

SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH

Adopted by the Supreme Court effective June 6, 1989

**Amended effective September 28, 1989, September 19, 1990,
January 27, 1992, December 21, 1992, July 29, 1993,
December 22, 1993, June 20, 1996, January 22, 1997,
January 22, 1998, February 4, 1998, August 23, 2001,
December 19, 2001, January 16, 2002, July 17, 2002,
July 26, 2002, November 20, 2002,
November 30, 2005, and January 1, 2008**

Policy 1. Stays of execution

The court will consider a motion for a stay of execution only if such a motion is made in connection with a petition for a writ of habeas corpus filed in this court, or to permit certiorari review by the United States Supreme Court.

Policy 2. Withdrawal of counsel

In the absence of exceptional circumstances — for example, when an appointed counsel becomes mentally or physically incapacitated — the court will consider a motion to withdraw as attorney of record only if appropriate replacement counsel is ready and willing to accept appointment for the balance of the representation for which the withdrawing attorney has been appointed (i.e., appellate representation, habeas corpus/executive clemency representation, or both). *[As amended effective Jan. 22, 1998.]*

Policy 3. Standards governing filing of habeas corpus petitions and compensation of counsel in relation to such petitions

The Supreme Court promulgates these standards as a means of implementing the following goals with respect to petitions for writs of habeas corpus relating to capital cases: (i) ensuring that potentially meritorious habeas corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses; and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to investigate and file habeas corpus petitions.

For these reasons, effective June 6, 1989, all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards:

1. Timeliness standards

1-1. Appellate counsel in a capital case shall take and maintain detailed, understandable and computerized transcript notes and shall compile and maintain a detailed list of potentially meritorious habeas corpus issues that have come to appellate counsel's attention. In addition, if appellate counsel's appointment does not include habeas corpus representation, until separate counsel is appointed for that purpose, appellate counsel shall preserve evidence that comes to the attention of appellate counsel if that evidence appears relevant to a potential habeas corpus investigation. If separate "post-conviction" habeas corpus/executive clemency counsel (hereafter "habeas corpus" counsel) is appointed, appellate counsel shall deliver to habeas corpus counsel copies of the list of potentially meritorious habeas corpus issues, copies of the transcript notes, and any preserved evidence relevant to a potential habeas corpus investigation, and thereafter shall update the issues list and transcript notes as warranted. Appellate counsel shall consult with and work cooperatively with habeas corpus counsel to facilitate timely investigation, and timely preparation and filing (if warranted) of a habeas corpus petition by habeas corpus counsel.

Habeas corpus counsel in a capital case shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that come to counsel's attention in the course of reviewing appellate counsel's list of potentially meritorious habeas corpus issues, the transcript notes prepared by appellate counsel, the appellate record, trial counsel's existing case files, and the appellate briefs, and in the course of making reasonable efforts to discuss the case with the defendant, trial counsel and appellate counsel. The duty to investigate does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a potentially meritorious claim. All petitions for writs of habeas corpus should be filed without substantial delay. *[As amended effective July 29, 1993, and Jan. 22, 1998.]*

1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal or within 36 months after appointment of habeas corpus counsel, whichever is later. *[As amended effective Sept. 19, 1990, Jan. 22, 1998, July 17, 2002, and Nov. 30, 2005.]*

1-1.2. A petition filed more than 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or more than 36 months after appointment of

habeas corpus counsel, whichever is later, may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim. *[As amended effective Sept. 19, 1990, July 29, 1993, Jan. 22, 1998, July 17, 2002, and Nov. 30, 2005.]*

Official Note No. 1: The amendments to standards 1-1.1 and 1-1.2, effective July 17, 2002, changing “90 days” to “180 days,” shall apply to all petitions for a writ of habeas corpus arising from a judgment of death that were pending before the Supreme Court on July 17, 2002, and to all such petitions filed after that date. *[Note added by Supreme Court order, July 26, 2002.]*

Official Note No. 2: The amendments to standards 1-1.1 and 1-1.2, effective November 30, 2005, changing “24 months” to “36 months,” shall apply to all petitions for a writ of habeas corpus arising from a judgment of death that were pending before the Supreme Court on November 30, 2005, and to all such petitions filed after that date. *[Note added by Supreme Court order, Nov. 30, 2005.]*

1-1.3. *[Standard repealed effective Jan. 22, 1998.]*

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

1-4. The court may toll the 180-day period of presumptive timeliness for the filing of a capital-related habeas corpus petition (which begins to run from the final due date to file the appellant’s reply brief in the appeal) when it authorizes the appellant to file supplemental briefing. The court will not toll before the 180-day presumptive timeliness period begins to run or after it has finished running.

Ordinarily, the court will toll the 180-day presumptive timeliness period only when the appellant is represented by the same counsel on appeal and also for related habeas corpus/executive clemency proceedings.

If the court determines that it will toll such 180-day presumptive timeliness period, it will so provide in its order authorizing the appellant to file supplemental briefing.

When the court provides for tolling of the 180-day presumptive timeliness period in its order authorizing the appellant to file supplemental briefing, it will determine a

reasonable period of time for the appellant to devote to whatever supplemental briefing is authorized, add that period of time to the final due date to file the appellant's reply brief in the appeal, and indicate the new date by which the appellant may file a presumptively timely habeas corpus petition.

Other than under these circumstances, the court will not toll, or otherwise extend, the period in which to file a presumptively timely capital-related habeas corpus petition. *[Standard adopted effective Nov. 20, 2002.]*

2. Compensation standards

2-1. This court's appointment of appellate counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court; (iii) preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court and, if certiorari is granted, preparation and filing of a brief or briefs on the merits and preparation and presentation of oral argument; and (iv) representation in the trial court relating to proceedings pursuant to Penal Code section 1193.

This court's appointment of habeas corpus counsel for a person under a sentence of death shall be made simultaneously with appointment of appellate counsel or at the earliest practicable time thereafter. The appointment of habeas corpus counsel is for the following: (i) investigation, and preparation and filing (if warranted), of a habeas corpus petition in the California Supreme Court, including any informal briefing and evidentiary hearing ordered by the court and any petition to exhaust state remedies; (ii) representation in the trial court relating to proceedings pursuant to Penal Code section 1227; and (iii) representation in executive clemency proceedings before the Governor of California.

Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition, or pleading in any other California or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court. *[As amended effective Dec. 22, 1993, Jan. 22, 1998, and Feb. 4, 1998.]*

2-2. Habeas corpus counsel should expeditiously investigate potentially meritorious bases for filing a petition for a writ of habeas corpus. If the timing of separate appointments permits, this investigation should be done concurrently with appellate counsel's review of the appellate record and briefing on appeal, and in any event, in cooperation with appellate counsel. *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

2-2.1. In all cases in which counsel was appointed on or after the October 12, 1997, enactment of Senate Bill No. 513 (Stats. 1997, ch. 869), counsel, without prior authorization of the court, may incur expenses up to a total of \$25,000 for habeas corpus investigation, and may submit claims to the court for reimbursement up to that amount. Investigative expenses include travel associated with habeas corpus investigation, and services of law clerks, paralegals, and others serving as habeas corpus investigators. The reasonable cost of photocopying defense counsel's trial files is not considered an investigative expense, and will be separately reimbursed. The court will reimburse counsel for expenses up to \$25,000 that were reasonably incurred pursuant to the duty to investigate as described in standard 1-1, but it will not authorize counsel to expend, nor will it reimburse counsel for, habeas corpus investigation expenses exceeding \$25,000 before the issuance of an order to show cause. This policy applies to both hourly ("time and costs") and fixed fee appointments.

The policy described in the foregoing paragraph shall also apply to those cases in which counsel was appointed prior to October 12, 1997 (the enactment of Sen. Bill No. 513), and in which, by January 22, 1998, the effective date of the above-described policy, the defendant has not filed a habeas corpus petition in this court and no more than 90 days [now 180 days] have passed since the final due date for the filing of the appellant's reply brief on direct appeal.

As to those cases in which, by January 1, 2008 (the effective date of Assem. Bill No. 1248), the defendant has not filed a capital-related habeas corpus petition in this court and the date by which to file a presumptively timely petition has not yet passed, counsel may be reimbursed up to \$50,000 for those investigative services and expenses incurred on or after that date. Such investigative funding for expenses incurred after January 1, 2008, also is available in those cases in which a presumptively timely petition has been filed by January 1, 2008, but petitioner's reply to the informal response has not been filed and the time to do so (with any extensions of time) has not passed as of that date. *[As amended effective Jan. 16, 2002, and Jan. 1, 2008; standard adopted effective Jan. 22, 1998.]*

2-2.2. In all cases in which counsel was appointed on an hourly basis prior to October 12, 1997, and in which, by January 22, 1998, either a petition for a writ of habeas corpus has been filed in this court, or more than 90 days have passed since the final due date for the filing of the appellant's reply brief on direct appeal, requests by appointed counsel for authorization to incur, and reimbursement of, investigation expenses shall be governed by the following standards (2-2.3 through 2-4.4): *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

2-2.3. Without prior authorization of the court, counsel may incur expenses up to a total of \$3,000 for habeas corpus investigation relating to a death penalty judgment, and may submit claims to the court for reimbursement up to that amount. The court will

reimburse counsel for expenses up to \$3,000 that were reasonably incurred pursuant to the duty to investigate as described in standard 1-1. *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

2-2.4. If after incurring \$3,000 in investigation expenses (or if \$3,000 in reimbursement for investigation funds previously has been granted on behalf of the same defendant/petitioner with regard to the same underlying death penalty judgment), counsel determines it is necessary to incur additional expenses for which he or she plans to seek reimbursement from the court, counsel must seek and obtain prior authorization from the court. As a general rule, the court will *not* reimburse counsel for expenses exceeding \$3,000, without prior authorization of the court. Requests by appointed counsel for prior authorization to incur investigation expenses shall be governed by the following standards. *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

2-3. Counsel shall file with this court a “Confidential request for authorization to incur expenses to investigate potential habeas corpus issues,” showing good cause why the request was not filed on or before the date the appellant’s opening brief on appeal was filed. *[As amended effective Dec. 21, 1992, and Jan. 22, 1998.]*

2-4. The confidential request for authorization to incur expenses shall set out: *[As amended effective Dec. 21, 1992.]*

2-4.1. The issues to be explored;

2-4.2. Specific facts that suggest there may be an issue of possible merit;

2-4.3. An itemized list of the expenses requested for each issue of the proposed habeas corpus petition; and

2-4.4. (a) An itemized listing of all expenses previously sought from, and/or approved by any court of this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner. *[As amended effective Jan. 27, 1992, and Dec. 21, 1992.]*

2-5. Counsel generally will not be awarded compensation for fees and expenses relating to matters that are clearly not cognizable in a petition for a writ of habeas corpus. *[As renumbered effective Dec. 21, 1992.]*

2-6. When a petition is pending in this court to exhaust claims presented in a federal habeas corpus petition, a request by counsel for investigative funds to bolster or augment claims already presented in the petition normally will be denied absent a showing of strong justification for the request. A request for investigative funds may be granted if the petitioner demonstrates that he or she has timely discovered new and potentially meritorious areas of investigation not previously addressed in the petitioner's federal or state petitions. This has been the internal operating policy of the court since December 16, 1992. [*Standard adopted effective June 20, 1996.*]

2-7. Each request for fees relating to a habeas corpus petition must be accompanied by: (a) An itemized listing of all fees previously sought from, and/or approved by any court of this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner. [*As renumbered and amended effective Dec. 21, 1992, and as renumbered effective June 20, 1996.*]

2-8. In a case in which the court orders an evidentiary hearing, and counsel and the court do not enter into a "fixed fee and expenses agreement" covering the evidentiary hearing (see "Guideline 10" of the "Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings in the California Supreme Court"), requests for reimbursement of necessary and reasonable expenses incurred in preparation for and presentation of the evidentiary hearing shall be governed by the following standards: [*Standard adopted effective Jan. 22, 1997.*]

2-8.1. Counsel may incur "incidental" expenses (i.e., travel to and from the evidentiary hearing and related hearings before the referee, meals and lodging during the hearing, telephone charges, photocopying, etc.) without prior approval, and the court will reimburse counsel for such itemized, reasonable and necessarily incurred expenses pursuant to the court's "Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court," part III ("Necessary Expenses"). [*Standard adopted effective Jan. 22, 1997.*]

2-8.2. Counsel should seek and obtain from this court prior approval for all investigation and witness expenses, including, but not limited to, investigator fees and costs, expert fees and costs, and expert witness fees and costs. [*As amended effective Jan. 22, 1998.*]

2-8.3. Counsel may submit requests for reimbursement of expenses every 60 days to this court, and will be reimbursed for necessary and reasonable expenses consistently

with part III of the “Payment Guidelines,” *supra*. [*Standard adopted effective Jan. 22, 1997.*]

Policy 4. Service of process by counsel for defendant

Consistently with longstanding practice and court policy, except as specified below, counsel for the defendant must serve his or her client, any separate counsel of record in any matter related to the same judgment, counsel of record for every other party, the trial court, the assisting entity or attorney for counsel for the defendant and any separate counsel of record, and trial counsel, with a copy of each motion, request for extension of time, brief, petition or other public document filed in this court or in the trial court on the client’s behalf, including any supporting declaration, with attached proof of service. A declaration submitted in support of any motion or request may refer to and incorporate by reference matters set forth in a current “confidential 60-day status report” simultaneously provided only to this court. Counsel also must serve any additional person or entity as requested by this court.

Counsel for the defendant need not serve (1) trial counsel with any matter upon or after the filing in this court of the certified record on appeal; (2) the trial court with any extension-of-time request related to appellate briefing; and (3) the trial court or trial counsel with any matter related to habeas corpus briefing.

If counsel for the defendant elects to serve the defendant personally with the document, counsel may indicate on the proof of service the date by which counsel will so serve the defendant (not to exceed 30 calendar days), and counsel shall thereafter notify the court in writing that the defendant has been served. In the alternative, counsel for the defendant need not serve the defendant with any specific document to be filed if counsel for the defendant attaches to the proof of service for that specific document (1) a declaration by the defendant stating that he or she does not wish to be served with that specific document, and (2) a declaration by counsel for the defendant stating that he or she has described to the defendant the substance and purpose of that specific document. [*Policy amended effective Dec. 19, 2001.*]