I. STATEMENT OF ORGANIZATIONAL INTEREST

The American Bar Association (“ABA”) respectfully submits these comments on the application of the State of Arizona pursuant to 28 C.F.R. § 26.20 (the “Rule”). See Notice of Request for Public Comment, 82 Fed. Reg. 61329 (Dec. 27, 2017). The ABA’s comments on this application are based on the standards, policies, and studies it has produced through decades of work promoting fair administration of the death penalty. Underlying each standard or policy position is a commitment to ensuring due process and access to justice in our most serious criminal cases. As set forth more fully below, Arizona’s current and past mechanisms for appointing capital post-conviction counsel have failed to ensure the timely appointment of qualified, adequately resourced counsel for indigent prisoners. Granting the State’s application and thereby permitting it to take advantage of expedited habeas corpus procedures would have devastating consequences affecting the fairness and accuracy of post-conviction proceedings for death-sentenced prisoners in Arizona.

The ABA is a voluntary, national membership organization of the legal profession. Its more than 413,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, judges, legislators, law professors, law enforcement and corrections personnel, law students and a number of “non-lawyer” associates in allied fields.

The ABA is dedicated to the promotion of a fair and effective system for the administration of justice. See ABA Const. art. 1, § 1.2. Although the ABA has not taken a position on the constitutionality of the death penalty, the ABA has made the right to effective assistance of counsel in capital cases and the preservation of the writ of habeas corpus a priority. The ABA adopts standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. See, e.g., ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) (“ABA Guidelines”) and ABA Standards for Criminal Justice for the Defense Function (4th ed. 2015) (“ABA Criminal Justice Standards”).

The ABA has adopted policy statements and issued reports urging specific reforms in federal and state post-conviction procedures.1 The ABA has presented testimony and written

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1 See, e.g., Resolution of the ABA House of Delegates 112D (1982) (the ABA resolved to “support the prompt availability of competent counsel for both state and federal [post-conviction] proceedings”); Resolution of the ABA House of Delegates (Feb. 1988) (resolution calling for the federal government to adopt procedures and standards for the appointment of counsel for death row inmates in federal habeas corpus proceedings).
materials at congressional hearings with respect to reform of the habeas corpus statutes.\textsuperscript{2} In 1989, under a grant from the State Justice Institute, an ABA task force conducted a nationwide study of death penalty habeas corpus practice and procedures. Based upon the task force’s report and recommendations, the ABA in 1990 adopted a comprehensive policy statement that urged legislative reform of habeas corpus procedures, both state and federal, to make them more efficient and better able to address the merits of the fundamental claims many post-conviction petitions raise in capital cases. See Ira P. Robbins, Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 Am. U. L. Rev. 1 (1990) (task force report).

Simultaneous with this review, the ABA House of Delegates in February 1989 adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The Guidelines “amplify previously adopted Association positions on effective assistance of counsel in capital cases” and “enumerate the minimal resources and practices necessary to provide effective assistance of counsel.” Resolution of the ABA House of Delegates (Feb. 1989). The ABA Guidelines were revised and updated in 2003 to reflect current norms of practice. Courts have long recognized that the ABA Guidelines establish the appropriate professional standards for the appointment and performance of competent defense counsel in death penalty proceedings.\textsuperscript{3} The Rule also recognizes the importance of the ABA Guidelines, repeatedly citing the Guidelines in the

\textsuperscript{2} See, e.g., Fairness and Efficiency in Habeas Corpus Adjudication: Hearings Before the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. (1991) (statement of John J. Curtin, Jr., President of the ABA, and of James S. Liebman, Professor of Law, Columbia University School of Law, and Member, ABA Task Force on Death Penalty Habeas Corpus); Habeas Corpus: Hearings Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) (statement of L. Stanley Chauvin, Jr., President of the ABA).

commentary as the basis for particular provisions. Indeed, while the Rule sets certain presumptive quantitative “benchmarks” for the standards of competency in 28 C.F.R. § 22(b), it is the ABA Guidelines that provide a well-defined legal standard for such competency.

The ABA’s Death Penalty Due Process Review Project (formerly Death Penalty Moratorium Implementation Project) has also conducted assessments of the administration of the death penalty (including state post-conviction practice and procedures) in twelve states, including Arizona, where the assessment was completed in July 2006. The on-the-ground assessment teams consisted of or had access to current or former defense attorneys, prosecutors, judges, state legislators, state bar representatives, and law professors. Each individual state assessment determined whether a particular state complied with over 90 ABA benchmarks on the fair and accurate administration of the death penalty. In Arizona specifically, beyond conducting such an assessment, the ABA Death Penalty Representation Project has worked closely with the legal community to improve the quality and availability of legal representation for persons facing the death penalty in the state. This work has included working with the Arizona Supreme Court to encourage compliance with the ABA Guidelines per Arizona Supreme Court Rule 6.8, the creation of a trial and appellate-level counsel certification program in Maricopa County, and on-going discussions aimed at expanding the Maricopa County system to the state level and to post-conviction appointments.

The application by the State of Arizona submitted on April 18, 2013 and supplemented on November 27, 2017 (the “Application”) is of vital concern to the ABA. If the application were successful, capital defendants in Arizona would face even graver risks of lacking effective assistance of counsel, contrary to principles of fairness and due process and contrary to the fundamental tenets of habeas corpus proceedings. Based on the ABA’s comprehensive assessment of the administration of capital punishment in Arizona, the familiarity of the ABA Death Penalty Representation Project in its interactions with key stakeholders in Arizona, and the ABA Guidelines, the ABA urges that the Application be denied.

II. BACKGROUND AND OVERVIEW OF COMMENTS

The Rule was promulgated pursuant to Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005 (“Section 507”), which amendedChapter 154 of Title 28 of the United States Code (“Chapter 154”) and provided that a state would be eligible for expedited handling of habeas corpus petitions in capital cases if the United States Attorney General certified that the state had a mechanism for the appointment and compensation of competent counsel for state post-conviction proceedings in capital cases.

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4 See, e.g., 78 Fed. Reg. 58160, 58166 (Sept. 23, 2013) (discussing the definition of reasonable timeliness in the context of a capital post-conviction appointment); at 58172 (considering the applicability of Guideline 9.1 to the evaluation of a state’s compensatory scheme); at 58173 (noting that the ABA Guidelines were cited by the United States Supreme Court to support the idea that defense counsel must be compensated for reasonable litigation expenses, including the costs associated with a re-investigation during post-conviction proceedings).

Chapter 154, as amended by Section 507, provides that the Attorney General is required to determine *inter alia* whether the state “has established a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel . . .” and “provides standards of competency for the appointment of counsel.” As explained in the Rule, the purpose of this review is to evaluate whether a State’s mechanism “ensur[es] that it will result in the appointment of competent counsel.” 78 Fed. Reg. 58160, 58161.

The Rule requires the state, in order to achieve certification, to establish that its mechanism meets five requirements:

- “The mechanism must offer to all . . . prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly requested continued representation.” 28 C.F.R. § 26.22(a);

- Counsel must be provided “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 mechanism must provide for appointment of competent counsel” pursuant to state standards. The state “standards of competency are presumptively adequate if they meet or exceed” quantitative benchmarks regarding either the time counsel has been admitted to the bar and post-conviction litigation experience, or the resources the State has put into its program. 28 C.F.R. § 26.22(b);

- “The mechanism must provide for compensation of appointed counsel.” The mechanism is “presumptively adequate if the authorized compensation is comparable to or exceeds” various benchmarks, including 18 U.S.C. § 3599. 28 C.F.R. § 26.22(c);

- “The mechanism must provide for payment of reasonable litigation expenses of appointed counsel.” The Rule states, “expenses may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel.” 28 C.F.R. § 26.22(d).

The Arizona mechanism fails to meet these requirements, for at least three principal reasons.

First, the Arizona mechanism fails to provide for the appointment of competent counsel as defined in 28 C.F.R. §§ 26.21, 26.22(a) and 26.22(b), or in the ABA Guidelines. The Arizona standards of “competency” fail to meet the Rule’s requirement for presumed adequacy. Although the State’s application heavily relies on a 2002 opinion from the Ninth Circuit Court of Appeals as evidence of adequacy, Arizona materially changed its mechanism in 2011 by removing a critical element—the requirement that appointed counsel have prior post-conviction experience. Accordingly, the Ninth Circuit’s observations are not applicable to the current mechanism.
Beyond the 2011 changes, the Arizona system for appointment of capital post-conviction counsel has been characterized by inconsistency—including frequent programmatic changes, some of which were later reversed—resulting in significant variance from case to case. Accordingly, no Arizona mechanism has ever guaranteed the provision of qualified post-conviction counsel. Moreover, the system has largely relied on private appointments. Although Arizona at one point established a capital post-conviction defender office (as recommended by the ABA Guidelines), this effort was severely underfunded and quickly abandoned. And the Arizona Supreme Court has rejected repeated efforts to establish a system for the oversight of capital post-conviction appointments. See, e.g., Capital Case Oversight Committee Draft Minutes, June 30, 2017, available at http://www.azcourts.gov/Portals/74/CCOC/Meetings/11012017/2CCOSCDraftMinutes06302017.pdf (rejecting a proposal for the Maricopa County review committee to assume responsibility for screening applications for postconviction appointments for Maricopa County cases). As explained in detail in the ABA Guidelines, such oversight is a critical component of a system of private appointments like the one used in Arizona, and without it, the mechanism will fail to “provide for the appointment of qualified counsel” as required under the Rule.

Second, the Arizona mechanism fails to provide for adequate compensation as that term is defined in 28 C.F.R. § 26.22(c) or the ABA Guidelines, and also fails to provide for payment of reasonable litigation expenses as that term is defined in 28 C.F.R. § 26.22(d) or the ABA Guidelines. Until 2013, Arizona’s mechanisms imposed a presumptive limitation of 200 hours of compensated work for post-conviction counsel. This number falls well below the time typically required to litigate a capital post-conviction case and is inconsistent with the ABA Guidelines’ prohibition on fee caps and similar limitations. And although the hour cap was lifted in 2013, the hourly rate remained at $100, the same as it was in 1998. In 2006, the ABA Assessment observed that a $100/hour rate was insufficient to attract qualified attorneys to handle capital post-conviction cases. More than a decade later, the inadequacy of this compensation is only magnified.

Third, there is no basis to grant a retroactive certification to Arizona’s mechanism. Arizona has failed to maintain a consistent, statewide mechanism to provide competent state post-conviction counsel in capital cases. The State’s application relies heavily on the Ninth Circuit’s approval of a system from 2002, a system that no longer exists. The Arizona Legislature passed a statute in 2006 to open a state capital post-conviction defender office, but in 2011, the legislature allowed the statute’s sunset provision to lapse. The State declined to open a second statewide office and has never provided an alternative statewide solution. Instead, Arizona continues to rely largely on the use of ad hoc and private counsel appointments.

In addition to its views on Arizona’s application for certification under the Rule, the ABA has broader comments to make on the Rule itself. Respectfully, it is the ABA’s view that the Rule violates several basic tenets of administrative law and procedure. Setting aside whether Section 507 is good policy (upon which the ABA does not take a position), the approach taken by the Department of Justice in the Rule fails to effectuate and otherwise ignores key aspects of the compromise inherent in Section 507. That compromise requires states to make significant improvements in the administration of their systems of post-conviction representation (including

the quality of appointed counsel) in order to be entitled to streamlined review on *habeas corpus*. At its core, the Rule fails to abide by this compromise and allows states to obtain streamlined review without ensuring that capital defendants receive competent counsel (or that such counsel is appropriately compensated) in post-conviction proceedings.

III. SUBSTANTIVE COMMENTS ON THE ARIZONA APPLICATION

A. Overview of Arizona’s Mechanism

Arizona’s experimental history with capital post-conviction representation has led to inconsistent results. Historically, Arizona’s mechanism relied largely on the use of an appointment “system” characterized by *ad hoc* appointments of private counsel made by the Arizona Supreme Court under the provisions of Arizona Criminal Rule 6.8. As discussed below, this program had difficulty attracting qualified post-conviction counsel due to strict restrictions on compensation of counsel.

In 2006, the state legislature approved the creation of a statewide post-conviction defender office for capital cases to ameliorate the delays in providing post-conviction representation created by Arizona’s under-compensated private appointment system. The office began operating in November 2007. Regrettably, the state capital post-conviction defense office suffered from same primary issue that had originally hamstrung the state’s ability to adequately recruit counsel: the office was underfunded. The ABA’s 2006 Assessment noted that the office was “only provided with $220,000” for its first fiscal year of operations.

Similarly, a 2008 Joint Report of the Capital Case Oversight Committee and Maricopa County Superior Court noted that the initial three-person staff of the state capital post-conviction defense office had only begun representation in four (4) capital post-conviction cases despite a recent increased need in capital post-conviction representation. The 2008 CCOC Report also noted the office’s ongoing staffing and funding problems, finding that the state continued to rely primarily on a list of appointed counsel and that there was a significant backlog of capital defendants awaiting appointment. 8

Throughout its existence, the legislature failed to provide sufficient funds to the public defender post-conviction office, however, and in 2011, opted to allow the office to fold. The office was never re-opened. Although the state capital post-conviction defense office was created with the intent of providing post-conviction representation to the majority of the capital prisoners who entered the post-conviction stages of their cases, the office ultimately represented only five clients before it closed.9

8 Id. at 11.
9 See S.B. 1531, 50th Leg., 2d Reg. Sess. (Ariz. 2012) (striking all references to “the state capital postconviction public defender office” from the Arizona Revised Statutes); see also 2008 CCOC Report at 11, noting that the office had only begun representation of four cases in 2008.
Based on the findings of the 2008 CCOC Report, advocates in Maricopa County, along with the ABA, approached the county judiciary to create a new mechanism for the appointment of trial and appellate capital defense counsel. In 2012, the Maricopa County Superior Court adopted a Plan for Review of Appointed Defense Counsel. (Plan for Review of Appointed Defense Counsel, Admin. Order 2012-008 (Maricopa Co., Jan. 11, 2012) (“Maricopa County Plan”). The Maricopa County Plan established a system by which attorneys who wished to represent capital clients might apply to a Capital Defense Review Committee to determine their fitness for representation. Specifically, the Review Committee was granted the authority to evaluate and re-evaluate those attorneys who represented capital prisoners in their trials and direct appeals. Although the Plan marked an important step forward for trial and appellate representation in Maricopa County, it has not been expanded to other areas of the state and does not apply to post-conviction appointments.

At the time the post-conviction office closed, the Arizona Supreme Court also modified Arizona Criminal Rule 6.8 regarding the qualifications of privately appointed counsel in capital post-conviction cases. Previously, the rule required capital post-conviction counsel to have post-conviction experience; after 2011, prior post-conviction experience is no longer mandatory. The effect of reverting to an ad hoc system of representation and a lessening of the qualifications to appoint private counsel has had the expected results: fewer capital prisoners receive quality representation during their state post-conviction proceedings.

B. The Arizona Mechanism Fails to Ensure the Appointment of Competent Counsel.

Section 507 expressly requires that to certify a state, the Attorney General must determine that “the State has established a mechanism for the appointment of . . . competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death.” 28 U.S.C. § 2265(a)(1)(A) (emphasis added). The Rule likewise requires that the “mechanism must provide for appointment of competent counsel,” 28 C.F.R. 26.22(b), and this evaluation must determine whether a State’s mechanism “ensur[es] that it will result in the appointment of competent counsel.” 78 Fed. Reg. 58160, 58161.

Capital cases are the most complex kind of criminal cases, requiring the ability to understand and present evidence involving a variety of experts such as pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, and translators. Defense counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns. Counsel must be able to develop and implement advocacy strategies that apply existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment. And state post-conviction counsel must have a thorough understanding of federal habeas law and procedure to perform competently in state post-conviction proceedings.

Accordingly, in assessing whether Arizona provides for the appointment of competent counsel, the Attorney General must assess whether Arizona requires appointed post-conviction counsel to have the necessary qualifications, training and experience. Appointment mechanisms based solely on an attorney’s qualification for some pre-defined status (such as number of years
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of employment as an attorney) without consideration of the attorney’s relevant training and experience, or quality of the attorney’s past work.

The *ABA Guidelines* set forth the *minimum* that is required of both capital defenders and defender systems to ensure high-quality representation for capital defendants and prisoners. The *ABA Guidelines* call on jurisdictions to identify a “responsible agency” (often a defender office or court) that will ensure that appointed counsel have the necessary training and experience, and also ensure that they receive the necessary resources in the form of team members, auxiliary services, funding, and workload limitations to provide effective representation in their cases. *See ABA Guidelines* 1.1-10.1. The *ABA Guidelines* also call on the Responsible Agency to have an established mechanism for monitoring counsel’s performance and removing from appointments attorneys whose performance is inadequate. Finally, the *ABA Guidelines* provide specific performance standards, *ABA Guidelines* 10.2-10.15.2, for capital defenders that “reflect the extraordinary responsibilities and commitment required of all members of the defense team in death penalty cases” and describe many of the “duties and functions” of capital counsel that are “definably different from those of counsel in ordinary criminal cases.” *ABA Guidelines* 1.1, 10.1, cmt. The *ABA Guidelines* call on the Responsible Agency to utilize the performance standards “in determining eligibility of counsel for appointment or reappointment to capital cases and when monitoring the performance of counsel.” *ABA Guideline* 10.1, cmt.

The Arizona mechanism falls short of the Rule’s requirement that the mechanism provide “for the appointment of competent” counsel for at least five reasons:

1. **The Arizona competency standards do not qualify for presumptive adequacy.**

Under 28 C.F.R. § 26.22(b)(1), a state’s competency standards are “presumptively adequate” only if they meet or exceed (1) a modified version of the federal appointment standards under 18 U.S.C. § 3599 or (2) certain standards provided by the Innocence Protection Act (“IPA”), 34 U.S.C. § 60301, which are “largely based on elements of the ABA Guidelines,” 78 Fed. Reg. 58160, 58178.

Arizona’s competency standards do not meet the requirements of 26.22(b)(1). 10 That provision in the Rule recognizes the importance of post-conviction experience by making such experience a requirement for presumptively adequate competency standards. As the Department observed when publishing the final version of the Rule: “In construing chapter 154, some courts have concluded that, given the complexity of post-conviction law and procedure, a qualifying

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10 Although not specified in its application, Arizona appears to claim presumptive adequacy only under the first option (modified federal appointment standards) and not the second (IPA). There is no claim in the application or its 2017 supplement, nor is there any basis to assert, that Arizona meets the IPA standards or that it has a training, monitoring, and removal program for post-conviction counsel as required under the IPA, 34 U.S.C. § 60301(e)(2)(D) and (E), and its corollaries in the *ABA Guidelines*. In fact, efforts to introduce or institute such programs have been expressly rejected (*see discussion infra* at 14-15).
mechanism for the appointment of competent counsel should provide for counsel with specialized post-conviction litigation experience.\textsuperscript{11}

Arizona has no requirement that appointed counsel have post-conviction experience. Indeed, Arizona removed such a requirement in 2011. Prior to 2011, Arizona Supreme Court Rule 6.8 mandated post-conviction experience as a prerequisite for appointment in capital post-conviction cases:

Within three years immediately preceding the appointment[, the attorney seeking appointment shall] have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one postconviction proceeding that resulted in an evidentiary hearing. Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings.


In 2011, the Arizona Supreme Court amended Rule 6.8 to remove the requirement that post-conviction counsel have post-conviction experience. The current version of Rule 6.8 requires counsel seeking appointment merely to have some experience at either the trial, appellate, or post-conviction level, completely disregarding the significant differences between capital trial, appeal, and post-conviction practices. The 2011 change was made over the opposition of the then-existing State Post-Conviction Defender Office. See In the Matter of: AMENDED Sua Sponte Petition to Amend Rule 6.8(a) and (c), Arizona Rules of Criminal Procedure, No. R-09-0033, Comment of the State Capital Post Conviction Public Defender (“The Court is understandably frustrated with the ability to attract qualified attorneys to represent death row inmates in post conviction proceedings. The office established to represent inmates in these proceedings is severely underfunded and only able to represent a few clients at a time . . . . The Court should not widen the pool of ‘qualified’ counsel, however, without assuring the quality of appointed counsel. The PCR office has seen how the failure to assure the competence of trial counsel has affected the representation”).

\textsuperscript{11} 78 Fed. Reg. 58160, 58169. 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 postconviction review, an attorney must, at minimum, have some experience in that area before he or she is deemed ‘competent’”); 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 post-conviction specialists that there is “little time available for inexperienced counsel to ‘learn the ropes,’ and no safety net if they fail”).
2. The Arizona competency standards are inadequate under the alternative provided by 28 C.F.R. 26.22(b)(2).

Because Arizona’s competency standards do not meet the requirements for presumptive certification, they “will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.” 28 C.F.R. 26.22(b)(2). The ABA Guidelines call for specific training and experience for all capital defense attorneys, and particular post-conviction experience and skills for lawyers appointed in post-conviction cases. The commentary to Guideline 5.1, which sets forth the basic qualification requirements for capital defense counsel, explains that “the abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ from those required in any other area of law.”


Arizona requires no post-conviction experience for appointed defense counsel in capital cases and it does not require compliance with the performance standards of the ABA Guidelines. Instead, Arizona relies on quantitative measures of competence.12

Under the Arizona standards, a defense lawyer may be considered competent to represent a death-row inmate if the lawyer has five years of bar admission, three years of criminal practice,13 six hours of training, and meets one of two specific experience requirements:

- Service as lead counsel in: three felony appeals, a trial or post-conviction case, and a death penalty case (any stage); or

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12 Although the original 1989 version of the ABA Guidelines, which were based on the 1985 NLADA Guidelines, included quantitative counsel qualification standards, this approach was abandoned in the 2003 revision to the Guidelines, based on the recognition that “quantitative measures of experience are not a sufficient basis to determine an attorney’s qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.” Guideline 5.1, cmt.

13 The reference to criminal “practice” as opposed to “defense” means that a former prosecutor with no defense experience or skills whatsoever would be qualified for appointment under the Arizona Rule.
• Service as lead counsel in: six felony appeals and two felony trials or post-conviction cases.\(^{14}\)

This rule allows for appointment of lead counsel without prior death penalty or post-conviction experience (\emph{e.g.} an attorney can qualify under this rule with service as lead counsel in six non-capital felony appeals and two non-capital felony trials). Thus, Arizona’s mechanism provides no assurance whatsoever that an appointed attorney will have the experience and skills required in capital post-conviction capital cases, such as skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence; skill in the investigation, preparation, and presentation of evidence bearing upon mental status; skill in the investigation, preparation, and presentation of mitigating evidence; and skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements -- all of which are required under the \emph{ABA Guidelines}.

\(^{15}\) Nor does Arizona require that appointed attorneys have completed a comprehensive capital defense training course that covers numerous topics\(^{16}\) identified in \emph{ABA Guideline 8.1}. And although the Arizona mechanism includes one qualitative standard—that counsel has demonstrated “the necessary proficiency and commitment” —it provides no additional guidance about what such proficiency or commitment entails without reference back to quantitative measures.

\(^{14}\) The Arizona standard requires experience in an additional number of cases if the applicant has no post-conviction experience. The Guidelines reject the idea that increasing the quantitative requirements can compensate for eliminating a key qualitative measure. Guideline 1.1, cmt. (“Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial . . . For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers”). Arizona defenders have also rejected this concept. \textit{See In the Matter of: AMENDED Sua Sponte Petition to Amend Rule 6.8(a) and (c), Arizona Rules of Criminal Procedure}, No. R-09-0033, Comment of the State Capital Post Conviction Public Defender (“If the Court is going to amend the Rule to widen the scope of available lawyers, it should enact measures designed to ensure that only competent and able counsel are appointed. This function is not a ‘numbers game’ but requires, as well, a qualitative assessment.”).

\(^{15}\) \textit{See ABA Guideline 5.1}, which also requires attorneys to demonstrate substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases; skill in the management and conduct of complex negotiations and litigation; skill in legal research, analysis, and the drafting of litigation documents; and skill in oral advocacy.

\(^{16}\) Guideline 8.1 calls attorneys seeking appointment to complete a comprehensive training program in the defense of capital cases that covers topics including:

1. relevant state, federal, and international law; 2. pleading and motion practice; 3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty; 4. jury selection; 5. trial preparation and presentation, including the use of experts; 6. ethical considerations particular to capital defense representation; 7. preservation of the record and of issues for post-conviction review; 8. counsel’s relationship with the client and his family; 9. post-conviction litigation in state and federal courts; and 10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.
Arizona’s Rule 6.8’s non-binding reference to the *ABA Guidelines* is inadequate to ensure competent representation. As part of its work to promote state adoption of the *ABA Guidelines*, the ABA Death Penalty Representation Project encouraged the Arizona Supreme Court to incorporate the Guidelines into its own rule. After hearing testimony from the ABA and others, the Arizona State Bar voted to support incorporation of the Guidelines into Rule 6.8. *See Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure*, Supreme Court No. R-05-0031 Comment of State Bar, (May 22, 2006). As proposed, the new rule would have mandated that counsel “shall comply with” the Guidelines related to counsel performance. *See Petition to Amend Rule 6.8 of the Arizona Rules of Criminal Procedure*, Supreme Court No. R-05-0031 (Dec. 7, 2005). This language was rejected and the current language in Rule 6.8(c)(3) only requires that counsel be “familiar and guided by” the Guidelines.\(^{17}\) This non-mandatory language is insufficient to ensure that appointed counsel take the necessary steps to provide competent representation. *See ABA Guideline 1.1, cmt.* (“[T]hese Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.”)

Arizona’s failure to use meaningful qualitative standards for attorney competency render its mechanism inadequate for certification under the Rule.

3. **Arizona has historically relied on an inconsistent system of private attorney appointments and decentralized funding to provide post-conviction representation.**

Arizona’s mechanism relies largely on the use of *ad hoc* and private counsel appointment systems. Under the *ABA Guidelines*, any such mechanism is “inimical to effective representation.” Guideline 1.1, cmt. Instead the Guidelines suggest the use of statewide defender offices, which “generally have the experience and dedication to provide high quality legal representation in capital cases” (although the Guidelines caution that problems arise when these offices are “overworked and inadequately funded”). *Id.*

The ABA Assessment found that Arizona’s “decentralized defense services” in capital cases was one of the areas “most in need of reform” in Arizona at the time. *Assessment* at iii. The Assessment found that, on the whole, “Arizona’s indigent defense services is a mixed and uneven system that lacks level oversight and standards and does not provide uniform, quality representation to indigent defendants in all capital proceedings.” *Id.*

The ABA Assessment similarly found that Arizona has no uniform system for the provision of indigent defense at *any* stage of a capital case. The funding for indigent defense services comes almost entirely from the counties. Arizona’s claim in its application and supplement that public defender offices are available to take on post-conviction appointments is inaccurate: Arizona does not have statewide public defender offices, and the countywide defender offices are regularly underfunded and unable to take on additional cases. Furthermore, there is no guarantee that a death-sentenced prisoner will be in a position to seek post-conviction representation in a county

\(^{17}\) *See, e.g.*, *State v. Hausner*, 280 P.3d 604, 630 (2012) (“The ABA Guidelines are, under our Criminal Rules, guidelines and not requirements. By its terms, Criminal Rule 6.8(b)(1)(iii) states that trial counsel ‘shall be familiar with and guided by the performance standards’ of the 2003 ABA Guidelines, and the 2006 comment to this Rule notes that ‘[s]ome guidelines may not be applicable to Arizona practice or to the circumstances of a particular case.’”).
where a public defender office exists and can take on the representation. The Assessment found that:

Arizona does not have a statewide indigent defense system for criminal cases. Instead, each of Arizona’s fifteen counties is responsible for establishing its own system to provide counsel to indigent defendants at trial and on direct appeal. Arizona law provides that the board of supervisors in each county may establish an office of the public defender. County boards of supervisors are not required to establish public defender offices, however, and instead may assign the representation of indigent defendants to private attorneys. In counties that have them, public defender offices generally serve as the first option for the appointment of counsel to indigent defendants. Legal defender offices, in those counties that have them, are considered secondary public defender offices and generally represent indigent defendants when the public defender office cannot due to a legal or ethical conflict or an overflow of cases. In counties without public defender offices, contract attorneys will be appointed to represent indigent defendants. Contract attorneys also represent indigent defendants in counties with public and/or legal defender offices when those offices cannot take a case for conflict or workload reasons.

Assessment at 154.

These concerns have been reiterated by Arizona’s own assessment of its system. For example, in 2000, the state’s ongoing failure to realize its statutory obligations regarding payment of counsel fees (under §13-4041(B)), led then-Governor Janet Napolitano to create the “Attorney General’s Capital Case Commission” to suggest ways in which to fix the scheme’s dysfunction. Assessment at 183. The Commission noted “the acute need for defense counsel in post-conviction proceedings.” Assessment at 185.

Following the advice of the 2000 Capital Case Commission, the legislature in 2006 approved the creation of a statewide post-conviction defender office for capital cases. While this office was intended to ameliorate the delays in providing post-conviction representation created by a county-by-county system of defender appointments, it suffered from same primary issue that had originally hamstrung the state’s ability to adequately recruit counsel: the office was underfunded. The ABA’s Assessment noted that the office was “only provided with $220,000” for its first fiscal year of operations.

A 2008 Joint Report of the Capital Case Oversight Committee and Maricopa County Superior Court[^18] underscores these ongoing staffing and funding problems.

In November 2007, the State Capital Post-conviction Public Defender’s Office, created earlier in 2007 by legislative enactment, began operation. This office

handles only capital case PCRs. It has three attorneys on staff: the director, the sole capital-case-qualified attorney in the office; one part-time attorney; and one full-time attorney. This office also has a full-time mitigation specialist. The Office of Statewide PCR counsel is currently handling four cases. The Arizona Supreme Court Staff Attorney’s Office maintains a list of private counsel qualified to handle PCR proceedings. There are eighteen names on the list. No new names have been added since August 2006. Presently the attorneys on this list are handling seven PCR cases. As of November 17, 2008, fifteen capital defendants were awaiting the appointment of PCR counsel. Two of these defendants have been on the list of PCR defendants awaiting the appointment of counsel for more than a year-and-a-half.


The Joint Report noted that the governor’s FY2009 proposed budget would have increased the staff of the office threefold—providing funding for seven new positions—but that this funding increase was not approved by the legislature. Id. at 11, n. 12. Given the limited amount of funding provided to the office and the subsequent small number of cases its tiny staff was able to represent, the state legislature allowed the sunset provision of the offices enacting statute to lapse at the end of 2011. In 2012, the legislature scrubbed the state’s statutes of all references to “the capital postconviction public defender office.” S.B. 1531, 50th Leg., 2d Reg. Sess. (Ariz. 2012). Thus, Arizona cannot claim to have established a functional mechanism for the provision of post-conviction counsel by virtue of this office.

While Arizona has experimented with a variety of different means of providing capital prisoners with state-funded post-conviction representation, the ABA’s assessment of Arizona’s death penalty system and subsequent experience in the state reveal that it never developed a post-conviction counsel system that could reasonably meet the criteria for certification under the Rule.

4. **Arizona lacks the necessary system for review and monitoring of post-conviction counsel to the appointment of competent or qualified counsel.**

The ABA’s Death Penalty Representation Project engaged in a multi-year systemic reform project to work with Arizona stakeholders to implement standards and a certification process for appointed counsel in capital cases. The work started with efforts to incorporate the *ABA Guidelines*’ standards for counsel appointment into the Arizona Supreme Court’s rules as discussed above.

Recognizing that standards alone are insufficient without consistent application and enforcement, the ABA then worked to implement a counsel certification program for private attorneys wishing to be appointed in capital cases. In 2012, the first of these programs was successfully implemented in Maricopa County, where the Superior Court adopted the Plan for Review of Appointed Defense Counsel to evaluate and certify attorneys who are eligible for appointments to represent capital defendants, albeit only at trial and direct appeal proceedings. The Maricopa County Plan requires attorneys to complete and submit a lengthy application that includes both quantitative and qualitative information about past relevant experience that can demonstrate a commitment to high quality representation in capital cases. The application also
requires the applicant to provide five references, including at least one judge and one attorney who has served with the applicant as co-counsel. The application is then submitted to a Capital Defense Review Committee, which is an independent committee as called for by the ABA Guidelines. See Guideline 3.1(E).

This Maricopa County Plan has been viewed as a model program for trial and direct appeals. See Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Project (Sep. 2013), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf, at 173 n.239 (“[T]he Capital Defense Review Committee of Maricopa County, Arizona, provides a useful localized model for evaluating the qualifications of capital defense counsel.”). The ABA and others undertook efforts to expand the Maricopa County Plan to post-conviction cases and encouraged the Arizona Supreme Court to adopt a similar program statewide, but neither the court nor the state legislature has implemented these recommendations. See Capital Case Oversight Committee 2014 Report at 3. The success of the Capital Defense Review Committee and the absence of any comparable program or system at the post-conviction stage in Maricopa County, let alone the remainder of the state, demonstrate that essential components are missing from Arizona’s mechanism. Because Arizona’s mechanism does not reliably ensure appointment of post-conviction counsel, it cannot meet the certification requirement to provide for appointment of competent counsel.

5. Arizona fails to appropriately limit capital defender caseloads.

Because post-conviction litigation in many jurisdictions is already expedited, special care must be made to ensure that staffing for the representation is appropriate and consistent with the defense team’s overall workload. See, e.g., Lockett v. Anderson, 230 F.3d 695, 711-12 (5th Cir. 2000) (counsel’s workload at time of appointment rendered assistance of counsel ineffective); Cleaver v. Bordenkircher, 624 F.2d 1010, 1012 (6th Cir. 1980) (appointed counsel ineffective because of workload at time of appointment). Because the Arizona mechanism allows appointment of counsel without regard to staffing or workload, it fails to satisfy the certification requirement to have a mechanism for the appointment of “competent counsel.”

The ABA Guidelines reflect the understanding that the competence of counsel may be severely affected (or even frustrated) by a heavy workload. Guideline 6.1 calls on the Responsible Agency to “implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation.” This Guideline reflects the understanding that “defending capital cases requires vastly more time and effort by counsel than noncapital matters.” Guideline 6.1, cmt.

The ABA Assessment found that while Arizona has caseload standards, the appointing authorities do not adhere to those standards or take them into account when making capital appointments. The Arizona Supreme Court established maximum caseloads for all attorneys providing indigent defense in 1984. Under the standards, the maximum allowable caseload for each full-time attorney may not exceed:

(1) Fifty felonies per attorney per year;
(2) Three hundred misdemeanors per attorney per year;
(3) Two hundred juvenile cases per attorney per year;
(4) Two hundred mental commitment cases per attorney per year; or
(5) Twenty-five appeals to appellate court hearing a case on the record and briefs per attorney per year.

The ABA Assessment found that these standards were regularly exceeded in multiple counties:

For example, in Maricopa County, workload standards are estimated to be consistently exceeded by 40%. A June 2003 article in the Phoenix New Times reported that the head of the Maricopa County Office of Court Appointed Counsel stated that he would continue appointing qualified attorneys to death penalty cases “as long as they tell me they can do the job.” At least one defense attorney, and reportedly more than one, had six capital cases at the time of the newspaper article. In addition, in a Yuma County survey, it was reported that Apache, Gila, Greenlee, and Santa Cruz could not estimate the average caseload for their criminal contract attorneys or public defenders. Cochise, Coconino, La Paz, Mohave, Navajo, and Yuma Counties estimated that their indigent defense attorneys each were handling more than 200 criminal and misdemeanor cases per year, and Maricopa, Pima, and Pinal counties estimated that their indigent defense attorneys handled nearly 200 cases per year.

Assessment at 131. The Guidelines do not provide a numerical caseload standard but estimate that “several thousand hours are typically required to provide appropriate representation” in capital cases. Guideline 6.1, cmt. The failure of the Arizona mechanism to meaningfully account for and limit caseloads to manageable levels means that it cannot ensure that capital prisoners will be represented by counsel with the necessary time to provide competent representation.

C. The Arizona Mechanism Fails To Ensure the Compensation and Payment of Reasonable Litigation Expenses to Counsel Appointed to Represent Indigent Capital Defendants in State Post-Conviction Proceedings.

Section 507 expressly requires that for a state to be certified, the Attorney General must determine “whether the State has established a mechanism for the . . . compensation and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death.” 28 U.S.C. § 2265(a)(1)(A). A mechanism is presumptively adequate where the state’s compensation mechanism equals or exceeds one of the following:

(1) compensation of federally appointed counsel under 18 U.S.C. § 3599;
(2) compensation of retained counsel in state capital post-conviction proceedings;
(3) compensation of state-appointed counsel in capital trial or appellate proceedings; or
(4) compensation of prosecuting counsel representing the state in state post-conviction proceedings.
28 C.F.R. § 26.22(c). Arizona’s current purported rate of $100/hour, see Ariz. Rev. Stat. § 13-4041(F) (2014), meets none of the four criteria for presumptive adequacy under the Rule. In addition, as reflected in Arizona’s original application, for significant periods of time, Arizona presumptively capped post-conviction counsel at no more than 200 hours of representation. See Ariz. Rev. Stat. § 13-4041(G) (1998) (“[C]ounsel appointed to represent a capital defendant in state postconviction relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour for up to two hundred hours of work, whether or not a petition is filed.”).

The ABA Guidelines recognize that capital cases require extraordinary time, effort, and skill from defense counsel as well as multi-member teams, expert assistance, and extensive investigations. The Guidelines observe that “[t]housands of attorney hours are required to represent a death-sentenced prisoner effectively in [state post-conviction] cases,” and attorney hours are only one aspect of the cost of a capital case. The Guidelines recognize that in addition to attorney hours, the costs of a capital case include time and service of investigators, mitigation specialists, experts, and “reasonable incidental expenses” of the entire defense team. See Guideline 9.1, cmt. This is reflected in the Rule, which provides that “reasonable litigation expenses . . . may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel” and “may incorporate presumptive limits on payment only if means are authorized for payment of necessary expenses above such limits.” 28 C.F.R. § 22(d).

The Arizona mechanism effectively ignores these realities.

1. Arizona does not provide a statewide public defender office.

As explained earlier in this Comment, only certain counties in Arizona have public defender offices, and thus capital prisoners requiring state post-conviction representation in cases originating from other counties have no access to public defender representation. Thus, the fact that public defenders may by statute take on capital post-conviction cases, and that these attorneys are salaried, does not change the reality that private counsel earning hourly wages are primarily responsible for representing indigent capital prisoners in Arizona. Arizona’s argument that its compensation of attorney fees and “reasonable litigation expenses” in capital post-conviction is adequate, therefore, lacks merit with respect to compensation of post-conviction counsel in the state overall.

2. Arizona does not provide parity or consistency in its compensation rate for capital post-conviction attorneys.

In 1998, Arizona provided a rate of up to $100/hour for the compensation of capital post-conviction attorneys; an amount that at the time was already significantly lower than other states and the federal government, and which has never been increased despite multiple recommendations to the contrary. See Capital Case Oversight Committee 2013 Report at 6 (“The Oversight Committee has recommended over the past several years that the hourly rate in A.R.S. § 13-4041 be increased to at least one-hundred twenty-five dollars, and it now reaffirms that recommendation. This proposed increase would match the rate of compensation for PCR counsel with the current rate provided by Maricopa County for attorneys defending a capital case at the
trial stage. There is no rationale for compensating PCR counsel less than trial counsel. The Oversight Committee believes that an hourly rate of one-hundred seventy-five dollars, which is comparable to the federal rate in a capital case, would further encourage qualified attorneys to apply for capital PCR appointments.”).

The Assessment found that “in state post-conviction proceedings, the county will be reimbursed for half of the expert and investigative services approved by the trial court,” Assessment at 135, but in practice “between 98% and 99% of all funding for Arizona’s indigent defense system is provided by counties.” Id. at 153. Because the funds allocated to indigent defense are almost entirely provided by the counties to begin with, the additional limitation on the amount of money a county is compensated for approval of expert or other assistance in a capital case would likely serve to discourage trial courts in poorer counties from approving certain expenses—even if they are reasonably necessary to defend the case. As a result, the provision both of attorney compensation and approval of expert and other expenses is likely to vary significantly depending on the county in which the capital defendant has been convicted, therefore leading to arbitrariness in the manner in which post-conviction counsel are compensated. This arbitrariness undermines Arizona’s assertion that a statewide mechanism has been created that adequately provides for the compensation of attorneys’ fees and reasonable additional expenses.

D. The Arizona Application Does Not Support a Basis for Instituting a Retroactive Certification

Under Rule § 26.23(c), if the Attorney General certifies a state’s mechanism, the Attorney General is required to determine “the date the capital counsel mechanism qualifying the State for certification was established.” The ABA’s position is that Arizona should not be certified, and if it is, any certification should not be retroactive. The ABA notes:

1. Arizona did not have a statewide post-conviction office until November 2007. The office was established in response to widespread criticism of the performance of list appointed counsel. Accordingly, there is no basis to certify prior to that point.

2. Even following establishment of the statewide post-conviction office, Arizona continued to rely on private counsel (both list counsel and recruited pro bono counsel). Because the mechanism for appointment of list counsel does not ensure the appointment of qualified counsel, there is no basis to certify Arizona even after the establishment of the state-wide office.

3. Because the Arizona Legislature allowed the sunset provision of the statute creating the state capital post-conviction public defender office to lapse without providing additional funding or opportunity to re-open the statewide post-conviction office, there is no basis to find that Arizona has a statewide mechanism to provide effective representation to capital defendants seeking post-conviction remedies. The state capital post-conviction defender office closed its doors at the end of 2011.

4. Because Chapter 154 imposes strict deadlines on capital defendants seeking federal habeas review, and because a delay in the appointment of postconviction counsel in state court prevents petitioners from taking the necessary steps to toll Chapter 154’s statute of limitations, it
is critical that the state’s mechanism for appointment of counsel provide for timely appointment of counsel. See, e.g., Spears v. Stewart, 283 F.3d 992, 1019 (9th Cir. 2002) ("timeliness [in appointment of post-conviction counsel] is a requirement at the heart of the post-conviction procedure"). See generally Chambers v. Maroney, 399 U.S. 42, 54 (1970) ("courts should make every effort to effect early appointments of counsel").

Arizona has had chronic deficiencies in the timeliness of its appointment of post-conviction counsel. For example, the ABA Assessment noted, “several death-row inmates had been awaiting the appointment of counsel for nearly two years.” Similarly, the 2008 Joint Report of the Capital Case Oversight Committee and Maricopa County Superior Court noted that more defendants were awaiting the appointment of post-conviction counsel (15) than were represented by the Office of Statewide post-conviction (4) or list counsel (7). The same report in 2015 indicates that Arizona only managed to fill the backlog in that year.

5. Although Arizona notes in its application that in 2002, the Ninth Circuit found in Spears v. Stewart that Arizona’s mechanism was qualified for certification, the “mechanism” discussed in that case has been fundamentally altered numerous times in the intervening 15 years. As discussed in detail elsewhere in this Comment, these changes include the creation and then dissolution of a capital post-conviction defender office, a “crisis of counsel” that left dozens of Arizona defendants and prisoners without counsel for years and led to the creation of the Arizona Supreme Court’s Capital Case Oversight Committee, and Arizona’s alteration of its own statute to remove the requirement that appointed capital post-conviction defense counsel have post-conviction experience. Even if the mechanism as it existed in 2002 satisfied the applicable requirements for certification as of that date, a new analysis is now required under existing rules to evaluate the myriad changes that have occurred in Arizona’s system of appointing capital post-conviction counsel.

E. The Rule Does Not Comply with Required Administrative Process.

As promulgated, the Rule itself violates several basic tenants of administrative law and procedure.

The Rule’s procedure for reviewing certification applications falls well short of providing the procedural protections required by the Administrative Procedure Act ("APA") for rule making processes, as outlined in 5 U.S.C. § 553. With regard to the suggestion in the Rule’s commentary that the certification decision is exempt from the rule making provisions of the APA, see 78 Fed. Reg. 58160, 58174, the certification process constitutes rule making under the APA because the practical impact of a certification decision will circumscribe the rights of capital defendants in habeas litigation, and accordingly it “[a]ffects the rights of broad classes of unspecified individuals... is prospective, and has a definitive effect on individuals only after [the certification decision] subsequently is applied.” Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448-49 (9th Cir. 1994). The certification decisions will impact and regulate the future conduct of habeas litigation for significant classes of individuals, and the decision whether to certify a state is made on policy considerations.
These are hallmarks of a rule making process, and for this reason, the process must be governed by the rulemaking provisions of the APA. Because the certification decision has a substantial impact upon private parties, “the Administrative Procedure Act’s general rule making section, 5 U.S.C. § 553, sets down certain procedural requirements with which agencies must comply. . . .” Utility Solid Waste Activities Group v. EPA, 236 F.3d 749 (D.C. Cir. 2001). Under these circumstances, the APA sets forth “an outline of minimum essential rights and procedures” and represent “the minimum requirements of public rule making procedure short of statutory hearing.” Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 545-46 (1978) (quoting legislative history). Although Congress certainly has the power to authorize more streamlined procedures for agency action than what is in the APA, there is nothing in Section 507 that suggests Congress intended to do so here. In the absence of express statutory language to the contrary, the Department of Justice is required to comply with the APA in making certification decisions.

The Proposed Final Rule provides that the only publication regarding a certification decision is that “the certification will be published in the Federal Register if certification is granted.” Rule § 26.23(c). In other words, the Rule does not require or contemplate that a certification decision will be supported by reasoned decision making. This contravenes a bedrock requirement of administrative law. See, e.g., Motor Vehicle Mfrs. Ass’n of United States v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) (an agency must “provide a reasoned explanation for its action”); Mr. Sprout, Inc. v. United States, 8 F.3d 118 (2d Cir. 1993) (a reviewing court must be able to understand the basis of agency’s action so that it may judge the consistency of that action with the agency’s mandate).

Without reasoned decision making, it will not be possible for a reviewing court to determine whether the Attorney General engaged in an ad hoc standardless decision. This is inconsistent with the APA and due process. See, e.g., W. Va. Pub. Serv. Comm’n v. U.S. Dep’t of Energy, 681 F.2d 847 n.75 (“[T]he exercise of unfettered flexibility too often results in ad hoc judgments and arbitrary decisions, both of which are counterproductive to the greater regulatory goals of consistency in decisions and reasoned guidance upon which affected parties may rely”). See generally Morton v. Ruiz, 415 U.S. 199, 232 (1974) (an agency’s “power to make rules that affect substantial individual rights and obligations carries with it the responsibility . . . to remain consistent.”)

In any event, the Attorney General should provide a reasoned explanation of his certification decision to enhance public understanding of the basis for his decision and to facilitate judicial review should it be sought.

IV. CONCLUSION

Arizona’s continued reliance on ad hoc and private counsel appointments and failure to provide a consistent statewide mechanism has failed to provide the competent counsel called for by the Rule. In practice, Arizona’s mechanism has been woefully inadequate in providing a consistent system to appoint competent counsel to capital defendants in post-conviction proceedings for years. Based on the facts and reasons presented in this Comment, the ABA urges the Department to reject Arizona’s Application for certification.
The ABA also urges the Department to consider revising the Rule to better reflect the ABA Guidelines, to which the Rule itself refers and which have been broadly accepted as the standard of care for the defense of death penalty cases. We urge the Department to improve the quality of representation in post-conviction proceedings and offer our continuing assistance toward meeting this goal.

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19 Dozens of state and federal death penalty cases considering the performance of defense counsel in death penalty cases cite the ABA Guidelines as authority. See supra n. 3 and accompanying text; see also ABA Death Penalty Representation Project, List of Opinions Citing the ABA Guidelines (Jan. 12, 2017), available at
http://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.authcheckdam.pdf.