CAPITAL PUNISHMENT
PROJECT

OJP Docket No. 1464

Comments of American Civil Liberties Union to Department of Justice regulations implementing USA PATRIOT Improvement and Reauthorization Act of 2005, 72 Fed. Reg. 31, 217 (August 24, 2007)

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On July 25, 2007, the American Civil Liberties Union (ACLU) filed a request for a 120-day extension of the period for submitting comments on this Notice of Proposed Rulemaking. The Department of Justice re-opened the comment period for only forty five days. A forty five day extension of the comment period is insufficient to permit ACLU to respond adequately to the proposed regulations. For the reasons stated in its original request for extension, ACLU renews its request for a 120 day extension. Out of an abundance of caution, ACLU submits these preliminary comments and will file its final comments within such deadline as the Department establishes.

The regulatory framework proposed by the Department of Justice for receiving and evaluating requests for certification of state capital post-conviction mechanisms pursuant to chapter 154 of Title 28 of the United States Code is deficient in several critical respects. These deficiencies are discussed below.

The proposed regulations would evaluate the sufficiency of a state's capital post-conviction mechanism without any consideration given to the actual performance of the attorneys appointed pursuant to that mechanism. This is contrary to the express language of chapter 154, which requires the Attorney General to determine "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." 28 U.S.C. § 2265(a)(1)(A) (emphasis added). This express requirement of competent counsel was offered based on the belief, as stated by the Powell Committee which proposed the opt-in scheme, "that provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to

ensuring fairness and protecting the constitutional rights of capital litigants." A capital post-conviction mechanism which routinely appoints counsel who perform incompetently would be a sham, and certification of such a mechanism would undermine Congressional intent. The proposed regulation's failure to give effect to the language of § 2265(a)(1)(A) must be corrected by adding a new subsection to section § 26.22 addressing performance of appointed counsel and ensuring their competence.

As detailed herein, the proposed regulations adopt interpretations of chapter 154 provisions that are at odds with interpretations of the same language already adopted by the federal courts. Such an approach is inconsistent with the Department's prior practice. *See, e.g.*, Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.56 ("In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts."). More significantly, United States Supreme Court precedent makes clear that the Department is not free to ignore federal court case law which interprets the provisions of chapter 154 that are unchanged by the 2006 amendments. The Court has stated:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 2370, 45 L.Ed.2d 280 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366, 71 S.Ct. 337, 340, 95 L.Ed. 337 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147, 40 S.Ct. 237, 239, 64 L.Ed. 496 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.
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> That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a

> detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation. . . .
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> This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.

Lorillard v. Pons, 434 U.S. 575, 580-82 (1978).

States must establish more than mere appointment of legal representation for indigent prisoners under chapter 154. Each state must provide competent post-conviction counsel in addition to creating a mechanism for assignment of counsel. Thus, if states do not establish that competent counsel are available during the post-conviction phase of a case, they have not complied with the requirements of chapter 154. Abundant federal court case law establishes that a jurisdiction's substantial compliance with chapter 154's requirements is insufficient to entitle that jurisdiction to the benefits it provides. *See, e.g., Satcher v. Netherland*, 944 F. Supp. 1222, 1241-42, 1244-45 (E.D. Va. 1996), aff'd in part and rev'd in part sub nom. *Satcher v. Pruett*, 126 F.3d 561 (4th Cir. Sep 18, 1997):

> Section 2261(a) of the Act grants "opt-in" status to a state only if the state complies with *all* of the requirements contained in subsections (b) and (c) of section 2261. Virginia's system fails to satisfy three of the "opt-in" requirements. Its pleadings concede as much by arguing for application of the doctrine of substantial compliance. That argument has met with no success in other federal courts which have been confronted with it. Indeed, the courts have strictly enforced the "opt-in" provisions which form the basis for the "quid pro quo" under the Act. *See Felker v. Turpin*, 83 F.3d 1303, 1305 n. 1 (11th Cir.) (noting that not all states with unitary or post-conviction procedures would automatically be able to avail themselves of the

benefits under Chapter 154), *cert. granted,* 517 U.S. 1182, 116 S.Ct. 1588, 134 L.Ed.2d 685 (1996), *aff'd* on other grounds, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996); *Austin v. Bell,* 927 F. Supp. 1058, 1061-62 (M.D.Tenn.1996) (declining to apply new Chapter 154 in considering petitioner's claims because Tennessee's systems of appointment of counsel and competency standards were insufficient to ensure that only qualified, competent counsel would be appointed and thus did not meet the requirements of § 2261); *Hill v. Butterworth,* 941 F. Supp. at 1140-48 (holding that Florida does not qualify as an "opt-in" state because its post-conviction system was insufficient in terms of both the standards for competency and offer of counsel); *Ashmus v. Calderon,* 935 F. Supp. at 1069-75 (noting that "[this] Court has previously held, that California does not qualify under § 2261's 'post-conviction' procedure" and that, although California did have a unitary review procedure, the court determined that the system was insufficient to "opt-in" under § 2265, a parallel provision to § 2261); *see also* C.R. S7814 (June 7, 1995) (statement of Mr. Specter agreeing with Senator Biden that "we have to be meticulous on right to counsel"); Powell Committee Report at 3242 ("The final judgment as to the *adequacy* of any system for the appointment of counsel under subsection (b), however, rests ultimately with the federal judiciary").

Strict interpretation of the stringent opt-in requirements of the Act is not mere formalism. Rather, strict interpretation is necessary to meaningfully effectuate the quid pro quo arrangement which lies at the core of Chapter 154. This is critically important because, if a state provides full and fair state habeas proceedings, the federal courts will be able to review cases more quickly and efficiently because they will have the benefit of a fully developed record of facts and constitutional rulings to review. Congress has determined that competent counsel who will be reasonably compensated and who has the availability of

> funds for reasonable litigation expenses is essential to full and fair state habeas proceedings. *If any one of the safeguards of Section 2261 is not met, but the state is nonetheless provided with the "benefits" of opt-in status anyway, prisoners will be subjected to less than full and fair state habeas review and then truncated federal court review without having the guarantees thought by Congress to warrant the truncated review.* This was not Congress' intent under the Act. More importantly, it is not what Congress explicitly provided in the Act.

944 F. Supp. at 1244-45 (emphasis in original). The final regulations promulgated by the Department must require strict compliance with the requirements of chapter 154.

Section 26.23(d) of the proposed regulations establishes a procedure for review of requests for certification, noting that the Attorney General may request supplementary information and shall consider timely public comments. The proposed regulations fail to allocate the burden of proof regarding the state mechanism's compliance with requirements for certification. The regulations should assign to the applicant the burden of proving compliance with chapter 154's requirements, in accord with settled case law, *see, e.g., Allen v. Lee*, 366 F.3d 319, 349 n.8 (4th Cir. 2004) (en banc); *Hall v. Luebbers*, 341 F.3d 706, 711 (8th Cir. 2003); *Spears v. Stewart*, 283 F.3d 992, 1012 (9th Cir. 2002); *High v. Head*, 209 F.3d 1257, 1262 n.4 (11th Cir. 2000), and the Department's practice in analogous contexts, *see, e.g.* Cost Recovery Regulations, Communications Assistance for Law Enforcement Act of 1994, 28 C.F.R. § 100.12(a)(2) (applicant bears burden of proof); Claims Under Radiation Exposure Compensation Act, 28 C.F.R. § 79.4 (same); Grants for Correctional Facilities, 28 C.F.R. § 91.4 (application must demonstrate compliance with standards).

In determining whether a particular jurisdiction's capital post-conviction mechanism satisfies chapter 154's requirements, the completeness of the factual and legal record regarding that mechanism is of paramount importance. The proposed regulations provide only for a request letter from the appropriate state official and timely submission of comments by the public. Under the

proposed regulations, the information available to the public on which to comment could consist of only the bare fact that the state has requested certification. Such notice is manifestly inadequate to provide the public with an adequate basis upon which to provide comment. The public cannot be expected to respond to a state official's request for certification of a mechanism if the notice of that request does not even identify the pertinent mechanism. A letter from a state official and written public comments are insufficient to apprise the Department of necessary facts regarding the mechanism's compliance with chapter 154.

The application procedure provided in § 26.23 of the proposed regulations is far inferior to that established by this Department in a directly analogous context. The Department promulgated regulations implementing the Americans with Disabilities Act which included provisions for processing requests by government officials for certification of state laws or local building codes. *See* Filing a Request for Certification, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. § 36.603. These regulations provide:

> (a) A submitting official may file a request for certification of a code under this subpart.
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> (b) Before filing a request for certification of a code, the submitting official shall ensure that--
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> > (1) Adequate public notice of intention to file a request for certification, notice of a hearing, and notice of the location at which the request and materials can be inspected is published within the relevant jurisdiction;
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> > (2) Copies of the proposed request and supporting materials are made available for public examination and copying at the office of the State or local agency charged with administration and enforcement of the code; and
> >
> > (3) The local or State jurisdiction holds a public hearing on the record, in the State or locality, at

which the public is invited to comment on the proposed request for certification.

(c) The submitting official shall include the following materials and information in support of the request:

(1) The text of the jurisdiction's code; any standard, regulation, code, or other relevant document incorporated by reference or otherwise referenced in the code; the law creating and empowering the agency; any relevant manuals, guides, or any other interpretive information issued that pertain to the code; and any formal opinions of the State Attorney General or the chief legal officer of the jurisdiction that pertain to the code;

(2) Any model code or statute on which the pertinent code is based, and an explanation of any differences between the model and the pertinent code;

(3) A transcript of the public hearing required by paragraph (b)(3) of this section; and

(4) Any additional information that the submitting official may wish to be considered.

(d) The submitting official shall file the original and one copy of the request and of supporting materials with the Assistant Attorney General. The submitting official shall clearly label the request as a "request for certification" of a code. A copy of the request and supporting materials will be available for public examination and copying at the offices of the Assistant Attorney General in Washington, DC. The submitting official shall ensure that copies of the request and supporting materials are available for public examination and copying at the office of the State or local agency charged with administration and

> enforcement of the code. The submitting official shall ensure that adequate public notice of the request for certification and of the location at which the request and materials can be inspected is published within the relevant jurisdiction.
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> (e) Upon receipt of a request for certification, the Assistant Attorney General may request further information that he or she considers relevant to the determinations required to be made under this subpart.

Id. In the present context, where the issue is the quality of justice afforded to persons facing the death penalty, the Department is obligated to adopt procedures at least as likely to ensure a complete and accurate record and an adequate opportunity for input from the public. The Department must hold an evidentiary hearing to permit adequate factual development. The department must require a detailed application which provides the public with fair notice of the mechanism for which certification is requested. Finally, the Department must require the appropriate state official to include with her or his request for certification a transcript of a public hearing held on the record in the State, at which the public is invited to comment on the proposed request for certification.

The examples provided in the proposed regulations of mechanism components that would satisfy particular chapter 154 requirements uniformly look only to the mechanism as it exists on paper. Such an approach is contrary to statute and case law. A jurisdiction has not "established a mechanism," 28 U.S.C. § 2265(a)(1)(A), by proclaiming that it meets the required standards when it has not in fact met those standards. The proposed regulations' methodology finds no support in the text of chapter 154 and is directly contrary to that established by federal courts interpreting the identical language of chapter 154 prior to 2006. The United States Court of Appeals for the Fourth Circuit, for example, observed, "It would be an astounding proposition if a state could benefit from the capital-specific provisions of AEDPA by enacting, but not following, procedures promulgated pursuant to 28 U.S.C. § 2261." *Tucker v. Catoe*, 221 F.3d 600, 605 (4th Cir. 2000). Other courts recognized the same point. *See, e.g., Baker v. Corcoran*, 220 F.3d 276, 286-87 (4th Cir.

2000); *Ashmus v. Woodford*, 202 F.3d 1160, 1168 (9th Cir. 2000); *Satcher v. Netherland*, 944 F. Supp. 1222, 1241-42 (E.D. Va. 1996); *Mills v. Anderson*, 961 F. Supp. 198, 201 (S.D. Ohio 1997). Moreover, the fact that this precise issue has arisen in several different jurisdictions serves to put the Department amply on notice as to the disparities between state capital post-conviction mechanisms as they appear on paper and as they exist in reality, illustrating that this concern is far from theoretical.

For the foregoing reasons, ACLU urges the Department to withdraw its proposed regulations and issue new regulations which ensure fair and reliable procedures for evaluating applications for opt-in certification.

Respectfully submitted,

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