

EASTERN DISTRICT OF TENNESSEE

LR9.4 Rule Applicable To Death Penalty

- (a) **Application of Rule.** This rule applies to cases filed pursuant to 28 U.S.C. § 2254 and otherwise which challenge a state court's imposition of a sentence of death.
- (b) **Motion for Stay.** A petitioner who seeks a stay of execution shall attach to the petition a copy of each state court opinion and judgment involving the matter to be presented. The petition shall also state whether the same petitioner has previously sought relief arising out of the same matter from this Court or from any other federal court. The reasons for denying relief given by any court that has considered the matter shall also be attached. If reasons for the ruling were not given in a written opinion, a copy of the relevant portions of the transcript may be supplied.
- (c) **Issuance of Certificate of Probable Cause.** If a certificate of probable cause is issued in any such case, the Court will grant a stay of execution to continue until such time as the court of appeals expressly acts with reference to it.
- (d) **Issues Not Raised or Exhausted in State Courts.** If any issue is raised that was not raised or has not been fully exhausted in state court, the petition shall state the reasons why such action has not been taken.
- (e) **Second or Successive Petitions.** A second or successive petition for habeas corpus relief may be dismissed if the Court finds that it fails to allege new or different grounds for relief, if the failure of the petitioner to assert those grounds in a prior petition constitutes an abuse of the writ, or if the petition is frivolous and entirely without merit.

The Court has established internal working procedures for judicial officers to follow in handling capital habeas corpus petitions in a standing order which is incorporated by reference and attached to these Rules as Appendix No. 4.

APPENDIX 4

Incorporated into Local Rule 9.4

- A. The *pro se* law clerk in each division shall act as a liaison between the district judge assigned to the case, the magistrate judge assigned to the case, and the Clerk's Office.
- B. After the case has been opened by the Clerk's Office, the *pro se* law clerk will take the file to the assigned district judge, who will:
1. Rule on the application to proceed *in forma pauperis*, if there is one, and the motion to stay execution and, if granted, do the following;
 2. Rule on the motion to appoint counsel, if there is one;
 3. Refer the case to the magistrate judge for appointment of counsel, for disposition of all non-dispositive motions, for scheduling of deadlines, for establishment of a litigation budget for payment of investigative, expert, and other reasonably necessary services, and for payment recommendation of attorney and other fees.
 4. If the assigned district judge is to be unavailable for 48 hours, the *pro se* law clerk will take the file to the next available district judge in order of rotation, who will act temporarily on matters that need immediate attention.
- C. After the district judge's order has been docketed, the *pro se* law clerk will take the file to the assigned magistrate judge, who will expeditiously:
1. Appoint counsel, establish the amount of compensation and authorize interim vouchers on a monthly basis.
 - a. Counsel will be appointed from the Court-approved panel of attorneys in each division of the district.
 - b. Counsel must possess the following qualifications:
 - At least one attorney must have been admitted to practice in the court of appeals for not less than 5 years, and must have had not less than 3 years experience in the handling of appeals in the court in felony cases. 18 U.S.C. § 3599(c).
 - The Court may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation. 18 U.S.C. § 3599(d).

- c. Appointed counsel will be compensated, in the Court's discretion, at a rate not more than the statutory rate. 18 U.S.C. § 3599(g)(1). The rate of compensation to be paid associates and paralegals shall be addressed at the first status conference to be held in the case.
- d. Interim vouchers must be submitted on a monthly basis, with the vouchers due on or before the 10th of each month. The magistrate judge shall review all interim vouchers before the vouchers are presented to the district judge.
 - Interim vouchers must be on an interim CJA Form 30, "Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel." Counsel shall strike the pre-printed numbers on all but the first CJA Form 30 submitted and substitute the number appearing on the first voucher thereafter. Each voucher shall be numbered in series and include the time period covered by the voucher.
 - Attorneys' fees and reimbursable expenses through the last day of the previous month shall be claimed on each interim voucher. The first interim voucher submitted shall reflect all attorneys' fees and reimbursable expenses incurred from the date of appointment. In the event there are no fees or expenses incurred for any given month, counsel shall file with the Clerk a statement to that effect on the form provided herein.
 - All interim vouchers shall be supported by detailed and itemized time and expense statements. Chapter VI, as well as the applicable provisions of Chapter II, Part C of the Guidelines for the Administration of the Criminal Justice Act, outlines the procedures and rules for claims by CJA attorneys and should be followed regarding each voucher.
 - At the conclusion of the representation, counsel shall submit a final voucher seeking payment for representation provided during the final interim period. The final voucher shall also set forth in detail the time and expenses claimed for the entire case, including all documentation. Counsel shall reflect all compensation and reimbursement previously received on the appropriate line of the final voucher.
- e. Counsel may be reimbursed for out-of-pocket expenses reasonably incurred incident to the representation. Counsel should incur no single expense item in excess of \$500 without prior approval of the Court. Such approval may be sought by filing an application with the Clerk stating the nature of the expense, the estimated dollar cost, and the reason the expense is necessary to the representation.
 - Recurring expenses, such as telephone toll calls, photocopying, and photographs, which aggregate more than \$500 on one or more interim vouchers are not considered single expenses requiring court approval.
 - Telephone toll calls, telegrams, photocopying, and photographs can all be reimbursable expenses if reasonably incurred. General

office overhead, such as rent, secretarial help, and telephone service, is not a reimbursable expense, nor are items of a personal nature. Expenses for service of subpoenas on fact witnesses are not reimbursable, but rather are governed by Federal Rule of Criminal Procedure 17 and 28 U.S.C. § 1825.

- Travel by privately owned automobile should be claimed at the rate currently prescribed for federal judiciary employees who use a private automobile for conduct of official business, plus parking fees, ferry fares, and bridge, road and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Air travel in “first class” is prohibited.
 - With respect to travel outside the attorney’s county of practice, the \$500 rule should be applied in the following manner: If travel expenses, such as air fare, mileage, parking fees, meals and lodging will aggregate an amount in excess of \$500, the travel should receive prior court approval.
 - Actual expenses incurred for meals and lodging while traveling outside the attorney’s county of practice must conform to the prevailing limitations placed upon travel and subsistence expenses of federal judiciary employees in accordance with existing government travel regulations.
- f. The Federal Defender will usually be appointed as co-counsel unless that office has a conflict or other good cause is shown why the Federal Defender should not be appointed.
2. Schedule a status conference with petitioner’s counsel and the Attorney General for the State of Tennessee for establishing deadlines and a litigation budget for payment of investigative, expert, and other reasonably necessary services.
- a. Fees and expenses for investigative, expert and other reasonably necessary services shall not exceed the statutory limit, unless payment in excess of that limit is certified by the Court as necessary and the amount of the excess payment is approved by the chief judge of the circuit. 18 U.S.C. § 3599(g)(2).
 - b. No ex parte proceeding, communication, or request pertaining to fees and expenses for investigative, expert, and other reasonably necessary services will be considered unless a proper showing is made concerning the need for confidentiality. 18 U.S.C. § 3599(f).

D. At the status conference, the magistrate judge will establish the following:

1. The deadlines for filing the habeas corpus petition, or an amendment to the petition if a petition has already been filed, the response to the habeas corpus petition, and petitioner’s traverse.

2. The deadlines for filing a dispositive motion and the response to the motion.
 3. The deadlines for filing the parties' witnesses and exhibits lists.
 4. The magistrate judge shall also establish a tentative date for an evidentiary hearing with the district judge.
- E. The magistrate judge will rule on all non-dispositive motions and discovery disputes.
1. As soon as they are filed, the *pro se* law clerk will take all non-dispositive motions and discovery disputes to the magistrate judge.
 2. The parties may appeal a ruling of the magistrate judge to the district judge by filing objections within 14 days of service of the magistrate judge's order. Fed. R. Civ. P. 72(a).
- F. The district judge to whom the case is assigned shall conduct the evidentiary hearing.
- G. The district judge to whom the case is assigned shall have the authority to vary these procedures as necessary in his discretion.