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MAY 24 2013

S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

May 24, 2013

HAND DELIVERED

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Brad Keith Sigmon, #SK-6008;
Capital Case: Federal District Court Stay of Execution Entered

Dear Mr. Shearouse,

Enclosed please find a copy of the May 23, 2013 Order of the District Court of South Carolina entering a stay of execution "for ninety (90) days after appointment of counsel...." (Order, p. 4). Also enclosed is a copy of the Magistrate's Order appointing below listed counsel on May 23, 2013.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

cc: William Harry Ehliens, II, Esquire (via U.S. Mail with e-mail courtesy copy)
Teresa Lynn Norris, Esquire (via U.S. Mail with e-mail courtesy copy)

conviction case on July 20, 2009. *Id.* The Supreme Court of South Carolina affirmed the denial of PCR on March 20, 2013, and issued an order denying rehearing and substituting an opinion on May 8, 2013. *Sigmon v. State*, No. 27233, 2013 WL 2005696 (May 8, 2013). Petitioner alleges that because the South Carolina Supreme Court denied rehearing on May 8, 2013, the state Clerk of Court will issue the remittitur order shortly which will automatically schedule Petitioner's execution for the fourth Friday after the order is entered. ECF No. 1 at 1. Thus, as of this date it appears that Petitioner requests that this Court stay his imminent yet *unscheduled* execution.¹ Further, Petitioner alleges that "at this time" one hundred and nine (109) days have elapsed on the one-year limitations period for filing a federal habeas corpus petition as prescribed by 28 U.S.C. § 2244(d). ECF No. 1 at 2.

Respondent asserts that the Supreme Court of South Carolina likely will not issue an execution notice in light of the Motion for Stay of Execution filed before this Court. ECF No. 9 at 1, n.2. Thus, Respondent asserts that Petitioner is essentially seeking a stay of issuance of the execution notice. Respondent does not oppose a stay in this matter, ECF No. 9 at 5, and it asserts that the stay should be limited at this time to ninety (90) days as provided by 28 U.S.C. § 2251(a)(3). *Id.* Further, it asserts that Petitioner is entitled to have counsel appointed pursuant to 28 U.S.C. § 3599(a)(2). *Id.* Also, Respondent asserts that "this Court should order the petition be filed within that time and allow Petitioner additional time to seek a further stay under the provisions of 28 U.S.C. § 2251(a)(1)." ECF No. 9 at 5, 8. Notably, Respondent agrees with Petitioner that one hundred and nine (109) days of the

¹ The remittitur has now been issued by the South Carolina Supreme Court. *See* ECF No. 13. **If an execution date now has been scheduled, attorneys for Petitioner and Respondent are directed to promptly notify this Court.**

federal one-year limitations period have lapsed between his state conviction becoming final and the filing of his PCR action. ECF No. 9 at 3.

Petitioner, through counsel, did not reply or object to the Respondent's position on any matter, including the length of the stay of execution to be entered by this Court or the time deadline for Petitioner to be required to file the habeas petition.

A stay of execution for a sentence of death imposed by a court of a state is governed by 28 U.S.C. § 2251(a)(1) and (a)(3).² See *Gray v. Kelly*, 131 S. Ct. 2956 (2011) (citing 28 U.S.C. § 2251(a)(3)); *McFarland v. Scott*, 512 U.S. 849 (1994); *Powell v. Kelly*, 492 F. Supp. 2d 552, 556–57 (E.D. Va. 2007) (applying 28 U.S.C. § 2251(a)(3)); Donald E. Wilkes, Jr., Federal Postconviction Remedies Handbook § 7:20 (May 2013) (explaining that the Patriot Act amended 28 U.S.C. § 2251 to expressly ratify the holding in *McFarland*); Order, *Wood v. Byars*, C/A No. 12-3532-DCN-PJG (D.S.C. Dec. 14, 2012), ECF No. 13 (stating that 28 U.S.C. § 2251(a)(3) and the holding in *McFarland* govern a stay of execution for a sentence of death imposed by a state court). “The federal habeas corpus statute grants any federal judge ‘before whom a habeas corpus proceeding is pending’ power to stay a state-court action ‘for any matter involved in the habeas corpus proceeding.’” *McFarland*,

² Chapter 154 of Title 28 contains special habeas corpus procedures in capital cases if specified criteria are met. See 28 U.S.C. §§ 2261–2266. The USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006), amended Chapter 154 to shift the eligibility determination from the federal courts to the Attorney General of the United States. See 28 U.S.C. § 2261(b). The United States Department of Justice on February 13, 2012, issued a supplemental notice of proposed rule-making and request for comments with respect to the certification process for state capital counsel systems. See Certification Process for State Capital Counsel Systems, RIN 1121-AA77, 77 Fed.Reg. 7559 (Feb. 13, 2012), available at 2012 WL 424555. It appears that as of April 18, 2013, the Department of Justice had not promulgated regulations to implement the certification procedure. See Tom Horne, *Letter from the Office of the Attorney General State of Arizona to the Attorney General of the United States* (April 18, 2013), <https://www.azag.gov/sites/default/files/AGHolderLetter.pdf>. Thus, Chapter 154 is not applicable in the above-captioned case.

512 U.S. at 857 (citing 28 U.S.C. § 2251) (emphasis in original). When a capital defendant invokes his or her right to counsel under 28 U.S.C. § 2251, a federal court has jurisdiction to issue a stay of execution. *See* 28 U.S.C. § 2251(a)(3); *McFarland*, 512 U.S. at 858 (“once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution”).

In the Motion for Stay of Execution, Petitioner seeks appointment of Teresa L. Norris of Columbia, South Carolina and William H. Ehliens of Greenville, South Carolina to represent him in the preparation and filing of a timely petition for habeas relief. Thus, Petitioner has invoked his right to appointed counsel and, therefore, this “federal court also has jurisdiction under § 2251 to enter a stay of execution.” *McFarland*, 512 U.S. at 858; *see also* 28 U.S.C. § 2251(a)(3).

This Court finds that Petitioner should be granted a stay of execution for ninety (90) days from the date counsel is appointed as prescribed by 28 U.S.C. § 2251(a)(3). Further, within the ninety (90) day stay of execution, Petitioner should be required to file the habeas petition. Additionally, prior to the expiration of the ninety (90) day stay of execution, Petitioner is required to seek a longer stay of execution pursuant to 28 U.S.C. § 2251(a)(1) in order to allow this Court to rule on the merits of the habeas petition.³ *See Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (“If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot.”). Accordingly, this Court orders the following:

(1) Petitioner’s Motion for Stay of Execution is **granted** for ninety (90) days after appointment of counsel pursuant to 28 U.S.C. § 2251(a)(3);

³ As discussed previously, Respondent states that pursuant to 28 U.S.C. § 2251(a)(1) Petitioner may seek a further stay.

(2) Within the ninety (90) day stay of execution, Petitioner is required to file the habeas petition;

(3) Prior to the expiration of the ninety (90) day stay of execution, Petitioner is required to seek a longer stay of execution pursuant to 28 U.S.C. § 2251(a)(1) in order to allow this Court to rule on the merits of the habeas petition;

(4) An order appointing counsel and ruling on the Motion for Leave to Proceed *in forma pauperis* will issue separately;

(5) The Clerk of Court shall assign a civil action number to this case, and the Clerk of Court shall notify the undersigned to review the stay of execution twenty (20) days prior to the expiration of the ninety (90) day stay of execution; and

(6) This matter is referred to the assigned United States Magistrate Judge for preliminary proceedings.

IT IS SO ORDERED.

s/R. Bryan Harwell
R. Bryan Harwell
United States District Judge

May 23, 2013
Florence, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

| | |
|--|------------------------------|
| Brad Keith Sigmon, # SK-6008, |) C/A No. |
| |) Misc. No. 8:13-206-RBH-JDA |
| Petitioner, |) |
| |) |
| vs. |) |
| |) |
| William R. Byars, Jr., <i>Commissioner, South Carolina</i> |) |
| <i>Department of Corrections;</i> |) |
| Joseph McFadden, <i>Warden of Lieber Correctional</i> |) |
| <i>Institution,</i> |) |
| |) |
| Respondents. |) |

ORDER RECEIVED
MAY 24 2013
S.C. Supreme Court

This death penalty habeas corpus matter is before the Court on Petitioner's Motion for Appointment of Counsel filed on May 10, 2013.¹ ECF No. 1. Respondent filed a Response to the Motion on May 16, 2013. ECF No. 9. Although this Court entered an order to direct that a Reply should be filed by Friday, May 17, 2013, ECF No. 5, Petitioner did not file a Reply.

In the Motion, Petitioner seeks appointment of Teresa L. Norris of Columbia, South Carolina and William H. Ehliès of Greenville, South Carolina as counsel pursuant to 18 U.S.C. § 3599 because he is financially unable to obtain adequate representation. He seeks appointment of counsel prior to the filing of a habeas petition and in order to pursue federal habeas corpus remedies. Petitioner alleges that both Teresa L. Norris and William H. Ehliès satisfy the provisions of 18 U.S.C. § 3599 such that appointing them would be appropriate under the statute. Mr. Ehliès is currently a member of this Court's Criminal Justice Act ("CJA") Death Penalty panel of attorneys designated lead counsel, and Ms.

¹ The Court previously granted Petitioner's Motion for Stay of Execution and his Motion for Leave to Proceed *in forma pauperis*. ECF Nos. 17, 18.

Norris is currently a member of this Court's CJA Death Penalty panel of attorneys designated second chair.²

A. Qualifications of Counsel

The qualifications for appointed counsel in capital cases are governed by 18 U.S.C. § 3599 and the Plan of the United States District Court for the District of South Carolina for Implementing the Criminal Justice Act. *See In re Amendments to the Plan of the U.S. Dist. Ct. for the Dist. of S.C. for Implementing the Criminal Justice Act*, No. 3:10-mc-5005-CIV (D.S.C. May 5, 2010) ("CJA Plan"). The statutory authority for the federal courts to appoint legal counsel for indigent, death-sentenced prisoners seeking habeas corpus relief is contained in the following relevant portions of 18 U.S.C. § 3599:

(a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

.....

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsection[] . . . (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

² The Court refers to the CJA Death Penalty Panel Attorney List revised January 8, 2013.

Courts interpreting the appointment of counsel provisions of § 3599 have held that this “provision grants a first time, indigent, capital habeas corpus petitioner ‘a mandatory right to qualified legal counsel.’” *Staton v. Folino*, No. 3:11-cv-00144, 2011 WL 5085029, at *1 n. 1 (W.D. Pa. Oct. 26, 2011). Also, the United States Supreme Court has held that an attorney’s assistance in preparing a capital habeas petition is crucial, owing to the complex nature of capital habeas proceedings and the seriousness of the death penalty. *McFarland v. Scott*, 512 U.S. 849, 855–56 (1994). In particular, the *McFarland* Court stated, “the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant’s habeas claims.” *Id.* at 858. At least one federal district court and one federal circuit court of appeals have construed the language of § 3599 as allowing appointment of counsel under subsection (d) either “alternatively or in addition” to an appointment under subsection (c). See *In re Lindsey*, 875 F.2d 1502, 1057 n.3 (11th Cir. 1989); *United States v. Sampson*, NO. CR. 01-10384-MLW, 2008 WL 2563374, at *1 (D. Mass.) (noting that the *Guide to Judicial Policies and Procedures*, vol. 7, ch. VI, §6.01(C)(3) describes § 3599(d) as a “waiver” provision, allowing appointment of an attorney whose experience level does not technically meet the requirements of §3599(c)). The CJA Plan further requires “in appointing counsel for death-sentenced state prisoners, consideration will be given to attorneys who are members of the first-tier of the death penalty CJA panel, which shall be maintained by the Office of the Clerk of Court. However, the Court shall not be precluded from making appointments from the second-tier death penalty CJA panel or from the general CJA panel.” See CJA Plan at 19.

The statute provides for appointment of “one or more” counsel. 18 U.S.C. § 3599(a)(1)(B), (a)(2). As previously stated, Petitioner seeks appointment of Ms. Norris

and Mr. Ehlies as counsel for this § 2254 habeas case, and without specifying whether counsel meet the requirements set forth in 18 U.S.C. § 3599(c) or (d), he alleges in general that Ms. Norris and Mr. Ehlies satisfy the statutory requirements.³ ECF No. 1 at 4–5.

Petitioner asserts that Mr. Ehlies has been admitted to the Bar of the United States Court of Appeals for the Fourth Circuit since 1981, has been licensed to practice law in South Carolina since 1975, and has had more than three years' experience in handling felony appeals before the court of appeals. *Id.* Mr. Ehlies is a member of the first tier of this Court's CJA Death Penalty panel, and it appears that he meets all of the experience requirements of 18 U.S.C. § 3599(c). Petitioner asserts that Ms. Norris previously served as the Director of the Center for Capital Litigation in Columbia, South Carolina, has represented over thirty-five clients in capital cases in every stage of the proceedings, and has been appointed as lead counsel in capital habeas proceedings in the District Court of South Carolina at least six times where she also served as lead counsel on five of those cases in the Fourth Circuit Court of Appeals.⁴ ECF No. 1 at 4. Ms. Norris is a member of this Court's CJA Death Penalty panel of attorneys designated second chair, and it appears that she meets all of the experience requirements of 18 U.S.C. § 3599(d).⁵ Additionally,

³ Petitioner does refer to 18 U.S.C. § 3599(b) and (d), but subsection (b) relates to appointment of counsel made *before* judgment. Because this case relates to appointment of counsel to be made after the entry of a judgment imposing a sentence of death, it appears that subsection (b) is not applicable.

⁴ Petitioner asserts that only five of the six cases had reached the appellate stage of habeas proceedings.

⁵ Although Petitioner does not allege whether Ms. Norris satisfies the requirements of § 3599(c), it appears likely that she also meets the experience requirements of § 3599(c) based on the allegations pertaining to her experience in the United States Court of Appeals
(continued...)

Ms. Norris represented Petitioner before the state PCR court and was appointed to the case on December 4, 2006, and Mr. Ehlied also served as state PCR counsel for Petitioner.

Although Respondent takes no position on who should be appointed as counsel for Petitioner in this matter, Respondent submits that Ms. Norris and Mr. Ehlied should have knowledge of and familiarity with the case due to their participation in the state PCR proceedings which would likely allow for more efficient representation in this action. ECF No. 9 at 5–6. Based on their stated and known experience and on the lack of objection from Respondent, the Court finds that both Mr. Ehlied and Ms. Norris are qualified to represent Petitioner under both the statutory requirements of § 3599 and the Court's CJA Plan.

B. Cost Containment and Budgeting

The Judicial Council of the United States Court of Appeals for the Fourth Circuit has adopted a resolution governing review of attorney compensation requests in death penalty habeas corpus cases. See Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases, <http://www.ca4.uscourts.gov/pdf/noticeofresolutionattorneycompensationcapitalcases.pdf>. Under this resolution, any request for compensation in excess of \$50,000 per attorney at the district court level is presumptively excessive. While the effective date of this resolution has been suspended pending public comment, see Suspension of Effective Date of Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases, <http://www.ca4.uscourts.gov/pdf/noticeofsuspensionresolutionattorneycompensation>

⁵(...continued)
for the Fourth Circuit.

capitalcases.pdf, the Court cautions appointed counsel to make every effort to contain expenses and fees in this matter below the presumptively excessive figure to the extent they can do so without detracting from their vigorous representation of the Petitioner's positions in this case. Toward that end, counsel shall submit a confidential proposed litigation budget within thirty (30) days of the date of this order to Claire Woodward O'Donnell, Panel Administrator, Federal Public Defender's Office. The proposed budget shall estimate the number of hours counsel anticipates expending for the following stages of the litigation: (1) preparation and filing of the petition for habeas corpus; (2) preparation of legal memoranda in opposition to the respondent's return; (3) evidentiary hearing, if one is sought. The proposed budget shall also contain cost estimates for investigative, expert, or other services, including law clerks and paralegals, if any. Additionally, counsel shall submit interim payment vouchers every sixty (60) days so that costs and fees may be monitored.

Accordingly, the Court appoints Teresa L. Norris, Esquire, and William H. Ehliens, Esquire, as Petitioner's counsel.

IT IS SO ORDERED.

s/Jacquelyn D. Austin
United States Magistrate Judge

May 23, 2013
Greenville, South Carolina