

**PROCEDURAL INSTRUCTIONS
DEATH PENALTY HABEAS CORPUS PETITIONS**

INTRODUCTION

This pamphlet contains important information for counsel who are representing litigants in habeas corpus actions brought pursuant to 28 U.S.C. § 2254 on behalf of death-sentenced state prisoners. The court of appeals has adopted a rule and established certain procedures to ensure that these cases proceed with full communication between the court and counsel, and with a complete understanding on the part of counsel of how the case will proceed once a notice of appeal has been filed. Included in this pamphlet is a copy of Sixth Circuit Rule 22(c), which governs death penalty appeals.

**FILING THE HABEAS CORPUS
ACTION IN THE DISTRICT COURT**

Your communication with the court of appeals begins with the filing of the habeas corpus petition in the district court. Although the court of appeals does not come into the picture in other types of cases until after a notice of appeal has been filed from a final judgment of the district court, the unique aspects of death penalty litigation require that this court be fully apprised of all developments as the petition makes its way through the district court. The court of appeals has developed a Capital Case Docketing Statement, a copy of which is attached for your use, which counsel for the petitioner is to file directly with the clerk of the court of appeals as soon as the petition is filed in the district court. This Statement calls for information about the date set for execution (if any), prior cases filed by the petitioner in federal court, any cases the petitioner has pending in other courts, and other relevant information. Once this statement has been received in the court of appeals clerk's office, we will contact counsel directly. Inasmuch as the court of appeals will be referring to the information on the Statement as it monitors the district court proceedings, counsel must take care to advise this office of any material changes.

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Habeas Corpus Petitions*

FILING OF DOCUMENTS

In cases where a date of execution has been set and has not been stayed, and where there is no certainty that the execution will be stayed, counsel should submit to the clerk of the court of appeals four copies of all filings made in the district court as soon as they are filed, as well as all relevant parts of the state court record. This step will assist the court should circumstances later make emergency review by the court of appeals necessary.

In other cases counsel need not routinely submit to the clerk of the court of appeals additional copies of filings made in the district court. Should the court of appeals find it necessary to obtain copies of a particular filing, the clerk will contact counsel for that purpose.

SELECTION OF PANELS

Panels in capital cases are drawn from a roster of all active circuit judges, including the chief judge. This roster, and the drawing of panels, is separate from the process by which panels are composed to hear all other types of cases in the ordinary course. As is the court's practice generally, see Internal Operating Procedure 34(c)(2), the identity of panel members is not disclosed until two weeks before the date of oral argument, unless the panel itself directs otherwise.

**MOTION FOR STAY OF EXECUTION
APPLICATION FOR CERTIFICATE
OF PROBABLE CAUSE**

In capital habeas cases, as in any other habeas corpus action arising from a state court conviction, in order for an appeal to go forward a certificate of probable cause must be issued by either the district court or the circuit court; 28 U.S.C. § 2253. Counsel should make application to the district court at the time that the notice of appeal is filed, if that court has not already spoken to the issue in its final order

or in a separate order. Where a date of execution has been set and there is no stay of execution in place, counsel should file a motion for a stay immediately. Rule 8, Fed. R. App. P. requires that the stay be sought in the first instance from the district court; if that court denies the stay, the motion can then be renewed before the court of appeals. Rule 8 recognizes that there may be circumstances where the exigencies are such that counsel determines that the stay must be sought initially from the court of appeals. Any motion for a stay of execution filed in the first instance in the court of appeals, or filed there concurrently with a motion for a stay addressed to the district court, should state clearly why it is not practicable to allow the district court to determine whether or not to grant a stay. Similarly, counsel should notify the clerk of the court of appeals immediately of any ruling the district court may make on a motion for a stay.

Sixth Circuit Rule 22(c)(6) prescribes a number of attachments which must accompany any motion for a stay of execution and application for a certificate of probable cause. Counsel should take care to ensure that all of these necessary items are included with the motion.

RECORD OF DISTRICT COURT PROCEEDINGS

As soon as it is advised that a notice of appeal has been filed, the court of appeals will direct the district court clerk's office to forward to Cincinnati the record of proceedings before that court. Where there are district court proceedings which must be transcribed to complete the record on appeal, the court of appeals clerk's office will advise the appropriate court reporter(s) to prepare the transcript as soon as possible. Attached you will find a form 6CA-30, to be used to order necessary transcript of district court proceedings; a separate order will need to be completed and given by counsel to each court reporter responsible for transcript. The clerk's office's Transcript Coordinator, Ms. Beverly Harris, will assist you in seeing to the prompt ordering of the transcript. In cases where the ordering party is represented by counsel appointed

under the Criminal Justice Act, the cost of producing necessary transcript will be borne by the government. If the exigencies of the case require that briefs be filed before the transcript can be completed, counsel may proffer a statement of what the transcript will show. Once the transcript is filed, copies will be forwarded at once to the panel.

EMERGENCY FILINGS

As a general rule, all filings with the court of appeals are to be made with the clerk's office in Cincinnati. Where it becomes evident that time constraints are going to be severe, counsel should call the clerk's office as soon as possible to advise of the likelihood that there will be emergency filings, and to obtain specific direction if some variation from the usual filing procedures will be permitted. *Counsel should not contact a judge or judges directly for purposes of filing papers or obtaining a hearing.*

Upon notification that an emergency filing necessitating the urgent attention of the court is imminent, the clerk will contact the assigned panel to determine whether it wants to accept filings directly from counsel in chambers, whether and when any hearing is to be held, and the like. The clerk's office will assist in the receipt and transmission of filings.

The clerk's office is equipped to send and receive fax transmissions, as is every judge's chambers. *Counsel must obtain prior permission, however, before faxing documents to the clerk's office or to a judge's chambers. When authorization to file by fax is given it is limited to the particular filings specifically authorized, and is not to be used otherwise either in that case or in others.* Any document faxed without authorization will not be accepted for filing. Counsel must send to the clerk's office the original hard copy of any document for which permission had been granted for filing by fax.

ARGUMENT ON MOTIONS

It is left to the discretion of the panel whether or not to allow argument on motions and, if so, the time, place, and manner in which it will take place. As soon as the court has given its direction regarding argument, the clerk's office will advise counsel accordingly.

FILING OF BRIEFS

Where necessary to present the case within the time allowed by circumstances, the court will establish a schedule for the expedited filing of briefs. Such a schedule may contemplate the simultaneous filing of briefs rather than the filing of the parties' briefs in serial order. An expedited briefing schedule can result from a motion or may be issued by the court sua sponte. Where the court has not expedited briefing, the parties shall file their briefs consistent with the requirements of Rule 32, Fed. R. App. P. and Sixth Cir. Rule 22(c)(8). Counsel will note that Rule 22(c)(8) allows more time and more pages than the customary briefing arrangement set forth in Rule 32, Fed. R. App. P.

PANEL CONTINUITY

Internal Operating Procedure 22(a)(1) provides that once a panel has been assigned to a capital case it will have referred to it all motions in the matter, the merits of the appeal, any successive petitions, remands from the Supreme Court, and all incidental and collateral matters.

The clerk's office is ready to offer counsel all assistance necessary in death penalty cases, and will act as liaison with the district court. Inquiries regarding procedural matters and

other requirements can be directed to any of the following, all of whom can be reached at (513) 564-7000:

Leonard Green, Clerk
Janice E. Yates, Chief Deputy Clerk
Dennis O. Harrell, Senior Motions Attorney

March, 1999

6th Cir. R. 22(c)
DEATH PENALTY
(Amended December 6, 1991)

(a) **APPLICATION OF RULE.** This rule applies to cases filed pursuant to 28 U.S.C. § 2254 and otherwise which challenge a state court order imposing a sentence of death.

(b) **PETITIONER'S STATEMENT.** Whenever such a case is filed in this court, petitioner should file a statement certifying the existence of a sentence of death and the emergency nature of the proceedings and listing the proposed date of execution, any previous cases filed by petitioner in federal court, and any cases filed by petitioner in federal court, and any cases filed by petitioner pending in any other court. Petitioner may use form 6CA-99 or the equivalent thereof for the statement.

(c) **ORIGINAL APPLICATIONS.** Ordinarily, an original application for habeas corpus relief addressed to this court or to any judge of this court will be transferred to the appropriate district court. All such applications are to be filed in the clerk's office and will be referred to a panel of the court in accordance with approved operating procedures of the court.

(d) **MOTIONS TO STAY BEFORE THE DISTRICT COURT.** Any motion for stay directed to this court must be first presented to the district court pursuant to Fed. R. App. P. 8(a).

(e) **EMERGENCY MOTIONS.** Counsel having emergency motions or applications, whether addressed to the court or to an individual judge, ordinarily shall file such petitions with the clerk of this court rather than with an individual judge. Counsel is encouraged to communicate with the clerk by telephone as soon as it becomes evident that emergency relief will be sought from this court.

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Death Penalty

(f) **PANEL ASSIGNMENT.** Applications for a certificate of probable cause and motions for stay, once denied by the district court, are to be filed in this court as promptly as possible following filing of the notice of appeal. The clerk of this court shall docket the case upon receipt of the notice of appeal and both the application and motion for stay shall be immediately assigned to a panel of the court in accordance with approved operating procedures of the court. The panel shall be assigned the case and all matters pertaining to the motion to stay, application for certificate of probable cause, the merits, second or successive petitions, remands from the Supreme Court of the United States, and all incidental and collateral matters, including any separate proceedings questioning the conviction or sentence.

(g) **DOCUMENTS TO BE FILED WITH MOTION.** An original and four copies of any motion for stay of execution and application for a certificate of probable cause shall be filed with the clerk of this court, together with the following documents:

- i) the complaint or petition to the district court;
- ii) each brief or memorandum of authority filed by any party in the district court;
- iii) any available transcripts of proceedings before the district court;
- iv) the memorandum opinion giving the reasons advanced by the district court for denying relief;
- v) the district court's judgment denying relief;
- vi) the application to the district court for a certificate of probable cause to appeal;
- vii) the application to the district court for stay;

- viii) the certificate of probable cause or order denying a certificate of probable cause;
- iv) the district court's order granting or denying a stay and its statement of reasons for this action;
- x) a copy of the docket entries of the district court in the case;
- xi) a copy of each state or federal court opinion or judgment involving any issue presented to this court or, if the ruling was not made in a written opinion or judgment, the copy of the relevant portions of the transcript.

(h) REVIEW OF THE MERITS OF THE CASE. The panel handling the case will allow the ordinary schedule for filing briefs on the merits of the case unless good cause for expedited briefing is demonstrated. However, in considering a motion for stay, the panel may conclude it can appropriately address the merits of the case in addition to the motion to stay. In such a situation, counsel will be given notice to address the merits in briefs to be filed on an expedited basis. The panel may grant a temporary stay pending consideration of the merits if necessary to prevent mootness of the case. Any oral argument of the merits will be scheduled as soon as practicable after briefs are filed.

(i) FILING OF THE BRIEFS. The appellant shall serve and file a brief within 60 days after the date on which the record is filed. The appellee shall serve and file a brief within 60 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee but, except for good cause shown, a reply brief must be filed at least 3 days before argument.

The principal briefs of the parties shall not exceed 75 pages, and reply briefs shall not exceed 25 pages, exclusive of

pages containing the table of contents, table of citations, and any appropriate addendum.

Requests for extensions of time or expansion or page limits will be referred to the panel to which the case has been assigned.

(j) DENIAL BY COURT OF APPEALS OF APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE. If the district court has refused to grant a certificate of probable cause and this court also denies a certificate of probable cause, no further action need be taken by the court.

(k) PETITIONS FOR REHEARING. Because of the difficulty of delivering petitions for rehearing with or without a suggestion for rehearing en banc to judges of the court where a panel of the court has denied a request to stay an execution scheduled for a time within 24 hours of the filing of the petition for rehearing, parties are hereby notified that such petitions will not ordinarily be able to be delivered to the judges of the court in sufficient time for consideration prior to the time of the scheduled execution. Petitions for rehearing filed within 24 hours of the scheduled execution shall be processed and distributed by the most expeditious service normally provided by the United States Mail Service unless the panel handling the case gives specific directions for some other method of delivery.

(l) MANDATE. Issuance of the mandate will be governed by the standards of Fed. R. App. P. 41 and 6th Cir. R. 15.