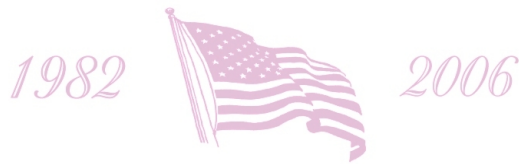


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September 24, 2007

Ms. Danica Szarvas-Kidd
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. Szarvas-Kidd:

The Criminal Justice Legal Foundation submits these additional comments in response to some of the other comments that have been submitted on the proposed regulations.

The American Bar Association

The American Bar Association (ABA) has submitted lengthy comments, with its primary complaint being that the regulations do not incorporate its own guidelines. To evaluate the ABA's comments it is important to recognize what the ABA is and what it is not. The ABA is a private organization representing those lawyers who choose to belong to it. Its members are not all of America's lawyers, most of its lawyers, or a representative sample of its lawyers.

The ABA misleadingly lists prosecutors first in describing its membership. In fact, prosecutors have had little influence in the organization for a very long time. The ABA's own advisory committee described the situation 15 years ago.

The ABA's unique status [as an umbrella organization representing a consensus] is in grave danger, at least as to criminal justice issues. Prosecutors have been increasingly alienated from the ABA, and many are publicly rejecting not merely the ABA's policies but the very legitimacy of the organization's role in promulgating those policies. Reduced to its simplest terms, most prosecutors now perceive that the ABA has become a captive to the narrow adversarial interests of the criminal defense bar.

The situation has only gotten worse since then. The ABA's comment letter in this proceeding has a tone sounding more like a criminal defense organization than a broad umbrella group. In point III. D. 4 of the letter, the ABA comments adversely on the Department of Justice's *amicus* briefs supporting the prosecution in criminal cases,

oblivious to the fact that for many years the ABA itself has supported the defendant against the prosecution in every Supreme Court case where it has appeared. If appearing as *amicus* consistently on one side raises a question regarding an institution's credibility as impartial, as the ABA's comment claims, then the ABA's *amicus* activity raises a grave question as to whether any weight at all should be given to its guidelines.

The ABA guidelines are a wish list compiled by advocates for one side. One need only read the acknowledgments in the published guidelines at 31 Hofstra L. Rev. 913, 914-915 to see that this was a purely defense-side project. The proposition that a set of guidelines established by advocates for one side should be given the force of law is extraordinary.

A government regulation elevating the ABA guidelines to the status of a legal requirement would be justified only if they represented the minimum standard that would comply with the requirements established by Congress, such that any deviation would be unacceptable. Respect for the federal structure of the United States requires that states have as much latitude as possible in structuring their own judicial systems, subject only to the requirements of the Constitution and laws of the United States. It is immediately apparent from the ABA guidelines that they contain limitations which are unnecessary to comply with any legal or constitutional requirement and are simply policy preferences of the defense bar.

One example will suffice. Both the guidelines and the attachment to the ABA comment would require a state to assign essential functions of its counsel appointment system to an organization run by defense lawyers. See Guideline 3.1 C.; ABA comment Appendix A, § III. C. Yet the defense bar as a whole is overwhelmingly opposed to the death penalty and does not want the system to work. They are opposed to the achievement of the central goal of the habeas reforms of AEDPA: an effective death penalty. That opposition creates a strong incentive to unnecessarily restrict the pool of lawyers who are deemed qualified, thereby slowing down the system and rendering it ineffective. To place an essential component of a system in the hands of people who do not want the system to work is simply foolish. To claim that doing so is essential and anything else is below legal minimums is preposterous.

Several specific points in the ABA comments also require a response. In Part II, the ABA claims that Congress required states to make "significant improvements" before qualifying for Chapter 154. No doubt, the purpose of the *quid pro quo* arrangement was to give an incentive to *some* states to make improvements, but Congress also indicated its belief that other states were already up to standard in 1996 and should have been rewarded for it. The retroactivity provision in the original AEDPA, § 107(c), would have made no sense unless some states' preexisting systems qualified.

In Part III. A. 1., the ABA contends that the regulations permit certification if the state mechanism provides for appointment of any counsel, not necessarily competent counsel. By the terms of the statute, the requirement that the mechanism be one for appointment of competent counsel is implemented by the requirement that the state system have standards of competency for appointment. See 28 U.S.C. § 2265(a)(1)(C). The regulations implement this requirement in § 26.22(d).

In Part III. A. 3., the ABA asks the Department of Justice to assume a power that Congress has specifically prohibited – levying additional requirements “other than those *expressly* stated in this chapter.” 28 U. S. C. § 2265(a)(3) (emphasis added). They ask for requirements regarding staffing and timeliness of appointment, astonishingly citing the notorious decision in *Spears v. Stewart*, 283 F. 3d 992 (CA9 2002) for the latter. If there is one decision more than any other that motivated the amendment to AEDPA, it is *Spears*. The Ninth Circuit’s decision to deny Arizona the benefits of Chapter 154 despite its compliance with all the requirements of the statute is the reason paragraph (a)(3) is in the amended statute. See 152 Cong. Rec. S1625 (2006) (Statement of Sen. Kyl). There is no authority to deny certification to any state that meets all of the *expressly* stated requirements of the chapter.

One point in the ABA comments does have merit. In Part III. C., the ABA correctly points out that the Attorney General is directed by statute to determine the date the qualifying mechanism was established. It would be helpful for the regulations to expressly provide that this determination will be part of the process.

In Part III. D. 1. c., the ABA contends that anyone opposing a request for certification should have 90 days or more to respond. That is too long. The capital defense bar in every state knows what the existing mechanism is. They already have their arguments as to why it does not qualify. If a new mechanism is created, the legislative or rulemaking process in the state will give notice that it is in the works, allowing time to prepare arguments against it. The Department of Justice should not forget that Congress moved the certification authority from the habeas courts to the Department because states which do, in fact, qualify have been wrongly denied the benefits of Chapter 154 for far too long. See 152 Cong. Rec. S1624-S1625 (Statement of Sen. Kyl). The Department has already extended the process with an overly generous extension of the comment period on the regulations. Unnecessary delay should not be built into the certification process. Thirty days is sufficient.

Finally, the ABA objects that there is no decertification procedure. Again, this is an argument that Congress has considered and rejected. See 152 Cong. Rec. S1625 (Statement of Sen. Kyl). The argument should be addressed to Congress. While there

are a number of lesser problems with the ABA comments, these are the primary ones. We also wish to respond to some of the other comments that have been submitted.

The Judicial Conference

The Judicial Conference objects that the proposed regulations “do not define *or set forth* any ‘standards of competency’ ” (emphasis added). This is a curious objection from a body that states in the same comment that it endorsed the Powell Committee report. Allowing the states to define their own standards subject to review for adequacy, rather than laying down uniform federal standards, was a major policy decision of the Powell Committee. The Committee decided that this approach was “more consistent with the federal-state balance.” See 131 Cong. Rec. 24,696, col. 2 (1989) (reprinting Powell Committee report). Congress codified this policy choice when it enacted the Powell Committee proposal, with modifications not relevant here, in AEDPA. The 2006 legislation merely removed the federal review from the habeas court and assigned it to the Department of Justice and the D.C. Circuit. It did not change the basic policy decision.

Establishing criteria for appointment of counsel is difficult. If rigid lines are drawn regarding how much and what kind of experience and training are required, some attorneys fully capable of providing quality representation will be arbitrarily excluded. Different, equally valid systems might make different trade-offs between experience, training, and supervision. A uniform national rule laid down by regulation could therefore arbitrarily exclude existing systems, and all cases already tried under those systems, even though the excluded systems are no less valid than others that are included. Such exclusion would be contrary to the clearly expressed intent of Congress, in providing retroactivity for both the original Chapter 154 and the 2006 amendment, to extend the benefit of the chapter to existing systems.

On the other hand, it is possible to, and the proposed regulation does, provide examples of criteria that clearly qualify. The first and most obvious is the set of criteria established by Congress itself for counsel in federal court. Congress could not seriously be thought to brand as inadequate for state courts the standards it adopted for federal courts. Five years admission and three years experience handling cases of the relevant type, see 18 U. S. C. § 3599(c), are sufficient. In addition, state judges should have the same latitude that Congress provided to federal judges in subdivision (d) of that section to appoint qualified counsel who happen to not meet rigid criteria.

The Constitution Project

The Department has also received comments from the Constitution Project, another anti-death-penalty advocacy group that poses as neutral. No detailed rebuttal is needed. The errors in these comments largely track those outlined above. They ask the Department to specify the additional substantive criteria that Congress has forbidden. They ask for rigid rules to be laid down in the regulations despite the likely effect of excluding valid existing systems. These comments are contrary to the statute for the reasons explained above.

The comments of the Constitution Project and a number of others imply that the Department of Justice should have a role in monitoring the operation of the state appointment mechanism. The statute does not provide for any such role. The Department's role under the statute is limited to certifying that the state has created the mechanism. See 28 U.S.C. § 2265(a). The habeas court then applies Chapter 154 if "counsel was appointed pursuant to that mechanism" or one of the alternative conditions is met. See § 2261(b)(2). Details of the operation of the state's mechanism are the responsibility of the state courts. Many of the comments reflect a cynical view of the state courts, implying that they will conspire to deprive capital defendants of their right under the mechanism to adequate representation. Such a view may have been justified 40 years ago, but AEPDA as a whole reflect Congress's growing confidence in the state courts. Congress decided to provide an incentive to the states to create a right to appointment and adequate compensation under state law and then leave the implementation of that right to the state courts. There is no authority to create by regulation a federal oversight that Congress declined to create by statute.

The Need for Swift Action

By enacting AEDPA, over 11 years ago, Congress made clear its determination that America have an effective death penalty. Yet after all these years this goal has still not been achieved. Unwarranted delays continue to delay and deny justice for the most heinous of crimes, in cases involving no reasonable doubt of guilt, and involving legal issues no more complicated than those handled expeditiously by those federal courts that voluntarily give these cases the priority they deserve. Some examples are given by Senator Kyl at 152 Cong. Rec. S1625-26.

A large and growing stack of empirical studies confirms what common sense has always told us. The death penalty has a deterrent effect and saves innocent lives if it is actually enforced. Excessive delays in enforcement reduce the deterrent and cost innocent lives. See Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 J. Legal Studies 283 (2004). While the greatest caution is in

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order when there is doubt of guilt, most cases involve no such doubt. The delay is killing innocent people.

Placing time constraints on the judiciary is not a step that Congress took lightly. It was a necessary response to a long and egregious record of obstruction and foot-dragging. The implementation of Chapter 154 is long overdue.

On behalf of the victims of crime and the law-abiding public, CJLF requests that the proposed regulations be finalized immediately, in largely the form proposed, and that the process for states to apply for certification be opened forthwith. It has already been much too long.

Very truly yours,

A handwritten signature in black ink that reads "Kent S. Scheidegger". The signature is written in a cursive, flowing style.

Kent S. Scheidegger

KSS:iha