

RULE 191 (Fed. R. Civ. P. 81)

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 relating to a particular petition may be deemed a first petition under these Rules if the original filing was not dismissed on the merits. The application of this Rule may be modified by the Judge or Magistrate Judge to whom the petition is assigned. See Rule 102(d), *supra*.

(b) Notices from California Attorney General. The California Attorney General is requested to notify the Chief Judge and Clerk, within seven (7) days, whenever an execution date is set. The Chief Judge, or a designate, will request a semi-annual report from the Attorney General's Office that includes the following categories: (1) all scheduled executions in California; (2) all capital cases pending on direct appeal before the California Supreme Court; (3) all capital cases pending before the California Supreme Court on habeas corpus; (4) all capital cases affirmed by the California Supreme Court on direct appeal since the last report; (5) all capital cases denied by the California Supreme Court on habeas corpus since the last report; and (6) until December 31, 2010, all capital cases affirmed on direct appeal by the California Supreme Court.

(c) Attorney Representation. Each indigent petitioner shall be represented by an attorney unless petitioner has clearly elected to proceed pro se. In the event a petitioner seeks to proceed pro se, the Court will conduct a hearing to determine whether the petitioner's election is appropriate under applicable legal standards. Unless petitioner is represented by a retained attorney, an attorney shall be appointed in every case as soon as possible. A Selection Board appointed by the Chief Judge will certify attorneys qualified for appointment in death penalty cases. The Selection Board consists of an assistant Federal Defender from the Capital Habeas Unit ("CHU") of the Office of the Federal Defender for the Eastern District of California, a member of the California Appellate Project ("CAP"), a member of the State Bar, a staff attorney from the Habeas Corpus Resource Center ("HCRC"), and a representative of the State Public Defender. If the Selection Board agrees, preference will be given to counsel who represented petitioner on state habeas corpus, except when state habeas counsel also actively represented petitioner on direct appeal. Appointment and compensation of a second attorney shall be governed by Section 2.11 of Volume VII of the Guide to Judiciary Policies and Procedures, Appointment of Counsel in Criminal Cases. Having appointed counsel to represent the petitioner, the Court generally will not consider pro se documents about the presentation of his or her case. However, the Court generally will consider pro se motions concerning petitioner's representation by appointed counsel.

(d) Budgeting and Case Management. The Judicial Council of the Ninth Circuit has mandated up-front budgeting in all pending capital habeas cases in which CJA counsel have been appointed. To assist in the budgeting and case management process, the Judicial Council routinely publishes updates of a CJA Capital Habeas Costs Policy. The Costs Policy is posted on the public internet site for the Eastern District of California, both the Sacramento and Fresno Divisions.

(e) Filing. Petitions shall be filed in accordance with Local Rule 190. All initial filings, whether a petition, request for stay and appointment of counsel, or other document, (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. All filings shall contain the wording in full caps and underscored "DEATH PENALTY CASE" directly under the case number. No filing fee is required.

(f) 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 may order a stay of execution to continue until such time as the transferee court acts upon the petition or the order of stay. All actions shall be commenced in accordance with Local Rule 120.

(g) Stays of Execution

(1) Temporary Stay for Appointment of an Attorney. When the attorney in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, an indigent petitioner acting pro se, or a member of the Selection Board acting on petitioner's behalf, may file an application for appointment of an attorney and for a temporary stay of execution. Upon the filing of this application, the Court may, in its discretion, issue a temporary stay of execution and refer the case to the Selection Board for recommendation of counsel. The temporary stay will remain in effect until ninety (90) days after counsel is appointed.

(2) Stay Pending Final Disposition. Upon the filing of a habeas corpus petition, unless the petition is patently frivolous, the Court may, in its discretion, issue a stay of execution pending final disposition of the matter. When an execution date is set and a non-frivolous petition is pending, the Court will issue a stay of execution.

(3) Stay Pending Appeal. If the petition is denied, the Court will consider an application for a stay of execution to continue in effect until the Court of Appeals has the opportunity to issue a stay.

(h) Procedures for Considering the Petition. Absent summary dismissal of the petition under Rule 4 of the Rules Governing § 2254 cases, the following schedule and procedures shall apply subject to modification by the Court. Requests for enlargement of any time period in this Rule shall comply with the applicable Local Rules of the Court. See L.R. 144.

(1) Respondent shall as soon as possible, but in any event on or before forty-five (45) days from the date of service of the order appointing counsel, lodge with the Clerk 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; and (C) petitioner's and respondent's briefs in any state court habeas corpus proceedings, and all opinions, orders and transcripts of such proceedings. Lodged materials are to be marked and numbered so that they can be uniformly cited. Respondent shall file an index of the lodged materials listed above. If any items identified in paragraphs (A) through (C) 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 paragraph (1), or if counsel for petitioner does not have copies of all the documents identified in the filed index of lodged documents, counsel for petitioner shall file a notice to that effect with the Court. Copies of any missing documents will be provided to counsel for petitioner by the Court.

(3) These state court records will be returned to the respondent when all federal proceedings are complete, or if the respondent and the Court agree, the records will be discarded by the Court.

(4) The petition shall conform to the requirements of Rule 2 of the Rules Governing § 2254 Cases. The answer and any traverse shall conform to the requirements of Rule 5 of the Rules Governing § 2254 Cases.

(5) Formal and third-party discovery requires leave of the Court. See Rule 6 of the Rules Governing § 2254 Cases. Informal discovery between the parties by agreement does not require leave of court.

(6) The Court will order an answer, merits briefing, and briefing of a motion for an evidentiary hearing according to a case management plan developed for each individual case.

(i) Evidentiary Hearing. If an evidentiary hearing is held, the parties may request the preparation of a transcript of the hearing, to be provided to petitioner and respondent for use in briefing and post-hearing argument.

(j) Final Dispositive Orders. Consistent with Rule 11 of the Rules Governing § 2254 Cases, and unless further input is solicited from the parties, the Court

will issue or deny a certificate of appealability (COA) when it enters its final order adverse to the petitioner. See 28 U.S.C. § 2253(c)(2). If the petitioner moves for reconsideration of the denial of a COA, the motion does not extend the time within which to appeal.