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DEPARTMENT OF JUSTICE

28 CFR Part 26

Docket No. OJP (DOJ) 1540; AG Order No 3322-2012

RIN 1121-AA77

Certification Process for State Capital Counsel Systems

AGENCY: Department of Justice.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: Section 2265 of title 28, United States Code, instructs the Attorney General to promulgate regulations establishing a certification procedure for States seeking to qualify for the special Federal habeas corpus review provisions for capital cases under chapter 154 of title 28. The benefits of chapter 154—including expedited timing and limits on the scope of Federal habeas review of State judgments—are available to States on the condition that they provide counsel to indigent capital defendants in State postconviction proceedings pursuant to mechanisms that satisfy certain statutory requirements. This supplemental notice of proposed rulemaking (supplemental notice) requests public comment concerning five changes that the Department is considering to a previously published proposed rule for the chapter 154 certification procedure.

DATES: Comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until Midnight Eastern Time at the end of that day.

ADDRESSES: Comments may be mailed to Regulations Docket Clerk, Office of Legal Policy, Department of Justice, 950 Pennsylvania Avenue, N.W., Room 4234, Washington, DC 20530. To ensure proper handling, please reference OAG Docket No. 1540 on your correspondence. You may submit comments electronically or view an electronic version of this supplemental notice at http://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Caroline T. Nguyen, Office of Legal Policy, (202) 514-4601 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Posting of Public Comments. Please note that all comments received are considered part of the public record and made available for public inspection online at http://www.regulations.gov. Such information includes personal identifying information (such as a name and address) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment. Nevertheless, if you want to submit personal identifying information (such as your name and address) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much

confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on http://www.regulations.gov.

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. If you wish to inspect the agency's public docket file in person by appointment, please see the paragraph above entitled "**FOR FURTHER INFORMATION CONTACT**."

Background

Chapter 154 of title 28, United States Code, makes special expedited procedures available to a State respondent in Federal habeas corpus proceedings involving review of State capital judgments, and limits the scope of Federal court review of such judgments, but only if the Attorney General has certified that the "State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265," and if "counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent." 28 U.S.C. 2261(b) (2006). Section 2265(a)(1) provides that, if requested by an appropriate State official, the Attorney General must 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 brought by indigent [capital] prisoners" and whether the State "provides standards of competency for the appointment of counsel in [such proceedings]." Section 2265(b) directs the Attorney General to promulgate regulations to implement procedures for making the necessary determinations and certifying States accordingly.

The Attorney General published a proposed rule for the chapter 154 certification procedure in the **Federal Register** on March 3, 2011, at 76 FR 11705. The comment period for

the proposed rule closed on June 1, 2011. The Department received approximately 30 comments concerning both the general approach and specific provisions of the proposed rule. In response to those comments, the Department is considering certain modifications to the proposed rule, including five modifications described in this supplemental notice.

Request for Comments

This supplemental notice solicits public comment on five potential changes to the proposed rule published on March 3. Each of these five proposed changes derives from comments received in response to the publication of that proposed rule. The Department solicits additional public views to provide all interested parties, including those who did not previously comment, an opportunity to provide input on these specific possible changes. The specific changes under consideration are (1) modifying the proposed rule's first counsel competency standard, § 26.22(b)(1), which sets as a benchmark five years of bar admission and three years of felony litigation experience, to substitute postconviction experience for felony litigation experience; (2) modifying the second counsel competency standard, § 26.22(b)(2), which incorporates as a benchmark certain provisions of the Innocence Protection Act of 2004, Pub. L. 108-405, Title IV, § 421, 118 Stat. 2286, codified at 42 U.S.C. 14163(e)(1) and (2)(A), to incorporate as well other provisions of section 14163(e)(2), specifically, subparagraphs (B), (D), and (E); (3) specifying that a mechanism for providing competent counsel in postconviction proceedings must encompass a policy for the timely provision of counsel to satisfy chapter 154; (4) providing that the Attorney General will presumptively certify a mechanism that meets the standards set out in the rule; and (5) providing for periodic renewal of certifications.

This supplemental notice is limited to solicitation of additional comment on the matters described herein. Commenters need not reiterate or re-submit comments in response to this

supplemental notice that they previously submitted relating to these matters or other aspects of the proposed rule. All public comments submitted pursuant to the proposed rule published on March 3, 2011, and in response to this supplemental notice will be fully considered when the Department prepares the final rule.

Proposed Change 1: Postconviction Experience

Section 26.22(b)(1) of the proposed rule provides that a State may satisfy chapter 154's requirement relating to counsel competency by requiring appointment of counsel ''who have been admitted to the bar for at least five years and have at least three years of felony litigation experience.'' 76 FR at 11712. The Department solicits comment on the suggestion to change this provision to set a standard of five years of bar admission and three years of *postconviction* litigation (instead of felony litigation) experience. In particular, the Department solicits comment on whether three years of postconviction litigation experience is an appropriate measure of competency in postconviction proceedings and whether more years, fewer years, or alternative measures would constitute a more appropriate benchmark.

The benchmark in the proposed rule is based on 18 U.S.C. 3599, pertaining to appointment of counsel in Federal court proceedings in capital cases. That provision sets out a standard of three years of felony trial experience for appointments made before judgment and three years of felony appellate experience for appointments made after judgment. The proposed rule incorporates neither of these specialized experience standards, but instead sets a benchmark of three years of felony litigation experience of any sort. The Department is considering substituting for that benchmark three years of *postconviction* litigation experience as the form of experience most relevant and most necessary to the litigation of State postconviction petitions.

In construing chapter 154, a number of courts have concluded that, given the complexity of postconviction law and procedure, a qualifying mechanism for the appointment of competent counsel should provide for counsel with specialized postconviction litigation experience. *See, e.g., Colvin-El v. Nuth*, No. Civ.A. AW 97-2520, 1998 WL 386403, at *6 (D. Md. July 6, 1998) ("Given the extraordinarily complex body of law and procedure unique to post-conviction review, an attorney must, at minimum, have some experience in that area before he or she is deemed 'competent.'"). Similarly, the Judicial Conference of the United States has recognized the value and importance of specialized experience when confronting the complexity of postconviction representation and the risk of irremediable procedural default. *See Judicial Conference of the United States*, *Committee on Defender Services*, *Subcommittee on Federal Death Penalty Cases*, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* 21 (May 1998) (recommending that appointing authorities "consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings"); *see also* Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* 88 (Sep. 2010) (noting the view of postconviction specialists that there is "little time available for inexperienced counsel to 'learn the ropes,' and no safety net if they fail").

At the same time, it is possible that some lawyers may be capable of providing competent counsel even without such postconviction experience. Accordingly, as in § 26.22(b)(1) of the proposed rule, a modified version of the provision with a postconviction experience standard could continue to include an exception allowing appointment of other counsel whose background, knowledge, or experience would otherwise enable him or her to properly represent

the defendant. *Cf.* 18 U.S.C. 3599(d); *Spears v. Stewart*, 283 F.3d 992, 1011, 1013 (9th Cir. 2002) (finding State competency standards generally requiring postconviction litigation experience, but allowing some exception, adequate under chapter 154); *Ashmus v. Calderon*, 123 F.3d 1199, 1208 (9th Cir. 1997) (recognizing that "habeas corpus law is complex and has many procedural pitfalls" but concluding that it is not necessary under chapter 154 that every lawyer have postconviction experience), *rev'd on other grounds*, 523 U.S. 740 (1998).

Proposed Change 2: Innocence Protection Act (IPA)

Section 26.22(b)(2) of the proposed rule provides that a State's capital counsel mechanism will be deemed adequate for purposes of chapter 154's counsel competency requirements if it provides for the appointment of counsel "meeting qualification standards established in conformity with 42 U.S.C. § 14163(e)(1) [and] (2)(A)." 76 FR at 11712. The Department solicits comments on the suggestion of modifying § 26.22(b)(2) in the proposed rule to incorporate not only section 14163(e)(1) and (2)(A), but all of the subparagraphs of that section that bear directly on counsel qualifications—specifically, subparagraphs (2)(B), (D), and (E).

Subparagraphs (B), (D), and (E) require maintenance of a roster of qualified attorneys; provision or approval of specialized training programs for attorneys representing defendants in capital cases; monitoring of the performance of attorneys who are appointed and their attendance at training programs to ensure continued competence; and removal from the roster of attorneys who fail to deliver effective representation or engage in unethical conduct. 42 U.S.C. 14163(e)(2). Those provisions are integral elements of the IPA's comprehensive approach to counsel qualifications. Under the modification now being considered by the Department, to the

extent that the rule uses the IPA standard as a benchmark for counsel competency, it would incorporate all directly relevant elements of that Act.

Proposed Change 3: Timely Provision of Competent Counsel

The Department solicits comments on a proposal to specify that a State capital counsel mechanism must encompass a policy for the timely provision of competent counsel in order to be certified as an adequate "mechanism for the appointment . . . of competent counsel in State postconviction proceedings" under chapter 154. 28 U.S.C. 2265(1)(A). The Department recognizes that States should be given significant latitude in designing their capital counsel mechanisms and therefore does not propose to define timeliness in terms of a specific number of days or weeks within which counsel is to be provided. Instead, the Department is considering only clarification that the mechanism must provide for affording counsel to indigent capital defendants in State postconviction proceedings in a manner that is reasonably timely, in light of the statutes of limitations governing both State and Federal collateral review and the effort involved in the investigation, research, and filing of effective habeas petitions, to protect a petitioner's right to meaningful habeas review.

Many comments raised the concern that the proposed rule does not address the timing of counsel appointment and asserted that such failure is particularly troubling in light of the expedited Federal habeas procedures under chapter 154. Section 2263, for example, generally requires the filing of a Federal habeas corpus petition within 180 days of the completion of direct State court review of the conviction and sentence, a period substantially shorter than in other Federal habeas cases. *Compare* 28 U.S.C. 2263(a) (180 days), *with* § 2444(d)(1) (one-year deadline); § 2255(f) (same). (Section 2263 also provides for tolling during the pendency of both a petition for certiorari to the Supreme Court (following direct review in State courts) and State

collateral proceedings. § 2263 (b).) And section 2266 restricts the ability to amend a Federal habeas petition after it has been filed. § 2266(b)(3)(B).

The comments raise an important issue for consideration. Chapter 154 involves a *quid pro quo* arrangement under which the right to representation by counsel is extended to State postconviction proceedings for capital defendants, and in return Federal habeas review is carried out with generally more limited time frames and scope following the State postconviction proceedings in which counsel has been made available. If a State capital counsel mechanism provided for the provision of counsel to represent indigent capital defendants only after the deadline for pursuing State postconviction proceedings had passed; or only after the expiration of section 2263's time limit for Federal habeas filing; or only after such delay that the time available for preparing for and pursuing either State or Federal postconviction review had been seriously eroded, then the mechanism would not appear to provide for appointment of postconviction counsel as required under chapter 154, even if the State mechanism otherwise tracked the appointment procedures set forth in § 26.22(a) of the proposed rule. Since chapter 154's enactment in 1996, when Federal habeas courts were charged with evaluating the sufficiency of state mechanisms (amendments to the statute in 2006 transferred that function to the Attorney General), a number of courts have concluded that chapter 154 required that the mechanism provide for timely appointment of counsel. *See, e.g., Brown v. Puckett*, No. 3:01-CV-197-D, 2003 WL 21018627, at *3 (N.D. Miss. Mar. 12, 2003) ("The timely appointment of counsel at the conclusion of direct review is an essential requirement in the opt-in structure. Because the abbreviated 180-day statute of limitations begins to run immediately upon the conclusion of direct review, time is of the essence. Without a requirement for the timely appointment of counsel, the system is not in compliance."); *Ashmus v. Calderon*, 31 F. Supp. 2d

1175, 1186-87 (N.D. Cal. 1998) (construing chapter 154 to require timely appointment in part because "the legislative history is clear that actual and expeditious appointment [of counsel] was expected" and "effective and competent habeas representation is compromised by long delays"); *Hill v. Butterworth*, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996), *rev'd on other grounds*, 147 F.3d 1333 (11th Cir. 1998) ("[T]he Court holds that any offer of counsel pursuant to Section 2261 must be a *meaningful offer*. That is, counsel must be immediately appointed after a capital defendant accepts the state's offer of post-conviction counsel."). Accordingly, the Department is considering specifying in the final rule that a mechanism, to be certified under section 2265, must encompass a policy for the timely provision of competent counsel.

Proposed Change 4: Effect on Certification of Compliance with Benchmarks

The Department is considering amending § 26.22(b) and (c) of the proposed rule to state that the Attorney General will "presumptively" certify that a State has established a sufficient mechanism for the appointment of competent counsel if he determines that the mechanism satisfies the specific standards for competency and compensation set out in the remainder of those paragraphs. So revised, the rule would continue to provide guidance to the States regarding approaches that are likely to be sufficient to warrant certification, while also allowing the Attorney General to consider whether the presumption that the standards described in the rule are adequate may be overcome in light of unusual circumstances presented by a particular State system.

Many commenters expressed concern that under the proposed rule, the Attorney General must certify a State's mechanism so long as it meets competence and compensation benchmarks identified in the proposed rule, even if it can be shown that in the context of the State in which it operates, the mechanism is not adequate. That concern is separate from criticism that the

proposed rule fails to provide for oversight of a State's compliance with its own mechanism over time; the Department remains of the view that whether a State has complied with its mechanism in an individual case is a question the statute assigns to the Federal habeas courts, not to the Attorney General. *See* 28 U.S.C. 2261(b)(2). The distinct concern at issue here arises from the seemingly categorical statement in the proposed rule that the "Attorney General *will* certify" a State's mechanism upon determination that it satisfies a relevant benchmark, *see* 76 FR at 11712 (emphasis added), which does not appear to allow for any additional evaluation by the Attorney General of whether the mechanism, as implemented in the particular State, is in fact reasonably likely to lead to the timely provision of competent counsel to State habeas petitioners.

The comments raise an issue that should be considered. The Department continues to believe that compliance with the competence and compensation benchmarks identified in the proposed rule, subject to modifications discussed herein, and the proposed specification that a mechanism include a policy on timeliness, are likely to result in the timely provision of competent counsel. But the comments seemed persuasive that it may not be possible to predict with certainty that these benchmarks will be adequate in the context of every possible State capital counsel system. For example, in the context of a particular State and its distinctive market conditions for legal services, it is conceivable that what normally should be sufficient compensation may not in fact be reasonably likely to make competent lawyers available for timely provision to capital petitioners in State habeas proceedings. Modification of the rule as indicated would afford the Attorney General latitude to consider such circumstances and other similar State-specific circumstances in making certification decisions. *See* Memorandum for the Attorney General from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: The Attorney General's Authority in Certifying Whether a State Has Satisfied the*

Requirements for Appointment of Competent Counsel for Purposes of Capital Conviction Review Proceedings at 2 (Dec. 16, 2009) ("[T]he statutory provisions in question may reasonably be construed to permit you to evaluate a State's appointment mechanism—including the level of attorney compensation—to assess whether it is adequate for purposes of ensuring that the state mechanism will result in the appointment of competent counsel.").

Proposed Change 5: Renewal of Certifications

The Department solicits comments on a proposal to specify that a certification under chapter 154 is effective for a specified term of years. This proposal is responsive to many comments pointing out that changed circumstances may affect whether a once-certified mechanism continues to be adequate for purposes of ensuring the availability for appointment of competent counsel. At the time a State applies for certification, for example, its provisions authorizing compensation at a specified hourly rate may be sufficient to achieve this objective. But after the passage of years, that may no longer be the case in light of inflation or other changed economic circumstances. *Cf. Durable Mfg. Co. v. United States Dep't of Labor*, 578 F.3d 497, 501-02 (7th Cir. 2009) (upholding time limitation of validity of labor certificates in light of possible subsequent changes in economic circumstances affecting consistency with statutory requirements and objectives). Similarly, changes in various State policies that may affect the mechanism's operation, or new statutory provisions or legal precedent relating to attorney competence, compensation, or reasonable litigation expenses, may bear on the continued adequacy of the mechanism. Providing some limitation on the lifespan of certifications and requiring renewal of certifications would allow questions regarding continued compliance with chapter 154 to be reexamined at regular intervals, each time with increased

information about a State's actual experience with its mechanism, rather than assuming that a once-compliant State system is compliant indefinitely.

At the same time, it is possible that overly stringent limitations on the duration of certifications could unduly burden States and disserve chapter 154's objectives by discouraging States from undertaking the effort to establish compliant mechanisms and seek their certification. Balancing the need for examination of continued compliance with the need to provide States with a substantial period of certainty, the Department is considering a term of five years for certifications, which would begin to run only after completion of both the certification process by the Attorney General and any related judicial review. *See* 28 U.S.C. 2265(c) (providing for D.C. Circuit review of certification decisions). The final rule could also provide that if a State requests renewal of the certification at or before the end of the five-year period, the initial certification would remain effective until completion of the renewal process and any related judicial review. Thus, a State that achieves certification of its mechanism would enjoy the uninterrupted benefits of chapter 154 for the full term of five years. The Department seeks comment on the merits and substance of a renewal requirement, including whether five years is an appropriate term of years during which a certification should be effective, or whether that term of years should be longer or shorter.

Regulatory Certifications

Executive Orders 12866 and 13563—Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," section 1(b), General Principles of Regulation.

The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. It only requests public comment on possible changes in a previously published proposed rule regarding the certification procedure under chapter 154 of title 28, United States Code. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. It only requests public comment on possible changes in a previously published proposed rule regarding the certification procedure under chapter 154 of title 28, United States Code.

Unfunded Mandates Reform Act of 1995

This rule will not result in aggregate expenditures by State, local, and tribal governments or by the private sector of $100,000,000 or more in any one year, and it will not significantly or

uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

February 6, 2012
Date

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Eric H. Holder, Jr.
Attorney General

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