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, January 1, 2008, February 1, 2025, July 1, 2025, and July 15, 2026

Policy 1. Scope and purpose

This document sets out general Supreme Court policies applicable to counsel appointed by this court to provide representation in an automatic appeal from a judgment of death, in death penalty-related habeas corpus proceedings, and in other postconviction proceedings arising out of a judgment of death. These policies are additional to, and do not defeat, replace, or diminish, counsel's responsibilities under federal and state law, including (without limitation) the federal and state Constitutions, federal and state statutory law, the California Rules of Court, the California Rules of Professional Conduct, and applicable case law. For specific information on the Supreme Court's policies and practices related to compensation for appointed counsel, see the court's Payment Guidelines for Counsel Appointed by the Supreme Court to Represent Indigent Criminal Appellants in the California Courts.

Policy 2. Standards governing counsel in automatic appeals

Policy 2.1 General Duties

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; (iv) representation in the superior court relating to proceedings pursuant to Penal Code section 1193; and (v) representation in other proceedings, as may be specifically authorized in advance by the court in exceptional circumstances.

If, during the course of representation, the person sentenced to death is resentenced to a term less than death, or has a sentence of death commuted to a term other than death, this court's appointment, and attendant payment obligations, shall terminate forthwith to the extent it applies to proceedings before any other court; provided, however, that in extraordinary circumstances the court may approve continued appointment upon receiving prompt notice of the resentencing or commutation and a showing of extraordinary cause why the court's appointment should remain in place notwithstanding the absence of a judgment of death. In proceedings before this court, counsel's appointment continues notwithstanding such resentencing or commutation. However, if this court subsequently dismisses or transfers a pending proceeding to another court, this court's appointment, and attendant payment obligations, shall terminate unless the court orders otherwise, and counsel should seek appointment from the transferee court, if desired.

Appellate counsel in a capital case shall take and maintain detailed and understandable digitized or electronic 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 habeas corpus counsel is appointed, appellate counsel shall deliver to habeas corpus counsel a copy of the list of potentially meritorious habeas corpus issues, a copy of the transcript notes, and any preserved evidence relevant to a potential habeas corpus investigation. Thereafter, appellate counsel shall update the issues list and transcript notes as warranted and deliver copies of the issues list and transcript notes to habeas corpus counsel periodically or upon request. 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.

In the event that more than one counsel is appointed to represent the same defendant jointly, one attorney must be designated as lead counsel and is responsible for the overall conduct of the case and for supervising the work of appointed associate counsel and any nonappointed, supervised counsel. (Cal. Rules of Court, rule 8.605.)

Policy 2.2 Cooperation with Assisting Entity or Counsel

Appellate counsel appointed by this court have a duty to cooperate, as a condition of the appointment, with the assisting entity or counsel designated by the court to provide outside consultation and resource assistance to appointed counsel. Appointed counsel's cooperation and close working relationship with their assisting entity or counsel are

important to achieving the common goal of maintaining a high level of legal representation in all capital appeals and related habeas corpus/executive clemency proceedings.

The court requires the assisting entity or counsel to report to it periodically and in detail on appointed counsel's case progress. The court places considerable weight on these reports in determining compensation of counsel and whether counsel should be given additional capital case appointments.

Assisting entities that may be designated in this capacity include, as appropriate, the California Appellate Project in San Francisco and the Office of the State Public Defender. (See Cal. Rules of Court, rule 8.605(g).) In the event the designated assisting entity or counsel has a conflict of interest, the court will designate an alternative assisting entity, or an experienced private capital appellate practitioner, as appropriate.

Appointed counsel's obligation to cooperate with other appointed counsel and the assisting entity or counsel includes the following duties:

1. Appellate counsel must promptly make available to the assisting entity or counsel, for review, the above-described digitized or electronic transcript notes and detailed list of potentially meritorious habeas corpus issues, as well as a list of potential issues on the direct appeal.

2. Upon a request from the assisting entity or counsel, and after consultation with the Capital Appointments Coordinator, appellate counsel must either make a copy of relevant portions of the record available to that entity or counsel for its review, or permit the assisting entity or counsel to photocopy the record.

3. Appointed counsel must promptly initiate and maintain communication with the defendant/appellant, trial counsel, and any separately appointed counsel.

4. Appointed counsel must review carefully all manuals, newsletters, and other materials distributed by any assisting entity or counsel, and make appropriate use of the resources available in brief and information banks.

5. Unless the court advises counsel otherwise, appointed counsel are expected to attend post-appointment training programs presented by the assisting entities or counsel.

6. Appellate counsel must maintain ongoing consultation with the assisting entity or counsel regarding possible appellate issues; drafts of motions, pleadings, and briefs; and oral argument. The court anticipates that all appointed counsel will participate in a moot court in preparation for oral argument.

7. Appointed counsel must consult with the assisting entity or counsel regarding the amount of time appointed counsel plans to spend researching the direct appeal and/or litigating a habeas corpus petition. In so doing, appointed counsel must consult, and be guided by, the court's (a) "time and costs" payment guidelines and (b) "fixed fee" guidelines.

8. Appointed counsel must submit drafts of all motions, pleadings, briefs, petitions and replies, investigation plans, etc., to the assisting entity or counsel for review, allowing sufficient time for that review and for incorporating appropriate suggested changes into the final document.

9. Appointed counsel must provide the assisting entity or counsel with copies of all court orders, motions, pleadings, briefs, petitions, replies and responses, etc., filed by appointed counsel and by counsel for the respondent.

The court anticipates that all appointed counsel will comply with these duties and provide the foregoing level of cooperation with other appointed counsel and with the assisting entity or counsel. The court will consider appointed counsel's cooperation and compliance with these duties in determining counsel's compensation (either fixed fee or time-and-costs) and counsel's suitability for subsequent appointments. Also, unless counsel has substantially complied with these duties, the assisting entity or counsel may be unable to submit the substantial compliance letter required under Guideline 5, Progress Payments, of the Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Capital Habeas Corpus Proceedings in California Courts (Fixed Fee Guidelines).

If appointed counsel, or the assisting entity or counsel, identifies problems in complying with these duties, appointed counsel, or the assisting entity or counsel, should promptly notify the court's Capital Appointments Coordinator.

Policy 3. Standards governing counsel in habeas corpus and other postconviction proceedings

Policy 3.1 Scope of Appointment

Proposition 66, the "Death Penalty Reform and Savings Act of 2016," effective October 25, 2017, requires the court that issued the sentence of death offer to appoint habeas corpus counsel for a state prisoner subject to a capital sentence. (Gov. Code, § 68662; Pen. Code, § 1509.)

Following the effective date of Proposition 66, the responsibility for appointment of habeas corpus counsel falls primarily to the sentencing court. This court's ongoing

function relating to the appointment of habeas corpus counsel is limited to replacement counsel appointments following the withdrawal, death, or incapacity of counsel previously appointed by this court; it extends only to work performed in the superior court in connection with habeas corpus petitions transferred to that court, or orders to show cause returnable to that court, in which this court expressly retained jurisdiction over appointment and payment of counsel. If, during the course of representation, the petitioner is resentenced to a term less than death, or has a sentence of death commuted to a term other than death, this court's appointment, and attendant payment obligations, shall terminate forthwith; provided, however, that in extraordinary circumstances the court may approve continued appointment upon receiving prompt notice of the resentencing or commutation and a showing of extraordinary cause why the court's appointment should remain in place notwithstanding the absence of a judgment of death.

To the extent this court appointed habeas counsel in certain cases prior to the enactment of Proposition 66, and has elected to maintain jurisdiction over the appointment and payment of habeas corpus counsel in such cases, the Supreme Court maintains these standards in order to: (i) ensure that potentially meritorious habeas corpus petitions will be presented and heard in a timely fashion; (ii) provide counsel appointed by this court some certainty of payment for authorized legal work and investigation expenses; and (iii) provide 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.

This court's appointment of habeas corpus counsel for a person under a sentence of death is limited to the following representation: (i) the preparation and litigation of a petition for writ of habeas corpus in the superior court; and, in the absence of a moratorium on the death penalty, (ii) representation in the superior court relating to proceedings pursuant to Penal Code section 1227; and (iii) representation in executive clemency proceedings before the Governor of California.

Following the effective date of Proposition 66, this court will compensate habeas corpus counsel appointed by this court only for (i) litigation of a habeas corpus petition transferred by this court to the sentencing court, including any informal briefing and evidentiary hearing ordered by that court and any work performed to develop and present a claim under the Racial Justice Act that complies with the investigation duties of this standard (Pen. Code, § 745); and, in the absence of a moratorium on the death penalty, (ii) representation in the superior court relating to proceedings pursuant to Penal Code section 1227; and (iii) representation in executive clemency proceedings before the Governor of California. The court's responsibilities in this respect are subject to termination upon the sentencing court's appointment of counsel. (See Gov. Code, § 68662; Pen. Code, §§ 1473, subd. (e), 1509.)

Absent prior authorization by this court, this court will not compensate habeas corpus counsel for the filing of any motion, petition, or pleading in any California

intermediate appellate court, federal court, or court of another state. Counsel who seek compensation for representation in another court, or for a motion or petition not expressly authorized by this court's appointment or subsequent order, should secure appointment by, and compensation from, the court in which the filing is proposed to be made.

Habeas corpus counsel appointed by this court in a capital case shall have a duty to expeditiously investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus, including claims under the Racial Justice Act. (Pen. Code, § 745.) 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.

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.

Policy 3.2 Cooperation with Assisting Entity or Counsel

Counsel appointed by this court to represent a defendant in habeas corpus or other postconviction proceedings have a duty to cooperate, as a condition of the appointment, with the assisting entity or counsel designated by the court to provide outside consultation and resource assistance to appointed counsel, as previously described in Policy 2.2, *ante*.

Policy 3.3 Reimbursement of Expenses

3.3.1 Investigation Expenses

To the extent counsel appointed by this court seeks reimbursement for investigative expenses, 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 investigative work was not conducted prior to the filing of the habeas corpus petition. Good cause in this respect is presumed if (i) counsel is litigating a habeas corpus petition transferred by this court to the sentencing court and as to which this court, in its transfer order, expressly retained jurisdiction over appointment and payment of counsel; and (ii) counsel seeks reimbursement for investigative expenses in

connection with a claim brought under the Racial Justice Act, Penal Code section 745 (RJA) that are in compliance with Policy 3.1. The court will not compensate counsel for investigative expenses outside the scope of representation described above.

Investigative expenses include travel associated with habeas corpus investigation, and services of law clerks, paralegals, and others serving as habeas corpus investigators.

The confidential request for authorization to incur expenses shall set out: (1) The issues to be explored; (2) specific facts that suggest there may be an issue of possible merit; (3) an itemized list of the expenses requested for each issue of the proposed habeas corpus petition; (4) 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; (5) 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 (6) a copy of any related petition previously filed in any court of this state and/or any federal court concerning the same judgment and petitioner.

Counsel may incur expenses investigating potential habeas corpus claims in a manner consistent with Policy 3.1, *ante*, up to the amount ($25,000 or $50,000, depending upon the circumstances) specified in former Policy 2-2.1 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death (as last amended Jan. 1, 2008) without an additional showing of good cause, and may submit claims for reimbursement for up to that amount. (See Appendix, former Policy 2-2.1.) In addition, counsel may incur expenses up to a total of $25,000 for RJA-related habeas corpus investigation in connection with a petition transferred to a sentencing court, consistent with Policy 3.1, *ante*, following receipt of this court's authorization, and may submit claims to the court for reimbursement up to that amount. <u>The court will not compensate counsel for investigative expenses above these limits absent prior authorization upon a showing of good cause.</u>

When a petition is pending 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.

3.3.2 Other Expenses

In a case in which the sentencing court orders an evidentiary hearing in connection with a habeas corpus petition pending in this court prior to the October 25, 2017, effective date of Proposition 66, and counsel appointed by this court has not entered into

a "fixed fee and expenses agreement" with this court covering the evidentiary hearing (see Guideline 10, Fixed Legal Fees and Expenses for Evidentiary Hearings, Fixed Fee Guidelines), 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:

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 Counsel Appointed by the Supreme Court Representing Indigent Criminal Appellants in the California Courts (Payment Guidelines), part III, Necessary Expenses.

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.

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.

Policy 4. Contents of Declarations in Support of Extension of Time (EOTs) in the Supreme Court

Any declaration submitted in support of an EOT request must include the following:

1. The original due date for the uncompleted matter for which an EOT is sought; the total amount of time that has elapsed since that date; and the number of prior extensions requested and granted or denied.

2. The number of pages in the record on appeal, as follows: (a) the number of pages in the combined record on appeal, both reporter's and clerk's transcripts, including juror questionnaires, and (b) the number of pages in the combined record on appeal, excluding the juror questionnaires.

3. A good faith estimate of the percentage of work accomplished to date, with regard to the uncompleted matter for which an EOT is sought; a good faith estimate of the amount of time required for the remaining work to be done, with regard to the uncompleted matter for which an EOT is sought; and a proposed target date for the filing of that matter.

As appropriate, counsel of record may be requested to submit a supplemental declaration to establish good cause for any requested EOT.

Pursuant to the court's longstanding practice, extensions of time for briefing will be granted in up to 60-day intervals.

Policy 5. Confidential Status Reports (CSR) of Appointed Counsel and Assisting Entity or Counsel

In accordance with longstanding court practice, until appointed appellate counsel files the appellant's opening brief, a current CSR must be submitted every 60 days. Lead appointed counsel must serve a copy of the CSR on the assisting entity or attorney and on any appointed associate counsel, and must submit proof of service with the report. A CSR submitted by appointed counsel must include the following:

1. Current case status, including a good faith estimate of the percentage of work accomplished to date with regard to each pending uncompleted task.

2. Progress during the last 60 days.

3. Problems and reasons for any delay.

4. Future plans, including a good faith estimate of the amount of time it will take for the remaining work to be done as to each pending uncompleted task, and a proposed target date for completion of each such task.

Whenever appointed appellate counsel has filed a request for an EOT to file the appellant's opening brief or appellant's reply brief and the court has subsequently denied that request, appointed counsel must submit to the court and serve upon the assisting entity or attorney a CSR as described above 30 days after the court's order denying the request and every 30 days thereafter until the brief has been filed.

In addition, the assisting entity or attorney must also submit to the court 30 days after the date of the court's order and every 30 days thereafter until the brief is filed a CSR providing the following:

1. The assisting entity's or attorney's assessment of current case status, including a good faith estimate of the percentage of work accomplished to date with regard to each pending uncompleted task.

2. The assisting entity's or attorney's assessment of appointed counsel's progress during the last 30 days.

3. The assisting entity's or attorney's views regarding any problems and the reasons for delay.

4. Future plans and arrangements appointed counsel and the assisting entity or attorney have made, including the assisting entity's or attorney's good faith estimate of the date when the brief will be filed.

The assisting entity or attorney must serve a copy of the CSR on the lead appointed counsel and any appointed associate counsel being assisted, and must submit proof of service with the report.

Appointed counsel, as appropriate, may be requested to submit a supplemental CSR.

In all automatic appeals in which appointed counsel of record is required to submit a periodic CSR, and in all such cases and proceedings in which appointed counsel is not required to submit a CSR but nevertheless chooses to do so, the CSR must contain a certification or declaration under penalty of perjury by lead counsel that the contents of the CSR are true and correct. (Code Civ. Proc., § 2015.5.)

Policy 6. Service of process

Except as specified below, appointed counsel 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.

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

If appointed counsel 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, appointed counsel 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.

In all automatic appeals and capital-related habeas corpus proceedings in which counsel of record is required to provide the court with the original of a proof of service, such delivery must be evidenced by a certification or declaration under penalty of perjury. (Code Civ. Proc., § 2015.5.)

Policy 7. Stays of execution

In the absence of a moratorium on the death penalty, 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, or to permit certiorari review by the United States Supreme Court.

Policy 8. 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).