I. STATEMENT OF ORGANIZATIONAL INTEREST

The American Bar Association ("ABA") respectfully submits these comments on the application of the State of Texas pursuant to 28 C.F.R. § 26.20 (the "Rule"). See Notice of Request for Public Comment, 82 Fed. Reg. 61327 (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, Texas’ 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 Texas.

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. 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 (“ABA Guidelines”). The ABA 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. Courts have long recognized that the ABA Guidelines establish appropriate professional standards for the appointment and performance of competent defense counsel in death penalty proceedings. The State Bar of Texas has adopted comprehensive guidelines for capital defense lawyers based in substantial part on the ABA Guidelines. The Rule also recognizes the importance of the ABA Guidelines, repeatedly citing

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the Guidelines in the 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 the Death Penalty Moratorium Implementation Project) also has conducted assessments of the administration of the death penalty (including state post-conviction practice and procedures) in twelve states, including Texas, where the assessment was completed in September 2013. The assessments were conducted by on-the-ground assessment teams that were composed of or had access to current and former defense attorneys, prosecutors, judges, state legislators, state bar representatives, and law professors. Each assessment determined whether the state was in compliance with over 90 ABA benchmarks on the fair and accurate administration of the death penalty. In addition to these efforts, the ABA Death Penalty Representation Project has worked closely with the legal community in Texas to improve the quality and availability of legal representation for persons facing the death penalty in Texas.

The application by the State of Texas for certification under 28 USC § 2265, initially submitted on March 11, 2013, and supplemented on December 18, 2017 (the “Application”), is of vital concern to the ABA. The ABA assessment of Texas includes findings that reflect that Texas falls far short of multiple standards established by the Rule, as well as those necessary to meet the requirements of Section 2265. If the Application is successful, capital defendants in Texas will face even graver risks of moving through the state and federal postconviction review process without the opportunity to raise serious constitutional claims, contrary to principles of fairness and due process and contrary to the fundamental tenets of habeas corpus proceedings. Based on the requirements of the ABA Guidelines, the ABA’s comprehensive assessment of the administration of capital punishment in Texas, and the familiarity of the ABA Death Penalty Representation Project in its interactions with key stakeholders in Texas, 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 amended Chapter 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);
- “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” various quantitative benchmarks regarding the time counsel has been admitted to the bar and the amount of counsel’s post-conviction litigation experience. 28 C.F.R. § 26.22(b);
- 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 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); and
- “The mechanism must provide for payment of reasonable litigation expenses of appointed counsel.” The Rule states that “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 Texas mechanism fails to meet these requirements. Texas’ mechanism does not 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*. For example:

- Texas has long relied, either predominantly or as a “back-up,” on counsel who had been approved for placement on a list of defense counsel (“list counsel”), but whose selection is not subject to sufficient competency or qualification standards and whose appointment is not subject to consideration of caseload. The ABA’s assessment of Texas’ administration of the death penalty (the “Assessment”) raised significant
concerns about the ability of this mechanism to reliably appoint competent post-conviction counsel to death-sentenced prisoners.

- Since 2010, Texas has relied on the Office of Capital Writs (now Office of Capital and Forensic Writs (“OCFW”)) to provide post-conviction representation to most death-sentenced prisoners, with list (or other) counsel as a back-up. The qualification and competency standards for hiring OCFW counsel are not published. In addition, the OCFW’s funding is set by the State Legislature and its funding and staffing have not been sufficient to meet demand. Based on these and other considerations, the ABA has long had concerns about the ability of this mechanism to reliably appoint competent post-conviction counsel to death-sentenced prisoners.

Insofar as Texas continues to rely on list counsel, the Texas mechanism also fails to provide for adequate compensation, as that term is defined in 28 C.F.R. § 26.22(c) or the ABA Guidelines, and 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. Notably, Texas’ procedures for appointment of list counsel have not provided and do not provide for: (i) the appointment of more than one lawyer, (ii) use of an investigator, or (iii) work with a mitigation specialist—all of which are considered minimum requirements under ABA Guidelines 4.1 and 5.1. Similarly, the Texas mechanism appears to be compensating state post-conviction counsel at rates lower than the presumptively adequate benchmarks, including instituting presumptive caps on list counsel in certain jurisdictions.

Further, even if there were not such serious present flaws in the Texas mechanism, there is no basis to grant a retroactive certification to Texas’ mechanism. Prior to the opening of the “OCFW” in 2010, the Texas mechanism experienced well-documented problems with competency of counsel. And between 2010 and 2018, although the OCFW evidences an important effort to provide adequate representation, the OCFW has not established—and does not currently promise to establish—a sufficient mechanism for ensuring the provision of competent counsel in state post-conviction proceedings, as discussed further below.

Finally, certification under the Rule is unwarranted because the Rule itself currently 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. Under that compromise, to be entitled to streamlined review on federal habeas corpus, states are obligated to make significant improvements in the administration of their systems of state post-conviction representation (including through ensuring the quality of appointed counsel). At its core, the Rule fails to abide by this compromise in allowing states to obtain streamlined review of their constitutional claims in the federal courts without sufficiently ensuring that capital defendants receive competent counsel (or that such counsel is appropriately compensated) in state post-conviction proceedings. Because constitutional claims may be waived in federal habeas corpus by the failure to present them in state collateral proceedings, the competency and quality of state post-conviction counsel is essential to ensuring that all capital prisoners receive thorough consideration of their claims.
III. SUBSTANTIVE COMMENTS ON THE TEXAS APPLICATION

A. The Texas Mechanism Fails To Ensure the Appointment of Competent Counsel to Represent Indigent Capital Defendants in State Post-Conviction Proceedings.

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). Consistent with this mandate, 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, translators, and others. 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 postconviction proceedings and to avoid undermining the success of claims raised on federal habeas corpus review.

Accordingly, in assessing whether Texas provides for the appointment of competent counsel, the U.S. Attorney General must assess whether Texas requires appointed counsel to have the necessary qualifications, training, and experience to be considered competent in this very specific area of legal practice. Appointment mechanisms based solely on an attorney’s qualification for some pre-defined status (such as number of years of employment as an attorney or reputation of law school attended), without consideration of the specific qualifications, training, or experience of those attorneys to conduct post-conviction litigation or represent capital defendants, will not result in the appointment of competent counsel. As noted in the commentary to the Rule: “prior postconviction litigation experience (as opposed to prior appellate experience) is more similar in character to the postconviction litigation for which an attorney would be appointed pursuant to chapter 154, and more likely on the whole to enable the attorney to provide effective representation in postconviction proceedings.” 78 Fed. Reg. 58,160, 58,169
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 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 attorneys from appointments where 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.”

The Texas mechanism falls short of the Rule’s requirement that for a state to be certified, its mechanism must provide for the appointment of “competent” counsel. This is evident for at least five reasons.

1. Texas standards for appointing counsel for state post-conviction proceedings do not ensure the appointment of competent or qualified counsel. Since 1996, representation in state post-conviction proceedings has been predominantly handled by private counsel on an approved list, as provided under Texas Code Crim. Proc. art. 11.071 s 2(f). Between 1977 and 2008, there were more than 900 individuals sentenced to death in Texas, almost all of whom were represented by list counsel in state habeas proceedings. Assessment at 236.

Exhibit B to the Texas March 11, 2013 application sets forth the “Procedures Regarding Eligibility for Appointment” (“Procedures”) for an attorney to be added to the list. The Procedures contain no competency standards or qualifications other than that the attorneys “shall exhibit continued proficiency and commitment to providing quality representation to defendants in death-penalty cases” and may not have been found by a court to have rendered ineffective assistance of counsel during the trial or appeal of a criminal case or otherwise been subject to disciplinary proceedings. There is nothing in the Procedures that ensures counsel will satisfy the 28 C.F.R. § 22(b) benchmarks—either with regard to general practice or specific post-conviction experience—nor the ABA Guidelines concerning competence or qualifications. Moreover, the Procedures only became effective on January 1, 2010, and grandfathered in all lawyers who were approved prior to that date without regard to whether they satisfied the eligibility requirements of the Procedures.

Similarly, Texas’ December 18, 2017 supplemental application states that there are currently nineteen counsel on the approved list, which is down from thirty-one at the time of the initial application. Supp. App. at 2; App. at 10. While the supplemental application discusses the qualifications of four of these individuals, it does not discuss how the mechanism generally ensures counsel will satisfy the 28 C.F.R. § 22(b) benchmarks or the ABA Guidelines concerning competence and qualifications. There is nothing in the Texas Application that confirms or requires
that appointed counsel have **any** actual post-conviction experience, actual experience representing clients in death penalty case, actual experience in criminal defense practice, or actual experience as a lawyer. See App. at 8-9.

The Application thus confirms the findings made during the ABA Assessment of Texas’ administration of the death penalty, when the state relied almost entirely on list-counsel: “the qualification standards for list-appointed counsel fall short of those required by the ABA Guidelines. The criteria are not sufficiently specific to ensure list-qualified appointed counsel possess the knowledge and skill required for effective capital-case representation. Attorneys are not required to have any special training in capital habeas representation, nor are there any experiential requirements delineated by the qualification standards.” Assessment at 236.

2. The Texas Application does not address whether the state’s list of approved counsel have met the statutory mandate of actually providing indigent capital defendants with “competent counsel.” There is a difference between having standards and ensuring that appointed counsel actually meet those standards. And there is a difference between providing standards and ensuring that those standards are enforced. As numerous courts have noted, “competency standards are meaningless unless they are actually applied in the appointment process.” *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000). See also *Ashmus v. Woodford*, 202 F.3d 1160, 1168 (9th Cir. 2000) ("a state's competency standards must be mandatory and binding if the State is to avail itself of Chapter 154"); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996) (competency standards must be “specific” and “mandatory” in order to satisfy the requirements of Chapter 154).


3. In 2009, before the ABA conducted its Assessment, Texas established an Office of Capital Writs (“OCW”). The office was created after a State Bar of Texas Task Force concluded there were “recurring problems” regarding the quality of representation “which undermine the integrity of capital habeas practice in the Texas courts.” See *Task Force Report*. This office opened and began accepting capital appointments in 2010. The OCFW is intended to function as the principal provider of state post-conviction representation to death-sentenced prisoners in Texas. However, the OCFW’s funding is set by the State Legislature, and since its inception its funding and staffing have been inadequate to meet demand. See Assessment at 238. Indeed, OCFW has been operating at full caseload for some time and, accordingly, Texas has been operating a mixed system where some clients are represented by OCFW, and some continue to be represented by private list counsel. According to Texas’ December 18, 2017 Supplemental Application, the eight

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6 In 2015, the OCW merged with the Office of Forensic Writs to become the “Office of Forensic and Capital Writs” (“OCFW”).
OCFW attorneys are currently staffing 53 cases, or 12 cases per attorney; working under such caseloads, counsel cannot possibly invest the thousands of hours typically required to provide competent representation in each capital post-conviction matter. *ABA Guideline* 7.1, cmt.

There are no published qualification and competency standards for hiring OCFW counsel, and there is nothing in the Texas Application indicating that hiring criteria for the office satisfy either the presumptive standards under 28 C.F.R. § 26.22(b)(1) or the *ABA Guidelines*. Although the Texas Application notes the educational reputation of the law schools attended by several of the OCFW’s attorneys, it does not discuss their general practice or specific experience representing clients in post-conviction proceedings. The ABA is aware that for many years, the office has been staffed predominantly by relatively junior attorneys, whose qualifications fall short of the presumptive standards under 28 C.F.R. § 26.22(b)(1) (i.e., they have not been members of the bar for five years and lack the benchmark post-conviction experience). Moreover, the ABA has observed that the OCFW has been characterized by lack of continuity in representation, and significant turnover of staff, including the departure of the first OCFW Director in 2015.

As noted in the ABA Assessment, the “Assessment Team was unable to determine whether OCFW attorneys possess the training, qualifications, and resources necessary to provide high-quality legal representation to its clients. It is clear, however, that the standards for list-appointed counsel, who are still appointed to represent inmates when OCFW is unable or unwilling to accept appointment, fall far below those of the *ABA Guidelines*.” Assessment at 236, 240.

4. Indeed, the OCFW has occasionally reached out to entities like the ABA Death Penalty Representation Project to help place state post-conviction cases with pro bono attorneys or to provide assistance on OCFW’s cases because of OCFW’s resource issues. The OCFW’s need to do this underscores that the current Texas system is not a statewide mechanism that ensures the provision of competent counsel in capital cases. As a result, Texas’ mechanism does not meet the statutory requirement that, to be certified under the Rule, it reliably provide for appointment of competent counsel.

5. The ABA also noted that for some time, “due to budget constraints, OCFW attorneys’ caseloads are becoming unmanageable.” Assessment at 238. The ABA noted in its Assessment that OCFW caseloads were above the national average. *Id.* The Texas Application is silent regarding the caseloads of list counsel or whether there is any consideration of such factors in the appointment of counsel. However, the ABA is aware that many list counsel who accept capital habeas appointments in Texas are regularly juggling dozens of other criminal cases at the time of and during the pendency of their appointment.

Because post-conviction litigation in many jurisdictions is already fast-paced, 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 Texas mechanism allows appointment of counsel without regard to staffing or workload, it further fails to satisfy the statutory requirement that the state must have a mechanism for the appointment of “competent counsel.”
B. The Texas 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 state mechanism that does not provide for adequate compensation or resources will leave capital defense representation to inexperienced and possibly incompetent counsel. To ensure that counsel is “competent,” therefore, compensation must be sufficient to encourage experienced and capable lawyers who would otherwise command higher fees to accept appointments in capital cases. Thus, for example, because the representation of post-conviction capital prisoners can take hundreds of hours, capped or predetermined fees do not constitute compensation that will ensure counsel are competent. At the same time, however, to protect public funds states must retain the ability to monitor litigation expenses to ensure that they are reasonable.

With regard to reasonable litigation expenses, the Rule 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). Similarly, ABA Guidelines 4.1 and 5.1 require that the core members of the defense team include “at least two [qualified] attorneys at every stage of proceedings . . . an investigator, and a mitigation specialist.” The Texas mechanism falls short of these standards for the following reasons:

- For individuals represented by list counsel, the Texas mechanism provides that “death-sentenced inmates only are entitled to one qualified attorney during state” post-conviction proceedings. Assessment at 151. There appears to be no mechanism under Texas law, nor does the Texas Application discuss any procedure, for appointment of a second attorney for post-conviction proceedings. This is inadequate under the ABA Guidelines and fails to meet the Rule’s standard to provide compensation for reasonable litigation expenses.

- Similarly, for individuals represented by list counsel, the Texas mechanism only provides for appointment of an investigator or mitigation specialists if state post-conviction counsel enlists them, and the court (which is the convicting court) approves the expense. Assessment at 151. “Reimbursement for those services depends on the presiding judge’s assessment that the expense was reasonable.” Assessment at 152. As the ABA Assessment notes: “a system which assigns to trial courts the authority to approve or deny funding

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7 As the Texas Application acknowledges, the request for such expense “must be submitted to the convicting court” and counsel must show that the “expenses are reasonably necessary and necessarily incurred”; moreover, if counsel requests pre-payment of such expenses, they are required to submit “specific facts that suggest a claim of possible merit may exist,” the specific “claims of the application to be investigated” and “and itemized list of anticipated expenses for each claim.” App. at 13-14.
requests invites uneven treatment. Some counties—and correspondingly, the judges who serve them as elected officials—will face greater budgetary pressure than others.” Assessment at 154-155. Allowing this kind of pressure to influence expenditures on post-conviction litigation fails to meet the Rule’s standard to provide compensation for reasonable litigation expenses and is contrary to the ABA Guidelines.

- The Texas Application notes that, for individuals represented by OCFW, the office currently has two investigators on staff, but the Application does not confirm that investigators must be assigned to each matter, nor does it discuss the availability of mitigation specialists. From its interactions with the OCFW, the ABA understands that the office only hires generic investigators, not specialists in fact or mitigation investigation, and typically assigns only one investigator to each case, meaning that the same individual is conducting both the fact and the mitigation investigation. To the extent OCFW is not assigning an investigator and mitigation specialist to each case, this is inadequate under the ABA Guidelines and fails to meet the Rule’s standard to provide compensation for reasonable litigation expenses. Moreover, as with OCFW attorneys, the exorbitant caseloads of the investigators prevent them from providing the meaningful assistance critical to competent representation.

With regard to compensation, ABA Guideline 9.1 provides that “appointed counsel should be fully compensated for actual time and services performed at an hourly rate commensurate with the prevailing rates for similar services performed by trained counsel in the jurisdiction,” and “flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.” Similarly, the Rule provides that compensation is “presumptively adequate” if it is “comparable” to certain benchmarks, including the compensation of counsel appointed pursuant to 18 U.S.C. § 3599, the compensation of prosecutors representing the state in state postconviction proceedings, or the compensation of appointed counsel in state capital appellate or trial proceedings. 28 C.F.R. § 22(c). The Rule recognizes that caps on compensation for post-conviction counsel preclude ensuring the provision of competent counsel. Notably, 18 U.S.C. § 3599 provides no flat fee or caps on compensation in federal capital cases. See also Baker v. Corcoran, 220 F.3d 276, 286 (4th Cir. 2000) (“a compensation system that results in substantial losses to the appointed attorney or his firm cannot be deemed adequate”).

- With regard to compensation of OCFW counsel, Texas suggests in its Application that salaries for OCFW counsel exceed those of prosecutors who represent the state in postconviction proceedings. App. at 6. The Application states that the OCFW salaries are “commensurate” with salaries in the Texas Attorney General’s Criminal Appeals Division. Supp. App. at 2. This may be inaccurate: the ABA Assessment notes that OCFW “attorney employees currently earn salaries ranging from $52,000 to $62,000 per year” and their “prosecutorial counterparts . . . tend to earn much higher annual salaries: for example, $94,000 in Harris County, $78,000 in Dallas County, and $76,000 in Bexar County.” Assessment at 184. To the extent that OCFW counsel are compensated at a level below those of state prosecutors in post-conviction proceedings, this fails to meet the Rule’s standard to provide reasonable compensation and is also inadequate under the ABA Guidelines.
With regard to state post-conviction counsel appointed off the approved list, compensation and expenses are the obligation of the county, although the State of Texas reimburses the county for “reasonable compensation” up to a cap of $25,000. Assessment at 145. The ABA Assessment notes that, in the period reviewed, there was considerable variance in the rates that counties compensated post-conviction work (ranging from $50 to $200 per hour) and that two major death penalty jurisdictions imposed presumptive maximums for post-conviction work—$25,000 in Harris County and $15,000 in Bexar County. Assessment at 179-181. See also Supp. App. Ex. D (stating that “$25,000 is the presumptive maximum”). In its application materials, Texas acknowledges that “some counties impose soft caps on attorneys’ fees.” App. at 13. As the ABA assessment noted, “these policies are not consistent with the provision of high-quality defense services in capital cases, may deter qualified counsel from undertaking capital representation, and do not accord with the ABA Guidelines.” Assessment at 181.

C. The Texas Application Does Not Support a Basis for Instituting a Retroactive Certification

If the Attorney General certifies a state’s mechanism, the Attorney General is also required, as part of the certification, to make a “determination of the date the capital counsel mechanism qualifying the State for certification was established.”

Even if the Attorney General determines that Texas’ current mechanism satisfies the requirements of Chapter 154, there is no basis for retroactive certification of any prior mechanism.


2. While the OCFW represents an effort to provide much-needed representation to death-sentenced prisoners during state post-conviction proceedings, due to the significant turnover in the office since 2010, the ongoing failure to establish hiring criteria ensuring that only competent counsel are representing capital prisoners in post-conviction proceedings, and the burgeoning caseload problems the office has been facing since its merger with the Office of Forensic Writs in 2015, it cannot yet be said to constitute a sufficient mechanism for ensuring the provision of competent counsel in state post-conviction proceedings. In addition to the questions noted above about the qualifications of OCFW staff, the ABA is concerned that the office has been and continues to be underfunded, requiring high attorney caseloads and the appointment of counsel off the approved list or identification of additional counsel including pro bono counsel. In addition, the ABA is concerned about the significant turnover in the office as well as the lack of continuity in representation of clients.
Because of these operational issues with OCFW, Texas has continued to appoint list counsel. With regard to such appointed counsel, as noted above (i) the Procedures that became effective on January 1, 2010, do not provide for the appointment of competent counsel, and (ii) grandfathered in all lawyers who were approved prior to that date.

3. As noted above, certain Texas jurisdictions impose presumptive caps on post-conviction representation. Historically, many jurisdictions have imposed such caps at levels that were not sufficient to provide for competent counsel. Because of this, retroactive certification is not appropriate.

D. The Rule Does Not Comply with Required Administrative Process

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

1. 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 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 represents “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.

2. The 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
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, 863 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**

In sum, the Texas Application fails to demonstrate that Texas, whose mechanism for providing counsel to capital defendants has proven problematic and insufficient for many years, merits certification for streamlined habeas corpus proceedings. There is nothing in the Application that provides a basis to believe that Texas can ensure that genuinely competent counsel are provided to capital defendants in post-conviction proceedings in that state.

The ABA therefore urges the Department to reject the Application. The ABA also requests that the Department 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.8 We urge the Department to use this opportunity to improve the quality of representation in post-conviction proceedings and offer our continuing assistance toward meeting this goal.

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8 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 cases discussed in note 3 and see ABA, *Cases that Cite to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, available at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcite s.authcheckdam.pdf.