FEDERAL JUDICIAL CENTER

Opt-in: Potential Workload Implications for the Federal Judiciary

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Executive Summary

- Opt-in certification may create a substantial wave of new litigants seeking federal counsel or seeking new state counsel.
- Opt-in certification will result in a significant increase in litigation in already-pending capital habeas cases, as litigants and courts attempt to determine whether and how the opt-in provisions apply to the individual cases.
- Attorneys in capital habeas cases will have to file a fully briefed petition in federal court in less than half the time they are currently allotted and there will be strict limitations on amendment.
- District courts will have to render decisions in approximately half the time they are currently taking, and there are substantial numbers of cases that may require immediate action to meet decision deadlines.
- Appellate courts will need to make immediate decisions in a number of pending appellate cases and may see a substantial increase in requests to file second or successive petitions.
- CHUs will see a substantial increase in their workload, an increase between 40% and 300%.
- Courts may have to rely on CJA panel attorney appointments to manage the substantial increases in caseload, requiring more resources for training capital habeas counsel.

Introduction

In late 2017, the Committee on Defender Services (Committee) asked the Federal Judicial Center (FJC) to generate a white paper on the potential effects on the federal courts and the defender services program of a determination that states have "opted in" to special expedited procedures created by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Chapter 154 of Title 28 of the United States Code provides for expedited review of capital habeas petitions in federal court. If the United States Attorney General certifies that a state meets statutory and administrative requirements for assuring competent, adequately funded counsel in state postconviction proceedings, the state may ask federal courts to employ Chapter 154's expedited procedures when conducting habeas corpus review of capital convictions and death sentences imposed by the state's courts. The process by which states become eligible for the expedited procedures available under opt-in is detailed in the Appendix. After a brief discussion of some of the changes under "opt-in," as Chapter 154's procedures are called, this white paper discusses the potential impact of opt-in for the federal district and appellate courts with jurisdiction in Arizona and Texas, the two states that have applied for opt-in status thus far.

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Opt-in certification is often referred to as a "quid pro quo" arrangement between the states and the federal government.[1] States may be certified by the United States Attorney General and receive the benefit of expedited procedures when litigating capital habeas petitions in federal courts if they do all of the following:

- Create a mechanism for the appointment of competent postconviction counsel in capital cases.
- Provide adequate compensation to capital postconviction counsel.
- Provide adequate funding for litigation expenses in capital postconviction cases, including for experts and investigations.

The benefits of the opt-in provisions include limiting stays of executions, expediting the deadline for litigants to file 28 U.S.C. § 2254 petitions in federal court, limiting the scope of habeas review by federal courts, limiting amendments to 2254 petitions, and prioritizing review of and setting time limits for ruling on 2254 petitions by federal district and appellate courts. (See Appendix for details.) The certification of a state's mechanism is retroactive to the date the mechanism became law.

For purposes of this white paper, we focus on those provisions that will have the most immediate effect on federal caseloads. As of September 30, 2018, there were at least 187 inmates on Texas's death row whose cases could be covered by opt-in given that the state is seeking certification retroactive to September 1, 1995. In Arizona, which is seeking certification retroactive to July 17, 1998, there were at least 101 inmates on its death row whose cases could be covered by opt-in as of September 30, 2018. Upon certification federal courts could anticipate immediate litigation in all potentially eligible opt-in cases, though the exact impact is impossible to predict.

For potential opt-in cases that are still in review in the state court systems, there is the possibility of litigation to seek the immediate appointment of new state or federal counsel. Section 2261(e) of Title 28 allows inmates to request counsel from federal courts, or the court to appoint them on their own motion, "at any phase of State or Federal post-conviction proceedings." Based on our estimates from September 30, 2018, 38 inmates in state court in Texas and 49 in state court in Arizona may file cases requesting appointment of counsel under section 2261(e).[2]

For capital habeas cases that have already moved into the federal system during our study period (161 inmates in Texas and 46 in Arizona), federal courts will need to determine whether opt-in's provisions should apply to the individual cases. In addition, federal courts will also need

1. 78 Fed. Reg. 58165 (Sept. 23, 2013), discussing 28 C.F.R. Ch. 1 § 26.21 ("Chapter 154 involves a *quid pro quo* arrangement under which appointment of counsel for indigents is extended to post-conviction proceedings in capital cases, and in return, subsequent Federal habeas review is carried out with generally more limited time frames and scope.").

2. There are two litigants from Arizona with federal cases outside our study period who are back in state court and may also seek relief under § 2261(e).

to determine how the provisions should be interpreted. This may require the federal courts to address the following issues:

- Whether the opt-in provisions are constitutional.
- Whether retroactive application of opt-in is constitutional.
- Whether the inmate's case qualifies for opt-in, as described in 28 U.S.C. § 2261(b).
- How the various provisions of opt-in should be construed.
- How the various provisions of opt-in apply in the inmate's case.

For all cases in which opt-in is applicable, federal courts must obtain briefing and decide these novel legal issues within the confines of significant new deadlines for capital habeas cases, including

- a 180-day statute of limitations (down from a one-year deadline) for capital habeas petitioners to file their capital habeas petition following the denial of state postconviction relief
- a 450-day deadline for federal district courts to decide capital habeas cases (or within 60 days of when the case is submitted, whichever is earlier)
- a 120-day deadline (from the filing of the reply brief) for federal appellate courts to decide the appeal of capital habeas cases

While there are a number of additional provisions related to opt-in that will affect the federal courts—such as how tolling of the reduced statute of limitations will be calculated and how the limited scope of review will affect judicial decision making—it is unclear how the provisions will work in practice, and so estimating their effects are impossible at this time. Most of the issues are specific to the facts of the case and will be litigated in federal court, with the ultimate application of the opt-in provisions in specific cases left to the judges presiding over the litigation. We note these issues to highlight that the effects of opt-in certification discussed in this memo are at the aggregate, not case-specific, level, and represent only part of the impact of certification. Furthermore, at this point, we are unable to ascertain the effect that prioritizing capital habeas cases over all civil cases will have on courts. Our best effort is to determine how resource intensive capital habeas cases have been and how courts have managed them without the abbreviated deadlines of opt-in. We include information on litigation of capital habeas cases nationally to provide context for the analysis in the two states under consideration for certification.

National Implications

While the precise effects of opt-in certification on litigation of habeas cases in federal court are unknown, looking at the habeas cases currently in federal court, including their duration, provides some insight into the changes opt-in will bring. Discussed below is the workload of federal district and appellate courts with respect to habeas litigation between Fiscal Years 2008 and 2017. The ten years of data provide stable estimates of caseload and court burden (in terms

of the time to litigate these cases). We should note that capital habeas cases are among the most difficult civil cases courts face, with one of the highest case weights of all civil cases.[3] Given the difficultly of the litigation, the time taken to litigate these cases (discussed below) should not be surprising.

Based on the data reported to the Administrative Office of the U.S. Courts, between 2008 and 2017, federal district courts saw approximately 2,545 Nature of Suit code 535 (Habeas Corpus Death) cases, some of which were cases reopened after review by the courts of appeals, and some of which were a second or successive petition filed by the litigant. While not all districts see capital habeas cases (30 states currently have the death penalty), seven districts saw more than 100 cases, including one that saw nearly four hundred in a 10-year period.[4] Of the 2,545 cases we identified during this 10-year period, 513 (20%) were pending at the end of FY 2017.

Federal capital habeas cases take a substantial amount of court time as measured by the average time to disposition in the district courts. Between FY 2008 and FY 2017, the average civil case was disposed of in 380 days while habeas death cases averaged 1,157 days, over three times as long.[5] Pending cases had been open 2,141 days, on average, at the end of our study period.[6] The long duration of capital habeas cases means that in any given year, district courts may have multiple capital habeas cases pending before them. In 2017, for example, 88% of the 50 districts with pending capital habeas cases had more than one case pending at the end of 2017, and one of these cases had been pending for as long as 27 years.

Between 2008 and 2017, there were 1,955 capital habeas appeals in the federal circuit courts. Of these appeals, 1,690 were closed while 265 (16%) were pending at the end of FY 2017. The 1,690 closed appeals terminated within 607 days, on average, while cases that were pending had been open, on average, for 1,009 days.[7]

Application of the opt-in provisions would require capital habeas cases to proceed through federal court much more quickly than under the current national practice. The effects of opt-in, of course, would not only change the national average case disposition times, but would also directly affect the federal court litigation of capital habeas cases in certified states. The specific effects of opt-in for districts with jurisdiction in certified states are discussed in detail below.

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3. In the most recent District Court Case Weighting Study, capital habeas cases were assigned a weight of 3.7. See http://jnet.ao.dcn/about-ao/directors-office/new-district-court-case-weights for more information.

4. The Middle District of Florida saw 387 capital habeas cases between FY 2008 and 2017, the highest number of any district court in the country.

5. Median times to disposition also differ substantially between regular civil litigation (232 days) and capital habeas cases (742 days to termination) during this period. The range of days to termination for capital habeas cases spanned less than a day (cases that were filed and terminated in the same day) to those pending for a maximum of 9,783 days.

6. Of the 513 cases pending at the end of FY 2017, the minimum number of days cases were pending was one day and the maximum was 9,822 days. The median number of days pending was 1,585 days.

7. For terminated appellate cases, the median disposition time was 424 days, with a minimum of 0 days and a maximum of 6,755. For pending appellate cases, the median time pending was 662 days, with a minimum of 2 days and a maximum of 6,542 days.

Opt-In Effects in Requesting States

As of the drafting of this white paper, two states, Arizona and Texas, have applied for opt-in certification with the Attorney General.[8] For each state, we compare the requirements of opt-in's key provisions governing capital habeas litigation in federal courts with recent district and appellate court capital habeas practice during a 10-year period covering Fiscal Years 2008 through 2017, and then identify the number and status of current death row inmates who could be affected by opt-in provisions in the near future.[9] We also gathered information on the number of litigants in federal court during our study period likely to be affected by the retroactivity provisions of opt-in, though we recognize that the issue of retroactivity, like other case-specific determinations, will likely be litigated on a case-by-case basis. We are unable to estimate the amount of time litigation related to the applicability of opt-in to each case will take, as there is no current parallel in federal court to provide a baseline. Nonetheless, the estimates below are the outer boundary of the effects of opt-in that we are able to estimate using regularly reported information from the courts.

We also note that certification in Texas or Arizona would result in an immediate surge in litigation in all potential opt-in cases. While the number of death row prisoners potentially subject to opt-in is a fluid number, as prisoners move on to and off of death row, during our period of study there were 101 cases in Arizona and 187 cases in Texas that are potentially subject to opt-in. Certification will likely result in immediate litigation in all of these potentially eligible opt-in cases. For cases already in federal court during our study period—46 cases in Arizona and 161 cases in Texas—litigation will be necessary in each case to determine whether opt-in's provisions should apply to the individual case and, if so, how the provisions should be interpreted. Such litigation will raise novel and difficult questions, including questions about the constitutionality of the opt-in statute, the retroactive application of particular provisions, and the proper interpretation and application of opt-in's provisions. For cases still in state court—49 cases in Arizona and 38 cases in Texas—opt-in certification may result in a rush to federal court to seek either the appointment of replacement state postconviction counsel or the early appointment of federal habeas counsel.[10]

8. The discussion of opt-in applications for both states does not include the details of their systems for appointing state postconviction counsel and how the counsel mechanisms have changed over time. The details of both systems and the relevance to the specific cases affected by opt-in status (should it be granted) are beyond the scope of this brief overview.

9. Our information on death row inmates was current through September 2018. We continue to monitor the cases of death row inmates and federal court litigants included in this analysis for any substantial changes in practice that would affect the results. No such changes have occurred as of the date of this memo.

10. By early appointment, we mean appointment *before* the end of state court proceedings, which Capital Habeas Units (CHUs) may consider seeking. Two litigants in Arizona from before our study period went back to state court and could potentially seek new counsel as well.

Arizona[11]

Overview of Processes

On April 18, 2013, then-State Attorney General Tom Horne applied for opt-in certification for the state of Arizona. In its application for opt-in certification, the state noted that the Ninth Circuit Court of Appeals found that the state's postconviction procedures for capital defendants met the requirements for opt-in certification as of July 17, 1998.[12] The state appointment process has changed since that decision, however, and the United States Attorney General ultimately decides the date the state established any opt-in qualifying appointment mechanism, so the extent to which cases may or may not be governed by opt-in is somewhat unclear. In the analysis below we focus on those sentenced to death whose postconviction counsel was appointed on or after July 17, 1998. For state court death row inmates sentenced near July 17, 1998, information on the appointment of postconviction counsel was provided by the District of Arizona Federal Defender Organization's Capital Habeas Unit (CHU).[13]

The state court processes for direct appeal and postconviction review are sequential in the state of Arizona, and the dates of decisions for each process are publicly available, allowing us to identify where death row inmates were in the state processes, as well as the time it took existing federal court litigants to move from state to federal court. In the 10 years under study, it was uncommon for capital petitioners to seek appointment of federal habeas counsel before the conclusion of state postconviction review, and it was fairly common, especially under a prior filing practice that has since been abandoned, for capital habeas petitions to be amended.[14] Our discussion of the effects of opt-in certification in Arizona highlights the impact the changes to deadlines and the restrictions on the ability to amend petitions would have on the litigation of these petitions in federal court.

11. The Arizona application can be found at: https://www.federalregister.gov/documents/2017/11/16/2017-24873/notice-of-request-for-certification-of-arizona-capital-counsel-mechanism. On November 21, 2018, DOJ posted a notice in the Federal Register reopening the comment period for Arizona's opt-in application due to some supplemental information provided by the state in response to DOJ questions. The new comment period closed January 7, 2019.

12. Spears v. Stewart, 283 F.3d 992 (9th Cir. 2002). The Ninth Circuit declined, however, to apply the opt-in provisions to the indigent defendant in the case because of a delay in the appointment of state postconviction counsel. The mechanism for appointing postconviction counsel has changed since the decision in *Spears*, and the implications of those changes for the requirements under opt-in are unclear. In the Arizona Attorney General Office's letter of October 16, 2018, the state clarified it is in fact requesting certification dating back to July 17, 1998. *See* Ariz. AG Letter at 1 (https://www.justice.gov/olp/page/file/1113346/download).

13. In no case was counsel appointed before the case was filed, but the appointment was before the first petition was filed in 61% of cases.

14. In a conversation with the authors, the Arizona Capital Habeas Unit staff noted that early appointments (i.e., appointment of federal counsel prior to the conclusion of state proceedings) in capital habeas cases were uncommon in the district. Amended petitions were filed in 58% of the initial civil cases in our petition analysis sample.

Number and General Status of Current Prisoners on Death Row

In September of 2018, there were 117 prisoners on Arizona's death row, with the most recently received on May 24, 2018.[15] Of these, a maximum of 101 had postconviction counsel appointed on or after July 17, 1998, and are therefore potentially eligible for retroactive application of the opt-in provisions. As of September 30, 2018,

- 46 (39%) of the potentially eligible prisoners had at least one case active in federal court in our 10-year study period.
  - 29 potentially eligible prisoners have cases pending in federal district court.
  - 7 potentially eligible prisoners have cases pending in the Ninth Circuit Court of Appeals.
  - 5 potentially eligible prisoners were last involved with a civil district court case that may be reopened but was closed at the end of our study period. [16]
  - 5 potentially eligible prisoners were last involved with a civil appellate court case that may be reopened but was closed as of the end of our ten-year period.
- 49 (42%) potentially eligible prisoners were in state court direct appeal or postconviction proceedings during our 10-year study period.
  - 10 potentially eligible prisoners are awaiting a decision on their direct appeal and will go through state postconviction, assuming relief is denied on direct appeal.
  - 29 potentially eligible prisoners are through direct appeal but have not yet completed postconviction review.
  - 10 potentially eligible prisoners are through direct review, have petitioned for postconviction review, and are awaiting a decision on their petition for review from the Arizona Supreme Court.[17]
- 6 (5%) potentially eligible prisoners had at least one case active in federal court outside of our 10-year study period.
  - 2 potentially eligible prisoners had at least one case active in federal court before our 10-year study period began and are currently in state court postconviction proceedings.
  - 4 potentially eligible prisoners had at least one case active in federal court after our ten-year study period ended.

Pipeline of New Cases

The 49 prisoners currently in state direct appeal or postconviction proceedings represent the pool of potential litigants whose entire federal case could be governed by opt-in.[18] They are also

15. This summary uses the date the prisoner was sentenced to death as the starting point for the death-review process. This differs slightly from the information in the Texas summary, which is based on the date the prisoner was received on death row. These choices depended on what data were available from the state listing of death row prisoners.

16. Cases may be closed statistically or dismissed without prejudice to refiling for procedural reasons.

17. Information provided in email from Ellen T. Hoecker, Assistant Federal Public Defender, to authors, October 19, 2018.

18. For this analysis, we exclude the two prisoners from before our study period who went back to state court.

the most likely to seek to enter federal court in order to obtain the appointment of federal habeas counsel and to take advantage of the opt-in provision allowing them to request that the federal court appoint new counsel if current state-appointed counsel is ineffective.[19] While such petitions could be immediate, we have no way of knowing how many death row inmates are likely to file to receive new state postconviction counsel or request the appointment of federal habeas counsel.

Absent information on who is likely to request new state postconviction counsel or the appointment of federal habeas counsel, we can estimate when the 49 death row prisoners currently in state court are likely to finish state postconviction proceedings and file in the federal court based on the filing timelines of recent capital petitioners. Using the time it took the death row prisoners who *have* filed federal district court cases (pending or terminated) in our 10-year study period to move from receiving the death penalty to their first filing in federal district court, we can then estimate time to federal court for those opt-in-eligible prisoners who are still in state court. We focus our analysis on the prisoners whose cases would potentially be governed by opt-in.[20] From Table 1, we see that, on average, litigants move to federal court 3,102 days after they receive a sentence of death.

Table 1: Days from Death Sentence to First Filed Federal Case, District of Arizona, Cases Active FY 2008 through 2017

District	N	Average	Median	Minimum	Maximum
AZ	**46**	**3,102**	**3,002**	**1,209**	**4,696**

The median times were then used to calculate "arrival estimates" for the 49 prisoners who have not yet filed in federal court at the end of our study period. The estimates were calculated by adding the median days to the date the inmate was sentenced to death. Using these dates, 22 litigants should be in federal court any day, 9 are expected during Fiscal Year 2019, 3 are expected during Fiscal Year 2020, and the remaining should appear in federal district court between Fiscal Years 2021 and 2026.

The cases discussed above represent the likely wave of current death row litigants who will enter federal district court and may see their entire case governed by opt-in. To understand how the cases will need to be litigated, we turn now to those cases already in federal district and appellate courts that may be subject to opt-in.

Cases Active in Federal Court, Fiscal Years 2008 Through 2017

Looking at the current time to litigate these capital habeas cases provides two pieces of information: how long these cases have taken in the past compared to the opt-in deadlines, and how many of these cases may involve litigation about whether the opt-in provisions apply to the

19. 28 U.S.C. § 2261(e) is the provision allowing for such requests.

20. Tables with estimates for the entire population of death row inmates whose cases matched at least one case in our 10-year study period are available upon request.

particular case and, if so, how opt-in's provisions should be applied and interpreted. We consider the time from the end of state court proceedings to filing petitions in federal court (as well as how many cases included amended petitions), how long district courts take to decide these cases, and, lastly, how soon district and appellate courts will need to render decisions in current cases.

180 Days to File

To consider the effect of opt-in's 180-day statute of limitations, we examined the time from case filing to the first full capital habeas petition, including amendments.[21] In the District of Arizona, cases are filed in federal court within a few days of the end of state court litigation, and appointments of federal habeas counsel prior to the completion of state court proceedings are uncommon. As a result of a prior local practice, in which petitioners initiated habeas cases by filing an initial petition, it was relatively common for petitioners to file an initial petition and then, with leave of the court, file an amended petition fully developing the arguments. We understand that this is no longer the local practice in Arizona. We counted the time from case filing to the filing of what we call the first full petition in order to capture all of the time counsel is taking to fully develop the case arguments under the current litigation regime and demonstrate how far a departure the filing requirement of opt-in might be.

During our 10-year study period, of the 46 death row inmates matched to at least one case in federal court, 43 were involved in district court cases, though many were in multiple cases.[22] We focus here on the original filings. Estimating the time between filing the case and filing the first full capital habeas petition further reduces the number of observations to 33.[23]

Table 2: Days from Initiating the Federal Case to the Filing of the First Full Capital Habeas Petition, District of Arizona, FY 2008 through 2017

District	N	Average	Median	Minimum	Maximum
AZ	**33**	**408**	**337**	**156**	**1,725**

Of the 33 potentially opt-in-eligible litigants whose original filing fit in our study period, only 1—a terminated case—saw the full petition filed within the 180-day period set by opt-in.[24] There are 15 cases (plus 4 cases with no petition and not included in the table above) pending at the end

21. While federal courts will need to interpret the tolling provisions within the context of each state's appellate and postconviction framework, under Arizona's procedures, it is possible that petitioners entering federal court in the District of Arizona will have significantly less than 180 days remaining on their opt-in statute of limitations by the time they conclude state court proceedings.

22. Ten litigants were in two cases during our study period and one was in three cases. Each case had a new case number. Additionally, two litigants fall out of the analysis because the district court case that fits within our study period is not an original proceeding. To consider the time between filing of case and filing of capital habeas petition, we focus only on the original filing for the litigant that fell within our 10-year window.

23. Four cases had no petition by the end of our 10-year study period; all four had petitions filed after our study period (between 308 and 331 days after case filing).

24. We use filing date of the federal court case as a proxy measure for the end of state court proceedings.

of our period of study, all of which had a petition filed beyond the 180-day deadline for filing a full capital habeas petition set by opt-in and possibly requiring immediate action by the district court if the provision goes into effect. There are also 17 terminated cases in which the first full petition was filed more than 180 days after the case was opened in federal court, the status of which is unclear.

In addition to reducing the time for filing the capital habeas petition by half, opt-in further restricts the ability of litigants to amend their petitions. Of the 33 original filings, 19 (58%) had more than one petition.[25] This percentage is somewhat of an underestimate given the number of litigants who had *multiple cases* in federal district court during our 10-year study period, many of which also had multiple petitions. Taking the multiple-petition original filings and the multiple filings for the opt-in eligible litigants together, we can see that the restrictions on amendment will substantially change the nature of capital habeas litigation in the district of Arizona and will likely increase requests for filing of second or successive petitions in the Ninth Circuit Court of Appeals.

450-Day District Court Deadline

Opt-in also sets a deadline for rendering decisions by the district courts. Using the 33 original filings, we estimate the duration of the cases in federal district court during our 10-year study period.

Table 3: Duration of District Court Cases from First Full Petition to Decision or End of Study Period, District of Arizona, FY 2008 through 2017

District	N	Average	Median	Minimum	Maximum
AZ	**33**	**1,125**	**792**	**24**	**2,284**

Of the 33 cases with a full petition, the average time pending was 1,125 days, and the median was 792 days, both well over the 450-day opt-in deadline (the table above combines pending and terminated cases). Among the 15 pending cases with a petition, the average time pending was 611 days and the median time was 582 days. Nine of the 15 pending cases were over the 450-day deadline for district court decisions set by opt-in, possibly requiring immediate action by the district court upon certification to determine whether opt-in applies to the particular case and, if so, to rule on the merits of the habeas petition. If we look just at the 18 terminated cases, we see an average case disposition time of 1,554 days and a median of 1,826.5 days. In fact, only one case was decided within the 450-day opt-in deadline. The status of the decisions in the 17 terminated cases that were not decided within the 450-day deadline is uncertain if Arizona is certified.[26]

25. The number of amended petitions reflects a practice of filing an initial petition to initiate the case—a practice that is no longer common in Arizona. Between 2000 and 2010, 71% of the cases involved an amended petition. Since 2010, 19% of cases involve such amendments.

26. Of course, using the original filing is the best approximation of what litigation of capital habeas petitions will be like under opt-in, but it may **undercount** the number of litigants federal courts see after certification. The 15

120-Day Appellate Court Deadline

The final opt-in provisions to consider are those that impact the appellate courts. As noted above, appellate courts may see an increase in filings to request permission to file second or successive petitions. Additionally, the opt-in requirements for appellate litigation set a 120-day deadline for a decision by the court of appeals after the reply brief is filed in the case.

As of September 30, 2018, there were 17 appeals involving Arizona death row inmates potentially subject to opt-in that were pending in the Ninth Circuit Court of Appeals. Of these, 15 were appeals active during the study period[27] and 2 were filed during fiscal year 2018.[28] We recorded the dates of the first and, if more than one, the last reply briefs filed in these pending cases as noted in the docket sheets available in PACER.[29] We found the following:

- No reply or answer had been filed in 4 of the cases.[30]
- Of the remaining 13 cases, all were past 120 days from the filing of the first reply brief.
- Using, instead, the date of the last reply brief—which for 6 cases was the date of a replacement or supplemental reply brief—11 of the 13 pending appeals were beyond the 120-day decision deadline.

The need to reach immediate decisions in these cases would be a substantial burden on the Ninth Circuit Court of Appeals, as would the need for federal courts to determine whether the opt-in provisions apply to each of the pending appellate cases potentially subject to opt-in.

Conclusions About Arizona

It is clear from the analysis above that opt-in certification would be a substantial departure from the current practice of litigating capital habeas cases in the District of Arizona and on appeal in the Ninth Circuit Court of Appeals. Taking the reduced statute of limitations together with the restrictions on amending petitions that are already in place will substantially change the nature of litigation. Both how the cases are litigated and how the courts manage the litigation will have to change under opt-in, and the change will come almost immediately after the certification decision. The changes will affect a large number of incoming and current cases given the pending caseload from state court and the number of litigants in federal court whose cases will require

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pending cases are only original petitions. There are 29 death row inmates with a petition (original or successive) pending in district court at the end of our study period. Because we are uncertain what the status of second or successive petitions will be for opt-in eligible litigants, we do not focus on the decision deadlines in all pending petitions. We note however, that the number of pending decisions on which district courts may need to take immediate action may be higher than estimated here. We note that some of these cases may be remands.

27. There were 93 appeals involving 60 eligible death row inmates active during the study period. Of these, 78 terminated before September 30, 2018, in an average of 966 days (median of 847) from when they were filed.

28. There were two cases pending at the end of Fiscal Year 2017 that closed during the next year. In one, no reply brief was filed; in the other, the appeal was decided more than 300 days after the last reply brief was filed.

29. A number of these were sent back to district court in light of the decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), and replacement reply briefs were filed after the case returned to the Ninth Circuit.

30. Two of the cases were pending, and two were stayed as of the end of our study period.

immediate litigation related to the application and interpretation of opt-in in the particular case and may require an immediate decision.

Not only will opt-in affect the courts and how they manage capital habeas cases, it will affect whom the courts appoint to this new wave of cases. Between FY 2013 and FY 2017, the CHU in Arizona served 105 clients, with an existing caseload of 77 clients in FY 2013 and an additional 4 to 9 clients added each year during the study period.[31] If our estimates are correct, and 22 new clients move into federal court almost immediately after certification, that would triple the normal caseload the CHU handles with its budgeted 43 full-time equivalent positions. Additionally, the work litigating both new and current opt-in-eligible cases would have to be done significantly faster than is currently the practice. Given the substantial percentage of the federal court capital habeas caseload managed by the CHU,[32] it is unclear if the CHU could absorb the new cases or if there are sufficient numbers of CJA Panel Attorneys trained to manage the new cases. The costs of hiring and training new attorneys to manage the additional caseload (either CHU or CJA) are outside the scope of this analysis, but should be considered.

Texas[33]

Overview of Processes

On March 11, 2013, Texas Attorney General (now Governor) Greg Abbott applied for opt-in certification for the state of Texas. In the application for opt-in certification, the state asked that the certification be effective as of the September 1, 1995, passage of the Texas Legislature's enactment of the procedure for the appointment and compensation of competent counsel in state postconviction capital cases. The state appointment process has changed since that date, however, and the United States Attorney General ultimately decides the date any qualifying mechanism was established, so the extent to which cases may or may not be governed by opt-in is somewhat unclear. In the analysis below we focus on those with counsel appointed on or after September 1, 1995.[34]

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31. Information provided by the District of Arizona Federal Defender Organization's Capital Habeas Unit (CHU).

32. The CHU was involved in over 80 percent of the capital habeas cases active in the Arizona district court during Fiscal Years 2013 through 2017.

33. The Texas application is available at: https://www.federalregister.gov/documents/2017/11/16/2017-24874/notice-of-request-for-certification-of-texas-capital-counsel-mechanism. Details of the Texas state postconviction counsel appointment process are available in the application for opt-in certification as well as the public comments regarding opt-in procedures; both are available at this link.

34. All inmates received on death row on after September 1, 1995, were counted as potentially eligible for opt-in because their postconviction counsel were appointed after the date of the qualifying mechanism. Prof. Jim Marcus (University of Texas–Austin Professor of Law and Texas Capital Habeas Resource Counsel) provided information as to the potential opt-eligibility of the remaining 39 death row inmates who were originally sentenced before that date. Of these, 21 were flagged as having had counsel appointed post-1995 either (1) as the natural consequence of the previous system under which state habeas proceedings were sequential to direct appeals, or (2) to handle subsequent cases of inmates who were later retried and resentenced to death.

The state processes for direct appeal and postconviction review are simultaneous in Texas. By law, state postconviction counsel for indigent defendants must be appointed within 30 days of imposition of the death sentence, and this includes time for a hearing on indigent status. In the 10 years under study, it was common for counsel representing litigants in federal court to seek appointment in the case before the federal petition was filed.[35] Additionally, in some cases attorneys filed petitions to meet statute-of-limitations deadlines, and, in accordance with a scheduling order, file an amended petition fully developing the argument at a later time.[36] Our discussion of the effects of opt-in certification in the four federal judicial districts in Texas highlights the impact changes to deadlines and petition amendments would have on the litigation of these petitions in federal court.

Number and General Status of Current Prisoners on Death Row

In September of 2018, there were 226 prisoners on Texas death row, with the most recently received on August 20, 2018. Of these, a maximum of 209 had postconviction counsel appointed on or after September 1, 1995, and are therefore potentially eligible for retroactive application of the opt-in provisions. As of September 30, 2018:

- 161 (77%) potentially eligible prisoners had at least one case active in federal court in our ten-year study period.
  - 29 potentially eligible prisoners have cases pending in federal district court.
  - 26 potentially eligible prisoners have cases pending in the Fifth Circuit Court of Appeals.
  - 32 potentially eligible prisoners were last involved with a civil district court case that may be reopened but was closed at the end of our study period.[37]
  - 74 potentially eligible prisoners were last involved with a civil appellate court case that may be reopened but was closed as of the end of our 10-year period.
- 38 (18%) potentially eligible prisoners were in state court direct appeal or postconviction proceedings during our 10-year study period.[38]
  - 3 potentially eligible prisoners were awaiting either resentencing or additional findings of fact.
  - 15 potentially eligible prisoners have pending state direct appeal and postconviction proceedings, which are simultaneous in Texas.
  - 17 potentially eligible prisoners are through direct appeal but awaiting a decision in a postconviction proceeding.

35. In those 89 cases for which attorney appointment dates were available, counsel was appointed before the case was filed in 20% percent of the cases and before the first petition was filed in 75%.

36. Amended petitions were filed in over 40% of the initial civil cases in our petition analysis sample.

37. Cases may be closed statistically or dismissed without prejudice to refiling for procedural reasons.

38. After searching all publicly available sources for the status of state court proceedings, we contacted the Texas Attorney General's Office for information on the state court proceedings in these cases.

- 1 potentially eligible prisoner is through both state direct appeal and state postconviction but as of now has no federal court case filed.
- 2 potentially eligible prisoners are missing information.

- 10 (5%) potentially eligible prisoners had at least one case active in federal court outside of our 10-year study period.
  - 4 potentially eligible prisoners had a least one case active in federal court before our 10-year study period began.
  - 6 potentially eligible prisoners had a least one case active in federal court after our 10-year study period ended.

Pipeline of New Cases

The 38 prisoners currently in state court proceedings represent the pool of potential litigants whose entire federal case could be governed by opt-in. They are also the most likely to seek to enter federal court in order to secure the appointment of federal habeas counsel and to take advantage of the opt-in provision allowing them to petition the federal court for appointment of new counsel if current state-appointed counsel is ineffective.[39] Without any information on how common that may be, we estimate the time to federal court using recent timelines from those already in court during our study period.

We estimate when these inmates are likely to file in federal court based on how long it took those potentially opt-in-eligible death row prisoners with active cases to move from the date they were received on death row to their first filing in federal district court. From Table 4, we see that, on average, the opt-in-eligible prisoners moved to federal court 2,709 days after they were received on death row.[40]

Table 4: Days from Being Received on Death Row to First Filed Federal Case, by District, FY 2008 through 2017

District	N	Average	Median	Minimum	Maximum
TXE	24	1,797	1,496	854	4,386
TXN	37	2,541	2,040	1,101	8,350
TXS	73	3,298	2,991	694	8,746
TXW	27	2,154	1,794	1,044	4,278
All	**161**	**2,709**	**2,190**	**694**	**8,746**

The median times were then used to calculate "arrival estimates" for 35 of the 38 prisoners who have not yet filed, with the 3 awaiting resentencing or new findings of fact excluded because

39. 28 U.S.C. § 2261(e) is the provision allowing for such requests.

40. The district was determined by mapping the county in which the state sentence was imposed to the federal district court with jurisdiction over the county. There was one exception where the actual federal filing showed a different district from the mapped result.

we do not have enough information to know if a federal case is likely or if the inmate will prevail in state court. The estimates were calculated by adding the median days for the appropriate district to the date the inmate was received. These calculations result in 5 potentially eligible prisoners who are expected to arrive in federal court any day, 8 who are expected in Fiscal Year 2019 and 5 more during Fiscal Year 2020. Another 11 should arrive by the end of Fiscal Year 2022, and the rest should appear before the end of Fiscal Year 2027.

The cases discussed above represent the likely wave of current death row inmates who will enter federal district court and may see their entire case governed by opt-in. To understand how the cases will be litigated, we turn now to those cases already in federal district and appellate courts that may be subject to opt-in.

Cases Active in Federal Court, Fiscal Years 2008 through 2017

Looking at the time to litigate these capital habeas cases provides two pieces of information: how long these cases have taken, compared with the deadlines set by opt-in, and how many of these cases may involve litigation about whether the opt-in provisions apply to the particular case and, for those that do, how opt-in's provisions should be applied and interpreted. We consider the time to filing petitions in federal court (as well as how many cases see amended petitions), how long district courts take to decide these cases, and, lastly, how soon district and appellate courts will need to render decisions in current cases.

180 Days to File

To consider the effect of opt-in's 180-day statute of limitations on current practices, we examined the time from case filing to the first full capital habeas petition, including amendments. In the districts in Texas, prepetition appointments were common, as was filing an initial petition to meet statute of limitations deadlines. Defense counsel often secure an agreed-upon briefing order from the court allowing three to six months to amend the petition before the state files a response. Thus, the time between filing the case and the first full petition represents the time necessary to fully develop the case under current practice and demonstrates how different the work will be under opt-in.

Of the 161 death row inmates matched to at least one case in federal court, 110 had an original filing in district court with a fully briefed capital habeas petition during our 10-year study period.[41]

41. The number was reduced from 161 to 110 because 33 litigants did not have their original case active during our study period, 3 had no petition filed during the study period, and 15 had their fully briefed petition in a second or reopened case.

Table 5: Days from Initiating the Federal Case to the Filing of the First Full Capital Habeas Petition, U.S. District Courts in Texas, Cases Litigated FY 2008 through 2017

District	N	Average	Median	Minimum	Maximum
TXE	18	318	345	0	621
TXN	24	109	0	0	363
TXS	51	260	226	0	1,527
TXW	17	259	328	31	357
All	**110**	**236**	**313**	**0**	**1,527**

Of the 110 potentially opt-in-eligible inmates whose original filing fit in our study period, only 42 saw the full petition filed within the 180-day period (as determined by our proxy measure of federal civil filing date) set by opt-in. Of the 24 eligible death row inmates with cases pending in federal district court at the end of the study period, 18 were beyond the 180-day deadline for filing a full capital habeas petition and possibly requiring action by the district court when the provision goes into effect. Of the 86 inmates with cases that terminated during the study period, there were 50 in which the first full petition was filed more than 180 days after the case was opened in federal court and whose status is unclear under opt-in.

In addition to reducing the time for filing capital habeas petitions by half, opt-in further restricts the ability of litigants to amend their petitions. Of the 110 original filings above, 46 (42%) had more than one petition. This percentage is something of an underestimate given the number of litigants who had *multiple cases* in federal district court during our 10-year study period, many of which also had multiple petitions. Taking the multiple-petition original filings and the multiple filings for the opt-in eligible-litigants together, we can see that the restrictions on amendment would substantially change the nature of capital habeas litigation in the districts in Texas and will likely increase requests for filing second or successive petitions in the Fifth Circuit Court of Appeals.

450-Day District Court Deadline

Opt-in also sets deadlines for decisions by the district courts. Using the 110 original filings, we estimated the duration of the cases during our 10-year study period.

Table 6: Days from Filing of the First Full Petition to Decision or End of Study Period, U.S. District Courts in Texas, Cases Litigated FY 2008 through 2017

District	N	Average	Median	Minimum	Maximum
TXE	18	1,849	1,284	418	5,039
TXN	24	853	934	21	1,758
TXS	51	872	657	12	4,335
TXW	17	906	627	183	3,283
All	**110**	**1,033**	**768**	**12**	**5,039**

Of the 110 cases with a full petition, the average time to disposition (or days pending as of September 30, 2017) was 1,033 days, and the median was 768, both well over the 450-day opt-in deadline. Of course, the table above combines pending and terminated cases. Among the 24 pending cases, the average time pending was 1,092 days and the median time was 668. Twenty-one of the 24 pending cases were over the 450-day deadline for district court decisions set by opt-in and might require an immediate decision by the district court upon certification to determine whether the particular case is subject to opt-in and, if so, to rule on the merits of the habeas petition. If we look just at the 86 terminated cases, we see an average case disposition time of 1,016 days and a median of 774 days. In fact, only 18 cases were decided within the 450-day opt-in deadline. The status of the decisions in the remaining 68 cases is uncertain if Texas is certified.[42]

120-Day Appellate Court Deadline

The final opt-in provisions to consider are those that impact the appellate courts. As noted above, appellate courts may see an increase in filings to request permission to file second or successive petitions. Additionally, the opt-in requirements for appellate litigation set a 120-day deadline for a decision by the court of appeals after the reply brief is filed in the case.

As of September 30, 2018, there were 35 appeals involving Texas death row inmates potentially subject to opt-in that were pending in the Fifth Circuit Court of Appeals. Of these, 13 were appeals active during the study period[43] and 22 were filed during fiscal year 2018.[44] We recorded the dates of the first and, if more than one, the last reply briefs filed in these pending cases as noted in the docket sheets available in PACER.[45] We found the following:

- No reply or answer had been filed in 10 of the cases, and another 5 were under seal.[46]
- Of the remaining 20 cases, 15 were past 120 days from the filing of the first reply brief.
- Using, instead, the date of the last reply brief—which for 5 cases was the date of a replacement or supplemental reply brief—14 of the 20 pending appeals were beyond the 120-day decision deadline.

42. Using the original filing is the best approximation of what litigation of capital habeas petitions will be like under opt-in, but it may undercount the number of litigants federal courts see after certification. The 24 pending cases are only original filings with petitions. There are 20 additional death row inmates with a case pending in district court at the end of our study period that were either not the prisoner's first case or with petitions filed after September 30, 2017. Because we are uncertain what the status of second or successive petitions will be for opt-in eligible litigants, we do not focus on the decision deadlines in these petitions. We note, however, that the number of pending decisions on which district courts may need to take immediate action may be higher than estimated here.

43. There were 153 appeals involving 104 eligible death row inmates active during the study period. Of these, 122 terminated before September 30, 2018, in an average of 428 days (median of 352) from when they were filed.

44. Thirty-three appeals were filed in fiscal year 2018, 11 of which closed before the end of the fiscal year.

45. We had also looked up the reply brief dates (which are not routinely collected by the courts) for 15 appeals that were pending at the end of fiscal year 2017, but closed during the next year. In these appeals, the decision was made past the 120-day mark from the first reply in 12, and past the 120-day mark from the last reply in 10.

46. Eight cases were pending at the end of our study period and two were mooted.

The need to reach immediate decisions in these cases[47] would be a substantial burden on the Fifth Circuit Court of Appeals, as would the need for federal courts to determine whether the opt-in provisions apply to each of the pending appellate cases potentially subject to opt-in.

Conclusions About Texas

It is clear from the analysis above that opt-in certification would be a substantial departure from the current practice of litigating capital habeas cases in the four districts in Texas. Both how the cases are litigated and how the courts manage the litigation will have to change under opt-in, and the change will come almost immediately after the certification decision. As in Arizona, the changes will affect a large number of cases given the pending caseload from state court and the number of litigants potentially subject to opt-in already in federal court whose cases will need immediate litigation related to the application and interpretation of opt-in in the particular case and potentially require an immediate decision.

Not only will opt-in affect the courts and how they manage capital habeas cases, it will affect whom the courts appoint to this new wave of cases. The two CHUs in Texas have been in operation for approximately 18 months, but they have not been fully staffed that entire time. The 13 new cases projected by the end of FY 2019 would increase the workload of the two CHUs between 40% and 65%. The CHUs currently manage 27 cases between them, with the remaining caseload managed by CJA Panel Attorneys or non-profit organizations.[48] The two new CHUs are much smaller than the Arizona CHU and may require more resources to accept additional appointments.[49] Additionally, the work litigating both new and current eligible cases would have to be done substantially faster than is currently the practice. The costs of hiring and training new attorneys to manage the additional caseload (either CHU or CJA) are outside the scope of this analysis, but can be expected to be significant.

Conclusions

This white paper focused on some of the provisions of opt-in likely to have a substantial impact on the federal courts in the five federal districts within the two states under consideration. We recognize four limitations of this analysis.

1. There are case-specific factors that will likely call into question whether opt-in applies in every case included in this analysis. We treat the estimates here as the maximum number

47. Although the numbers of appellate filings and terminations are in constant flux, an estimate of 20 pending cases looks to be a good approximation of the number of appeals likely to require the court's immediate attention at any given point in time. For example, the "pending with reply" numbers at the end of fiscal year 2017 and as of December 31, 2018, were 16 and 20, respectively.

48. Information about the current caseloads of the CHUs was provided in a conversation between the authors and litigators from both Texas CHUs and Texas Capital Habeas Resource Counsel.

49. The predictions for the Texas CHUs underestimate the impact of the new cases due to the recent creation of the CHUs and the lack of information about how many new cases a fully staffed CHU in Texas could manage each year.

of cases covered by opt-in—assuming every case with appointment of state postconviction counsel on or after the effective date would be governed by opt-in's provisions. The applicability of opt-in is a decision that will be made by judges in individual cases and we cannot (and should not) predict those decisions.

2. There are effects of opt-in (aside from the question of applicability) that we cannot estimate at this time. Included among these are the time courts will spend on the litigation related to the applicability of opt-in for each individual case, and the specifics of the applicability including stays, tolling, and the limited review powers of federal courts. We have no way to know how long such litigation would last or how many court resources would be taken, but given the nature of habeas litigation generally, we would expect it to be a substantial investment for the courts. This litigation will happen immediately in every case in which the state seeks application of opt-in, and courts will necessarily be required to resolve all issues related to the applicability of opt-in immediately so that the parties will know which rules govern the cases. Given the number of cases pending in federal court, this litigation may have an immediate and substantial effect on federal courts.
3. We have no estimate of how much work it will take courts to prioritize capital habeas cases on their dockets, or the delays this prioritization may cause other areas of litigation.
4. We do not discuss the potential problems federal courts (who appoint capital habeas counsel) may have in finding enough qualified counsel for the pending future waves of litigation, nor can we estimate the potential for burnout among such attorneys. While these may be real concerns, they do not speak specifically to the provisions of opt-in and their impact on filings and decision making, which is the scope of this memo. We mention them now because they are unintended effects of opt-in that courts will have to manage, and burdens that may be substantial given the impact on court workload discussed here.

Those caveats aside, what we do find about the impact of opt-in should be of concern to the courts. Opt-in will bring in cases faster than they currently reach the federal courts because the opt-in provisions have the potential to create a substantial wave of new litigants seeking federal counsel or seeking new state counsel. Even if the wave does not occur, litigation of capital habeas cases under opt-in will substantially differ from how these cases are currently litigated in federal court, including faster filing of habeas petitions under a truncated statute of limitations and restrictions on amending petitions, the potential increase in the use of early appointments, and the limitations on the time courts take to reach decisions on the merits of petitions for habeas corpus. Given the shortened statute of limitations and the frequency of amended petitions, attorneys in these cases will have to file a fully briefed petition in federal court in less than half the time they are currently using. Courts may see an increase in requests for leave to amend petitions or file second or successive petitions as attorneys try to meet new deadlines.

The provisions of opt-in may change both the number of filings courts see, in the district courts and the appellate courts—who will see the requests for second or successive petitions—

and how much time courts have to render decisions. Courts will not only see new litigants, they will also need to manage litigation of novel issues of law related to the interpretation and application of opt-in's provisions in all potential opt-in cases, and may be asked to re-evaluate their decision making for those litigants governed by opt-in whose cases were not litigated under its provisions. District courts will have to render decisions in approximately half the time they are currently taking to make decisions, and there are substantial numbers of cases that may require immediate action. Appellate courts will also need to make immediate decisions in a number of pending appellate cases. District courts may also struggle to find sufficient numbers of counsel to appoint in capital habeas cases, as the pending state court caseload would be a substantial increase in the workload of CHUs in each state seeking certification, and CJA counsel may be hesitant to accept appointment in these resource-intensive cases, given the uncertainty and urgency surrounding application of opt-in's provisions.

In summary, district and appellate courts and CHUs in both states are likely to need more resources to manage the new litigation under opt-in and keep criminal and civil cases moving through the federal system.

Appendix – Procedures for Opt-In Certification by the States

Chapter 154 of Title 28 of the United States Code creates special procedures for expedited review of capital habeas petitions in federal court if states establish a mechanism for appointing competent, adequately funded capital postconviction counsel. While initially states argued that their mechanisms complied with the opt-in procedures as they litigated capital habeas cases in federal court, no state was found to have a mechanism or practice in compliance with the opt-in procedures.[50] As a result of states failing to receive opt-in certification from the federal courts, legislation was enacted to move decisions about compliance with opt-in procedures from federal habeas courts to the Attorney General of the United States.[51]

Certification Procedures

Section 2265 of Title 28 of the U.S. Code requires that the process by which states apply for opt-in certification be determined by the Attorney General through the promulgation of regulations.[52] Opt-in status is sought by the state attorney general or "appropriate state official" if the state attorney general does not have responsibility for capital habeas litigation.[53] While there is no official format for the certification request, other than the application should be made in writing, the application should generally include information to demonstrate the state's compliance with the special procedures of Chapter 154. The Attorney General then makes the request available to the public (on the internet) including any supporting documents and publishes a notice in the Federal Register.[54] The notice includes the name of the state seeking certification, a link to the application, and a solicitation for public comment.[55] The Attorney General then considers the application and any public comment provided. Any decision to grant certification is then published in the Federal Register, and must include the date on which the qualifying mechanism was established (e.g., the date on which the appointment mechanism is made retroactive).[56] If states change or alter their procedures for the appointment of postconviction counsel, they can request new certification.[57] The certification remains in effect for five years after enactment and any related judicial review that may occur.[58] If the state requests recertification, the existing procedures remain in effect until the completion of the

50. *See, e.g.*, Ashmus v. Calderon, 935 F. Supp. 1048 (N.D. Cal. 1996); Hamblin v. Anderson, 947 F. Supp. 1179 (N.D. Ohio 1996); Satcher v. Netherland, 944 F. Supp. 1222 (E.D. Va. 1996); Williams v. Cain, 942 F. Supp. 1088 (W.D. La. 1996); *see also* Spears v. Stewart, 283 F.3d 992 (9th Cir. 2002) (finding in dicta that Arizona had a qualifying mechanism, but concluding that Arizona did not follow its own mechanism in appointing postconviction counsel).

51. *See generally* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 192 (March 9, 2006).

52. 28 U.S.C. § 2265(b).

53. *Id.* § 2265(a)(1); 28 CFR Part 26.21 (October 23, 2013). If the state attorney general does not have responsibility for capital habeas litigation, opt-in certification can be requested by the chief executive of the state.

54. 28 C.F.R. Ch. 1 § 26.23(b).

55. *Id.* § 26.23(b)(1)–(3).

56. *Id.* § 26.23(c).

57. *Id.* § 26.23(d).

58. *Id.* § 26.23(e).

recertification process and any related judicial review.[59] Review of the certification decision is exclusively under the jurisdiction of the Court of Appeals for the District of Columbia Circuit, with review by the U.S. Supreme Court under Section 2350 of Title 28.[60] The Court of Appeals for the District of Columbia Circuit uses a standard of de novo review.[61]

Provisions to Qualify for Opt-In Status

When the Attorney General reviews requests for certification, he/she must determine if a state has established an adequate mechanism for the appointment of counsel in state capital postconviction proceedings.[62] The state mechanism must offer appointment of competent counsel to all state prisoners under sentence of death and provide for the entry of a court order.[63] The court order includes one of the following:

- an appointment of one or more counsel to the indigent prisoner (if the prisoner accepts counsel or was found unable competently to decide whether to accept or reject offer of counsel)
- a finding (after a hearing if necessary) that the prisoner rejected the appointment (understanding the legal consequences)
- a denial of the appointment of counsel upon a finding that the prisoner is not indigent[64]

Opt-in certification requires that the counsel appointed by the state for postconviction proceedings be different from counsel representing the prisoner at trial unless the prisoner and counsel express a desire to continue the representation.[65] Either the court, on its own motion, or the prisoner can request the appointment of new counsel at any point in the state or federal postconviction proceedings on the basis of ineffective assistance of counsel. Such claims, however, shall not be grounds for habeas relief in 2254 proceedings.[66]

The state's mechanism for the appointment of counsel must provide for the reasonably timely appointment of postconviction counsel in light of the time limitations for seeking state and federal postconviction review.[67] The appointment mechanism must also provide for "competent" counsel as defined by the state's own standards for competency.[68] These standards for competency are presumed adequate if they meet or exceed specific criteria. These criteria include the following:

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59. *Id.*
60. 28 U.S.C. § 2265(c)(2).
61. *Id.* § 2265(c)(3).
62. *Id.* § 2261(b)(1).
63. The same procedures apply to compensation or reimbursement of appointed counsel. See below for more information.
64. 28 U.S.C. § 2261(c)(1)–(3).
65. *Id.* § 2261(d).
66. *Id.* § 2261(e).
67. 28 C.F.R. Ch. 1 § 26.21.
68. *Id.* § 26.22(b).

- Appointment of counsel who have been admitted to the bar for at least five years, with three years of postconviction litigation experience, or if the state generally requires such experience and, with good cause, appoints other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the complexity of the litigation and seriousness of the penalty.
- Appointment of counsel who meet the standards for representation of defendants under the Innocence Protection Act, specifically:
    - The appointment of competent legal representation through a public defender system (either using staff attorneys or the private bar) or through an entity (established by statute or the highest court) with jurisdiction in criminal cases, which is composed of individuals with demonstrated knowledge of capital litigation, or through a statutory procedure established before October 30, 2004, under which trial judges appoint qualified attorneys from a roster maintained by the state or regional selection committee.
    - The system of legal representation must have a roster of qualified attorneys that is monitored so attorneys who fail to deliver effective representation, engage in unethical behavior, fail to participate in the required training established by the system of representation, or have been sanctioned within the past five years related to their conduct as defense counsel in either state or federal court are removed.[69]

If the state's appointment mechanism does not meet the above criteria, it will be considered adequate only if it reasonably assures a level of proficiency appropriate for state postconviction capital cases.[70]

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69. *Id.* § 26.22(b)(1)(i)–(ii). The Innocence Protection Act (Pub. L. 108-405, revising 42 U.S.C. § 14163) defines a competent legal representation system as one that vests the appointment of counsel for indigent defendants in capital cases either (1) in a public defender system (either using staff attorneys or the private bar); (2) through an entity (established by statute or the highest court) with jurisdiction in criminal cases, which is composed of individuals with demonstrated knowledge of and expertise in capital litigation, excluding those in the prosecutor's office; or (3) in a statutory procedure established before October 30, 2004, under which trial judges appoint qualified attorneys from a roster maintained by the state or regional selection committee. The system of legal representation must (1) have qualifications for attorneys to be appointed to represent indigent capital litigants; (2) have a roster of qualified attorneys that is monitored for performance by counsel and provides for the removal of counsel found to have failed to deliver quality representation or who refuse to continue to receive training, or who have been sanctioned by the bar for ethical misconduct related to their conduct as defense counsel in a criminal case in federal or state court within the past five years; (3) appoint two attorneys in a capital case (or gives the trial judge a list of not more than two pairs of attorneys for appointment); (4) conduct, sponsor, or approve continued training for attorneys representing capital defendants; and (5) ensure funding for the cost of competent legal representation by the defense team and outside experts where the defenders rate matches that of the prosecutors or counsel are paid on an hourly basis comparable to the local market for cases of similar complexity, where experts are paid at rates that reflect the specialized skills needed to assist defense counsel, and where both counsel and experts are reimbursed for reasonable expenses. Section 26.22(b)(1)(ii) incorporates the definition of competency if the requirements for rosters, training, and review of performance are met.

70. 28 C.F.R. Ch. 1 § 26.22(b)(2).

In addition to the requirements for the competency of counsel appointed pursuant to the state mechanism for appointing postconviction counsel, the requirements for opt-in certification also state guidelines for the compensation of counsel. Compensation of counsel appointed under the state mechanism is considered presumptively adequate if it meets or exceeds any of the following:

- compensation of counsel under 18 U.S.C. 3599
- compensation of retained counsel in state postconviction proceedings who otherwise meet the adequate standards of competency for the state (noted above)
- compensation of appointed counsel in state trial or appellate proceedings in capital cases
- compensation of attorneys representing the state in state postconviction proceedings in capital cases, after adjusting for overhead costs borne by private counsel that are not otherwise payable as litigation expenses.[71]

The compensation for the state appointment mechanism will only otherwise be deemed adequate if it is reasonably designed to ensure the availability of counsel who meet the sufficient competency standards set by the state.[72] The final requirement for state appointment mechanisms is that the state mechanism must provide for the payment of reasonable litigation expenses of appointed counsel, including the use of expert services.[73] Beyond the above mentioned requirements, there are no additional requirements for opt-in certification.[74]

Benefits to Opt-In States When Litigating Federal Capital Habeas Cases

States creating mechanisms for the appointment of counsel in state postconviction proceedings of capital cases meeting the requirement of opt-in certification benefit from expedited procedures when litigating capital habeas petitions in federal courts. These benefits include limits on the use of stays, expediting the deadline to file 2254 petitions in federal court, limiting the scope of habeas review by federal courts, limiting amendments to 2254 petitions, and prioritizing review of and setting time limits for ruling on 2254 petitions by federal district and appellate courts. Because the benefits of opt-in certification to states directly affect the workload of federal courts, they are discussed in detail below.

Stays

The execution date set by the state will be stayed during section 2254 capital habeas proceedings in federal court for any case governed by opt-in. The stay will expire if one of the following conditions is met:

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71. *Id.* § 26.22(c)(1)(i)–(iv).
72. *Id.* § 26.22(c)(2).
73. *Id.* § 26.22(d).
74. 28 U.S.C. § 2265(a)(3) clearly states, "There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter."

- the state prisoner fails to file a section 2254 petition within the 180-day requirement set by section 2263
- the state prisoner waives the right (in court, in the presence of counsel, unless counsel was competently and knowingly waived) to pursue review under 2254
- the state prisoner timely filed a petition for 2254 review but failed to make a substantial showing of the denial of a federal right, or was denied relief by any federal court[75]

If one of the above conditions is the reason the stay of execution expired, no federal court has the authority to enter another stay of execution in the case unless the court of appeals gives leave for the petitioner to file a second or successive application under 2244(b).[76] The time limits for decisions on federal habeas petitions in 2266 are not to be construed as entitling a state prisoner to a stay of execution, to which the applicant would not otherwise be entitled, for purposes of litigating an application for habeas or an appeal.[77]

Timelines for Filing 2254 Petitions and Tolling

Applications for habeas relief filed by state prisoners sentenced in opt-in states must be filed within 180 days of the final state court affirmance on direct review, or the expiration of the period during which direct review could have been sought.[78] Tolling also works differently under the opt-in provisions than those governed under standard AEDPA procedures.[79] Under opt-in, time requirements are tolled in one of three ways:

1. From the date a petition for cert is filed with the Supreme Court until the date of final disposition if a petitioner filed for Supreme Court review of a state court's affirmance of a capital sentence on direct review by the state court of last resort or other final state court decision.
2. From the date on which the first petition for postconviction review is filed until the final state court disposition of the petition.
3. During an additional period not to exceed 30 days if a motion for extension was filed in the federal habeas court responsible for 2254 review and there is a showing of good cause for failure to make a timely filing.

Scope of Review by Federal Courts

For habeas petitions by state court prisoners from opt-in states, the scope of federal court review is limited to the claims that were litigated and decided on the merits in the state courts[80] unless

75. 28 U.S.C. § 2262(b)(1)–(3).
76. *Id.* § 2262(c).
77. *Id.* § 2266(b)(3)(A).
78. *Id.* § 2263(a).
79. *Id.* § 2263(b)(1)–(3)(B).
80. *Id.* § 2264(a).

the failure to raise the claim falls into one of the following categories:[81]

- It was the result of state action in violation of the U.S. Constitution or laws of the United States.
- It was the result of the Supreme Court's recognition of a new federal right that is available retroactively.
- It was based on a factual predicate that could not have been discovered through due diligence in time to present the claim to state or federal postconviction review.

After review of the petition, subject to the categories noted above, the federal court with jurisdiction for the habeas petition is required to rule on the claims before it.[82]

Amendment of 2254 Petitions

State prisoners subject to opt-in are not permitted to amend their petition after the filing of an answer to the application except on the grounds permitted for filing a second or successive petition under 28 U.S.C. § 2244(b). The grounds for filing a second or successive petition with new claims must be met: (1) the claim relies on a new rule of constitutional law, made retroactive by the Supreme Court, or the factual predicate for the claim could not have been previously discovered through due diligence, and (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the offense.[83]

Timelines for Review by Federal Courts

In addition to the change in the time to file a 2254 petition for review in federal court and the changes to the tolling of that deadline, opt-in states receive a number of procedural benefits in litigating 2254 petitions under the opt-in provisions in federal courts. First, 2254 petitions litigated under the opt-in provisions are given priority in the district court and court of appeals over other noncapital matters.[84] Relatedly, district courts must render a decision on habeas petitions governed by opt-in within 450 days of the filing of the petition, or 60 days after the case is submitted for a decision, whichever is earlier.[85] District courts are required to give parties at least 120 days to complete all actions, including preparing pleadings and briefs and holding a hearing (if necessary), prior to the case being submitted.[86] No more than a 30-day extension can be given to the deadline for a decision, and only after a written order by the court explaining why

81. *Id.* § 2264(a)(1)–(3).
82. *Id.* § 2254 (a), (d), (e).
83. *Id.* §§ 2266(b)(3)(B) and 2244(b)(1)–(4).
84. *Id.* § 2266(a).
85. *Id.* § 2266(b)(1)(A).
86. *Id.* § 2266(b)(1)(B).

the benefits of a delay in decision outweigh the speedy disposition of the case. In making the decision to grant an extension or not, the district court shall focus on the following factors:[87]

- whether the failure to allow the extension would result in a miscarriage of justice
- whether the case is so unusual or complex that the deadline is unreasonable
- whether not granting the extension would otherwise deny the applicant reasonable time to find counsel, or deny the applicant or government continuity of counsel, or would deny counsel for either party reasonable time necessary to prepare for the case, taking into account the exercise of due diligence

No delays for general court congestion are allowable.[88] Any order entered to allow for delay must be filed with the Administrative Office of the U.S. Courts for purposes of reporting.[89]

These time limits for the filing of and decisions in 2254 habeas petitions apply to initial habeas petitions, second or successive petitions, and redetermination of an application following remand by the court of appeals or Supreme Court (using the date of remand to determine deadlines).[90] The timeline for decisions is not grounds for a stay of execution to which the applicant would not otherwise be entitled.[91] Failure of the district court to meet the deadlines of review is not grounds for granting petitioner relief from conviction or sentence.[92] States may file a writ of mandamus with the court of appeals to enforce the deadlines for review of habeas petitions under opt-in, and the court of appeals shall have 30 days (after the date of filing) in which to rule.[93] The Administrative Office of the U.S. Courts is required to issue a report detailing compliance by the district courts, including any orders for 30-day extensions discussed above.[94]

The opt-in provisions also govern review of district court decisions by the courts of appeals. Any appeal, either granting or denying relief, must be heard and decided by the court of appeals no later than 120 days after the reply brief is filed, or, if no reply brief is filed, within 120 days of when the answering brief is filed.[95] As stated above, review of decisions regarding 2254 petitions from prisoners in opt-in states are to be given priority over noncapital matters on the dockets of courts of appeals.[96] Petitions for rehearing or requests to rehear en banc must be decided within 30 days of when the request was made, unless a responsive pleading is required, in which case the date of filing the responsive pleading is used, and the court of appeals has 30 days from that date.[97] If a petition for rehearing or for review en banc is granted, a final determination of the

87. *Id.* § 2266(b)(1)(C)(i)–(ii)(III).
88. *Id.* § 2266(b)(1)(C)(iii).
89. *Id.* § 2266(b)(1)(C)(iv).
90. *Id.* § 2266(b)(2)(A)–(C).
91. *Id.* § 2266(b)(3)(A).
92. *Id.* § 2266(b)(4)(A).
93. *Id.* § 2266(b)(4)(B).
94. *Id.* § 2266(b)(5)(A)–(B).
95. *Id.* § 2266(c)(1)(A).
96. *Id.* § 2266(a).
97. *Id.* § 2266(c)(1)(B)(i).

appeal must be made by the court of appeals within 120 days on which the order granting rehearing or en banc review is granted.[98] The time limits for courts of appeals apply to initial petitions for review; second or successive petitions, if any; and redetermination of an application upon remand by the en banc panel of the court of appeals or the Supreme Court, if necessary, in which the date of the remand order is used to estimate deadlines.[99] As with the district courts, failure by the court of appeals to meet this deadline is not grounds for granting relief from conviction or sentence.[100] The state may apply for a writ of mandamus with the Supreme Court to compel the court of appeals to render its decision[101] and the Administrative Office of the U.S. Courts is responsible for reporting to Congress compliance by the courts of appeals with the deadlines.[102]

98. *Id.* § 2266(c)(1)(B)(ii).
99. *Id.* § 2266(c)(2)(A)–(C).
100. *Id.* § 2266(c)(4)(A).
101. *Id.* § 2266(c)(4)(B).
102. *Id.* § 2266(c)(5).