[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE
United States Court of Appeals for the District of Columbia Circuit
No. 20-1144

OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA; SAMMANTHA ALLEN; STEVE BOGGS; JOHNATHAN BURNS; ALAN CHAMPAGNE; MIKE GALLARDO; RODNEY HARDY; ALVIE KILES; ANDRE LETEVE; BRAD NELSON; STEVEN PARKER; WAYNE PRINCE; PETE ROGOVICH; & GILBERT MARTINEZ,
Petitioners,

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL; UNITED STATES OF AMERICA,
Respondents,

STATE OF ARIZONA,
Intervenor.

On Petition for Review of the Attorney General's April 14, 2020 Decision Certifying Arizona's Capital Counsel Mechanism Under 28 U.S.C. §§ 2261–2266, Docket No. OAG-167

BRIEF OF THE INNOCENCE NETWORK AND THE SOUTHERN CENTER FOR HUMAN RIGHTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS AND REVERSAL OF THE CERTIFICATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel submits the following certification:

(A) Parties, Intervenors, and Amici. All parties, intervenors, and amici presently appearing in this Court are listed in the Brief for Petitioners.

Amici Curiae in support of Petitioners and Reversal of the Certification are the Innocence Network and the Southern Center for Human Rights (together "Amici"). Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Amici certify that they have no parent corporations and issue no stock because they are non-profit organizations.

(B) Ruling Under Review. References to the ruling at issue appear in the Brief for Petitioners.

(C) Related Cases. Amici are aware of no cases related to the same underlying agency order or which involve substantially the same issues as the instant case other than those cited in the Brief of the Petitioners.

August 20, 2020

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CERTIFICATE OF COUNSEL AS TO SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), I certify that it is necessary to separately file the following Brief of Amici Curiae. Amici are specialized non-profit legal organizations devoted to representing and advocating for persons who have been wrongfully convicted or sentenced, especially those facing the death penalty. Amici's unique expertise, particularly as it pertains to post-conviction death penalty litigation, allows them to provide the Court with relevant insight and perspective that no other amicus curiae is capable of providing.

August 20, 2020

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GLOSSARY OF ABBREVIATIONS

ABA Guidelines	ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003), 31 Hofstra L. Rev. 913 (2003)
California Commission Report	California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California (June 30, 2008)
CJA	Criminal Justice Act
House Judiciary Report	Committee on the Judiciary Report, Effective Death Penalty Act of 1995, H.R. Rep. No. 104-23 (1995), 1995 WL 56412
Powell Report	Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report, 135 Cong. Rec. S13471-04, Aug. 23, 1989 (Oct. 16, 1989)
SCHR	Southern Center for Human Rights

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Innocence Network is an affiliation of 68 organizations dedicated to providing pro bono legal and investigative services to indigent prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. These affiliates represent hundreds of people in prison with innocence claims in all 50 states and around the world.[2] The Network's members have to date achieved exonerations of 642 people, including 375 (of whom 21 were on death row) resulting from post-conviction DNA testing that requires complex forensic analysis, expert testimony, and other significant investment of resources and time. Based on these experiences, the Network is acutely aware of the need for competent and properly funded representation in post-conviction proceedings.

The Southern Center for Human Rights ("SCHR") is a non-profit, public interest law office based in Atlanta, Georgia. For the past forty-four years, SCHR has represented people facing the death penalty in the southern United States. Its work includes trials, direct appeals, and state and federal post-conviction proceedings. SCHR represented the petitioners in five capital cases reversed by the

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[1] All parties consent to the filing of this brief provided that it is timely filed and consistent with the rules of the Court. No person other than Amici and their outside counsel authored this brief in whole or in part or provided funding related to it.

[2] A current list of Innocence Network members is available at https://innocencenetwork.org/members/.

United States Supreme Court: *Amadeo v. Zant*, 486 U.S. 214 (1988), *Ford v. Georgia*, 498 U.S. 411 (1991), *Snyder v. Louisiana*, 552 U.S. 472 (2008), *Foster v. Chatman*, 136 S. Ct. 1737 (2016), and *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

The Innocence Network and SCHR have strong interests in ensuring that state and federal courts provide effective forums for vindicating the constitutional rights of persons sentenced to death. The Attorney General's certification of the State of Arizona's state-level post-conviction review mechanism under Chapter 154 imperils these interests.

SUMMARY OF ARGUMENT

Individuals that a state has sentenced to death have two arenas for post-conviction review, and the Attorney General's decision compromised both. As designed, Chapter 154 was intended to ensure that post-conviction review in state court was so reliable and thorough that the time allowed for federal review could in turn be curtailed. To ensure states provided the necessary protections, Chapter 154 required states seeking expedited federal review to meet specific guarantees within their state systems. Those guarantees were to include the appointment of competent counsel with essential experience, compensation to attract such counsel, and adequate funding for tasks like hiring experts that often mean the difference between life and death. In practice, the Attorney General's decision to certify Arizona as the first state to qualify under Chapter 154, when Arizona meets *none* of the requirements, ensures petitioners will not receive meaningful habeas corpus review under either the state or federal systems.

As Petitioners' opening brief demonstrates, Arizona's post-conviction review mechanism does not satisfy the statutory guarantees of Chapter 154, so the Attorney General's certification of Arizona's application cannot stand. Amici address three specific ways the erroneous certification undermines their collective mission to ensure the justice system delivers correct and defensible outcomes.

First, an Attorney General's certification that blesses a patently deficient state post-conviction review mechanism such as Arizona's contravenes Chapter 154's text, history, and purpose. Where a state does not satisfy the statute, there is no *quid pro quo* or justification for diminished federal review; instead, petitioners are left with two failed systems operating in swift succession.

Second, certification of an unsatisfactory state system increases the odds that the state will kill innocent people.

Third, certifying state mechanisms that do not guarantee petitioners the right to suitably experienced, compensated, and funded counsel will lead to the execution of people who were convicted and sentenced in proceedings unconstitutionally infected by race discrimination.

Rather than allow such injustices to befall individuals who were unconstitutionally convicted or sentenced, the Court should overturn the Attorney General's improper certification.

ARGUMENT

I. ARIZONA'S POST-CONVICTION REVIEW MECHANISM DOES NOT SATISFY CHAPTER 154.

A. Chapter 154 Is Designed to Incentivize States to Provide Death-Row Inmates with a Robust Post-Conviction Review.

As Chapter 154 explicitly provides, a state obtains the benefits of truncated federal review only when the state has affirmatively 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). These necessary elements ensure that the state "[does] its part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage[.]" *Lindh v. Murphy*, 521 U.S. 320, 331 (1997).

Sound resolution of habeas petitions is essential because "[t]he writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law." *Harrington v. Richter*, 562 U.S. 86, 91 (2011). "Judges must be vigilant and independent in reviewing [habeas] petitions," even where vigilance creates "a commitment that entails substantial judicial resources." *Id.* Such review is especially important in capital cases, where the state has imposed "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring).

Individuals convicted and sentenced to death under state laws are entitled to post-conviction review in both state and federal courts before any execution may occur. Substantive federal review is essential in part because state proceedings have long failed to provide a reliable safeguard for the wrongly convicted. *See* James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, at 30 (2000) (finding between 1973–1995 federal courts granted relief in 40 percent of state capital judgments).[3] Federal law entitles a death-sentenced prisoner to counsel in federal post-conviction proceedings who will "meaningfully" develop claims for relief. *McFarland v. Scott*, 512 U.S. 849, 858 (1994). It also provides petitioners with resources to develop claims, including money for investigation and experts to assist the defendant in preparing for his federal habeas efforts. *Id*. at 854–56.

In Amici's experience, post-conviction review in federal courts is often the first time that capital habeas petitioners receive competent, experienced representation and access to reasonable litigation funds. Petitioners commonly discover new claims during federal review. California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California at 136 (June 30, 2008) ("California Commission

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[3] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=232712.

Report") (concluding federal courts grant relief in part because of "the availability of sufficient funds for investigation of the defendant's claims in federal court, the opportunity to develop a more comprehensive record at a federal evidentiary hearing, and the greater independence of federal judges with lifetime appointments").[4] Substantial procedural obstacles, however, often preclude meaningful review of claims not raised in state post-conviction proceedings. *E.g*, *Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991) (finding "petitioner must bear the risk of attorney error" if it results from "ignorance or inadvertence"). As a result, a state's failure to provide effective representation often operates as a procedural barrier to federal review of credible post-conviction claims. *Id.* at 754–55.

Congress intended Chapter 154 to address these problems by incentivizing states to correct deficiencies in their post-conviction proceedings. The effort began in 1989, when retired Associate Justice of the U.S. Supreme Court Lewis Powell chaired a committee that examined habeas corpus review of state capital judgments. The committee concluded that competent representation is "crucial to ensuring fairness and protecting the constitutional rights of capital litigants" and proposed

[4] Available atttps://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs.

incentivizing states to guarantee adequate representation to death-row inmates in state post-conviction review:

> Every capital defendant is now entitled to competent counsel at state trial and appeal and, under recent congressional enactment, in federal habeas corpus proceedings. The Committee's proposal seeks to fill a gap that now exists by encouraging the appointment of competent counsel also in state habeas or collateral proceedings.

135 Cong. Rec. S13471-04, at S13481, S13482–83 (daily ed. Oct. 16, 1989) (Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report, Aug. 23, 1989 (Oct. 16, 1989)) ("Powell Report").

Congress enacted the Powell Committee's recommendations as Chapter 154. Committee on the Judiciary Report, Effective Death Penalty Act of 1995, H.R. Rep. No. 104-23, 1995 WL 56412, at *8 (1995) ("House Judiciary Report"); *Ashmus v. Woodford*, 202 F.3d 1160, 1163 (9th Cir.), *cert. denied*, 121 U.S. 274 (2000) (noting "Chapter 154 essentially codifies" the Powell Report). "Chapter 154 provides for expedited filing and adjudication of habeas applications in capital cases when a State has met certain conditions." *Lindh*, 521 U.S. at 331–32. "In general terms, applications will be expedited (for a State's benefit) when a State has made adequate provision for counsel to represent indigent habeas applications at the State's expense." *Id.* at 332; *see also Ashmus*, 202 F.3d at 1163 (describing "quid pro quo"

as "[i]n return for meeting the statutory requirements of Chapter 154, a state is entitled to [multiple] procedural advantages").

In 2006, Congress amended Chapter 154, authorizing the Attorney General to determine whether a state has established the necessary qualifying mechanism. To certify a state's mechanism, the Attorney General must examine:

> (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).

28 U.S.C. § 2265(a). The Attorney General's determination is reviewed by this Court "de novo." 28 U.S.C. § 2265(c)(3).

Chapter 154's incentive structure depends on whether "a State establishes . . . a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners." *Lindh*, 521 U.S. at 331 (quoting 28 U.S.C. § 2261(b) (1996) (current version at 28 U.S.C. § 2261(a)(1)(A))). Certification of a mechanism that falls short of Chapter 154's requirements—as Arizona's does—would fatally undermine that purpose.

B. Chapter 154's Requirements Are Essential Because Capital Habeas Petitions Require Significant Time and Resources.

Petitioners need competent counsel with proper training, necessary expertise, and sufficient time and resources to navigate the "extraordinarily complex body of law and procedure unique to post-conviction review." *Colvin-El v. Nuth*, No. CIV. A. AW 97-2520, 1998 WL 386403, at *6 (D. Md. July 6, 1998). As Amici have learned in representing capital habeas petitioners, effective representation requires counsel to reinvestigate the conviction and sentence; raise and develop all available, potentially relevant claims as to guilt and sentence in order to avoid waiver; and enlist experts to aid the investigation and presentation of the claims. These necessary steps are complicated, time-consuming, and resource-intensive.

Attorney Time. "To do . . . a habeas case in the death penalty area and to do it right is a commitment of . . . perhaps more than a thousand hours." Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. Pitt. L. Rev. 521, 577 (2005). A 1998 survey of the "most experienced and qualified lawyers at Florida's post-conviction defender office" found "on average, over 3,300 lawyer hours are required" to develop and litigate capital habeas claims in state post-conviction proceedings. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003), 31 Hofstra L. Rev. 913, 969 (2003) ("ABA Guidelines"). In 1993, the Texas

Bar found that "an average of 400 to 900 hours of an attorney's time is required to handle a post-conviction case" involving the death penalty. Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 Tex. L. Rev. 1805, 1824–25 (2000). "Naturally, the fewer the hours, the greater the chance that counsel has not performed her required duties, including the duty to investigate the case." McConville, 66 U. Pitt. L. Rev. at 577.

Fees and Costs. Little reliable data exists for how expensive it is to provide effective counsel in state habeas proceedings, largely because state mechanisms are chronically underfunded and ineffective. Federal habeas review is a useful proxy, as it reflects "the cost of further investigating the claims exhausted in state court habeas corpus proceedings, and of any additional investigation of federal constitutional claims not asserted by state habeas counsel in state court." Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 Loy. L.A. L. Rev. S41, S89 (2011). While numbers vary, the investment in all instances is substantial. *See, e.g.*, *id.* at S97 (reporting that from 1998–2008 the average case litigated by the Federal Public Defender's Capital Habeas Unit in the "Central and Eastern Districts of California cost[] approximately $1.58 million"); *id.* at S94, S96 (reporting two-dozen habeas cases handled by

private lawyers under the Criminal Justice Act ("CJA") averaged "$635,000 per case" because the government only partially reimbursed CJA lawyers for conducting investigations, interviewing witnesses, hiring experts); Peter A. Collins et al., *An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State*, 14 Seattle J. Soc. Just. 727, 773 (2016) (concluding federal capital habeas cases were "quite expensive," including two cases that cost "more than one million dollars each" and occupied lawyers over "12 years or longer").

Amici's experience pursuing innocence-based exonerations also demonstrates the heavy time investment and financial burden. For example, the Northern California Innocence Project won freedom for one innocent man after devoting more than 5,100 attorney hours (not including investigators or experts), a commitment that would have cost approximately $2,054,400 had it been billed by a mid-level associate at a law firm. Northern California Innocence Project, *The Impact of Your Gift: The Costs*.[5] In another example—the successful state habeas petition in *In Re Lucas*, 94 P.3d 477 (Cal. 2004)—"the law firm of Cooley Godward LLP provided 8,000 hours of pro bono attorney time, 7,000 hours of paralegal time, and litigation expenses of $328,000." California Commission Report at 153 n.71.

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[5] Available at http://ncip.org/wp-content/uploads/2018/07/Impact-of-your-gift.pdf.

To provide effective post-conviction review requires resources. That is why the Chapter 154 requirements exist—to ensure that states seeking diminished federal review will make the necessary investments to guarantee proper review within the state system. Where, as here, the state system does *not* provide that thorough review *and* the federal review is abbreviated, crucial errors in capital cases go undetected.

C. Once a State Mechanism Is Certified Under Chapter 154, Habeas Petitioners Face Significant New Limitations on Federal Review.

Chapter 154 both limits and expedites federal court review of state convictions resulting in death sentences. 28 U.S.C. §§ 2261–2266. For example, Chapter 154:

- Cuts in half a petitioner's time to file a federal habeas petition—from one year to 180 days—after the final state court affirmance on direct review. *Compare* 28 U.S.C. § 2244(d) *with* 28 U.S.C. § 2263(a).
- Limits tolling of that 180-day deadline when compared with ordinary federal habeas review. *Compare* 28 U.S.C. § 2244(d) *with* 28 U.S.C. § 2263(b)(3).
- Restricts a petitioner's ability to amend a petition after the state answers. 28 U.S.C. § 2266(b)(3)(B).
- Requires the court to enter final judgment "not later than 450 days after the date on which the application was filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier." 28 U.S.C. § 2266(b)(1)(A); *see also* 28 U.S.C. § 2266(b)(1)(C)(i) (permitting only one 30-day extension).

These limitations operate with real force in complex, time-consuming federal habeas proceedings. Counsel must undertake a thorough and independent investigation of the guilt and penalty phases to identity constitutional violations. *See McCleskey v. Zant*, 499 U.S. 467, 498 (1991) ("[P]etitioner must conduct a

reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition."); Powell Report, 135 Cong. Rec. at S13483 (requiring "a searching and impartial examination"); ABA Guidelines § 10.7(B)(1), 31 Hofstra L. Rev. at 919 ("Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case."). And under Chapter 154, petitioners are afforded no second chances if counsel misses the shortened deadline or fails to include in their petition what later proves to be a meritorious claim.

D. Chapter 154's Limitations on Habeas Petitioners Are Only Justified if a State Actually Provides Effective Representation to Them.

To justify certification under Chapter 154, the state must, at a minimum, guarantee "one complete and fair course of collateral review." Powell Report, 135 Cong. Rec. at S13482. "With the counsel provided by the statute, there should be no excuse for failure to raise claims in state court." *Id.* at S13483. That is why Chapter 154 explicitly requires the state to show it has a mechanism for appointing competent counsel and providing appropriate compensation and reimbursement for necessary litigation expenses—including investigators, mitigation specialists, and mental health and forensic science experts—during state post-conviction proceedings. *See McFarland*, 512 U.S. at 855 ("[I]nvestigators and other experts

may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified.").

State mechanisms that on paper do not satisfy Chapter 154's terms are obviously insufficient. For example, in *Baker v. Corcoran*, the Fourth Circuit concluded Maryland could not satisfy Chapter 154 because "[a] compensation system that results in substantial losses to the appointed attorney or his firm simply cannot be deemed adequate." 220 F.3d 276, 286 (4th Cir. 2000). Similarly, *Ashmus v. Calderon* ruled that California's mechanism fell short because it did not fund investigation of all the petitioner's potentially meritorious claims, nor did it pay "all reasonable expenses." 31 F. Supp. 2d 1175, 1188–89 (N.D. Cal. 1998), *aff'd*, 202 F.3d 1160 (9th Cir.), *cert. denied*, 531 U.S. 916 (2000). Courts across the country have held likewise. *See, e.g.*, *Colvin-El*, 1998 WL 386403 at *6 (ruling mechanism deficient because it only required attorneys to have participated in "ten serious criminal matters"); *Mills v. Anderson*, 961 F. Supp. 198, 202 (S.D. Ohio 1997) (finding Ohio's compensation scheme inadequate because it contained maximum limits and no minimum level for reasonable litigation expenses); *Austin v. Bell*, 927 F. Supp. 1058, 1062 (M.D. Tenn. 1996) (finding Tennessee's mechanism insufficient because it merely provided appointment of "a competent attorney licensed in this state"); *Satcher v. Netherland*, 944 F. Supp. 1222, 1224 (E.D. Va. 1996), *aff'd in part, rev'd in part on other grounds sub nom. Satcher v. Pruett*, 126

F.3d 561 (4th Cir. 1997) (ruling Chapter 154 requires "formal, institutionalized commitment to the payment of counsel and litigation expenses"); *Wright v. Angelone*, 944 F. Supp. 460 (E.D. Va. 1996) (rejecting Virginia's scheme because it lacked explicit mechanism for paying counsel).

But a state may not simply adopt a facially adequate mechanism to obtain the benefits of Chapter 154; it must also establish that it puts Chapter 154's requirements into practice. Before 2006, federal courts were authorized to evaluate in the first instance whether a state complied with Chapter 154, and they consistently and properly examined state practices to determine whether they actually ensured appointment of competent counsel and adequate resources. For example, the Fourth Circuit in *Tucker v. Catoe* held that "the mere promulgation of a 'mechanism' is not sufficient" for Chapter 154 purposes; "a state must not only enact a 'mechanism' and standards for post-conviction review counsel, but those mechanisms and standards *must in fact be complied with* before the state may invoke" Chapter 154. 221 F.3d 600, 604–05 (4th Cir. 2000) (emphasis added); *see also Baker*, 220 F.3d at 286 ("Competency standards are meaningless unless they are actually applied in the appointment process."). The Ninth Circuit likewise ruled in *Ashmus v. Woodford* that "[a] state does not qualify under Chapter 154 by setting forth competency standards that the state can completely disregard when appointing counsel." 202 F.3d at 1168 n.13 (citation omitted); *see also Grayson v. Epps*, 338 F. Supp. 2d 699,

703 (S.D. Miss. 2004) (rejecting argument that state could invoke Chapter 154 procedures without evidence that it complied with its mechanism); *Satcher*, 944 F. Supp. at 1245 ("[S]trict interpretation is necessary to meaningfully effectuate the quid pro quo arrangement which lies at the core of Chapter 154.").

Moreover, qualifying mechanisms must "assure that collateral review will be fair, thorough, and the product of capable and committed advocacy." Powell Report, 135 Cong. Rec. at S13483. That means appointed counsel must not only be *capable* of developing and presenting all potentially meritorious claims in the first state capital habeas petition but also must *perform* in accordance with that expectation. As the Supreme Court held in *United States v. Cronic*, counsel competence is measured by "actual performance" rather than mere qualifications or experience. 466 U.S. 648, 662 (1984). Chapter 154 is designed to ensure these standards actually operate in the complex arena of state capital post-conviction representation. House Judiciary Report, 1995 WL 56412, *10 (predicting competent counsel in state capital habeas review "would fill the gap in representation for indigent capital defendants in state proceedings under existing law, since appointment of counsel for indigents is constitutionally required for the state trial and direct appeal"); Powell Report, 135 Cong. Rec. at S13482–83 (anticipating proper state procedures would ensure all claims are exhausted before federal review).

The 2006 amendments to Chapter 154 may have authorized the Attorney General to examine and certify a state mechanism, but it did not erase the need to confirm that the state is, in fact, meeting the statutory minimums. "The mere existence of state requirements for the appointment, compensation and expenses of competent counsel does not ensure that such requirements are applied and enforced in practice." *Habeas Corpus Res. Ctr. v. Dep't of Justice*, No. 13-cv-4517, 2014 WL 3908220, at *10 (N.D. Cal. Aug. 7, 2014), *vacated and remanded on justiciability grounds*, 816 F.3d 1241 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1338 (2017).

Initially, even the Department of Justice adopted this well-accepted approach. After receiving numerous comments opposing Arizona's certification and documenting its failure to provide effective habeas representation, the Department submitted numerous questions to the Arizona Attorney General seeking information about how the State's mechanism performs in practice. The Department inquired about assertions "that Arizona's mechanism fails to attract competent counsel and ensure effective representation" and "does not provide adequate standards of counsel competency," and that "particular counsel have provided inadequate representation and that the inadequacy of counsel points to a broader systemic problem under

Arizona's mechanism with respect to counsel competency." Letter to Mark Brnovich from U.S. Department of Justice, June 29, 2018, at 2-4.[6]

Arizona never answered the Department's questions in any meaningful way. *See* Letter to Department of Justice from Arizona Attorney General, October 16, 2018 (failing to provide meaningful data addressing Department's stated concerns).[7] And the Attorney General's ultimate certification dismisses *any* inquiry into the systemic failure by Arizona to provide effective representation, let alone impose a burden on it to demonstrate actual compliance with Chapter 154. Certification of Arizona Capital Counsel Mechanism, 85 Fed. Reg. 20705-02, 20708, 20711 (Apr. 14, 2020) (refusing to consider "asserted deficiencies in [Arizona's] practice" or evaluate whether it "compl[ies] with [its] capital counsel mechanisms to have the benefit of the chapter 154 review procedures").

The Attorney General's lax, novel approach to Chapter 154 is unsupported for the same reasons that federal courts rejected it prior to 2006: "the mere promulgation of a 'mechanism' is not sufficient," *Tucker*, 221 F.3d at 604, because otherwise a state could obtain Chapter 154 certification for its mechanism and then "completely disregard [it] when appointing counsel." *Ashmus*, 202 F.3d at 1168 n.13. This

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[6] Available at https://www.justice.gov/olp/page/file/1081486/download.

[7] Available at https://www.justice.gov/olp/page/file/1113346/download.

Court's *de novo* review should address the realities that the Attorney General erroneously chose to ignore. *See* Brief for Petitioners at 37–80.

II. THE UNSUPPORTED CERTIFICATION INCREASES THE RISK OF STATES EXECUTING INNOCENT PEOPLE.

"The quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Schlup v. Delo*, 513 U.S. 298, 324–25 (1995). "Nothing could be more contrary to contemporary standards of decency . . . than to execute a person who is actually innocent." *Herrera v. Collins*, 506 U.S. 390, 430 (1993) (Blackmun, J., dissenting). Yet, as Amici well know, innocent people are wrongly convicted of capital crimes.[8] Certifying a state under Chapter 154 without corresponding guarantees of competent and adequately funded representation in state post-conviction proceedings would curtail the ability of death-sentenced persons to demonstrate innocence. Two recent examples—in which innocent people on death row successfully pursued post-conviction relief thanks to competent federal counsel with access to adequate litigation resources—demonstrate that where states fail to provide fulsome post-conviction review, the federal system must.

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[8] *See, e.g.*, Samuel R. Gross et al., *Rate of False Conviction in Capital Cases*, 111 Proceedings of the National Academy of Sciences 7230 (May 20, 2014), available at https://www.pnas.org/content/111/20/7230; Gerald M. LaPorte, *Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science*, National Institute of Justice Journal (Sept. 7, 2017), available at https://www.ncjrs.gov/pdffiles1/nij/250705.pdf.

A. Barry Jones.

In 1995, Arizona condemned Barry Jones to death, claiming he murdered four-year-old Rachel Gray. *State v. Jones*, 937 P.2d 310, 313 (Ariz. 1997). Trial and state post-conviction counsel completely failed to investigate the nature and timing of the victim's injuries and death. *Jones v. Shinn*, 943 F.3d 1211, 1218 (9th Cir. 2019). The federal defender was appointed to represent Mr. Jones in his federal post-conviction proceedings. *Jones v. Stewart*, No. CV-01-592, ECF No. 4 (D. Ariz. Nov. 9, 2001). After an exhaustive investigation, the federal defender's office filed a federal habeas petition in December 2002 alleging trial counsel rendered ineffective assistance for failing to investigate potential guilt defenses. The court initially denied the petition, finding the procedural default doctrine barred the claim because counsel failed to present it in the state proceedings. *Jones v. Schriro*, No. CV-01-592, 2008 WL 4446619, at *2, 5 (D. Ariz. Sept. 29, 2008). Following the Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), holding that ineffective assistance of state post-conviction counsel may excuse a procedural default of an ineffective assistance of trial counsel claim, the Ninth Circuit remanded for reconsideration. *Jones v. Ryan*, No. 07-99000, ECF No. 138 (9th Cir. May 5, 2014).

On remand, counsel proved that both trial and state post-conviction counsel rendered deficient representation. Counsel also presented testimony from medical

experts that the victim's injuries could not have been inflicted in the narrow time frame that purportedly linked Mr. Jones to the crime. Mr. Jones thus "met his burden under *Martinez* to establish ineffective assistance of trial and post-conviction counsel as cause for the default of his substantial claim of ineffective assistance of trial counsel for failure to conduct an adequate pre-trial investigation." *Jones v. Ryan*, 327 F. Supp. 3d 1157, 1218 (D. Ariz. 2018), *aff'd in part, vacated in part on other grounds sub nom. Jones v. Shinn*, 943 F.3d 1211 (9th Cir. 2019). The court also found a "failure to uncover key medical evidence that Rachel's injuries were not sustained on May 1, 1994, [and a] failure to impeach the state's other physical and eyewitness testimony with experts who could support the chosen defense." *Id*. Accordingly, the court reversed the conviction and ordered Mr. Jones released. *Id.* The Ninth Circuit affirmed in *Jones v. Shinn*, 943 F.3d at 1236.[9]

As Mr. Jones's case demonstrates, Arizona's promise of competent representation in state court proceedings is illusory. Mr. Jones's attorney in state post-conviction proceedings, appointed under the very mechanism the Attorney General has now approved, was woefully deficient. Counsel conducted zero investigation into Mr. Jones's claims of actual innocence, and the federal district

[9] Arizona has sought en banc review of the Ninth Circuit's decision. *See Jones v. Shinn*, No. 18-99006, ECF No. 71 (9th Cir. Dec. 13, 2019).

court deemed the representation constitutionally ineffective.[10] If the Attorney General's determination stands, innocent individuals like Mr. Jones would have the same perilously flawed state post-conviction process *and* a truncated federal review process with half the time to file a petition, limitations on later amendments, little ability to leverage federal resources to present new claims, and time limits on the federal court to consider new claims and evidence. These limitations would have made it functionally impossible for Mr. Jones's experts to review and independently assess the forensic evidence. Nor would there have been adequate time for the federal court to (1) hold a hearing with over 100 exhibits and thirteen witnesses, many from out-of-state, (2) assess witness credibility, and (3) determine that the state medical examiner had provided misleading testimony at both trial and the federal hearing—all of which proved crucial to deciding the merits of Mr. Jones's claims and concluding he was wrongfully convicted and sentenced to death.

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[10] *See also Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc) (remanding for hearing on whether Arizona-appointed post-conviction counsel rendered ineffective assistance to permit death-sentenced inmate to present procedurally defaulted claim developed in federal court); *Gallegos v. Shinn*, No. 01-CV-01909, ECF No. 160 (D. Ariz. Feb. 20, 2020) (holding state habeas counsel was constitutionally ineffective and ordering evidentiary hearing on defaulted constitutional claim); *Salazar v. Ryan*, No. 96-CV-00085, ECF No. 225 (D. Ariz. Sept. 9, 2016) (granting evidentiary hearing to determine whether state capital habeas counsel was ineffective); *Lopez v. Ryan*, No. 97-CV-00224, ECF No. 173 (D. Ariz. Nov. 20, 2015) (same).

B. Ha'im Sharif.

In December 1988, Nevada convicted and sentenced to death Ha'im Sharif (formerly Charles Robins) on charges he murdered his girlfriend's young daughter, Britany Smith. *Robins v. State*, 798 P.2d 558 (Nev. 1990). The conviction rested on medical examiner testimony. *Id*. at 561–62. The State also presented testimony of the victim's mother and other relatives who claimed to have observed Mr. Sharif abuse her. *Id*. at 560, 565. State courts upheld Mr. Sharif's capital conviction and sentence on appeal and in post-conviction proceedings. *Id.*; *Robins v. State*, No. 31054 (Nev. Nov. 24, 1998) (unpublished order dismissing appeal).

In 2012, Mr. Sharif was appointed a federal public defender for his federal habeas case. *Robins v. Baker*, No. 99-cv-0412, ECF No. 221 (D. Nev. July 18, 2012). For the first time, Mr. Sharif's lawyers investigated the forensic evidence and discovered that Britany was not murdered; she had in fact died from Barlow's disease. *Robins v. Baker*, No. 99-cv-0412, ECF No. 262 (D. Nev. June 11, 2013) (amended petition). Federal investigators also uncovered that the child's mother, Lovell McDowell, testified falsely at trial and that Ms. McDowell had been threatened with imprisonment by Las Vegas police and prosecutors unless she testified against Mr. Sharif. *Robins v. Baker*, No. 99-cv-0412, ECF No. 265-2 (D. Nev. June 11, 2013) (Declaration of Lovell McDowell).

The federal court ruled Mr. Sharif sufficiently showed he was "actually innocent" and that "his death penalty was improperly imposed," permitting him to return to state court to present the new evidence. *Robins v. Baker*, No. 99-cv-0412, ECF No. 288, at 14 (D. Nev. Nov. 5, 2013). An expert retained by the State eventually agreed that Brittany likely suffered from Barlow's disease. Prosecutors eventually offered, among other things, to vacate Mr. Sharif's death sentence and grant him a term-of-years prison sentence, resulting in his immediate freedom. After almost thirty years of imprisonment, Mr. Sharif was released on June 7, 2017. Michael Kiefer, *The Long Journey from Death Row to Freedom: Arizona Lawyer's Sleuthing Frees Murder Convict*, The Republic, June 15, 2017.[11]

Like Mr. Jones, Mr. Sharif received inadequate representation in his state proceeding that was only cured only by extensive federal review. Had Chapter 154's abbreviated 180-day deadline applied, coordinating the extensive forensic analysis and re-investigation of the facts that saved Mr. Sharif's life would have been impossible. And Nevada has (at least on paper) essentially the same flawed mechanism as Arizona. The Attorney General's improper certification of Arizona

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[11] Available at https://www.azcentral.com/story/news/local/arizona-investigations/2017/06/15/nevada-death-row-inmate-set-free-arizona-lawyer/394809001/.

could inspire more applications for certification, with downstream effects limiting the ability of the courts, across multiple states, to cure wrongful convictions.

III. IMPROPER CERTIFICATION MAKES MORE LIKELY EXECUTIONS OF INDIVIDUALS WITH CONVICTIONS AND SENTENCES TAINTED BY UNCONSTITUTIONAL RACE DISCRIMINATION.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Systemic racial discrimination pervades the criminal justice system, and "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner v. Murray*, 476 U.S. 28, 35 (1986).[12] Race-tainted executions "poison[] public confidence in the judicial process" and diminish "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (internal citations omitted). To stop wrongful

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[12] *See also* John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 Am. Crim. L. Rev. 689 (2014); The Sentencing Project, *Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System* (August 2013), available at http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf; U.S. Government Accountability Office, GAO-GGD-90-57, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990), available at https://www.gao.gov/assets/220/212180.pdf.

race-based executions, effective lawyers must investigate, uncover, and present in post-conviction proceedings claims of racial discrimination, including in jury selection and sentencing.

A. Racial Discrimination in Capital Jury Selection.

Juror participation in capital trials maintains the essential "link between contemporary community values and the penal system" required for constitutional death sentences. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (internal citations omitted). The recent Supreme Court case *Foster v. Chatman* shows how racial discrimination can taint a jury and cause an unconstitutional death sentence. 136 S. Ct. 1737 (2016). Timothy Foster, an 18-year-old Black man, was charged with killing an elderly white woman in Georgia. The prosecution used peremptory strikes to exclude all four qualified Black prospective jurors. Mr. Foster objected, but the prosecutors asserted they had race-neutral reasons for the strikes. The trial court overruled Mr. Foster's objection. He was convicted and sentenced to death, and the Georgia Supreme Court affirmed on direct appeal. *Id.* at 1744-45.

Mr. Foster obtained new counsel for his state post-conviction proceedings. Over several years, his legal team—which included lawyers, investigators, and experts—found vital evidence of intentional discrimination that was previously unavailable: the prosecution's detailed jury selection notes. The notes included highlighting of Black jurors' names in bright green, a draft affidavit from an

investigator identifying the names of who *not* to strike "[i]f it comes down to having to pick one of the black jurors," a list of "definite no" names that included *all* of the qualified Black jurors, and questionnaires from Black jurors with their race circled. *Id.* at 1744. "The sheer number of references to race in that file is arresting." *Id.* at 1755. Mr. Foster's counsel built a post-conviction record that included testimony, either live or by affidavit, from more than forty witnesses. *See Foster v. Terry*, Volume 1 (Index) of Habeas Corpus Proceedings, No. 1989-v-2275 (Butts Co. Ga.). Although the state courts denied relief, the Supreme Court reversed on a 7–1 vote, holding the "contents of the prosecution's file . . . plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner" and contradicted the "race-neutral" reasons the prosecutors offered for the strikes. *Foster*, 136 S. Ct. at 1755. Had it not been for a substantial post-conviction investigation, Mr. Foster would have been executed based on a conviction tainted by racial discrimination.

B. Racial Discrimination in Obtaining Death Sentences.

Racial discrimination infects application of the death penalty. In *Buck v. Davis*, a Texas jury sentenced Duane Buck to death after finding, as Texas law requires, that he would pose a threat of future danger if not executed. 137 S. Ct. at 767. In so finding, the jury improperly relied on expert testimony that Mr. Buck, as a Black man, posed an increased risk for future violence. *Id.* Mr. Buck's state-appointed counsel filed a post-conviction petition in 1999 but did not assert a claim

that he had been unconstitutionally sentenced to die because of his race; rather, it included only "frivolous or noncognizable" claims. *Id.* at 769.

While Mr. Buck's state petition was pending, the Texas Attorney General conceded error in a different case based on an identical race-based-expert prediction of future danger. *Id.* (citing *Saldano v. Texas*, 530 U.S. 1212 (2000)). As a result, the Supreme Court reversed the death sentence in that case. *Id.* The Texas Attorney General consented to relief and waived the procedural bars in federal court to five of the six cases in which the State had offered similar race-based predictions of the defendants' future danger, but the District Attorney—who represents the State in state habeas proceedings—refused to do so for Mr. Buck. *Id.* at 770. Nevertheless, in 2002, Mr. Buck attempted to present his claim in a state post-conviction petition, which the Texas high court denied as a procedurally barred successor petition. *Id.* Federal courts likewise initially denied his claim because the Texas courts found it procedurally barred. *Id.* at 770–71.

Several years later, the Supreme Court decided in *Trevino v. Thaler* that ineffective assistance of post-conviction counsel may excuse a Texas procedural default. 569 U.S. 413 (2013). Mr. Buck's new counsel persuaded the Supreme Court to grant review, reopen Mr. Buck's habeas petition under Federal Rule of Civil Procedure 60(b), apply *Trevino*, and reverse his unconstitutional death sentence. *Buck*, 137 S. Ct. at 780. Until then, his claim was "never . . . heard on the merits in

any court, because the attorney who represented Buck in his first state post-conviction proceeding failed to raise it." *Id.* at 767. But for the complete federal habeas review afforded Mr. Buck, Texas would have executed him because of his race.

Foster, *Buck*, and many other similarly successful cases demonstrate the need for meaningful, effective post-conviction representation. Such representation would not be available under the Attorney General's new approach to Chapter 154, either in the state that secured a blank-check certification or in the abbreviated federal review. The writ of habeas corpus, a constitutional bedrock for redressing the worst injustices of the criminal justice system, would instead provide a streamlined path to wrongful executions.

CONCLUSION

Amici urge reversal of the Attorney General's certification.

Respectfully submitted,

Dated: August 20, 2020

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rules of Appellate Procedure 29 and 32, the foregoing Brief of Amici Curiae is printed in a proportionally spaced, serif typeface of 14-point, and contains 6,469 words, excluding words in sections identified as exempted in Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

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CERTIFICATE OF SERVICE

I certify that on August 20, 2020, I caused the foregoing Brief of Amicus Curiae to be filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system. Counsel in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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