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March 14, 2012

Regulations Docket Clerk
Office of Legal Policy, Department Justice
950 Pennsylvania Avenue NW, Room 4234
Washington, D.C. 20530

RE: OAG DOCKET NO. 1540.

On behalf of the National Association of Criminal Defense Lawyers (NACDL), we submit this comment on supplemental notice regarding a proposed rule to implement a process by which states may establish their eligibility for the limitations on federal review of state capital post-conviction cases set forth in chapter 154 of Title 28 of the United States Code. *Certification Process for State Capital Counsel Systems, Supplemental notice of proposed rulemaking*, 77 Fed. Reg. 7559 (Feb. 13, 2012) ("supplemental notice"); *Certification Process for State Capital Counsel Systems*, *Proposed rule*, 76 Fed. Reg. 11705 (Mar. 3, 2011) ("proposed rule").

NACDL was founded in 1958 to advance and disseminate knowledge about criminal law practice and encourage integrity, independence, and expertise among criminal defense counsel. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. NACDL is particularly dedicated to advancing the proper, efficient, and fair administration of justice and addressing the role and duties of lawyers in administrative, regulatory, and criminal proceedings. NACDL has unique expertise in the duties of defense counsel in capital cases and frequently has addressed a range of issues arising in capital cases, including interpretation of the statutes governing them.

The Attorney General Must Adhere To A Minimum Federal Standard For Ensuring Counsel Competence.

The supplemental notice suggests changes to counsel qualification requirements for a state seeking to become certified under Chapter 154. Importantly, the Attorney General has recognized the significance of post-conviction experience to counsel competence as well as the work of Congress in defining an effective system for capital representation in the Innocence Protection Act ("IPA"). We commend these improvements to counsel qualification requirements.

As proposed, however, the regulations do not require a state to comply with any minimum federal standards if the state chooses to adopt an alternative mechanism, as set forth in section 26.22(b)(3). Thus, the regulations allow a state to ignore critical IPA guidelines and seek certification without any system in place for training, performance monitoring, removal of counsel, and other features Congress recognized as important to an effective state mechanism for appointing competent counsel. NACDL has urged the Attorney General to establish a minimum national standard for counsel competence, and we continue to do so. As we previously stated, "the regulations must define a minimum national standard of competence in order to provide uniform application of Chapter 154 requirements to every state." *Comment to Proposed Regulations by the National Association of Criminal Defense Lawyers*, Dept. of Justice Docket No. DOJ-2007-0110-0161.1 (Sept. 24, 2007) ("NACDL 2007 Comment") at 11.

Congress already has established minimum guidelines for an effective system of capital representation, and the Attorney General should not allow those guidelines to be diluted with a undefined exception, such as that contained in section 26.22(b)(3) of the proposed regulations, or with measures of experience only, such as those contained in section 26.22(b)(1). As NACDL discussed in detail in prior comments, counsel competence may not be measured solely by longevity or experience. A state mechanism must ensure both the experience and performance necessary to competently perform all duties demanded in capital post-conviction proceedings. *See* NACDL 2007 Comment at 12-13. The requirements Congress devised in the IPA therefore should serve as the minimum requirement for certification. The IPA guidelines already provide states with flexibility to establish mechanisms for appointment of counsel in a variety of ways while still ensuring key protections for a system to appoint competent counsel in state capital post-conviction proceedings.

The Meaning of Presumptive Certification Is Not Apparent from the Supplemental Notice

The only requirement for a state application for certification is that it be "in writing." 76 Fed. Reg. at 11713. The supplemental notice seems to indicate that a state asserting compliance with an appropriate combination of enumerated benchmarks will be "presumptively" certified. 77 Fed. Reg. at 7561 (discussing "Proposed Change 4"). The supplemental notice also suggests that a state that appears in a written application to meet required standards for competency and compensation might not be certified "if it can be shown that in the context of the State in which it operates, the mechanism is not adequate." *Id.*

In spite of the crucial role presumptive certification would play in the application of Chapter 154, and the tremendous burden it potentially creates for indigent death row inmates and

their defense counsel to rebut such a presumption, there is no indication how the Attorney General's final rule might incorporate Proposed Change 4. The supplemental notice states that the Department of Justice is considering amending sections 26.22 (b) and (c) of the proposed rule, but does not publish the amended sections for consideration or disclose the language that would comprise the final rule. As a result, defense counsel and their clients with critical interests at stake are left speculating on how to meaningfully raise a wide array of concerns with a general concept of presumptive certification.

Moreover, there is no description of what "presumptively" certifying a state means, even though variations in that definition have critical repercussions. The supplemental notice indicates that the Department recognizes at least two elements of certification: the Attorney General's determination that (1) a state mechanism satisfies specific standards for competency and compensation;[1] and (2) the state mechanism, in practice, is "likely to result in the timely provision of competent counsel." 77 Fed. Reg. at 7561. There is no information, however, about the second element—how the Attorney General will measure whether a state mechanism is likely to result in the timely provision of competent counsel. The Attorney General may require appointments to comply with Chapter 154 in all, a substantial number, or a simple majority of cases in a particular period of time, or could use a variety of other measures of a state mechanism's effectiveness. State applicants and defense interests responsible for responding to a state application must know what measures will be applied to evaluate the effectiveness of the state mechanism so that they can evaluate their respective positions and efforts regarding certification.

Specific proposed language for a final rule also determines to what extent subsequent administrations will be bound by the interpretations of the current Attorney General. As it stands, the supplemental notice provides some limited discussion of the current Attorney General's views on certification, but no specific proposed language that indicates whether, and if so, how, those views will be reflected in the language and requirements of the final rule itself.

The choices the Department is making about these and other important issues should be clear and explicit, but the supplemental notice is neither. It is not possible to effectively address comments to all the various possibilities suggested by the supplemental notice without knowing what language is being proposed for the final rule.

Presumptive Certification Must Be Based On Greater Showing By State Applicants

If facial compliance with specific standards is the only requirement for presumptive certification, then a state could be certified even though its mechanism did not make competent counsel available, as in the Department's example regarding compensation of counsel. As currently proposed, the regulations avoid this result by allowing local defense counsel to raise the inadequacy of the mechanism during the state application for certification or, failing that, to raise the inadequacy in individual cases in federal court. *See id.* (noting that "the Department remains of the view that whether a State has complied with its mechanism in an individual case

[1] It is not clear why the Department has omitted payment of reasonable litigation expenses, which is the third requirement of Chapter 154, and should be included in any standards for compliance with the statute. *See* 28 U.S.C. § 2265 (a)(1)(A).

is a question the statute assigns to the Federal habeas courts"). Though both channels for defense interests to respond to and challenge a state's assertion of compliance with Chapter 154 are necessary features of any certification scheme, they must not be the only means of ensuring compliance with the statute's requirements.

If a presumptive threshold is to be considered for certification, it must include a requirement for a state to first demonstrate that its mechanism is "likely to result in the timely provision of competent counsel" in practice. 77 Fed. Reg. at 7561. When a state seeks the benefits of certification, it must bear the burden of demonstrating the likelihood that the state mechanism actually functions to timely provide competent counsel with adequate resources to investigate, develop, and raise potentially meritorious claims in state post-conviction proceedings. This should include a showing of the average length of time from a capital conviction to the appointment of post-conviction counsel, and the qualifications, compensation rates, and paid litigation expenses of specific counsel appointed under the mechanism prior to an application for certification.

The Attorney General must not base enforcement of Chapter 154 requirements solely on defense responses to facial assertions in a state application because it often will be virtually impossible for individual defense counsel or defense organizations to develop and present the evidence upon which the Attorney General should rely. Collecting evidence of a state's mechanism for compensating counsel, for example, demonstrating how it functions in practice, and providing data that illustrate its inadequacy, require access to state-wide information that is not, or not readily, available to the public. Mounting such a defense also would demand time and resources that individual defense counsel and agencies do not have. The alternative to this certification-by-default is to rely on the Federal courts to correct the systemic failure of the state's mechanism in all individual cases affected by it. This approach impermissibly allows states to insist on compliance with Chapter 154 until a court determines otherwise, and frustrates Congress's intent of having systematic review of a state mechanism by amending Chapter 154 and placing the authority for state certification with the Attorney General.

Defense Counsel and the NACDL Must Have Actual Notice of a State Application for Certification

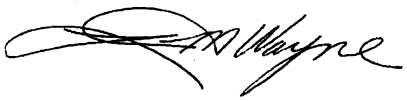
It is not fair or realistic to expect that potentially affected individuals on death row and their defense attorneys must regularly monitor the Federal Register from this point on to determine whether they will be required to respond to a state application for certification. Affected individuals and defense counsel and organizations must receive actual notice when a state applies for certification, especially if they are expected to provide critical information about whether the state mechanism functions effectively in a sufficient number of cases. NACDL should be included among the organizations immediately notified of a state application so that it can assist in notifying its members in the state of relevant application materials and deadlines.

CONCLUSION

NACDL is committed to providing whatever assistance it can to ensure that certification proceedings develop full and accurate information about whether a state mechanism provides for the timely appointment, compensation, and payment of litigation expenses of competent counsel.

We continue to urge minimum Federal standards and adequate procedures for certification that will allow the Attorney General to make fair decisions that consistently reflect the national standards Congress intended states to meet to become eligible for the benefits of Chapter 154.

Respectfully submitted,



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