



Mark Brnovich
Attorney General

Office of the Arizona Attorney General
Solicitor General's Office/Capital Litigation Section

Lacey Stover Gard
(520) 628-6654
Lacey.gard@azag.gov

November 27, 2017

Stephen E. Boyd
Assistant Attorney General
Office of Legislative Affairs
United States Department of Justice
Main Justice Building, Room 1145
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

RE: Arizona's opt-in certification under 28 U.S.C. § 2265(a)

Dear Mr. Boyd:

I write in response to your recent letter notifying Arizona Attorney General Mark Brnovich that the Department of Justice has published a notice in the Federal Register of Arizona's request for certification under 28 U.S.C. § 2265 of its system for providing counsel in postconviction proceedings for prisoners subject to capital sentences. While Arizona's system has remained mostly the same since former Attorney General Tom Horne's April 18, 2013, certification request, I provide below updated information that takes into consideration the Department of Justice's regulations, promulgated after the prior certification request, as well as a few minor changes to Arizona's system for providing postconviction counsel in capital cases.

The statutory requirements under Section 2261 require a State seeking certification to (1) "establish[] a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death," 28 U.S.C. § 2265(a)(1)(A); (2) "offer counsel to all State prisoners under capital sentence," and ensure that the offered counsel did not also represent the prisoner at trial, unless the prisoner and counsel expressly request continued representation, 28 U.S.C. § 2261(c), (d); and (3) provide for the entry of an order by a court of record that (a) appoints counsel upon finding either that the defendant is indigent and accepts the offer of counsel or that the defendant is unable competently to accept or reject the offer, § 2261(c)(1); (b) finds that the defendant declined the offer of counsel with an understanding of its legal consequences, § 2261(c)(2); or (c) denies the appointment of counsel upon finding the defendant is not indigent, § 2261(c)(3).

In 1998, Arizona established procedures to appoint qualified counsel in capital post-conviction proceedings. Pursuant to both statute and rule, after the Arizona Supreme Court has affirmed an

indigent capital defendant's conviction and sentence on direct appeal, post-conviction counsel is automatically appointed. A.R.S. § 13-4041(B); Ariz. R. Crim. P. 32.4(c). As required by 28 U.S.C. § 2261(d), appointed counsel cannot have previously represented the defendant at trial or on direct appeal, unless both counsel and the defendant expressly request continued representation and waive all potential issues foreclosed by continued representation. A.R.S. § 13-4041(C)(3).

Arizona additionally provides for reasonable compensation for appointed counsel as required by 28 U.S.C. § 2265(a)(1)(A). Section 2265(a)(1)(A) sets no requirements for compensation and does not define "reasonable litigation expenses." Department of Justice regulations, however, provide that compensation is presumptively adequate for certification if it is comparable to or exceeds the compensation of:

1. Appointed counsel pursuant to 18 U.S.C. § 3599 in Federal habeas corpus proceedings reviewing State capital cases;
2. Retained counsel in State post-conviction proceedings in capital cases who meet State standards of competency;
3. Appointed counsel in State appellate or trial proceedings in capital cases; or
4. Attorneys representing the State in State post-conviction proceedings in capital cases, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses.

28 C.F.R. § 26.22(c)(1)(i)-(iv). Arizona is not required to meet these regulatory requirements to be certified under 28 U.S.C. § 2265 because they do not appear in the statute, and "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter." 28 U.S.C. § 2265(a)(3). But in any event, Arizona's mechanism for appointment of counsel provides for compensation that is more than adequate under the regulations.

Indigent capital defendants in Arizona are represented during post-conviction proceedings either by the Public Defender or other publicly-funded offices, or by appointed private counsel. A.R.S. § 13-4041(A), (B) & (C). Counsel employed by publicly-funded offices are compensated by salary. *See* A.R.S. § 13-4041(A). Appointed private counsel are compensated at an hourly rate of up to \$100 per hour. A.R.S. § 13-4041(F); Ariz. R. Crim. P. 6.7(a), (b). That rate meets 28 C.F.R. § 26.22(c)(1)(iii)'s requirements because \$100 per hour is also the rate payable to appointed counsel in Arizona appeals in capital cases. (Attachment, excerpt from Maricopa County Office of Public Defense Services, Contract for Indigent Representation.)

Further, the trial court overseeing the post-conviction proceeding is required to review and approve "all reasonable fees and costs." A.R.S. § 13-4041(G). And Arizona provides for payment of all reasonable litigation expenses, such as for investigative and expert assistance, as required by 28 U.S.C. § 2265(a)(1)(A) and 28 C.F.R. § 26.22(d). *See* A.R.S. § 13-4041(I) ("The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by § 13-4232.") Arizona regularly spends well over \$200,000 in attorney fees and litigation costs in capital post-conviction cases, and has spent over \$500,000 in more than one case.

Section 2265 also requires a State to appoint “competent” counsel in post-conviction proceedings. 28 U.S.C. § 2265(a)(1)(A). While the statute leaves “competent” undefined, Department of Justice regulations state that competency standards are presumptively adequate if they provide for appointment of counsel that:

1. Have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience; however, for good cause, a court may appoint other counsel whose background, knowledge, or experience otherwise enables them to properly represent the prisoner, with due consideration of the seriousness of the penalty and unique and complex nature of the litigation; or
2. Meet qualifications standards established in conformity with 42 U.S.C. § 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. § 14163(e)(2)(B), (D), and (E) are also satisfied.

28 C.F.R. § 26.22(b)(1)(i), (ii). The regulations further provide that standards not satisfying the first listed criteria are adequate only if they otherwise reasonably assure a level of proficiency appropriate for State post-conviction litigation in capital cases. 28 C.F.R. § 26.22(b)(2).

Once again, Arizona need not meet the regulation’s competency standards to be certified under 28 U.S.C. § 2265 since the statute does not define what qualifies as “competent” counsel and specifically states that “[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.” 28 U.S.C. § 2265(a)(3). But in any event, Arizona’s strict competency standards for appointed counsel exceed those of 28 C.F.R. § 26.22(b)(1).

To be eligible for appointment in an Arizona capital post-conviction proceeding, counsel must:

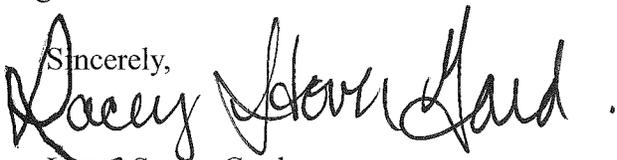
1. Have been member in good standing of the State Bar of Arizona for at least five years immediately preceding appointment;
2. Have practiced state criminal litigation for three years immediately preceding appointment;
3. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases;
4. Within three years immediately preceding appointment, have been lead counsel in a trial in which a death sentence was sought, or in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, *and* have prior experience as lead counsel in the appeal of at least three felony convictions and a trial or post-conviction proceeding with an evidentiary hearing. Alternatively, the attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which included first or second-degree murder convictions, *and* lead counsel in at least two felony trials or post-conviction proceedings with evidentiary hearings;

5. Have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense; and
6. Be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases.

Ariz. R. Crim. P. 6.8(a), (c).¹ These competency requirements, mandated by the Arizona Supreme Court, exceed more general competency requirements set out in A.R.S. § 13-4041(C) and 28 C.F.R. § 26.22(b)(1).

In 2002, before Congress amended 28 U.S.C. § 2265 to require the Attorney General of the United States to determine whether a State met the requirements for certification, the United States Court of Appeals for the Ninth Circuit found that, as of July 17, 1998, Arizona's postconviction procedures for capital defendants established a qualified procedure under 28 U.S.C. §§ 2261-65. *Spears v. Stewart*, 283 F.3d 992, 1007 (9th Cir. 2002). The court declined, however, to apply the expedited procedures in that case due to delay in the appointment of postconviction counsel.

As the court of appeals concluded more than 15 years ago, it is clear that Arizona's post-conviction mechanism for appointing qualified counsel in capital cases meets the statutory requirements for certification. Given the Ninth Circuit's finding that Arizona satisfies Congress' requirements, Arizona should be certified to have "opted-in" to the accelerated capital-case review procedures provided by AEDPA. I would be happy to address any questions you may have regarding Arizona's mechanism for appointing counsel in capital post-conviction proceedings.

Sincerely,


Lacey Stover Gard
Chief Counsel
Capital Litigation Section
Office of the Arizona Attorney General

Attachment
6622833

¹ In exceptional circumstances, and with consent of the Arizona Supreme Court, attorneys who do not meet these requirements may be appointed, provided that the attorney's experience, stature, and record enables the court to conclude that the attorney's ability significantly exceeds the standards set forth above and that the attorney associates with a lawyer who meets the rule's standards. Ariz. R. Crim. P. 6.8(d). However, all appointed counsel must be familiar with, and guided by, the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases. *Id.*

ATTACHMENT

