No. _____

In the Supreme Court of the United States

THE COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

FEDERAL COMMUNITY DEFENDER ORGANIZATION OF PHILADELPHIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Capital case: Questions presented

The Federal Community Defender Organization (FCDO) of Philadelphia appears in Pennsylvania capital collateral review proceedings without State or federal appointment, using federal resources to oppose the State. The Commonwealth challenged this practice in its own courts, contending that such conduct by the defender organization violates federal law. The FCDO removed the case to federal court under 28 U.S.C. § 1442, claiming they were acting as federal officers. The district court ruled that removal was warranted because federal law, 18 U.S.C. § 3599, permits the federal government to provide federal counsel in such State criminal cases. The court then entered judgment against the State, and the Court of Appeals affirmed. The issue is:

Has Congress created a right to federally funded counsel in state capital post-conviction proceedings, in State court, prior to completing federal habeas litigation, notwithstanding this Court's contrary decision in *Harbison v. Bell*?

(Answered in the affirmative by the Third Circuit court of appeals, in conflict with every other circuit addressing the question.)

List of parties

Petitioner

The Commonwealth of Pennsylvania (appellant at 3d Circuit Court of Appeals No. 13-4070)

Respondent

The Philadelphia "Federal Community Defender Organization," or FCDO, is a "community defender organization" designated by the United States District Court for the Eastern District of Pennsylvania under 18 U.S.C. § 3006A(g)(2)(A)-(B), and is authorized to use federal funds to conduct federal habeas litigation in federal court. It is a subcomponent of a non-profit corporation, the Defender Association of Philadelphia, that provides legal representation to indigent criminal defendants in Philadelphia criminal cases. Because the Commonwealth's claim in this case concerns the appearance of the federal FCDO, not the Defender Association generally, in State criminal proceedings, its opposing party is properly designated the FCDO.

Table of contents

Appendix

Table of authorities

Federal cases

State cases

State cases removed to federal court

Federal statutes

Federal rules

State rules

Orders and Opinions below

The June 12, 2015 judgment and opinion of the United States Court of Appeals for the Third Circuit is reported at *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia*, 790 F.3d 457 (3d Cir. June 12, 2015), *as amended* (June 16, 2015) and is reprinted in the Appendix at App.1-62.

Jurisdiction

Pennsylvania seeks review of the order of the United States Court of Appeals of the Third Circuit dated June 12, 2015, affirming the final order of the district court. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

Constitutional and statutory provisions involved

28 U.S.C. § 1442 states in pertinent part:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency

thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

18 U.S.C. § 3006A states in pertinent part:

[(a)](1) Representation shall be provided for any financially eligible person who--

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

(c) Duration and substitution of appointments.--A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings.

18 U.S.C. § 3599 states, in pertinent part:

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either--

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment; shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such services in accordance with subsections (b) through (f).

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(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process[.]

Pa.R.Crim.P. 904 states in pertinent part:

> (H) Appointment of Counsel in Death Penalty Cases.
>
> (1) At the conclusion of direct review in a death penalty case, which includes discretionary review in the Supreme Court of the United States, or at the expiration of time for seeking the review, upon remand of the record, the trial judge shall appoint new counsel for the purpose of post-conviction collateral review, unless:
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> (a) the defendant has elected to proceed *pro se* or waive post-conviction collateral proceedings, and the judge finds, after a colloquy on the record, that the defendant is competent and the defendant's election is knowing, intelligent, and voluntary;
>
> (b) the defendant requests continued representation by original trial counsel or direct appeal counsel, and the judge finds, after a colloquy on the record, that the petitioner's election constitutes a knowing, intelligent, and voluntary waiver of a claim that counsel was ineffective; or
>
> (c) the judge finds, after a colloquy on the record, that the defendant has engaged counsel who has entered, or will promptly enter, an appearance for the collateral review proceedings.

Statement of the case

The Philadelphia Federal Community Defender Organization (FCDO) is funded from the United States Treasury via the federal court system; yet the FCDO appears in Pennsylvania capital collateral review proceedings, in State court, using its federal resources against the State. When Pennsylvania disputed this practice in ongoing criminal cases its own courts, the FCDO removed that issue to federal court, where the district court entered judgment against the State.

The Third Circuit held that 18 U.S.C. § 3599 permits the use of federal government funds to afford counsel for defendants in State criminal cases. Other circuits, however, have held that § 3599 does not permit the federal government to provide counsel in State criminal proceedings, and that this construction of the statute is required by this Court's reasoning in *Harbison v. Bell*.

On June 10, 1991, William Johnson fatally fired six shots into John McDonald's head and back on the 4800 block of Merion Avenue in Philadelphia. Eyewitnesses identified Johnson as the killer (N.T. 5/29/92, 103-12; 6/1/92, 23-26).

Following trial before the Honorable John J. Poserina, a jury found Johnson guilty of first degree murder and related crimes and sentenced him to death. The Pennsylvania Supreme Court affirmed the judgments of sentence on November 22, 1995. *Commonwealth v.*

Johnson, 668 A.2d 97 (Pa. 1995). This Court denied Johnson's petition for certiorari on October 7, 1996.

With State-court-appointed counsel Johnson sought collateral relief under Pennsylvania's Post Conviction Relief Act (PCRA). The State court denied relief on March 6, 2006. At this point the the Federal Community Defender Organization (FCDO) of Philadelphia took over Johnson's case and filed an appeal on his behalf in the State appellate court.

The FCDO was not appointed by any State judge, or any federal judge, to handle Johnson's appeal. Although Johnson was entitled to State-appointed counsel, the FCDO, as is its common practice, simply appeared and proceeded to conduct the State appeal.

The Philadelphia FCDO is effectively a federally-funded law firm, created and maintained with money from the United States Treasury distributed by the federal court system. It is a "community defender organization," designated by the United States District Court for the Eastern District of Pennsylvania under 18 U.S.C. § 3006A(g)(2)(A)-(B). As such the FCDO is funded by "periodic sustaining grants" of federal money under 18 U.S.C. § 3006A(g)(2)(B)(ii). The grants are administered by the Director of the Administrative Office of the United States Courts ("Administrative Office") under § 3006A(i). The Administrative Office is in turn under the direction of the Judicial Conference of the United States, which oversees the regulation of entities such as the FCDO, and monitors federal funding by (inter alia) requiring annual reports that

include the FCDO's "caseload and expenses" under § 3006A(g)(2)(B) and § 3006A(h).[1]

In Pennsylvania the federally-funded FCDO appears as defense counsel in State capital collateral review proceedings. As here, that process can take years to complete, and is just starting when the FCDO intervenes. Once involved, the FCDO deploys its considerable federal resources - far exceeding those of the Commonwealth - against the Commonwealth in its own criminal courts.

In recent years, however, as the FCDO litigated more and more capital appeals, the Pennsylvania Supreme Court began to notice, and eventually express concerns about, what it saw as abusive behavior by the organization's attorneys. That court was of course accustomed to dealing regularly with other institutional litigants, such as the public defender and larger prosecutor offices such as in Pittsburgh and Philadelphia. But the FCDO was different.

In contrast to other litigants before the State's highest court, FCDO lawyers systematically raised a

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[1] The capital habeas unit of the FCDO operates throughout Pennsylvania and Delaware. Figures provided by the Administrative Office of Federal Courts establish that federal funding for capital federal defender services for fiscal year 2014 for Pennsylvania and Delaware totals $18,733,000. Yet the outlay for California, which has more than three times the population of Pennsylvania, is only $16,846,900. Funding for States such as Arizona and Nevada is far less, respectively $8,572,900 and $4,393,700 (Source: Administrative Office of United States Courts).

plethora of plainly frivolous claims, interposed with the apparent intent to bog down the capital appeal process. In service of this strategy, the organization's briefs routinely ignored applicable rules of appellate procedure, such as those for page limits, font size, statements of issues, and development of the argument.

Thus, in *Commonwealth v. Chmiel*, 30 A.3d 1111, 1190 (Pa. 2011), for example, the court took the unusual step of closing its lengthy opinion by noting, "with regret and disfavor, that Appellant's present counsel have chosen to raise several issues that are plainly frivolous …. A frivolous issue is one lacking in **any** basis [emphasis in original] in law or fact, but is distinguishable from an issue that simply lacks merit…. We strongly admonish counsel."

Similarly, in *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1138 (Pa. 2012), the Court cautioned that "FCDO counsel should be mindful of their own ethical duties before leveling such baseless accusations" against prior defense lawyers and prosecutors in the case.

In yet another case, the State supreme court was forced to withdraw its previously granted leave to exceed briefing page limitations: "upon review of the briefs in this submitted capital PCRA appeal, the Court has determined that counsel for Appellant have filed a brief that does not conform with the Pennsylvania Rules of Appellate Procedure…. [T]he indulgence of the order granting leave … having been abused, it is hereby vacated." *Per curiam order quoted in Commonwealth v. Roney*, 79 A.3d 595, 645-46 (Pa.

2013) (Castille, C.J., concurring). FCDO attorneys were directed to file a new brief – and the court was compelled to amend the statewide rules of appellate procedure to provide for new word count and font size limitations. *Id.*

But such measures only exacerbated the problem, because forcing the FCDO to follow the rules applicable to all litigants only added to the delay. As the court had observed in another recent FCDO case, "[t]he point here is simple and fundamental, obscured only by the fact that federal counsel's strategy – pursued in both state and federal court – has been to avoid having any of appellant's collateral claims decided any time soon." The court observed that this "legally dubious" strategy was "peculiar to certain capital defense counsel, who view delay as an end in itself for those condemned under a sentence of death." *Commonwealth v. Porter*, 35 A.3d 4, 15 (Pa. 2012).

Indeed, even the dissenting justices in *Porter*, while disagreeing with the court's disposition of the case, made clear their frustration with FCDO tactics. "I share the Court's concern for the gridlock created by federal counsel in this case…. Obviously, all courts, state and federal, should guard against such manipulation." *Id.* at 28 (Baer, J., joined by Todd, J.).

This series of public admonitions had little or no impact; within the last year the State supreme court saw the need to conclude yet another lengthy capital opinion with even stronger language. "It further appears that, as in *Chmiel*, *supra*, PCRA counsel in this case [i.e., the FCDO] have raised numerous claims

that, beyond lacking merit, are patently frivolous and deliberately incoherent. PCRA counsel's predictable tactics designed merely to impede the already deliberate wheels of justice have become intolerable." *Commonwealth v. Eichinger*, 108 A.3d 821, 850 (Pa. 2014).[2]

Faced with the challenge of overseeing these outside attorneys, the Pennsylvania Supreme Court attempted at least to clarify their status. Were they appearing in state capital collateral proceedings upon direction of the federal government, and thus somehow beyond the supervisory authority of the state courts? Or were they merely private lawyers who would transition with their clients into federal court once the state court's primary role was completed?

Accordingly, in a series of cases, the court issued orders directing the FCDO to disclose whether they had been appointed by a federal judge specifically to conduct proceedings in state court, and whether they

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[2] Some federal judges have voiced similar misgivings. *See, e.g., Michael v. Horn,* 459 F.3d 411, 422 (3d Cir. 2006) (Greenberg, J., concurring) ("The reality of the situation could not be clearer. The [FCDO], rather than representing Michael, its supposed client, was representing itself and advancing its own agenda when it filed this appeal"); *Abdul-Salaam v. Beard*, 16 F. Supp. 3d 420, 511 (M.D. Pa. 2014) ("while we admire zealous advocacy and deeply respect the mission and work of the [FCDO] attorneys who have represented Abdul-Salaam in this matter, they are at bottom gaming a system and erecting roadblocks in aid of a singular goal - keeping Abdul-Salaam from being put to death. The result has been the meandering and even bizarre course this case has followed").

were authorized under 18 U.S.C. § 3599 to employ federal funding for such state court litigation. *E.g., Commonwealth v. Wright*, 78 A.3d 1070, 1087 & n.18 (Pa. 2013) (collecting cases). The supreme court issued such an order in this case on January 4, 2012, directing the FCDO to produce any federal appointment it may have secured. On January 13, 2012, the FCDO responded that there was no such appointment. On March 25, 2013, the State supreme court therefore issued an order remanding to the PCRA court to determine counsel's status under § 3599.

As if to confirm the supreme court's concerns, the FCDO devised a new tactic to resist these inquiries. The organization took the position that state judges had no right even to ascertain its status, let alone to supervise its conduct, because FCDO lawyers appeared in state court under a federal duty to represent capital defendants, acting in effect as agents of the federal government. As a result, any inquiry concerning their authority became a federal question subject to "removal" to federal district court under the federal officer removal statute, 28 U.S.C. § 1442.

This and other state capital proceedings – a total of seven – were thus "removed" to the federal district courts of the Eastern and Middle Districts of Pennsylvania by the FCDO.[3] In each such case, the

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[3] Eastern District: *Commonwealth v. Francis Bauer Harris*, Lancaster County, Pa., No. 13-62, 2013 WL 4501056; *Commonwealth v. Isaac Mitchell*, Philadelphia, Pa., No. 13-1871, 2013 WL 4193960 (Mitchell died of natural causes during the (continued...)

Commonwealth objected to removal on the ground that the federal capital habeas appointment statute, 18 U.S.C. § 3599, creates no mandate to provide federally funded lawyers in *State* court. FCDO attorneys therefore could not claim federal status for their appearances in State collateral proceedings, and therefore had no basis for removing these cases to federal court.

The district courts divided on the question of how 18 U.S.C. § 3599 applies in this context. In the four cases in the Middle District, the Honorable A. Richard Caputo ruled that the FCDO does not act under any federal government duty when it seeks to represent criminal defendants in State criminal proceedings (E.g., Opinion and order of August 16, 2013, Caputo, J., Civil Action number 1:13-CV-510, 2013 WL 4458848, *14).

In the three Eastern District cases, three different judges invoking identical reasoning reached the opposite conclusion. In circular fashion, these judges held that § 3599 indeed established a federal duty for FCDO lawyers to appear in state court, and that the

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[3](...continued)
appeal and that case was discontinued); *Commonwealth v. William Johson*, Philadelphia, Pa., No. 13-2242, 2013 WL 477449 (instant case; 3rd Cir. at 13-4070); Middle District: *Commonwealth v. Kevin Dowling*, York County, Pa., No. 13-510, 2013 WL 4458848; *Commonwealth v. Anthony Dick*, Columbia County, Pa., No. 13-561, 2013 WL 4458885; *Commonwealth v. William Housman*, Cumberland County, Pa., No. 13-2103 (no Westlaw cite available); *Commonwealth v. Manuel Sepulveda*, Monroe County, Pa., No. 13-511, 2013 WL 4459005.

State cases were thus properly removed to federal court to determine whether § 3599 permits FCDO lawyers to appear in State court. The judges then granted judgment on that question in favor of the FCDO under Fed.R.Civ.P. 12(b)(6). Again in circular fashion, the judges ruled that § 3599 "preempted" the State supreme court's inquiry into the FCDO's status under § 3599. The judges additionally held that the Commonwealth of Pennsylvania, which had been dragged into federal court by the removal, was just a "private party" and so had no right even to raise a question as to the application of § 3599.

Both parties appealed, and the Third Circuit consolidated the cases in one proceeding. The court of appeals then overturned the Middle District's removal ruling and affirmed the Eastern District in all respects. In addressing removal, the court of appeals ruled that 18 U.S.C. § 3599 indeed permits the federal government to fund counsel for criminal defendants in State court. It explained that this Court's decision construing § 3599, *Harbison v. Bell*, was not inconsistent with this result because *Harbison* said only that the statute does not *require* such representation; it did not assert that federally funded counsel are "*prohibited* from representing clients in state habeas proceedings" (original emphasis):

> *Harbison* examined whether state clemency proceedings were proceedings "subsequent" to federal habeas for purposes of 18 U.S.C. § 3599(e). If they were, § 3599(e) would require the district court to appoint an attorney, already appointed for purposes of seeking federal habeas

> relief, to represent the petitioner in those proceedings as well. The Court determined that state clemency proceedings were "subsequent" and that appointment of counsel was authorized. *Id.* at 182–83, 129 S.Ct. 1481. The Court contrasted state clemency with state post-conviction relief, stating that "[s]tate habeas is not a stage 'subsequent' to federal habeas. Just the opposite: Petitioners must exhaust their claims in state court before seeking federal habeas relief. See § 2254(b)(1)." *Harbison,* 556 U.S. at 189, 129 S.Ct. 1481. Thus, absent an authorization order from a federal district court requiring exhaustion of state remedies, federally funded counsel would not be *required* in such situations. *Id.* at 190 n. 7, 129 S.Ct. 1481. The Court never stated, however, that Federal Community Defender counsel would be *prohibited* from representing clients in state habeas proceedings in preparation for federal habeas corpus representation. *See id.* Indeed, that is the question squarely presented by the merits of this case.

In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia, 790 F.3d 457, 474 (3d Cir. 2015) (original emphasis).

Chief Judge McKee issued a separate concurring opinion (endorsed by the majority) in order to chastize the Commonwealth (and, apparently, the Pennsylvania Supreme Court) for even questioning the FCDO's appearance in State cases. 790 F.3d at 486 (McKee, Chief Judge, concurring) ("simple animosity ... cloaked

in claims of state authority and appeals to principles of federalism"); *see* 790 F.3d at 478 n.11.

This case involves an important question of statutory construction, guided by this Court's decision in *Harbison*, as to whether Congress has, by statute, authorized the federal government to intervene in State criminal matters by affording federal representation to State defendants in State habeas proceedings, and how federalism matters in construing 18 U.S.C. § 3599.

Reasons for granting the writ

18 U.S.C. § 3599 should not be construed to permit the federal government to provide counsel for defendants in State criminal proceedings.

As the Third Circuit concluded, the "question squarely presented by the merits of this case" is whether 18 U.S.C. § 3599 allows the federal government to afford counsel for defendants "in state habeas proceedings." 790 F.3d at 474. The Court answered that question in the affirmative.[4]

18 U.S.C. § 3599 provides, in pertinent part:

> (a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation ... shall be entitled to the appointment of one or more attorneys ...

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[4] Each of the Third Circuit's specific rulings in this case derives from this central holding that 18 U.S.C. § 3599 permits federal counsel to appear in State habeas proceedings. Removal jurisdiction was based on the contention that, by appearing in State habeas cases, the FCDO is complying with § 3599; the motion to dismiss the Commonwealth's case was based on its lack of a "private right of action" to dispute that § 3599 permits such representation, as well as the conclusion that Congress has preempted any such contest by enacting § 3599.

> (a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys ...
>
> (e) Unless replaced by similarly qualified counsel ... each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including ... all available post-conviction process[.]

Read without the aid of this Court's jurisprudence (or, as shown below, the decisions of other circuits going back to 1989), § 3599 provides no obvious sign that Congress intended to insert federal counsel wholesale into the State's post conviction review process. Had there been uncertainty, however, it has been foreclosed by this Court. Under *Harbison v. Bell*, 556 U.S. 180 (2009), § 3599 simply does not allow federally funded counsel in State habeas proceedings. The statute precludes this because such proceedings are not "subsequent" to federal habeas. Further, the statute by its plain terms can never apply to proceedings in which the State appoints counsel; and § 3599 is to be construed under the presumption that Congress intends to uphold federalism. Decisions of other circuits conflict with the Third Circuit's ruling on precisely these grounds.

A. The Third Circuit's construction of 18 U.S.C. § 3599 conflicts with *Harbison v. Bell*.

Harbison decided that § 3599 permits already-appointed federal habeas counsel to continue to represent an indigent capital defendant in State clemency proceedings in which no State-appointed counsel is afforded. This Court applied the statue to State clemency proceedings based on its plain terms (referring to executive "or other" clemency) and the fact that, under the statute, such matters are clearly "subsequent" to federal habeas.

In doing so, *Harbison* considered whether § 3599 permits federal counsel to appear in State habeas proceedings that precede federal habeas. This Court's reasoning precludes that result.

In that case the government warned that allowing federal counsel to continue on to such proceedings was inconsistent with federalism; and that to so read § 3599 would likewise require federally funded counsel in, for example, retrials resulting from federal habeas relief, and State habeas proceedings. This Court rejected these scenarios on the ground that § 3599 applies only to federal habeas and proceedings "subsequent" to federal habeas.

As *Harbison* explains, "the sequential order of the statute" is critical. Federal habeas counsel appear "only" in proceedings "subsequent" to a federal court appointment. This excludes reading the statute to permit federal counsel in State habeas proceedings.

Since the federal habeas challenge to a State conviction is the starting point, federal counsel could not appear in a new State trial: that is not "subsequent" to federal habeas, but rather "the commencement of new judicial proceedings." State habeas is likewise not "subsequent" to federal habeas. "Just the opposite: Petitioners must exhaust their claims in state court before seeking federal habeas relief." 556 U.S. at 189.

True, additional State litigation may ensue after federal habeas counsel is appointed; but "[t]hat state postconviction litigation sometimes follows the initiation of federal habeas because a petitioner has failed to exhaust does not change the order of proceedings contemplated by the statute." *Id.* at 188-190. Section 3599 permits a federal district court to send lawyers in an active federal habeas proceeding back to State court only "on a case by case basis to exhaust a claim in the course of her federal habeas representation." This must occur "subsequent to" the state habeas proceeding and "in the course of" *federal* proceedings. It "is not the same" as permitting federal counsel to conduct "state habeas proceedings." *Id.* at n.7. As Chief Justice Roberts concluded, it is "highly unlikely" Congress intended defendants to be afforded federally funded counsel in State criminal proceedings other than clemency. 556 U.S. at 195 (citation omitted) (Roberts, C.J., concurring).

Thus, this Court concluded in *Harbison* that in § 3599 Congress did *not* authorize federally funded counsel in State habeas proceedings.

Harbison also recognized that § 3599(a)(2) "provides for counsel only when a state petitioner is unable to obtain adequate representation." Where the State provides counsel a defendant is "*ineligible* for § 3599 counsel[.]" 556 U.S. at 189, emphasis added. In Pennsylvania, counsel in collateral review capital cases are made available at the conclusion of the direct appeal. Pa.R.Crim.P. 904. Thus, even if § 3599 could be construed to apply to prior State criminal proceedings in which the State afforded no counsel (though it cannot), it cannot apply where, as here, the State *does* provide counsel.

B. The Third Circuit's view of § 3599 conflicts with other circuits.

As early as 1989 the 11th Circuit anticipated this Court's analysis regarding similar federal statutes (18 U.S.C. § 3006A - allowing federally funded counsel for a state prisoner who "is seeking relief under section ... 2254 ... of title 28"; and the predecessor to § 3599, former 21 U.S.C. § 848), and rejecting a construction that would permit federally funded counsel to appear in State habeas proceedings. *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989).

Lindsey held that the exhaustion requirement, which derives from "principles of federalism," is inconsistent with the view that an inmate pursuing State habeas is nevertheless "seeking relief under section ... 2254," and "[t]o hold otherwise would be to relegate state-court collateral proceedings to the status of meaningless procedural hurdles placed in the path to a *federal* writ of habeas corpus." Further, to construe

"subsequent" proceedings to include State habeas "would have the practical effect of supplanting state-court systems" and would "encourage state prisoners to ignore ... the proper sequence, developed from concerns for federalism, for seeking collateral relief from state-court judgments in death-penalty cases." Otherwise State inmates would "ignore the exhaustion requirement" and instead file empty federal habeas applications solely to obtain a federally funded lawyer for State habeas litigation. "If Congress had intended so novel a result, we think it would have stated so in unmistakable terms." 875 F.2d at 1506-1508 (original emphasis).

Later decisions of the 11th Circuit have concluded that this reasoning is sustained by *Harbison*, and that construing § 3599 to permit federally funded counsel in State habeas proceedings would be contrary to the "fundamental policy against federal interference with state criminal prosecutions," as well as "the States' interest in administering their criminal justice systems free from federal interference." *Gary v. Warden, Georgia Diagnostic Prison*, 686 F.3d 1261, 1278 (11th Cir. 2012) (citations, internal quotation marks, and footnote omitted).

The 6th Circuit followed the reasoning of *Harbison* in *Irick v. Bell*, 636 F.3d 289, 292-293 (6th Cir. 2011) (no federal counsel for offender's attempt to reopen State post-conviction process because "the Supreme Court explicitly limited the scope of § 3599 to exclude state habeas proceedings ... [as] not 'subsequent to' federal habeas"; and *Harbison* excludes federal counsel

where offender has a right to appointed counsel under State law).

The 8th Circuit has followed the reasoning of the 11th Circuit in *Lindsey*, which anticipated this Court's statutory analysis in *Harbison*. *Hill v. Lockhart*, 992 F.2d 801, 803-804 (8th Cir. 1993) ("comity mandates that state judicial proceedings precede the seeking of federal habeas relief. ... Congress did not intend to encourage futile federal habeas petitions filed only to obtain attorney compensation for state proceedings").

In 1995, well before *Harbison* was decided, the 5th Circuit too concluded that the statutory predecessor to § 3599 could not be read to afford federally funded counsel for State habeas proceedings, in reasoning that anticipated that of this Court. The court recognized that the word "subsequent" means "subsequent to the completion of the state court proceedings." The court was also reluctant to find "congressional intent for so sweeping an idea that the federal government will pay attorneys for a state defendant to pursue state remedies in state courts. ... Congress is usually more express in its intent when it decides to fund a project." An express statement of intent by Congress would be necessary "to permit intrusion into the state judicial process" by lawyers answerable to federal courts for their conduct, qualifications, and compensation. Such counsel would effectively be controlled by the federal

court. *Sterling v. Scott*, 57 F.3d 451, 455-458 (5th Cir. 1995).[5]

One District Court has observed that "[e]very court that has addressed this issue agrees that Congress did not intend federal resources to be used for the purposes of investigating, identifying, and exhausting claims in state court." *Thompson v. Thomas*, 2008 WL 2096882 *5 n.7 (D. Haw. May 19, 2008) (unreported). The Eastern District of Pennsylvania itself had previously so held, anticipating *Harbison*, in *Harold C. Wilson v. Martin Horn, James Price, Joseph Mazurkiewicz*, 1997 WL 137343 (E.D. Pa. Mar. 24, 1997) (unreported) ("a petitioner has no right to the assistance of federally appointed counsel or experts to exhaust state

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[5] The en banc 10th Circuit, construing the precursor of § 3599, also anticipated *Harbison* in holding that federal habeas counsel may continue on to subsequent State clemency proceedings. But the three dissenting judge presented sound reasons for concluding that this does not support an inference that federal counsel may generally be allowed in State criminal proceedings. *Hain v. Mullin*, 436 F.3d 1168, 1178-79 (10th Cir. 2006) (en banc) (Briscoe, J., joined by Kelly, J., and Murphy, J., dissenting) (footnote omitted):

> [I]t cannot seriously be suggested that Congress intended, in the event a state capital prisoner obtains federal habeas relief and is granted a new trial, to provide federally-funded counsel to represent that prisoner in the ensuing state trial, appellate, and post-conviction proceedings, even though those proceedings are expressly listed in § 848(q)(8). Indeed, if that were true, we would have the odd, and potentially unconstitutional, result of a federal court (i.e., the federal district court that first appointed counsel pursuant to § 848(q)(4)(B)) effectively overseeing state proceedings.

remedies") (citation and internal quotation marks omitted).

Yet the Eastern District of Pennsylvania here, despite ruling that § 3599 permits the FCDO to appear in State habeas proceedings, *Mitchell v. Wetzel*, 13-cv-1871, 2013 WL 4193960 (E.D. Pa. Aug. 15, 2013) (unreported), held simultaneously – on a placeholder federal habeas petition filed in that same case – that it would not *appoint* the FCDO to appear in State court to exhaust State remedies, precisely because § 3599 does not allow it. *Mitchell v. Wetzel*, 13-cv-1871, 2013 WL 4194324, at *4-6 (E.D. Pa. Aug. 15, 2013) (unreported) ("this type of proceeding is not in the ordinary course of 'subsequent' available proceedings" and under "state law, Mitchell will be provided court-appointed counsel"; also, "federalism concerns" militate against federal counsel in State court, which would put the federal court "in the position of overseeing, and thus indirectly managing, counsel's performance in the state court proceeding") (internal quotation marks omitted) (citing *Gary v. Warden, Georgia Diagnostic Prison, supra*).

The District Court tried to reconcile the contradiction by claiming it had "discretion" to appoint the FCDO to act in the State criminal proceeding but had instead merely decided not to *prevent* it. But as *Harbison* makes clear, prior to proceedings in "the course of ... federal habeas," 556 U.S. at 190 n.7, § 3599 simply does not allow federal counsel to appear against the State in a State criminal case.

As discussed below, the consequences of the Third Circuit's contrary view of § 3599 were anticipated by the Fifth Circuit in 1995: "the hand of the federal court" has found its way into State court proceedings "and the independence of state courts [has been] unnecessarily interfered with and compromised thereby." *Sterling v. Scott*, 57 F.3d at 457.

C. The Third Circuit's idiosyncratic application of § 3599 warrants this Court's review.

The Third Circuit was of course aware of *Harbison*, and indeed purports to follow it in construing § 3599. But its approach is so idiosyncratic that § 3599 now applies very differently in the Third Circuit than in the rest of the world. The result is *de facto* federal dominion over the defense function in capital cases on State collateral review, something that *Harbison* – and Congress – never contemplated.

Citing footnote 7 of *Harbison*, the Circuit Court concluded that while "federally funded counsel [are not] *required*" in State habeas proceedings under § 3599, since this Court "never stated that federally funded counsel would be *prohibited* from" such State proceedings, § 3599 must be read to *authorize* federally funded counsel therein. 790 F.3d at 474.

That truly stands *Harbison* on its head. Footnote 7 described a limited *revisit* to State court to correct specific exhaustion errors, supervised by a federal court "in the course of" federal habeas proceedings. "This," *Harbison* clearly explained, "is not the same as

classifying state habeas proceedings as 'available post-conviction process' within the meaning of the statute," such that federally funded counsel might conduct original State postconviction proceedings under § 3599.

The Third Circuit reads "not the same" to mean "exactly the same."

Indeed, by reading into *Harbison* a "not prohibited equals authorized" construction of § 3599, the Third Circuit effectively grants the federal government power to do whatever is not expressly forbidden. This is not merely wrong, but contrary to the fundamental constitutional principle that "the Federal Government can exercise only the powers granted to it."*National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (citation and internal quotation marks omitted).

For this reason, positing an implicit congressional intent to authorize federal counsel in State habeas proceedings via § 3599, as the Third Circuit does, is error as a matter of statutory construction. Any statute enacted by Congress is to be construed under the presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Congressional intervention in State criminal justice systems beyond that already required by federal habeas would be an extraordinary event. Where a construction of a federal statute "would upset the usual constitutional balance of federal and state powers," a court is obliged to be "certain of Congressional intent

before finding that federal law overrides" that balance. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance") (footnote omitted).[6]

The intrusion discerned by the Third Circuit is certainly extraordinary. The most fundamental expression of State sovereignty within the federal system is its criminal justice system. *E.g., Oregon v. Ice*, 555 U.S. 160, 168 (2009) ("we remain cognizant that administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain") (citation omitted); *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) ("we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. ... [W]e *always* have rejected readings of the ... scope of federal power that would permit Congress to exercise a police power") (original

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[6] Federal habeas itself already "entails significant costs ... [f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Coleman v. Thompson*, 501 U.S. 722, 748 (1991) (citations and internal quotation marks omitted). It "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citations and internal quotation marks omitted).

emphasis; citations, internal quotation marks and footnote omitted). Congressional intent to alter this fundamental balance, far from being clearly stated, cannot be found in the text of § 3599.

The Third Circuit also cited "the need to exhaust claims in State court" as justification for its construction of § 3599 to authorize FCDO appearance in State habeas litigation. 790 F.3d at 472. But rather than a tryout en route to federal habeas, the State proceeding is the main event. *Beard v. Kindler*, 558 U.S. 53, 62 (2009); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). *Precisely because* the federal habeas scheme "leaves primary responsibility with the state courts," *Woodward v. Viscotti*, 537 U.S. 19, 27 (2002), it is "*Congress' intent* to channel prisoners' claims first to the state courts." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398-1399 (2011) (citation omitted, emphasis added); *Rose v. Lundy,* 455 U.S. 509, 518 (1982) (exhaustion "is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings"). Citing the exhaustion requirement to construe an intent to require federal *intrusion* into State criminal proceedings *reverses* Congress' priorities.

In contrast to the situation in *Harbison,* 556 U.S. at 193 ("Congress likely appreciated that federal habeas counsel are well positioned to represent their clients in the state clemency proceedings that typically follow the conclusion of § 2254 litigation"), federal counsel are presumably no better, and possibly worse, than State lawyers familiar with State procedures when it comes to exhausting claims. Notably, the 4th and 5th Circuits

have held that, under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (ineffective assistance in State habeas may constitute cause and prejudice in subsequent federal habeas proceedings), counsel who litigated State habeas proceedings have a conflict of interest with regard to later federal habeas proceedings, and such counsel are ethically barred from representing the same offenders in federal court. *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013) (where *Martinez* applies new counsel "ethically required" on federal habeas, and district court "must" grant a motion for appointment of new counsel if the federal petitioner is "represented by the same counsel as in state habeas") (emphasis omitted); *Mendoza v. Stephens*, 783 F.3d 203, 211 (5th Cir. 2015) (same, following *Juniper*).

A State court might likewise find conduct by federal lawyers unethical even if their presence were otherwise authorized by federal statute.[7] But here, Pennsylvania's ability to do so, or even to question that supposed authorization, was extinguished.

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[7] *See, e.g.*, *Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States ... The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977) ("the regulation of the activities of the bar is at the core of the State's power to protect the public"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792-93 (1975) ("The interest of the States in regulating lawyers is especially great") (citations and internal quotation marks omitted).

The Third Circuit upheld summary dismissal on the ground that a State lacks a "private right of action" under § 3599. Applying the private right of action doctrine to a removed proceeding, however, is incoherent. That doctrine limits *federal* courts, to prevent the abuse of Article III jurisdiction that would result from their "embracing a dispute Congress has not assigned [them] to resolve"; it exists to limit "the reach of *federal* power." *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-165 (2008) (emphasis added). This rationale vanishes when the jurisdiction is that of a *State* court in a *State* proceeding that was merely removed to a federal *forum*. *See Arizona v. Manypenny*, 451 U.S. 232, 242-243 (1981) (removal "is a purely derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties"). Pennsylvania is no private party, but a sovereign State entitled of its own right to question unauthorized federal intrusion into its criminal justice system. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) ("This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens") (citation omitted).

The Circuit Court's view of "conflict preemption," meanwhile, 790 F.3d at 475 ("the disqualification proceedings may not enforce [§ 3599] ... If, on the other hand, the disqualification proceedings are based on state law, they conflict with [§ 3599] and are therefore preempted"), sets up a circular "Catch-22" hurdle. The conclusion that any State law that might support the State's position must conflict with § 3599 depends

precisely on the very construction of the statute the State disputes.

In refusing to even allow the State to contest the foregone conclusion that § 3599 authorizes federal counsel in State habeas proceedings, the Circuit Court simply ignored that, by State procedural rule (Pa.R.Crim.P. 904), Pennsylvania provides counsel in State capital collateral review proceedings. Consequently, as § 3599(a)(2) provides, a defendant in such a State proceeding is "ineligible for § 3599 counsel." *Harbison*, 556 U.S. at 189. The Circuit Court did not distinguish this point; it completely failed to address it. Yet part of *Harbison's* rationale for allowing federally funded counsel even in "subsequent" State clemency proceedings was Tennessee's indifference to that result, expressed both explicitly (Tennessee said it had "no real stake" in the controversy) and by not providing State-appointed counsel. 556 U.S. at 192 n.9. In contrast here, Pennsylvania does provide counsel, and is far from indifferent to the prospect of *de facto* federal control of its capital collateral review process.

The Third Circuit's analysis of § 3599 is thus jarringly inconsistent with *Harbison*; decisions of other Circuits; the explicit text of the statute; presumptive congressional intent; and even sound ethics. Indeed, in denying the State even the opportunity to litigate its claims, the Third Circuit's analysis is blind even to the possibility that State interests worthy of consideration may exist. The Court professes inability to find any basis for the Commonwealth's contrary view of § 3599 other than "animosity." 790 F.3d at 478 & n.11 (McKee, Chief Judge, concurring).

But there are obvious valid reasons for the State to challenge the FCDO's presence in State court. The Pennsylvania Supreme Court has noted that FCDO lawyers have systematically misconducted themselves, apparently out of abolitionist zeal, using the resources of the federal government to try to overwhelm the State capital collateral review system.

Moreover, the very posture of this case confirms that federal lawyers cannot be supervised by the State court system. Just as anticipated by the 5th Circuit, when Pennsylvania responded to the FCDO's conduct by merely scheduling a hearing, the FCDO invoked the power of the federal courts to have the matter quashed, compromising the independence of the State courts. *Sterling v. Scott*, 57 F.3d at 457. Congress did not intend that.

Certiorari is warranted.

Conclusion

For the reasons set forth above, the Commonwealth respectfully requests this Court to grant its petition for writ of certiorari.

Respectfully submitted:

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APPENDIX

Appendix
Table of Contents

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-3853, No. 13-3854, No. 13-3855, No. 13-4070,
No. 13-4269, No. 13-4325

In Re: Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia

The Defender Association of Philadelphia,
Appellant in No. 13-3853

In Re: Proceedings Before the Court of Common Pleas of Monroe County, Pa. to Determine Propriety of State Court Representation by Defender Association of Philadelphia

The Defender Association of Philadelphia,
Appellant in No. 13-3854

In Re: Commonwealth's Request for Relief Against or Directed to Defender Association of Philadelphia

The Defender Association of Philadelphia,
Appellant in No. 13-3855

App. 2

In Re: Proceeding Before The Court of Common Pleas Of Philadelphia To Determine The Propriety of The Defender Association of Philadelphia's Representation of William Johnson In Commonwealth of Pennsylvania v. Johnson

Commonwealth of Pennsylvania,
Appellant in No. 13-4070

In Re: Commonwealth of Pennsylvania's Rule to Show Cause Filed in Commonwealth of Pennsylvania v. William Housman

The Defender Association of Philadelphia,
Appellant in 13-4269

In Re: Commonwealth's Motion to Appoint New Counsel Against or Directed to Defender Association of Philadelphia

Commonwealth of Pennsylvania,
Appellant in No. 13-4325

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(Civil Action No. 2-13-mc-00062)
District Judge: Hon. Cynthia M. Rufe
(Civil Action No. 2-13-cv-02242)
District Judge: Hon. Berle M. Schiller

On Appeal from the United States District Court for the Middle District of Pennsylvania
(Civil Action Nos. 1-13-cv-00510; 3-13-cv-00511;

1-13-cv-00561; 1-13-cv-02103)
District Judge: Hon. A. Richard Caputo

Argued: June 25, 2014

Before: MCKEE, *Chief Judge*, FUENTES, GREENAWAY, JR., *Circuit Judges*.

(Opinion Filed: June 12, 2015;
Amended: June 16, 2015)

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OPINION

FUENTES, *Circuit Judge*:

This case involves a concerted effort by the Commonwealth of Pennsylvania and various Pennsylvania counties to bar attorneys from the Capital Habeas Unit of the Federal Community Defender Organization for the Eastern District of Pennsylvania ("Federal Community Defender") from representing clients in state post-conviction proceedings. In seven different Post-Conviction Review Act ("PCRA") cases in various

Pennsylvania counties, hearings were initiated to disqualify the Federal Community Defender as counsel. In each case, the cited reason for disqualification was based on the organization's alleged misuse of federal grant funds to appear in state proceedings.

The Federal Community Defender removed all of these motions under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), (d)(1). In response, the Commonwealth filed motions under 28 U.S.C. § 1447(c) to return each case to the state court, claiming that the federal officer removal statute did not confer federal subject matter jurisdiction. The Federal Community Defender then filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the Commonwealth lacked a private right of action under federal law, and alternatively that federal law preempted the Commonwealth's motions.

The District Courts split on the jurisdictional question. In three cases, the Eastern District of Pennsylvania denied the Commonwealth's motions to remand and granted the Federal Community Defender's motions to dismiss. In four cases, the Middle District of Pennsylvania granted the motions to remand, and denied as moot the Federal Community Defender's motions to dismiss.

The threshold question before us is whether the Federal Community Defender Organization's invocations of removal jurisdiction were proper. We conclude that they were. On the merits of the Federal Community Defender's motions to dismiss, we conclude that the Commonwealth's attempts to disqualify it as counsel in PCRA proceedings are preempted by federal

law. Accordingly, we affirm the judgments of the District Court for the Eastern District of Pennsylvania, and we reverse the judgments of the Middle District and remand with instructions to grant the Federal Community Defender's motions to dismiss.[1]

I. BACKGROUND

A. Statutory Framework

The Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, requires each District Court to establish a plan to furnish representation to indigent persons charged with federal crimes. The CJA authorizes the Judicial Conference, the congressionally created policy-making arm of the U.S. Courts, to "issue rules and regulations governing the operation of plans [of representation] formulated under [the CJA]." § 3006A(h). The Judicial Conference has exercised this authority by promulgating a comprehensive regulatory framework for administering the CJA, which it sets out in its *Guide to Judiciary Policy ("Guide")*, Vol. 7, Part A.[2]

Under 18 U.S.C. § 3599(a)(2), the District Court *must* appoint counsel to any indigent inmate, federal or state, pursuing a federal habeas corpus challenge to a

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[1]Isaac Mitchell, the petitioner in the underlying post-conviction proceeding that gave rise to Appeal No. 13-3817, died while the appeal was pending. Accordingly, we have dismissed that appeal as moot by separate order.

[2]*Available at* http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines (last visited May 27, 2015).

death sentence. Further, habeas petitioners facing execution have "enhanced rights of representation" under 18 U.S.C. § 3599, as compared to non-capital defendants and other habeas petitioners. *Martel v. Clair*, 132 S. Ct. 1276, 1284 (2012). This enhanced right of representation includes more experienced counsel, a higher pay rate, and more money for investigative and expert services. *Id.* at 1285. These measures "reflect a determination that quality legal representation is necessary in all capital proceedings to foster fundamental fairness in the imposition of the death penalty." *Id.* (alterations and quotation marks omitted). In some circumstances, a federal court can appoint counsel to represent a federal habeas corpus petitioner in state court for the purpose of exhausting state remedies before pursuing federal habeas relief. *Harbison v. Bell*, 556 U.S. 180, 190 n.7 (2009).

For districts where at least two-hundred people require the appointment of counsel, the CJA allows for the creation of two types of defender organizations. The first is a Federal Public Defender, which is essentially a federal government agency. The second is a Community Defender Organization. *See* § 3006A(g)(2). A Community Defender Organization, while not a federal agency, is defined as a "nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation." § 3006A(g)(2)(B). A Community Defender Organization's bylaws must appear in "the plan of the district or districts in which it will serve," and Congress requires it to "submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and

the anticipated caseload and expenses for the next fiscal year." *Id.*

B. The Federal Community Defender Organization and the Administrative Office of the United States Courts

The Federal Community Defender is a Community Defender Organization that represents indigent defendants charged with federal crimes. Its Capital Habeas Unit specially represents inmates sentenced to death in Pennsylvania in federal habeas corpus proceedings.

The Federal Community Defender operates as a distinct sub-unit of the Defender Association of Philadelphia. It receives a periodic sustaining grant through § 3006A(g)(2)(B)(ii). This grant is paid "under the supervision of the Director of the Administrative Office of the United States Courts." § 3006A(i). The Administrative Office of the United States Courts ("AO") is an agency within the Judicial Conference. The *Guide*'s grant terms require the AO to audit the Federal Community Defender every year. Unless otherwise authorized by the AO, the Federal Community Defender is prohibited from commingling grant funds with non-grant funds and is required to use grant funds "solely for the purpose of providing representation and appropriate other services in accordance with the CJA." J.A. 334; *see also* J.A. 338-39. If the Federal Community Defender fails to "comply substantially" with the terms of the grant or is "unable to deliver the representation and other services which are the subject of th[e] agreement," the Judicial Conference or the AO "may reduce, suspend, or

terminate, or disallow payments under th[e] grant award as it deems appropriate." J.A. at 341.

The U.S. District Court for the Eastern District of Pennsylvania designates the Federal Community Defender to facilitate CJA representation to eligible individuals. The Middle District of Pennsylvania includes the Federal Community Defender as an organization that may be appointed to represent indigent capital habeas petitioners.[3]

The Federal Community Defender acknowledges that it sometimes appears in PCRA proceedings without a federal court order directing it to do so. It alleges, however, that in such cases it uses federal grant funds only for "preparatory work that [will also be] relevant to a federal habeas corpus petition" and only if it "has received a federal court order appointing it as counsel for federal habeas proceedings or is working to obtain such an appointment." Second Step Br. 10. Otherwise, it uses donated funds. *See id.* at 10-11.

C. The Genesis of the Disqualification Motions

These disqualification proceedings were spawned by a concurrence written by then-Chief Justice Castille of the Pennsylvania Supreme Court, in a decision denying PCRA relief to a petitioner represented by the Federal Community Defender. Chief Justice Castille criticized

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[3]Middle District Plan, § VII, *available at* http:// www.pamd.uscourts.gov/sites/default/files/cja_plan.pdf (last visited May 27, 2015).

the organization's representation of capital inmates in state proceedings and asked pointedly: "is it appropriate, given principles of federalism, for the federal courts to finance abusive litigation in state courts that places such a burden on this Court?" *Commonwealth v. Spotz*, 18 A.3d 244, 334 (Pa. 2011) (Castille, C.J., concurring). Chief Justice Castille answered in the negative, commenting on the "obstructionist" tactics of the Federal Community Defender attorneys and the "perverse[ness]" of the commitment of federal resources to state post-conviction proceedings. *Id.* at 165.

D. Procedural History

Seizing on Chief Justice Castille's comments, the District Attorney of Philadelphia filed a "Petition for Exercise of King's Bench Jurisdiction Under 42 Pa. C.S. § 726" directly with the Pennsylvania Supreme Court, requesting that all Federal Community Defender counsel be disqualified from continuing to represent clients in state PCRA proceedings absent an authorization order from a federal court. *In re: Appearance of Federal FCDO in State Criminal Proceedings* (hereinafter *King's Bench Petition*), No. 11-cv-7531, Doc. 1 at 11-42 (E.D. Pa. Dec. 8, 2011).

The Federal Community Defender removed the *King's Bench Petition* to federal court in the U.S. District Court for the Eastern District of Pennsylvania. Its basis for removal was the federal officer removal statute, 28 U.S.C. § 1442(a)(1), (d)(1). Within six days, however, the Commonwealth voluntarily dismissed the action.

The Commonwealth subsequently sought to disqualify Federal Community Defender counsel in individual PCRA proceedings. The Pennsylvania Supreme Court also initiated inquiries into the Federal Community Defender's continued representation of PCRA petitioners. Before us now are seven actions consolidated from the District Courts in the Eastern and Middle Districts of Pennsylvania.[4] In each case, a

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[4]The District Court judgments we review here are: *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia, Respondent* (hereinafter *Dowling*), 1:13-CV-510, 2013 WL 4458848 (M.D. Pa. Aug. 16, 2013), *reconsideration denied*, 1:13-CV-510, 2013 WL 5781732 (M.D. Pa. Oct. 25, 2013); *In re Proceedings Before the Court of Common Pleas of Monroe Cnty., Pa. to Determine Propriety of State Court Representation by Defender Ass'n of Philadelphia* (hereinafter *Sepulveda*), 3:13-CV-511, 2013 WL 4459005 (M.D. Pa. Aug. 16, 2013), *reconsideration denied*, 3:13-CV-511, 2013 WL 5782383 (M.D. Pa. Oct. 25, 2013); *In re Commonwealth's Request for Relief Against or Directed to Defender Ass'n of Philadelphia, Respondent* (hereinafter *Dick*), 1:13-CV-561, 2013 WL 4458885 (M.D. Pa. Aug. 16, 2013), *reconsideration denied*, 1:13-CV-561, 2013 WL 5781760 (M.D. Pa. Oct. 25, 2013); *In re: Commonwealth of Pennsylvania's Rule to Show Cause* (hereinafter *Housman*), No. 13-cv-2103, Doc. 14 (M.D. Pa. Oct. 25, 2013); *In re Proceeding Before Court of Common Pleas of Philadelphia* (hereinafter *Johnson*), CIV.A. 13-2242, 2013 WL 4774499 (E.D. Pa. Sept. 6, 2013); *In re Commonwealth's Motion to Appoint New Counsel Against or Directed to Defender Ass'n of Philadelphia* (hereinafter *Harris*), MISC.A. 13-62, 2013 WL 4501056 (E.D. Pa. Aug. 22, 2013), *reconsideration denied*, MISC.A. 13-62, 2013 WL 5498152 (E.D. Pa. Oct. 3, 2013). The action mooted by Isaac Mitchell's death is *In re: Proceeding in Which the Commonwealth of Pennsylvania Seeks to Compel the Defender Association of Philadelphia to Produce Testimony and Documents and to Bar it from Continuing to Represent Defendant Mitchell in State Court* (hereinafter *Mitchell*),

(continued...)

federal court assigned the Federal Community Defender to represent these clients in federal habeas corpus proceedings, but not in state PCRA proceedings. Like the *King's Bench Petition*, the main thrust of these motions, as well as the Pennsylvania Supreme Court's orders, is that Federal Community Defender attorneys should be removed from the underlying PCRA cases because they are misusing federal funds by representing clients in state proceedings without an authorization order from a federal court. A summary of the allegations in these disqualification motions follows.

In *Mitchell*, the District Attorney of Philadelphia filed a "Motion to Remov[e] Federal Counsel" in the Pennsylvania Supreme Court. J.A. at 309-16. The DA alleged that (1) "the presence of federally-funded [Federal Community Defender] lawyers in this case [wa]s unlawful [under 18 U.S.C. § 3599], as there has been no order from a federal court specifically authorizing them to appear in state court," J.A. at 310, and (2) it was "a violation of the sovereignty of the Commonwealth of Pennsylvania for lawyers funded by a federal government agency for the purpose of appearing in federal courts to instead appear in the state's criminal courts," J.A. at 312-13.

In a per curiam order, the Pennsylvania Supreme Court found that the Commonwealth's allegations were potentially meritorious:

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[4](...continued)
13-CV-1871, 2013 WL 4193960 (E.D. Pa. Aug. 15, 2013).

> [T]he matter is **REMANDED** to the PCRA court to determine whether current counsel, the . . . [Federal Community Defender] . . . may represent appellant [Mitchell] in this state capital PCRA proceeding, or whether other appropriate post-conviction counsel should be appointed. In this regard, the PCRA court must first determine whether the [Federal Community Defender] *used any federal grant monies to support its activities in state court in this case*. If the [Federal Community Defender] cannot demonstrate that *its actions here were all privately financed*, and convincingly attest that this will remain the case going forward, it is to be removed.

J.A. at 275 (emphasis added).[5]

The Supreme Court's remand order in *Mitchell* was the genesis of similar proceedings in the remaining PCRA cases that are on review here. In *Housman*, the District Attorney of Cumberland County filed an almost identical motion as the DA in *Mitchell*. J.A. at 713-20. The DA in *Housman* contended that, "[w]hen a PCRA court finds that [Federal Community Defender] attorneys use federal funding in a state proceeding, they must remove the [Federal Community Defender] attorneys from the case." J.A. at 718. The Attorney General of Pennsylvania filed motions in

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[5]This order provoked a dissent from two of the justices, on the basis that the legal issues "require the construction of federal statutes and other authority, consideration of the relationship between federal and state court systems in capital litigation, and consideration of counsel's role therein." J.A. at 278.

three other cases, *Harris*, *Dowling*, and *Dick*. J.A. at 456, 502; *In re: Commonwealth's Request for Relief Against or Directed to Defender Association of Philadelphia*, No. 13-cv-561, Doc. 10-4 at 8 (M.D. Pa ., March 28, 2013).

In *Johnson* and *Sepulveda*, the Pennsylvania Supreme Court issued sua sponte orders to the PCRA trial courts. In *Johnson*, the Supreme Court required that the Federal Community Defender "produce a copy of any federal appointment order it may have secured in this matter, within ten (10) days of the issuance of this Order." J.A. at 392. In *Sepulveda*, the order was more detailed:

> If federal funds were used to litigate the PCRA below—*and the number of [Federal Community Defender] lawyers and witnesses involved, and the extent of the pleadings, suggest the undertaking was managed with federal funds—the participation of the [Federal Community Defender] in the case may well be unauthorized by federal court order or federal law*. Accordingly, on remand, the PCRA court is directed to determine whether to formally appoint appropriate post-conviction counsel and to consider whether the [Federal Community Defender] may or should lawfully represent appellant in this state capital PCRA proceeding.

Commonwealth v. Sepulveda, 55 A.3d 1108, 1151 (Pa. 2012) (emphasis added).

The Federal Community Defender removed these seven proceedings, producing seven separate federal

civil actions, four in the Middle District of Pennsylvania, and three in the Eastern District of Pennsylvania.[6] The Commonwealth responded to each removal petition with a motion to remand, claiming that federal jurisdiction was improper. The Federal Community Defender simultaneously filed a motion to dismiss on the merits under Federal Rule of Civil Procedure 12(b)(6). The District Courts split: judges in the Eastern District found there was federal jurisdiction and granted the Federal Community Defender's motions to dismiss on the merits. A judge deciding four of these actions in the Middle District granted the Commonwealth's motions to remand and denied as moot the Federal Community Defender's motions to dismiss. Each party appeals the adverse rulings against it.

II. REMOVAL JURISDICTION

The first issue in this case is whether federal courts have jurisdiction over the Commonwealth's disqualification motions. We have jurisdiction over these appeals under 28 U.S.C. § 1291; *see also* 28 U.S.C. § 1447(d). We review de novo whether the District Court had subject matter jurisdiction. *Bryan v. Erie Cnty. Office of Children & Youth*, 752 F.3d 316, 321 n.1 (3d Cir. 2014). A defendant seeking removal must provide a "notice of removal . . . containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446. This notice "must allege the underlying facts

[6]Although the disqualification proceedings were removed to federal court, the underlying PCRA actions remained in state court.

supporting each of the requirements for removal jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014). Because the Commonwealth facially attacks jurisdiction, we construe the facts in the removal notice in the light most favorable to the Federal Community Defender. *See Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014).

The Federal Community Defender proposes that federal courts have mandatory jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), (d)(1). For the following reasons, we agree.

A. Statutory Framework

The federal officer removal statute has existed in some form since 1815. *Willingham v. Morgan*, 395 U.S. 402 (1969). The Statute's "basic purpose" is:

> [T]o protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Federal Government acting within the scope of their authority.

Watson v. Phillip Morris Cos., Inc., 551 U.S. 142, 150 (2007) (alterations and internal quotation marks omitted).

The federal officer removal statute's current form, § 1442, is the result of many amendments that broadened a 1948 codification of the statute. *Willingham*,

395 U.S. at 406. Following its most recent amendment in 2011, the statute provides, in relevant part:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> . . .
>
> (d) In this section, the following definitions apply:
>
> > (1) The terms "civil action" and "criminal prosecution" include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

28 U.S.C. § 1442(a)(1), (d)(1).

"Section 1442(a) is an exception to the well-pleaded complaint rule, under which (absent diversity) a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case arises under federal law." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 n.12 (2006) (internal quotation marks omitted). Under this statute, a colorable federal defense is sufficient to confer federal jurisdiction. *See id.* Unlike the general removal statute, the federal officer removal statute is to be "broadly construed" in favor of a federal forum. *See Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1262 (3d Cir. 1994).

The Removal Clarification Act of 2011, Pub. L. 112-51, 125 Stat. 545 (2011), made two amendments to § 1442 that are relevant here. First, the Act clarified that the term "civil action" includes ancillary proceedings, so long as a "judicial order" is sought or issued. *Id*. at 545; *see* § 1442(d)(1). Second, it added the words "or relating to" after "for" in § 1442(a). 125 Stat. 545. The House Committee on the Judiciary wrote that the changes to the statute were meant "to ensure that any individual drawn into a State legal proceeding based on that individual's status as a Federal officer has the right to remove the proceeding to a U.S. district court for adjudication." H.R. Rep. No. 112-17, pt. 1 (2011), as reprinted in 2011 U.S.C.C.A.N. 420, 420. Furthermore, adding the "or relating to" language is "intended to broaden the universe of acts that enable Federal officers to remove to Federal court." *Id*. at 425.

B. Preliminary Considerations

As a preliminary matter, we must address a couple of arguments raised by the Commonwealth. We note

that the proceedings are "civil actions" as defined by § 1442(a)(1), (d)(1): they are ancillary proceedings in which a judicial order was sought or, in the cases of *Mitchell*, *Johnson*, and *Sepulveda*, issued. Contrary to the Commonwealth's related assertion, attorney disciplinary proceedings are not categorically exempt from removal under § 1442. *See Kolibash v. Comm. on Legal Ethics of W. V. Bar*, 872 F.2d 571, 576 (4th Cir. 1989) (allowing for attorney disciplinary proceedings in front of the Committee on Legal Ethics of West Virginia to be removed because the "state investigative body operate[d] in an adjudicatory manner"). In any event, the disqualification motions in this case are not attorney disciplinary proceedings. *See Commonwealth v. Spotz*, No. 576 CAP, 2011 Pa. LEXIS 2368, at *6 (Pa. Oct. 3, 2011) (Baer, J., dissenting) (contending that "unethical practices engaged in by the [Federal Community Defender] attorneys should be resolved by referral to the Disciplinary Board").

C. Elements for Removal

In order for the Federal Community Defender to properly remove under § 1442, it must meet four requirements. The Federal Community Defender must show that (1) it is a "person" within the meaning of the statute; (2) the Commonwealth's claims are based upon the Federal Community Defender's conduct "acting under" the United States, its agencies, or its officers; (3) the Commonwealth's claims against it are "for, or relating to" an act under color of federal office; and (4) it raises a colorable federal defense to the Commonwealth's claims. *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1180-81 (7th Cir. 2012); *accord Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 127 (3d Cir. 1998).

D. Application of the Elements for Removal

We address each of the four elements in turn.

1. The Federal Community Defender is a "person"

The Federal Community Defender is a "person" within the meaning of § 1442(a)(1). Because the statute does not define "person," we look to 1 U.S.C. § 1, which defines the term to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1; *see also Ruppel*, 701 F.3d at 1181. As a non-profit corporation, the Defender Association of Philadelphia falls within this definition. Furthermore, as the Second Circuit has recognized, "the legislative history is devoid of evidence suggesting that Congress intended § 1442 not apply to corporate persons," and "§ 1442 also lists other non-natural entities, such as the United States and its agencies, which suggests that interpreting 'person' to include corporations is consistent with the statutory scheme." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135-36 (2d Cir. 2008). Consequently, we find that the Defender Association—the umbrella organization and therefore the named party in this case—satisfies the first requirement for removal.

2. The Federal Community Defender was "acting under" a federal officer or agency

The Federal Community Defender satisfies the next element because the injuries the Commonwealth complains of are based on the Federal Community

Defender's conduct while it was "acting under" the AO. *See Feidt*, 153 F.3d at 127.

The words "acting under" describe "the triggering relationship between a private entity and a federal officer." *Watson*, 551 U.S. at 149. The Supreme Court has stated that "the word 'under' must refer to what has been described as a relationship that involves 'acting in a certain capacity, considered in relation to one holding a superior position or office.'" *Id.* at 151 (quoting 18 Oxford English Dictionary 948 (2d ed. 1989)).

Furthermore, "precedent and statutory purpose make clear that the private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152. The Court has stressed that "[t]he words 'acting under' are broad, and . . . that the statute must be 'liberally construed.'" *Id.* at 147 (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932)).

While the Court has not precisely determined "whether and when particular circumstances may enable private contractors to invoke the statute," *id.* at 154, it has noted with approval that "lower courts have held that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Id.* at 153. The Supreme Court cited by way of example *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398-400 (5th Cir. 1998), in which the Fifth Circuit determined that Dow Chemical was "acting under" color of federal

office when it manufactured Agent Orange for use in helping to conduct a war pursuant to a contractual agreement with the United States.

The *Watson* Court explained that in *Winters* and other similar cases, the private contractor acted under a federal officer or agency because the contractors "help[ed] the Government to produce an item that it need[ed]." 551 U.S. at 153. This is because, the "assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id*. For example, in *Winters*, "Dow Chemical fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war. Moreover, at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Id*. at 153-54.

The Court contrasted government contractors with other private parties lacking a contractual relationship with the government. *See id*. It concluded that "compliance (or noncompliance) with federal laws, rules, and regulations does not by itself [bring a party] within the scope of the statutory phrase 'acting under' a federal 'official.'" *Id*. at 153. The factual scenario in *Watson* itself is illustrative. In that case, Phillip Morris could not remove a deceptive and unfair business practices suit filed against it based merely on a defense that it complied with Federal Trade Commission regulations governing its advertising. *Id*. at 156. The Court explained that Congress could not have meant for the statute to sweep so broadly, for if mere compliance with federal law were sufficient, then

the meaning of "acting under" could include taxpayers who complete federal tax forms; airline passengers who obey prohibitions on smoking; or federal prisoners who follow the rules and regulations governing their conduct. *Id.* at 152. These types of relationships do not warrant removal because state court prejudice would not be expected. *See id.*

We adopt the principles outlined in *Watson* to guide our understanding of whether the Federal Community Defender was "acting under" a federal agency. *Cf. Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1231 (8th Cir. 2012) (relying on same); *Bennett v. MIS Corp.*, 607 F.3d 1076, 1086-87 (6th Cir. 2010) (same). The relationship between the Federal Community Defender and the federal government is a sufficiently close one to conclude that the Federal Community Defender was "acting under" a federal agency—the Judicial Conference and its subordinate, the AO—at the time of the complained-of conduct.

The Federal Community Defender is a non-profit entity created through the Criminal Justice Act that is delegated the authority to provide representation under the CJA and § 3599. Its "stated purposes must include implementation of the aims and purposes of the CJA." *Guide*, Vol. 7A, Ch. 4, § 420.20(a). It also must adopt bylaws consistent with representation under the CJA and a model code of conduct similar to those governing Federal Public Defender Organizations. *See* § 420.20(a) & (c). Through this relationship, the Federal Community Defender "assists" and helps the AO to "*carry out*[ ] the duties or tasks of a federal superior," which is to implement the CJA and § 3599 through the provision of counsel to federal defendants and indigent

federal habeas corpus petitioners. *See Watson*, 551 U.S. at 152. Unlike the companies in *Watson*, the Federal Community Defender provides a service the federal government would itself otherwise have to provide. *See id.* at 154; *Isaacson*, 517 F.3d at 137 ("Unlike the tobacco companies in *Watson*, Defendants received delegated authority; they were not simply regulated by federal law.").

Additionally, the nature of the Commonwealth's complaints pertains to the "triggering relationship" between the Federal Community Defender and the AO, because the Commonwealth targets the manner in which the Federal Community Defender uses its federal money, not another aspect of its representation of clients in state court. *See Watson*, 551 U.S. at 149. As a condition of receiving federal grant money, the Federal Community Defender must maintain detailed financial records, submit an annual report of activities and expected caseload, and return unexpended balances to the AO. Additionally, the Federal Community Defender is prohibited from commingling CJA funds with its other funds. And "[u]nless otherwise authorized by the AO, no employee of a grantee organization (including the federal defender) may engage in the practice of law outside the scope of his or her official duties with the grantee." J.A. at 340. The scope of when the Federal Community Defender acts under the AO, whatever its limits, surely extends to whether it sufficiently complies with its obligations under its grant, specifically whether it is engaged in the unauthorized practice of law, or is commingling funds in violation of the AO's directives.

The Commonwealth disagrees, contending that the Federal Community Defender must show not only that it "act[ed] under" color of federal office at the time of the complained-of conduct, but also that the Federal Community Defender acted pursuant to a *federal duty* in engaging in the complained-of conduct. The Commonwealth argues that because the Federal Community Defender cannot state a duty to appear in PCRA proceedings on behalf of its clients, it cannot be "acting under" a federal agency when it does so. Framing the inquiry in this manner essentially collapses the "acting under" inquiry into the requirement that the complained-of conduct be "for, or relating to," an act under color of federal office. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 124-25 (2d Cir. 2007). Even if we were to address these requirements simultaneously, whatever causation inquiry we import could not be narrower than the one Congress has written into the statute. As discussed below, we disagree that the Federal Community Defender is required to allege that the complained-of conduct *itself* was at the behest of a federal agency. It is sufficient for the "acting under" inquiry that the allegations are directed at the relationship between the Federal Community Defender and the AO.

Given these considerations, we conclude that the Federal Community Defender satisfies this requirement.

3. The Commonwealth's claims concern acts "for or relating to" an act under color of federal office

We conclude that the Federal Community Defender satisfies the causation element because the Commonwealth's claims concern acts "for or relating to" the Federal Community Defender's federal office.

Prior to 2011, the proponent of jurisdiction was required to show that it has been sued "*for* any act under color of [federal] office." 28 U.S.C. § 1442(a)(1) (2010) (emphasis added).[7] In other words, the proponent was required to "show a nexus, a causal connection between the charged conduct and asserted official authority." *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (quotation marks omitted).

For example, in *Maryland v. Soper* (No. 2), 270 U.S. 36 (1926), the Supreme Court decided that four prohibition agents and their chauffeur could not take advantage of the federal officer removal statute for their state prosecutions for lying under oath to a coroner. According to the agents, what required them to testify in front of the coroner was their discovery of a man who was wounded, and who eventually died, on their way back from investigating an illegal alcohol still. Thus, they claimed that their federal duties were a cause of their allegedly perjurous testimony. *Id.* at

[7]Both before and after the 2011 amendments, however, the statute also permitted the removal of actions brought "on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue." 28 U.S.C. § 1442(a)(1).

41. The Court determined that this connection was insufficient to justify removal because testifying before the coroner was not part of the agents' official duties, and those were the acts that the State relied on for prosecution. *Id*. at 42. The Court acknowledged, however, that the acts need not be "expressly authorized" by a federal statute, so long as the acts complained of are "an inevitable outgrowth of" and "closely interrelated" with the officer's federal duty. *Id*.

By contrast, the Court found a sufficient causal connection for removal jurisdiction in *Acker*, 527 U.S. 423. There, two federal district court judges resisted payment of a county's occupational tax,[8] claiming that it violated the "intergovernmental tax immunity doctrine." *Id*. at 429. After the State brought a collection action against the judges in state small claims court, the judges removed under § 1442 and asserted that the small claims suits were "*for* a[n] act under color of office." *Id*. at 432. The judges argued that there was a sufficient causal relationship because the ordinance at issue made it unlawful to engage in their federal occupation without paying the tax. *Id*. For its part, the State argued that the tax was levied against the judges personally, and not on them as judges, so the collection suit was unrelated to their federal office. *Id*. The Court decided that "[t]o choose between those readings of the Ordinance is to decide the merits of this case," which it would not do at this stage. *Id*.; *see also id*. at 431 ("We . . . do not require the officer virtually

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[8]Defined as "[a]n excise tax imposed for the privilege of carrying on a business, trade, or profession." *TAX*, Black's Law Dictionary (9th ed. 2009).

to win his case before he can have it removed.") (quotation marks omitted). The Court concluded that the judges had made an adequate threshold showing at this stage to grant federal courts jurisdiction under § 1442 because "[t]he circumstances that gave rise to the tax liability, not just the taxpayers' refusal to pay, 'constitute the basis' for the tax collection lawsuits at issue." *Id.* at 433. The tax suits arose out of the judges' "holding court in the county and receiving income for that activity" and therefore had a sufficient nexus to the judges' official duties. *Id.*

Thus, before 2011, proponents of removal jurisdiction under § 1442 were required to "demonstrate that the acts for which they [we]re being sued" occurred at least in part "*because of* what they were asked to do by the Government." *Isaacson*, 517 F.3d at 137. In 2011, however, the statute was amended to encompass suits "for *or relating to* any act under color of [federal] office." 28 U.S.C. § 1442(a)(1) (2011) (emphasis added). Neither the Supreme Court nor any federal appellate court has addressed the significance of the insertion of the words "or relating to" in the statute. However, the Supreme Court has defined the same words in the context of another statute: "The ordinary meaning of the[ ] words ['relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 & n.16 (1983) (same). Thus, we find that it is sufficient for there to be a "connection" or "association" between the act in question and the federal office. Our understanding comports with the

legislative history of the amendment to § 1442(a)(1), which shows that the addition of the words "or relating to" was intended to "broaden the universe of acts that enable Federal officers to remove to Federal court." H.R. Rep. No. 112-17, pt. 1 (2011), as reprinted in 2011 U.S.C.C.A.N. 420, 425.

In this case, the acts complained of undoubtedly "relate to" acts taken under color of federal office. First, the Federal Community Defender attorneys' employment with the Federal Community Defender is the very basis of the Commonwealth's decision to wage these disqualification proceedings against them. The Commonwealth has filed these motions to litigate whether the Federal Community Defender is violating the federal authority granted to it. As the Supreme Court has noted, whether a federal officer defendant has completely stepped outside of the boundaries of its office is for a federal court, not a state court, to answer. *See Acker*, 527 U.S. at 431-32; *Willingham*, 395 U.S. at 409 ("If the question raised is whether they were engaged in some kind of 'frolic of their own' in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court.").

Moreover, the Federal Community Defender's representation of state prisoners in PCRA proceedings is closely related to its duty to provide effective federal habeas representation. As the Supreme Court has emphasized on numerous occasions, the Antiterrorism and Effective Death Penalty Act of 1996 significantly increased the extent to which federal habeas relief is contingent on the preservation and effective litigation

of claims of error in state court, including state post-conviction proceedings:

> Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. 28 U.S.C. § 2254(b). If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 82-84, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), applies. And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies. Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding, see *id.*, at 90, 97 S.Ct. 2497.

Harrington v. Richter, 562 U.S. 86, 103 (2011). As a result, counsel in PCRA proceedings must be careful to comply with state procedural rules, file within applicable limitations periods, and fully exhaust their clients' claims in order to secure meaningful habeas review in federal court. The impact PCRA litigation can have on a subsequent federal habeas petition is, of course, one of the reasons the Federal Community Defender represents prisoners in such litigation. This impact is significant enough to convince us that the Federal Community Defender's actions in PCRA litigation "relate to" its federal duties for purposes of removal jurisdiction.

4. The Federal Community Defender raises colorable defenses

The final element for removal requires the Federal Community Defender to raise a "colorable federal defense" to the Commonwealth's claims. *Acker*, 527 U.S. at 431-32. Since at least 1880, the Supreme Court has required that federal officer removal be allowed if, and only if, "it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein." *Mesa v. California*, 489 U.S. 121, 126-27 (1989) (quoting *Tennessee v. Davis*, 100 U.S. 257, 262 (1880)) (quotation marks and emphasis omitted). This requirement assures that federal courts have Article III jurisdiction over federal officer removal cases. *Mesa*, 489 U.S. at 136.[9]

The Commonwealth contends that the federal defense must coincide with an asserted federal duty. Not so. In *Acker*, for example, the Supreme Court concluded that the defendant-judges' defense–that they enjoyed "intergovernmental tax immunity"–brought them within the removal statute, notwithstanding the fact that the judges' duties did not require them to

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[9]We note that, in this case, because the motions for disqualification have as an element a nested federal question that is both "disputed" and "substantial," Article III "arising under" jurisdiction likely exists even without the assertion of a federal defense. *Cf. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); *Mesa*, 489 U.S. at 129 (describing a federal officer removal case where the plaintiff "could have brought suit in federal court based on 'arising under' jurisdiction" because the plaintiff claimed that a federal officer had failed to a comply with a federal duty).

resist the tax. *See* 527 U.S. at 437. What matters is that a defense raises a federal question, not that a federal duty forms the defense. True, many removal cases involve defenses based on a federal duty to act, or the lack of such a duty. *See Mesa*, 489 U.S. at 126-34. But the fact that duty-based defenses are the most common defenses does not make them the only permissible ones.

The Federal Community Defender raises three colorable defenses. First, the Federal Community Defender claims that it was not violating the terms of § 3599 when it appeared in state court because it used non-federal funds when necessary. Second, it argues that the Commonwealth's attempts to disqualify it on the alleged basis that it was misusing federal grant money is preempted by federal law. Third, it argues that the Commonwealth lacks a cause of action to enforce the terms of the Federal Community Defender's grant with the AO under the CJA, § 3599, or otherwise. Each of these three defenses is analogous to a defense the Supreme Court has allowed to trigger removability.

The Federal Community Defender's first defense is a "colorable federal defense" akin to the one raised in *Cleveland, C., C. & I.R. Co. v. McClung*, 119 U.S. 454 (1886). In *McClung*, a railroad company sued a U.S. Customs collector, McClung, in state court for recovery of a lien. The company alleged that McClung had a duty under federal law to notify the railroad company before delivering merchandise to the consignees, even where the consignees had paid the lien over to the collector. *Id*. at 454-56. McClung argued that he had no duty to notify the railroad company under federal law, which allowed him to remove. *Id*. at 462. In a

later case interpreting *McClung*, the Supreme Court explained that "[t]o assert that a federal statute does *not* impose certain obligations whose alleged existence forms the basis of a civil suit is to rely on the statute in just the same way as asserting that the statute *does* impose other obligations that may shield the federal officer against civil suits." *Mesa*, 489 U.S. at 130. In both cases, the defenses "are equally defensive and equally based in federal law." *Id*.

The defense raised by the Federal Community Defender is analogous to the defense raised in *McClung*. The Commonwealth claims that the Federal Community Defender has violated 18 U.S.C. § 3599 and the grant terms in its contract with the AO, which implements the statute. The Federal Community Defender responds that it has violated neither set of requirements. Whether this is true is a determination to be made by a federal court. We find this to be a federal defense in that it requires interpretation of federal statutes, the CJA and § 3599, as well as the *Guide*, which the Judicial Conference promulgated to effectuate these statutes.

Contrary to the Commonwealth's argument, this defense is not foreclosed by the Supreme Court's interpretation of the boundaries of § 3599. *See Harbison*, 556 U.S. at 180. *Harbison* examined whether state clemency proceedings were proceedings "subsequent" to federal habeas for purposes of 18 U.S.C. § 3599(e). If they were, § 3599(e) would require the district court to appoint an attorney, already appointed for purposes of seeking federal habeas relief, to represent the petitioner in those proceedings as well. The Court determined that state clemency proceedings

were "subsequent" and that appointment of counsel was authorized. *Id.* at 182-83. The Court contrasted state clemency with state post-conviction relief, stating that "[s]tate habeas is not a stage 'subsequent' to federal habeas. Just the opposite: Petitioners must exhaust their claims in state court before seeking federal habeas relief. *See* § 2254(b)(1)." *Harbison*, 556 U.S. at 189. Thus, absent an authorization order from a federal district court requiring exhaustion of state remedies, federally funded counsel would not be *required* in such situations. *Id.* at 190 n.7. The Court never stated, however, that Federal Community Defender counsel would be *prohibited* from representing clients in state habeas proceedings in preparation for federal habeas corpus representation. *See id.* Indeed, that is the question squarely presented by the merits of this case. Because we must accept the Federal Community Defender's theory of the case at this juncture, *see Acker*, 527 U.S. at 432, we find this defense to be colorable.

Next, the Federal Community Defender claims that the Commonwealth is impermissibly attempting to interfere in the relationship between the Federal Community Defender and the AO under the preemption principles laid out in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001). This federal defense is similar to the one raised by the judges in *Acker*, which was that Jefferson County's tax "risk[ed] interfering with the operation of the federal judiciary in violation of the intergovernmental tax immunity doctrine." 527 U.S. at 431 (alterations in original and quotation marks omitted). This, too, is a "colorable" defense that the Federal Community Defender can raise in federal court: it is plausible that the Congress

intended for no one other than the Judicial Conference and the AO to monitor and enforce a Community Defender Organization's compliance with its grant terms.

Finally, the Federal Community Defender raises the defense that the Commonwealth lacks a private right of action to enforce § 3599 and the terms of the Federal Community Defender's grant with the AO. Similar to the preemption defense, the lack of a right of action in the Commonwealth is premised on the idea that Congress has delegated authority only to the Judicial Conference and the AO to monitor and enforce the CJA and § 3599. Thus, the Commonwealth's attempt to enforce these statutory provisions would interfere with Congress's intended mechanism for gaining compliance with the CJA and § 3599.

The Federal Community Defender therefore satisfies all of the requirements of § 1442(a)(1), and the disqualification proceedings were properly removed.[10]

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[10]In its Third Step Brief, the Commonwealth argues for the first time that, even if the federal courts have jurisdiction over these proceedings, we should decline to exercise it under the *Younger* abstention doctrine. Because the Commonwealth failed to raise this issue in its First Step Brief, it has waived the argument. *Winston v. Children & Youth Servs.*, 948 F.2d 1380, 1384 (3d Cir. 1991). Furthermore, we decline to exercise our discretion to look past the waiver because the abstention argument lacks merit. The Commonwealth has pointed us to no courts that have exercised *Younger* abstention where the federal officer removal statute grants jurisdiction. In fact, the courts we are aware of, that have addressed the argument, have found such an exercise of abstention to be inappropriate. *See*, *e.g.*, *Jamison v. Wiley*, 14 F.3d

(continued...)

III. THE MERITS OF THE FEDERAL COMMUNITY DEFENDER'S MOTIONS TO DISMISS

Satisfied that we have proper jurisdiction over these consolidated appeals under the federal officer removal statute, 28 U.S.C. § 1442(a), we now turn to the merits of the Federal Community Defender's motions to dismiss under Rule 12(b)(6). To summarize, the Federal Community Defender's motions argue, in relevant part, that the Commonwealth lacks a private right of action to enforce the CJA and § 3599, and, alternatively, that the disqualification motions are preempted by federal law.

As for the right of action argument, the Commonwealth concedes that it lacks a right of action under the CJA or § 3599. And without a private right of action, the Commonwealth may not claim a direct violation of federal law. *See Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 296-97 (3d Cir. 2007); *see also State of N.J., Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 421 n.34 (3d Cir. 1994) (noting that a State also needs a right of action to enforce a federal law).

Rather, the Commonwealth argues that its disqualification motions rest on state law. The named source of state authority is Article V, § 10(c) of the Pennsylvania constitution, which allows the Pennsylvania

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[10](...continued)
222, 239 (4th Cir. 1994) ("[T]he removal jurisdiction granted by § 1442(a), which is designed to protect federal employees against local prejudice, is mandatory, not discretionary, and a district court has no authority to abstain from the exercise of that jurisdiction on any ground other than the two specified in 1447(c).").

Supreme Court to "prescribe general rules governing practice, procedure and the conduct of all courts." Accordingly, we look to the Pennsylvania Supreme Court Orders issued for the substance of the rule in this case. Those Orders provide that if the Federal Community Defender fails to show that its actions representing its clients are entirely "privately financed" with non-federal funds, the state PCRA court is to disqualify the Federal Community Defender as counsel. J.A. at 275 (Remand Order in *Mitchell*); *see also Sepulveda*, 55 A.3d at 1151 (sua sponte Order); J.A. at 392 (sua sponte Order in *Johnson*).

It is unclear whether these Orders were in fact issued pursuant to Article V, § 10(c) of the Pennsylvania constitution. The Pennsylvania Supreme Court undoubtedly has the power to enforce its rules of conduct. But the Orders here are concerned with the unauthorized use of federal funds and cite no generally applicable rule governing the practice of law in Pennsylvania courts. Whether the Pennsylvania Supreme Court relied on its § 10(c) authority is a question of state law, and if that Court were to speak on the question, we would be bound by its determination. We may sidestep this issue, however, as the Federal Community Defender prevails regardless of the answer. As explained above, the disqualification proceedings may not enforce the federal statutes at issue here. If, on the other hand, the disqualification proceedings are based on state law, they conflict with federal law and are therefore preempted.

The doctrine of conflict preemption "embraces two distinct situations." *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 495 (3d Cir. 2013), *cert.*

denied, 134 S. Ct. 905 (2014). The first is "where it is impossible for a private party to comply with both state and federal law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). This type of conflict preemption is not present here, because it would be possible for the Federal Community Defender to comply with both federal law and the state rule alleged by the Commonwealth by withdrawing as counsel in these cases. The second type of conflict preemption arises "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 373 (alterations and internal quotation marks omitted). This is the type of conflict preemption that the Federal Community Defender presses.

The Supreme Court has instructed that, "particularly in those [cases] in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citations and internal quotation marks omitted); *see also Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 248 (3d Cir. 2008) (explaining that, "because the States are independent sovereigns . . . we have long presumed that Congress does not cavalierly pre-empt state-law causes of action" (citation omitted)). This presumption does not apply, however, when Congress legislates in an area of uniquely federal concern. *See Buckman*, 531 U.S. at 347.

The presumption against preemption does not apply here. As a general matter, it is true that the States have a long history of regulating the conduct of lawyers, who are officers of the courts. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 361-62 (1977). But the impetus for the proceedings here is that the Federal Community Defender is allegedly applying its federal grant funds to purposes not authorized by the relevant federal statutes and grant terms. *See*, *e.g.*, *Sepulveda*, 55 A.3d at 1151; J.A. at 275. As explained above, these grants are paid under the supervision of the AO, a federal agency within the Judicial Conference with regulatory control over the Federal Community Defender. "[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Buckman*, 531 U.S. at 347. Policing such relationships "is hardly a field which the States have traditionally occupied," and thus there can be no presumption against preemption here. *Id.* (citation and internal quotation marks omitted).

In light of this determination, we find that the disqualification proceedings are preempted. The overarching purpose of the federal statutory provisions at issue here is to provide "quality legal representation . . . in all capital proceedings to foster fundamental fairness in the imposition of the death penalty." *Martel*, 132 S. Ct. at 1285 (internal quotation marks omitted). To achieve this objective, Congress has authorized grants to Community Defender Organizations and tasked the AO with supervising grant payments. The disqualification proceedings, however, seek to supplant the AO by allowing the

Commonwealth's courts to determine whether a Community Defender Organization has complied with the terms of its federal grants and to attach consequences to noncompliance.

Significantly, the disqualification proceedings are preempted whether or not federal law authorizes the Federal Community Defender to use grant funds for certain purposes in PCRA cases. If the Federal Community Defender is authorized to use grant funds, the Commonwealth plainly cannot disqualify it for doing so without undermining congressional objectives. But even if the Federal Community Defender is not authorized to use grant funds, the disqualification proceedings interfere with the regulatory scheme that Congress has created.

As the Supreme Court has observed, "'[c]onflict is imminent whenever two separate remedies are brought to bear on the same activity.'" *Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012) (quoting *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986)). "Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions [may] undermine[ ] the congressional calibration of force." *Crosby*, 530 U.S. at 380 (2000). This is especially so when a federal agency is afforded the discretion to apply those sanctions or stay its hand. *See Buckman*, 531 U.S. at 349-51; *Farina v. Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010) (noting that "regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption").

Here, Congress has delegated supervisory authority over CJA grants to the AO. The AO has the power to "reduce, suspend, or terminate, or disallow payments . . . as it deems appropriate" if the Federal Community Defender does not comply with the terms of its grants. J.A. at 341. But if the Commonwealth could sanction noncompliance, the AO could be hindered in its ability to craft an appropriate response. For example, the AO might be inhibited from exercising its authority to reduce payments if it knew that the Commonwealth might disqualify the Federal Community Defender from representing indigent capital defendants as a result. After all, as the District Court noted in *Mitchell*, "the [AO's] usual remedies, such as recoupment of distributed funds, are more consistent with the CJA's objectives because they mitigate the disruption to the existing attorney-client relationships." 2013 WL 4193960, at *19. Allowing the Commonwealth to attach consequences to the Federal Community Defender's relationship with the AO would "exert an extraneous pull on the scheme established by Congress" in a manner that conflicts with federal objectives. *Buckman*, 531 U.S. at 353.

Consequently, we hold that the disqualification proceedings brought against the Federal Community Defender are preempted and must be dismissed.

IV. CONCLUSION

The federal officer removal statute provides removal jurisdiction for federal courts to decide the motions to disqualify filed in the Commonwealth's PCRA proceedings. Those disqualification proceedings are preempted by federal law. We will therefore affirm the judgments

of the Eastern District of Pennsylvania and reverse the Middle District's judgments, remanding to the Middle District with instructions that the Federal Community Defender's motions to dismiss be granted.[11]

[11]We also wish to express our agreement with the sentiments expressed in the concurrence, which further discusses the context of this dispute.

McKEE, Chief Judge, concurring

I agree with the Majority's conclusions that this action was properly removed under the federal officer removal statute, 28 U.S.C. §§ 1442(a)(1), (d)(1) (2012), and that any state law cause of action is preempted. I therefore join the Majority Opinion in its entirety. Nevertheless, I feel compelled to write separately to amplify the context of this dispute and to stress that the Commonwealth is not actually proceeding on a state law theory at all, despite its claims to the contrary.

I. Context

Although it does not alter our legal analysis of the issues before us, it is difficult not to wonder why the Commonwealth is attempting to bar concededly qualified defense attorneys from representing condemned indigent petitioners in state court. A victory by the Commonwealth in this suit would not resolve the legal claims of these capital habeas petitioners. Rather, it would merely mean that various cash-strapped communities would have to shoulder the cost of paying private defense counsel to represent these same petitioners, or that local pro bono attorneys would have to take on an additional burden. And it would surely further delay the ultimate resolution of the petitioners' underlying claims.

Pennsylvania law instructs that, after the conclusion of a death-sentenced prisoner's direct appeal, "the trial judge shall appoint new counsel for the purpose of post-conviction collateral review, unless . . . [among other things] the defendant has engaged counsel who

has entered, or will promptly enter, an appearance for the collateral review proceedings." Pa. R. Crim. P. 904(H)(1)(c). Death-sentenced petitioners are thus entitled to counsel during PCRA proceedings, and they may be represented by their counsel of choice. *Id*. In the cases consolidated for this appeal, the Federal Community Defender asserts that its attorneys, members of the Pennsylvania bar, are functioning in that capacity—counsel of choice for their condemned clients. The Commonwealth does not challenge that representation.

As my colleagues in the Majority note, the genesis of these disqualification motions was a concurring opinion by then-Chief Justice Castille in *Commonwealth v. Spotz*, 18 A.3d 244 (Pa. 2011) (Castille, C.J., concurring).[1] Maj. Op. 7-8. The opinion severely criticized the tactics, motives, integrity, and even the veracity of Federal Community Defender attorneys who had intervened in state court PCRA proceedings on behalf of a condemned prisoner. It is rife with harsh critiques of the Federal Community Defender. *See Spotz*, 18 A.3d at 334 (Castille, C.J., concurring) ("There is no legitimate, ethical, good faith basis for [their] obstreperous briefing.").[2] Chief Justice Castille

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[1]Then-Chief Justice Castille was joined by then-Justice McCaffery and joined in part by then-Justice Melvin. Although each of these jurists has since left the Pennsylvania Supreme Court, I refer to them as "Chief Justice" or "Justice" for the sake of simplicity.

[2]The opinion further described the representation as abusive and inappropriate. *See Spotz*, 165 A.3d at 330 (Castille, C.J., (continued...)

lamented in his concurring opinion in *Spotz* that the Federal Community Defender's "commitment of . . . manpower" in the PCRA proceedings was "something one would expect in major litigation involving large law firms." *Spotz*, 18 A.3d at 332 (Castille, C.J., concurring). However, I am not quite sure why the same kind of meticulous devotion of resources should not be available to someone who has been condemned to die by the state and who seeks to challenge the legality of that punishment. State post-conviction proceedings *are* a critical stage of litigation for those challenging their capital murder convictions or death sentences. Surely, these cases are not less important than the "high dollar" litigation to which large law firms so often devote substantial resources.[3]

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[2](...continued)
concurring) ("[I]t is time to take more seriously requests by the Commonwealth to order removal of the Defender in cases where, as is becoming distressingly frequent, their lawyers act inappropriately."); *id.* ("[I]t is not clear that the courts of this Commonwealth are obliged to suffer continued abuses by federal 'volunteer' counsel paid by the federal courts."); *id.* at 333 ("The Defender's briefing in this Court is similarly abusive."); *id.* at 335 (noting that, although the presence of the Federal Community Defender "spares Pennsylvania taxpayers the direct expense of state-appointed counsel[,] . . . that veneer ignores the reality of the time lost and the expenses generated in the face of the resources and litigation agenda of the Defender"); *id.* at 336 (referring to "the morass that is the Defender's brief").

[3]In making this point, I do not mean to minimize the heinous nature of the crimes which many of the Defender's clients were convicted of. However, that is simply not the point, nor can it be relevant to the clients' entitlement to counsel under our system of justice.

The ultimate fate of a habeas petitioner in federal court depends to a very large extent on the performance of counsel in state post-conviction proceedings. Indeed, as appreciated by my colleagues, "state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The state post-conviction stage is often a habeas petitioner's first opportunity to raise claims that certain constitutional rights have been violated, and many such claims require significant investigation. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (noting that, in that case, "the initial-review collateral proceeding [was] the first designated proceeding for a prisoner to raise a [Sixth Amendment] claim of ineffective assistance at trial"); *Commonwealth v. Grant*, 813 A.2d 726, 735 (Pa. 2002) (noting that the practice of most state and federal courts is to "only review those claims on direct appeal that can be adequately reviewed on the existing record[,]" and deciding that ineffective assistance of counsel claims are properly presented in state collateral proceedings). With very limited exceptions, a petitioner must raise all claims during state post-conviction proceedings or forfeit review of those claims in federal court. 28 U.S.C. § 2254(b)(1) (2012); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004). Any federal review is almost always limited to the results of the investigations that occurred during state post-conviction proceedings.

Moreover, as any experienced practitioner appreciates, it is exceedingly difficult to introduce additional evidence in support of these claims in federal court. 28 U.S.C. § 2254(e)(2). Thus, after a state court has ruled on the merits of a condemned

petitioner's post-conviction claim, "the die is cast"—as that ruling will only be disturbed during federal habeas corpus review if the state court's judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law." *Id.* § 2254(d)(1). "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). Thus, even if a federal court has a firm belief that the state court's ruling on a petitioner's federal claim was incorrect, the federal court usually must defer to the state ruling. *See Harrington*, 562 U.S. at 101 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." (citation omitted)). It is readily apparent to the lawyers who litigate and the judges who decide these cases that procedural and substantive mistakes of state post-conviction counsel can destroy the chances of vindicating even meritorious constitutional claims in federal court.

Conversely, a thoroughly investigated and well-presented petition for post-conviction relief in state PCRA proceedings can ensure that petitioners' claims are fully heard and appropriately decided on the merits, rather than going unresolved in federal court because of earlier procedural defects. In addition to the important investigative and substantive legal work that an attorney must undertake during post-conviction proceedings in state court, attorneys must fastidiously comply with state procedural rules and the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—which can be notoriously difficult to

calculate—or risk being barred in federal court on procedural grounds. *See* 28 U.S.C. § 2244(d); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) ("The [independent and adequate state ground] doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement."); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 416 n.6 (2005) (discussing different means of calculating AEDPA's one-year limitations period).[4]

The labyrinthine complexity of federal habeas review has caused one noted jurist to conclude that AEDPA's "thicket of procedural brambles" is one of the most difficult legal schemes for an attorney to navigate. *In re Davis*, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting). Indeed, AEDPA's procedural obstacle course compares to the notoriously vexing Rule Against Perpetuities insofar as both enmesh the

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[4]"In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. A procedural default caused by state post-conviction counsel's mistake may also be excused if agency relationship between the lawyer and client had been severed, *see Maples v. Thomas*, 132 S. Ct. 912 (2012), or (in more limited circumstances) if the state post-conviction counsel was unconstitutionally inadequate, *see Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). However, relief on the basis of inadequate state post-conviction counsel remains difficult to obtain. *See Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task.").

unwary (or unseasoned) lawyer in a procedural minefield that can put him or her out of court.[5] Even if a petitioner's claims are eventually heard in federal court, initial missteps can increase the expense and time of the litigation there. *See*, *e.g.*, *Maples*, 132 S. Ct. at 916-17 (noting that the issue of whether a petitioner could excuse his procedural default, caused by negligent attorneys' missing a state court filing deadline, had been litigated extensively below). Deciding issues of life and death on such procedural intricacies threatens to undermine trust and confidence in the accuracy of the criminal justice system. *See* Brendan Lowe, *Will Georgia Kill an Innocent Man?*, TIME, July 13, 2007, http://content.time.com/time/nation/article/0,8599,1643384,00.html (explaining that the requirements of AEDPA made it difficult for petitioner Troy Davis to litigate his claim of actual innocence).

Systematic attempts to disqualify competent Federal Community Defender attorneys from representing clients in state post-conviction proceedings are all the more perplexing and regrettable when one considers the plethora of literature discussing how inadequate representation at the state post-conviction stage increases the cost of the criminal justice system and creates a very real risk of miscarriages of justice. *See* Ken Armstrong, *Lethal Mix: Lawyers' Mistakes, Unforgiving Law*, WASH. POST, Nov. 16, 2014, at A1. For

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[5] *See* W. Barton Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318, 1322 (1960) ("[T]he esoteric learning of the Rule Against Perpetuities is, apart from dim memories from student days, a monopoly of lawyers who deal in trusts and estates.").

example, many petitioners have been barred from federal court because their lawyer missed a deadline. *See id.* There are numerous reasons why this should concern prosecutors as much as defense counsel—not the least of which is that some actually innocent petitioners only gain relief at the federal habeas corpus stage of their post-conviction appeals process. *See id.* (noting, by way of example, that "of the 12 condemned prisoners who have left death row in Texas after being exonerated since 1987, five of them were spared in federal habeas corpus proceedings").[6] There were at least 125 exonerations in 2014—the highest in recorded history. *See* NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014 at 1 (2015), *available at* https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf. Access to the Great Writ can be particularly critical to death-sentenced petitioners, some of whom may have meritorious claims of actual innocence.[7]

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[6] *See also Berger v. United States*, 295 U.S. 78, 88 (1935) ("[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

[7] This is not to suggest that state courts are less capable of ruling on constitutional claims, or that lawyers other than the Federal Community Defender are less capable of litigating them. However, it would be naïve to think that the investigation, presentation, and preservation of these claims is a simple task, or that the skill with which the claims are presented to state and federal courts has no effect on how the courts resolve those claims. The petitioners in these cases understand the stakes of this litigation, and they have chosen the Defender as their counsel of

(continued...)

Against this backdrop, the Federal Community Defender has apparently concluded that representing these petitioners at an earlier stage of their post-conviction appeals process is consistent with its purpose, and the Administrative Office of the United States Courts has neither voiced an objection, nor chosen to interfere with this representation. Rather, the Commonwealth (*i.e.*, opposing counsel) is attempting to disqualify highly qualified defense counsel from representing these death-sentenced petitioners in state court. The Commonwealth is obviously not objecting because the Federal Community Defender is providing inadequate representation and thereby denying the petitioners the constitutional rights that all parties seek to respect. Rather, the objection seems to be that the Federal Community Defender is providing too much defense to the accused. To again quote the criticism from the *Spotz* concurrence, they are approaching the litigation the same way a large law firm might approach representation of a client in "major litigation" concerning large sums of money. *See Spotz*, 18 A.3d at 332 (Castille, C.J., concurring).

II. The Authority for the Disqualification Motions

The Majority Opinion notes that it is "unclear" whether the Orders in this case were actually issued pursuant to the "named source of state authority,"

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[7](...continued)
choice. Given that context and the lack of sanctionable misbehavior by the Federal Community Defender, I merely urge that we respect that decision.

Article V, § 10(c) of the Pennsylvania Constitution. Maj. Op. 31. It is not only unclear, it is quite dubious. I separately address this issue to highlight the absence of authority to support the Commonwealth's argument and to emphasize the extent to which the legal underpinnings of the Commonwealth's argument have shifted during this litigation. The Commonwealth's current theory appears to be that state law authorizes promulgation of new disqualification rules targeted at specific Pennsylvania attorneys in specific cases. Although both the weakness of that position as well as the extent to which the Commonwealth has previously relied on a different theory are worth emphasizing, I nevertheless agree with the Majority's conclusion that the Commonwealth's claims are preempted, even if they were properly based in state law.

A. The Commonwealth's legal rationales

The Commonwealth did not initially rely on the Pennsylvania Constitution in seeking disqualification of the Federal Community Defender attorneys. Rather, the Commonwealth claimed it was seeking to disqualify the Federal Community Defender from appearing in state court because of an alleged misuse of federal funds. The district court in *Mitchell*, one of the cases that was consolidated for this appeal, accurately described the Commonwealth's litigation theory as follows:

> The Commonwealth's seven-page motion devoted almost two pages of citations to its allegation that the presence of federally-funded [Federal Community Defender] lawyers in Mitchell's state case was unlawful under federal

> law. Mot. for Removal ¶ 6. It asserted no corollary state law cause of action, and it made no reference to an attorney disqualification proceeding or to any violation of the rules of professional conduct. The motion offered a single state law citation: it pled jurisdictional authority to pursue the matter under Section 10(c) of the state Constitution, the general provision endowing the Pennsylvania Supreme Court with the right to govern its courts. *Id.* ¶ 7. Even this citation, however, was secondary to its assertion, earlier in the paragraph, that it had concurrent jurisdiction to enforce federal law. *Id.*

In re Pennsylvania, No. 13-1871, 2013 WL 4193960, at *15 (E.D. Pa. Aug.15, 2013) (footnote omitted) [hereinafter *Mitchell*]. As the *Mitchell* court noted, § 10 of the Pennsylvania Constitution was only used to justify opposition to the Federal Community Defender's representation of capital defendants *after* the Federal Community Defender removed this action to federal court. However, even then, § 10 was more of a passing reference than the foundation of the Commonwealth's arguments in the district courts.

Article V, § 10(c) of the Pennsylvania Constitution allows the Pennsylvania Supreme Court to make "general rules" to govern the state court system. PA. CONST., art. V § 10(c). However, § 10(c) is not cited at all in the Commonwealth's briefs to this Court. Instead, the Commonwealth stated generally that the disqualification motions were rooted in the "sovereign authority of Pennsylvania, including its power to supervise the practice of law under Article V, § 10 of

the State constitution." Com. First Step Br. 38. It later cited to Article V, § 10(a) of the Pennsylvania Constitution as the basis for the state's sovereign power to "regulate[ ] the practice of law in Pennsylvania State courts." Com. Third Step Br. 37; *see also id*. at 34.

By contrast, the basis for the Commonwealth's challenge to the Federal Community Defender at the beginning of this litigation was federal law. The rules articulated by the state Supreme Court in these consolidated cases differed slightly in their wording, but the main thrust of each was as follows:

> If federal funds were used to litigate the PCRA [proceeding] . . . the participation of the [Federal Community Defender] in the case may well be unauthorized by federal court order or federal law. Accordingly, on remand, the PCRA court is directed to determine whether to formally appoint appropriate post-conviction counsel and to consider whether the [Federal Community Defender] may or should lawfully represent appellant in this state capital PCRA proceeding.

Maj. Op. 11 (quoting *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1151 (Pa. 2012)). Not only was federal law the initial basis for these Orders, it was the *only* justification given in state court for disqualifying the Federal Community Defender. Thus, far from proceeding on a state law theory, the Commonwealth originally claimed that its opposition to the Federal Community Defender's representation was based on the Commonwealth's desire to enforce *federal* law.

The Commonwealth concedes that it lacks a right of action under the Criminal Justice Act, 18 U.S.C. § 3006A *et seq.*, and I agree with the Majority's conclusion that the Commonwealth may therefore not "claim a direct violation of federal law." Maj. Op. 31. Because the Commonwealth has no right of action to enforce federal law directly, it also does not have the authority to enforce compliance with federal law indirectly through a new state rule targeted at specific attorneys. *See Astra USA, Inc. v. Santa Clara Cnty., Cal.*, 131 S. Ct. 1342, 1345 (2011) (noting that direct and indirect legal challenges are "one and the same" and must be treated as such, "[n]o matter the clothing in which [litigants] dress their claims" (quoting *Tenet v. Doe*, 544 U.S. 1, 8 (2005) (internal quotation marks omitted)). The *post hoc* nature of the Commonwealth's assertion that the rules aimed at the Federal Community Defender were actually made pursuant to § 10(c), and the absence of supporting authority for this theory, seriously undermine the credibility of that assertion.

B. State law cause of action

As my colleagues appreciate, and as I explained at the outset, the impetus for this litigation, and ultimately this new "rule," was the concurring opinion in *Spotz* that accused the Federal Community Defender in the PCRA litigation of being "abusive," "obstructionist," and "contemptuous." 18 A.3d at 330-33 (Castille, C.J., concurring). It also referred to the alleged use of federal funds for that purpose as "perverse." *Id.* at

331.[8] The Pennsylvania Supreme Court then promulgated what amounts to a new "rule" in cases where the Federal Community Defender was representing a PCRA petitioner: that the lower courts should consider disqualifying counsel if they conclude that the Federal Community Defender is misusing federal funds. *See*, *e.g.*, *Sepulveda*, 55 A.3d at 1151. However, because this rule bears no resemblance to the procedural rules that the state Supreme Court has historically

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[8]The Commonwealth cites to the *Spotz* line of reasoning in its brief to this Court, arguing that the Federal Community Defender has "pursued a strategy to overwhelm the state courts with volumes of claims and pleadings, many simply frivolous, a strategy which burdens prosecutors and can shut down a trial court for weeks." Com. First Step Br. 48 (internal quotation marks omitted). The criticism leveled at the Federal Community Defender in *Spotz*, and repeated by the Commonwealth in its briefing, goes beyond accusations of zealousness or merely over-trying a case. The Chief Justice and the concurring Justices accuse the Federal Community Defender of engaging in tactics that are intended to obstruct the state's judicial process and thereby halt the state's attempt to enforce the death penalty. *See Spotz*, 18 A.3d at 331 (Castille, C.J., concurring). Later, in response to a motion asking him to withdraw that concurring opinion, Chief Justice Castille issued a Single Justice Opinion on Post-Decisional Motions, which reaffirmed the importance of "principled representation of indigent capital defendants" as being "lawyering in the best tradition of the bar." *Commonwealth v. Spotz*, 99 A.3d 866, 867 (2014) (Castille, C.J.). However, the opinion again described representation of the Federal Community Defender as advancing "an agenda beyond mere zealous representation, one which routinely pushes, and in frequent instances, as here, far exceeds ethical boundaries" in pursuit of its "global agenda." *Id*. at 867. The opinion then sets forth examples to support its accusation that the Federal Community Defenders "**are at bottom gaming a system and erecting roadblocks in aid of a singular goal—keeping [their client] from being put to death.**" *Id*. at 868 (emphasis in original).

promulgated or enforced pursuant to § 10(c), the proposition that § 10(c) actually provides authority for the disqualification rule is tenuous at best.

The Pennsylvania Constitution states, in relevant part, that "[t]he Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant. . . ." PA. CONST., art. V § 10(c). Though § 10 gives the state Supreme Court authority to "exercise general supervisory . . . authority" over the courts and to prescribe "general rules" regulating the courts, nothing about the rules announced in these cases is the least bit "general." PA. CONST., art. V § 10(a), (c). Instead, as my colleagues note, the Pennsylvania Supreme Court decreed that "if the Federal Community Defender fails to show that its actions representing its clients are entirely 'privately financed' with non-federal funds, the state PCRA court is to disqualify the Federal Community Defender as counsel." Maj. Op. 31. Rather than being a general rule, the Order that energizes this dispute is aimed squarely and solely at the Federal Community Defender.

The Pennsylvania Supreme Court has exercised its § 10 power in a number of different ways, but it has not previously promulgated a targeted rule like the one that is purportedly present here. Moreover, its previous exercises of § 10 authority are so dissimilar from this case that they provide little support for the Commonwealth's current theory. For example, the Court has promulgated and enforced general rules of

civil and appellate procedure.[9] It has exercised its § 10(c) power to regulate judges, attorneys, and the practice of law by creating and enforcing the Code of Judicial Conduct, which regulates the activity of judges,[10] and by defining and regulating the practice of law in Pennsylvania.[11] It has also maintained its exclusive authority over the regulation of attorneys in the state by invalidating legislation that attempted to regulate this area.[12] In a more unique use of this power, the state court established procedures to implement a new constitutional rule announced by the United States Supreme Court.[13] Taken together, these cases stand for the proposition that the state court, ethics board, or other appropriate entity can make and enforce clearly-established, generally applicable rules of conduct to govern the conduct of judges and lawyers in state courts.

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[9]*See Commonwealth v. Rose*, 82 A.3d 426 (Pa. 2013); *Laudenberger v. Port Auth. of Allegheny Cnty.*, 436 A.2d 147, 155 (Pa. 1981) (referring to the state Supreme Court's "constitutional rule-making authority").

[10]*See Commonwealth v. Melvin*, 103 A.3d 1, 14 (Pa. Super. Ct. 2014).

[11]*See Lenau v. Co-eXprise, Inc.*, 102 A.3d 423, 432-33 (Pa. Super. Ct. 2014).

[12]*See Wajert v. State Ethics Comm'n*, 420 A.2d 439, 442 (Pa. 1980).

[13]*See Commonwealth v. Hackett*, 99 A.3d 11, 26 (Pa. 2014) (interpreting *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that intellectually disabled people could not be executed, but which initially gave states the ability to establish procedures to assess whether capital defendants were intellectual disabled).

In re Merlo, the main case cited by the Commonwealth in support of its actions here, is an illustrative example of the Pennsylvania Supreme Court's § 10 power. 17 A.3d 869 (2011). Though the Commonwealth asserts that *Merlo* supports its claim, the run-of-the-mill attorney discipline case is so dissimilar from the instant case that it actually undercuts the Commonwealth's position. In *Merlo*, a local judge who had been suspended for absenteeism and for being abusive towards parties petitioned to set aside her suspension on the ground that the Supreme Court did not have the power to suspend her. *Id*. at 871. The state Supreme Court had suspended the judge after concluding that the Judicial Conduct Board had probable cause to file a formal charge against her. That charge asserted various violations of the Rules Governing Standards of Conduct of Magisterial District Judges. In its decision, Pennsylvania Supreme Court explained that an earlier amendment to the state constitution had not stripped it of its general and broad power to supervise attorneys and enforce the state ethics rules. *Id*.

Merlo thus demonstrates how the Pennsylvania Supreme Court regulates attorney discipline: by applying general rules of conduct equally to all lawyers. The additional cases cited by the Commonwealth also generally support the position that the Pennsylvania Supreme Court has retained the power to regulate the conduct of lawyers through enforcement of the state's ethical and conduct rules. *See Office of Disciplinary Counsel v. Jepsen*, 787 A.2d 420, 424-25 (Pa. 2002) (holding that the Court of Judicial Discipline does not have exclusive authority over regulating lawyers'

conduct).[14] It is clear that Pennsylvania courts and the state disciplinary board have the authority to discipline *any* attorney whose conduct so transcends the bounds of propriety as to be sanctionable. However, none of the generally applicable rules that regulate the conduct of Pennsylvania lawyers were even cited in the

[14]The cases relied on by the Commonwealth also explain that courts themselves, not merely the state disciplinary board, have the power to enforce the state ethical rules against lawyers who appear before them. *Slater v. Rimar, Inc.*, 338 A.2d 584, 587 (1975) (explaining that a judge may disqualify an attorney appearing before him who is conflicted out of representing his client); *Am. Dredging Co. v. City of Phila.*, 389 A.2d 568, 571-72 (1978) (noting that a trial court has the power and duty to ensure that lawyers appearing before it comply with the Code of Professional Responsibility, and considering the merits of whether an attorney betrayed the confidence of a client). Finally, the authority cited by the Commonwealth makes clear that a state's ability to regulate lawyers is undoubtedly one of its important roles—though that power is not without limits. *See*, *e.g.*, *Leis v. Flynt*, 439 U.S. 438, 442-43 (1979) (holding that out-of-state attorneys did not have a federal constitutional right to appear pro hac vice in Ohio court); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 97 S. Ct. 2691, 2694 (1977) (holding that a state rule barring lawyers from advertising their services was not challengeable under the Sherman Act but also that the state rule, as applied, violated the attorneys' First Amendment free speech rights). The Commonwealth also referred to *Hoover v. Ronwin*, 466 U.S. 558 (1984), and *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975), which involved challenges under the Sherman Act to the grading of the Arizona bar exam and a fee schedule published by a Virginia county bar, respectively. Neither supports the Commonwealth's argument that its state constitution is a proper basis of authority for the disqualification motions into this case.

disqualification orders before us.[15] To the extent that the Federal Community Defender's zealousness violates generally-applicable codes of conduct, the appropriate remedy would appear to be enforcing those codes of conduct in specific instances against specific attorneys rather than systematically depriving condemned prisoners of their counsel of choice as a matter of policy.

The issue here is not whether the Pennsylvania Supreme Court can enforce Pennsylvania's ethical rules; it surely can, but the Disqualification Orders in these cases were not issued pursuant to a charge that the Federal Community Defender violated a specific rule of conduct. Rather, the question here is what rule or law is actually being enforced. The Federal Community Defender argues that the Commonwealth is impermissibly trying to enforce federal law. The Commonwealth now relies upon a state law cause of action. However, the Commonwealth has not directed us to a previous instance where § 10 has been used to support what it attempts in this case: enforcement of a specific rule that is aimed directly at a single legal

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[15]The Commonwealth argued at a hearing in the district court in the *Mitchell* litigation that Pennsylvania Rule of Professional Conduct 8.3(a) was the true basis of the disqualification motion. That rule "instructs attorneys to inform 'the appropriate professional authority' if he or she 'knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.'" *Mitchell*, 2013 WL 4193960, at *14 (citing 204 Pa. Code § 8.3(a)). This is the only mention of an existing Rule of Professional Conduct of which I am aware. The Commonwealth appears to have abandoned this argument on appeal.

office or attorney based on conduct which has not been found to violate any of Pennsylvania's general rules governing the conduct of lawyers. The absence of any such citation is understandable, as I have not been able to find any such case. Therefore, even if it were not preempted, the purported disqualification rule here would not be authorized under state law.[16]

III. Conclusion

Though this dispute has been cloaked in claims of state authority and appeals to principles of federalism, I am unfortunately forced to conclude that this suit actually arises out of simple animosity or a difference in opinion regarding how capital cases should be litigated. Given the costs of capital litigation and the very real stakes for the petitioners in these cases, it is extremely regrettable that this debate has now played out in our judicial forum.

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[16]Like my colleagues, I recognize that the Pennsylvania Supreme Court is the ultimate arbiter of the meaning of the state constitution. However, neither the Majority Opinion nor this opinion relies on an interpretation of state law. Moreover, as explained, federal law preempts any state law cause of action.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

In re:	:	**CIVIL ACTION**
	:	
PROCEEDING BEFORE THE COURT OF COMMON PLEAS OF PHILADELPHIA TO DETERMINE THE PROPRIETY OF THE DEFENDER ASSOCIATION OF PHILADELPHIA'S REPRESENTATION OF WILLIAM JOHNSON IN COMMONWEALTH OF PENNSYLVANIA V. JOHNSON	:	**No. 13-2242**

MEMORANDUM

Schiller, J. **September 6, 2013**

William Johnson was convicted of first-degree murder in Pennsylvania state court and sentenced to death. The Federal Community Defender Organization for the Eastern District of Pennsylvania (FCDO)[1] represents Johnson in his petition under the Pennsylvania Post-Conviction Relief Act (PCRA). During the PCRA proceedings, the Pennsylvania Supreme Court ordered the PCRA court to hold a hearing regarding

[1]The FCDO is the Federal Court Division of the Defender Association of Philadelphia.

whether the FCDO's representation of Johnson in the PCRA proceedings was proper given the FCDO's federal funding and the lack of a federal appointment order. The FCDO removed that proceeding to this Court. Before the Court are the Commonwealth's motion to remand and the FCDO's motion to dismiss. For the reasons that follow, the motion to remand is denied, and the motion to dismiss is granted.

I. FACTUAL AND PROCEDURAL HISTORY

Johnson initially sought post-conviction relief from his death sentence by filing a *pro se* petition under the PCRA, after which time the PCRA court appointed a succession of four different attorneys to represent him in the proceedings. In 2006, an attorney from the FCDO undertook the PCRA representation of Johnson and ultimately filed an appeal before the Pennsylvania Supreme Court. While the appeal was pending, the Commonwealth on at least two occasions raised with the Pennsylvania Supreme Court the propriety of the FCDO's representation of Johnson in the PCRA litigation.

In 2011, after briefing on the merits of Johnson's appeal was completed, the Pennsylvania Supreme Court issued an order directing the FCDO to produce a copy of its federal appointment order. The FCDO replied that it did not have such an appointment order. Subsequently, in its order remanding Johnson's case to the PCRA court, the supreme court included a direction that the PCRA court "determine whether current counsel from the Federal Community Defender's Office should continue to represent appellant in this state capital PCRA proceeding, or whether other appropriate

post-conviction counsel should be appointed, as there is no federal order authorizing current counsel's involvement in these state court collateral proceedings . . . ." (Notice of Removal, Ex. A. [Supreme Court Order].)

The FCDO removed the proceeding to this Court under the federal officer removal statute, 42 U.S.C. § 1442. It then moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the Commonwealth lacked a private right of action to enforce the federal law that regulates FCDO funding, and that state regulation in this area is preempted by federal law. The Commonwealth moved to remand the proceeding to state court, arguing that removal under § 1442 was improper, and opposed the motion to dismiss.

II. DISCUSSION

In deciding the Commonwealth's motion to remand and the FCDO's motion to dismiss, this Court is not writing on a blank slate. This case is one of at least seven similar state court proceedings that have been removed to federal court. (Br. in Opp'n to the Commonwealth's Mot. to Remand at 5 n.3.) These cases have resulted in a number of opinions which address the issues before this Court. *See In re Commonwealth v. Harris*, Misc. A. No. 13-63 [sic], 2013 WL 4501056 (E.D. Pa. Aug. 22, 2013); *In re Commonwealth v. Dowling*, Civ. A. No. 13-510, 2013 WL 4458848 (M.D. Pa. Aug. 16, 2013); *In re Commonwealth v. Dick*, Civ. A. No. 13-561, 2013 WL 4458885 (M.D. Pa. Aug. 16, 2013); *In re Commonwealth v. Mitchell*, Civ. A. No. 13-1871, 2013 WL 4193960 (E.D. Pa. Aug. 15, 2013). This Court finds highly persuasive the opinions of Judges

McLaughlin and Rufe on these matters. *See Harris*, 2013 WL 4501056; *Mitchell*, 2013 WL 4193960.[2] As such, this Court adopts the relevant analysis and conclusions of *Harris* and *Mitchell*. Specifically, the FCDO has met all requirements of the federal officer removal statute and thus jurisdiction in this Court is proper. Furthermore, the Commonwealth fails to state a claim because it lacks standing to bring a private right of action to enforce the federal statute that regulates the FCDO's funding, and alternatively because state regulation in this area is preempted by federal law.

The Commonwealth argues that this Court's analysis should be altered because the Pennsylvania Supreme Court *sua sponte* ordered an inquiry into the FCDO's representation of Johnson in this case, rather than in response to a motion by the Commonwealth, as in *Mitchell* and *Harris*. The Court does not believe that

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[2]These opinions diverge from the opinions in *Dick* and *Dowling* on one key issue: whether the FCDO must show that it was "acting under" a federal officer *in the PCRA proceedings* or simply "acting under" a federal office *in general* to satisfy the requirements of the federal officer removal statute. *See Harris*, 2013 WL 4501056 at *4; *Dowling*, 2013 WL 4458848 at *7; *Dick*, 2013 WL 4458885 at *7; *Mitchell*, 2013 WL 4193960 at *8-9. This Court is persuaded that the more general inquiry conducted in *Mitchell* and *Harris* is proper. To ask the more specific inquiry would render the "arising under" inquiry essentially repetitive of the statute's additional requirement, that there is a causal connection between the proceeding and acts taken under color of federal law. *See Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012) ("[T]he . . . element which requires the gravamen of the claim against [the removing party] occur while it acted under color of federal authority . . . is distinct from the 'acting under' requirement . . . .").

this fact changes the analysis of whether the Commonwealth lacked a private right of action to enforce federal law or whether state regulation in this area is preempted by federal law. *See Harris*, 2013 WL 4501056 at *7 ("Restrictions on private rights of action apply whenever a party is 'in substance' attempting to enforce a provision of federal law") (citation omitted); *see also Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 973 (2012) (employing a functional preemption analysis and refusing to rely on the state's characterization of its action). Therefore, because the issues presented in *Harris* and *Mitchell* are nearly identical to the issues presented in this case, this Court adopts the analysis of those cases.

III. CONCLUSION

The Commonwealth's motion to remand is denied, and the FCDO's motion to dismiss is granted. An Order consistent with this Memorandum will be docketed separately.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

In re:	:	**CIVIL ACTION**
	:	
PROCEEDING BEFORE	:	
THE COURT OF COMMON	:	
PLEAS OF PHILADEL-	:	
PHIA TO DETERMINE	:	
THE PROPRIETY OF THE	:	
DEFENDER ASSOCIATION	:	
OF PHILADELPHIA'S	:	
REPRESENTATION OF	:	
WILLIAM JOHNSON IN	:	
COMMONWEALTH OF	:	
PENNSYLVANIA V.	:	**No. 13-2242**
JOHNSON	:	

ORDER

AND NOW, this **6th** day of **September**, **2013**, upon consideration of the Commonwealth of Pennsylvania's Motion to Remand, the Federal Community Defender Organization's Motion to Dismiss, and all the responses thereto and replies thereon, and for the reasons stated in the Court's Memorandum dated September 6, 2013, it is hereby **ORDERED** that:

1. The Motion to Remand (Document No. 10) is **DENIED**.

2. The Motion to Dismiss (Document No. 8) is **GRANTED** and this matter is **DISMISSED with prejudice**.

3. The Clerk of Court is directed to close this case.

BY THE COURT:

/s/
Berle M. Schiller, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

IN RE PROCEEDING IN WHICH THE COMMONWEALTH OF PENNSYLVANIA SEEKS TO COMPEL THE DEFENDER ASSOCIATION OF PHILADELPHIA TO PRODUCE TESTIMONY AND DOCUMENTS AND TO BAR IT FROM CONTINUING TO REPRESENT DEFENDANT MITCHELL IN STATE COURT	:	NO. 13-cv-1871

MEMORANDUM

McLaughlin, J. August 15, 2013

Isaac Mitchell, a Pennsylvania state prisoner under sentence of death, is represented in his state and federal habeas corpus proceedings by attorneys with the Federal Community Defender Organization, Eastern District of Pennsylvania ("FCDO"). The Commonwealth has filed a motion in the Pennsylvania Supreme Court to remove the FCDO as counsel in Mitchell's state proceeding for allegedly violating its funding obligations under federal law. As a result, the Pennsylvania Supreme Court directed the Court of Common Pleas to hold a hearing to determine whether the FCDO used federal grant monies in its state court representation of Mitchell, and, if it made such a finding, to disqualify the FCDO from the case. The FCDO has now removed the hearing to federal court

under 28 U.S.C. § 1442, the federal officer removal statute.

This memorandum resolves two motions, filed in federal court, related to the hearing and its directives as set forth by the Pennsylvania Supreme Court.[1] First, the Commonwealth has moved to remand the proceeding to state court. Second, the FCDO has moved to dismiss the proceeding for failing to state a claim for relief.

The Court denies the Commonwealth's motion to remand. The FCDO's removal was proper under 28 U.S.C. § 1442(a) and § 1446(g), in that the hearing was directed to a person acting under a federal agency, pled a colorable defense that the proceeding was related to an act taken under color of federal office, and was timely removed.

The Court grants the FCDO's motion to dismiss under Fed. R. Civ. P. 12(b)(6). The essence of the Commonwealth's claim is that the FCDO should be disqualified from representing Mitchell in his state post-conviction proceeding because it is using federal monies in that representation, in violation of the Criminal Justice Act ("CJA") and 18 U.S.C. § 3599 ("§ 3599"). The FCDO argues that there is no private right

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[1]A third related motion was also filed in the underlying habeas corpus proceeding, *Mitchell v. Wetzel*, 11-2063, in which Mitchell sought an order from the Court authorizing the FCDO to exhaust Mitchell's state court remedies in the scope of its federally funded duties ("Authorization Motion"). Docket No. 7. In a separate memorandum and order with today's date, the Court denied the FCDO's Authorization Motion.

of action under the federal statutes the Commonwealth seeks to enforce. The Commonwealth concedes that point but argues that the private right of action doctrine does not apply to an action brought in the public interest by a governmental entity. Third Circuit and Supreme Court precedent applying the private right of action doctrine in such circumstances causes the Court to reject the Commonwealth's theory.

The Commonwealth next argues that even if it cannot enforce federal law directly, it can incorporate that federal law into its state code of professional conduct and then disqualify the FCDO for violating those rules of professional conduct. Again, Supreme Court precedent rejects such a formalistic approach to determining whether a proceeding falls under the private right of action doctrine. It instructs courts to look to the substance of the cause of action at issue. The substance of the Commonwealth's motion to disqualify is that the FCDO's use of federal money in state court violates federal law. As the Commonwealth's counsel said at oral argument, its allegations are all "coming from" the unauthorized use of federal money.

Even if the Commonwealth's motion were not otherwise barred, it would fail on preemption grounds. Any state rule of professional conduct that attempted to enforce the CJA and § 3599 would be an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in passing those statutes.

I. Factual and Procedural Summary

In 1999, Isaac Mitchell was convicted of two counts of first-degree murder and sentenced to death by a jury sitting in the Court of Common Pleas of Philadelphia County. His sentence was affirmed by the Pennsylvania Supreme Court on direct appeal in December 2003. *Commonwealth v. Mitchell*, 839 A.2d 202, 283 (Pa. 2003).

Mitchell petitioned for post-conviction relief under the state Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541, et seq., in June 2004. Mitchell's first court-appointed counsel filed amended and supplemental pleadings, and after a limited evidentiary hearing, his petition was rejected in July 2010. A second counsel was appointed by the court for purposes of Mitchell's PCRA appeal, but that counsel did not file a timely notice of appeal and allowed Mitchell's filing deadline to expire. The second counsel later moved to withdraw from Mitchell's case. Notice of Removal, ¶ 11-12 (Docket No. 1).

On September 20, 2010, counsel from the Federal Community Defender Organization, Eastern District of Pennsylvania entered its appearance on behalf of Mitchell in the Court of Common Pleas.[2] The Commonwealth did not object. FCDO counsel also successfully

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[2]The FCDO entered its appearance in Mitchell's state court proceeding at Mitchell's request. As members of good standing of the Pennsylvania bar, FCDO counsel meet the qualifications set forth under state law to provide Mitchell's representation. Mot. to Dismiss at 1, 6 (Docket No. 4); Mot. for Remand at 1 (Docket No. 14).

moved to restore Mitchell's PCRA appellate rights. *Id.* ¶ 13.

On March 25, 2011, the FCDO filed a federal habeas petition on Mitchell's behalf in the instant court. On April 1, 2011, Mitchell moved the Court to appoint the FCDO as his federal counsel under 18 U.S.C. § 3599(a)(2). He also moved to hold the federal proceedings in suspense.[3] The Commonwealth did not object to these motions, and the Court appointed the FCDO as federal counsel and placed the federal case in suspense pending exhaustion of state remedies. *Id.* ¶ 14-16; *see also* 4/15/11 Orders, *Mitchell v. Wetzel*, 11-2063 (Docket Nos. 5-6).

Over the next year, the FCDO took several steps to prepare Mitchell's PCRA appeal brief, including issuing discovery requests, investigating prior and collateral claims, and filing a preliminary statement of matters on appeal. On September 13, 2012, the FCDO filed Mitchell's PCRA appeal brief with the Pennsylvania Supreme Court. *Id.* ¶ 17; *see also* Initial Brief, *Commonwealth v. Mitchell*, No. 617 Cap. App. Dkt.

On September 25, 2012, the Pennsylvania Supreme Court *sua sponte* directed the FCDO to "produce a copy

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[3]In light of his second counsel's failure to file a timely notice of appeal, Mitchell filed, and then moved to stay, his federal proceeding to preserve his right to federal habeas relief in the event that the Pennsylvania Supreme Court ultimately denied his right to an appeal. *See* 28 U.S.C. § 2244(d)(2) (one-year statute of limitations for federal habeas petitions begins to run when direct appeal becomes final); *see also* Mot. to Stay, ¶ 4-5, *Mitchell v. Wetzel*, 11-2063 (Docket No. 4).

of any federal or state appointment order it may have secured in this matter, authorizing it to pursue a [PCRA] petition in Pennsylvania state courts." Order 9/25/12, Opp. to Mot. to Dismiss, exh. 1 (Docket No. 15-1). The FCDO responded to this request on October 5, 2012. It stated that it had secured an order appointing it as counsel for Mitchell's federal proceeding, but that the order did not mention Mitchell's state proceeding. The FCDO further stated that it was able to represent Mitchell in state court without a federal order in its capacity as a "nonprofit organization providing defender services." Response 10/5/12, Mot. to Remand, exh. 2 (Docket No. 14-4).

On October 16, 2012, the Commonwealth filed a motion to remove the FCDO as counsel in the state court proceeding ("Motion for Removal"). Referring to a set of cases analyzing the scope of federally appointed counsel under 18 U.S.C. § 3599, the Commonwealth contended that "the presence of federally-funded FCDO lawyers in [Mitchell's] case is unlawful." It argued that the Pennsylvania Supreme Court had jurisdiction to remove the FCDO as counsel by way of its power to govern the practice of law as well as the general doctrine of concurrent jurisdiction. Mot. for Removal, *id*., at exh. 4, at 2-6. The FCDO submitted a brief opposing the Commonwealth's motion. *Id*., at exh. 5.

The Pennsylvania Supreme Court issued a *per curiam* decision on this motion on January 10, 2013 ("Supreme Court Order"). The Supreme Court Order remanded the motion to the Court of Common Pleas of Philadelphia County, the lower court that had previously presided over Mitchell's PCRA petition ("PCRA court"). Noting that it was "not clear" under

federal law whether the FCDO had authority to participate in the state proceeding, the Pennsylvania Supreme Court directed the PCRA court to hold a hearing to determine whether to remove the FCDO as counsel. Specifically, it ordered the PCRA court to "determine whether the FCDO used any federal grant monies to support its activities in state court in this case." If the PCRA court determined that the FCDO's actions were privately financed, then the PCRA court was to allow the FCDO to remain on the case. If, however, the FCDO failed to demonstrate that its actions were privately financed, the Pennsylvania Supreme Court directed the PCRA court to remove it as Mitchell's counsel.[4] Supreme Court Order, Notice of Removal, exh. A.

On March 14, 2013, Mitchell filed a motion with the instant Court, requesting that the Court reactivate the federal habeas case and enter an order authorizing the FCDO to exhaust his claims in state court in the scope of its federally funded duties. Authorization Mot., *Mitchell v. Wetzel*, 11-2063 (Docket No. 7). At that point, the PCRA court had not yet acted on the Pennsylvania Supreme Court's order of January 10.

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[4]Two justices dissented from the order, stating that the Court's *per curiam* order decided "novel questions without discussion of the parties' arguments, without citation to legal authority, without benefit of any lower court analysis, and indeed, without acknowledgment that there are open legal questions." The dissent noted that the issue presented required "the construction of federal statutes and other authority, consideration of the relationship between federal and state court systems in capital litigation, and consideration of counsel's role therein." Dissenting Statement to Supreme Court Order, Notice of Removal, exh. A.

On March 19, in light of the federally-filed motion, the PCRA court requested that the parties submit papers on whether it should "refrain from proceeding with the remand hearing ordered by the Pennsylvania Supreme Court until such time as the United States District Court has acted on petitioner's Motion." Notice of Removal, exh. C. On April 3, 2013, after receiving the parties' correspondences, and after hearing from counsel in open court, the PCRA court issued an order setting a hearing date of June 12, 2013 on the remanded issue ("PCRA hearing"). *Id*., exh. E; *see also id*. at ¶ 7; Tr. Hr'g 6/27/13 49:24-50:18.

Two days later, on April 5, 2013, the FCDO filed a Notice of Removal as to the PCRA hearing, which the instant Court received as related to Mitchell's suspended federal habeas case.[5] On April 12, 2013, the FCDO moved to dismiss the proceeding under Fed. R. Civ. P. 12(b)(6), or, in the alternative, to stay the proceeding and refer the issue to the administrative agency for its views. On May 6, 2013, the Commonwealth moved to remand the proceeding to state court. The Court heard oral argument on these motions on June 27, 2013.

II. Overview of Associated FCDO Litigation

This proceeding is part of a broader effort by the Commonwealth to disqualify FCDO counsel from representing petitioners in state post-conviction

[5]The underlying state action, in which Mitchell is appealing the denial of his PCRA petition, has not been removed and remains in the Court of Common Pleas of Philadelphia County.

proceedings. In addition to the proceeding in front of this Court, at least six Pennsylvania capital cases are currently involved in litigating the issue of FCDO representation. In all six cases, the Commonwealth maintained the position that FCDO attorneys should be disqualified from state court because they unlawfully used federal funding in their representation of clients in state court activities.

A logical starting point for this narrative is the Pennsylvania Supreme Court concurring opinion in *Commonwealth v. Spotz*, which was issued in April 2011. *Commonwealth v. Spotz*, 18 A.3d 244 (Pa. 2011). Spotz was represented by FCDO counsel in his post-conviction proceedings. In the course of denying Spotz's appeal, the concurrence criticized the FCDO's litigation practices in those proceedings as "abusive" and obstructionist.[6] *Id.* at 330. Observing that "the commitment of federal manpower alone is beyond remarkable, something one would expect in major litigation involving large law firms," it characterized the FCDO's litigation as an effort to "obstruct capital punishment in Pennsylvania at all costs." *Id.* at 331-32.

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[6]The *Spotz* concurrence was authored by Chief Justice Castille and joined by Justices McCaffery and Melvin. It highlighted the fact that the FCDO had devoted five lawyers, an investigator, and multiple experts to the petitioner's case, eventually culminating in a 100-page brief. *Id.* at 332. It sought to bring the issue to the attention of the "federal authorities financing and authorizing the incursions; to Pennsylvania's Senators and House members; and to the taxpayers who ultimately foot that bill." *Id.* at 330.

In November 2011, the Commonwealth petitioned the Pennsylvania Supreme Court to exercise its "extraordinary jurisdiction" under 42 Pa. Cons. Stat. Ann. § 726 to bar all FCDO attorneys from appearing in state post-conviction proceedings. Its "King's Bench" petition alleged, for the first time, that the FCDO had violated its funding obligations under federal law by using federal monies in its state court activities. When the FCDO removed the Petition to federal court, however, the Commonwealth voluntarily dismissed the Petition. *In re Appearance of Federal FCDO in State Criminal Proceedings*, No. 11-7531 (E.D. Pa. Dec. 8, 2011) (Docket No. 4).

The Commonwealth instead submitted separate motions in individual capital post-conviction cases in state court, beginning with Mitchell's, seeking removal of FCDO counsel in each case. Each motion alleged that the FCDO had violated its federal funding obligations by representing clients in state court, and each requested that the Pennsylvania Supreme Court order hearings to determine whether the FCDO used federal money in its state court representation and, if so, to remove the FCDO as counsel. The FCDO again responded by removing those proceedings to federal court. Currently, there are at least six similarly situated proceedings that have been removed.

III. Federal Administration of Criminal Justice Act and § 3599

This Court appointed the FCDO to represent Mitchell in his federal habeas proceedings pursuant to its authority under 18 U.S.C. § 3599(a)(2) and the Criminal Justice Act, 18 U.S.C. § 3006A(a), et seq.

Congress enacted the Criminal Justice Act shortly after the Supreme Court's holding in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which established the right to counsel for indigent criminal defendants. The CJA set forth the federal procedure for appointing and compensating court-appointed counsel for defendants "who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States." Pub. L. No. 88-455, 78 Stat. 552 (1964); *see generally* 18 U.S.C. § 3006A(a), et seq. Included within the group of indigent individuals for whom counsel may discretionarily be appointed are inmates seeking federal habeas corpus relief under 28 U.S.C. § 2254 and 2255. 18 U.S.C. § 3006A(a)(2)(B). Such appointment of counsel is mandatory for indigent petitioners seeking habeas relief from a sentence of death.[7]

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[7]In any post-conviction proceeding under § 2254 and 2255 seeking to vacate a death sentence, "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys and the furnishing of such other services." 18 U.S.C. § 3599(a)(2) (emphasis added); *enacted pursuant to* Pub. L. No. 103-322, § 60002(a) (1994).

Once an attorney is appointed by the district court under § 3599(a)(2), the scope of his representation is governed by § 3599(e). "[E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings . . . ." 18 U.S.C. § 3599(e); *see also Harbison v. Bell*, 556 U.S. 180, 189-90 (2009) (interpreting the statute's "every subsequent stage" language). In Mitchell's case, the FCDO is not asserting that it is authorized to appear in state court by virtue of its federal appointment. It contends that its attorneys are appearing in their capacities as members of good standing of the Pennsylvania bar.

As set forth under the CJA, the appointment of court-appointed federal counsel, including those obligated under § 3599, is administered through individual district courts under the supervision of the judicial council of each circuit. 18 U.S.C. § 3006A(a). Each district court is required to implement a plan regarding the provision of adequate representation for its district's indigent criminal defendants. The plan may provide either for the establishment of a federal public defender organization or the use of authorized nonprofit defense counsel services referred to as "community defender organizations" ("CDOs"). 18 U.S.C. § 3006A(g)(2)(A)-(B).

The Defender Association of Philadelphia, of which the FCDO is a subunit, was named under the Eastern District of Pennsylvania's plan as a CDO. The FCDO may therefore be appointed as counsel in this district to represent indigent petitioners seeking federal habeas relief in death penalty proceedings. Plan of the United States District Court for the Eastern District of Pennsylvania Pursuant to the Criminal Justice Act, at 3 ("E.D. Pa. Plan").

Grantee CDOs, including the FCDO, are not compensated on a fee-for-service basis for their representation services. Instead, under the CJA, their funding is derived through "periodic sustaining grants" which are appropriated from the Federal Treasury. 18 U.S.C. § 3006A(g)(2)(B)(ii). The administration of these periodic grants is tasked to the Director of the Administrative Office of the United States Courts ("Administrative Office"). *Id*. at § 3006A(i) ("Payments from such appropriations shall be made under the

supervision of the Director of the Administrative Office of the United States Courts.").

The Administrative Office, under the direction of the Judicial Conference of the United States, oversees the regulation of grantee CDOs and compliance with its funding obligations. *Id.*; *id.* at § 3006A(h); *see generally* 28 U.S.C. § 604, et seq. As a federal grantee CDO, the FCDO is required to "submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the next fiscal year." *Id.* at § 3006A(g)(2)(B); *see also* E.D. Pa. Plan at 24 (CDOs "shall receive such periodic sustaining grant[s] as may be approved by the Judicial Conference of the United States from year to year based on the aggregate of cases and matters to be handled by such service, and its expenses, over the period of the next ensuing year.").

The Judicial Conference is also authorized to "issue rules and regulations governing the operation of plans formulated under this section." *Id.* at § 3006A(h). One set of regulations promulgated by the Judicial Conference under this authority is its Guidelines for Administering the CJA and Related Statutes (the "Guidelines"). *See* Guide to Judiciary Policy, Vol. 7, Pt. A (2011), *available at* http:// www.uscourts.gov/Federal Courts/AppointmentOfCounsel/CJAGuidelinesForms/ GuideToJudiciaryPolicyVolume7.aspx; *see also* Appendix 4A, Community Defender Organizations: Grants and Conditions, *attached to* Mot. to Dismiss, exh. 3.

The FCDO's obligations as a federal grantee are enumerated in these Guidelines. In addition to the

submission of its annual report, the Guidelines mandate that the FCDO keep detailed financial records which are auditable at any reasonable time upon request. Appendix 4A of the Guidelines, at 4. Its funds are required to be segregated into grant funds and private funds, and unexpended balances are required to be returned to the Administrative Office. *Id*. at 2-3.

The FCDO enters into an annual grant contract with the Administrative Office, binding it to the terms and conditions set forth in the Guidelines. The Administrative Office performs an annual audit of each grantees' compliance with the terms of the contract. *Id*. at 4. If a grantee is found to have failed to comply substantially with the terms or conditions of the grant, the Administrative Office may "reduce, suspend, or terminate, or disallow payments under th[e] grant award as it deems appropriate." *Id*. at 9.

IV. Motion to Remand

The FCDO has removed the proceeding under 28 U.S.C. § 1442(a)(1), the federal officer removal statute, and § 1442(d)(1), the provision governing proceedings seeking subpoenas for testimony or documents from a federal officer. The Commonwealth has moved to remand the matter on both substantive and procedural grounds. The Court finds that removal was proper and denies the Commonwealth's motion to remand.[8]

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[8]At oral argument, counsel for the Commonwealth conceded that removal was proper under 42 U.S.C. § 1442(a)(1) and (d)(1) but maintained its timeliness argument. Tr. Hr'g 6/27/13 36:18-37:7; 45:2-3. Because of the inconsistent positions of the (continued...)

A. Federal Officer Removal Statute

28 U.S.C. § 1442 governs removal of proceedings against federal officers or agencies. Under § 1442(a)(1), removal to federal court is proper if the action is

> a civil action or criminal prosecution that is commenced in a State court and that is against or directed to . . . [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office.

28 U.S.C. § 1442(a)(1) (final clause omitted).

Section 1442(d)(1) clarifies the scope of "civil action and criminal prosecution" to include "any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued." 28 U.S.C. § 1442(d)(1), enacted pursuant to Removal Clarification Act of 2011, Pub. L. No. 112-51 (2011).

Under the relevant provisions of § 1442(a)(1) and (d)(1), therefore, a state proceeding is properly removed if: 1) it involves a civil action or criminal prosecution,

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[8](...continued)
Commonwealth and the jurisdictional nature of the issue, the Court will consider all of the requirements under 42 U.S.C. § 1442 and § 1446.

including one in which a judicial order, such as a subpoena for testimony or documents, is sought or issued; 2) it is against or directed to a person acting under an officer or agency of the United States; and 3) it is "for" or relates to actions taken "under color" of federal office.

The federal officer removal statute was enacted by Congress to "maintain the supremacy of the laws of the United States by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law." *Colorado v. Symes*, 286 U.S. 510, 517 (1932) (final clause omitted). Its removal power is to be "liberally construed to give full effect to the purposes for which they were enacted." *Id.*; *see also Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969).

1. The PCRA Hearing Seeks Testimony or Documents From the FCDO.

The Court first considers whether the instant proceeding qualifies as a proceeding described in § 1442(d)(1). The subject of the FCDO's Notice of Removal is a hearing that was originally scheduled to be held in front of the PCRA court on June 12, 2013.[9] Because the hearing was ordered by the Pennsylvania Supreme Court, the Court looks to the Supreme Court

[9]The FCDO properly removed only the PCRA hearing and not the underlying PCRA action, in which Mitchell's PCRA appeal is still pending. *See* 28 U.S.C. § 1442(d)(1) ("If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.").

Order directing the remand to determine the hearing's intended subject matter.

The purpose of the PCRA hearing, as it was described by the Pennsylvania Supreme Court, was to determine whether to remove the FCDO as Mitchell's counsel. Specifically, the Pennsylvania Supreme Court directed the PCRA court to "determine whether the FCDO used any federal grant monies to support its activities in state court in this case. If the FCDO cannot demonstrate that its actions here were all privately financed, and convincingly attest that this will remain the case going forward, it is to be removed." Supreme Court Order, at 1.

According to this Order, the PCRA court was to determine whether the FCDO could "demonstrate" the source of funding for its state court litigation. Although the Order did not specify the manner by which the demonstration was to be made, the FCDO would have had to produce some sort of evidence, through testimony or production of documents, regarding its funding. Indeed, in open court on April 3, 2013, the PCRA court and counsel for the FCDO discussed the types of evidence that the FCDO intended to present. Tr. Hr'g 6/27/13 49:24-50:18. To paraphrase the language of § 1442(d)(1), the PCRA hearing is an ancillary proceeding that issues, or seeks to issue, a judicial order requiring testimony or documents from the FCDO.

2. The FCDO is "Acting Under" a Federal Agency.

The next issue is whether, under § 1442(a)(1), the proceeding is directed to or against an "officer (or any person acting under that officer) of the United States or of any agency thereof." 28 U.S.C. § 1442(a)(1). Here, the PCRA hearing is directed to counsel from the FCDO, a federal grantee acting under the Administrative Office of the United States Courts, a United States agency.

The Supreme Court has held that a private person "acts under" a federal officer when his actions "involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 152-53 (2007). The words "acting under" are broad and should be "liberally construed," while contained by the text, context, history, and purposes. *Id.* at 147 (internal citations omitted).

In *Watson*, the Supreme Court considered whether a private company that was closely monitored by a federal regulatory agency "acted under" a federal officer, and held that, under those circumstances, it did not. The Court distinguished Philip Morris's actions of "simple compliance" from the responsibilities of a federal agency's private contractor. *Id.* at 153-54. Because private contractors may "help the Government produce an item that it needs . . . and help[ ] officers fulfill other basic governmental tasks," they "act under" the federal agency in a manner that Philip Morris did not. *Id.*; *see also Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 400 (5th Cir. 1998) (holding that

government contractor chemical company could apply the federal officer removal statute).

One of the FCDO's stated purposes as a CDO is to assist the federal government by providing representation to indigent defendants. Notice of Removal, ¶ 30. Under § 3599(a)(2), the federal government is required to provide counsel for all indigent death penalty defendants in federal habeas proceedings. The task of appointing counsel has been delegated to the district courts, and, instead of directly providing this service through a federal public defender organization, the Eastern District of Pennsylvania has opted to "contract" the service through the use of CDOs. In exchange, the FCDO receives a periodic sustaining federal grant, which is administered by the Administrative Office. *See generally* 18 U.S.C. § 3006A(g).

The Court finds that the FCDO's assistance in implementing the aims and purposes of the CJA is similar to that of the federal contractor discussed in *Watson*. Because the federal government is obligated by law to appoint counsel to capital habeas petitioners, the FCDO provides a service that the "Government itself would [otherwise] have had to perform." *Watson*, 551 U.S. at 154. Its service as court-appointed federal counsel for Mitchell and other similarly-situated individuals sufficiently evinces an effort to carry out the duties of a federal superior. *Id*. at 152.

In addition, as a federal grantee, the FCDO is subject to the authority and supervision of the Administrative Office by virtue of the Office's dispensation of CJA grants. 18 U.S.C. § 3006A(g)(2)(B). The federal

regulatory scheme involves a number of terms and conditions regarding the use of federal grant funds. For example, a grantee is required to submit an annual report setting forth the activities it has performed over the year. If the grantee fails to comply substantially with the terms and conditions of the grant award, the Administrative Office may "reduce, suspend, terminate, or disallow payments . . . as it deems appropriate." Appendix 4A of Guidelines, at 9.

At least two district courts, in considering a similar issue, held that civil legal service lawyers funded by the United States through grants or contracts qualified as persons "acting under" a federal officer under § 1442. Both emphasized the fact that the defendant organization seeking removal was subjected to strict funding regulation by the federal government. *See Gurda Farms, Inc. v. Monroe Cnty. Legal Assistance Corp.*, 358 F. Supp. 841, 847-48 (S.D.N.Y. 1973); *Dixon v. Georgia Indigent Legal Servs., Inc.*, 388 F. Supp. 1156, 1162 (S.D. Ga. 1974).

The Commonwealth's briefs have at times taken the position that when the FCDO engaged in state court litigation, such actions did not "help or assist a federal officer," because § 3599 does not require that the federal government provide counsel in state court post-conviction proceedings. *See*, *e.g.*, Mot. to Remand, at 13. Under this reading of the "acting under" requirement, not only must the person support a federal officer, but the person's specific *act* must support a federal officer, as well.

To the extent that the Commonwealth maintains this line of argument, the Court rejects it. Whether the

FCDO's acts allow for federal removal is a separate question, one that is analyzed when the Court considers whether the proceeding relates to an "act under color" of federal office. *See*, *e.g.*, *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999). The Commonwealth has not pointed to any case law that narrowly construes the "acting under" requirement in this manner. Rather, under the *Watson* standard, the FCDO acts under a federal agency for purposes of § 1442 by virtue of its support in representing capital habeas petitioners, a task the government would otherwise need to take on itself.

3. The Hearing Was "For or Relating To" the FCDO's Acts Taken Under Color of Federal Office.

Next, the Court must consider whether the PCRA hearing in question was initiated "for or relating to any act" taken "under color" of federal office. 28 U.S.C. § 1442(a)(1).

Unlike ordinary federal question jurisdiction, a court applying the federal officer removal statute may look to a well-pled federal defense to satisfy these jurisdictional requirements. Removal jurisdiction is established if the notice of removal 1) raises a colorable federal defense; and 2) establishes that the suit is "for an act under color of office." *Jefferson County v. Acker*, 527 U.S. 423, 431-32 (1999) (internal quotations omitted); *see also Mesa v. California*, 489 U.S. 121, 138-39 (1989). The latter requirement is satisfied if the officer raises a colorable assertion of causality between the charged conduct and the asserted official federal authority. *Jefferson County*, 527 U.S. at 431-32.

Before analyzing whether the FCDO's defenses are colorable, the Court first summarizes the allegations against it. In its January 10, 2013 Order, the Pennsylvania Supreme Court stated that if the FCDO was not able to demonstrate that its actions were privately financed, it was to be removed as Mitchell's counsel. Although the Order did not elaborate on its legal reasoning, it specifically referred to 18 U.S.C. § 3599(a)(2), noting that "the authority of the FCDO to participate in this state capital proceeding is not clear." Supreme Court Order, at 2; *see also* Mot. for Removal, 2-4 (arguing that the FCDO was not authorized to "provide services in state court proceedings," because, under a set of cases analyzing federal law, "the presence of federally-funded FCDO lawyers in this case is unlawful.").

In response, the FCDO challenges the premise of the PCRA hearing, arguing that it relies on erroneous interpretations of federal law. It contends that both the Commonwealth's motion and the Supreme Court Order stake their positions on the false premise that a state can disqualify the FCDO as Mitchell's counsel if it is unable to demonstrate that its actions are privately financed. According to the FCDO, however, this is an incorrect application of federal law. For instance, contrary to the Commonwealth's position asserting concurrent jurisdiction, the FCDO argues that the CJA does not vest the Commonwealth with a private right of action. Notice of Removal, ¶ 35, 38. It also argues that § 3599, properly interpreted, does not prohibit the FCDO's involvement in state court activities. *Id*. ¶ 48-53.

It is well established that a defense that the plaintiff has wrongly interpreted a federal statute is a properly pled federal defense. In *Cleveland, Columbus, & Cincinnati R.R. v. McClung*, a federal customs collector was accused of violating his federal statutory duties. The defendant sought federal removal, arguing that the plaintiff erred in his reading of the federal statute, and the Supreme Court found removal jurisdiction was proper. 119 U.S. 454, 460-61 (1886), as described in *Mesa v. California*, 489 U.S. at 129-30; *see also id.* (finding that an "assert[ion] that a federal statute does not impose certain obligations whose alleged existence forms the basis of a civil suit" is "defensive" and "based in federal law"). Such defenses are colorable on the instant facts.[10]

The Court next considers whether the FCDO's notice of removal presents a colorable assertion of

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[10]The Court pauses on two related arguments made by the Commonwealth: first, that the FCDO has not pled a colorable defense because both parties agree on the relevant substantive law; and second, that the FCDO's defense is purely fact-based and, as such, does not raise a federal defense. Tr. Hr'g 6/27/13 29:18-30:1; 27:13-25. The Court rejects both arguments. Although the parties agree that the FCDO can proceed in state court if it demonstrates that its activities are privately financed, it is clear that the parties do not agree on what should result if the FCDO does *not* make such a demonstration. After all, the Commonwealth's position is that a court can remove the FCDO as counsel, and the FCDO's position is the opposite. As to the contention that the FCDO's defense is solely fact-based, this is not true. The FCDO has put forth a number of theories of law under which it believes it can prevail, including whether the Commonwealth's allegations can survive the private right of action and preemption doctrines.

causation. Because it is plausible that the charged conduct (here, the allegations of improper use of federal funds in state court) is related to an asserted federal authority (the FCDO's status as a federal grantee), the Court finds sufficient nexus to satisfy this element.

The FCDO persuasively argues that the PCRA hearing is "for or relating to" an act under color of office. It is reasonable to conclude that the Commonwealth's motion seeking the FCDO's disqualification, as well as the resulting Supreme Court Order, were initiated as a result of the FCDO receiving federal grants to represent Mitchell in federal court. But for the FCDO's status as court-appointed counsel under § 3599, the Commonwealth would have no basis upon which to claim that the FCDO had violated any law, federal or otherwise.

The Supreme Court's recent decision in *Jefferson County v. Acker* is on point. 527 U.S. 423 (1999). There, the county sought to invoke its "license or privilege tax" on resistant federal judges. *Id*. at 428. When the judges sought to remove the county's enforcement proceedings under § 1442, the county argued that, because the suit was against the judges in their personal capacity for failing to pay a personal tax, the judges had not shown that the suit had a sufficient causal connection to an official act. The Court held that, "read literally," it was plausible to find that the tax was levied "for" the judges' choice to engage in their occupation, which gave rise to a colorable causal nexus. *Id*. at 432-33.

Both the Commonwealth's motion and the Supreme Court Order make numerous references to the FCDO's

status as a federal grantee in the course of concluding that a hearing should be held, and a penalty levied, against it. Especially when compared to the nexus asserted in *Jefferson County*, the Court finds ample reason to find that the PCRA hearing was initiated "for" an act under color of federal office.

The Court holds that the elements of removal jurisdiction under 28 U.S.C. § 1442(a)(1) and (d)(1) are satisfied. The PCRA hearing is a proceeding that issues, or seeks the issuance of, a judicial order requiring testimony or documents from the FCDO. It is directed at the FCDO counsel, a person acting under the Administrative Office of the United States, a federal agency. Finally, because the FCDO has asserted federal defenses that are sufficiently connected to its status as a federal grantee, the proceeding involves acts taken under color of federal office.

B. Timeliness of Notice of Removal

Having determined that it has proper removal jurisdiction over the PCRA hearing, the Court turns to procedural concerns.[11] The Commonwealth has raised a timeliness objection to the hearing's removal to federal court. It argues that the FCDO's filing of its notice of removal was untimely, in violation of 28 U.S.C. § 1446(b) and § 1446(g).

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[11]Section 1446(b)'s thirty-day time limit for removal is a procedural provision, not a jurisdictional one. *Farina v. Nokia Inc.*, 625 F.3d 97, 114 (3d Cir. 2010).

A defendant generally has thirty days from receipt of the initial pleading to file a notice of removal. 28 U.S.C. § 1446(b). However, under § 1446(g), if the proceeding at issue is one in which, pursuant to § 1442(a), "a judicial order for testimony or documents is *sought or issued or sought to be enforced*," the removing party may file a notice of removal "not later than 30 days after receiving, through service, notice of any such proceeding." 28 U.S.C. § 1446(g) (emphasis added). Both parties agree that § 1446(g) is applicable in the instant case.

The Court finds that the FCDO's notice of removal, filed on April 5, 2013, was timely under 28 U.S.C. § 1446(g). The FCDO removed the hearing two days after it received an order from the PCRA court setting the hearing for a date certain. Applying the language of § 1446(g), the FCDO filed the notice of removal less than thirty days after receiving notice of a proceeding in which testimony or documents were sought from the FCDO.

The Commonwealth contends that the FCDO's notice of removal was untimely because there were at least two earlier triggers of the clock that caused the thirty-day period to begin to run, and, after thirty days, to expire. Specifically, it argues that the requirements of § 1446(g) were satisfied on October 16, 2012, by way of the Commonwealth's filing of its motion to remove the FCDO as counsel; and/or on January 10, 2013, by way of the Supreme Court Order remanding the case to the PCRA court. The thirty-day clock for removal had thus expired well before the FCDO filed its notice on April 5, 2013.

The Court rejects this argument. Putting aside whether the two orders afforded the FCDO sufficient notice to satisfy the requirements of § 1446(g)—which, as the Court will discuss later, leaves room for doubt—the statute contemplates the ability of the removing party to "re-trigger" the thirty-day period under certain circumstances. Under § 1446(g), a notice of removal is timely if it is filed within thirty days of receiving notice that a judicial order for testimony or documents is "sought," or "issued," or "sought to be enforced." 28 U.S.C. § 1446(g). By its terms, the statute contemplates that the same § 1442(a) proceeding could be removed at more than one juncture. For example, a federal recipient of a subpoena could properly remove the proceeding after receiving notice of the original subpoena, but it could also properly remove the proceeding upon notice of the issuance of a court's order for its testimony.

The statute's legislative history supports this reading. Section 1446(g) was drafted at the request of the Department of Justice to "maintain the current and longstanding [Department of Justice] practice of resetting the 30-day removal clock for cases that involve the enforcement of a subpoena." H.R. Rep. No. 112-107, at 6-7 (2011-12). The House Report explained that because the Justice Department typically ignored subpoenas in the first instance, the Department wanted to maintain its ability to "re-trigger" the removal period when it received notice of a party's motion to enforce, the point at which the Department could no longer ignore the subpoena. *Id.*

Congress intended to provide a federal officer with an opportunity to remove a proceeding when it would

be clear that it needed to take action, even if it meant "re-set[ting]" the clock to allow for a second or third chance. Regardless of whether the FCDO could have removed the proceeding at an earlier time, its clock was re-triggered on April 3, 2013, when it was given notice that a hearing requiring its production of documents and testimony had been scheduled.

Allowing for such a re-trigger is especially appropriate in light of the imperfect notice afforded to the FCDO by the earlier "triggers." Section 1446(g) contemplates the removal of a proceeding once the federal officer receives "notice" that it will be asked to produce testimony or documents. It is doubtful that the Commonwealth's motion to remove the FCDO as counsel, filed on October 16, 2012, placed the FCDO on sufficient notice. That motion argued that the FCDO should be removed as Mitchell's counsel because it lacked authority to present itself in state court, and the FCDO's response to the motion was comprised of legal arguments only. At no point did the Commonwealth explicitly request that the FCDO produce documents or testimony.

It is a closer issue whether the Pennsylvania Supreme Court's January 10, 2013 order calling for a fact-specific hearing gave sufficient notice to the FCDO. The Supreme Court Order, which instructed the PCRA court to make a determination on whether "the FCDO used any federal grant monies to support its activities in state court in this case," alerted the FCDO to the eventual necessity of producing documents and testimony to the PCRA court. However, the Order was not self-executing and it was not directed to the FCDO; it required a second step by the PCRA court to determine

how to proceed. The Order did not require that the FCDO take any particular action, and the FCDO did not act until the PCRA court issued its letter on March 19, 2013, asking the parties how they wished to proceed. Tr. Hr'g 6/27/13 43:10-20.

Even if the Supreme Court Order afforded adequate notice under the language of § 1446(g), it does not defeat the timeliness of the FCDO's notice of removal. The statute contemplates a "re-trigger" of the removal clock, allowing a federal officer to remove a proceeding upon receiving notice that a judicial order for testimony or documents is "sought," or "issued," or "sought to be enforced." Because the FCDO's notice of removal was filed within thirty days of receiving notice of the PCRA hearing date, the FCDO properly removed the proceeding to federal court.[12]

V. FCDO's Motion to Dismiss

Having denied the motion to remand, the Court considers the FCDO's motion to dismiss under Fed. R. Civ. P. 12(b)(6). The FCDO argues that the federal statutes that the Commonwealth seeks to enforce do not create a private right of action, and that calling the

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[12]The Commonwealth has asked in the alternative that the Court abstain from this proceeding on *Younger* abstention grounds, but the Court will deny this request. Jurisdiction under the federal officer removal statute is mandatory, not discretionary, and a district court may not invoke *Younger* abstention in this context. *See*, *e.g.*, *Kolibash v. Comm. on Legal Ethics*, 872 F.2d 571, 575 (4th Cir. 1989); *Jamison v. Wiley*, 14 F.3d 222, 239 (4th Cir. 1994); *see also Puerto Rico v. Marrero*, 24 F. Supp. 308, 311 (D.P.R.1985).

proceeding an attorney disqualification proceeding that incorporates federal law does not change the analysis. Alternatively, the FCDO argues that even if a state code of professional conduct could incorporate federal law, a state law purporting to incorporate the CJA and § 3599 would be preempted because it would frustrate the accomplishment and execution of the full purposes and objectives of Congress in passing those statutes. The Court agrees with both of the FCDO's contentions.[13]

A. State Enforcement of Federal Law

A private party asserting that a federal statute has been violated does not automatically have a right to seek enforcement of that statute. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). A party may pursue a judicial remedy for that violation only if Congress has either expressly or implicitly created a private right of action. *Id.*; *see also Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Because neither the CJA nor § 3599 creates an express private right of action, private enforcement of those provisions is only permissible if there exists an implicit private right of action.

The touchstone of an implied right of action analysis is Congressional intent. *McGovern v. City of Phila.*, 554 F.3d 114, 119 (3d Cir. 2009). In the Third Circuit,

[13]Because the Court reaches its decision on the motion to dismiss, it need not resolve the FCDO's motion in the alternative seeking a stay in the proceeding under the doctrine of primary jurisdiction.

courts perform a two-step inquiry: "(1) whether Congress intended to create a personal right in the plaintiff; and (2) whether Congress intended to create a personal remedy for that plaintiff." *Id*. at 116.

There is no evidence to suggest that Congress intended to create a right or remedy to enforce the provisions of the CJA and § 3599. Section 3599 confers on indigent death-sentenced inmates the right to counsel in federal habeas proceedings, and the CJA sets forth the administrative regime by which the federal government provides such counsel. Under this regime, Congress has delegated to certain federal entities (most prominently the Administrative Office) the responsibility for administering and monitoring the grants that pay for such counsel. *See*, *e.g.*, 18 U.S.C. § 3006A(i); *id*. § 3006A(h).

Courts have held that in cases regarding "classic federal funding statute [s]," "inferring a private right of action is disfavored." *Louisiana Landmarks Soc'y, Inc. v. City of New Orleans*, 85 F.3d 1119, 1125 (5th Cir. 1996). Similarly, when a statute explicitly delegates authority to a federal agency to enforce its law, there is a "strong presumption against implied private rights of action." *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 305 (3d Cir. 2007). Because the CJA is both a funding statute and one that authorizes agency enforcement, it is unlikely that Congress intended to create a private right of action for any plaintiff.

It is even more unlikely that Congress intended to create a personal remedy for the Commonwealth, whose interest in this matter is indisputably adverse to that of the petitioners whom the CJA and § 3599 were

enacted to protect.[14] The stated purpose of the CJA, as set forth in its preamble, is to "promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States." Pub. L. No. 88-455, 78 Stat. 552; *see also United States v. Parker*, 439 F.3d 81, 92 n.11 (2d Cir. 2006). Far from being a member of a class for "whose especial benefit the statute was enacted," the Commonwealth is the direct adversary of the death-row inmates afforded protection under the statute. Courts are instructed to give this factor special weight in considering whether to imply a private right of action. *E.g.*, *California v. Sierra Club*, 451 U.S. 287, 297 (1981).

Counsel for the Commonwealth conceded at oral argument that no private right of action exists under the CJA or § 3599, but contends that this point is irrelevant because the Commonwealth is not bringing a "private" right of action. Tr. Hr'g 6/27/13 54:13-16. It argues that because it is acting in the public interest when it disqualifies counsel, it may do so for a violation

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[14]Section 3599, enacted by Congress in 2006, clarified the rights afforded to a defendant who was charged or convicted with a crime punishable by death. In passing these laws, Congress sought to provide capital petitioners in post-conviction proceedings with experienced counsel and reasonably necessary litigation resources. *See*, *e.g.*, 18 U.S.C. § 3599(a)(1)-(2) (capital habeas petitioners entitled to "one or more attorneys" and "investigative, expert, or other reasonably necessary services"); *see also id*. § 3599(c) (such counsel must have three years of experience in handling felony appeals); *id*. § 3599(d) (court may appoint a second attorney "with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.").

of federal law such as the CJA or § 3599. The Commonwealth has not provided the Court, and the Court has not independently found, any support for that argument. The case law in this area supports the opposite conclusion.

The United States Court of Appeals for the Third Circuit, for instance, considered an action in which a state regulatory agency brought an action against an electric company and a federal commission, alleging that an impending shipment of partially irradiated reactor fuel violated federal environmental law. *N.J. Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403 (3d Cir. 1994). The court held that the federal statute did not create a private right of action. It noted that the private right of action analysis is the same, regardless of whether the plaintiff is a private party or a government. *Id*. at 421-22; *see also Astra U.S.A., Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1345 (2011) (no private right of action when county sought to enforce a contract that would obligate drug providers to provide lower prices to groups working with the indigent).

To the extent, therefore, that the PCRA hearing is an attempt by the Commonwealth to directly enforce federal law, it is prohibited from doing so by the private right of action doctrine.

The Commonwealth argues alternatively that even if it cannot enforce federal law directly, it can do so indirectly by incorporating federal law into its rules for

professional conduct.[15] The Commonwealth's position is that the PCRA hearing is an attorney disqualification proceeding against the FCDO, a hearing that would apply state rules of professional conduct that incorporated federal funding regulations.

The provisions of the state rules of professional conduct that the FCDO is alleged to have violated were not specified in any papers filed either in state court or with this Court. The Supreme Court Order directing the PCRA court to hold the hearing did not explain its authority, state law or otherwise, for ordering the hearing. The Commonwealth's papers maintained that the FCDO violated certain state laws in the course of its representation of Mitchell, but they did not refer to a particular state law until oral argument in front of this Court.

Counsel for the Commonwealth asserted at oral argument that the hearing was authorized under Pennsylvania Rule of Professional Conduct 8.3(a). Tr. Hr'g 6/27/13 55:18-21. Rule 8.3(a) instructs attorneys

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[15]As an initial matter, where courts have acknowledged the ability of state law to incorporate federal law provisions, the cases have involved conventional state law claims such as negligence and contract enforcement—what the Seventh Circuit referred to as "garden variety" claims—that implicated some questions of federal law. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 805-06 (1986); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 555, 578 (7th Cir. 2012); *In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 491 F.3d 638, 644-47 (7th Cir. 2007). In contrast, the instant case contains far more than a federal law ingredient. But for the FCDO's alleged violations of federal law, there would be no state law basis upon which to claim that it should be disqualified.

to inform "the appropriate professional authority" if he or she "knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." 204 Pa. Code § 8.3(a). Counsel also represented that the charges of dishonesty, lack of trustworthiness or fitness as a lawyer against the FCDO are that it engaged in fraudulent conduct by appearing in state court with federal money and that it misrepresented the nature of its appearance to both the Pennsylvania Supreme Court and the Administrative Office. Tr. Hr'g 6/27/13, 55:24-56:3.

The Commonwealth's argument is inconsistent with *Astra U.S.A., Inc. v. Santa Clara County*, in which the Supreme Court considered whether the private right of action doctrine applied to an action based not on a federal statute itself, but on a contract with obligations deriving from a federal statute. 131 S. Ct. 1342, 1345 (2011). *Astra* involved the administration of a federal program under § 340B of the Public Health Services Act (PHSA), in which drug manufacturers received government incentives if they promised to charge a reduced price to certain covered entities. In addition, drug manufacturers were required to sign a form contract reciting the responsibilities imposed by the statute. *Id*. at 1346-47.

When Santa Clara County, which was listed in the contracts as a covered entity, sued a manufacturer for violating the terms of its contract, the manufacturer moved to dismiss the suit based on the private right of action doctrine. The county argued that the doctrine did not apply because its cause of action derived from

the contract, which listed obligations under federal law, and not from federal law directly.

The Supreme Court rejected the county's argument. Because the manufacturers' obligations under § 340B and the contract were "one and the same," and because the source of the contractual terms at issue derived from § 340B, the Court held that they should be subject to the same analysis under the private right of action doctrine. *Id*. at 1345. It concluded:

> If [covered] 340B entities may not sue under the statute, it would make scant sense to allow them to sue on a form contract implementing the statute, setting out terms identical to those contained in the statute. Though labeled differently, suits to enforce § 340B suits and suits to enforce [contracts] are in substance one and the same. Their treatment, therefore, must be the same, no matter the clothing in which [they] dress their claims.

Id. at 1345. *Astra* rejects a formalistic approach to determining whether a proceeding falls under the private right of action doctrine; instead, it instructs courts to look to the substance of the cause of action at issue. *Id*.; *see also Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012).

Just as *Astra* involved a contract that incorporated federal terms, this proceeding involves a state disqualification action that incorporates federal terms. The Commonwealth's state law allegations sound solely and exclusively in federal law. As the Commonwealth stated at oral argument, its allegations are all "coming

from" the unauthorized use of federal money. Tr. Hr'g 6/27/13 56:8-10. If the Commonwealth may not sue under the CJA and § 3599, it makes "scant sense" to allow such an action to proceed under the "dress[ing]" of a state disqualification proceeding. *Id.*

Any reference to state law in papers filed by the Commonwealth, or in the order from the Pennsylvania Supreme Court describing the hearing to be held by the PCRA court, was decidedly ancillary. The Commonwealth's seven-page motion devoted almost two pages of citations to its allegation that the presence of federally-funded FCDO lawyers in Mitchell's state case was unlawful under federal law. Mot. for Removal ¶ 6. It asserted no corollary state law cause of action, and it made no reference to an attorney disqualification proceeding or to any violation of the rules of professional conduct.[16] The motion offered a single state law citation: it pled jurisdictional authority to pursue the matter under Section 10(c) of the state Constitution, the general provision endowing the Pennsylvania Supreme Court with the right to govern its courts. *Id.* ¶ 7. Even this citation, however, was secondary to its assertion, earlier in the paragraph, that it had concurrent jurisdiction to enforce federal law. *Id.*

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[16]In addition, the Commonwealth's motion alleged that the FCDO's activities violate "the sovereignty of Pennsylvania." Mot. for Removal ¶ 8. It cited to a number of cases holding that states remain "independent and autonomous within their own sphere of authority," and it asserted that it is a "violation of the sovereignty" for "lawyers funded by a federal government agency for the purpose of appealing in federal courts to instead appear in the state's criminal courts." *Id.* The Court does not construe these allegations to contain a specific state law cause of action.

Likewise, the Supreme Court Order made no mention of any state law cause of action, attorney disqualification proceeding, or professional conduct violation. The only relevant law referred to in the Order was federal. *See* Supreme Court Order, at 2 (noting that "the authority of the FCDO to participate in this state capital proceeding is unclear" under § 3599(a)(2)).

In its briefing to this Court, well after it was made aware that the FCDO contested its authority to pursue the proceeding under federal law, the Commonwealth still did not refer to a specific state law authority. The Commonwealth repeatedly asserted that it had rights under state law, but it did not specify the precise source of those rights: at one point in its briefing, for example, it asserted that "the relevant court rule is, in essence, simply that there are certain types of statutes that an attorney's ethical duties do not allow him to violate if he wishes to remain in good standing with the court." Opp. to Mot. to Dismiss at 14. It was not until the Court held oral argument in June of this year—eight months after the Commonwealth filed its initial papers seeking the FCDO's disqualification—that the Commonwealth raised Rule 8.3(a) for the first time.

Under *Astra*, the Court is instructed to look to the substance of the Commonwealth's cause of action to determine whether it falls under the private right of action doctrine. The substance of the Commonwealth's motion is that the FCDO's use of federal funds in state court violates federal law. It fails under the private right of action doctrine, regardless of how it is formulated.

B. Preemption

Even if the incorporation of the CJA and § 3599 into an attorney disqualification proceeding were not barred by *Astra*, it would fail on preemption grounds.

Under the Supremacy Clause, Congress has the authority, in exercising its Article I powers, to preempt state law. *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989). In making this determination, "[t]he purpose of Congress is the ultimate touchstone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (internal citations omitted).

In the absence of an express Congressional statement that state law is preempted, there are two bases for finding preemption. First, state law is "field preempted" if Congress intends that federal law occupy a particular field. Second, even if Congress has not occupied the field, state law is "conflict preempted" if it conflicts with federal law such that compliance with both state and federal law is impossible, or if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California v. ARC America Corp.*, 490 U.S. at 100-01; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). The parties agree that the relevant analysis here is conflict preemption.

The threshold question in preemption analysis, including conflict preemption, is whether there should be a presumption against preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also id.* at 565, n.3. In two recent cases, the Supreme Court analyzed whether to

afford a presumption against preemption and reached opposite conclusions.

In *Wyeth v. Levine*, the plaintiff sustained injuries after receiving an injection of an antihistamine product manufactured by the defendant, and she sued the defendant under common law negligence and strict liability causes of action. 555 U.S. at 558-59. The plaintiff claimed that even though the drug's warning labels had been deemed sufficient by the Food and Drug Administration (FDA), they failed to provide an adequate warning of the risks associated with the drug. *Id*. The Supreme Court held that the plaintiff's failure to warn claims were not preempted by federal law. In the course of its analysis, it afforded the state claims a presumption against preemption. Because the case involved state regulation of health and safety matters, "a field which the States have traditionally occupied," the Court's preemption analysis began with the presumption that the state law is valid and that "the historic police powers of the States were not to be superseded by the Federal Act." *Id*. at 565 (internal citations omitted).

In *Buckman Co. v. Plaintiffs' Legal Committee*, however, the Supreme Court declined to afford a presumption against preemption when the case involved "uniquely federal interests" that are "committed by the Constitution and laws of the United States to federal control." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001). The *Buckman* Court considered a state tort cause of action described as a "fraud-on-the-FDA" claim. This claim alleged that medical product-related entities made fraudulent representations to the FDA and that these

statements allowed the FDA to approve the products for sale and led to the injuries subsequently sustained by plaintiffs. *Id*.

In holding that the plaintiffs' claim was preempted, the Court first considered whether the fraud-on-the-FDA claim was entitled to the traditional presumption against preemption. It held that it was not. In contrast to situations involving the "historic primacy" of state regulation, "[p]olicing fraud against federal agencies is hardly a field which the states have traditionally occupied." *Id*. at 347-48. A fraud-on-the-FDA claim necessarily implicated the relationship between a federal agency and the entities subject to its regulation, a relationship that is "inherently federal in nature" because it "originates from, is governed by, and terminates according to federal law." *Id*. A state law that disrupts the relationship between a federal agency and the entity it regulates should not be afforded a presumption against preemption. *See also United States v. Locke*, 529 U.S. 89, 108 (2000).

The instant facts are closer to *Buckman*. This "attorney disqualification proceeding" stems exclusively from the Commonwealth's concern that FCDO attorneys are using federal money in their state court activities, in violation of their obligations under federal law. This includes its misrepresentation claim: the allegation is that the FCDO represented to the authorities that it was not using federal money, when in fact it was.[17] The basic premise of the Commonwealth's

[17]It is also worth noting that this alleged false representation (continued...)

claims depends on an interpretation of the CJA, § 3599, and the surrounding body of federal regulations and contracts, the analysis of which Congress has delegated to the Administrative Office. The Commonwealth attempts to "police" alleged misrepresentations and violations in an area that is within the purview of a federal agency.

Even if the Court were to apply a presumption against preemption, it would still find that the Commonwealth's application of state law is preempted. *See*, *e.g.*, *Farina v. Nokia Inc.*, 625 F.3d 97, 117, 123 (3d Cir. 2010) (applying the presumption against preemption but still finding that state law was preempted because it would interfere with the federal regulator's determination of how to balance competing policy objectives).

In general, courts have found preemption in two situations. First, preemption occurs if state law conflicts with a federal law such that compliance with both laws is impossible. *California v. ARC America Corp.*, 490 U.S. at 100-01. Second, preemption is necessary when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.*; *see also Crosby v. Nat'l*

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[17](...continued)
was made *in response* to the Commonwealth's motion to have the FCDO disqualified. According to the Commonwealth, then, even supposing that there was no cognizable state interest in reviewing the FCDO's use of federal funds at the time the disqualification motion was filed, the fact that the FCDO opposed the motion gave rise to such an interest. This argument rests on classic bootstrapping grounds and is of minimal persuasion to the Court.

Foreign Trade Council, 530 U.S. at 373 ("If the purpose of the [federal] act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.").

It is possible for the FCDO to comply with both federal and state law: it could voluntarily withdraw as counsel from its representation of Mitchell and similarly-situated petitioners in state court. The Court's preemption analysis therefore turns on the second question, whether the state law stands as an obstacle to Congress's objectives in enacting the CJA and § 3599.

Regulatory situations that require an agency to strike a balance between competing statutory objectives "lend themselves to a finding of conflict preemption." *Farina v. Nokia, Inc.*, 625 F.3d 97, 123 (3d Cir. 2010). In summarizing Supreme Court preemption case law, the Third Circuit observed:

> The reason why state law conflicts with federal law in these balancing situations is plain. When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives. Allowing state law to impose a different standard permits a re-balancing of those considerations.

Id.

The Third Circuit's concerns are implicated here. By seeking to remove FCDO as counsel based on its independent interpretation of federal law, the Commonwealth attempts to claim a concurrent regulatory function alongside the Administrative Office. This is especially troubling where, as here, the federal scheme developed by Congress is comprehensive and implicates the balancing of multiple competing policy objectives.[18]

In the first instance, the Commonwealth's proposed proceeding will seek to interpret the CJA on strict facts, whereas the Administrative Office's analysis would also consider the implicated legal and policy questions. In making funding decisions, and in deciding upon remedies for violations thereof, the

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[18]The Administrative Office, under the authority of the Judicial Conference, has developed an intricate regulatory system to fulfill its responsibilities under the CJA. 18 U.S.C. §§ 3006A(g); (i). Through its Guidelines and contracts, it sets forth the terms and conditions of grant usage, requires annual audits to ensure adherence, and describes the set of available remedies if an organization violates its terms.

In addition to this regulatory process, the Commonwealth has proposed that a parallel, and completely distinct, process be administered through the court system. Thus, the issue is not merely whether the PCRA hearing would conflict with the Administrative Office's check writing duties, but rather whether it would conflict with the Office's responsibility in overseeing the regulatory system set forth under the CJA, § 3599, and the surrounding body of regulatory guidelines and individual contracts. For that reason, the Court rejects the Commonwealth's position that there is no conflict between the Office's authority to pay attorneys and the inquiry of the PCRA hearing. *E.g.*, Opp. to Mot. to Dismiss at 18-19.

Administrative Office must consider a number of priorities. Some of the objectives at stake include fiscal responsibility, maintaining high-quality representation for death-sentenced inmates, avoiding over-deterrence of performing tasks that may be helpful in federal representation, and maximizing efficiency in the administration of the § 3599 program. In Mitchell's case, for example, the FCDO engaged in investigative tasks in the course of preparing its PCRA appeal brief; whether these activities are "reasonably necessary" to providing federal habeas representation, such that they can be properly "charged" to the federal government, involves the balancing of competing policy objectives delegated by Congress to the Administrative Office.

The potential for intrusion increases if the PCRA hearing would reach one conclusion as to whether a violation of the CJA occurred, and the Administrative Office would reach another. At oral argument, counsel for the Commonwealth maintained its position that the state court is not "bound by the Administrative Office's finding" to the contrary. Tr. Hr'g 6/27/13, 71:10-72:2. The reality is that a court could find the FCDO to have violated federal law and disqualify the FCDO from representing Mitchell in state court, even though the FCDO has acted in a manner entirely consistent with the Administrative Office's interpretation. *See*, *e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012) (noting that permitting "mirror image" state immigration statutes would give the state the "power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal

policies"); *see also Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1207 (9th Cir. 2002).

This problem is further exacerbated if different state courts were to reach conflicting conclusions on the issue. The Administrative Office's delegated powers under the CJA extend not only to the administration of funds in this district, but to judicial districts nationwide. If it was forced to navigate its funding through a system in which some states penalized CDOs for using federal funds in certain state court activities and others did not, its ability to administer funding would be impaired. *Cf. Buckman*, 531 U.S. at 350 ("As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants.").

Finally, there exists the high likelihood of conflict in the difference in remedy. The Commonwealth has stated that as a result of the FCDO's failure to comport with its federal funding obligations, it seeks as a "remedy" the FCDO's removal as Mitchell's counsel. Mot. for Removal, at 1. According to the Administrative Office's regulations, however, the Administrative Office would not fashion such a remedy. Instead, the Guidelines state that the Administrative Office has the ability to "reduce, suspend, terminate, or disallow payments under th[e] grant award as it deems appropriate." Guidelines at 9.

The Supreme Court has held that "conflict is imminent whenever two separate remedies are brought to bear on the same activity." *Wisconsin Dep't of Industry, Labor, and Human Relations v. Gould Inc.*,

475 U.S. 282, 286 (1986) (internal citations omitted); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. at 380 (holding that the "inconsistency of sanctions . . . undermines the congressional calibration of force."). The Commonwealth's position raises the very real specter that the proposed state proceeding will impose a punishment far harsher than those contemplated by Congress. Notably, the Administrative Office's usual remedies, such as recoupment of distributed funds, are more consistent with the CJA' s objectives because they mitigate the disruption to the existing attorney-client relationships.

The Court rejects the Commonwealth's contention that these conflicts are illusory. The Commonwealth's position rests on the premise that the PCRA hearing is fact-based and does not necessitate interpretations of federal law. It is apparent that fact-finding in and of itself cannot resolve the issues at stake in the PCRA hearing.

An appropriate order shall issue separately.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

IN RE PROCEEDING IN WHICH THE COMMONWEALTH OF PENNSYLVANIA SEEKS TO COMPEL THE DEFENDER ASSOCIATION OF PHILADELPHIA TO PRODUCE TESTIMONY AND DOCUMENTS AND TO BAR IT FROM CONTINUING TO REPRESENT DEFENDANT MITCHELL IN STATE COURT	:	NO. 13-cv-1871

ORDER

AND NOW, this 15th day of August, 2013, upon consideration of 1) the Commonwealth's motion to remand (Docket No. 14); and 2) the Federal Community Defender Organization's motion to dismiss (Docket No. 4), the briefs in support of and in opposition to these motions, and the replies and sur-replies thereto; and following an oral argument on June 27, 2013,

IT IS HEREBY ORDERED, for the reasons stated in a memorandum of law bearing today's date, that the Commonwealth's motion to remand is DENIED.

IT IS FURTHER ORDERED, for the reasons stated in a memorandum of law bearing today's date, that the

Federal Community Defender Organization's motion to dismiss is GRANTED.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA**

In Re: Commonwealth's Request for Relief Against or Directed to Defender Association of Philadelphia, Respondent, Filed In COMMONWEALTH OF PENNSYLVANIA, v. ANTHONY DICK.	CIVIL ACTION NO. 1:13-CV-561 (JUDGE CAPUTO)

MEMORANDUM

In response to Anthony Dick's ("Mr. Dick") amended counseled Post Conviction Relief Act ("PCRA") petition challenging his conviction in the Court of Common Pleas of Columbia County, Pennsylvania, the Commonwealth of Pennsylvania (the "Commonwealth") filed a response to the petition with a "New Matter." The "New Matter" requests the Court of Common Pleas to conduct a hearing to determine whether lawyers employed by the Federal Community Defender Organization, Eastern District of Pennsylvania (the

"FCDO")[1] should be removed as Mr. Dick's counsel in the PCRA proceeding. Relying on the federal officer removal statute, 28 U.S.C. § 1442, Respondent Defender Association of Philadelphia removed the Commonwealth's hearing request to this Court.[2] Mr. Dick's PCRA proceeding, however, has not been removed and remains in state court. Now before the Court are the Commonwealth's Motion to Remand (Doc. 10) the request for a hearing to the PCRA court and the Defender Association of Philadelphia's Motion to Dismiss (Doc. 11) the Commonwealth's hearing request.

The underlying proceeding in this removed action seemingly implicates several issues of federal law involving the construction of federal statutes and the application of relevant federal decisional authority and

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[1]The named movant Defender Association of Philadelphia's Federal Court Division is a Community Defender Organization within the meaning of 18 U.S.C. § 3006A(g)(2)(B). The Federal Court Division of the Defender Association of Philadelphia is often referred to as the FCDO. The FCDO is not a juridical entity, but rather is a subunit of the named movant, Respondent Defender Association of Philadelphia.

[2]At least six other similarly situated proceedings have been removed to federal court. Three are pending in this District, *Commonwealth v. Housman*, No. 13-2103 (M.D. Pa.) (Caputo, J.); *Commonwealth v. Sepulveda*, No. 13-511 (M.D. Pa.) (Caputo, J.); *Commonwealth v. Dowling*, No. 13-510 (M.D. Pa.) (Caputo, J.), and three are pending in the United States District Court for the Eastern District of Pennsylvania, *Commonwealth v. Johnson*, No. 13-2242 (E.D. Pa.) (Schiller, J.); *Commonwealth v. Mitchell*, No. 13-1871 (E.D. Pa.) (McLaughlin, J.); *Commonwealth v. Harris*, No. 13-062 (E.D. Pa.) (Rufe, J.).

legal principles. Nonetheless, I am of the view that the FCDO fails to satisfy its burden to establish the existence of federal jurisdiction under the federal officer removal statute. Specifically, because the "acting under" requirement for removal under 28 U.S.C. § 1442(a)(1) is not satisfied in this case, the Commonwealth's motion to remand this action to the Court of Common Pleas of Columbia County will be granted. And, since the Commonwealth's motion to remand will be granted, the FCDO's motion to dismiss will be denied as moot.

I. Background

A. Relevant Factual Background

On August 22, 2007, Anthony Dick pleaded guilty to two counts of first-degree murder and related offenses in the Court of Common Pleas of Columbia County, Pennsylvania. The following day, after waiving his right to a sentencing jury, Mr. Dick was sentenced to death. Mr. Dick's conviction and sentence of death were affirmed on August 18, 2009. Mr. Dick's petition for certiorari review was denied on April 19, 2010.

Thereafter, Mr. Dick filed a motion in this Court for leave to proceed *in forma pauperis* and appointment of federal habeas corpus counsel. *See Dick v. Beard, et al.*, No. 10-cv-0988, (M.D. Pa. May 7, 2010). On July 6, 2010 Mr. Dick's request to proceed *in forma pauperis* was granted, and the Capital Habeas Unit of the Federal Public Defender Office for the Middle District of Pennsylvania and the FCDO were appointed as co-counsel for Mr. Dick's to-be-filed habeas corpus petition.

On October 17, 2012, Mr. Dick filed his habeas petition. On the same day, he filed a motion to stay the proceedings pending exhaustion of state court remedies. Mr. Dick's request to stay the proceedings was denied and the petition was dismissed without prejudice on November 29, 2012 because adequate time would remain to file a habeas petition under AEDPA's statute of limitations following exhaustion of state remedies.

In the meantime, on July 7, 2010, Mr. Dick had filed a *pro se* petition for post-conviction relief in the Court of Common Pleas of Columbia County. In that petition, Mr. Dick requested that the court appoint the FCDO to represent him. On July 29, 2010, at the request of Mr. Dick and upon motion by the FCDO, the FCDO was appointed to represent Mr. Dick in his PCRA proceedings.

On June 29, 2012, the Commonwealth moved in the Court of Common Pleas to have the FCDO disqualified from representing Mr. Dick in state court. The Commonwealth's motion was denied. Thereafter, on September 26, 2012, Mr. Dick filed his amended counseled petition for post-conviction relief in the Court of Common Pleas.

On January 25, 2013, the Commonwealth filed a response to the PCRA petition. In that response, under the heading "New Matter," the Commonwealth made a new request (the "Commonwealth's Request") for the Court of Common Pleas to conduct a hearing pursuant to the Pennsylvania Supreme Court's Order in *Mitchell*.

B. *Commonwealth v. Mitchell*

On January 10, 2013, the Pennsylvania Supreme Court issued a per curiam order in the PCRA case of *Commonwealth v. Mitchell*, No. 617 CAP (the "*Mitchell* Order"). Upon consideration of the Commonwealth's motion to remove counsel in *Mitchell*, the Pennsylvania Supreme Court remanded to the PCRA court to "determine whether current counsel, the Federal Community Defender Organization ("FCDO") may represent appellant in this state capital PCRA proceeding; or whether other appropriate post-conviction counsel should be appointed." *Id*. To resolve that issue, the Pennsylvania Supreme Court provided the following guidance:

> [T]he PCRA court must first determine whether the FCDO used any federal grant monies to support its activities in state court in this case. If the FCDO cannot demonstrate that its actions here were all privately financed, and convincingly attest that this will remain the case going forward, it is to be removed. If the PCRA court determines that the actions were privately financed, it should then determine "after a colloquy on the record, that the defendant has engaged counsel who has entered, or will promptly enter, an appearance for the collateral review proceedings." *See* Pa. R. Crim. P. 904(H)(1)(c). We note that the order of appointment produced by the FCDO, issued by the U.S. District Court for the Eastern District of Pennsylvania at No. 2:11-cv-02063-MAM, and dated April 15, 2011, appointed the FCDO to represent appellant only for purposes of liti-

> gating his civil federal *habeas corpus* action, and the authority of the FCDO to participate in this state collateral proceeding is not clear. *See* 18 U.S.C. § 3599(a)(2) (authorizing appointment of counsel to indigent state defendants actively pursuing federal *habeas corpus* relief from death sentence).

Id.

Justice Todd, joined by Justice Baer, filed a dissenting statement, noting that the court directed "the removal of counsel without any stated analysis of the issues involved, issues which require the construction of federal statutes and other authority, consideration of the relationship between federal and state court systems in capital litigation, and consideration of counsel's role therein." *Commonwealth v. Mitchell*, No. 617 CAP (Todd, J., dissenting).

C. The Commonwealth's Request for a *Mitchell* Hearing

Citing the per curiam *Mitchell* Order in its entirety, the Commonwealth, on January 25, 2013, filed its response with "New Matter" to the PCRA petition. As noted, the Commonwealth in that response requested the Court of Common Pleas to conduct a hearing consistent with the *Mitchell* Order.

D. The Notice of Removal

On February 27, 2013, the FCDO removed the Commonwealth's Request to this Court pursuant to 28 U.S.C. § 1442. (Doc. 1.) The FCDO did not remove the

underlying action in which Mr. Dick is challenging his conviction under the PCRA, and that action remains in state court. (*Id*. at ¶ 1.) The Notice of Removal asserts that the Commonwealth's Request is properly removed to this Court because "it is directed against a person, *i.e.*, the FCDO, acting under an officer or agency of the United States, for or relating to the FCDO's acts 'under color of such office,' 28 U.S.C. § 1442(a)(1), and is a proceeding that seeks a judicial order, 28 U.S.C. § 1442(c)." (*Id*. at ¶ 11.)

The FCDO also argues that a number of colorable federal defenses will be raised in opposition to the Commonwealth's Request. These defenses include, among others: (1) preemption; (2) primary jurisdiction; and (3) that the Commonwealth's Request seeks to deprive the FCDO and its lawyers of their First Amendment rights and their equal protections rights under the Fourteenth Amendment. The FCDO further maintains that the Commonwealth's position is predicated on an incorrect interpretation of federal law. (*Id*. at ¶¶ 22-36.)

E. The FCDO's Motion to Dismiss and the Commonwealth's Motion to Remand

Following the removal of the Commonwealth's Request, the FCDO filed a motion to dismiss the proceeding pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 7.) The FCDO asserts that the Commonwealth's Request fails to state a claim on which relief can be granted because sole responsibility for the enforcement of the funding provisions on which the Commonwealth relies, 18 U.S.C. § 3006A and 18 U.S.C. § 3599, lies with the Administrative

Office of the United States Courts ("AO"). Thus, the FCDO contends that the federal statutes the Commonwealth seeks to enforce do not endow any non-federal entity with a right of action. However, to the extent that the Commonwealth is not barred from proceeding under these statutes, the FCDO requests that the action be stayed and referred to the AO under the doctrine of primary jurisdiction.

On March 28, 2013, the Commonwealth filed a motion to remand this proceeding to the Court of Common Pleas of Columbia County. (Doc. 10.) The Commonwealth argues that remand is necessitated in this case because the FCDO is unable to establish that it "act[s] under" a federal officer or agency as required by 28 U.S.C. § 1442(a)(1); the Commonwealth's Request does not qualify as a "civil proceeding" as defined by § 1442(d)(1); and the Commonwealth's Request was not directed to or against the FCDO. Additionally, the Commonwealth asserts that *Younger* abstention prohibits removal of the instant proceeding.

After the motion to dismiss and motion to remand were fully briefed, oral argument was held on both motions on June 19, 2013. The motions are thus ripe for disposition.

II. Legal Standard

Under 28 U.S.C. § 1447(c), a party may bring a motion to remand an action removed from state to federal court. The general removal statute, 28 U.S.C. § 1441, is to be strictly construed in favor of state court adjudication. *See Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985); *see also In re Asbestos*

Prods. Liab. Litig. (No. IV), 770 F. Supp. 2d 736, 741 (E.D. Pa. 2011) ("the presumption under the general removal statute favors remand [ ] due to the limited jurisdiction of federal courts"). Conversely, 28 U.S.C. § 1442, the federal officer removal statute upon which removal was based in this proceeding, is to be broadly construed in favor of a federal forum. *See Sun Buick v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1262 (3d Cir. 1994); *see also In re Asbestos*, 770 F. Supp. 2d at 741 ("the presumption under the federal officer removal statute favors removal [ ] for the benefit of the federal officer involved the case"). This is so because "'one of the primary purposes for the federal officer removal statute—as its history clearly demonstrates—was to have federal defenses litigated in the federal courts.'" *Calhoun v. Murray*, 507 F. App'x 251, 260 (3d Cir. 2012) (quoting *Willingham v. Morgan*, 395 U.S. 402, 407, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969)). "As with removal petitions based on other statutes, the burden of establishing the propriety of removal and the existence of federal jurisdiction under section 1442(a)(1) is upon the removing party." *N.J. Dep't of Envtl Prot. v. Dixo Co.*, No. 06-1041, 2006 WL 2716092, at *2 (D.N.J. Sept. 22, 2006); *In re Asbestos Litig.*, 661 F. Supp. 2d 451, 453 (D. Del. 2009) (same); *see also Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) ("party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists"). But the Supreme Court has held that "the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" *Arizona v. Manypenny*, 451 U.S. 232, 242, 101 S. Ct. 1657, 68 L. Ed. 2d 58 (1981) (citation omitted).

III. Discussion

As noted, before the Court are the FCDO's motion to dismiss and the Commonwealth's motion to remand. Because the motion to remand raises an issue of jurisdiction, the Commonwealth's motion will be addressed first.

The federal officer removal statute, 28 U.S.C. § 1442, provides, in pertinent part:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue. . . .

28 U.S.C. § 1442(a)(1) (2013). A "civil action" is defined by the federal officer removal statute to include:

> any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued.

> If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

Id. at § 1442(d)(1).[3]

According to the United States Court of Appeals for the Third Circuit, jurisdiction under § 1442(a)(1) requires that:

> a defendant . . . must establish that (1) it is a "person" within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct "acting under" a federal office; (3) it raises a colorable federal defense; and (4) there is a causal nexus between the claims and the conduct performed under color of a federal office.

Feidt v. Owens Corning Fiberglass Corp., 153 F.3d 124, 127 (3d Cir. 1998) (citing *Mesa v. California*, 489 U.S. 121, 129, 109 S. Ct. 959, 965, 103 L. Ed. 2d 99 (1989); *Willingham v. Morgan*, 395 U.S. 402, 409, 89 S. Ct. 1813, 1817, 23 L. Ed. 2d 396 (1969)).

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[3]Prior to the 2013 amendments to § 1442, the definition of a "civil action" in the federal officer removal statute was set forth in subsection (c). *See* 28 U.S.C. § 1442 (2011), *amended by* 28 U.S.C. § 1442 (2013).

A. "Person" Within the Meaning of Section 1442; Colorable Federal Defense; and Causal Nexus

Section 1442 does not define the term "person." *See generally* 28 U.S.C. § 1442. Courts in the Third Circuit have routinely recognized that corporate entities qualify as persons under the federal officer removal statute. *See*, *e.g.*, *Lewis v. Asbestos Corp., Ltd.*, No. 10-650, 2012 WL 3240941, at *4 (D.N.J. Aug. 7, 2012); *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 776 (E.D. Pa. 2010); *Reg'l Med. Transp., Inc. v. Highmark, Inc.*, No. 04-1969, 2008 WL 936925, at *5 (E.D. Pa. Apr. 2, 2008). The vast majority of other federal courts have reached the same conclusion. *See*, *e.g.*, *Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135 (2d Cir. 2008) (section 1442's text covers "non-natural entities, such as the United States and its agencies, which suggests that interpreting 'person' to include corporations is consistent with the statutory scheme."); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) ("corporate entities qualify as "persons" under § 1442(a)(1)"); *Glein v. Boeing Co.*, No. 10-452, 2010 WL 2608284, at *2 (S.D. Ill. June 25, 2010); *McGee v. Arkel Int'l, LLC*, 716 F. Supp. 2d 572, 575 (S.D. Tex. 2009). Applying this reasoning, the FCDO qualifies as a "person" under the federal officer removal statute.

Feidt also requires the removing party to raise a colorable federal defense. "The question before the court on this prong is 'not whether [a] claimed defense is meritorious, but only whether a colorable claim to such a defense has been made.'" *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398, 403

(D.N.J. 2005) (quoting *Fung v. Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992)).

The Supreme Court made clear in *Mesa v. California*, 489 U.S. 121, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989) that the assertion of a colorable federal defense is essential to removal jurisdiction under § 1442(a)(1). *See id.* at 139, 109 S. Ct. 959 ("Federal officer removal under 28 U.S.C. § 1442(a) must be predicated upon averment of a federal defense."). "But while *Mesa* affirmatively settled that Section 1442(a)(1) requires a colorable federal defense to effect removal under the statute, it did not clarify what defenses qualify as such." *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 778 (E.D. Pa. 2010). The Supreme Court has, however, explained:

> The federal officer removal statute is not 'narrow' or 'limited.' At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts.

Willingham v. Morgan, 395 U.S. 402, 406-07, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969). As a result, an "officer need not win his case before he can have it removed." *Id.* at 407, 89 S. Ct. 1813.

The Commonwealth has not addressed in detail the colorable federal defense requirement in its submission. Thus, I will assume that the FCDO satisfies this requirement.

Feidt further requires a causal nexus between the claims and the conduct performed under color of a federal office. "[A] defendant seeking removal must 'by direct averment exclude the possibility that [the defendant's action] was based on acts or conduct of his not justified by his federal duty.'" *Hagen*, 739 F. Supp. 2d at 785 (quoting *Mesa*, 489 U.S. at 132, 109 S. Ct. 959). This inquiry is distinct from the "acting under" requirement under the federal officer removal statute. *Parlin v. DynCorp International, Inc.*, 579 F. Supp. 2d 629, 635 (D. Del. 2008); *see also Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012) (color of federal authority requirement is distinct from the "acting under" requirement). However, some courts have noted that these considerations "'tend to collapse into a single requirement.'" *Parlin*, 579 F. Supp. 2d at 635 (quoting *Reg'l Med. Transp., Inc. v. Highmark, Inc.*, 541 F. Supp. 2d 718, 724 (E.D. Pa. 2008)).

As with the colorable federal defense consideration, the Commonwealth's submissions provide little argument with respect to whether the FCDO satisfies the causal nexus requirement. Again, I will assume this requirement is met. Nevertheless, although these three *Feidt* requirements are met, the FCDO must also establish that is "act[s] under" a federal officer in order to invoke removal jurisdiction under § 1442(a)(1).

B. "Acting Under" a Federal Officer

The focal point of the Commonwealth's motion to remand is the second *Feidt* inquiry. To remove the Commonwealth's Request under the federal officer removal statute, the FCDO must show that it was "acting under" a federal officer. *See Isaacson v. Dow*

Chem. Co., 517 F.3d 129, 136 (2d Cir. 2008). "The words 'acting under' are broad, and . . . the statute must be 'liberally construed.'" *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007) (citing *Colorado v. Symes*, 286 U.S. 510, 517, 52 S. Ct. 635, 76 L. Ed. 2d 1253 (1932)). "There is no precise standard for the requisite control to bring an entity within the 'acting under' clause, but the determination is dependent upon the facts and conduct giving rise to the alleged cause of action." *Scrogin v. Rolls-Royce Corp.*, No. 3:10cv442, 2010 WL 3547706, at *4 (D. Conn. Aug. 16, 2010) (citing *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 125 (2d Cir. 2007)). But the Supreme Court has stated to satisfy the "acting under" requirement of § 1442(a)(1), a private person's actions "must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152, 127 S. Ct. 2301.

In the Notice of Removal, the FCDO asserts that it assists the Government in "providing representation to indigent defendants, a service that the Government itself would have to perform under the CJA." (Doc. 1, ¶ 19.) Essentially, the FCDO argues that as a federal grantee/contractor pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, it "act[s] under" the AO.[4]

The Commonwealth, however, citing the Supreme Court's decision in *Watson*, argues that the FCDO is unable to satisfy the federal officer removal statute

[4]The FCDO does not allege that it is a federal agency under § 1442. (Doc. 24, 11-13.)

because "no federal agency is obligated to appear in state court and the instant PCRA answer concerns FCDO's appearances in state court rather than its appearances in federal court." (Doc. 11, 23.) Even if a federal court has discretion to appoint the FCDO to represent a state PCRA petitioner before federal habeas review, federal courts are not obligated to make such appointments. (Doc. 26, 4.) As a result, the Commonwealth insists that the FCDO is not helping the Federal Government produce an item it needs when the FCDO represents indigent criminal defendants in state court.

The FCDO's contention that it "act[s] under" the AO for purposes of the federal officer removal statute requires consideration of the Criminal Justice Act and an understanding of the relationship between Community Defender Organizations and the AO. Moreover, as the Commonwealth asserts that the resolution of the FCDO's private contractor argument is controlled by *Watson v. Philip Morris Cos.*, 551 U.S. 142, 146, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007), a discussion of that decision follows as well.

1. The Criminal Justice Act and the Relationship Between Community Defender Organizations and the Administrative Office of the United States Courts

The Criminal Justice Act authorizes the appointment of counsel for financially eligible individuals seeking habeas corpus relief under 18 U.S.C. §§ 2241, 2254, and 2255 whenever "the court determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). In post conviction proceedings under §

2254 or § 2555 to vacate or set aside a death sentence, "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys. . . ." 18 U.S.C. § 3599(a)(2). Section 3599(e) provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Id. at § 3599(e).[5]

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[5]In *Harbison v. Bell*, 556 U.S. 180, 182-83, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009), the Court granted certiorari to address "whether § 3599(e)'s reference to 'proceedings for executive or other clemency as may be available to the defendant' encompasses state clemency proceedings." In finding that § 3599(e) authorizes federally appointed counsel to represent clients in such proceedings, the Court considered the text of § 3599(e) and noted that "[i]t is the sequential organization of the statute and the term 'subsequent' that circumscribe counsel's representation, not a strict division

(continued...)

Under the Criminal Justice Act, federal district courts must place in operation a plan for furnishing representation to indigent criminal defendants. *See* 18 U.S.C. § 3006A(a). A district in which at least two hundred persons annually require the appointment of counsel may establish a "Federal Public Defender Organization," a "Community Defender Organization," or both. *See id*. at § 3006A(g)(1).

The Criminal Justice Act Plan for the United States District Court for the Middle District of Pennsylvania provides that "the federal public defender organization of the Middle District of Pennsylvania, previously established in this district pursuant to the provisions of the CJA, is hereby recognized as the federal public defender organization for this district." In death penalty proceedings under § 2254 and § 2255, the Middle District Plan permits the appointment of

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[5](...continued)
between federal and state proceedings." *Id*. at 188, 129 S. Ct. 1481. The Court also indicated that the Government's concern that § 3599(e) as interpreted by the Court that federally funded counsel would need to represent petitioners in any state habeas proceeding occurring after appointment of counsel to be unfounded because state habeas is not a stage "subsequent" to federal habeas. *See id*. at 189, 129 S. Ct. 1481. Thus, even though "state post-conviction litigation sometimes follows the initiation of federal habeas because a petitioner has failed to exhaust does not change the order of proceedings contemplated by the statute." *Id*. at 190, 129 S. Ct. 1481. Nevertheless, in light of § 3599(e)'s provision that counsel may represent clients in "other appropriate motions and procedures," the Court noted that "a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation." *Id*. at 190 n.7, 129 S. Ct. 1481.

counsel from a number of sources, including the Defender Association of Philadelphia's Capital Habeas Unit, *i.e.*, the FCDO.

The Plan of the United States District Court for the Eastern District of Pennsylvania Pursuant to the Criminal Justice Act of 1964, as amended, designates the FCDO as the Community Defender Organization to "facilitate the representation of persons entitled to appointment of counsel under the Criminal Justice Act."

A "Community Defender Organization" under the Criminal Justice Act is defined as "a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation." 18 U.S.C. § 3006A(g)(2)(B).[6] Community Defender Organizations "shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the next fiscal year." *Id.* Community Defender Organizations may apply for approval from the Judicial Conference to receive an initial grant to establish the organization and in lieu of payments for representation and services under subsections (d) and (e) of § 3006A, Community Defender Organizations may "receive periodic sustaining grants to provide representation and other

[6]The FCDO, as explained above, is a division within the Defender Association of Philadelphia, which is a non-profit organization that provides legal representation to indigent criminal defendants in federal and state courts. (Doc. 12, 3-4.) The FCDO's activities are supported by a combination of federal funds received under the Criminal Justice Act and private charitable contributions. (*Id.*)

expenses pursuant to this section." *Id.* The Judicial Conference is also tasked with issuing rules and regulations for governance of plans established under § 3006A. *See id.* at § 3006A(h). Appropriations under the Criminal Justice Act "shall be made under the supervision of the Director of the Administrative Office of the United States Courts." *Id.* at § 3006A(i).

The AO, acting under the supervision and direction of the Judicial Conference, "administers the federal defender and attorney program on a national basis; is responsible for training related to furnishing representation under the CJA; and provides legal, policy, management, and fiscal advice to the Conference and its . . . defenders and their staffs." United States Courts, http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx (last visited July 22, 2013).

Community Defender Organizations seeking grant funds must apply on a form prepared by the AO. *See* 7 Guide to Judiciary Policy: Defender Services, pt. A, § 420, available at http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol_07.pdf (last visited July 22, 2013). The receipt and use of funds is subject to certain conditions, and Community Defender Organizations must agree to and accept these conditions before grant payments are issued. *See id.* Among others, the terms and conditions include that: "grant funds will be maintained separately and will not be commingled with any non-grant funds maintained by grantee;" "the grantee must submit reports each year setting forth its activities and financial position and the anticipated caseload and expense for the next fiscal year;" and "the grantee must keep financial books . . . unless a waiver is granted by the AO [and] such

records must be maintained and submitted in such manner and form as required by the AO." *Id.* at Appx. 4A, available at http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol07A-Ch04-Appx4A.pdf (last visited July 22, 2013). If a grantee fails to comply with the terms and conditions of its grant award, the Judicial Conference or its authorized representative "may reduce, suspend, or terminate, or disallow payments under th[e] grant award as it deems appropriate." *Id.*

Based on these guidelines and regulations, the FCDO asserts that it operates under congressional authorization and is subject to federal control. (Doc. 1, ¶ 18.) The FCDO thus concludes that it "act[s] under" a federal officer and/or agency for purposes of the federal officer removal statute. The Commonwealth, however, contends that this showing fails to satisfy the "acting under" analysis set forth by the Supreme Court in *Watson*.

2. *Watson v. Philip Morris Cos.*

The Supreme Court addressed the "acting under" requirement in the context of the federal officer removal statute in *Watson v. Philip Morris Cos.*, 551 U.S. 142, 146, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007). The Commonwealth argues that the Supreme Court's decision in *Watson* provides the framework for the "acting under" inquiry for the federal officer removal statute, and, pursuant to *Watson*, remand of the Commonwealth's Request is compelled in this action. For the reasons detailed below, I agree with the Commonwealth in both respects.

In *Watson*, the petitioners filed a civil action in state court claiming that the respondents, the Philip Morris Companies, violated state laws prohibiting unfair and deceptive business practices by advertising certain cigarette brands as "light" when, in fact, the respondents manipulated testing results by designing its cigarettes and employing techniques that caused the cigarettes to register lower levels of tar and nicotine than would actually be delivered to consumers. *See Watson*, 551 U.S. at 146, 127 S. Ct. 2301. Relying on the federal officer removal statute, the respondents removed the action to federal court. *See id.* The district court held that the statute authorized removal because the petitioner's complaint attacked the respondents' use of the Government's method of testing cigarettes and thus the action involved conduct by the respondents that was taken under the Federal Trade Commission ("FTC"). *See id.*

The district court certified the question for interlocutory review, and the United States Court of Appeals for the Eighth Circuit affirmed. *See id.* at 147, 127 S. Ct. 2301. As with the district court, the Eighth Circuit found significant the FTC's detailed supervision of the cigarette testing process. *See id.* The Supreme Court granted certiorari to address the question "whether the fact that a federal regulatory agency directs, supervises, and monitors a company's activities in considerable detail brings that company within the scope of the italicized language ("*acting under*" an "*officer*" of the United States) and thereby permits

removal." *Id*. at 145, 127 S. Ct. 2301 (emphasis in original).[7]

While recognizing the words "acting under" are broad, the Court emphasized that "broad language is not limitless." *Id*. at 148, 127 S. Ct. 2301. The Court thus considered the statute's language, context, history, and purpose to determine the scope and breadth of § 1442(a)(1). *See id*. After considering the history of the statute, the Court noted that early Supreme Court precedent "illustrate[s] that the removal statute's basic purpose is to protect the Federal Government from interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Federal Government acting within the scope of their authority." *Id*. at 150, 127 S. Ct. 2301 (internal quotations, citations, and alterations omitted). Significantly, state courts may display "local prejudice" against unpopular federal officials or federal laws, States may impede the enforcement of federal law, or States may deprive federal officials of a federal forum in which to assert federal immunity defenses. *See id*. These concerns can also arise when private persons act as assistants to federal officers carrying out the performance of their official duties. *See id*.

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[7]Section 1442(a)(1) as construed by the Supreme Court in *Watson* has since undergone minor amendments. *See* 28 U.S.C. § 1442(a)(1) (1996), *amended by* 28 U.S.C. § 1442(a)(1) (2011). Section 1442(a)(1) continues to require a private person to be "acting under" a federal officer as set forth in *Watson*.

Against that historical backdrop, the *Watson* Court analyzed the phrase "acting under" as used in § 1442(a)(1), and found use of the word "under" "refer[red] to what has been described as a relationship that involves 'acting in a certain capacity, considered in relation to one holding a superior position or office.'" *Id*. at 151, 127 S. Ct. 2301 (quoting 18 Oxford English Dictionary 948 (2d ed.1989)). Such a relationship often involves subjection, guidance, or control. *See id*. (citing Webster's New International Dictionary 2765 (2d ed. 1953)). Moreover, the Supreme Court found that its precedent and the statute's purpose confirmed that a private person's "acting under" "must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Id*. at 152, 127 S. Ct. 2301 (citing *Davis v. South Carolina*, 107 U.S. 597, 600, 2 S. Ct. 636, 27 L. Ed. 574 (1883)). The Court emphasized that mere compliance (or noncompliance) with federal laws, rules and regulations does not bring a private actor within the scope of the federal officer removal statute even if "the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id*. at 152-53, 127 S. Ct. 2301.

The *Watson* Court next considered the respondents' argument that "lower courts have held that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Id*. The respondents thus questioned why if a private contractor can act under a federal officer based on close supervision, would the result not be the same when a private party is subject

to intense regulation. *See id.* The Supreme Court explained:

> The answer to this question lies in the fact that the private contractor [in cases where close supervision by a federal officer or agency is sufficient] is helping the Government to produce an item that it needs. The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks. In the context of *Winters*, for example, Dow Chemical fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war. Moreover, at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform.

Id. at 153-54, 127 S. Ct. 2301 (referring to *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). The Court found this examination sufficiently addressed the respondent's argument in light of the fact that private contracting was not at issue in the case.

Lastly, the respondents in *Watson* asserted that its activities exceeded the mere compliance with regulations because the FTC, after initially testing cigarettes for tar and nicotine, delegated that authority to an industry-financed testing laboratory. *See id.* at 154, 127 S. Ct. 2301. The Court rejected the respondents' argument because it "found no evidence of any delegation of legal authority from the FTC to the industry

association to undertake testing on the Government agency's behalf. Nor is there evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement." *Id*. at 156, 127 S. Ct. 2301. And, without evidence of a special relationship, the Court found the respondents' analogy to Government contracting flawed because it was left with only detailed rules, which sounded as regulation, and not delegation of authority. *See id*. at 157, 127 S. Ct. 2301.

3. Analysis of the "Acting Under" Requirement

Citing § 3006A, § 3599, and *Watson*, the Commonwealth insists that the FCDO fails to satisfy its burden as the removing party in establishing the existence of federal jurisdiction under § 1442(a)(1). Specifically, the Commonwealth takes the position that the FCDO fails to adequately "establish[ ] that it acts under a federal officer or agency in a private contractor capacity." (Doc. 26, 3.) The FCDO's private contractor argument, according to the Commonwealth, makes little sense because when the FCDO "appears in state court proceedings before federal habeas review it is not assisting or helping carry out the duties of its federal superior," (Doc. 11, 13), since no federal agency has "a duty to appoint legal representation to criminal defendants in state court." (*Id*. at 23.) Without such an obligation to appoint counsel or appear in state post-conviction proceedings, the Commonwealth concludes that the FCDO cannot satisfy the federal officer removal statute because it is not helping the Government produce something it needs.

The FCDO, however, asserts that it adequately alleges that it "act[s] under" the AO as a federal grantee/contractor. In that regard, "[a]s a community defender organization, the FCDO assists the Government to implement the aims and purposes of the CJA, by representing indigent defendants." (Doc. 24, 16.) The FCDO suggests that it satisfies the federal officer removal statute because it "operates under congressional authorization and is therefore subject to federal guidelines and regulations." (*Id.*; *see also* Doc. 1, ¶ 18 ("The receipt and use of grant funds are subject to conditions set forth in Appx 4A of the Guidelines. . . . [T]he FCDO is subject to federal control.").) The FCDO also criticizes the Commonwealth's construction of the federal officer removal statute. It maintains that the Commonwealth's arguments in support of remand are hinged to the merits of the underlying controversy, and, at this point in the proceeding, it would be improper to decide the merits of the case. (Doc. 24, 17-19.)

In view of the above cited authority and upon consideration of the arguments of the parties, the FCDO fails to satisfy its burden and demonstrate the existence of federal jurisdiction under § 1442(a)(1). In *Watson*, the Supreme Court explained that a "private person's 'acting under' must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson*, 55 U.S. at 152, 127 S. Ct. 2301. In essence, the Court held that helping carry out or assisting with a governmental task or duty is a necessary condition for a private entity to be considered "acting under" a federal officer or agency for purposes of § 1442(a)(1). The FCDO asserts that it assists the Government by representing indigent defendants,

which it suggests is bolstered by the fact that the Guidelines for Administering the Criminal Justice Act and Related Statutes require that a Community Defender Organization's "stated purposes must include implementation of the aims and purposes of the CJA." However, the FCDO has not identified any federal agency or officer that is tasked with or has a duty to appoint, arrange, or provide legal representation for indigent capital criminal defendants in *state post-conviction proceedings* to preserve claims for federal habeas review. A necessary condition to invoke the federal officer removal statute, the assistance or carrying out of duties of a federal superior, is therefore absent in this case.[8] As a result, even if the FCDO is "acting under" a federal officer in the course of its representation of clients in federal court, it does not follow that it also "act[s] under" a federal officer in its performance of tasks for which the Government bears no responsibility, such as appearing in state post-conviction capital proceedings to exhaust claims for federal habeas review. Indeed, "[c]ritical under the

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[8]For this reason, and in light of the fact that they pre-date *Watson*, the district court cases relied on by the FCDO as supporting its claim that it "act[s] under" the AO are not persuasive. *See*, *e.g.*, *Dixon v. Ga. Indigent Legal Servs., Inc.*, 388 F. Supp. 1156 (S.D. Ga. 1974) (finding that "attorneys employed by organizations conducting federally-funded legal assistance programs for the indigent act under officers of the United States within the meaning of the removal statute[.]"); *Gurda Farms, Inc. v. Monroe Cnty. Legal Assistance Corp.*, 358 F. Supp. 841 (S.D.N.Y. 1973) ("In light of the foregoing description of the relationship between [the Office of Economic Opportunity] and its legal service programs, I conclude that the defendants in the instant actions are persons 'acting under' a federal officer within the meaning of § 1442(a)(1).").

statute is to what extent defendants acted under federal direction *at the time they were engaged in the conduct now being sued upon*." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 125 (2d Cir. 2007) (emphasis added) (noting that the "acting under" and causal connection considerations tend to collapse into a single requirement and stating that "removal will not be proper where a private party establishes only that the acts complained of were performed under the 'general auspices' of a federal officer."); *Parlin v. DynCorp Int'l, Inc.*, 579 F. Supp. 2d 629, 635 (D. Del. 2008). As a corollary, if the FCDO's status as a federal grantee alone authorizes removal under § 1442(a)(1), numerous other entities and organizations that receive federal grants would also fall within the purview of the federal officer removal statute. Allowing these entities to remove proceedings to federal court simply because they receive grant funds subject to federal conditions and regulations without also finding that the entities are assisting or carrying out duties of the Federal Government would be inconsistent with the *Watson* Court's construction of § 1442(a)(1).

Moreover, the FCDO's argument that it satisfies the "acting under" requirement of § 1442(a)(1) as a federal contractor/grantee because it operates "under congressional authorization" and is "subject to federal guidelines and regulations," (Doc. 24, 16), is similar to the position advanced by the Philip Morris Companies and rejected by the Supreme Court in *Watson*. As the Supreme Court noted, intense regulation alone is insufficient to turn a private contractor into a private firm "acting under" a federal officer or agency. *See Watson*, 551 U.S. at 153, 127 S. Ct. 2301 ("a highly

regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone."). The *Watson* Court noted a crucial distinction between cases where a contractor and the Government are in an unusually close relationship "involving detailed regulation, monitoring, and supervision," and those instances where a company is simply subject to "intense regulation." *Id.* In the former, the private contractor assists the Government by providing an "item that it needs," which, in the contractor's absence, the Government itself would have to produce. *Id.*

The FCDO and the Government are not in such a relationship that render it "acting under" a federal officer for purposes of the federal officer removal statute. Among other things, the FCDO is required to segregate grant funds, submit reports detailing its financial activities, and keep financial books under the terms of its funding grant. But, these requirements sound in regulation. And being subject to intense regulation alone does not entitle a private entity to remove an action under § 1442(a)(1). *See Watson*, 551 U.S. at 153.

Furthermore, the FCDO's submissions nor its arguments demonstrate that it is in such an unusually close relationship with the AO or the Federal Government to make the federal officer removal statute applicable to this proceeding. The FCDO, as discussed, is subject to guidelines and regulations including the terms of its funding grant. But the FCDO has not suggested that its representation of clients is performed at the direction of the AO, that the AO dictates its litigation strategies or legal theories in individual cases, that the AO reviews its work product, or that the

AO otherwise takes an active role in monitoring and/or participating in client representation. Of course, a third-party cannot dictate the FCDO's legal representation of its clients. *See*, *e.g.*, *Polk Cnty. v. Dodson*, 454 U.S. 312, 318-22, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) ("a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior," and a lawyer shall not permit a person "who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.");[9] *see also Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S. Ct. 402, 62 L. Ed. 2d 355 (1979) ("indispensable element of the effective performance of [appointed counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."). Nonetheless, it is this lack of monitoring or close supervision that distinguishes the relationship between the FCDO and the AO from cases that have found an unusually close relationship between a private contractor and a federal officer or agency for purposes of § 1442(a)(1). For example, in *Bennett v. MIS Corp.*, 607 F.3d 1076, 1088 (6th Cir. 2010) the United States Court of Appeals for the Sixth Circuit concluded that a private mold remediation firm was "acting under" the Federal Aviation Administration because it "helped FAA officers carry out their task of ridding a federal

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[9]In *Dodson*, the issue before the Court was "whether a public defender acts 'under color of state law' when representing an indigent defendant in a state criminal proceeding." *Dodson*, 454 U.S. at 314, 102 S. Ct. 445. Significantly, the Court held that a public defender does not act under color of state law when performing "a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 325, 102 S. Ct. 445.

employee occupied building of an allegedly hazardous contaminant, a job that in the absence of a contract with MIS or another private mold remediation firm the FAA itself would have had to perform." *Id.* (citation, internal quotation, and alterations omitted). In finding the private contractor and the FAA in an unusually close relationship, the Sixth Circuit emphasized that the FAA contracts included precise specifications and required the contractor to follow explicit parameters, the contractor's work was closely monitored by federal officers, the FAA contracting officers had authority to require that the contractor dismiss incompetent employees, and the FAA controlled the working hours of the contractor's employees. *See id.* at 1087.

Here, in comparison, for the reasons detailed above, the FCDO is not providing a service the Government "needs" when it represents criminal defendants in state post-conviction proceedings prior to federal habeas review. Nor in the absence of the FCDO would the Government be obligated to provide representation itself in such circumstances. Accordingly, there is no unusually close relationship between the FCDO and the Federal Government, and removal of the Commonwealth's Request in this proceeding was improper.

Lastly, the FCDO suggests that conducting such an analysis at this stage of the proceeding is premature. Specifically, it contends that finding that no federal agency is required to appoint counsel for indigent capital criminal defendants in their state post-conviction proceedings on the Commonwealth's motion to remand would inappropriately result in an accelerated decision on the merits of whether the Criminal Justice

Act prohibits Community Defender Organizations from appearing in state court.

Concluding that there is no federal officer or agency obligated to represent or appoint counsel to represent indigent capital state criminal defendants in their state post-conviction proceedings is distinct from deciding the merits of the Commonwealth's Request. That is, I am able to determine that the FCDO fails to establish the "acting under" requirement of the federal officer removal statute without determining that the FCDO should be removed as counsel in the PCRA proceeding. Thus, while I hold that the FCDO has not met its burden to establish federal jurisdiction under § 1442(a)(1), I make no finding that the Criminal Justice Act bars the FCDO from appearing in state court. *See supra* note 5.

IV. Conclusion

Since the FCDO fails to establish that it is "acting under" a federal officer for purposes of § 1442(a)(1), the Commonwealth's remaining arguments for remand, *i.e.*, the applicability of *Younger* abstention to this proceeding, whether the PCRA Answer is a "civil action" as defined by § 1442(d)(1), or whether the Commonwealth's Request is against or directed to the FCDO, need not be addressed. And, as the proceeding will be remanded, the FCDO's motion to dismiss will be denied as moot.

An appropriate order follows.

August 16, 2013
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA**

In Re: Commonwealth's Request for Relief Against or Directed to Defender Association of Philadelphia, Respondent, Filed In COMMONWEALTH OF PENNSYLVANIA, v. ANTHONY DICK.	CIVIL ACTION NO. 1:13-CV-561 (JUDGE CAPUTO)

ORDER

NOW, this 16th day of August, 2013, **IT IS HEREBY ORDERED** that:

(1) The Commonwealth's Motion to Remand (Doc. 10) is **GRANTED**.

(2) The Commonwealth's Request for Relief Against or Directed to Defender Association of Philadelphia is **REMANDED** to the Court of Common Pleas of Columbia County, Pennsylvania.

(3) The Defender Association of Philadelphia's Motion to Dismiss (Doc. 7) is **DENIED as moot**.

(4) The Clerk of Court is directed to mark the case as **CLOSED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA**

In Re: Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia, Respondent, Filed In COMMONWEALTH OF PENNSYLVANIA, v. KEVIN DOWLING.	CIVIL ACTION NO. 1:13-CV-510 (JUDGE CAPUTO)

MEMORANDUM

In Kevin Dowling's ("Mr. Dowling") pending Post Conviction Relief Act ("PCRA") proceedings challenging his conviction and sentence of death in the Court of Common Pleas of York County, Pennsylvania, the Commonwealth of Pennsylvania (the "Commonwealth") filed a Motion to Appoint Counsel for Mr. Dowling. Although styled as a request to appoint counsel, Mr. Dowling is currently represented in the PCRA proceedings by the Federal Community Defender Organization, Eastern District of Pennsylvania (the "FCDO").[1]

[1]The named movant Defender Association of Philadelphia's (continued...)

In actuality, the Commonwealth's motion seeks a judicial determination of whether lawyers employed by the FCDO should be disqualified from representing Mr. Dowling in the PCRA proceedings. Relying on the federal officer removal statute, 28 U.S.C. § 1442, Respondent Defender Association of Philadelphia removed the Commonwealth's Motion to Appoint Counsel to this Court.[2] Mr. Dowling's PCRA proceedings, however, have not been removed and remain in state court. Now before the Court are the Commonwealth's Motion to Remand (Doc. 14) the Motion to Appoint Counsel to the PCRA court and the Defender Association of Philadelphia's Motion to Dismiss (Doc. 11) the Commonwealth's Motion to Appoint Counsel.

The underlying proceeding in this removed action seemingly implicates several issues of federal law

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[1](...continued)
Federal Court Division is a Community Defender Organization within the meaning of 18 U.S.C. § 3006A(g)(2)(B). The Federal Court Division of the Defender Association of Philadelphia is often referred to as the FCDO. The FCDO is not a juridical entity, but rather is a subunit of the named movant, Respondent Defender Association of Philadelphia.

[2]At least six other similarly situated proceedings have been removed to federal court. Three are pending in this District, *Commonwealth v. Housman*, No. 13-2103 (M.D. Pa.) (Caputo, J.); *Commonwealth v. Dick*, No. 13-561 (M.D. Pa.) (Caputo, J.); *Commonwealth v. Sepulveda*, No. 13-511 (M.D. Pa.) (Caputo, J.), and three are pending in the United States District Court for the Eastern District of Pennsylvania, *Commonwealth v. Johnson*, No. 13-2242 (E.D. Pa.) (Schiller, J.); *Commonwealth v. Mitchell*, No. 13-1871 (E.D. Pa.) (McLaughlin, J.); *Commonwealth v. Harris*, No. 13-062 (E.D. Pa.) (Rufe, J.).

involving the construction of federal statutes and the application of relevant federal decisional authority and legal principles. Nonetheless, I am of the view that the FCDO fails to satisfy its burden to establish the existence of federal jurisdiction under the federal officer removal statute. Specifically, because the "acting under" requirement for removal under 28 U.S.C. § 1442(a)(1) is not satisfied in this case, the Commonwealth's motion to remand this action to the Court of Common Pleas of York County will be granted. And, since the Commonwealth's motion to remand will be granted, the FCDO's motion to dismiss will be denied as moot.

I. Background

A. Relevant Factual Background

Kevin Dowling was convicted of first-degree murder and related counts, and sentenced to death on November 9, 1998, in the Court of Common Pleas of York County, Pennsylvania. Mr. Dowling's convictions and sentence of death were affirmed by the Pennsylvania Supreme Court, and Mr. Dowling's petition for certiorari review was denied on October 2, 2006.

Thereafter, Mr. Dowling filed a motion in this Court for leave to proceed *in forma pauperis* and appointment of federal habeas corpus counsel. *See Dowling v. Beard, et al.*, No. 06-cv-2085, (M.D. Pa. Oct. 23, 2006). On October 24, 2006, Mr. Dowling's request to proceed *in forma pauperis* was granted, and the Capital Habeas Unit of the Federal Public Defender Office for the Middle District of Pennsylvania and the FCDO were appointed as co-counsel for Mr. Dowling's to-be-filed

habeas corpus petition. On January 29, 2007, the FCDO entered its appearance for Mr. Dowling in the Court of Common Pleas on the homicide case.

After the Governor of Pennsylvania signed a warrant scheduling execution for February 27, 2007, Mr. Dowling petitioned this Court for a stay of execution, which was granted on January 12, 2007. Mr. Dowling ultimately filed his petition for writ of habeas corpus on July 24, 2007. The next day, Mr. Dowling moved to stay the federal proceedings to permit his counsel to exhaust his remedies in state court. The motion to stay was granted on September 11, 2007.

On December 7, 2012, the orders staying the federal proceedings and staying execution were both lifted in light of the fact that the Governor's warrant had expired without a new warrant having issued. Mr. Dowling's petition for writ of habeas corpus was also dismissed without prejudice.

B. *Commonwealth v. Mitchell*

On January 10, 2013, the Pennsylvania Supreme Court issued a per curiam order in the PCRA case of *Commonwealth v. Mitchell*, No. 617 CAP (the "*Mitchell* Order"). Upon consideration of the Commonwealth's motion to remove counsel in *Mitchell*, the Pennsylvania Supreme Court remanded to the PCRA court to "determine whether current counsel, the Federal Community Defender Organization ("FCDO") may represent appellant in this state capital PCRA proceeding; or whether other appropriate post-conviction counsel should be appointed." *Id*. To resolve that issue, the

Pennsylvania Supreme Court provided the following guidance:

> [T]he PCRA court must first determine whether the FCDO used any federal grant monies to support its activities in state court in this case. If the FCDO cannot demonstrate that its actions here were all privately financed, and convincingly attest that this will remain the case going forward, it is to be removed. If the PCRA court determines that the actions were privately financed, it should then determine "after a colloquy on the record, that the defendant has engaged counsel who has entered, or will promptly enter, an appearance for the collateral review proceedings." *See* Pa. R. Crim. P. 904(H)(1)(c). We note that the order of appointment produced by the FCDO, issued by the U.S. District Court for the Eastern District of Pennsylvania at No. 2:11-cv-02063-MAM, and dated April 15, 2011, appointed the FCDO to represent appellant only for purposes of litigating his civil federal *habeas corpus* action, and the authority of the FCDO to participate in this state collateral proceeding is not clear. *See* 18 U.S.C. § 3599(a)(2) (authorizing appointment of counsel to indigent state defendants actively pursuing federal *habeas corpus* relief from death sentence).

Id.

Justice Todd, joined by Justice Baer, filed a dissenting statement, noting that the court directed "the removal of counsel without any stated analysis of

the issues involved, issues which require the construction of federal statutes and other authority, consideration of the relationship between federal and state court systems in capital litigation, and consideration of counsel's role therein." *Commonwealth v. Mitchell*, No. 617 CAP (Todd, J., dissenting).

C. The Commonwealth's Motion to Appoint Counsel

In view of the *Mitchell* Order, on January 18, 2013, the Commonwealth filed its Motion to Appoint Counsel (the "Commonwealth's Motion") in the PCRA court. While styled as a request to appoint counsel, Mr. Dowling is currently represented in the PCRA proceedings by the FCDO. In actuality, the Motion to Appoint Counsel requests a hearing to determine whether the FCDO can represent Mr. Dowling in his PCRA proceedings pursuant to the *Mitchell* Order and to remove the FCDO as counsel if it fails to make the requisite showing. The Commonwealth's Motion also notes that if the FCDO is removed as counsel in Mr. Dowling's PCRA proceedings, he would still be entitled to appointment of counsel pursuant to the Pennsylvania Rules of Criminal Procedure.

D. The Amended Notice of Removal

The FCDO, on February 21, 2013, removed the Commonwealth's Motion to this Court pursuant to 28 U.S.C. § 1442. (Doc. 1.) On March 1, 2013, the FCDO filed an Amended Notice of Removal. (Doc. 6.) The FCDO did not remove the underlying action in which Mr. Dowling is challenging his conviction and death sentence under the PCRA, and that action remains in

state court. (*Id.* at ¶ 3.) The Amended Notice of Removal asserts that the Commonwealth's Motion is properly removed to this Court because "it is directed against a person, *i.e.*, the FCDO, acting under an officer or agency of the United States, for or relating to the FCDO's acts 'under color of such office,' 28 U.S.C. § 1442(a)(1), and is a proceeding that seeks a judicial order, 28 U.S.C. § 1442(c)." (*Id.* at ¶ 11.)

The FCDO also argues that a number of colorable federal defenses will be raised in opposition to the Commonwealth's Motion. These defenses include, among others: (1) preemption; (2) primary jurisdiction; and (3) that the Commonwealth's Motion seeks to deprive the FCDO and its lawyers of their First Amendment rights and their equal protections rights under the Fourteenth Amendment. The FCDO further maintains that the Commonwealth's position is predicated on an incorrect interpretation of federal law. (*Id.* at ¶¶ 21-39.)

E. The FCDO's Motion to Dismiss and the Commonwealth's Motion to Remand

Following the removal of the Commonwealth's Motion, the FCDO filed a motion to dismiss the proceeding pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 11.) The FCDO asserts that the Commonwealth's Motion fails to state a claim on which relief can be granted because sole responsibility for the enforcement of the funding provisions on which the Commonwealth relies, 18 U.S.C. § 3006A and 18 U.S.C. § 3599, lies with the Administrative Office of the United States Courts ("AO"). Thus, the FCDO contends that the federal statutes the Commonwealth

seeks to enforce do not endow any non-federal entity with a right of action. However, to the extent that the Commonwealth is not barred from proceeding under these statutes, the FCDO requests that the action be stayed and referred to the AO under the doctrine of primary jurisdiction.

On March 22, 2013, the Commonwealth filed a motion to remand this proceeding to the Court of Common Pleas of York County. (Doc. 14.) The Commonwealth argues that remand is necessitated in this case because the FCDO is unable to establish that it "act[s] under" a federal officer or agency as required by 28 U.S.C. § 1442(a)(1); the Commonwealth's Motion does not qualify as a "civil proceeding" as defined by § 1442(d)(1); and the Commonwealth's Motion was not directed to or against the FCDO. Additionally, the Commonwealth asserts that *Younger* abstention prohibits removal of the instant proceeding.

After the motion to dismiss and motion to remand were fully briefed, oral argument was held on both motions on June 19, 2013. The motions are thus ripe for disposition.

II. Legal Standard

Under 28 U.S.C. § 1447(c), a party may bring a motion to remand an action removed from state to federal court. The general removal statute, 28 U.S.C. § 1441, is to be strictly construed in favor of state court adjudication. *See Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985); *see also In re Asbestos Prods. Liab. Litig. (No. IV)*, 770 F. Supp. 2d 736, 741 (E.D. Pa. 2011) ("the presumption under the general

removal statute favors remand [ ] due to the limited jurisdiction of federal courts"). Conversely, 28 U.S.C. § 1442, the federal officer removal statute upon which removal was based in this proceeding, is to be broadly construed in favor of a federal forum. *See Sun Buick v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1262 (3d Cir. 1994); *see also In re Asbestos*, 770 F. Supp. 2d at 741 ("the presumption under the federal officer removal statute favors removal [ ] for the benefit of the federal officer involved the case"). This is so because "'one of the primary purposes for the federal officer removal statute—as its history clearly demonstrates—was to have federal defenses litigated in the federal courts.'" *Calhoun v. Murray*, 507 F. App'x 251, 260 (3d Cir. 2012) (quoting *Willingham v. Morgan*, 395 U.S. 402, 407, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969)). "As with removal petitions based on other statutes, the burden of establishing the propriety of removal and the existence of federal jurisdiction under section 1442(a)(1) is upon the removing party." *N.J. Dep't of Envtl Prot. v. Dixo Co.*, No. 06-1041, 2006 WL 2716092, at *2 (D.N.J. Sept. 22, 2006); *In re Asbestos Litig.*, 661 F. Supp. 2d 451, 453 (D. Del. 2009) (same); *see also Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) ("party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists"). But the Supreme Court has held that "the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" *Arizona v. Manypenny*, 451 U.S. 232, 242, 101 S. Ct. 1657, 68 L. Ed. 2d 58 (1981) (citation omitted).

III. Discussion

As noted, before the Court are the FCDO's motion to dismiss and the Commonwealth's motion to remand. Because the motion to remand raises an issue of jurisdiction, the Commonwealth's motion will be addressed first.

The federal officer removal statute, 28 U.S.C. § 1442, provides, in pertinent part:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue. . . .

28 U.S.C. § 1442(a)(1) (2013). A "civil action" is defined by the federal officer removal statute to include:

> any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued.

> If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

Id. at § 1442(d)(1).[3]

According to the United States Court of Appeals for the Third Circuit, jurisdiction under § 1442(a)(1) requires that:

> a defendant . . . must establish that (1) it is a "person" within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct "acting under" a federal office; (3) it raises a colorable federal defense; and (4) there is a causal nexus between the claims and the conduct performed under color of a federal office.

Feidt v. Owens Corning Fiberglass Corp., 153 F.3d 124, 127 (3d Cir. 1998) (citing *Mesa v. California*, 489 U.S. 121, 129, 109 S. Ct. 959, 965, 103 L. Ed. 2d 99 (1989); *Willingham v. Morgan*, 395 U.S. 402, 409, 89 S. Ct. 1813, 1817, 23 L. Ed. 2d 396 (1969)).

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[3]Prior to the 2013 amendments to § 1442, the definition of a "civil action" in the federal officer removal statute was set forth in subsection (c). *See* 28 U.S.C. § 1442 (2011), *amended by* 28 U.S.C. § 1442 (2013).

A. "Person" Within the Meaning of Section 1442; Colorable Federal Defense; and Causal Nexus

Section 1442 does not define the term "person." *See generally* 28 U.S.C. § 1442. Courts in the Third Circuit have routinely recognized that corporate entities qualify as persons under the federal officer removal statute. *See*, *e.g.*, *Lewis v. Asbestos Corp., Ltd.*, No. 10-650, 2012 WL 3240941, at *4 (D.N.J. Aug. 7, 2012); *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 776 (E.D. Pa. 2010); *Reg'l Med. Transp., Inc. v. Highmark, Inc.*, No. 04-1969, 2008 WL 936925, at *5 (E.D. Pa. Apr. 2, 2008). The vast majority of other federal courts have reached the same conclusion. *See*, *e.g.*, *Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135 (2d Cir. 2008) (section 1442's text covers "non-natural entities, such as the United States and its agencies, which suggests that interpreting 'person' to include corporations is consistent with the statutory scheme."); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) ("corporate entities qualify as "persons" under § 1442(a)(1)"); *Glein v. Boeing Co.*, No. 10-452, 2010 WL 2608284, at *2 (S.D. Ill. June 25, 2010); *McGee v. Arkel Int'l, LLC*, 716 F. Supp. 2d 572, 575 (S.D. Tex. 2009). Applying this reasoning, the FCDO qualifies as a "person" under the federal officer removal statute.

Feidt also requires the removing party to raise a colorable federal defense. "The question before the court on this prong is 'not whether [a] claimed defense is meritorious, but only whether a colorable claim to such a defense has been made.'" *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398, 403

(D.N.J. 2005) (quoting *Fung v. Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992)).

The Supreme Court made clear in *Mesa v. California*, 489 U.S. 121, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989) that the assertion of a colorable federal defense is essential to removal jurisdiction under § 1442(a)(1). *See id.* at 139, 109 S. Ct. 959 ("Federal officer removal under 28 U.S.C. § 1442(a) must be predicated upon averment of a federal defense."). "But while *Mesa* affirmatively settled that Section 1442(a)(1) requires a colorable federal defense to effect removal under the statute, it did not clarify what defenses qualify as such." *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 778 (E.D. Pa. 2010). The Supreme Court has, however, explained:

> The federal officer removal statute is not 'narrow' or 'limited.' At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts.

Willingham v. Morgan, 395 U.S. 402, 406-07, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969). As a result, an "officer need not win his case before he can have it removed." *Id.* at 407, 89 S. Ct. 1813.

The Commonwealth has not addressed in detail the colorable federal defense requirement in its submission. Thus, I will assume that the FCDO satisfies this requirement.

Feidt further requires a causal nexus between the claims and the conduct performed under color of a federal office. "[A] defendant seeking removal must 'by direct averment exclude the possibility that [the defendant's action] was based on acts or conduct of his not justified by his federal duty.'" *Hagen*, 739 F. Supp. 2d at 785 (quoting *Mesa*, 489 U.S. at 132, 109 S. Ct. 959). This inquiry is distinct from the "acting under" requirement under the federal officer removal statute. *Parlin v. DynCorp International, Inc.*, 579 F. Supp. 2d 629, 635 (D. Del. 2008); *see also Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012) (color of federal authority requirement is distinct from the "acting under" requirement). However, some courts have noted that these considerations "'tend to collapse into a single requirement.'" *Parlin*, 579 F. Supp. 2d at 635 (quoting *Reg'l Med. Transp., Inc. v. Highmark, Inc.*, 541 F. Supp. 2d 718, 724 (E.D. Pa. 2008)).

As with the colorable federal defense consideration, the Commonwealth's submissions provide little argument with respect to whether the FCDO satisfies the causal nexus requirement. As such, I will assume this requirement is met. Nevertheless, although these three *Feidt* requirements are met, the FCDO must also establish that is "act[s] under" a federal officer in order to invoke removal jurisdiction under § 1442(a)(1).

B. "Acting Under" a Federal Officer

The focal point of the Commonwealth's motion to remand is the second *Feidt* inquiry. To remove the Motion to Appoint Counsel under the federal officer removal statute, the FCDO must show that it was "acting under" a federal officer. *See Isaacson v. Dow*

Chem. Co., 517 F.3d 129, 136 (2d Cir. 2008). "The words 'acting under' are broad, and . . . the statute must be 'liberally construed.'" *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007) (citing *Colorado v. Symes*, 286 U.S. 510, 517, 52 S. Ct. 635, 76 L. Ed. 2d 1253 (1932)). "There is no precise standard for the requisite control to bring an entity within the 'acting under' clause, but the determination is dependent upon the facts and conduct giving rise to the alleged cause of action." *Scrogin v. Rolls-Royce Corp.*, No. 3:10cv442, 2010 WL 3547706, at *4 (D. Conn. Aug. 16, 2010) (citing *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 125 (2d Cir. 2007)). But the Supreme Court has stated to satisfy the "acting under" requirement of § 1442(a)(1), a private person's actions "must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152, 127 S. Ct. 2301.

In the Amended Notice of Removal, the FCDO asserts that it assists the Government in "providing representation to indigent defendants, a service that the Government itself would have to perform under the CJA." (Doc. 6, ¶ 19.) Essentially, the FCDO argues that as a federal grantee/contractor pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, it "act[s] under" the AO.[4]

The Commonwealth, however, citing the Supreme Court's decision in *Watson*, argues that the FCDO is

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[4]The FCDO does not allege that it is a federal agency under § 1442. (Doc. 29, 11-13.)

unable to satisfy the federal officer removal statute because "no federal agency is obligated to appear in state court and the instant Motion to Appoint Counsel concerns FCDO's appearances in state court rather than its appearances in federal court." (Doc. 15, 25.) Even if a federal court has discretion to appoint the FCDO to represent a state PCRA petitioner before federal habeas review, federal courts are not obligated to make such appointments. (Doc. 31, 4.) As a result, the Commonwealth insists that the FCDO is not helping the Federal Government produce an item it needs when the FCDO represents indigent criminal defendants in state court.

The FCDO's contention that it "act[s] under" the AO for purposes of the federal officer removal statute requires consideration of the Criminal Justice Act and an understanding of the relationship between Community Defender Organizations and the AO. Moreover, as the Commonwealth asserts that the resolution of the FCDO's private contractor argument is controlled by *Watson v. Philip Morris Cos.*, 551 U.S. 142, 146, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007), a discussion of that decision follows as well.

1. The Criminal Justice Act and the Relationship Between Community Defender Organizations and the Administrative Office of the United States Courts

The Criminal Justice Act authorizes the appointment of counsel for financially eligible individuals seeking habeas corpus relief under 18 U.S.C. §§ 2241, 2254, and 2255 whenever "the court determines that the interests of justice so require." 18 U.S.C. §

3006A(a)(2)(B). In post conviction proceedings under § 2254 or § 2555 to vacate or set aside a death sentence, "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys. . . ." 18 U.S.C. § 3599(a)(2). Section 3599(e) provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Id. at § 3599(e).[5]

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[5]In *Harbison v. Bell*, 556 U.S. 180, 182-83, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009), the Court granted certiorari to address "whether § 3599(e)'s reference to 'proceedings for executive or other clemency as may be available to the defendant' encompasses state clemency proceedings." In finding that § 3599(e) authorizes federally appointed counsel to represent clients in such proceedings, the Court considered the text of § 3599(e) and noted that "[i]t is the sequential organization of the statute and the term 'subsequent'

(continued...)

Under the Criminal Justice Act, federal district courts must place in operation a plan for furnishing representation to indigent criminal defendants. *See* 18 U.S.C. § 3006A(a). A district in which at least two hundred persons annually require the appointment of counsel may establish a "Federal Public Defender Organization," a "Community Defender Organization," or both. *See id*. at § 3006A(g)(1).

The Criminal Justice Act Plan for the United States District Court for the Middle District of Pennsylvania provides that "the federal public defender organization of the Middle District of Pennsylvania, previously established in this district pursuant to the provisions of the CJA, is hereby recognized as the federal public defender organization for this district." In death penalty proceedings under § 2254 and § 2255, the

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[5](...continued)
that circumscribe counsel's representation, not a strict division between federal and state proceedings." *Id*. at 188, 129 S. Ct. 1481. The Court also indicated that the Government's concern that § 3599(e) as interpreted by the Court that federally funded counsel would need to represent petitioners in any state habeas proceeding occurring after appointment of counsel to be unfounded because state habeas is not a stage "subsequent" to federal habeas. *See id*. at 189, 129 S. Ct. 1481. Thus, even though "state post-conviction litigation sometimes follows the initiation of federal habeas because a petitioner has failed to exhaust does not change the order of proceedings contemplated by the statute." *Id*. at 190, 129 S. Ct. 1481. Nevertheless, in light of § 3599(e)'s provision that counsel may represent clients in "other appropriate motions and procedures," the Court noted that "a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation." *Id*. at 190 n.7, 129 S. Ct. 1481.

Middle District Plan permits the appointment of counsel from a number of sources, including the Defender Association of Philadelphia's Capital Habeas Unit, *i.e.*, the FCDO.

The Plan of the United States District Court for the Eastern District of Pennsylvania Pursuant to the Criminal Justice Act of 1964, as amended, designates the FCDO as the Community Defender Organization to "facilitate the representation of persons entitled to appointment of counsel under the Criminal Justice Act."

A "Community Defender Organization" under the Criminal Justice Act is defined as "a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation." 18 U.S.C. § 3006A(g)(2)(B).[6] Community Defender Organizations "shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the next fiscal year." *Id.* Community Defender Organizations may apply for approval from the Judicial Conference to receive an initial grant to establish the organization and in lieu of payments for representation and services under subsections (d) and (e) of § 3006A, Community Defender Organizations may "receive periodic

[6]The FCDO, as explained above, is a division within the Defender Association of Philadelphia, which is a non-profit organization that provides legal representation to indigent criminal defendants in federal and state courts. (Doc. 17, 4.) The FCDO's activities are supported by a combination of federal funds received under the Criminal Justice Act and private charitable contributions. (*Id.*)

sustaining grants to provide representation and other expenses pursuant to this section." *Id*. The Judicial Conference is also tasked with issuing rules and regulations for governance of plans established under § 3006A. *See id*. at § 3006A(h). Appropriations under the Criminal Justice Act "shall be made under the supervision of the Director of the Administrative Office of the United States Courts." *Id*. at § 3006A(i).

The AO, acting under the supervision and direction of the Judicial Conference, "administers the federal defender and attorney program on a national basis; is responsible for training related to furnishing representation under the CJA; and provides legal, policy, management, and fiscal advice to the Conference and its . . . defenders and their staffs." United States Courts, http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx (last visited July 22, 2013).

Community Defender Organizations seeking grant funds must apply on a form prepared by the AO. *See* 7 Guide to Judiciary Policy: Defender Services, pt. A, § 420, available at http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol_07.pdf (last visited July 22, 2013). The receipt and use of funds is subject to certain conditions, and Community Defender Organizations must agree to and accept these conditions before grant payments are issued. *See id*. Among others, the terms and conditions include that: "grant funds will be maintained separately and will not be commingled with any non-grant funds maintained by grantee;" "the grantee must submit reports each year setting forth its activities and financial position and the anticipated caseload and expense for the next fiscal year;" and "the grantee must keep financial books

. . . unless a waiver is granted by the AO [and] such records must be maintained and submitted in such manner and form as required by the AO." *Id*. at Appx. 4A, available at http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol07A-Ch04-Appx4A.pdf (last visited July 22, 2013). If a grantee fails to comply with the terms and conditions of its grant award, the Judicial Conference or its authorized representative "may reduce, suspend, or terminate, or disallow payments under th[e] grant award as it deems appropriate." *Id*.

Based on these guidelines and regulations, the FCDO asserts that it operates under congressional authorization and is subject to federal control. (Doc. 6, ¶ 18.) The FCDO thus concludes that it "act[s] under" a federal officer and/or agency for purposes of the federal officer removal statute. The Commonwealth, however, contends that this showing fails to satisfy the "acting under" analysis set forth by the Supreme Court in *Watson*.

2. *Watson v. Philip Morris Cos.*

The Supreme Court addressed the "acting under" requirement in the context of the federal officer removal statute in *Watson v. Philip Morris Cos.*, 551 U.S. 142, 146, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007). The Commonwealth argues that the Supreme Court's decision in *Watson* provides the framework for the "acting under" inquiry for the federal officer removal statute, and, pursuant to *Watson*, remand of the Commonwealth's Motion to Appoint Counsel is compelled in this action. For the reasons detailed below, I agree with the Commonwealth in both respects.

In *Watson*, the petitioners filed a civil action in state court claiming that the respondents, the Philip Morris Companies, violated state laws prohibiting unfair and deceptive business practices by advertising certain cigarette brands as "light" when, in fact, the respondents manipulated testing results by designing its cigarettes and employing techniques that caused the cigarettes to register lower levels of tar and nicotine than would actually be delivered to consumers. *See Watson*, 551 U.S. at 146, 127 S. Ct. 2301. Relying on the federal officer removal statute, the respondents removed the action to federal court. *See id.* The district court held that the statute authorized removal because the petitioner's complaint attacked the respondents' use of the Government's method of testing cigarettes and thus the action involved conduct by the respondents that was taken under the Federal Trade Commission ("FTC"). *See id.*

The district court certified the question for interlocutory review, and the United States Court of Appeals for the Eighth Circuit affirmed. *See id.* at 147, 127 S. Ct. 2301. As with the district court, the Eighth Circuit found significant the FTC's detailed supervision of the cigarette testing process. *See id.* The Supreme Court granted certiorari to address the question "whether the fact that a federal regulatory agency directs, supervises, and monitors a company's activities in considerable detail brings that company within the scope of the italicized language ("*acting under*" an "*officer*" of the United States) and thereby permits

removal." *Id.* at 145, 127 S. Ct. 2301 (emphasis in original).[7]

While recognizing the words "acting under" are broad, the Court emphasized that "broad language is not limitless." *Id.* at 148, 127 S. Ct. 2301. The Court thus considered the statute's language, context, history, and purpose to determine the scope and breadth of § 1442(a)(1). *See id.* After considering the history of the statute, the Court noted that early Supreme Court precedent "illustrate[s] that the removal statute's basic purpose is to protect the Federal Government from interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Federal Government acting within the scope of their authority." *Id.* at 150, 127 S. Ct. 2301 (internal quotations, citations, and alterations omitted). Significantly, state courts may display "local prejudice" against unpopular federal officials or federal laws, States may impede the enforcement of federal law, or States may deprive federal officials of a federal forum in which to assert federal immunity defenses. *See id.* These concerns can also arise when private persons act as assistants to federal officers carrying out the performance of their official duties. *See id.*

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[7]Section 1442(a)(1) as construed by the Supreme Court in *Watson* has since undergone minor amendments. *See* 28 U.S.C. § 1442(a)(1) (1996), *amended by* 28 U.S.C. § 1442(a)(1) (2011). Section 1442(a)(1) continues to require a private person to be "acting under" a federal officer as set forth in *Watson*.

Against that historical backdrop, the *Watson* Court analyzed the phrase "acting under" as used in § 1442(a)(1), and found use of the word "under" "refer[red] to what has been described as a relationship that involves 'acting in a certain capacity, considered in relation to one holding a superior position or office.'" *Id*. at 151, 127 S. Ct. 2301 (quoting 18 Oxford English Dictionary 948 (2d ed.1989)). Such a relationship often involves subjection, guidance, or control. *See id*. (citing Webster's New International Dictionary 2765 (2d ed. 1953)). Moreover, the Supreme Court found that its precedent and the statute's purpose confirmed that a private person's "acting under" "must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Id*. at 152, 127 S. Ct. 2301 (citing *Davis v. South Carolina*, 107 U.S. 597, 600, 2 S. Ct. 636, 27 L. Ed. 574 (1883)). The Court emphasized that mere compliance (or noncompliance) with federal laws, rules and regulations does not bring a private actor within the scope of the federal officer removal statute even if "the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id*. at 152-53, 127 S. Ct. 2301.

The *Watson* Court next considered the respondents' argument that "lower courts have held that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Id*. The respondents thus questioned why if a private contractor can act under a federal officer based on close supervision, would the result not be the same when a private party is subject

to intense regulation. *See id.* The Supreme Court explained:

> The answer to this question lies in the fact that the private contractor [in cases where close supervision by a federal officer or agency is sufficient] is helping the Government to produce an item that it needs. The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks. In the context of *Winters*, for example, Dow Chemical fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war. Moreover, at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform.

Id. at 153-54, 127 S. Ct. 2301 (referring to *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). The Court found this examination sufficiently addressed the respondent's argument in light of the fact that private contracting was not at issue in the case.

Lastly, the respondents in *Watson* asserted that its activities exceeded the mere compliance with regulations because the FTC, after initially testing cigarettes for tar and nicotine, delegated that authority to an industry-financed testing laboratory. *See id.* at 154, 127 S. Ct. 2301. The Court rejected the respondents' argument because it "found no evidence of any delegation of legal authority from the FTC to the industry

association to undertake testing on the Government agency's behalf. Nor is there evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement." *Id*. at 156, 127 S. Ct. 2301. And, without evidence of a special relationship, the Court found the respondents' analogy to Government contracting flawed because it was left with only detailed rules, which sounded as regulation, and not delegation of authority. *See id*. at 157, 127 S. Ct. 2301.

3. Analysis of the "Acting Under" Requirement

Citing § 3006A, § 3599, and *Watson*, the Commonwealth insists that the FCDO fails to satisfy its burden as the removing party in establishing the existence of federal jurisdiction under § 1442(a)(1). Specifically, the Commonwealth takes the position that the FCDO fails to adequately "establish[ ] that it acts under a federal officer or agency in a private contractor capacity." (Doc. 31, 3.) The FCDO's private contractor argument, according to the Commonwealth, makes little sense because when the FCDO "appears in state court proceedings before federal habeas review it is not assisting or helping carry out the duties of its federal superior," (Doc. 15, 14), since no federal agency has "a duty to appoint legal representation to criminal defendants in state court." (*Id*. at 24-25.) Without such an obligation to appoint counsel or appear in state post-conviction proceedings, the Commonwealth concludes that the FCDO cannot satisfy the federal officer removal statute because it is not helping the Government produce something it needs.

The FCDO, however, asserts that it adequately alleges that it "act[s] under" the AO as a federal grantee/contractor. In that regard, "[a]s a community defender organization, the FCDO assists the Government to implement the aims and purposes of the CJA, by representing indigent defendants." (Doc. 29, 16.) The FCDO suggests that it satisfies the federal officer removal statute because it "operates under congressional authorization and is therefore subject to federal guidelines and regulations." (*Id.*; *see also* Doc. 6, ¶ 18 ("The receipt and use of grant funds are subject to conditions set forth in Appx 4A of the Guidelines. . . . [T]he FCDO is subject to federal control.").) The FCDO also criticizes the Commonwealth's construction of the federal officer removal statute. It maintains that the Commonwealth's arguments in support of remand are hinged to the merits of the underlying controversy, and, at this point in the proceeding, it would be improper to decide the merits of the case. (Doc. 29, 17-19.)

In view of the above cited authority and upon consideration of the arguments of the parties, the FCDO fails to satisfy its burden and demonstrate the existence of federal jurisdiction under § 1442(a)(1). In *Watson*, the Supreme Court explained that a "private person's 'acting under' must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson*, 55 U.S. at 152, 127 S. Ct. 2301. In essence, the Court held that helping carry out or assisting with a governmental task or duty is a necessary condition for a private entity to be considered "acting under" a federal officer or agency for purposes of § 1442(a)(1). The FCDO asserts that it assists the Government by representing indigent defendants,

which it suggests is bolstered by the fact that the Guidelines for Administering the Criminal Justice Act and Related Statutes require that a Community Defender Organization's "stated purposes must include implementation of the aims and purposes of the CJA." However, the FCDO has not identified any federal agency or officer that is tasked with or has a duty to appoint, arrange, or provide legal representation for indigent capital criminal defendants in *state post-conviction proceedings* to preserve claims for federal habeas review. A necessary condition to invoke the federal officer removal statute, the assistance or carrying out of duties of a federal superior, is therefore absent in this case.[8] As a result, even if the FCDO is "acting under" a federal officer in the course of its representation of clients in federal court, it does not follow that it also "act[s] under" a federal officer in its performance of tasks for which the Government bears no responsibility, such as appearing in state post-conviction capital proceedings to exhaust claims for federal habeas review. Indeed, "[c]ritical under the

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[8]For this reason, and in light of the fact that they pre-date *Watson*, the district court cases relied on by the FCDO as supporting its claim that it "act[s] under" the AO are not persuasive. *See*, *e.g.*, *Dixon v. Ga. Indigent Legal Servs., Inc.*, 388 F. Supp. 1156 (S.D. Ga. 1974) (finding that "attorneys employed by organizations conducting federally-funded legal assistance programs for the indigent act under officers of the United States within the meaning of the removal statute[.]"); *Gurda Farms, Inc. v. Monroe Cnty. Legal Assistance Corp.*, 358 F. Supp. 841 (S.D.N.Y. 1973) ("In light of the foregoing description of the relationship between [the Office of Economic Opportunity] and its legal service programs, I conclude that the defendants in the instant actions are persons 'acting under' a federal officer within the meaning of § 1442(a)(1).").

statute is to what extent defendants acted under federal direction *at the time they were engaged in the conduct now being sued upon*." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 125 (2d Cir. 2007) (emphasis added) (noting that the "acting under" and causal connection considerations tend to collapse into a single requirement and stating that "removal will not be proper where a private party establishes only that the acts complained of were performed under the 'general auspices' of a federal officer."); *Parlin v. DynCorp Int'l, Inc.*, 579 F. Supp. 2d 629, 635 (D. Del. 2008). As a corollary, if the FCDO's status as a federal grantee alone authorizes removal under § 1442(a)(1), numerous other entities and organizations that receive federal grants would also fall within the purview of the federal officer removal statute. Allowing these entities to remove proceedings to federal court simply because they receive grant funds subject to federal conditions and regulations without also finding that the entities are assisting or carrying out duties of the Federal Government would be inconsistent with the *Watson* Court's construction of § 1442(a)(1).

Moreover, the FCDO's argument that it satisfies the "acting under" requirement of § 1442(a)(1) as a federal contractor/grantee because it operates "under congressional authorization" and is "subject to federal guidelines and regulations," (Doc. 29, 16), is similar to the position advanced by the Philip Morris Companies and rejected by the Supreme Court in *Watson*. As the Supreme Court noted, intense regulation alone is insufficient to turn a private contractor into a private firm "acting under" a federal officer or agency. *See Watson*, 551 U.S. at 153, 127 S. Ct. 2301 ("a highly

regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone."). The *Watson* Court noted a crucial distinction between cases where a contractor and the Government are in an unusually close relationship "involving detailed regulation, monitoring, and supervision," and those instances where a company is simply subject to "intense regulation." *Id.* In the former, the private contractor assists the Government by providing an "item that it needs," which, in the contractor's absence, the Government itself would have to produce. *Id.*

The FCDO and the Government are not in such a relationship that render it "acting under" a federal officer for purposes of the federal officer removal statute. Among other things, the FCDO is required to segregate grant funds, submit reports detailing its financial activities, and keep financial books under the terms of its funding grant. But, these requirements sound in regulation. And being subject to intense regulation alone does not entitle a private entity to remove an action under § 1442(a)(1). *See Watson*, 551 U.S. at 153.

Furthermore, the FCDO's submissions nor its arguments demonstrate that it is in such an unusually close relationship with the AO or the Federal Government to make the federal officer removal statute applicable to this proceeding. The FCDO, as discussed, is subject to guidelines and regulations including the terms of its funding grant. But the FCDO has not suggested that its representation of clients is performed at the direction of the AO, that the AO dictates its litigation strategies or legal theories in individual cases, that the AO reviews its work product, or that the

AO otherwise takes an active role in monitoring and/or participating in client representation. Of course, a third-party cannot dictate the FCDO's legal representation of its clients. *See*, *e.g.*, *Polk Cnty. v. Dodson*, 454 U.S. 312, 318-22, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) ("a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior," and a lawyer shall not permit a person "who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.");[9] *see also Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S. Ct. 402, 62 L. Ed. 2d 355 (1979) ("indispensable element of the effective performance of [appointed counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."). Nonetheless, it is this lack of monitoring or close supervision that distinguishes the relationship between the FCDO and the AO from cases that have found an unusually close relationship between a private contractor and a federal officer or agency for purposes of § 1442(a)(1). For example, in *Bennett v. MIS Corp.*, 607 F.3d 1076, 1088 (6th Cir. 2010) the United States Court of Appeals for the Sixth Circuit concluded that a private mold remediation firm was "acting under" the Federal Aviation Administration because it "helped FAA officers carry out their task of ridding a federal

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[9]In *Dodson*, the issue before the Court was "whether a public defender acts 'under color of state law' when representing an indigent defendant in a state criminal proceeding." *Dodson*, 454 U.S. at 314, 102 S. Ct. 445. Significantly, the Court held that a public defender does not act under color of state law when performing "a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 325, 102 S. Ct. 445.

employee occupied building of an allegedly hazardous contaminant, a job that in the absence of a contract with MIS or another private mold remediation firm the FAA itself would have had to perform." *Id.* (citation, internal quotation, and alterations omitted). In finding the private contractor and the FAA in an unusually close relationship, the Sixth Circuit emphasized that the FAA contracts included precise specifications and required the contractor to follow explicit parameters, the contractor's work was closely monitored by federal officers, the FAA contracting officers had authority to require that the contractor dismiss incompetent employees, and the FAA controlled the working hours of the contractor's employees. *See id.* at 1087.

Here, in comparison, for the reasons detailed above, the FCDO is not providing a service the Government "needs" when it represents criminal defendants in state post-conviction proceedings prior to federal habeas review. Nor in the absence of the FCDO would the Government be obligated to provide representation itself in such circumstances. Accordingly, there is no unusually close relationship between the FCDO and the Federal Government, and removal of the Commonwealth's Motion to Appoint Counsel in this proceeding was improper.

Lastly, the FCDO suggests that conducting such an analysis at this stage of the proceeding is premature. Specifically, it contends that finding that no federal agency is required to appoint counsel for indigent capital criminal defendants in their state post-conviction proceedings on the Commonwealth's motion to remand would inappropriately result in an accelerated decision on the merits of whether the Criminal Justice

Act prohibits Community Defender Organizations from appearing in state court.

Concluding that there is no federal officer or agency obligated to represent or appoint counsel to represent indigent capital state criminal defendants in their state post-conviction proceedings is distinct from deciding the merits of the underlying Motion to Appoint Counsel. That is, I am able to determine that the FCDO fails to establish the "acting under" requirement of the federal officer removal statute without resolving the merits of the Commonwealth's Motion to Appoint Counsel or determining that the FCDO should be removed as counsel in the PCRA proceedings. Thus, while I hold that the FCDO has not met its burden to establish federal jurisdiction under § 1442(a)(1), I make no finding that the Criminal Justice Act bars the FCDO from appearing in state court. *See supra* note 5.

IV. Conclusion

Since the FCDO fails to establish that it is "acting under" a federal officer for purposes of § 1442(a)(1), the Commonwealth's remaining arguments for remand, *i.e.*, the applicability of *Younger* abstention to this proceeding, whether the Motion to Appoint Counsel is a "civil action" as defined by § 1442(d)(1), or whether the Commonwealth's Motion is against or directed to the FCDO, need not be addressed. And, as the proceeding will be remanded, the FCDO's motion to dismiss will be denied as moot.

An appropriate order follows.

August 16, 2013
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

In Re: Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia, Respondent, Filed In COMMONWEALTH OF PENNSYLVANIA, v. KEVIN DOWLING.	CIVIL ACTION NO. 1:13-CV-510 (JUDGE CAPUTO)

ORDER

NOW, this 16th day of August, 2013, **IT IS HEREBY ORDERED** that:

(1) The Commonwealth's Motion to Remand (Doc. 14) is **GRANTED**.

(2) The Commonwealth's Motion to Appoint Counsel is **REMANDED** to the Court of Common Pleas of York County, Pennsylvania.

(3) The Defender Association of Philadelphia's Motion to Dismiss (Doc. 11) is **DENIED as moot**.

(4) The Clerk of Court is directed to mark the case as **CLOSED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA**

In Re: Proceedings Before the Court of Common Pleas of Monroe County, Pa. to Determine Propriety of State Court Representation by Defender Association of Philadelphia, Filed In COMMONWEALTH OF PENNSYLVANIA, v. MANUEL SEPULVEDA.	CIVIL ACTION NO. 3:13-CV-511 (JUDGE CAPUTO)

MEMORANDUM

In Manuel Sepulveda's ("Mr. Sepulveda") pending Post Conviction Relief Act ("PCRA") proceeding challenging his conviction in the Court of Common Pleas of Monroe County, Pennsylvania, the PCRA court scheduled a hearing to determine whether the Federal Community Defender Organization, Eastern District of Pennsylvania (the "FCDO")[1] may or should lawfully

[1]The named movant Defender Association of Philadelphia's Federal Court Division is a Community Defender Organization (continued...)

continue to represent Mr. Sepulveda in his PCRA proceeding. Relying on the federal officer removal statute, 28 U.S.C. § 1442, Respondent Defender Association of Philadelphia removed the proceeding involving the hearing to this Court.[2] Mr. Sepulveda's PCRA proceeding, however, has not been removed and remains in state court. Now before the Court are the Commonwealth's Motion to Remand (Doc. 9) and the Defender Association of Philadelphia's Motion to Dismiss (Doc. 8) the proceeding.

The underlying proceeding in this removed action seemingly implicates several issues of federal law involving the construction of federal statutes and the application of relevant federal decisional authority and legal principles. Nonetheless, I am of the view that the FCDO fails to satisfy its burden to establish the existence of federal jurisdiction under the federal officer

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[1](...continued)
within the meaning of 18 U.S.C. § 3006A(g)(2)(B). The Federal Court Division of the Defender Association of Philadelphia is often referred to as the FCDO. The FCDO is not a juridical entity, but rather is a subunit of the named movant, Respondent Defender Association of Philadelphia.

[2]At least six other similarly situated proceedings have been removed to federal court. Three are pending in this District, *Commonwealth v. Housman*, No. 13-2103 (M.D. Pa.) (Caputo, J.); *Commonwealth v. Dick*, No. 13-561 (M.D. Pa.) (Caputo, J.); *Commonwealth v. Dowling*, No. 13-510 (M.D. Pa.) (Caputo, J.), and three are pending in the United States District Court for the Eastern District of Pennsylvania, *Commonwealth v. Johnson*, No. 13-2242 (E.D. Pa.) (Schiller, J.); Commonwealth v. Mitchell, No. 13-1871 (E.D. Pa.) (McLaughlin, J.); *Commonwealth v. Harris*, No. 13-062 (E.D. Pa.) (Rufe, J.).

removal statute. Specifically, because the "acting under" requirement for removal under 28 U.S.C. § 1442(a)(1) is not satisfied in this case, the Commonwealth's motion to remand this action to the Court of Common Pleas of Monroe County will be granted. And, since the Commonwealth's motion to remand will be granted, the FCDO's motion to dismiss will be denied as moot.

I. Background

A. Relevant Factual Background

Manuel Sepulveda was convicted of two counts of first-degree murder and related counts, and sentenced to death on January 27, 2003, in the Court of Common Pleas of Monroe County, Pennsylvania. Mr. Sepulveda's convictions and sentence of death were affirmed by the Pennsylvania Supreme Court on August 19, 2004. Mr. Sepulveda's petition for certiorari review was denied on February 21, 2006.

Thereafter, Mr. Sepulveda filed a motion in this Court for leave to proceed *in forma pauperis* and appointment of federal habeas corpus counsel. *See Sepulveda v. Beard, et al.*, No. 06-cv-0731 (M.D. Pa. Apr. 7, 2006). On that same day, Mr. Sepulveda's request to proceed *in forma pauperis* was granted, and the Capital Habeas Unit of the Federal Public Defender Office for the Middle District of Pennsylvania and the FCDO were appointed as co-counsel for Mr. Sepulveda's to-be-filed habeas corpus petition.

On June 7, 2006, after the Governor of Pennsylvania signed a warrant scheduling execution for July

27, 2006, Mr. Sepulveda petitioned this Court for a stay of execution, which was granted on June 14, 2006.

Thereafter, on August 16, 2006, the FCDO, in the person of then-FCDO lawyer Michael Wiseman, entered its appearance for Mr. Sepulveda in the Court of Common Pleas on the homicide case.

Following a series of Orders on his applications for extensions of time, Mr. Sepulveda filed a timely petition for habeas corpus relief in this Court on December 4, 2006. On December 6, 2006, on Mr. Sepulveda's unopposed motion, the federal habeas corpus proceedings were stayed pending exhaustion of state remedies.

On January 2, 2007, Mr. Sepulveda filed an amended PCRA petition. After holding an evidentiary hearing, the PCRA court denied Mr. Sepulveda's petition on October 11, 2007. Mr. Sepulveda appealed to the Pennsylvania Supreme Court.

On November 28, 2012, the Pennsylvania Supreme Court issued an Opinion holding that Mr. Sepulveda's trial "counsel's performance related to the development and presentation of mitigating evidence was constitutionally deficient." *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1130 (Pa. 2012). Thus, the Pennsylvania Supreme Court remanded to the PCRA court for the limited purpose of determining whether counsel's deficient performance prejudiced Mr. Sepulveda. *See id.* at 1131. The Pennsylvania Supreme Court concluded its opinion by addressing the FCDO's appearance as counsel in the PCRA proceeding:

[T]he FCDO simply entered its appearance in this case to represent appellant in his state postconviction challenge. The FCDO filed a petition for a writ of habeas corpus on appellant's behalf in the U.S. District Court for the Middle District of Pennsylvania on December 4, 2006. The PCRA court notes in its opinion that federal counsel were appointed by a federal district court judge to file a federal habeas corpus petition; instead, the FCDO proceeded to Pennsylvania state court. The federal proceedings have been stayed pending resolution of appellant's PCRA claims.

Appellant is represented by three FCDO lawyers: Michael Wiseman, Esquire, Keisha Hudson, Esquire, and Elizabeth Larin, Esquire. Attorney Wiseman is lead counsel and he signed the brief. Recently, in another capital matter, *Commonwealth v. Abdul-Salaam*, 42 A.3d 983 (Pa. 2012), the FCDO withdrew its appearance and advised that Attorney Wiseman, lead counsel there too, would be representing Abdul-Salaam on a pro bono basis, listing a private address for Wiseman. No such notice has been entered here. It is unclear whether Attorney Wiseman remains a member of the FCDO for some cases, while acting as "pro bono" counsel in other cases. If federal funds were used to litigate the PCRA below–and the number of FCDO lawyers and witnesses involved, and the extent of the pleadings, suggest the undertaking was managed with federal funds–the participation of the FCDO in the case may well be unauthorized by federal court order or federal

> law. Accordingly, on remand, the PCRA court is directed to determine whether to formally appoint appropriate post-conviction counsel and to consider whether the FCDO may or should lawfully represent appellant in this state capital PCRA proceeding. *See* 18 U.S.C. § 3599(a)(2) (authorizing appointment of counsel to indigent state defendants actively pursuing federal habeas corpus relief from death sentence).

Id. at 1151.

B. *Commonwealth v. Mitchell*

Less than two months after it rendered its decision in *Sepulveda*, 55 A.3d 1108, the Pennsylvania Supreme Court, on January 10, 2013, issued a per curiam order in the PCRA case of *Commonwealth v. Mitchell*, No. 617 CAP (the "*Mitchell* Order"). Upon consideration of the Commonwealth's motion to remove counsel in *Mitchell*, the Pennsylvania Supreme Court remanded to the PCRA court to "determine whether current counsel, the Federal Community Defender Organization ("FCDO") may represent appellant in this state capital PCRA proceeding; or whether other appropriate post-conviction counsel should be appointed." *Id*. To resolve that issue, the Pennsylvania Supreme Court provided the following guidance:

> [T]he PCRA court must first determine whether the FCDO used any federal grant monies to support its activities in state court in this case. If the FCDO cannot demonstrate that its actions here were all privately financed, and convincingly attest that this will remain the case going

> forward, it is to be removed. If the PCRA court determines that the actions were privately financed, it should then determine "after a colloquy on the record, that the defendant has engaged counsel who has entered, or will promptly enter, an appearance for the collateral review proceedings." *See* Pa. R. Crim. P. 904(H)(1)(c). We note that the order of appointment produced by the FCDO, issued by the U.S. District Court for the Eastern District of Pennsylvania at No. 2:11-cv-02063-MAM, and dated April 15, 2011, appointed the FCDO to represent appellant only for purposes of litigating his civil federal *habeas corpus* action, and the authority of the FCDO to participate in this state collateral proceeding is not clear. *See* 18 U.S.C. § 3599(a)(2) (authorizing appointment of counsel to indigent state defendants actively pursuing federal *habeas corpus* relief from death sentence).

Id.

Justice Todd, joined by Justice Baer, filed a dissenting statement, noting that the court directed "the removal of counsel without any stated analysis of the issues involved, issues which require the construction of federal statutes and other authority, consideration of the relationship between federal and state court systems in capital litigation, and consideration of counsel's role therein." *Commonwealth v. Mitchell*, No. 617 CAP (Todd, J., dissenting).

C. The Disqualification Hearing Order

In view of the Pennsylvania Supreme Court's remand instructions, the PCRA court, on February 4, 2013, scheduled a hearing for March 1, 2013 "for the sole purpose of addressing the Supreme Court's mandate directing this Court 'to determine whether to formally appoint appropriate post-conviction counsel and to consider whether the FCDO may or should lawfully represent appellant in this state capital PCRA proceeding.'" (Doc. 1, Ex. C.)

D. The Notice of Removal

The FCDO, on February 21, 2013, removed the proceeding (the "Disqualification Proceeding") relating to the judicial determination of whether the FCDO may lawfully represent Mr. Sepulveda in his PCRA action pursuant to 28 U.S.C. § 1442. (Doc. 1.) The FCDO did not remove the underlying action in which Mr. Sepulveda is challenging his conviction under the PCRA, and that action remains in state court. (*Id*. at ¶ 6.) The Notice of Removal asserts that the Disqualification Proceeding is properly removed to this Court because "it is directed against a person, *i .e.*, the FCDO, acting under an officer or agency of the United States, for or relating to the FCDO's acts 'under color of such office,' 28 U.S.C. § 1442(a)(1), and is a proceeding that seeks a judicial order, 28 U.S.C. § 1442(c)." (*Id*. at ¶ 19.)

The FCDO also argues that a number of colorable federal defenses will be raised in opposition to the Disqualification Proceeding. These defenses include, among others: (1) preemption; (2) primary jurisdiction; and (3) that the Disqualification Proceeding seeks to

deprive the FCDO and its lawyers of their First Amendment rights and their equal protections rights under the Fourteenth Amendment. The FCDO further maintains that the Commonwealth's position is predicated on an incorrect interpretation of federal law. (*Id.* at ¶¶ 29-44.)

E. The FCDO's Motion to Dismiss and the Commonwealth's Motion to Remand

Following the removal of the proceeding concerning the FCDO's representation of Mr. Sepulveda, the FCDO filed a motion to dismiss the proceeding pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 8.) The FCDO asserts that the Disqualification Proceeding fails to state a claim on which relief can be granted because sole responsibility for the enforcement of the funding provisions on which the Commonwealth relies, 18 U.S.C. § 3006A and 18 U.S.C. § 3599, lies with the Administrative Office of the United States Courts ("AO"). Thus, the FCDO contends that the federal statutes the Commonwealth seeks to enforce do not endow any non-federal entity with a right of action. However, to the extent that the Commonwealth is not barred from proceeding under these statutes, the FCDO requests that the action be stayed and referred to the AO under the doctrine of primary jurisdiction.

On March 25, 2013, the Commonwealth filed a motion to remand this proceeding to the Court of Common Pleas of Monroe County. (Doc. 9.) The Commonwealth argues that remand is necessitated in this case because the FCDO is unable to establish that it "act[s] under" a federal officer or agency as required by

28 U.S.C. § 1442(a)(1) and that the Disqualification Proceeding does not qualify as a "civil proceeding" as defined by § 1442(d)(1). Additionally, the Commonwealth asserts that *Younger* abstention prohibits removal of the instant proceeding.

After the time to brief the motions expired, oral argument was held on both motions on June 19, 2013. The motions are thus ripe for disposition.

II. Legal Standard

Under 28 U.S.C. § 1447(c), a party may bring a motion to remand an action removed from state to federal court. The general removal statute, 28 U.S.C. § 1441, is to be strictly construed in favor of state court adjudication. *See Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985); *see also In re Asbestos Prods. Liab. Litig. (No. IV)*, 770 F. Supp. 2d 736, 741 (E.D. Pa. 2011) ("the presumption under the general removal statute favors remand [ ] due to the limited jurisdiction of federal courts"). Conversely, 28 U.S.C. § 1442, the federal officer removal statute upon which removal was based in this proceeding, is to be broadly construed in favor of a federal forum. *See Sun Buick v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1262 (3d Cir. 1994); *see also In re Asbestos*, 770 F. Supp. 2d at 741 ("the presumption under the federal officer removal statute favors removal [ ] for the benefit of the federal officer involved the case"). This is so because "'one of the primary purposes for the federal officer removal statute—as its history clearly demonstrates—was to have federal defenses litigated in the federal courts.'" *Calhoun v. Murray*, 507 F. App'x 251, 260 (3d Cir. 2012) (quoting *Willingham v. Morgan*, 395 U.S. 402,

407, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969)). "As with removal petitions based on other statutes, the burden of establishing the propriety of removal and the existence of federal jurisdiction under section 1442(a)(1) is upon the removing party." *N.J. Dep't of Envtl Prot. v. Dixo Co.*, No. 06-1041, 2006 WL 2716092, at *2 (D.N.J. Sept. 22, 2006); *In re Asbestos Litig.*, 661 F. Supp. 2d 451, 453 (D. Del. 2009) (same); *see also Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) ("party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists"). But the Supreme Court has held that "the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" *Arizona v. Manypenny*, 451 U.S. 232, 242, 101 S. Ct. 1657, 68 L. Ed. 2d 58 (1981) (citation omitted).

III. Discussion

As noted, before the Court are the FCDO's motion to dismiss and the Commonwealth's motion to remand. Because the motion to remand raises an issue of jurisdiction, the Commonwealth's motion will be addressed first.

The federal officer removal statute, 28 U.S.C. § 1442, provides, in pertinent part:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the

> United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue. . . .

28 U.S.C. § 1442(a)(1) (2013). A "civil action" is defined by the federal officer removal statute to include:

> any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

Id. at § 1442(d)(1).[3]

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[3]Prior to the 2013 amendments to § 1442, the definition of a "civil action" in the federal officer removal statute was set forth in subsection (c). *See* 28 U.S.C. § 1442 (2011), *amended by* 28 U.S.C. § 1442 (2013).

According to the United States Court of Appeals for the Third Circuit, jurisdiction under § 1442(a)(1) requires that:

> a defendant . . . must establish that (1) it is a "person" within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct "acting under" a federal office; (3) it raises a colorable federal defense; and (4) there is a causal nexus between the claims and the conduct performed under color of a federal office.

Feidt v. Owens Corning Fiberglass Corp., 153 F.3d 124, 127 (3d Cir. 1998) (citing *Mesa v. California*, 489 U.S. 121, 129, 109 S. Ct. 959, 965, 103 L. Ed. 2d 99 (1989); *Willingham v. Morgan*, 395 U.S. 402, 409, 89 S. Ct. 1813, 1817, 23 L. Ed. 2d 396 (1969)).

A. "Person" Within the Meaning of Section 1442; Colorable Federal Defense; and Causal Nexus

Section 1442 does not define the term "person." *See generally* 28 U.S.C. § 1442. Courts in the Third Circuit have routinely recognized that corporate entities qualify as persons under the federal officer removal statute. *See*, *e.g.*, *Lewis v. Asbestos Corp., Ltd.*, No. 10-650, 2012 WL 3240941, at *4 (D.N.J. Aug. 7, 2012); *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 776 (E.D. Pa. 2010); *Reg'l Med. Transp., Inc. v. Highmark, Inc.*, No. 04-1969, 2008 WL 936925, at *5 (E.D. Pa. Apr. 2, 2008). The vast majority of other federal courts have reached the same conclusion. *See*, *e.g.*, *Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135 (2d Cir. 2008)

(section 1442's text covers "non-natural entities, such as the United States and its agencies, which suggests that interpreting 'person' to include corporations is consistent with the statutory scheme."); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) ("corporate entities qualify as "persons" under § 1442(a)(1)"); *Glein v. Boeing Co.*, No. 10-452, 2010 WL 2608284, at *2 (S.D. Ill. June 25, 2010); *McGee v. Arkel Int'l, LLC*, 716 F. Supp. 2d 572, 575 (S.D. Tex. 2009). Applying this reasoning, the FCDO qualifies as a "person" under the federal officer removal statute.

Feidt also requires the removing party to raise a colorable federal defense. "The question before the court on this prong is 'not whether [a] claimed defense is meritorious, but only whether a colorable claim to such a defense has been made.'" *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398, 403 (D.N.J. 2005) (quoting *Fung v. Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992)).

The Supreme Court made clear in *Mesa v. California*, 489 U.S. 121, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989) that the assertion of a colorable federal defense is essential to removal jurisdiction under § 1442(a)(1). *See id.* at 139, 109 S. Ct. 959 ("Federal officer removal under 28 U.S.C. § 1442(a) must be predicated upon averment of a federal defense."). "But while *Mesa* affirmatively settled that Section 1442(a)(1) requires a colorable federal defense to effect removal under the statute, it did not clarify what defenses qualify as such." *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 778 (E.D. Pa. 2010). The Supreme Court has, however, explained:

> The federal officer removal statute is not 'narrow' or 'limited.' At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts.

Willingham v. Morgan, 395 U.S. 402, 406-07, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969). As a result, an "officer need not win his case before he can have it removed." *Id*. at 407, 89 S. Ct. 1813.

The Commonwealth has not addressed in detail the colorable federal defense requirement in its submission. Thus, I will assume that the FCDO satisfies this requirement.

Feidt further requires a causal nexus between the claims and the conduct performed under color of a federal office. "[A] defendant seeking removal must 'by direct averment exclude the possibility that [the defendant's action] was based on acts or conduct of his not justified by his federal duty.'" *Hagen*, 739 F. Supp. 2d at 785 (quoting *Mesa*, 489 U.S. at 132, 109 S. Ct. 959). This inquiry is distinct from the "acting under" requirement under the federal officer removal statute. *Parlin v. DynCorp Int'l, Inc.*, 579 F. Supp. 2d 629, 635 (D. Del. 2008); *see also Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012) (color of federal authority requirement is distinct from the "acting under" requirement). However, some courts have noted that these considerations "'tend to collapse into a single requirement.'" *Parlin*, 579 F. Supp. 2d at 635 (quoting

Reg'l Med. Transp., Inc. v. Highmark, Inc., 541 F. Supp. 2d 718, 724 (E.D. Pa. 2008)).

As with the colorable federal defense consideration, the Commonwealth's submissions provide little argument with respect to whether the FCDO satisfies the causal nexus requirement. As such, I will assume this requirement is met. Nevertheless, although these three *Feidt* requirements are met, the FCDO must also establish that is "act[s] under" a federal officer in order to invoke removal jurisdiction under § 1442(a)(1).

B. "Acting Under" a Federal Officer

The focal point of the Commonwealth's motion to remand is the second *Feidt* inquiry. To remove the Disqualification Proceeding under the federal officer removal statute, the FCDO must show that it was "acting under" a federal officer. *See Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 136 (2d Cir. 2008). "The words 'acting under' are broad, and . . . the statute must be 'liberally construed.'" *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007) (citing *Colorado v. Symes*, 286 U.S. 510, 517, 52 S. Ct. 635, 76 L. Ed. 2d 1253 (1932)). "There is no precise standard for the requisite control to bring an entity within the 'acting under' clause, but the determination is dependent upon the facts and conduct giving rise to the alleged cause of action." *Scrogin v. Rolls-Royce Corp.*, No. 3:10cv442, 2010 WL 3547706, at *4 (D. Conn. Aug. 16, 2010) (citing *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 125 (2d Cir. 2007)). But the Supreme Court has stated to satisfy the "acting under" requirement of § 1442(a)(1), a private person's actions "must involve an effort to

assist, or to help carry out, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152, 127 S. Ct. 2301.

In the Notice of Removal, the FCDO asserts that it assists the Government in "providing representation to indigent defendants, a service that the Government itself would have to perform under the CJA." (Doc. 1, ¶ 27.) Essentially, the FCDO argues that as a federal grantee/contractor pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, it "act[s] under" the AO.[4]

The Commonwealth, however, citing the Supreme Court's decision in *Watson*, argues that the FCDO is unable to satisfy the federal officer removal statute because "no federal agency is obligated to appear in state court and the instant Motion to Appoint Counsel concerns FCDO's appearances in state court rather than its appearances in federal court." (Doc. 23, 19.) Thus, the Commonwealth insists that the FCDO is not helping the Federal Government produce an item it needs when the FCDO represents indigent criminal defendants in state court.

The FCDO's contention that it "act[s] under" the AO for purposes of the federal officer removal statute requires consideration of the Criminal Justice Act and an understanding of the relationship between Community Defender Organizations and the AO. Moreover, as the Commonwealth asserts that the resolution of the FCDO's private contractor argument is controlled by

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[4]The FCDO does not allege that it is a federal agency under § 1442. (Doc. 29, 11-13.)

Watson v. Philip Morris Cos., 551 U.S. 142, 146, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007), a discussion of that decision follows as well.

1. The Criminal Justice Act and the Relationship Between Community Defender Organizations and the Administrative Office of the United States Courts

The Criminal Justice Act authorizes the appointment of counsel for financially eligible individuals seeking habeas corpus relief under 18 U.S.C. §§ 2241, 2254, and 2255 whenever "the court determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). In post conviction proceedings under § 2254 or § 2555 to vacate or set aside a death sentence, "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys. . . ." 18 U.S.C. § 3599(a)(2). Section 3599(e) provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and

> proceedings for executive or other clemency as may be available to the defendant.

Id. at § 3599(e).[5]

Under the Criminal Justice Act, federal district courts must place in operation a plan for furnishing representation to indigent criminal defendants. *See* 18 U.S.C. § 3006A(a). A district in which at least two hundred persons annually require the appointment of counsel may establish a "Federal Public Defender

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[5]In *Harbison v. Bell*, 556 U.S. 180, 182-83, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009), the Court addressed "whether § 3599(e)'s reference to 'proceedings for executive or other clemency as may be available to the defendant' encompasses state clemency proceedings." In finding that § 3599(e) authorizes federally appointed counsel to represent clients in such proceedings, the Court considered the text of § 3599(e) and noted that "[i]t is the sequential organization of the statute and the term 'subsequent' that circumscribe counsel's representation, not a strict division between federal and state proceedings." *Id*. at 188, 129 S. Ct. 1481. The Court also indicated that the Government's concern that § 3599(e) as interpreted by the Court that federally funded counsel would need to represent petitioners in any state habeas proceeding occurring after appointment of counsel to be unfounded because state habeas is not a stage "subsequent" to federal habeas. *See id*. at 189, 129 S. Ct. 1481. Thus, even though "state postconviction litigation sometimes follows the initiation of federal habeas because a petitioner has failed to exhaust does not change the order of proceedings contemplated by the statute." *Id*. at 190, 129 S. Ct. 1481. Nevertheless, in light of § 3599(e)'s provision that counsel may represent clients in "other appropriate motions and procedures," the Court noted that "a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation." *Id*. at 190 n. 7, 129 S. Ct. 1481.

Organization," a "Community Defender Organization," or both. *See id*. at § 3006A(g)(1).

The Criminal Justice Act Plan for the United States District Court for the Middle District of Pennsylvania provides that "the federal public defender organization of the Middle District of Pennsylvania, previously established in this district pursuant to the provisions of the CJA, is hereby recognized as the federal public defender organization for this district." In death penalty proceedings under § 2254 and § 2255, the Middle District Plan permits the appointment of counsel from a number of sources, including the Defender Association of Philadelphia's Capital Habeas Unit, *i.e.*, the FCDO.

The Plan of the United States District Court for the Eastern District of Pennsylvania Pursuant to the Criminal Justice Act of 1964, as amended, designates the FCDO as the Community Defender Organization to "facilitate the representation of persons entitled to appointment of counsel under the Criminal Justice Act."

A "Community Defender Organization" under the Criminal Justice Act is defined as "a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation." 18 U.S.C. § 3006A(g)(2)(B).[6] Community

[6]The FCDO, as explained above, is a division within the Defender Association of Philadelphia, which is a non-profit organization that provides legal representation to indigent criminal defendants in federal and state courts. (Doc. 17, 4.) The FCDO's activities are (continued...)

Defender Organizations "shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the next fiscal year." *Id.* Community Defender Organizations may apply for approval from the Judicial Conference to receive an initial grant to establish the organization and in lieu of payments for representation and services under subsections (d) and (e) of § 3006A, Community Defender Organizations may "receive periodic sustaining grants to provide representation and other expenses pursuant to this section." *Id.* The Judicial Conference is also tasked with issuing rules and regulations for governance of plans established under § 3006A. *See id.* at § 3006A(h). Appropriations under the Criminal Justice Act "shall be made under the supervision of the Director of the Administrative Office of the United States Courts." *Id.* at § 3006A(i).

The AO, acting under the supervision and direction of the Judicial Conference, "administers the federal defender and attorney program on a national basis; is responsible for training related to furnishing representation under the CJA; and provides legal, policy, management, and fiscal advice to the Conference and its . . . defenders and their staffs." United States Courts, http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx (last visited July 22, 2013).

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[6](...continued)
supported by a combination of federal funds received under the Criminal Justice Act and private charitable contributions. (*Id.*)

Community Defender Organizations seeking grant funds must apply on a form prepared by the AO. *See* 7 Guide to Judiciary Policy: Defender Services, pt. A, § 420, available at http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol_07.pdf (last visited July 22, 2013). The receipt and use of funds is subject to certain conditions, and Community Defender Organizations must agree to and accept these conditions before grant payments are issued. *See id.* Among others, the terms and conditions include that: "grant funds will be maintained separately and will not be commingled with any non-grant funds maintained by grantee;" "the grantee must submit reports each year setting forth its activities and financial position and the anticipated caseload and expense for the next fiscal year;" and "the grantee must keep financial books . . . unless a waiver is granted by the AO [and] such records must be maintained and submitted in such manner and form as required by the AO." *Id.* at Appx. 4A, available at http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol07A-Ch04-Appx4A.pdf (last visited July 22, 2013). If a grantee fails to comply with the terms and conditions of its grant award, the Judicial Conference or its authorized representative "may reduce, suspend, or terminate, or disallow payments under th[e] grant award as it deems appropriate." *Id.*

Based on these guidelines and regulations, the FCDO asserts that it operates under congressional authorization and is subject to federal control. (Doc. 1, ¶ 26.) The FCDO thus concludes that it "act[s] under" a federal officer and/or agency for purposes of the federal officer removal statute. The Commonwealth, however, contends that this showing fails to satisfy the

"acting under" analysis set forth by the Supreme Court in *Watson*.

2. *Watson v. Philip Morris Cos.*

The Supreme Court addressed the "acting under" requirement in the context of the federal officer removal statute in *Watson v. Philip Morris Cos.*, 551 U.S. 142, 146, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007). The Commonwealth argues that the Supreme Court's decision in *Watson* provides the framework for the "acting under" inquiry for the federal officer removal statute, and, pursuant to *Watson*, remand of the Disqualification Proceeding is compelled in this action. For the reasons detailed below, I agree with the Commonwealth in both respects.

In *Watson*, the petitioners filed a civil action in state court claiming that the respondents, the Philip Morris Companies, violated state laws prohibiting unfair and deceptive business practices by advertising certain cigarette brands as "light" when, in fact, the respondents manipulated testing results by designing its cigarettes and employing techniques that caused the cigarettes to register lower levels of tar and nicotine than would actually be delivered to consumers. *See Watson*, 551 U.S. at 146, 127 S. Ct. 2301. Relying on the federal officer removal statute, the respondents removed the action to federal court. *See id.* The district court held that the statute authorized removal because the petitioner's complaint attacked the respondents' use of the Government's method of testing cigarettes and thus the action involved conduct by the respondents that was taken under the Federal Trade Commission ("FTC"). *See id.*

The district court certified the question for interlocutory review, and the United States Court of Appeals for the Eighth Circuit affirmed. *See id*. at 147, 127 S. Ct. 2301. As with the district court, the Eighth Circuit found significant the FTC's detailed supervision of the cigarette testing process. *See id*. The Supreme Court granted certiorari to address the question "whether the fact that a federal regulatory agency directs, supervises, and monitors a company's activities in considerable detail brings that company within the scope of the italicized language ("*acting under*" an "*officer*" of the United States) and thereby permits removal." *Id*. at 145, 127 S. Ct. 2301 (emphasis in original).[7]

While recognizing the words "acting under" are broad, the Court emphasized that "broad language is not limitless." *Id*. at 148, 127 S. Ct. 2301. The Court thus considered the statute's language, context, history, and purpose to determine the scope and breadth of § 1442(a)(1). *See id*. After considering the history of the statute, the Court noted that early Supreme Court precedent "illustrate[s] that the removal statute's basic purpose is to protect the Federal Government from interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Federal Government acting within the

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[7]Section 1442(a)(1) as construed by the Supreme Court in *Watson* has since undergone minor amendments. *See* 28 U.S.C. § 1442(a)(1) (1996), *amended by* 28 U.S.C. § 1442(a)(1) (2011). Section 1442(a)(1) continues to require a private person to be "acting under" a federal officer as set forth in *Watson*.

scope of their authority." *Id*. at 150, 127 S. Ct. 2301 (internal quotations, citations, and alterations omitted). Significantly, state courts may display "local prejudice" against unpopular federal officials or federal laws, States may impede the enforcement of federal law, or States may deprive federal officials of a federal forum in which to assert federal immunity defenses. *See id*. These concerns can also arise when private persons act as assistants to federal officers carrying out the performance of their official duties. *See id*.

Against that historical backdrop, the *Watson* Court analyzed the phrase "acting under" as used in § 1442(a)(1), and found use of the word "under" "refer[red] to what has been described as a relationship that involves 'acting in a certain capacity, considered in relation to one holding a superior position or office.'" *Id*. at 151, 127 S. Ct. 2301 (quoting 18 Oxford English Dictionary 948 (2d ed.1989)). Such a relationship often involves subjection, guidance, or control. *See id*. (citing Webster's New International Dictionary 2765 (2d ed. 1953)). Moreover, the Supreme Court found that its precedent and the statute's purpose confirmed that a private person's "acting under" "must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Id*. at 152, 127 S. Ct. 2301 (citing *Davis v. South Carolina*, 107 U.S. 597, 600, 2 S. Ct. 636, 27 L. Ed. 574 (1883)). The Court emphasized that mere compliance (or noncompliance) with federal laws, rules and regulations does not bring a private actor within the scope of the federal officer removal statute even if "the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id*. at 152-53, 127 S. Ct. 2301.

The *Watson* Court next considered the respondents' argument that "lower courts have held that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Id*. The respondents thus questioned why if a private contractor can act under a federal officer based on close supervision, would the result not be the same when a private party is subject to intense regulation. *See id*. The Supreme Court explained:

> The answer to this question lies in the fact that the private contractor [in cases where close supervision by a federal officer or agency is sufficient] is helping the Government to produce an item that it needs. The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks. In the context of *Winters*, for example, Dow Chemical fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war. Moreover, at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform.

Id. at 153-54, 127 S. Ct. 2301 (referring to *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). The Court found this examination sufficiently addressed the respondent's argument in light of the

fact that private contracting was not at issue in the case.

Lastly, the respondents in *Watson* asserted that its activities exceeded the mere compliance with regulations because the FTC, after initially testing cigarettes for tar and nicotine, delegated that authority to an industry-financed testing laboratory. *See id.* at 154, 127 S. Ct. 2301. The Court rejected the respondents' argument because it "found no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf. Nor is there evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement." *Id.* at 156, 127 S. Ct. 2301. And, without evidence of a special relationship, the Court found the respondents' analogy to Government contracting flawed because it was left with only detailed rules, which sounded as regulation, and not delegation of authority. *See id.* at 157, 127 S. Ct. 2301.

3. Analysis of the "Acting Under" Requirement

Citing § 3006A, § 3599, and *Watson*, the Commonwealth insists that the FCDO fails to satisfy its burden as the removing party in establishing the existence of federal jurisdiction under § 1442(a)(1). According to the Commonwealth, the FCDO's private contractor argument makes little sense because when the FCDO "appears in state court proceedings before federal habeas review it is not assisting or helping carry out the duties of its federal superior," (Doc. 23, 9), since no federal agency has "a duty to appoint legal

representation to criminal defendants in state court." (*Id*. at 19.) Without such an obligation to appoint counsel or appear in state post-conviction proceedings, the Commonwealth concludes that the FCDO cannot satisfy the federal officer removal statute because it is not helping the Government produce something it needs.

The FCDO, however, asserts that it adequately alleges that it "act[s] under" the AO as a federal grantee/contractor. In that regard, "[a]s a community defender organization, the FCDO assists the Government to implement the aims and purposes of the CJA, by representing indigent defendants." (Doc. 28, 16.) The FCDO suggests that it satisfies the federal officer removal statute because it "operates under congressional authorization and is therefore subject to federal guidelines and regulations." (*Id.* at 17; *see also* Doc. 1, ¶ 27 ("The receipt and use of grant funds are subject to conditions set forth in Appx 4A of the Guidelines . . . . [T]he FCDO is subject to federal control.").) The FCDO also criticizes the Commonwealth's construction of the federal officer removal statute. It maintains that the Commonwealth's arguments in support of remand are hinged to the merits of the underlying controversy, and, at this point in the proceeding, it would be improper to decide the merits of the case. (Doc. 28,19-21.)

In view of the above cited authority and upon consideration of the arguments of the parties, the FCDO fails to satisfy its burden and demonstrate the existence of federal jurisdiction under § 1442(a)(1). In *Watson*, the Supreme Court explained that a "private person's 'acting under' must involve an effort to assist,

or to help carry out, the duties or tasks of the federal superior." *Watson*, 55 U.S. at 152, 127 S. Ct. 2301. In essence, the Court held that helping carry out or assisting with a governmental task or duty is a necessary condition for a private entity to be considered "acting under" a federal officer or agency for purposes of § 1442(a)(1). The FCDO asserts that it assists the Government by representing indigent defendants, which it suggests is bolstered by the fact that the Guidelines for Administering the Criminal Justice Act and Related Statutes require that a Community Defender Organization's "stated purposes must include implementation of the aims and purposes of the CJA." However, the FCDO has not identified any federal agency or officer that is tasked with or has a duty to appoint, arrange, or provide legal representation for indigent capital criminal defendants in *state post-conviction proceedings* to preserve claims for federal habeas review. A necessary condition to invoke the federal officer removal statute, the assistance or carrying out of duties of a federal superior, is therefore absent in this case.[8] As a result, even if the FCDO is

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[8]For this reason, and in light of the fact that they pre-date *Watson*, the district court cases relied on by the FCDO as supporting its claim that it "act[s] under" the AO are not persuasive. *See*, *e.g.*, *Dixon v. Ga. Indigent Legal Servs., Inc.*, 388 F. Supp. 1156 (S.D. Ga. 1974) (finding that "attorneys employed by organizations conducting federally-funded legal assistance programs for the indigent act under officers of the United States within the meaning of the removal statute[.]"); *Gurda Farms, Inc. v. Monroe Cnty. Legal Assistance Corp.*, 358 F. Supp. 841 (S.D.N.Y. 1973) ("In light of the foregoing description of the relationship between [the Office of Economic Opportunity] and its legal service programs, I conclude that the defendants in the instant actions are

(continued...)

"acting under" a federal officer in the course of its representation of clients in federal court, it does not follow that it also "act[s] under" a federal officer in its performance of tasks for which the Government bears no responsibility, such as appearing in state post-conviction capital proceedings to exhaust claims for federal habeas review. Indeed, "[c]ritical under the statute is to what extent defendants acted under federal direction *at the time they were engaged in the conduct now being sued upon*." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 125 (2d Cir. 2007) (emphasis added) (noting that the "acting under" and causal connection considerations tend to collapse into a single requirement and stating that "removal will not be proper where a private party establishes only that the acts complained of were performed under the 'general auspices' of a federal officer."); *Parlin v. DynCorp Int'l, Inc.*, 579 F. Supp. 2d 629, 635 (D. Del. 2008). As a corollary, if the FCDO's status as a federal grantee alone authorizes removal under § 1442(a)(1), numerous other entities and organizations that receive federal grants would also fall within the purview of the federal officer removal statute. Allowing these entities to remove proceedings to federal court simply because they receive grant funds subject to federal conditions and regulations without also finding that the entities are assisting or carrying out duties of the Federal Government would be inconsistent with the *Watson* Court's construction of § 1442(a)(1).

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[8](...continued)
persons 'acting under' a federal officer within the meaning of § 1442(a)(1).").

Moreover, the FCDO's argument that it satisfies the "acting under" requirement of § 1442(a)(1) as a federal contractor/grantee because it operates "under congressional authorization" and is "subject to federal guidelines and regulations," (Doc. 28, 17), is similar to the position advanced by the Philip Morris Companies and rejected by the Supreme Court in *Watson*. As the Supreme Court noted, intense regulation alone is insufficient to turn a private contractor into a private firm "acting under" a federal officer or agency. *See Watson*, 551 U.S. at 153, 127 S. Ct. 2301 ("a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone."). The *Watson* Court noted a crucial distinction between cases where a contractor and the Government are in an unusually close relationship "involving detailed regulation, monitoring, and supervision," and those instances where a company is simply subject to "intense regulation." *Id*. In the former, the private contractor assists the Government by providing an "item that it needs," which, in the contractor's absence, the Government itself would have to produce. *Id*.

The FCDO and the Government are not in such a relationship that render it "acting under" a federal officer for purposes of the federal officer removal statute. Among other things, the FCDO is required to segregate grant funds, submit reports detailing its financial activities, and keep financial books under the terms of its funding grant. But, these requirements sound in regulation. And being subject to intense regulation alone does not entitle a private entity to remove an action under § 1442(a)(1). *See Watson*, 551 U.S. at 153.

Furthermore, the FCDO's submissions nor its arguments demonstrate that it is in such an unusually close relationship with the AO or the Federal Government to make the federal officer removal statute applicable to this proceeding. The FCDO, as discussed, is subject to guidelines and regulations including the terms of its funding grant. But the FCDO has not suggested that its representation of clients is performed at the direction of the AO, that the AO dictates its litigation strategies or legal theories in individual cases, that the AO reviews its work product, or that the AO otherwise takes an active role in monitoring and/or participating in client representation. Of course, a third-party cannot dictate the FCDO's legal representation of its clients. *See*, *e.g.*, *Polk Cnty. v. Dodson*, 454 U.S. 312, 318-22, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) ("a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior," and a lawyer shall not permit a person "who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.");[9] *see also Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S. Ct. 402, 62 L. Ed. 2d 355 (1979) ("indispensable element of the effective performance of [appointed counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.").

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[9]In *Dodson*, the issue before the Court was "whether a public defender acts 'under color of state law' when representing an indigent defendant in a state criminal proceeding." *Dodson*, 454 U.S. at 314, 102 S. Ct. 445. Significantly, the Court held that a public defender does not act under color of state law when performing "a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 325, 102 S. Ct. 445.

Nonetheless, it is this lack of monitoring or close supervision that distinguishes the relationship between the FCDO and the AO from cases that have found an unusually close relationship between a private contractor and a federal officer or agency for purposes of § 1442(a)(1). For example, in *Bennett v. MIS Corp.*, 607 F.3d 1076, 1088 (6th Cir. 2010) the United States Court of Appeals for the Sixth Circuit concluded that a private mold remediation firm was "acting under" the Federal Aviation Administration because it "helped FAA officers carry out their task of ridding a federal employee occupied building of an allegedly hazardous contaminant, a job that in the absence of a contract with MIS or another private mold remediation firm the FAA itself would have had to perform." *Id*. (citation, internal quotation, and alterations omitted). In finding the private contractor and the FAA in an unusually close relationship, the Sixth Circuit emphasized that the FAA contracts included precise specifications and required the contractor to follow explicit parameters, the contractor's work was closely monitored by federal officers, the FAA contracting officers had authority to require that the contractor dismiss incompetent employees, and the FAA controlled the working hours of the contractor's employees. *See id*. at 1087.

Here, in comparison, for the reasons detailed above, the FCDO is not providing a service the Government "needs" when it represents criminal defendants in state post-conviction proceedings prior to federal habeas review. Nor in the absence of the FCDO would the Government be obligated to provide representation itself in such circumstances. Accordingly, there is no unusually close relationship between the FCDO and

the Federal Government, and removal of the Disqualification Proceeding was improper.

Lastly, the FCDO suggests that conducting such an analysis at this stage of the proceeding is premature. Specifically, it contends that finding that no federal officer or agency is required to appoint counsel for indigent capital criminal defendants in their state post-conviction proceedings on the Commonwealth's motion to remand would inappropriately result in an accelerated decision on the merits of whether the Criminal Justice Act prohibits Community Defender Organizations from appearing in state court.

Concluding that there is no federal officer or agency obligated to represent or appoint counsel to represent indigent capital state criminal defendants in their state post-conviction proceedings is distinct from resolving the Disqualification Proceeding. That is, I am able to determine that the FCDO fails to establish the "acting under" requirement of the federal officer removal statute without determining that the FCDO should be removed as counsel in the PCRA proceeding. Thus, while I hold that the FCDO has not met its burden to establish federal jurisdiction under § 1442(a)(1), I make no finding that the Criminal Justice Act bars the FCDO from appearing in state court. *See supra* note 5.

IV. Conclusion

Since the FCDO fails to establish that it is "acting under" a federal officer for purposes of § 1442(a)(1), the Commonwealth's remaining arguments for remand, *i.e.*, the applicability of *Younger* abstention to this

proceeding and whether the Disqualification Proceeding is a "civil action" as defined by § 1442(d)(1), need not be addressed. And, as the proceeding will be remanded, the FCDO's motion to dismiss will be denied as moot.

An appropriate order follows.

August 16, 2013
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

In Re: Proceedings Before the Court of Common Pleas of Monroe County, Pa. to Determine Propriety of State Court Representation by Defender Association of Philadelphia, Filed In COMMONWEALTH OF PENNSYLVANIA, v. MANUEL SEPULVEDA.	CIVIL ACTION NO. 3:13-CV-511 (JUDGE CAPUTO)

ORDER

NOW, this 16th day of August, 2013, **IT IS HEREBY ORDERED** that:

(1) The Commonwealth's Motion to Remand (Doc. 9) is **GRANTED**.

(2) The Proceedings Before the Court of Common Pleas of Monroe County, Pa. to Determine Propriety of State Court Representation by Defender Association of Philadelphia are **REMANDED** to the Court of Common Pleas of Monroe County, Pennsylvania.

(3) The Defender Association of Philadelphia's Motion to Dismiss (Doc. 8) is **DENIED as moot**.

(4) The Clerk of Court is directed to mark the case as **CLOSED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: COMMONWEALTH'S MOTION TO APPOINT NEW COUNSEL AGAINST OR DIRECTED TO DEFENDER ASSOCIATION OF PHILADELPHIA	:	**MISCELLANEOUS ACTION**
COMMONWEALTH OF PENNSYLVANIA,	:	**NO. 13-62**
v.	:	
FRANCIS BAUER HARRIS.	:	

MEMORANDUM OPINION

RUFE, J. **AUGUST 22, 2013**

This matter comes before the Court having been removed by the Federal Community Defender Organization ("FCDO") from the Lancaster County Court of Common Pleas.[1] On February 11, 2013, prior to removal, Pennsylvania Attorney General Kathleen G. Kane filed a Motion to Appoint Counsel in the underlying Post-Conviction Relief Act ("PCRA") proceeding, *Commonwealth v. Harris*, No. CP-36-CR-0000672-1997 (the "Disqualification Motion"). In the Disqualification Motion, the Commonwealth seeks to disqualify Defendant Francis Bauer Harris's FCDO counsel from

[1]Notice of Removal [Doc. No. 2] at 1.

representing Mr. Harris in his state court PCRA proceedings on the grounds that such representation violates federal law. Without removing the underlying PCRA proceeding, the FCDO removed the Disqualification Motion to this Court and thereafter, filed a Motion to Dismiss, arguing that the Commonwealth is without standing to enforce the statute under which it seeks to disqualify FCDO counsel. The Commonwealth then filed a Motion to Remand, asserting that the Federal Officer Removal Statute, 28 U.S.C. § 1442, pursuant to which the Disqualification Motion was removed, does not allow removal in this case. The Court held oral argument on the pending motions and permitted supplemental briefing. The Motion to Remand and the Motion to Dismiss are now ripe for disposition.

I. Background

A. Background of Francis Bauer Harris's Criminal Proceedings

Francis Bauer Harris was convicted of first degree murder on October 4, 1997, in the Lancaster County Court of Common Pleas, and after a penalty phase proceeding, was sentenced to death.[2] On November 20, 2002, the Pennsylvania Supreme Court affirmed the conviction and sentence, and on December 8, 2003, the United States Supreme Court denied a Petition for Writ of Certiorari.[3] On March 15, 2004, then-Governor

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[2]Doc. No. 2 ¶ 4.

[3]*Id.* ¶ 5 (citing *Commonwealth v. Harris*, 817 A.2d 1033 (Pa. 2002) and *Harris v. Pennsylvania*, 540 U.S. 1081 (2003)).

Edward Rendell signed a death warrant, which scheduled Mr. Harris's execution for May 13, 2004.

Mr. Harris petitioned this Court for a stay of execution, and at the same time, requested leave to proceed *in forma pauperis* and asked that counsel be appointed to represent him.[4] The matter was docketed as a capital habeas petition at Civil Action No. 04-1237, on March 22, 2004. By Order dated March 29, 2004, after a telephone conference with FCDO counsel and the Lancaster County District Attorney's Office, this Court stayed Mr. Harris's execution, granted his motion to proceed IFP, and pursuant to 21 U.S.C. § 848(q)(4)(B), appointed the FCDO "to represent Petitioner [Harris] in his to-be-filed Petition for Writ of Habeas Corpus."[5]

FCDO counsel then filed a Petition for Writ of Habeas Corpus in this Court on Mr. Harris's behalf on October 12, 2004.[6] On November 22, 2004, FCDO attorneys also filed a PCRA petition in the Lancaster County Court of Common Pleas on Mr. Harris's behalf.[7] The Court thereafter granted Mr. Harris's Motion to place the federal habeas proceeding in suspense pending exhaustion of state court remedies, stating that it would revisit the issue of whether suspense or dismissal without prejudice was warranted during the

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[4]*Harris v. Beard*, Civ. A. No. 04-1237, Doc. No. 1.

[5]Civ. A. No. 04-1237, Doc. No. 4 ¶ 2.

[6]Civ. A. No. 04-1237, Doc. No. 12.

[7]Doc. No. 2 ¶ 9.

pendency of the state proceedings.[8] By Opinion and Order dated September 22, 2005, the Court dismissed the Petition without prejudice pending exhaustion of state court remedies.[9]

Litigation in Mr. Harris's underlying state post-conviction proceedings has been ongoing since that time. On February 11, 2013, the Commonwealth for the first time raised an objection to the FCDO's representation of Mr. Harris in state court, filing the Disqualification Motion that is the subject of these proceedings.

B. Background of What the FCDO Calls "The Commonwealth's Campaign Against the FCDO"

The FCDO asserts that following a concurring opinion by the Chief Justice of the Pennsylvania Supreme Court in an unrelated criminal appeal, which questioned whether FCDO attorneys may appear in PCRA proceedings,[10] the Office of the Philadelphia District Attorney petitioned the Pennsylvania Supreme Court to exercise its "King's Bench Jurisdiction" pursuant to 42 Pa. C.S. § 726 to bar FCDO attorneys from appearing in any PCRA proceedings, based on the FCDO's purported improper use of federal funds in representing defendants in these proceedings. The

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[8]Civ. A. No. 04-1237, Doc. No. 19.

[9]Civ. A. No. 04-1237, Doc. Nos. 25, 26.

[10]*Commonwealth v. Spotz*, 18 A.3d 244, 329-49 (Pa. 2011) (Castille, C.J., concurring).

FCDO removed the King's Bench Proceeding to federal court on December 8, 2011; six days later the Commonwealth voluntarily dismissed the petition.[11] After voluntary dismissal of the King's Bench Proceeding, the Commonwealth, through various county District Attorney's Offices and the Office of the Attorney General, continued to pursue the objective of the King's Bench Proceeding through piecemeal litigation, challenging the appearance of FCDO counsel in several individual, capital PCRA proceedings (including that of Mr. Harris).

On January 10, 2013, the Pennsylvania Supreme Court issued a *per curiam* order in *Commonwealth v. Mitchell*, No. 617,[12] in which it remanded a case to the PCRA court to determine whether the FCDO could continue to represent the defendant in PCRA proceedings. The Pennsylvania Supreme Court instructed the PCRA court, on remand, to determine whether the FCDO used any federal grant monies to support its activities and directed that if the FCDO could not demonstrate that all of their actions in PCRA court were privately financed, counsel should be removed.[13]

Following the *Mitchell* remand, the Attorney General filed the Disqualification Motion in Mr. Harris's

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[11]E.D. Pa. Civ. A. No. 11-7531 (Dalzell, J.).

[12]*Commonwealth v. Mitchell*, CP-51-CR-0204961-1998, D56/1 (*see* Exhibit 4 to FCDO's Mot. to Dismiss [Doc. No. 5]).

[13]*Id.*

PCRA proceedings.[14] In the Motion, the Commonwealth asserts that pursuant to 18 U.S.C. § 3599, the FCDO may not represent Mr. Harris in his PCRA proceeding and citing *Mitchell*, argues that the PCRA court should hold a hearing to determine whether the FCDO has used or will use federal grant money to support its state court activities. The FCDO timely removed the Motion to this Court. This case is one of several cases removed by the FCDO to federal court after the Commonwealth filed a disqualification motion citing improper use of federal funds.[15]

C. Background of the Criminal Justice Act

The Criminal Justice Act ("CJA"),[16] was enacted "to promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States."[17] The CJA authorizes, *inter alia*, the appointment of counsel for indigent inmates seeking habeas corpus relief under 28 U.S.C.

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[14]Commonwealth's Motion to Appoint Counsel ("Disqualification Motion"), [Doc, No. 2, Ex. A].

[15]*See*, *e.g.*, E.D. Pa. Civ. A. Nos. 13-1871 (McLaughlin, J.), 13-2242 (Schiller, J.), M.D. Pa. Civ. A. Nos. 13-510, 13-511, 13-561 (Caputo, J.). As of the date of this Opinion, Judge McLaughlin and Judge Caputo have filed pinions on the motions to remand in their respective cases.

[16]18 U.S.C. § 3006A.

[17]S. Rep. No. 88-346 (1963), *reprinted in* 1964 U.S.C.C.A.N. 3000, 3000.

§ 2254,[18] and makes appointment mandatory for those indigents seeking relief from a death sentence.[19] Pursuant to the CJA, each federal district court must implement a plan for the furnishing of this representation; the plan may establish a federal "Community Defender Organization" ("CDO"), "a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation."[20] The Federal Community Defender Organization ("FCDO") appearing in the instant case is one such organization and is a division of the Defender's Association of Philadelphia.

The CJA requires that counsel be appointed for an indigent defendant "[i]n any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence."[21] It further requires that each United States district court implement a plan for furnishing representation

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[18]18 U.S.C. § 3006A(a)(2)(B).

[19]18 U.S.C. § 3599(a)(2).

[20]18 U.S.C. § 3006A(g)(2)(B). The Defender Association of Philadelphia's Federal Court Division is a CDO within the meaning of 18 U.S.C. § 3006A(g)(2)(B). The Federal Court Division of the Defender Association of Philadelphia is often referred to as the "Federal Community Defender Organization, Eastern District of Pennsylvania" or "FCDO" for short. For purposes of these proceedings, "FCDO" will denote the Federal Court Division of the Defender Association. While CDO's, like the FCDO, are established pursuant to § 3006A(g)(2)(B), federal public defender organizations are established pursuant to § 3006A(g)(2)(A).

[21]18 U.S.C. § 3599(a)(2).

in accordance with the CJA, and authorizes the Judicial Conference of the United States to issue rules and regulations governing the operation of such plans.[22] The United States District Court for the Eastern District of Pennsylvania's Plan authorizes the FCDO to provide representation to persons so entitled under the CJA, and FCDO attorneys are required to abide by CJA Guidelines.[23]

In addition to representing federal criminal defendants and capital defendants in § 2254 proceedings, FCDO attorneys appear on behalf of federal clients in PCRA proceedings before Pennsylvania state courts. They do so either (1) on the purported authority of a federal court order to exhaust their client's state court remedies or (2) as Pennsylvania-barred attorneys appointed by the PCRA court or retained by a defendant to provide representation on a *pro bono* basis. The FCDO asserts that the research and investigation of federal claims, which are essential to federal habeas representation, may be compensated with CJA funds even where the work is done in the PCRA proceedings, before a federal habeas petition is filed. However, work that need not be undertaken to provide federal habeas representation (such as appearing at state court hearings) is not compensated with CJA funds and instead, is underwritten by private funds or furnished *pro bono* with the knowledge and approval of the

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[22]18 U.S.C. § 3006A(a), (h).

[23]See Guide to Judiciary Policy, Vol. 7, Pt. A (2011), *available at* http://www. uscourts.gov/FederalCourts/AppointmentOfCounsel/ CJAGuidelinesForms/ GuideToJudiciaryPolicyVolu me7.aspx; *see also* Exhibit 3 to FCDO's Mot. to Dismiss [Doc. No. 5-6].

Administrative Office ("AO") of the United States Courts.

Under the CJA, appropriations are "made under the supervision of the Director of the [AO]"[24] who carries out that responsibility under the direction of the Judicial Conference of the United States.[25] The AO has enacted a comprehensive regulatory scheme governing the appointment of counsel and compensation, and the conditions attached to the FCDO's receipt of federal funds.[26] The AO Guidelines require segregation of grant funds from private funds, return of unused funds to the AO, and the submission of annual reports regarding the grantee's activities, financial position, and anticipated caseload and expenses for the next fiscal year.[27] Grantees are required to keep detailed financial records and are audited by the AO each year to ensure compliance with the terms and conditions of the grant award.[28] If the grantee fails to comply with the terms and conditions of the grant award, the AO is empowered to reduce, suspend, terminate, or disallow further payments.[29]

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[24]18 U.S.C. § 3006A(i).

[25]18 U.S.C. § 3006A(g)(2)(B).

[26]*See* AO Guidelines, Ex. 3 to the Mot. to Dismiss.

[27]*Id.* at 2-3.

[28]*Id.* at 4.

[29]*Id.* at 9.

II. Motion To Remand

A. Legal Standard for Removal

The FCDO filed its Notice of Removal pursuant to 28 U.S.C. § 1442, which provides in pertinent part:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.[30]

Section 1442, commonly referred to as the "Federal Officer Removal Statute," authorizes the removal of any ancillary civil proceeding, separate and apart from an underlying action, if such proceeding is directed to or against a federal officer, or person acting under a federal officer, for conduct relating to any act done

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[30] 28 U.S.C. § 1442(a)(1).

under color of the office.[31] "Although the general removal statute, 28 U.S.C. § 1441, is to be strictly construed in favor of state court adjudication, the federal officer removal statute, 28 U.S.C. § 1442, upon which removal was premised in this matter, should be broadly construed in favor of a federal forum."[32]

To establish removal jurisdiction under section 1442(a)(1), the removing party, here the FCDO, "must establish that (1) it is a 'person' within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct 'acting under' a federal office; (3) it raises a colorable federal defense; and (4) there is a causal nexus between the claims and the conduct performed under color of a federal office."[33] Additionally, the removing party must establish that the removed action is a "civil action," as defined by § 1442(d)(1), directed at the removing party, and which is removed without removing the underlying action.

B. Discussion

The final two requirements need little discussion. It is without question that the FCDO removed only the

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[31] *See, e.g.*, *Vedros v. Northrop Grumman Shipbuiding, Inc.*, No. 11-67281, 2012 WL 3155180, at *2 (E.D. Pa. Aug. 2, 2012).

[32] *Calhoun v. Murray*, 507 F. App'x 251, 260 (3d Cir. 2012) (citing *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985) and *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1262 (3d Cir. 1994).

[33] *Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 127 (3d Cir. 1998) (citing *Mesa v. California*, 489 U.S. 121, 129 (1989)).

Disqualification Motion and not the underlying criminal prosecution, and that it is a "civil action" before this Court. Although the Commonwealth maintains that the Disqualification Motion is directed to Mr. Harris, not the FCDO, because it seeks to have counsel appointed to represent Mr. Harris, the Motion is more reasonably read as a motion to disqualify the FCDO, which is directed at the FCDO itself (since Mr. Harris is already represented by the FCDO, there is no need to have counsel appointed unless the FCDO is disqualified).

The crux of the dispute between the parties concerns whether the FCDO, as a private nonprofit organization, "acts under" a federal officer or agency for the purpose of § 1442 removal.[34] The Commonwealth argues that the FCDO does not act under a federal agency when it appears in state court, and therefore removal would never be proper with respect to FCDO state court representation. The Commonwealth's argument, however, overreaches.

A private person is "acting under" a federal officer or agency for the purpose of the federal officer removal statute where such person's efforts "assist, or [ ] help

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[34]It is undisputed that the FCDO is part of the Defender's Association of Philadelphia, an independent, non-profit corporation. Corporate persons are "persons" within the meaning of the statute. *Bouchard v. CBS Corp.*, No. 11-66270, 2012 WL 1344388, at *9 (E.D. Pa. Apr. 17, 2012). Therefore, the FCDO is a "person" for the purpose of the Court's analysis. The Commonwealth does not argue to the contrary.

carry out, the duties or tasks of the federal superior."[35] Accordingly, courts have held that "attorneys employed by organizations conducting federally-funded legal assistance programs for [ ] indigent [persons] act under officer of the United States within the meaning of the removal statute."[36] Here, the FCDO provides a service to indigent defendants that the "Government itself would [otherwise] have had to perform," and thus, acts under a federal officer or agency for the purpose of the federal officer removal statute.[37]

The Commonwealth argues that there is no causal nexus between the claims and the conduct performed under color of the federal office; that is, even assuming the FCDO may at times "act under" a federal officer or agency, it does not do so when appearing in state court PCRA proceedings, which must be exhausted before a federal habeas petition may be filed. While the Court recognizes the basic logic of this argument, it fails to defeat removal here.

The "'under color of office' [requirement is] meant . . . to preserve the pre-existing requirement of a

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[35]*Watson v. Philip Morris Cos.*, 551 U.S. 142, 152 (2007) (emphasis omitted).

[36]*Dixon v. Georgia Indigent Legal Servs., Inc.*, 388 F. Supp. 1156, 1161 (S.D. Ga. 1974), *aff'd* 532 F.2d 1373 (5th Cir. 1976); *see also Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841 (S.D.N.Y.1973).

[37]*Watson*, 551 U.S. at 154.

federal defense for removal,"[38] and here, the FCDO's defense itself shows the causal nexus that exists between the claims and the conduct performed under color of the federal office. According to the FCDO, its state court activities are mixture of federally funded activities and privately funded activities; the aspect of state court representation that is done in preparation of the federal habeas petition is permitted by § 3599, and is performed "under color" of a federal office. Therefore, in asserting this defense, the FCDO satisfies both the "causal nexus" and the "federal defense" requirements of the removal statute.

The viability of the FCDO's defense is of no moment in the determination of whether removal is proper as the Supreme Court does not require the removing party to "win [its] case before [it] can have [the case] removed."[39] Additionally, the Supreme Court has rejected a "narrow, grudging interpretation" of the federal officer removal statute, recognizing the importance of federal defenses being determined in a federal court.[40] While the Court recognizes "strong judicial

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[38]*Mesa*, 489 U.S. at 135.

[39]*Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (internal quotation omitted).

[40]*See id.*; *see also Mesa*, 489 U.S. at 126 ("[T]he Federal Government can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for

(continued...)

policy against federal interference with state criminal proceedings,"[41] the Court finds that in this case, public policy favors having a federal entity interpret this federal defense, particularly as there is no interference with the state courts' determination of the merits of Mr. Harris's PCRA Petition.

Despite the Commonwealth's insistence that the state court's interest in regulating the practice of law is paramount and warrants remand, removal does not prevent the Courts of the Commonwealth from regulating the practice of law. If the FCDO's appearance in state court were to violate Pennsylvania Supreme Court ethical rules, disqualification or other disciplinary action may be taken by an authorized body. Here, the Commonwealth does not advance any independent state ethical rule that prohibits the FCDO from representing Mr. Harris in his PCRA proceedings; disqualification is sought solely on the basis of a federal funding statute. To the extent the general state interest in regulating the practice of law may be implicated, it is insufficient to override the policy underlying federal officer removal statute which supports removal in this matter.

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[40](...continued)
their protection,–if their protection must be left to the action of the State court,–the operations of the general government may at any time be arrested at the will of one of its members.") (internal quotation marks and citation omitted).

[41]*Mesa*, 489 U.S. at 138 (internal quotation omitted).

C. Abstention

The Commonwealth argues that even if the Court finds that removal is proper under the federal officer removal statute, *Younger* Abstention prohibits removal.[42] The FCDO asserts that the Commonwealth's *Younger* argument is misplaced because according to the FCDO, the jurisdiction conferred by § 1442 is mandatory and therefore, the doctrine does not apply in the § 1442(a) context.

Younger Abstention, named for *Younger v. Harris*,[43] requires that a federal court abstain "in certain circumstances from exercising jurisdiction over a claim where resolution of that claim would interfere with an ongoing state proceeding."[44] The doctrine "reflects a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances."[45] *Younger* Abstention is appropriate "only when (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to

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[42]*See* Doc. No. 7 at 21-30.

[43]401 U.S. 37 (1971).

[44]*Miller v. Mitchell*, 598 F.3d 139, 145 (3d Cir. 2010).

[45]*Hill v. Barnacle*, No. 13-1205, 2013 WL 1760898, at *1 (3d Cir. Apr. 25, 2013) (quoting *Gwynedd Properties, Inc. v. Lower Gwynedd Twp.*, 970 F.2d 1195, 1199 (3d Cir. 1992) (internal quotation marks omitted)).

raise federal claims."[46] "Even when the three-prong test is met, *Younger* abstention is not appropriate when '(1) the state proceedings are being undertaken in bad faith or for purposes of harassment or (2) some other extraordinary circumstances exist . . . .'"[47]

Neither party has cited and the Court's research revealed no cases in which a court applied *Younger* Abstention in the context of federal officer removal. The Commonwealth states that "[i]n the absence of guidance from the Supreme Court, there is no clear indication that *Younger* does not apply to cases that have been removed,"[48] citing two cases, one from the Fourth Circuit,[49] the other from the Sixth Circuit,[50] in which *Younger* Abstention was applied in removed cases. Both cases, however, involved removal pursuant to 28 U.S.C. § 1441, the general removal statute. This argument is not persuasive in the context of federal officer removal because it does not address the

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[46]*Miller*, 598 F.3d at 146 (quoting *Kendall v. Russell*, 572 F.3d 126, 131 (3d Cir. 2009) (internal quotation marks omitted)).

[47]*Lazaridis v. Wehmer*, 591 F.3d 666, 670 n.4 (3d Cir. 2010) (quoting *Schall v. Joyce*, 885 F.2d 101, 106 (3d Cir. 1989) (omission in original)).

[48]Doc. No. 22 at 7 (quoting Daniel C. Norris, *The Final Frontier of Younger Abstention: The Judiciary's Abdication of the Federal Court Removal Statute*, 31 Fla. St. U. L. Rev. 193, 219 (2003)).

[49]*Emp'rs Res. Mgmt. Co. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995).

[50]*Lutz v. Calme*, No. 98-6570, 1999 WL 1045163 (6th Cir. Nov. 9, 1999).

countervailing policy of the federal officer removal statute. In fact, the Fourth Circuit has held that "the removal jurisdiction granted by § 1442(a), which is designed to protect federal employees against local prejudice, is mandatory, not discretionary, and a district court has no authority to abstain from the exercise of that jurisdiction on any ground other than the two specified in 1447(c)."[51] Accordingly, the Court should be hesitant to apply *Younger* abstention in the context of § 1442 removal.

However, the Court need not decide whether *Younger* Abstention could ever apply to a case removed pursuant to § 1441 because in this case, the state court's interest in deciding the Disqualification Motion, is outweighed by the federal interest in interpreting this federal funding statute. As stated above, the Court is not persuaded by the Attorney General Office's attempts to advance "regulation of the practice of law" as the important state interest warranting remand or abstention. This Court's decision to allow removal does not prohibit the Pennsylvania Supreme Court from regulating which attorneys may practice law in Pennsylvania or the conduct of attorneys who practice there to the extent such attorneys engage in unethical behavior or otherwise fail to comply with court rules. The Commonwealth herein seeks disqualification solely on the basis of a federal funding statute and in this context, abstention is not warranted.[52]

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[51]*Jamison v. Wiley*, 14 F.3d 222, 239 (4th Cir. 1994) (citation omitted).

[52]Though the Court will not go so far as to say that "the state

(continued...)

D. Conclusion

For the foregoing reasons, the Court finds that removal pursuant to 28 U.S.C. § 1442 was proper. Accordingly, the Motion to Remand will be denied.

III. FCDO's Motion to Dismiss

Having determined that the case is properly before the Court, the FCDO's Motion to Dismiss must be considered. The FCDO argues that the Disqualification Motion should be dismissed because § 3599, pursuant to which the Commonwealth seeks to disqualify the FCDO, does not provide a private right of action. The Commonwealth responds that it need only demonstrate that it generally has standing to file a disqualification

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[52](...continued)
proceedings are being undertaken in bad faith or for purposes of harassment," *see Lazaridis*, 591 F.3d at 670 n.4, the Court notes that it appears that the success of the Commonwealth's Disqualification Motion would likely be detrimental to state court interests. As the FCDO states in its Brief in Opposition to the Motion to Remand:

> If the Commonwealth were to succeed in removing the FCDO, Mr. Harris would be entitled to new representation pursuant to Pennsylvania Rule of Criminal Procedure 904(H), a fact the Commonwealth does not dispute. That representation would be at the expense of the Commonwealth or Lancaster County or both and would result in protracted delay of the PCRA proceedings while new counsel learns the facts and undertakes an investigation into Mr. Harris's federal claims.

Doc. No. 27 at 31.

motion is state criminal proceedings, not that it has standing to bring a claim pursuant to § 3599.

In its Disqualification Motion, the Commonwealth defines the question at issue in the Motion as "whether FCDO, a *federal* entity, can represent a *state* court litigant."[53] The Motion goes on to state "a background of the issue," and in doing so, begins with the text of 18 U.S.C. § 3599, arguing that the statute permits appointment of counsel in § 2554 and "every subsequent stage of available judicial proceedings" but that "[a]n initial PCRA petition cannot legally be considered a 'subsequent stage of available judicial proceedings' to federal habeas corpus proceeding under 28 U.S.C. § 2254," and therefore, "there is no federal action or federal appointment order authorizing FCDO's representation of Harris."[54] The Commonwealth further states that the state court to which the motion is directed "has the authority to enforce federal law and remove the FCDO"[55] and appoint new counsel.

It is evident, from this last statement in particular, that the purpose of the Motion is to disqualify the FCDO based on federal law. The Motion seeks to disqualify the FCDO because, according to the Commonwealth, such representation is not permitted by virtue of a federal statute. Said differently, it is a suit to enforce § 3599. While the Commonwealth argues that the FCDO "mischaracterizes" its motion as seeking an

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[53]Disqualification Motion ¶ 5.

[54]Disqualification Motion ¶¶ 9, 15.

[55]Disqualification Motion ¶ 10.

adjudication of the use of federal funds when the real "thrust" of its motion is the propriety of FCDO representation in state court, this does not alter the conclusion that the Motion "is in essence a suit to enforce the statute itself."[56] The question thus becomes whether the Commonwealth has standing to seek enforcement of § 3599. The Court finds that it does not.

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."[57] Because of this, the Third Circuit "employ[s] a two-step inquiry for determining whether a private right of action exists under a federal statute: (1) whether Congress intended to create a personal right in the plaintiff; and (2) whether Congress intended to create a personal remedy for that plaintiff."[58] A party asserting a violation of a federal statute "must address both aspects of this rights-remedies dichotomy."[59] In the absence of an express private right of action, courts may infer an implied private right of action only if both aspects of this dichotomy

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[56]*Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1348 (2011).

[57]*McGovern v. City of Philadelphia*, 554 F.3d 114, 116 (3d Cir. 2009) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)).

[58]*Id.*

[59]*Id.*

have been satisfied .[60] Where, as here, a statute provides for "agency enforcement" (that is, delegation to a federal agency to enforce the law), it "creates a strong presumption *against* implied private rights of action."[61] The two-step inquiry applies to states as well as private parties seeking implied rights of action.[62]

Here, the Commonwealth does not make any effort to argue that an explicit or implied right of action may be read into § 3599, as it surely cannot given the strong presumption against an implied private right of action in this case.[63] Rather, the Commonwealth argues that the foregoing principles do not apply in this case because the FCDO created this action by removing it to federal court. Given that this is not "a traditional civil action commenced via a complaint in state court," and instead is a motion filed during the course of state criminal proceedings, the Commonwealth asserts that it need only show that it has the authority to seek "a court order concerning whether the FCDO can be appointed to represent a state PCRA petitioner before federal habeas corpus review."[64] The Court disagrees.

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[60] *Id.*

[61] *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 305 (3d Cir. 2007) (emphasis added).

[62] *See New Jersey Dep't of Envtl. Protection & Energy v. Long Island Power Auth.*, 30 F.3d 403, 421 n.34 (3d Cir. 1994).

[63] *See Wisniewski*, 510 F.3d at 305.

[64] Doc. No. 10 at 15.

The Commonwealth cannot evade Congressional limits on the enforcement of federal law by characterizing its motion as a disqualification proceeding where the disqualification sought is solely based on federal law. Restrictions on private rights of action apply whenever a party is "in substance" attempting to enforce a provision of federal law.[65] Because the Commonwealth seeks to do just that, it must show that it has a right to do so. The Commonwealth has not made this showing and thus, the private right of action doctrine prevents it from raising its claims.

Both parties advance several policy arguments in support of their respective positions, with the Commonwealth again advancing the state court's interest in regulating the practice of law. The Court, however, does not interpret the Commonwealth's argument to be that the FCDO attorneys representing Mr. Harris are not authorized to practice law in Pennsylvania or are otherwise in violation of Pennsylvania Supreme Court's ethical rules. The only basis for disqualification is the Commonwealth's construction of a federal funding statute, and the state has not established its interest in ensuring that any federal funds are properly expended. Additionally, the Court is mindful that it "must prevent litigants from using motions to disqualify opposing counsel for tactical purposes."[66] Disqualification is a

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[65] *See Astra USA, Inc.*, 131 S. Ct. at 1345.

[66] *Hamilton v. Merill Lynch*, 645 F. Supp. 60, 61 (E.D. Pa. 1986).

harsh measure, and "motions to disqualify opposing counsel generally are not favored."[67]

The Court recognizes that the effect of its decision is to foreclose review of the scope of representation permitted under § 3599 in state-court PCRA proceedings. However, recognizing the Commonwealth's right to proceed in this instance "could spawn a multitude of dispersed and uncoordinated lawsuits" by state actors seeking to disqualify opposing counsel in death penalty proceedings, and "the risk of conflicting adjudications would be substantial."[68]

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[67] *Commw. Ins. Co. v. Graphix Hot Line, Inc.*, 808 F. Supp. 1200, 1203 (E.D. Pa. 1992) (internal quotation omitted).

[68] *Astra USA, Inc.*, 131 S. Ct. at 1349. Though of no moment to the Court's analysis and without reaching a conclusion on the substantive merits of the Commonwealth's claim, the Court notes a fundamental defect in the Commonwealth's argument. According to the Commonwealth, § 3599 permits the FCDO to represent a litigant in federal habeas corpus proceedings and "throughout every *subsequent* stage of judicial proceedings." 18 U.S.C. § 3599(a) (2), (e) (emphasis added). Because federal habeas corpus relief cannot be granted under 28 U.S.C. § 2244 unless a petitioner *first* exhausts his administrative remedies in state court, the Commonwealth argues that an initial PCRA petition cannot legally be considered to be a "subsequent stage of available judicial proceedings," and therefore, the FCDO representation of a petitioner in these proceedings is prohibited by § 3599. However, the mere fact that § 3599 does not provide funding for CJA counsel's representation in state PCRA proceedings, does not mean that CJA counsel cannot represent a petitioner in such proceedings, nor does it necessarily suggest that CJA counsel is never entitled to funding for work relating to state proceedings. Although this is not necessarily fatal to a substantive review of the Common-

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Given that § 3599 does not provide the Commonwealth the private right of action to enforce the statute and in an effort to discern the policy and motivation underlying the filing of these disqualification motions, the Court, during oral argument, questioned the Commonwealth regarding the impetus for filing these motions. The Commonwealth was unable to provide the Court with a clear explanation. The FCDO expressed the apparent contradiction in the Commonwealth's position well in its brief in opposition to the Motion to Remand:

> If the Commonwealth were to succeed in removing the FCDO, Mr. Harris would be entitled to new representation pursuant to Pennsylvania Rule of Criminal Procedure 904(H), a fact the Commonwealth does not dispute. That representation would be at the expense of the Commonwealth or Lancaster County or both and would result in protracted delay of the PCRA proceedings while new counsel learns the facts and undertakes an investigation into Mr. Harris's federal claims. The sincerity of the Commonwealth's avowed interest in avoiding delay and ensuring the proper expenditure of federal funds pursuant to the CJA can hardly be credited in these circumstances. If the Commonwealth's "vital interest" is in eliminating a formidable adversary in capital case litigation, that is hardly a legally cognizable justification

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[68](...continued)
wealth's claim, it weakens the Commonwealth's position considerably.

> for the disqualification of counsel or for abstention.[69]

Here, FCDO counsel are Pennsylvania-barred attorneys who are qualified, capable, and competent to appear on behalf of Mr. Harris in state court, which they have done for more than eight-and-a-half years first by Federal Court appointment and then at Mr. Harris's request without opposition from the Commonwealth. There is no asserted threat to the integrity and authority of Pennsylvania courts to regulate the practice of law; rather, the Disqualification Motion is made on the purported authority of federal law. The Court is unable to discern the impetus underlying the filing of the Disqualification Motion in the absence of any discernible *state* interest, and the lack of such interest supports the ultimate dispositions of the matter before the Court.[70]

In its response to the Motion to Dismiss, the Commonwealth asserts that "[i]f this Court concludes

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[69]Doc. No. 27 at 31.

[70]The Court is puzzled by the Commonwealth's purported interest in "remedying" the FCDO failure to comply with its federal funding obligations. The remedy for a violation of AO Guidelines is a disallowance or a reduction of payments under the grant award. Here, however, the Commonwealth seeks disqualification. Thus, the success of the Commonwealth's Motion does not provide the remedy contemplated by the statute. This conflict in remedy undermines the Commonwealth's assertion that it seeks to remedy a violation of the statute and further supports the finding that the Commonwealth does not have the authority to enforce this statute as it does not have the authority to provide the proper remedy.

removal was proper, and was inclined to grant FCDO's motion to dismiss, this Court should first allow the Commonwealth to amend its pleading as obviously the Commonwealth did not anticipate that its state court motion in a criminal case would become a complaint in a civil action in federal court."[71] However, because the Court finds that the Commonwealth lacks standing to assert a claim to enforce § 3599, an amendment would be futile. Consequently, the Court dismisses this action with prejudice to the reassertion of claims under § 3599.[72]

IV. Conclusion

For the foregoing reasons, the Motion to Remand will be denied and the Motion to Dismiss will be granted. The Disqualification Motion will be dismissed with prejudice.

An appropriate Order follows.

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[71]Doc. No. 10 at 24 n.4 (citing Fed. R. Civ. P. 15(a)(2)).

[72]At oral argument the Court inquired as to whether Mr. Harris should be represented in these proceedings. The FCDO responded that "practice within this district, and the absence of any conflict of interest between the FCDO and Harris, suggest that there is no need for Mr. Harris to be separately represented." Doc. No. 32 at 19. Since this action has been dismissed the issue is moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

IN RE: COMMONWEALTH'S MOTION TO APPOINT NEW COUNSEL AGAINST OR DIRECTED TO DEFENDER ASSOCIATION OF PHILADELPHIA	:	**MISCELLANEOUS ACTION**
COMMONWEALTH OF PENNSYLVANIA,	:	**NO. 13-62**
v.	:	
FRANCIS BAUER HARRIS.	:	

ORDER

AND NOW, this 22nd day of August 2013, upon consideration of the Commonwealth of Pennsylvania's Motion to Remand (Doc. No. 6), and the Federal Community Defender Organization's Motion to Dismiss (Doc. No. 5), and the responses and replies in support of and in opposition thereto, after oral argument on the Motions, and for the reasons stated in the Opinion filed this day, it is hereby **ORDERED** as follows:

1. The Motion to Remand is **DENIED**.

2. The Motion to Dismiss is **GRANTED** and this matter is **DISMISSED with prejudice**.

The Clerk of Court shall **CLOSE** this case.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe
CYNTHIA M. RUFE, J.