



**U.S. Department of Justice**

Office of Legislative Affairs

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*Office of the Assistant Attorney General*

*Washington, DC 20530*

The Honorable Kris Mayes  
Attorney General  
400 West Congress  
South Building, Suite 315  
Tucson, AZ 85701

Dear Attorney General Mayes:

We are writing in regard to Arizona's request that the Attorney General of the United States certify Arizona's mechanism for providing counsel in postconviction proceedings for prisoners subject to capital sentences. On October 12, 2021, the United States Department of Justice (Department) sent a letter to the Office of the Arizona Attorney General requesting that it provide additional information for the Department to assess whether Arizona's capital counsel mechanism satisfies the requirements imposed by Chapter 154 of Title 28 of the United States Code. Following Arizona's submission of additional information on June 24, 2022, the Department published the submission on a publicly accessible website and invited comment on the information.<sup>1</sup> The public comment period closed on October 24, 2022. The Department is now reviewing Arizona's submission together with the six public comments received thereon.

We are writing to request that Arizona provide additional information about its postconviction capital counsel mechanism, based on questions that have arisen during the Department's review of Arizona's supplemental submission and the associated public comments. Please provide answers to the questions below as soon as reasonably possible.

1. Arizona provided certain information regarding the compensation of appointed counsel in certain capital trial and appellate proceedings. (*See* page 3 of 6.24.22 letter.) But, data appears to be missing from several Arizona counties and for several years between 1998 and the present date. Please provide data for the full time period and for each county in Arizona for capital trial, appellate, and postconviction proceedings.
2. Arizona provided certain aggregate information regarding the compensation of attorneys representing the state in postconviction proceedings in capital cases. (*See* page 4 of 6.24.22 letter.) It is unclear to the Department how these aggregate figures were calculated. Please provide an explanation.

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<sup>1</sup> 87 Fed. Reg. 52,416 (Aug. 25, 2022). The public comments are available at [www.regulations.gov](http://www.regulations.gov), Docket No. DOJ-OLP-2022-0002. The Department has made the request and supporting information available at <https://www.justice.gov/olp/pending-requests-final-decisions>.

3. Arizona did not provide information about attorneys representing the State in postconviction proceedings in capital cases for the full time period – from 1998 to the present. Please provide that information.
4. Arizona did not provide or discuss the value of non-salary compensation—including leave, health insurance, and retirement benefits—the attorneys representing the state in post-conviction proceedings receive, as compared to appointed counsel, who are paid an hourly rate by the State. Please describe this non-salary compensation, its quantitative value, and discuss how the Department should consider it in evaluating Arizona’s system, so that the Department can make appropriate comparisons.
5. Arizona did not delineate what percentage of time attorneys representing the State in postconviction proceedings spend on postconviction matters, as opposed to other duties. Please provide those figures, so that the Department can make appropriate comparisons.
6. Arizona did not address 28 C.F.R. § 26.22(c)(1)(i), which discusses the compensation of counsel appointed pursuant to 18 U.S.C. 3599 in Federal habeas proceedings reviewing capital cases from the State. Please provide that compensation information. Certain commenters have stated that the standard rate is currently \$202 per hour. Please confirm if this is accurate. Please identify the rate for each year since 1998.
7. Arizona did not address 28 C.F.R. § 26.22(c)(1)(ii), which discusses the compensation of retained counsel in State postconviction proceedings in capital cases, who meet State standards for competency. Please identify any such attorneys between 1998 and the present and provide the compensation information for those attorneys if it can be determined. Certain commenters have suggested that there has been no retained counsel in capital postconviction proceedings in Arizona since 1998. If you agree, please discuss how that fact should impact the Department’s analysis.
8. In its prior request the Department asked for certain information related to the sufficiency of the \$100 maximum hourly rate for appointed counsel in postconviction proceedings. Arizona’s response largely ignored these requests and deemed them irrelevant. Despite your position, we ask that you provide information regarding:
  - (i) the sufficiency of the \$100 maximum hourly rate for maintenance of a competent postconviction legal practice;
  - (ii) whether and how the cost of living, the median income, and other related and relevant metrics have changed in Arizona since the \$100 maximum rate went into effect in 1998;
  - (iii) why, assuming the \$100 maximum rate was sufficient compensation when established, that figure (i) is adequate to attract competent counsel at the present time notwithstanding the diminution in purchasing power over the intervening period and (ii) would remain adequate throughout the period

during which a certification would be effective (i.e., five years post certification and any related judicial review).

9. Finally, the Department asked Arizona to explain whether the fact that pro bono representation was needed in several Arizona capital cases shows that competent counsel could not be secured under Arizona's capital postconviction counsel mechanism, and, if not, to explain what relevance, if any, pro bono legal services have to the State's compliance with the requirements of Chapter 154. Although Arizona responded to those inquiries, the Department respectfully requests that Arizona provide certain clarifying information. Specifically, the Department asks that Arizona clarify whether these three pro bono appointments were made pursuant to the capital counsel mechanism for which Arizona is seeking certification. Arizona should also make clear whether the three cases it cited represent the entire universe of State capital postconviction proceedings in which a defendant obtained pro bono representation during the period for which Arizona is seeking certification (*i.e.*, 1998 to the present). And the Department asks that Arizona explain its understanding of why pro bono representation was obtained in all of those cases, and how long it took for pro bono counsel to be found in each.

If there is any additional information relevant to the certification of Arizona's capital counsel mechanism that you would like to submit, we welcome you to do so at this time. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

 Digitally signed by  
MEGAN BENNETT  
Date: 2023.05.24  
12:21:05 -04'00'

Megan A. Bennett  
Intergovernmental Affairs Liaison