CAPITAL CASE
No. 01-1862

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, WARDEN OF SAN QUENTIN STATE PRISON, *Petitioner,*

v.

ROBERT F. GARCEAU, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I.

THE APPLICATION OF AEDPA TO A CAPITAL CASE IS PROPERLY DETERMINED BY THE DATE THE FEDERAL PETITION WAS FILED

Chapter 153 of the Antiterrorism and Effective Death Penalty Act (AEDPA) applies to applications for writ of habeas corpus, in both capital and noncapital cases, filed after the Act's April 24, 1996, effective date. This Court has already applied this rule in one capital case. *Williams v. Taylor*, 529 U.S. 420, 429 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case. See *Lindh v.*

Murphy, 521 U.S. 320, 326-327 . . . (1997).")[1/] The same rule is applied in noncapital cases. *Lindh v. Murphy*, 521 U.S. at 327 (Chapter 153 applies to "the general run of cases only when those cases had been filed after the date of the Act."); *Slack v. McDaniel*, 529 U.S. 473, 474 (2000) (28 U.S.C. § 2254 of Chapter 153 applies to cases filed in the district court post-AEDPA.) In a capital case filed after the enactment of AEDPA, the filing of requests for counsel and stay of execution prior to the enactment of AEDPA does not alter this rule.

A. The Express Language Of Chapter 153 Demonstrates The Application Of Its Provisions Should Be Triggered By The Filing Of The Application For Writ Of Habeas Corpus

The express language of Chapter 153 provides that the filing date of an application for habeas corpus is the relevant date for determining the application of AEDPA in all cases. An analysis of AEDPA's provisions begins with the words of the statute, which "must be given their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams*, 529 U.S. at 421. Virtually every provision of Chapter 153 expressly references and applies to filed applications for writs of habeas corpus. *See* 28 U.S.C. §§ 2241(b) and (d), 2242-2250, 2254. *See also McFarland v. Scott*, 512 U.S. 849, 862 (1994) (O'Connor, J., concurring in part and dissenting in part) (the provisions of the pre-AEDPA habeas corpus statute, and the Rules Governing § 2254 Cases, indicate that a "pending" case is

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1. In *Williams*, 529 U.S. 420, the requests for counsel and stay of execution, and the formal petition, were filed after AEDPA's enactment. The Court identified the filing of the petition as the determinative event.

created by the filing of the habeas corpus petition.)[2/]

Garceau ignores the plain language of Chapter 153 to justify his conclusion that, in capital cases, the filing date of the requests for appointment of counsel and stay of execution is the relevant trigger event for determining whether AEDPA applies to an application. Garceau concludes that his case was "pending" at that time and that AEDPA does not apply to his case pursuant to *Lindh v. Murphy*, 521 U.S. at 327, even though his first petition was not filed until after AEDPA's effective date. (Resp. Brf. at 7-13.)

Garceau ignores the express references in Chapter 153 to "application[s]" and relies on the retroactivity provision of Chapter 154 (section 107(c))[3/] to support his argument. He repeatedly refers to the language of this provision and argues its meaning. (*See* Resp. Brief at 7-12, 14-15, 19.) Garceau's reliance on this section is misplaced.[4/]

Section 107(c) applies Chapter 154 to "cases pending on or after the date of enactment." This language is not contained in Chapter 153. In fact, the absence of this language in Chapter 153

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2. The only sections of Chapter 153 referencing something other than an application for writ of habeas corpus are: 28 U.S.C. § 2251, which grants federal judges "before whom a habeas corpus proceeding is pending" authority to stay state court proceedings; 28 U.S.C. § 2252, concerning notice of the "habeas corpus proceeding"; 28 U.S.C. § 2253, concerning an appeal from a "habeas corpus proceeding"; and 28 U.S.C. § 2255, which governs motions by federal prisoners challenging sentences.

3. Chapter 154, 110 Stat. 1226, Public Law 104-132, section 107(c).

4. Despite Garceau's reliance on Chapter 154's retroactivity provision, he acknowledges that Chapter 154 does not apply, and that the only issue before the Court is whether Chapter 153 applies to his case. (Resp. Brf. at 7, n. 2.)

was the basis for *Lindh*'s negative inference that Congress did not intend that chapter to apply retroactively. *Lindh*, 521 U.S. at 330. Chapters 153 and 154 also have different purposes: Chapter 153 establishes new standards for "the general run of habeas cases"; Chapter 154 creates "an entirely new chapter" establishing new standards for review of habeas applications by state prisoners under capital sentences. *Id.* at 327, 329. Chapter 154 contains "special rules favorable to the state if conditions are met." *Id.* at 327. "Nothing . . . but a different intent explains the different treatment [of the chapters]." *Id.* at 329. The express language of Chapter 153 indicates that the proper event for determining the application of Chapter 153 is the filing date of the formal habeas corpus application.

When Congress enacted section 107(c), it intended Chapter 154 to apply to pending cases with a qualifying state post-conviction mechanism for representation by competent counsel. To accomplish its intent, Congress did not need to distinguish between the pre-application and post-application habeas proceedings recognized by this Court in *McFarland*, 512 U.S. 849. Accordingly, while section 107(c) gave rise to the negative inference that Chapter 153 did not apply to any pending case not covered by Chapter 154, the phrase "cases pending" in section 107(c) does not otherwise help define a "case" under Chapter 153. Indeed, the most natural reading of "cases pending" in the context of Chapter 153 would be that it applies to the "general run of habeas cases," which are initiated by an application. There is no indication that Congress intended an additional distinction in capital cases based on *McFarland*.

Garceau's position means an unnecessarily smaller number of capital cases are subject to AEDPA's newly-enacted provisions, thereby thwarting the purposes of AEDPA to further the principles of comity, finality, and federalism (*Duncan v. Walker*, 533 U.S. 167, 178 (2001)), eliminate delays in the execution of state and federal criminal sentences (*Hohn v. United States*, 524

U.S. 236, 264 (1998) (Scalia, J., dissent); *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), overruled in *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (1998)), grant greater deference to state court convictions (*Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1849 (2002) (AEDPA prevents federal habeas "retrials" and ensures that state-court convictions are given effect to the extent possible under law)), and enhance the states' capacities to control their own adjudications (*Lindh*, 521 U.S. at 333, n. 7). In Garceau's case, the failure to apply AEDPA resulted in the Ninth Circuit's reversal of his state death penalty conviction.

B. The Plain Meaning Of "Pending" Demonstrates The Application Of Chapter 153's Provisions Should Be Triggered By The Filing Of The Application For Writ Of Habeas Corpus

The plain meaning of the term "pending," as relevant to Chapter 153, also indicates that the filing of the an application for habeas corpus relief is the trigger event for applying the chapter. The Federal Rules of Civil Procedure (FRCP) may apply to habeas corpus cases when they are not inconsistent with the habeas rules. Rules Governing § 2254 Cases, Rule 11. Under FRCP 3, a civil action is normally commenced by the filing of a complaint with the court. No inconsistency prevents the application of FRCP 3 to find that a habeas corpus case commences with the filing of the application for habeas relief. *Calderon v. United States District Court (Beeler)*, 128 F.3d at 1287 n.3.

Garceau correctly asserts that the definition of "pending" can vary depending on the particular provision of AEDPA. *McFarland v. Scott*, 512 U.S. at 856-57 (a request for stay of execution under 28 U.S.C. § 2251, following a pre-application appointment of counsel under 21 U.S.C. § 848(q)(4)(B),

constituted a pending habeas corpus proceeding despite the absence of a filed petition); *Carey v. Saffold*, 536 U.S. 214, 122 S.Ct. 2134, 2138 (2002) ("pending" in the context of the federal statute of limitations (28 U.S.C. § 2244(d)(2)) can include gaps when state petitions were not on file); *Slack v. McDaniel*, 529 U.S. 473 (an application for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) constituted a pending case for purpose of applying AEDPA).

These varied interpretations of "pending" support the State's argument. In each case, "pending" is defined in the context of the statutory provision being interpreted, with the intention of best effectuating the statute's purpose. In determining whether a capital case is "pending" for purposes of Chapter 153, the provision's express language, its purpose, and the related Federal Rules of Civil Procedure, dictate the plain meaning of "pending" be applied to find that the filing date of the application is the correct trigger event.

Garceau asserts that *McFarland*, 512 U.S. 849, affects the meaning of "pending" because Congress was aware of the case when it enacted section 107(c). However, as discussed above, the provisions of section 107(c) have no application to the issue before this Court.[5/] Moreover, the terms "petition" and "application" repeatedly appear in Chapter 153. Furthermore, no court, including the Ninth Circuit, has concluded that *McFarland* by itself supports reading Chapter 153 in the manner that is advocated by respondent Garceau. *Beeler*, 128 F.3d at 1287 n.3. *McFarland*'s purpose is very narrow: interpreting 21 U.S.C. § 848(q)(4)(B), which creates a statutory right to habeas counsel in post-conviction proceedings in capital cases, and reconciling it with 28 U.S.C. §

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5. In Respondent's Brief, at 12, footnote 7, he discusses specific Congressional consideration of *McFarland* during the debates on AEDPA. The case was discussed because one of AEDPA's provisions amended 21 U.S.C. § 848(q), and not because it affected Chapter 153.

2251, which grants federal courts the authority to issue a stay of execution in habeas corpus proceedings to permit counsel to prepare the petition. *Id.* at 858.

Garceau speculates that the correct trigger event for the application of Chapter 153 is influenced by Congressional awareness of the complexity of capital habeas cases and the liberal construction of pleadings allowed pro se litigants. (Resp. Brief at 15.) His conjecture is meritless.

Garceau's first argument is based on perceived differences between Chapter 154 capital applicants who have benefitted from a qualifying state post-conviction mechanism, and Chapter 153 capital applicants. He asserts that capital habeas petitioners in the process of preparing comprehensive habeas petitions at the time of AEDPA's enactment were not made subject to the new provisions of 28 U.S.C. § 2254(d), establishing new standards for entitlement to relief, because it would be too disruptive for applicants who had not had the benefit of a qualifying state mechanism. This statement is untrue and Garceau provides no support for it other than an inapplicable reference to *Lindh v. Murphy*, 521 U.S. at 329. (Resp. Brief at 15-16.) To the extent Congress distinguished between Chapter 153 and Chapter 154 applicants, the distinction Garceau propounds does not explain why Congress would further innoculate potential applicants from Chapter 153 merely because they had initiated pre-application proceedings under *McFarland*. Furthermore, a represented capital petitioner is presumably in a better position to comply with the requirements of AEDPA than a pro per noncapital petitioner, who is subject to AEDPA's provisions based on the filing of the application for habeas corpus.

Garceau's second argument is also meritless. He argues that, in enacting AEDPA, Congress was mindful that unrepresented pro per habeas petitioners are subject to less stringent filing requirements. The implication appears to be that, despite the habeas pleading requirements contained in 28 U.S.C. §2242, and

Rules Governing § 2254 Cases, Rule 2, Congress intended that a Chapter 153 pending habeas case could begin with the filing of a document that merely placed the State on notice of the claims to be later raised in the formal habeas petition. However, Garceau and other capital petitioners are not unrepresented. Furthermore, under AEDPA, the existing habeas pleading requirements remain intact.

The cases offered by Garceau to support his claim of a lowered pleading requirement interpret civil, rather than habeas, pleading requirements and are inapplicable. Unlike a civil complaint, a habeas petition "must meet heightened pleading requirements." *McFarland*, 512 U.S. at 856 (citing Rules Governing § 2254 Cases, Rule 2). It is required to allege the factual underpinnings of the petitioner's claims. *Id.* at 860 (O'Conner, J., concurring in part and dissenting in part); *Blackledge v. Alison*, 431 U.S. 63, 75 n. 7 (1977) (citing the Advisory Committee Note to Rule 4, Rules Governing Habeas Corpus Cases: "'(N)otice' pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of constitutional error'").

Garceau asserts that *Lindh* contains language supporting his interpretation of "pending." (Resp. Brief at 19.) *Lindh*, in the course of explaining its conclusion that Chapter 153 was nonretroactive, explained that section 2254(h), providing for appointment of counsel, was not incorporated into Chapter 154 because counsel was already authorized in these cases. *Id.* at 335-36. Thus, *Lindh*'s use of the phrase "cases pending" only explained why a specific provision of Chapter 153 was omitted from Chapter 154 since counsel was already appointed under 21 U.S.C. § 848(q)(4)(B) and *McFarland*. In context, *Lindh*'s terminology did not amount to a holding that Chapter 153 did not apply to cases in which the applicant had only commenced a *McFarland* proceeding. This isolated phraseology does not in any way support Garceau's argument.

II.

GARCEAU'S REQUESTS FOR APPOINTMENT OF COUNSEL AND STAY OF EXECUTION, AND SPECIFICATION OF NONFRIVOLOUS CLAIMS, DID NOT COMMENCE A PENDING HABEAS CORPUS CASE FOR PURPOSE OF DETERMINING THE APPLICATION OF CHAPTER 153

Garceau argues that a pending case for purposes of Chapter 153 was commenced by the filing of his requests for appointment of counsel and stay of execution, and the filing of a "Specification of Nonfrivolous Issues." (Resp. App. 225-229.) Under the local federal court rules, the Specification of Nonfrivolous Issues was required to support the issuance of a temporary stay of execution to permit the preparation of a petition. Local Rules of the United States District Court, Eastern District, Rule 81-191(h).[6/]

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6. The rule was then Local Rule 191(h)(3). This provision stated in relevant part:

> . . . upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the Court shall issue a temporary stay of execution unless no nonfrivolous issues are presented.

(The relevant local rules are attached as an appendix to this reply brief.) Garceau's filed document alleged only two constitutional violations -- a small part of the twenty-eight claims ultimately raised in the formal habeas petition. The document did not purport to be, nor did it satisfy any of the requirements for, a formal habeas petition. Significantly, the local rules do not contemplate that the "Specification of Nonfrivolous Issues" will constitute an application

In support of his claim, Garceau first looks to *Hohn v. United States*, 524 U.S. 236, and *Ex Parte Quirin*, 317 U.S. 1 (1942). These cases found that the denial of a request for certificate of appealability or request to file a petition constituted the determination of an Article III "case or controversy," reviewable by this Court under 28 U.S.C. § 1254. Characteristics of such a "case" include an immediate and redressable injury, and adversity. (*Hohn*, 524 U.S. at 240.) Garceau then analogizes the *McFarland* requests for appointment of counsel and stay to a "case" as described in *Hohn* and *Ex Parte Quirin.* However, *Hohn and Ex Parte Quirin* involve significantly different provisions than those in *McFarland,* and all of these cases involve different provisions than those involved in Chapter 153. These cases provide no guidance in determining the event that commences a habeas proceeding under AEDPA.

It is immaterial that the State challenged the sufficiency of Garceau's request for a stay of execution to prepare his habeas petition. His request contained only a conclusory statement that Garceau intended to file unspecified multiple meritorious claims of constitutional violations, and did not even include the required listing of nonfrivolous claims. (Resp. App. at 205, 220.) This local rule error was corrected with the filing of the Specification of Nonfrivolous Claims. (Resp.App. 225-229.) The Specification of Nonfrivolous Claims only assists the district court in determining whether to exercise its discretionary stay authority under 28 U.S.C. § 2251. *McFarland,* 512 U.S. at 858 (issuance of stay is discretionary). This filing does not constitute a petition on the

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for habeas relief. They do not require a responsive pleading or answer from the State. In fact, the local rules specifically distinguish between pre-application procedures and the application itself which inaugurates the actual merits case.

merits.[7/]

The Specification is also not the same nature as a request for a certificate of appealability, the denial of which prevents a habeas petitioner from appealing on the merits of his case. (See Resp. Brief at 26, relying on *Slack v. McDaniel*, 529 U.S. at 481-82.) The granting of a request for appointment of counsel and stay of execution does not determine the ultimate consideration of a petitioner's claims. It does not even ensure that a petition will ultimately be filed. Conversely, the denial of a request for appointment of counsel or a stay of execution does not necessarily mean that an application will not be filed.

The filing of a petition is a "distinct[ly]" different step from the pre-application process. In short, "[w]hen Congress instructs us (as *Lindh* says it has) that application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to" reviewing the constitutionality of an applicant's custody is the case initiated by the application for relief. *Slack*, 529 U.S. at 481-82.

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7. Garceau notes that the district court referred to the first formal habeas petition as an "amended petition." (Resp. Brief at 2, n. 1; Resp. App. at 211.) The State objected to the use of this term and noted that it was apparently used in error. (Resp. App. at 219.)

III.

THIS COURT MAY DETERMINE THE MERITS OF THE CASE BASED ON THE PROPER APPLICATION OF AEDPA'S PROVISIONS

The State asks this Court to apply the provisions of AEDPA and resolve this case on the merits. As provided in Supreme Court Rule 14.1(a), the question presented in the petition for certiorari is "deemed to comprise every subsidiary question fairly included therein. . . ." Questions "fairly included [in the question presented], will be considered by the Court." *Id.*[8/]

The State asks this Court to resolve the issue of whether Chapter 153 applies to Garceau's, and other similarly situated, capital cases. Once the standard of review is resolved, the only remaining legal issue will be whether the California Supreme Court, in its well written opinion adjudicating this instructional error claim, reasonably applied this Court's existing precedents, as articulated in *Estelle v. McGuire*, 502 U.S. 62 (1991), *Chapman v. California*, 386 U.S. 18 (1967) (harmless error on direct state review), and *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (harmless error on federal habeas review). The California Supreme

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8. Respondent contends that this issue is not "fairly included" in the question presented. Even if true, this Court will still consider such issues in "exceptional cases" "where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). In Garceau's case, resolution of this issue could mean the difference between a full-scale retrial in his case or simply a resolution of other issues still pending in his federal habeas corpus case. Resolution of this one particular issue now is consistent with AEDPA's objectives.

Court's assumption of a due process violation and determination of harmless error beyond a reasonable doubt did not involve an unreasonable application of these precedents. The underlying claim of constitutional error was raised and fully briefed below, and no unfairness will result from this Court performing a merits determination.[9/]

Garceau asserts that it is a fact-laden inquiry requiring remand due to the lower court's familiarity with the trial and appellate record. On the contrary, under the correct application of 28 U.S.C. § 2254(d), the California Supreme Court's well written decision (Pet. App. 138, *et seq.*) must be reviewed under a highly deferential standard and upheld unless it is objectively unreasonable. *Woodford v. Visciotti*, __ U.S. __, 123 S.Ct. 357, 360-61 (2002), *per curium.* Assisting in the assessment of "objective reasonableness" is the fact that United States District Court Judge Oliver W. Wanger also found harmless error. Furthermore, a review of the decisions of the California Supreme Court, federal district court, and Ninth Circuit, provided summaries of all of the evidence relevant to the harmless error analysis. (Pet. App. 1, 35, 105.) The requested analysis is much like this Court recently performed in *Woodford v. Visciotti*, 123 S.Ct. 357 (determination that state prejudice determination on an ineffective assistance of counsel claim was objectively reasonable).

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9. The California Supreme Court assumed without deciding this issue. (Pet. App. 141.) Of course, if a state court conclusion that the instructional claim was not a due process violation would be "objectively reasonable" under AEDPA then any harmless error analysis would also be "objectively reasonable" under AEDPA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: January 10, 2003

Respectfully submitted,

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APPENDIX

RULE 190. PETITIONS FOR HABEAS CORPUS AND MOTIONS PURSUANT TO 28 U.S.C. § 2255

(a) Scope of This Rule. All petitions for writs of habeas corpus pursuant to 28 U.S.C. § 2254 and motions filed pursuant to 28 U.S.C. § 2255 shall be subject to the provisions of this Rule unless otherwise ordered by the Court.

(b) Form of Petitions and Motions. The petition or motion shall be printed in ink or typewritten, and signed under penalty of perjury, and, if presented in propria persona, upon the form and in accordance with the instructions approved by the Court. Copies of the forms and instructions shall be supplied by the Clerk upon request. In the event a petition or motion is submitted that is not in the proper form, the Clerk shall forthwith mail the proper form and instructions to the person submitting the petition or making the motion.

(c) Filing. Petitions and motions shall be addressed to the Clerk of the United States District Court for the Eastern District of California, 650 Capitol Mall, Sacramento, California 95814, or 1130 "O" Street, Fresno, California 93721, according to L.R. 120(b). Petitioners shall send to the Clerk an original and two copies of the completed petition or motion. No petition or motion shall be addressed to an individual Judge or Magistrate Judge.

(d) Assignment. Petitions shall be assigned by the Clerk pursuant to L.R. 122, provided that motions under 28 U.S.C. § 2255 shall, if possible, be assigned to the sentencing Judge or Magistrate Judge. If, in the same matter in this Court, the petitioner has previously filed a petition for relief or for a stay of enforcement, the new petition shall be assigned to the Judge or Magistrate Judge

who considered the prior matter.

(e) Contents.

(1) All petitions by state prisoners shall state with specificity that all issues raised in the petition, either:

(A) have been raised before all state tribunals in which the issues could be heard, to the exhaustion of petitioner's state remedies; or

(B) have not been raised before all state tribunals in which the issues could be heard, in which case the petition shall also set forth all facts which justify the failure to exhaust state remedies.

(2) All petitions shall state whether or not petitioner has previously sought relief arising out of the same matter from this Court or any other federal court, together with the ruling and reasons given for denial of relief.

(3) In a capital case the petition shall set forth any scheduled execution date.

(f) Where Relief Granted. If relief is granted on a petition of a state prisoner, or if any stay of execution of state court judgment is issued by the Court, the Clerk shall forthwith notify the state authority having jurisdiction over the prisoner of the action taken.

Eff. Dec. 19, 1994

RULE 191. SPECIAL REQUIREMENTS FOR HABEAS CORPUS PETITIONS INVOLVING THE DEATH PENALTY

(a) Applicability. This Rule shall govern the procedures for a first petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 in which a petitioner seeks relief from a judgment imposing the penalty of death. A subsequent filing relating to a particular petition may be deemed a first petition under these Rules if the

original filing was not dismissed on the merits. The application of this Rule may be modified by the Judge or Magistrate Judge to whom the petition is assigned. These Rules shall supplement the Rules Governing § 2254 Cases and do not in any regard alter or supplant those rules.

(b) Notices From California Attorney General. The California Attorney General shall send to the Clerk (1) prompt notice whenever the California Supreme Court affirms a sentence of death; (2) at least once a month, a list of scheduled executions; and (3) at least once a month, a list of the death penalty appeals pending before the California Supreme Court.

(c) Notice From Petitioner's Counsel. Whenever counsel determines that a petition will be filed in this Court, counsel shall promptly file with the Clerk and serve on the California Attorney General a written notice of counsel's intention to file a petition. The notice shall state the name of the petitioner, the district in which the petitioner was convicted, the place of petitioner's incarceration, and the status of petitioner's state court proceedings. The notice is for the information of the Court only, and the failure to file the notice shall not preclude the filing of the petition.

(d) Counsel.

(1) *Appointment of Counsel*. Each indigent petitioner shall be represented by counsel unless petitioner has clearly elected to proceed pro se and the Court is satisfied, after hearing, that petitioner's election is intelligent, competent and voluntary. Unless petitioner is represented by retained counsel, counsel shall be appointed in every case at the earliest practicable time. A panel of attorneys qualified for appointment in death penalty cases will be certified by a selection board appointed by the Chief Judge. This board will consist of a federal defender, a member of the California Appellate Project (CAP), a member of the State Bar, and a

representative of the state public defender.

When a death judgment is affirmed by the California Supreme Court and any subsequent proceedings in the state courts have concluded, California Appellate Project will forward to the selection board the name of state appellate counsel and, if counsel is willing to continue representation on federal habeas corpus, California Appellate Project's evaluation of counsel's performance in the state courts, and recommendation on whether counsel should be appointed in federal court.

If state appellate counsel is available to continue representation into the federal courts, and counsel is deemed qualified to do so by the selection board, there is a presumption in favor of continued representation except when state appellate counsel was also counsel at trial.

In light of this presumption, it is expected that appointed counsel who is willing to continue representation and who has been certified by the selection board as qualified to do so, would ordinarily file a motion for appointment of counsel on behalf of his or her client together with the client's federal habeas corpus petition. If, however, counsel for any reason wishes to confirm appointment before preparing the petition, counsel may move for appointment as described above, before filing the petition.

If state appellate counsel is not available to represent petitioner on federal habeas corpus or if appointment of state appellate counsel would be inappropriate for any reason, the Court shall appoint counsel upon application of petitioner. The Clerk shall have available forms for such application. Counsel shall be appointed from the panel of qualified attorneys certified by the selection board. Either California Appellate Project or the selection board may suggest one or more counsel for appointment. The Court may also request suggestion from California Appellate Project or the selection board. If application for appointed counsel is made before a petition is filed, the application shall be assigned to a Judge and

Magistrate Judge in the same manner that a petition would be assigned, and counsel shall be appointed by the Magistrate Judge. The Judge and Magistrate Judge so assigned shall be the Judge and Magistrate Judge assigned when counsel files a petition for writ of habeas corpus.

(2) *Second Counsel*. Appointment and compensation of second counsel shall be governed by Section 2.11 of Volume VII of the Guide to Judiciary Policies and Procedures, Appointment of Counsel in Criminal Cases.

(e) Filing. Petitions as to which venue lies in this District shall be filed in accordance with Local Rules 120 and 190. Petitions shall be filled in by printing or typewriting. In the alternative, the petition may be in a legible typewritten or written form which contains all of the information required by that form. All petitions (1) shall state whether petitioner has previously sought relief arising out of the same matter from this Court or any other federal court, together with the ruling and reasons given for denial of relief; (2) shall set forth any scheduled execution date; and (3) shall contain the wording in full caps and underscored "**DEATH PENALTY CASE**" directly under the case number on each pleading. An original and three (3) copies of the petition shall be filed by counsel for petitioner. A pro se petitioner need file only the original. No filing fee is required.

The Clerk will immediately notify the California Attorney General's Office when a petition is filed.

When a petition is filed by a petitioner who was convicted outside of this District, the Clerk will immediately advise the Clerk of the District in which the petitioner was convicted.

(f) Assignment to Judges. Notwithstanding the general assignment plan of this Court, petitions shall be assigned to Judges of the Court as follows: (1) the Clerk shall establish a separate category for these petitions, to be designated with the title "Capital Case"; (2) all active Judges of this Court shall participate in the

assignments; (3) petitions in the Capital Case category shall be assigned blindly and randomly by the Clerk to each of the active Judges of the Court; (4) if the assigned Judge has filed a Certificate of Unavailability with the Clerk which is in effect on the date of the assignment, a new random assignment will be made to another Judge immediately; (5) if a petitioner has previously sought relief in this Court with respect to the same conviction, the petition will be assigned to the Judge who was assigned to the prior proceeding; and (6) pursuant to 28 U.S.C. § 636(b)(1)(B), and not inconsistent with law, Magistrate Judges may be designated by the Court to perform all duties under these Rules, including evidentiary hearings.

(g) Transfer of Venue. Subject to the provisions of 28 U.S.C. § 2241(d), it is the policy of this Court that a petition should be heard in the District in which petitioner was convicted rather than in the District of petitioner's present confinement.

If an order for the transfer of venue is made, the Judge will order a stay of execution which shall continue until such time as the transferee court acts upon the petition or the order of stay. The issuance of a stay in the transferee court shall be determined under paragraph (h) of this Rule.

(h) Stays of Execution.

(1) *Stay Pending Final Disposition*. Upon the filing of a habeas corpus petition, unless the petition is patently frivolous, the District Court shall issue a stay of execution pending final disposition of the matter.

(2) *Temporary Stay for Appointment of Counsel*. Where counsel in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection board will designate an attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application, the Court shall issue

a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45) days unless extended by the Court.

(3) *Temporary Stay for Preparation of the Petition*. Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the Court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition. The temporary stay may be extended by the Court upon a subsequent showing of good cause.

(4) *Temporary Stay for Transfer of Venue*. (See paragraph (g).)

(5) *Temporary Stay for Unexhausted Claims.* If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During the proceedings in state court, the proceedings on the petition will be stayed. After the state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims.

(6) *Stay Pending Appeal*. If the petition is denied and a certificate of probable cause for appeal is issued, the Court will grant a stay of execution which will continue in effect until the court of appeals acts upon the appeal or the order of stay.

(7) *Notice of Stay*. Upon the granting of any stay of execution, the Clerk will immediately notify the warden of San Quentin Prison and the California Attorney General. The California Attorney General shall ensure that the Clerk has a twenty-four (24) hour telephone number to the warden.

(i) Procedures for Considering the Petition. Unless the Judge

summarily dismisses the petition under Rule 4 of the Rules Governing § 2254 Cases, the following schedule and procedures shall apply subject to modification by the Court. Requests for enlargement of any time period in this Rule shall comply with the applicable Local Rules of the Court.

(1) Respondent shall as soon as practicable, but in any event on or before twenty (20) days from the date of service of the petition, lodge with the Court the following: (A) transcripts of the state trial court proceedings; (B) appellant's and respondent's briefs on direct appeal to the California Supreme Court, and the opinion or orders of that Court; (C) petitioner's and respondent's briefs in any state court habeas corpus proceedings, and all opinions, orders and transcripts of such proceedings; (D) copies of all pleadings, opinions and orders in any previous federal habeas corpus proceeding filed by petitioner which arose from the same conviction; and (E) an index of all materials described in paragraphs (A) through (D) above. Such materials are to be marked and numbered so that they can be uniformly cited. Respondent shall serve this index upon counsel for petitioner.

If any items identified in paragraphs (A) through (D) above are not available, respondent shall state when, if at all, such missing material can be lodged.

(2) If counsel for petitioner claims that respondent has not complied with the requirements of paragraph (1), or if counsel for petitioner does not have copies of all the documents lodged with the Court in writing, with a copy to respondent, counsel for petitioner shall immediately notify the Court in writing, with a copy to respondent. Copies of any missing documents will be provided to counsel for petitioner by the Court.

(3) Respondent shall file an answer to the petition with accompanying points and authorities within thirty (30) days from the date of service of the petition. Respondent shall include in the answer the matters defined in Rule 5 of the Rules Governing § 2254 Cases and shall attach any other relevant documents not already

filed or lodged.

(4) Within thirty (30) days after respondent has filed the answer, petitioner may file a traverse.

(5) No discovery shall be had without leave of the Court.

(6) Any request for an evidentiary hearing by either party shall be made within fifteen (15) days from the filing of the traverse, or within fifteen (15) days from the expiration of the time for filing the traverse. The request shall include a specification of which factual issues require a hearing and a summary of what evidence petitioner proposes to offer. Any opposition to the request for an evidentiary hearing shall be made within fifteen (15) days from the filing of the request. The Court will then give due consideration to whether an evidentiary hearing will be held.

(j) Evidentiary Hearing. If an evidentiary hearing is held, the Court will order the preparation of a transcript of the hearing, which is to be immediately provided to petitioner and respondent for use in briefing and argument. Upon the preparation of the transcript, the Court may establish a reasonable schedule for further briefing and argument of the issues considered at the hearing.

(k) Rulings. The Court's rulings may be in the form of a written opinion which will be filed, or in the form of an oral opinion on the record in open court, which shall be promptly transcribed and filed.

The Clerk will immediately notify the warden of San Quentin Prison and the California Attorney General whenever relief is granted on a petition.

The Clerk will immediately notify the Clerk of the United States Court of Appeals for the Ninth Circuit by telephone of (1) the issuance of a final order denying or dismissing a petition without a certificate of probable cause for appeal, or (2) the denial of a stay of execution.

When a notice of appeal is filed, the Clerk will transmit the appropriate documents to the United States Court of Appeals for the Ninth Circuit immediately.

Eff. Dec. 19, 1994.