

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

Andres Antonio Torres,)
)
Petitioner,)
)
vs.)
)
Bryan P. Stirling, *Director, South Carolina*)
Department of Corrections, and Lydell)
Chestnut,¹ *Deputy Warden of Broad River*)
Correctional Secure Facility,)
)
Respondents.)
)

Case No. 6:23-mc-00571-BHH-KFM

ORDER

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Sep 18 2023
S.C. SUPREME COURT

Andres Antonio Torres (“Petitioner”) is a state prisoner sentenced to death. This matter is before the court on Petitioner’s request for counsel (doc. 1) and motion to proceed *in forma pauperis* (doc. 4).² Respondents have filed a response (doc. 9), and Petitioner filed a reply (doc. 11).

I. Motion for Leave to Proceed in *Forma Pauperis*

After a careful review of Petitioner’s motion for leave to proceed *in forma pauperis* and supporting affidavit, the court finds Petitioner should be relieved of the obligation to prepay the full filing fee. Petitioner’s motion is therefore GRANTED.

II. Motion for Appointment of Counsel

Pursuant to 18 U.S.C. § 3599(a)(2), indigent death-sentenced prisoners are “entitled to the appointment of one or more attorneys” to pursue federal habeas corpus remedies. Further, “the right to counsel necessarily includes a right for that counsel meaningfully to research and present

¹ Lydell Chestnut is substituted for Kenneth Nelson as the proper respondent in this matter.

² Petitioner has also moved to stay his execution (*see* doc. 1). The Honorable Bruce Howe Hendricks, United States District Judge, will rule on that motion by separate order.

a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994). Thus, § 3599 contemplates the appointment of qualified counsel prior to the filing of a petition for writ of habeas corpus and sets forth the required qualifications:

- (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.

18 U.S.C. § 3599(c)-(d).

In addition, pursuant to the District of South Carolina's plan for implementing the Criminal Justice Act ("CJA"), this court maintains a panel of qualified attorneys available to represent indigent defendants. *See Standing Orders – Amended CJA Plan for the District of South Carolina*, Case No. 3:20-mc-00027 (D.S.C. Jan. 22, 2020) ("CJA Plan"). Recognizing the particular complexity of capital cases, the CJA Plan instructs the court to utilize the expert services available through the Administrative Office of the United States Courts, which include capital habeas units and federal community defender offices, where appropriate. CJA Plan § XIII(B)(4). Further, "[a]ll attorneys appointed in federal capital cases must be well qualified, by virtue of their training, commitment, and distinguished prior capital defense experience at the relevant stage of the proceeding, to serve as counsel in this highly specialized and demanding litigation" and "must have sufficient time and resources to devote to the representation, taking into account their current caseloads and the extraordinary demands of federal capital cases." *Id.* § XIII(B)(6), (7).

Specifically, regarding appointment of counsel in capital habeas matters, the CJA Plan provides the following guidance:

3. Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment as co-counsel in capital § 2254 cases to achieve cost and other efficiencies together with high quality representation.

....

6. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
7. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.
8. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to the qualifications standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.
9. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to proposed counsel's commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to represent effectively the interests of the client.

CJA Plan § XIII(F).

Petitioner requests the court appoint the Capital Habeas Unit of the Fourth Circuit ("CHU"), along with William H. Ehliès, an attorney based in the District of South Carolina (doc. 1 at 5).

The Court of Appeals for the Fourth Circuit established the CHU to provide qualified representation to indigent, death-sentenced prisoners. The CHU's staff attorneys have specialized expertise in capital litigation and are each qualified under § 3599's standards.

This District previously approved Mr. Ehliès as lead counsel on its death penalty CJA panel based on his certifications that he had been admitted to practice in this District for at least five years and had not less than three years' experience handling felony cases, demonstrating his compliance with § 3599, and is a member in good standing of the federal bar of this District and eligible and willing to provide representation under the CJA. Mr. Ehliès has previously represented

six death-sentenced inmates in federal habeas proceedings in this District and the Fourth Circuit, and the court is confident in his qualifications and ability to effectively represent Petitioner in this matter.

Based on the foregoing, the court finds Mr. Ehlies and the CHU qualified to represent Petitioner under § 3599 and GRANTS Petitioner's motion to appoint counsel (doc. 1).

However, the court is mindful of a potential issue under *Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013),³ because Mr. Ehlies also served as Petitioner's state post-conviction relief ("PCR") counsel. The appointment of independent counsel alongside Mr. Ehlies should mitigate any potential conflict. *See Fowler v. Joyner*, 753 F.3d 446, 463–65 (4th Cir. 2014) (finding *Juniper* satisfied where a petitioner was represented in federal habeas action by state post-conviction counsel and an additional independent attorney). However, to further assuage the issue, the court instructs the CHU attorneys to conduct any *Martinez* investigation independent of Mr. Ehlies.

Counsel are reminded that by accepting appointment they are indicating their willingness and availability to represent Petitioner to the full extent of their professional ability in all phases of this litigation. Counsel should advise the court immediately if their current caseload does not permit this level of representation.

III. Cost Containment and Budgeting

Mr. Ehlies shall file an *ex parte* confidential proposed litigation budget within thirty days of this order. In preparing his budget, Mr. Ehlies should consult with Larry M. Dash, Fourth Circuit Case Budgeting Attorney. The court cautions counsel to avoid duplication of efforts and unnecessary attorney time.

Mr. Ehlies shall submit interim payment vouchers every sixty days to Claire Woodward

³ In *Juniper*, the Fourth Circuit held that a capital habeas petitioner is entitled to the appointment of qualified, independent counsel for the purpose of investigating any potential claims pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), if his counsel also represented him in state PCR proceedings.

O'Donnell, Panel Administrator, Federal Public Defender's Office, for payment consideration and so that costs and fees can be monitored. Counsel shall be compensated at the current capital rate approved by the Administrative Office of the United States Courts.

IV. State Court Record

Counsel for Respondents are directed to file a complete record of all state court proceedings to date in connection with this matter within thirty days of this order. Additionally, counsel shall provide one courtesy copy to the assigned District Judge and one courtesy copy to "Death Penalty Law Clerk" at the Matthew J. Perry Courthouse in Columbia. Further, for ease of reference, the parties shall cite to the filed version of the record and use the ECF docket and page number, rather than the state court appendix number.

V. Petition and Scheduling

In accordance with 28 U.S.C. § 2251(a)(3), Petitioner shall file a petition for a writ of habeas corpus within ninety days of this order appointing counsel. Petitioner shall then have until the expiration of the one-year limitation period prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to amend his petition.⁴ *See* 28 U.S.C. § 2244(d). The court will enter a scheduling order regarding responsive briefing after Petitioner amends his petition or the time to do so expires.

IT IS SO ORDERED.

s/Kevin F. McDonald
United States Magistrate Judge

September 5, 2023
Greenville, South Carolina

⁴ The parties agree AEDPA's statute of limitations will run 235 days after August 16, 2023, the date the state remittitur was filed (*see* docs. 9 at 3–4, 11 at 1–5).