WASHINGTON
LEGISLATIVE OFFICE

June 1, 2011

Submitted electronically at http://www.regulations.gov

The Honorable Attorney General Eric H. Holder, Jr.
C/o Lisa Ellman
United States Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue, NW, Room 4234
Washington, DC 20530

RE: Docket No. OAG Docket No. 1540 Certification Process for State Capital Counsel Systems

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Dear Attorney General Holder:

With this letter the American Civil Liberties Union (ACLU) provides commentary to the Department of Justice on Proposed Rule Implementing USA PATRIOT Improvement and Reauthorization Act of 2005, 76 Fed. Reg. 11705 (March 3, 2011). The American Civil Liberties Union is a nationwide, non-partisan organization with over a half million members, countless additional supporters and activists, and 53 affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws.

On February 25, 2011, your office issued Certification Process for State Capital Counsel Systems, proposing a rule establishing procedures for determining whether an individual state complies with the requirements of Chapter 154 and, therefore, may invoke its procedures in capital habeas proceedings in federal court.

As set forth in this comment,[1] the proposed rule contains a number of critical deficiencies. Although it purports to ensure competent counsel by requiring state mechanisms to possess qualification standards for appointed counsel and to mandate reasonable compensation, the proposed rule: (1) fails to ensure adequate compensation for appointed counsel; (2) fails to ensure competent performance by appointed counsel; (3) fails to establish a minimum national qualification standard for appointed counsel; and (4) fails to provide for an adequate certification process.

[1] The ACLU provided comments on previous versions of the proposed rule, one on April 7, 2009 and another on September 24, 2007. See Attached Comments of the ACLU (Apr. 7, 2009), http://www.regulations.gov/#!documentDetail;D=DOJ-OAG-2008-0029-0042 (hereinafter "Comments of ACLU (Apr. 7, 2009)"); Comments of the ACLU (Sept. 24, 2007), http:// http://www.regulations.gov/#!documentDetail;D=DOJ-2007-0110-0157.1 (hereinafter "Comments of ACLU (Sept. 24, 2007)").

1. Failure to ensure adequate compensation.

Paragraph (c) of Section 26.22 of the proposed rule states that the state mechanism "must provide for compensation" of state postconviction counsel, but the proposed rule falls short of its stated purpose of ensuring adequate compensation for appointed counsel in two central ways.

First, subsection (c)(1)(iii) fails to ensure that appointed private counsel will receive adequate compensation by permitting them to receive the same compensation as "appointed counsel in State appellate or trial proceedings in capital cases." In many states, compensation for attorneys representing indigent capital defendants at the trial and direct appeal levels is woefully inadequate.[2]

Second, subsection (c)(2) permits states to comply with the adequate compensation requirement "by means not dependent on any special financial incentive for accepting appointing, such as providing salaried public defender personnel to carry out such assignments.[3]" Indeed, for many states the provision of salaried public defender personnel may turn out to be the most cost-effective method of providing counsel for their indigent death-row populations. However, this alternative will not result in competent representation if the workloads of the public defender personnel are not limited. As the Department of Justice has recognized, "excessive workload is one of the most pressing issues facing indigent defense programs in the United States" because "[e]very day, defender offices and assigned counsel are forced to manage too many clients with inadequate resources. Too often, the quality of service suffers, jeopardizing one of our most important constitutional rights: the right to effective counsel.[4]"

In light of the failure of many states to adequately fund their indigent defense delivery systems, there is an intolerable risk that states will shift the burden of state postconviction representation onto already overburdened public defender divisions without a concomitant increase in funding, or establish underfunded state postconviction units without the time and resources to provide competent representation.[5] For example,

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[2] *See generally* Marea L. Beeman & James Downing, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial: A State-By-State Overview* (Apr. 2003), http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/compensationratescapital2003.pdf. *See also McFarland v. Scott*, 512 U.S. 1256, 1257-59 (1994) (Blackmun, J., dissenting on denial of writ of certiorari) ("compensation for attorneys representing indigent capital defendants often is perversely low. Although a properly conducted capital trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings, many States severely limit the compensation paid for capital defense.").

[3] 76 Fed. Reg. at 11710.

[4] Bureau of Just. Assistance, U.S. Dep't of Just., KEEPING DEFENDER WORKLOADS MANAGEABLE iii, 1 (Jan. 2001). *See also* Eric Holder, Attorney General, U.S. Dep't of Just., Remarks on Indigent Defense Reform at the Brennan Center for Justice Legacy Awards Dinner (Nov. 16, 2009) (hereinafter "Holder Remarks (Nov. 16, 2009)") (addressing need to improve indigent defense services throughout the country; "[e]ven when counsel is appointed the appointment is oftentimes not meaningful, not truly effective," because of excessive caseloads; "[h]igh caseloads leave even those lawyers with the best of intentions little time to investigate, file appropriate motions, and do the basic things we assume lawyers do"; "[w]hen defense counsel are handicapped by lack of training, time, and resources – or when they're just not there when they should be – we rightfully begin to doubt the process and we start to question the results. We start to wonder: is justice being done? Is justice being served?").

[5] *See, e.g.*, Deborah Fleischaker, *ABA State Death Penalty Assessments Facts (Un)Discovered, Progress (to be) Made, and Lessons Learned*, 34 ABA Hum. Rts. Mag.10, 11 (Spring 2007)

district public defender offices in Tennessee are burdened by some of the highest caseloads in the country and presently are short a shocking 123 attorneys. The Office of the Post-Conviction Defender in Tennessee is said to be on the verge of collapse due to an excessive caseload, with five assistant postconviction defenders each handling an average of twelve to fourteen capital cases at any one time. Given that capital cases are some of the most difficult and time-consuming cases an attorney can handle, this sort of overwhelming caseload makes it difficult, if not impossible, to provide adequate representation.").[6]

2. Failure to ensure competent performance by appointed counsel.

Even putting aside the flaws of the provisions addressing qualification and compensation standards, *see infra* and *supra*, the rule will not ensure counsel competency because it does not address counsel's independence and actual performance. To achieve the objective of assuring competent counsel, the rule must require that state mechanisms ensure that appointed counsel are sufficiently independent, a necessary prerequisite to competency in many cases.[7]

Second, we also explained in its previous comments, the proposed rule must require that state mechanisms have performance standards or that counsel's performance be regularly monitored.[8] At a bare minimum, a state competency standard should require

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http://www.americanbar.org/publications/human_rights_magazine_home/irr_hr_spring07_fleisspr07.html ("Even in states that do appoint counsel in state postconviction proceedings, serious problems persist.

[6]*See also* Jimmie Gates, *State's Legal Help For Death Row Inmates Called Failure*, CLARION-LEDGER (Jackson, MS) at A5 (Oct. 19, 2010) ("Mississippi consistently has appointed unqualified, underfunded and overburdened attorneys to represent death row inmates in their appeals, a petition filed Monday with the state Supreme Court says. The brief was filed on behalf of 15 death row inmates challenging the system wide failure to provide them with competent counsel during their appeals after conviction."); Chuck Lindell, *Cuts Challenge New State Office For Death-Row Appeals*, AUSTIN AMERICAN-STATESMAN (Dec. 31, 2010) ("Two rounds of budget cuts have already cost the [Texas Office of Capital Appeals, which was legislatively established in 2009 and began operations in 2010,] a part-time worker prompted remaining staffers to cut corners by supplying their own ergonomic chairs, buying office supplies and traveling on the cheap by staying with friends or declining to be repaid for meals. But additional budget cuts of 10 percent, likely to hit almost every state agency next year, could leave little choice but to lay off a lawyer or investigator. Such a reduction could jeopardize the agency's mission and the state's long-standing — but often broken — promise that no inmate will be executed without first getting help from a competent appeals attorney.").

[7]*See* ABA Standing Committee on Legal and Indigent Defendants, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002) http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf ("The public defense function, including the selection, funding, and payment of defense counsel, is independent."); *see also* Holder Remarks (Nov. 16, 2009) ("In addition to resource problems, many public defender offices have insufficient independence ….").

[8]*See Ten Principles of a Public Defense Delivery System*, ABA Standing Committee on Legal and Indigent Defendants (2002) http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf ("Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards."); Guideline 7.1: Monitoring; Removal, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 970 (2003) (establishing review and removal guidelines necessary to ensure that capital defense counsel are providing competent representation); Holder Remarks (Nov. 16, 2009) ("In addition to resource problems, many public defender offices have insufficient … oversight to ensure that the lawyers are effectively representing

performance of such basic duties as adequate investigation and obligation to explore and raise all potential legal claims.[9]

3. Failure to establish a minimum national qualification standard.

Paragraph (b) of Section 26.22 reads in pertinent part: "The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments that meet or exceed any of the following:… (2) Appointment of counsel satisfying standards established in conformity with [Innocence Protection Act,] 42 U.S.C. 14163(e)(1), (2)(A); or (3) Appointment of counsel satisfying qualification standards that reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases."

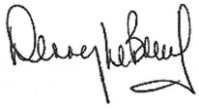
Paragraph (b) is deficient because it fails to establish a minimum national standard of competency. The ACLU demonstrated this point in an earlier comment, which it incorporates here by reference.[10]

4. Failure to provide for an adequate certification process.

In its previous comments, the ACLU described at length the deficiencies of a certification procedure that permits nothing more than a request letter by a state official and public comment, which the current proposed rule continues to do. The ACLU incorporates here by reference these earlier comments.[11]

Respectfully submitted,

Laura W. Murphy,
Director
Washington Legislative Office



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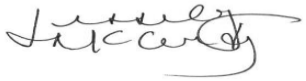
the interests of the accused."); Innocence Protection Act, 42 U.S.C. §14163(e) (2004) ("an effective system for providing competent legal representation is a system that --- …. (2)(E)… (i) monitor[s] the performance of attorneys who are appointed… and (ii) remove[s] from the roster attorneys who—(I) fail to deliver effective representation…."); Adele Bernhard, *Raising the Bar: Standards Based Training, Supervision, and Evaluation - An Essay*, 75 Mo. L. Rev. 831 (2010).

[9] *See generally* Guidelines 10.2-10.15.2, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003); *see also Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (2010) ("'[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable' .... [T]hese standards may be valuable measures of the prevailing professional norms of effective representation…. ") (citations omitted).

[10] *See* attached Comments of the ACLU (Apr. 7, 2009).

[11] *See* attached Comments of the ACLU (Apr. 7, 2009) and attached Comments of the ACLU (Sept. 24, 2007).



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