



Regulations Docket Clerk  
Office of Legal Policy  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Room 4234  
Washington, DC 20530  
*Submitted online via [regulations.gov](https://www.regulations.gov)*

May 15, 2026

**RE: Proposed Rule for Certification Process for State Capital Counsel Systems, Docket No. OAG198, RIN 1105-AB80**

We write on behalf of Fair and Just Prosecution to **oppose** the Proposed Rule for Certification Process for State Capital Counsel Systems RIN 1105-AB80 (“Proposed Rule”). FJP is a national organization that supports a peer-driven community of local elected prosecutors working toward a justice system that prioritizes public safety grounded in fairness, equity, fiscal responsibility, and humanity. We raise the standards of prosecutorial accountability through a steadfast commitment to the core principles that make justice possible: independence, discretion, and transparency.

The post-conviction process is an essential part of a capital case that is meant to protect the constitutional rights of individuals sentenced to death and prevent wrongful executions. A fair, thorough, and reliable capital post-conviction process is essential to prosecutors because they have a duty to seek justice and uphold the integrity of the justice system.

The Proposed Rule makes it far too easy for states to certify that they have an appropriate mechanism for providing and compensating post-conviction counsel, and therefore the state can avail itself of Chapter 154’s limited federal habeas review of state capital cases. In an effort to expedite the process for imposing our nation’s most severe and irreversible penalty, the Proposed Rule eliminates guardrails in the certification process, curtails transparency, and increases the risk of wrongful executions. These actions will make state death penalty systems less fair and reliable. The Proposed Rule therefore jeopardizes the careful trust that prosecutors have worked so hard to build within their communities and will erode the public’s faith in the legitimacy of the legal system.

**A. As ministers of justice, prosecutors have a strong interest in fair procedures that foster trust and faith in the legitimacy of the justice system.**

Prosecutors occupy a unique position in American law: they have a special duty to seek justice and not merely serve as advocates for convictions. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (“The [prosecutor] is the representative not of any ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); *United States v. Agurs*, 427 U.S. 97, 111-12 (1976) (“For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client’s overriding interest that justice shall be done.” (internal quotation marks omitted)). Courts across the country have reinforced the prosecutorial duty to act as a “minister of justice.”<sup>1</sup> The prevailing national standards for prosecutorial conduct also make clear that prosecutors have a unique responsibility to promote fairness and justice in the legal system. The American Bar Association’s Criminal Justice Standards for the Prosecution Function explains that a prosecutor’s “primary duty” is to “seek justice within the bounds of the law, not merely to convict.” 3-1.2(b). The Standards further provide that “[t]he prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system.” *Id.* at 3-1.2(f). Prosecutors therefore have a strong interest in processes that promote fairness, transparency, and integrity in criminal proceedings.

Prosecutors require the public’s trust to realize their mission of pursuing justice and promoting public safety for all members of the community. Research and experience show that when individuals have confidence in legal authorities and view the police, prosecutors, the courts, and the law as legitimate, they are more likely to report crimes, cooperate as witnesses, and accept police and judicial authority.<sup>2</sup> In contrast, when the public does not trust law enforcement and

---

<sup>1</sup> *See, e.g., Caudill v. Commonwealth*, 374 S.W.3d 301, 309 (Ky. 2012) (“Unlike other attorneys, ‘[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.’”); *State v. Torres*, 279 P.3d 740, 746 (N.M. 2012) (noting local rules codifying “the duty of a prosecutor as a ‘minister of justice’”); *Domingo-Gomez v. People*, 125 P.3d 1043, 1055 (Colo. 2005) (“Prosecutors, who are enforcers of the law, have higher ethical duties than other lawyers because they are ministers of justice, not just advocates.”); *People v. Jones*, 662 N.W.2d 376, 381 (Mich. 2003) (“A prosecutor has the responsibility of a minister of justice, not simply that of an advocate.”); *Attorney Grievance Comm’n of Maryland v. Gansler*, 835 A.2d 548, 572 (Md. 2003) (“Prosecutors are held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice.”); *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (“[T]he prosecutor is a ‘minister of justice’ whose obligation is ‘to guard the rights of the accused as well as to enforce the rights of the public.’”); *Aldridge v. State*, 470 S.W.2d 42, 46 (Tenn. Crim. App. 1971) (“[A] public prosecutor is not a plaintiff’s attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty[.]”).

<sup>2</sup> *See, e.g., Tom R. Tyler & Jeffrey Fagan, Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263 (2008) (hereinafter: Tyler & Fagan) (“[Findings] demonstrate that people are more willing to cooperate with the police when they view the police as legitimate social authorities. If people view the police as more legitimate, they are more likely to report crimes in their neighborhood.”); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the*

prosecutors, community members may be less willing to cooperate with police and judicial system authority.<sup>3</sup> This reluctance hampers the ability of prosecutors and other law enforcement officers to fulfill their public safety obligations.<sup>4</sup> Indeed, the legitimacy of the entire legal system depends upon the public’s trust that it pursues just ends. The United States Supreme Court recognized this in describing the relationship between the public and the Courts, writing that “justice must satisfy the appearance of justice.” *Offut v. United States*, 348 U.S. 11, 14 (1954). The Supreme Court has also recognized that our legal system “depends in large measure on the public’s willingness to respect and follow its decisions.” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445-46 (2015).

Changes to criminal procedures – especially those involving our nation’s most severe penalty – must be made through careful deliberations and with the goal of improving fairness, transparency, and accuracy in the system, not cutting corners to fast-track executions. This helps to foster trust in the legal system and prosecutors. As outlined below, the Proposed Rule does the opposite. It will erode the public’s trust and faith in the legitimacy of the legal system and will harm the entire prosecutorial profession.

**B. The Proposed Rule eliminates guardrails in the certification process that are essential to promote integrity in the administration of the death penalty.**

**1. The Proposed Rule eliminates any meaningful review of state certification applications and effectively reduces the Attorney General’s role to a ministerial approval process before certification becomes final.**

The Proposed Rule eliminates several requirements states must meet in order to obtain certification. The existing rule governing approval of state requests for certification requires the

---

*Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psych., Pub. Pol’y & L. 78, 78-79 (2014) (“The most important finding of this study is that legitimacy plays a significant role in motivating law related behavior. The prior role of legitimacy in shaping compliance is replicated, as is the role of legitimacy in encouraging cooperation, including ceding power to the state and helping to address problems of crime and social order. In addition, legitimacy is shown to have a role in motivating empowerment, e.g. in building social capital and facilitating social, political and economic development.”).

<sup>3</sup> See Tyler & Fagan, *supra*, at 265 (“Hence, procedural injustice leads to lowered legitimacy and diminished cooperation with the police.”); German Lopez, *Police Have to Repair Community Trust to Effectively do Their Job*, Vox (Nov. 14, 2018), <https://www.vox.com/identities/2016/8/13/17938262/police-shootings-brutality-black-on-black-crime>; Kassy Alia Ray et al., *A Framework for Collaborative Crime Prevention: Community-Police Partnerships that Save Lives*, Police Chief Online (Nov. 12, 2025), <https://www.policemagazine.org/framework-collaborative-crime-prevention/> (“Increases in trust and perceptions of safety are not abstract concepts; they can be quantified and linked to reductions in crime.”).

<sup>4</sup> See *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence*, Giffords Law Center to Prevent Gun Violence, (Sept. 9, 2021), <https://giffords.org/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/> (violent crime rates increase in areas with a lack of public trust in law enforcement).

timely appointment of counsel and provides standards for counsel's competency, adequate compensation of counsel, and the payment of reasonable litigation expenses. *See* §§ 26.21, 26.22. The existing rule also requires the certification requests to be subject to public notice and comment through publication in the Federal Register. § 26.23(b), (c). Thus, the Attorney General is required to consider how the mechanism for providing post-conviction counsel functions in practice and hear from the public before a state can be certified for expedited federal habeas procedures.

However, the Proposed Rule is itself a fast-track certification process that absolves the Attorney General from critical examination of a state's representations in their certification application and reduces the Attorney General to a rubber stamp of the state's request for certification. Under the Proposed Rule, the Attorney General must only determine: "(1) 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; (2) The date on which the mechanism was established; and (3) Whether the State provides standards of competency for the appointment of counsel . . . ." § 26.22(a). The Proposed Rule further places a 90-day time limit on the Attorney General to certify a state's request. § 26.22(c). These paltry requirements for certification are wholly inadequate and troubling for several reasons.

First, there are no minimal competency standards for counsel that a state must meet in order to obtain certification. Instead, a state merely needs to provide some standards, even if they fail to ensure that counsel is adequately prepared to handle capital post-conviction cases. In both procedure and substance, capital post-conviction cases are notoriously complex. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 855 (1994) (referencing "the unique and complex nature of the litigation"); *Murray v. Giarratano*, 492 U.S. 1, 28 (1989) (Stevens, J., dissenting) ("[T]his Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master."); *In re Seaton*, 34 Cal. 4th 193, 208 (2004) (Brown, J., concurring and dissenting) (describing California's post-conviction rules as "a Byzantine system of procedural hurdles, each riddled with exceptions and fact-intensive qualifications"). To preserve the integrity of the system and ensure accuracy and fairness, capital post-conviction cases must be subject to meaningful adversarial testing by competent counsel who is familiar with both state and federal law governing capital cases.<sup>5</sup> Without some minimal competency standards, the Proposed Rule will allow states to undermine the provision of competent counsel in capital post-conviction cases.

In addition, nothing in the Proposed Rule requires a state to ensure that counsel is appointed in a timely manner. Failing to require the timely appointment of counsel is a glaring omission

---

<sup>5</sup> *See* Eric M. Freedman, *No Need to Wait: Congress Has the Power Under Section Five of the Fourteenth Amendment to Abolish the Death Penalty in the States*, 32 Wm. & Mary Bill Rts. J. 1049, 1087-89 (2024) (explaining that if state post-conviction counsel errs, federal habeas proceedings can be precluded entirely and therefore justice depends on competent state post-conviction counsel).

given the strict deadlines imposed on post-conviction petitions in both state and federal courts, especially for capital cases that are subject to Chapter 154. *See, e.g.*, § 28 U.S.C. 2263 (subjecting Chapter 154 cases in federal court to a 180-day deadline and limiting the tolling period during state post-conviction proceedings). The timely appointment of counsel is extremely important given these deadlines as well as the additional limitations on relief imposed by both state post-conviction rules and Chapter 154. *See, e.g.*, § 28 U.S.C. 2264 (requiring exhaustion of claims in state courts). Requiring a death-sentenced individual to navigate the factual and procedural complexity of a capital post-conviction case without the assistance of counsel for any period of time whatsoever reeks of systemic inadequacy. Basic principles of fairness require the timely appointment of competent counsel in capital cases, and the Proposed Rule’s recession of the “reasonably timely” definition of appointment does untold damage to the legitimacy of a state’s death penalty process.

Additionally, the Proposed Rule does not provide minimal requirements or standards for compensating counsel. A state simply has to pay counsel some amount of money, even if those sums are wholly inadequate to attract experienced, capital-qualified counsel. Capital post-conviction cases are highly specialized, and failing to adequately compensate counsel for these cases will operate as a deterrent to undertaking such complex representation. In California, for example, people sentenced to death languish for decades awaiting the appointment of counsel for their post-conviction cases, and one major reason for this backlog is that lawyers do not accept capital appointments due to the inadequate compensation.<sup>6</sup> A dysfunctional system that does not adequately compensate counsel benefits no one, and the Proposed Rule’s failure to provide some compensation floor is unsustainable.

Troublingly, the Proposed Rule also makes certification permanent and provides no way to revisit a state’s certification if or when a state changes their mechanism for providing and compensating post-conviction counsel. *See* § 26.22(e). Under the Proposed Rule, a state, once certified, could decide to abandon its appointment mechanism altogether, leaving people subject to a death sentence without any counsel at all to assist in the preparation and submission of a state post-conviction petition. Although such a scenario may seem unlikely, there is recent precedent for a state’s failure to guarantee counsel for death-sentenced individuals in post-conviction. For example, Alabama did not provide post-conviction counsel to death-sentenced individuals to assist in the preparation of their post-conviction petitions until 2017, less than 10 years ago. *See, e.g.*, 2017 Ala. Laws Act No. 417 (S.B. 187); *Maples v. Thomas*, 565 U.S. 266, 272-73 (2012) (noting that Alabama mostly relied on a non-profit organization and out-of-state volunteers to serve as post-conviction counsel for death-sentenced individuals because the state neither guaranteed nor provided such counsel to every indigent capital post-conviction petitioner). Without requiring

---

<sup>6</sup> *See, e.g.*, Sharon Bernstein, *Hundreds of Death Row Inmates Sit in California Prisons. Why Must They Wait?*, The Sacramento Bee (Dec. 3, 2024 4:47 PM), <https://www.sacbee.com/news/local/article295391939.html>; Maura Dolan, *Lack of Funding Builds Death Row Logjam*, L.A. Times (Nov. 27, 2010 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-2010-nov-27-la-me-death-lawyers-20101201-story.html>.

states to maintain the same mechanism to appoint competent post-conviction counsel that they use to obtain certification or otherwise requiring states to seek certification again if significant changes are made, states have no incentive to adhere to their mechanisms, however flawed they may be.

## **2. The Proposed Rule erodes transparency in states' capital processes.**

The Proposed Rule rescinds the requirement that states' certification requests are published in the Federal Register for public notice and comment, thus eliminating an important avenue for transparency and public insight into decision-making around death penalty processes. Shielding the public from decision-making processes is particularly harmful to the public's trust in the legal system because research demonstrates that "[t]he process by which legal authorities make decisions deeply matters to the public."<sup>7</sup> The current rule's requirement that certification applications are subject to public notice and comment creates a public record that can strengthen public trust because it allows the public to understand and contribute to the Attorney General's decision-making around certification and further allows for an informed judicial review of the grant or denial of a certification.

Eliminating publication of certification applications in the Federal Register for public notice and comment also means that the people and organizations who are most familiar with how a state's post-conviction process works – directly-impacted people who are indigent and sentenced to death and the attorneys and organizations who represent them – are unable to counter a state's representations about its process. On paper, a state can claim that they have a mechanism in place, but the reality may be quite different.<sup>8</sup> Without public notice and the ability to inform the Attorney General that the state is not complying with its own mechanism or that its mechanism doesn't have appropriate guardrails to ensure that the state should qualify for Chapter 154 opt-in procedures, the Proposed Rule limits transparency and public oversight when the stakes are life and death.

## **3. The elimination of necessary guardrails in the state certification process will have grave consequences.**

The consequences of the lack of guardrails and erosion of transparency in the Proposed Rule are magnified by what follows certification, which is truncated federal review of state capital convictions. Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2265(a)(1) establishes a *quid pro quo* arrangement: if a state

---

<sup>7</sup> Trace C. Vardsveen & Tom R. Tyler, *Elevating Trust in Prosecutors: Enhancing Legitimacy by Increasing Transparency Using A Process-Tracing Approach*, 50 Fordham Urb. L.J. 1153, 1182 (2023).

<sup>8</sup> For example, Florida law requires continuous representation for people sentenced to death, but last year Florida executed two men who had no counsel for years, including when their death warrants were signed. See Floridians for Alternatives to the Death Penalty, *We, the People – A Record of Florida's Death Penalty in 2025*, at 39 (Dec. 2025), <https://www.fadp.org/we-the-people-a-record-of-floridas-death-penalty-in-2025/>.

provides indigent defendants sentenced to death with a mechanism for competent post-conviction counsel and adequate litigation expenses, *then* the state may be certified to apply special expedited and narrowed federal habeas review by Article III courts. Specifically, Chapter 154’s provisions would cut the statute of limitations in half, limit the ability of petitioners to amend their habeas petitions, require federal courts to prioritize Chapter 154 habeas petitions, and place strict timelines on district and appellate court rulings. *See* §§ 28 U.S.C. 2262-2266. Thus, a state’s certification request should turn on whether it actually provides competent counsel and reasonably compensates counsel such that federal court review can be expedited. However, the Proposed Rule’s elimination of the guardrails necessary for meaningful certification review completely undermines the purpose and intent of Chapter 154.

Federal habeas review is a critical, if imperfect, safeguard against wrongful executions and the protection of fundamental constitutional rights. “Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.” *Christeson v. Roper*, 574 U.S. 373, 377 (2015). In state capital cases, federal habeas review should act as a final safeguard against egregious state actions and is meant to guard against “extreme malfunctions in the state criminal justice systems.” *Harrington v. Richter*, 562 U.S. 86, 102-103 (2011). It is an important final opportunity to hold the state and prosecutors accountable for egregious mistakes that violated someone’s constitutional rights in the most serious cases our system decides.

A state’s attempt to short-circuit federal habeas review of state capital convictions should be subject to scrutiny using meaningful standards, critical evaluation, and public review. After all, the benefit the state obtains from certification is that its actions and those of its prosecutors will be subject to less oversight and may even evade accountability for their errors or misconduct. Thus, meaningful review and oversight is imperative at the point the state requests certification to qualify for Chapter 154’s fast-tracked habeas procedures.

Ultimately, rushing through judicial review of capital cases following a rubber-stamp certification process encourages mistakes and missed or withheld evidence, and it will increase the already considerable risk that someone will be wrongfully executed. Capital cases are rife with error. The “single most likely outcome of a death sentence imposed in the United States is that the sentence or conviction is ultimately overturned and not re-imposed.”<sup>9</sup> Notably, courts have reversed more than 600 cases due to prosecutorial misconduct, meaning that “more than 6.3% of all death sentences imposed since 1972 have been reversed for prosecutorial misconduct or resulted in a misconduct exoneration.”<sup>10</sup> Alarming, researchers estimate that at least 4.1 percent

---

<sup>9</sup> *Death Penalty Census*, Death Penalty Information Center, <https://deathpenaltyinfo.org/facts-and-research/data/death-penalty-census> (last visited May 15, 2026).

<sup>10</sup> *Official Misconduct*, Death Penalty Information Center, <https://deathpenaltyinfo.org/policy-issues/policy/prosecutorial-accountability> (last visited May 15, 2026).

of death-sentenced individuals are actually innocent of the crime for which they were convicted and sentenced to die.<sup>11</sup> There is no way for our legal system to correct a wrongful execution and the ensuing harm to the legitimacy of our justice system. We must ensure that processes are fair, transparent, thorough, and not artificially truncated to avoid this horrendous outcome.

The Proposed Rule, however, prioritizes speed and finality above all else. In doing so it recklessly risks disastrous consequences for individuals facing death sentences, prosecutors, and the legitimacy of our justice system.

\*\*\*\*\*

For these reasons, FJP strongly opposes the Proposed Rule and urges the Department of Justice to withdraw the Proposed Rule.

Respectfully submitted,

Aramis Donell Ayala  
Former State Attorney, Florida's Ninth Judicial District  
Executive Director  
Fair and Just Prosecution

Estela Dimas  
Senior Legal Counsel  
Fair and Just Prosecution

---

<sup>11</sup> Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PNAS 7230, 7234 (2014), <https://pmc.ncbi.nlm.nih.gov/articles/PMC4034186/>.