

**Southern District of California**  
**Civil Rule HC.3**  
**Habeas Corpus Proceedings (28 U.S.C. § 2254) -**  
**Petitions Involving Death Penalty**

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

b. **Notices from California Attorney General.** The California Attorney General will send the following reports:

- (1) Report Upon Setting of Execution Date. Whenever an execution date is set, the California Attorney General must send prompt notice to the Clerk of this Court and Chief Judge of this District Court, within seven (7) days; and
- (2) Semi-Annual Report. The California Attorney General must electronically send to the Chief Judge of this District Court and designated recipients a semi-annual report that lists:
  - (a) all scheduled executions in California;
  - (b) all capital cases, pending on direct appeal before the California Supreme Court;
  - (c) all capital cases affirmed on direct appeal and pending before the California Supreme Court on first state habeas corpus petitions; and
  - (d) the county of conviction for each case.

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

d. **Counsel.**

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

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

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

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

If state appellate counsel is not available to represent petitioner on federal habeas corpus or if appointment of state appellate counsel would be inappropriate for any reason, the court must appoint counsel upon application of petitioner. The clerk of court must have available forms for such application. Counsel may be appointed from the panel of qualified attorneys certified by the selection board, or the court may appoint any other attorney under 18 U.S.C. § 3599. Either California Appellate Project or the selection board may suggest one or more counsel for appointment. The court may also request suggestion of one or more counsel from California Appellate Project or the selection board. If application for appointed counsel is made before a petition has been filed, the application must be assigned to a district judge in the same manner that a petition would be assigned, and counsel must be appointed by the assigned judge. The judge so assigned must be the judge assigned when counsel files a petition for writ of habeas corpus.

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

e. **Assignment to Judges.** Notwithstanding the general assignment plan of this court, petitions must be assigned to judges of the court as follows:

1. The clerk of the court must establish a separate category for these petitions, to be designated with the title "Capital case".

2. All active or combination of active and senior judges of this court must participate in the assignments without regard to intra district venue.

3. Petitions in the capital case category must be assigned blindly and randomly by the clerk of the court to each of the active or combination of active and senior judges of the court.

4. If the assigned judge has filed a certificate of unavailability with the clerk of the court which is in effect on the date of assignment, a new random assignment will be made to another judge immediately.

5. If a petitioner has previously sought relief in this court with respect to the same conviction, the petition will be assigned to the judge who was assigned to the prior proceeding.

6. Pursuant to 28 U.S.C. § 636(b)(1)(B), and not inconsistent with law, magistrate judges may be designated by the court to perform all duties under these rules, including evidentiary hearings.

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

If an order for the transfer of venue is made, the judge will order a stay of execution which must continue until such time as the transferee court acts upon the petition or the order of stay.

g. **Stays of Execution.**

1. **Stay Pending Final Disposition.** Upon the filing of a habeas corpus petition, unless the petition is patently frivolous, the district court must issue a stay of execution pending final disposition of the matter.

2. **Temporary Stay for Appointment of Counsel.** Where counsel in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection panel will designate an attorney from the panel who will assist an indigent petitioner in filing *pro se* applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application the district court must issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45) days unless extended by the court.
  3. **Temporary Stay for Preparation of the Petition.** Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court must issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition. The temporary stay may be extended by the court upon a subsequent showing of good cause.
  4. **Temporary Stay for Transfer of Venue.** (See paragraph f.)
  5. **Temporary Stay for Unexhausted Claims.** If the petition indicates that there are unexhausted claims for which the state court remedy is still available, petitioner may be granted a thirty (30) day period in which to commence litigation on the unexhausted claims in state court. During the proceedings in state court, the proceedings on the petition will be stayed. After the state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims.
  6. **Stay Pending Appeal.** If the petition is denied and a certificate of probable cause for appeal is issued, the court will grant a stay of execution which will continue in effect until the court of appeals acts upon the appeal or the order of stay.
  7. **Notice of Stay.** Upon the granting of any stay of execution, the clerk of the court will immediately notify the warden of San Quentin Prison and the California Attorney General. The California Attorney General must assure that the clerk of the court has a twenty-four hour telephone number to the warden.
- h. **Procedures for Considering the Petition.** Unless the judge summarily dismisses the petition under Rule 4 of the Rules Governing §2254 Cases, the following schedule and procedures must apply, subject to modification by the judge. Requests for enlargement of any time period in this rule must comply with the applicable local rules of the court.
1. Respondent must as soon as practicable, but in any event on or before twenty-one (21) days from the date of service of the petition, lodge with the court the following:
    - a. Transcripts of the state trial court proceedings.

- b. Appellant's and respondent's briefs on direct appeal to the California Supreme Court, and the opinion or orders of that court.
- c. Petitioner's and respondent's briefs in any state court habeas corpus proceedings, and all opinions, orders and transcripts of such proceedings.
- d. Copies of all pleadings, opinions and orders in any previous federal habeas corpus proceeding filed by petitioner which arose from the same conviction.
- e. An index of all materials described in paragraphs (A) through (D) above. Such materials are to be marked and numbered so that they can be uniformly cited. Respondent must serve this index upon counsel for petitioner.

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

- 2. If counsel for petitioner claims that respondent has not complied with the requirements of paragraph (a), or if counsel for petitioner does not have copies of all the documents lodged with the court by respondent, counsel for petitioner must immediately notify the court in writing, with a copy to respondent. Copies of any missing documents will be provided to counsel for petitioner by the court.
- 3. Respondent must file an answer to the petition with accompanying points and authorities within thirty (30) days from the date of service of the petition. Respondent must include in the answer the matters defined in Rule 5 of the Rules Governing §2254 Cases and must attach any other relevant documents not already filed.
- 4. No discovery will be had without leave of the court.
- 5. Unless extended by the court at any time, a request for an evidentiary hearing by either party must be made within fourteen (14) days from the filing of the answer to the petition. The request must include specification of which factual issues require a hearing and a summary of what evidence petitioner proposes to offer. Any opposition to the request for an evidentiary hearing must be made within fourteen (14) days from the filing of the request. The court will then give due consideration to whether an evidentiary hearing will be held.
  - i. **Evidentiary Hearing.** If an evidentiary hearing is held, the court will order the preparation of a transcript of the hearing, which is to be immediately provided to petitioner and respondent for use in briefing and argument. Upon the preparation of the transcript, the court may establish a reasonable schedule for further briefing and argument of the issues considered at the hearing.

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

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

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

When a notice of appeal is filed, the clerk of the court will transmit the available records to the court of appeals immediately.