

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

**Contents**

INTRODUCTION .....	2
COMMENCEMENT OF THE CASE .....	2
BUDGET PROCEDURES .....	3
APPROVED COMPENSATION .....	6
APPROVED EXPENSES.....	7
ANCILLARY SERVICE PROVIDERS .....	9
VOUCHER PROCEDURES .....	10
CASE MANAGEMENT PHASES.....	12
Phase I – Appointment, Record Review, and Preliminary Investigation .....	12
Phase II – Petition, Answer, Statute of Limitations and Exhaustion .....	16
Phase III: Substantive Briefing and Requests for Further Factual Development .....	19
Phase IV Pre-hearing Preparation, Evidentiary Hearing Final Briefing, and Post-Judgment	21
CLEMENCY PROCEEDINGS .....	24
CONCLUSION.....	24

## **INTRODUCTION**

1. This Guide provides an over of the case management and budgeting process for capital habeas corpus cases in the Fresno Division of the Eastern District of California. Updates to this Guide are available on the Court's website at [www.caed.uscourts.gov](http://www.caed.uscourts.gov), under Forms, CJA Capital Habeas Forms, Fresno. 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, especially with respect to the apportionment of deposition and hearing expenses.
2. Each case will be divided into four phases:

Phase I	Appointment of Counsel, Record Review, Preliminary Investigation
Phase II	Petition and Answer Preparation, together with Statute of Limitations and Exhaustion Resolution
Phase III	Merits and Fact Development Briefing, Opposition, and Reply
Phase IV	Pre-Evidentiary Hearing Preparation, Hearing, Final Briefing, if applicable; and Post-Judgment Proceedings

3. The Court currently uses the eVoucher system to handle interim payments. The Court has developed a process for tracking budgeted amounts against approved budgets. This information is available to attorneys representing capital petitioners.
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 substantive law governing federal habeas corpus proceedings, appointed attorneys may consult with the Capital Habeas Unit of the Federal Defender for the Eastern District of California (ED Cal CHU), the California Habeas Corpus Resource Center (HCRC), the California Appellate Project (CAP), and Habeas Assistance and Training a part of the Capital Defense Network (HAT). 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 request for a 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 this district 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 in most cases appoints two attorneys to capital cases, due to the complex natures 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. Effective for services rendered on and after March 1, 2014, the compensation rates followed by the Court are: \$180 for lead counsel with substantial experience and skill in federal capital habeas corpus proceedings; \$160 per hour for lead counsel (or co-lead counsel) with significant, but less than substantial experience; \$135 to \$155 per hour for other lead counsel according to experience and skill; \$100 to \$135 for second counsel according to experience and skill; \$75 to \$100 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), governing *ex parte* consideration of funding applications, Petitioner is required 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 under seal
10. Pre-approval for ancillary service providers required by 18 U.S.C. § 3599(f), is accomplished by the submission of a proposed budget. Petitioner shall demonstrate to the Court that the ancillary services “are reasonably necessary” in the budget request. In addition, the proposed

budget should reflect the total attorney time required, including time for budget preparation, plus any anticipated travel or other expenses. A reasonably (but not overly) detailed explanation shall be provided in a supporting declarations subscribed pursuant to 28 U.S.C. § 1746.

11. In general, the service categories shown in the CJA 30 voucher shall inform the budget. The “Other” category on the voucher shall be reserved for budget preparation, *only*. 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 recognized legal resources, such as the ED Cal CHU, HCRC, CAP, and HAT.
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 under the travel time heading on the voucher. (The hourly rate will be converted by either the CJA administrator or the Court.)

13. Counsel are expected to tier staff responsibilities to lower-rate personnel whenever practical, utilizing paralegal professionals and associates to complete tasks for which lead 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 is 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 staff.
20. Unless a contrary need is demonstrated, the Court will compensate only one attorney for physical attendance at CMCs, other court hearings, prison visits to Petitioner, and witness interviews. Upon sufficient justification, the Court may authorize compensation for up to two members of counsel's legal staff at a time for prison visits, and witness interviews.
21. In cases where two attorneys 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) under “Travel and Relocation Policy,” “Per Diem Rates.” 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 under “Travel and Relocation Policy,” “Mileage Reimbursement.” 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. This usually entails purchasing public transportation tickets themselves (in time to receive reduced rates) and seeking reimbursement under the CJA. Reimbursement will be limited to prevailing government rates. 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. Overly expensive, last minute travel plans are subject to denial.



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 constitutes “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. Computer software capable of utilization on multiple of counsel’s cases;
  - e. General law office supplies and equipment; and
  - f. Travel, attendance, registration, or material costs related to educational seminars.

## ANCILLARY SERVICE PROVIDERS

31. Presumptive hourly rates will apply to all ancillary service providers pursuant to 18 U.S.C. § 3599(f) 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	\$180
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 particular 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 mitigation specialists' qualifications vary, they include the ability to recognize congenital, mental, and neurological conditions and to understand how these conditions affected 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 a 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 \$2,000 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 ancillary 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 without formal application and justification.
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 record. 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 may 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. 1388 (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 hearing at the culmination of Phase III. Conversely, pre-petition investigation may be authorized to develop the factual basis for unexhausted claims, or, 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, however, the Court will not approve funding for a prima face case before the California Supreme Court to the extent of developing evidence to prove factual allegations. Rather the Court will limit funding to the development of a *colorable claim* under federal habeas corpus principles, that is, allegations of fact. 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 unexhausted as well as *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 facts sought to be uncovered;
- b. The efforts previously undertaken to develop the facts 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 facts sought existed and was reasonably accessible at the time of the state trial; and
- e. The connection of the facts sought to a prospective claim that will be raised in the federal petition.

Counsel are cautioned that multi-generational social histories rarely assist the Court in assessing the merits of Petitioner's claims. The Court is aware of ABA Guidelines and Commentary that encourage counsel to undertake a plenary investigation, including multi-generational social histories and developing evidence of Petitioner's life from conception to sentencing. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), Guideline 10.7, and commentary, Guideline 10.11 sub¶ F and commentary. In contrast, the Court is governed by 18 U.S.C. § 3599(a)(2), which provides that a condemned inmate proceeding under 28 U.S.C. § 2254 is entitled to “adequate representation or investigative, expert or other reasonably necessary services.” (Emphasis supplied.) In balancing these precepts, the Court will authorize fact development of the circumstances of Petitioner's upbringing, but not the causes for his/her caregivers' abusive or neglectful treatment. Petitioner will have to make a strong showing of the need to investigate social histories of his/her parents, aunts, uncles, cousins, step-parents, and grandparents in advance of undertaking the investigation.

44. The budget should include all tasks to be completed during Phase I, including the time spent on tasks completed or partially completed prior to submission of the proposed budget (but following appointment of counsel to the case). Counsel for both Petitioner and the Warden shall complete the Confidential Case Evaluation Form, (*see* Appendix B), and are authorized to file this document under seal prior to the initial CMC.
45. The Phase I CMC provides an opportunity for the Court to make a preliminary evaluation of case complexity, determine how much time will be needed to assemble the case record, set a date for the Warden 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 the Warden 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 federal petition and answer, as well as proceedings to resolve issues pertaining to the statute of limitations and exhaustion.

46. Once case management issues are resolved, counsel for the Warden 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 the Warden 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 – Petition, Answer, Statute of Limitations and Exhaustion

48. In Phase II, Petitioner's counsel will complete review of the record, consult with experts and investigators, and draft the federal petition. The petition will be presented in pleading format with factual allegations and identification of applicable law, but without argument, excessive citation to authority, or accompanying points and authorities. Unless otherwise ordered by the Court the filing of the federal petition will be followed by the filing of an answer. Proceedings related to satisfaction of the statute of limitations and exhaustion also will be addressed during this phase.
49. Counsel for both parties will be present at the Phase II CMC to discuss the litigation timetable and set deadlines for filing the petition and answer. 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, and seek abeyance of federal proceedings under *Rhines v. Weber*, 544 U.S. 269 (2005), those matters should be disclosed and discussed at the Phase II CMC.
50. Once the federal petition is filed there are three directions the proceedings can take. If both parties agree the petition is fully exhausted and the statute of limitations has been met, the Court will direct the Warden to file an answer, which shall address the allegations in the petition, consistent with Rule 5 of the Rules Governing § 2254 Cases (hereafter the "§ 2254 Rules"). The answer, like the petition, will be filed in pleading format and will admit and deny allegations in the petition. In addition, the answer shall allege all substantive and procedural affirmative defenses, without argument and without points and authorities.

51. Second, if the Warden raises the issue of the statute of limitations, the Court will direct the parties to brief the matter. Resolution of statute of limitations compliance shall precede the filing of the answer.
52. Third, and most commonly, the federal petition will include unexhausted and partially unexhausted claims. This occurs either when no state petition was presented to the California Supreme Court in advance of federal proceedings, or when pre-petition investigation has resulted in the development of new claims beyond those presented in a previously filed state habeas petition. In the former situation, the Petitioner likely will file a state exhaustion petition concurrently with the federal petition. In the latter case, the Petitioner will have to file an exhaustion petition in state court that complies with the new state requirements following the decision in *In re Reno*, 55 Cal.4th 428 (2012).
53. In either event, when exhaustion is raised, the Court will direct the parties to file a joint statement as to which claims are unexhausted (or partially unexhausted). Since all exhausted and partially unexhausted claims are anticipated to be included in the state exhaustion petition, the Court will not litigate any dispute between the parties as to which claims in the federal petition were previously exhausted. As far as the Court is concerned, once the claims are presented to the California Supreme Court, they are exhausted.
54. Once exhaustion (or non-exhaustion) is settled, the next matter to be considered is abeyance under *Rhines v. Weber*, *supra*. In the usual case, the Court will direct the Warden to show cause as to why abeyance should not be ordered.
55. Once federal proceedings are held in abeyance (if they are held in abeyance), Petitioner's counsel will be directed to file brief status reports on the progress of state exhaustion

proceedings. This includes progress reports regarding the preparation of any post-*Reno* exhaustion petition. Funding for preparation of this exhaustion petition will be available pursuant to *Harbison v. Bell*, 566 U.S. 180, 190, n. 7 (2009). That funding, however, will be limited and vouchers closely scrutinized. Funding also will be available of the small amount of time required for filing status reports and continued communication with Petitioner. In-person visits, for purposes of maintaining a good attorney-client relationship and keeping Petitioner informed, will be limited to no more than one visit every two months. Unless otherwise directed, the Court expects that no other fees or expenses will be incurred while a case is held in abeyance. Once the exhaustion petition is filed, counsel are to seek funds from the state court for fees and expenses incurred during this period. However, consistent with the policy adopted by the Judicial Conference Committee on Defender Services and *Harbison v. Bell*, *supra*, the Court will consider, on a case-by-case basis, whether CJA funding should be made available to counsel prosecuting Petitioner's state exhaustion petition.

56. When exhaustion proceedings are complete (and if the state court denies relief) federal proceedings will resume with the pre-exhaustion federal petition will be the operative petition. The first order of business upon the re-opening of federal proceedings will be for the Warden to file an answer, as described in ¶ 50, *supra*. Phase II will close when exhaustion and statute of limitations compliance is complete and the case is at issue. When that determination is made, the Court will establish due dates for filing the Phase III budget as well as scheduling the Phase III CMC.

57. At the Phase II CMC, once the discussion of the case management issues is complete, counsel for the Warden will be excused and discussion about the proposed Phase II 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: Substantive Briefing and Requests for Further Factual Development

58. At the Phase III CMC, the Court will address Petitioner's anticipated preparation of substantive briefing combined with a request for further factual development (that is, discovery, evidentiary hearing, and record expansion). In some limited cases the Court may consider bifurcation and address pre-trial or guilt phase issues first, if that procedure is warranted.
59. Petitioner may wish to conduct discovery or request record expansion in advance of presenting a substantive brief. These intentions should be raised at the CMC. The parties are encouraged to cooperate in the exchange of non-confidential documents that may be in the possession of the other party. Since a significant number of discovery issues can be resolved informally by the parties, discovery identified in Petitioner's budget application ultimately may require less time to complete than originally contemplated. As mentioned above, the Court's approval of a contingent budget item may go unutilized if the contingency fails to materialize. *See* ¶ 15, *supra*.

60. A request for further evidentiary development included in the substantive memorandum of points and authorities shall:
- a. Identify the claim or sub-claim for which further evidentiary development is sought;
  - b. Make an offer of proof as to the evidence sought to be developed;
  - c. Identify the state court version of each federal claim denied by the California Supreme Court;
  - d. Provide 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 1389, 1401, 28 U.S.C. § 2254(e)(2).
61. Except in cases where the issues are bifurcated, Phase III of the litigation is complete when the Court denies the merits of all claims *or* grants an evidentiary hearing. In either event the Court will schedule the CMC and direct Petitioner's counsel to file a budget application for Phase IV. In cases where the entire petition is denied on the merits, the Phase IV budget application will be very minimal, encompassing only a notice of appeal and limited post-judgment litigation. *See* ¶70, *infra*.
62. If bifurcated claims are denied on the merits, the case remains in Phase III for substantive briefing and request(s) for further evidentiary development of the remaining claims in the petition.

Phase IV Pre-hearing Preparation, Evidentiary Hearing Final Briefing, and Post-Judgment

63. If an evidentiary hearing is authorized, Phase IV likely will be bifurcated between preparing for and conducting the evidentiary hearing in Phase IV-A, and preparing final briefing and any post-judgment briefs in Phase IV-B.
64. Pre-hearing preparation will be scheduled in a manner consistent with Federal Rule of Civil Procedure 26, including disclosure of witnesses, the exchange of reports, discovery (limited by Rule 6 of the § 2254 Rules), and in limine motions. The matter of how testimony will be presented and how evidence will be received can be discussed at the CMC. While live testimony of key witnesses is preferred, as ultimately less time consuming, for good cause shown, the Court may allow some direct testimony by declaration (subject to cross examination) or depositions in lieu of live testimony. 28 U.S.C. § 2246.
65. With respect to pre-hearing discovery, 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, court reporter's fees, and cost of the original transcript. Second, for depositions of fact witnesses conducted by the Warden, 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, § 320.40.20. Under Rule 6(c) of the § 2254 Rules, for fact witness depositions noticed by the Warden, 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, § 320.40.30. Witness fees, travel expenses, reporter's fees, and cost of original transcripts for fact witness depositions noticed by the Warden must be paid by the State of California. The State of California also pays for the Warden's transcript copy of a fact witness deposition noticed by Petitioner.

66. Depositions of expert witnesses generally are the responsibility of the party noticing the deposition. Under Federal Rule of Civil Procedure 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 the Warden'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 the Warden must be paid by the State of California. In addition, under Rule 6(c) of the § 2254 Rules, for expert witness depositions noticed by the Warden, 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, § 320.40.30.
67. 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 the Warden'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* ¶ 41, *supra*.)

68. In light of the aforementioned provisions, the Court will consider apportionment of discovery costs between Petitioner and the Warden 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
69. After further evidentiary development has been completed, the Court will determine the amount of time and resources needed for post-hearing briefing, and set deadlines accordingly. As noted above, a separate CMC likely will be scheduled 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. The exception to this procedure is if the Court's ruling is adverse to Petitioner and the petition was bifurcated. In that event, case management at the beginning of Phase III or Phase IV will be ordered for remaining claims.
70. Absent that exception, 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**

71. 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.
72. 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. The Warden 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**

This Guide should serve to assist Petitioner's and the Warden'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 applies):

☐ 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

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

5. Was discovery requested at the state level?

☐ No - Reason:

☐ Yes

Was it:

Nature of Discovery Requested

Granted?

Denied?

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 \_\_\_\_\_

**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: