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December 16, 2025

Honorable Pamela J. Bondi  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

**Submitted via email to [nicholas.schilling@usdoj.gov](mailto:nicholas.schilling@usdoj.gov)**

*Re: Florida's Request for Certification Under 28 U.S.C. § 2265*

Dear General Bondi:

On Inauguration Day, the President signed, among other impactful executive orders, one titled “Restoring the Death Penalty and Protecting Public Safety.” In it, he directed that “[t]he Attorney General shall take all appropriate action to approve or deny any pending request for certification made by any State under 28 U.S.C. 2265.” *Restoring the Death Penalty and Protecting Public Safety*, Exec. Order No. 14164 (Jan. 20, 2025), at 90 Fed. Reg. 8463 (Jan. 30, 2025). You subsequently directed the Office of Legal Policy “to promptly address states’ pending requests for certification pursuant to 28 U.S.C. § 2265.” Memorandum for All Department Employees from the Attorney General, *Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions* at 4 (Feb. 5, 2025), <https://www.justice.gov/ag/media/1388561/dl>.

I accordingly write to request certification that Florida may use the expedited federal habeas corpus review procedures in capital cases under 28 U.S.C. §§ 2261–2266 (Special Habeas Corpus Procedures in Capital Cases). Florida’s system of appointing, compensating, and reimbursing well-qualified counsel in state postconviction proceedings meets the statutory and regulatory<sup>1</sup> requirements for certification.

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<sup>1</sup> Florida reserves the argument that it is not required to meet the regulatory requirements. According to 28 U.S.C. § 2265(a)(3), “[t]here are no requirements for certification or for application of this chapter other than those

## **I. Expedited Federal Habeas Review**

Federal law guarantees expedited federal habeas corpus review of capital convictions to states that have established a mechanism for providing qualified counsel to indigent capital defendants in state postconviction proceedings. 28 U.S.C. §§ 2261–2266. This option has been in place since enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214. To exercise the option, a state must be certified by the Attorney General. To be certified, the state must meet the following requirements:

**(A) The state must “offer counsel to all State prisoners under capital sentence.” 28 U.S.C. § 2261(c).**

This requirement to “offer counsel” is met if the process for appointing counsel provides for entry of an order by a court of record that does any of the following three things:

- (1) The court may direct the appointment of 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, 28 U.S.C. § 2261(c)(1);
- (2) The court may find that the defendant declined the offer of counsel with an understanding of the legal consequences, 28 U.S.C. § 2261(c)(2); or
- (3) The court may deny the appointment of counsel upon finding that the defendant is not indigent, 28 U.S.C. § 2261(c)(3).

“Indigent prisoners means persons whose net financial resources and income are insufficient to obtain qualified counsel.” 28 C.F.R. § 26.21. Appointment of counsel must be “reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.” *Id.* 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).

**(B) The state must “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).**

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expressly stated in this chapter.” Regardless, as this letter demonstrates, Florida’s mechanism is more than adequate under the regulations.

This “mechanism” must feature at least the following:

- (1) The mechanism must establish “standards of competency” for appointed counsel, 28 U.S.C. § 2265(a)(1)(C);
- (2) The mechanism must provide for adequate compensation of appointed counsel, 28 C.F.R. § 26.22(c); and
- (3) The mechanism must “provide for payment of reasonable litigation expenses,” such as for “investigators, mitigation specialists, mental health and forensic science experts, and support personnel.” 28 C.F.R. § 26.22(d).

“[P]resumptive limits” on reimbursement are allowed “only if means are authorized for payment of necessary expenses above such limits.” *Id.*

As will be shown, Florida meets and indeed exceeds all of these statutory and regulatory requirements for certification.

## **II. Postconviction Review in Florida**

In Florida, a capital inmate may collaterally challenge his conviction in trial court by filing an initial “motion to vacate judgment of conviction and sentence of death . . . within 1 year after the judgment and sentence becom[ing] final.” Fla. R. Crim. P. 3.851(d)(1). The state must file an answer brief within 60 days. Fla. R. Crim. P. 3.851(f)(3). Within 90 days of that filing, the court must hold a case management conference, at which the court must “hear argument on any purely legal claims” and schedule an evidentiary hearing to be held within 150 days on claims that “require[e] a factual determination.” Fla. R. Crim. P. 3.851(f)(5)(A). Expert witnesses, including those with information about the prisoner’s mental state, may testify at the evidentiary hearing. Fla. R. Crim. P. 3.851(f)(6).

The trial court may allow written closing arguments to be filed within 30 days of the filing of the transcript of the hearing. Fla. R. Crim. P. 3.851(f)(5)(E). The court then must rule within 30 days of the hearing, or within 30 days of the filing of written oral arguments if it permitted them. Fla. R. Crim. P. 3.851(f)(5)(F). The order must resolve all claims in the motion and make “detailed findings of fact and conclusions of law . . . to allow for meaningful appellate review.” *Id.* The losing party may file a motion for rehearing, as well as an appeal. Fla. R. Crim. P. 3.851(f)(7)–(8).

## **III. Postconviction Counsel in Florida**

In 1998, Florida established a mechanism to appoint qualified counsel in capital postconviction proceedings. Over time it has built on that mechanism, instituting measures that (A) provide appointed counsel to capital inmates on postconviction review; (B) ensure the competency of appointed coun-

sel; (C) guarantee adequate compensation to appointed counsel; and (D) reimburse the expenses of appointed counsel. In each of these respects, Florida’s mechanism amply satisfies 28 U.S.C. §§ 2261–2266 and the implementing regulations.

### **A. Appointment of Counsel**

Florida’s mechanism of appointing counsel for capital defendants in state postconviction proceedings meets the requirements of 28 U.S.C. § 2261(c).

The Florida Legislature created the three offices of the Capital Collateral Regional Counsel (“CCRC”) to “represent each person convicted and sentenced to death in this state for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.” Fla. Stat. § 27.702(1). In fact, a defendant sentenced to death may not represent himself or herself in state postconviction proceedings. Fla. R. Crim. P. 3.851(b)(6).

When the CCRC is unable to supply an attorney, the court may appoint an attorney from the Capital Collateral Attorney Registry. Registry Counsel will serve “throughout all postconviction capital collateral proceedings, including federal habeas corpus proceedings.” Fla. Stat. § 27.711(2). “In making an assignment, the court shall give priority to attorneys whose experience and abilities in criminal law, especially in capital proceedings, are known by the court to be commensurate with the responsibility of representing a person sentenced to death. The trial court must issue an order of appointment which contains specific findings that the appointed counsel meets the statutory requirements and has the high ethical standards necessary to represent a person sentenced to death.” Fla. Stat. § 27.710(5)(b)(2).

“On the issuance of the mandate affirming a judgment and sentence of death on direct appeal, the Supreme Court of Florida must at the same time issue an order appointing the appropriate office of the [CCRC] or directing the trial court to immediately appoint counsel from the Registry of Attorneys maintained by the Justice Administrative Commission [i.e., the Capital Collateral Attorney Registry].” Fla. R. Crim. P. 3.851(b)(1). The CCRC or Registry Counsel must then file either a notice of appearance or a motion to withdraw within 30 days. Fla. R. Crim. P. 3.851(b)(2). “Within 15 days after [CCRC] or Registry Counsel files a motion to withdraw, the chief judge or assigned judge must rule on the motion and appoint new postconviction counsel if necessary.” Fla. R. Crim. P. 3.851(b)(3).

The end result is that a capital inmate will receive postconviction counsel within 45 days. This process 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. *See* Fla. R. Crim. P. 3.851(d)(1) (one year to file initial postconviction motion); *Green v. Sec’y, Dep’t of Corrs.*, 877 F.3d 1244, 1247 (11th Cir. 2017) (a “properly filed” state petition for postconviction relief tolls the one-year statute of limitations for filing a subsequent federal habeas corpus petition under 28 U.S.C. § 2244(d)(2)).

## **B. Competency of Appointed Counsel**

Florida’s mechanism also ensures the appointment of “competent counsel.” 28 U.S.C. § 2265(a)(1)(A).

“A State’s standards of competency are presumptively adequate if” appointed counsel “have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience.” 28 C.F.R. § 26.22(b)(1)(i). “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.” *Id.* “Competency standards not satisfying th[ose] benchmark criteria . . . 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).

Florida’s mechanism exceeds those requirements. To start with, Florida requires counsel in death penalty cases “to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.” Fla. R. Crim. P. 3.112(a). Counsel in capital postconviction proceedings must additionally have:

- (1) a bar membership for at least five years;
- (2) at least three years of experience in the field of postconviction litigation; and
- (3) prior participation in a combined total of five proceedings in any of the following areas, at least two of which shall be from [(C), (D), or (E)] below:
  - (A) capital trials;
  - (B) capital sentencings;
  - (C) capital postconviction evidentiary hearings;
  - (D) capital collateral postconviction appeals;
  - (E) capital federal habeas proceedings.

Fla. R. Crim. P. 3.112(k). These competency requirements, mandated by the Florida Supreme Court, exceed more general competency requirements for CCRCs set out in sections 27.701 and 27.704 of the Florida Statutes.

Registry Counsel all must certify that they meet the requirements of Rule 3.112(k) and that they are “counsel of record for not more than nine post-conviction capital collateral proceedings.” Justice Administrative Commission, State of Florida, *Application for Statewide Capital Collateral Attorney Registry*, <https://tinyurl.com/49y2vz96>.

The standards of competency and their fulfillment have not gone unnoticed. Florida Supreme Court Justice John Curiel recently touted Florida’s “highly skilled assistant attorney generals and capital collateral review counsel.” Jim Ash, *Justice Curiel Praises Florida’s Criminal Bar, Defends Textualist Approach*, Fla. Bar News (Aug. 6, 2025), <https://tinyurl.com/3ctssvnpn>. “[W]e have a really tremendous dedicated criminal bar, especially in these capital cases, who are making the right arguments at the right time.” *Id.*

### **C. Compensation of Appointed Counsel**

Florida’s mechanism likewise provides reasonable compensation to appointed counsel, as required by 28 U.S.C. § 2265(a)(1)(A).

Compensation of appointed counsel is “presumptively adequate” if it “is comparable to or exceeds”:

- The compensation of counsel appointed pursuant to 18 U.S.C. § 3599 in federal habeas corpus proceedings reviewing capital cases from the state;
- 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);
- The compensation of appointed counsel in state appellate or trial proceedings in capital cases; or
- 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)(i)–(iv). “Provisions for compensation not satisfying th[ose] benchmark criteria . . . 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 paragraph (b).” 28 C.F.R. § 26.22(c)(2).

As noted, all capital defendants, indigent or not, are represented during postconviction proceedings either by one of the three regional offices of the CCRC or by private counsel from the Capital Collateral Attorney Registry. Fla. R. Crim. P. 3.851(b)(1).

CCRCs are compensated by salary. Fla. Stat. § 27.705. CCRCs are compensated between \$138,904 and \$189,072.96 annually, while assistant CCRCs are paid between approximately \$60,000 and \$168,621 annually.

Registry Counsel are compensated at a rate of \$100 per hour, with caps depending on when the litigation and representation conclude. Fla. Stat. § 27.711(4) (one round of postconviction litigation through the state courts and U.S. Supreme Court could pay close to \$75,000).

Rates of compensation for the CCRCs and Registry Counsel compare favorably to those for private counsel appointed in capital trials and direct appeals. Appointed private counsel may not be compensated more than \$25,000 for trials and \$9,000 for appeals in capital cases. Fla. Stat. § 27.5304(5)(d)–(e). Public defenders whose caseloads include a significant amount of capital cases are paid between \$55,000 and \$175,000 a year.

The rates of compensation also compare favorably to those for “attorneys representing the State in state postconviction proceedings in capital cases.” 28 C.F.R. § 26.22(c)(1)(iv). In Florida, Assistant Attorneys General in the Capital Collateral Section are compensated at a range of \$83,523 to \$128,594.

In sum, postconviction counsel in capital cases are paid comparably to or more than both counsel working on capital trials or direct appeals and counsel representing the State in capital postconviction proceedings. Florida’s compensation of appointed defense counsel in postconviction proceedings is therefore presumptively adequate, and it should be deemed to satisfy 28 C.F.R. § 26.22(c).

#### **D. Reimbursing Expenses of Appointed Counsel**

Finally, Florida’s process for reimbursement of costs in capital cases meets the requirement to pay “reasonable litigation expenses of appointed counsel,” such as “payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel.” 28 C.F.R. § 26.22(d).

“An attorney who represents a capital defendant,” including in a postconviction proceeding, is entitled to a maximum of \$15,000 for litigation expenses, and more “if [a] trial court finds that extraordinary circumstances exist.” Fla. Stat. § 27.711(6). Attorneys are specifically entitled to payment of up to \$15,000 for “investigative services.” Fla. Stat. § 27.711(5). Attorneys are paid by Florida’s Justice Administrative Commission (“JAC”) upon approval of reimbursement by the trial court. Fla. Stat. § 27.711(5)–(6). On information

and belief, Florida trial courts regularly approve, and the JAC accordingly pays, the reasonable amounts requested by appointed postconviction counsel.

#### IV. Conclusion

Based on the foregoing, Florida’s mechanism for appointing, compensating, and reimbursing qualified postconviction counsel in capital cases fully meets the statutory and regulatory requirements for certification. Under 28 C.F.R. § 26.21, I am the appropriate state official to seek certification, and I request that you certify Florida’s mechanism under 28 U.S.C. § 2265.

Under 28 U.S.C. § 2265(a)(2), “[t]he date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.” I therefore propose that the effective date of the certification be January 1, 2015—the date Florida Rule of Criminal Procedure 3.112(k) went into effect. As explained above, Rule 3.112(k) provides a standard of competency in line with what is required by 28 C.F.R. § 26.22(b)(1). *In re Amendments to Fla. R. of Jud. Admin.; Fla. R. Crim. P.; and Fla. R. App. P.*, 148 So. 3d 1171, 1173 (Fla. 2014) (explaining addition of subsection (k) to Rule 3.112); *id.* at 1177 (declaring effective date of January 1, 2015). All the other elements of Florida’s capital postconviction counsel mechanism were in place before then.

My staff and I would be happy to address any questions. We request that a determination be made by the earliest possible date.

Sincerely,

/s/ James Uthmeier

James Uthmeier  
Attorney General

cc: Jeffrey Paul DeSousa, Acting Solicitor General; Marilyn Muir, Associate Deputy Attorney General; Scott Browne, Chief Assistant Attorney General.