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; JONATHAN 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

BRIEF OF AMICI CURIAE ACADEMIC EXPERTS IN FEDERAL CRIMINAL PROCEDURE AND POST-CONVICTION PRACTICE IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici curiae* Academic Experts in Federal Criminal Procedure and Post-Conviction Practice file the following Certificate as to Parties, Rulings, and Related Cases.

Parties, Intervenors, and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the Brief for Petitioners: American Bar Association and Professors of Administrative Law.

Rulings 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.

Related Cases

Amici adopt the statement of related cases set forth in Brief for Petitioners.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), *amici curiae* submit that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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SEPARATE BRIEFING CERTIFICATION

Pursuant to Circuit Rule 29(d), the undersigned counsel for *amici curiae* Academic Experts in Federal Criminal Procedure and Post-Conviction Practice certifies that a separate brief is necessary because the *amici* will draw on their collective expertise to provide the Court with an overview of the concerns animating the requirements enacted under Chapter 154 of Title 28. To the best of the undersigned counsel's knowledge, none of the other *amici* supporting Petitioners will focus on those issues. Filing a joint brief will therefore not be practicable.

/s/ James Gatta
James Gatta

Dated: August 20, 2020

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Petitioners.

STATEMENT OF AMICI CURIAE REGARDING IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29(b), *amici curiae* state that all parties have consented to the filing of this brief. *Amici curiae* filed a notice of intent to participate on August 17, 2020.

Amici are professors[1] who study and teach criminal procedure, with specific expertise in post-conviction process.[2] *Amici* submit this brief to provide the background behind the *quid pro quo* requirement of competent state post-conviction counsel in Chapter 154 of Title 28. This brief draws on the authors' research and expertise in these areas to analyze this issue for the benefit of the Court.

[1] A full list of *amici* is provided as an addendum to this brief.

[2] No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

After a state sentences a defendant to death, and the defendant has exhausted his direct appeals, the litigation moves to its state and federal post-conviction phases. Together, Chapters 153 and 154 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") set forth the federal post-conviction (*i.e.*, habeas) procedures available to state prisoners. Chapter 154 provides streamlined federal habeas process for state prisoners sentenced to death. Stacking the federal habeas deck in favor of state respondents, Chapter 154's streamlined approach applies only when a state provides a "qualifying mechanism" for promptly appointing and adequately compensating competent state post-conviction counsel. In all other capital cases, and in all non-capital cases, the federal habeas litigation proceeds under Chapter 153 alone.

Chapter 154 grew out of specific concerns—in death penalty cases—about the unstructured relationship between state and federal post-conviction proceedings. Specifically, the Chapter 154 provisions are a *quid pro quo* tracing to the recommendations of a well-known working group chaired by former Associate Justice Lewis F. Powell, Jr. Under certain circumstances initially recommended by the "Powell Committee" and eventually specified in 28 U.S.C. §§ 2261 & 2265, a state can "opt-in" to a special federal habeas process with a reduced limitations period and other severe restrictions on relief for death-sentenced state prisoners. A

state can get the benefit of this restrictive federal habeas procedure, however, only if that state has a qualifying mechanism that guarantees competent, timely-appointed, and sufficiently-resourced capital representation during the state post-conviction proceedings.

Because the legislative history of the *quid pro quo* is rich and well-documented, it is especially probative of statutory meaning. That meaning, informed by that history, is unambiguous. The Attorney General may not certify a state that skimps on the qualifying mechanism—that is, the rules by which it ensures that competent counsel are appointed promptly, paid fairly for their time, and reimbursed reasonably for their experts, investigators, and other expenses. Certification thereby ensures that a state litigant may only be afforded Chapter 154's federal habeas advantages when federal courts can be assured of the integrity and reliability of the capital judgment that the state is defending. Any suggestion that a state can cut corners when it seeks certification belies the bargain at the heart of the habeas corpus legislation at issue here.

That the federal judiciary have authoritative say over the certification decision has been a basic principle ever since the Powell Committee conceived of the *quid pro quo*. In fact, this Court's vigilance is even more important in light of how AEDPA combined Chapters 153 and 154. Post-conviction litigation is increasingly central to the enforcement of bedrock constitutional rights, and modern restrictions

on *federal* habeas review mean that the reliability and fairness of the modern death penalty often comes down to the procedural guarantees in the state post-conviction forum. Chapter 154 recognizes that state post-conviction proceedings are not a meaningful forum for the enforcement of rights unless a death-sentenced prisoner has the guarantee of representation that the provisions contain. For the reasons that follow, and as set forth in the Opening Brief for Petitioners in this case, Arizona's procedures for appointing capital post-conviction counsel do not meet Chapter 154's certification requirements.

ARGUMENT

I. THE POWELL COMMITTEE ORIGINATED THE *QUID PRO QUO* REQUIRING STATES TO MAINTAIN QUALIFYING MECHANISMS FOR THE TIMELY APPOINTMENT AND REASONABLE COMPENSATION OF COMPETENT COUNSEL.

Before AEDPA, a death-sentenced state prisoner could simply relitigate the same allegations of constitutional error in state and federal post-conviction proceedings, with relatively few statutory restrictions.[3] In June 1988, amid mounting concerns about the relationship between post-conviction litigation and

[3] *See Miller v. Fenton*, 474 U.S. 104, 112 (1985) (observing that "an unbroken line of cases" rejects the proposition that federal habeas review "merits something less than independent federal consideration" of pure and mixed legal questions); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1793 (2003) ("Habeas courts thus do decide federal issues resolved by state courts, and, before AEDPA, decided them *de novo*.").

delayed imposition of the death penalty,[4] Chief Justice Rehnquist formed the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (the "Committee" or "Powell Committee"). The Powell Committee, chaired by then-retired Associate Justice Lewis Powell, Jr., was instructed to inquire into the "necessity and desirability of legislation directed toward avoiding delay and the lack of finality" in capital cases.[5]

The Powell Committee reviewed relevant comments and presentations from numerous prosecutors, legislators, scholars, and organizations. The Committee released a report identifying three key issues warranting legislative attention: (1) the lack of quality counsel in state post-conviction proceedings; (2) the unnecessary delay and repetition of habeas claims; and (3) the difficulty placed on the decision-making process by imminent execution dates.[6] The Committee ultimately surmised that these three issues were interconnected, with the second and third following, at least in part, from the first: the dearth of competent and sufficiently compensated state post-conviction counsel.[7]

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[4] *See* Ad Hoc Comm. on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, reprinted in 135 Cong. Rec. 24694-95 (1989) ("CR").

[5] *Id.*

[6] *See id.* at 24694-95.

[7] *See id.* at 24696 (stressing that the efficacy of the Powell Committee's scheme for striking "a realistic balance between the values of judicial efficiency and procedural

First, the Powell Committee Report emphasized the importance of providing competent counsel for capital prisoners throughout both state and federal post-conviction review, in order to ensure both "fairness" and a meaningful forum for enforcing constitutional rights.[8] While the Constitution requires counsel at trial and on direct appeal, and while a federal statute mandates *federal habeas* counsel for death-sentenced state prisoners,[9] there was no guarantee to representation in *state* post-conviction proceedings. The onus for timely litigation therefore fell on indigent, often uneducated death-sentenced prisoners. Such prisoners had to navigate byzantine state post-conviction processes alone, as they "often [could] not obtain qualified counsel until execution is imminent."[10] Explaining the special concern for *capital* cases, the Committee reasoned that "death is a unique punishment" that demands special procedural safeguards, and that a capital sentence should be imposed only with "utmost reliability and fairness."[11]

Second, the Powell Committee concluded that federal habeas review was fraught with "unnecessary delay and repetition," in part because death-row prisoners

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fairness in the context of a federal system" hinges on states taking affirmative steps to appoint competent post-conviction counsel).

[8] CR 24694-95.

[9] *See* 18 U.S.C. § 3599.

[10] CR 24694.

[11] *Id.*

lacking competent state post-conviction counsel often engaged in fractured and unstructured litigation across state and federal post-conviction forums. Facing no statute of limitations and lacking the stewardship of counsel, these prisoners would inefficiently divide and repeat their litigation across state and federal post-conviction forums.[12] Without any coordination between the federal and state legal systems, death-sentenced prisoners spent "significant time moving back and forth between federal and state systems in the process of exhausting state remedies."[13]

Third, the Powell Committee concluded that, because death-sentenced state prisoners often lacked incentives to initiate timely litigation, they might intentionally wait to file claims until prompted by the setting of the execution date.[14] Capital prisoners' particular interest in prolonging collateral review proceedings, along with an authentic shortage of qualified counsel, meant that post-conviction litigation for those facing death sentences was more likely to be protracted.[15]

The Powell Committee made a legislative recommendation in light of these findings, and in order to elevate the reliability of death sentences from states certified for restricted federal habeas review. Specifically, the Committee recommended that

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[12] *See id.*

[13] *See id.*

[14] *See id.* at 24695.

[15] *See id.* at 24694.

Congress establish special, streamlined rules that would permit certain death penalty states to opt into an advantaged federal habeas position in exchange for "providing competent counsel for inmates on state collateral review."[16] The Committee described its overriding goal to be procedure comprising "one complete and fair course of a collateral review in the State and Federal system, free from the time of impending execution, *and with the assistance of competent counsel for the defendant*."[17]

The heart of the Powell Committee's proposal was thus the *quid pro quo*—the opt-in system under which states would benefit from strict restrictions on federal habeas relief in exchange for ensuring timely, competent, and well-resourced state post-conviction representation. The proposed strength of the state post-conviction guarantee was commensurate with the windfall in subsequent federal habeas proceedings: a six-month limitations period, a bar on relief for claims not presented to state courts, and firm limits on successive federal petitions.[18] Because the benefits to qualifying states in the recommendation were substantial, so were the qualifying commitments to state post-conviction representation.

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[16] *Id.* at 24695.

[17] *Id.* at 24694-95 (emphasis added).

[18] *See* CR 24694-95.

In recommending the *quid pro quo*, the Powell Committee recognized that restrictive federal habeas rules made sense only if capital sentences had certain indicia of heightened integrity and reliability. It explained: "The purpose of this mechanism is to assure that collateral review will be fair, thorough, and the product of capable and committed advocacy."[19] The Committee therefore emphasized that "central to the efficacy" of this *quid pro quo* was, among other things, the states' development of standards to determine the competency of counsel appointed to indigent prisoners.[20] As the rest of this Brief explains, the Powell Committee's recommendation—that there be a vigorous commitment to timely, qualified, and adequately funded state-post-conviction representation—is the lodestar of opt-in certification under Chapter 154.

II. AEDPA REQUIRES THAT A CERTIFIED STATE MAINTAIN A QUALIFYING MECHANISM TO APPOINT AND REASONABLY COMPENSATE STATE POST-CONVICTION COUNSEL.

The Powell Committee Report is the elemental piece of Chapter 154's legislative history,[21] providing further contextual support for statutory language

[19] *Id.* at 24696.

[20] *Id*.

[21] *See* 135 Cong. Rec. 24,684-86 (1989) (statement of Sen. Biden establishing the Powell Committee Report recommendations as the substantive genesis of proposed habeas corpus reform legislation); Larry Yackle, *The New Habeas Corpus in Death Penalty Cases*, 63 AM. U. L. REV. 1791, 1799 (2014) (hereinafter, "Yackle, The New Habeas Corpus") ("There is no gainsaying that the [Powell] Committee provided the

requiring rigorous compliance with certification requirements.[22] In order for a state to be certified for a Chapter 154 advantage in federal habeas proceedings, it must establish a regime for promptly appointing and reasonably compensating competent capital post-conviction counsel.[23] To skirt the requirements about state post-conviction counsel is to flout the statute.

A. AEDPA Embraces the Powell Committee's Recommendations.

The Powell Committee's recommendations were adopted, in somewhat modified form, by AEDPA. Passed in the wake of the Oklahoma City bombing, AEDPA largely addressed federal habeas corpus procedures for state prisoners.[24]

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general model for Chapter 154, nor that many provisions in the statute plainly stem from analog elements of the Committee's Plan").

[22] *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) ("Ordinary principles of statutory construction [require an interpreting court to] examine the statute's text in light of context, structure, and related statutory provisions."); *Castillo v. United States*, 530 U.S. 120, 124 (2000) (in articulating statutory meaning, emphasizing that "language, structure, context, history, and such other factors . . . typically help courts determine a statute's objectives"); *N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 274 (1974) (referring to "the importance of legislative history" as an "established principle[] of statutory construction"); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972) ("But, while the clear meaning of statutory language is not to be ignored, words are inexact tools at best and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history.") (internal citations and quotation marks omitted).

[23] 28 U.S.C. § 2265(a).

[24] Chapter 154 was the result of a years-long Congressional effort, following the release of the Powell Committee Report, to integrate its recommendations into legislation. Various pre-AEDPA Democratic and Republican proposals packaged the Powell Committee's recommendations together with other reform measures.

Chapter 154 specifies opt-in procedures for certain capital habeas litigation arising out of qualifying states—that is, it implements the Powell Committee's recommendations. AEDPA included provisions applicable to all federal post-conviction cases, but Chapter 154 established the *quid pro quo* for certified states that must defend their capital sentences in federal habeas proceedings.

The House Judiciary Committee Report on AEDPA expressly states that AEDPA adopts the core tenet of the Powell Committee's recommendations: the "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants."[25] In so doing, the House Judiciary Committee outlined the basic conditions under which a state could opt in to the statutory benefits it enjoyed under Chapter 154[26]: by guaranteeing timely appointment of qualified post-conviction

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See, e.g., S. 635, 102d Cong. (1991); H.R. 1400, 102d Cong. (1991); *see also* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 466-68 (2007); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, fn. 154 (1996) (hereinafter, "Yackle, The New Habeas Primer").

[25] H.R. Rep. No. 104-23, at 8-10 (1995). The House Judiciary Committee expressly stated that the purpose of AEDPA's provisions regarding Chapter 154 was to enact "the core recommendation of the 'Powell Committee' – States that appoint competent counsel to represent indigent capital defendants in state collateral proceedings obtain further safeguards against delay by limiting second and successive habeas in capital cases to claims raising doubt about prisoner's factual guilt . . . ."). *Id.*

[26] Among the Chapter 154 advantages are those recommended in the Powell Committee Report, including: a six-month limitations period, 28 U.S.C. § 2263(a),

counsel, and making sure that they were reasonably compensated for their time and litigation expenses.[27]

Specifically, the states' obligations under the *quid pro quo* are now embodied in 28 U.S.C. §§ 2261 & 2265. Section 2261 imposes the certification requirement,[28] and the requirements for certification are in turn elaborated in § 2265. Under Subsection 2265(a)(1)(A), certification requires "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." Subsection 2265(a)(1)(C) further requires the state to provide "standards of competency for the appointment of counsel in proceedings described in subparagraph (A)." Chapter 154 thereby incorporates § 2256 of the Powell Committee Report, which describes the procedures for the appointment of counsel.[29]

Chapter 154 also tracks the Powell Committee's recommendation with respect to the benefits that certified states receive. For example, an opt-in state enjoys a

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and a rule generally restricting relief to "claims that have been raised and decided on the merits in the State courts." 28 U.S.C. § 2264(a).

[27] *See* H.R. Rep. No. 104-23, at 17 (1995).

[28] 28 U.S.C. § 2261 ("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").

[29] *See* Betsy Dee Sanders Parker, *The Antiterrorism and Effective Death Penalty ("AEDPA"): Understanding the Failures of State Opt-In Mechanisms*, 92 IOWA L. REV. 1969, 1980-81 (July, 2007).

stronger statute-of-limitations defense—six months[30]—in order to "address the problem of delay and repetitive litigation in capital cases."[31] These same parallels are apparent in the Chapter 154 rules for mandatory stays of execution,[32] the limits on those stays,[33] the treatment of successive petitions,[34] and the strict limit on relief to claims that were "raised and decided on the merits in the State courts."[35]

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[30] *Compare* 28 U.S.C. § 2263(a) (providing that Section 2254 petitions "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") with the Powell Committee Report, CR at 24696 (recommending a "six-month period within which the federal habeas petition must be filed").

[31] H.R. Rep. No. 104-23, at 8.

[32] *Compare* 28 U.S.C. § 2262(a) with the Powell Committee Report, CR at 24696 (each providing that "a warrant or order setting an execution date for a [s]tate prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254").

[33] *Compare* 28 U.S.C. § 2262(b) with the Powell Committee Report, CR at 24697 (each providing that a stay shall expire if the prisoner fails to file the habeas petition within the limitations period, the petition is denied or the prisoner waives the right to habeas review).

[34] *Compare* 28 U.S.C. § 2262(c) with the Powell Committee Report, CR at 24697 (each barring successive petitions unless a new rule of constitutional law becomes available or the factual predicate for the claim could not have been discovered previously and such facts would be sufficient to undermine the determination of the prisoner's guilt for the offense(s) for which the death penalty was imposed).

[35] *Compare* 28 U.S.C. § 2264(c) (district court shall consider claims "actually presented and litigated in the state courts") with the Powell Committee Report, CR at 24697 (providing that district courts shall only considers claims that been "raised and decided on the merits in the state courts").

The *quid pro quo* remains the animating principle behind Chapter 154, even though AEDPA's text diverges from the Powell Committee Report in certain ways.[36] Perhaps the most interpretively significant difference between the Powell Committee's recommendations and the Chapter 154 opt-in provisions is that the latter accompany Chapter 153 provisions applicable to all federal post-conviction litigation.[37] The Powell Committee had recommended institutional guarantees for state post-conviction representation on the assumption that the federal courts would

[36] Examples of concepts arising out of the Powell Committee recommendations integrated into Chapter 154 by Congress in modified form include: 28 U.S.C. § 2263 (regarding the filing of habeas petitions, time limitations and tolling rules) decreases the amount of time for an extension to 30 (rather than 60) days, as was the Powell Committee recommendation Section 2258; 28 U.S.C. § 2264 (regarding the scope of federal review and district court adjudications) omits the parts of Powell Committee recommendation Section 2259 which commands courts to "determine the sufficiency of the evidentiary record" and then "conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review"; 28 U.S.C. § 2265 makes a new addition to the Committee's recommendations by giving definitions of "unitary review," "post-conviction review," and "direct review," as well as giving another description of how counsel should be appointed; 28 U.S.C. § 2266 adds to the Committee's recommendations by stating that the reduced limitations period applies to death-sentenced prisoners' initial petitions, successive petitions, and any to petitions following remand by a circuit court of appeals or the Supreme Court. The precise intention behind Congress's deviations from the Powell Committee Report in Chapter 154 are not self-evident, and could even be the result of legislative "drafting protocols, clumsy efforts to polish, oversight, ignorance, or (so often with respect to AEDPA) plain bad grammar." Yackle, *The New Habeas Corpus*, *supra* note 21, at 1799.

[37] *See Lindh v. Murphy*, 521 U.S. 320, 332, 334 (1997) (recognizing that generally applicable provisions of AEDPA, including 28 U.S.C. § 2254(d), continue to apply in cases from opt-in jurisdictions).

still backstop any state court mistakes by reviewing the constitutional claims *de novo*.[38]

AEDPA, however, further heightened the importance of *state* post-conviction representation because of how its strict re-litigation bar affects the availability of federal habeas relief. Specifically, under AEDPA, a federal court is prohibited from considering a claim on the merits and in light of new evidence, unless the state decision was factually or legally "unreasonable," and requires that this reasonability determination be made by exclusive reference to the state record.[39] Under AEDPA, therefore, the qualifying mechanism for appointing and compensating state post-conviction counsel – *i.e.*, a state's side of the *quid pro quo* – is even more central to the bargain than it was under the Powell Committee's proposal. To the extent that the state's obligations under Chapter 154's *quid pro quo* differ from those contemplated by the Powell Committee Report, they are more robust.

[38] *See* CR 24696 ("There is no intent to alter the substantive scope of federal habeas corpus review under section 2254.").

[39] *See* 28 U.S.C. § 2254(d)(2) (permitting a prisoner to avoid the § 2254(d) re-litigation bar if the state decision was factually unreasonable "in light of the evidence presented in the State court proceeding"); *Cullen v. Pinholster,* 563 U.S. 170 (2011) (interpreting Section 2254(d)(1) to require that any determination of legal unreasonableness be made in light of the state record).

B. While the U.S. Attorney General Now Makes Initial Certification Decisions, the Final Determination Regarding a State's Appointed Counsel Mechanism Rests With This Court.

AEDPA granted federal courts the authority to determine whether state mechanisms for providing counsel in capital post-conviction proceedings met the standards for Chapter 154 certification.[40] While some states sought the benefits of the process under Chapter 154, by 2006 no states had been determined to have established the requisite post-conviction representation regimes required under the law.[41] In connection with the 2006 Patriot Reauthorization and Improvement Act (the "PATRIOT Act"), Congress gave certification authority to the U.S. Attorney General, but left intact Chapter 154's critical requirement for competent state post-conviction representation,[42] and the corresponding administrative regulations were issued thereafter. Further to this point, Congress required that any Attorney General certification decision be subject to this Court's de novo review.[43] This review, in turn, reflects the Powell Committee's urgent belief that the "final judgment as to the

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[40] *See* Yackle, *The New Habeas Corpus*, *supra* note 21, at 1795.

[41] *See Id*. Although the Ninth Circuit commented, in *Spears v. Stewart*, that Arizona's proposed regime in 2002 might have, on its face, entitled the state to opt in, the state failed to meet its own timeliness requirement and thus could not enforce the Chapter 154 provisions. 283 F.3d 992, 1018-19 (9th Cir. 2002).

[42] *See* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 274-75 (2006); Yackle, *The New Habeas Corpus*, *supra* note 21, at 1795; *see* 28 U.S.C. § 2261.

[43] 28 U.S.C. § 2265.

adequacy of any" state system for appointing counsel must "rest[] ultimately with the federal judiciary."[44]

III. STRICT APPLICATION OF THE CHAPTER 154 CERTIFICATION REQUIREMENTS FOLLOWS FROM THE MODERN STRUCTURAL EMPHASIS ON STATE POST-CONVICTION REVIEW.

Strict enforcement of AEDPA's certification requirements follows from Chapter 154's text and legislative history, but also from context: the structural realities of modern capital post-conviction litigation. Courts cannot compromise the qualifying mechanism at the heart of the Chapter 154 *quid pro quo* for three related reasons, all reflected in the statutory text. First, post-conviction proceedings have emerged as a crucial forum for enforcing bedrock constitutional rights and avoiding wrongful executions. Second, because AEDPA and other modern decisional law severely restrict *federal* post-conviction review, the *state* post-conviction proceeding is now the primary collateral forum for such enforcement and avoidance. Third, Chapter 154 recognizes that, because capital post-conviction representation is almost always representation of indigent prisoners, the quality of state post-conviction lawyering is only as good as what the state pays for.

[44] CR 24696.

A. Post-Conviction Proceedings Are a Crucial Forum For Enforcing Constitutional Rights and Averting Wrongful Executions.

Post-conviction proceedings have become essential for enforcing basic constitutional rights, and for avoiding wrongful executions.[45] For example, bedrock constitutional guarantees, such as the right to effective assistance of counsel (*Strickland v. Washington*)[46] or against the state suppression of evidence (*Brady v. Maryland*),[47] cannot be practicably enforced at trial or on direct appeal. In most situations where trial counsel is constitutionally deficient, for example, trial counsel's deficient performance prevents the development of a trial record sufficient for efficacious appellate enforcement.[48] Undisclosed *Brady* material rarely crops up on appeal; it is often discovered years after trial and direct review conclude.[49] These

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[45] *See generally* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 453-460 (2017) (explaining why the post-conviction forum is now essential to the enforcement of certain rights and for avoiding wrongful executions).

[46] *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for determining ineffective assistance of counsel).

[47] *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the prosecution must turn over all exculpatory evidence to the defense).

[48] *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORN. L. REV. 679, 689 (2007); *see also Trevino v. Thaler*, 569 U.S. 413, 424 (2013) ("[T]he inherent nature of [*Strickland*] claims means that the trial court record will often fail to contain the information necessary to substantiate the claim.") (internal alterations, citations, and quotation marks omitted).

[49] *See* Melanie D. Wilson, *Anti-Justice*, 81 TENN. L. REV. 699, 742 (2014); *see also Martinez v. Ryan*, 566 U.S. 1, 19 (2012) (Scalia, J., dissenting) (observing that there

Sixth and Fourteenth Amendment rights are among the most basic commitments of American criminal procedure, and meaningful enforcement usually requires a collateral forum.

Post-conviction proceedings are also the crucial forum to enforce rights that accrue only after conviction, such as the prohibition against state execution of incompetent offenders.[50] Or there may be trial rights announced only after state trial proceedings are completed but that require retroactive enforcement, such as the prohibition against executing defendants with intellectual disabilities[51] and juvenile offenders.[52] And there may be new evidence of innocence, including DNA results and other advances in forensic science, that must be considered even after appeals conclude.[53] None of these rights can be enforced, nor wrongful executions averted, unless a capitally-sentenced prisoner has effective representation in a meaningful post-conviction forum.

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is not a "dime's worth of difference" between *Strickland* and *Brady* claims, insofar as both ordinarily have to be raised collaterally).

[50] *See Panetti v. Quarterman*, 551 U.S. 930 (2007); *Ford v. Wainwright*, 477 U.S. 399 (1986).

[51] *See Atkins v. Virginia*, 536 U.S. 304 (2002).

[52] *See Roper v. Simmons*, 543 U.S. 551 (2005).

[53] *See, e.g.,* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005) (noting that out of 340 exonerations between 1989 and 2003, 144 exonerations were based on DNA evidence).

B. AEDPA's Restrictions on Federal Habeas Relief Further Increase The Importance of the State Post-Conviction Forum.

AEDPA created new restrictions on *federal* habeas relief, contemplating that *state* post-conviction proceedings should be the main post-conviction event. As detailed above, AEDPA strictly limits what federal courts can consider on collateral review, and requires that federal courts' reasonableness determinations be based entirely on the state court record.[54] In addition, state prisoners seeking federal habeas relief also face strict procedural default rules that generally preclude them from litigating claims that their state post-conviction lawyers fail to raise.[55]

By design, then, availability of the federal habeas remedy has been strictly curtailed. As a result, state post-conviction proceedings are now the primary forum for death-sentenced prisoners to enforce rights that are otherwise not capable of enforcement at trial or on direct appeal. Therefore, a decision to water down the state's obligations under the *quid pro quo*—allowing them to gain the advantaged

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[54] *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (requiring for habeas relief that a state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (recognizing that unreasonableness standard is "difficult to meet because it was meant to be") (internal quotation marks omitted).

[55] *See Coleman v. Thompson*, 501 U.S. 722, at 753-55 (1991) (holding that ineffective state post-conviction counsel could not excuse procedural default). *Coleman*'s rule now has a narrow exception for *Strickland* claims defaulted by inadequate state post-conviction counsel. *See Martinez*, 566 U.S. at 9.

federal habeas position without the corresponding commitment to ensuring reliable death sentences—is contrary to AEDPA's principle that state post-conviction proceedings should be the main collateral event.

C. AEDPA's Certification Requirements Reflect The Importance of Quickly Appointing and Adequately Compensating Qualified Attorneys for Indigent Defendants.

The Chapter 154 certification requirements, in turn, ensure that opportunities to enforce rights and avoid wrongful executions in state post-conviction proceedings are meaningful. For death-sentenced prisoners, the collateral enforcement of constitutional rights requires timely investigation of guilt and punishment, speedy access to experts appropriate for capital litigation, familiarity with complex constitutional law specific to death penalty cases, and comfort with the unique client-management demands that capital work presents—including, for example, continual monitoring of the client's mental, physical and emotional condition for effects on the client's legal position.[56] Reliable state post-conviction representation therefore requires competent and experienced lawyers with sufficient access to financial

[56] *See* American Bar Association, American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, *reprinted in* 31 HOFSTRA L. REV. 913, 1079 (2003) ("ABA Guidelines") ("Guideline 10.15.1—Duties of Post-Conviction Counsel").

resources. Chapter 154 serves no purpose unless the certifying institution strictly enforces these compensation and competence requirements.[57]

Virtually every person on death row is indigent, and is therefore incapable of retaining and paying a lawyer of their choosing.[58] Because of such pervasive indigency, the sufficiency of state compensation—for qualified public defender entities or appointed lawyers—is a baseline requirement for a system in which cases necessarily require significant resources. A widely-cited survey of Florida post-conviction representations found that, on average, more than 3,300 attorney hours were necessary to competently represent an individual in state post-conviction proceedings.[59] As the American Bar Association observes in its influential guidelines for death penalty representation, "Low fees make it economically unattractive for competent attorneys to seek assignments and to expend the time and

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[57] *See Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996) (recognizing that "[u]nder the AEDPA, it is crucial that states provide competent, qualified attorneys to represent indigent capital defendants").

[58] *See*, *e.g.*, Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1395, 1431 n.149 (2016) (observing that "ninety-five percent of [Alabama's] death row inmates are indigent"); Bradley A. MacLean & H. E. Miller, Jr., *Tennessee's Death Penalty Lottery*, 13 TENN. J.L. & POL'Y 85, 88 (2018) (observing that "all defendants on [Tennessee's] death row are indigent").

[59] *See* ABA Guidelines at 969, n.119 (quoting The Spangenberg Group, Amended Time & Expense Analysis of Post-Conviction Capital Cases in Florida, at 16 (1998)).

effort a case may require."[60] This problem is acute for capital trial counsel, but it is "even worse . . . for representation in state collateral proceedings."[61]

For these reasons, the federal judiciary has strictly enforced the Chapter 154 compensation requirements.[62] In *Baker v. Corcoran*, for example, the Fourth Circuit considered Maryland's appointed representation system, and ruled that because limitations on reimbursement in that system resulted in significant financial hardships for appointed attorneys, it did not satisfy the adequate compensation requirements of Chapter 154.[63] In refusing to "conclude that Maryland adequately compensates state post-conviction counsel," the Fourth Circuit explained that "[a] compensation system that results in substantial losses to the appointed attorney or his firm simply cannot be deemed adequate."[64]

Courts conducting certification proceedings have determined that compensation alone is not enough—certification requires *qualified* state post-

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[60] ABA Guidelines at 986.

[61] *Id.*

[62] While the 2006 PATRIOT Act amendments shifted authority for certification from federal courts to the Attorney General, Congress did not change the requirement that the state establish "a mechanism for the appointment . . . of competent counsel in State postconviction proceedings brought by indigent [capital] prisoners." 28 U.S.C. § 2265. This Court's *de novo* review of any certification decision ensures that the requirement for competent representation in Chapter 154 is met.

[63] *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000).

[64] *Id.*

conviction counsel. Specifically, courts have held that states seeking to opt in under Chapter 154 must establish and rigorously enforce standards for appointing capital post-conviction lawyers.[65] The standards must be "mandatory and binding" on all counsel appointments.[66] This is because without "mandatory standards, [reviewing] federal courts would be unable to evaluate the adequacy of a state's appointment mechanism without examining the competency of individual counsel."[67] Courts have emphasized that the appointment of qualified counsel was all the more crucial after AEDPA because "the Act does not permit the ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings to be grounds for relief in a proceeding arising under section 2254. Instead, such incompetence may only result in the appointment of different counsel on the motion of the state or the petitioner."[68]

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[65] *See e.g., Mata v. Johnson,* 99 F.3d 1261, 1267 (5th Cir. 1996) (determining Texas's appointment mechanism inadequate as it did not "establish[] by statute, rule of court of last resort, or by another agency authorized by State law" specific, mandatory standards for capital habeas counsel, and concluding that the state was "not yet eligible to take advantage of the provisions afforded opt-in states" under AEDPA).

[66] *Ashmus v. Woodford*, 202 F.3d 1160, 1168 (9th Cir. 2000).

[67] *Id.; see also Spears*, 283 F.3d at 1000-1003.

[68] *Austin v. Bell,* 927 F. Supp. 1058, 1062 (M.D.Tenn. 1996) (citing 28 U.S.C. § 2261(e)).

A key criterion for competency is the level of counsel's experience, and specifically with post-conviction proceedings. In *Hill v. Butterworth*, a Florida court interpreted 28 U.S.C. § 2261 as "contemplat[ing] counsel who are competent through capital, post-conviction experience."[69] It is insufficient, moreover, for counsel to merely have criminal trial or appellate experience, as "[t]he average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy."[70] Courts have thus required that the state-appointed attorney have particular experience in post-conviction cases.[71]

Finally, it is not sufficient for a state to merely promulgate a mechanism whereby competent counsel may be provided and adequately compensated. In order to take advantage of Chapter 154's bargain, the state must *actually comply* with a certified mechanism. Specifically, Chapter 154 requires that "counsel was appointed pursuant to [the certified] mechanism." 28 U.S.C. § 2261(b)(2). For these reasons,

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[69] 941 F. Supp. 1129, 1142 (N.D. Fla. 1996) (emphasizing that 28 U.S.C. § 2261(b) requires the state mechanism to provide for "competent counsel in State *post-conviction* proceedings [and] . . . [t]he rule of court or statute must provide standards for the appointment of *such* counsel").

[70] *Ashmus v. Calderon*, 935 F. Supp. 1048, 1074 (N.D. Cal. 1996) (quoting Eleventh Circuit Judge John Godbold in rejecting California's assertion that its competency standards were sufficient, "*You Don't Have To Be a Bleeding Heart," Representing Death Row: A Dialogue Between Judge Abner J. Mikvah and Judge John C. Godbold,* Human Rights, Winter 1987, at 22, 24).

[71] *See, e.g.*, *Wright*, 944 F. Supp. at 466-67 (finding competency standards deficient without requiring habeas or capital experience).

courts have examined the state's actual practices before determining that a state may opt into Chapter 154's special federal habeas procedures.[72] A rigorous qualifying mechanism is therefore indispensable to the bargain at the heart of Chapter 154, because it guarantees the competence and resources necessary to make the state post-conviction forum meaningful and the death sentence reliable.

IV. CONCLUSION

A state can only benefit from the narrow federal habeas procedural rules in Chapter 154 where it has established its end of the *quid pro quo*: a qualifying mechanism that guarantees competent, timely-appointed, and sufficiently-resourced state post-conviction representation in death penalty cases. The Attorney General may not certify a state that cuts corners and certification in the absence of a qualifying mechanism that ensures the reliability and integrity of death sentences is contrary to the language and intent of the statute. Accordingly, and as set forth in the Opening Brief for Petitioners in this case, Arizona's procedures for appointing capital post-conviction counsel do not meet Chapter 154's certification requirements.

[72] *See, e.g., Tucker v. Catoe*, 221 F.3d 600, 604 (4th Cir. 2000) (holding that South Carolina's "mere promulgation of a 'mechanism' [was] not sufficient to permit [it] to invoke [Chapter 154's] provisions . . . . [T]hose mechanisms and standards must in fact be complied with . . . .").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 29(d) because this brief contains 6,154 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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