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**Aug 11 2023**

**S.C. SUPREME COURT**

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA**

**ANDRES ANTONIO TORRES,** )  
*Petitioner,* )

v. )

**BRYAN P. STIRLING,** Director, )  
South Carolina Department of Corrections, )  
And **KENNETH NELSON,** Warden, )  
Broad River Correctional Institution, )  
*Respondents.* )

No. \_\_\_\_\_  
**CAPITAL CASE**

**MOTION FOR STAY OF EXECUTION  
AND APPOINTMENT OF COUNSEL**

Pursuant to 18 U.S.C. § 3599, Andres Antonio Torres, an indigent prisoner under a sentence of death, respectfully requests that this Honorable Court preemptively stay his execution<sup>1</sup> and appoint him counsel to investigate, prepare and file his first federal petition for a writ of *habeas corpus* challenging his conviction and sentence of death. In support of this motion, Torres submits the following:

1) Torres is incarcerated at Broad River Correctional Institution in Columbia, South Carolina. He is in the custody of Warden Kenneth Nelsen.

2) Torres was convicted in 2008 of murder (x 2); armed robbery (x 2); first-degree burglary; first-degree criminal sexual conduct; and attempt to burn and sentenced to death by the Spartanburg County General Sessions Court in Spartanburg, South Carolina. On December 13,

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<sup>1</sup> Though the South Carolina Supreme Court has not yet issued an execution date for Torres, it could do so imminently, which requires a stay from this Court in order to safeguard his rights to federal habeas corpus review. As discussed *infra*, the Court denied Torres’ Petition for Writ of Certiorari seeking review of the denial of his state post-conviction application. Exhibit 1. Torres filed a timely Petition for Rehearing of that decision on July 11, 2023, which the Court denied on August 10, 2023. Exhibit 2. The Court will notify the Department of Corrections of the denial and schedule Torres’ execution for the fourth Friday after the issuance of that notice. *See* S.C. Code § 17-25-370; *In re: Stays of Execution in Capital Cases*, 471 S.E.2d 140 (S.C. 1996).

2010, the South Carolina Supreme Court affirmed his conviction and sentence on direct appeal. *State v. Torres*, 703 S.E.2d 226 (S.C. 2010).

3) Torres properly filed a pro se PCR application on April 22, 2011, thereby statutorily tolling the one-year statute of limitations for filing a petition for writ of federal habeas corpus under the Anti-terrorism and Effective Death Penalty Act (“AEDPA”) that had commenced on December 14, 2013. 28 U.S.C. § 2244(d). Following the appointment of counsel, Torres’ PCR application was amended several times with the final application filed on April 7, 2014. Following evidentiary hearings, the PCR court denied post-conviction relief to Torres on December 9, 2019. *Torres v. State*, No. 2011-CP-42-01851 (Dec. 9, 2019 Order). Torres timely filed a Motion to Alter or Amend the Judgment that was denied on May 8, 2020. Following a timely notice of appeal, the South Carolina Supreme Court denied certiorari. *Torres v. State*, No. 2020-000842 (S.C. June 27, 2023). Exhibit 1. A rehearing petition was filed on July 11, 2023, and was denied on August 10, 2023. Exhibit 2.

4) Only 130 days of § 2244(d)’s one year limitations period had run before Torres filed his PCR application. Thus, when the South Carolina Supreme Court denied Torres’ Petition for Rehearing, he had 235 days remaining to file his federal habeas petition. *See generally, Beatty v. Rawski*, 97 F.Supp.3d 768, 774 (D.S.C. 2015) (time for filing federal habeas is tolled until the South Carolina Supreme Court’s remittitur on appeal from the denial of post-conviction relief has been filed in the circuit court rather than the date of denial of rehearing). The remittitur has not yet been issued.

5) Because Torres is indigent and unable to afford counsel, he has contemporaneously filed an Application for Permission to Proceed without Payment of Fees and a Motion for Leave to

Proceed *in Forma Pauperis*, in accordance with Rule 3(a) of the Rules Governing Section 2254 Cases.

6) Capital habeas petitioners are entitled to qualified court-appointed counsel, pursuant to 18 U.S.C. § 3599(a)(2), formerly codified as 21 U.S.C. § 848(q).<sup>2</sup>

7) In *McFarland v. Scott*, 512 U.S. 849 (1994), the United States Supreme Court recognized the importance of the right to counsel in capital cases:

Congress’ provision of a right to counsel under § 848(q)(4)(B) [now § 3599] reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of “the seriousness of the possible penalty and ... the unique and complex nature of the litigation.” § 848(q)(7).

*Id.* at 855. See also *Martel v. Clair*, 565 U.S. 648, 657 (2012) (citing § 3599(a)(2)). “On its face, [§ 848(q)(4)(B), now § 3599] grants indigent capital defendants a mandatory right to qualified counsel and related services in any federal post-conviction proceeding.” *McFarland*, 512 U.S. at 854. This right to counsel “necessarily includes a right for that counsel meaningfully to research and present a defendant’s habeas claims.” *Id.* at 858.

8) Accordingly, the § 3599 right to counsel attaches even before the filing of a § 2254 petition and entitles an indigent capital petitioner to counsel who can research, investigate, and prepare the habeas petition for filing. As the United States Supreme Court has made clear:

The language and purposes of § 848(q)(4)(B) [now § 3599] and its related provisions establish that the right to appointed counsel includes the right to legal assistance in the preparation of a habeas corpus application. We therefore conclude that “a post-conviction proceeding” within the meaning of § 848(q)(4)(B) [now § 3599] is commenced by the filing of a death row defendant’s motion requesting the appointment of counsel for his federal habeas corpus proceeding. *McFarland* filed such a motion and was entitled to the appointment of a lawyer.

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<sup>2</sup> See also United States District Court for The District of South Carolina, Plan for Implementing the Criminal Justice Act of 1964, As Amended, 18 U.S.C. § 3006A (Jan. 22, 2020) (hereafter, “CJA Plan”), XIII(F)(1) (available at [http://www.scd.uscourts.gov/StandingOrders/Criminal\\_CJA\\_Procedure/Amended\\_Plan\\_For\\_Implementing\\_The\\_Criminal\\_Justice\\_Act\\_Of\\_1964.pdf](http://www.scd.uscourts.gov/StandingOrders/Criminal_CJA_Procedure/Amended_Plan_For_Implementing_The_Criminal_Justice_Act_Of_1964.pdf)) (as of Jul. 17, 2023).

*McFarland*, 512 U.S. at 859.

9) Moreover, the AEDPA’s one-year statute of limitations period is strict and not subject to equitable tolling absent a showing of petitioner’s diligent pursuit of his rights and a showing that some extraordinary circumstance stood in his way and prevented timely filing of his petition. *See Holland v. Florida*, 560 U.S. 631, 649 (2010); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); § 2244(d)(1). Any petitioner must investigate, develop, and present all possible claims to the court within that time frame, or risk waiving them. *McFarland*, 512 U.S. at 856.

An attorney’s assistance prior to the filing of a capital defendant’s habeas corpus petition is crucial, because the complexity of our jurisprudence in this area ... makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.

*Id.* at 855-56.

10) Thus, because Torres is indigent and has requested counsel in order to challenge his conviction and sentence under § 2254, he is entitled to the appointment of counsel to investigate, research, and prepare his petition for writ of habeas corpus.

11) Section 3599 sets forth the required qualifications for appointed counsel in capital cases, including at least one attorney who has been admitted in a federal court of appeals for five years and had not less than three years of experience appealing felony cases in that court, as well as additional counsel “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.” 18 U.S.C. § 3599(c)-(d).

12) Moreover, the District of South Carolina’s plan for implementing the Criminal Justice Act (“CJA Plan”) instructs the court to appoint “at least two attorneys” and permits the Court to utilize the expert services available through the Administrative Office of the United States (“AO”), which

includes out-of-district federal defender organization staff and capital habeas units, in order “to achieve cost and other efficiencies together with high quality representation.” CJA Plan XIII(F)(2)-(3). Likewise, the Court may appoint counsel from qualified attorneys in the CJA Panel. *Id.*

13) The CJA Plan specifically highlights the importance of “distinguished prior experience” in federal post-conviction and capital post-conviction representation under 2254. CJA Plan XIII(F)(6)-(7). Likewise, the CJA Plan permits the Court to consider the commitment of counsel to capital representation and willingness to zealously represent the petitioner. *Id. at XIII(F)(9)*. The CJA Plan also requires the Court to appoint counsel at the earliest opportunity and provide counsel with “appropriate litigation resources.” *Id. at XIII(F)(4)*.

14) In this case, the Court should appoint the Capital Habeas Unit for the Fourth Circuit (“the CHU”) and William H. Ehliens, II, to represent Torres. The CJA guidelines permit this and other courts in this District have appointed the CHU, along with a CJA Panel attorney. *See, e.g., Owens v. Stirling*, 0:16-cv-02512-TLW, ECF No. 237 (D.S.C. Order Apr. 8, 2021), available at 2021 WL 1313550.

15) The CHU was established by the Fourth Circuit to provide the representation mandated by § 3599(e) for indigent, death-sentenced prisoners within that court’s appellate jurisdiction. Based in the Office of the Federal Public Defender for the Western District of North Carolina, the CHU has a staff of attorneys with specialized expertise in capital jurisprudence and who meet the qualification standards set forth in § 3599(b) and (c).

16) Per the guidelines promulgated by the Judicial Conference for the United States Courts, cases “assigned to a federal public...defender organization...should be made in the name of the

organization...rather than in the name of an individual staff attorney within the organization,”<sup>3</sup> and “federal public defenders...should be responsible for the assignment of cases within their own offices.”<sup>4</sup> The Federal Public Defender and CHU Chief intend to assign this case to Teresa L. Norris, who more than satisfies the requirements of § 3599(a)(2).<sup>5</sup>

17) As the CHU attorneys would appear within the scope of their duties as Federal Public Defenders, the appointment of the CHU would obviate the need for payment of attorney fees and expenses for their services. The appointment of the CHU will also ensure the provision of expert services and resources that § 3599 requires without the submission of requests and vouchers to this Court, except for the attorney fees and expenses of Mr. Ehlies.

18) The guidelines also state that “[i]n the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel” in federal proceedings.<sup>6</sup> Mr. Ehlies represented

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<sup>3</sup>See Guide to Judiciary Policy, Vol 7A, § 220.35 (available at <https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-220-appointment-counsel>) (as of July 18, 2023).

<sup>4</sup>See *Id.*, Vol 7A, § 440 (available at <https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-4-ss-440-assignment-cases#a440>) (as of July 18, 2023).

<sup>5</sup> Ms. Norris has been a member in good standing of the South Carolina bar since November 1990. She has directly represented approximately fifty (50) indigent capital defendants in various stages of court proceedings, including state capital trials, as well as numerous state post-conviction relief proceedings and federal habeas proceedings. Her most recent appearances in federal habeas proceedings are for death-sentenced inmates from South Carolina and Virginia, as well as appearances in 2255 post-conviction proceedings and on direct appeal for federally death-sentenced inmates sentenced in the Western District of Missouri and the Eastern District of Virginia. See *Bowman v. Stirling*, 45 F.4th 470 (4th Cir. 2022); *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019); *Morva v. Zook*, 821 F.3d 517 (4th Cir. 2016); *Purkey v. United States*, 729 F.3d 860 (8th Cir. 2013); *United States v. Runyon*, 707 F.3d 475 (4th Cir. 2013).

<sup>6</sup> See Guide to Judiciary Policy, Vol 7A, § 620.70 (available at [https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-6-ss-620-appointment-counsel-capital-cases#a620\\_70](https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-6-ss-620-appointment-counsel-capital-cases#a620_70)) (as of July 18, 2023).

Torres throughout his trial level state post-conviction proceedings. He was appointed to represent Torres soon after the post-conviction court held a hearing on Torres' desire for appointment of counsel on March 10, 2011, and continued his representation through the filing of a Notice of Appeal on June 4, 2020. While Torres was represented in the appeal by the South Carolina Commission on Indigent Defense, Appellate Defenders, Mr. Ehlied continued to consult with them and advise Torres. Moreover, Mr. Ehlied also more than satisfies the requirements of § 3599(a)(2).<sup>7</sup> To the extent necessary, the CHU can serve as independent, conflict-free counsel to determine whether there are claims available that were not previously presented in state post-conviction proceedings. *See Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013); *Gray v. Pearson*, 526 Fed. Appx. 331 (4th Cir. 2013).<sup>8</sup>

19) Torres requests the CJA rates for appointed counsel in capital cases for Mr. Ehlied.

20) Finally, this Court should enter a stay, preempting the issuance of an execution warrant, to allow Torres along with newly appointed counsel, to investigate, prepare, and file his federal habeas petition. 28 U.S.C. § 2251 expressly states that "A justice or judge of the United States

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<sup>7</sup> Mr. Ehlied has been a member of the South Carolina bar in good-standing since 1975. The Court has approved Mr. Ehlied to be a member of the death penalty CJA panel based on his certifications that he is a member in good standing of the federal bar of this District and that he is eligible and willing to provide representation under the CJA. He has previously represented 6 South Carolina death-sentenced inmates in federal habeas proceedings in the District Court and in the Fourth Circuit. *See Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019); *Ivey v. Ozmint*, 304 Fed. Appx. 144 (4th Cir. 2008); *Ivey v. Catoe* 36 Fed. Appx. 718 (4th Cir. 2002); *Owens v. Stirling*, No. 0:16-cv-02512-TLW.

<sup>8</sup> While portions of *Martinez v. Ryan*, 566 U.S. 1 (2012), which is the underpinning of *Juniper*, have been negated by *Shinn v. Ramirez*, 142 S. Ct. 1718 (2023), it still provides a potential basis to establish cause and prejudice to overcome a procedural default of a valid claim not previously asserted by state post-conviction counsel. Moreover, the Fourth Circuit has not revisited or reversed *Juniper* after *Shinn* so appointment of conflict-free counsel remains a requirement in this circuit.

before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.” *Id*; *McFarland*, 512 U.S. at 858 (“Because § 2251 expressly authorizes federal courts to stay state court proceedings ‘for any matter involved in the habeas corpus proceeding,’ the exercise of this authority is not barred by the Anti-Injunction Act,” 28 U.S.C. § 2283).

21) Therefore, just as this Court has done in numerous other federal capital habeas proceedings, this Court should enter an order preempting or staying the warrant for execution, so that Torres may timely file his federal habeas corpus petition. *See e.g.*, *Dickerson v. Stirling*, Case No. 9:21-mc-00618-SAL-MHC, ECF No. 16 (granting stay for 90 days); *Allen v. Davis*, Case No. 0:18-cv-01544-DCC-PJG, ECF No. 8 (granting stay for 90 days); *Mahdi v. Stirling*, Case No. 8:16-cv-03911-TMC, ECF No. 12 (granting stay for 90 days); *Owens v. Stirling*, Case No. 16-cv-02512-TLW, ECF Nos. 9 (granting stay for 90 days), 30 (granting stay for 90 days), 37 (granting stay for 90 days), 69 (granting stay for 90 days).

### **Conclusion**

WHEREFORE, for the foregoing reasons, this Court should enter an order (i) appointing the CHU and William H. Ehliens, II, to represent Torres pursuant to 18 U.S.C. § 3599 and (ii) preempting or staying the warrant of execution.

Respectfully submitted,

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August 10, 2023