

§ 0.28. Death Penalty Cases.

This rule describes the administration of capital cases in this Court. Capital case, as used in this rule, means any application in this Court, to which the person under sentence is a party, that challenges, defends, or otherwise relates to the validity or execution of a death sentence that has been imposed. Capital cases ordinarily will be heard by panels composed in the manner described herein. The Court, however, may deviate from these procedures; their publication does not give any litigant a right to require that they be followed.

- (1) Certificate of Death Penalty Case. Upon the filing of any proceeding in a district court of this circuit or in this Court challenging a sentence of death imposed pursuant to a federal or state court judgment, each party in such proceeding must file a Certificate of Death Penalty Case with the Clerk of the Court of Appeals. A Certificate of Death Penalty Case must also be filed by the U.S. Attorney upon the return of a verdict recommending a sentence of death in a district court of this circuit.

The Certificate must be in the form provided as annexed to these rules, or in substantially similar form, and must set forth the names, telephone numbers and addresses of the parties and counsel; the proposed date of execution of the sentence, if set; and the emergency nature of the proceedings, if applicable.

A special tracking docket is maintained by the Clerk of this Court for all cases in which a district court of this circuit has imposed a sentence of death, and for all proceedings in a district court of this circuit or in this Court challenging a sentence of death imposed pursuant to a federal or state court judgment.

- (2) Preparation and Transmittal of the Record. Upon the filing of a notice of appeal from an order under 18 U.S.C. § 3731, 28 U.S.C. § 1291, or 28 U.S.C. § 1292(a)(1) in a death penalty case in the district court, the Clerk of the district court and appellant's counsel must immediately prepare the record for the appeal. The record must be transmitted to this Court within five days of the filing of the notice of appeal unless such order is entered within twenty-one (21) days of the date of a scheduled execution, in which case the record must be transmitted immediately by an expedited means of delivery.
- (3) Monitoring of Cases and Lodging of Relevant Documents. The Clerk of the Court of Appeals is authorized to monitor the status of scheduled executions and pending litigation in connection with any case within the geographical boundaries of this circuit wherein a warrant or order setting an execution date has been entered, and to establish communications with all parties and relevant state and/or federal courts. The Clerk may direct parties to lodge with this Court five copies of (1) all relevant portions of previous state and/or federal court records, or the entire record, and (2) all pleadings, briefs, and transcripts of any ongoing proceedings. The Clerk may docket such materials in advance of this Court's jurisdiction, under a miscellaneous docket, pending receipt of a notice of appeal or application in such case. This miscellaneous docket case is closed upon the opening of a regularly docketed case in this Court, or upon other final disposition of the case without its reaching this Court (for example, a reversal of the sentence or conviction which is not appealed, or a carrying out of the execution).

(4) Capital Case Pool and Panels.

- (a) Capital Case Pool. The capital case pool of judges consists of all active judges of the Court and those senior judges who have filed with the Clerk a statement of willingness to serve on capital case panels.
- (b) Capital Case Panel. Upon receipt of a notice of appeal from the district court, an application for a certificate of appealability, or other application to this Court for relief in a capital case, the Clerk docketts the case and assigns it to a capital case panel (except as provided in paragraph 5 of this rule). A capital case panel consists of three judges, of whom at least one is an active judge of the Court.
- (c) Selection. Judges are assigned to capital case panels by random drawing from the capital case pool. If a judge is unable to serve, that judge's name is returned to the pool after a replacement has been drawn. In the event a random drawing results in the names of three senior judges having been selected, the name of the third such senior judge is set aside and the selection process continues until an active judge's name is drawn; after the active judge's name has been drawn, the third senior judge's name is returned to the pool.
- (d) Rotation. A judge drawn from the capital case pool to serve on a capital case panel is not returned to the pool until the pool is exhausted. When the pool has been exhausted, the Clerk prepares a new capital case pool and selects capital case panels from the pool in like manner.

- (e) Replacement. If any judge serving on a capital case panel is unable to continue to serve, a replacement is drawn from the capital case pool, and the judge ceasing to serve on the panel is returned to the pool.
- (f) Duties of Capital Case Panel. A capital case panel assigned to a particular capital case handles all matters pertaining to that case, including but not limited to the merits of a direct appeal and of all petitions for collateral review, motions for stay of execution, motions to vacate a stay of execution, applications for a certificate of appealability, motions for an order authorizing the district court to consider a second or successive application for habeas corpus, appeals from subsequent petitions, and remands from the United States Supreme Court.
When practical, a capital case panel hearing a direct appeal from a death sentence imposed in federal court hears together with it the direct appeals of co-defendants, at least to the extent they involve issues in common with the appeal of the person sentenced to death. Non-common issues in the appeals of co-defendants may be severed and assigned to an ordinary panel.
- (g) Applications for Certificate of Appealability. Applications for a certificate of appealability are referred initially to a single judge of the capital case panel, who has authority to grant the certificate. If the single judge does not grant the certificate, the application is referred to the full panel for disposition by majority vote.

- (5) Original Petitions. All original applications for habeas corpus relief filed in the Clerk's office in a capital case are referred to a judge on the capital case panel in accordance with the approved operating procedures of this Court. Such an application ordinarily is transferred to the appropriate district court.
- (6) Ruling on Certificate of Appealability. This Court may rule on a certificate of appealability whether or not a formal request is made of this Court, either as a preliminary matter or as part of a merits review of the case.
- (7) Stays of Execution and Motions to Vacate Orders Granting Stay of a Federal or State Court Judgment.
- (a) Limits on Stays of Execution. Notwithstanding any provision of this paragraph 7, stays of execution are not granted, or maintained, except in accordance with law. Thus, the provisions of this paragraph 7 for a stay are ineffective in any case in which such stay would be inconsistent with the limitations of 28 U.S.C. § 2262, or any other governing statute.
- (b) Emergency Motions. Emergency motions or applications are filed with the Clerk of the Court of Appeals. If time does not permit the filing of a motion or application in person or by mail, counsel may communicate with the Clerk and obtain the Clerk's permission to file the motion by telefacsimile. Counsel are encouraged to communicate with the Clerk by telephone as soon as it becomes evident that emergency relief will be sought from this Court. The motion or application must contain a brief account of the prior actions, if any, of this Court and the name of the judge

or judges involved in such prior actions.

- (c) Documents Required for Motions for Stay or to Vacate Stay. The party moving for a stay of execution of a sentence of death or to vacate a stay must file the original and four (4) copies (a total of five) of the motion and serve all parties. A copy of the documents listed below must be attached to the original and to each copy of the motion. If time does not permit, the motion may be filed without attachments, but the movant must file the necessary copies as soon as possible. (If the respondent (the State or the U.S. Attorney) has indicated to the petitioner that it does not seek to oppose the stay immediately and the petitioner states this fact in the petition, these documents need not be filed with the application but must be filed within ten (10) days after the application is filed.)

(i) The indictment or other accusatory instrument;

(ii) The judgment of conviction containing the sentence of death;

(iii) The petition or complaint filed in the district court;

(iv) The opinion of the district court setting forth the reasons for granting or denying relief;

(v) The district court judgment granting or denying relief;

(vi) The district court order granting or denying a stay, and the statement of reasons for its action;

(vii) The certificate of appealability or order denying a certificate of appealability;

(viii) A copy of each state or federal court opinion or judgment bearing on the issues presented in the motion in cases in which appellant was a party;

(ix) A copy of the docket entries of the district court;

and

(x) A copy of the notice of appeal.

(d) Automatic Stays. In any case in which a sentence of death has been imposed by a district court of this circuit, or by a state court within the circuit, execution of the sentence of death is automatically stayed upon the filing of a notice of appeal from the judgment of conviction or a notice of appeal from the denial of the first application in federal court seeking relief from the sentence of death. The clerk must promptly enter an order implementing the stay. Unless vacated or modified, the stay provided by this subparagraph remains in effect until the expiration of all proceedings available to the person sentenced to death (including review by the United States Supreme Court) as part of the direct review of the judgment of conviction or of the denial of such first application. The stay may be modified or vacated by the assigned panel at any time.

(e) Other Stays. A stay of any duration up to that specified in subparagraph 7(f)(i) may be ordered in any case by the assigned capital case panel, upon the affirmative vote of any judge of that panel.

(f) Duration of Stays: Terminology. Use of the following terminology to specify the duration of a stay denotes the durations specified below:

(i) If, in granting a stay of execution of a sentence of death, the Court or judge indicates that the stay shall be in effect "for the standard duration" under this rule, this signifies that, unless vacated or modified, the stay remains in effect until the expiration of all proceedings available to the person sentenced to death (including review by the United States Supreme Court) as part of the direct review of the judgment of the district court, or of the Court of Appeals in the case of an original petition filed there.

(ii) If, in granting a stay of execution of a sentence of death, the Court or judge indicates that the stay shall be in effect "for the duration of the appeal," this signifies that, unless vacated or modified, the stay remains in effect until the Court's mandate issues. Absent an order to the contrary preceded by timely notice to counsel, the mandate does not issue until the time for filing a petition for rehearing has expired, or, if such a petition has been filed, until the petition and any petition for rehearing in banc have been determined.

(g) Stays in Relation to Petitions for Rehearing.

(i) Petitions for rehearing accompanied by petitions for rehearing in banc are circulated to all judges of the capital case pool simultaneously with the

circulation of the petition for rehearing to the assigned capital case panel. Judges participating in the petition for rehearing in banc may vote on a stay of execution of a sentence of death immediately, without waiting for the action of the assigned panel as to the petition for rehearing.

- (ii) A stay of execution of a sentence of death pending disposition of the petition for rehearing and the petition for rehearing in banc is granted upon the affirmative vote of any two judges eligible to participate in a rehearing in banc.
- (h) All stay applications must be filed with the Clerk of the Court. In each case in which the Court orders a stay of execution, the Clerk of the Court issues a written order in the name of the Court specifying the duration of the stay.
- (i) During non-business hours, emergency stay applications must be directed to an assigned representative of the Clerk (the duty clerk), whose telephone number is left with the courthouse security officers. The duty clerk must immediately advise the members of the assigned panel of the filing of an emergency stay application.
- (j) In the event the members of the assigned panel cannot be reached by the duty clerk, the duty clerk advises the judge of the court assigned at that time to hear emergency applications of the filing of an off-hours emergency stay application. Notwithstanding the provisions of subparagraphs 7(e) and 7(g)(ii), the applications judge may stay an execution until such time as the application can be placed before the assigned panel or the Court in banc.

