



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT 12 2021

The Honorable Mark Brnovich
Attorney General
400 West Congress
South Building, Suite 315
Tucson, AZ 85701

Dear Attorney General Brnovich:

I am writing in regard to Arizona's application for certification, pursuant to Chapter 154 of Title 28 of the United States Code (Chapter 154) and its implementing regulations at Subpart B of Part 26 of Title 28 of the Code of Federal Regulations (Final Rule), of the State's mechanism for appointing counsel in postconviction proceedings for indigent prisoners subject to capital sentences. You were notified of former Attorney General William Barr's certification of Arizona's capital counsel mechanism by letter dated April 13, 2020, and the statement of certification and supporting analysis (Certification) was published in the Federal Register on April 14, 2020. 85 Fed. Reg. 20,705. As permitted by Chapter 154, a group of Arizona capital prisoners and the Arizona Federal Public Defender's Office instituted a petition for review of the Certification on April 29, 2020 in the U.S. Court of Appeals for the District of Columbia Circuit. *See* 28 U.S.C. § 2265(c). On February 10, 2021, the U.S. Department of Justice (Department) informed the court that then-Acting Attorney General Monty Wilkinson had determined that aspects of the Certification may benefit from further consideration or further development of the record. On April 28, 2021, the Department moved for a voluntary remand of the Certification to facilitate further development of the administrative record and reconsideration of the Certification by Attorney General Merrick Garland. The court granted that motion on May 26, 2021.

In the course of this ongoing review, the Department has determined that additional information is necessary to assess whether Arizona's capital counsel mechanism satisfies the requirements imposed by Chapter 154. Therefore, please provide answers to the questions below as soon as reasonably possible.

1. For a State to secure certification of its capital counsel mechanism, Chapter 154 requires, *inter alia*, that the State have "established a mechanism for the . . . compensation . . . of competent counsel." 28 U.S.C. § 2265(a)(1)(A). The Final Rule provides that "[a] State's provision for compensation is presumptively adequate if the authorized compensation is comparable to or exceeds" one of four specified benchmarks, 28 C.F.R.

2. § 26.22(c)(1)(i)-(iv), or “if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency,” *id.* § 26.22(c)(2). With respect to private counsel appointed pursuant to Arizona’s capital counsel mechanism, former Attorney General Barr stated that “the information [he had] received from the State and public comments [was] insufficient to enable [him] to determine whether Arizona’s mechanism for compensation has satisfied the benchmarks of section 26.22(c)(1) because it does not include comparative information for the benchmarks’ reference points—such as compensation of trial and appellate counsel, and compensation of attorneys representing the State in postconviction proceedings—for all parts of the State throughout the period of the certification.” 85 Fed. Reg. 20,714.

The Department notes Arizona’s view that a State need not provide information sufficient to evaluate its capital counsel mechanism by reference to the benchmark criteria because (1) the benchmarks are additional requirements not found in the statutory text of Chapter 154, and (2) Section 26.22(c)(2) provides an alternative basis on which a State’s mechanism may satisfy Chapter 154’s compensation requirement. As the Department has made clear in the past, the benchmark criteria outlined in the Final Rule are reflective of the Department’s interpretation of the statutory requirements imposed by Congress in Chapter 154. And, although the Final Rule allows that “[p]rovisions for compensation not satisfying the benchmark criteria” may nevertheless “be deemed adequate” so long as they are “reasonably designed to ensure the availability for appointment of [qualifying] counsel,” 28 C.F.R. § 26.22(c)(2), the data points informing the benchmark criteria remain relevant to the determination whether the State’s compensation scheme is “reasonably designed” toward that end, as “mechanisms seeking to qualify under paragraph (c)(2) that appear likely to provide for significantly lesser compensation compared to the benchmark levels risk being found inadequate under chapter 154,” 78 Fed. Reg. 58,180. Accordingly, as part of this review, the Department requests that you provide comparative information for the benchmarks’ reference points sufficient to enable a thorough analysis of Arizona’s compensation system for all parts of the State throughout the full period for which Arizona seeks certification.

3. Notwithstanding the lack of information noted above, the Certification determined that Arizona provided compensation in satisfaction of Section 26.22(c)(2) through a statute authorizing up to \$100 per hour for postconviction legal services. A review of the record indicates that commenters argued that the figure was too low to attract competent counsel. Please respond to the following:
 - a. The Certification calculated that an attorney working full time on one case for one year at the rate of \$100 per hour would be compensated a gross amount of \$200,000. Accounting for overhead expenses of 40 percent of total income, as suggested by a commenter, the Certification calculated that the attorney would still receive net compensation approximating \$120,000 per year. Commenters nonetheless argued that the figure of \$100 per hour was insufficient considering the needs of a modern

legal practice, and several attorneys who had worked on postconviction cases submitted declarations indicating they could not maintain a legal practice at that compensation level. Notably, no attorney opined in the public comments that the \$100-per-hour figure was adequate. Further, the Maricopa County Office of Public Defense Services, Contract for Indigent Representation, which Arizona included with its November 27, 2017 letter and linked in its October 16, 2018 letter, notes that lead counsel in capital appeals are actually paid \$140 per hour (that is, \$40 more than the \$100 maximum rate for appointed counsel in a post-conviction case). *See* Section IV, Consideration, <https://www.maricopa.gov/DocumentCenter/View/29608/Adult-Criminal-Attorney-Services-09020-ROQ?bidId=>. Please provide further information regarding the sufficiency of the \$100 maximum hourly rate for maintenance of a competent postconviction legal practice, such as a detailed break-down of costs associated with such a practice and an explanation of how a \$100 maximum hourly rate for postconviction capital representation would cover those costs while providing an adequate financial incentive to attract competent counsel. In providing this information, please also consider whether and how the cost of living, the median income, and other related and relevant metrics have changed in Arizona since the \$100 maximum rate went into effect.

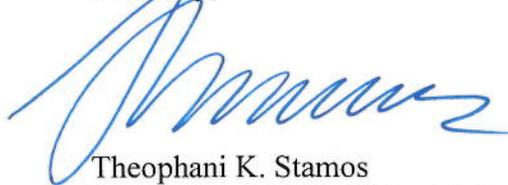
- b. The Certification, based on the figures noted above, determined that the \$100 maximum hourly rate was sufficient even considering the effects of inflation since its establishment by statute in 1998. In support of that conclusion, the Certification noted that Arizona's maximum rate exceeded that offered by the State of Maryland, whose own capital counsel mechanism—which imposed a \$30-per-hour limit for out-of-court time and \$35-per-hour for in-court time, subject to an overall cap of \$12,500—had been found inadequate by the U.S. Court of Appeals for the Fourth Circuit in *Baker v. Corcoran*, 220 F.3d 276 (4th Cir. 2000). However, the comparison to a clearly inadequate figure does not necessarily establish that the \$100 figure is, for its own part, adequate. As to the effect of inflation, as of August 2021, the equivalent purchasing power of \$100 in 1998 would be \$167.63 today, according to the Consumer Price Index (CPI) Calculator of the U.S. Bureau of Labor Statistics. *See* https://www.bls.gov/data/inflation_calculator.htm. The average annual inflation rate has been 2.02% in that time period. *See* <https://www.inflationtool.com/us-dollar/2002-to-present-value>. Meanwhile, the inflation rate for legal services has risen even faster over that period, averaging 3.41% per year. *See* <https://www.in2013dollars.com/Legal-services/price-inflation> (reporting the CPI for legal services from the U.S. Bureau of Labor Statistics). Notably, the inflation-adjusted figure for Arizona's maximum hourly rate—roughly \$167 per hour—is within the range of hourly fees for postconviction legal services paid in federal capital (\$195) and non-capital (\$152) cases. Please explain why Arizona submits that, assuming that a \$100 maximum hourly rate was sufficient compensation when established in 1998, that figure (1) is adequate to attract competent counsel at the present time notwithstanding the diminution in value over the intervening period and (2) would remain adequate throughout the period during which a certification would

be effective. *See* 28 C.F.R. § 26.23(e) (providing that “[a] certification remains effective for a period of five years after the completion of the certification process by the Attorney General and any related judicial review”).

4. In the supplemental information provided by your letter to the Department dated October 16, 2018, you included three cases—*State v. Andriano*, Maricopa County CR 2000-096032; *State v. Garza*, Maricopa County CR 1999-017624; and *State v. Carreon*, Maricopa County CR 2001-090195—in which attorneys working pro bono provided legal services to the defendants. Commenters pointed out that the need for pro bono representation in these cases demonstrated that competent counsel could not be secured at the \$100-per-hour rate pursuant to Arizona’s capital counsel mechanism. Do you agree with this criticism? If not, please explain the relevance, if any, of pro bono legal services to the State’s compliance with the requirements of Chapter 154.

If there is any additional information relevant to the certification of Arizona’s capital counsel mechanism that you would like to submit, we welcome you to do so at this time. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,



Theophani K. Stamos
Intergovernmental Affairs Liaison