

**GUIDE TO  
CASE MANAGEMENT AND BUDGETING  
IN CAPITAL HABEAS CASES  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION**

**CONTENTS**

INTRODUCTION.....	1
COMMENCEMENT OF THE CASE.....	2
BUDGET PROCEDURES. ....	2
APPROVED COMPENSATION. ....	4
APPROVED EXPENSES. ....	5
ANCILLARY SERVICE PROVIDERS. ....	7
VOUCHER PROCEDURES.....	9
CASE MANAGEMENT PHASES. ....	10
Phase I – Appointment, Record Review, and Preliminary Investigation.....	10
Phase II - Preparation of the Petition, Answer, and Traverse.....	12
Phase III: Fact Development Discovery, and Request for Evidentiary Hearing. ....	14
Phase IV: Discovery, Evidentiary Hearing and Final Briefing. ....	16
CLEMENCY PROCEEDINGS.....	19
CONCLUSION. ....	19
APPENDIX A           RATE JUSTIFICATION WORKSHEET	
APPENDIX B           CONFIDENTIAL CASE EVALUATION FORM	

## INTRODUCTION

1. This Guide provides an overview of the case management and budgeting process for capital habeas corpus cases in the Fresno Division of the Eastern District of California. Updates of this Guide are available on the Court’s website at [www.caed.uscourts.gov](http://www.caed.uscourts.gov), under Fresno, Attorney Info, Forms, CJA. The information herein is of primary interest to attorneys appointed to represent capital habeas petitioners, but also is relevant to Deputy Attorneys General assigned to cases pending in the Fresno Division. The judge assigned to an individual case may modify the process described herein.
2. The entire case will be divided into four logical phases for which budgets can be developed:
  - Phase I Appointment, Record Review, and Preliminary Investigation
  - Phase II Comprehensive Petition Preparation, Answer, and Traverse
  - Phase III Fact Development Discovery, and Motion for Evidentiary Hearing
  - Phase IV Pre-Evidentiary Hearing Discovery, Evidentiary Hearing, and Final Briefing
3. The Court currently is transitioning to an electronic voucher system (“eVoucher”). The Court and CJA Administrator currently are developing a process for tracking budgeted amounts against approved budgets. In the interim, the Court will maintain updated records manually.
4. Once the Court appoints a CJA attorney, the appointing order will be transmitted to the Fresno Division CJA Administrator so an account may be created.
5. For assistance with the substantive law governing federal habeas corpus proceedings, appointed attorneys may consult with the California Habeas Corpus Resource Center and the Capital Habeas Unit of the Federal Defender for the Eastern District of California. A substantial amount of consultation, however, will be considered work inherently necessary to practice and remain current in the relevant habeas law, which is not reimbursable. *See* ¶ 18, *infra*.

## COMMENCEMENT OF THE CASE

6. The federal capital habeas corpus process typically is initiated by Petitioner's requests for stay of execution, leave to proceed *in forma pauperis*, and appointment of counsel.
7. Following review of the initial pleadings, the Court will issue an order staying execution if necessary, evaluating Petitioner's request to proceed *in forma pauperis*, and addressing the appointment of counsel. The stay of execution issued pending appointment of counsel is authorized pursuant to Rule 191(g)(1) of the Local Rules for the Eastern District of California and 28 U.S.C. § 2251(a)(3). For a recommendation regarding the appointment of counsel, the Court will refer the case to the Selection Board of the Eastern District of California.
8. While the Court often appoints two attorneys to a case due to the complex nature and restrictive time limits of capital habeas work, *see* 18 U.S.C. § 3599(d), appointment of two attorneys at the maximum hourly rate is not presumed. Justification for the appointment of two lawyers who truly function as co-counsel to one another will be required. The Judicial Council of the Ninth Circuit has set the compensation rates followed by this Court: \$178 for lead counsel with substantial experience and skill in federal capital habeas corpus proceedings; \$163 per hour for lead counsel (or co-lead counsel) with significant, but less than substantial experience; \$142 to \$158 per hour for other lead counsel according to experience and skill; \$116 to \$142 for second counsel according to experience and skill; \$74 to \$95 for associate counsel according to experience and skill. Appointed CJA attorneys are directed to complete the Rate Justification Worksheet (Appendix A) for determination of the appropriate compensation rate.

## BUDGET PROCEDURES

9. Under 18 U.S.C. § 3599(f), *ex parte* consideration of funding applications requires Petitioner to make a showing of the need for confidentiality. The Court finds that budget applications require

disclosure of matters protected by the attorney-client or work-product privileges, and accordingly, the need for confidentiality is inherent in the budgeting process. *See* Fed. R. Civ. P. 26(b)(1) and (3). Budget applications will be filed ex parte and under seal.

10. The proposed budget should reflect the total attorney time required, including time for budget preparation, as well as the time for all ancillary service providers, and any anticipated travel or other expenses. Supporting declarations must be subscribed pursuant to 28 U.S.C. § 1746.
11. In general, the service categories shown in the CJA 31 voucher shall inform the budget. The “Other” category on the voucher shall be reserved for budget preparation. To the extent CJA attorneys need to consult with co-counsel or with the Attorney General, those conferences shall be budgeted and billed to substantive tasks described on the voucher. The category “Consulting with Expert Counsel” shall be limited to consultation with a recognized legal resource, such as the Habeas Corpus Resource Center or the Capital Habeas Unit of the Federal Defender’s Office.
12. Travel and processing time, including processing at the prison for client visits, will be budgeted and compensated at the maximum rate of \$100 per hour. CJA attorney time spent in an airport or other common carrier terminal or as a passenger will be compensated at the professional hourly rate only when the attorney is performing substantive tasks that can be billed to a category listed on the voucher. The Court recognizes that when CJA attorneys are required to travel for a case and accept the lower reimbursement rate they could be working on another case at the maximum rate. In light of the public service nature of CJA appointments together with the fact that public rather than private funds are being utilized, the travel reimbursement set forth in this paragraph will be applied. Travel time shall be claimed as an expense on the voucher and supported by a statement describing the purpose of the travel.

13. Counsel are expected to tier staff responsibilities to lower-rate personnel whenever practical, utilizing paralegals and associates to complete tasks for which attorney expertise is not required.
14. The Court will conduct a Case Management Conference (“CMC”) at the beginning of each phase to explore with counsel for both parties general case planning. A more complete description of the tasks to be completed in each litigation phase are discussed under **CASE MANAGEMENT PHASES**, *infra*. Budget applications should be filed at least one week before the date set for the CMC, unless the Court sets an alternate date.
15. The Court appreciates that some anticipated events may not occur. Accordingly, the Court in some instances may grant conditional approval for certain tasks.
16. Counsel generally will not be allowed to exceed the authorized budget during any phase without first seeking prior approval, or amendment to the budget, and explaining why additional funds are required. Failure to obtain approval to amend the budget could result in the denial of unauthorized or excessive expenditures during voucher review. Counsel should submit any request for amendment far enough in advance to provide the Court an adequate opportunity to consider and rule on the request without impeding the progress of the litigation.
17. The budget for each phase will be closed out when the work for that phase is completed. Hours and expenditures will not be carried over to the next phase. Rather, a new budget for each succeeding phase must be prepared by counsel and approved by the Court. CJA attorneys are responsible for ensuring that ancillary service providers stay within the established budget.

#### **APPROVED COMPENSATION**

18. Work inherently necessary to practice and remain current in the area of federal habeas law, which is not directly attributable to a particular case, including the review and analysis of new cases, is considered general overhead, and is not reimbursable.

19. The Court will not approve compensation for administrative services, such as secretarial services, preparation of payment vouchers, or communications with Court.
20. Unless a contrary need is demonstrated, the Court will compensate only one attorney for physical attendance at CMCs and other court hearings. Upon sufficient justification, the Court may authorize compensation for up to two members of counsel's legal staff at a time for visits to Petitioner and witness interviews.
21. In cases where two counsel are appointed as co-counsel, both will be authorized to review the core materials from the record, and expected to divide review of the non-core materials. Core materials consist of the trial transcript from opening statement to verdict, substantial motions, state appellate briefs and decisions, and state habeas pleadings, exhibits, transcripts, and decisions.
22. The Court will not approve compensation for work performed on appellate proceedings. Counsel are to seek compensation for work performed at the appellate level from the Court of Appeals.

#### **APPROVED EXPENSES**

23. The Court will authorize payment for miscellaneous expenses reasonably incurred and subject to national and district policies. Travel expenses are limited by GSA rates published on the GSA website at [www.gsa.gov](http://www.gsa.gov). Reimbursement requires submission of all bills and receipts.
24. Mileage for case-related travel by privately owned automobile may be claimed at a rate in effect for federal judicial employees on the GSA website. Case-related parking fees and bridge/road tolls also are reimbursable. CJA attorneys should assess whether case-related travel would be more cost effective by privately owned automobile or rented automobile.

25. In general, CJA attorneys are encouraged to obtain the lowest possible fares for public transportation and rates for public accommodations. Reimbursement will be limited to prevailing government rates. Counsel are directed to provide a statement of the applicable government rate when requesting reimbursement for air travel. If a member of Petitioner’s litigation team intends to travel by air and have CJA funds pay the fare directly, a Travel Request and Authorization Form must be authorized by the CJA Administrator and approved by the Court. In this event, CJA attorneys are expected to request authorization for air travel through the CJA Administrator in sufficient time to obtain low cost advance fare for air travel.
26. The Court will approve reimbursement for actual food and lodging expenses for out of town travel on case-related business, subject to the GSA established area per diem rate. To trigger tax-exempt lodging, the Court will provide CJA attorneys with a statement that authorized hotel stays constitute “government business.”
27. Counsel will be reimbursed for the actual cost of case-related long-distance telephone calls. The Court will not authorize payment for any surcharges or for general telephone service. Facsimile transmissions are reimbursable for the actual amount of the telephone charge.
28. Counsel will be reimbursed for the actual out-of-pocket expenses incurred in photocopying, up to a maximum of 10 cents per page. Counsel will be expected to send documents over 100 pages in length to an outside copying service, unless counsel’s in-house photocopying is more economically efficient.
29. The Court will authorize reimbursement for the actual cost of case-related regular U.S. postage. With the advent of electronic submission of documents, use of overnight postal services or non-federal carriers is discouraged. If counsel utilize expedited delivery services, preauthorization must be obtained.

30. The Court will not reimburse counsel for the following expenditures:
- a. General office overhead; including cellular telephone maintenance fees;
  - b. Books or other publications;
  - c. Flat-fee computer research plans;
  - d. General law office supplies and equipment;
  - e. Travel, attendance, registration, or material costs related to educational seminars.

**ANCILLARY SERVICE PROVIDERS**

31. Requests for ancillary service provider assistance should be detailed. Prior to approval, the Court must find the requested ancillary assistance is “reasonably necessary for the representation of the defendant.” 18 U.S.C. § 3599(f). Presumptive hourly rates contained in the Ninth Circuit Capital Habeas Costs Policy will apply to all ancillary service providers as follows:

Paralegal	up to \$45
Investigator	up to \$75 (\$55 for record collection)
Mitigation Specialist (non-testifying)	up to \$100 (\$55 for record collection)
<i>Strickland</i> Expert	\$178
Psychiatrist, Neurologist, and medically licensed experts	\$275
Forensic experts	\$200
Psychologists (with Ph.D.)	\$200

32. Counsel should provide the Court with the curriculum vitae of all proposed ancillary service providers. Hiring service providers who work in the geographic area where the work is to be performed should be considered to determine if the cost savings outweigh the factors favoring a single provider. Any investigators retained to interview witnesses or mitigation specialists

should avoid unnecessary expense by conducting interviews by telephone, if possible, and otherwise taking all reasonable steps to locate the interviewees before initiating travel.

33. Where the assistance of mental health experts is sought, counsel must disclose in the supporting declaration the services performed by, and summarize the findings of, previous mental health experts utilized in any capacity in the case, whether at the state or federal level. If the assistance of more than one mental health professional is proposed, counsel should make clear the tasks each expert is to complete, and how his or her work is distinguishable from that of prior and/or concurrent requested experts.
34. Mitigation specialists are specialized mitigation investigators who have become integral members of capital habeas corpus litigation teams. The mitigation specialist identifies signs of mental or psychological impairments. S/he prepares a comprehensive social history summary based on life history records and interviews with Petitioner and those who played a significant role in or are familiar with Petitioner's life. While a mitigation specialist's qualifications vary, they include the ability to recognize congenital, mental, and neurological conditions and to understand how these conditions affected the petitioner's life. A mitigation specialist is distinguished from a testifying mitigation expert.
35. A testifying mitigation expert is an individual with specialized mental health experience and education who generally is qualified to diagnose mental illness. This expert is qualified to testify on the genetic, biological or environmental factors that have influenced the petitioner's life. While a testifying mitigation expert usually is a psychologist, in some cases a psychiatrist, neurologist, or other mental health professional may be retained. A testifying mitigation expert interprets the social history summary to assist the understanding the mitigation evidence.

## VOUCHER PROCEDURES

36. All vouchers are reviewed for reasonableness. Fees or expenses which exceed the authorized budget or the limits set forth in this Guide are subject to reduction.
37. Counsel are directed to submit vouchers covering services from the commencement to the completion of each budgeted phase, **on a monthly basis**. Generally, vouchers should extend from the first to the last day of each month, except when combined attorney's fees and expenses total less than \$1,000 for any given month. In that event, the fees and expenses for that month may be combined with the fees and expenses incurred the following month. If a budgeted phase commences mid-month, the voucher may extend to the end of the following month. If the budgeted phase is completed mid-month, the voucher will extend to that date. All vouchers are to be submitted within the first ten days of the month following the last day of service reported. All fees and expenses for a particular time period should be submitted on the same voucher (e.g., travel and administrative expenses).
38. The Court expects counsel to submit vouchers within a maximum of 90-days after the services are provided. Without prior Court approval, vouchers will not be processed for services rendered more than one-year prior to the date of submission of the voucher.
39. Billing statements and voucher worksheets for both CJA attorneys and ancillary service providers shall specifically describe the work performed, the time allotted to each specific task, reported to one-tenth (.1) of an hour.
40. While the Court will permit the transfer of non-contingent attorney hours from one task to another, and/or between appointed counsel, budgeted hours between or among experts and investigators generally are not transferrable.

41. In the event transcripts of in-court hearings, including evidentiary hearings, are requested by Petitioner, Petitioner’s counsel should arrange with the court reporter(s) to bill the Court directly through the use of a CJA 24 vouchers. Transcript fees shall not be included CJA 30 vouchers.

### **CASE MANAGEMENT PHASES**

#### Phase I – Appointment, Record Review, and Preliminary Investigation

42. Phase I encompasses case proceedings from the appointment of counsel through organization of available records, including preliminary investigation and, if appropriate, a mental state evaluation concerning Petitioner’s competence to proceed with federal litigation. Because counsel new to the case will need to review a good portion of the record and prior attorney files before establishing a litigation strategy, the Court anticipates that the Phase I budget will be limited. Some, if not many tasks identified to be completed in Phase I may well continue into and be re-requested for Phase II. If Petitioner’s counsel are familiar with the case (as in the event one or more appointed counsel are continuing from state post-conviction proceedings), Phase I could include additional tasks before the case proceeds to Phase II.
43. The Supreme Court’s ruling that the reasonableness of a state court decision “is limited to the record that was before the state court,” in *Cullen v. Pinholster*, 563 U.S. \_\_\_, 131 S. Ct. 1833 (2011), will inform the breadth and depth of pre-petition investigation in Phases I and II of the litigation, as well as the disposition of motions for further evidentiary development in Phase III. Following *Pinholster*, the Court will not authorize pre-petition factual development of exhausted claims. That development will proceed only if the Court grants an evidentiary at the culmination of Phase III. Pre-petition investigation may be authorized, however, where additional factual bases exist which will augment the state claim such that it will rise to the level of a new claim. *See Vasquez v. Hillery*, 474 U.S. 254 (1986). Even where pre-petition fact development is

authorized, the Court will not approve funding for a prima face case before the California Supreme Court to the extent of developing evidentiary proof to support factual allegations. Rather the Court will limit funding to the development of a *colorable claim* under federal habeas corpus principles. In order to determine whether funding should be authorized to develop an unexhausted claim or augment a partially exhausted claim, Petitioner's counsel will be directed to highlight the claims in the state petition from which the proposed claims in the federal petition are derived and explain how further fact development will render that claim *colorable* under federal law. Once that task is undertaken, the evaluation of a pre-petition investigation funding request will be further informed by the following factors:

- a. A description of the evidence sought to be uncovered.
  - b. The efforts previously undertaken to develop the evidence sought and the reason(s) those efforts were unsuccessful.
  - c. Reasonable assurance by counsel that the investigation, expert service, or other ancillary assistance will be efficacious in uncovering the evidence sought.
  - d. Whether the evidence sought existed and was reasonably accessible at the time of trial.
  - e. The connection of the evidence sought to a prospective claim that will be raised in the federal petition.
44. The budget should include all tasks to be completed during Phase I, including the time spent on tasks completed or partially performed prior to submission of the proposed budget. Counsel for both Petitioner and Respondent shall complete the Confidential Case Evaluation Form, (*see* Appendix B), and are directed to file it under seal prior to the initial CMC.
45. The Phase I CMC provides an opportunity to make a preliminary evaluation of case complexity, determine how much time will be needed to assemble the case record, set a date for Respondent

to lodge the state record, *see* Local Rule 191(h)(1), and determine the limitations period under 28 U.S.C. § 2244(d). The Court may require counsel for Respondent to provide any missing portions of the state record to Petitioner's counsel. The Court also may issue a subpoena duces tecum requiring prior counsel to supply case files to Petitioner's counsel. Petitioner's attorneys should notify the Court of any delays in receiving prior counsel's files. The parties also will discuss the scheduling of a Phase II CMC to set the timetable and deadlines for filing the comprehensive petition, answer, and traverse.

46. Once case management issues are resolved, counsel for Respondent will be excused from the CMC so the Court can discuss budgeting procedures with Petitioner's counsel on an *ex parte* basis. The transcript of the budgeting portion of the conference shall be maintained under seal.
47. After the CMC, the Court will issue two case management orders, one filed publicly, addressed to all parties, setting forth significant dates and establishing schedules, and one filed under seal, addressed only to Petitioner's counsel, regarding budgeting issues. The publicly filed order will include the date upon which the statute of limitations expires, a due date for Respondent to lodge the state record with the Court, the date for the culmination of Phase I, and the date of the Phase II CMC, as well as any other matters or decisions made at the conference. The sealed order will memorialize discussions entertained during the confidential portion of the CMC, explain approval of the Phase I budget plan, and set a due date for submitting the proposed Phase II budget.

Phase II - Preparation of the Petition, Answer, and Traverse.

48. In Phase II Petitioner's counsel will complete review of the record, consult with experts and investigators, and draft a comprehensive habeas petition. The petition will include legal points and authorities. A comprehensive, answer, including points and authorities, as well as a traverse

also will be filed during this phase. Counsel for both parties will be present at the Phase II CMC to discuss the litigation timetable and set deadlines for filing the petition, answer, and traverse. If Petitioner plans to file a protective petition pursuant to *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), pursue equitable tolling, or file a state exhaustion petition concurrently with the federal petition, these intentions will be discussed at the Phase II CMC.

49. The Court anticipates the possibility that Petitioner's federal petition may allege unexhausted claims and concurrent with the filing of the federal petition Petitioner will file a successive (or in some cases original) state petition. In that event, and on Petitioner's motion pursuant to *Rhines v. Weber*, 544 U.S. 269, 276 (2005), abeyance of federal proceedings will be considered. If abeyance is ordered, the filing of the answer by Respondent will be deferred until exhaustion proceedings are complete.
50. If Petitioner does not file a state exhaustion petition concurrently with filing the federal petition, Respondent shall file an answer within the time frame established by the Court. The answer shall address the allegations in the petition, consistent with Rule 5 of the Rules Governing § 2254 Cases (hereafter the "§ 2254 Rules"), and shall include legal points and authorities, and in addition allege all substantive and procedural affirmative defenses Respondent intends to pursue. Within a reasonable time after the filing of the answer, Petitioner shall file a traverse responding to the Respondent's allegations and legal authority. The Court thereafter will take up the matters of exhaustion and statute of limitations issues, as briefed by the parties. Phase II will close when the Court resolves the parties' respective contentions regarding exhaustion and statute of limitations compliance. Concurrent with the issuance of that order, the Court will set a date for the Phase III CMC. If the Court determines certain claims in the petition are not exhausted, the necessity of abeyance will be considered. Should the federal petition be found

to be partially unexhausted, abeyance of federal proceedings may be available under *Rhines v. Weber, supra*.

51. If the federal proceedings are held in abeyance, whether ordered when the state petition is filed concurrently with the federal petition, or after exhaustion is litigated, Petitioner's counsel will be directed to file brief quarterly status reports on the progress of the case in state court. Counsel will be paid for the small amount of time this task requires. Unless otherwise directed, the Court expects that no other fees or expenses will be incurred while a case is held in abeyance. Counsel are to seek funds from the state court for fees and expenses incurred during this period.
52. Once an amended petition is found to be appropriately before the Court, or where the federal petition does not require amendment, that petition will be considered the operative petition. Unless an answer previously has been filed to the operative petition, Respondent will file an answer and Petitioner will file a traverse, as described in ¶ 49, *supra*. The Court will then establish due dates for filing the Phase III budget as well as scheduling the Phase III CMC.
53. Once discussion of the case management aspects of the CMC are completed, counsel for Respondent will be excused and discussion about the proposed amended budget will be entertained. As with the orders following the Phase I CMC, two orders will be filed following the Phase II CMC. The publicly filed order will set out the due dates and timetables for the various tasks discussed during the CMC. The sealed order will address budgeting issues.

Phase III: Fact Development Discovery, and Request for Evidentiary Hearing

54. At the Phase III CMC, the Court will address Petitioner's anticipated preparation of a motion or motions for further factual development (that is, discovery, evidentiary hearing and record expansion).

55. In some cases, Petitioners may wish to conduct discovery or request record expansion in advance of presenting a motion for evidentiary hearing. These intentions can be discussed during the CMC. Petitioner's attorneys are encouraged to discuss at the CMC any discovery identified in the course of preparing the petition.
56. A request for an evidentiary hearing shall be limited to identification of: (a) the claims for which a hearing is sought; (b) an offer of proof as to the evidence sought to be presented; (c) identification of the state court version of each federal claim denied by the California Supreme Court and (d) the reason(s) Petitioner did not present the evidence sought to be developed in state proceedings. *See Pinholster*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. at 1398, 1401; 28 U.S.C. § 2254(e)(2). The budget for Petitioner's evidentiary hearing motion should include preparation of a reply brief.
57. Phase III of the litigation is complete when the Court issues an order addressing Petitioner's motion for further evidentiary development. If there are multiple motions for evidentiary development, Phase III will be complete when the last motion is resolved. If a motion for further evidentiary development is granted, the Court will schedule the next CMC and direct Petitioner's counsel to file a budget application for Phase IV.
58. In the event the Court denies Petitioner's motion for further evidentiary development and denies the merits of all record-based claims as well, the Court will issue or deny a certificate of appealability (COA) concurrently with the final order. Rule 11 of the § 2254 Rules; 28 U.S.C. § 2253(c)(2). Entry of judgment will follow. If Petitioner moves for reconsideration of the denial of a COA, the motion will not extend the time to appeal. In cases where resolution of the action is adverse to Petitioner at the culmination of Phase III, the Phase IV budget application will be very minimal, encompassing only a notice of appeal and limited post-judgment litigation.

Phase IV: Discovery, Evidentiary Hearing and Final Briefing

59. If further evidentiary development is authorized, Phase IV may be bifurcated and multiple CMCs may be held to determine the time and resources needed to prepare for and conduct pre-hearing discovery, the evidentiary hearing, and post-development briefing
60. Pre-hearing discovery may include deposing the opponent's experts, obtaining documents upon which expert testimony is predicated, and identifying witnesses who will testify. The matter of how testimony will be presented and how evidence will be received can be discussed at the CMC. The Court may allow some direct testimony by declaration or depositions in lieu of live testimony (subject to live cross examination), although live testimony of key witnesses is preferred. To assist in preparing the budget application for Phase IV, a date will be set for the parties to disclose the identities of witnesses expected to be deposed and/or to provide live testimony, in order to enable Petitioner's counsel to estimate the number of witnesses to be deposed on behalf of Petitioner and the number of Respondent's depositions at which attendance will be required.
61. Certain expenses incurred in connection with depositions of fact witnesses are paid by the U.S. Marshal for the Eastern District of California, and as such are not part of the budget. First, the Marshal pays expenses associated with fact witnesses deposed by Petitioner (whether or not by subpoena), including witness fees and travel expenses, the court reporter's fees, and cost of the original transcript. Second, for depositions of fact witnesses conducted by Respondent, the Marshal pays costs associated with Petitioner's copy of the deposition transcript. *See* 28 U.S.C. § 1825(b); Guide to Judiciary Policy, Volume 7, § 3.20.40.20. Under Rule 6(c) of the § 2254 Rules, for fact witness depositions noticed by Respondent, the Court may additionally require

the State of California to pay travel expenses, subsistence expenses, and fees of Petitioner's attorney (which the Court will limit to one of Petitioner's attorneys) to attend the deposition. *See also* Guide to Judiciary Policy, Volume 7, § 3.20.40.30. Witness fees, travel expenses, reporter's fees, and cost of original transcripts for fact witness depositions noticed by Respondent must be paid by the State of California. The State of California also pays for Respondent's transcript copy of a fact witness deposition noticed by Petitioner.

62. Depositions of expert witnesses generally are the responsibility of the party noticing the deposition. Under F.R.C.P. 26(b)(4)(E), the party seeking discovery concerning the opponent's expert witness shall pay that expert's reasonable fee in responding to the discovery. Court reporter fees and expenses together with fees and expenses of Respondent's experts deposed by Petitioner are paid out of CJA funds, and must be included in the budget. By the same token, court reporter fees and expenses together with fees and expenses of Petitioner's experts deposed by Respondent must be paid by the State of California. In addition, under Rule 6(c) of the § 2254 Rules, for expert witness depositions noticed by Respondent, the Court may require the State of California to pay the travel expenses, subsistence expenses, and fees of Petitioner's attorney (which the Court will limit to one of Petitioner's attorneys) to attend the deposition. Petitioner's copy of the deposition transcript is paid out of CJA funds, and should be included in the budget. *See also*, Guide to Judiciary Policy, Volume 7, § 3.20.40.30.
63. A number of expenses associated with oral testimony at evidentiary hearings also are not part of the budget. The U.S. Marshal pays for fees and travel expenses of fact witnesses called by subpoena to testify at the evidentiary hearing. *See* 28 U.S.C. § 1825(b). The State of California must pay the court reporter for Respondent's copy of the transcript. The budget should include

fees and travel expenses for any expert witness Petitioner intends to call to testify at an evidentiary hearing. (Fees for the actual transcript are paid in the same manner as all in-court hearings, with the court reporter submitting transcript expenses on a CJA 24 voucher. *See* ¶ 40, *supra*.) Reimbursement of costs for depositions in lieu of live testimony at an evidentiary hearing *may be* made according to the same policies as at an evidentiary hearing.

64. In light of the aforementioned provisions, the Court will consider apportionment of discovery costs between Petitioner and Respondent in the budget. The Court also will determine whether any experts who testified at the state court trial should be considered fact witnesses and, if so, order that travel and other expenses be paid by the U.S. Marshal pursuant to 28 U.S.C. § 1825(b), and not included in Petitioner's budget. Because the budget order is a confidential document, the Court will issue a companion order served on both parties indicating any resolutions as to the apportionment of costs.
65. After further evidentiary development has been completed, the Court will determine the amount of time and resources needed for post-development briefing, and set deadlines accordingly. A separate CMC may be required to accomplish this. After review of the pleadings, briefing, the state record, all properly admitted evidence, and the argument of the parties, the Court will issue a memorandum order and decision on the merits of the petition. Entry of judgment will follow.
66. In the event the Court enters its final order adverse to Petitioner, it will issue or deny a COA. Rule 11 of the Rules Governing § 2254 Cases; 28 U.S.C. § 2253(c)(2). If Petitioner moves for reconsideration of the denial of a COA, the motion will not extend the time to appeal.

## **CLEMENCY PROCEEDINGS**

67. In the event all habeas relief is denied before the District Court and Petitioner's appeals to the Ninth Circuit and the United States Supreme Court are unsuccessful, clemency proceedings are anticipated. While a new appointment for clemency representation is not necessary for continuing counsel, a new appointment will be considered if continuing representation is unavailable. Guide to Judiciary Policy, Volume 7, § 680.10.
68. Once all appeals are exhausted, Petitioner's counsel shall notify the Court so that a CMC may be scheduled for budgeting purposes. *See id.*, § 680.30. Respondent will not participate in the clemency budgeting process. Due to time constraints inherent in the clemency process, the Court anticipates that the clemency budget will be presented as an overview, with more attention to the time-frame than to the specific tasks. Petitioner is directed to submit the clemency budget in declaration format over the signature of the CJA attorney. In all cases, the Court anticipates that clemency counsel will first seek funds from the California Supreme Court. All budgeting and vouchering procedures set forth in this Guide shall apply to the clemency budget.

## **CONCLUSION**

69. This Guide should serve to assist Petitioner's and Respondent's counsel in managing capital habeas cases while allowing control of associated case costs. Within the basic framework of the budgeting process, creative and individual approaches to case management are encouraged. Ideas for effective case management are welcomed and should be communicated to the Court.

**Appendix A**

**RATE JUSTIFICATION WORKSHEET**

**A. Attorney Name and Address:** \_\_\_\_\_

---

**B. Experience and Qualifications:**

Admitted to practice: \_\_\_\_\_ years.

Member of the bar of a federal district court or court of appeals: \_\_\_\_\_ years.

Primary area of practice: \_\_\_\_\_

Has previously represented a client in (check all that apply):

- Direct appeal of a death sentence
- State capital post-conviction proceeding
- Direct appeal of a non-capital homicide conviction
- Capital trial
- Non-capital homicide trial
- Other felony trial
- Non-capital federal habeas corpus
- Federal capital habeas proceeding

Number of clients previously represented in federal habeas actions: \_\_\_\_\_

Most recently authorized hourly rate in such a case: \_\_\_\_\_

Approximate hours spent in training programs on death penalty litigation and/or post-conviction representation: \_\_\_\_\_

**C. Other Relevant Information:**

**Appendix B**

**CONFIDENTIAL CASE EVALUATION FORM**

*The answers on this form are for case management and budgeting purposes only and will not be binding in any respect on substantive issues to be raised in the course of litigation.*

**NAME OF ATTORNEY(S):**

**Lead Counsel:**

**Co-Counsel:**

**STATE LEVEL PROCEEDINGS**

1. Did either lawyer participate in any part of Petitioner's state proceedings?

No -- proceed to question 2.  Yes (indicate which lawyer) \_\_\_\_\_

If yes, in what aspects of the case?

2. Was a state habeas petition involving the same conviction and sentence filed?

No  Yes

If yes: Date filed: \_\_\_\_\_

Disposition &  
Date: \_\_\_\_\_

3. Was investigation performed at the state level?

Yes  No

If yes, what was the purpose?

4. Were funds requested at the state level for post-conviction investigation?

No - Reason:

Yes

	<u>Amount</u>	<u>Amount</u>
<u>Purpose</u>	<u>Requested</u>	<u>Authorized</u>

5. Was discovery requested at the state level?

No - Reason:

Yes

	Was it:
<u>Nature of Discovery Requested</u>	<u>Granted?</u> <u>Denied?</u>

6. Was an evidentiary hearing held at the state level?

Yes       No

**STATUTE OF LIMITATIONS**

Based on current information, what is the date required by the statute of limitations for filing of the petition? \_\_\_\_\_

**THE RECORD**

1. Has the record been assembled?

- Yes       No: Missing portion(s) and location? \_\_\_\_\_

2. Have the complete files of prior counsel been obtained?

- Yes       No: Missing portion(s) and location? \_\_\_\_\_

3. As accurately as possible (recognizing that it may be an estimate at this point), provide information about the size of the record:

<u>Type of Record</u>	<u>No. of Pages</u>
Trial transcript & Exhibits	_____
State appellate record	_____
State habeas record & Exhibits (including transcript from any state evidentiary hearing)	_____
Ancillary files and records (including prior counsel's files, investigative reports, etc.)	_____
Total Pages	<b>_____</b>

**FACTORS AFFECTING CASE COMPLEXITY**

Check all the factors applicable to this case and provide information that will allow determination of whether the case may be especially complex or costly:

Age of Petitioner at time of offense: \_\_\_\_\_

Co-defendants (specify if tried jointly or separately).

Number: \_\_\_\_\_

Number of victims: \_\_\_\_\_

Related cases.

Summarize:

Prior convictions.

Number and type:

Elapsed time since offense: \_\_\_\_\_

Elapsed time since trial: \_\_\_\_\_

Informant involved

Number, type and availability of informant(s):

Serial homicides

Number of different events at separate locations:

Number of death eligibility circumstances alleged: \_\_\_\_\_  
List:

Other crimes charged  
List:

Unadjudicated criminal conduct  
Type:

Unadjudicated bad acts  
Type and Petitioner's age at commission:

Petitioner spent an extended time out of the state or country  
Location:

Petitioner's family presently out of the state or country  
Location:

Witnesses or other investigation that will require travel  
Provide specifics, including number of witnesses, locations, and number of trips anticipated:

Petitioner's and/or family's background records were not obtained in state proceedings.

- There are issues as to competency/mental illness/or other disabilities.  
Explain impact on legal issues:

Explain impact on client relations:

- Use of drugs or alcohol at time of offense.
- Petitioner suffered physical/mental abuse as a child.
- Translator required for Petitioner.
- Translator required for witnesses.  
Number of witness and types:

- Scientific procedures will be required.  
Type:

- No investigation was performed or was denied at the state level.
- No evidentiary hearing was conducted at the state level.
- Other issues - Describe: