TOM HORNE
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

April 18, 2013

Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530–0001

RE: Opt-in under 28 U.S.C. § 2265(a)

Dear General Holder:

I write to request certification that Arizona qualifies for "opt-in" status entitling Arizona to take advantage of the expedited federal habeas corpus review procedures in capital cases under chapter 154, *Special Habeas Corpus Procedures in Capital Cases*, 28 U.S.C. §§ 2261–2266. I believe that Arizona meets the statutory requirements for opt-in status, and that Arizona's system of appointing qualified, well-compensated counsel in state post-conviction proceedings entitles Arizona to qualify to "opt-in" under the statute.

Chapter 154 provides for expedited federal habeas corpus review in capital cases for states that establish a mechanism for providing qualified counsel to indigent capital defendants in state post-conviction proceedings. These procedures have been in place since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2261.

The statutory requirements under Section 2261 provide that a state seeking certification (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," 28 U.S.C. § 2261(c); 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, 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) under

the certification process, appointed counsel cannot have previously represented the defendant at trial or on direct appeal, unless both counsel and the defendant otherwise consent. A.R.S. § 13–4041(C)(3).

Arizona provides for the reasonable compensation for appointed counsel as required by 28 U.S.C. § 2265(a)(1)(A). Indigent capital defendants 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. A.R.S. § 41–4041 (A). Appointed private counsel are compensated at an hourly rate of up to $100 per hour for up to 200 hours of representation. A.R.S. § 13–4041(F); Ariz. R. Crim. P. 6.7(a), (b). Upon a showing of good cause, appointed counsel may be compensated for representation exceeding 200 hours. A.R.S. § 13–4041(G). In addition, Arizona provides for the payment of reasonable litigation expenses required by 28 U.S.C. § 2265 (a)(1)(A). *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.") On average, Arizona spends well over $200,000 in attorney fees and litigation costs for each capital post-conviction case.

The statutory certification also requires the appointment of "competent" counsel in a State's capital post-conviction mechanism. 28 U.S.C. § 2265(A). Arizona requires appointed counsel to meet strict competency standards. Counsel must:

1. Be a member in good standing of the State Bar of Arizona for at least five years immediately preceding appointment;

2. Have practiced criminal litigation for 3 years immediately preceding appointment;

3. Must have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases;

4. Within 3 years immediately preceding appointment, must have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least 3 felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, to be appointed an attorney must have been lead counsel in the appeal of at least 6 felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in 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. Must 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).

Additionally, although not required for opt-in status, Arizona also contemporaneously adopted heightened standards for counsel who handle capital *trials*. Under Arizona law, Rule 6.2, Ariz. R. Crim. P., a defendant charged with capital murder is entitled to two highly qualified attorneys – a procedure that presumably lessens the likelihood of ineffective assistance of trial counsel and makes post-conviction counsel's job easier.

In 2002, the United States Circuit 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 chapter 154. *Spears v. Stewart*, 283 F.3d 992, 1007 (9th Cir. 2002). The court declined, however, to apply the expedited procedures due to delay in the appointment of postconviction counsel for Spears (notwithstanding any claim of prejudice resulting from the delay).

In 2005, Congress abrogated *Spears* and amended 28 U.S.C. §§ 2261–66 by enacting the USA PATRIOT Improvement and Reauthorization Act of 2005. Senator Kyl, who sponsored the amendments, explained:

> In *Spears v. Stewart* . . . the Ninth Circuit held that even though Arizona had established a qualifying system and even though the State court had appointed counsel under that system, the Federal Court could still deny the State the benefit of qualification because of a delay in appointing counsel . . . [T]his bill abrogates . . . th[is] holding and removes the qualification decision to a neutral forum . . . . Paragraph (a)(3) of new section 2265 forbids creation of additional requirements not expressly stated in the chapter, as was done in the *Spears* case.

152 Cong. Rec. S1620, 1624–25 (daily ed. Mar. 3, 2006).

The 2005 amendments did not change the requirement that a qualifying State establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State capital postconviction proceedings. The amendments provide that the Attorney General promulgate regulations to implement the certification procedure. As of this date, the Department of Justice has not promulgated regulations for the certification procedure. The statute permissively allows the Department of Justice to promulgate regulations, but it does not authorize indefinite suspension of the expedited procedures. Nor does the statute require States to wait for the Department of Justice to promulgate regulations prior to seeking certification.

I believe that 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 what Congress has now confirmed to be the universe of requirements that must be

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[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. 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. Ariz. R. Crim. P. 6.8(d).

met, Arizona should be deemed to have "opted-in" to the accelerated review procedures contemplated under AEDPA.

My staff and I would be happy to address any questions you may have regarding Arizona's capital case procedures. We request that a determination regarding opt-in status be made within 90 days. If we do not receive a decision in 90 days we will treat that as a wrongful denial and seek relief in the United States Court of Appeals for the District of Columbia, which has judicial review under the relevant statute.

Sincerely,

Tom Horne

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cc: Eric J. Bistrow, Chief Deputy
Robert Ellman
Jeffrey Zick

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