

STATE OF TENNESSEE

Office of the Attorney General



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U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Submitted via Email to alida.kass@usdoj.gov

Re: Tennessee's Request for Certification under 28 U.S.C. § 2265

Dear Ms. Kass,

Consistent with Executive Order 14164, dated January 20, 2025, for “Restoring the Death Penalty and Protecting Public Safety,” and the Attorney General’s guidance memorandum, dated February 5, 2025, for “Reviving the Federal Death Penalty”—and pursuant to 28 U.S.C. §§ 2261 and 2265 and 28 C.F.R. §§ 26.20, et seq.—the State of Tennessee now seeks Attorney General certification for limited federal habeas corpus review in Tennessee’s capital cases. Tennessee “has established 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,” and it “provides standards of competency for the appointment of counsel” in those proceedings. 28 U.S.C. § 2265(a)(1).

As shown more fully below, Tennessee has long provided a state-court process for collateral review of a criminal conviction. *State v. Whitehead*, 402 S.W.3d 615, 621 n.2 (Tenn. 2013). Since at least 1995, Tennessee has authorized the appointment of competent counsel for all indigent capital defendants, upon request, when collaterally challenging their convictions and death sentences in Tennessee’s state courts. Tennessee has likewise provided adequate compensation and expense payment to counsel appointed in those cases. Appointed counsel has largely come from Tennessee’s post-conviction defender office, established in 1995 as exclusive and dedicated counsel for Tennessee’s capital defendants in its state-court collateral review process.

Tennessee fully satisfies all relevant statutory and regulatory criteria for certification. In view of Tennessee’s fulsome state-court collateral review process for capital cases and its mechanism for providing counsel within it—and as authorized by 28 C.F.R. § 26.21—I respectfully request certification of Tennessee’s capital counsel mechanism.

I. Criteria for Attorney General Certification of State Mechanism for Appointment, Compensation, and Expense Payment of Competent Counsel in State Court Collateral Review of Capital Cases

A state may request certification from the Attorney General when the state (1) “has established 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” and (2) “provides standards of competency for the appointment of counsel” in those proceedings. 28 U.S.C. § 2265(a)(1). A state’s “mechanism for the appointment, compensation, and reimbursement of counsel . . . must offer counsel to all State prisoners under capital sentence.” 28 U.S.C. § 2261(c).

The mechanism for appointing counsel “must provide for the entry of an order by a court of record” noting (1) the appointment of counsel, upon a finding of indigency and a finding of the prisoner’s acceptance of appointed counsel or incompetency to accept or reject the appointment, (2) the prisoner’s rejection of appointed counsel, made while understanding the legal consequences of rejection, or (3) the denial of appointed counsel, because the prisoner is not indigent. 28 U.S.C. § 2261(c). An indigent prisoner is one “whose net financial resources and income are insufficient to obtain qualified counsel.” 28 C.F.R. § 26.21. To qualify as an “appointment” of counsel, the provision of counsel must occur in a “reasonably timely” manner, in light of the time limitations for seeking state and federal collateral review and the time required for developing and presenting post-conviction claims. 28 C.F.R. § 26.21. Appointed counsel may not “have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.” 28 U.S.C. § 2261(d).

A state’s standards for appointing competent counsel in capital post-conviction cases are presumptively adequate if the standards conform to certain existing federal statutory standards for appointing counsel in state capital cases¹ or if they meet or exceed the following criteria:

Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience. But a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation.

¹ The regulation references 42 U.S.C. § 14163(e), which has been reclassified as 34 U.S.C. § 60301. That statute authorizes the Attorney General to “award grants to States for the purpose of improving the quality of legal representation provided to indigent defendants in State capital cases.” 34 U.S.C. § 60301(a).

28 C.F.R. § 26.22(b)(1). “Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.” 28 C.F.R. § 26.22(b)(2).

Regarding the compensation of appointed counsel in capital post-conviction cases, a state’s compensation system is presumptively adequate if it is comparable to or exceeds one of the following:

1. The compensation of counsel appointed pursuant to 18 U.S.C. § 3599 in Federal habeas corpus proceedings reviewing capital cases from the State;
2. The compensation of retained counsel in State postconviction proceedings in capital cases who meet State standards of competency sufficient under [28 C.F.R. § 26.22(b)];
3. The compensation of appointed counsel in State appellate or trial proceedings in capital cases; or
4. The compensation of attorneys representing the State in State postconviction 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). “Provisions for compensation not satisfying the benchmark criteria in paragraph (c)(1) of this section will be deemed adequate only if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency sufficient under” 28 C.F.R. § 26.22(b). 28 C.F.R. § 26.22(c)(2).

As for the payment of expenses, the state “must provide for payment of reasonable litigation expenses of appointed counsel,” including, but not limited to, “payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel.” 28 C.F.R. § 26.22(d). “Provision for reasonable litigation expenses may incorporate presumptive limits on payment only if means are authorized for payment of necessary expenses above such limits.” 28 C.F.R. § 26.22(d).

From the above, a state must show (1) that it has established a mechanism for appointing, compensating, and paying expenses for competent counsel for indigent capital defendants in state-court post-conviction cases and (2) that it has competency standards for the appointment of such counsel. The state’s mechanism must require an individualized assessment of indigency and the defendant’s acceptance (or knowing rejection) of appointed counsel. It may not require prior counsel to serve as post-conviction counsel absent a joint request by the defendant and prior counsel. A state’s competency standards are presumptively adequate under certain benchmark criteria, but standards not meeting those criteria are still adequate if they reasonably assure an appropriate level of proficiency by counsel in capital post-conviction litigation. Likewise, a state’s compensation system is presumptively adequate under certain circumstances, but if the system

does not meet the presumption, it is still adequate if it ensures the availability of competent counsel. Finally, the mechanism must pay or reimburse reasonable litigation expenses, including those for investigative and expert services. If it places presumptive limits on payments, then it should allow for payment of necessary expenses above those limits.

II. Application to Tennessee’s Provision of Counsel in Capital Post-Conviction Cases

In view of its robust procedures for the state-court collateral review of capital cases and its provision of specialized counsel in that review, Tennessee readily qualifies for certification under the above-referenced statutory and regulatory requirements. As shown, Tennessee has established a mechanism for the appointment, compensation, and expense-payment of counsel for indigent criminal defendants in all capital collateral review cases. Likewise, Tennessee provides competency standards in the appointment of counsel in those cases.

A. Post-Conviction Review in Tennessee

In Tennessee, a criminal defendant may collaterally challenge a conviction by filing a verified petition for post-conviction relief within one year of the judgment’s finality. Tenn. Code Ann. §§ 40-30-102(a) and 40-30-104(e). Post-conviction relief is authorized “when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. The petition “shall include allegations of fact supporting each claim for relief set forth in the petition and allegations of fact explaining why each ground for relief was not previously presented in an earlier proceeding.” Tenn. Code Ann. § 40-30-104(e). Upon the petition’s filing, the trial court must conduct a preliminary consideration of the petition within 30 days. Tenn. Code Ann. § 40-30-106(a). At that stage, the petition “shall be dismissed” only if it is untimely, premature, or successive or “[i]f the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined.” Tenn. Code Ann. § 40-30-106(b) and (f); *see also* Tenn. Sup. Ct. R. 28, § 5(F).² Otherwise, the trial court shall enter a preliminary order for further proceedings on the petition and at that time “shall appoint counsel” if the petitioner is unrepresented, is indigent, and requests counsel. Tenn. Code Ann. §§ 40-30-106(i) and 40-30-107(b)(1); Tenn. Sup. Ct. R. 28, § 6(B)(3).

Following this preliminary consideration, the petitioner, through counsel, may file an amended petition or notice of no amended petition, and the State must file a response to the petition and any amended petition. Tenn. Code Ann. §§ 40-30-107(b)(2) and 40-30-108(a). Unless the trial court, from a review of the pleadings and the record, “determines conclusively that the petitioner is entitled to no relief,” the court must set an evidentiary hearing. Tenn. Code Ann. § 40-30-109(a). “If a colorable claim is stated, the court shall enter an order . . . setting an evidentiary hearing.” Tenn. Sup. Ct. R. 28, § 6(B)(6).

² Outside of two narrow exceptions, “[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.” Tenn. Code Ann. § 40-30-106(g). “A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing” in which the petitioner was “afforded the opportunity to call witnesses and otherwise present evidence.” Tenn. Code Ann. § 40-30-106(h).

Discovery consistent with state criminal discovery rules is expressly authorized. Tenn. Code Ann. § 40-30-109(b). “[T]he state shall provide to petitioner discovery of all those items deemed discoverable under Rule 16, Tennessee Rules of Criminal Procedure, if relevant to the issues raised in the post-conviction petition, and shall provide any other disclosure required by the state or federal constitution.” Tenn. Sup. Ct. R. 28, § 6(C)(7). In addition, “[e]ach party shall have the right to subpoena witnesses for appearance at the evidentiary hearing.” Tenn. Sup. Ct. R. 28, § 8(C)(3). Investigative and expert services “necessary to ensure that the constitutional rights of the defendant are properly protected” are available for indigent petitioners in capital post-conviction cases. Tenn. Sup. Ct. R. 13, § 5(a)(1)(B); *see also* Tenn. Sup. Ct. R. 28, § 6(B)(8).

At the evidentiary hearing, the petitioner must testify unless confined out-of-state, in which case the petitioner may seek submission of an affidavit or deposition. Tenn. Code Ann. § 40-30-110(a) and (b). The petitioner must prove factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). After the hearing, the trial court must make written findings of fact and conclusions of law. Tenn. Code Ann. § 40-30-111(b). An order granting or denying post-conviction relief is appealable to the Tennessee Court of Criminal Appeals. Tenn. Code Ann. § 40-30-116.

B. Appointment of Counsel

Tennessee has enacted a mechanism for appointing counsel for all indigent capital defendants upon initiation of the state-court post-conviction review process, fully consistent with 28 U.S.C. § 2261(c). This provision of counsel is “reasonably timely” under 28 C.F.R. § 26.21 in view of time limitations on state and federal collateral review and the time necessary to develop and present collateral review claims. On the first point, a timely, properly filed petition for post-conviction relief tolls the one-year statute of limitations for filing a subsequent federal habeas corpus petition under 28 U.S.C. § 2244(d)(2). *Pinchon v. Myers*, 615 F.3d 631, 641 (6th Cir. 2010).

On the second point, the state-court provision of counsel occurs before the development and presentation of all collateral review claims. After a defendant files an initial post-conviction review petition stating the factual basis of a proper claim for relief, newly appointed counsel then must file an amended petition or a notice that no amended petition will be filed. Tenn. Code Ann. § 40-30-107(b)(2).³ Even where the initial filing is *pro se*, “[n]o pro se petition shall be dismissed for failure to follow the prescribed form until the court has given petitioner a reasonable opportunity to amend the petition with the assistance of counsel.” Tenn. Sup. Ct. R. 28, § 6(B)(4)(b). Appointed counsel may also file successive amendments to the petition raising additional constitutional claims. *Smith v. State*, 357 S.W.3d 322, 358 n. 6 (Tenn. 2011) (noting that trial court has “discretion to allow free amendment of post-conviction petitions”). Indeed, the

³ Even when an initial, *pro se* petition for post-conviction relief fails to state the factual basis to support a claim, the trial court may allow the petitioner to file an amended petition prior to the court’s preliminary consideration of the petition. Tenn. Code Ann. § 40-30-106(d). If that amended petition is likewise incomplete, then the trial court “shall determine whether the petitioner is indigent and in need of counsel,” and the court “may appoint counsel and enter a preliminary order if necessary to secure the filing of a complete petition.” Tenn. Code Ann. § 40-30-106(e).

court may allow amendments at the evidentiary hearing itself “and shall do so freely when the presentation of the merits of the cause will otherwise be subserved.” Tenn. Sup. Ct. R. 28, § 8(D). Even on appeal, Tennessee’s appellate courts can consider an unasserted claim that was “argued at the post-conviction hearing and decided by the post-conviction court without objection.” *Holland v. State*, 620 S.W.3d 450, 458 (Tenn. 2020). The provision of counsel early in the litigation, well before various opportunities to develop and present claims pass, is thus “reasonably timely.”

Tennessee’s mechanism for appointing counsel in post-conviction review cases provides for an individualized determination of indigency. When assessing indigency in these cases, the trial court utilizes the same standards that govern the appointment of counsel during a criminal prosecution. Tenn. Code Ann. § 40-30-115. Those standards, codified in Tenn. Code Ann. §§ 40-14-201, et seq., define an “indigent person” as “any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney.” Tenn. Code Ann. § 40-14-201(1). This fully matches the definition of an “indigent prisoner” within 28 C.F.R. § 26.21.

“Whenever an accused informs the court that the accused is financially unable to obtain the assistance of counsel, it is the duty of the court to conduct a full and complete hearing as to the financial ability of the accused to obtain the assistance of counsel and, thereafter, make a finding as to the indigency of the accused.” Tenn. Code Ann. § 40-14-202(b). The defendant must submit a uniform affidavit of indigency, and all statements by the defendant supporting the requested appointment of counsel must be made “by sworn testimony in open court or written affidavit sworn to before the judge.” Tenn. Code Ann. § 40-14-202(b) and (i). The trial court must weigh various considerations about the petitioner’s income and assets and the nature and costs of the expected services. Tenn. Code Ann. § 40-14-202(c). The withdrawal of appointed counsel is only by leave of court, and successor counsel shall be immediately appointed. Tenn. Code Ann. § 40-14-205(a).

Consistent with 28 U.S.C. § 2261(c), Tennessee’s provision for appointed counsel in capital post-conviction review cases requires entry of an individualized order by a court of record upon an assessment of indigency and a petitioner’s acceptance of counsel. As noted above, the trial court during its preliminary consideration of a post-conviction review petition “shall appoint counsel” if an unrepresented petitioner is indigent and if that petitioner requests counsel. Tenn. Code Ann. §§ 40-30-107(b)(1). Under Tenn. Code Ann. § 40-14-202(a), if a criminal defendant is not represented by counsel, is indigent, and “has not competently waived the right to counsel,” then the court shall appoint counsel for the defendant. *See also* Tenn. Sup. Ct. R. 13, § 1(e)(3) (“Upon finding a party indigent, the court shall enter an order appointing counsel. If the indigent party rejects the offer of appointment of counsel with an understanding of the legal consequences of the rejection, the court shall enter an order stating the indigent party refused representation.”). Tennessee’s individualized indigency assessment and counsel appointment process fully comports with 28 U.S.C. § 2261(c).

Once an indigent capital defendant qualifies for appointed counsel in a post-conviction review case, the office of the post-conviction defender, established in 1995, is presumptive counsel for that appointment. Tenn. Code Ann. § 40-30-201. This office “provide[s] for the representation of any person convicted and sentenced to death in this state who is unable to secure counsel due to indigence.” Tenn. Code Ann. § 40-30-202(a). Its “exclusive function . . . [is] to provide legal

representation to persons convicted of capital offenses.” Tenn. Code Ann. § 40-30-205(g). And its “primary responsibility” is to represent an indigent capital defendant “for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against that person in state court.” Tenn. Code Ann. § 40-30-206(a).⁴ In fact, the post-conviction defender often assists capital defendants in preparing and filing an initial post-conviction review petition, prior to formal appointment as counsel. *Jones v. State*, No. W2020-01347-CCA-R10-PD, 2022 WL 601074, at *1 (Tenn. Crim. App. Mar. 1, 2022) (no perm. app. filed); *Davidson v. State*, No. E2019-00541-CCA-R3-PD, 2021 WL 3672797, at *12 (Tenn. Crim. App. Aug. 19, 2021), *perm. app. denied* (Tenn. Dec. 8, 2021); *Jordan v. State*, No. W2015-00698-CCA-R3-PD, 2016 WL 6078573, at *79 (Tenn. Crim. App. Oct. 14, 2016), *perm. app. denied* (Tenn. Jul. 19, 2017).

If the post-conviction defender represents multiple capital defendants and determines that “the interests of those persons are so adverse or hostile that they cannot all be counseled by the post-conviction defender or the post-conviction defender’s staff without conflict of interest,” then separate counsel should be appointed for those persons. Tenn. Code Ann. § 40-30-207. “[T]he statutory right to counsel in a post-conviction case contemplates a conflict-free counsel,” and this statute “provides certain assurances of conflict-free counsel.” *Frazier v. State*, 303 S.W.3d 674, 680, 682 n.5 (Tenn. 2010); *see also* Tenn. Sup. Ct. R. 13, § 1(e)(4)(A) (including “the state post-conviction defender’s office” among list of available counsel for appointment to indigent defendant “if qualified pursuant to this rule and no conflict of interest exists”).

Finally, Tennessee’s system for appointing counsel in capital post-conviction cases disallows the appointment of counsel who previously represented the defendant at trial, absent an affirmative waiver by the petitioner, fully consistent with 28 U.S.C. § 2261(d). The post-conviction defender may not represent a capital defendant on collateral review if the post-conviction defender represented the defendant on direct appeal. Tenn. Code Ann. § 40-30-205(h). Also, Tenn. Sup. Ct. R. 13, § 3(h) disallows the appointment of counsel in a capital post-conviction case who “previously represented the defendant at trial or on direct appeal in the case for which the appointment is made, unless the defendant and counsel expressly consent to continued representation.”

⁴ The post-conviction defender is authorized to represent a capital defendant on direct appeal if the post-conviction defender determines that doing so is in the interest of justice and if “that person is without counsel and is unable to secure counsel due to indigency, or is determined by a state court with competent jurisdiction to be indigent and where that state court has determined competent counsel is unavailable.” Tenn. Code Ann. § 40-30-206(b). The post-conviction defender also may represent a capital defendant on federal habeas corpus review if “compensation for representation and reimbursement for expenses is provided by 18 U.S.C. § 3006A or any other non-state funded source.” Tenn. Code Ann. § 40-30-206(c). The post-conviction defender is further charged with representing indigent capital defendants in clemency and competency proceedings, if the post-conviction defender determines that doing so is in the interest of justice. Tenn. Code Ann. § 40-30-206(e). And the post-conviction defender is directed to offer certain services and training to public defenders and private defense counsel concerning capital litigation. Tenn. Code Ann. § 40-30-206(d).

The above establishes that appointed post-conviction counsel—either counsel from the post-conviction defender’s office or private counsel in the event of a conflict—is available to any indigent capital defendant in the state-court post-conviction review process, as required by 28 U.S.C. § 2261(c).

C. Competency of Appointed Counsel

Tennessee’s competency requirements for appointing counsel in capital post-conviction cases are both presumptively adequate, under 28 C.F.R. § 26.22(b)(1), and reasonably assuring of an appropriate level of proficiency, under 28 C.F.R. § 26.22(b)(2). Pursuant to Tenn. Code Ann. § 40-30-205(c), the post-conviction defender “shall be an attorney in good standing with the Tennessee supreme court and shall possess a demonstrated experience in the litigation of capital crimes.” Under Tenn. Sup. Ct. R. 13, § 3(h), “[c]ounsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as appointed appellate counsel, or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two murder cases, or one capital case.” In addition, appointed post-conviction counsel in a capital case “must have a working knowledge of federal *habeas corpus* practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts.” *Id.* Regarding the minimum qualifications for appointed appellate counsel in capital cases, these include “three years of litigation experience in criminal trials and appeals,” as well as either (1) “experience as counsel of record in the appeal of a capital case,” or (2) “experience as counsel of record in the appeal of at least three felony convictions within the past three years and a minimum of six hours of specialized training in the trial and appeal of capital cases.” Tenn. Sup. Ct. R. 13, § 3(g). And as noted above, “the state post-conviction defender’s office” is among the list of available counsel for appointment to indigent defendants “if qualified pursuant to this rule and no conflict of interest exists.” Tenn. Sup. Ct. R. 13, § 1(e)(4)(A).

Although Tennessee’s competency standards for appointed counsel in capital post-conviction cases do not require the term-of-years stated in 28 C.F.R. § 26.22(b)(1), the various requirements detailed here remain presumptively adequate under that subsection because they certainly provide for appointed counsel “whose background, knowledge, or experience . . . enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation.” But even if the presumption of adequacy does not apply, Tennessee’s appointment system—and particularly its 30-year utilization of a specialized post-conviction defender office working exclusively on state-court capital collateral review cases—“reasonably assure[s] a level of proficiency appropriate for State postconviction litigation in capital cases.” 28 C.F.R. § 26.22(b)(2).

D. Compensation of Appointed Counsel

Tennessee’s system of compensation for appointed counsel in capital post-conviction cases is presumptively adequate under 28 C.F.R. § 26.22(c)(1). At the very least, appointed post-conviction counsel is compensated comparably to appointed counsel in the trial or direct appeal of a capital case. Under Tenn. Sup. Ct. R. 13, § 3(b)(1), the district public defender for the respective judicial district “whenever possible” should serve as lead counsel for an indigent capital defendant

during the prosecution. As discussed more fully above, the post-conviction defender is charged with representing capital post-conviction petitioners unless prevented by a conflict from doing so. Tenn. Code Ann. §§ 40-30-205(g) and 40-30-207. The post-conviction defender is paid the same as the various district public defenders, while assistant post-conviction defenders are compensated under the same pay scale utilized by assistant district public defenders. Tenn. Code Ann. § 40-30-209(a) and (b).

Outside of the public defender and post-conviction defender pay systems, if counsel is appointed to represent a capital defendant at trial, on direct appeal, or on post-conviction review, the rates of compensation for counsel at those different levels are comparable to each other. Effective July 1, 2024, the hourly compensation rate for lead counsel is \$110 while the hourly rate for co-counsel⁵ and for post-conviction counsel is \$90. Tenn. Sup. Ct. R. 13, § 3(k).⁶ Appointed counsel in capital cases may file interim claims for payment of compensation every 30 to 180 days during the course of the litigation. Tenn. Sup. Ct. R. 13, § 6(a)(4). There are no limits on the number of hours authorized for compensation to appointed counsel in capital cases. Tenn. Sup. Ct. R. 13, §§ 2(d) and 3(k). This compensation comparability among appointed defense counsel at the various stages throughout the duration of a capital case fully satisfies the presumption of adequacy in 28 C.F.R. § 26.22(c)(1).⁷

In addition, Tennessee's compensation system is presumptively adequate under 28 C.F.R. § 26.22(c)(1) because appointed post-conviction counsel receive compensation comparable to the State's post-conviction counsel. Prior to 2023, the respective district attorneys general represented the State in all capital post-conviction trial litigation. Since 2023, under Tenn. Code Ann. § 40-30-114(c)(1) and (c)(4)(B), the attorney general and reporter represents the State in pending capital post-conviction trial litigation for death sentences imposed on or before March 1, 2023. *See*

⁵ Two appointed counsel are provided to an indigent capital defendant at trial and on direct appeal, with one designated as lead counsel and the other designated as co-counsel. Tenn. Sup. Ct. R. 13, § 3(b)(1), (e), and (f).

⁶ Prior to July 1, 2024, and effective July 1, 2018, the compensation rate for lead counsel was \$100 per hour while the rate for co-counsel and for post-conviction counsel was \$80 per hour. *In Re: Rule 13, Section 2 and 3, Rules of the Tennessee Supreme Court*, No. ADM2018-00796 (Tenn. Jul. 2, 2018) (order substituting appendix), https://www.tncourts.gov/sites/default/files/order_amending_appendix_sct_r13_admin2018-00796_revised.pdf (last accessed June 3, 2025). From 1997 until 2018, the compensation rate for lead counsel was \$100 per hour for in-court work and \$75 per hour for out-of-court work, and the compensation rate for co-counsel and for post-conviction counsel was \$80 per hour for in-court work and \$60 per hour for out-of-court work. *In Re: Rule 13, Supreme Court Rules*, (Tenn. Apr. 3, 1997) (order), https://www.tncourts.gov/sites/default/files/sc_rule_13_order_indigent_def_qual.pdf (last accessed June 3, 2025).

⁷ Even when the relevant hourly rates for appointed counsel are considered alongside salaries paid to assistant district public defenders and assistant post-conviction defenders, the respective compensations are comparable. For example, assistant district public defenders and assistant post-conviction defenders are currently paid, based on experience level, between \$180,960 and \$69,060 per year. *See State Employee Salary Search*, <https://salary.app.tn.gov/public/searchsalary> (last accessed June 3, 2025).

generally State v. McKay, 706 S.W.3d 338 (Tenn. 2025). The respective district attorneys general continue to represent the State in capital post-conviction trial litigation for death sentences imposed after March 1, 2023. Tenn. Code Ann. § 40-30-108(a). The attorney general and reporter represents the State in all matters before Tennessee's appellate courts. Tenn. Code Ann. §§ 8-6-109(b)(2) and 8-6-110. District attorneys general are compensated the same as district public defenders and as the post-conviction defender while assistant district attorneys general are paid under the same compensation system as assistant district public defenders and assistant post-conviction defenders. Tenn. Code Ann. §§ 8-7-105, 8-7-226, 8-14-107 and 40-30-209(a) and (b). Although staff within the office of the attorney general and reporter are not paid under the same systems, the compensation is sufficiently comparable so as to render Tennessee's appointment system for capital post-conviction review presumptively adequate. Tenn. Code Ann. § 8-6-104.

From the above, Tennessee fully satisfies 28 C.F.R. § 26.22(c)(1) and the presumption of adequacy in its compensation for appointed counsel in capital post-conviction review cases.

E. Expense Payment for Appointed Counsel

Tennessee's process for expense payment meets the requirement to pay "reasonable litigation expenses of appointed counsel," including "payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel." 28 C.F.R. § 26.22(d). Tennessee has a process for paying expenses incident to the representation of indigent criminal defendants. *See Tenn. Sup. Ct. R. 13, § 4*. In *Owens v. State*, 908 S.W.2d 923, 924 (Tenn. 1995), the Tennessee Supreme Court concluded that this expense payment system established by Tenn. Code Ann. § 40-14-207(b) and Tenn. Sup. Ct. R. 13 applies in capital post-conviction cases. Thus, Tennessee has procedures for authorizing experts, investigators, and other support services not only in the trial and the direct appeal of criminal cases but also in the post-conviction review of capital cases. *See Tenn. Sup. Ct. R. 13, § 5*; Tenn. Code Ann. 40-14-207(b). This process involves the defendant, through counsel, establishing a particularized need for the service in an ex parte proceeding. Tenn. Sup. Ct. R. 13, § 5(c). It culminates in the authorization of funding by approval from the trial court and the director of the administrative office of the courts (AOC) or, if denied by the director, the chief justice. Tenn. Sup. Ct. R. 13, § 5(e).

Review by the AOC director and by the chief justice is not "substantive." Instead, their denial "can be based on a prior authorization order that is noncompliant with Rule 13 or an administrative funding decision." *Dotson v. State*, 673 S.W.3d 204, 215 (Tenn. 2023). "Funds are limited, and there has to be a mechanism for regulating the flow of funds. That is the role of" the AOC director and the chief justice under Rule 13. *Id.* The Tennessee Supreme Court has analogized that task to the role played by a chief circuit judge or designee circuit judge in federal court under the Criminal Justice Act (CJA), upon review when a district or magistrate judge has authorized expert services in a federal criminal case beyond presumptive funding caps. *Id.* at 220. "The CJA, like Rule 13, also allows a litigant to seek funds in excess of the cap if the district court or magistrate judge certifies that the additional funds are necessary to provide fair compensation for services of an unusual character or duration and the amount of the excess payment is certified by the chief judge of the circuit." *Id.* (citing 18 U.S.C. § 3006A(e)(3)).

This process “incorporate[s] presumptive limits on payment,” and “means are authorized for payment of necessary expenses above such limits.” 28 C.F.R. § 26.22(d). In a capital post-conviction case, the trial court ultimately may authorize investigative services beyond a total of \$20,000 and expert services beyond a total of \$25,000 if, “in its sound discretion, the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence.” Tenn. Sup. Ct. R. 13, § 5(d)(5). Maximum hourly rates apply for particular types of expert services. Tenn. Sup. Ct. R. 13, § 5(d)(1).⁸ Still, the system allows for the trial court to exceed the \$25,000 limit for expert services overall, and as of October 2024, the AOC director may consider “[s]ubsequent requests for additional funding for the same investigator or expert giving due consideration to state revenues.” *Id.*⁹

F. Effective Date of Tennessee’s Mechanism

Pursuant to 28 U.S.C. § 2265(a)(2), the Attorney General must determine the date on which a state’s mechanism for the appointment, compensation, and expense-payment of appointed counsel became effective. In view of the above analysis, at the latest, the effective date of Tennessee’s mechanism is October 23, 1995, when the Tennessee Supreme Court decided *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). In that case, the court construed state law to conclude that state-paid investigative and expert services are authorized for indigent petitioners within capital post-conviction cases under then-existing statutory and rule authority. This was mere weeks after September 1, 1995, when the office of the post-conviction defender came into existence. 1995 Tenn. Pub. Acts, ch. 510, § 2. In view of the expense-payment system provided by *Owens* and the counsel-appointment structure enhanced by creation of the post-conviction defender office, the proposed effective date for Tennessee’s current mechanism satisfying the relevant certification criteria is October 23, 1995.

⁸ The rates were previously stated within this rule; however, they are now accessible online at <https://www.tncourts.gov/sites/default/files/docs/Guidance%20on%20Expert%20and%20Investigator%20with%20Forms.pdf> (last accessed June 3, 2025).

⁹ The post-conviction defender is authorized to hire investigators and other clerical and support personnel “from funds appropriated for that purpose.” Tenn. Code Ann. § 40-30-208. Beginning July 1, 2023, the Tennessee General Assembly appropriated separate funding to that office for expert services, obviating the need going forward for it to request expert funding on a case-by-case basis under the process laid out above. 2023 Tenn. Pub. Acts, ch. 418, § 54, Item 1, Line 124; 2024 Tenn. Pub. Acts, ch. 966, § 36, Item 207; 2025 Tenn. Pub. Acts, ch. 530, § 36, Item 23. For that reason, “[i]n a post-conviction capital case where the Office of the Post-Conviction Defender represents a petitioner, funding for investigative services and expert services and tests shall not be paid pursuant to” Rule 13. Tenn. Sup. Ct. R. 13, § 5(d)(4).

III. Conclusion

For the reasons stated, Tennessee fully meets the requirements for certification of its mechanism for appointing, compensating, and paying expenses for competent counsel in capital collateral review proceedings. Pursuant to 28 C.F.R. § 26.21, I am the appropriate State official to seek certification, and I request that the Attorney General certify this mechanism under 28 U.S.C. § 2265. Please contact my office if you have any questions or need any additional information regarding this request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jonathan Skrmetti".

JONATHAN SKRMETTI
Attorney General and Reporter
State of Tennessee