

A Plan for Budgeting and Case Management in Capital Habeas Cases in the District of Montana [as of April 11, 2001]

I. Introduction and Overview

This Plan describes a case management and budgeting process for capital habeas cases in the District of Montana; the process joins case management and budgeting in an attempt to promote effective judicial oversight and conserve costs in capital habeas cases. This Plan applies only to first—not second or subsequent—habeas petitions. Additionally, the Plan includes the District’s Cost Policies and Budget Policies for Capital Habeas cases.

This Plan divides a capital habeas case into five logical phases, and requires CJA counsel to submit budgets for each phase. Cases with exclusive Federal Defender representation are subject to all case management provisions of this Plan. The Plan promotes firm deadlines for the completion of activities within each phase. The Court expects all counsel to adhere to the deadlines established in both scheduling and conference orders; time extensions will be granted only for good cause.

CJA Counsel are required to prepare and submit to the assigned District Judge a Case Management and Budget Plan for each phase of the case *in advance* of commencing work on that phase. An Excel budget automation program will be used in budget preparation. The Excel templates are expected to be available from the District of Montana internet web page. Sample budgeting forms are also included at the end of this Plan. The forms incorporate a level of detail intended to assist counsel both in budgeting and accounting for actual costs incurred, and to assist the Court in evaluating the reasonableness of the budget and counsel’s vouchers. The Montana Plan is designed for flexible application; forms and orders will be revised as needed.

In addition to the Excel forms, CJA counsel shall file a supplemental declaration to provide justification for Petitioner’s budget. The declaration should (1) address the reasonable necessity standard set forth in 21 U.S.C. § 848(q)(9) for expert and investigative fees, and (2) provide a basis for attorney and paralegal time, and expenses.

Pursuant to the Judicial Council of the Ninth Circuit CJA Capital Habeas Costs Policy, adopted by the Judicial Council in February 1998, all phased budgets require Ninth Circuit Judicial Council review. This review process may take up to three months because the Judicial Council meets quarterly. However, CJA counsel is authorized to commence work once the district court authorizes the budget.

Although 21 U.S.C. § 848(q)(9) requires Petitioner to assert a showing of confidentiality with respect to a budget request for expert and investigative fees, it does not place the burden on Petitioner to assert a showing of confidentiality as to attorney fees and expenses. The Court recognizes that the Judicial Conference of the United States and the Judicial Council of the Ninth Circuit mandate budgeting in capital habeas cases. The Court regards the budget as a confidential pleading because it involves matters of case strategy and development. The Court believes that knowledge of these matters is essential to the Court’s determination of an

appropriate budget but disclosure to the Attorney General would be improper. See Fed. Rules Civ. Pro. 26(b)(3).

[Judges are urged to consult with the assigned Death Penalty Law Clerk or the Circuit's CJA Project Director for assistance in matters pertaining to management of capital habeas cases.]

II. District of Montana Cost Policies

- When two counsel are appointed, counsel shall develop a division of labor to ensure that each counsel will perform tasks in a relatively independent manner, minimizing duplication and excessive staff conferencing.
- The Court presumes that only one attorney will be paid for attending a court hearing. Compensation will not be approved for attendance at court hearings by additional counsel or support staff, including law clerks, paralegals and investigators, without the Court's express permission.
- Unless the Court expressly grants permission, no more than one person (attorneys or investigators or paralegals) will be compensated for time participating in interviews and meetings with experts, service providers or witnesses.
- In cases where one attorney has been appointed from a district outside of Montana, local counsel should conduct most of the client visits.
- Counsel is expected to use paralegals and other cost effective means to minimize costs where attorney expertise is not required.
- Counsel is not permitted to earn a profit from use of support staff.
- Reimbursement for independent contractors may not exceed the amount actually paid. Payment rates for support services performed by both counsel's employees and independent contractors must be consistent with the presumptive rates set forth in this policy, unless otherwise authorized by the Court. This policy also applies to *Strickland* experts.
- The presumptive rate for lead counsel is \$__ /hour.
- The presumptive rate for associate counsel is \$__ /hour.
- The presumptive rate for paralegal support is \$__ /hour.
- The presumptive rate for investigative support is \$__ /hour.
- Use of associates, paralegals, law clerks, and law students must be pre-approved in conjunction with case budgeting.
- The use of couriers, messengers and other premium delivery services (e.g., Express Mail, Federal Express, Airborne Express, etc.) is discouraged unless a genuine need for the service exists. Counsel must submit receipts of such costs.
- Computerized research fees are considered office overhead, as are other fees for library items. All CJA counsel are expected to subscribe to a flat-fee research plan; the Court will provide reimbursement for computerized research above the flat rate plan only when an explanation is provided.

- If discovery is granted in a case, the Court will adhere to Fed. R. Civ. P. 26(a)(2)'s disclosure of expert testimony requirement and allocation of deposition costs contained in Fed. R. Civ. P. 2(b)(4) and Fed. R. Habeas Corpus 6(c).

III. District of Montana Budget Policies

- Counsel will be paid for preparation of the budget and all related forms because it is a component of case management. However, counsel will not be paid for voucher preparation.
- Sixty (60) pages per hour for record review should be used by counsel in developing the budget.
- Within a particular phase, attorney hours may be transferred from one task to another, provided both tasks are ultimately performed; similarly, paralegal hours may also be transferred among tasks. However, unused funds designated for one expert *cannot* be allocated toward another expert.
- A budget may be amended on a case-by-case basis for good cause. CJA counsel has the responsibility of staying within budget. Counsel must submit a written amendment when the amendment exceeds ten percent (10%) of the original phase budget.
- Although incorporated into the budgeting process, requests for expert and investigative assistance must comply with the reasonable necessity standard set forth in 21 U.S.C. § 848(q)(9).
- Vouchers are submitted every 60 days and will be reviewed under standards of reasonableness set forth in the *Guide to Judiciary Policies and Procedures* for administration of the Criminal Justice Act, Volume VII (Appointment of Counsel in Criminal Cases). Timely submission should be enforced to ensure that expenditure of CJA funds coincides with the appropriate budget cycle. All costs for a given time period should be submitted on the same voucher.
- All paralegal expenses should be claimed on a CJA 31 voucher.
- Each voucher must have attached a reconciliation of actual expenditures vs. budgeted amounts. The budget forms are designed to accommodate such a reconciliation.

IV. Case-Management Conferences

The assigned Judge is encouraged to conduct a Case Management Conference (CMC) at the beginning of each phase to discuss case status. Counsel for Petitioner and the Attorney General are required to attend the Case Management Conferences. All CMCs will be held on the record. *See* 21 U.S.C. § 848(q)(9). It is anticipated that the CMCs will not be lengthy. Duration will depend on case complexity and the issues under discussion.

Counsel for Petitioner and the Attorney General are required to fill out a case evaluation form. The Court may have CJA counsel fill out an additional confidential Case Evaluation Form to help the Court determine the reasonableness of counsel's requested budget.

V. Budgeting Conferences

If Petitioner is represented by CJA counsel, the Court will meet with counsel following the Case Management Conference to determine the reasonableness of the proposed budget. Although CJA counsel are required to make a showing of confidentiality with respect to ex parte requests for experts and investigative fees pursuant to 21 U.S.C. § 848(q)(9), the Court anticipates that all budgeting conferences, although held on the record, will be ex parte. The Court may approve the budget at the hearing or require additional documentation from counsel for any part of the budget.

VI. Case Management and Budgeting Approach

The following approach to case management and budgeting guides the Court through five identified phases of a capital habeas case. The approach follows a litigation framework incorporating timely case-management and budgeting conferences and appropriate deadlines. The bracketed information is designed for court use only and is not intended for external use.

Case Management and Budgeting Approach

Phase I: Appointment and Record Review

1. Motions for Stay of Execution and Appointment of Counsel are filed.

[The Court takes jurisdiction over the case at this time pursuant to *McFarland v. Scott*, 512 U.S. 849 (1994).]

2. Case assigned to District Judge.

3. Stay Order, Order of Appointment and General Procedures issued within 10 days of receipt of Petitioner's motion.

[The Federal Defender of Montana shall be designated as counsel within ten (10) calendar days from application for appointment. (See District of Montana Criminal Justice Act Plan.) In the event of a conflict, CJA counsel will be appointed from an established list of lawyers experienced in federal habeas practice. It is not assumed that co-counsel will be required. However, use of co-counsel may help develop a qualified pool of capital habeas lawyers.]

The Order of Appointment and General Procedures contains the following:

- Date for Phase I CMC with assigned Judge approximately 30 calendar days from date of Order.
- Applicable Court policies, hourly rate limits, phased budgeting and voucher submission requirements. (*See* sections II and III above; the Court may incorporate these sections by reference into its order.)

- Requirement that Petitioner identify in his petition where in the record each claim was exhausted.
 - Deadlines for filing the Respondent's Answer Re: Procedural Issues Only (60 days after Petition filed) and the Petitioner's Reply to Respondent's Answer (45 days after Answer filed).
4. Petitioner's counsel obtains state court record and meets with Petitioner.
 5. Both counsel for Petitioner and the Attorney General are directed to fill out a Case Evaluation Form prior to the Phase I CMC.
 6. Phase I CMC Held

Issues to be resolved at Phase I CMC

- Case complexity.
[Counsel will be expected to complete the CEF to the extent possible at this stage and to update it as the case proceeds.]
- Parties agree on AEDPA statute of limitations.
- Problems, if any, with Petitioner's counsel's ability to obtain the record and prior counsel's files.
[Petitioner's counsel is instructed to contact the Court if she has any difficulty obtaining prior counsel's files; the Court may issue a subpoena duces tecum.]
- Record organization and management.
[Counsel may wish to have the pages of the record sequenced using a numbering stamp which facilitates reference to documents during the case and when preparing vouchers. Judges also should be aware that some voluminous cases may be suitable for imaging (or other) technology to facilitate automated page retrieval. Counsel is encouraged to employ paralegals to assist in record compilation and review.]
- Whether a Phase II CMC is necessary.
[There may not be a need to conference with both Petitioner's counsel and the Attorney General at the outset of Phase II. However, any Phase II CMC should coincide with the Phase II Budget Conference.]

Issues to be Resolved at the Phase I Budget Conference:

[Although counsel does not submit a separate Phase I budget, this Budget Conference is important to address any preliminary or immediate funding matters.]

- Authorization of hourly rate for counsel and co-counsel.
- Authorization of interim expenditures for investigators and paralegals.
- Investigative resource requests. Hourly rates, travel requirements, and extent of proposed investigation should be discussed.

- Scheduling the next budgeting conference and ordering the Phase I/II budget to be submitted to the Court one week prior to the Phase II conferences.
7. Court issues Phase I CMC Order and Separate Phase I Ex Parte Budget Order
[Phase I CMC Order sets forth any decisions reached at the Phase I CMC, particularly counsel’s position on the statute of limitations. Phase I Budget Order includes the date for the Phase II Budget Conference approximately 45 days after the Phase I Budget Conference, and directs CJA counsel to submit the Phase I/II Case Management and Budget Plan to the court one week prior to the Phase II Budget Conference.]
 8. Counsel prepares and submits Phase II/II Case Management and Budget Plan.

Phase II: Preparation of the Petition

[District CJA Reviewer and/or Death Penalty Law Clerk analyze Phase I/II Case Management and Budget Plan and make recommendations to Judge.]

1. Optional Phase II CMC held.
[If the Court holds a Phase II CMC, it will memorialize any directives, understandings, and/or deadlines in a Phase II CMC Order.]
2. Phase II Budget Conference held.
[CJA counsel must meet her burden of confidentiality if she is requesting 21 U.S.C. § 848(q)(9) funds.]
3. Budget Order issued approving Phase I/II Budget.
[Timely budget review by the Court is essential. The ability of counsel to comply with established deadlines depends, in part, on timely court response to budget submissions, motions, etc. The Court’s goal should be budget review and approval within ten (10) days. An additional budget conference may be scheduled if needed.

Counsel is expected to continue work on the case while the Court reviews the Phase I/II Budget.

The Budget Order requires counsel to submit Petitioner’s Phase III Budget within 10 days of the filing of the Answer.]
4. Counsel prepares and files Petition within the statute of limitations, pursuant to 28 U.S.C. § 2244(D).
5. Within 60 days, the Attorney General files and Answer addressing and briefing exhaustion (including abeyance) and procedural issues (e.g., procedural default, AEDPA issues) only.
[F.R.H.C. 5, requires Respondent to address the merits of Petitioner’s claims in the Answer. However, because initially addressing procedural matters conserves the resources of both parties and the Court, adherence to rule 5 is not mandatory. See discussion in *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).]

6. The Court schedules Phase III Case Management and Budget Conferences for a date three (3) weeks after the Answer is filed.

Phase III: Procedural Litigation

1. Phase III Case Management and Budget Plan is filed one (1) week prior to the Phase III Case Management and Budget Conferences.

[District CJA Reviewer and/or Death Penalty Law Clerk analyze Phase III Case Management and Budget Plan and make recommendations to Court.]

2. Court conducts Phase III CMC and Budget Conferences.

[At the Phase III CMC, the parties discuss the course of the procedural litigation. The Court may impose/modify deadlines.]

3. Phase III CMC Order is issued.

4. Court issues Phase III Budget Order.

[The Court's goal should be budget review and approval within ten (10) days. An additional budget conference may be scheduled if needed.

Counsel is expected to continue work on the case while the Court reviews the Phase III Budget.]

5. Petitioner files Traverse to Procedural Challenges within 45 days of Answer.

[This pleading asserts Petitioner's cause and prejudice arguments to procedural default issues. See 28 U.S.C. § 2254(e)(2).

At this juncture, the Court should determine whether a response to any of Petitioner's arguments is warranted. Since Petitioner bears the burden of proving cause and prejudice, he should be entitled to reply to an Attorney General's response addressing cause and prejudice.]

6. The Court rules on procedural status of claims, sets Phase IV CMC three (3) weeks from ruling, orders CJA counsel to submit its Phase IV Case Management and Budget Plan one (1) week prior to the Phase IV CMC. The Court also rules sua sponte on any meritless claims, see FRHC 4 and *Boys v. Thompson*, *infra*, and issues a briefing schedule for merits adjudication.

[Judges are urged to allocate time explicitly for ruling on the procedural status of claims to assure that decisions are rendered in a timely manner.]

7. Counsel prepares and submits Phase IV Case Management and Budget Form one (1) week before Phase IV CMC.

Phase IV: Merits and Evidentiary Hearing Briefing

[District CJA Reviewer and/or Death Penalty Law Clerk analyze Phase IV Case Management and Budget Plan and make recommendations to Judge.]

1. Phase IV Case Management and Budget Conferences held.

[At the Phase IV CMC, the parties discuss the time needed to brief the merits of the case and/or prepare a motion for evidentiary hearing. The Court should determine whether the parties should proceed simultaneously with both evidentiary hearing and non-evidentiary hearing claims.

Discovery requests, if any, should also be addressed at this conference.]

2. Phase IV CMC Order is issued setting Phase IV briefing schedule.

[Petitioner files Motion for Evidentiary Hearing/Merits Brief 45 calendar days following Phase IV CMC; Respondent files opposition 45 calendar days thereafter; Petitioner files Reply 30 calendar days thereafter.]

3. Phase IV Budget Order issued.

[The Court's goal should be budget review and approval within ten (10) days. An additional budget conference may be scheduled if needed.

Counsel is expected to continue work on the case while the Court reviews the Phase IV Budget.]

4. Petitioner files Motion for Evidentiary Hearing and/or Merits Brief on non-evidentiary hearing claims.
5. Attorney General files Opposition to Evidentiary Hearing Motion and/or Amended Answer to Merits Claims.
6. Court rules on the Motion for Evidentiary Hearing.
- 7a. If evidentiary hearing granted, proceed to Phase V.
- 7b. If evidentiary hearing denied, Court rules on merits of claims and case proceeds to judgment.

[Judges are urged to allocate time explicitly for ruling on the merits of claims to assure that decisions are rendered in a timely manner.]

8. Court rules on post-judgment motions, including certificate of appealability.

[See 28 U.S.C. § 2253(c).]

Phase V: Evidentiary Hearing

1. Court grants Petitioner's request for evidentiary hearing.
[The order granting an evidentiary hearing should include a date for a Phase V Case Management and Budgeting Conference. The Conference should be held within 30 days of the order. The order also should direct CJA counsel to file Petitioner's Phase V Case Management and Budget Plan one (1) week prior to the Phase V Conferences.]
2. Counsel files Case Management and Budget Plan for Phase V.
3. The Court holds the Phase V CMC.
[The parties should discuss the time needed to prepare for the evidentiary hearing, discovery issues and possible settlement. The Court also should discuss stipulations, determine the need for any pre-hearing briefing, and determine how evidence will be received (e.g., possibly deposition in lieu of live testimony.)]
4. The Court issues a Phase V CMC Order.
[The order should contain all discovery rulings and deadlines.]
5. The Court issues a Phase V Budget Order.
[The Court should rule on the Budget at the conference, or request additional information to make a budget determination as expeditiously as possible.]
6. Counsel conducts discovery.
7. Counsel prepares witnesses.
8. Evidentiary hearing held.
9. Court rules on merit of claims and proceeds to judgment, filing notice of appeal, etc.
[The Court sets deadlines for post-judgment motions.]
10. Court rules on any outstanding non-evidentiary hearing claims.
11. Court rules on post-judgment motions.
12. Court issues/denies Certificate of Appealability.