

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FILED

JUN 09 1988

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DB

RE:)
)
ORDER ADOPTING LOCAL RULE)
191, SPECIAL REQUIRMENTS)
FOR HABEAS CORPUS)
PETITIONS INVOLVING THE)
DEATH PENALTY.)
_____)

GENERAL ORDER NO. 232

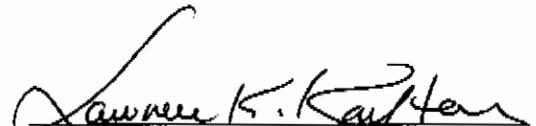
Good Cause Appearing;

IT IS HEREBY ORDERED that Local Rule 191 detailed in
the attachment hereto is adopted by this court.

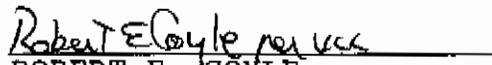
DATED: June 9, 1988



RAUL A. RAMIREZ
U.S. DISTRICT COURT JUDGE



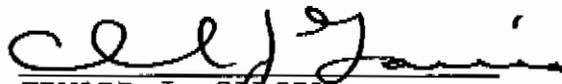
LAWRENCE K. KARLTON, CHIEF
U. S. DISTRICT COURT JUDGE



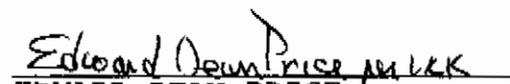
ROBERT E. COYLE
U.S. DISTRICT COURT JUDGE



MILTON L. SCHWARTZ
U.S. DISTRICT COURT JUDGE



EDWARD J. GARCIA
U.S. DISTRICT COURT JUDGE



EDWARD DEAN PRICE
U.S. DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Local Rule 191
SPECIAL REQUIREMENTS FOR HABEAS CORPUS
PETITIONS INVOLVING THE DEATH PENALTY

(a) **Applicability.** This rule shall govern the procedures for a first petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 in which a petitioner seeks relief from a judgment imposing the penalty of death. A subsequent filing may be deemed a first petition under these rules to a particular petition if the original filing was not dismissed on the merits. The application of this rule may be modified by the judge to whom the petition is assigned. These rules shall supplement the Rules Governing § 2254 Cases and do not in any regard alter or supplant those rules.

(b) **Notices from California Attorney General.** The California Attorney General shall send to the Clerk of this Court (1) prompt notice whenever the California Supreme Court affirms a sentence of death; (2) at least once a month, a list of scheduled executions; and, (3) at least once a month, a list of the death penalty appeals pending before the California Supreme Court.

(c) **Notice from Petitioner's Counsel.** Whenever counsel determines that a petition will be filed in this court, he or she shall promptly file with the Clerk of this Court and send to the California Attorney General a written notice of his or her intention to file a petition. The notice shall state the name of the petitioner, the district in which petitioner was convicted, the place of petitioner's incarceration, and the status of petitioner's state court proceedings. The notice is for the information of the court only, and the failure to file the notice shall not preclude the filing of the petition.

(d) **Counsel.** (1) Appointment of Counsel: Each indigent petitioner shall be represented by counsel unless petitioner has clearly elected to proceed pro se and the court is satisfied, after hearing, that petitioner's election is intelligent and voluntary. Unless petitioner is represented by retained counsel, counsel shall be appointed in every such case at the earliest practicable time. A panel of attorneys qualified for appointment in death penalty cases will be certified by a selection board appointed by the Chief Judge of the district. This board will consist of a federal defender, a member of the California Appellate Project (CAP), a member of the state bar, and a representative of the state public defender.

When a death judgment is affirmed by the California Supreme Court and any subsequent proceedings in the state courts have concluded, California Appellate Project will forward to the selection board the name of state appellate counsel and, if counsel is willing to continue representation on federal habeas corpus, California Appellate Project's evaluation of counsel's performance in the state courts and recommendation on whether counsel should be appointed in federal court.

If state appellate counsel is available to continue representation into the federal courts, and he or she is deemed qualified to do so by the selection board, there is a presumption in favor of continued representation except when state appellate counsel was also counsel at trial.

In light of this presumption, it is expected that appointed counsel who is willing to continue representation and who has been certified by the selection board as qualified to do so would ordinarily file a motion for appointment of counsel on behalf of his or her client together with the client's federal habeas corpus petition. If, however, counsel for any reason wishes to confirm his or her appointment before preparing the petition, counsel may move for appointment, as described above, before filing the petition.

If state appellate counsel is not available to represent petitioner on federal habeas corpus or if appointment of state appellate counsel would be inappropriate for any reason, the court shall appoint counsel upon application of petitioner. The Clerk of Court shall have available forms for such application. Counsel shall be appointed from the panel of qualified attorneys certified by the selection board. Either California Appellate Project or the selection board may suggest one or more counsel for appointment. The court may also request suggestion from California Appellate Project or the selection board of one or more counsel. If application for appointed counsel is made before a petition has been filed, the application shall be assigned to a district judge in the same manner that a petition would be assigned, and counsel shall be appointed by the assigned judge. The judge so assigned shall be the judge assigned when counsel files a petition for writ of habeas corpus.

(2) Second Counsel: Appointment and compensation of second counsel shall be governed by § 2.11 of Volume VII of the Guide to Judiciary Policies and Procedures, Appointment of Counsel in Criminal Cases.

(e) Filing. Petitions as to which venue lies in this district shall be filed in accordance with Local Rule 120. Petitions shall be filled in by printing or typewriting.

In the alternative, the petition may be in a legible typewritten or written form which contains all of the information required by that form. All petitions (1) shall state whether petitioner has previously sought relief arising out of the same matter from this court or any other federal court, together with the ruling and reasons given for denial of relief, and (2) shall set forth any scheduled execution date.

An original and three copies of the petition shall be filed by counsel for petitioner. A pro se petitioner need file only the original. No filing fee is required.

The Clerk of the Court will immediately notify the California Attorney General's Office when a petition is filed.

When a petition is filed by a petitioner who was convicted outside of this district, the Clerk of the Court will immediately advise the Clerk of the Court of the district in which petitioner was convicted.

(f) Assignment to Judges. Notwithstanding the general assignment plan of this court, petitions shall be assigned to judges of the court as follows: (1) The Clerk of the Court shall establish a separate category for these petitions, to be designated with the title "Capital Case". (2) All active judges of this court shall participate in the assignments. (3) Petitions in the Capital Case category shall be assigned blindly and randomly by the Clerk of the Court to each of the active judges of the court. (4) If the assigned judge has filed a Certificate of Unavailability with the Clerk of the Court which is in effect on the date of the assignment, a new random assignment will be made to another judge immediately. (5) If a petitioner has previously sought relief in this court with respect to the same conviction, the petition will be assigned to the judge who was assigned to the prior proceeding. (6) Pursuant to 28 U.S.C. § 636 (b)(1)(B), and not inconsistent with law, magistrates may be designated by the court to perform all duties under these rules, including evidentiary hearings.

(g) Transfer of Venue. Subject to the provisions of 28 U.S.C. § 2241(d), it is the policy of this court that a petition should be heard in the district in which petitioner was convicted, rather than in the district of petitioner's present confinement.

If an order for the transfer of venue is made, the judge will order a stay of execution which shall continue until such time as the transferee court acts upon the petition or the order of stay. The issuance of a stay in the transferee court shall be determined under paragraph (h) of this rule.

(h) Stays of Execution. (1) Stay pending Final Disposition. Upon the filing of a habeas corpus petition, unless the petition is patently frivolous, the district court shall issue a stay of execution pending final disposition of the matter. (2) Temporary Stay for Appointment of Counsel. Where counsel in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection panel will designate an attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45) days unless extended by the court. (3) Temporary Stay for Preparation fo the Petition. Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition. The temporary stay may be extended by the court upon a subsequent showing of good cause. (4) Temporary Stay for Transfer of Venue. [See paragraph (g).] (5) Temporary Stay for Unexhausted Claims. If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During the proceedings in state court, the proceedings on the petition will be stayed. After the state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims. (6) Stay Pending Appeal. If the petition is denied and a certificate of probable cause for appeal is issued, the court will grant a stay of execution which will continue in effect until the court of appeals acts upon the appeal or the order of stay. (7) Notice of Stay. Upon the granting of any stay of execution, the Clerk of the Court will immediately notify the warden of San Quentin Prison and the California Attorney General. The California Attorney General shall assure that the Clerk of the Court has a twenty-four (24) hour telephone number to the warden.

(i) Procedures for Considering the Petition. Unless the judge summarily dismisses the petition under Rule 4 of the Rules Governing § 2254 Cases, the following schedule and procedures shall apply subject to modification by the judge.

Requests for enlargement of any time period in this rule shall comply with the applicable local rules of the court.

(1) Respondent shall as soon as practicable, but in any event on or before twenty (20) days from the date of service of the petition, lodge with the court the following: (A) Transcripts of the state trial court proceedings. (B) Appellant's and respondent's briefs on direct appeal to the California Supreme Court, and the opinion or orders of that court. (C) Petitioner's and respondent's briefs in any state court habeas corpus proceedings, and all opinions, orders and transcripts of such proceedings. (D) Copies of all pleadings, opinions and orders in any previous federal habeas corpus proceeding filed by petitioner which arose from the same conviction. (E) An index of all materials described in paragraphs (A) through (D) above. Such materials are to be marked and numbered so that they can be uniformly cited. Respondent shall serve this index upon counsel for petitioner.

If any items identified in paragraphs (A) through (D) above are not available, respondent shall state when, if at all, such missing material can be filed.

(2) If counsel for petitioner claims that respondent has not complied with the requirements of paragraph (1), or if counsel for petitioner does not have copies of all the documents lodged with the court in writing, with a copy to respondent, counsel for petitioner shall immediately notify the court in writing, with a copy to respondent. Copies of any missing documents will be provided to counsel for petitioner by the court. (3) Respondent shall file an answer to the petition with accompanying points and authorities within thirty (30) days from the date of service of the petition. Respondent shall include in the answer the matters defined in Rule 5 of the Rules Governing § 2254 Cases and shall attach any other relevant documents not already filed. (4) Within thirty (30) days after respondent has filed the answer, petitioner may file a traverse. (5) No discovery shall be had without leave of the court. (6) Any request for an evidentiary hearing by either party shall be made within fifteen (15) days from the filing of the traverse, or within fifteen (15) days from the expiration of the time for filing the traverse. The request shall include a specification of which factual issues require a hearing and a summary of what evidence petitioner proposes to offer. Any opposition to the request for an evidentiary hearing shall be made within fifteen (15) days from the filing of the request. The court will then give due consideration to whether an evidentiary hearing will be held.

(j) **Evidentiary Hearing.** If an evidentiary hearing is held, the court will order the preparation of a transcript of the hearing, which is to be immediately provided to petitioner and respondent for use in briefing and argument. Upon the preparation of the transcript, the court may establish a reasonable schedule for further briefing and argument of the issues considered at the hearing.

(k) **Rulings.** The court's rulings may be in the form of a written opinion which will be filed, or in the form of an oral opinion on the record in open court, which shall be promptly transcribed and filed.

The Clerk of the Court will immediately notify the warden of San Quentin Prison and the California Attorney General whenever relief is granted on a petition.

The Clerk of the Court will immediately notify the Clerk of the United States Court of Appeals for the Ninth Circuit by telephone of (i) the issuance of a final order denying or dismissing a petition without a certificate of probable cause for appeal, or (ii) the denial of a stay of execution.

When a notice of appeal is filed, the Clerk of the Court will transmit the available records to the Court of Appeals immediately.