



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 29 2018

The Honorable Mark Brnovich
Attorney General
State of Arizona
1275 West Washington St.
Phoenix, AZ 85007

Dear Attorney General Brnovich:

I am writing in regard to Arizona's request that the Attorney General certify Arizona's system for providing counsel in postconviction proceedings for prisoners subject to capital sentences. The Department of Justice (Department) notified the public of Arizona's request for certification and Arizona's submission of additional information, published the request and supporting information on a publicly accessible website, and invited comment on the request.¹ The Department is reviewing the request and the extensive public comments received thereon.

I am writing to request that Arizona provide additional information about its postconviction capital counsel mechanism, based on questions that have arisen during the Department's review. Please provide answers to the questions below as soon as reasonably possible. Responses to any other matters raised in the public comments but not specified in this letter are also welcome.

I. Effective Date

Subpart B of part 26 of title 28 of the Code of Federal Regulations provides that the Attorney General shall determine the date the capital counsel mechanism qualifying the State for certification was established. Arizona's request for certification referenced the Ninth Circuit Court of Appeals' finding in *Spears v. Stewart*, 283 F.3d 992, 1007-19 (9th Cir. 2002) that stated that Arizona had a postconviction capital counsel mechanism satisfying the requirements of Chapter 154 as of July 17, 1998, which was the date state postconviction counsel was appointed for the defendant in that case. The request stated that Arizona established procedures to appoint qualified counsel in capital postconviction proceedings in 1998, but did not specify a definite date.

¹ The public comments are available at www.regulations.gov, Docket # [DOJ-OLP-2017-0009](https://www.justice.gov/olp/pending-requests-final-decisions). The Department has made the request and supporting information available at <https://www.justice.gov/olp/pending-requests-final-decisions>.

1. Please clarify as of what date Arizona requests that the Attorney General certify Arizona's mechanism.
2. Legislation enacted subsequent to 1998 made changes in Arizona's mechanism affecting appointment, compensation, and payment of expenses. Please explain these changes and, as relevant, address whether and how the changes may affect certification of Arizona's mechanism in answering the questions that follow.

II. Counsel Fees and Expenses

1. Commenters assert that Arizona's mechanism fails to attract competent counsel and ensure effective representation for a number of reasons, including: Arizona's mechanism establishes a maximum compensation rate of \$100 per hour, which, commenters argue, is too low to attract competent counsel; there is no minimum hourly rate; there was a presumptive 200 hour limit on compensable work until 2013; and judges and county expense systems fail to provide adequate resources as a practical matter.

Please provide any responses or additional information you believe to be relevant to these criticisms of Arizona's mechanism with respect to compensation and payment of expenses.

2. Subpart B provides four benchmark criteria by which a state may presumptively fulfill the requirement for compensation of counsel. 28 C.F.R. § 26.22(c)(1); *see* 78 Fed. Reg. at 58172-73, 58179-80. Please describe specifically whether and how Arizona's mechanism meets or exceeds each of the benchmarks on a statewide basis.
3. Subpart B allows approval of compensation provisions not satisfying the benchmark criteria if the state mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meets state standards of competency sufficient under the rule. 28 C.F.R. § 26.22(c); *see* 78 Fed. Reg. at 58173, 58180. Please provide any additional information bearing on whether Arizona's mechanism is so designed including, to the extent feasible, the following information:
 - a. the statewide average hourly rate paid to appointed private postconviction counsel;
 - b. the average number of hours for which appointed private counsel received compensation prior to the 2013 reform affecting compensable hours, including: (i) how often counsel requested compensation for more than 200 hours of work in that period, and (ii) how often such requests were granted or denied; and
 - c. the average number of compensated hours worked since the removal of the 200-hours language in the statute.

4. Regarding defense counsel resources, Arizona's request for certification stated that Arizona regularly provides more than \$200,000 in attorney fees and litigation costs in capital postconviction cases, and has spent over \$500,000 in more than one case. Please provide any additional information you believe to be relevant regarding the payment of defense fees and costs in capital postconviction proceedings, including the average amount requested and the average amount paid, distinguishing, if possible, between the amount of attorney compensation and the amount of covered expenses.
5. Arizona's request for certification noted provisions which state that courts "shall" compensate counsel and "shall" review and approve all reasonable fees and costs, Ariz. Rev. Stat. § 13-4041(F)-(G). But commenters pointed to permissive language ("may") in § 13-4041(I) regarding additional monies for investigative and expert services. Please advise how Arizona courts determine whether to authorize additional payment under § 13-4041(I) and whether the difference in language between the two provisions is significant in relation to the request for certification.

III. Standards of Competency for Appointment

1. Commenters asserted that Arizona's mechanism does not provide adequate standards of counsel competency for a number of reasons, including: (i) the lack of a categorical postconviction litigation experience requirement in Ariz. R. Crim. P. 6.8 (following its amendment in 2011), (ii) Rule 6.8's provision allowing appointment of counsel not meeting its specified experience requirements under certain conditions, and (iii) lack of qualitative evaluation.

Please provide any responses or additional information you believe to be relevant to these criticisms of Arizona's mechanism with respect to counsel competency.

2. One of Rule 6.8's eligibility requirements is that an attorney "must have demonstrated the necessary proficiency and commitment" exemplifying the "quality of representation appropriate to capital cases." Please provide further information about this requirement, such as how attorneys would meet the requirement and what quality of representation they would be expected to exemplify.
3. A comment suggested that public defender personnel, and in some instances private counsel, may have been appointed who did not satisfy Rule 6.8's standards of competency for appointment. Please advise whether in fact that has occurred. If so, please provide additional relevant information, such as whether such counsel were appointed as co-counsel or sole counsel, the number of appointments in which that occurred out of all postconviction capital appointments, and whether such counsel were required to satisfy any alternative standards of competency.

4. Subpart B provides two benchmark criteria for standards of competency for appointment that are presumptively adequate. 28 C.F.R. § 26.22(b)(1); *see* 78 Fed. Reg. at 58169-72, 58177-79. Arizona's request for certification states that Arizona's competency standards exceed the § 26.22(b)(1) benchmarks, while commenters asserted that Arizona's mechanism does not in fact satisfy either benchmark. Please clarify whether you believe Arizona's competency standards satisfy the presumptively adequate benchmark criteria, and, if so, provide additional information supporting that position.
5. Subpart B allows approval of competency standards that do not satisfy either of the benchmark criteria if the standards otherwise reasonably assure an appropriate level of proficiency. 28 C.F.R. § 26.22(b)(2); *see* 78 Fed. Reg. at 58171-72, 58179. If a state's competency requirements are likely to result in similar or even higher levels of proficiency than a benchmark criterion, that can support a finding of adequacy under chapter 154. 78 Fed. Reg. at 58179. Please provide your analysis as to whether Arizona's mechanism reasonably assures an appropriate level of proficiency as required by § 26.22(b)(2), including whether the counsel competency standards of Arizona's mechanism are likely to result in similar or higher levels of proficiency than either or both of the benchmark criteria appearing in § 26.22(b)(1).
6. Some commenters asserted that particular counsel have provided inadequate representation and that the inadequacy of counsel points to a broader systemic problem under Arizona's mechanism with respect to counsel competency. One such commenter identified twelve lawyers whose performance was asserted by the comment to be inadequate. Do you agree that some or all of the lawyers criticized in the comments, or other counsel, have provided ineffective assistance? If so, what is your response to the criticism that this evidences a broader systemic failure of Arizona's mechanism?

IV. Timeliness of Appointment

Subpart B 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. 28 C.F.R. § 26.21. The definition reflects a concern that delay in appointment may erode or eliminate the period available to file timely petitions with the assistance of counsel, consistent with the deadlines for state postconviction and federal habeas filing. *See* 78 Fed. Reg. at 58165-67, 58176-77.

1. The definition of appointment in 28 C.F.R. § 26.21 refers, in part, to timeliness in light of the time limitation for seeking state postconviction review. Ariz. R. Crim. P. 32.4(c)(1) currently provides twelve months after the filing of the notice of postconviction relief to file the first petition for postconviction relief, allows extensions of time, and requires that the Arizona Supreme Court be notified if a petition is not filed within twelve months after

counsel is appointed. Materials submitted by commenters indicate that the time limit under Rule 32.4(c)(1) may be stayed pending the appointment of postconviction capital counsel. However, the foregoing information falls short of providing a clear and complete picture of the operation of the time limit for state capital postconviction filing and any effect of delay in the appointment of counsel. Please explain the operation of the Rule 32.4(c)(1) time limit, including whether there are existing measures that stay the time limit pending the appointment of postconviction counsel or other measures which prevent delays in the appointment of counsel from eroding or eliminating the time available for filing a first petition under Rule 32.4(c)(1).

2. A commenter stated that the average delay in appointment of postconviction capital counsel in Arizona, following the Arizona Supreme Court's opinion on direct review, was 711 days from 2000 to 2011 and 256 days from January 1, 2011, to the present. However, the comments did not indicate that the Arizona Supreme Court's issuance of its opinion (as opposed to its mandate) triggers the time limits for subsequent filings, and materials in the comments indicate that issuance of the mandate may be delayed until state postconviction counsel is appointed. Please advise whether the foregoing information is correct, and provide any other analysis or information bearing on whether delays in appointment of postconviction capital counsel in Arizona prejudices defendants with respect to the time available for seeking state and federal postconviction review.
3. The preamble to the Department's rule notes a concern that defendants could be executed during a period of delay in appointment of postconviction capital counsel, because the stay-of-execution provision in 28 U.S.C. § 2262 is not triggered until counsel is appointed. 78 Fed. Reg. at 58166. Ariz. R. Crim. P. 31.23 and materials in the comments indicate that Arizona may address this concern by not issuing warrants of execution until the initial postconviction review petition is resolved. Please advise whether Arizona has measures in place that ensure defendants cannot be executed during periods of delay in the appointment of postconviction capital counsel.

I appreciate your attention to these questions, which will assist the Attorney General in determining whether Arizona has established a capital counsel mechanism satisfying the requirements of Chapter 154.

Sincerely,



Jessica E. Hart
Intergovernmental Affairs & Public Liaison