate that its mechanism "otherwise reasonably assure[s] a level of proficiency appropriate for State postconviction litigation in capital cases," 28 C.F.R. §26.22(b)(2). But the benchmarks "do not simply identify two competency standards that will entitle a State that adopts them to a presumption of adequacy; they also serve as a point of reference in judging the adequacy of other counsel qualification standards that States may establish." JA__**[R.150.78Fed.Reg.58,172]** (preamble to regulations). As such, "[a] State mechanism that does not incorporate the benchmark standards will naturally require closer examination by the Attorney General." *Id.* Arizona's standards fail such examination, because, among other things, they fail to ensure that appointed attorneys have relevant qualifications, contravene applicable standards reflected in ABA Guidelines, and permit appointment of attorneys who meet no objective standards of competency whatsoever.

a. Arizona does not require its appointed capital postconviction counsel to have postconviction experience, despite wide agreement that "it is obvious that to be qualified to undertake a capital postconviction case, one must have actually handled a postconviction representation in the past." JA__**[R.14.11.LiebermanDecl.¶32]** (former director of Arizona's postconviction public defender office).

Capital postconviction proceedings are *sui generis*. They are the first opportunity for death-sentenced prisoners to raise critical claims challenging their convictions and sentences, including claims of newly discovered evidence, ineffective assistance of counsel, prosecutorial failure to turn over exculpatory evidence (*Brady* claims), and other issues outside of the trial record. JA__**[R.14.FDO-AZCmt.at64-65; R.14.3.ArmstrongDecl.¶¶10, 14]**. Postconviction counsel must therefore reinvestigate the client's conviction and sentence; assemble a team of experts and investigators to assist; develop new legal claims; and all the while navigate intricate state procedural rules. *See, e.g.*, JA__**[R.14.20.PhalenDecl.¶¶48-49]**. And because claims must generally be exhausted in state postconviction proceedings before they

can be raised in federal habeas, JA__**[R.14.FDO-AZCmt.at20]**, the failures of state postconviction counsel are typically irreparable.

As courts have explained, therefore, "[g]iven the extraordinarily complex body of law and procedure unique to post-conviction review, an attorney must, at minimum, have some experience in that area before he or she [is] deemed 'competent'" for purposes of Chapter 154. *Colvin-El*, 1998 WL 386403, at *6; *Wright*, 944 F. Supp. at 466-67 (finding Virginia competency standards "grossly inadequate" because they failed to require postconviction or capital experience); *Hill*, 941 F. Supp. at 1142 (noting inadequacy of Florida's competency standards because they did not require appointed counsel to "have any degree of specialization or skill in the arena of [postconviction] proceedings").[7]

The record repeatedly makes the same point in explaining why Arizona's competency standards have proven so ineffective at assuring

[7] The Attorney General cited *Ashmus v. Calderon*, 123 F.3d 1199, 1208 (9th Cir. 1997), *vacated*, 148 F.3d 1179 (9th Cir. 1998), in stating that postconviction experience should not be deemed a prerequisite for appointed counsel. JA__**[R.1.85Fed.Reg.20,710]**. But DOJ's regulations, other courts, CJA Guidelines, and Arizona experts all say otherwise. *See* JA__**[R.14.FDO-AZCmt.at64-69]**. *Ashmus* set forth no analysis for its contrary assertion, which is, in any event, dicta in a vacated decision.

appointment of competent counsel. As the former director of the ABA's Death Penalty Representation Project put it: "[I]t is essential that appointed capital post-conviction counsel have actual and meaningful post-conviction experience. … Poor people are not training wheels for inexperienced lawyers, and courts should not appoint inexperienced counsel to cases where the stakes are literally life and death." JA__**[R.14.18.MaherDecl.¶20]**. Or, as one of the state's most prominent criminal justice organizations explained: "Arizona postconviction proceedings are uniquely complex.… Postconviction experience is essential to being able to navigate that complexity and effectively represent clients." JA__**[R.17.AACJCmt.at3]**; *see also* JA__**[R.14.10.HammondDecl.¶53]**.

Even attorneys who have been appointed under Arizona's procedures agree. One attorney, for instance, who had only trial experience when he was first appointed, observed that "[t]he Arizona Supreme Court was desperate for lawyers to appoint, and [he] was a live body." JA__**[R.14.7.DarbyDecl.¶20]**. In his words, "Frankly, I did not know what I was doing as a postconviction lawyer, and my prior experience with trial cases was woefully inadequate to prepare me for

the unique complexities of a capital postconviction proceeding." JA__**[R14.7.DarbyDecl.¶10]**; *see* JA__**[R.14.20.PhalenDecl.¶¶48-49; R.14.19.GormanDecl.¶15]**.

Arizona's failure to require postconviction experience for appointed counsel is aggravated by its refusal to require counsel to have any capital experience. The key under Chapter 154 is whether the state's procedures ensure competent representation in capital postconviction proceedings. That is difficult if not impossible to achieve with no background in either postconviction or capital representation.

b. Arizona asserted below that its competency standards are nonetheless sufficient because they are akin to federal capital appointment standards in 18 U.S.C. §3599 that do not require postconviction experience. *See* JA__**[R.129.AZAG10.16.18Ltr.at4, 7-8]**. The Attorney General agreed and relied on §3599 in his certification decision. But §3599 is inapposite, and the regulations themselves reject using it to gauge the adequacy of a state's competency standards under Chapter 154.

Chapter 154 "differs from section 3599 in that chapter 154 deals exclusively with postconviction proceedings," and §3599 "does not

provide an experience requirement tailored specifically to postconviction proceedings." JA__**[R.150.78Fed.Reg.58,169]** (preamble to regulations). Instead, §3599 applies to both pre-judgment and post-judgment appointments, and does not distinguish in the post-judgment context between direct-appeal and postconviction appointment standards. *See* 18 U.S.C. §3599(c). The federal CJA Guidelines, however, which apply to appointments under §3599, are clear that "[i]n appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings." Guidelines for the Administration of the Criminal Justice Act and Related Statutes (CJA Guidelines), §620.50(b), https://www.uscourts.gov/sites/default/files/vol07a-ch06.pdf.

A previous version of DOJ's certification regulations proposed using the §3599 standard—requiring only appellate and other felony experience—as a competency benchmark for postconviction appointments under Chapter 154. But DOJ rejected that approach in the final regulations. DOJ explained that commenters had "persuasive[ly]" shown that "the difficult and unique demands [of]

postconviction law and procedure" make "postconviction litigation experience … a better measure of competency" than general trial or appellate experience. JA__**[R.150.78Fed.Reg.58,169]**. DOJ also explained that courts had concluded that "specialized postconviction litigation experience" should be required for Chapter 154 appointments, and that several states had followed that guidance. *Id.* The final regulation's first benchmark standard accordingly specifies "three years of postconviction litigation experience, rather than three years of any sort of felony litigation experience as in the proposed rule." *Id.*

In urging that a §3599-like competency standard nonetheless satisfies Chapter 154, Arizona and the Attorney General disregard this history. Moreover, Arizona itself previously agreed that postconviction experience was essential for appointed postconviction attorneys. From 1999 to 2011, the state appointment standards required postconviction experience, albeit not the three years that the federal benchmark specifies. *Supra* 19. Arizona deleted that requirement after it was unable to attract qualified counsel willing to accept appointments at Arizona's compensation rate. JA__**[R.14.FDO-AZCmt.at40, 44]**. From 2011 to present, therefore, Arizona's mechanism has required only a

combination of general felony appeal and trial experience. *Supra* 19, 39.

It is possible to imagine an adequate state system that permits some appointments of attorneys who have no postconviction experience. One can envision a system, for example, that permits appointment of attorneys with substantial capital experience along with substantial background knowledge of postconviction law. Or a public defender office that has an appropriate mix of supervising attorneys with deep postconviction experience and more junior, less experienced attorneys. But Arizona has established nothing like this; the state simply substitutes appellate and trial experience for postconviction experience, which is exactly what the governing DOJ regulations, as finally promulgated, rejected.

c. Arizona's mechanism also contravenes multiple provisions of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, as the ABA itself has concluded. *See* JA__**[R.120.ABACmt.; R.241.ABAGuidelines]**. The Supreme Court has described the ABA's standards as reflecting "[p]revailing norms of practice," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and as

"guides to determining what is reasonable" regarding attorney performance, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Lower courts have looked to the ABA Guidelines to determine whether states satisfy Chapter 154, *see, e.g.*, *Hill v. Butterworth*, 170 F.R.D. 509, 521 (N.D. Fla. 1997). And the preamble to DOJ's regulations cites the Guidelines repeatedly. *See, e.g.*, JA__**[R.150.78Fed.Reg.58,166, 58,170, 58,172]**.

Arizona violates the standards reflected in Guideline 3.1, which states that the entity responsible for appointing counsel "should be independent of the judiciary." JA__**[R.241.ABAGuideline3.1]**. The guideline thus makes clear that "lawyer selection should not be performed by the judiciary or elected officials." JA__**[R.241.ABAGuidelines.at946]** (Guideline commentary).

Arizona does the opposite: It places exclusive appointment authority in the judiciary. The state originally employed an independent screening committee, but disbanded the committee in 2001 after it rejected a large percentage of applicants as unqualified. *Supra* 13-15. Instead, Arizona has a black box, relying on a single Supreme Court staff attorney who processes applications and forwards them to Supreme Court justices for appointment decisions, with little if any

independence or public transparency. *See* JA__**[R14.20.PhalenDecl.¶¶4, 10; R14.19.GormanDecl.¶¶17, 21; R14.7.DarbyDecl.¶¶18, 20, 22]**.[8]

Arizona also violates Guidelines 7.1 and 8.1. Guideline 7.1 requires substantive "monitor[ing]" of appointed capital counsel, including a "periodic[]" review of the roster of qualified attorneys "to ensure that those attorneys remain capable of providing high quality legal representation." JA__**[R.241.ABAGuideline7.1]**. Arizona's mechanism encompasses no such monitoring, and capital postconviction attorneys have routinely been reappointed by the state supreme court after performing inadequately. *See* JA__**[R.14.FDO-AZCmt.at83-120]**. Guideline 8.1 requires comprehensive training and funding for training of appointed counsel, also absent from Arizona's system. JA__**[R.241.ABAGuideline8.1]**; *see also* JA__**[R.120.ABACmt.at11]**.

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[8] In contrast, a screening committee makes recommendations for capital trial and direct-appeal appointments in Arizona's largest county (Maricopa). JA__**[R.14.FDO-AZCmt.at73-75; R.14.4.ChapmanDecl.]**. That committee has offered to perform screening for capital postconviction appointments, JA__**[R.14.FDO-AZCmt.at74]**, only to be rebuffed. The committee has rejected for trial and appellate appointments several attorneys who have been given postconviction appointments. JA__**[R.14.FDO-AZCmt.at75]**.

Arizona's mechanism thus falls far short of the national standards that are widely considered the barometer of capital counsel standards.

d. Even if Arizona's standards were otherwise sufficient to assure attorney proficiency, the state has a gaping loophole that permits their routine evasion. Arizona Rule of Criminal Procedure 6.8(e) allows appointment of capital postconviction counsel who do not meet the state's own competency standards. It provides:

> In exceptional circumstances, a court may appoint an attorney who does not meet the qualifications set forth in this rule if:
>
> (1) the Supreme Court consents;
>
> (2) the attorney meets the requirements set forth in [Rule 6.8](a)(3)-(5);
>
> (3) the attorney's experience, stature, and record establishes that the attorney's ability significantly exceeds the standards set forth in this rule; and
>
> (4) the attorney associates with a lawyer who meets the qualifications set forth in this rule and the associating attorney is appointed by the court for this purpose.

Arizona has not defined "exceptional circumstances," has issued no criteria for how it determines whether an otherwise unqualified lawyer nonetheless may possess "ability [that] significantly exceeds the standards set forth in this rule," and has developed no standards or

guidance regarding what "associates with" means, or defined the role of associated counsel. *See* JA__**[R.14.3.ArmstrongDecl.¶42; R.14.6.MaynardDecl.¶¶5, 19-20; R.14.19.GormanDecl.¶20; R.14.20.PhalenDecl.¶¶43-44]**. As one experienced Arizona capital counsel explained, Rule 6.8(e) as a practical matter "is dumbing down the system to make it as easy as possible to appoint unqualified lawyers, and to make it as easy as possible for associated qualified lawyers to really not have to do anything." JA__**[R.14.20.PhalenDecl.¶44]**.

The record proves there is nothing exceptional about "exceptional circumstances" in Arizona. The Arizona Supreme Court has used Rule 6.8(e) to appoint attorneys in 25% of all cases since 1998, and in 30% of cases since 2011. JA__**[R.14.FDO-AZCmt.at31-32n.16, 77, 79-80]**. Those appointments are also made in a black box—they are unaccompanied by any showing or finding of exceptional circumstances, and the attorneys appointed receive no instruction regarding what it means to "associate with" qualified counsel. *See* JA__**[R.14.6.MaynardDecl.¶¶13-16; R.14.19.GormanDecl.¶20; R.14.20.PhalenDecl.¶¶42-44; R.14.FDO-AZCmt.at80-82]**.

Confirming the futility of this scheme, the state oversight committee recommended in 2018 that Rule 6.8(d) (now 6.8(e)) be amended to require that unqualified appointed counsel "meaningfully" associate with a lawyer who meets state competency standards, but Arizona made no such change. *Supra* 19-20. That Arizona, when the opportunity presented itself, declined to take even the modest step of requiring its unqualified capital counsel to "meaningfully" associate with a qualified lawyer, lays bare that its mechanism does not reasonably ensure the appointment of competent attorneys.

e. Arizona's failure to appoint competent counsel is no abstract matter. The empirical record shows that "Arizona's continued reliance on *ad hoc* and private counsel appointments and failure to provide a consistent statewide mechanism has failed to provide [for the appointment of] competent counsel." JA__**[R.120.ABACmt.at20]**. "In practice, Arizona's mechanism has been woefully inadequate in providing a consistent system to appoint competent counsel to capital defendants in post-conviction proceedings for years." *Id.*; *see also*, *e.g.*, JA__**[R.134.SchayeCmt.at3]** ("[T]he Arizona Supreme Court has continued to appoint post-conviction counsel lacking the necessary skills

to provide effective representation in capital cases.");

JA__**[R.142.PhillisCmt.at1]** (noting Maricopa County counsel's "dismay[]" at "the lack of competency demonstrated by some [appointed postconviction] attorneys"); JA__**[R.140.FDO-AZSupp.Cmt.at30; R.14.FDO-AZCmt.at74]**.

Any review of the attorneys actually appointed under Arizona's procedures underscores the procedures' failings, as evidenced by FDO-AZ's comment that profiled attorneys who have received multiple appointments. JA__**[R.14.FDO-AZCmt.at83-120]**. Among them: attorneys expressly found deficient or otherwise criticized by state and federal judges (JA__**[R.14.FDO-AZCmt.at84-87, 97-101, 105-09, 117-20]**), attorneys formally suspended from practicing law or placed on probation for unethical behavior and performance issues (JA__**[R.14.FDO-AZCmt.at87-91, 91-94, 94-97, 114-16]**), an attorney who lied about attendance at required capital training (JA__**[R.14.FDO-AZCmt.at110-12]**), and another found to have committed billing fraud (JA__**[R.14.FDO-AZCmt.at114-16]**). And then attorneys whose conduct and performance generally should have

disqualified them from appointment to a capital case. *See* JA__**[R.14.FDO-AZCmt.at83-120]**.

The Attorney General concluded that such evidence of the real-world performance of Arizona's system is irrelevant to the certification inquiry. JA__**[R.1.85Fed.Reg.20,711-12]**.[9] But the question before the Attorney General, and the question now before this Court, is whether the state "otherwise reasonably assure[s]" competent counsel in state postconviction proceedings, given that the state does not meet the regulations' postconviction experience or Innocence Protection Act competency benchmarks. JA__**[R.1.85Fed.Reg.20,710]**; 28 C.F.R. §26.22(b)(2). Empirical evidence showing how the system has actually functioned in practice is probative regarding that inquiry—not just regarding attorney competency, but also as to other elements of the certification analysis—and the Attorney General had no basis for concluding otherwise.

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[9] The Attorney General stated in particular: "[T]he 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 …. The statute does not provide that the Attorney General is to inquire into counsel's performance following appointment in all or even some cases." JA__**[R.1.85Fed.Reg.20,712]**.

Arizona's scheme is fundamentally flawed, both on paper and in practice.

3. *Spears* does not support certification.

In nonetheless certifying Arizona, the Attorney General erroneously relied on *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002). *See* JA__**[R.1.85Fed.Reg.20,707-11]**. In *Spears*, the Ninth Circuit generally approved of Arizona's previous appointment standards but held the state could not avail itself of Chapter 154 because counsel there was not appointed pursuant to those standards. As eleven judges noted in dissenting from denial of rehearing en banc, there is a strong argument that the *Spears* discussion is dicta. *See* 283 F.3d at 998-99 ("The panel's statement that Arizona opted-in to Chapter 154's abbreviated capital review procedures is clearly unnecessary to its resolution of the case, does not affect its outcome in any manner, and constitutes an advisory opinion."). Indeed, to our knowledge, no court has treated *Spears* as effectively certifying Arizona, and no court applied Chapter 154 to Arizona cases in its aftermath.

Spears is in any event irrelevant to this certification proceeding. Four years after the decision issued, Congress stripped the courts of

certification authority, transferred that authority to the Attorney General, and directed the Attorney General to promulgate implementing regulations. *Supra* 8-9. *Spears* has no bearing on whether Arizona's mechanism meets the governing regulatory standards that states must meet for certification, which were promulgated more than a decade later.

Even putting aside that *Spears* could not have assessed Arizona's compliance with regulations that did not yet exist, Arizona's mechanism that is now before this Court is very different from the scheme that *Spears* considered almost twenty years ago. Among other things, the version of the Arizona system that was before the Ninth Circuit required that appointed capital postconviction counsel have actual postconviction experience. *See* 283 F.3d at 1011, 1013. As noted, Arizona discarded that requirement in 2011. *Supra* 19.

Subsequent to the scheme reviewed in *Spears*, Arizona has also reduced the number of capital defense training hours required for appointed counsel; disbanded the committee that had screened capital postconviction counsel applications; contravened multiple other ABA appointment standards; increased reliance on the Rule 6.8(e) loophole

allowing appointment of unqualified counsel; and in 2018 rejected capital oversight committee recommendations to address some of the mechanism's shortcomings. *Supra* 19-20; JA__**[R.14.FDO-AZCmt.at41-42; R.140.FDO-AZSupp.Cmt.at3, 29-32; R.134.SchayeCmt.]**. All of these developments are part of the record against which Arizona's mechanism must now be assessed under 28 U.S.C. §2265, and they all post-date the version of the mechanism that *Spears* considered in 2002, some by many years.

Nor did the Ninth Circuit have before it the record of Arizona's failures currently before this Court. In 2006, for example, Arizona abandoned its mechanism and created a postconviction public defender's office to ensure competent postconviction representation of death-row prisoners. But Arizona never sufficiently funded the office, and terminated it five years later. At that point, Arizona reverted to a weakened version of its previous system that was widely acknowledged as deficient. *See, e.g.*, JA__**[R.14.17.MeyerDecl.Ex.30at8]** (testimony of Arizona Sen. John Huppenthal); JA__**[R.14.13.KimererDecl.¶16]** (declaration of member of commission established by state Attorney General) ("Arizona's system for appointing capital postconviction

lawyers had deep and systemic problems, including the regular appointment of unqualified lawyers."). Again, *Spears* confronted none of this, because the events occurred after *Spears* was decided.

Spears does not support the Attorney General's decision, and Arizona cannot properly be certified.

B. Arizona fails to adequately compensate counsel.

To be certified, a state must also demonstrate that it provides for the "compensation … of competent counsel." 28 U.S.C. §2265(a)(1)(A). A state's compensation must provide "sufficient financial incentives to secure the appointment of competent counsel in sufficient numbers to timely provide representation." JA__**[R.150.78Fed.Reg.58,173]** (preamble to regulations); *see* 28 C.F.R. §26.22(c)(2). The record here is unambiguous: Arizona's compensation—a $100-per-hour maximum rate—provides no such incentive.

1. Arizona does not meet the compensation benchmarks.

A state's compensation is presumptively adequate if it "is comparable to or exceeds" one of four regulatory benchmarks. 28 C.F.R. §26.22(c)(1)(i)-(iv). Arizona's $100-per-hour maximum rate satisfies none.

Benchmark One is compensation of appointed counsel in federal capital habeas proceedings. 28 C.F.R. §26.22(c)(1)(i). In 1998, that was $125 per hour; in 2020, it is $195 per hour. United States District Court, District of Arizona, Rates, http://www.azd.uscourts.gov/attorneys/cja/rates (D. Ariz. Rates). Arizona has never met this benchmark. Today, its compensation is barely half the federal rate. *See* A.R.S. §13-4041(F).

Benchmark Two is compensation of retained counsel in state capital postconviction proceedings. 28 C.F.R. §26.22(c)(1)(ii). There have been no such retained counsel in Arizona since 1998. JA__**[R.14.3.ArmstrongDecl.¶26]**. In 2016, retained counsel in other Arizona criminal cases earned $259 per hour on average, more than two-and-a-half times the $100-per-hour rate. JA__**[R.14.17.MeyerDecl.Ex.157at25]**; *see* JA__**[R.14.20.PhalenDecl.¶68; R.14.6.MaynardDecl.¶22]**.

Benchmark Three (compensation of appointed counsel in state capital trials or appeals) and **Benchmark Four** (compensation of attorneys representing the state in capital postconviction proceedings) are not at issue here. 28 C.F.R. §26.22(c)(1)(iii)-(iv). Arizona has either

failed to provide sufficient information or does not contend that it meets the applicable standards. *See* JA__**[R.1.85Fed.Reg.20,714]**.

2. Arizona's compensation is not "otherwise reasonably designed to ensure" availability of competent counsel.

a. When a state does not meet the benchmarks, it may be certified only if it provides compensation "otherwise reasonably designed to ensure the availability for appointment of [competent] counsel." 28 C.F.R. §26.22(c)(2). The "latitude to consider alternative compensation standards … is not unbounded"; the benchmarks must "guide the Attorney General's evaluation."

JA__**[R.150.78Fed.Reg.58,173]**.

Arizona's compensation is not "reasonably designed" to secure competent counsel. Arizona's compensation has not changed for over two decades. *See* A.R.S. §13-4041. Not once, not even for inflation. Over twenty-two years, its compensation has fallen dramatically behind the rates paid to comparable appointed counsel. The rate for appointed counsel in federal capital habeas cases has increased from $125 to $195 per hour. D. Ariz. Rates; CJA Guidelines §630.10.10(A). The rate in

federal non-capital cases is now $152 per hour. CJA Guidelines §230.16(A).

The record confirms that Arizona's compensation is too low to ensure the availability of competent counsel for timely appointment to capital postconviction cases—the entire purpose of the compensation requirement. 28 C.F.R. §26.22(c)(2); JA__**[R.150.78Fed.Reg.58,172-73]**. This is a consensus view. The ABA reached that conclusion fourteen years ago. JA__**[R14.17.MeyerDecl.Ex.5atiii, 153-54]** (2006 ABA report). That same year, Arizona Supreme Court Justice Michael Ryan reported that "the amount of money is too low" to secure attorneys for appointment. JA__**[R.14.17.MeyerDecl.Ex.14at10]**.

In 2007, 2008, 2010, 2012, 2013, 2015, and 2018, Arizona's capital case oversight committee—a cross-section of judges, prosecutors, and defense attorneys—recommended increased compensation to better attract competent capital postconviction counsel. JA__**[R.134.Schaye.Cmt.at2; R.140.FDO-AZSupp.Cmt.Ex2at5]**. In 2012, Arizona Supreme Court Justice Scott Bales joined the call. JA__**[R.14.9.MoultonDecl.Ex.582at6]**. All to no avail.

Commenter after commenter, and declarant after declarant, explained in these proceedings that "limiting compensation to $100 per hour almost guarantees ineffective assistance of counsel," because the "only lawyers" who are "consistent[ly] interest[ed] in accepting appointments are those who will not be hired" otherwise. JA__**[R.14.18.MaherDecl.¶22]** (former head of ABA's death penalty project). So say the most respected criminal justice organizations (JA__**[R.125.ACRPCmt.at7; R.141.ACRPSupp.Cmt.at1-2; R.18.InnocenceProj.&AzJusticeProj.Cmt.at4; R.17.AACJCmt.at3; R.120.ABACmt.at5, 17-18; R.138.ABASupp.Cmt.at1-2; R.127.PhillipsBlackCmt.at3-4]**); a former state bar president (JA__**[R.14.13.KimererDecl.¶¶32-34]**); the former head of the statewide postconviction public defender's office (JA__**[R.14.11.LiebermanDecl.¶34]**); the former chair of the state bar's indigent defense task force (JA__**[R.14.10.HammondDecl.¶¶59-61; R.144.HammondSupp.Cmt.at3-4]**); capital oversight committee members (JA__**[R.134.SchayeCmt.at2-3]**); and some of Arizona's most respected criminal defense attorneys (JA__**[R.14.20.PhalenDecl.¶¶52, 67-70; R.14.6.MaynardDecl.¶¶22-24; R.14.19.GormanDecl.¶¶9-14;**

R.14.3.ArmstrongDecl.¶45]). Even the Arizona "Attorney General's office … supports a higher amount than currently prescribed to encourage competent counsel to apply for appointments on capital cases." JA__**[R.140.FDO-AZSupp.Cmt.Ex.2at5]** (state oversight committee report).

b. Despite this unrebutted record, the Attorney General nevertheless determined that Arizona's rate is sufficient. The Attorney General based that determination on some back-of-the-napkin math: Assuming a 40-hour work week and 2,000 hours of billable work per year, postconviction counsel being paid at $100 per hour "would receive $4,000 for a week of full-time work on a capital case, and … $200,000 for a year's work," and therefore compensation would be sufficient. JA__**[R.1.85Fed.Reg.20,713-14]**.

That the Attorney General would resort to such casual arithmetic in disregard of the record is extraordinary. The record demonstrates unequivocally that $100-per-hour is insufficient to secure the appointment of competent capital postconviction counsel, or to sustain a law practice. Experienced Arizona practitioners submitted sworn declarations to that effect. As one attorney explained, "it is difficult if

not impossible to sustain a legal practice at such a rate of compensation for cases that take years to resolve." JA__**[R.14.20.PhalenDecl.¶67]**. Another attorney added: "Compensation of $100 per hour is not enough to cover overhead in private practice. My practice … would take a loss … at that rate." JA__**[R.14.13.KimererDecl.¶33]**. Another attorney actually "lost money every time [he] accepted a postconviction appointment …. [He] accepted those appointments out of a sense of public service, not to make money." JA__**[R.14.6.MaynardDecl.¶22]**; *see also* JA__**[R.14.19.GormanDecl.¶11]**. And yet another attorney can accept state postconviction appointments only by "having almost no overhead expenses"—"no physical office[] and … no administrative support." JA__**[R.14.7.DarbyDecl.¶25]**.

In short, "the only attorneys who would regularly accept appointments at the rate of $100 per hour are those with insufficient experience or insufficient qualifications to competently represent clients in post-conviction proceedings." JA__**[R.14.20.PhalenDecl.¶70]**.

The Attorney General also posited that the compensation rate is sufficient because Arizona has been able to appoint people to take on postconviction matters. JA__**[R.1.85Fed.Reg.20,715]**. That is a non-

sequitur. The fact that Arizona has been able to find lawyers willing to undertake capital postconviction representations at this rate does not establish that those counsel are competent. And the Attorney General failed to address the fact that the state has been able to find attorneys to appoint only by regularly taking up to two or three years to make appointments. *See, e.g.*, JA__**[R.14.3.ArmstrongDecl.¶43]** ("frequently waited two or three years between their direct appeal and the appointment of post-conviction counsel."). If its $100 hourly rate were sufficient to attract competent counsel, the state would not have encountered such significant delays. See JA__**[R.14.3.ArmstrongDecl.¶¶43, 47];** **R.14.10.HammondDecl.¶¶44-45, 59]**.

The Attorney General also relied on *Spears* in finding that Arizona's compensation satisfied Chapter 154. JA__**[R.1.85Fed.Reg.20,713-14]**. But the sufficiency of Arizona's compensation rate was not disputed in *Spears*, and the court there did not analyze it. *See* 283 F.3d at 1015. Moreover, in the eighteen years since *Spears*, Arizona's compensation rate has remained unchanged. The regulations' preamble recognizes that "inflation or changed

economic circumstances" may render compensation that was "sufficient at the time of an initial certification decision" insufficient "after the passage of years." JA__**[R.150.78Fed.Reg.58,176]**. So even if $100-per-hour were deemed sufficient in 1998, the rate would need to be increased to more than $150 today just to keep pace. *See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm.

c. For its part, Arizona has pointed (in a supplemental submission filed at DOJ's behest) to cases where it asserts it paid a large sum to defense counsel. *See* JA__**[R.129.AZAG10.16.18Ltr.at5]**; *see also* JA__**[R.1.85Fed.Reg.20,714]** (certification decision). But several of those cases involved no compensation paid to attorneys, because the attorneys undertook representation free of charge. *See* JA__**[R.140.FDO-AZSuppCmt.at10-11; R.144.HammondSupp.Cmt.at3; R.132.GormanSupp.Cmt.at1-2; R.137.LynchSupp.Cmt.at1; R.138.ABASupp.Cmt.at2; R.147.MoranSupp.Cmt.at1-2]**. Included, for example, are cases in which the ABA recruited out-of-state pro bono law firms because Arizona was unable to secure counsel at its compensation rate. The

dollar amounts submitted by the Arizona Attorney General for those cases thus reflect the payment of litigation expenses, not attorney compensation. *See* JA__**[R.129.AZAG10.16.18Ltr.at5; R.140.FDO-AZSuppCmt.at10-11]**.

Even if the figures did reflect attorney compensation, the fact that the state in a particular capital postconviction proceeding may have paid a substantial attorney fee does not, again, prove that its $100 hourly rate is generally adequate to attract competent lawyers. It does not even prove that counsel in that case was competent. *See* JA__**[R.140.FDO-AZSuppCmt.at11-12]**.

There is nothing in the record contradicting the evidence that Arizona's $100 compensation rate is woefully insufficient to attract competent capital postconviction counsel. Arizona's deficient compensation forecloses certification.

C. Arizona does not guarantee payment of reasonable litigation expenses.

To qualify for certification, a state's capital counsel mechanism must also "provide for payment of reasonable litigation expenses of appointed counsel." 28 C.F.R. §26.22(d); *see* 28 U.S.C. §2265(a)(1)(A). Competent capital postconviction representation typically "requires a

pool of expertise" beyond qualified counsel, including fact investigators, mitigation specialists, mental health specialists, and forensic experts. JA__**[R.14.18.MaherDecl.¶23]**; *see also* JA__**[R.241.ABAGuideline4.1(B)]** (ABA Guideline 4.1(B)). It is therefore "critical that a state appointment mechanism mandate the payment of reasonable litigation expenses." JA__**[R.14.18.MaherDecl.¶23]**.

Arizona does not do so. Arizona law provides only that "[t]he trial court *may* authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate" the case. A.R.S. §13-4041(I) (emphasis added).[10] This language is permissive, not mandatory. There is no statewide requirement for payment of reasonable litigation expenses in a capital postconviction

[10] The Attorney General also cited A.R.S. §§13-4041(G) and 13-4013(B) in support of certification. Section 13-4041(G) pertains to counsel's fees and costs. Arizona did not point to §13-4013(B) in its submissions to DOJ; that provision refers to the appointment of investigators and expert witnesses in felony cases. Regardless, nothing in the decision's statutory references alters the uncontradicted record showing that, in many Arizona capital postconviction cases, reasonable litigation expenses are not paid.

case. The absence of such a requirement disqualifies the state's mechanism.

In nonetheless certifying Arizona, the Attorney General stated that the word "may" in the state statute does not preclude certification, because reasonable expenses can still be reimbursed in any particular case. JA__**[R.1.85Fed.Reg.20,715-16]**. That misses the point. The point is not just that the permissive nature of the statute and the use of "may" makes the state's capital counsel scheme legally deficient. The point is also that, against the backdrop of the permissive "may," Arizona has not shown that, in general, reasonable litigation expenses in state capital postconviction cases are actually and consistently paid. JA__**[R.14.FDO-AZ.Cmt.at130-36]**. The Attorney General did not conclude otherwise. Instead, he relied on Arizona's "deni[al] that the variation in language is significant" and asserted that commenters failed to show courts are afforded "boundless discretion to refuse to pay for expenses that are reasonably necessary." JA__**[R.1.85Fed.Reg.20,715]**.

First, "boundless discretion" is not the standard. Second, it is Arizona's burden to prove eligibility for Chapter 154's habeas

restrictions. *Infra* 86-93. Third, the record makes abundantly clear that payment of litigation expenses for capital postconviction cases in Arizona is largely ad hoc, and in many instances reasonable expenses have not been properly paid. *See* JA__**[R.14.10.HammondDecl.¶¶62-64; R.14.19.GormanDecl.¶¶22-24; R.14.15.ShawDecl.¶¶7-9]**. For example, Arizona courts have repeatedly denied payment for travel to develop relevant mitigation evidence, JA__**[R.14.FDO-AZCmt.at132]**, and for the appointment of essential experts, JA__**[R.14.FDO-AZCmt.at132-33]**. And Arizona's failure to consistently pay reasonable litigation expenses has led to a scarcity of available qualified specialists. *See* JA__**[R.14.3.ArmstrongDecl.¶21; R.14.12.DurandDecl.¶¶10-11]**.

Thus, the state's practice aligns with its statutory language: In some cases, courts may pay reasonable litigation expenses, but the mechanism does not require, let alone guarantee, such payments, and in many cases they are not approved. *See, e.g.*, JA__**[R.14.10.HammondDecl.¶64]** ("In Maricopa County, for instance, the denial of reasonable litigation expenses was commonplace for much of the period from 1998 until around 2010—depending on the county's

budgetary circumstances, the preferences of county administrators, and the identity of the presiding judge."); JA__**[R.14.19.GormanDecl.¶23]** ("I have experienced the routine denial of such expenses in a capital postconviction case outside of Maricopa County," "[i]n Cochise County."); *see also* JA__**[R.146.LiebermanSupp.Cmt.at2]** (describing funding issues in the statewide Postconviction Public Defender Office: "At times, limitations and reductions to the Office's budget resulted in inadequate funds to cover litigation expenses and required me to suspend work by expert witnesses.").

The Attorney General asserted that the regulations do not require "statewide uniformity in payment of litigation expenses." JA__**[R.1.85Fed.Reg.20,716]**. But that also misses the point. The point is not that reimbursement patterns may sometimes vary from one case to another, or from one jurisdiction to another. The point is that, consistent with its governing statute, Arizona does not require that reasonable expenses be paid in this context, and they often are not. The record shows that payments are not reasonably assured, and the state has not demonstrated otherwise.

To the extent the Attorney General suggested his conclusion was supported by *Spears*, that is again incorrect. JA__**[R.1.85Fed.Reg.20,715]**. *Spears* did not address payment of litigation expenses under A.R.S. §13-4041(I). *See* 283 F.3d at 1016. Further, the court in *Spears* did not have before it the record in this case showing that Arizona has failed to consistently assure payment of reasonable litigation expenses in capital postconviction cases, including in the years since *Spears*.

Arizona's system fails the litigation-expenses requirement because it does not mandate or in any way consistently assure payment of such expenses.[11]

[11] 18 U.S.C. §3599(f), which provides that a court "may" authorize investigative or expert services, does not validate Arizona's statutory language for certification purposes. Section 3599, as noted, concerns federal capital counsel appointments; it does not concern the distinct question of whether a state meets its burden for Chapter 154 certification—which, when granted, alters the applicable federal habeas process. Nor does the record here address how §3599(f) is applied and implemented; much less does it contain evidence suggesting any concern under §3599 that reasonable litigation expenses are not being paid.

D. Arizona fails to ensure timely appointments.

DOJ's regulations require that a state's mechanism provide for the appointment of postconviction counsel "in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings." 28 C.F.R. §26.21. The requirement "reflect[s] the … importance of the timely availability of counsel in the context of a complex and difficult type of litigation and specific issues arising from chapter 154's special time limit for Federal habeas filing[s]." JA__**[R.150.78Fed.Reg.at58,165]** (preamble to regulations).

Arizona has no timeliness requirement. There is no requirement in the Arizona scheme that capital postconviction counsel be appointed within any particular time frame. JA__**[R.1.85Fed.Reg.20,716; R.2.AZapplication; R.129.AZAG10.16.18Ltr.at4]**.

Arizona used to have a timeliness requirement. A former provision of Arizona state law, long removed, required that "[u]pon the filing of a timely notice [for postconviction relief] in a capital case … the presiding judge shall appoint counsel for the defendant within 15 days

if requested and the defendant is determined to be indigent." JA__**[R.14.17.MeyerDecl.Ex.299]** (Ariz. R. Crim. P. 32.4(c) (1999)). It is unclear that this fifteen-days-from-postconviction-notice proviso would meet Chapter 154's timeliness prerequisite, given Chapter 154's newly restrictive timing and tolling provisions. *See* 28 U.S.C. §2263. But that requirement has not existed since 2000.

And the record demonstrates that Arizona has, in fact, not consistently made timely appointments. Even when there was a time limit on the books, it was often disregarded. And since the time limit was repealed, the record shows that the state has sometimes delayed appointments for two years or more. *See* JA__**[R.14.FDO-AZCmt.at35, 138-40]**. Indeed, from 2000 to 2011, defendants waited, on average, 711 days for postconviction counsel to be appointed following the Arizona Supreme Court's affirmance on direct review. JA__**[R.14.FDO-AZCmt.at140; R.14.2.Case.Chart]**. From 2011 (when Arizona deleted its postconviction experience requirement) to 2018, prisoners waited an average of 256 days. JA__**[R.14.FDO-AZCmt.at140; R.14.2.Case.Chart]**.

The Attorney General nevertheless asserted that Arizona satisfies the timeliness requirement because, in his view, it can be expected that federal habeas courts in addressing timing issues will "fairly" and reasonably try to mitigate any prejudice flowing from the delay in state capital postconviction appointments. JA__**[R.1.85Fed.Reg.20,718]**. The Attorney General added that any suggestion to the contrary is "[s]peculation." *Id.*

The Attorney General gets matters backwards. It is the Attorney General who engaged in "speculation." Specifically, he speculated that federal courts in habeas proceedings can be expected to address timing concerns "fairly" under Chapter 154, as the courts in his view have done under Chapter 153, which sets forth the applicable habeas provisions where a state's capital counsel mechanism has not been certified. *See* 28 U.S.C. §§2241-55. The Attorney General pointed in particular to *Isley v. Arizona Department of Corrections*, 383 F.3d 1054 (9th Cir. 2004), which held that for purposes of Chapter 153, the statute of limitations for a prisoner's federal habeas petition would be tolled from the initial filing of a notice of state postconviction relief (as opposed to the prisoner's subsequent submission of an actual postconviction

application). JA__**[R.1.85Fed.Reg.20,718]**. Chapter 154 is, of course, markedly different from Chapter 153. Reflecting Congress's goal of accelerating the habeas process, Chapter 154 drastically cuts the statute of limitations applicable under Chapter 153 in half, from one year to 180 days, *compare* 28 U.S.C. §2244(d)(1) *with* 28 U.S.C. §2263(a), and also replaces Chapter 153's tolling provisions with new rules that are materially different and considerably more stringent, *compare* 28 U.S.C. §2244(d) *with* 28 U.S.C. §2263(b).

But whether federal habeas courts under Chapter 154 will try to be fair and reasonable in seeking to mitigate harm resulting from delayed appointments is ultimately beside the point. Setting aside that the Attorney General has no say in how federal courts will interpret Chapter 154 in individual habeas cases (as he readily acknowledged in dismissing petitioners' retroactivity concerns, JA__**[R.1.85Fed.Reg.20,719]**), certification requires that Arizona's appointment mechanism itself contain a timeliness provision. *See* 28 C.F.R. §26.21. Arizona's scheme features no such requirement, either in theory or in practice. Arizona therefore cannot be certified.

And it is unclear in any event how a federal habeas court could properly alleviate the harms that can befall a death-row prisoner who languishes without counsel for a lengthy period after his direct review proceedings are completed but before being appointed postconviction counsel. The record explains that, in this period, which has regularly lasted months or even years in Arizona, memories can fade, witnesses can disappear, and evidence can be, and often is, lost. *See, e.g.*, JA__**[R.14.3.ArmstrongDecl.¶43]**. That kind of harm cannot later be undone, even by the most well-meaning habeas court.

In short, Arizona's mechanism cannot be certified because it has no requirement for the timely appointment of capital postconviction counsel. The Attorney General's reasoning to the contrary is erroneous. The certification must therefore be set aside.

* * *

The Attorney General's certification of Arizona cannot be upheld on de novo review. Arizona's capital counsel mechanism fails to provide adequate competency standards for appointed postconviction counsel, fails to adequately compensate appointed attorneys, fails to mandate

reimbursement of reasonable expenses, and fails to require timely appointments.

The Attorney General's failure to engage with the record on these points also renders his decision arbitrary and capricious under the APA, because he failed to "examine the relevant data," and "offered an explanation for [his] decision that runs counter to the evidence." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). At a minimum, a remand would be required for the Attorney General to address the record in a new and proper decisionmaking process.

II. The Certification Also Cannot Stand Because DOJ's Certification Regulations Are Invalid And The Certification Process Is Fundamentally Flawed.

The Attorney General's certification of Arizona fails on its own terms for the above reasons, and the Court need proceed no further. But the certification must also be struck down because DOJ's underlying regulations are invalid, and the certification process itself is flawed. Indeed, the only court to have passed upon the validity of the certification regulations has held them invalid both procedurally and substantively. *HCRC*, 2014 WL 3908220 (N.D. Cal. Aug. 7, 2014).

A. The certification decision was issued without notice and comment, which the regulations do not require.

In the preamble to DOJ's regulations, the Attorney General asserted, without explanation, that Chapter 154 certification determinations are "not subject to the APA's rulemaking provisions" because they are orders, not rules. JA__**[R.150.78Fed.Reg.58,174]**. Accordingly, the Attorney General did not follow notice-and-comment procedures when issuing the certification here: He did not alert the public that he intended to certify Arizona's mechanism until he issued the final decision announcing the certification. Nor did he provide notice of his certification reasoning, which, among other things, included rationales for certification that Arizona had not advanced (*e.g.*, the Attorney General's back-of-the-napkin compensation calculations, *supra* 65, and his invocation of §13-4013(B) regarding payment of litigation expenses, *supra* 70 n.10). As a result, death-row litigants whose habeas rights could be severely curtailed were denied a meaningful opportunity to comment on the certification decision before it was issued, as was FDO-AZ. As the district court in *HCRC* concluded, this failure to abide by notice-and-comment procedures in

connection with issuance of a certification violates the APA. 2014 WL 3908220, at *9.

"The APA defines a rule very broadly as 'the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.'" *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002) (quoting 5 U.S.C. §551(4)). In distinguishing a rule from an adjudicative order, this Court has emphasized two principles. *Safari Club Int'l v. Zinke*, 878 F.3d 316, 332-33 (D.C. Cir. 2017). First, rules are typically "generally applicable," *id.* at 332, whereas orders involve "case-specific individual determinations," *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017). Second, "rules generally have only 'future effect' while adjudications immediately bind parties by retroactively applying law to their past actions." *Safari Club*, 878 F.3d at 333; *see Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 922 (D.C. Cir. 2013). Arizona's certification is a rule under either consideration.

First, the certification is "generally applicable to an open class" of individuals, *Safari Club*, 878 F.3d at 332, namely Arizona death-

sentenced prisoners appointed postconviction counsel after May 19, 1998. *See HCRC*, 2014 WL 3908220, at *8. Moreover, the certification does "not adjudicate any dispute between specific parties." *Safari Club*, 878 F.3d at 333; *see Neustar*, 857 F.3d at 893. To the contrary, certification is "based only on the procedures adopted as policy by a state, rather than the way in which those procedures have been applied in specific cases." *HCRC*, 2014 WL 3908220, at *8-9.

Second, the certification is prospective in the sense that it will only bind specific litigants in independent habeas proceedings—and only if the habeas court determines that the remaining requirements of Chapter 154 are satisfied in an individual case. *Compare Neustar*, 857 F.3d at 896 (agency action was adjudication given "immediate effects on the individuals concerned"). To be sure, Chapter 154's future applicability may, in some cases, depend on an appointment of counsel that took place long before the certification was issued. *See* JA__**[R.1.85Fed.Reg.20,706]** (certifying Arizona's mechanism with an effective date of May 19, 1998). That is similar to *Safari Club*, where the agency's decision to ban the import of already-killed elephants applied to actions taken in the past but "resulted in no immediate legal

consequences for any specific parties"; it "only banned … importation … going forward." 878 F.3d at 333-34.

"Because certification decisions will 'affect[] the rights of broad classes' of individuals and impact such persons 'after the [decision] is applied,'" they are "properly characterized as rules rather than orders." *HCRC*, 2014 WL 3908220, at *9 (quoting *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994)). Accordingly, certification decisions must comply with the notice-and-comment requirements of 5 U.S.C. §553. Among other things, the agency must publish a notice "of proposed rule making" in the Federal Register, *id.* §553(b), and "give interested persons an opportunity to participate in the rule making through submission" of comments, which the agency must consider, *id.* §553(c).

Those requirements were not met here. The Attorney General provided no advance notice of his certification decision or of his supporting analysis. Instead, he announced only that he was considering Arizona's request for certification and invited comments on the state's application. JA__**[R.6.82Fed.Reg.53,529; R.116.82Fed.Reg.61,329]**. Given that the public received no

information concerning the agency's proposed certification decision until it was too late to provide feedback, the "notice" here did not "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Honeywell Int'l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (quotation marks omitted).

There is no question that providing advance notice of and an opportunity to comment on the Attorney General's proposed certification decision would have been advantageous. *See Sugar Cane Growers*, 289 F.3d at 96. As shown above, the Attorney General's reasoning in certifying Arizona is flawed, and there are aspects of the decision that the interested public could not reasonably have anticipated. Had death-row prisoners, FDO-AZ, and other interested parties been able to comment on the decision and its rationale prior to its issuance, the Attorney General might ultimately have issued a different decision or employed different reasoning.

The certification process here was thus legally flawed because it did not comply with APA notice-and-comment requirements. The regulations require no such procedures, and for that reason they are

therefore invalid as well, as the district court in *HCRC* determined. 2014 WL 3908220, at *8.

B. The application process set out in the regulations places no onus on the state and effectively shifts the burden of proof to third parties.

Under DOJ's regulations, a state seeking certification need only submit a "request in writing that the Attorney General determine whether the State meets the requirements for certification." 28 C.F.R. §26.23(a). This bare minimum requirement is insufficient, and arbitrary and capricious, because it does not provide the Attorney General or the commenting public with the information needed to assess the state's claimed mechanism. *State Farm*, 463 U.S. at 43 (rule is arbitrary and capricious when an agency "entirely fail[s] to consider an important aspect of the problem"). As the *HCRC* court correctly held, "the certification procedure set out in the Final Rule is" "procedurally deficient" for this reason too. 2014 WL 3908220, at *10; *see id.* at *9.

At least as applied in this case, the regulations do not require a state to provide information regarding the following questions bearing on the state's eligibility for certification:

- How the mechanism actually functions in practice.
- How terms in the state's rules are defined and implemented.
- Whether the state follows its claimed mechanism.
- Whether, ultimately, the mechanism consistently results in the timely appointment of competent, properly compensated, and adequately resourced capital postconviction counsel.

Without this information, the Attorney General and the public lack the means to properly assess a state's certification request, and certifying a state on this basis nullifies Chapter 154's *quid pro quo* premise, because it removes the burden from the state to affirmatively demonstrate eligibility for Chapter 154's habeas restrictions.

The proceedings in this case amply demonstrate the failure of the regulations to require the most basic information from the state. Arizona first applied for certification by submitting a cursory three-and-a-half-page letter to DOJ. JA__**[R.2.AZapplication]**. The letter provided little information beyond reproducing the text of Arizona statutes and procedural rules. *Id.* Among other shortfalls, the letter relied on an out-of-date version of Arizona's competency standards, inaccurately stating that Arizona required prior postconviction

experience when it does not. *Id.*; *see* JA__**[R.14.FDO-AZCmt.at56-57]**. And the letter failed altogether to address whether Arizona's scheme requires the timely appointment of postconviction counsel (as shown above, it does not).

To the extent the regulations permit this sort of barebones application, they effectively and improperly place the burden on the public to disprove the state's eligibility for certification, rather than requiring the state to affirmatively demonstrate that it satisfies applicable requirements. That means public commenters have no alternative but to canvas on their own the universe of law and fact pertinent to a state's eligibility for certification, and to uncover and compile the relevant information for the Attorney General's benefit.

That is exactly what happened here. Following Arizona's initial letter and a supplemental letter, FDO-AZ undertook its own exhaustive study of Arizona's counsel mechanism. FDO-AZ's comprehensive review resulted in a 163-page comment, accompanied by thousands of pages of documentary support, including detailed declarations from prominent members of the Arizona bar. The comment shows

unmistakably that Arizona's capital counsel mechanism is uniquely dysfunctional and has been for years. *See* JA__**[R.14.FDO-AZCmt.]**.

Confronted with FDO-AZ's conclusive analysis of Arizona's system indicating that no proper basis for certification existed, DOJ asked Arizona to respond to particular issues raised by FDO-AZ's assessment. JA__**[R.128.DOJ6.29.18Ltr.]**. In responding, Arizona again accepted no onus to make a fulsome presentation of its own. Instead, the state resorted largely to perfunctory assertions and criticisms of DOJ's questions. *See* JA__**[R.129.AZAG10.16.18Ltr.]**. Tangential data that it did provide was not informative. *See supra* 23.

Illustrative is Arizona's treatment of its Rule 6.8(a)(3), which requires appointed counsel to "have demonstrated the necessary proficiency and commitment that exemplifies the quality of representation appropriate to capital cases." Responding to DOJ's inquiry regarding how this provision is applied, the Arizona Attorney General's office's entire explanation was the following: "This is a case-by-case inquiry for the Arizona Supreme Court, based on reputation and experience known to that court. This office is not privy to how the Arizona Supreme Court evaluates defense attorneys under this

requirement and thus cannot comment."

JA__**[R.129.AZAG10.16.18Ltr.at8]**. The Attorney General cannot properly evaluate a capital counsel mechanism where, as here, the state's official representative openly acknowledges that it has no idea how an important element of its system operates.

Arizona's dismissive treatment of Rule 6.8(a)(3) underscores that the process established by the regulations relies on public commenters to determine whether a state complies with its own mechanism as written. As the *HCRC* court explained, "[c]ommon sense requires that a state must actually comply with its own mechanism, and the history, purpose and exhaustive judicial interpretation of chapter 154 also support this view." *HCRC*, 2014 WL 3908220, at *10.

In this case, the regulations ultimately permitted Arizona to navigate the certification process without undertaking to show that its scheme consistently results in the timely appointment of competent, properly compensated, and adequately resourced capital postconviction counsel. That cannot be right.

Competency is but one example. As shown above, Arizona's state competency standards do not meet the federal benchmark standards;

the state competency standards reflect a proposed benchmark that DOJ's regulations specifically rejected; and, in a significant number of cases, Arizona relies on an open-ended state exception that allows ad hoc appointment of capital postconviction counsel who do not meet even the state's own competency standards. *See supra* 52-53. Especially against this backdrop, to say that Arizona can obtain certification without demonstrating how its system can be expected to result in the appointment of qualified counsel is to reduce the process to an empty formality. We have shown that the record compels the conclusion that Arizona does not qualify for certification, *see supra* 37-80, but, at a minimum, the Attorney General could not properly certify Arizona's scheme without requiring a more robust explanation of how the scheme actually works.

Payment of litigation expenses is another example. As shown above, FDO-AZ compiled record evidence showing that Arizona's practice reflects the permissive terms of the governing state statute and does not mandate payment of reasonable litigation expenses in capital postconviction proceedings. The Attorney General's decision placed no onus on Arizona to furnish any appropriate showing that the state in

fact has a system (it does not) for reliably paying such expenses. *See supra* 71; *see also* JA__**[R.129.AZAG10.16.18Ltr.at6]** (state response to DOJ) ("[Y]our letter requested information concerning the denial of litigation funding requests. This office forwarded that request to the county officials who would have the information and learned that it is not readily available.").

In short, the Attorney General's decision violates the very precept of Chapter 154. "Chapter 154 involves a quid pro quo arrangement under which appointment of counsel for indigents is extended to postconviction proceedings in capital cases, and in return, subsequent Federal habeas review is carried out with generally more limited time frames and scope." JA__**[R.150.78Fed.Reg.at58,165]** (preamble to regulations). A state can qualify for Chapter 154's capital habeas restrictions only if it establishes a suitable mechanism for the timely appointment of properly qualified and resourced state capital postconviction counsel. Arizona wants the perceived advantages of restricted federal habeas without doing the hard work of showing that, at the state postconviction stage, death-row prisoners in Arizona are actually provided with proper legal representation as the statute

contemplates. Arizona's scheme simply does not meet the standards for certification. *See supra* 37-80. But, at a minimum, the Attorney General erred under 28 U.S.C. §2265(c) in approving Arizona's regime without requiring the state to show that, in fact, it has a qualifying mechanism. And insofar as DOJ's regulations permitted this illusory process, they are invalid. *See HCRC*, 2014 WL 3908220, at *10.

C. The regulations provide insufficient substantive standards for certification.

The defects in DOJ's certification process are compounded by the fact that the regulations leave essential criteria for certification undefined and vague. For competency and compensation respectively, the regulations purport to give the Attorney General discretion to certify a state even if the state does not meet any of the federal benchmarks for certification, if the state "otherwise reasonably assure[s] a level of proficiency appropriate for State postconviction litigation in capital cases," or if its claimed mechanism "is otherwise reasonably designed to ensure the availability for appointment of counsel who meet" Chapter 154's competency standards. 28 C.F.R. §§26.22(b)(2), (c)(2). These generalized catchall provisions are

inconsistent with Chapter 154 and are arbitrary and capricious, as the *HCRC* court also correctly concluded. *See* 2014 WL 3908220, at *11.

"It is a basic tenet that regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (internal quotation marks omitted). Thus, when Congress mandated that "[t]he Attorney General shall promulgate regulations to implement the certification procedure under [§2265(a)]," 28 U.S.C. §2265(b), the Attorney General was required to issue regulations satisfying statutory requirements.

The statute contemplates specific, binding standards for the appointment of properly qualified and properly compensated capital postconviction counsel. Chapter 154 applies when a state has "done its part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage." *Lindh v. Murphy*, 521 U.S. 320, 331 (1997). Courts interpreting Chapter 154 consistently emphasized that "[t]he statute and legislative history also require that [competency] standards be mandatory and binding," and cannot be "left to the discretion of a court or guideline administrator." *Ashmus v. Woodford*, 202 F.3d 1160, 1167-68 (9th Cir. 2000). Congress left no room for

"catchall" loopholes that are highly general and undefined, and that set forth no binding and mandatory qualification criteria.

The regulations suitably define "specific, mandatory standards" for its primary competency and compensation benchmarks. *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on reh'g on unrelated grounds*, 105 F.3d 209 (5th Cir. 1997). But they are impermissibly vague to the extent they permit states to circumvent those benchmarks by qualifying under the competency and compensation catchall provisions, which use amorphous standards like "reasonably assure[s]" and "reasonably designed." 28 C.F.R. §§26.22(b)(2), (c)(2). By failing to define and constrain those standards in a more meaningful way, the Attorney General failed to discharge his duty under §2265(b).

The certification decision here brings the regulations' deficiencies into sharp relief. As discussed above, the Attorney General took advantage of both the vague competency and compensation catchalls to effectively override the regulations' specific and objective benchmarks. He certified Arizona despite its mechanism's failure to satisfy the regulations' objective markers of a state's qualification for Chapter 154

treatment, and despite Arizona's failure to undertake a showing of how its mechanism "reasonably assure[s]" the appointment of competent counsel or is "reasonably designed" to adequately compensate qualified counsel. The certification cannot stand under 28 U.S.C. §2265(c), and to the extent the regulations allow that result, they have failed properly to "implement the certification procedure" by imposing meaningful and intelligible competency and compensation requirements. 28 U.S.C. §2265(b).

The problem is exacerbated to the extent that DOJ's regulations allow a state mechanism to meet Chapter 154's requirements by deploying the state's own vague and undefined catchalls. Indeed, it bears repeating that Arizona here has achieved certification despite regularly appointing counsel who do not meet even the state's own standards of competency, pursuant to the state's catchall loophole. *See* Rule 6.8(e). More than a quarter of Arizona capital postconviction counsel are appointed under this state escape valve. *Supra* 53. Insofar as they allow certification of such a state mechanism, DOJ's regulations fail to provide sufficiently definite certification standards.

This is not the bargain Chapter 154 envisioned. The Attorney General's certification decision fails on its own terms, and also because it rests on a deficient certification process and invalid regulations.

CONCLUSION

The Attorney General's certification of Arizona should be set aside.

Dated: August 13, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and with the Court's Order of June 22, 2020 (permitting brief not in excess of 16,000 words), because, as determined by the Word Count feature of Word 2013, it contains 15,882 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook font.

Dated: August 13, 2020

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28 U.S.C. § 2261

Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) Counsel.—This chapter is applicable if—

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

****

28 U.S.C. § 2262

Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived

such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

****

28 U.S.C. § 2263

Filing of habeas corpus application; time requirements; tolling rules.

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

****

28 U.S.C. § 2264

Scope of Federal review; district court adjudications.

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

****

28 U.S.C. § 2265

Certification and judicial review.

(a) Certification.

(1) In general.—If requested by an appropriate State official, the Attorney General of the United States shall determine—

(A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;

(B) the date on which the mechanism described in subparagraph (A) was established; and

(C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(2) Effective date.—The date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.

(3) Only express requirements.—There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

(b) Regulations.—The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).

(c) Review of certification.—

(1) In general.—The determination by the Attorney General regarding whether to certify a State under this section is subject to review exclusively as provided under chapter 158 of this title.

(2) Venue.—The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over matters under paragraph (1), subject to review by the Supreme Court under section 2350 of this title.

(3) Standard of review.—The determination by the Attorney General regarding whether to certify a State under this section shall be subject to de novo review.

****

28 U.S.C. § 2266

Limitation periods for determining applications and motions.

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of

all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.

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28 C.F.R. § 26.20

Purpose.

Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a State has a mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. If the Attorney General certifies that a State has established such a mechanism, sections 2262, 2263, 2264, and 2266 of chapter 154 of title 28 apply in relation to Federal habeas corpus review of State capital cases in which counsel was appointed pursuant to that mechanism. These sections will also apply in Federal habeas corpus review of capital cases from a State with a mechanism certified by the Attorney General in which petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent, as provided in section 2261(b) of title 28. Subsection (b) of 28 U.S.C. § 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.

****

28 C.F.R. § 26.21

Definitions.

For purposes of this part, the term—

Appointment means provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.

Appropriate State official means the State attorney general, except that, in a State in which the State attorney general does not have responsibility for Federal habeas corpus litigation, it means the chief executive of the State.

Indigent prisoners means persons whose net financial resources and income are insufficient to obtain qualified counsel.

State postconviction proceedings means collateral proceedings in State court, regardless of whether the State conducts such proceedings after or concurrently with direct State review.

****

28 C.F.R. § 26.22

Requirements.

The Attorney General will certify that a State meets the requirements for certification under 28 U.S.C. §§ 2261 and 2265 if the Attorney General determines that the State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings that satisfies the following standards:

(a) As provided in 28 U.S.C. § 2261(c) and (d), the mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly requested continued representation, and the mechanism must provide for the entry of an order by a court of record—

> (1) Appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) Finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

(b) The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments.

(1) A State's standards of competency are presumptively adequate if they meet or exceed either of the following criteria:

(i) Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience. But a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation; or

(ii) Appointment of counsel meeting qualification standards established in conformity with 42 U.S.C. § 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. § 14163(e)(2)(B), (D), and (E) are also satisfied.

(2) Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

(c) The mechanism must provide for compensation of appointed counsel.

(1) A State's provision for compensation is presumptively adequate if the authorized compensation is comparable to or exceeds—

(i) The compensation of counsel appointed pursuant to 18 U.S.C. § 3599 in Federal habeas corpus proceedings reviewing capital cases from the State;

(ii) The compensation of retained counsel in State postconviction proceedings in capital cases who meet State standards of competency sufficient under paragraph (b);

(iii) The compensation of appointed counsel in State appellate or trial proceedings in capital cases; or

(iv) The compensation of attorneys representing the State in State postconviction proceedings in capital cases, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses.

(2) Provisions for compensation not satisfying the benchmark criteria in paragraph (c)(1) of this section will be deemed adequate only if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency sufficient under paragraph (b) of this section.

(d) The mechanism must provide for payment of reasonable litigation expenses of appointed counsel. Such expenses may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel. Provision for reasonable litigation expenses may incorporate presumptive limits on payment only if means are authorized for payment of necessary expenses above such limits.

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28 C.F.R. § 26.23

Certification process.

(a) An appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart.

(b) Upon receipt of a State's request for certification, the Attorney General will make the request publicly available on the Internet (including any supporting materials included in the request) and publish a notice in the Federal Register—

(1) Indicating that the State has requested certification;

(2) Identifying the Internet address at which the public may view the State's request for certification; and

(3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of timely public comments received in response to the Federal Register notice under paragraph (b) of this section, or any subsequent notice the Attorney General may publish providing a further opportunity for comment. The certification will be published in the Federal Register if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies chapter 154's requirements. A State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the

State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.

(e) A certification remains effective for a period of five years after the completion of the certification process by the Attorney General and any related judicial review. If a State requests re-certification at or before the end of that five-year period, the certification remains effective for an additional period extending until the completion of the re-certification process by the Attorney General and any related judicial review.

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Arizona Revised Statutes

A.R.S. § 13-4041

Fee of counsel assigned in criminal proceeding or insanity hearing on appeal or in postconviction relief proceedings; reimbursement

A. Except pursuant to subsection G of this section, if counsel is appointed by the court to represent the defendant in either a criminal proceeding or insanity hearing on appeal, the county in which the court from which the appeal is taken presides shall pay counsel, except that in those appeals where the defendant is represented by a public defender or other publicly funded office, compensation shall not be set or paid. Compensation for services rendered on appeal shall be in an amount as the supreme court in its discretion deems reasonable, considering the services performed.

B. After the supreme court has affirmed a defendant's conviction and sentence in a capital case, the supreme court or, if authorized

by the supreme court, the presiding judge of the county from which the case originated shall appoint counsel to represent the capital defendant in the state postconviction relief proceeding.

C. The supreme court shall establish and maintain a list of persons who are qualified to represent capital defendants in postconviction proceedings. The supreme court may establish by rule more stringent standards of competency for the appointment of postconviction counsel in capital cases than are provided by this subsection. The supreme court may refuse to certify an attorney on the list who meets the qualifications established under this subsection or may remove an attorney from the list who meets the qualifications established under this subsection if the supreme court determines that the attorney is incapable or unable to adequately represent a capital defendant. The court shall appoint counsel from the list. Counsel who are appointed from the list shall meet the following qualifications:

1. Be a member in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.

2. Have practiced in the area of state criminal appeals or postconviction proceedings for at least three years immediately preceding the appointment.

3. Not previously have represented the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation.

D. Before filing a petition, the capital defendant may personally appear before the trial court and waive counsel. If the trial court finds that the waiver is knowing and voluntary, appointed counsel

may withdraw. The time limits in which to file a petition shall not be extended due solely to the change from appointed counsel to self-representation.

E. If at any time the trial court determines that the capital defendant is not indigent, appointed counsel shall no longer be compensated by public monies and may withdraw.

F. Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state postconviction relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour. Monies shall not be paid to court appointed counsel unless either:

1. A petition is timely filed.

2. If a petition is not filed, a notice is timely filed stating that counsel has reviewed the record and found no meritorious claim.

G. The trial court shall compensate appointed counsel from county funds. The court or the court's designee shall review and approve all reasonable fees and costs. If the attorney believes that the court has set an unreasonably low hourly rate or if the court finds that the hours the attorney spent are unreasonable, the attorney may file a special action with the Arizona supreme court. If counsel is appointed in successive postconviction relief proceedings, compensation shall be paid pursuant to § 13-4013, subsection A.

H. The county shall request reimbursement for fees it incurs pursuant to subsections F, G and I of this section arising out of the appointment of counsel to represent an indigent capital defendant in a state postconviction relief proceeding. The state shall pay a portion of the fees incurred by the county out of monies appropriated to the supreme court for these purposes. The total

amount that may be spent in any fiscal year by this state for indigent capital defense in a state postconviction relief proceeding may not exceed the amount appropriated in the general appropriations act for this purpose, together with additional amounts appropriated by any special legislative appropriation for indigent capital defense. The supreme court shall approve county requests for reimbursement after certification that the amount requested is owed.

I. The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by § 13-4232.

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Arizona Rules of Criminal Procedure

Rule 6.8: Standards for Appointment and Performance of Counsel in Capital Cases

(a) Generally. To be eligible for appointment in a capital case, an attorney must:

(1) have been a member in good standing of the State Bar of Arizona for at least 5 years immediately before the appointment;

(2) have practiced criminal litigation in Arizona state courts for 3 years immediately before the appointment;

(3) have demonstrated the necessary proficiency and commitment that exemplifies the quality of representation appropriate to capital cases;

(4) have successfully completed, within one year before the initial appointment, at least 6 hours of relevant training or educational

programs in the area of capital defense; and successfully completed within one year before any later appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense;

(5) be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.

If an attorney is a member in good standing of the State Bar of Arizona, the attorney's practice in a federal jurisdiction or in another state may be considered for purposes of satisfying the requirements of (a)(1) and (a)(2).

(b) Trial Counsel.

(1) *Lead Counsel.* To be eligible for appointment as lead trial counsel, an attorney must meet the requirements of (a) and must have:

(A) practiced criminal litigation in Arizona state courts for 5 years immediately before the appointment; and

(B) been lead counsel in at least 9 felony jury trials that were tried to completion, and have been lead counsel or co-counsel in at least one capital jury trial.

(2) *Co-Counsel.* To be eligible for appointment as co-counsel, an attorney must be a member in good standing of the State Bar of Arizona and meet the requirements of (a)(4) and (a)(5).

(c) Appellate Counsel. To be eligible for appointment as appellate 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 an appeal in a case in which a death sentence was imposed (including petitions for review of post-conviction proceedings); and prior experience as lead counsel in the appeal of at least 3 felony convictions; or

(2) prior experience as lead counsel in merits briefing in the appeal of at least 6 felony convictions, including two appeals from first-or second-degree murder convictions.

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

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

(2) have been lead counsel in the appeal of at least 6 felony convictions, including two appeals from first-or second-degree murder convictions, and lead counsel in at least two felony trials or post-conviction proceedings with evidentiary hearings.

(e) Exceptions. In exceptional circumstances, a court may appoint an attorney who does not meet the qualifications set forth in this rule if:

(1) the Supreme Court consents;

(2) the attorney meets the requirements set forth in (a)(3)—(5);

(3) the attorney's experience, stature, and record establishes that the attorney's ability significantly exceeds the standards set forth in this rule; and

(4) the attorney associates with a lawyer who meets the qualifications set forth in this rule and the associating attorney is appointed by the court for this purpose.