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Regulations Docket Clerk  
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Re: OAG Docket No. 1540

I write on behalf of the National Association of Criminal Defense Lawyers (NACDL) to comment on the 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. 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. *See, e.g.,* Amicus Curiae briefs in *Maples v. Allen*, No. 10-63 (2010); *Wood v. Allen*, No. 08-9156 (2009); *Kennedy v. Louisiana*, No. 07-343 (2007); *Uttecht v. Brown*, No. 06-413 (2007); *Lawrence v. Florida*, No. 05-8820 (2006), *Schriro v. Landrigan*, No. 05-1575 (2006), *Carey v. Musladin*, No. 05-785 (2006), *Roper v. Simmons*, No. 03-633 (2004).

### Ensuring a complete and fair course of collateral review

A key aspect of the chapter 154 statutory scheme initially proposed by Justice Powell and the Judicial Conference committee that he chaired is that limitations on federal review of state post-conviction claims are allowed only upon assurance that individuals sentenced to death will receive “one complete and fair course of collateral review” in state proceedings. 135 Cong. Rec. S13471-04, at S13482 (Oct. 16, 1989) (Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report). When Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), it adopted the “Powell Committee” recommendations, including this “quid pro quo arrangement.” Report of the House of Representatives on P.L. 104-132, Antiterrorism and Effective Death Penalty Act of 1996, H.R. Rep. 104-23 (Feb. 8, 1995) at \*10.

As NACDL has highlighted in connection with the effect of other limitations imposed by the AEDPA,<sup>1</sup> procedural due process dictates that state proceedings must provide a full and fair review of federal constitutional claims if federal review is to be limited. *See, e.g., Wright v. West*, 505 U.S. 277, 298 (1992) (O’Connor, J., concurring) (explaining the requirement of a “full and fair hearing in the state courts” as a constitutional prerequisite to limitations on federal review). If a state is certified under chapter 154, this constitutionally required review *must* take place in the state courts, given the mandatory and severe limits on federal review that chapter 154 establishes. Indeed, this was the trade-off envisioned by Justice Powell’s committee and enacted by Congress. *See* Powell Committee Report, 135 Cong. Rec. at S13482 (explaining that chapter 154’s short six-month time period for filing habeas claims in federal court is reasonable in light of provisions to toll the federal time limit while state proceedings are pending and limit federal review to claims exhausted in state court).

We urge the Attorney General to give effect to congressional intent and due process requirements by ensuring that a state provides complete and fair hearings on federal constitutional claims prior to certifying that state’s mechanism for the limited federal review provided in chapter 154. *See* Opinion of the Office of Legal Counsel, *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* (Dec. 16, 2009) (determining that when Congress amended chapter 154 in 2006, it did not intend to dispense with federal review of the adequacy of state mechanisms). This is necessary because although a state may appear to appoint, compensate, and provide expenses for competent counsel, the existence of state procedures that limit the scope or availability of state hearings nonetheless may undermine the adequacy and fairness of state proceedings.

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<sup>1</sup> *See, e.g.,* Brief of the National Association of Federal Defenders and the National Association of Criminal Defense Lawyers as *Amici Curiae* Supporting Petitioner, *Bell v. Kelly*, 555 U.S. 55 (2008) (No. 07-1223), 2008 WL 3459585.

Resolution of federal claims in state proceedings is not fair if it is the result of procedures that are “inadequate for the ascertainment of the truth,” and thus insufficient “as a means of finally determining facts upon which constitutional rights depend.” *Townsend v. Sain*, 372 U.S. 293, 316 (1963). The United States Supreme Court has further explained that [i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Fundamental elements of reliable fact finding include a condemned person’s rights to be heard through the presentation of relevant evidence and the opportunity to challenge or impeach state evidence. *Id.* at 414-15. Any number of state procedures during post-conviction proceedings may function to impair these rights, for example: lack of discovery; severe limits on the time to investigate, develop, and present claims in state court; enforcement of unreasonable page limits; prohibition on supplements or amendments to the habeas petition; and resolution of petitions without allowing for the presentation or cross-examination of witnesses relevant to the factual disputes. The ability of defense counsel to obtain independent experts is another critical aspect of challenging or impeaching state evidence.<sup>2</sup> State procedures that require defense counsel to rely on state forensic lab work and experts or upon court-appointed mental health experts undermine the adversarial process and thus reliable fact finding. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 696 (1984) (the result of proceedings may be unreliable “because of a breakdown in the adversarial process that our system counts on to produce just results”).<sup>3</sup>

The regulation to implement chapter 154 certification should require inquiry into the procedural adequacy of state proceedings. At the very least, the Attorney General’s regulations should require states that seek certification to identify any procedural limitations on the development and presentation of relevant evidence in state post-conviction proceedings and the ability to challenge and impeach state evidence in state post-conviction hearings. Such limitations should weigh significantly in the Attorney General’s decision whether to certify a state.

#### Minimum standards for counsel performance

The Attorney General’s failure to address the performance of counsel in his regulations to implement chapter 154 certification seriously undermines the quid pro quo design of chapter 154 and constitutional requirements for full and fair fact finding in state proceedings. The duties of defense counsel in capital cases are uniquely challenging. The recognition of a capital defendant’s right to introduce a wide range of mitigation evidence to avoid a penalty of death, *see, e.g., Kansas v. Marsh*, 548 U.S. 163, 174-75 (2006), creates a corresponding duty of defense counsel to perform a reasonable investigation to identify such mitigation, *see, e.g., Wiggins v.*

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<sup>2</sup> From Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner, *Moore v. Maryland*, 549 U.S. 813 (2006) (No. 05-1411), 2006 WL 1887185.

<sup>3</sup> From Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner, *Day v. McDonough*, 547 U.S. 198 (2006) (No. 04-1324), 2005 WL 1364917.

*Smith*, 539 U.S. 510, 521-22 (2003).<sup>4</sup> Mitigating evidence as well as forensic evidence related to the crime is complex and often scientific in nature;<sup>5</sup> at the same time, mastery of law and procedures necessary to effectively present it is difficult. In order to actually provide competent representation, defense counsel must therefore be knowledgeable about and capable of abiding by current and well-established standards for capital defense representation. The American Bar Association’s Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, revised in 2003, are widely regarded as the most authoritative statement of existing standards for competent representation. Other organizations, such as the National Legal Aid and Defender Association and state bar associations also compile and publish standards.

Notably, the federal courts do not rely on experience alone to make appointments under 18 U.S.C. section 3599, as suggested in one of the Attorney General’s options for establishing counsel competency. While experience measures are one factor, the federal courts also require consideration of “qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases,” Guidelines for Administering the CJA and Related Statutes: Federal Death Penalty and Capital Habeas Corpus Representations, § 620.30(c)(2), together with the past performance of counsel in death penalty cases, and other factors that “will assure high-quality representation,” *id.* at § 620.30(e).

In the Innocence Protection Act, another model for counsel competency in the Attorney General’s proposed rule, an omitted section of the statute requires the appointing entity to “monitor the performance of attorneys who are appointed” and remove attorneys from the appointment roster if they “fail to deliver effective representation” or do not comply with training and other requirements to ensure counsel competence. 42 U.S.C. § 14163(e)(2). The third option for establishing counsel competency simply requires the appointment of counsel who satisfy qualification standards that “reasonably assure” an “appropriate level of proficiency” without further defining such standards.

Each of the options for establishing counsel competency must include a requirement that state appointing entities measure counsel performance according to well-established national standards for capital post-conviction representation and remove counsel who fail to provide effective representation. Reference to existing performance standards has been the primary method for evaluating counsel effectiveness since *Strickland v. Washington*. A requirement that states seeking certification evaluate the effectiveness of state post-conviction counsel and remove ineffective counsel is necessary to ensure fair post-conviction proceedings in state court as well as to implement the determination of Congress that for purposes of chapter 154, the effectiveness of capital post-conviction representation is to be addressed through the appointment and removal of counsel. *See* 28 U.S.C. § 2261(e).

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<sup>4</sup> From Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Respondent, *Schiro v. Landrigan*, 550 U.S. 465 (2007) (No. 05-1575), 2006 WL 3742250.

<sup>5</sup> *Id.*

Reliable fact finding in the certification determination

As with state post-conviction proceedings subject to chapter 154, the Attorney General's certification determination should be the result of thorough and reliable fact finding. One impediment to the reliability of the Attorney General's fact finding is the concern that it is, consciously or not, affected by the Attorney General's primary prosecutorial duties. It is well established that decision makers "not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings v. Cont'l Cas.*, 393 U.S. 145, 150 (1968). As we have pointed out in other contexts, capital defendants are especially dependent on the Due Process Clause of the Fourteenth Amendment to protect them from biased decision making because their life and liberty hang in the balance.<sup>6</sup>

Ensuring thorough and transparent consideration of all relevant information could serve to counter the appearance of bias. Toward this end, the Attorney General should require states to provide detailed information about how the state complies with each of the chapter 154 requirements and ensure that defense entities have an opportunity to consider and respond to the state application by providing notice directly to the state defender entities and to the federal defender for the jurisdiction.

Respectfully submitted,



Jim E. Lavine  
President

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<sup>6</sup> See, e.g., Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioners, *Caperton v. Massey Coal*, 129 S. Ct. 2252 (2009) (No. 08-22), 2009 WL 27299.