



DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 26

[Docket No. OAG198; AG Order No. 6678-2026]

RIN 1105-AB80

Certification Process for State Capital Counsel Systems

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: Chapter 154 of title 28, United States Code, provides special procedures for federal habeas corpus review of cases brought by prisoners in state custody who are under a sentence of death. The special procedures are available to States that the Attorney General has certified as having established mechanisms for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state postconviction proceedings brought by indigent prisoners, and as providing standards of competency for the appointment of counsel in these proceedings. This rule would remove impediments to certification that chapter 154 does not authorize and would enable more prompt decisions on States' requests for certification.

DATES: Written and electronic comments must be sent or submitted on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Comments received by mail will be considered timely if they are postmarked on or before the last day of the comment period. The electronic Federal Docket Management System will accept electronic comments until midnight Eastern Time at the end of that day.

ADDRESSES: Comments may be mailed to Regulations Docket Clerk, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Room 4234, Washington, DC 20530. To ensure proper handling, please reference RIN 1105-AB80 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at

http://www.regulations.gov. In accordance with 5 U.S.C. 553(b)(4), a summary of this rule may be found at *https://www.regulations.gov*. Commenters must submit comments by using one of the methods described above, not by emailing the address set forth in the following paragraph.

FOR FURTHER INFORMATION CONTACT: Levi Lall, Counsel, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530; telephone 202-598-0771.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Posting of Public Comments. Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule via one of the methods and by the deadline stated above. The Department of Justice (“the Department”) also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Please note that all comments received are considered part of the public record and made available for public inspection at *http://www.regulations.gov*. Such information includes personally identifying information (“PII”) (such as your name, address, etc.).

Interested persons are not required to submit their PII in order to comment on this rule. However, any PII that is submitted is subject to being posted to the publicly accessible website at *http://www.regulations.gov* without redaction.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much

confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Confidential business information identified and located as set forth above will not be placed in the public docket file. The Department may withhold from public viewing information provided in comments that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>. To inspect the agency's public docket file in person, you must make an appointment with the agency. Please see the **"FOR FURTHER INFORMATION CONTACT"** paragraph above for agency contact information.

II. Legal Authority

The Department of Justice is issuing this rule pursuant to 28 U.S.C. 2265(b).

III. Overview

Executing final judgments in state capital cases, and thus achieving finality for crime victims and their families, is substantially delayed because of an interminable process of state and federal postconviction review. Following conviction, sentencing, affirmance of the convictions and capital sentences on direct state court review, affirmance of the convictions and capital sentences in state collateral proceedings, and denial of certiorari by the U.S. Supreme Court, inmates under sentence of death imposed pursuant to state law may continue to litigate and relitigate their claims in the lower federal courts. The process starts by applying for habeas corpus in a federal district court and ordinarily takes years to move through the federal court system. Even when a capital sentence survives the multiple stages of repetitive state and federal review, it is typically decades before it can be carried out. Data collected by the Department reveals that, as of December 31, 2022, the average time on death row was 21 years. *See* Tracy L. Snell, Bureau of Just. Stat., *Capital Punishment, 2022 – Statistical Tables* at 10 (2024), <https://perma.cc/UM7U-HXKL>. That constitutes a dramatic increase from 1984, at which time the average time between sentencing and execution was just over six years. *See id.* at 12.

While the States have a degree of control over the extent and duration of capital punishment litigation in their own court systems, they are powerless to curb the delays resulting from federal habeas review. Congress initially sought to address this problem in 1996 by enacting chapter 154 of title 28 as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, sec. 107, 110 Stat. 1214, 1221–26. Among other reforms, chapter 154 provides definite time limits for concluding the adjudication of federal habeas petitions in capital cases, which otherwise can languish for years at the various stages of federal court adjudication and review. *See, e.g.*, 28 U.S.C. 2266. Application of chapter 154 is conditioned on States adopting mechanisms to appoint, compensate, and pay reasonable litigation expenses for competent counsel to represent indigent prisoners under sentence of death in state postconviction proceedings in capital cases, and setting counsel competency standards. *See id.* 2265(a)(1)(A), (C).

Originally, federal courts determined whether States satisfied chapter 154’s statutory preconditions. Congress eventually concluded, however, that the courts were not implementing chapter 154 as Congress intended, but rather were creating their own preconditions for applying chapter 154 that had no basis in the statute. *See* 152 Cong. Rec. 2440–41, 2445–46 (2006) (remarks of Sen. Jon Kyl); 151 Cong. Rec. E2639–40 (2005) (remarks of Rep. Jeff Flake). Congress accordingly amended chapter 154 in 2006 to assign the certification determination to the Attorney General, believing that the Attorney General would be free of the conflicts of interest that were leading to adverse judicial decisions from the regional courts of appeals. *Id.* Congress further amended chapter 154 by adding section 2265(a)(3), which states that “[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.” USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, sec. 507(c), 120 Stat. 192, 250 (2006) (codified at 28 U.S.C. 2265(a)(3)).

Following the direction of 28 U.S.C. 2265(b) to promulgate implementing regulations for the certification procedure, Attorney General Mukasey issued regulations in 2008 to carry out the

chapter in conformity with the legislative text, imposing no significant preconditions on State qualification beyond those appearing expressly in the statutes. *See* Certification Process for State Capital Counsel Systems, 73 FR 75327 (Dec. 11, 2008) (“2008 Regulations”). However, the regulations were quickly challenged in litigation, and following a change of administration, Attorney General Holder rescinded the original regulations and later issued regulations imposing many additional requirements and restrictions on chapter 154 certification. *See* Certification Process for State Capital Counsel System, 78 FR 58160, 58160–61 (Sept. 23, 2013) (“2013 Regulations”).

Following another change of administration, and after clearing additional litigative challenges, the Department began reviewing state applications for chapter 154 certification. It ultimately concluded in 2020 that Arizona satisfied chapter 154’s requirements. *See* Certification of Arizona Capital Counsel Mechanism, 85 FR 20705 (Apr. 14, 2020). The 2020 certification was promptly challenged in the D.C. Circuit and, following the transition to the Biden Administration, the Department effectively nullified the 2020 certification by seeking and securing a voluntary remand from the D.C. Circuit for further development of the administrative record and reconsideration. *See* Arizona Chapter 154 Certification Review; Notice Regarding Arizona’s June 2022 Response, 87 FR 52416 (Aug. 25, 2022). On January 17, 2025, Attorney General Garland signed an order determining that the record did not support a conclusion that Arizona’s postconviction capital counsel mechanisms meet the requirements under chapter 154 and denying certification to Arizona, notwithstanding the favorable determination by Attorney General Barr in 2020. *Denial of Arizona Chapter 154 Certification*, A.G. Order No. 6157-2025 (2021).

Hence, nearly 30 years after the original enactment of chapter 154, its expedited federal habeas corpus procedures have not been applied in federal habeas review of a single state capital case, effectively rendering chapter 154 a dead letter and thwarting Congress’s objectives. To ensure that Congress’s statutory scheme is given effect, the Department is re-committing to

implementing chapter 154 in conformity with its terms. *Cf.* Memorandum from Attorney General Pam Bondi to All Department Employees, *Re: Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions* (Feb. 5, 2025), <https://perma.cc/U3AG-ELUD>. Effectuating the statute’s terms requires rescinding aspects of the 2013 Regulations that add non-statutory requirements for certification and adopting other changes that will expedite and strengthen the certification process. The affected areas are counsel competency, compensation of counsel, timeliness of appointment, the definition of indigent prisoners, the Department’s internal review process for state applications, and the finality of certifications. Because each of the proposed changes to these affected areas is independently valid and justified, the proposed rule clarifies that each proposed change is severable.

Attorney General’s regulatory responsibilities

Section 2265(b) requires the Attorney General to “promulgate regulations to implement the certification procedure” under section 2265(a). 28 U.S.C. 2265(b). By its terms, the grant of regulatory authority to the Attorney General is limited to procedure, not substance. The statute further restrains the Attorney General’s regulatory authority by providing that “[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.” *Id.* 2265(a)(3).

Notably, chapter 154 leaves undisturbed the States’ authority to set substantive standards for counsel competency, appointment, compensation, and payment of reasonable litigation expenses. Section 2265(a)(1)(C) directs the Attorney General merely to determine whether “the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).” *Id.* 2265(a)(1)(C). Similarly, section 2265(a)(1)(A) directs the Attorney General to determine only “whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses for competent counsel.” *Id.* 2265(a)(1)(A). In light of these narrow authorizations to the Attorney General and section 2265(a)(3)’s prohibition against adding to chapter 154’s express requirements, the 2013

Regulations exceeded the Attorney General’s statutory authority by promulgating federal standards on counsel competency, appointment, and compensation, in addition to other textual requirements. This rule thus does not prescribe alternative federal standards on these issues, which would suffer from the same legal infirmity.

Statutory prohibition aside, adding textual requirements to chapter 154 through federal regulation would thwart Congress’s goal of expediting federal habeas review of state capital convictions; delay finality for victims and their families; increase burdens on States, the Department, and affected parties; and unnecessarily complicate review of state applications. For these reasons, even if the Attorney General had statutory discretion to promulgate certification requirements in addition to those in section 2265—which she does not—she would not exercise such discretion.

Counsel competency

Section 2265(a)(1) directs the Attorney General to determine “whether the State has established a mechanism for the appointment . . . of competent counsel” and “whether the State provides standards of competency for the appointment of counsel.” 28 U.S.C. 2265(a)(1). The 2008 Regulations naturally understood this to mean that the state capital counsel mechanism must provide for the appointment of counsel who meet competency standards that the State has adopted. The 2008 Regulations rejected the view that the Attorney General could adopt a nationwide, federal counsel competency standard, which chapter 154 nowhere authorizes:

Some commenters urged that the rule be revised to provide further specification concerning the “standards of competency[]” [and] “competent counsel” . . . that a state’s postconviction capital counsel system must provide to qualify for chapter 154 certification. For example, . . . the Judicial Conference of the United States in its comments urged . . . that “[s]pecific mandatory standards similar to those set forth in [18 U.S.C. 3599] should be required with respect to the appointment and compensation of counsel for capital defendants The commenters are correct that the text of chapter

154 needs to be supplemented in defining competency standards for postconviction capital counsel, but mistaken as to who must effect that supplementation. Responsibility to set competency standards for postconviction capital counsel is assigned to the states that seek certification. 28 U.S.C. 2265(a)(1)(C) [While] the Judicial Conference . . . urg[ed] that states be required to satisfy federally prescribed standards of counsel competency . . . , Congress did not accept the Conference’s recommendation on this point The Attorney General has no authority to overrule Congress and prescribe standards that others unsuccessfully urged Congress to impose.

73 FR at 75330–31.

In contrast, the 2013 Regulations required States to comply with competency standards sufficient in the Attorney General’s judgment, relying on an opinion issued in 2009 by the Department’s Office of Legal Counsel (“OLC”). *See* 78 FR at 58161–62, 58169–72, 58177–79 (citing *State Procedures for Appointment of Competent Counsel in Post-Conviction Review of Capital Sentences*, 33 Op. O.L.C. 402 (2009) (“2009 OLC Opinion”). The 2009 OLC Opinion opined that chapter 154 did not “compel” the Attorney General to interpret chapter 154 in the same manner as the original 2008 Regulations, and that chapter 154 could “reasonably” be interpreted to allow greater discretion to prescribe federal counsel competency requirements “under the now familiar *Chevron* framework.” 2009 OLC Opinion, 33 Op. O.L.C. at 409, 411 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

The Supreme Court has since overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Following *Chevron*’s abrogation, agencies must adhere to the single best reading of the statutes they administer, and not alternative, less plausible interpretations that are merely within the bounds of what could be considered reasonable. In view of this intervening precedent, OLC recently withdrew its 2009 Opinion after determining that it did not provide even a permissible reading of section 2265. *Reconsidering State Procedures for Appointment of Competent Counsel in Postconviction Review of Capital*

Sentences, 50 Op. O.L.C. ___, at *3–4 (Feb. 18, 2025) (“2025 OLC Opinion”). Having fully considered the matter, the Attorney General has concluded that the 2013 Regulations’ counsel-competency provisions do not reflect the best reading of the statute. The best reading of chapter 154 is that it does not authorize the Attorney General to establish federal competency standards for state capital counsel, and does not permit the Attorney General to impose more stringent requirements relating to counsel competency than those expressly stated in chapter 154 itself. *See* 28 U.S.C. 2265(a)(3). Hence, this proposed rule limits the regulations only to what is required by the statute and rescinds the additional counsel-competency requirements appearing in § 26.22(b) in the 2013 Regulations. *See* 78 FR at 58183–84.

Compensation of counsel

Section 2265(a)(1) directs the Attorney General to determine “whether the State has established a mechanism for the . . . compensation . . . of . . . counsel.” 28 U.S.C. 2265(a)(1). The 2008 Regulations rejected public comments that urged that the regulations should adopt more stringent compensation requirements:

With respect to compensation of counsel, various commenters urged that the rule be more prescriptive regarding the amount of required compensation, to ensure that state postconviction capital counsel are “reasonably” or “adequately” compensated or receive “fair” compensation. Again, such comments urge the regulatory adoption of measures that Congress declined to include in chapter 154. In contrast to the immediately succeeding phrase concerning litigation expenses in section 2265(a)(1)(A), which requires a mechanism for payment of “reasonable” litigation expenses, the language relating to “compensation” in the same provision comes with no qualifier. The statute requires only that the state have a mechanism for the “compensation” of postconviction capital counsel, leaving determination of the level of compensation to the states.

73 FR at 75331.

Drawing on the 2009 OLC Opinion, the 2013 Regulations maintained that the Department could ignore Congress’s statutory language and impose extra-statutory counsel-compensation requirements as necessary to ensure the availability for appointment of competent counsel. *See* 78 FR at 58161–62, 58179. As with its approach to counsel competency, the 2009 OLC Opinion again relied on *Chevron*’s deference to “reasonable,” but not necessarily best, interpretations of statutes, *see* 2009 OLC Opinion, 33 Op. O.L.C. at 419—deference that no longer exists following the Supreme Court’s decision in *Loper Bright*. *See also* 2025 OLC Opinion, 50 Op. O.L.C. ___, at *1 (withdrawing 2009 OLC Opinion).

Having fully considered the matter, the Attorney General has concluded that the 2013 Regulations’ understanding of chapter 154’s language relating to compensation of counsel is not the best reading of the statute. Section 2265(a)(3) unequivocally prohibits imposing requirements not expressly stated in chapter 154 itself. The 2013 Regulations’ atextual federal compensation requirements, *see* 78 FR at 58183, contravene Congress’s express prohibition. Moreover, chapter 154 recognizes States’ authority to set the mechanism for counsel compensation and simply authorizes the Attorney General to “determine” that a State has done so. 28 U.S.C. 2265(a)(1)(A). Because chapter 154 does not authorize the Attorney General to set a federal compensation standard for state capital counsel, the Attorney General is statutorily prohibited from regulating on this issue.

Even if chapter 154 did give the Attorney General discretion to prescribe by regulation counsel-compensation requirements not stated in chapter 154, the Attorney General would not exercise that discretion. If States are unable to provide counsel—due to insufficient compensation or any other reason—then the expedited federal habeas review procedures of chapter 154 are not available to them. 28 U.S.C. 2261(b)(2) generally conditions the application of chapter 154 on actual representation by or waiver of counsel. Thus, the States are incentivized to provide compensation that will attract willing counsel. The statutory requirement that States

“establish[] a mechanism for the appointment . . . of competent counsel” ensures that States must offer sufficient compensation to attract counsel meeting this qualification. *Id.* 2265(a)(1)(A).

Because the imposition of a federal compensation standard contravenes Congress’s prohibition of extra-statutory requirements, *see* 28 U.S.C. 2265(a)(3), the proposed rule rescinds the atextual counsel-compensation requirements of section 26.22(c) appearing in the 2013 Regulations. *See* 78 FR at 58183.

Timeliness of appointment

The 2013 Regulations added a requirement that appointment of state postconviction capital counsel must be “in a manner that is 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.” 78 FR at 58177. The 2008 Regulations had no similar requirement because nothing of this nature appears in chapter 154, and “[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.” 28 U.S.C. 2265(a)(3). Indeed, the judicial imposition of a timely appointment requirement motivated Congress’s decision in 2006 to transfer the chapter 154 certification determination to the Attorney General and to add a provision prohibiting any addition to chapter 154’s express requirements. 152 Cong. Rec. 2446 (remarks of Sen. Jon Kyl) (“In *Spears v. Stewart*, the Ninth Circuit . . . den[ie]d the State the benefit of [chapter 154] qualification because of a delay in appointing counsel. . . . 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.” (citation omitted)); *see* 73 FR at 75332.

The 2013 Regulations sought to justify this addition to the express statutory requirements on the ground that in some situations delay in appointing postconviction counsel could deprive a defendant of meaningful assistance of counsel. *See* 78 FR at 58165–67, 58176–77. Chapter 154, however, directs the Attorney General to determine whether States have capital counsel mechanisms that satisfy the requirements Congress has prescribed in chapter 154—not to insert

requirements that others believe Congress ought to have included. Timing rules for appointment of state postconviction capital counsel are not among the express statutory requirements. Nor does inserting “reasonably timely” into a “definition” of “appointment”—a term that requires no definition—circumvent the statute’s unequivocal prohibition of atextual certification requirements.

This proposed rule accordingly rescinds the “reasonably timely” requirement graphed onto the definition of appointment by the 2013 Regulations.

Definition of indigent prisoners

The 2008 Regulations did not include any special definition of the term indigent prisoners. *See* 73 FR at 75338. The 2013 Regulations added a special definition of “[i]ndigent prisoners” to mean “persons whose net financial resources and income are insufficient to obtain qualified counsel.” *See* 78 FR at 58183. No explanation was provided for the addition of this special definition. *See id.* 58165–68.

This proposed rule rescinds the definition of “indigent prisoners.” Indigency requires no special definition because all jurisdictions will have a definition of this term that they can use, given that States are required to appoint counsel for indigent defendants in trial and appellate proceedings. The definition in the 2013 Regulations clouds what is otherwise a clear and familiar concept because it refers to persons whose financial resources and income are insufficient to obtain “qualified” counsel, with no explanation of what “qualified” is supposed to mean.

Application review process

Both the 2008 Regulations and the 2013 Regulations included a categorical requirement that the Attorney General publish a notice in the Federal Register of every State’s request for chapter 154 certification and receive and consider public comments thereon. *See* 73 FR at 75339; 78 FR at 58184. This proposed rule rescinds this requirement for two reasons:

First, notice and comment is not required under either chapter 154 or the Administrative Procedure Act (“APA”). Nothing in chapter 154 contemplates a categorical requirement for

public notice and comment with respect to all States' applications, regardless of actual need, with resulting delay in deciding whether the State is entitled to the application of chapter 154. Evaluating States' requests for chapter 154 certification consistent with Congress's statutory framework should be simpler and quicker without the legally and practically unnecessary requirement that processing States' requests must start by posting them for public comment.

The APA likewise does not require notice and comment for chapter 154 certification requests. Under the APA, the chapter 154 certification process is an adjudication, not a rulemaking, and the resulting certification decisions are orders, not rules. Hence, the notice-and-comment requirements of 5 U.S.C. 553 for rulemaking do not apply. *See* 73 FR at 75333–34; 78 FR at 58174.

Second, public notice and comment will not always be necessary for determining whether a State has established a capital counsel mechanism that satisfies chapter 154. Stripped of the extra-statutory conditions of the 2013 Regulations, certification decisions present fairly straightforward questions regarding whether a State has a mechanism for appointing, compensating, and paying reasonable litigation expenses of counsel, and has standards of competency for such appointments. These are matters that may be readily ascertainable from a State's statutes and policies and from the information in its request for certification, without need for public input through Federal Register publication. Nevertheless, the Attorney General will retain the discretion to seek public input on individual state certification requests when judged necessary or helpful, as may be done with respect to any other matter the Attorney General needs to decide.

Finality of certifications

Chapter 154 provides no authorization for the Attorney General to temporally limit State certifications and require periodic recertification, or to terminate or revoke a certification once granted. The plain statutory text reflects Congress's decision to adopt a system of one-time,

permanent certification, as was explicitly stated by one of its key drafters during the course of its ratification:

When section 507 [i.e., the 2006 chapter 154 amendments] was being finalized, I and others were presented with arguments that some mechanism should be created for “decertifying” a State that has opted in to chapter 154 but that allegedly has fallen out of compliance with its standards. I ultimately concluded that such a mechanism was unnecessary, and that it would likely impose substantial litigation burdens on the opt-in States that would outweigh any justification for the further review. . . . [I]f such a means of post-opt-in review were created, it inevitably would be overused and abused. . . . I thought it best to create a system of one-time certification, with no avenues to challenge or attempt to repeal the State’s continuing chapter-154 eligibility. The consequences of opting in to chapter 154 should not be perpetual litigation over the State’s continuing eligibility. . . . Therefore . . . , once a State is certified for chapter 154, that certification is final. There is no provision for “decertification” or “compliance review” after the State has been made subject to chapter 154.

152 Cong. Rec. 2446 (remarks of Sen. Jon Kyl).

The 2008 Regulations recognized and respected the terms of chapter 154 in this regard, as well as the intent clearly stated in the legislative history. *See* 73 FR at 75335.

The 2013 Regulations do not. They acknowledge that chapter 154 contains “no direction to the Attorney General to implement a decertification procedure” and that “day-to-day oversight and potential decertification of state capital counsel mechanisms are not among the Attorney General’s authorized functions under chapter 154.” 78 FR at 58175. Nevertheless, the 2013 Regulations provide categorically that a certification remains good only for a period of five years, a condition that likewise does not appear in chapter 154. *See id.* at 58184. The 2013 Regulations sought to justify this requirement based on a policy concern that a State’s capital-

counsel mechanism should be periodically revisited to ensure continued compliance with chapter 154. *See id.* at 58175–76, 58180–81.

However, speculative concerns about possible future changes in certified States’ capital-counsel mechanisms, which may not occur in any State, cannot justify the addition of a regulatory certification requirement not required by the statute and contrary to the legislative intent. The 2013 Regulations’ five-year rule makes chapter 154 inapplicable unless a State reapplies for certification after five years and persuades the Attorney General again that it has established a capital counsel mechanism satisfying chapter 154’s requirements—a condition on chapter 154’s application that appears nowhere in chapter 154 itself. Since there are “no requirements for certification or for application of” chapter 154 “other than those expressly stated in th[e] chapter,” 28 U.S.C. 2265(a)(3), the requirement to recertify after five years, *see* 78 FR at 58184, is *ultra vires* and this proposed rule rescinds it.

Severability

Each of the reforms proposed in this rulemaking is independently justified and valid. For example, rescission of the 2013 Regulations’ federal compensation standard for state capital counsel is necessary and justified, regardless of the validity of this rule’s rescission of the federal counsel-competency standard, timeliness requirement for appointments, or limitation on the finality of certifications, and vice versa. Likewise, affording the Attorney General discretion on whether public notice and comment is needed or useful in deciding any particular State’s application for chapter 154 certification is justified and valid, regardless of the validity of the rule’s other reforms. The provisions of this rule accordingly are severable and each is valid regardless of the validity or invalidity of any other provision.

IV. Section-by-Section Analysis

By section and subsection, the provisions of the proposed rule are as follows:

Section 26.20

Section 26.20 explains the rule’s purpose of implementing the certification procedure for chapter 154, as directed by 28 U.S.C. 2265(b). It briefly describes the effect of chapter 154 certification. This explanation has been shortened from the 2013 Regulations for clarity.

Section 26.21

Section 26.21 defines the terms “appropriate state official” and “State postconviction proceedings.” These definitions are unchanged from the previous regulations and reflect the same purposes. *See* 78 FR at 58177, 58183.

Section 26.21 no longer includes the 2013 Regulations’ definition of “[a]ppointment” to mean “provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking state and federal postconviction review and the time required for developing and presenting claims.” *See id.* at 58183. This was not a definition of “appointment” at all—a term that requires no definition in this context—but rather an effort to add a timeliness-of-appointment precondition for chapter 154 certification, contrary to section 2265(a)(3)’s prohibition of conditions for certification not expressly stated in the chapter.

Section 26.21 no longer includes the 2013 Regulations’ definition of “[i]ndigent prisoners” to mean “persons whose net financial resources and income are insufficient to obtain qualified counsel.” *See id.* Indigency requires no special definition here because all jurisdictions will have a definition of this term that they can use, given that States are required to appoint counsel for indigent defendants in trial and appellate proceedings. The definition in the 2013 Regulations clouds what is otherwise a clear and familiar concept because it refers to persons whose financial resources and income are insufficient to obtain “qualified” counsel, with no explanation of what “qualified” is supposed to mean.

Section 26.21 adds a definition of “competent counsel” to mean “counsel meeting state standards of competency.” This confirms that chapter 154’s requirement relating to competent counsel means appointment of counsel meeting state standards of competency, not the additional

federal standard of competency appearing in § 26.22(b) in the 2013 Regulations, *see id.*, which is *ultra vires* because chapter 154 does not authorize a federal competency standard.

Section 26.22

Subsections (a) and (b) of § 26.22 reproduce (i) 28 U.S.C. 2265(a)(3)’s provision that there are no requirements for certification or application of chapter 154 other than those expressly stated in the chapter and (ii) chapter 154’s express requirements for certification, relating to appointment, compensation, payment of reasonable litigation expenses, and competency. Section 26.22 as amended does not include the extra-statutory federal competency and compensation standards appearing in § 26.22(b)–(c) in the 2013 Regulations, *see* 78 FR at 58183, which are *ultra vires* because they do not appear expressly in chapter 154.

Subsections (a) and (b) of § 26.22 also do not include language from § 26.22(a) in the 2013 Regulations requiring that postconviction counsel “may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly requested continued representation.” 78 FR at 58183. This language mirrors a statutory requirement in 28 U.S.C. 2261, which imposes conditions on the application of expedited habeas proceedings. But section 2261’s text and structure reflect that this requirement is not a precondition for state certification under section 2265. Start with section 2261(b), which provides that chapter 154 applies if, among other requirements, “the Attorney General certifies [] a State . . . as provided in section 2265.” Neighboring section 2261(d) then provides that “[n]o counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall 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). This is most naturally read as an additional, independent qualification on subsections (b) and (c) for applying expedited habeas procedures, distinct from the section 2265 certification requirements separately cross referenced in section 2261(b).

Section 2265 reinforces this reading. That section provides that “certification” is limited to only three determinations: (A) whether the State 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; (B) the date on which the mechanism described in subparagraph (A) was established; and (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A). *Id.* 2265(a)(1). These determinations do not include whether post-conviction counsel is separate from trial counsel—a requirement found in section 2261. Whether postconviction counsel is separate from trial counsel (absent an express request for continued representation) is a question for a federal court to determine on a case-by-case basis and would be ill-suited to a categorical state certification decision. The 2013 Regulations improperly conflated it with the separate requirements for certification by the Attorney General.

Subsection (c) of § 26.22 rescinds the unnecessary requirement that all chapter 154 certification requests be subject to public notice and comment. *See* 78 FR at 58174, 58183. It instead promotes the prompt resolution of certification applications by directing the Attorney General to make a determination within 90 days of receipt of the request. For certification applications that are pending when this rule is finalized, § 26.22(c)’s 90-day decision period begins to run from the finalization of the rule. Section 26.22(c) further provides that these time rules do not affect the validity of a later certification decision by the Attorney General if the Attorney General is unable to decide within the relevant time frame. This ensures that the Attorney General will not be divested of authority to make a certification determination, and that the State will not have to restart the application and certification process if, for example, the Attorney General is temporarily barred from proceeding with a certification because of a district court’s injunction.

Subsection (d) of § 26.22 provides that the certification is final and that there is no authorization or procedure for suspending, reconsidering, revoking, or denying a certification

once granted. This rescinds the 2013 Regulations’ provision in § 26.23(d)-(e) that certifications lapse after five years.

Section 26.23

Section 26.23 no longer discusses the certification process because that issue is now addressed in § 26.22. Instead, § 26.23 adds a severability provision for the rule.

V. Regulatory Requirements

A. Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the purposes of that Act because the regulation only implements the certification procedure for chapter 154 of title 28. No small entities (small businesses, small organizations, or small governmental jurisdictions) are regulated by this rulemaking.

B. Executive Orders 12866 and 13563—Regulatory Review

The Office of Management and Budget (“OMB”) has determined that this rulemaking is a “significant regulatory action” under section 3(f) of Executive Order 12866, 58 FR 51735, 51738 (Sept. 30, 1993), but that it is not a section 3(f)(1) significant action. Accordingly, this proposed rule has been submitted to OMB for review. This proposed rule has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866 and Executive Order 13563, 76 FR 3821 (Jan. 18, 2011). The changes made by this rulemaking involve no additional costs. If anything, this rulemaking will diminish the financial burden on States related to their applications for certification. The benefits include increased ease and expedition in determining whether States have satisfied the requirements of chapter 154.

C. Executive Order 14192—Unleashing Prosperity Through Deregulation

Executive Order 14192, 90 FR 9065 (Jan. 31, 2025), requires an agency, unless prohibited by law, to identify at least 10 existing regulations to be repealed or revised when the

agency publicly proposes for notice and comment, or otherwise promulgates a new regulation, that qualifies as an Executive Order 14192 regulatory action (defined in OMB Memorandum M-25-20 as a final significant regulatory action as defined in section 3(f) of Executive Order 12866 that imposes total costs greater than zero). In furtherance of this requirement, section 3(c) of Executive Order 14192 requires that the incremental costs associated with such new regulations must, to the extent permitted by law, also be offset by eliminating existing costs associated with at least 10 prior regulations. *Id.* at 9065. This proposed rule proposes to rescind impediments to certification that chapter 154 does not authorize, and to enable more prompt decision of States' requests for certification. Accordingly, this rule, if finalized, will be considered a deregulatory action.

D. Executive Order 14294—Overcriminalization of Federal Regulations

Executive Order 14294, 90 FR 20363 (May 9, 2025), requires agencies promulgating regulations with criminal regulatory offenses potentially subject to criminal enforcement to explicitly describe the conduct subject to criminal enforcement, the authorizing statutes, and the mens rea standard applicable to each element of those offenses. *Id.* at 20363. This proposed rule does not create a criminal regulatory offense and is thus exempt from Executive Order 14924 requirements.

E. Executive Order 13132—Federalism

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as outlined by Executive Order 13132, 64 FR 43255 (Aug. 4, 1999). The proposed rule implements only a procedure for States that request certification of their postconviction capital-counsel mechanisms under chapter 154 of title 28.

F. Executive Order 12988—Civil Justice Reform

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, 61 FR 4729, 4730–32 (Feb. 5, 1996), to specify provisions in clear language. Pursuant to section 3(b)(1)(I) of the Executive Order, nothing in this proposed rule is intended to create any legal or procedural rights enforceable against the United States. *See id.* at 4731.

G. Unfunded Mandates Reform Act of 1995

This rule when finalized will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995. The rule only concerns the procedure for certification of state postconviction capital counsel mechanisms under chapter 154 of title 28.

List of Subjects in 28 CFR Part 26

Law enforcement officers, Prisoners.

Authority and Issuance

Accordingly, for the reasons stated in the preamble, the Attorney General proposes to amend 28 CFR part 26 as follows:

PART 26—DEATH SENTENCES PROCEDURES

1. The authority citation for part 26 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 4001(b), 4002; 28 U.S.C. 509, 510, 2261, 2265.

2. Subpart B of part 26 is revised to read as follows:

Subpart B—Certification Process for State Capital Counsel Systems

Sec.

26.20 Purpose.

26.21 Definitions.

26.22 Certification.

26.23 Severability.

Subpart B—Certification Process for State Capital Counsel Systems

§ 26.20 Purpose.

Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a State has established a mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. Certification qualifies the State for the application, in its capital cases, of special federal habeas corpus review procedures set forth in sections 2262, 2263, 2264, and 2266 of title 28. Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.

§ 26.21 Definitions.

For purposes of this part, the term—

Appropriate State official means the state attorney general, except that, in a State in which the state attorney general does not have responsibility for federal habeas corpus litigation, it means the chief executive of the State.

Competent counsel means counsel meeting state standards of competency for the appointment of counsel in state postconviction proceedings brought by indigent prisoners who have been sentenced to death.

State postconviction proceedings means collateral proceedings in state court, regardless of whether the State conducts such proceedings after or concurrently with direct state review.

§ 26.22 Certification.

(a) There are no requirements for certification or for application of chapter 154 other than those expressly stated in the chapter. An appropriate state official may request in writing that the Attorney General determine whether the State meets the requirements for certification expressly stated in chapter 154. If so requested, the Attorney General shall determine—

(1) Whether the State 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;

(2) The date on which the mechanism was established; and

(3) Whether the State provides standards of competency for the appointment of counsel in proceedings described in paragraph (1) of this section.

(b) As provided in 28 U.S.C. 2261(c), the mechanism must offer postconviction counsel to all indigent prisoners with capital sentences and must provide for the entry of an order by a court of record—

(1) Appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) Finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

(c) The Attorney General shall determine whether to certify a State's capital counsel mechanism within the later of —

(1) 90 days after the Attorney General's receipt of the request for certification by the appropriate state official; or

(2) 90 days after the Attorney General publishes in the Federal Register a final rule, if the request for certification is received before the final rule is published in the Federal Register.

(d) The failure to make a determination within the applicable time frame because of judicial interference or other circumstances beyond the Attorney General's control does not affect the validity of a later determination.

(e) If certification is granted, the certification will be published in the Federal Register and will identify the date on which the State established its qualifying capital counsel

mechanism. Certification is a final determination by the Attorney General that the State meets the statutory requirements for certification. There is no authorization or procedure for suspending, reconsidering, revoking, or denying certification with respect to a State for which certification has been granted.

§ 26.23 Severability.

If any provision of this subchapter, or the application of such provision to any person or circumstance, is found to be invalid, that shall not affect the validity of any other provision or application.

Dated: March 12, 2026.

Pamela Bondi,

Attorney General.

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