[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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, in his official capacity as United States Attorney General, and THE UNITED STATES OF AMERICA,

Respondents.

ON REVIEW OF AN ORDER OF THE ATTORNEY GENERAL, 85 FED. REG. 20,705

INITIAL RESPONSE BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rules 18(a)(4), 27(a)(4) and 28(a)(1)(A), I hereby certify as follows:

A. Parties to This Litigation

1. Petitioners are 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.

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

3. The State of Arizona has intervened.

4. Eight amicus briefs were filed in support of petitioners on behalf of (1) Federal Public Defender Capital Habeas Units; (2) sixteen professors of administrative law; (3) seventeen professors of criminal procedure and postconviction practice; (4) Russell D. Feingold, former U.S. Senator from Wisconsin; (5) the Arizona Capital Representation Project, Arizona Attorneys for Criminal Justice, Arizona Justice Project, and Katherine Puzauskas (the Supervising Legal Clinic Attorney for the Post-Conviction Clinic at the Sandra Day O'Connor College of Law at Arizona State University); (6) the American Bar Association; (7) five former federal judges; and (8) the Innocence Network and the Southern Center for Human Rights.

B. Rulings Under Review

Petitioners seek review of the Attorney General's April 14, 2020 certification of Arizona's capital counsel mechanism under 28 U.S.C. §§ 2261-2266, published in the Federal Register at 85 Fed. Reg. 20,705. JA__[R.1.85Fed.Reg.20,705].

C. Related Cases

There are no other matters involving the Attorney General's certification order pending before the Department of Justice, in this Court, or in the Supreme Court.

Petitioners challenged the Department's regulations implementing the certification procedure in the District of Arizona. See *Boggs* v. *U.S. Dep't of Justice*, No. 19-cv-5238 (D. Ariz.). The district court granted the government's motion to dismiss on August 4, 2020. Petitioners appealed to the Ninth Circuit on October 6, 2020, see No. 20-16941 (9th Cir.), but have moved, with the government's consent, to suspend the briefing schedule and hold appellate proceedings in abeyance pending this Court's disposition of the instant case.

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October 14, 2020

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GLOSSARY OF ABBREVIATIONS

2006 amendments	USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, § 507, 120 Stat. 192, 250 (2006)
ABA	American Bar Association
AEDPA	Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996)
APA	Administrative Procedure Act
Ariz. Rev. Stat.	Arizona Revised Statutes
Chapter 153	28 U.S.C. §§ 2241-2255
Chapter 154	28 U.S.C. §§ 2261-2266
CJA	Criminal Justice Act
Powell Committee Report	Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report (1989), 135 Cong. Rec. 24692 (Oct. 16, 1989)
Rule 6.8	Arizona Rule of Criminal Procedure 6.8

INTRODUCTION

Congress has enacted a statutory scheme—Chapter 154 of Title 28 of the U.S. Code—that encourages States to provide representation, in conformity with specified standards, to indigent capital prisoners during state postconviction proceedings. Once the Attorney General of the United States certifies that a State's procedures satisfy the requirements of Chapter 154, the State may take advantage of special rules that streamline federal habeas review of the State's capital cases. See 28 U.S.C. §§ 2261, 2265. Those alternative procedures aim to reduce delay in reaching a final judgment by, *inter alia*, providing a 180-day period (subject to tolling) within which state capital prisoners may seek federal habeas relief and requiring the federal courts to rule on those habeas petitions within set periods. See 28 U.S.C. §§ 2262-2264, 2266.

On April 14, 2020, the Attorney General certified that the State of Arizona has established a capital counsel mechanism that complies with Chapter 154's requirements. See JA__[R.1.85Fed.Reg.20,705]. The Attorney General exhaustively assessed Arizona's procedures and responded to concerns raised in the multiple rounds of public comments that the Department of Justice had solicited with respect to Arizona's application. Much of the Attorney General's analysis paralleled the Ninth Circuit's determination that Arizona complied with materially identical requirements under a preceding version of Chapter 154 that had committed such assessments to federal habeas courts rather than to the Attorney General. See *Spears* v. *Stewart*, 283 F.3d 992 (9th Cir.), cert. denied, 537 U.S. 995 (2002).

Petitioners—the Federal Public Defender for the District of Arizona and 13 individual capital prisoners—ask this Court to set aside the Attorney General's certification. They renew four broad complaints about the purported operation of Arizona's capital counsel mechanism that the Attorney General already addressed and persuasively dismissed during the certification process—the majority of which were also raised and rejected in the Ninth Circuit during its adjudication of *Spears*. Otherwise, petitioners largely rely on policy-based objections about the design and operation of Chapter 154, but those concerns are better directed to Congress than to the Attorney General, whose role under this statutory scheme is restricted to a binary compliance determination as to state capital counsel mechanisms, not a granular assessment of individual appointees' performance. Petitioners also raise a perfunctory challenge to the Department's regulations implementing Chapter 154, but their arguments misapprehend the adjudicatory nature of certification and overlook the transparent process and substantive analysis that the Attorney General carried out with respect to Arizona's mechanism. Accordingly, this Court should sustain the certification.

STATEMENT OF JURISDICTION

Petitioners seek review of the Attorney General's April 14, 2020 certification of Arizona's capital counsel mechanism under 28 U.S.C. §§ 2261-2266. JA__[R.1.85Fed.Reg.20,705]. Petitioners timely filed their petition for review on April 29, 2020. See 28 U.S.C. § 2344. This Court has jurisdiction under 28 U.S.C. § 2265(c).

STATEMENT OF THE ISSUES

1. Whether the Attorney General appropriately certified that Arizona's capital counsel mechanism satisfies the requirements set out in Chapter 154.

2. Whether the regulations promulgated by the Department of Justice to implement Chapter 154's certification procedure are valid.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

A. The Constitution does not guarantee a right to counsel during postconviction proceedings. See *Pennsylvania* v. *Finley*, 481 U.S. 551, 552 (1987) ("States have no obligation to provide" postconviction relief, "and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well."). By statute, however, Congress has assured indigent capital prisoners that qualified counsel will be appointed during federal postconviction proceedings. See 18 U.S.C. § 3599. Moreover, Congress has enacted a statutory scheme—Chapter 154—that incentivizes States to provide qualified counsel to indigent capital prisoners during state postconviction proceedings.

The basic contours of what would become Chapter 154 were proposed by the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases under the leadership of Justice Lewis Powell (the Powell Committee). Then-

Chief Justice William Rehnquist appointed the Powell Committee to develop proposals for minimizing litigation-related delays between the imposition and execution of capital sentences, which at the time stood at a nationwide average of about eight years (and has since ballooned to over twenty). See JA__[R.154.135Cong.Rec.24,694-95]; JA__[R.1.85Fed.Reg.20,719]. The Powell Committee's proposal provided that more expeditious procedures would apply in federal habeas review of capital cases from States that appoint counsel for indigent capital prisoners in state postconviction proceedings. Congress passed a modified version of the Powell Committee proposal in 1996 as Chapter 154.

Under Chapter 154, if a State establishes a qualifying mechanism for providing indigent capital prisoners with counsel during state postconviction proceedings, special procedural rules may apply to federal habeas review of the State's capital cases. 28 U.S.C. §§ 2261, 2265. Specifically, in a case proceeding under Chapter 154, the limitation period for a federal habeas filing is 180 days after final state-court affirmance, subject to tolling provisions. *Id.* § 2263. In addition, amendments to an application for a writ of habeas corpus are limited, *id.* § 2266(b)(3)(B), and the scope of federal habeas review is confined to the claims that were decided by the state courts or were not properly raised for specified reasons, *id.* § 2264. Finally, federal courts are directed to give priority to capital habeas proceedings under Chapter 154 and to render final judgments within set periods. *Id.* § 2266.

As originally enacted, Chapter 154 left it to the federal habeas courts to determine a State's eligibility for these special procedures. In 2006, Congress amended Chapter 154, shifting responsibility for this eligibility determination to the Attorney General, subject to direct review in this Court.[1]

To receive such a certification, a State must first request it. See 28 U.S.C. § 2265(a)(1). The Attorney General is then tasked with determining "whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." *Id.* § 2265(a)(1)(A). The Attorney General must also determine the date such a mechanism was established (which becomes the "effective date of [the] certification") and "whether the State provides standards of competency for the appointment of counsel" in those postconviction proceedings. *Id.* §§ 2265(a)(1)(B), (C), 2265(a)(2).

The Attorney General's certification does not automatically trigger Chapter 154's procedures, however, as each federal habeas court must still find that the habeas petitioner himself was provided with counsel during his postconviction proceedings pursuant to the State's certified mechanism (or, alternatively, that he waived counsel, retained his own counsel, or was found not to be indigent). 28 U.S.C. § 2261(b)(2); see

[1] See Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 107, 110 Stat. 1214, 1221 (1996); USA PATRIOT Improvement and Reauthorization Act (2006 amendments), Pub. L. No. 109-177, § 507, 120 Stat. 192, 250 (2006).

id. § 2261(c). Consequently, certification alone does not permit a State to take advantage of Chapter 154's special rules. Rather, in the 2006 amendments, Congress enacted a two-step process for making those rules applicable in any given case: (1) certification by the Attorney General of the State's established procedures, 28 U.S.C. § 2261(b)(1); and (2) a federal habeas court's determination that counsel was appointed as required by those procedures in the habeas petitioner's case, *id.* § 2261(b)(2).

B. Chapter 154 also directs the Attorney General to "promulgate regulations to implement the certification procedure." 28 U.S.C. § 2265(b).

In March 2011, the Department of Justice published a notice of proposed rulemaking concerning the certification process. JA__[R.164.76Fed.Reg.11,705]. After receiving public comments, the Department published a supplemental notice soliciting additional feedback. JA__[R.165.77Fed.Reg.7,559]. In September 2013, Attorney General Holder issued a Final Rule regarding certification procedures. JA__[R.150.78Fed.Reg.58,160].

The Final Rule explains that, after the State "request[s] in writing that the Attorney General determine whether the State meets the requirements for certification," the Attorney General makes the State's request, including "any supporting materials," publicly available online. 28 C.F.R. § 26.23(a), (b). The Department must also publish a notice in the Federal Register (1) indicating that the State has requested certification; (2) identifying the Internet address at which the public may view the State's request and supporting materials; and (3) soliciting public comment

on the request. *Id.* § 26.23(b)(1)-(3). The Attorney General then reviews the State's request along with all timely public comments and determines whether the State's mechanism satisfies Chapter 154's requirements for certification. *Id.* § 26.23(c), (d).

Under these regulations, the State must have established a mechanism to: (1) offer all indigent state capital prisoners postconviction representation by a lawyer meeting certain standards of competency who did not previously represent the prisoner at trial (unless the prisoner and counsel expressly request continued representation), 28 C.F.R. § 26.22(a)-(b); (2) provide such counsel in a timely manner, *id.* § 26.21; and (3) compensate appointed counsel and pay their reasonable litigation expenses, *id.* § 26.22(c)-(d). See JA__[R.150.78Fed.Reg.58,161-62, 58,165-67, 58,176-77].

The regulations require that the State have defined "standards of competency" and that the State's "mechanism" provide for appointments to be made pursuant to those standards. 28 C.F.R. § 26.22(b); see JA__[R.150.78Fed.Reg.58,165]. Moreover, the Attorney General must evaluate the adequacy of the State's standards. 28 C.F.R. §§ 26.22(b), 26.23(d). The regulations identify benchmarks supporting a presumption that a State has established adequate standards for appointing competent counsel. To meet the benchmarks, appointed counsel must (1) "have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience" (although courts may appoint, for "good cause," others "whose background, knowledge, or experience" would enable them to provide proper capital representation); or (2) "meet[] qualification standards established in conformity with"

certain federal requirements for capital representation improvement grants. 28 C.F.R. § 26.22(b); see also 42 U.S.C. § 14163(e). If a State's competency standards meet or exceed either of these benchmarks, they are considered "presumptively adequate." 28 C.F.R. § 26.22(b)(1); see JA__[R.150.78Fed.Reg.58,168-69] (noting that the Attorney General may find "State-specific circumstances" establish that the benchmark standard is inadequate). If a State seeks certification of standards that vary from the "benchmark criteria," the regulations require that the Attorney General determine whether the State's approach "otherwise reasonably assure[s] a level of proficiency appropriate for State postconviction litigation in capital cases." 28 C.F.R. § 26.22(b)(2); see JA__[R.150.78Fed.Reg.58,172] (recognizing the importance of affording States discretion to develop alternate competency standards and explaining that the benchmarks in Section 26.22(b)(1) serve as "point[s] of reference" in the Attorney General's evaluation of alternate standards under Section 26.22(b)(2)).

The regulations likewise require the Attorney General to consider the adequacy of a State's compensation standards. 28 C.F.R. § 26.22(c); see JA__[R.150.78Fed.Reg.58,173] (discussing the need for "sufficient financial incentives to secure the appointment of competent counsel"). The regulations specify four "presumptively adequate" standards for the compensation of appointed counsel, 28 C.F.R. § 26.22(c)(1), and provide that, where a State's compensation provisions take a different approach from the benchmark criteria, the Attorney General will deem them "adequate only if the State mechanism is otherwise reasonably designed to ensure the

availability for appointment of counsel who meet State standards of competency." *Id.* § 26.22(c)(2); see JA__[R.150.78Fed.Reg.58,162] (explaining that States have discretion to "formulate alternative compensation schemes" subject to examination by the Attorney General).

Finally, a State's capital counsel mechanism must "provide for payment of reasonable litigation expenses of appointed counsel," and the regulations offer examples of such expenses. 28 C.F.R. § 26.22(d). The regulations explain that a State may adopt "presumptive limits" on reasonable litigation expenses, but "only if means are authorized for payment of necessary expenses above such limits." *Ibid.*

If the Attorney General grants certification, the regulations require that that decision be published in the Federal Register and include "a determination of the date [on which] the capital counsel mechanism qualifying the State for certification was established." 28 C.F.R. § 26.23(c). The Rule provides generally that a "certification remains effective for a period of five years after the completion of the certification process by the Attorney General and any related judicial review." *Id.* § 26.23(e).

II. Certification of Arizona's Capital Counsel Mechanism

The State of Arizona has now twice sought a determination that its mechanism for appointing postconviction counsel for indigent capital prisoners complies with the requirements of Chapter 154: first from the Ninth Circuit sitting as a federal habeas court, as envisioned by the predecessor provision enacted in AEDPA, see *supra* p. 5; and now from the Attorney General, as required by the 2006 Amendments. On both

occasions, the relevant decisionmaker determined that Arizona has established compliant procedures.

A. In *Spears* v. *Stewart*, 283 F.3d 992 (9th Cir. 2002), the Ninth Circuit was asked to decide, in the context of a state prisoner's federal habeas petition, whether Arizona had established a qualifying system for appointing postconviction capital counsel in satisfaction of Chapter 154's requirements. *Id.* at 1008. Arizona pointed to two statutes, Arizona Revised Statutes (Ariz. Rev. Stat.) §§ 13-4041 and 13-4013, and a court rule, Arizona Rule of Criminal Procedure 6.8, that, in its view, "together comprised a mechanism for the appointment of counsel that complied with the requirements of Chapter 154." 283 F.3d at 1009. The court then analyzed "whether the system provided (1) mandatory and binding competency standards for appointed counsel, (2) reasonable compensation for appointed counsel, (3) payment of reasonable litigation expenses, and (4) an offer of post-conviction counsel to all capital defendants." *Id.* at 1012. After comprehensively assessing Arizona's procedures, the court determined that the State's capital counsel mechanism, as enacted, satisfied the requirements of Chapter 154 in each of these respects.[2]

[2] The *Spears* Court separately determined that Arizona had *not* complied with its appointment procedure with respect to the habeas petitioner in that case, as the State had failed to appoint counsel within its self-imposed timeframe. But the court's finding that "the state [did not] follow [its] system in essential particulars" as to Spears did not disturb its determination that Arizona had enacted a facially adequate capital counsel mechanism. 283 F.3d at 1018.

B. After Congress amended Chapter 154 to reassign responsibility for assessing state procedures to the Attorney General and the Attorney General promulgated regulations for that process, Arizona requested administrative certification in April of 2013. The certification process was delayed because a district court enjoined the regulations from taking effect. See *Habeas Corpus Res. Ctr.* v. *U.S. Dep't of Justice*, 2014 WL 3908220, at *3 (N.D. Cal. Aug. 7, 2014). After the Ninth Circuit vacated that injunction, see *Habeas Corpus Res. Ctr.* v. *U.S. Dep't of Justice*, 816 F.3d 1241 (9th Cir. 2016), the Department of Justice published a notice in the Federal Register inviting public comment on Arizona's request for certification and providing a 60-day comment period, JA__[R.6.82Fed.Reg.53,529]. Because of the passage of time since Arizona's original request, the Department sent a letter to the Arizona Attorney General on November 16, 2017, advising of the publication, seeking confirmation that the materials previously submitted by the State were still current, and asking whether the State wished to supplement, modify, or update its request for certification. JA__[R.5.DOJLetter.11.16.2017]. Arizona provided updated information, and the Department then published a second notice, which noted the updated request and provided 60 days for public comment. JA__[R.116.82Fed.Reg.61,329].

On June 29, 2018, the Department of Justice sent a letter to the Arizona Attorney General requesting that the State provide additional information about its capital counsel mechanism, based on questions that had arisen during the Department's review of the State's request for certification and the public comments received up to that

point. JA__[R.128.DOJLetter.06.29.2018]. Arizona sent a responsive letter on October 16, 2018, attaching over 200 pages of exhibits. JA__[R.129.AZLetter.10.16.2018]. The following month, the Department published a third notice in the Federal Register to provide an opportunity for public comment with respect to the additional information the Arizona Attorney General had submitted. JA__[R.131.83Fed.Reg.58,786]. The Department received additional comments during the 45-day comment period in response to this notice.

On April 14, 2020, Attorney General Barr issued a notice delineating Arizona's postconviction legal framework, addressing the substance of the public comments the Department had received on Arizona's certification request, and ultimately certifying Arizona's capital counsel mechanism as compliant with Chapter 154. JA__[R.1.85Fed.Reg.20,705].

The Attorney General noted at the outset that he was "not writ[ing] on a clean slate in addressing Arizona's request for certification" and expressed his "view [of] the Ninth Circuit's determination [in *Spears*] that Arizona's mechanism satisfies chapter 154 as persuasive authority of substantial weight." JA__[R.1.85Fed.Reg.20,707-08]. He explained that "[t]he analysis in *Spears* remains relevant because Arizona's capital counsel mechanism has remained largely the same since the Ninth Circuit's decision in that case, and the elements of an adequate state capital counsel mechanism as required by chapter 154 are largely the same as those required by chapter 154 at the time of that decision." *Ibid.* Where relevant provisions of either the federal statutory scheme or the

Arizona appointment mechanism had changed in the interim, however, the Attorney General explained how the change affected his analysis. See JA__[R.1.85Fed.Reg.20,708].

Consequently, the Attorney General's review of Arizona's appointment mechanism largely tracked (but did not precisely mirror) the Ninth Circuit's earlier analysis in *Spears*. The Attorney General considered (1) Arizona's appointment of postconviction counsel for indigent capital prisoners, JA__[R.1.85Fed.Reg.20,708]; (2) its standards of competency for such counsel, JA__[R.1.85Fed.Reg.20,708-13]; (3) its compensation scheme for appointed counsel, JA__[R.1.85Fed.Reg.20,713-15]; (4) its provision for payment of reasonable litigation expenses, JA__[R.1.85Fed.Reg.20,715-16]; and (5) the timeframe within which counsel are appointed, JA__[R.1.85Fed.Reg.20,716-18]. Because each of these metrics satisfied the requirements of Chapter 154, the Attorney General approved Arizona's certification request, JA__[R.1.85Fed.Reg.20,708-18], and certified that Arizona had established an adequate mechanism as of May 19, 1998, JA__[R.1.85Fed.Reg.20,718-19].

III. Procedural History

Petitioners—the Federal Public Defender for the District of Arizona and 13 individual capital prisoners—filed this petition for review challenging the Attorney General's certification of Arizona's capital counsel mechanism. Dkt. No. 2. They also requested a stay pending disposition of their petition, Dkt. No. 6, which this Court denied, Dkt. No. 21.

STANDARDS OF REVIEW

"The determination by the Attorney General regarding whether to certify a State * * * [is] subject to de novo review." 28 U.S.C. § 2265(c)(3). Under the Administrative Procedure Act, the regulations implementing the certification procedure must be set aside only if this Court determines that they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that they were promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

SUMMARY OF ARGUMENT

I. Arizona's statutes and rules establish a mechanism for the appointment and compensation of postconviction counsel for indigent prisoners in state capital cases, set clear and compliant standards of competency and compensation for such counsel, and provide for the payment of their reasonable litigation expenses. The Attorney General thus correctly determined that Arizona's mechanism satisfies the requirements for certification under Chapter 154.

Petitioners' arguments to the contrary arise from one of two flawed premises: first, that a state capital counsel mechanism must satisfy certain prerequisites borrowed from other statutes, guidelines, or policy documents but absent from the requirements that Congress adopted in Chapter 154; and second, that a state capital counsel mechanism can pass muster under Chapter 154 only if the State has invariably delivered effective representation in practice. Neither theory holds water.

As Congress expressly provided in Chapter 154, "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter." 28 U.S.C. § 2265(a)(3). Thus, the Attorney General could not administratively superimpose additional requirements onto the framework Congress enacted.

Nor was it the function of the Attorney General to adjudicate the competency of appointed attorneys' performance in particular state postconviction proceedings; assess whether those attorneys were, in fact, adequately compensated in such cases; reexamine the litigation expenses for which they received payment; and determine whether their appointment in each case was timely. In petitioners' view, if representation fell short in one or more of these respects in one or more cases, the Attorney General should have denied certification. This premise conflates the role of the Attorney General and of this Court—which are tasked with evaluating a State's "mechanism"—with the separate function of the federal habeas courts—which must still determine whether the State appointed counsel pursuant to that mechanism in the individual habeas petitioner's case. Because petitioners' cherry-picked examples of purportedly deficient performance by individual attorneys cast no doubt on the sufficiency of the mechanism that Arizona has established, the Attorney General properly rejected their objections.

II. Petitioners' challenge to the Department's regulations fares no better. The Final Rule's explanation that certification decisions are adjudications, not rulemakings, is correct as a matter of law. A certification decision is a fact-bound inquiry triggered

by a State's request for an assessment whether its appointment mechanism satisfies certain statutory criteria—an agency action that fits comfortably within the traditional definition of the adjudicatory function. Indeed, such certifications were until 2006 the province of federal courts, and Chapter 154 distinguishes between the Attorney General's task to prescribe rules implementing the certification process and his separate role in making State-by-State certification determinations.

Petitioners also incorrectly suggest that the Final Rule shifts the burden of proving a State's ineligibility to public commenters. The Rule makes clear that certification will be denied unless the Attorney General is convinced that a State has established a qualifying mechanism. Here, the Attorney General reviewed the extensive submissions received during multiple rounds of public comment on Arizona's application and determined that Arizona's mechanism qualifies under the statute.

Finally, the Rule's substantive criteria for certification are entirely reasonable. The Rule contains guidance in the form of "benchmark criteria" regarding the standards for certification, and the regulations make clear that the flexibility permitted States in demonstrating statutory compliance does not render that guidance meaningless. In assessing Arizona's mechanism, the Attorney General applied the regulations and properly concluded that the State satisfied their requirements.

ARGUMENT

I. The Attorney General Appropriately Certified that Arizona's Capital Counsel Mechanism Complies with the Requirements of Chapter 154.

In the course of evaluating Arizona's application, the Attorney General considered (1) the State's appointment of postconviction counsel for indigent capital defendants; (2) its standards of competency for appointed counsel; (3) its authorization of (and any limits on) attorney compensation; (4) its provision for payment of reasonable litigation expenses; and (5) the timeframe within which appointment occurs.

Petitioners do not contest the Attorney General's determination that Arizona has satisfied the first of these requirements—that the State's "statutes and rules provide for the appointment by court order of postconviction counsel for prisoners under sentence of death, unless waived, and provide that postconviction counsel cannot be the same as trial counsel unless the defendant and counsel expressly request continued representation." JA__[R.1.85Fed.Reg.20,708]. The Ninth Circuit had reached the same conclusion about the Arizona provisions in effect at the time of *Spears*, and as the Attorney General noted, those provisions "did not differ significantly from their current versions with respect to the 28 U.S.C. 2261(c)-(d) requirements." *Ibid.*

However, petitioners object to the remaining four criteria: competency standards, compensation, expense payment, and timeliness. Because the Attorney General considered, discussed, and persuasively rejected each of these objections, this Court should uphold the certification. And at minimum, the Attorney General's

determinations as to the requirements imposed by Chapter 154 and the Department's regulations were reasonable exercises of his interpretive authority that support his decision to certify Arizona's capital counsel mechanism.

A. Arizona Has Established Standards of Competency that Comply with Chapter 154.

After evaluating the relevant Arizona statutes and court rules, the Attorney General correctly determined that the State's competency standards for appointed counsel satisfy the requirements of Chapter 154—and, in fact, exceed the baseline established by Congress for appointed counsel in federal postconviction litigation.

The Attorney General looked first to Ariz. Rev. Stat. § 13-4041(C), which requires that appointed postconviction counsel "[b]e a member in good standing of the state bar of Arizona for at least five years immediately preceding the appointment" and "[h]ave practiced in the area of state criminal appeals or postconviction proceedings for at least three years immediately preceding the appointment." See JA__[R.1.85Fed.Reg.20,709]. He noted that these requirements "are similar to counsel competency standards that Congress has adopted for federal court proceedings in capital cases." *Ibid.*; see 18 U.S.C. § 3599(c) ("If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years['] experience in the handling of appeals in that court in felony cases."). The Attorney General found it "significant," both "[u]nder the regulations implementing

chapter 154 * * * and as a matter of common sense," that Arizona "has adopted experience requirements similar to those that Congress has adopted for federal court proceedings." JA__[R.1.85Fed.Reg.20,709].

The Attorney General also observed that "the Arizona Supreme Court has adopted a rule, Ariz. R. Crim. P. 6.8, that sets more stringent counsel competency standards than those appearing in the state statute that emulates the federal competency standards." JA__[R.1.85Fed.Reg.20,709]. The Attorney General found that these more stringent standards "compare favorably" to "[t]he first benchmark criterion" under the Department's regulations, 28 C.F.R. § 26.22(b)(1)(i), and are "likely to result in even higher levels of proficiency * * * than the benchmark." JA__[R.1.85Fed.Reg.20,709-10].

Specifically, Rule 6.8(a) requires that an attorney appointed in capital litigation:

> (1) have been a member in good standing of the State Bar of Arizona for at least 5 years immediately before the appointment;
>
> (2) have practiced criminal litigation in Arizona state courts for 3 years immediately before the appointment;
>
> (3) have demonstrated the necessary proficiency and commitment that exemplifies the quality of representation appropriate to capital cases;
>
> (4) have successfully completed, within one year before the initial appointment, at least 6 hours of relevant training or educational programs in the area of capital defense; and successfully completed within one year before any later appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense; [and]
>
> (5) be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment

> and Performance of Defense Counsel in Death Penalty Cases, and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.

And, "[t]o be eligible for appointment as post-conviction counsel" under Rule 6.8(d), the attorney must, in addition to meeting the requirements above, also:

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

Finally, Rule 6.8(e) allows for appointment of an attorney not satisfying each of these criteria "[i]n exceptional circumstances," and only if:

> (1) the [Arizona] Supreme Court consents;
>
> (2) the attorney meets the requirements set forth in (a)(3)-(5);
>
> (3) the attorney's experience, stature, and record establishes that the attorney's ability significantly exceeds the standards set forth in this rule; and
>
> (4) the attorney associates with a lawyer who meets the qualifications set forth in this rule and the associating attorney is appointed by the court for this purpose.

In *Spears*, the Ninth Circuit noted with approval a predecessor version of Rule 6.8 in the course of finding Arizona's counsel-competency standards sufficient under Chapter 154. The court expressly addressed—and rejected—an objection based on Rule 6.8's exception allowing the appointment of lawyers not meeting its specific

criteria, noting that the exception required that such a lawyer "significantly exceed" those criteria "and that the lawyer associate with one who did meet the precise qualifications" in the Rule. *Spears*, 283 F.3d at 1013. The Ninth Circuit also dismissed an objection based on the Rule's permitting appointment of counsel without prior experience defending a capital case, reasoning that "[n]othing in [Chapter 154] or in logic requires that a lawyer must have capital experience to be competent." *Ibid.* Finally, the court dismissed an objection based on the statutory allowance of other counsel if qualified counsel were unavailable, because the Arizona Supreme Court had "bound itself by Rule 6.8 to appoint counsel in capital cases whose qualifications met the competency standards listed therein." *Id.* at 1014. Although Arizona has amended Rule 6.8 since the Ninth Circuit approved the scheme in *Spears*, the Attorney General determined that, even "[a]s modified, Arizona's postconviction counsel competency standards have continued to exceed the standards of 18 U.S.C. 3599, which Congress has deemed adequate for postconviction counsel in federal court proceedings in capital cases." JA__[R.1.85Fed.Reg.20,709].

The Attorney General then addressed concerns raised in the public comments concerning Arizona's competency standards. Among other objections, the Attorney General responded to "comments argu[ing] that Arizona's competency standards should be deemed inadequate in practice" in light of allegations that, *inter alia*, "many appointed postconviction counsel in Arizona do not perform competently" and "the qualification requirements for appointment are not consistently enforced."

JA__[R.1.85Fed.Reg.20,711]. While noting that "Arizona disagrees that there are systemic problems relating to the competency of the State's appointed postconviction capital counsel," the Attorney General declined to adjudicate that dispute because "the current [federal] statutory scheme does not call for or allow case-specific oversight by the Attorney General" with respect to "a State's compliance with its own capital mechanism." *Ibid.* Instead, "[o]nly the general certification function" of a State's established mechanism "is assigned to 'the Attorney General of the United States'"; "[a]scertaining whether counsel was appointed pursuant to the certified mechanism"—the second step in the analysis—"is reserved to federal habeas courts, 'which can address individual irregularities and decide whether the Federal habeas corpus review procedures of chapter 154 will apply in particular cases.'" JA__[R.1.85Fed.Reg.20,711] (quoting JA__[R.150.78Fed.Reg.58,162]).

In challenging this well-reasoned determination, petitioners renew a number of arguments that the Attorney General appropriately considered and rejected during his evaluation of Arizona's application and the multiple rounds of public comment thereon.

1. Experience in Postconviction and Capital Litigation Is Not a Prerequisite to Appointment Under Chapter 154 or the Department's Regulations.

First, petitioners argue (Pet. Br. 39) that, because Arizona's standards do not uniformly require postconviction-litigation experience and capital-litigation experience, they do not satisfy the benchmarks in the Department's regulations or otherwise reasonably assure the appointment of competent counsel. Petitioners' objection finds

no support in the text or history of Chapter 154, relevant caselaw, or the Department's regulations.

a. As a threshold matter, the Attorney General correctly concluded that neither capital-litigation experience nor postconviction-litigation experience is an absolute prerequisite to appointment under Chapter 154. JA__[R.1.85Fed.Reg.20,709-10]. That determination is consistent with judicial decisions interpreting Chapter 154's requirements. In *Spears*, the Ninth Circuit rejected the same argument—"that Arizona's competency standards were insufficient because they permitted the appointment of a lawyer with no experience defending a capital case"—by holding that "[n]othing in 28 U.S.C. § 2261(b) or in logic requires that a lawyer must have capital experience to be competent." 283 F.3d at 1013. And in *Ashmus* v. *Calderon*, 123 F.3d 1199 (9th Cir. 1997), rev'd on other grounds, 523 U.S. 740 (1998), the same court held that "a state's competency standards need not require previous experience in habeas corpus litigation" because "such a standard" would disqualify "[m]any lawyers who could competently represent a condemned prisoner," *id.* at 1208.[3]

[3] Petitioners suggest (Pet. Br. 44) that other courts have held that postconviction-litigation experience *is* essential under Chapter 154. But the three opinions they cite (two by district court judges and one by a magistrate judge) relied on statements in the district court decision in *Ashmus*—which the Ninth Circuit repudiated as erroneous. See 123 F.3d at 1208. Petitioners offer no reason that this view, rejected on appeal, should control the Attorney General's certification criteria.

b. Nor do the Department's regulations impose such a blanket prerequisite.[4] The first benchmark, 28 C.F.R. § 26.22(b)(1)(i), specifies five years of bar admission and three years of postconviction-litigation experience as indicia of qualification, but it expressly allows appointment of otherwise-qualified counsel lacking postconviction-litigation experience "for good cause." The second, 28 C.F.R. § 26.22(b)(1)(ii), does not reference postconviction-litigation experience at all. And although satisfaction of the benchmark criteria entails a *presumption* of adequacy, the regulations expressly provide that other standards may be adequate if they reasonably assure an appropriate level of proficiency. 28 C.F.R. § 26.22(b)(2). Thus, petitioners' objection is rooted in an erroneous understanding that the regulations restrict appointment solely to counsel with postconviction- and capital-litigation experience, which they do not.

Nevertheless, petitioners urge (Pet. Br. 47-48) this Court to read an absolute postconviction-experience prerequisite into the regulations because Attorney General Holder substituted "three years of postconviction litigation experience" into the 28 C.F.R. § 26.22(b)(1)(i) benchmark in place of the "three years['] experience in the handling of [felony] appeals" required of counsel appointed after judgment under 18

[4] Indeed, they could not do so. As petitioners acknowledge (Pet. Br. 38 n.5), the "regulations construing Chapter 154 do not add to the requirements for certification, but merely implement the statutory terms." As the Ninth Circuit has observed, see *supra* p. 23, Chapter 154 does *not* require postconviction- or capital-litigation experience as a standard of competency. Superimposing such a requirement on the statute would, thus, violate 28 U.S.C. § 2265(a)(3) by administratively creating "requirements for certification or for application of this chapter other than those expressly stated in this chapter."

U.S.C. § 3599. This distinction reveals, at most, the Attorney General's view that postconviction experience will often be a better fit than appellate experience as a model for competency standards in state postconviction proceedings. But the Department's rulemaking made clear that the modification of the Section 3599 standard in the benchmark "does not take issue * * * with Congress's judgment" that appellate experience alone can be sufficient. JA__[R.150.78Fed.Reg.58,169]. Moreover, by expressly allowing appointment of counsel lacking this experience under both benchmarks and expressly permitting state standards that meet neither benchmark, the regulations plainly did not adopt a categorical postconviction-experience requirement. See JA__[R.150.78Fed.Reg.58,170] ("[I]nsisting on a rigid application of a defined experience requirement could debar attorneys who are well-qualified on other grounds to represent capital petitioners."); *ibid.* ("[U]se of this particular standard as a benchmark does not convey or depend on a judgment that other approaches States may choose to adopt are necessarily illegitimate or inadequate[.]"). Petitioners' contrary assertions are not supported by the text of the regulations, the Attorney General's commentary on them, or the relevant caselaw at the time they were adopted.

c. Unable to identify a blanket requirement for capital- and postconviction-litigation experience in the text of Chapter 154, the precedents interpreting it, or the Department's regulations, petitioners attempt to engraft onto the statute a number of other standards and guidelines that Congress conspicuously declined to enact.

First, petitioners point (Pet. Br. 47) to the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (CJA Guidelines), which state that, "[i]n appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should *consider* the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings." CJA Guidelines § 620.50(b), https://go.usa.gov/xGJjJ (emphasis added). As a non-binding policy document adopted by the Judiciary, the CJA Guidelines are less relevant in interpreting Chapter 154 than the standards enacted by Congress for federal-court proceedings in capital cases in 18 U.S.C. § 3599. But even assuming that they are instructive here, nothing in Arizona's statutes or rules suggests that postconviction experience cannot be *considered* in making appointments; rather—like the CJA Guidelines—the State does not *require* such experience as a mandatory prerequisite to appointment.

Next, petitioners fault (Pet. Br. 49-52) Arizona's mechanism for not complying with the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines). Congress was aware of the ABA Guidelines when it most recently took up this statutory scheme—it had included in the capital-litigation grant program of the Innocence Protection Act of 2004 a set of capital-counsel standards that were largely based on those Guidelines—but opted against incorporating them into Chapter 154 in the 2006 amendments. Nonetheless, recognizing that Congress had in another statute identified this approach as one way to promote competent representation, the Department adopted these

standards as the second counsel-competency benchmark in its Final Rule. See JA__[R.150.78Fed.Reg.58,178]. But recognizing that compliance with the ABA Guidelines offers one means of promoting competent representation does not imply that it is the only way to do so. If Congress had intended to require satisfaction of the ABA's criteria under Chapter 154, it no doubt would have said so when it enacted the current scheme in 2006, following what it had done in the Innocence Protection Act two years earlier. Instead, Congress carried forward the competency language of the original version of Chapter 154, based on the Powell Committee's recommendation to afford States substantial discretion in defining the substance of their competency standards. See JA__[R.154.135.Cong.Rec.24,696] (Powell Committee Report) (States have "wide latitude to establish a mechanism that complies with" the requirement to "provide standards of competency for * * * appointment").

In any event, petitioners fail to mention that the ABA Guidelines *reject* their view that postconviction-litigation experience is essential for competent postconviction representation. The original version of the ABA Guidelines, issued in 1989, included postconviction experience in its standard for postconviction capital representation, but allowed in the alternative appointment of counsel without such experience because

> there are many attorneys who do not possess the experiential criteria detailed in the Guidelines, but who should receive appointments because they will provide competent representation[.] * * * Such attorneys may have criminal law experience which does not meet the experiential criteria, may have attended training in death penalty defense representation or may have substantial experience in civil practice.

1989 ABA Guidelines 60, http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Detrich_1989Guidelines.pdf.

The current ABA Guidelines similarly eschew "quantitative measures of attorney experience * * * such as years of litigation experience * * * as the basis for qualifying counsel to undertake [capital] representation" because there are "attorneys who do not possess substantial prior experience yet who will provide high quality legal representation in death penalty cases. Such attorneys may have specialized training and experience in the field (e.g., as law professors), may previously have been prosecutors, or may have had substantial experience in civil practice." 2003 ABA Guidelines, 31 Hofstra L. Rev. 913, 962, 964. The Guidelines further note that "[s]uperior post-conviction death penalty defense representation has often been provided by members of the private bar who did not have prior experience in the field but who did have a commitment to excellence." *Id.* at 964 n.111.

Indeed, petitioners acknowledge that prior postconviction-litigation experience is not essential to competent postconviction representation of indigent capital prisoners, conceding (Pet. Br. 49) that "[i]t is possible to imagine an adequate state system that permits some appointments of attorneys who have no postconviction experience." The Attorney General determined that Arizona's mechanism—which indisputably exceeds the federal standards for "appointment[s] * * * made after judgment" under 18 U.S.C. § 3599(c)—constitutes such an adequate system, even absent a blanket requirement for postconviction- and capital-litigation experience.

Nothing in the statute, the regulations, or various nonbinding best-practices guidelines that Congress opted *not* to incorporate into Chapter 154 refutes that determination.

2. Rule 6.8(e) Does Not Vitiate Arizona's Competency Standards.

Petitioners assert (Pet. Br. 52) that Rule 6.8(e), which allows counsel who do not fully satisfy the Rule's standards to be appointed under certain circumstances, creates "a gaping loophole that permits * * * routine evasion" of the State's competency standards. This argument, too, lacks merit.

The Ninth Circuit considered and rejected the same objection to the adequacy of Arizona's competency standards in *Spears*. The court acknowledged that the Rule "authorized the appointment of counsel who did not meet the precise qualifications listed in the rule," but held that "this feature did not make the competency standards any less mandatory or binding" because "[t]he rule required that the qualifications of any lawyer appointed who did not meet the specific criteria of [Rule] 6.8(a) 'significantly exceed[]' the standards provided by [Rule] 6.8(a) and that the lawyer associate with one who did meet the precise qualifications listed in [Rule] 6.8(a)." *Spears*, 283 F.3d at 1013. Thus, "in every case, at least one lawyer who met all the listed criteria must have been appointed and involved in the case." *Ibid.*

For similar reasons, the Attorney General likewise rejected this objection in the certification notice, pointing out that "the Rule 6.8(e) proviso is narrower in some respects" than the corresponding exceptions in the first regulatory benchmark and 18

U.S.C. § 3599(d). JA__[R.1.85Fed.Reg.20,711]. Specifically, the Rule 6.8(e) exception goes beyond the federal provisions' exceptions in requiring (1) that the Arizona Supreme Court consent to the appointment; (2) that the attorney have successfully completed relevant training or educational programs; (3) that the attorney's experience, stature, and record establish that the attorney's ability significantly exceeds the full set of qualification standards; and (4) that the attorney associate with an attorney appointed by the court who meets the full set of standards. *Ibid.* Hence, Rule 6.8(e) has consistently required more to ensure that appointed counsel will provide competent representation than its federal counterpart provisions.[5]

3. Evaluating the Performance of Individual Attorneys Appointed by the State Is Outside the Scope of the Attorney General's Duty to Certify Qualifying State Mechanisms.

Next, petitioners argue (Pet. Br. 54-57) that, regardless of whether a State's competency standards are adequate on paper, the State's mechanism can be certified under Chapter 154 only if "[e]mpirical evidence showing how the system has actually functioned in practice" demonstrates that the State consistently provides counsel who perform competently following their appointment. Their theory is insupportable for

[5] Petitioners also complain (Pet. Br. 52-53) that Arizona has not sufficiently fleshed out the terms used in Rule 6.8(e)—*e.g.*, that the State "has developed no standards or guidance regarding what 'associates with' means, or defined the role of associated counsel." But the language in the current rule requiring "associat[ion] with a lawyer who meets the qualifications set forth in this rule" is materially identical to that considered and approved by the Ninth Circuit. See *Spears*, 283 F.3d at 1003 (requiring "that the attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule").

the reasons explained in the Attorney General's certification notice. See JA__[R.1.85Fed.Reg.20,711-12].

Chapter 154 provides that the Attorney General shall determine "whether the State has established a *mechanism* for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings" and "whether the State provides *standards* of competency for the appointment of counsel in [such] proceedings." 28 U.S.C. § 2265(a)(1)(A), (C) (emphases added). It does not provide that the Attorney General is to conduct a separate inquiry into counsel's *actual performance* following appointment in all—or any—cases. Congress could certainly have required that more granular analysis, but it chose instead to frame Chapter 154's requirements regarding counsel competency as *standards* for assessing eligibility for appointment—a threshold determination that neither contemplates nor requires reassessment following completion of the appointment.

The judicial interpretation and application of Chapter 154 also refute petitioners' theory. For example, in *Spears*, the Ninth Circuit did not assess the competency of any specific instance of postconviction representation in Arizona, but rather proceeded in the same fashion as the Attorney General in his certification determination, examining whether "the Arizona system for the appointment of post-conviction counsel provided mandatory and binding competency *standards*." 283 F.3d at 1015 (emphasis added).

The Powell Committee Report likewise confirms this understanding, explaining that federal review would examine whether a State's *mechanism* for appointing capital

postconviction counsel comports with the statutory requirements "as opposed to [examining] the competency of particular counsel." JA__[R.154.135.Cong.Rec.24,696]. It further explained that, in contrast to the focus on "the performance of a capital defendant's trial and appellate counsel," "[t]he effectiveness of state and federal postconviction counsel is a matter that can and must be dealt with in the appointment process." *Ibid.* Thus, petitioners' argument that the Attorney General ought to have evaluated the post-appointment performance of Arizona capital counsel is a dispute with the wisdom of the statutory scheme that Congress enacted—not a relevant factor in the Attorney General's (or this Court's) performance of the certification function under Chapter 154.[6]

[6] The amicus brief of Academic Experts in Federal Criminal Procedure and Post-Conviction Practice suggests that the Attorney General's review of counsel-competency standards under Chapter 154 should be more exacting than that contemplated by the Powell Committee Report. The amici point out (Academic Amicus Br. 15) that the rule of 28 U.S.C. § 2254(d) requiring deference to reasonable state-court determinations on federal habeas review was not enacted until 1996, which increases the importance of having competently performing counsel who are able to raise capital prisoners' claims in the state postconviction proceedings. However, Section 2264 in Chapter 154 states expressly that review under Chapter 154 is subject to the 28 U.S.C. § 2254(d) rule of deference. Had Congress consequently wished to heighten the requirements for state competency standards beyond those under the Powell Committee Report, it no doubt would have said so. Instead, Congress carried forward the Powell Committee counsel-competency language without change.

4. The Attorney General Appropriately Considered the Ninth Circuit's Decision in *Spears* When Evaluating Arizona's Request for Certification.

Petitioners also take issue (Pet. Br. 57-60) with the Attorney General's invocation of *Spears* to support his determination that Arizona complies with Chapter 154's requirements for standards of competency. They assert several grounds for disregarding that decision: because *Spears* could not have assessed compliance with the Department's regulations, which had not yet been promulgated; because Arizona's standards were later modified to relax a prior requirement of postconviction-litigation experience; because Arizona disbanded a committee that had screened capital postconviction-counsel applications and contravened other ABA appointment standards; because Arizona later changed its training requirements; because Arizona increased reliance on the Rule 6.8(e) exception; and because of the abortive establishment of a postconviction public defender's office in the 2007-2011 period. All of these attempted distinctions fail for reasons explained in the Attorney General's certification notice, JA__[R.1.85Fed.Reg.20,707-13], and reiterated below.

a. Nothing in the Department's regulations could lessen the persuasive weight of *Spears*. Indeed, "the case law under chapter 154, and particularly *Spears*, provided the background for the development of the Department's implementing regulations," and that case law "elucidates and supports many aspects of the Department's rule in its application to Arizona." JA__[R.1.85Fed.Reg.20,707]. In any event, because Chapter 154 provides that "[t]here are no requirements for certification

* * * other than those expressly stated in this chapter," 28 U.S.C. § 2265(a)(3), the regulations could not have introduced substantive requirements that newly disqualified a previously qualifying state mechanism. Thus, the delta that petitioners are positing—state capital counsel mechanisms that satisfy the statutory criteria of Chapter 154 but fail the regulatory criteria of the Final Rule—is, by statutory prescription, a null set.

b. Petitioners' suggestion that *Spears* might have come out differently had the court considered the current version of Arizona's mechanism, which does not require postconviction-litigation experience, is similarly meritless. Not only did the *Spears* Court have nothing at all to say about the necessity of postconviction-litigation experience, but five years before *Spears* was handed down, the Ninth Circuit had already expressly determined in *Ashmus*, 123 F.3d at 1208, that such experience is *not* a required element of adequate counsel-competency standards under Chapter 154.

c. Chapter 154 does not require that an independent committee play any role in appointment, nor does it require compliance with any other ABA Guidelines—which Congress notably left out of Chapter 154 in the 2006 amendments after having partially incorporated into a different federal statute only two years earlier, see *supra* pp. 26-27. Moreover, the court in *Spears* did not rely on the existence of such a committee to determine that Arizona's standards of competency pass muster, nor did it even mention the ABA Guidelines. See 283 F.3d at 1012-15.

d. Chapter 154 does not prescribe any training requirement as an element of counsel-competency standards, nor do the counsel-competency standards that

Congress has adopted for federal postconviction proceedings in capital cases, 18 U.S.C. § 3599, incorporate any training requirement whatsoever. At the time of the appointment considered in *Spears*, Arizona's mechanism required at least 12 hours of training or education in the area of capital defense within one year of appointment. As later amended, Arizona's mechanism requires at least six hours of training or education in the area of capital defense within one year before initial appointment, and at least 12 hours of training or education in the area of criminal defense within one year before any later appointment. Petitioners offer no persuasive reason that this change in the particulars of the training requirement implies that Arizona's competency standards now fall short under Chapter 154. See JA__[R.1.85Fed.Reg.20,709-10].

e. As discussed above, *Spears* considered and approved an exception materially identical to the current Rule 6.8(e) carve-out, and the court did not base that holding on any assumption concerning the percentage of cases in which it had been or would be applied. 283 F.3d at 1013. Thus, petitioners' claim (Pet. Br. 53) that selections pursuant to Rule 6.8(e) have made up close to 25% of capital counsel appointments in Arizona does not affect the Ninth Circuit's determination that the State's "mechanism ensured that *all* indigent capital defendants in Arizona were represented in state post-conviction proceedings by counsel who were, at a minimum, as competent as lawyers who met the standards provided in Rule 6.8(a)." 283 F.3d at 1013 (emphasis added).

f. Finally, in considering public comments related to Arizona's temporary use of a postconviction public defender's office, the Attorney General pointed out that,

"[d]uring the limited period of its existence, the agency did not supplant Arizona's general capital counsel mechanism, which continued to provide counsel for postconviction representation outside of the few cases handled by the agency." JA__[R.1.85Fed.Reg.20,712]. Thus, petitioners' invocation of this agency to diminish the import of *Spears* or otherwise cast doubt on the certification "do[es] not go to the question whether Arizona had a capital counsel mechanism adequate under chapter 154 before the agency's establishment [in 2007] or after its termination [in 2011]," nor to the adequacy of that mechanism with respect to any capital prisoner who continued to receive representation through the certified mechanism, rather than the defender's office, during the 2007-2011 period.[7] *Ibid.*

The handful of capital prisoners who *were* represented by the defender's office are free to "claim that agency counsel were not appointed pursuant to the [certified] mechanism * * * in the few cases the agency handled, because the agency counsel were not required to satisfy state standards of competency." JA__[R.1.85Fed.Reg.20,712]. Under Chapter 154's bifurcated proceedings, such claims "could be presented to the federal habeas court * * * in the cases in which the agency provided postconviction representation and, if found to have merit, [they] could provide a basis for finding chapter 154's review procedures inapplicable in those cases." *Ibid.* But no reason exists

[7] Moreover, the Attorney General determined that Arizona's overall mechanism in that period, comprising the general mechanism established in 1998 together with the defender's office, satisfied Chapter 154's requirements. JA__[R.1.85Fed.Reg.20,712-13].

to decertify the continuously operative and adequate capital counsel mechanism that the Attorney General and the Ninth Circuit approved simply because it briefly existed alongside an alternative mechanism.

B. Arizona Provides for the Adequate Compensation of Attorneys Appointed Pursuant to Its Capital Counsel Mechanism.

1. The Attorney General correctly determined that Arizona's compensation provisions for appointed counsel satisfy the requirements of Chapter 154. He cited Ariz. Rev. Stat. § 13-4041(F), which provides that, "[u]nless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state postconviction relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour." See JA__[R.1.85Fed.Reg.20,713]. Although Arizona "formerly required that counsel establish good cause to receive compensation for more than 200 hours of work" (which "amount[ed] to a presumptive $20,000 cap on compensation at the maximum hourly rate of $100"), "legislation enacted in 2013 eliminated this limitation." *Ibid.* The Attorney General pointed out that Arizona's statutes have also consistently required payment of reasonable fees and costs and provide recourse through a special action in the Arizona Supreme Court when the attorney believes that the hourly rate or hours allowed were too low. *Ibid.* The Attorney General also noted that this system was materially identical to the compensation scheme that the Ninth Circuit had approved in *Spears*—even with "the then-existing 200-hour limit." *Ibid.*

In fact, the principal complaint that the Department received on this aspect of Arizona's mechanism is that the present compensation scheme is *too* identical to that approved by the Ninth Circuit in 2002—in other words, "that the $100 hourly rate has not been changed since 1998, during which time its real value has been eroded by inflation." JA__[R.1.85Fed.Reg.20,713]. The Attorney General acknowledged "the reduction of the value of $100 by inflation during the period of the certification," but he found that this inflationary effect "does not imply that it is now an inadequate maximum hourly rate," as the formula still works out to an annualized compensation of $200,000. *Ibid.* By contrast, "[j]udicial precedent finding state compensation inadequate under chapter 154 has involved much more restrictive compensation provisions than Arizona's." JA__[R.1.85Fed.Reg.20,714] (collecting cases).

2. Petitioners acknowledge (Pet. Br. 67-68) that Arizona's compensation mechanism is essentially the same one considered in *Spears*, 283 F.3d at 1015, but they contend that it has been rendered inadequate in the years since because (1) it does not match the benchmark criteria set out in the Department's regulations; (2) the Attorney General did not adequately account for inflation; and (3) a number of legal practitioners have expressed the view that they would be uninterested in accepting an appointment at Arizona's rate. None of these objections overcomes the Attorney General's reasoned determination that Arizona's compensation scheme is adequate to attract attorneys who meet the State's standards for appointment

a. Petitioners' first criticism again misapprehends the regulatory benchmarks as mandates rather than guideposts. As with the competency-standards benchmarks, the regulations deem adequate compensation mechanisms that differ from the benchmarks but are otherwise reasonably designed to ensure the availability of qualified counsel. 28 C.F.R. § 26.22(c)(2). Chapter 154 does not require compensation for appointed state postconviction capital counsel equivalent to the prevailing rate for, *e.g.*, federal habeas counsel. Indeed, Congress rejected a modification of the Powell Committee proposal, recommended by the Judicial Conference, to require "[s]pecific mandatory standards similar to those set forth [elsewhere in federal law] * * * with respect to the appointment and compensation of counsel," and it adopted instead the language of the original Powell Committee Report, which affords States discretion regarding the level of compensation. See Report of the Proceedings of the Judicial Conference of the United States 8 (Mar. 13, 1990), https://go.usa.gov/xGSaV. Consistent with *Spears*, the Attorney General determined that Arizona's compensation mechanism, which compensates counsel up to $100/hour, satisfies Chapter 154's requirements. JA__[R.1.85Fed.Reg.20,713-14].

b. With respect to petitioners' inflation-based argument, the Attorney General acknowledged "the reduction of the value of $100 by inflation during the period of the certification," JA__[R.1.85Fed.Reg.20,713], but determined that this diminution "does not imply that it is now an inadequate maximum hourly rate," as the formula still yields annualized compensation of up to $200,000,

JA__[R.1.85Fed.Reg.20,714]. By contrast, "precedent finding state compensation inadequate under chapter 154 has involved much more restrictive compensation provisions than Arizona's." *Ibid.* For example, in *Baker* v. *Corcoran*, 220 F.3d 276, 285-87 (4th Cir. 2000), the Fourth Circuit had deemed Maryland's compensation scheme inadequate because counsel received only $30/hour for out-of-court time and $35/hour for in-court time under an overall cap of $12,500. On the other hand, in *Mata* v. *Johnson*, 99 F.3d 1261, 1266 (5th Cir. 1996), vacated in part on other grounds, 105 F.3d 209 (5th Cir. 1997), the Fifth Circuit had held that Texas's "strict guidelines limiting compensation to $7,500 and reimbursement of expenses to $2,500 for each appointment" complied with the requirements of Chapter 154. Using petitioners' cited inflation index (Pet. Br. 68), both the rejected Maryland scheme and the approved Texas scheme would fall well short of Arizona's compensation standards.[8]

c. Petitioners do not appear to dispute the Attorney General's "back-of-the-napkin math," Pet. Br. 65, nor do they cite any authority deeming categorically inadequate a $200,000 maximum-annualized-compensation scheme. Instead, they find it "extraordinary" that "the Attorney General would resort to such casual arithmetic in

[8] Texas's $7,500 compensation limit would, adjusted for inflation, total a little over $12,000 today. See Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm. Maryland's $30-35/hour rate would amount to $45-53 today, and its $12,500 overall cap has a present purchasing power of about $18,800. See *ibid.* All of these figures are substantially lower than the $100/hour rate that Arizona has consistently paid, and nowhere near the $200,000 that an attorney could earn by devoting a full billable year to an appointment.

disregard of the record." *Ibid.* The aspects of "the record" to which they are referring are, apparently, comments and declarations from a handful of individual attorneys who are not interested in accepting an appointment at Arizona's rate. See Pet. Br. 65-66 (quoting declarations from four attorneys). But Chapter 154 does not require compensation sufficient to induce *every* qualified Arizona lawyer to accept such appointments; rather, the State must provide compensation that is "reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency." 28 C.F.R. § 26.22(c)(2). As Arizona *has* been able to attract attorneys who meet its standards for appointment, the State's compensation mechanism plainly satisfies this standard. See JA__[R.1.85Fed.Reg.20,715].

C. Arizona Provides for Payment of Reasonable Litigation Expenses in State Postconviction Proceedings.

1. The Attorney General correctly determined that Arizona "has established a mechanism for payment of reasonable litigation expenses of appointed postconviction capital counsel" in satisfaction of 28 U.S.C. § 2265(a). JA__[R.1.85Fed.Reg.20,715]. He began by observing that, "[i]n *Spears*, the Ninth Circuit found that Arizona's provisions for payment of reasonable litigation expenses * * * were adequate under chapter 154." *Ibid.* Because those provisions "have not changed in the intervening years in any material respect," the Attorney General found no reason to depart from the *Spears* Court's analysis. *Ibid.*

The Attorney General then addressed one "frequent point of criticism in the public comments": "that Arizona's provisions regarding payment of litigation expenses include both mandatory and permissive language." JA__[R.1.85Fed.Reg.20,715] (citing Ariz. Rev. Stat. § 13-4041(G) (court "shall" review and approve all reasonable fees and costs); *id.* § 13-4041(I) (court "may" authorize additional monies to pay for reasonably necessary investigative and expert services)). The Attorney General pointed out that, not only did this "same variation in language exist[] when the Ninth Circuit decided *Spears*," but the latter provision mirrors the permissive formulation that Congress used in the federal provision authorizing payment for "investigative, expert, or other services" in federal capital cases and federal habeas corpus review of state capital cases. *Ibid.*; see 18 U.S.C. § 3599(f) ("Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant").

2. Petitioners renew (Pet. Br. 69-71) their objection to the facially "permissive" nature of Arizona's expense-compensation mechanism; assert (Pet. Br. 71-73) that this statutory language has resulted in a "largely ad hoc" reimbursement scheme; and attempt (Pet. Br. 74) to distinguish the Ninth Circuit's approval of a materially identical system in *Spears*. None of their contentions has merit.

a. The suggestion that Congress would not have tolerated state mechanisms that vest discretion in courts to approve reasonable litigation expenses is irreconcilable

with the fact that, "in the same act that added chapter 154 to title 28 of the United States Code, Congress changed the wording of the provision for payment of reasonably necessary litigation expenses in federal capital cases, and in federal habeas corpus review of state capital cases, from 'shall' to 'may.'" JA__[R.1.85Fed.Reg.20,715]. Petitioners try (Pet. Br. 74 n.11) to distinguish the two contexts on the ground that the adequacy of a State's mechanism with respect to payment of litigation expenses can affect the applicable procedures for federal habeas corpus review of its capital cases under Chapter 154. But inadequate expense payment in a proceeding under 28 U.S.C. § 2255 would have direr consequences, potentially denying a prisoner under a *federal* death sentence—who has no prospect for further review of his case thereafter in another court system—the final opportunity to establish his claims. If an expense-payment provision with permissive language ("may") is adequate in the federal context, state provisions including a mix of mandatory ("shall") and permissive ("may") language must *a fortiori* be adequate under Chapter 154.

b. Regarding petitioners' claim that expense payment is, in practice, inadequate in some cases, the Attorney General explained that neither Chapter 154 nor the Department's regulations "require state judges or other authorities to agree in all instances that the litigation expenses counsel wants are reasonably necessary," and Congress did not authorize or require the Attorney General to undertake a case-by-case analysis "second-guess[ing]" the reasonableness determinations of state courts. JA__[R.1.85Fed.Reg.20,716]. Rather, as the Ninth Circuit concluded, Chapter 154

> requires only that the state mechanism provide for the payment of reasonable litigation expenses. The federal statute thus assumes that a State can assess reasonableness as part of its process. The Arizona system met this criterion * * * by requiring the payment of reasonable costs, as well as reasonable fees to investigators and experts, whenever the court deemed them reasonably necessary.

Spears, 283 F.3d at 1016.

c. Petitioners' attempts to distinguish *Spears* also do not withstand scrutiny.

Petitioners assert (Pet. Br. 74) that "*Spears* did not address payment of litigation expenses under [Ariz. Rev. Stat.] § 13-4041(I)." But the reimbursement scheme that the Ninth Circuit evaluated in that case was materially identical to the one that the Attorney General evaluated in the certification. In *Spears*, the Ninth Circuit had before it three expense-payment provisions: Ariz. Rev. Stat. § 13-4041(H), which provided that the court "shall review and approve additional reasonable fees and costs"; Ariz. Rev. Stat. § 13-4041(J), which provided that "[t]he trial court may authorize additional monies to pay for investigative and expert services"; and Ariz. Rev. Stat. § 13-4013(B), which provided that, in a capital case, the court "shall upon application of the defendant and a showing that the defendant is financially unable to pay for such services, appoint such investigators and expert witnesses as are reasonably necessary adequately to present his defense at trial and at any subsequent proceeding." 283 F.3d at 1009-11, 1015-16. The current provisions are Ariz. Rev. Stat. § 13-4041(G), which provides that the court "shall review and approve all reasonable fees and costs"; Ariz. Rev. Stat. § 13-4041(I), which provides that the court "may authorize additional monies to pay

for investigative and expert services"; and Ariz. Rev. Stat. § 13-4013(B), which provides that, in a felony case, the court "shall on application of [an indigent defendant] * * * appoint investigators and expert witnesses as are reasonably necessary to adequately present a defense at trial and at any subsequent proceeding." Petitioners have offered no reason that the former basket of provisions would qualify while the latter would not.

And regarding petitioners' assertion that the *Spears* Court lacked a record of inadequate expense payments, the Ninth Circuit did not interpret Chapter 154 to require examination of how much expense money had actually been paid in Arizona's capital cases but rather, as with Chapter 154's other requirements, decided the matter based on examination of Arizona's provisions. Consistent with his limited role under Chapter 154, the Attorney General did the same.

D. Arizona Provides for the Timely Appointment of Counsel.

Finally, the Attorney General correctly determined that the timeframe in which postconviction counsel are appointed in Arizona is consistent with the regulations.

1. To begin, the Attorney General noted that Chapter 154 does not "specify a timeline for appointment" of postconviction counsel. JA__[R.1.85Fed.Reg.20,716]. Although *Spears* read in an "implicit requirement" to appoint counsel "expeditiously," 267 F.3d at 1039, Congress subsequently clarified that "[t]here are no requirements for certification * * * other than those expressly stated in this chapter," 28 U.S.C. § 2265(a)(3). Moreover, Arizona has repealed the fifteen-day rule that the Ninth Circuit

had deemed violated in *Spears*, see *supra* p. 10 n.2, leaving no quantitative requirement under either state or federal law.

Nevertheless, the Attorney General recognized that 28 C.F.R. § 26.21 "defines 'appointment' to mean 'provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.'" JA__[R.1.85Fed.Reg.20,716]. Because 28 U.S.C. § 2263 requires that any application for habeas corpus under Chapter 154 be filed within 180 days from final state-court affirmance of the conviction and sentence on direct review, some comments expressed concern that delay in the appointment of counsel would prejudice the capital prisoner's ability to timely seek federal habeas relief.[9] JA__[R.1.85Fed.Reg.20,717]. However, Section 2263 tolls the 180-day clock during, *inter alia*, the period "from the date on which the first petition for postconviction review or other collateral relief is filed until the final State court disposition of such petition." 28 U.S.C. § 2263(b)(2). And under Ninth Circuit precedent, the "notice of post-conviction relief" is the relevant filing that stops the clock for the analogous tolling provision in 28 U.S.C. § 2244(d)(2). See *Isley*

[9] The Attorney General noted that "[c]omments on the issue of timeliness in appointment agree that any delays in the appointment of counsel in Arizona do not prevent timely filing of state postconviction petitions," JA__[R.1.85Fed.Reg.20,717], and petitioners do not dispute this conclusion. Indeed, the lead petitioner in the present case so advised the Attorney General. See JA__[R.15.FDO-AZLetter.16-17] ("FDO-AZ agrees that Arizona's delays in appointing postconviction counsel will not prevent a prisoner from filing a first *state* petition for postconviction review").

v. *Arizona Dep't of Corrections*, 383 F.3d 1054, 1055-56 (9th Cir. 2004). Because Arizona "directs the clerk of the Arizona Supreme Court to file the notice of postconviction relief once the Arizona Supreme Court has issued its mandate affirming the conviction and sentence in capital cases," JA__[R.1.85Fed.Reg.20,718], capital prisoners' federal habeas clock will be tolled at that point, regardless of any delay in the appointment of postconviction counsel. Consequently, the Attorney General was satisfied that Arizona's scheme is "reasonably timely" within the meaning of the regulations. *Ibid.*

2. Petitioners reassert (Pet. Br. 75-79) that Arizona's lack of a statute or rule requiring timely appointment of counsel is fatal to its application because of the risk of prejudice to prisoners' federal proceedings. But none of their arguments demonstrate prejudice in any relevant sense from Arizona's timing of appointment.

a. First, petitioners complain (Pet. Br. 76) that there have been long delays—"sometimes * * * for two years or more"—in appointing counsel following the Arizona Supreme Court's decision affirming a capital judgment on direct review. But as the Attorney General pointed out in the certification notice, JA__[R.1.85Fed.Reg.20,718], these figures are uninformative regarding satisfaction of the regulations' timeliness requirement, because the time limits for state and federal postconviction review do not run continuously from the date of the Arizona Supreme Court's decision affirming the capital judgment.

Instead, Section 2263 tolls the 180-day clock while "the first petition for postconviction review" is pending. And under *Isley*, *supra*, prejudice from delay in

appointing counsel is avoided by treating the "notice of post-conviction relief" as the relevant filing that stops the clock for the analogous tolling provision under Chapter 153. 383 F.3d at 1055-56. As noted, Arizona ensures that capital prisoners obtain the benefit of the *Isley* tolling rule by "direct[ing] the clerk of the Arizona Supreme Court to file the notice of postconviction relief once the Arizona Supreme Court has issued its mandate affirming the conviction and sentence in capital cases." JA__[R.1.85Fed.Reg.20,718]. Thus, the Arizona scheme is "reasonably timely" within the meaning of the regulations, even absent a fixed deadline for appointment, because it ensures that prisoners will not be deprived of a reasonable amount of time in which to seek state and federal postconviction review on account of any delay in the appointment of counsel. *Ibid.*

b. Petitioners do not appear to disagree with any of that reasoning. Instead, they dismiss (Pet. Br. 77-78) it as "speculation" because (1) Arizona effects timely appointment in part through the practice of the Arizona Supreme Court, as opposed to a statute or rule, and (2) *Isley* considered the language of Chapter 153 rather than Chapter 154.

The Arizona Supreme Court's role is permissible under Chapter 154. In 2006, Congress specifically removed language requiring that a State's mechanism be codified by "statute" or by "rule of its court of last resort," rejecting judicial precedent that had held that "policy," "practice," or "compliance in practice" by a state supreme court was insufficient to satisfy Chapter 154. See JA__[R.1.85Fed.Reg.20,717]; 152 Cong. Rec.

2446 (2006) (remarks of Sen. Kyl) ("The 'statute or rule of court' language * * * is removed, allowing the States flexibility on how to establish the mechanism within the State's judicial structure.").

With respect to *Isley*, the Attorney General observed that "there is no reason to believe that federal habeas courts will * * * distinguish between" Chapter 153 and Chapter 154 with regard to "[t]he *Isley* understanding of the trigger for tolling the federal habeas time limit." JA__[R.1.85Fed.Reg.20,718]. Indeed, petitioners do not contend that there is any valid textual or contextual basis to conclude that Arizona's "notice of post-conviction relief" is "a properly filed application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)—as *Isley* holds—but not "the first petition for post-conviction review or other collateral relief" under 28 U.S.C. § 2263(b)(2). The Attorney General thus correctly determined that Arizona Supreme Court practice and Ninth Circuit precedent obviate petitioners' timeliness concerns.

c. Petitioners also assert (Pet. Br. 79) that delays in appointment could prejudice capital prisoners for reasons independent of the time limits for seeking federal habeas review, because "memories can fade, witnesses can disappear, and evidence can be, and often is, lost." This objection misunderstands the scope of the timeliness requirement in the Department's regulations, which concerns "the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings"—not any independent requirement to preclude the attrition of evidence. 28 C.F.R. § 26.21. Indeed, delays

may (and often do) occur at numerous stages of capital cases: before and at trial, on appeal, during state postconviction proceedings, and in the initiation and completion of federal habeas review. States have their own incentives to address delays in state proceedings, as they cannot implement their sentences while state-court litigation continues. Congress accordingly limited the expedited measures in Chapter 154 to sources of delay that are not under state control, such as the time allowed for federal habeas filing and adjudication, and left other timeliness constraints outside the "requirements * * * expressly stated in this chapter." 28 U.S.C. § 2265(a)(3).

E. The Attorney General's Interpretation of Chapter 154's Requirements Was Reasonable.

1. Even if this Court determines that Chapter 154 *could* be read as petitioners urge—*i.e.*, to require empirical analysis of how appointed counsel performed in practice, how much they were compensated, which of their litigation expenses were paid, and how quickly they were appointed—the Attorney General's contrary understanding is, at minimum, a reasonable interpretation of the statutory language that merits deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The *Chevron* framework governs this Court's review of the statutory requirements because Congress has delegated to the Attorney General the authority both to "promulgate regulations to implement the certification procedure," 28 U.S.C. § 2265(b), and to "determine" in the first instance "whether the State has established a [qualifying] mechanism," *id.* § 2265(a)(1)(A). See *National Cable & Telecomms. Ass'n* v. *Brand X*

Internet Servs., 545 U.S. 967, 980 (2005) ("The *Chevron* framework governs our review of the [agency]'s construction" of statutory provisions where "Congress has delegated to the [agency] the authority to 'execute and enforce' the [statute], and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the [statute].").[10] The Attorney General first set out his interpretation of Chapter 154 in the Final Rule, where he rejected arguments that he must "review a State's record of appointments in individual cases" because "the statutory scheme does not call for such case-specific oversight" and the Attorney General's performing that task would leave "little need" for the separate statutory province of federal habeas courts. JA__[R.150.78Fed.Reg.58,162]. The Attorney General then confirmed that understanding repeatedly in the course of adjudicating Arizona's application for certification, see, *e.g.*, JA__[R.1.85Fed.Reg.20,711, 20,715]—an interpretation that is likewise entitled to *Chevron* deference. See *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002) (extending *Chevron* deference to agency interpretation "reached * * * through means less formal than 'notice and comment' rulemaking"); *Village of Barrington* v. *Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (recognizing that this Court has

[10] There is no inconsistency between this Court's *de novo* review of "[t]he determination by the Attorney General regarding whether to certify a State," 28 U.S.C. § 2265(c)(3), and its appropriate according of deference to the Attorney General's interpretation of Chapter 154's requirements. See *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 391 (1999) ("Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, de novo.").

"grant[ed] *Chevron* deference to *** agency interpretation[s] produced through informal adjudication"). The Attorney General's interpretation was a reasonable reading of the statutory language, which requires the Attorney General to review the State's "established *** mechanism" and "standards"—not to grade its record.

2. Moreover, to the extent petitioners ground their arguments in the regulations rather than the statute, the Attorney General determined that an empirical analysis is unnecessary to assessing whether state standards relating to competency, compensation, payment of expenses, and timing of appointment satisfy the Final Rule. See JA__[R.1.85Fed.Reg.20,711-12, 14-16, 18]. Thus, petitioners' assertion (Pet. Br. 56) that the Final Rule's "otherwise reasonably assure[s]" language implies the necessity of evaluating "how the system has actually functioned in practice" is foreclosed by the Attorney General's reasonable construction of the Department's own regulations, which is, at minimum, entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997). See *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2424 (2019) (Roberts, C.J., concurring) (*Auer* deference is appropriate when, *inter alia*, agency's reasonable interpretation "reflect[s] its authoritative, expertise-based, and fair and considered judgment" as to the meaning of the regulation).

Because the Attorney General exhaustively reviewed Arizona's capital counsel mechanism, correctly determined that it satisfies the requirements of Chapter 154, and persuasively addressed and rejected each of the objections petitioners now renew to that determination, no reason exists for this Court to set aside the certification.

II. The Regulations for the Chapter 154 Certification Procedure Do Not Violate the APA.

Apart from the Attorney General's certification of Arizona's capital counsel mechanism, petitioners assert (Pet. Br. 80-97) that the certification procedures set out in the Final Rule are deficient in various ways. Their arguments misapprehend the nature of certification decisions under Chapter 154 and the requirements that the regulations impose on States and the Attorney General.

A. The Certification Process Set Out in the Regulations Is Reasonable.

1. Certification Decisions Are Properly Viewed as a Form of Adjudication, Not Rulemaking.

Agencies "generally ha[ve] discretion to determine whether to proceed by adjudication or rulemaking." *Teva Pharm.* v. *FDA*, 182 F.3d 1003, 1010 (D.C. Cir. 1999). To that end, the Final Rule appropriately characterizes the certification procedure initiated by an applicant State as adjudicatory (resulting in an order), rather than rulemaking (resulting in a rule and subject to the APA's rulemaking requirements). See JA__[R.150.78Fed.Reg.58,174].

a. Certification requires the Attorney General to make a fact-bound inquiry in response to the request of an individual State regarding whether its mechanism for providing postconviction counsel satisfies certain statutory criteria. See 28 U.S.C. § 2265(a) (directing the Attorney General to determine whether a State has established the requisite mechanism only "[i]f requested by an appropriate State official"). The Attorney General enforces those criteria—enacted by Congress and interpreted in the

Department's regulations—on a case-by-case basis, evaluating each mechanism as it is presented by an applicant State, a function previously performed by federal habeas courts under the prior version of Chapter 154. This process fits comfortably within the traditional definition of "[a]djudication" as "the quasi-judicial power, [which] is intended to provide for the enforcement of agency * * * regulations on a case-by-case basis." *RLC Indus. Co.* v. *Commissioner*, 58 F.3d 413, 417 (9th Cir. 1995) (cleaned up).

Indeed, Chapter 154 distinguishes the Attorney General's task in making certification decisions regarding individual States from the Attorney General's role in implementing the certification process through rulemaking. Section 2265(a) speaks to the former, addressing the Attorney General's duty to make a determination regarding an individual State's request about its mechanism, while Section 2265(b) addresses the latter, directing the Attorney General to "promulgate regulations to implement the certification procedure." There is no indication that Congress intended to require the Attorney General to make State-by-State evaluations through the same sort of "regulations" that characterize his promulgation of the certification procedures. To the contrary, given that Congress "reassigned the certification function from the Federal courts"—which had for a decade made such determinations themselves—"to the Attorney General," JA__[R.150.78Fed.Reg.58,172], it was entirely reasonable to proceed with certification decisions through adjudication.

b. In support of their contention that certifications should be treated as rules, petitioners point to two benchmarks that this Court has set out to distinguish between

adjudications and rulemakings: (1) that "rules are typically 'generally applicable,' * * * whereas orders involve 'case-specific individual determinations,'"; and (2) that "rules generally have only 'future effect' while adjudications immediately bind parties by retroactively applying law to their past actions." Pet. Br. 82 (quoting *Neustar, Inc.* v. *FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017); *Safari Club Int'l* v. *Zinke*, 878 F.3d 316, 333 (D.C. Cir. 2017)). While petitioners correctly identify the principles from this Court's caselaw, neither supports petitioners' attempt to convert the State-by-State application-and-certification process into a rulemaking.

First, the fact that an agency's adjudication of a State's application will necessarily have some downstream effects on individuals in that State does not convert the adjudication into a rulemaking. "Just as a class action can encompass the claims of a large group of plaintiffs without thereby becoming a legislative proceeding, an adjudication can affect a large group of individuals without becoming a rulemaking." *Goodman* v. *FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999); see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292 (1974) (agency may, in an adjudication, "promulgate a new standard that would govern future conduct" of non-parties). That the entity involved in the adjudication is a State may, in turn, carry implications for more people than if the entity were a natural person or corporation, but that is a product of the statutory scheme. It does not change the fact that the determination is a "proceeding[] designed to adjudicate disputed facts" concerning the adequacy of Arizona's capital counsel mechanism, not a

"proceeding[] for the purpose of promulgating policy-type rules or standards." *United States* v. *Florida E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973).

Second, petitioners misunderstand the retroactivity analysis that distinguishes purely prospective rulemakings from adjudications of existing (and past) factual circumstances that may also entail future legal effects. Petitioners characterize (Pet. Br. 83) the certification as "prospective" because "it will only bind specific litigants in independent habeas proceedings—and only if the habeas court determines that the remaining requirements of Chapter 154 are satisfied in an individual case." But they concede (*ibid.*) that "Chapter 154's future applicability may, in some cases, depend on an appointment of counsel that took place long before the certification was issued"—an appointment that occurred under past circumstances now evaluated to have comported with certain legal standards. The Attorney General's assessment of the mechanism that Arizona has had in place since the certified effective date of May 19, 1998 is, thus, largely retrospective. That the certification may entail future legal consequences for some Arizona capital prisoners based on the Attorney General's "determination of past and present rights and liabilities" in the context of Arizona's existing mechanism, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J., concurring), does not bring it outside the realm of adjudication, since "adjudications *may* have prospective effects but *must* have retroactive effects," *Neustar*, 857 F.3d at 895. Petitioners' contrary argument "produces a definition of 'rule' that is meaningless, since

obviously *all* agency statements have 'future effect' in the sense that they do not take effect until after they are made." *Bowen*, 488 U.S. at 217 (Scalia, J., concurring).[11]

Thus, because certifications are not rules, the APA's "notice requirements" under 5 U.S.C. § 553 are inapplicable as a matter of law. Cf. *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 102 (2015) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.'").

2. Even If Deemed a Rulemaking, the Transparent and Iterative Certification Process Here Complied with the APA.

a. As described *supra* pp. 11-13, the Attorney General's certification of Arizona's mechanism was the product of back-and-forth engagement with the State, the public, and petitioners themselves over a number of years. The Department first invited public comment on Arizona's certification request in November 2017, and, simultaneously, sent a letter to Arizona asking whether the State wished to supplement,

[11] Petitioners' reliance (Pet. Br. 83-84) on *Safari Club*, *supra*, is misplaced. There, this Court deemed suspension of certain imports a rulemaking rather than an adjudication because, *inter alia*, the agency action "only banned" importation "going forward" and "resulted in no immediate legal consequences for any specific parties." 878 F.3d at 333-34. Here, by contrast, the lone party to the adjudication—the State of Arizona—enjoys an "immediate, substantial, and concrete" (Pet. Br. 83) enhancement of its legal rights by virtue of the certification, as it may now invoke Chapter 154's procedures in federal habeas proceedings. Thus, petitioners' assertion (Pet. Br. 83) that *Safari Club* is "similar" because "the agency's decision to ban the import of already-killed elephants applied to actions taken in the past but 'resulted in no immediate legal consequences for any specific parties'" misses the point that the party to the certification decision is, by statutory design, the applicant State, not individual prisoners.

modify, or update its application. The Department published a second notice the following month, providing a further 60-day period for public comment. The Department received 140 comments in response to these solicitations. In June 2018, the Department sent a letter to Arizona requesting that the State provide additional information about its mechanism, based on questions that had arisen from public comments. In November 2018, the Department published a third notice respecting the additional submission from Arizona, which elicited 17 comments over a 45-day period. This April, the Attorney General published a 17-page certification notice, in which he responded to numerous issues raised in the multiple rounds of public comments.

b. Notwithstanding this iterative and transparent process, petitioners complain (Pet. Br. 84-86) that the Attorney General did not satisfy the requirements of notice-and-comment proceedings because "there are aspects of the decision that the interested public could not reasonably have anticipated." Specifically, petitioners fault (Pet. Br. 81) the Attorney General for "includ[ing] rationales for certification that Arizona had not advanced," and offer as the only examples "the Attorney General's back-of-the-napkin compensation calculations * * * and his invocation of [Ariz. Rev. Stat.] § 13-4013(B) regarding payment of litigation expenses." Neither of these aspects of the Attorney General's reasoning deprived petitioners or the general public of the "description of the subjects and issues involved" that 5 U.S.C. § 553 requires.

As explained in the certification notice, the annualization of Arizona's maximum hourly rate was simply a matter of multiplying that rate ($100) by a standard 2000-hour

work-year to obtain a product of $200,000. The maximum hourly rate of $100—appearing in the Arizona statutes and discussed in numerous comments, including the one submitted by the lead petitioner here, JA__[R.14.FDO-AZCmt.30-31]—was publicly available information, and the Attorney General's multiplication of that rate by the number of hours in a standard work-year was not the kind of complex mathematical formula that agencies have sometimes included in notices of proposed rulemakings. See, *e.g.*, *Hall* v. *FCC*, 237 F.2d 567, 573 (D.C. Cir. 1956) (noting the inclusion of "mathematical curves and equations" in an appendix to a notice of proposed rulemaking).

Likewise, Ariz. Rev. Stat. § 13-4013(B) was not a bit of statutory esoterica that the Attorney General sprung on an unsuspecting public. Section 13-4013(B) is a provision in the public laws of Arizona located in the same title (13, comprising the State's "Criminal Code") as the other provisions on which the Attorney General relied in assessing Arizona's coverage of litigation expenses. See JA__[R.1.85Fed.Reg.20,715-16] (citing Ariz. Rev. Stat. §§ 13-4041(G), 13-4041(I), 13-4013(B)). And the statute is expressly referenced in orders of the Arizona Supreme Court appointing counsel for indigent capital prisoners—which were attached as exhibits to Arizona's October 16, 2018 letter in response to the Attorney General's request for further information. See JA__[R.129.AZLetter.10.16.2018.162] ("The superior court shall approve funding for such investigators and expert witnesses as are reasonably necessary pursuant to [Ariz. Rev. Stat.] § 13-4013(B) and § 13-4041(J).")); JA__[R.129.AZLetter.10.16.2018.178,

182, 188, 193, 195, 197, 199, 202, 212, 222, 250, 252, 257] (same). If petitioners had concerns about Section 13-4013(B)'s role in Arizona's reimbursement scheme, they were welcome to raise those in response to the Department's November 13, 2018 notice, which expressly "solicit[ed] public comment on th[e] supplemental information" supplied by Arizona in its October 16, 2018 letter. JA__[R.131.83Fed.Reg.58,787].

In any event, failing to more ostentatiously advert to these generally available facts did not deprive petitioners or others of a meaningful opportunity to comment on the adequacy of Arizona's compensation or expense-payment provisions—which they, in fact, did at length. The APA does not require advance disclosure of every detail of an agency's reasoning supporting a rule; rather, the agency need only provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The process for adjudicating Arizona's certification application amply satisfied that requirement.

B. The Regulations Faithfully Effectuate Congress's Design by Placing the Onus on the Attorney General to "Determine" a State's Compliance with Chapter 154 and Permitting Public Input on That Determination.

Petitioners also assert (Pet. Br. 86-93) that the certification process embodied in the Final Rule is deficient because it "places no onus on the state and effectively shifts the burden of proof to third parties." This argument misapprehends both the statutory scheme—which places the onus of certification on the Attorney General—and the Rule—which does not impose any burden-shifting framework.

The Final Rule makes clear that certification will be denied unless the Attorney General is convinced that a State has established a qualifying capital counsel mechanism. Chapter 154 requires the Attorney General to affirmatively "determine * * * whether" a State has established such a mechanism. 28 U.S.C. § 2265(a)(1). The regulations reiterate that statutory mandate. See 28 C.F.R. § 26.22 (stating that Attorney General will certify a State if he "determines that the State has established" a qualifying mechanism satisfying Chapter 154's requirements as articulated in the Rule); *id.* § 26.23(d) ("[C]ertification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism * * * satisfies chapter 154's requirements").

As the preamble to the Rule notes, both "Chapter 154 itself and [the regulations] explain what States must do to qualify for chapter 154 certification." JA__[R.150.78Fed.Reg.58,174]. The Rule provides a framework for the Attorney General's "inquiry into whether a State has put into place adequate * * * standards" to satisfy the statutory requirements. JA__[R.150.78Fed.Reg.58,163]. The Rule authorizes States to submit "supporting materials" showing satisfaction of Chapter 154's requirements. 28 C.F.R. § 26.23(b); JA__[R.150.78Fed.Reg.58,174] (States may "present any and all information they consider relevant or useful to explain how the mechanism for which they seek certification satisfies these requirements"); JA__[R.150.78Fed.Reg.58,180] (discussing supporting materials). The Rule likewise

allows any interested party to submit materials in support of or opposition to the State's request. 28 C.F.R. § 26.23(b)(3); JA__[R.150.78Fed.Reg.58,174].

Curiously, after criticizing (Pet. Br. 85) the Attorney General for purportedly giving short shrift to "APA notice-and-comment requirements," petitioners condemn (Pet. Br. 86) the certification process for placing *too much* import on the role of public comments. Petitioners' objection misses the mark: allowing for public comments—and meaningfully considering the information submitted therein—in no way establishes a burden-shifting presumption in favor of certification. Rather, the burden here remained exactly where Congress allocated it in Chapter 154: on the Attorney General, who "shall determine * * * whether the State has established a [qualifying] mechanism." 28 U.S.C. § 2265(a)(1). His engagement with the public comments—by, for instance, "ask[ing] Arizona to respond to particular issues raised by [petitioner] FDO-AZ's assessment," Pet. Br. 87—demonstrates that he took this responsibility seriously, not that he improperly enlisted the public to do his (or Arizona's) job for him.

C. The Regulations Set Out Substantive Standards for Certification, and the Attorney General Applied Them Appropriately to Arizona's Application.

Finally, petitioners assert (Pet. Br. 93-96) that the Department's regulations "leave essential criteria for certification undefined and vague." But as is clear from both the content of the regulations and their application to Arizona's mechanism, the regulations omit nothing that Chapter 154 requires and, moreover, provide extensive guidance and structure for the Attorney General's application of the statutory criteria.

1. Chapter 154 does not require conformity with rigid, pre-announced substantive metrics as to competency and compensation. Prior to the 2006 amendments, federal habeas courts (such as the Ninth Circuit in *Spears*) assessed state mechanisms without prior articulation of substantive standards. Rather, they adhered to Congress's intention, first articulated in the Powell Committee Report, that States enjoy wide latitude in establishing compliant mechanisms. The Judicial Conference proposed modification of the Powell Committee's proposal to require compliance with more restrictive federal standards regarding competency and compensation, but Congress rejected this proposal and preserved States' discretion to develop their own procedures in satisfaction of Chapter 154. See *supra* p. 39.

In any event, the regulations *do* contain significant substantive content. Section 26.22 of the Final Rule prescribes the standards a State must meet under 28 U.S.C. §§ 2261 and 2265 and, in so doing, addresses all aspects of the "mechanism" a State must establish—from competency and compensation standards to provisions for the payment of litigation expenses. 28 C.F.R. § 26.22. The regulations make clear that the Attorney General will make an independent determination whether a State has established a qualifying mechanism, including assessing the adequacy of the State's standards. See JA__[R.150.78Fed.Reg.58,161-62, 58,172-73].

Moreover, in the areas of competency and compensation, the regulations identify specific "benchmarks" to guide the Attorney General's evaluation of States' standards—without imposing more rigid, uniform national *requirements*. 28 C.F.R.

§ 26.22(b)-(c). If, for example, a State's competency standards do not satisfy either of the two "benchmark criteria," they "will be deemed adequate only if" the Attorney General determines that they "reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases." 28 C.F.R. § 26.22(b)(2). The Rule states that "the Attorney General will assess such State mechanisms individually"—as was the case in "the courts' consideration of the adequacy of State competency standards prior to the 2006 amendments to chapter 154"—and that "[m]easures that will be deemed relevant include standards of experience, knowledge, skills, training, education, or combinations of these considerations that a State requires attorneys to meet in order to be eligible for appointment in State capital postconviction proceedings." JA__[R.150.78Fed.Reg.58,179]. Likewise, state compensation provisions that do not satisfy the benchmark criteria "will be deemed adequate only if" the Attorney General determines that "the State mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency" sufficient under the regulations. 28 C.F.R. § 26.22(c)(2). That determination is informed by prior statutory and judicial determinations deeming compensation provisions adequate "independent of any comparison to the benchmarks," including the Ninth Circuit's favorable determination in *Spears* regarding Arizona's compensation provisions. JA__[R.150.78Fed.Reg.58,180].

Thus, the regulations provide guidance as to how the Attorney General will evaluate state mechanisms. At the same time, consistent with the text and history of

Chapter 154, the regulations do not "foreclos[e] innovative efforts by States to devise robust standards" that would result in the "timely appointment of competent counsel." JA__[R.150.78Fed.Reg.58,172]; see JA__[R.150.78Fed.Reg.58,162] (recognizing that impeding such efforts would "risk conflict with [Chapter 154], which leaves room for States to formulate their own standards so long as they reasonably assure the availability and appointment of competent counsel").

2. Contrary to petitioners' assertions (Pet. Br. 95-96), the Attorney General's certification of Arizona's mechanism exemplified, rather than "circumvented," these substantive aspects of the regulations. The Attorney General's discussion of both competency and compensation considered the benchmarks outlined in the regulations. See JA__[R.1.85Fed.Reg.20,710]; JA__[R.1.85Fed.Reg.20,714]. With respect to competency standards, the Attorney General noted (1) that the first benchmark, 28 C.F.R. § 26.22(b)(1)(i), "is based on the qualification standards Congress has adopted in 18 U.S.C. 3599 for appointment of counsel in Federal [capital] proceedings"; (2) that Arizona's standards "exceed the standards of 18 U.S.C. 3599"; and (3) that Arizona's standards "are 'likely to result in even higher levels of proficiency' * * * than the [first] benchmark." JA__[R.1.85Fed.Reg.20,709-10]. With respect to compensation, the Attorney General acknowledged that the information before him was "insufficient to enable [him] to determine whether Arizona's mechanism * * * satisfied the benchmarks of section 26.22(c)(1)," and he accordingly extended no presumption of adequacy; instead, his analysis compared Arizona's mechanism to relevant caselaw

analyzing state compensation schemes, and he determined that Arizona's "provision for compensation is 'reasonably designed to ensure the availability for appointment of counsel who meet' * * * the standards for appointment" that the State has established. JA__[R.1.85Fed.Reg.20,713-15]. Thus, the Attorney General's analysis was firmly grounded in the regulations, but—consistent with the statutory scheme and the Final Rule—it did not exclude other approaches that satisfy Chapter 154.

3. In any event, petitioners' procedural complaints are immaterial to this Court's "de novo review," 28 U.S.C. § 2265(c)(3), of Arizona's capital counsel mechanism. If this Court determines that Arizona has established a mechanism satisfying the requirements of Chapter 154, it should sustain the certification, regardless of any deficiencies in the Department's regulations or the certification process for Arizona. And this Court *should* reach that conclusion: As explained above, and in the certification notice, and in the Ninth Circuit's decision in *Spears*, Arizona has established a capital counsel mechanism that satisfies the statutory requirements.

CONCLUSION

For the foregoing reasons, this Court should sustain the Attorney General's certification of Arizona's capital counsel mechanism.

Respectfully submitted,

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October 14, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of this Court's June 22, 2020 Order, Dkt. No. 24, because it contains 16,000 words (excluding those portions exempted by Federal Rule of Appellate Procedure 32(f)), as verified by the word-count feature of Microsoft Word 2019.

2. This brief complies with the type-size and type-face requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond font.

3. This brief has been scanned for viruses with the most recent version of McAfee Endpoint Security, version 10.50, which is continuously updated, and according to that program, is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, I caused the foregoing brief to be served electronically through the Case Management/Electronic Case Filing system of the United States Court of Appeals for the District of Columbia Circuit.

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ADDENDUM OF RELEVANT STATUTES AND REGULATIONS

TABLE OF CONTENTS

28 U.S.C. § 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.

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

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

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

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

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

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

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

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

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

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

28 U.S.C. § 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

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

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

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

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

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

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

* * * * * * * * * *

28 U.S.C. § 2263. Filing of habeas corpus application; time requirements; tolling rules.

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

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

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure

review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

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

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

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

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

* * * * * * * * * *

28 U.S.C. § 2264. Scope of Federal review; district court adjudications.

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

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

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

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

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

* * * * * * * * * *

28 U.S.C. § 2265. Certification and judicial review.

(a) Certification.—

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

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

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

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

(2) Effective date.—

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

(3) Only express requirements.—

There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

(b) Regulations.—

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

(c) Review of Certification.—

(1) In general.—

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

(2) Venue.—

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

(3) Standard of review.—

The determination by the Attorney General regarding whether to certify a State under this section shall be subject to de novo review.

* * * * * * * * * *

28 U.S.C. § 2266. Limitation periods for determining applications and motions.

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

(b)

(1)

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

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)

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

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

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

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

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

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

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

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

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

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

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

(3)

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

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

(4)

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

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

(5)

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

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

(c)

(1)

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

(B)

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

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

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

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

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

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

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

(4)

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

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

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

* * * * * * * * * *

18 U.S.C. § 3599. Counsel for financially unable defendants.

(a)

(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper

showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)

(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

* * * * * * * * * *

28 C.F.R. § 26.20. Purpose.

Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a State has a mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. If the Attorney General certifies that a State has established such a mechanism, sections 2262, 2263, 2264, and 2266 of chapter 154 of title 28 apply in relation to Federal habeas corpus review of State capital cases in which counsel was appointed pursuant to that mechanism. These sections will also apply in Federal habeas corpus review of capital cases from a State

with a mechanism certified by the Attorney General in which petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent, as provided in section 2261(b) of title 28. Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.

* * * * * * * * * *

28 C.F.R. § 26.21. Definitions.

For purposes of this part, the term -

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

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

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

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

* * * * * * * * * *

28 C.F.R. § 26.22. Requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * * * * * * *

28 C.F.R. § 26.23. Certification process.

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

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

(1) Indicating that the State has requested certification;

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

(3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of timely public comments received in response to the Federal Register notice under paragraph (b) of this section, or any subsequent notice the

Attorney General may publish providing a further opportunity for comment. The certification will be published in the Federal Register if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies chapter 154's requirements. A State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.

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

* * * * * * * * * *

Ariz. Rev. Stat. § 13-4013. Counsel assigned in criminal proceeding or insanity hearings; investigators and expert witnesses; compensation.

A. If counsel is appointed by the court and represents the defendant in either a criminal proceeding or insanity hearing, counsel shall be paid by the county in which the court presides, except that in those matters in which a public defender is appointed, no compensation shall be paid by the county. Compensation for services rendered to the defendant shall be in an amount that the court in its discretion deems reasonable, considering the services performed.

B. If a person is charged with a felony offense the court may on its own initiative and shall on application of the defendant and a showing that the defendant is financially unable to pay for such services appoint investigators and expert witnesses as are reasonably necessary to adequately present a defense at trial and at any subsequent proceeding.

C. Compensation for investigators and expert witnesses who are appointed pursuant to subsection B of this section shall be at such rates as the county contracts for such services. If a necessary expert witness represents a discipline or has a skill that is not then the subject of a county contract, the county may either promptly procure those services pursuant to section 11-254.01 or ask the court to establish a reasonable fee for that witness. If no investigator or expert witness who is under contract with the county to provide services is available and the defendant is unable to obtain such services at the county rate, the court shall establish a reasonable fee for the expert witness or investigator providing the service.

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Ariz. Rev. Stat. § 13-4041. Fee of counsel assigned in criminal proceeding or insanity hearing on appeal or in postconviction relief proceedings; reimbursement.

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

B. After the supreme court has affirmed a defendant's conviction and sentence in a capital case, the supreme court or, if authorized by the supreme court, the presiding judge of the county from which the case originated shall appoint counsel to represent the capital defendant in the state postconviction relief proceeding.

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

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

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

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

D. Before filing a petition, the capital defendant may personally appear before the trial court and waive counsel. If the trial court finds that the waiver is knowing and voluntary, appointed counsel may withdraw. The time limits in which to file a petition shall not be extended due solely to the change from appointed counsel to self-representation.

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

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

1. A petition is timely filed.

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

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

H. The county shall request reimbursement for fees it incurs pursuant to subsections F, G and I of this section arising out of the appointment of counsel to represent an indigent capital defendant in a state postconviction relief proceeding. The state shall

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

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

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Ariz. R. Crim. P. 6.8. Standards for Appointment and Performance of Counsel in Capital Cases.

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

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

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

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

(4) have successfully completed, within one year before the initial appointment, at least 6 hours of relevant training or educational programs in the area of capital defense; and successfully completed within one year before any later appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense;

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

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

(b) Trial Counsel.

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

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

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

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

(c) Appellate Counsel. To be eligible for appointment as appellate counsel, an attorney must meet the qualifications set forth in (a) and the attorney must:

(1) within 3 years immediately before the appointment, have been lead counsel in an appeal in a case in which a death sentence was imposed (including petitions for review of post-conviction proceedings); and prior experience as lead counsel in the appeal of at least 3 felony convictions; or

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

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

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

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

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

(1) the Supreme Court consents;

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

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

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