

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

XXXX XXX,

Petitioner,

vs.

Robert K. Wong, as Acting Warden  
of San Quentin State Prison,

Respondent.

Case No. 00-cv-00000 XXX

DEATH PENALTY CASE

ORDER FOLLOWING PHASE II-A CASE  
MANAGEMENT CONFERENCE

DATE: June 21, 2009

TIME: 8:45 a.m.

COURTROOM 3

This matter came on for a Phase II Case Management Conference (“CMC”) in the above-entitled Court, the Honorable XXXX XXX presiding. Petitioner was represented at the conference by CJA attorney XXXX XXX and Assistant Federal Defender XX XXXXX. Respondent Warden of San Quentin State Prison (the “Warden”) was represented by Deputy Attorney General XX XXXX. Both parties appeared telephonically.

Phase I of the litigation in this case was considered completed as of June 15, 2009, although not all litigation tasks anticipated to have been completed in Phase I were completed. Under the Guide to Case Management and Budgeting in Capital Habeas Cases, Eastern District of California, Fresno Division (the “Fresno Attorney Guide”), by the end of Phase I a petitioner’s litigation team generally has made a substantial effort to complete review of the state record and case files, conducted preliminary investigation, and advised the Court of the nature of the case by completing a Case Evaluation form. The Warden’s litigation team similarly is expected at the culmination of Phase I to have advised the Court of the nature of the case by completing a Case Evaluation form and also to have lodged the state record. The parties also are expected to have agreed on the expiration of the statute of limitations under

1 28 U.S.C. § 2244(d). Phase I may include a motion to extend the limitations period under equitable  
2 principles. All of the foregoing tasks were completed in Phase I of Petitioner’s case, including the filing  
3 by Petitioner of a motion to equitably toll the statute of limitations. The Court granted the motion due  
4 to the substantial delay in appointing counsel. As result, the limitations period has been extended to  
5 January 16, 2010.

6 Phase II generally involves the petitioner’s continuation of record review, claim development  
7 and preparation of the federal petition. During Phase II, the Warden files an answer to the petition, and  
8 both parties work on resolving of all exhaustion issues.<sup>1</sup> If there is a state exhaustion petition filed  
9 during Phase II, the Court considers holding federal proceedings in abeyance. If abeyance is ordered,  
10 Phase II resumes when state exhaustion proceedings are complete. At that time, the federal petition is  
11 either amended or reactivated, the answer is filed, and exhaustion issues are resolved. Phase II does not  
12 involve litigation of procedural default, as this issue is considered an affirmative defense. As with the  
13 motion to toll the limitations period filed in Phase I of the litigation, Phase II may involve the litigation  
14 of statute of limitations issues, although the limitations bar generally is treated as an affirmative defense  
15 and addressed after the substantive claims in the petition are briefed. Mr. XXX and Mr. XXXXX also  
16 advised the Court that Petitioner likely will be filing a subsequent state habeas corpus petition  
17 contemporaneous with the filing of his anticipated federal petition by January 16, 2010. At that time,  
18 Petitioner also will file a motion to hold federal proceedings in abeyance pending the completion of state  
19 exhaustion proceedings.

20 Based on the foregoing explanation of the case, the Court contemplates that Phase II of this  
21 litigation will proceed in two parts. Phase II-A will be in effect until the Court orders abeyance of  
22 federal proceedings (if the Court orders abeyance of federal proceedings) pending the completion of  
23 state exhaustion. Since the federal petition currently is due January 16, 2010, the Court will extend  
24 Phase II-A thirty days beyond that date to Friday, February 15, 2010. Phase II-B will commence once  
25

---

26  
27 <sup>1</sup> The first step in resolving exhaustion issues is for the parties to meet and confer. Thereafter  
28 they are directed to file a joint statement outlining which claims are in dispute respecting exhaustion.  
The Court thereafter makes a final determination.

1 state exhaustion is complete and the matter resumes in federal court with the reactivation of the federal  
2 petition, the Warden's answer, and exhaustion resolution.

3       Following discussion of the scope of litigation tasks that have been performed in Phase I and will  
4 be performed in Phase II, including the Warden's potential motion to dismiss and the position of the  
5 State of California on Chapter 154 certification, the Court excused Mr. XXXX from further participation  
6 in the hearing so matters of funding and budget preparation could proceed ex parte with Messrs. XXX  
7 and XXXXX. Under 18 U.S.C. § 3599(f), ex parte consideration of funding applications requires a  
8 showing of the need of confidentiality. Since budget applications require disclosure of matters protected  
9 by the attorney-client privilege and/ or the work product rule, the need for confidentiality is inherent in  
10 the budgeting process. *See* Fed. R. Civ. P. 26(b)(3). Accordingly, budget forms and supporting  
11 documentation are filed under seal and court proceedings similarly are conducted confidentially. An  
12 order to be filed within the next calendar week, under seal, will document the results of the ex parte  
13 proceedings regarding the budget of Phase II-A of Petitioner's case. The Warden's response to the  
14 Court's question about Chapter 154 certification and the potential motion to dismiss on the grounds of  
15 the statute of limitations bar are important considerations for the Court's evaluation of Petitioner's  
16 proposed case management and budget plan.

17 IT IS SO ORDERED.

18  
19 Dated: July 10, 2009

\_\_\_\_\_  
/s/ XXXX XXXX  
United States District Judge

20  
21  
22  
23  
24  
25  
26  
27  
28