THE CONSTITUTION PROJECT

*Safeguarding Liberty, Justice & the Rule of Law*



June 1, 2011

The Honorable Christopher Schroeder
Assistant Attorney General
c/o Regulations Docket Clerk
Office of Legal Policy
United States Department of Justice
950 Pennsylvania Avenue, NW
Room 4234
Washington, DC 20530

Re: Certification Process for State Capital Counsel Systems
Docket Number OJP (DOJ) 1540

Dear Mr. Schroeder:

The Constitution Project submits these comments in response to the Office of the Attorney General's notice of proposed rulemaking published in the Federal Register (Vol. 76, No. 42) on March 3, 2011, to implement certification procedures for States seeking to qualify for expedited Federal *habeas corpus* review procedures in capital cases under chapter 154 of title 28 of the United States Code.

The Constitution Project is a nonprofit organization in Washington, D.C., that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. The Constitution Project's Death Penalty Committee was created to address the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death. This bipartisan, blue-ribbon Committee comprises supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. Committee members are united in their profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been revealed to be deeply flawed.

Similarly, The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system from across the ideological spectrum. The Committee's seminal report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* includes findings on the right to counsel nationwide and 22 substantive recommendations for reform. The Committee's recommendations urge States to provide sufficient funding and oversight to comply with constitutional requirements and urge the

federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation. These two Committees believe that no one should be denied basic constitutional protections, including, most importantly, competent counsel with appropriate and relevant experience who have adequate resources and are fairly compensated.

The Constitution Project joins in the comments submitted by the Habeas Corpus Resource Center, and submits additional comments with respect to certain aspects of the proposed rule—namely, the provisions respecting compensation of appointed counsel and payment of litigation expenses.

The Constitution Project favors revision of the proposed rule because its provisions concerning the compensation of counsel may mandate the Attorney General to certify States that lack "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent [capital] prisoners." 28 U.S.C. § 2265(a)(1)(A).

In particular, we urge the Attorney General to remove section 26.22(c)(1)(iii) of the proposed rule, which states: "A State's provision for compensation will be deemed adequate if the authorized compensation is comparable to or exceeds—(iii) The compensation of appointed counsel in State appellate or trial proceedings in capital cases . . . ." 28 C.F.R. § 26.22(c)(1)(iii).

Additionally, the Attorney General should remove section 26.22(c)(2), which contains an overly vague exception to section 26.22(c)(1), allowing certification "if the State mechanism [for compensation] is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency." 28 C.F.R. § 26.22(c)(2).

Finally, the Attorney General should revise section 26.22(d), which requires States to provide for "payment of reasonable litigation expenses," to clarify the types of reasonable expenses that are commonly incurred in State postconviction proceedings and to provide a standard for evaluating reasonable compensation for expenses in those areas.

**Section 26.22(c)(1)(iii) Relies on Inadequate State Compensation Levels**

We urge the removal of section 26.22(c)(1)(iii) as a benchmark for compensation because, in most instances, appointed attorneys in State appellate and trial proceedings in capital cases receive compensation that is inadequate and is not reasonably calculated either to attract qualified attorneys to accept such assignments or to permit otherwise-qualified appointed attorneys to perform their duties competently. In most States, to pay counsel appointed in postconviction proceedings rates "comparable" to what appointed counsel are compensated for representing capital defendants in trial or appellate proceedings will be to support a level of representation that falls short of what will be required for competent representation as contemplated by Congress.

In promulgating the proposed regulation, the Attorney General stated, with respect to section 26.22(c)(1)(iii):

> The compensation afforded at the stages of trial and appeal [in capital cases] must be sufficient to secure competent attorneys to provide representation because effective

> legal representation of indigents is constitutionally required at those stages. Comparable compensation should accordingly be sufficient for that purpose at the post-conviction stage.

This reasoning is unsound because it assumes the conclusion. While there is no doubt that the States ***should*** provide compensation sufficient to assure constitutionally effective representation to criminal defendants, ***they do not***.

Contrary to the stated assumption, it is well known and widely documented that, in the various States, compensation for attorneys representing indigent criminal defendants is consistently inadequate. To use such compensation levels as an acceptable standard will not only be inappropriate but will serve to provide an incentive to the States to maintain the compensation levels for appointed counsel well below what is required by the Gideon v. Wainwright mandate.

The inadequacy of funding for indigent capital defense has been repeatedly—and eloquently—acknowledged by the Attorney General himself.

In his June 24, 2009 remarks to the American Council of Chief Defenders, Attorney General Holder confirmed that the compensation crisis in indigent defense has not ended, noting that in many cases "contract attorneys and assigned lawyers often receive compensation that doesn't even cover their overhead."[1]

On November 16, 2009, in a speech to the Brennan Center for Justice, Attorney General Holder described this indigent defense crisis as an issue of "personal importance and national conscience."[2] The Attorney General stated that "even when counsel is appointed the appointment is oftentimes not meaningful, not truly effective" because of "high caseloads," "resource problems," and "insufficient independence and oversight."[3] He went on to say:

> [T]here are still seven states in this great nation that contribute nothing to trial-level public defense, putting the burden on their counties. Because of a chronic lack of resources, many counties, in turn, rely on so-called 'flat-fee' contracts that pay lawyers regardless of how much (or more likely, how little) time the attorney spends on each case.[4]

While total dollars spent on indigent defense have increased over the last ten years, many State systems remain in crisis.[5] *Justice Denied* cites numerous examples of States whose severe

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[1] Available at http://www.justice.gov/ag/speeches/2009/ag-speech-090624.html.

[2] Attorney General Eric Holder, Remarks at Brennan Center for Justice Legacy Awards Dinner (Nov. 16, 2009), available at http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html [hereinafter "Brennan Center Remarks"].

[3] Id

[4] Id.

[5] The Spangenberg Project, State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008 7 (2010).

funding shortfalls and budget cutbacks threaten to further reduce the level of compensation received by attorneys engaged in indigent defense work.[6]

- In Florida, budget cuts have hit hard in many counties. In one county, the public defender's office laid off 10 attorneys and suffered a loss of 40 positions.[7] In Miami, lack of funding has led to a lawsuit challenging excessive public defender caseloads.

- In Missouri, the Office of the State Public Defender has inadequate resources to handle its rising caseload. As a result, the State has been involved in proceedings questioning the validity of the Public Defender Commission's caseload management.[8]

- In Kentucky, the legislature cut the 2009 indigent defense budget by $2.3 million, representing a 6.4% decrease.[9]

- In Minnesota, the legislature cut the Board of Public Defense's FY 2009 budget by $4 million, forcing the layoff of "13% of public defender staff (23 public defenders)."[10]

- In New York, the Commission on the Future of Indigent Defense Services concluded in a 2006 report that there was a "grievous lack of adequate funding by the state for [indigent criminal defense] services." The commission determined that "at an average cost-per-capita of $18.54, New York ranks substantially lower in payment per defendant than a number of states" and that "[s]uch under-funding has a deleterious impact on all aspects of indigent defense representation."[11]

- In Michigan, the State Appellate Defender Office found that "the state's failure to invest resources at the trial court level has contributed to the costly imprisonment of defendants whose convictions were later reversed."[12] The office reported that "since 1996, there have been approximately 50 successful *habeas corpus* actions based on ineffective assistance of counsel."[13]

The problem of inadequate compensation for appointed defense attorneys is particularly acute—and especially troubling—in the death penalty context. The issue is not novel. In 1990,

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[6] The Constitution Project, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel (2009), available at http://www.constitutionproject.org/pdf/139.pdf [hereinafter "Justice Denied"].

[7] See id. at 60.

[8] See Missouri Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870 (Mo. 2009) (en banc).

[9] See Justice Denied at 60.

[10] Id.

[11] Commission on the Future of Indigent Defense Services, Final Report to the Chief Judge of the State of New York 17 (2006).

[12] Brennan Center Remarks.

[13] Id.

after an exhaustive study, the ABA concluded that "the inadequacy and inadequate compensation of counsel at trial" was one of the "principal failings of the capital punishment systems in the states today."[14]

This funding situation—for both capital and noncapital cases—has not improved in recent times. In 2006, the Spangenberg Group, a nationally recognized research and consulting firm specializing in improving justice programs, conducted a study of indigent defense systems across the United States; the state-by-state figures reveal the severe deficiencies in compensation rates for appointed counsel.[15] In Alabama, the rate of compensation was increased to $40 per hour out-of-court and $60 per hour in-court, with a cap of between $1000 and $3500 depending on the type of case. As of 2004, the hourly rate in New York was increased to $75 per hour in all felony cases with a per-case cap of $4,400 – but only after a court found, in ruling on a suit brought by the New York County Lawyers' Association, that there was a "serious and imminent danger of ineffective assistance of counsel to indigent litigants in the New York City Family and Criminal Courts resulting from the inadequate compensation rates paid to assigned counsel."[16] In Virginia, the hourly rate is set at $90 per hour with a cap of $1,186 for felonies.

As a practical matter, the caps that these states impose reduce the effective hourly rate drastically. Experts estimate that capital cases require between 500 and 1000 hours of work to prepare and try.[17] A committee of the Judicial Conference of the United States found that in federal capital cases that went to trial, total attorney work per representation through the end of trial averaged ***1,889 hours***.[18] The ABA has credited studies consistently finding that "defending capital cases requires vastly more time and effort by counsel than noncapital matters," with one study concluding that the bill runs more than ***twelve times higher*** than in a noncapital ***homicide*** case.[19] If an attorney were to actually spend the estimated 500 hours or more that experts believe to be required for competent representation in capital cases, the caps imposed by these states would result in an effective hourly rate of between $2.30 and $8.80 an hour, not including overhead costs. (Appointed counsel would have to limit their work on each case to 15 to 50 hours—no more than one-tenth of the estimated 500 hours required to properly investigate and prepare for a capital case—if they wish to receive the stated hourly rates.)

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[14] Am. Bar Ass'n, Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 Am. U. L. Rev. 1, 79-92 (1990).

[15] See The Spangenberg Group, State and County Expenditures for Indigent Defense Services in Fiscal Year 2005 (December 2006).

[16] Id. at 22 n.10.

[17] Robert L. Spangenberg and Tessa J. Schwartz, The Indigent Defense Crisis is Chronic, 9 Sum. Crim. Just. 13, 15 (1994).

[18] Subcomm. on Federal Death Penalty Cases, Comm. on Defender Services, Judicial Conference of the United States, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (1998).

[19] Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 ed.).

At such hourly rates, it would be nearly impossible for appointed counsel to expend the necessary time and resources required for effective representation. Appointed counsel, to be considered competent, should have the requisite time and resources to comply with existing professional standards for an effective defense such as those promulgated by the ABA and the National Legal Aid and Defender Association ("NLADA"). Those standards require that counsel, to render "effective" assistance, must:

- be fully informed as to the rules and law relating to all stages of the process;
- obtain copies of any relevant documents that are available, including charging documents and law enforcement reports;
- interview his or her client to acquire, *inter alia*, information concerning pretrial release, information regarding the client's personal, criminal and employment history, the facts surrounding the charges against the client, and information about any possible witness who should be located;
- provide the client with information concerning the case such as the charges and potential penalties and a general procedural overview and progression of the case;
- advise the client on the direct and collateral consequences of various dispositions;
- attend and preserve the client's rights at presentment and arraignment and any preliminary hearing;
- conduct an independent investigation as promptly as possible, including securing information in the possession of the police and prosecution, visiting the scene of the offense, and securing the assistance of experts where necessary;
- seek discovery of items to supplement the factual investigation, such as potential exculpatory information, statements of the accused, and results and reports of relevant physical or mental examinations;
- explore the possibility and desirability of reaching a negotiated disposition of the charges; and
- prepare for grand jury proceedings, court appearances, pre-trial hearings, trial and sentencing by, among other things, conducting thorough legal research, filing and arguing pre-trial motions, developing tailored *voir dire* questions in advance of trial, developing an overall defense strategy for trial, preparing opening and closing statements, preparing a plan for direct and cross examinations of each potential witness, and developing a plan to achieve the least restrictive and burdensome sentencing alternative.[20]

Under the compensation regimes described above, even the most diligent attorneys, if they wish to earn a minimal, living wage, must forego some of necessary case preparation outlined above, and therefore cannot provide truly competent assistance to indigent defendants. According to an ABA report:

> Attorneys who do not receive sufficient compensation have a disincentive to devote the necessary time and effort to provide meaningful representation or even participate in the system at all. With fewer attorneys available to accept cases, the lawyers who provide services often are saddled with excessive caseloads, further hampering their ability to represent their clients effectively. Additionally, the lack of funding leads to

[20] See generally Am. Bar Ass'n, Eight Guidelines of Public Defense Related to Excessive Workloads (Aug. 2009); Am. Bar Ass'n, Standards for Criminal Justice: Providing Defense Services (3d ed. 1992); NLADA, Performance Guidelines for Criminal Defense Representation Guideline (1995).

> inadequate support services by decreasing the availability of resources for training, research, and basic technology, as well as the indispensable assistance of investigators, experts, and administrative staff.[21]

It simply cannot be that Congress, in enacting chapter 154, intended to allow States to take advantage of expedited *habeas* procedures merely by paying attorneys appointed in State postconviction proceedings an effective wage of $2.30 per hour, simply because appointed trial counsel for indigent defendants in that State receives $2.30. Obviously, to the extent this is a market rate for legal services, it will pay for services of only the very lowest caliber. Under such a standard, ordinarily-competent counsel may accept appointment in a capital case but is likely to spend so little time working on the case, relative to what is reasonably necessary, as to fall well short of competent performance.

If the Attorney General seeks to provide another method by which States may choose to comply with the compensation requirements of chapter 154, options preferable to the proposed subsection (c)(1)(iii) are readily available. For instance, one could look to the compensation standards set forth in the Innocence Protection Act, and certify States that

> ensure funding for the cost of competent legal representation by the defense team and outside experts selected by counsel, who shall be compensated . . . as follows: . . . Appointed attorneys shall be compensated for actual time and service, computed on an hourly basis and at a reasonable hourly rate in light of the qualifications and experience of the attorney and the local market for legal representation in cases reflecting the complexity and responsibility of capital cases.

42 U.S.C. § 14163(e)(2)(F)(ii)(II). This would parallel the Attorney General's use of 42 U.S.C. § 14163(e) as a yardstick for competency of counsel in section 26.22(b)(2) of the proposed regulation, and would be consistent with the use of 18 U.S.C. § 3599 in both the competency and compensation sections of the rule.

**Section 26.22(c)(2) Is Overly Vague**

The Constitution Project also urges the Attorney General to omit section 26.22(c)(2) of the proposed regulation, which allows a State to avoid satisfying each of the requirements in section (c)(1) if its scheme is "otherwise reasonably designed" to provide for the appointment of competent counsel. As the discussion above suggests, the vague catch-all provides insufficient guidance or incentive for States that already fail to provide reasonable compensation to appointed counsel at the trial and appellate level.

The history of State attempts to claim compliance with the requirements of chapter 154 demonstrates the importance of providing adequate guidance to the States through rulemaking. When left to their own devices, States have often failed to meet the reasonableness standard for compensation of appointed postconviction counsel and reimbursement of their litigation expenses. In the ten years during which States' chapter 154 compliance was evaluated by the federal courts rather than the Attorney General, States frequently attempted to claim opt-in status even when they clearly had made no efforts to meet the basic requirements of chapter 154. For example, Missouri tried to claim opt-in status despite having no mechanism for

[21] Am. Bar Ass'n, Gideon's Broken Promise: America's Continuing Quest for Equal Justice 7 (2004).

reimbursement of litigation expenses of postconviction counsel.[22] Maryland repeatedly tried to claim opt-in status despite its compensation rate that required counsel to operate at a loss, and even after being instructed twice by the federal district court that its compensation mechanism was inadequate.[23] In the only case in which a State was found to have created a mechanism in compliance with chapter 154, the State had ceased to employ the compliant mechanism by the time the case was heard.[24] In sum, the case law surrounding chapter 154 demonstrates that if given the opportunity, many States may intentionally or inadvertently undermine the intent of Congress by creating – or simply continuing to employ – inadequate standards for compensation of post-conviction counsel.

Moreover, vagueness regarding the reasonableness of compensation standards and the certainty of reimbursement for litigation expenses defeats the purpose of Congress in enacting chapter 154: to ensure that competent counsel are available and willing to represent indigent petitioners in postconviction proceedings. The case law shows that even when States created a mechanism for appointment and compensation of counsel for the purposes of opting-in to chapter 154, States frequently failed to apply their mechanisms in practice. If attorneys do not feel certain that they will be reasonably compensated for their time and litigation expenses in practice, they will not be willing to take these cases.

**Section 26.22(d) Does Not Provide Sufficient Detail**

Finally, we urge the Attorney General to add detail to section 26.22(d) of the proposed rule, which, as written, provides little guidance to States in determining whether their appointment mechanisms adequately provide for payment of "reasonable" litigation expenses.

Rejection of reasonable litigation expenses is a major part of the problem of insufficient compensation described above, particularly in the area of capital defense. A 1994 study by the Spangenberg Group found that payment for experts and other necessary capital litigation expenses are often denied, requiring attorneys who take on indigent capital defense cases to spend large sums out of pocket that are not reimbursed. According to a 1993 report prepared for the Texas Bar Foundation, the average out-of-pocket amount spent by counsel handling a post-conviction capital case was as high as $15,627.[25]

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[22] See Hall v. Luebbers, 341 F.3d 706 (8th Cir. 2003).

[23] In Baker v. Corcoran, 220 F.3d 276 (4th Cir. 2000), despite earlier district court decisions finding Maryland's compensation rates for postconviction counsel unreasonably low, see Colvin-El v. Nuth, No. AW 97-2520, 1998 U.S. Dist. LEXIS 9981 (D. Md. July 2, 1998); Booth v. Maryland, 940 F. Supp. 849 (D. Md. 1996), Maryland continued to claim that its compensation standards were reasonable and that it qualified for the benefits of chapter 154. Maryland continued to press these claims in the face of the district court's finding that Maryland's compensation standards required appointed counsel to operate at a loss of at least $41 per hour. The Fourth Circuit concluded that Maryland had not satisfied the statutory requirements, holding that "[a] compensation system that results in substantial losses to the appointed attorney or his firm simply cannot be deemed adequate." Baker, 220 F.3d at 286.

[24] See Spears v. Stewart, 283 F.3d 992, 996-97 (9th Cir. 2001) (dissent from denial of rehearing en banc).

[25] Robert L. Spangenberg and Tessa J. Schwartz, The Indigent Defense Crisis is Chronic, 9 Sum. Crim. Just. 13, 15 (1994).

To ensure that States seeking chapter 154 certification will create adequate mechanisms for reimbursement of litigation expenses, the Attorney General's rule should specify that reasonable litigation expenses include expenses for investigators, mitigation specialists, expert witnesses, and support personnel, and should provide a standard for evaluating reasonable compensation for each category. Such a standard should take into account the market rate charged by individuals in the State who possess the specialized skills necessary to perform each function (*e.g.*, investigations, mitigation and expert analysis, clerical and administrative support functions).

We thank you for the opportunity to submit these comments. If you have any questions, please contact me at the address and/or phone number provided.

Sincerely,

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