No. 16-880

IN THE

# Supreme Court of the United States

HABEAS CORPUS RESOURCE CENTER, *et al.*,

*Petitioners,*

*v.*

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS


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The National Association of Federal Defenders, the National Legal Aid and Defender Association, and the National Association of Criminal Defense Lawyers ("*amici*") hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief *amici curiae* in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit. A copy of the proposed brief is attached.

*Amici* are filing this motion because we have been unable to secure consent from Respondent. *Amici* provided the Acting Solicitor General with at least 10 days notice of their intent to file a brief in this case and requested consent. The Acting Solicitor General has not responded. Counsel for Petitioners have provided consent for undersigned to file a brief in this case and informed undersigned that a request for the Office of the Solicitor General to provide blanket consent for *amici* filings in this case has been submitted, but has received no response to that request.

As more fully explained on page 1 of the attached brief under "Interests of *Amici Curiae*," *amici* are public defender organizations who represent, in federal habeas corpus proceedings, persons sentenced to death in state court. The undersigned have significant interests in the issues presented by this case. The National Association of Federal Defenders (NAFD) is a nationwide, non-profit, volunteer organization whose membership comprises attorneys who work in Criminal Justice Act public and community defender organizations. NAFD's membership includes attorneys who represent capital-habeas petitioners, both from capital habeas units (CHUs) and defender's offices without CHUs. The National Legal Aid and Defender Association's (NLADA's) membership

is comprised of attorneys who provide legal service to indigent criminal defendants in federal and state courts. Thus, its membership also includes members of defender organizations who provide representation in federal capital habeas corpus cases. The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Its members include private criminal defense lawyers and public defenders.

This brief will assist the Court in determining whether to grant *certiorari* by detailing the intricate and multi-front nature of federal capital habeas work and the crippling burdens the Final Regulations will place on petitioners and other defender organizations around the country.

Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief as *amici curiae.*

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## INTERESTS OF *AMICI*[1]

The National Association of Federal Defenders (NAFD) was formed to enhance representation of indigent criminal defendants under the Criminal Justice Act and the Sixth Amendment. The NAFD is a nationwide, non-profit organization of attorneys who work for federal public and community defender organizations. The NAFD's members represent capital habeas petitioners both within capital habeas units and in defender offices without such units. One of the principles of the NAFD is to promote the interests of justice by appearing as amicus curiae in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court.

The National Legal Aid & Defender Association (NLADA), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. For 100 years, NLADA has pioneered access to justice and right to counsel at the national, state, and local level. NLADA serves as a collective voice for our country's public defense providers and civil legal aid attorneys and provides advocacy, training, and technical assistance to further its goal of securing equal justice. The Association pays particular attention to procedures and policies that affect the constitutional rights of the accused.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

## SUMMARY OF ARGUMENT

This Court should grant certiorari because the petition raises a crucial question concerning an organization's standing to challenge vague, standardless regulations that work immediate harm to the organization's day-to-day operations. The Final Regulations force federal defenders to assume that habeas petitions must be filed on a drastically shortened time frame, with no opportunity to amend once filed. Federal defenders will therefore have to alter every aspect of the manner in which they prepare and litigate capital federal habeas cases: when they begin working on a case, how it is staffed, the types of work that are done, and treating every case as an emergency matter as soon as or even before the direct appeal is decided. The federal defenders are injured in fact by the regulations at issue here.

This Court has recognized that once a conviction and death sentence have been affirmed on direct appeal, the crucial forum for the condemned prisoner is state post-conviction proceedings. The tasks facing post-conviction

counsel are many and complex – obtaining and reviewing the entire trial court record; obtaining and reviewing any and all records that were not obtained by trial counsel; investigating the evidence supporting the conviction; investigating the available evidence in mitigation; and obtaining and consulting relevant experts both with respect to any forensic issues and with respect to mental health and other types of mitigating evidence.

Despite the importance and complexity of these tasks, states have lagged in ensuring that state post-conviction counsel are timely appointed and have the skill, experience, and resources necessary to provide adequate representation. Under current practice there are opportunities for experienced and skilled federal habeas counsel to attempt to cure the errors and omissions of state post-conviction counsel. But, pursuant to the Final Regulations, there will be a drastically shortened time limit on the preparation of both the state post-conviction petition and the federal habeas petition, and many of the ways in which the errors and omissions of state post-conviction counsel can be cured will no longer be available.

Chapter 154 was intended to authorize changes in habeas procedure for states that have taken affirmative steps to cure the inadequacies of post-conviction counsel. But the Final Regulations are so vague and standardless that states can be certified as compliant without actually fixing the underlying problems. And because Chapter 154 can have retroactive effect, federal defenders and other habeas counsel will have to assume, even before a state has been certified, that these significant and far-reaching changes will apply.

## ARGUMENT

### I. THE FINAL REGULATIONS ARE VAGUE AND STANDARDLESS.

The district court found that the Final Regulations are arbitrary and capricious, both procedurally and substantively. Pet. App. 50a-65a. In reversing the district court on standing and ripeness grounds, the Ninth Circuit did not disturb the district court's ruling on the merits.

The Final Regulations merely require a state to submit a request for certification in writing. 28 C.F.R. § 26.23(a). The failure to require states to specify how they provide adequate counsel or prove that they actually do so deprives the agency of important information and "improperly shifts the burden to the public to prove that the state applying for certification does not comply with Chapter 154." Pet. App. 54a-55a. The district court found this inconsistent with Chapter 154 itself, which "requires that a state take affirmative steps to prove its eligibility." Pet. App. 55a; *see Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1183 (N.D. Cal. 1998) (to qualify under Chapter 154, "a state must establish a system reflecting 'an affirmative, institutionalized, formal commitment' to habeas representation"), *aff'd sub nom. Ashmus v. Woodford*, 202 F.3d 1160 (9th Cir. 2000).

The district court held: "Common sense requires that a state must actually comply with its own mechanism, and the history, purpose and exhaustive judicial interpretation of chapter 154 also support this view." Pet. App. 57a (collecting decisions). Because the Final Regulations do not provide an accurate method for determining whether

a state is complying with its own mechanism, they are procedurally deficient, arbitrary, and capricious. Pet. App. 58a.

Substantively, the Final Regulations are vague and undefined, allowing a state to be "certified if its competency standards 'reasonably assure a level of proficiency appropriate for State post-conviction litigation in capital cases.'" Pet. App. 60a (quoting 28 C.F.R. § 26.22(b)). The district court found that the lack of substantive criteria for a state to be certified violates the intent of Chapter 154, which requires "that a state actually uphold its end of the bargain – to provide competent representation." Pet. App. 61a.

In addition to these deficiencies, the Final Regulations also fail to carry out congressional intent that states only be rewarded with streamlined procedures when they actually provide adequate post-conviction counsel,[2] or provide for a fair certification process in at least the following respects:

The Final Regulations fail to ensure that a mechanism will be approved only if appointed counsel are actually provided adequate compensation for their work and reasonable litigation expenses. The Final Regulations allow the requirement to be satisfied in a number of ways, including by a showing that the compensation of post-conviction counsel is comparable to that of trial and appellate counsel. 28 C.F.R. § 26.22(c)(1)(iii). In many

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2. Congressional intent is reflected in a Judicial Conference report that formed the basis for Chapter 154. *See* 135 Cong. Rec. S13471-04, S13482 (1989) (Ad Hoc Comm. Rpt.).

jurisdictions, however, the compensation of capital trial and appellate counsel is itself inadequate.[3] A jurisdiction that does not provide adequate resources throughout the trial/direct-appeal/post-conviction process does not satisfy the intent of Chapter 154.

The Final Regulations fail to ensure that a mechanism will be approved only if the state actually provides for timely appointment of counsel at the conclusion of direct review. The regulations state only that appointment must occur "in a manner that is reasonably timely." 28 C.F.R. § 26.21.

While 28 U.S.C. § 2261(c) provides that a state mechanism "must offer counsel to all State prisoners under capital sentence," the regulations do not require a state to make an affirmative offer that does not depend on the actions or initiative of the prisoner or counsel. Several courts have held that a mechanism that does not require an affirmative offer fails to comply with § 2261.[4] Under the regulations, such states could nevertheless be certified.

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3. *See, e.g.*, Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J. L. Soc'y 1 (2010).

4. *See, e.g.*, *Hall v. Luebbers*, 341 F.3d 706, 712 (8th Cir. 2003) (Missouri procedure did not comply because state only offered appointment to prisoners "who file a petition for post-conviction relief"); *Satcher v. Netherland*, 944 F. Supp. 1222, 1243-44 (E.D. Va. 1996) (Virginia procedure did not comply because it "did not require the State affirmatively to offer counsel to all prisoners"), *rev'd in part on other grounds*, 126 F.3d 561 (4th Cir. 1997); *Zuern v. Tate*, 938 F. Supp. 468, 471 (S.D. Ohio 1996) (Ohio procedure did not comply because it failed to offer counsel until filing of pro se petition).

Finally, both the state attorneys general, who are designated by the Final Regulations as an "appropriate State official" to seek certification, *see* 28 C.F.R. § 26.21, and the United States Attorney General, who reviews certification requests, face conflicts of interest. The State Attorney General, who typically represents the state and/or the prisoner's custodian both in state post-conviction proceedings and in federal habeas proceedings, has an interest *as a litigant* in obtaining certification, given the fast-track procedures and other benefits provided for the state under Chapter 154. The United States Attorney General also faces a conflict between his prosecutorial interests and his responsibilities in the certification process.

As a result of these procedural and substantive deficiencies, federal defenders, other counsel representing death-sentenced prisoners, and prisoners themselves must assume that their state will be certified, regardless of whether the state actually provides for timely appointment of competent post-conviction counsel, supported by adequate resources. Moreover, 28 U.S.C. § 2265 provides that the effective date of certification is the date on which the mechanism was established, which may be years before the actual certification occurs. Therefore, the substantive provisions of Chapter 154 – including a dramatically shortened statute of limitations, § 2263; curtailed ability to overcome state court procedural defaults, § 2264; and severely limited ability to amend a petition, § 2266(b)(3)(B) – could apply retroactively once a state is certified.

As the district court found, the combination of unreasonably vague, arbitrary, and capricious regulations and the retroactive effect of Chapter 154 will force federal

defenders to dramatically alter their operations well before any state is actually certified: "The confusion caused by the retroactive effect, particularly when combined with the lack of clear certification standards discussed below, forces Plaintiffs to make urgent decisions regarding their litigation, resources, and strategy." Pet. App. 42a.

Because of the standardless regulations, states will reap the benefits of Chapter 154 without ever having provided meaningfully improved state post-conviction representation. This will require federal defenders to make numerous burdensome and expensive changes to their litigation practices, in order to protect their clients' rights, eventually, to seek habeas corpus relief.

## II. ADEQUATE STATE POST-CONVICTION COUNSEL IS CRUCIAL, YET STATES FAIL TO PROVIDE SUCH COUNSEL.

### A. The Requirements for Adequate Post-Conviction Representation.

A condemned prisoner's ability to properly present a federal claim in a state post-conviction forum is literally a matter of life and death -- "state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding," *Harrington v. Richter*, 562 U.S. 86, 103 (2011), and state courts' merits decisions are subject only to deferential review.

The availability of meaningful federal habeas review to death-sentenced prisoners is therefore dependent on the provision of skilled, experienced, and adequately resourced state post-conviction counsel. "The ultimate

fate of a habeas petitioner in federal court depends to a very large extent on the performance of counsel in state post-conviction proceedings." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila.*, 790 F.3d 457, 479 (3d Cir. 2015) (McKee, C.J., concurring).

**1. Counsel must have adequate skill and experience.**

Post-conviction litigation requires counsel to have expertise in procedural, legal, and technical issues well beyond the skill set of many appointed counsel, and different from skills and experience required for other kinds of criminal cases.[5] Post-conviction counsel must be aware of specialized and frequently changing legal principles, scientific developments, and mental health concerns.

The ABA Guidelines define "qualified" capital counsel as those who fulfill training requirements, and who have the demonstrated skills and abilities necessary for

5. *See, e.g.*, *McFarland v. Scott*, 512 U.S. 849, 854 n.2 (1994) ("Counsel appointed to represent capital defendants in post-conviction proceedings must meet more stringent experience criteria than attorneys appointed to represent noncapital defendants . . . ."); *see also* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 931 (2003) ("ABA Guidelines") ("Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial.").

adequate representation.[6] While experience alone is not "a sufficient basis to determine an attorney's qualifications for the task," *see* ABA Guidelines, 31 Hofstra L. Rev. at 964, it is nevertheless critically important, *see Colvin-El v. Nuth*, No. Civ. A. AW 97-2520, 1998 WL 386403, at *6 (D. Md. July 6, 1998) (because of the "extraordinarily complex body of law and procedure unique to post-conviction review, an attorney must, at a minimum, have some experience in that area before he or she may be deemed 'competent'").

**2. Counsel must have access to adequate resources and experts.**

Under the ABA Guidelines, the defense should include at least two skilled and qualified lawyers, an investigator, and a mitigation specialist. The mitigation specialist compiles a comprehensive history of the client based on an exhaustive investigation; analyzes the significance of the information; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; and provides social history information to experts to enable them to conduct competent and reliable evaluations. The social history investigation must also gather documentation about the client and his family, typically including medical, educational, employment, social service, and court records, a process that is often time-consuming. *See* ABA Guidelines, 31 Hofstra L. Rev. at 1021-26. Experienced mitigation specialists estimate that hundreds of hours are required to complete an adequate social history.[7]

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6. *See* ABA Guidelines, 31 Hofstra L. Rev. at 961-62, 976-77.

7. *See* Lee Norton, *Capital Cases: Mitigation Investigation*, THE CHAMPION, 43-45 (May 1992).

The expenses of counsel litigating a capital post-conviction case are particularly high because post-conviction proceedings involve review of both the merits and sentencing trials. Meaningful post-conviction representation requires funding for investigation, experts, and other essential resources. Since almost all death-sentenced prisoners are indigent, government funding of the defense team and supporting services and resources is essential to competent representation.[8]

### 3. Counsel must have adequate time to investigate, prepare, and present defense case.

No matter how skilled or talented counsel may be, there is no way for counsel to adequately represent a client if she is not given enough time to prepare. The pace of post-conviction litigation in many jurisdictions is already expedited, and given the extensive responsibilities involved in preparing a post-conviction appeal, *any* delay in appointment can seriously impair counsel's ability to perform competently. *See, e.g.*, *Spears v. Stewart*, 283 F.3d 992, 1019 (9th Cir. 2002) ("[T]imeliness [in appointment of post-conviction counsel] is a requirement at the heart of the post-conviction procedure . . . .").

A survey of the time required in Florida capital post-conviction cases concluded that "on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the United

8. *See* ABA Guidelines, 31 Hofstra L. Rev. at 981-82 (funding is required for the full cost of high quality legal representation by the defense team and outside experts).

States Supreme Court following direct appeal to the denial of certiorari [from state post-conviction proceedings].” ABA Guidelines, 31 Hofstra L. Rev. at 969 (quoting The Spangenberg Group, Amended Time & Expense Analysis of Post-Conviction Capital Cases in Florida 16 (1998)). As post-conviction proceedings have become more complicated since 1998, even more time is now required.

### B. State Post-Conviction Systems Fail to Provide Adequate Representation

Many states have adopted mechanisms that provide for appointment and funding of post-conviction counsel in capital cases.[9] However, the experience of federal defenders who litigate capital habeas cases and monitor state post-conviction cases reveals that in actual practice, most if not all of the state mechanisms fail to:

- appoint counsel in a timely fashion;
- appoint counsel who are themselves experienced and capable, and who have necessary resources;
- provide adequate financial resources, including funding for counsel themselves and for mitigation, forensic, and other experts;
- provide any remedy for violation of the rules that exist on paper, or for ineffective post-conviction counsel.[10]

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9. The vagueness of the regulations, *see* § I, makes it likely that many states will have their mechanisms certified as compliant, regardless of adequacy.

10. *See* ABA Guidelines, 31 Hofstra L. Rev. at 932 n.47 (“the intertwined realities of chronic underfunding, lack of standards,

Timely appointment of post-conviction counsel is crucial in capital cases. *See Spears*, 283 F.3d at 1019. This will be all the more crucial if a state qualifies for the shortened statute of limitations provided in 28 U.S.C. § 2263. Nevertheless, many state mechanisms require appointment of counsel only after the death-sentenced prisoner takes affirmative steps to request counsel or file a petition pro se.[11] Even where the mechanism does not require such steps, some states routinely fail to appoint post-conviction counsel until the prisoner takes some action,[12] or delay an unconscionable amount of time before actually appointing counsel.[13]

Most state mechanisms require that appointed counsel have some combination of general criminal law experience and training. Most do not, however, require any experience in post-conviction proceedings. *See, e.g.*, *Wright v. Angelone*, 944 F. Supp. 460, 466-67 (E.D. Va.

and a dearth of qualified lawyers willing to accept appointment, have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance.") (citation omitted).

11. *See, e.g.*, Mo. R. Crim. P. 29.16(a) (post-conviction counsel appointed after prisoner files application for post-conviction relief); S.C. Code Ann. § 17-27-160 (same); Va. Code Ann. § 19.2-163.7 (post-conviction counsel appointed after prisoner requests appointment).

12. For example, on paper Pennsylvania requires appointment of counsel upon "conclusion of direct review, . . . which includes discretionary review in the Supreme Court of the United States." Pa. R. Crim. P. 904(H)(1). In practice, counsel is rarely appointed until after the prisoner files a pro se petition.

13. *See, e.g.*, Pet. App. 56a ("capital prisoners in Arizona generally wait more than a year and a half" after direct appeal before state post-conviction counsel is appointed).

1996) (Virginia standards inadequate because they did not require capital or post-conviction experience); *Colvin-El*, 1998 WL 386403, at *6 (Maryland standards inadequate because they did not require post-conviction experience); Pa. R. Crim. P. 801 (no requirement of capital or post-conviction experience). And many states have not actually required compliance with their requirements.[14]

For these and other reasons, appointed counsel frequently fail to provide adequate representation. For example, appointed counsel have failed to file timely within the statute of limitations (currently one year, *see* 28 U.S.C. § 2244(d)), resulting in habeas petitions being barred;[15] waived or failed to raise viable claims;[16] failed

14. *See, e.g.*, *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000) (South Carolina's mere creation of mechanism did not qualify for certification where state failed to comply with mechanism); *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) (Maryland's "[c]ompetency standards are meaningless unless they are actually applied in the appointment process").

15. *See, e.g.*, *Christeson v. Roper*, 135 S. Ct. 891, 892 (2015) (appointed counsel miscalculated statute of limitations and failed to file timely); *Holland v. Florida*, 560 U.S. 631, 654 (2010) (remanding for determination whether post-conviction counsel's failure to timely file habeas petition could be ground for equitable tolling of statute); *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (appointed counsel miscalculated statute and allowed it to expire); *Banks v. Sec'y, Fla. Dep't of Corr.*, 592 F. App'x 771, 774 (11th Cir. 2014) (as of 2014, at least *three dozen* men on Florida's death row had missed their federal filing deadline); *Melson v. Comm'r, Ala. Dep't of Corr.*, 713 F.3d 1086 (11th Cir. 2013) (one of several Alabama capital cases in which habeas petition was untimely).

16. *See, e.g.*, *Martinez v. Johnson*, 255 F.3d 229, 234 (5th Cir. 2001) (state habeas counsel filed petition raising four claims, two of

to fully investigate, plead and present available evidence in support of post-conviction claims;[17] failed to develop available facts;[18] and failed to exhaust claims of error under the Federal Constitution.[19]

Many state mechanisms also do not provide the necessary funds either to compensate counsel adequately or to fund necessary aspects of post-conviction

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which had already been rejected on direct appeal); *Commonwealth v. Albrecht*, 720 A.2d 693, 699 (Pa. 1999) (appointed counsel waived most issues raised by prior counsel and then raised three meritless issues in an "abbreviated and perfunctory manner"); *compare Commonwealth v. Porter*, 728 A.2d 890, 893 (Pa. 1999) (post-conviction counsel asserted there were no meritorious issues), *with Porter v. Horn*, 276 F. Supp. 2d 278 (E.D. Pa. 2003) (granting sentencing relief on claim post-conviction counsel had failed to raise); *Ex parte Buck*, 418 S.W. 3d 98, 107 (Tex. Crim. App. 2013) (counsel in a capital case "filed only non-cognizable or frivolous claims"); *Ex parte Kerr*, 64 S.W.3d 414, 416 (Tex. Crim. App. 2002) (initial petition did not raise single claim challenging petitioner's conviction or sentence).

17. *See, e.g.*, *Trevino v. Thaler*, 133 S. Ct. 1911, 1915-16 (2013) (post-conviction counsel failed to conduct any investigation); *Menzies v. Galetka*, 150 P.3d 480, 514 (Utah 2006) (same); *Commonwealth v. Hall*, 872 A.2d 1177, 1181 (Pa. 2005) (numerous claims raised in post-conviction petition were "waived because they were not supported by any testimony or evidence").

18. *See, e.g.*, *Taylor v. Horn*, 504 F.3d 416, 437 n.17 (3d Cir. 2007) (expressing "doubts about the effectiveness of Taylor's post-conviction counsel," who failed to develop evidence in support of competence claim).

19. *Collins v. Sec'y of Pa. Dep't of Corr.*, 742 F.3d 528, 541 (3d Cir. 2014) (claim that was raised before post-conviction trial court not exhausted because not raised before state supreme court).

representation, such as the employment of investigators, mitigation specialists, and forensic and mental health experts.[20] The deadly combination of unqualified counsel and insufficient funding does not serve the interests of justice.

### C. Currently, Federal Defenders Have Opportunities to Attempt to Remedy the Deficiencies of State Post-Conviction Counsel.

Because representation in state post-conviction proceedings is often inadequate, federal defenders typically start from scratch in their efforts to carry out the numerous tasks required to provide the adequate representation discussed in § I.B. To determine whether there are any claims that were not properly investigated or litigated by prior counsel, federal defenders must review all prior transcripts, pleadings, reports, and files; request any outstanding records, including litigating any denials of the requests; and review any court records for those involved in the case. Federal habeas counsel must also determine whether there are witnesses whom prior counsel failed to interview, or from whom prior counsel failed to obtain critical information.

Habeas counsel must accomplish these tasks and file a federal habeas petition before time expires within the current one year statute of limitations. Concurrently, counsel must attempt to determine whether any of the

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20. *See, e.g.*, *Baker*, 220 F.3d at 285-86 (Maryland's compensation system "simply cannot be deemed adequate," because it "result[ed] in substantial losses to the appointed attorney or his firm"); *Mills v. Anderson*, 961 F. Supp. 198, 202 (S.D. Ohio 1997) (finding Ohio fee schedules "unreasonably low").

petitioner's claims have not been exhausted and/or may be subject to a procedural default because they were not raised, or not properly raised, in state court. Should counsel determine that such barriers to federal habeas review exist, there are several possible ways under current law and practice to attempt to overcome them.

One option is to stay proceedings on the petition, *see Rhines v. Weber*, 544 U.S. 269, 278-79 (2005), and return to state court to exhaust any unexhausted claims. Should relief be denied in state court, the petitioner may then return to federal court and amend the petition to include the now-exhausted claims. This option depends on the ability to amend a federal habeas petition.

Another option is to argue that any state court default ruling was either not "adequate" to bar federal court review or not "independent" of federal law. This option depends on the application of the "adequate and independent" grounds doctrine to federal habeas proceedings. *See, e.g.*, *Beard v. Kindler*, 558 U.S. 53, 60-62 (2009).

A third option for attempting to overcome defaults that occurred during the state post-conviction proceedings is to show under *Martinez v. Ryan*, 566 U.S. 1 (2012), that state post-conviction counsel ineffectively failed to raise claims of trial counsel ineffectiveness. This option requires showing that state post-conviction counsel "was ineffective under the standards of *Strickland v. Washington*" and "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one," in that it "has some merit." *Id.* at 14 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To make that showing, federal habeas

counsel must demonstrate that the claim was available and would have been raised by professionally reasonable counsel, both at the time of trial and in the initial state post-conviction proceedings. This option depends on the ability to overcome a procedural default by a showing of "cause and prejudice." *See id.* at 10.

Through discovery in habeas proceedings, or through open records acts requests or other means, federal habeas counsel may unearth exculpatory evidence that the police investigators or prosecutors previously failed to disclose, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Even if state post-conviction counsel failed to discover such claims – whether as a result of omissions by counsel or inability to compel such disclosures in state court – the development of a viable *Brady* claim may serve as "cause and prejudice" for any default. *See Strickler v. Greene*, 527 U.S. 263 (1999). This option depends on the ability of federal defenders to overcome a procedural default by showing "cause and prejudice," and frequently on the ability to amend a habeas petition.

## III. THE VAGUE REGULATIONS WILL FORCE FEDERAL DEFENDERS IN CAPITAL HABEAS CASES TO DRASTICALLY ALTER THEIR OPERATIONS, DIMINISHING THEIR ABILITY TO IDENTIFY AND PRESENT MERITORIOUS CLAIMS FOR DEATH-SENTENCED PRISONERS.

The vague regulations mean that federal habeas counsel must assume that the changes to habeas will apply to their clients, *even though* their state has not fulfilled its side of the bargain. Because the Final Regulations are so vague and ill-defined, habeas counsel must assume that

states will be certified. Thus, the Final Regulations force federal defenders into immediate disarray: they must drastically alter their operations and reallocate limited resources in order to address Chapter 154's shortened statute of limitations and restrictions on amendment.

Defenders will have to perform essential tasks – record collection and review, investigation, consultation with client and experts, research, drafting, and editing – on an emergency basis, or not at all. Defenders will have to continuously reallocate staff to respond to the urgent time limits in cases, undermining continuity. They will be forced to procure services, including travel and expert costs, on an emergency basis and thus at a higher price. Lurching from one emergency to another will increase staff burnout and turnover, and fiscal limitations will interfere with or prevent replacement of exhausted staff. The regulations will cause federal defenders injury in fact.

Three aspects of Chapter 154 are particularly relevant here. First, the statute of limitations, 28 U.S.C. § 2263, requires a capital federal habeas petitioner to file within 180 days after the denial of direct appeal, with tolling running from (1) the filing of a petition for certiorari in the United States Supreme Court to final disposition in that Court, and (2) the filing of a first state post-conviction petition to final disposition in the state courts. 28 U.S.C. §§ 2263(a), (b)(1)-(2). Second, federal habeas courts may review only "claims that have been raised and decided on the merits in the state courts," with narrow exceptions. 28 U.S.C. § 2264(a). Third, § 2266(b)(3)(B) forbids a district court to allow a capital habeas petitioner to file an amendment after the respondent has answered.

Together with the regulations, the effect of these provisions is that both state post-conviction counsel and habeas counsel must work on an expedited schedule, and that there is no way for federal habeas counsel to rectify errors and omissions by state post-conviction counsel. Because most states are not now providing adequate post-conviction counsel, these provisions will force federal defenders to make drastic alterations in their operations.

### A. The Ability of Federal Defenders to Cure the Deficiencies of State Post-Conviction Counsel Will Be Severely Curtailed or Eliminated.

The regulations mean that all claims must be identified, investigated, pled, developed and presented in state court on a drastically shortened time frame, with no mechanism to correct malfunctions in the state court process.

Because § 2266(b)(3)(B) severely restricts a petitioner's ability to amend a habeas petition, it will no longer be possible to file a barebones "protective" habeas petition and amend it following development and exhaustion of the claims in state court, or to amend a petition to reflect evidence developed during the course of the litigation, as the result of additional investigation, open records act requests, or through habeas or state post-conviction discovery processes. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 690-703 (2004) (granting relief from death sentence based on evidence developed during habeas proceedings).

Because § 2264 forecloses any excuses for procedural missteps in state court, defenders will be prevented from proving, when appropriate, that state post-conviction

counsel's deficiencies excuse the default of trial ineffective assistance claims. *See* § II.C (discussing arguments under *Martinez*). Similarly, even evidence of "extreme malfunctions in the state criminal justice system," *see Harrington v. Richter*, 562 U.S. at 102, such as a client's innocence or categorical ineligibility for the death penalty or the prosecution's suppression of material exculpatory evidence, *see, e.g.*, *House v. Bell*, 547 U.S. 518 (2006); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Brady v. Maryland*, 373 U.S. 83 (1963), will no longer matter if the state court did not rule on the merits of the claim.

### B. The Regulations Will Require Intervention by Federal Habeas Counsel in State Post-Conviction Proceedings.

Because of the drastically shortened time frame and the inability to cure any errors or omissions committed by state post-conviction counsel, the Final Regulations will require early intervention by federal habeas counsel in state post-conviction proceedings.

During the first ninety days following affirmance of the conviction and sentence, direct appeal counsel often continue representing their clients for purposes of preparing and filing a certiorari petition. The shortened time frame means that federal defenders will have to attempt to form an attorney-client relationship and begin an investigation while the client is still represented by direct appeal counsel. This situation is fraught with problems: direct appeal counsel may see this as interfering in the existing attorney-client relationship, and the client likely will be focused on the possibility of obtaining relief

on direct appeal or certiorari review. This creates a real risk that roles and responsibilities will be confused and deadlines missed. *See, e.g.*, *Zeigler v. Wainwright*, 805 F.2d 1422, 1425 (11th Cir. 1986) (confusion regarding who was representing petitioner led to failure to amend habeas petition and file notice of appeal).

During the second ninety days of the 180 days under Chapter 154 (assuming direct appeal counsel has used the full ninety days allowed for certiorari), time will also be running on the statute of limitations for the state post-conviction petition. Most states currently allow at least a year for filing after the conviction becomes final.[21] Even assuming that state post-conviction counsel is timely appointed, most counsel will naturally be inclined to use most or all of the remaining available time pursuant to the state statute to investigate and prepare their petition. Under Chapter 154, however, doing so would mean federal habeas review is foreclosed for that client, since the filing would be well past the new federal statute of limitations.[22]

21. *See, e.g.*, Ala. R. Crim. Proc. 32.2(c) (one year); Fla. R. Crim. Pro. 3.851(d)(1) (one year); Va. Code Ann. § 8.01-654(A)(2) (one year after appeal final or two years after trial judgment); S.D. Codified Laws § 21-27-3.3 (two years); Ky. R. Crim. Proc. 11.42(10) (three years); Wyo. Stat. Ann. § 7-14-103(d) (five years); Ind. R. Proc. for Post-Conviction Remedies (none).

22. This has frequently occurred in states with statutes of limitations that exceed the current one year statute, 28 U.S.C. § 2244(d). *See, e.g.*, *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (rejecting argument that Oregon two year statute of limitations rendered § 2244(d) unconstitutional); *Tinker v. Moore*, 255 F.3d 1331, 1333-34 (11th Cir. 2001) (while Florida state post-conviction petition was timely filed within two year statute of limitations, one year federal statute of limitations had already

To safeguard the client's federal rights, federal counsel will have to secure post-conviction counsel's agreement to file the state petition much earlier than the state statute of limitations requires – a task that will likely be met with understandable resistance or opposition. State post-conviction counsel may reasonably believe that their primary duty is to prepare the best possible post-conviction petition, and that taking the requisite time to investigate and prepare such a petition is a paramount necessity. Consequently, federal defenders will have to devote new resources to outreach and training. To protect the rights of prisoners to have their claims heard by federal courts, state post-conviction counsel must be convinced to file state petitions early; and federal defenders must begin their investigation and preparation during the time currently allowed for petitioning for certiorari. Pursuit of these competing and urgent priorities will likely create more confusion and chaos.

The Final Regulations will require federal defenders to divert essential resources to the initial stages of a case. Defenders will be forced to assign more staff to each new case, and to focus on fewer claims, obtain fewer records, interview fewer witnesses, and consult fewer experts who will have little or no opportunity to conduct their evaluations or assessments. In the process, meritorious claims will be undeveloped or inadequately developed. This will also mean draining resources from cases in which habeas petitions have already been filed, because such cases – regardless of their importance or the complexity

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expired before state petition filed); *Ocon-Parada v. Young*, No. 3:09cv87, 2010 WL 2928590, at *2 (E.D. Va. July 23, 2010) (same as to Virginia).

of the work involved – do not present the same type of emergency as the new cases. Defenders will have to suspend other important activities, such as work on other in-district cases, accepting assignments to out-of-district cases or capital § 2255 cases, and training.

## CONCLUSION

The implementation of the Final Regulations will sow confusion and chaos into federal defenders' representation of their clients. It will transform staff allocation, claim identification, client relationships, and expenditures from the orderly to the haphazard. And, because the ambiguity of the regulations requires defenders to assume that their state will be certified, that transformative process has already begun. All capital habeas counsel are injured in fact by the regulations. For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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