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March 14, 2012

Regulations Docket Clerk
Office Of Legal Policy
Department of Justice
950 Pennsylvania Ave., NW, Room 4234
Washington, DC 20530

Re: OAG Docket No. 1540, Certification Process for State Capital Counsel Systems

Dear Sir or Madam:

The Criminal Justice Legal Foundation (CJLF) submits these comments in response to a notice published February 13, 2012, 77 Fed. Reg. 7559. CJLF is a California nonprofit corporation formed to advance the rights of victims of crime and the law-abiding public in the criminal justice system.

Once again, the Department of Justice has further delayed a process that Congress assigned to it for the purpose of expediting the process. This further delay defeats the purpose of the legislation. It does so for the ostensible purpose of considering comments that were submitted after the prior notice, but those comments merely brought up issues that had already been debated and considered before the prior notice was published.

As noted in our prior comment of April 6, 2009, the statute does not authorize the Attorney General to establish substantive standards by regulation. The statutory authority for regulations, 28 U. S. C. § 2265(b) is unambiguously limited to "regulations to implement the certification *procedure* under subsection (a)." (Emphasis added.) (All subsequent section and chapter references are to title 28 of the U. S. Code unless otherwise indicated.)

On the merits, the proposals vary from patently illegal to comparatively unimportant. We will take them in order of importance.

Proposed Change 3, on timeliness of appointment of state collateral counsel as a requirement for certification, is patently illegal. The proposal purports to decide a controversial question that Congress has already decided the other way.

This issue is covered in the Memorandum for the Attorney General from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: The Attorney General's Authority in Certifying Whether a State Has Satisfied the Requirements for Appointment of Competent Counsel for Purposes of Capital Conviction Review Proceedings* (Dec. 16, 2009) ("Barron Memo"). On most points, the Barron Memo strained to interpret the statute in ways giving the Attorney General the maximum ability to deny certification. On this point, though, even this memorandum had to concede that the statutory language and history were clear. In *Spears* v. *Stewart*, 283 F. 3d 992 (CA9 2001), the Ninth Circuit had denied Arizona the benefit of Chapter 154, despite its compliance with all the express criteria in the statute, on the ground that appointment had not been timely. As the Barron Memo notes at page 12, quoting Senator Kyl, the specific intent of Congress in enacting § 2265(a)(3) is to forbid what was done in the *Spears* case.

A compelling reason why timeliness of appointment must not be made a criterion of qualification was noted by Congressman Flake in his remarks on the amendments made by the PATRIOT Act reauthorization bill, 151 Cong. Rec. E2639 (daily ed. Dec. 22, 2005). The delay in the *Spears* case was the result of a defense lawyer boycott of the system. A state can do everything that Chapter 154 requires—provide a right to appointed counsel, standards, compensation, and expenses—and still be prevented from making timely appointments by a collective action of the defense bar. Clearly, Congress's goal of creating an effective death penalty cannot be subject to derailing by the people who are adamantly opposed to any death penalty at all, but that is what the Ninth Circuit authorized in *Spears*.

The problem of delays in appointment of counsel possibly extending past filing deadlines is already being addressed in other ways. In *Rhines* v. *Weber*, 544 U. S. 269 (2005), the United States Supreme Court authorized a "stay and abey" procedure of filing in federal court to stop the running of the federal statute of limitations pending completion of state proceedings. The California Supreme Court authorized a similar procedure in *In re Morgan*, 50 Cal. 4th 932, 237 P. 3d 993 (2010).

Improving the timeliness of state habeas counsel appointments is desirable, of course, and discussion of how to make that improvement should continue. Adding a timeliness criterion for Chapter 154 certification, however, is not an available option. Congress has clearly and unambiguously forbidden it.

Proposed Change 5, that certifications "sunset" after some time period, is also patently illegal. The statute on its face provides in § 2261(b)(1) that it applies if "the Attorney General of the United States certifies that a State has established a mechanism...." Further, § 2265(a)(2) provides that the effective date of the certification is the date the mechanism was established. The statute clearly contemplates establishment of the mechanism and certification of its establishment as one-time events. Of course, if subsequent events in the state resulted in counsel no longer being appointed pursuant to the mechanism that originally qualified, that would be a ground not to apply Chapter 154 under § 2261(b)(2).

The notice raises the issue that a mechanism with fixed fees or expense caps might be adequate when certified but become inadequate over a period of years through inflation if the state never adjusts the amounts. Any such potential problem is far in the future. A mechanism for decertification can be considered by Congress or possibly by amendment of the regulation, but such distant concerns are no reason to hold up the already long-overdue implementation of Chapter 154. Certainly the drastic action of sunsetting certifications after a fixed number of years regardless of whether the state adjusts its compensation scales is uncalled for. If certifications are to be revisited in the future, the burden of going forward must be on the challenger to show the mechanism no longer complies, not on the state to show it still does. States are entitled by law to the certification upon showing they have complied, and Congress has not authorized an automatic revocation of that certification.

Proposed Change 4, that criteria for certification in the regulation be only presumptive and not binding, would defeat the only good reason for having substantive criteria in the regulation in the first place. Establishing a mechanism for appointment of counsel is no small or easy matter. It requires a state to invoke sometimes cumbersome machinery for enacting laws or promulgating rules. These mechanisms are often easier to block than to move into action. The good reason for having substantive criteria in the regulation (putting aside for now whether they are authorized) is to assure

states that they will only have to adopt statutes or rules once, knowing in advance what they need to do to qualify. This proposal suggests playing a game of bait-and-switch, telling a state that certain criteria will qualify, then telling the state its mechanism is not good enough anyway, requiring new legislation or rulemaking to qualify. This game offers more opportunities for those who do not want an effective death penalty to block the needed action at the state level, contrary to the central purpose of Congress in enacting AEDPA. That is very likely the true purpose of the proposal.

The commentary also suggests a much more pervasive role for the Department than Congress envisioned or authorized in the statute. The commentary suggests that the Attorney General would look beyond the mechanism established into subjective evaluations of whether the system as a whole is functioning "adequately." The Attorney General has no such broad supervisory authority over state governments under this statute. The statute envisions a simple yes or no determination of whether the state has established the requisite mechanism. The actual operation of the mechanism is a matter for the state courts.

Proposed Change 1 suggests that a state could copy exactly the standards that Congress has provided for federal courts and still be declared inadequate. Requiring three years postconviction experience rather than three years felony litigation experience, as Congress has deemed sufficient, would drastically and needlessly narrow the pool of available lawyers. That is very likely the true purpose of the proposal. Pointlessly severe restriction of the attorney pool combined with timeliness requirements under proposed change 3 are calculated to prevent states from qualifying.

While collateral review does have its own set of rules, learning the rules is not beyond the capacity of a competent lawyer. "Even if you are a practitioner of commercial litigation, you can learn, as I have learned, how to do these cases." Stewart Tabak, quoted in Quade, From Wall Street to Death Row, 14 Human Rights, No. 1, 18, 62 (1987). "I happened to hear the first case presented by one of these appointed lawyers who had never seen a habeas case before. One, he won his case. Two, I never read a better brief. Three, I never heard a better oral argument." John Godbold (with Abner Mikva), "You Don't Have to Be a Bleeding Heart," 14 Human Rights, No. 1, 22, 24 (1987). To say that three years postconviction experience is an indispensable prerequisite to competency is clearly wrong.

Whatever else may be said in the debate over standards of competency, the standard enacted by Congress for federal cases should be a safe harbor for states. The standard in 18 U. S. C. § 3599 stands as Congress's declaration of a sufficient standard for the purpose of federal cases. Standards of competence for state cases cannot be required to be any more restrictive.

Proposed Change 2 is the least important of the group. It addresses one of several methods of qualification, the one states are least likely to try to conform to. While we consider any attempt to make qualification even more difficult than was provided in the March 3, 2011 proposed regulations to be unwarranted, this is the least troublesome of the proposed changes. The so-called Innocence Protection Act is misnamed, ill-conceived, poorly drafted, and requires elements that are not at all necessary, or even desirable, for an effective appointment mechanism. Nonetheless, so long as this is only one of several alternatives, there is little harm in tracking the statute more closely.

The regulations published last year were considerably short of ideal and inferior to those published in 2008, but they were at least acceptable. The proposed changes in the latest notice are clearly illegal and usurp to the Attorney General a much larger authority than the statute grants. Adopting these changes can only lead to more litigation and delay before they are struck down. Delay may very well be the real agenda, as it so often is in capital litigation today.

While we would prefer the 2008 regulations, the swiftest course to implementation of Chapter 154 at this point would be to finalize the March 2011 regulations without further changes. That is therefore the course we suggest, and we suggest it be done immediately. There has been far too much delay already.

Sincerely yours,

Kent S. Scheidegger

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