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August 6, 2007

Ms. Kim Ball Norris
Senior Policy Advisor for Adjudication
Bureau of Justice Assistance
Office of Justice Programs
U.S. Department of Justice
810 7th Street, N.W.
Washington, DC 20531

Re: OJP Docket No. 1464, Certification Process for State Capital Counsel Systems

Dear Ms. Norris:

In response to the notice published June 6 at 72 Fed. Reg. 31217, the Criminal Justice Legal Foundation (CJLF) submits these comments on the proposed regulations for the certification process for state capital counsel systems. CJLF is a nonprofit organization formed to protect the rights of victims of crime and the law-abiding public in the criminal justice system. On the whole, the proposed regulations properly implement the intent of Congress. We have only a few minor suggestions for improvement.

Definition of "State postconviction proceedings"

Section 26.21 defines "State postconviction proceedings" in a way that limits them to a definition that Congress has abandoned. At the time of the Powell Committee Report, reprinted at 135 Cong. Rec. 24,694 (1989), state habeas corpus proceedings and proceedings under state replacements for habeas corpus (often patterned on 28 U. S. C. § 2255) almost always followed affirmance of the conviction and sentence on direct appeal. The Powell Committee draft therefore referred to "state post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal...." However, as AEPDA was moving through Congress, it was noted that some states, including California, no longer waited for the appeal to be decided before commencing the collateral review, and former § 2265 was added to the bill for "unitary" review.

Under AEDPA as enacted, the state procedure had to either chronologically follow the direct review or be "in the course of direct review." Despite the clear legislative history that this term referred to systems like California's, death row inmates in California claimed that the state's system was not "unitary review" because it did not provide " 'a single procedure affording identical substantive review and disposition of direct review and collateral claims.' " *Ashmus* v. *Calderon*, 935 F. Supp. 1048, 1069 (ND Cal., 1996), aff'd 123 F. 3d 1199 (CA9 1997), rev'd 523 U.S. 740 (1998).

Although the argument was rejected, the very fact that it could be credibly argued pointed out a weakness in AEDPA. Whether collateral review follows direct appeal or is concurrent with it and whether it is consolidated with direct review or a separate proceeding are issues that have no bearing on the propriety of applying Chapter 154. What matters is that the state have a procedure of challenging the judgment based on facts outside the appellate record and that it provides qualified counsel for that procedure.

For this reason, the amendment to AEDPA deleted both the separate sections for "unitary review" and the language in § 2261 implying that postconviction review had to follow affirmance on direct appeal. The statute now refers to postconviction review without limitation. "Postconviction review" simply refers to the procedure provided by state law or practice for collaterally challenging the judgment in a criminal case. The fact that it refers to collateral challenges and not direct appeal is indicated by common usage of the term and by the way Congress uses it in other sections of AEDPA. For example, the prohibition of habeas relief based on ineffective assistance of postconviction counsel, §§ 2254(i), 2261(e), does not preclude relief for ineffective assistance of direct appeal counsel.

One alternative would be to simply delete the definition. The term is well understood in capital litigation practice and requires no definition. It is used in several places in AEDPA, and the lack of a statutory definition has not caused difficulty. If a definition is thought to be needed, CJLF suggests that "State postconviction proceedings" be defined as "a mechanism provided by state law or practice for collateral attack on the judgment in capital cases."

Substantive requirements for qualification

Section 26.22 provides that certification depends on the State meeting the requirements in § 2261(c) and (d) and § 2265(a)(1) and only those requirements. CJLF agrees that this is a correct implementation of the statute. We comment only to answer some objections we anticipate may be raised by others.

First and foremost, in § 2265(a)(3) Congress flatly forbade the creation of any additional requirements not expressly stated in the chapter. This language should not have been necessary, but it was necessary to abrogate the Ninth Circuit's decision in *Spears* v. *Stewart*, 283 F. 3d 992, 1017 (CA9 2001). That decision added a timeliness requirement that is not in the statute. The difficulty of maintaining both high standards for counsel and prompt appointment has been a challenge for state courts. Congress was well aware of the problem as it considered AEDPA, see Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing before the

Committee on the Judiciary, United States Senate, S. Hrg. 104-428, 104th Cong., 1st Sess. 144, 151-153 (1995) (written question from Senator Biden to California Attorney General Lungren and response), yet no timeliness requirement was included in the final legislation. Congress's decision not to include such a requirement and its express prohibition on reading in implied requirements precludes adding it by regulation.

One might argue from the structure of the statute that certification by the Attorney General should only cover the requirements of § 2265(a)(3) and that the requirements of § 2261(c) and (d) should be considered at the time the state seeks to apply Chapter 154 to a particular case. Such a division of the mechanism review is not required by the language of the statute, however, and it would be contrary to the purpose of the amendment. The amendment was motivated by the cramped, hostile interpretation of Chapter 154 in the *Spears* case and in the *Ashmus* litigation. The Powell Committee believed that it was appropriate to resolve questions of the adequacy of the state's appointment mechanism through litigation, see 135 Cong. Rec., at 24,696, col. 2, and, with no other direction in the statute, that litigation fell to the same courts that would be impacted by the time limits that are the most important reform in the chapter. Regrettably, experience showed that fair application of the statute was not to be had there, and so Congress removed the decision on the qualifying mechanism to the Attorney General with review by the one federal circuit that has no stake in the outcome, the D.C. Circuit. To fulfill this purpose, it is necessary that all decisions as to whether the mechanism qualifies be made at the certification stage. The only question to be decided by the habeas court is whether counsel was appointed pursuant to the mechanism in the individual case.

As to the substantive requirements for qualified counsel, the proposed regulation appropriately gives as an example state standards which are equivalent to those Congress itself has provided for federal capital cases. Concern has been expressed in some quarters that a state could comply with the letter of the statute while violating the spirit by establishing standards for qualification that are so low as to be meaningless. While that is a theoretical possibility, it can be resolved in the certification process if and when a state with such low standards applies. In the meantime, the proposed regulation appropriately establishes a safe harbor of standards equal to those applicable in federal cases. An argument that Congress intended to require states to meet standards higher than Congress itself has provided would be frivolous.

Amendments to the Mechanism

Rules and statutes governing appointment may need to be adjusted from time to time. Rules for qualification of counsel, for example, may be found in practice to be

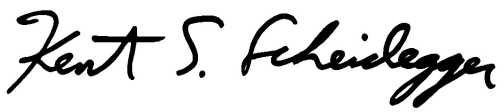
insufficient or overly restrictive. In some cases, an amendment may require a new certification procedure. However, the proposed regulation goes too far, in our view:

> "If a State with a certified mechanism amends governing State law to change its mechanism in a manner that *may* affect satisfaction of the requirements of § 26.22, the certification of the State's mechanism prior to the change *does not* apply to the changed mechanism, but the State may request a new certification by the Attorney General that the changed mechanism satisfies the requirements of § 26.22." (Emphasis added.)

The mere possibility that an amendment *may* affect satisfaction of the requirements is insufficient to support the conclusion that the prior certification necessarily *does not* apply. If a change is not material or if it goes in the direction of higher standards, then the mechanism is the same mechanism that was certified, and counsel appointed under the amendment "was appointed pursuant to that mechanism" for the purpose of § 2261(b)(2). While it would generally be prudent for the state to reapply, a new application cannot be required for changes which merely *may* affect satisfaction of the requirements.

CJLF appreciates the opportunity to comment on these regulations. We welcome the Department of Justice's attention to this matter and hope that the final regulations will be issued expeditiously after the end of the comment period. Eleven years after the passage of the Antiterrorism and Effective Death Penalty Act of 1996, its premier reform remains unimplemented. The states that have historically done the best job of providing postconviction counsel still do not have an effective death penalty, which was the purpose of the habeas reform section of the Act, due to this lack of implementation. As a result, the states which presently do not have an effective mechanism for appointment of postconviction counsel do not have the incentive to adopt one that Congress intended to create. Eleven years is far too long for this important reform to go unimplemented, and we hope that the Department of Justice will give this matter the priority it deserves.

Very truly yours,



Kent S. Scheidegger

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