

**[ORAL ARGUMENT NOT YET SCHEDULED]****No. 20-1144**

---

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

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,

*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 Council Mechanism  
Under 28 U.S.C. §§ 2261–2266, Docket No. OAG-167

---

**THE AMERICAN BAR ASSOCIATION'S BRIEF AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

---

John A. Freedman  
ARNOLD & PORTER  
KAYE SCHOLER LLP  
601 Massachusetts Ave., N.W.  
Washington, D.C. 20001  
(202) 942-5000

Patricia Lee Refo  
*Counsel of Record*  
AMERICAN BAR ASSOCIATION  
321 North Clark Street  
(312) 988-5000  
Chicago, Illinois 60654

*Counsel for the American Bar Association*

August 20, 2020

**DISCLOSURE STATEMENT**  
**PURSUANT TO CIRCUIT RULE 26.1**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), undersigned counsel certifies:

*Amicus* American Bar Association (“ABA”) discloses that it is an Illinois nonprofit corporation, has no parent corporation, and does not issue shares of stock. ABA is a national voluntary organization whose members include attorneys, law students, and related professionals.

*s/ Patricia Lee Refo*  
Patricia Lee Refo

**CERTIFICATE OF PARTIES, RULINGS, AND  
RELATED CASES PURSUANT TO CIRCUIT RULE 28(A)(1)**

**A. Parties and *Amici*.** All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Petitioner or have filed notices of intent to file an *amicus* brief.

**B. Ruling Under Review.** An accurate reference to the ruling at issue appears in petitioners' brief.

**C. Related Cases.** The only related cases of which counsel are aware are identified in petitioners' brief.

*s/ Patricia Lee Refo*  
Patricia Lee Refo

**STATEMENT REGARDING CONSENT TO FILE  
AND SEPARATE BRIEFING**

All parties have consented to the filing of this *amicus* brief. The ABA filed its notice of intent to participate in this case on August 17, 2020.

Pursuant to Circuit Rule 29(d), the ABA certifies that a separate brief is necessary to provide the ABA's unique perspective and expertise in death penalty litigation and policy, including the promulgation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

*s/ Patricia Lee Refo*  
Patricia Lee Refo

**STATEMENT OF AUTHORSHIP AND FINANCIAL  
CONTRIBUTIONS**

No party's counsel authored this brief in whole or in part. Nor did any party or party's counsel, or any other person other than *amicus*, contribute money that was intended to fund preparing or submitting this brief.

*s/ Patricia Lee Refo*  
Patricia Lee Refo

## TABLE OF CONTENTS

	<u>Page</u>
DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1 .....	i
CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1) .....	ii
STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING .....	iiii
STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	vi
STATEMENT OF INTEREST .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	5
STATUTES AND REGULATIONS .....	5
ARGUMENT .....	7
I. ARIZONA’S MECHANISM FAILS TO MEET THE SUBSTANTIVE REQUIREMENTS FOR CERTIFICATION .....	7
A. Arizona’s Mechanism Fails to Provide for the Appointment of Competent Counsel .....	8
1. Arizona Does Not Require Post-Conviction Experience .....	8
2. Arizona’s Lack of a Statewide Defender Office, High Caseloads, and Failure to Timely Appoint Counsel Compound Arizona’s Failure to Ensure Appointment of Competent Counsel and Should Prevent Certification. ....	17

a. Lack of Statewide Defender and Oversight..... 17

b. Attorney Case Loads ..... 18

c. Lack of Timely Appointment ..... 20

B. Arizona’s Mechanism Fails to Ensure Compensation  
and Payment of Reasonable Litigation Expenses..... 22

a. Rates..... 23

b. Presumptive Hours Caps ..... 25

c. Reasonable Expenses ..... 27

d. Dramatically Inconsistent Funding Within  
the State..... 28

II. THERE IS NO BASIS FOR CERTIFICATION  
RETROACTIVE TO MAY 1998..... 30

CONCLUSION..... 35

CERTIFICATE OF COMPLIANCE ..... 36

CERTIFICATE OF SERVICE..... 377

ADDENDUM..... 1a

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bobby v. Van Hook</i> , 558 U.S. 4 (2009) .....	2
<i>Cleaver v. Bordenkircher</i> , 634 F.2d 1010 (6th Cir. 1980) .....	18
<i>Colvin-El v. Nuth</i> , 1998 WL 386403 (D. Md. July 6, 1998).....	12, 16
<i>Lockett v. Anderson</i> , 230 F.3d 695 (5th Cir. 2000) .....	18
<i>McFarland v. Scott</i> , 512 U.S. 849 (1994) .....	16
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005) .....	2
<i>Spears v. Stewart</i> , 283 F.3d 992 (9th Cir. 2002) .....	13, 30, 31, 32, 33, 35
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003) .....	2
 <u>Statutes and Rules</u>	
28 U.S.C.	
§ 2261 .....	35
§ 2262 .....	5
§ 2263 .....	5, 20
§ 2264 .....	5
§ 2265 .....	5, 8, 23, 35
§ 2266 .....	5
28 C.F.R.	
§ 26.22(b) .....	8, 13, 15, 32
§ 26.22(c) .....	23
§ 26.22(d) .....	27

78 Fed. Reg. 58160 (Sept. 23, 2013).....	7, 8,12, 15
Ariz. R. Crim. P.	
6.8 .....	13, 31
32.4(c) .....	32
32.5(b).....	33
Ariz. Rev. Stat.	
§ 13-4041(B) .....	33
§ 13-4041(G) .....	25
§ 13-4041(F) .....	24

### **Other Authorities**

ABA Const. art. 1, § 1.2 .....	1
ABA Death Penalty Representation Project, List of Opinions Citing the ABA Guidelines (Mar. 23, 2020), <a href="https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.pdf">https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.pdf</a> .....	2
ABA Guidelines, reprinted in 31 Hofstra L. Rev. 913 (2003), <a href="http://ambar.org/2003guidelines">ambar.org/2003guidelines</a> .2, 7, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 25, 28, 32	
American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Arizona Death Penalty Assessment Report, (July 2006), <a href="https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/arizona_report.pdf">https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/arizona_report.pdf</a> ..	4, 19, 21, 24, 27, 33
Comments of the American Bar Association to the Office of Legal Policy Docket No. OLP 166 (Feb. 26, 2018), <a href="https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-comments-on-tx-opt-in-applications.pdf">https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-comments-on-tx-opt-in-applications.pdf</a> .....	31



Comments of the American Bar Association to the Office of Legal Policy Docket No. OLP 166 (Jan. 7, 2019), <a href="https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2019jan7-ABACommentletterAZDP.pdf">https://www.americanbar.org/content/dam/aba/uncategorized/</a> <a href="https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2019jan7-ABACommentletterAZDP.pdf">GAO/2019jan7-ABACommentletterAZDP.pdf</a> .....	31
Hearings Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) .....	3
Jon B. Gould & Lisa Greenman, Report to the Committee on Defender Services, Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 88 (Sept. 2010) .....	12
Letter from the Office of the Arizona Attorney General to the Department of Justice (Oct. 16, 2018), <a href="https://www.justice.gov/olp/page/file/1113346/download">https://www.justice.gov/olp/page/file/1113346/download</a> .....	26, 29
Office of the Attorney General, Capital Case Commission Final Report (Dec. 2002), <a href="https://www.azag.gov/sites/default/files/docs/criminal/ccf/CapitalCaseCommission-FinalReport.pdf">https://www.azag.gov/sites/default/files/docs/criminal/ccf/</a> <a href="https://www.azag.gov/sites/default/files/docs/criminal/ccf/CapitalCaseCommission-FinalReport.pdf">CapitalCaseCommission-FinalReport.pdf</a> .....	21
Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, Supreme Court No. R-05-0031 (Dec. 7, 2005) .....	14
Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, Supreme Court No. R-05-0031 Comment of State Bar (May 22, 2006).....	13
Report of the Capital Case Oversight Committee (Dec. 2013), <a href="https://www.azcourts.gov/Portals/74/CCOC/2013ReportCCOC.pdf?ver=2019-11-25-131439-927">https://www.azcourts.gov/Portals/74/CCOC/2013ReportCC</a> <a href="https://www.azcourts.gov/Portals/74/CCOC/2013ReportCCOC.pdf?ver=2019-11-25-131439-927">OC.pdf?ver=2019-11-25-131439-927</a> .....	24
Report of the Capital Case Oversight Committee & Maricopa County Superior Court to the Arizona Judicial Counsel (Nov. 2008), <a href="https://www.azcourts.gov/Portals/74/CCOC/2015ReportCCOC.pdf?ver=2019-11-25-131442-600">https://www.azcourts.gov/Portals/74/CCOC/2015ReportCC</a> <a href="https://www.azcourts.gov/Portals/74/CCOC/2015ReportCCOC.pdf?ver=2019-11-25-131442-600">OC.pdf?ver=2019-11-25-131442-600</a> .....	21

Report of the Capital Case Oversight Committee & Maricopa  
County Superior Court to the Arizona Judicial Counsel  
(Oct. 24, 2007),  
[https://www.azcourts.gov/LinkClick.aspx?fileticket=blbzoo  
GmJj4%3d&tabid=1953](https://www.azcourts.gov/LinkClick.aspx?fileticket=blbzooGmJj4%3d&tabid=1953)..... 34

Report of the Capital Case Oversight Committee to the  
Arizona Judicial Counsel (Dec. 2015),  
[https://www.azcourts.gov/Portals/74/CCOC/2015ReportCC  
OC.pdf?ver=2019-11-25-131442-600](https://www.azcourts.gov/Portals/74/CCOC/2015ReportCCOC.pdf?ver=2019-11-25-131442-600)..... 34

Report to the Committee on Defender Services, Judicial  
Conference of the United States: Update on the Cost and  
Quality of Defense Representation in Federal Death  
Penalty Cases (Sep. 2010)..... 12

Resolution of the ABA House of Delegates 107 (2003).....2

Resolution of the ABA House of Delegates 107D (2012).....2

Resolution of the ABA House of Delegates 112D (1982).....2

## STATEMENT OF INTEREST

The ABA is the largest voluntary organization of attorneys and legal professionals in the world. Its members come from all fifty states and other jurisdictions, and include prosecutors, public defenders, private lawyers, judges, legislators, law professors, law enforcement and corrections personnel, law students and a number of professionals in allied fields. The ABA serves the public and the legal profession by advocating for the ethical and effective representation of all clients and promoting a fair and effective system for the administration of justice.<sup>1</sup>

Although the ABA has not taken a position on the constitutionality of the death penalty per se, it considers the right to effective assistance of counsel and the preservation of the writ of *habeas corpus* to be essential elements of the fair and constitutional administration of the death penalty. For more than thirty years, the ABA Death Penalty Representation Project has worked to improve the quality and availability of counsel in death penalty cases.

---

<sup>1</sup> See ABA Const. art. 1, § 1.2. Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

The ABA's work in the area of federal and state post-conviction procedures has spanned decades.<sup>2</sup> Its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines"),<sup>3</sup> first published in 1989, establish benchmarks for effective representation at all stages of a capital case. The Guidelines have been widely adopted by state and local bar associations and indigent defense organizations; many courts have long recognized them as the appropriate professional standards for the appointment and performance of competent defense counsel in death penalty proceedings.<sup>4</sup> The culmination of years of study, the Guidelines codify the views of the criminal justice

---

<sup>2</sup> See, e.g., Resolution of the ABA House of Delegates 112D (1982) (the ABA resolved to "support the prompt availability of competent counsel for both state and federal [post-conviction] proceedings"); Resolution of the ABA House of Delegates 107D (2012) (urging amendment of the statute governing federal capital *habeas review* to require independent review of ineffective assistance of counsel claims).

<sup>3</sup> Adopted by Resolution of the ABA House of Delegates 107 (2003). The ABA Guidelines are available at [ambar.org/2003guidelines](http://ambar.org/2003guidelines) and are reprinted in 31 Hofstra L. Rev. 913 (2003).

<sup>4</sup> See, e.g., *Bobby v. Van Hook*, 558 U.S. 4 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); see also ABA Death Penalty Representation Project, List of Opinions Citing the ABA Guidelines (Mar. 23, 2020),

[https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/allcites.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.pdf).

community and the legal profession regarding the minimum requirements for defending a capital case. They are designed to ensure fair and constitutional administration of the death penalty and help the justice system avoid unconstitutional executions. The ABA has also testified and provided written materials at congressional hearings supporting the wide availability of *habeas corpus* in post-conviction proceedings and funding for indigent criminal defense.<sup>5</sup>

Of particular importance here, the ABA submitted four rounds of comments during the rulemaking proceedings that culminated in the final certification rule, 28 C.F.R. Part 26, Subpart B (the “Rule”), and two rounds of comments on Arizona’s application for certification under the Rule, which is the subject of the current litigation. The Rule itself recognizes the ABA Guidelines as the basis for certain requirements of the Rule.

The ABA’s Death Penalty Due Process Review Project has also conducted assessments of the administration of the death penalty (including state post-conviction practice and procedures) in twelve states,

---

<sup>5</sup> See, e.g., *Habeas Corpus: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (statement of L. Stanley Chauvin, Jr., President of the ABA).

including Arizona, where the assessment was completed in July 2006. The 2006 Assessment identified serious problems with Arizona's counsel system and administration of capital cases, many of which remain unaddressed to this day.<sup>6</sup>

Since the assessment, the ABA Death Penalty Representation Project has worked closely with the Arizona legal community to improve the quality and availability of legal representation for persons facing the death penalty in the state. This work has included the creation of a trial and appellate-level counsel certification program in Maricopa County, and discussions of expanding the Maricopa County system to the state level and to post-conviction appointments. The ABA Death Penalty Representation Project has also played an important role in recruiting *pro bono* counsel for Arizona to represent numerous Arizona capital defendants in post-conviction proceedings on a *pro bono* basis throughout the certification period. Consequently, it has developed a nuanced understanding of capital defense trends in Arizona.

---

<sup>6</sup> American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Arizona Death Penalty Assessment Report, (July 2006), [https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/arizona\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/arizona_report.pdf) (“ABA Assessment”).

## **STATUTES AND REGULATIONS**

Pertinent authorities are reproduced in an addendum to this brief at pages 1a-2a.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Under Arizona's "system" for appointing counsel for death-row inmates in post-conviction litigation, counsel are not required to have critical post-conviction experience and are inadequately compensated. That alone disqualifies Arizona from certification under the Rule. Yet Arizona's system also has other fatal flaws. Funding varies considerably across counties, resulting in significant variance in time and resources devoted to cases, meaning that geographic location can dictate amounts and quality of representation available. Workloads and late timing of appointments result in inadequate availability of counsel to provide the type of representation needed in post-conviction proceedings.

If Arizona is certified under the Rule, death row inmates would face extraordinary restrictions on the availability of federal *habeas corpus* relief, including a shortening of the statute of limitations for federal *habeas* proceedings in federal court and significantly reduced scope of judicial review of state judgments. *See* 28 U.S.C. §§ 2262–66. In

particular, certification halves the time for death row inmates to file their federal *habeas* petitions, compounding the problems of an already tight deadline that cannot possibly be addressed by a chronically underfunded and under-resourced system that has routinely failed to appoint qualified post-conviction counsel in a timely manner. Inexperienced, unqualified, or under-resourced counsel are more likely to fail to develop substantial claims and evidence in state proceedings, and expedited proceedings under Chapter 154 will effectively remove federal court as an available avenue to remedy those deficiencies. The Rule's retroactive certification could additionally mean that previously timely filed petitions for *habeas corpus* relief would suddenly be deemed untimely and procedurally barred from any further consideration.

Because of this loss of rights, it is critical that the requirements for certification under the Rule, which is unwarranted by Arizona's post-conviction appointment mechanism, be rigorously enforced.

The Attorney General's certification, compounded by his determination that Arizona has satisfied the requirements *retroactively* for a twenty-two-year period starting in 1998, misapplied the Rule and ignored compelling evidence of the failures inherent in Arizona's capital



defense system. Unless this Court vacates the decision, capital defendants in Arizona will face even graver risks of ineffective assistance of counsel, denying the fundamental guarantee of due process through *habeas corpus* proceedings.

## ARGUMENT

### **I. ARIZONA’S MECHANISM FAILS TO MEET THE SUBSTANTIVE REQUIREMENTS FOR CERTIFICATION**

Arizona does not meet the requirements for certification under the Rule. In adopting the Rule, the Department of Justice expressly recognized the ABA Guidelines as the basis for certain requirements.<sup>7</sup> And the Guidelines also are helpful for interpreting other substantive criteria in the Rule because they provide a relevant baseline in the form of well-established national norms for the quantitative “benchmarks” underlying the standards of competent representation under the Rule.

---

<sup>7</sup> See, e.g., 78 Fed. Reg. 58160, 58166 (Sept. 23, 2013) (discussing the definition of reasonable timeliness in the context of a capital post-conviction appointment); at 58172 (considering the applicability of Guideline 9.1 to the evaluation of a state’s compensatory scheme); at 58173 (noting that the ABA Guidelines were cited by the United States Supreme Court to support the idea that defense counsel must be compensated for reasonable litigation expenses, including the costs associated with a re-investigation during post-conviction proceedings).

Under the Rule and the Guidelines, Arizona's system for appointment of counsel in death penalty cases fails to ensure that prisoners receive timely, qualified, and adequately resourced counsel to provide representation in their post-conviction proceedings. Certification of this inadequate mechanism for the expedited *habeas* procedures of Chapter 154 greatly jeopardizes the role of essential *habeas corpus* review in Arizona capital cases.

**A. Arizona's Mechanism Fails to Provide for the Appointment of Competent Counsel**

1. Arizona Does Not Require Post-Conviction Experience.

Section 507 expressly requires that to certify a state, the Attorney General must determine that "the State has established a mechanism for the appointment of . . . competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. § 2265(a)(1)(A). The Rule likewise requires that the "mechanism must provide for appointment of competent counsel," 28 C.F.R. § 26.22(b), and the certification requires a mechanism that "ensur[es] that it will result in the appointment of competent counsel." 78 Fed. Reg. 58160, 58161.

The requirement of “appointment of competent counsel” in the Rule was drafted with heavy reliance on the ABA Guidelines. 78 Fed. Reg. 58,178. The ABA Guidelines urge jurisdictions to identify a “responsible agency” (often a defender office or court) that will ensure appointed counsel have the necessary training and experience, and the necessary resources in the form of team members, auxiliary services, funding, and workload limitations to provide effective representation.<sup>8</sup> The Guidelines also call on the “responsible agency” to have an established mechanism for monitoring counsel’s performance and removing inadequate counsel. The Guidelines provide specific performance standards for capital defenders that “reflect the extraordinary responsibilities and commitment required of all members of the defense team in death penalty cases” and describe many of the “duties and functions” of capital counsel that are “definably different from those of counsel in ordinary criminal cases.”<sup>9</sup> The ABA Guidelines also guide the “responsible agency” to use the performance standards “in determining eligibility of counsel

---

<sup>8</sup> ABA Guidelines 1.1-10.1.

<sup>9</sup> *Id.* 1.1, 10.1, cmt; *id.* 10.2-10.15.2 (performance standards).

for appointment or reappointment to capital cases and when monitoring the performance of counsel.”<sup>10</sup>

The purpose of this Guideline is to ensure capital defense systems result in meeting the constitutional guarantee of due process and effective assistance of counsel. Capital cases are the most complex kind of criminal cases, requiring the ability to understand and present evidence involving a variety of experts such as pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, and translators.<sup>11</sup> Defense counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns.<sup>12</sup> Counsel must be able to develop and implement advocacy strategies that apply existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment. They must have skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics,

---

<sup>10</sup> *Id.* 10.1, cmt.

<sup>11</sup> *Id.* 1.1.

<sup>12</sup> *Id.* 1.1, 5.1, 8.1.

forensic pathology, and DNA evidence; skill in the investigation, preparation, and presentation of evidence bearing upon mental status; skill in the investigation, preparation, and presentation of mitigating evidence; and skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements—all of which are norms embodied in the ABA Guidelines.<sup>13</sup> And state post-conviction counsel must have a thorough understanding of federal *habeas* law and procedure to perform competently in state post-conviction proceedings.<sup>14</sup>

Arizona does not and cannot meet the presumption of adequacy under the Rule because Arizona’s post-conviction counsel qualification standards (set forth in Arizona Supreme Court Rule of Criminal Procedure 6.8 (“Rule 6.8”)) do not require any post-conviction experience. As the Department of Justice noted in adopting the Rule: “In construing

---

<sup>13</sup> ABA Guideline 5.1 requires attorneys to demonstrate substantial knowledge and understanding of the relevant state, federal and international law governing capital cases; skill in the management and conduct of complex negotiations and litigation; skill in legal research, analysis, and the drafting of litigation documents; and skill in oral advocacy.

<sup>14</sup> *Id.* 5.1, 8.1, 10.15.1.

chapter 154, some courts have concluded that, given the complexity of postconviction law and procedure, a qualifying mechanism for the appointment of competent counsel should provide for counsel with specialized postconviction litigation experience.”<sup>15</sup> Nor does Arizona require that appointed attorneys have completed a comprehensive capital defense training course that covers numerous topics identified in ABA Guideline 8.1.<sup>16</sup>

Although Arizona once required post-conviction experience for appointment, that requirement was removed in 2011. But even prior to 2011, a substantial number of appointments were made of attorneys who

---

<sup>15</sup> 78 Fed. Reg. 58160, 58169. *See, e.g., Colvin-El v. Nuth*, 1998 WL 386403, at \*6 (D. Md. July 6, 1998) (“Given the extraordinarily complex body of law and procedure unique to postconviction review, an attorney must, at minimum, have some experience in that area before he or she is deemed ‘competent’”); *see also* Jon B. Gould & Lisa Greenman, Report to the Committee on Defender Services, Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases 88 (Sept. 2010) (noting the view of post-conviction specialists that there is “little time available for inexperienced counsel to ‘learn the ropes,’ and no safety net if they fail”).

<sup>16</sup> ABA Guideline 8.1 calls attorneys seeking appointment to complete a comprehensive training program in the defense of capital cases.

did not meet the qualifications in the requirement by allowing those appointments under the “exceptional circumstances” exception.<sup>17</sup>

The Attorney General’s rationale that compliance with Arizona Rule 6.8 is sufficient because Arizona Rule 6.8 “compare[s] favorably” with 28 C.F.R. § 26.22(b)(1)(i) (noting that the Arizona Rule requires demonstrated proficiency and familiarity with the ABA Guidelines) is misplaced because Rule 6.8 does not require actual death penalty or post-conviction experience. Indeed, the Arizona Supreme Court specifically rejected the argument that Rule 6.8 requires compliance with the ABA Guidelines. Notably, this rejection came after (i) the ABA Death Penalty Representation Project specifically encouraged the Arizona Supreme Court to incorporate the Guidelines into its rule, and (ii) the Arizona State Bar voted to support incorporation of the Guidelines into Rule 6.8.<sup>18</sup> As

---

<sup>17</sup> Prior to 2011, Arizona required appointed post-conviction counsel to have had “at least one postconviction proceeding that resulted in an evidentiary hearing.” *Spears v. Stewart*, 283 F. 3d 992, 1011 (9th Cir. 2002); Ariz. Rule Crim. P. 6.8. Even then, this rule did not meet the requirements of 28 C.F.R. § 26.22(b)(1)(i), which requires three years of post-conviction experience.

<sup>18</sup> See Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, Supreme Court No. R-05-0031 Comment of State Bar (May 22, 2006).

proposed in the Petition to Amend and supported in official Comments submitted by the ABA and the Arizona State Bar, the new rule would have mandated that counsel “shall comply with” the Guidelines related to counsel performance.<sup>19</sup> This language was rejected, and replaced with language that counsel be “familiar with” the Guidelines.

This non-mandatory suggestion is insufficient to ensure that appointed counsel take the necessary steps to provide competent representation. The current version of Rule 6.8 requires counsel seeking appointment merely to have some experience in either criminal trial or appellate practice and disregards the significant differences involved in capital cases generally and in post-conviction capital practice specifically.<sup>20</sup>

Arizona also does not meet the alternative pathway to presumptive certification because it does not “otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital

---

<sup>19</sup> See Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure, Supreme Court No. R-05-0031 (Dec. 7, 2005).

<sup>20</sup> See ABA Guideline 1.1, cmt. (“[T]hese Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.”)



cases.” 28 C.F.R. § 26.22(b)(2). In adopting the Rule, the Attorney General noted that this standard is “largely based on elements of the ABA Guidelines,” 78 Fed. Reg. 58160, 58178. But the ABA Guidelines call for specific training and experience for all capital defense attorneys, and specialized experience and skills for lawyers appointed in post-conviction cases. These requirements recognize the unique challenges of post-judgment proceedings, which “demand a high degree of technical proficiency, and . . . skills essential to effective representation [that] differ in significant ways from those necessary to succeed at trial.”<sup>21</sup> Once an execution warrant has issued, “[s]ubstantive pleadings may have to be prepared simultaneously with, or even be delayed for, pleadings to stay the client’s execution.”<sup>22</sup>

Both post-conviction litigation and capital representation generally require expertise in procedural, legal, and technical issues beyond the skillset of many appointed counsel. Capital sentencing is extraordinarily complex, and post-conviction procedures challenging capital sentences further require counsel to avoid procedural default on claims challenging

---

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

the sentence, which are all too easy to default for the inexperienced. Recognizing the “extraordinarily complex body of law and procedure unique to post-conviction review,” courts have routinely held post-conviction attorneys to a higher standard than the “average trial lawyer.”<sup>23</sup>

Because Arizona requires no post-conviction experience for appointed counsel in capital cases, nor compliance with the performance standards of the ABA Guidelines, its mechanism provides no assurance that an appointed attorney will have the experience and skills required in capital post-conviction capital cases. And although the Arizona mechanism includes one qualitative standard—that counsel has demonstrated “the necessary proficiency and commitment”—it provides no guidance about what such proficiency or commitment entails. The consequence of this shortcoming is that the rights of capital petitioners in Arizona are jeopardized because appointed post-conviction counsel may not have the qualifications or experience to properly litigate claims,

---

<sup>23</sup> *Colvin-El*, 1998 WL 386403, at \*6 (citations omitted); *see also McFarland v. Scott*, 512 U.S. 849, 854 n.2 (1994) (“[c]ounsel appointed to represent capital defendants in postconviction proceedings must meet more stringent experience criteria than attorneys appointed to represent noncapital defendants under the Criminal Justice Act of 1964”).

and there is little possibility of correcting such errors going forward under a system of curtailed federal *habeas* review.

2. Arizona's Lack of a Statewide Defender Office, High Caseloads, and Failure to Timely Appoint Counsel Compound Arizona's Failure to Ensure Appointment of Competent Counsel and Should Prevent Certification.

Additional flaws in Arizona's capital defense system, including Arizona's lack of a statewide defender office, high attorney caseloads, and failure to timely appoint counsel, compound the system's failure regarding appointment of competent counsel. These further flaws are additional independent reasons to deny certification under the Rule, especially in light of the other entrenched flaws in Arizona's system.

a. Lack of Statewide Defender and Oversight

As discussed at length in Section II, *infra*, Arizona only had a post-conviction defender office for six years, which was consistently underfunded until its closure. Arizona has otherwise relied on *ad hoc* and private counsel appointments. In the ABA's view, that reliance is "inimical to effective representation."<sup>24</sup> The Guidelines advocate the use of statewide defender offices, because they "generally have the experience

---

<sup>24</sup> ABA Guideline 1.1, cmt.

and dedication to provide high quality legal representation in capital cases.”<sup>25</sup>

The consequence of this shortcoming is that there is no standard or consistent method to appoint post-conviction counsel for capital defendants in Arizona. The *ad hoc* system in place neither ensures timely nor competent representation.

b. Attorney Case Loads

Because post-conviction litigation in many jurisdictions is already expedited, special care must be taken to ensure that staffing for the representation is appropriate and consistent with the defense team’s overall workload.<sup>26</sup>

The ABA Guidelines reflect the criminal justice community’s understanding that the competence of counsel may be frustrated by a heavy workload. Guideline 6.1 suggests the Responsible Agency “implement effectual mechanisms to ensure that the workload of

---

<sup>25</sup> *Id.* Introduction.

<sup>26</sup> *See, e.g., Lockett v. Anderson*, 230 F.3d 695, 711-12 (5th Cir. 2000) (counsel’s workload at time of appointment rendered assistance of counsel ineffective); *Cleaver v. Bordenkircher*, 634 F.2d 1010, 1012 (6th Cir. 1980) (appointed counsel ineffective because of workload at time of appointment).

attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation.” This Guideline embodies the understanding that “defending capital cases requires vastly more time and effort by counsel than non-capital matters.”<sup>27</sup>

The 2006 ABA Assessment found that while Arizona has caseload standards for general criminal defense, the appointing authorities do not adhere to those standards when making capital appointments.<sup>28</sup> While the Guidelines do not provide a specific caseload limit, they acknowledge the reality that “several thousand hours are typically required to provide appropriate representation” in capital cases.<sup>29</sup> The failure of the Arizona mechanism to meaningfully account for and limit caseloads to manageable levels means that it cannot ensure that capital prisoners will be represented by counsel with adequate time to provide competent

---

<sup>27</sup> ABA Guideline 6.1, cmt.

<sup>28</sup> The ABA Assessment noted these standards were regularly exceeded in multiple counties. For example, in Maricopa County, workload standards are estimated to be consistently exceeded by 40%. At least one defense attorney had six capital cases at the same time. *See* ABA Assessment at 131.

<sup>29</sup> ABA Guideline 6.1, cmt.

representation. Again, the consequence of this shortcoming is that capital defendants in Arizona will be appointed counsel who do not have the time or capacity to provide the representation necessary to meet the strict timelines.

c. Lack of Timely Appointment

For the entire twenty-two-year period certified by the Attorney General, Arizona has failed to meet the requirements of the Rule because the state has failed to make a timely offer of post-conviction counsel to all prisoners. Chapter 154 imposes strict deadlines on capital defendants seeking federal *habeas* review; following certification, federal *habeas* petitions must be submitted within 180 days after the conviction and death sentence have been affirmed on direct review, or the time allowed for seeking such review has expired. 28 U.S.C. § 2263(a) (2006). As the release to the Rule notes, because of the strict deadlines for a federal *habeas* petition, timely appointment of competent counsel is an essential requirement before any state can avail itself of the “fast track” procedures.

Arizona has consistently failed to appoint post-conviction counsel in a timely manner. For example:

- In 2001, eight capital cases were delayed at the post-conviction relief stage because no qualified lawyers were available to represent the defendants. At the time of the Arizona Office of the Attorney General's report in 2002, a number of these defendants had been waiting for over eighteen months for a lawyer to be appointed to represent them in their post-conviction proceedings.<sup>30</sup>
- In 2006, the ABA Assessment noted that "several death-row inmates had been awaiting the appointment of counsel for nearly two years."<sup>31</sup>
- In 2008, the Joint Report of the Capital Case Oversight Committee and Maricopa County Superior Court found that more defendants were awaiting the appointment of post-conviction counsel (fifteen) than were represented by the Office of Statewide post-conviction (four) or list counsel (seven).<sup>32</sup>

As a result of Arizona's failure to appoint qualified counsel on a timely basis, the burden has fallen to outside organizations to recruit *pro bono* counsel. Indeed, the State's application to the Attorney General for

---

<sup>30</sup> Office of the Attorney General, Capital Case Commission Final Report (Dec. 2002), at 14, <https://www.azag.gov/sites/default/files/docs/criminal/cc/CC/CapitalCaseCommission-FinalReport.pdf>.

<sup>31</sup> ABA Assessment at 185.

<sup>32</sup> Joint Report of the Capital Case Oversight Committee & Maricopa County Superior Court to the Arizona Judicial Council (Nov. 2008), at 11, <https://www.azcourts.gov/Portals/74/CCOC/2015ReportCCOC.pdf?ver=2019-11-25-131442-600> ("2008 Joint Report of the Capital Case Oversight Committee & Maricopa County Superior Court to the Arizona Judicial Council").

certification featured three cases where the ABA had to recruit large civil law firms because Arizona had failed to timely appoint qualified post-conviction counsel. Throughout the certification period, the ABA Death Penalty Representation Project has had to find *pro bono* counsel to represent Arizona prisoners. One of the prerequisites for certification is that the State have a mechanism to promptly appoint post-conviction counsel; relying on outside organizations to find *pro bono* counsel, which often takes months or years, is inconsistent with the timing demanded by this process. More importantly, the ABA's efforts are a stop-gap measure that reflect basic deficiencies in Arizona's appointment mechanism: fundamentally, there is an insufficient pool of competent post-conviction counsel available to accept appointments in Arizona as a result of insufficient compensation the state has provided to post-conviction counsel.<sup>33</sup>

**B. Arizona's Mechanism Fails to Ensure Compensation and Payment of Reasonable Litigation Expenses**

Section 507 expressly requires that for a state to be certified, the Attorney General must determine "whether the State has established a

---

<sup>33</sup> See *supra* Section I.B.



mechanism for the . . . 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). A mechanism is presumptively adequate where the state’s compensation mechanism equals or exceeds one of the following:

- (1) compensation of federally appointed counsel under 18 U.S.C. § 3599;
- (2) compensation of retained counsel in state capital post-conviction proceedings;
- (3) compensation of state-appointed counsel in capital trial or appellate proceedings; or
- (4) compensation of prosecuting counsel representing the state in state post-conviction proceedings.

28 C.F.R. § 26.22(c).

Arizona’s compensation mechanism falls short on three metrics: hourly rates, the number of hours compensated, and payment of reasonable litigation expenses.

a. Rates

In 1998, Arizona provided a rate of *up to* \$100 per hour for the compensation of capital post-conviction attorneys. At the time, that

amount was already significantly lower than rates paid in other states and the federal government.

Despite persistent recommendations, Arizona has never increased that rate.<sup>34</sup> In 2020, the rate is still \$100 per hour. Ariz. Rev. Stat. § 13-4041(F). The rate meets none of the four criteria for presumptive adequacy under the Rule. Indeed, the insufficiency of the hourly compensation rate to attract qualified attorneys is confirmed by the recurring need for the ABA to recruit *pro bono* counsel.

In its application, Arizona argued that because public defenders were appointed, the compensation paid to private counsel was not relevant. But while certain counties in Arizona have public defender offices, many do not, and Arizona relies primarily on its *ad hoc* system of appointments from the private bar.<sup>35</sup> Thus, the fact that public defenders *may* by statute take on capital post-conviction cases, and that these attorneys are salaried, does not change the reality that private counsel

---

<sup>34</sup> See Progress Report of the Capital Case Oversight Committee (Dec. 2013), at 6, <https://www.azcourts.gov/Portals/74/CCOC/2013Report/CCOC.pdf?ver=2019-11-25-131439-927> (“The Oversight Committee has recommended over the past several years that the hourly rate in A.R.S. § 13-4041 be increased . . .”).

<sup>35</sup> ABA Assessment at 154.

earning an hourly rate of \$100 are primarily responsible for representing indigent capital prisoners in Arizona.

b. Presumptive Hours Caps

For a significant portion of the relevant period, Arizona presumptively capped post-conviction counsel at no more than 200 hours of representation.<sup>36</sup> The ABA Guidelines recognize that capital cases require extraordinary time, effort, and skill from defense counsel as well as multi-member teams, expert assistance, and extensive investigations. The Guidelines observe that that “[t]housands of attorney hours are required to represent a death-sentenced prisoner effectively in [state post-conviction] cases,”<sup>37</sup> and attorney hours are only one aspect of the cost of a capital case. Under a presumptive-cap system, there is an “unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee.”<sup>38</sup>

---

<sup>36</sup> See Ariz. Rev. Stat. § 13-4041(G) (1998) (“[C]ounsel appointed to represent a capital defendant in state post-conviction relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour for up to two hundred hours of work, whether or not a petition is filed.”).

<sup>37</sup> ABA Guideline 9.1, cmt.

<sup>38</sup> *Id.*

In light of the presumptive cap, there was no basis for the Attorney General to conclude that Arizona had established an adequate mechanism for compensation prior to the cap's elimination in 2013. And even after that time, the impact of the cap lingers. The data submitted by Arizona in its application indicates that many counsel are spending an order of magnitude less time than it typically takes to represent a capital defendant in post-conviction proceedings. For example, the State has provided funding data for twenty-one Maricopa County cases—excluding those where representation was provided by *pro bono* counsel recruited by the ABA. In five of those cases, attorneys requested total compensation *under* \$20,000 (*i.e.*, less than 200 hours), and in nine cases total, attorneys billed varying amounts of less than \$50,000 (less than 500 hours).<sup>39</sup> While there will always be some degree of variation from case to case, this is far less than the “[t]housands of attorney hours . . . required,” the national norm noted in the Guidelines.<sup>40</sup>

---

<sup>39</sup> Letter from the Office of the Arizona Attorney General to the Department of Justice (Oct. 16, 2018), Ex. B, <https://www.justice.gov/olp/page/file/1113346/download>.

<sup>40</sup> *Id.* (emphasis added).

c. Reasonable Expenses

The Rule requires that compensation must be provided for “reasonable litigation expenses,” which “may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel.” 28 C.F.R. § 26.22(d). In Arizona, the funds allocated to indigent defense are almost entirely provided by the counties, and for “state post-conviction proceedings, the county will be reimbursed for half of the expert and investigative services approved by the trial court.”<sup>41</sup> Because the county is reimbursed for only a fraction of expenses incurred in post-conviction representation, it discourages trial courts in poorer counties from approving certain expenses—even if they are reasonably necessary to defend the case.

As a result, the provision both of attorney compensation and approval of expert and other expenses is likely to vary significantly depending on the county in which the capital defendant has been convicted, therefore leading to arbitrariness in post-conviction compensation. This arbitrariness contradicts Arizona’s assertion that a statewide mechanism has been created that adequately provides for the

---

<sup>41</sup> ABA Assessment at 135, 153.

compensation of attorneys' fees and reasonable additional expenses. In this regard, it is notable that *pro bono* law firms appear to be requesting significantly higher payments for litigation expenses than attorneys appointed under the State's own mechanism.<sup>42</sup> The ABA's study of and experience with capital cases has repeatedly confirmed that conducting an adequate investigation is time-intensive and costly, and that an inexpensive investigation is also likely to be an inadequate one.<sup>43</sup>

d. Dramatically Inconsistent Funding Within the State

Because Arizona takes a county-by-county approach, there is significant arbitrariness in the funding across counties. Arizona's application confirmed there is widely divergent funding. For example, in its application, the State acknowledged that "Pima County Public Defense Services reported average spending for attorney representation . . . exceeds \$110,000 per case and average litigation expense exceed \$50,000 per case.

---

<sup>42</sup> See also 2018 ABA Comment at 2; *id.* at 5 (discussing litigation expense data in the State's petition).

<sup>43</sup> ABA Guideline 9.1, cmt. ("[A]ny compensation system that fails to reflect the extraordinary responsibilities and commitment required of all members of the defense team in death penalty cases . . . will not succeed in obtaining the high quality legal representation required by these Guidelines. For better or worse, a system for the provision of defense services in capital cases will get what it pays for.").

*Even smaller counties spend significantly more than \$20,000 per case.”<sup>44</sup>*

This summary reflects a gross disparity—large counties are spending eight times as much as smaller counties. The lack of available funding in smaller jurisdictions is not an excuse for failing to provide adequate compensation; rather it is a reason to avoid a county-by-county system of indigent defense.

The information provided by the State paints a troubling picture of Arizona’s system of capital defense, one that continues to suffer from the same problems that led the ABA and others to issue repeated calls for the creation of a statewide office. The admirable work of *pro bono* counsel in certain cases does not erase the very real problems with appointment of competent counsel under the mechanism, nor do a handful of cases where the courts appear to have authorized reasonable litigation expenses erase the fact that numerous other cases are receiving unreasonably low payments and that there is a wide disparity in funding of the defense effort across counties. The information provided in the

---

<sup>44</sup> Letter from the Office of the Arizona Attorney General to the Department of Justice (Oct. 16, 2018), at 5, <https://www.justice.gov/olp/page/file/1113346/download> (emphasis added).

October Supplement merely confirms that the Arizona mechanism, as a whole, fails to meet the requirements of Chapter 154.

## **II. THERE IS NO BASIS FOR CERTIFICATION RETROACTIVE TO MAY 1998**

The Attorney General's retroactive certification to May 19, 1998 ignores Arizona's history of substantial and longstanding deficiencies in its post-conviction appointment process. Under the Rule, if the Attorney General certifies a state's mechanism, the Attorney General is required to determine "the date the capital counsel mechanism qualifying the State for certification was established." Retroactive application could mean that timely filed petitions for *habeas corpus* relief would suddenly be deemed untimely and procedurally barred from any further consideration. The crux of the Attorney General's decision to retroactively certify is that the elements of the mechanism approved by the Ninth Circuit in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002) have been in place since 1998.

This decision ignores evidence that, since 1998, Arizona has failed to maintain a consistent, statewide mechanism to provide competent state post-conviction counsel in capital cases. Indeed, in the span of just a few years, Arizona (i) replaced its private appointment system with a



statewide post-conviction office, (ii) repealed the requirement that post-conviction counsel be appointed within fifteen days of notice of [direct appeal], (iii) eliminated its requirement that appointed counsel have actual post-conviction experience, (iv) underfunded its statewide post-conviction office, and (v) abolished its statewide post-conviction office. At no point since 1998 did Arizona have a system that adequately, regularly, or timely appointed competent post-conviction counsel. Arizona's current system differs from that analyzed by *Spears* but still fails to guarantee the provision of qualified post-conviction counsel.<sup>45</sup>

Since 1998, Arizona made two rounds of material revisions in the rules governing the provision of post-conviction counsel, to the detriment of indigent defendants. Prior to 2011, Rule 6.8 required that counsel have prior post-conviction experience as a prerequisite for appointment in post-conviction cases. Ariz. R. Crim. P. 6.8(c) (2002). In 2011, Rule 6.8

---

<sup>45</sup> See, e.g., Comments of the American Bar Association to the Office of Legal Policy Docket No. OLP 166 (Feb. 26, 2018), [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/statements\\_testimony/aba-comments-on-tx-opt-in-applications.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-comments-on-tx-opt-in-applications.pdf); Comments of the American Bar Association to the Office of Legal Policy Docket No. OLP 166 (Jan. 7, 2019), [https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2019\\_jan7-ABAComentletterAZDP.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2019_jan7-ABAComentletterAZDP.pdf).

eliminated this requirement, allowing counsel instead to qualify if they were lead counsel in two felony trials. The ABA opposed this decision, noting that the revised Rule failed to comply with the ABA Guidelines. The current version of Rule 6.8 does not distinguish between the trial, appellate, or post-conviction level, disregarding the significant differences between capital trial, appeal, and post-conviction practices. The Department of Justice recognized this significance: when publishing the Rule, it specifically required states to appoint counsel with “at least three years of postconviction litigation experience.” 28 C.F.R. § 26.22(b)(1)(i). Arizona does not meet that requirement.

Since 1998, Arizona also changed the time period for appointing counsel after the notice of post-conviction relief. Ariz. R. Crim. P. 32.4(c), promulgated in 1998, required that “[u]pon the filing of a timely notice in a capital case, in a non-capital case, or the second or subsequent notice in a non-capital case which, for the first time raises a claim of ineffective assistance of counsel, the presiding judge shall appoint counsel within 15 days if requested and the defendant is determined to be indigent.” Ariz. R. Crim. P. 32.4(c) (1998); *see also Spears*, 283 F.3d at 1016–18. This requirement was removed in 2000; the current rules direct appointment

of counsel after the Arizona Supreme Court's affirmance of the conviction and sentence. *See* Ariz. Rev. Stat. 13-4041(B) (2014); Ariz. R. Crim. P. 32.5(b) (2020). *Spears* evaluated the 1998 rule applicable to the case before it and based its findings of the adequacy of Chapter 154 certification in part on the requirement of post-conviction counsel within fifteen days of notice of direct appeal. 283 F.3d at 1018. That is no longer the case in Arizona. In the absence of a timeliness requirement, there is no guarantee that counsel will be appointed to give adequate time to prepare a *habeas* petition, especially given the abbreviated period for filing *habeas* petitions after Chapter 154 certification.

In addition, in the period from 2006 to 2011, Arizona opened, underfunded, and then closed the Capital Postconviction Public Defender Office. During its short existence, the office was grossly underfunded; the ABA's 2006 Assessment noted that the office was "only provided with \$220,000" for its first fiscal year of operations.<sup>46</sup> In addition, the office had a strict cap on staffing, which significantly limited the number of cases it could handle and created a significant backlog of capital

---

<sup>46</sup> ABA Assessment at 139.

defendants awaiting appointment.<sup>47</sup> By 2011, the legislature, still having failed to allocate sufficient funding, allowed the office to lapse. The underfunding and closure of the office left dozens of Arizona defendants and prisoners without counsel for years. Due to funding constraints, the office ultimately represented only five clients before it closed.<sup>48</sup> Both before the opening and following the closure, Arizona relied largely on a system of *ad hoc* appointments of private counsel made by the Arizona Supreme Court under the provisions of Rule 6.8. Arizona's *ad hoc* appointment system that had (and still has) difficulty attracting qualified post-conviction counsel due to strict restrictions on compensation of counsel, including a \$100 hourly rate and cap limiting attorney's billable hours to 200 in a post-conviction relief case.<sup>49</sup>

---

<sup>47</sup> Joint Report of the Capital Case Oversight Committee & Maricopa County Superior Court to the Arizona Judicial Counsel (Oct. 24, 2007), at 21, <https://www.azcourts.gov/LinkClick.aspx?fileticket=blbzooGmJj4%3d&tabid=1953>.

<sup>48</sup> Progress Report of the Capital Case Oversight Committee to the Arizona Judicial Counsel (Dec. 2015), at 11, <https://www.azcourts.gov/Portals/74/CCOC/2015ReportCCOC.pdf?ver=2019-11-25-131442-600>.

<sup>49</sup> See *supra* n.47.

Accordingly, the Ninth Circuit's observations in *Spears* address Arizona's death penalty counsel mechanism at a specific point in time—July 17, 1998. *Spears*, 283 F.3d at 1018. The Attorney General did not consider changes after this time that demonstrate that Arizona does not, and cannot, comply with the requirements of 28 U.S.C. § 2261(b). Furthermore, retroactive application could mean that timely filed petitions for *habeas corpus* relief would suddenly be deemed untimely and procedurally barred from any further consideration.

### CONCLUSION

The ABA urges that this Court vacate the Attorney General's certification of Arizona under 28 U.S.C. § 2265.

Dated: August 20, 2020

Respectfully submitted,

John A. Freedman  
ARNOLD & PORTER KAYE  
SCHOLER LLP  
601 Massachusetts Avenue, NW  
Washington, DC 20001  
(202) 942-5000  
John.Freedman@arnoldporter.com

/s/ Patricia Lee Refo  
Patricia Lee Renfo  
*Counsel of Record*  
AMERICAN BAR ASSOCIATION  
321 North Clark Street  
Chicago, IL 60654  
(312) 988-5000  
AmicusBriefs@americanbar.org

*Counsel for the American Bar Association*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,440 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

Dated: August 20, 2020

Respectfully submitted,

/s/ Patricia Lee Refo  
Patricia Lee Refo

**CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2020, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, I caused the foregoing Brief to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: August 20, 2020

/s/ Patricia Lee Refo  
Patricia Lee Refo

# **ADDENDUM**



**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Ariz. R. Crim. P. 32.4(c) (1998) .....	1a
Ariz. R. Crim. P. 32.5(b) (2020) .....	2a

**Ariz. R. Crim. P. 32.4(c) (1998)**

**c. Appointment of Counsel.** Upon the filing of a timely notice in a capital case, or the first notice in a non-capital case, or the second or subsequent notice in a non-capital case which, for the first time, raises a claim of ineffective assistance of counsel, the presiding judge shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. Upon the filing of all other notices in non-capital cases, the appointment of counsel in successive or untimely petitions is within the discretion of the presiding judge. In non-capital cases, appointed counsel for the defendant shall have sixty days from the date of appointment to file a petition raising claims under Rule 32.1. A non-capital defendant proceeding without counsel shall have sixty days to file a petition from the date the notice is filed or from the date the request for counsel is denied. In capital cases, appointed counsel for the defendant shall have one hundred twenty days from the date of appointment to file a petition raising claims under Rule 32.1. A capital defendant proceeding without counsel shall have one hundred twenty days from the filing of the notice to file a petition. On a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition. On a showing of good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition. In non-capital cases, additional extensions of thirty days shall be granted only in extraordinary circumstances. In capital cases, additional extensions of thirty days may be granted for good cause.

**Ariz. R. Crim. P. 32.5(b) (2020)**

**(b) Capital Cases.** After the Supreme Court has affirmed an indigent capital defendant's conviction and sentence, the Supreme Court or its designee must appoint counsel who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. If the Supreme Court has authorized the presiding judge of the county where the case originated to appoint counsel, the presiding judge must file a copy of the appointment order with the Supreme Court. If a capital defendant files a successive notice, the presiding judge must appoint the defendant's previous post-conviction counsel, unless the defendant waives counsel or there is good cause to appoint another qualified attorney who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. On application and if the trial court finds that such assistance is reasonably necessary, it must appoint co-counsel.