Resource Guide for Managing Capital Cases

Volume II: Habeas Corpus Review of State Capital Convictions

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I. Introduction

This guide was created to assist judges and court staff in managing capital habeas corpus cases by providing a summary of relevant law and case-management procedures. Section II, "Management of Individual Capital Habeas Cases," summarizes the substantive law of federal habeas corpus that has an impact on case management and procedure (such as jurisdiction to appoint counsel, statutes of limitations, and evidentiary hearings) and describes various techniques judges have used to manage individual cases. Section III, "District-Wide and Circuit-Wide Approaches to Capital Habeas Corpus Case Management," describes several practices used in the federal courts to monitor and streamline capital case management at a district- or circuit-wide level. These include formalized case-management plans, standardized budgeting and voucher review, standing capital case committees, death penalty law clerks and staff attorneys, budgeting oversight, and state–federal joint educational and planning efforts. The appendices include case-management plans, budgeting forms, attorney guidelines, and sample orders from several districts that illustrate these approaches in practice. The appendices appear as separate files on FJC Online and on the FJC internet site (www.fjc.gov).

This guide is based on a variety of sources:

- substantive legal research of federal habeas corpus law;
- inquiries to federal judges and judicial staff;
- various court publications (national and local), including guidelines for capital cases, court budgeting, and case-management statistics; and
- court documents supplied by death penalty staff attorneys of several courts.

Examples of case-management approaches are illustrative rather than prescriptive. The guide discusses the substantive law of habeas corpus only as it affects case-management issues. Section III.F provides a list of resources that more fully explain substantive habeas corpus law.

Figure 1 is a generalized overview of the flow of a typical capital habeas corpus case in the federal courts, with reference to some key substantive legal issues. The text outside boxes indicates activities carried out by the court or by counsel. The text inside boxes refers to relevant law applicable at each stage of the case. This overview does not include all law or procedures. Court procedures in individual cases may follow only some parts of this overview or may proceed in a different order.

Figure 1: Capital Habeas Corpus Case Flow Chart

The court receives a request for appointment of counsel, leave to proceed in forma pauperis, and/or stay of execution.

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A. Appointment and Compensation of Counsel

A request for counsel under 18 U.S.C. § 3599(a)(2) invokes federal jurisdiction and entitles an indigent capital petitioner to court-appointed counsel as well as reasonably necessary funds for investigators and experts.

The court appoints counsel (a federal defender or CJA panel attorney), issues a general procedures order, including budgeting policies, and sets a date for the case-management conference.

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B. Stay of Execution

Once federal jurisdiction is invoked by an 18 U.S.C. § 3599(a) request, the district court has discretion to grant a stay of execution. 28 U.S.C. § 2251(a)(3); *McFarland v. Scott,* 512 U.S. 849, 856 (1994).

A stay on the first petition is authorized where there are substantial grounds for granting relief. *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983).

Opt-in states: See Part F, below.

Counsel begins assembly of the record, record review, and preliminary investigation. The CJA panel attorney submits a proposed budget plan.

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The first case-management conference is held, addressing *publicly* the statute of limitations, status of state record assembly, and estimation by the state for lodging the state record, and addressing *confidentially,* with the petitioner's counsel (if a showing under 18 U.S.C. § 3599(f) is satisfied), budget proposals, petitioner's competence, and representation issues.

The court issues a case-management order memorializing agreements made during the conference. If the petitioner is represented by a CJA panel attorney, the court issues a separate budget order filed under seal and conducts periodic voucher review and approval throughout the case.

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Counsel continues record review and investigation.

Additional case-management conferences are conducted as needed, and orders are issued accordingly; settlement possibilities are discussed (if feasible).

C. Habeas Petition

Filing a protective petition within the limitations period may be appropriate where state timeliness rules are unclear, *Pace v. DiGuglielmo,* 544 U.S. 408, 416 (2005), or to maintain a stay of execution under 28 U.S.C. § 2251(a).

At the court's direction, the full petition will be filed either with integrated points and authorities, or strictly as a pleading, satisfying the requirements of Rule 2(c) of the Rules Governing § 2254 Cases.

After a short amendment-as-of-right period, an amended pleading is allowed only within the court's discretion. 28 U.S.C. § 2242; Fed. R. Civ. P. 15; *Foman v. Davis,* 371 U.S. 178, 182 (1962).

The answer is filed within 60 to 90 days, depending on whether the answer is filed with points and authorities (in the event the petition is briefed). The state must allege *all* procedural and substantive affirmative defenses. Failure to assert procedural defenses can result in a waiver. *Danforth v. Minnesota,* 552 U.S. 264, 289 (2008) *(Teague*-bar); *Day v. McDonough*, 547 U.S. 198, 199, 205 (2006) (statute of limitations and procedural default).

If the petition and answer are fully briefed, the petitioner may file a reply, which responds to the state's answer and opposition points and authorities. Where the petition and answer are strictly pleadings, no traverse or reply need be filed at this time.

D. Successive Petitions

A successive § 2254 petition with no new grounds must be dismissed. 28 U.S.C. § 2244(b)(1).

A successive § 2254 petition with new grounds may be reviewed only upon authorization from the court of appeals and satisfaction of the specified statutory conditions. 28 U.S.C. § 2244(b)(2), (3).

E. Timeliness of Petition

A § 2254 petition must be filed within one year of finality of the petitioner's conviction, the removal of an impediment created by the state, the recognition of a right by the Supreme Court made retroactive, or the diligent discovery of the factual predicate of the claim. 28 U.S.C. § 2244(d)(1)(A)–(D).

Statutory tolling under § 2244(d)(2) is available for timely filed state habeas/post-conviction petitions commenced during the federal limitations period. *Pace v. DiGuglielmo,* 544 U.S. 408, 410 (2005).

The limitations period is not jurisdictional, *Day v. McDonough,* 547 U.S. 198, 205 (2006); therefore, equitable tolling may apply.

Opt-in states: See Part F, below.

F. Expedited Procedures for Opt-In States

The court may issue a stay on commencement of action for first petitions. 28 U.S.C. § 2262(a). No stay may be issued for petitions filed beyond the 180-day limitations period or where the petitioner waives habeas relief, unless authorized by the court of appeals. 28 U.S.C. § 2262(b), (c).

The petition must be filed within 180 days of the finality of conviction. 28 U.S.C. § 2263(a).

The court may excuse a petitioner's failure to exhaust only under limited circumstances specified by statute. 28 U.S.C. § 2264(a).

Amendments are allowed only under circumstances that would allow a successive petition under § 2244(b). 28 U.S.C. § 2266(b)(3)(B).

The district court must issue a final ruling not later than 450 days after the filing of the petition or 60 days after the date the matter was submitted for decision. 28 U.S.C. § 2266(b).

The court of appeals must make a final determination of the appeal within 120 days of the filing of the reply or answering brief. 28 U.S.C. § 2266(c).

G. Exhaustion of State Remedies; Mixed Petitions

Courts may deny unexhausted claims on the merits, 28 U.S.C. § 2254(b)(2), but may not grant relief unless the claim was presented to the highest state court or exhaustion is futile. 28 U.S.C. § 2254(b)(1)(B). The state also may affirmatively waive exhaustion. 28 U.S.C. § 2254(b)(3).

If the petitioner is determined to pursue unexhausted claims and the state does not waive exhaustion, the court may proceed with adjudication of the petition, but deny the unexhausted claims on the merits, or, under limited circumstances, hold federal proceedings in abeyance to permit further exhaustion. *Rhines v. Weber,* 544 U.S. 269, 277–79 (2005). The petitioner then goes to state court to exhaust state remedies and returns to federal court with the previously filed federal petition.

Opt-in states: See Part F, above.

H. Amended Petitions

New claims alleged in amended § 2254 petitions filed outside the limitations period under 28 U.S.C. § 2244(1)(A) must arise out of the same "conduct, transaction, or occurrence" alleged in the original petition. *Mayle v. Felix,* 545 U.S. 644, 656 (2005). Amendments also may be permissible when the limitations period is established under 28 U.S.C. § 2244(d)(1)(B)–(D). See Part E, above.

Opt-in states: See Part F, above.

I. Procedural Default; Adequate and Independent State Bar

A claim is procedurally defaulted if it is denied on an adequate and independent state ground by a state court.

Courts may exercise discretion not to address procedural default and simply deny allegedly procedurally defaulted claims on the merits if this method is a more efficient use of judicial resources. Under this procedure, merits briefing would precede any potential determination of procedural default.

No habeas relief may be granted on procedurally defaulted claims absent a showing of cause and prejudice or a miscarriage of justice. *Wainwright v. Sykes,* 433 U.S. 72, 81 (1977); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

If comprehensive, substantive points and authorities have not been filed previously, each party should do so at this juncture. The petitioner files the last brief in reply to the state's opposition brief.

The case is now at issue.

J. Further Fact Development

An evidentiary hearing under Rule 8 of the Rules Governing § 2254 Cases is permitted where the petitioner exercised diligence in state court to develop the factual basis, 28 U.S.C. § 2254(e)(2), *Williams (Michael) v. Taylor,* 529 U.S. 420, 435 (2000), and the evidentiary hearing would enable the petitioner to prove factual allegations which, if true, would entitle him or her to federal habeas relief, taking into account the deferential standards in § 2254(d)(1) and (2). *Landrigan v. Schriro,* 550 U.S. 465, 474 (2007).

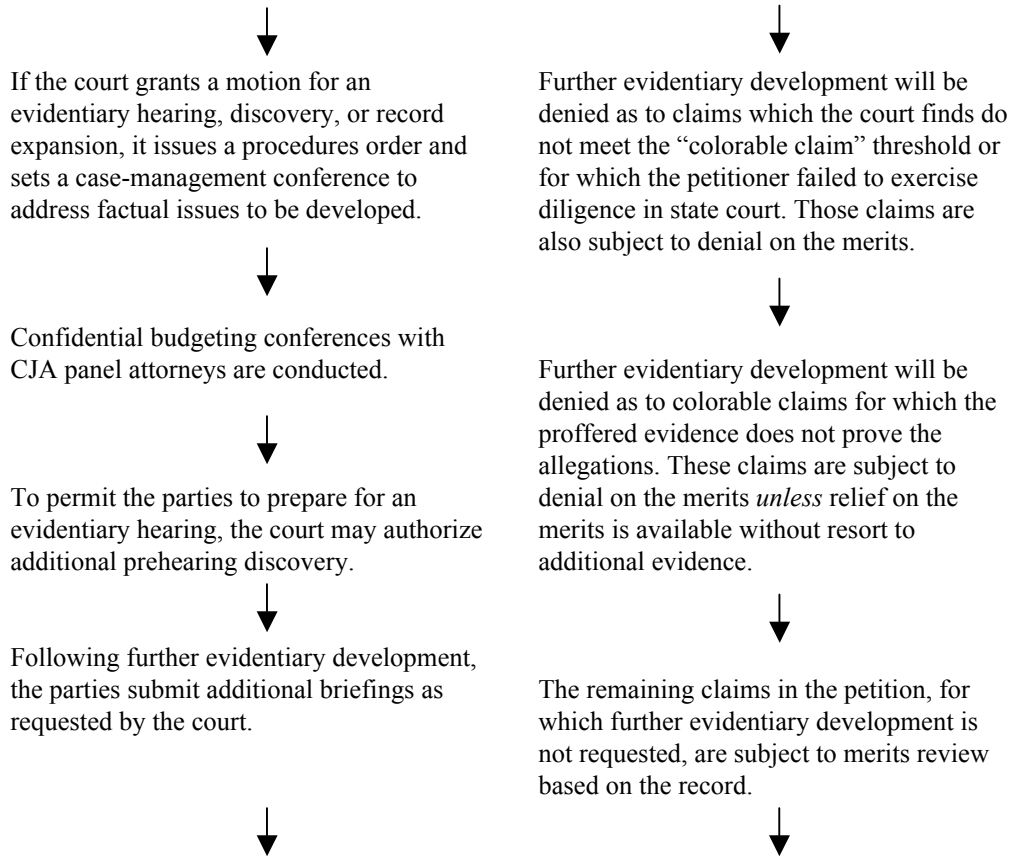
Discovery is available under Rule 6 of the Rules Governing § 2254 Cases where the allegations in the petition show entitlement to relief if specific facts are developed. *Harris v. Nelson,* 394 U.S. 286, 300 (1969). A request to expand the record pursuant to Rule 7 of the Rules Governing § 2254 Cases can obviate the need for an evidentiary hearing. *Blackledge v. Allison,* 431 U.S. 63, 81–82 (1977).

A petitioner who seeks to expand the record to establish the factual predicate of a claim may be subject to the diligence requirement under § 2254(e)(2). *Holland v. Jackson,* 542 U.S. 649, 653 (2004).

The failure to exercise diligence for further evidentiary development can be excused under limited circumstances specified by statute. 28 U.S.C. § 2254(e)(2).

The court must consider the deferential standards under § 2254(d)(1) when deciding whether a petitioner has set forth grounds warranting further evidentiary development. *Landrigan v. Schriro,* 550 U.S. at 474.

In some districts the parties may be directed to combine merits briefing with a request for an evidentiary hearing. Where a petition is especially lengthy and complex, courts may request briefing in discernible portions. Requests for an evidentiary hearing and merits briefing are then resolved in stages.



K. Scope of Federal Review

There can be no § 2254 relief unless the state court adjudication resulted in a decision that was either contrary to or an unreasonable application of clearly established Supreme Court precedent, or was based on an unreasonable determination of the facts in light of the evidence presented in state court proceedings. 28 U.S.C. § 2254(d)(1), (2).

If the criteria under either § 2254(d)(1) or § 2254(d)(2) have been met, or these provisions are found inapplicable (e.g., because the state court did not adjudicate the claim), a petitioner is entitled to § 2254 relief if the meritorious claim is structural and prejudice is presumed, *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991), or if analysis of the claim included a prejudice component (e.g., ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), or prosecutorial misconduct claims under *Brady v. Maryland*, 373 U.S. 83 (1963)). For all other claims, there can be no § 2254 relief unless there is a further showing that the constitutional error had a substantial and injurious effect or influence in determining the state jury's verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993).

L. Culmination of District Court Review

The court issues an order granting or denying habeas corpus relief.

The court must issue or deny a COA in the final dispositive order (in which the clerk of court is directed to enter judgment) if habeas relief is partially or entirely denied. Rule 11 of the Rules Governing § 2254 Cases (effective Dec. 1, 2009). Merits decisions issued through several orders should indicate whether the court intends to issue or deny a COA as to the claim or claims addressed in each order.

Opt-in states: See Part F, above.

The petitioner has twenty-eight days to request modification of the judgment pursuant to Fed. R. Civ. P. 59(e), absent any limiting directives by the court. The filing of such a motion will not extend the period for the petitioner to file a notice of appeal.

If habeas corpus relief is denied (or partially denied), the petitioner files a notice of appeal.

M. Appellate Review

The petitioner may not appeal without a COA issued by a "circuit justice or judge." 28 U.S.C. § 2253. If the district court denies a COA, the petitioner may request a COA from the court of appeals.

Opt-in states: See Part F, above.

N. Execution-Related Matters

After appeals have been exhausted and execution is imminent, district courts can expect a variety of "last minute" filings, including civil rights actions, successive habeas petitions, motions for restraining orders, and stays of execution. Clemency applications also may be initiated before applicable state bodies or individuals. District courts may adopt special procedures to address these proceedings. The Supreme Court has held that state clemency proceedings may be funded under 18 U.S.C. § 3599(e) for federally appointed counsel. *Harbison v. Bell,* 129 S. Ct. 1481, 1491 (2009).

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II. Management of Individual Capital Habeas Cases

Capital habeas corpus law has grown in complexity and volume since 1976, when the Supreme Court affirmed the constitutionality of the death penalty.[1] Changes in case law and legislation, including the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[2] directly affect district courts' case-management practices in these cases. This section provides a summary of those aspects of substantive law that affect case management, in the general order of their appearance in a court undertaking federal habeas corpus review, and describes how different district courts have applied that law in individual cases.

Petitions for capital habeas relief from state death sentences arise under 28 U.S.C. § 2254,[3] which authorizes federal review of claims by an inmate in state custody that his or her detention is "in violation of the Constitution or laws or treaties of the United States."[4]

The most common method of capital case management is the creation and use of standard orders, especially in the initial phases of litigation, where events are rather predictable and standardized information about court procedures must be conveyed to the parties. Many district courts have developed standardized orders, which an individual judge can then tailor to the needs of a specific case. Even if a judge does not use a standardized order, the general flow of events is fairly predictable, particularly in the early stages of litigation.

The court normally issues an appointment-of-counsel order early in the case (see *infra* section II.A). Shortly thereafter (and sometimes in the same appointment-of-counsel order), the court issues an order conveying the relevant procedures and policies for capital habeas corpus litigation in that jurisdiction, or the particular judge implements his or her own procedures for managing such cases. The "general procedure" order might include such matters as the court's expectations of counsel in preparation for and during case-management conferences (e.g., obtaining and reviewing the record), and required supporting documentation. If the court has appointed counsel under the Criminal Justice Act (CJA),[5] then this order (or a separate ex parte order) might include details on budgeting and voucher submission, such as hourly rates, a list of reimbursable expenses, budget preparation requirements, and standards for requesting funds for investigators and experts. Some general procedure orders are very detailed, including substantive law bases for the rules and procedures mentioned. Appendix B presents examples of orders appointing counsel in capital habeas cases; Appendix E presents examples of general procedure orders.

After these initial orders, the court usually issues a scheduling order containing deadlines for upcoming events, such as the state's submission of the state court record

1. The Court affirmed the constitutionality of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), after it had been unconstitutional for four years under *Furman v. Georgia*, 408 U.S. 238 (1972).

2. Pub. L. No. 104-132, 110 Stat. 1214.

3. Unless otherwise noted, all statutory references are to title 28 of the United States Code.

4. Petitions for capital habeas relief from federal death sentences arise under 28 U.S.C. § 2255 and will be addressed in a future revision to Volume I of the Resource Guide for Managing Capital Cases.

5. 18 U.S.C. § 3006A (West 2004).

and the filing of the petition, answer (or in some districts, motion to dismiss), and reply, as well as motions for factual development, such as discovery, record expansion, and evidentiary hearings. Appendix F presents examples of scheduling orders.

Some courts prefer to resolve procedural defenses, such as timeliness, exhaustion, and procedural default, in an interim order before obtaining points and authorities on the merits of claims; in these districts, a scheduling order may direct the state to limit its answer to affirmative procedural defenses or to file a motion to dismiss. Other courts prefer the state's answer to be a comprehensive pleading that both raises procedural defenses and addresses the merits of each of the petitioner's claims. The latter briefing approach provides flexibility for bypassing procedural defense issues for plainly meritless claims (see *infra* sections II.C, II.G, and II.I).

Courts that hold case-management conferences often issue post–case-management conference orders memorializing the details of what the parties and the court agreed on during the conference. If the court has granted a motion for further evidentiary development, that order usually is followed by a scheduling order setting forth relevant deadlines (for completing discovery, introducing evidence, filing objections, identifying witnesses, and setting forth a statement of disputed and undisputed facts). Appendix H contains examples of evidentiary hearing scheduling orders.

Some courts have magistrate judges assist in these initial stages of capital case management, either under district policy or on a case-by-case basis. In some of these courts, magistrate judges appoint counsel and issue scheduling orders before referring the case back to a district judge; in other courts, the magistrate judge continues with the case, resolving procedural motions, monitoring budgets, holding case-management conferences, and issuing recommendations on merits resolution.

The following subsections describe relevant law and more specific case-management approaches for various stages of capital habeas litigation.

A. Appointment and Compensation of Counsel

1. Requests for Counsel and Related Services; Applicable Law and Practice

Even before a capital habeas petition is filed, a petitioner is likely to file a request for court-appointed counsel. Although there is no constitutional right to counsel in habeas corpus proceedings,[6] 18 U.S.C. § 3599(a)(2) (and its identical predecessor statute, 21 U.S.C. § 848(q)(4)(B)) entitles an indigent petitioner who has been sentenced to death to be appointed one or more attorneys, at least one of whom must meet the experience requirements in that provision.[7] In *McFarland v. Scott*,[8] the Supreme Court held that because section 848(q) (now 18 U.S.C. § 3599(a)(2)) creates a statutory right to counsel for capital habeas corpus petitioners, the court should appoint such counsel before the petition is filed, so that counsel can assist in preparation of the petition.[9]

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6. Murray v. Giarratano, 492 U.S. 1, 8, 10 (1989).

7. 18 U.S.C. § 3599(a)(2), (c), (d) (West 2007).

8. 512 U.S. 849 (1994).

9. In 2008, the Judicial Conference Committee on Defender Services revised its timely appointment policy to encourage early appointment of death penalty habeas counsel in order to help reduce the delay that occurs after new federal habeas counsel is appointed.

The Guidelines for Administering the CJA and Related Statutes, in volume VII of the *Guide to Judiciary Policy*[10] urge courts to permit interim payments in death penalty cases and to issue a separate memorandum or order outlining payment procedures and detailing payment for expenses, travel, and compensation of counsel. As of January 1, 2010, attorneys' fees are capped at $178 per hour by 18 U.S.C. § 3599(g)(1).[11]

Under 18 U.S.C. § 3599(a)(2), the court has discretion to authorize funds for expert, investigative, and other services. Section 3599(f) prohibits ex parte authorization "unless a proper showing is made concerning the need for confidentiality." Section 3599(g)(2) caps investigative and expert fees at a total of $7,500 (for all combined services, not each service individually) unless the presiding district judge certifies a greater amount and the chief judge of the circuit approves it.

Courts sometimes have found it difficult to find qualified private attorneys for capital habeas cases, and some legislators and members of the public have criticized high payments made to CJA panel attorneys. Federal courts and administrators have adopted creative and flexible approaches to capital counsel appointment, several of which are described below. An individual judge might find that one of the following approaches to counsel appointment is already in place in his or her district; if not, one of these approaches might be adopted for use in a particular case.

a. Authorizing federal counsel to work in state court in cases where exhaustion is necessary. In section 2254 cases filed prior to 2009, the law was unclear whether federally compensated counsel were permitted to appear in state court for the petitioner when claims were returned for exhaustion.[12] Section 3599(e) of title 18 contemplates that federally appointed counsel will represent a petitioner throughout the federal habeas corpus case as well as in "other appropriate motions and procedures." In 2009, the Supreme Court, interpreting § 3599(e), held that district courts have the discretion to determine, on a case-by-case basis, whether it is appropriate for federal counsel to exhaust claims in state court during the course of federal habeas representation.[13] Thus, in districts with states that do not provide for appointment and/or compensation of state post-conviction counsel, courts have discretion to compensate federally appointed capital habeas counsel using CJA appropriations or to allow federal defender organizations to represent the petitioner in state court. In districts that do provide for the appointment and compensation of state post-conviction counsel, district courts may want to urge federally appointed counsel to seek appointment by the state court (if eligible to do so under the state's appointment process) or to work with a state-appointed attorney. Such an approach will also conserve federal resources.

b. Appointing state post-conviction counsel as federal habeas corpus counsel. In some districts, the state post-conviction attorneys are available to continue representation of

10. Available on the J-Net.

11. The Judicial Conference of the United States is authorized by 18 U.S.C. § 3599(g)(1) to annually raise the maximum hourly rate up to the aggregate of the overall average percentage of adjustments in the rates of pay for General Schedule federal employees. The Judicial Conference has raised the maximum hourly rate every year since 2006; the current maximum rate is available under "CJA Panel Attorney/Defender Info" on the J-Net. See *infra* sections II.A.2 and III.A for more information on budgeting and cost control.

12. See *infra* section II.G for a discussion of exhaustion requirements.

13. Harbison v. Bell, 129 S. Ct. 1481, 1489 n.7 (2009).

clients during federal habeas corpus proceedings, and courts may appoint the attorneys under the CJA for those proceedings.[14] The quality of such counsel, of course, depends in part on the state's program for post-conviction appointment, but there are significant benefits to having state attorneys continue their representation of clients in federal court. First, the attorneys are already well acquainted with the cases, thus reducing the time (and expense) necessary to research the record and file the federal habeas corpus petition. Second, fewer unexhausted claims may be presented in the federal habeas corpus petition, thus minimizing the need to suspend cases for state exhaustion proceedings (as well as the need for funding state court representation). Courts may also consider pairing a state post-conviction attorney who has little federal habeas experience with an experienced federal habeas CJA attorney, thus providing continuity on the case as well as an opportunity to expand the pool of qualified federal habeas counsel for future cases.

c. Appointing counsel from capital units in federal defender offices. Several federal and community defender offices accept appointment of their attorneys to capital habeas corpus cases, and some even have dedicated capital habeas units. Appointing these attorneys in lieu of appointing private attorneys with CJA funding not only generally ensures well-qualified counsel but also avoids the administrative complications of using CJA panel attorneys (e.g., budgeting expenses and voucher review). Some courts, either pursuant to district policy or in an individual case, combine the use of federal defenders and appointed counsel. For example, in the Eastern District of California, the selection board often teams an attorney from the federal capital habeas unit with a CJA panel attorney, such as the state post-conviction attorney. Not all courts find a combined approach to be efficient, however, and the usefulness of this approach will depend on the compatibility of teamed attorneys.

In the Central District of California, district judges first appoint a federal defender to the case and only use the panel of CJA attorneys if the federal defender is unable to take the case. Even as second chair, CJA panel attorneys may not be utilized in the Central District of California unless the case is sent back to state court for exhaustion and the federal defender is unavailable to provide representation in state court. In contrast, in the Eastern District of Tennessee, judges normally use (private) CJA panel attorneys initially, and appoint the federal defender as cocounsel if necessary.

d. Appointing counsel from state-funded or privately funded capital representation centers. State-funded or privately funded offices for capital defense representation exist in some states, such as the Office of Capital Collateral Representation in Florida, the Arizona Capital Representation Project, the California Habeas Corpus Resource Center, Kentucky's Department of Public Advocacy, and the North Carolina Center for Death Penalty Litigation. District courts in these states often appoint lawyers from these offices as counsel in federal habeas corpus cases and compensate them for their work through CJA vouchers. Because these attorneys are funded by state and private re-

14. *See* Admin. Office of the U.S. Courts, Guide to Judiciary Policy, vol. 7, § 620.20 (directing courts to consider appointment of an attorney who represented the petitioner during prior state court proceedings if the attorney is qualified and appointment would provide the most effective representation).

sources, there should be no need to expend CJA funds if counsel must later return to state court for exhaustion or other proceedings.

The state-funded centers generally cannot handle all petitioners in need of counsel; private attorneys or federal defender units often need to provide some representation in each district. Most state capital representation centers, therefore, also offer professional support to private CJA panel attorneys if needed.

e. Appointing federal counsel for simultaneous representation in state post-conviction and federal habeas proceedings. In the District of Maryland, counsel is jointly appointed by the state court and the federal court to represent the petitioner in both the state post-conviction proceedings and federal court. Invoking the authority of *McFarland v. Scott*,[15] the federal court authorizes CJA funds to compensate counsel for "federal research"—that is, research for claims that will eventually be filed in the federal habeas corpus petition. Attorney time and expert and investigative fees related to developing claims for state post-conviction litigation are paid by the Office of the State Public Defender. In the event a federal evidentiary hearing is conducted, CJA funds are used to compensate expert costs. The benefit of this approach is that quality federal habeas corpus counsel will be well acquainted with the claims by the time the federal case is filed, thereby reducing federal time and cost, as well as minimizing the likelihood of unexhausted claims appearing in the federal petition. When exhaustion is necessary, the exhaustion representation problem is avoided because the state pays the jointly appointed attorneys for the work necessary to pursue state remedies.

In Maryland, the district's CJA supervising attorney, who also is charged with voucher review, oversees this approach. The state public defender alerts the CJA supervising attorney when a prisoner sentenced to death will begin post-conviction proceedings and helps identify a CJA panel attorney to appoint. The case is given a civil miscellaneous number, and a judge who is responsible for CJA budgeting for the district further supervises counsel appointment and payment. When the petitioner files a federal petition, the case is randomly sent to a judge for permanent assignment. During the prepetition proceedings, the supervising judge asks appointed counsel to submit a budget. The CJA supervising attorney or the judge holds a meeting with counsel to work out the budget. Counsel then submit vouchers under standard CJA compensation procedures, and the judge reviews those vouchers for compliance with the approved budget. Further meetings between counsel and the CJA supervising attorney or the judge are conducted to work out budget adjustments, as needed.

The District of Maryland has a very small habeas caseload (only one case in December 2009). Other districts, especially those with a large number of prisoners sentenced to death, may have difficulty finding enough attorneys to handle early representation. In addition, there may be local objections to the expenditure of federal funds and appointment of federal counsel prior to the completion of state proceedings.

2. Budgeting and Voucher Review

When the petitioner is represented by private counsel compensated under the CJA, the court's case-management responsibilities include the review and approval of expenses

15. 512 U.S. 849, 856 (1994) (holding federal jurisdiction begins upon a request for counsel).

submitted in CJA vouchers. Some judges choose to review the vouchers themselves, while others use death penalty law clerks and staff attorneys[16] to conduct the review. In a few districts, CJA attorney administrators are designated specifically for reviewing CJA vouchers.[17]

Many courts require the CJA panel attorneys appearing before them to submit budgets in the cases prior to submitting vouchers. After the court has approved a budget, it reviews submitted vouchers for consistency. Some courts have regularized this practice through standard budgeting orders.[18]

B. Stay of Execution

Inmates often submit prepetition requests for stays of execution contemporaneously with requests for court-appointed counsel. Courts need not wait for a petition to be filed in order to grant a stay of execution. In *McFarland*,[19] the Supreme Court, interpreting section 2251, held that once a petitioner has invoked the 21 U.S.C. § 848(q) right to habeas corpus counsel (now codified at 18 U.S.C. § 3599), federal jurisdiction exists and the court has the power to grant a stay. Section 2251 was amended in 2006 as part of the USA Patriot Improvement and Reauthorization Act of 2005[20] to expressly permit a federal court to stay execution of a state prisoner's capital sentence for up to ninety days after counsel is appointed upon the filing of a request for counsel under 18 U.S.C. § 3599.[21]

Although section 2251 authorizes a federal court to stay execution of state judgments, it does not specify the standards that govern review of stay requests. Under *McFarland*,[22] the exercise of stay jurisdiction prior to a petition being filed is within the discretion of a federal court, but denial of a prepetition stay is improper if pendency of a scheduled execution does not afford a petitioner's appointed counsel time to meaningfully research and present habeas claims. Once a petition is filed, following the Supreme Court's decision in *Barefoot v. Estelle*,[23] the court should grant a stay if it is necessary to permit consideration of the merits and when there are "substantial grounds upon which relief might be granted." In *Lonchar v. Thomas*,[24] the Court explained that

16. *See infra* section III.C.

17. *See infra* section III.A.2.

18. *See infra* section III.A.1 for more details on various budgeting approaches.

19. 512 U.S. at 856.

20. Pub. L. No. 109-177, 120 Stat. 192 (2006).

21. Although limited to ninety days after appointment of counsel by section 2251(a)(3), a stay issued in conjunction with a request for appointment of counsel essentially remains in effect until the filing of the habeas petition, even if that filing occurs more than ninety days after appointment of counsel, because few states seek a new warrant of execution after expiration of the ninety-day period so long as the petitioner is actively investigating and preparing the habeas petition. In the event that a new warrant is sought after expiration of the ninety-day period under section 2251(a)(3) but prior to expiration of the applicable statute of limitations, a petitioner is likely to file a protective petition for purposes of ensuring a continuing stay under section 2251(a)(1), followed by an amended petition within the limitations period. *See* Pace v. DiGuglielmo, 455 U.S. 408, 416 (2008).

22. 512 U.S. at 858.

23. 463 U.S. 880, 892 (1983).

24. 517 U.S. 314 (1996).

when a petitioner requests a stay on a first petition and the court cannot dismiss the petition on the merits before the scheduled execution, the court should issue a stay and address the merits to prevent the case from becoming moot.

In cases involving states that the United States Attorney General has determined meet certain statutory counsel representation and compensation requirements ("opt-in" states), the court must issue an automatic stay upon the filing of a first petition,[25] and issue no stays for successive petitions unless the court of appeals has authorized the filing of a successive petition.[26] See Table 1 in section II.F, *infra*, for details.

Most federal courts of appeals have rules providing for a stay of execution pending determination of the appeal.[27] In addition, Federal Rule of Appellate Procedure 41(d)(2) allows a party to move for a ninety-day stay pending the filing of a petition for certiorari to the U.S. Supreme Court (requiring a showing that the petition presents a substantial question and that there is good cause for a stay). The ninety-day stay is extendable for good cause or, if a stay is obtained, until the Supreme Court's final disposition.[28]

C. Habeas Petition

The practical result of federal habeas corpus law's minimizing the number of times a capital defendant may file a petition is essentially a "one-shot" habeas corpus regimen. That regimen places a great deal of importance on the first petition filed because it is likely to be the only petition reviewed on the merits. Judges sometimes emphasize this in initial orders of appointment and procedure. Because of the importance of the first petition, courts can expect counsel to request significant time and expense in preparation of that petition, especially if they are new to the case.[29]

Rule 2 of the Rules Governing § 2254 Cases[30] directs that a petition "specify all grounds for relief available to the petitioner," including the facts supporting each ground. Because capital habeas petitioners have the assistance of counsel, many courts require that the petition include legal points and authorities in support of the petitioner's claims. However, the latter may also be filed separately if, for example, there is insufficient time remaining under the applicable limitations period or if the court prefers to dispose of claims subject to a procedural defense before having the parties expend time and resources addressing the merits of claims.

A bifurcated case approach—addressing procedural defenses before merits—has both advantages and disadvantages. An advantage of bifurcation is that it may conserve resources because the parties will not spend time briefing legal points and authorities for claims that are untimely, unexhausted, or defaulted in state court. A disadvantage is that bifurcation limits a court's ability to bypass procedural defense arguments when a

25. § 2262(a).

26. § 2261(c).

27. *See, e.g.*, Fourth Circuit Rule 22(b)(3); Seventh Circuit Rule 22(h); Ninth Circuit Rule 22-2.

28. Fed. R. App. P. 41(d)(2)(B).

29. *See* McCleskey v. Zant, 499 U.S. 467, 498 (1991) ("petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition").

30. 28 U.S.C. foll. § 2254.

claim is plainly meritless.[31] In addition, bifurcation necessarily takes longer (and consequently increases costs for CJA-appointed cases) because the court must make an interim ruling on the procedural status of the petitioner's claims in order to identify for the parties the claims that require points and authorities. This also means that a court cannot resolve a petition in "one sitting."

The scope of the state's answer, which should be filed sixty to ninety days after the petition, will vary depending on the type of petition the petitioner files. In districts that prefer to address procedural defenses before briefing points and authorities, the answer may be limited to appropriate admissions and denials, together with the assertion of all procedural defenses. Alternatively, the state may be directed to file a motion to dismiss in lieu of an answer. However, if the petition is a comprehensive filing that includes all grounds for relief, supporting facts, and legal points and authorities, the answer should also be comprehensive, alleging all procedural and substantive defenses. If the petition and answer are fully briefed, the petitioner files a reply at this juncture.

D. Successive Petitions

When the court determines that a petition is not a first petition, it must decide whether to dismiss the petition outright. There are two types of successive petitions: (1) those that present claims for relief that were already adjudicated in an earlier proceeding; and (2) those that present new claims.

Petitions in which no new claims are presented must be dismissed.[32] Review of petitions that raise new claims is extremely limited. In order for such a successive petition to receive merits review in the district court, the petitioner must first obtain an order authorizing such filing from a three-judge panel of the court of appeals.[33] The court of appeals may grant such an order only if the petitioner makes a prima facie showing of one of the two prongs specified in section 2244(b)(2): (1) the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." If a successive petition does not comply with either of these procedural requirements, it is prohibited. The court of appeals must make its decision to grant or deny the application within thirty days,[34] and its decision is not appealable or subject to a writ of certiorari to the U.S. Supreme Court.[35]

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31. *See infra* section II.I.

32. § 2244(b)(1).

33. 28 U.S.C. § 2244(b)(3)(B) (West 2004).

34. 28 U.S.C. § 2244(b)(3)(D) (West 2004).

35. *Id.* § 2244(b)(3)(E). This provision was upheld against constitutional challenge in *Felker v. Turpin*, 518 U.S. 651 (1996). *But see* Castro v. United States, 540 U.S. 375 (2003) (holding that certiorari review is not prohibited where petitioner did not seek authorization to file a successive petition or where the "subject" of the petition is not the circuit court's "denial of an authorization").

A subsequent petition that raises the claim that the petitioner is incompetent to be executed under *Ford v. Wainwright*[36] provides one exception to the AEDPA limitations on successive petitions. In *Panetti v. Quarterman,*[37] the Supreme Court held that a ripe *Ford* claim brought for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application is not "successive," and thus section 2244(b) does not apply. Other exceptions include petitions dismissed without prejudice for failure to exhaust remedies,[38] petitions dismissed as premature or for a procedural defect,[39] and petitions raising claims not available at the time of the previous petition.[40]

A motion filed under Rule 60(b) of the Federal Rules of Civil Procedure may be construed as a second or successive habeas application under 28 U.S.C. § 2244(b) if it advances a new claim or new legal authority or evidence in support of a previously litigated claim. In *Gonzalez v. Crosby*,[41] the Court explained that an appropriate Rule 60(b) motion attacks not the substance of a court's resolution of a claim on the merits but some defect in the integrity of the federal habeas proceedings.

E. Timeliness of Petition

Under section 2244(d)(1), the first petition must be filed within one year of the date on which (1) the judgment of conviction became final (the most common situation);[42] (2) an impediment to filing, created by the state or federal government, was removed; (3) the Supreme Court recognized the right asserted and made it retroactively applicable to cases on collateral review; or (4) the factual predicate of the claim could have been discovered by due diligence. Because the statute of limitations is not jurisdictional, district courts are not obligated to raise the time bar sua sponte, but may do so after providing the parties with an opportunity to present their positions.[43]

Section 2244(d)(2) tolls the one-year limitations period for section 2254 cases while a "properly filed" petition is "pending" on "state post-conviction or other collateral review." The Supreme Court has held that this tolling period includes the time between a lower state court's decision and the filing of a notice of appeal to a higher state court,[44] but does not include the time between denial of state post-conviction relief and pendency of a petition for certiorari in the U.S. Supreme Court seeking review of

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36. 477 U.S. 399 (1986).

37. 551 U.S. 930, 945 (2007).

38. *See, e.g.*, Camarano v. Irvin, 98 F.3d 44, 47 (2d Cir. 1996).

39. *See, e.g.*, Johnson v. United States, 196 F.3d 802, 804 (7th Cir. 1999).

40. *See, e.g.*, Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003) (holding that a petition raising a claim challenging an involuntary medication order entered after completion of the first petition was not "second or successive").

41. 545 U.S. 524, 531–32 (2005).

42. Finality under section 2244(d)(1)(A) is defined as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Direct review is concluded when the availability of direct appeal to the state courts or the U.S. Supreme Court is exhausted. Jimenez v. Quarterman, 129 S. Ct. 681, 685 (2009); Clay v. United States, 537 U.S. 522, 527 (2003).

43. Day v. McDonough, 547 U.S. 198, 205, 209–10 (2006).

44. Carey v. Saffold, 536 U.S. 214, 217, 221 (2002).

that denial.[45] Statutory tolling during the pendency of "other collateral review" also does not include federal habeas review.[46] Many other issues surrounding tolling, such as the meaning of "pendency" and "properly filed," continue to be litigated.[47]

In addition to statutory tolling under section 2244(d)(2), most circuit courts have ruled that a habeas petitioner may be entitled to equitable tolling. In *Lawrence v. Florida*,[48] the Supreme Court assumed without deciding that section 2244(d) allows for equitable tolling and stated that, to be entitled to such tolling, the petitioner had to demonstrate that he diligently pursued his rights and was prevented from timely filing by some extraordinary circumstance. The Court has granted certiorari in *Holland v. Florida*[49] on the question whether "gross negligence" by collateral counsel qualifies as an exceptional circumstance warranting equitable tolling; a ruling is expected by June 2010.

As discussed next in section F, filing deadlines for petitions filed in "opt-in" states are significantly more stringent.

F. Expedited Procedures for "Opt-In" States

Chapter 154 of title 28, created by the AEDPA, provides expedited procedures for section 2254 capital habeas corpus petitions in states that "opt in" to the chapter by meeting detailed counsel-representation and compensation requirements.

The USA Patriot Improvement and Reauthorization Act of 2005[50] shifted the responsibility for certifying a state as having a qualifying mechanism from the federal courts to the Attorney General of the United States. Pursuant to the Act, the Department of Justice (DOJ) is in the process of promulgating regulations to implement the certification procedures. Consequently, as of this writing no state has yet been certified under chapter 154.

To qualify for expedited processing of capital habeas petitions, a state is required by chapter 154 to establish a "mechanism for the appointment, compensation, and reimbursement of counsel" for all indigent death-sentenced prisoners in state post-conviction proceedings.[51] If the Attorney General finds that the state has met these requirements and the court determines that state post-conviction counsel was appointed pursuant to this mechanism, the procedures and deadlines set forth in 28 U.S.C. §§ 2261–2266 will apply to the processing of section 2254 petitions filed in federal courts in that state. Table 1 provides an overview of these provisions.

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45. Lawrence v. Florida, 549 U.S. 327, 332 (2007).

46. Duncan v. Walker, 533 U.S. 167, 172 (2001).

47. Allen v. Siebert, 552 U.S. 3, 4 (2007) (holding that a petition dismissed by a state court as untimely under state law was not "properly filed" within the meaning of section 2244(d)(2)); Pace v. DiGuglielmo, 544 U.S. 408, 414, 417 (2005) (same); Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that an application for state post-conviction relief is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings").

48. 549 U.S. 327, 336 (2007).

49. 539 F.3d 1334 (11th Cir. 2008).

50. Pub. L. No. 109-177, 120 Stat. 192 (2006).

51. 28 U.S.C. § 2261 (West 2006).

Table 1: Expedited Procedures for "Opt-In" States

Stage of Litigation	Special Procedures for Opt-In States
Stay of Execution	First § 2254 petition: automatic stay must issue. § 2262(a). Successive petitions: no stay will issue unless filing is authorized by the court of appeals. § 2261(c).
Petition Filing	Petition must be filed within 180 days after "final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." § 2263(a). Federal court can extend the deadline by 30 days upon a showing of good cause by petitioner. § 2263(b)(3).
Unexhausted Claims Review	Unexhausted claims may be reviewed only if the failure to raise the claim properly in state court resulted from (1) unconstitutional state action, (2) the Supreme Court newly recognizing a federal right that is retroactively applicable to the case, or (3) the claim being based on facts that could not have been discovered in time to be presented earlier. § 2264(a).
Amending the Petition	Petitioner can amend the petition only if the claim meets the grounds for successive petitions under § 2244(b). § 2266(b)(3)(B).
Federal Review	The district court shall render a final determination and enter a final judgment on a § 2254 petition not later than 450 days after the petition was filed, including 120 days for the parties to complete briefing. The Court may extend the deadline by no more than one 30-day period, upon a showing that "the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application." § 2266(b)(1)(C). Capital habeas petitions are given priority over all non-capital matters in both district courts and courts of appeals. § 2266(a).
Determination of Appeal	The court of appeals shall render a final determination of any appeal on a § 2254 petition not later than 120 days from the filing of the reply brief, or if there is no reply brief, the answering brief. § 2266(c)(1)(A). Petition for rehearing or for rehearing en banc must be decided within 30 days of the date the petition or responsive brief is filed. If rehearing is granted, the appellate court must render final determination within 120 days after issuance of an order granting the rehearing. § 2266(c)(1)(B).

G. Exhaustion of State Remedies; Mixed Petitions

Assuming a section 2254 petition is not dismissed on a basis already described, the court must determine whether the petitioner has exhausted state remedies. Section 2254(b)(1)(A) provides that federal habeas corpus relief is not available to a state inmate unless he or she has "exhausted the remedies available in the courts of the state."

This exhaustion requirement is satisfied if the claims have been "fairly presented" to the highest state court.[52] If the federal claims have not been exhausted in state court, the claims may still be reviewable for federal habeas corpus relief if "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant."[53] The state also may choose to affirmatively waive exhaustion.[54] In addition, the court may determine that a petitioner no longer has an available state remedy for exhausting a claim that was not previously exhausted. In that situation, the claim is "technically" exhausted because the petitioner is barred from now raising it in state court, but procedurally defaulted because it was not properly exhausted.[55]

If the court finds that a section 2254 petition contains some unexhausted claims, two important case-management questions arise:

1. How can the court handle a mixed petition such that potentially valid claims are not barred by the one-year limitations period?
2. How should representation of the petitioner during state exhaustion be funded?

1. Management of Mixed Petitions Returned for Exhaustion

Historically, courts following *Rose v. Lundy*[56] would either dismiss the petition entirely and send it back to state court or allow the petitioner to amend it to present only exhausted claims. The one-year filing deadline,[57] however, has created new questions about how to handle a mixed petition in order to avoid barring a potentially valid federal claim. Recognizing this conundrum, the Supreme Court held in *Rhines v. Weber*[58] that a district court has discretion to stay a mixed petition in order to allow the petitioner to present his unexhausted claims to the state court and then to return to federal court for review of his perfected petition. However, because staying a petition "frustrates AEDPA's objectives of encouraging finality," stay and abeyance is appropriate only "when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court," his unexhausted claims are not plainly

52. O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999); Picard v. Connor, 404 U.S. 270, 275 (1971). In *Boerckel*, 526 U.S. at 847, the Court acknowledged that discretionary petitions to a state's highest court are required for exhaustion only if state law or rule makes such filings part of the state's ordinary appellate review procedure. Consequently, some states have eliminated discretionary petitions as part of their appellate process. *See, e.g.*, Tenn. Sup. Ct. R. 39.

53. 28 U.S.C. § 2254(b)(1)(B).

54. 28 U.S.C. § 2254(b)(3).

55. *See* Coleman v. Thompson, 501 U.S. 722, 732 (1991) (holding that a "habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him"); Woodford v. Ngo, 548 U.S. 81, 92–93 (2006) (same); *see also infra* section II.I.

56. 455 U.S. 509, 510 (1982) (holding that a federal court may not adjudicate a "mixed" § 2254 petition).

57. *See* 28 U.S.C. § 2244(d)(1) (West 2004).

58. 544 U.S. 269 (2005).

meritless, and he demonstrates that he has not engaged in abusive litigation tactics or intentional delay.[59]

Another approach is for the court to revert to the historical practice of dismissing the entire mixed petition as soon as possible, so as to allow the petitioner sufficient time to return to federal court within the limitations period and to motivate the petitioner to appear in state court quickly enough to toll the clock under section 2244(d)(2). Finally, the court confronted with a mixed petition containing nonmeritorious claims, regardless of exhaustion, can avoid the abeyance question altogether and deny the mixed petition on the merits, following the specific approval of this practice in section 2254(b)(2). Thus, some district courts request initial briefing on not only exhaustion status and other procedural issues, but also the merits of every claim.

2. Funding for Representation of Petitioner in State Exhaustion Proceedings

As mentioned previously, sending a section 2254 case back for state exhaustion creates additional case-management decisions. As stated in 18 U.S.C. § 3599(e), appointed counsel must represent the defendant through "every subsequent stage of judicial proceedings." The Supreme Court has now clarified, in *Harbison v. Bell*, that on a case-by-case basis, district courts have the discretion under section 3599(e) to allow federally appointed counsel to represent a petitioner in state court for the purpose of exhausting federal habeas claims.[60]

This ruling is in line with policy previously adopted by the Judicial Conference Committee on Defender Services (the body that allocates federal defender services funds), which states: "Defender Services appropriated funds may not be used to represent an individual under a state-imposed death sentence in a state proceeding unless a presiding judicial officer in a federal judicial proceeding involving the individual has determined that such use of Defender Services appropriation funds is authorized by law."[61]

Prior to *Harbison*, individual federal judges and districts took various case-management measures to facilitate the handling of cases on state exhaustion, such as appointing state-funded cocounsel or directing counsel to other state-funded resources.[62] Some courts (such as the Fifth, Sixth, and Eighth Circuits),[63] following the Eleventh Circuit in *In re Lindsey*,[64] have refused to authorize such use of CJA funds. A

59. 544 U.S. at 277–79. Most courts that hold federal proceedings in abeyance to permit exhaustion of state remedies will direct petitioners to file status reports, at least quarterly, to advise the court on the status of the state litigation.

60. 129 S. Ct. 1481, 1489, n.7 (2009).

61. Report of the Committee on Defender Services to the Judicial Conference of the United States 9–10 (March 1999) (available on Westlaw in the JCUS database).

62. The Eastern District of Arkansas has permitted federally appointed attorneys to return to state court on a mixed petition and receive payment from federal funds. In these cases, the court appointed counsel, the petitioner filed a federal petition, and then the petitioner asked to return to state court to exhaust a claim, ultimately returning to federal court. See *supra* section II.A.1 for further discussion of the use of federal counsel and other approaches to appointing counsel for habeas cases.

63. *See, e.g.*, House v. Bell, 332 F.3d 997, 998–99 (6th Cir. 2003); Sterling v. Scott, 57 F.3d 451, 458 (5th Cir. 1995); Hill v. Lockhart, 992 F.2d 801, 803 (8th Cir. 1993).

64. 875 F.2d 1502 (11th Cir. 1989).

parallel question is whether a federal judge may or should authorize payment of investigative or expert services for developing unexhausted federal claims.[65]

It remains to be seen whether the circuit courts will revisit their positions on this issue in light of the Supreme Court's decision in *Harbison*.

H. Amended Petitions

Section 2242 permits a petitioner to amend a petition for writ of habeas corpus pursuant to the Federal Rules of Civil Procedure. After a brief period in which a party may amend a petition as of right, the judge has sole discretion to grant leave to amend, upon consideration of four factors enumerated in *Foman v. Davis*[66]: (1) undue delay, (2) bad faith or dilatory motive, (3) undue prejudice to opposing party, and (4) futility of amendment.

With respect to futility, timeliness may be the deciding factor in determining whether amendment is appropriate. In *Mayle v. Felix*,[67] the Supreme Court construed the relation-back principle in Rule 15(c)(2) of the Federal Rules of Civil Procedure with respect to the one-year limitations period under section 2244(d)(1). The Court held that pleading amendments relate back to the date of the original (timely filed) petition when the claim asserted in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."[68] The Court rejected the argument that a common core of operative facts could be interpreted to include all facts arising out of a petitioner's trial, conviction, or sentence.[69] New claims supported by facts that differ in both "time and type" from those included in the original petition do not relate back and are thus untimely, absent satisfaction of an alternative limitations-period-trigger date under section 2244(d)(1)(B)–(D).[70] In contrast, if a new claim merely clarifies or amplifies facts already alleged in support of a claim or theory in the original petition, it may relate back to the date of the original petition and avoid a time bar.[71]

I. Procedural Default; Adequate and Independent State Bar

As a matter of comity and federalism, federal courts will not review a petitioner's claim that was denied by a state court on the basis of independent state law adequate to support the judgment.[72] The "adequate and independent state ground" doctrine itself is a

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65. The Ninth Circuit has authorized ancillary service providers to assist in the development of unexhausted federal claims. *See* Calderon v. United States Dist. Court (Gordon), 107 F.3d 756 (9th Cir. 1997) (holding district court was within its discretion to determine whether a section 848(q) request for investigative fees would assist petitioner in preparing for federal habeas defense, even though funds would be used to develop unexhausted federal claims).

66. 371 U.S. 178, 182 (1962).

67. 545 U.S. 644 (2005).

68. *Id.* at 656.

69. *Id.* at 660–61, 664.

70. *Id.* at 657, 660.

71. *Id.* at 653.

72. Wainwright v. Sykes, 433 U.S. 72, 81 (1977) (federal courts generally may not review a state court's denial of a state prisoner's federal constitutional claim if the state court's decision rests on a state procedural default that is independent of the federal question and adequate to support the prisoner's continued cus-

rather complex area of federal case law requiring, among other things, a finding that the state rule is not ambiguous and is "firmly established and regularly applied."[73] When such a state procedural rule (e.g., requiring timely presentation of claims) bars a federal claim in state court, then a district court may not review the merits of that claim, unless the petitioner shows cause and prejudice or shows that a miscarriage of justice would otherwise result.[74] If a petitioner alleges cause and prejudice to overcome a state procedural bar, then the resolution of the procedural default issue can overlap significantly with the merits of the claim.[75]

Where merits resolution of a suspected (or asserted) procedurally defaulted claim adverse to the petitioner will preserve judicial resources, the court need not undertake the sometimes cumbersome analysis of the independent and adequate state ground doctrine or assess whether the petitioner has established cause and prejudice or a fundamental miscarriage of justice.[76]

J. Further Fact Development

Whether a petitioner in federal court is permitted to further develop facts in support of habeas claims may depend on the individual state's post-conviction process. In states where prisoners are provided with the opportunity to develop post-conviction claims and hearings are held to resolve disputed facts, further evidentiary development in federal court occurs infrequently. However, when a petitioner presents one or more colorable claims that have survived all procedural impediments and that, despite the petitioner's diligence in state court, were not adequately developed in state proceedings,

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tody, without cause and prejudice). Any other rule would essentially allow section 2254 petitioners to evade the exhaustion requirement and the principle of federalism respecting the "States' interest in correcting their own mistakes." Coleman v. Thompson, 501 U.S. 722, 731–32 (1991).

73. *Coleman*, 501 U.S. at 729; Ake v. Oklahoma, 470 U.S. 68, 74–75 (1985) (state rule based in part on federal law is not an independent state ground); Ford v. Georgia, 498 U.S. 411, 423–24 (1991) (adequate state law must be "firmly established" and "regularly applied" at the time of default). There are exceptional cases in which "exorbitant application" of an otherwise sound state rule renders that rule inadequate to bar federal review. Lee v. Kemna, 534 U.S. 362, 376 (2002).

74. *Coleman*, 501 U.S. at 750; Murray v. Carrier, 477 U.S. 478, 488 (1986) (clarifying meaning of "cause"); United States v. Frady, 456 U.S. 152, 170 (1982) (specifying that "prejudice" must mean actual and substantial disadvantage); Smith v. Murray, 477 U.S. 527, 538 (1986) (distinguishing between "actual" and "legal" innocence, and concluding that when an alleged constitutional error "did not serve to pervert the jury's deliberations concerning the ultimate question" whether the petitioner constituted a continuing threat to society, refusal to consider the defaulted claim did not carry with it "the risk of a manifest miscarriage of justice").

75. *See, e.g.,* Strickler v. Greene, 527 U.S. 263, 282 (1999) (holding that cause and prejudice asserted by petitioner to avoid procedural default of *Brady* claim constitute two components of the alleged *Brady* violation itself).

76. *See* Lambrix v. Singletary, 520 U.S. 518, 525 (1997) ("We do not mean to suggest that the procedural-bar issue must invariably be resolved first; only that it ordinarily should be."). This approach has been used in the Ninth Circuit, where the process for even determining the existence of an independent and adequate state procedure is complex. *See* Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same."); Batchelor v. Cupp, 693 F.2d 859, 864 (9th Cir. 1982) (the court may decide the merits of a case if resolving procedural default is more complicated and time-consuming).

evidentiary development in federal court may be required. The three procedures for further fact development are an evidentiary hearing, discovery, and record expansion.

1. Evidentiary Hearing

An evidentiary hearing is authorized under Rule 8 of the Rules Governing § 2254 Cases for the development of a colorable claim when the state court has not reliably found the relevant facts and the claim, if proved, would entitle the petitioner to relief.[77] However, pursuant to section 2254(e)(2), a federal court may not hold a hearing unless it first determines that the petitioner exercised diligence in trying to develop the factual basis of the claim in state court.[78] If the failure to develop a claim's factual basis is attributable to the petitioner (i.e., he or she was not diligent in state court), a federal court may hold an evidentiary hearing only if the claim relies on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence," and, in addition to one of these, "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."[79]

When an evidentiary hearing is granted, the court may initiate additional case-management procedures to prepare for the hearing. For example, the court may recommend that the parties meet and confer within a specified time, or may require a prehearing conference in which both parties meet with the judge to discuss how the hearing will substantively proceed. Appendix H contains examples of evidentiary hearing scheduling orders.

Disputed facts can be resolved in ways other than the presentation of live testimony, including by declaration, deposition, and documents produced through discovery or record expansion. In some cases, opposing counsel may agree on some facts and enter a formal stipulation to that effect. These alternative methods may be more efficient in terms of judicial economy and cost-effective from a case-management per-

77. Schriro v. Landrigan, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegation, which, if true, would entitle the applicant to federal habeas relief").

78. *See also* Williams (Michael) v. Taylor, 529 U.S. 420 (2000) (holding that subsection (e)(2) precludes an evidentiary hearing only if the failure to develop the factual basis of a claim is due to a "lack of diligence or some greater fault attributable to the prisoner or the prisoner's counsel"). The circuits' views regarding the interrelation between fact exhaustion and fact development are divergent. In the Fifth Circuit, diligence under section 2254(e)(2) need not be assessed if the new facts do not render the claim unexhausted under *Vasquez v. Hillery*, 474 U.S. 254 (1986). Morris v. Dretke, 413 F.3d 484, 498 (5th Cir. 2005). In the Sixth and Ninth Circuits, the courts address both exhaustion and diligence when new facts are introduced for the first time in federal habeas proceedings. Richey v. Bradshaw, 498 F.3d 344, 352 (6th Cir. 2007); Pinholster v. Ayers, 590 F.3d 651, 668 (9th Cir. 2009) (explaining that the AEDPA requires federal courts to assess whether the petitioner was diligent *and* whether new facts render the claim unexhausted).

79. 28 U.S.C. § 2254(e)(2).

spective because they reduce the number of issues that require specific attention at the live evidentiary hearing.[80]

2. Discovery

Formal discovery is authorized in Rule 6 of the Rules Governing § 2254 Cases only by leave of court upon a showing of good cause. Good cause exists where specific allegations in the petition[81] convince the court that the petitioner may be entitled to relief if the evidence solicited were to be developed.[82] Because of the nature of habeas corpus, the expansive construction of relevance in civil cases—to embrace all information "reasonably calculated to lead to the discovery of admissible evidence," as specified in Federal Rule of Civil Procedure 26(b)(1)—is not appropriate in capital habeas cases. Habeas corpus is not a proceeding to *learn* facts.[83]

3. Record Expansion

The record expansion procedure under Rule 7 of the Rules Governing § 2254 Cases facilitates the court's consideration of evidence developed through investigation and discovery. Under Rule 7(a), the court may require authentication of the materials presented. Record expansion follows and works in tandem with sections 2246 and 2247[84] to allow admissibility of proceedings and records conducted or filed in state court, or developed on federal habeas corpus. If the petitioner seeks to expand the record to introduce new evidence never presented in state court for the purpose of establishing the factual predicate of a claim, he or she may have to satisfy section 2254(e)(2) and show that he or she exercised diligence in state court to develop the evidence now proffered in federal proceedings.[85] If the petitioner seeks to expand the record for rea-

80. *See* Blackledge v. Allison, 431 U.S. 63, 81–82 (1977) (courts may employ "a variety of measures in an effort to avoid the need for an evidentiary hearing," including record expansion).

81. In the Ninth Circuit, petitioners are not permitted to propound discovery until after the petition is filed. Calderon v. U.S. Dist. Ct. (Nicolaus), 98 F.3d 1102, 1106 (9th Cir. 1996). In *Orbe v. True*, 201 F. Supp. 2d 671 (E.D. Va. 2002), the Eastern District of Virginia reached the same result. Citing *Nicolaus*, it held that "federal courts do not have authority to order pre-petition discovery in capital habeas cases." *Id.* at 681.

82. Harris v. Nelson, 394 U.S. 286, 300 (1969); *see also* Bracy v. Gramley, 520 U.S. 899, 908–09 (1997) (holding that discovery is indicated where specific allegations give the court reason to believe that a petitioner may be able to demonstrate that he is entitled to relief).

83. *See Harris*, 394 U.S. at 297 ("broad-ranging preliminary inquiry is neither necessary nor appropriate in the context of a habeas corpus proceeding").

84. Section 2246 of title 28 provides: "On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits." Section 2247 of title 28 provides: "On application for a writ of habeas corpus[,] documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence."

85. Holland v. Jackson, 542 U.S. 649, 653 (2004) (per curiam) (holding that section 2254(e)(2) restrictions apply to evidence presented without an evidentiary hearing); Mark v. Ault, 498 F.3d 775, 788 (8th Cir. 2007); Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005).

sons other than to introduce evidence to bolster the merits of his or her claim, the diligence requirement of section 2254(e)(2) may not apply.[86]

K. Scope of Federal Review

Assuming all procedural criteria have been met, the court takes up the substance of the remaining claims in the petition to determine whether relief should be granted. Section 2254(d) states that federal habeas corpus relief will not be granted with respect to any claim adjudicated on the merits in state court unless the adjudication of the claim

1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[87]

There has been considerable litigation since the enactment of the AEDPA over the meaning and application of section 2254(d). Some key issues include the meaning of "contrary to," "unreasonable application of," and "clearly established Federal law, as determined by the Supreme Court."[88] Courts should consult circuit law carefully when ruling on these issues.

If a federal court determines that a constitutional error occurred in state court and such error was structural, no showing of prejudice is required. Structural errors are those that affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself."[89] For nonstructural errors, if review of the error did not necessarily include a prejudice analysis (as would be the case with a *Strickland* or *Brady* claim, for example),[90] then the court must assess whether the error had a "sub-

86. Boyko v. Parke, 259 F.3d 781, 790 (7th Cir. 2001) (declining to apply section 2254(e)(2) when expansion of the record was used for reasons other than to introduce new factual information on merits of claim).

87. 28 U.S.C. § 2254(d) (West 2004).

88. *See, e.g.*, Williams (Terry) v. Taylor, 529 U.S. 362, 399 (2000) (holding that the petitioner's constitutional right to effective assistance of counsel was violated and that the state supreme court's refusal to set aside his death sentence was contrary to, or involved an unreasonable application of, federal law within the meaning of § 2254(d)(1)); Bell v. Cone, 535 U.S. 685, 699 (2002) (holding that the claim was governed by *Strickland* and that the state court decision was neither "contrary to" nor involved an "unreasonable application of clearly established Federal law" under section 2254(d)(1)) because the state court decision was not "objectively unreasonable"; Lockyer v. Andrade, 538 U.S. 63, 73–74 (2003) (holding that the Ninth Circuit erred in ruling that the decision of the California Court of Appeal affirming consecutive terms of twenty-five years to life in prison for a "third strike" conviction was contrary to, or an unreasonable application of, clearly established federal law of gross disproportionality in punishment); Carey v. Musladin, 549 U.S. 70, 74 (2006) (reiterating that "clearly established Federal law" in section 2254(d)(1) refers to the holdings, as opposed to the dicta, of the Supreme Court's decision as of the time of the relevant state-court decision).

89. Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

90. Strickland v. Washington, 466 U.S. 668, 694 (1984) (claim alleging ineffective assistance of counsel requires showing a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different); Brady v. Maryland, 373 U.S. 83, 88–89 (1963) (claim alleging a disclosure violation requires showing a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different).

stantial and injurious effect" on the verdict or sentence.[91] If a court has "grave doubt" concerning whether the error affected the verdict, the error is not harmless.[92]

L. Culmination of District Court Review

In states that have not met the statutory criteria for expedited processing of capital habeas cases (see *supra* section II.F), there are no limitations on the amount of time district courts can take to review a capital habeas corpus petition.

Consistent with Rule 11 of the Rules Governing § 2254 Cases (effective Dec. 1, 2009), a court must issue or deny a Certificate of Appealability (COA) when it enters a final order[93] that is adverse to the petitioner. Although the rule provides that a court may allow supplemental briefing on the issue whether a COA should be granted, courts should allow such briefing only if the pleadings already filed in the case do not provide a sufficient basis for ruling.

The petitioner has twenty-eight days to request modification of the judgment pursuant to Federal Rule of Civil Procedure 59(d). New Rule 11(a), however, cautions that the district court's grant of such a motion does not extend the time during which the petitioner must file a notice of appeal. If a court addresses claims in stages, the court should rule on whether it is inclined to grant or deny a COA at the time it addresses the specific claim and then include in the final dispositive order whether a COA is granted or denied.

M. Appellate Review

Federal Rule of Appellate Procedure 22 and 28 U.S.C. § 2253 require a judge to either issue a COA or state the reasons for not issuing one. Without such a certificate, no appeal may proceed. A COA may be issued only upon a "substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[94] For procedural rulings, a COA should be issued only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the court's procedural ruling was correct.[95] In 2003, the Supreme Court cautioned that a court should not refuse to grant the COA simply because it believes the petitioner will not prevail on the merits.[96]

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91. Fry v. Pliler, 551 U.S. 112, 119–20 (2007); Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

92. O'Neal v. McAninch, 513 U.S. 432, 435 (1995).

93. The "final order" issued by a district court ordinarily is the one denying partial or total relief on the petition and directing the clerk of court to enter judgment.

94. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

95. *Id.*

96. Miller-El v. Cockrell, 537 U.S. 322 (2003) (holding that the Fifth Circuit should have issued a COA because section 2253(c)(2) requires only a substantial showing of the denial of a constitutional right, through a showing that jurists of reason could disagree with the district court's resolution of the constitutional claims or could conclude that the issues were adequate to allow the petition to proceed further). *See also* Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (holding that a petitioner need not show he should prevail on the merits in order to be granted a COA).

If a COA is denied in whole or in part by a district court judge, a petitioner may request a COA or expansion of a COA from the court of appeals.

N. Execution-Related Matters

In advance of a concrete execution date, some district courts either formally (e.g., by local rule, general order, or status hearing) or informally (e.g., by written or oral communication with habeas counsel) establish procedures for any "last minute" filings, such as civil rights actions, successive habeas petitions, motions for temporary restraining order, and stays of execution. Such procedures may include requiring counsel to provide

1. courtesy copies of any state court filings;
2. prior notice to the court during regular business hours if an after-hours filing is contemplated; and
3. twenty-four-hour contact information for counsel for both parties as well as the prison warden.

A court also may want to establish internal guidelines or checklists for court staff that set forth filing and appeal procedures. A contact list for all counsel, prison officials, and appellate court personnel is another valuable tool.

Imminent execution dates also generally involve applications for clemency. Under *Harbison v. Bell*,[97] a federal judge has authority to authorize payment of attorneys' fees for representing a condemned client in state clemency proceedings.

97. 129 S. Ct. 1481, 1491 (2009).

III. District-Wide and Circuit-Wide Approaches to Capital Habeas Corpus Case Management

This section summarizes several of the procedures, policies, and programs federal courts have implemented to meet the aggregate case-management needs of capital habeas cases in their jurisdictions and to track the progress of capital habeas cases within the district or circuit.

A. Case-Management and Budgeting Plans

In an effort to standardize the processing of individual capital habeas cases and provide guidance about such things as briefing procedures, case budgeting, and voucher submission, some districts have developed standardized orders, model case-management plans, general procedures orders, and local rules. In addition, several circuits have implemented cost policies governing the capital habeas cases in their district courts.

The appendices to this resource guide present examples of many standardized orders, general procedures, and local rules used in the district courts:

- Appendix A contains examples of orders staying execution.
- Appendix B contains examples of orders appointing counsel.
- Appendix C includes budgeting orders, case-management plans, and circuit cost policies.
- Appendix D contains local rules relating to capital cases adopted by some districts.
- Appendix E contains examples of general procedure orders.
- Appendix F is composed of sample scheduling orders.
- Appendix G contains examples of orders addressing exhaustion/stay and abeyance.
- Appendix H includes examples of orders scheduling evidentiary hearings.

1. Standard Budgeting Orders

For cases involving CJA appointments, some district courts have standard orders that require counsel to submit a budget prior to voucher approval.[98] For example, the Western District of Oklahoma includes budgeting in its standard "general procedures" order following appointment of counsel.[99]

In the Ninth Circuit, budgeting is a central part of its circuit-wide capital habeas costs policy, and the Circuit Executive's Office has created standardized Excel budgeting worksheets for use by counsel and the courts.[100] In most districts in the Ninth Circuit, death penalty law clerks and staff attorneys monitor the budgeting scheme, doing everything from preparing the initial budgeting forms to reviewing the submitted ex-

98. Budgeting guidance and forms are also available under "CJA Panel Attorney/Defender Info" on the J-Net intranet site.

99. *See* Appendix B-4 (Western District of Oklahoma—Order Appointing Counsel).

100. *See, e.g.*, Appendix C-9 (Eastern District of California—Capital Case Budget and Expenses Worksheets).

penses for reasonableness and compliance with authorized budgets. After counsel has had a chance to conduct preliminary review of the budgeting materials, the staff attorney assists in a case-management conference to address any questions counsel might have about the format of and quantifying work for the forms, noting that the court is receptive to later modifications for good cause. Attorneys are advised to break the tasks into the smallest parts possible, as this helps the court to determine whether an estimate is reasonable and to isolate areas of concern. (If there is a concern, an ex parte meeting with the judge is scheduled to resolve the issue.)

After counsel submits the budget (with appropriate declarations detailing how figures were calculated), a staff attorney reviews it and gives the judge any recommendations for approval or modification. After the judge approves the final budget, the staff attorney (or other court staff designated for this duty) reviews submitted vouchers for consistency with the budget and forwards any comments to the judge before vouchers are authorized for payment. In the Central and Northern Districts of California, CJA supervising attorneys do this work.

Districts that use budgeting generally tell counsel from the outset how and when amendments to an approved budget should be submitted and usually require that an amendment be requested before a budget is exceeded. For amendments that do not affect the total budget, some courts provide broad discretion for counsel to transfer hours between categories of work, while others require preauthorization to shift hours between tasks. The former approach has the advantage of eliminating billable time an attorney would have spent preparing amendment-related motions.

2. Standardized Voucher Review

Whether or not a budget is required, some courts have concluded that having individual judges or their staff review CJA vouchers creates potential problems. First, the practice of judges or their staff conducting such a review means that there is no uniform standard within a court by which attorneys are compensated. Second, such review may involve ex parte communications. Third, some may consider it improper for federal judges or their staff to supervise a litigant's work. Finally, using death penalty law clerks and staff attorneys[101] to conduct such review in districts where they are available cuts into time they would otherwise devote to substantive and procedural review of habeas corpus petitions, which is especially important in courts with a large caseload.

It was in response to some of these concerns that the Judicial Conference approved three pilot "CJA supervising attorney" positions in 1997 and 1998.[102] Under this pilot program, CJA supervising attorneys in the Northern and Central Districts of California and the District of Maryland reviewed the CJA vouchers submitted to their courts (in both capital and non-capital cases). A 2001 study reported that these courts were pleased with the focused and timely attention the attorneys gave the CJA vouchers and the institutional expertise they developed in determining reasonable hours and fees for

101. *See infra* section III.C.

102. *See* Tim Reagan et al., The CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration 21 (Federal Judicial Center 2001).

the discrete work of attorneys, experts, and investigators.[103] In March 2002, the Judicial Conference endorsed the establishment of a CJA supervising attorney position in courts that would find it of value. Such positions are budgeted for using decentralized salaries and expense account funding.

B. Capital Case Committees

At least two circuits have established committees to monitor capital cases in the district courts of that circuit. The Eighth Circuit's Ad Hoc Committee on the Death Penalty monitors capital cases throughout the circuit, reviewing quarterly reports submitted by each of its district courts and sometimes recommending reassignment of cases in overloaded courts. The Ninth Circuit's judicial council created the circuit's Capital Case Committee as a central forum for addressing the variety of capital case issues anticipated by the circuit in response to the steadily increasing caseload. The committee is composed of representatives of the districts within the circuit, including district and magistrate judges, staff attorneys, defense attorneys, and administrative staff members. The committee's centralized attention to capital case issues enabled the judicial council to gather broad-based data in order to examine problems on a circuit-wide basis and to implement specific responses. The committee developed a phased case-management and budgeting plan and the *Ninth Circuit Capital Punishment Handbook* (a substantive law resource guide).[104] The Ninth Circuit Capital Case Committee is also assisting the judicial council's effort to budget all capital cases in the circuit.

Some district courts also have established capital case committees for centralized discussion of death penalty issues, from docketing to counsel appointment. These committees generally oversee common capital habeas corpus matters, such as counsel appointment and compensation (e.g., maintaining a panel list of eligible attorneys and setting guidelines for attorneys' fees), modifying local rules as needed, supervising and monitoring the death penalty law clerk's workload, and devising general case-management policies.

C. Death Penalty Law Clerks and Staff Attorneys

The Judicial Conference has authorized permanent, centrally funded death penalty law clerk positions for districts in circuits with a specified number of capital habeas corpus cases. These death penalty law clerks are referred to as staff attorneys in many districts. They respond to federal judges' need, first perceived in the district courts of the Ninth Circuit, for institutional expertise in dealing with the increasing number of complex capital habeas corpus cases that generally remain in the system longer than the one- or two-year tenure of a judge's elbow law clerks.[105]

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103. *Id.* at 7.

104. This publication is available online at www.ce9.uscourts.gov (last visited Mar. 3, 2010).

105. District courts from the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have been authorized death penalty staff attorney positions, though not all have been requested and filled. In the Ninth Circuit, these staff attorneys meet annually and stay in regular contact using a circuit-wide e-mail list to exchange expertise, advice, and analyses of current law.

Death penalty staff attorneys generally perform the same task throughout the country: They serve as a law clerks or capital habeas corpus specialists for the judges in their courts, and they usually work directly on most if not all of the court's capital habeas corpus petitions, assisting with both procedural and substantive issues. Most death penalty staff attorneys serve all of the judges in the district because they work on all capital cases in the district. That is, each judge with a capital case generally uses a death penalty law clerk or staff attorney in lieu of a chambers law clerk for substantive legal assistance in reviewing and ruling on a petition. However, this approach is not followed by all federal judges. Some prefer to have their chambers law clerks work on these cases. Some districts divide the early work of capital habeas petitions (such as appointment of counsel and scheduling) among magistrate judges. As a result of their work on multiple cases, death penalty law clerks or staff attorneys often serve as central information sources for the status of all the capital cases in a given district, and they know the nature of each case in comparison with others in the system—a comparison that is important for budgeting and case management.

Most death penalty staff attorneys help draft the initial orders setting the case on track, such as orders staying execution, appointing counsel, scheduling case-related events (especially case-management conferences, if any), and setting filing deadlines.[106] Death penalty staff attorneys in many courts also review the budgets and CJA voucher compensation requests submitted by petitioners' counsel.[107]

D. Case Status Reports

Regular case status reports, prepared by death penalty staff attorneys where available, describe the status of each capital case pending in the court. Many death penalty staff attorneys keep updated case status reports for their own internal use and for regular presentation to a local capital case committee, a district, or simply the judge assigned to a case. This is true, for example, of death penalty staff attorneys in the District of Arizona, Western District of North Carolina, the Eastern and Northern Districts of Texas, the Southern District of Ohio, and the Eastern District of Missouri.

E. State–Federal Judicial Councils

Federal and state courts created state–federal judicial councils in the early 1970s, in response to Chief Justice Warren Burger's call for such institutions to reduce state–federal tension. In response to a survey of chief district judges conducted in April 2009, sixteen chief judges (28% of respondents) indicated that there is an active state–federal judicial council in the state in which their district sits.[108] Frictions caused by state prisoner habeas petitions in federal courts have been a staple of council business.[109]

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106. *See* Appendices A, B, C, and F for samples of some of these orders, provided by death penalty staff attorneys in each district indicated.

107. *See supra* section II.A.2.

108. Data on file, Research Division, Federal Judicial Center. Available from Emery Lee.

109. James G. Apple, Paula L. Hannaford & G. Thomas Munsterman, Manual for Cooperation Between State and Federal Courts (Federal Judicial Center, National Center for State Courts & State Justice Institute 1997) (*see* section I.D, "Habeas Corpus and Appellate Matters").

F. Additional Resources

The following are some useful additional resources on managing capital habeas corpus litigation:

- Judicial Council of the Ninth Circuit, Ninth Circuit Capital Punishment Handbook (2006) (available from the Office of the Circuit Executive, www.ce9.uscourts.gov).
- James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure (5th ed. 2001) (Lexis Law Publishing).
- Brian R. Means, Federal Habeas Manual: A Guide to Federal Habeas Corpus Litigation (2008) (Thomson West).
- Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254.
- Administrative Office of the U.S. Courts, Guidelines for Administering the CJA and Related Statutes, Guide to Judiciary Policy, vol. VII.

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Index of Appendices

These appendices are separate files on FJC Online and fjc.gov.

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H-6: Northern District of Texas—Order Setting Hearing

H-7: Northern District of Texas—Order for Petitioner's Participation at Hearing via Video Teleconference

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