The American Bar Association (“ABA”) respectfully submits these comments in response to the State of Arizona’s October 16, 2018, supplemental submission to the Department of Justice (“October Supplement”) regarding its Application pursuant to 28 C.F.R. § 26.21 (the “Rule”). See Notice of Supplemental Information Regarding Arizona Capital Counsel Mechanism, 83 Fed. Reg. 58786 (Nov. 21, 2018). The ABA’s February 26, 2018 Comment to the Office of Legal Policy on the Certification Process for Arizona’s Capital Counsel Mechanism (“2018 ABA Comment”) sets forth in detail the basis for its view that Arizona’s current and past Mechanisms for appointing capital post-conviction counsel have failed to ensure the timely appointment of competent, adequately resourced counsel and therefore fail to meet the requirements of Chapter 154 of Title 28, U.S. Code (“Chapter 154”) and the Rule. Both the 2018 ABA Comment and the comments that follow are based on the extensive policies, standards, and studies produced by the ABA through decades of work promoting fair administration of the death penalty.

After reviewing the information provided by the State of Arizona in the October Supplement, the ABA reaffirms its conclusions set forth in the 2018 ABA Comment. The ABA submits these additional comments to address two issues raised in the October Supplement that are of particular concern to the ABA: 1) the State’s misplaced use of data from cases handled by pro bono counsel rather than counsel appointed by the Mechanism to demonstrate the effective functioning of the Mechanism, and 2) the State’s failure to use an independent appointment authority to ensure counsel appointments and monitoring that is free from outside influence. For the reasons set forth below, as well as those in the 2018 ABA Comment, the ABA again urges that Arizona’s Application be denied.

I. CAPITAL POST-CONVICTION MATTERS HANDLED ON A PRO BONO BASIS SHOULD NOT BE USED TO EVALUATE A SYSTEM FOR COMPLIANCE WITH CHAPTER 154.

As discussed at length in the 2018 ABA Comment, a number of aspects of Arizona’s Mechanism undermine the provision of competent counsel and adequate compensation, including a maximum compensation rate of $100/hour, the former existence of a presumptive 200-hour limit on work, and the failure to provide adequate defense services and other resources. The specific


2 See 2018 ABA Comment at 1-3 for detailed statement of organizational interest.

3 The cap was lifted in 2013, but the prior impact of this rule remains relevant to the question of whether Arizona has established a basis for retroactive certification.
examples identified by Arizona in an attempt to demonstrate adequate compensation do nothing to alleviate these concerns—first, because these cases appear to be at the top end of a troublingly wide range of authorized funding, suggesting significant arbitrariness, and, second, because the examples selected by the State include cases where representation was provided by pro bono attorneys recruited by the ABA rather than appointed pursuant to Arizona’s Mechanism. Contrary to the State’s intent, these examples only underscore the deep flaws that persist in the Mechanism itself.

a. Capital Representation Provided by Pro Bono Counsel Is Not Evidence of a Functioning Appointment Mechanism.

Arizona’s reliance on data from capital post-conviction cases where pro bono counsel provided representation is misplaced. When an outside organization such as the ABA recruits pro bono counsel to take on a capital post-conviction case, that representation is necessarily provided in a manner that is external to Arizona’s Mechanism and cannot serve as evidence that the Mechanism is functioning effectively. It is thus remarkable that the State of Arizona chose in its October Supplement to highlight three different cases where pro bono counsel provided representation. For example, the October Supplement points to State v. Andriano, where

the State paid over $1,000,000 in compensation for litigation expenses alone, as Ms. Andriano’s attorneys were pro bono. And in State v. Garza, Maricopa County CR 1999-017624, the State paid over $500,000, as it did in State v. Carreon, Maricopa County CR 2001-090195, State v. Carreon, Maricopa County CR 2002-010926, and State v. McCray, Maricopa County CR 2001-015915.5.

October Supplement at 4. While the State acknowledges that Ms. Andriano’s attorneys provided pro bono representation, it neglects to mention that so too did counsel in State v. Garza and State v. Carreon. In fact, pro bono representation in these cases was provided by large civil law firms that were recruited by the ABA’s Death Penalty Representation Project in response to a lack of qualified post-conviction counsel available to handle these cases.

4 The ABA Death Penalty Representation Project was created in 1986 with the singular purpose of recruiting pro bono counsel to take on capital post-conviction cases in jurisdictions where the state was not providing access to competent, adequately compensated counsel. More than 30 years later, this remains a core part of the Death Penalty Representation Project’s work. Its limited resources are dedicated to recruitment of pro bono counsel for cases in jurisdictions where there is the greatest concern about lack of available counsel.

5 In its current form, the Arizona Mechanism contemplates appointment from a list maintained by the Arizona Supreme Court. As discussed at length in the 2018 ABA Comment, Arizona’s Mechanism for counsel appointment has undergone numerous significant changes since 1998, including the adoption of an entirely new model—a statewide defender office—which was subsequently abandoned. See, e.g., 2018 ABA Comment at 18. However, in none of its myriad forms has the Mechanism even purported to include pro bono representation as a part of the system for providing competent post-conviction counsel.
Far from serving as evidence of sufficient compensation to attract qualified counsel, these cases further demonstrate that the previously identified issues with Arizona’s Mechanism have, in fact, created an insufficient pool of competent post-conviction counsel available to accept appointments. While the ABA and others have attempted to take steps to mitigate the harm caused by problems with the Mechanism by recruiting pro bono counsel, pro bono representation is never an adequate substitute for an effective Mechanism of counsel appointment and compensation. Pro bono law firms often do remarkable work on behalf of their pro bono clients, but their lawyers are typically inexperienced in criminal law and capital defense, and there are numerous inefficiencies and challenges involved that typically do not exist in a well-functioning system that relies on experienced, adequately compensated capital defenders to provide representation. Moreover, there is an extremely limited supply of law firms who are able to take on a large-scale pro bono project such as a capital post-conviction case. The ABA’s Death Penalty Representation Project often spends months, and sometimes years, looking for a pro bono firm to take on a single case, and there have been numerous instances where it has been unable to find pro bono counsel at all. For these reasons and others, pro bono representation—when it can be obtained—should not be considered a part of a system of indigent capital defense but rather, at best, a stopgap measure to minimize the damage caused by a poorly functioning system.

b. The Payment of Litigation Expenses to Pro Bono Counsel Highlights Ongoing Problems with Counsel Appointed Through Arizona’s Mechanism

Although the litigation expenses paid in pro bono cases do not serve as evidence of an effective Mechanism in Arizona, the comparison between those cases and the cases with appointed counsel underscores problems with the Mechanism. It is notable that pro bono law firms appear to be requesting significantly higher payments for litigation expenses than attorneys appointed under the State’s own Mechanism. In capital post-conviction cases, non-attorney payments primarily include litigation expenses such as hiring mitigation specialists, investigators, and expert witnesses; conducting forensic testing such as DNA and ballistics examinations; and otherwise fully developing both the record and potential legal arguments in a given case. The ABA’s study

6 The amount of compensation for litigation expenses that a court is willing to provide makes little difference if there are no competent lawyers available to litigate the case, and the State cannot rest its argument about adequate compensation on cases where the lawyers were only involved with the case as the result of their generous decision to volunteer their services at the request of an outside organization.

7 See Emily Olson-Gault, Director, ABA Death Penalty Representation Project, Testimony, Birmingham, Alabama Hearing Before the Judicial Conference of the United States Committee to Review the Criminal Justice Act Program, Panel 4, Tr. at 25 (Feb. 18, 2016) (“It is enormously time consuming and difficult [to persuade] law firms to sign onto these cases . . . and we are often unsuccessful.”).


9 See ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”), 31 Hofstra L. Rev. 913 (2003), Guideline 10.7 “Investigation.” As discussed more fully in the 2018 ABA Comment, the ABA Guidelines set forth a national standard of care for capital cases that has been relied upon by state and federal courts at every level, including the United States Supreme Court. See 2018 ABA Comment at 2.
of and experience with capital cases has repeatedly confirmed that conducting an adequate investigation is time-intensive and costly, and that an inexpensive investigation is also likely to be an inadequate one.\textsuperscript{10}

The significant variation in attorney fees and additional expenses, as well as the extremely low compensation in several cases, are causes for concern. For example, in the 22 Maricopa County cases for which funding data was provided,\textsuperscript{11} in five cases, or roughly 23\%, attorneys requested total compensation \textit{under} $20,000—thus coming in \textit{under} the presumptive 200-hour funding cap—for hours worked in the case.\textsuperscript{12} In nine of the 22 cases, or 41\%, attorneys billed varying amounts of less than $50,000—or fewer than 500 total hours worked.\textsuperscript{13} While there will always be some degree of variation from case to case, the Guidelines observe that on average “\textit{[h]undreds of} attorney hours are required to represent a death-sentenced prisoner effectively in [state post-conviction] cases.” Guideline 9.1, cmt. at 987 (emphasis added). The data provided by the State shows that a troubling number of attorneys appointed under the Arizona Mechanism appear to have fallen far short of investing the resources required to provide competent representation.

c. Litigation Expenses Paid in Cases Appointed Pursuant to the Mechanism Reflect Significant Arbitrariness

In addition to the problems exposed by comparison with pro bono cases, the State’s data also points to significant arbitrariness in funding and quality of representation for counsel appointed pursuant to the Mechanism. The 2018 ABA Comment expressed concern with Arizona’s county-by-county system of indigent defense,\textsuperscript{14} a problem that is confirmed by the data provided in the October Supplement. Summarizing the data in Exhibit B, the State wrote that “Pima County Public Defense Services reported average spending for attorney representation . . . exceeds $110,000 per case and average litigation expense exceed $50,000 per case. \textit{Even smaller counties}

\textsuperscript{10} See, e.g., ABA Guideline 9.1, cmt, at 988 (“For better or worse, a system for the provision of defense services in capital cases will get what it pays for.”).

\textsuperscript{11} See October Supplement, Exhibit B. Ruben Garza and Albert Carreon were excluded from this count because their cases were handled by pro bono law firms and the amount of compensation requested likely does not reflect the actual cost to the firm of providing representation. Data from the case of Richard Glassel was also excluded because the listed attorney payments totaled $0.00 and is therefore assumed to be an error.

\textsuperscript{12} See id. (attorney fees paid for Richard Djerf, Eugene Doerr, Charles Michael Hedlund, Kenneth Laird, Chad Lee).

\textsuperscript{13} See id. (attorney fees paid for Benjamin Cota, Clarence Dixon, Richard Hurles, and Ernesto Martinez).

\textsuperscript{14} “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.” 2018 ABA Comment at 18.
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spend significantly more than $20,000 per case.” October Supplement at 5 (emphasis added). This summary of the data reflects a gross disparity between the funds spent in a large county—averaging more than $160,000 per case—and those spent in “smaller counties” at just $20,000 per case—only 12.5% of the average funding provided by a larger county.

Chapter 154 and the Rule make no distinction between the necessary funding for a defense team in a small county versus a large county. Similarly, the prevailing professional norms for an adequate defense, as reflected in the ABA Guidelines, are the same, regardless of the size of the county where the case is tried. The lack of available funding in smaller jurisdictions is not an excuse for failing to provide adequate compensation; rather it is a reason to avoid a county-by-county system of indigent defense. Indeed, it is precisely the worry about such disparities that has led the ABA and others to call for statewide indigent defense systems for capital cases. As the 2006 Arizona Assessment observed:

Arizona’s indigent defense services is a mixed and uneven system that lacks level oversight and standards and that does not provide uniform, quality representation to indigent defendants in all capital proceedings across the State. The State’s failure to adopt a statewide public defender office for anything other than state post-conviction proceedings, mandate the establishment of public defender offices providing coverage within each county, adequately fund indigent defense services in each county, or to implement close oversight of indigent legal services at the county level has resulted in the State being incapable of delivering quality counsel in all capital cases.

Arizona Assessment at xiii (emphasis added).

The information provided by the State paints a troubling picture of Arizona’s system of capital defense, one that continues to suffer from the same problems that led the ABA and others to issue repeated calls for the creation of a statewide office. The admirable work of pro bono counsel in certain cases does not erase the very real problems with appointment of competent counsel under the Mechanism, nor do a handful of cases where the courts appear to have authorized reasonable litigation expenses erase the fact that numerous other cases are receiving unreasonably low payments and that there is a wide disparity in funding of the defense effort based on the county

15 See Guideline 1.1(A) (“The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.”) (emphasis added)).

16 As discussed at length in the 2018 ABA Comment, Arizona has not had a statewide public defender system for post-conviction cases in place since 2011, and the office that was in existence between 2006 and 2011 was significantly underfunded. See 2018 ABA Comment, at 13-14, 17. As a result, the same system the 2006 Assessment described as being incapable of providing uniform and quality representation remains in place today; and the arbitrariness and lack of uniformity inherent in this system is only highlighted by the handful of examples of capital case examples the State points to highlight the adequacy of its system for compensation.
in which the case is heard. The information provided in the October Supplement merely confirms that the Arizona Mechanism, as a whole, fails to meet the requirements of Chapter 154.

II. ARIZONA’S LACK OF AN INDEPENDENT APPOINTMENT AUTHORITY CONTINUES TO UNDERMINE ITS ABILITY TO PROVIDE A STATEWIDE MECHANISM FOR THE APPOINTMENT OF COMPETENT COUNSEL.

The information provided in the October Supplement also underscores the numerous problems created by Arizona’s lack of an independent authority for appointing and monitoring capital post-conviction counsel and its reliance on the Arizona Supreme Court to perform these functions. It is precisely because of the potential for such problems that ABA Guideline 3.1 calls on each death-penalty state to designate an agency responsible for “ensuring that each capital defendant in the jurisdiction receives high quality legal representation” that is “independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.” ABA Guideline 3.1(A)(1), (B) (emphasis added).

a. The Lack of an Independent Appointing Authority in Arizona Creates Conflicts for the Judiciary

Reliance on the judiciary to maintain and monitor appointed counsel in capital cases creates an inherent conflict of interest between the agency responsible for maintaining the list of qualified attorneys and the ability of these attorneys to effectively and zealously advocate for their clients. The State admits that the functioning of Arizona’s Mechanism is dependent on accurate decisions by the judiciary, but it fails to acknowledge the problems inherent in such a system where judges are subject to financial and political pressures that may directly conflict with their responsibilities to appoint and fund competent counsel. The ABA’s Arizona Assessment observed that “Arizona’s judicial system is not immune to political pressure, and recent trends indicate a gradual erosion of the judiciary’s independence.” Arizona Assessment at 271. It found that a “judicial evaluation program” and judicial retention elections have created threats to the Arizona judiciary’s independence by incentivizing judges to look beyond the law and the facts of the case when making decisions. Arizona Assessment at 267-269.

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17 See, e.g., October Supplement at 7-8 (“Ultimately, the Arizona Supreme Court controls the appointment of competent attorneys in capital post-conviction proceedings. . . . This is a case-by-case inquiry for the Arizona Supreme Court, based on reputation and experience known to that court.”).

18 See Tabak, Ronald J., “Why an Independent Appointing Authority Is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases,” 31 Hofstra L. Rev. 1105, 1115 (2003) (explaining that the 2003 Guidelines called for an appointment authority that is independent of the judiciary because, “[i]n view of the political pressures faced by judges, whether they face retention elections, must run for re-election, or hope for appointment to higher courts, there is substantial danger that judges will appoint lawyers who are disinclined or unable to raise a vigorous defense or to make crucial objections.”).

19 The Arizona Assessment observed that despite laudable attempts to protect the independence of the judiciary, “politics are steadily being infused into Arizona’s retention elections” and that “the notion of a fair and autonomous judiciary appears to be shifting in favor of greater public accountability.” Arizona Assessment at 270.
These threats to judicial independence in Arizona are particularly troubling given the opacity of the Arizona Supreme Court’s operations. For example, the Arizona Assessment Team was unable to obtain key information about how Arizona handles complaints against judges; whether steps are taken to insulate judges from public criticism about decisions in habeas cases; and whether the Arizona Supreme Court is taking steps to investigate and remedy instances of ineffective lawyering and professional misconduct. See Arizona Assessment at 271-275. See also id. at 152 (“It does not appear that the Arizona Supreme Court investigates or maintains records concerning complaints about the performance of attorneys providing capital postconviction representation.”). Worse still, the State itself was unable to respond to the Department’s questions about the standards employed by the Arizona Supreme Court to determine qualifications of capital post-conviction counsel. See October Supplement at 8 (“This office is not privy to how the Arizona Supreme Court evaluates defense attorneys under this requirement and thus cannot comment.”). The State’s arguments rely on an assumption that the Arizona Supreme Court is ensuring competent post-conviction counsel in capital cases, but Chapter 154 and the Rule demand more than blind faith in a Mechanism that cannot even articulate its own standards.

Moreover, what little information is available suggests precisely the opposite—that the judiciary may not be taking the necessary steps to ensure competent counsel. For example, while the State asserts that there is nothing to “suggest that the Supreme Court would not take remedial steps if it became aware of an appointed attorney failing to comply with the terms of his appointment,” October Supplement at 8, it also admits that “none of the 12 attorneys [identified by commenters as providing ineffective performance] has been disciplined in connection with such representation, and none has been removed by the court,” October Supplement at 9-10.20 By contrast, the independent Maricopa County Capital Defense Review Committee, which oversees trial and direct appeal appointments, has found a number of attorneys on the appointments list to be unqualified. See October Supplement at 8-9. As explained in the 2018 ABA Comment, that Committee was established in coordination with the ABA and was modeled after Guideline 3.1 to avoid the very conflicts of interest described above, and it has received repeated praise for its effective functioning. See 2018 ABA Comment at 15. The lack of a comparable statewide independent authority for capital post-conviction cases and the inaction of the Arizona Supreme Court demonstrate that essential components are absent in Arizona’s Mechanism.

b. The Lack of an Independent Appointing Authority Creates Conflicts of Interest for Appointed Counsel

The same pressures that threaten the independence of the judiciary often create a conflict of interest for counsel seeking such appointments. Counsel performance can be impaired in capital cases when the court is the appointing authority, as zealous advocacy in one case could be

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20 See also Arizona Assessment at 152 (“Attorneys may be removed from the list upon request, and in addition, the Arizona Supreme Court may remove an attorney from the list of attorneys qualified to receive appointments in state post-conviction proceedings if the [Court] determines that the attorney is incapable or unable to adequately represent a defendant.” As of March 2006, the Arizona Supreme Court had not sought the removal of any attorneys from the list.” (emphasis added)).
perceived as reducing the chances of appointment in subsequent cases.\(^\text{21}\) For this reason, ABA Guideline 2.1(C) calls for a representation plan that ensures that counsel is not subject to sanctions or the loss of future appointments as the result of zealous advocacy. See Guideline 2.1, cmt., at 942 (“Therefore, as Guideline 2.1(C) mandates, any acceptable Legal Representation Plan must assure that individual lawyers are not subject to formal or informal sanctions (e.g., through the denial of future appointments, reductions in fee awards, or withholding of promotions in institutional offices) for engaging in effective representation.”).

The danger of such conflicts in Arizona’s system provides a possible explanation for the significant variation in funding approved between Mechanism-appointed attorneys and pro bono counsel, discussed above in Section I(b). Whereas appointed counsel has motivations—contrary to the interest of their clients—to minimize billing and thereby increase the chances of future appointments,\(^\text{22}\) pro bono counsel is subject to no such pressure. This is further reason why funding in cases handled by pro bono counsel should not serve as evidence that the Mechanism is ensuring adequate compensation for appointed counsel.

The ABA and others have made several unsuccessful efforts to encourage Arizona to create an independent authority for appointing and monitoring capital post-conviction counsel, as exists in Maricopa County for trial and direct appeals. The failure of the state to do so has created a system where both appointed counsel and the judiciary are subject to competing incentives and where, as a result, the provision of competent and adequately resourced counsel cannot be ensured.

III. CONCLUSION

The information provided in the October Supplement supports the conclusions of the ABA and others that Arizona’s *ad hoc* system of private counsel appointments is failing to provide competent counsel as required by Chapter 154 and the Rule. The ABA applauds the work of pro bono counsel who have voluntarily undertaken capital post-conviction representation in Arizona, as well as those appointed counsel who make every effort to advocate for their clients’ interests in spite of insufficient resources and other shortcomings of Arizona’s system. But such cases are not evidence of a well-functioning Mechanism. To the contrary, pro bono representation is the result of a system that is failing to regularly provide timely appointment of competent, adequately compensated counsel. These problems are exacerbated by over-reliance on the judiciary to appoint

\(^\text{21}\) See Tabak, supra, n. 18, at 1115 (“When judges appoint counsel in capital cases, the appointed lawyers face a potential conflict of interest between the desire to please the judge—so that the lawyers will be appointed in other cases—and their obligation to represent their client zealously.”).

\(^\text{22}\) Parallel issues in the federal system recently prompted a group of federal judges and other criminal justice system experts to recommend that judges be removed from the process of appointing and compensating counsel. Following an extensive study, this group reported that judicial control of counsel payments and appointments is a structural problem that “risks diminishing or distorting the defense attorney’s single-minded focus on the client’s interest.” 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (rev. Apr. 2018) at 92, available at http://cjastudy.fd.org. As a solution, the Committee proposed creation of an independent defense commission, outside the control of the Judicial Conference, to govern the administration of indigent defense in federal courts. Id. at 243 et seq.
and monitor counsel, without any recognition of the inherent conflicts of interest created by such a system. Based on the facts and reasons presented in this comment and the 2018 ABA Comment, the ABA urges the Department to reject Arizona’s Application for certification.