



Office of the Attorney General
Washington, D.C. 20530

August 22, 2017

MEMORANDUM FOR THE ACTING ASSISTANT ATTORNEY GENERAL,
OFFICE OF LEGAL POLICY

FROM: THE ATTORNEY GENERAL 
SUBJECT: Guidance for Certification of State Capital Counsel Mechanisms

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). AEDPA contains provisions that limit the timing and scope of federal habeas review of state capital cases under certain circumstances. *See* 28 U.S.C. §§ 2261–2266. Two prerequisites must be satisfied for AEDPA’s special procedures to apply. First, the State must be certified as having a mechanism for providing indigent state capital prisoners with competent, adequately resourced, and adequately compensated counsel in state postconviction proceedings. Second, a federal court must find that the State complied with the certified mechanism with respect to an individual habeas petitioner. Congress originally vested responsibility for both determinations with the federal courts, but in 2006, Congress reassigned the responsibility for initial certification to the Attorney General. The Department then promulgated regulations to implement certification procedures. 28 C.F.R. Part 26, Subpart B; 78 Fed. Reg. 58,160 *et seq.*

I direct the Office of Legal Policy (“OLP”) to manage the application and review process set forth in the regulations. OLP will make applications submitted for certification, including any supporting materials, publicly available on the Department’s website and will publish a Federal Register notice to initiate a 60-day public comment period on each application. In its discretion, OLP may permit additional input from an applicant State or the public.

Upon completion of the application and comment process, OLP will review the State’s application, any supplemental materials or responses, and any comments or information received from the public under the governing statutory and regulatory standards. *See* 28 U.S.C. §§ 2261, 2265(a); 28 C.F.R. § 26.22.

OLP will prepare a recommendation and draft decision for the Attorney General regarding each application. In preparing the recommendation, OLP will consult with relevant components, including the Office of the Associate Attorney General, the Executive Office of United States Attorneys, the Office for Access to Justice, the Civil Rights Division, and the Capital Case Section of the Criminal Division. If OLP recommends in favor of certification, it

will include in its recommendation the date on which the State's capital counsel mechanism was established. OLP will submit the recommendation for or against certification to the Attorney General, through the Deputy Attorney General.

After consideration of the recommendation and all relevant materials, the Attorney General will issue a final decision on each application. If the Attorney General issues a final decision in favor of certification, OLP will publish a certification notice in the Federal Register. If the Attorney General issues a final decision denying certification, the Attorney General will so inform the State by letter. All final decisions, whether granting or denying certification, will be publicly available on the Department's website.

A certification remains effective for five years after the completion of the certification process and any related judicial review. 28 C.F.R. § 26.23(e). If a State requests re-certification at or before the end of that five-year period, the original certification remains effective until the completion of the re-certification process by the Attorney General and any related judicial review. Re-certification requests will be reviewed under the same procedures and standards as initial requests for certification.

These guidelines are effective immediately and supersede any prior guidance or policy. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal, nor does it place any limitation on otherwise lawful prerogatives of the Department of Justice.

cc: Deputy Attorney General, Office of the Deputy Attorney General
Associate Attorney General, Office of the Associate Attorney General
Director, Executive Office for United States Attorneys
Acting Director, Office for Access to Justice
Acting Assistant Attorney General, Civil Rights Division
Acting Assistant Attorney General, Criminal Division
Chief, Capital Case Section