

[ORAL ARGUMENT NOT SCHEDULED]

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

OFFICE OF THE FEDERAL PUBLIC DEFENDER  
FOR THE DISTRICT OF ARIZONA, et al.,

Petitioners,

v.

MERRICK B. GARLAND,  
Attorney General of the United States, et al.,

Respondents.

No. 20-1144

**RESPONDENTS' MOTION FOR VOLUNTARY REMAND**

Respondents the Attorney General and the United States respectfully move for voluntary remand of this matter to the Department of Justice for supplementation of the administrative record and further proceedings on the State of Arizona's application for certification under Chapter 154.<sup>1</sup>

**STATEMENT**

1. On April 14, 2020, then-Attorney General William Barr issued an order certifying that Arizona's capital counsel mechanism satisfies the

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<sup>1</sup> Petitioners do not oppose this motion. Counsel for intervenor the State of Arizona stated as follows: "Arizona objects to DOJ's motion to remand and intends to file a written response to the motion."

requirements of Chapter 154 of Title 28 of the U.S. Code, which specifies standards for the appointment of counsel to represent indigent capital prisoners in state postconviction proceedings. JA.20-36. On April 29, 2020, petitioners—the Office of the Federal Public Defender for the District of Arizona and 13 individual capital prisoners—filed a petition for review challenging the certification order. Dkt. No. 2. The case was briefed, and oral argument was calendared for February 16, 2021. Dkt. No. 73.

2. On February 10, 2021, then-Acting Attorney General Monty Wilkinson determined that the certification order may benefit from further consideration or further development of the record. To permit such review, respondents moved to postpone argument. Dkt. No. 79, at 2. This Court granted that motion, ordered the case held in abeyance, and directed respondents to file status reports at 30-day intervals.<sup>2</sup> Dkt. No. 81. The Court also “directed [the parties] to file motions to govern future proceedings in this case within 30 days of the conclusion of agency proceedings.” *Ibid.*

3. Attorney General Merrick Garland was confirmed by the United States Senate on March 10, 2021 and assumed office the following day. After

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<sup>2</sup> Respondents filed their first status report on March 29, 2021, *see* Dkt. No. 82, and now file this motion in lieu of a second status report.

taking office, the Attorney General reviewed the matter. He has now determined that Arizona's application for certification warrants further review and that the existing record lacks certain information necessary to the Attorney General's statutorily assigned function of "determin[ing] . . . 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." 28 U.S.C. § 2265(a)(1).

### ARGUMENT

Voluntary remand is appropriate in light of the Attorney General's determinations that the agency action challenged here—the order certifying Arizona's capital counsel mechanism—warrants reconsideration and that such reconsideration would benefit from supplementation of the record.

This Court "commonly grant[s] . . . motions [for voluntary remand], preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); see generally 3 Administrative Law and Practice § 8:31, at 187 (3d ed. 2010) (voluntary remand is appropriate when an

“agency recognizes deficiencies in its decision, explanation or procedures” and asks the “court to remand the case back to the agency so that it may correct the deficiency”). “[A]n agency need [not] confess error or impropriety in order to obtain a voluntary remand” but instead only “profess [its] intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge.” *Limnia, Inc. v. United States Dep’t of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017).<sup>3</sup>

After reviewing the matter, the Attorney General now intends to reconsider Arizona’s application for certification, and he has determined that additional information is necessary to evaluate whether the State’s capital counsel mechanism satisfies the requirements set out in Chapter 154.

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<sup>3</sup> In opposition to respondents’ motion to postpone argument, Arizona contended that “the regulations guiding the opt-in assessment contain no vehicle to reconsider an already-final certification decision.” Dkt. No. 80, at 2. But this Court has long held that “[t]he power to reconsider is inherent in the power to decide,” *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950), and therefore that “agencies have an inherent authority to reconsider their own decisions,” *Sunday Sch. Bd. v. USPS*, No. 99-5018, 1999 WL 322746 at \*1 (D.C. Cir. Apr. 30, 1999). Moreover, the only assurance of “final[ity]” that the regulations offer to States is the five-year effective period of a certification, which does not commence until “the completion of the certification process by the Attorney General *and any related judicial review.*” 28 C.F.R. § 26.23 (emphasis added). Thus, neither this Court’s caselaw nor the Department’s regulations support Arizona’s argument that the Attorney General is precluded from reconsidering the certification order at this stage.

Accordingly, the Department of Justice plans to make further informational requests to Arizona, including by reiterating certain inquiries about the State's compensation system that the Department first posed in June 2018, *see* AR.10905-09, and in response to which the State provided incomplete answers, *see* AR.10910-20.<sup>4</sup> In accordance with the regulations implementing the certification procedure, the Department will then notify the public of Arizona's response and invite further comment. *See* 28 C.F.R. § 26.23(b). At the conclusion of this process, the Attorney General intends to enter a new order assessing the State's mechanism, at which point any aggrieved parties with standing may seek judicial review of the Attorney General's determination pursuant to 28 U.S.C. § 2265(c).

Because, whatever the ultimate outcome, the Attorney General's reconsideration will moot the petition for review presently pending before this Court, remand to the Department of Justice is the proper course. In the event the Attorney General denies certification following reconsideration,

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<sup>4</sup> Attorney General Barr likewise recognized the incompleteness of the State's response on this point. *See* JA.29 (“[T]he information I have received from the State and public comments is insufficient to enable me to determine whether Arizona's mechanism for compensation has satisfied the benchmarks of section 26.22(c)(1) because it does not include comparative information for the benchmarks' reference points[.]”).

petitioners would have no basis for seeking further relief from this Court. In the event the Attorney General grants certification in reliance on the expanded record developed during the course of reconsideration, the petition for review presently pending before this Court would no longer reflect the full extent of the Attorney General's reasoning or relevant record materials upon which it was based. In either case, the Attorney General's voluntary reconsideration of the challenged action would obviate any need for further proceedings in this litigation.

#### CONCLUSION

For the foregoing reasons, the Court should remand this matter to the Department of Justice to facilitate further development of the administrative record and reconsideration of the certification order.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Book Antiqua and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 1,111 words, as verified by the word-count feature of Microsoft Word.

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## CERTIFICATE OF SERVICE

I certify that on April 28, 2021, I electronically filed the foregoing motion via the appellate CM/ECF system. The participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

*s/Joshua K. Handell*

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