COMMENTS OF THE AMERICAN BAR ASSOCIATION
TO OFFICE OF JUSTICE PROGRAMS DOCKET NO. 1540
“CERTIFICATION PROCESS FOR STATE CAPITAL COUNSEL SYSTEMS”

I. STATEMENT OF ORGANIZATIONAL INTEREST

The American Bar Association (“ABA”) respectfully submits these comments on the proposed regulations relating to certification of states pursuant to chapter 154 of title 28 of the United States Code (“Proposed Rule”). See Supplemental Notice of Proposed Rulemaking, 77 Fed. Reg. 29 (Feb. 13, 2012). The ABA is a voluntary, national membership organization of the legal profession. Its almost 400,000 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 nonlawyer associates in allied fields.

Although the ABA does not take a position on the constitutionality of the death penalty, 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. 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 promulgates 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”); ABA Standards for Criminal Justice (2d ed. 1980).

The ABA has adopted policy statements, studied state death penalty systems, and issued reports urging specific reforms in federal and state postconviction procedures.1 The ABA has presented testimony and submitted materials at congressional hearings that urge the reforms necessary to ensure the fairness and accuracy of habeas corpus proceedings.2

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 [postconviction] 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). The ABA’s examinations of nine death penalty jurisdictions were performed by state-based assessment teams of experts, composed of judges, legislators, prosecutors, defense attorneys, members of the State bar, and academics who examined their state’s death penalty system in light of ABA policies. Two of the thirteen areas examined in each state were the provision of defense services as well as the state postconviction process. See ABA Death Penalty Moratorium Implementation Project State Assessments, available at: http://www.americanbar.org/groups/ individual_rights/projects/death_penalty_moratorium_implementation_project/death_penalty_assessments.html.

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,
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, by overwhelming vote, 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 constitutionally meritorious claims that many postconviction petitions raise. 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).

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 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 expanded and updated in 2003 to reflect changes in the law and practice that had occurred since 1989.

The Proposed Rule raises serious concerns about the quality of representation for capital defendants, the fairness of death penalty proceedings, and the relationship between the federal and state courts in habeas corpus proceedings—issues that long have been and are today of vital concern to the ABA. The ABA urges that the Department revise the Proposed Rule consistent with the ABA Guidelines before certifying any state under chapter 154.

II. OVERVIEW OF COMMENTS

The ABA previously submitted comments regarding prior versions of the proposed regulations on August 25, 2007; April 6, 2009; and May 31, 2011. Even with adoption of the changes in the Supplemental Notice, the Proposed Rule fails to ensure that states that seek certification have appropriate mechanisms in place that will ensure the appointment of “competent counsel,” as required by section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005, which amended chapter 154 of title 28 of the United States Code, as well as case law interpreting chapter 154. Accordingly, the ABA has serious concerns that the Proposed Rule will result in the Attorney General’s improperly certifying states that fail to provide competent postconviction counsel or otherwise fail to meet the statutory requirements of section 507. These erroneous certifications would have devastating and detrimental consequences affecting the fairness and accuracy of postconviction proceedings for death-sentenced prisoners.

While the ABA does not take a position on whether section 507 is good policy, the approach taken by the Department of Justice in implementing section 507 fails to effectuate and otherwise ignores key aspects of the compromise inherent in the
legislation. That compromise requires states to make significant and meaningful improvements to the counsel systems that provide legal representation to indigent death-sentenced prisoners (including ensuring the quality of appointed counsel) in order to be entitled to the benefits of streamlined review in federal habeas corpus proceedings. The Proposed Rule fails to abide by this compromise and would allow states to obtain streamlined review without first ensuring that capital defendants receive the critical assistance of competent counsel in postconviction proceedings.

The American Bar Association sincerely appreciates the efforts made by the Department of Justice to address our previous concerns and the concerns of thousands of other commentators. Despite some small improvements, however, the Proposed Rule remains deeply and fundamentally flawed. For these reasons, the Department of Justice should not use it to certify any state to receive the benefits of streamlined federal habeas review pursuant to section 507.

III. SUBSTANTIVE COMMENTS

A. Proposed Change 1: Postconviction Experience

Section 26.22(b)(1) of the Proposed Rule provides that a State may satisfy chapter 154’s requirement relating to counsel competency by requiring appointment of counsel ‘‘who have been admitted to the bar for at least five years and have at least three years of felony litigation experience.’’ 76 FR at 11712. The Department solicits comment on the suggestion to change this provision to set a standard of five years of bar admission and three years of postconviction litigation (instead of felony litigation) experience. In particular, the Department solicits comment on whether three years of postconviction litigation experience is an appropriate measure of competency in postconviction proceedings and whether more years, fewer years, or alternative measures would constitute a more appropriate benchmark.

The American Bar Association commends the Department of Justice for recognizing that specific experience in postconviction litigation is critical to the delivery of meaningful legal representation in state postconviction cases. However, the Proposed Change does not sufficiently address our previously stated concerns that the Rule, as currently drafted, will allow for appointment of counsel who do not have the requisite skills and knowledge to competently represent capital defendants in postconviction proceedings.

Capital cases are the most complex kind of criminal cases, requiring the ability to understand and present evidence involving a variety of experts—pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, etc. 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. Recent United States Supreme Court cases have also made clear that defense counsel in state postconviction proceedings must have a thorough understanding of federal habeas law and procedure to perform competently in state postconviction proceedings.3

It is for these reasons that the ABA and other commentators conclude that “quantitative measures of experience are not a sufficient basis to determine an attorney’s qualifications for the task.” See Appendix A.4 The skills, abilities, training, and experience of counsel must be taken into account if there is to be a meaningful assessment of whether counsel is

3 See, e.g., Cullen v. Pinholster, 131 S.Ct. 1388, 1398 (2011) (holding that federal review of issues adjudicated in state courts is “limited to the record that was before the state court that adjudicated the claim on the merits”); Elmore v. Ozmint, 661 F.3d 783, 850 (4th Cir. 2011) (stating that “our § 2254(d)(1) review is generally confined to the record that was before the state PCR court”); Harrington v. Richter, 131 S.Ct. 770, 787 (2011) (“Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions. Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of Wainwright v. Sykes, 433 U.S. 72, (1977), applies. And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies. Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding”) (internal citations omitted).

4 “Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications. Such standards can actually be counterproductive because they may provide a basis for denying appointment to some of the most gifted and committed lawyers who lack the number of prior trials but would do a far better job in providing representation than the usual court-appointed hacks with years of experience providing deficient representation.” Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, at 1871 n.209 (1994).
qualified. Many jurisdictions that retain use of the death penalty agree with the approach of the ABA Guidelines and require a specific skill set in addition to experience. See Appendix B.

Finally, the Association expresses its continued concern that the omission of a requirement for specific “defense” postconviction experience fails to properly identify the specific experience that results from defending death-sentenced persons. As currently drafted, members of the prosecution effort in state postconviction proceedings with no defense experience or understanding of the requirements of the defense effort would be qualified for appointment. This result is clearly not intended by chapter 154 and would result in the appointment of counsel who are clearly not qualified to provide the zealous legal representation that all death-sentenced prisoners should receive.

B. **Proposed Change 2: Innocence Protection Act (IPA)**

Section 26.22(b)(2) of the Proposed Rule provides that a State’s capital counsel mechanism will be deemed adequate for purposes of chapter 154’s counsel competency requirements if it provides for the appointment of counsel “meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) [and] (2)(A).” 76 FR at 11712. The Department solicits comments on the suggestion of modifying § 26.22(b)(2) in the Proposed Rule to incorporate not only section 14163(e)(1) and (2)(A), but all of the subparagraphs of that section that bear directly on counsel qualifications—specifically, subparagraphs (2)(B), (D), and (E).

Subparagraphs (B), (D), and (E) require maintenance of a roster of qualified attorneys; provision or approval of specialized training programs for attorneys representing defendants in capital cases; monitoring of the performance of attorneys who are appointed and their attendance at training programs to ensure continued competence; and removal from the roster of attorneys who fail to deliver effective representation or engage in unethical conduct. 42 U.S.C. § 14163(e)(2). Those provisions are integral elements of the IPA’s comprehensive approach to counsel qualifications. Under the modification now being considered by the Department, to the extent that the rule uses the IPA standard as a benchmark for counsel competency, it would incorporate all directly relevant elements of that Act.

Proposed Change 2 is welcome recognition of the fact that the Department of Justice, before granting certification, must conduct a thorough and meaningful assessment of whether a state’s counsel mechanism actually provides for the appointment of competent counsel. The Department’s proposal to utilize some of the requirements of the Innocence Protection Act when making this determination is an improvement to the previous version of the Rule. But even with this change, the Proposed Rule remains inadequate.

The Proposed Rule does not specify what criteria should be used by the state to determine whether counsel is qualified. Maintaining a roster, monitoring performance, requiring training, and removing counsel from the list are excellent concepts in theory—but they
are only meaningful if the qualification standards themselves are substantive. There is a difference between having standards and ensuring that appointed counsel actually meet those standards. There is a difference between having pro forma standards and meaningful standards (such as those embodied in the ABA Guidelines) that will actually result in the appointment of competent counsel. Finally, 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 Tucker v. Catoe, 221 F.3d 600, 604-05 (4th Cir. 2000); Wright v. Angelone, 944 F. Supp. 460, 467 (E.D. Va. 1996).

The ABA strongly urges the Department of Justice to incorporate and require compliance with the ABA Guidelines, which have been widely cited and utilized by courts as the appropriate professional standards for the appointment and performance of competent defense counsel. As currently drafted, the Department of Justice is authorizing a certification program that is actually less than what the law in many states requires. The continued omission of the ABA Guidelines in the Proposed Rule is inexplicable given their widespread acceptance.

C. Proposed Change 4: Effect on Certification of Compliance with Benchmarks

The Department is considering amending § 26.22(b) and (c) of the proposed rule to state that the Attorney General will “presumptively” certify that a State has established a sufficient mechanism for the appointment of competent counsel if he determines that the mechanism satisfies the specific standards for competency and compensation set out in the remainder of those paragraphs.

Proposed Change 4 raises the possibility of “presumptively” certifying states that claim to comply with certain requirements and suggests that the Attorney General will not consider evidence that the state system does not function in practice as it appears to on paper. As an initial matter, the Association does not believe that the Attorney General should certify any state until and unless he is satisfied that the state has met all of its obligations under chapter 154. There is no need and no authority to provide states with a presumptive certification. Given the serious and devastating consequences for death-sentences prisoners that will flow from such a certification, the Association believes that this proposed change should not be adopted.


6 See id. and Appendix C.
An assessment of how the state mechanism performs in practice is a critical part of any certification process. There are a variety of reasons why state systems for appointing counsel often do not function as intended and the Attorney General must first consider such information and insist upon compliance with the requirements of chapter 154 in practice prior to issuing any certification decision.

The Association notes that the Department of Justice also did not publish the sections of the amended rule that will contain information about presumptive certification. Although it appears that the Attorney General intends to rely on capitally charged individuals and their attorneys to demonstrate that a state’s mechanism does not function effectively in practice, we are left to guess at how presumptive certification will be implemented and how concerned parties can bring a state’s systemic deficiencies to the attention of the Attorney General.

Most importantly, there is no measure by which the Attorney General will determine a state mechanism’s effectiveness. For example, there is no discussion of the percentage of appointments in which the requirements of a state mechanism must be fulfilled for a state to be entitled to the benefits of chapter 154, or any other measure or probability for determining the effectiveness of a state’s mechanism. To rebut presumptive certification, there must be an understanding of what is necessary to accomplish this task.

The state must bear the burden of establishing compliance with chapter 154. Placing that burden on death-sentenced prisoners is inappropriate. Defense counsel must already contend with a chronic lack of funding, large caseloads, and substantial obstacles to obtaining state-wide data and statistics, among other problems. Individual defense counsel and defense organizations are simply unable to rebut facial claims of state-wide compliance with the requirements of chapter 154. As currently drafted, state certification is more likely to be granted not because a state mechanism functions as envisioned by chapter 154, but because there are insufficient defense resources to present evidence of its inadequacy to the Attorney General during the state application process.

When a state seeks the benefits of certification, including expenditure of fewer resources in federal court, the state reasonably bears the initial burden of demonstrating the likelihood that the state mechanism actually functions to timely provide competent counsel and the resources necessary to present potentially meritorious claims in state court proceedings. Because the statute designates an “appropriate State official” as the person responsible for seeking certification, it follows that, unlike individual defense interests, such an official has ready access to state-wide information and data necessary to make this showing. This should include, at the very least, the average length of time from a capital conviction to the appointment of postconviction counsel, and the qualifications, compensation rates, and paid litigation expenses of specific counsel appointed under the mechanism in the years and months leading up to the application for certification.

Without a rigorous process for ensuring the effectiveness of a state’s mechanism for timely appointing competent counsel, it will fall to the federal courts to correct the
systemic failure of the state’s mechanism in all individual cases affected by it. This approach greatly taxes court and defense resources without any assurance that chapter 154 provisions will be applied only in those cases in which the state mechanism functioned adequately. Courts have not yet addressed challenges to the application of chapter 154 in individual cases after a state becomes certified, and some may decline to do so, particularly where the deficiency appears to be a systemic one that the Attorney General should have considered.

An additional significant concern with presumptive certification is inadequate notice to affected capital defense counsel, defense organizations, and capital petitioners. It appears from the Proposed Rule that the only notice of a state’s certification application is publication of the application in the Federal Register. Greater notice of a state’s application is required. This is particularly true in a scheme such as the one the Attorney General seems to be considering, where local defense counsel bear the burden of demonstrating the effectiveness of the state mechanism and are directly and significantly affected by the certification decision, but do not have access to information about whether the state intends to submit an application. At the very least, the state official who seeks certification on behalf of a state should be required to provide individual notice to all defense counsel of record in capital postconviction cases in the state, as well as to state-wide and national organizations that provide assistance to such counsel.

For these reasons and others, the Association strongly urges the Department not to adopt the practice of issuing presumptive certifications.

IV. CONCLUSION

The Proposed Rule fails to ensure that genuinely competent counsel, with the necessary skills and knowledge that the term “competence” reflects, are provided to death-sentenced prisoners in postconviction proceedings. The ABA urges the Department of Justice to revise the Proposed Rule to, among other things, require compliance with the ABA Guidelines (either by name or in substance) before any state is certified. The Department should use this important opportunity to make a meaningful contribution to improving the quality of legal representation for indigent death-sentenced prisoners in postconviction proceedings. We offer our continuing assistance toward meeting this important goal.