

Hopkins, Debbie

From: Teresa Norris <teresa@blumelaw.com>
Sent: Friday, June 27, 2014 12:49 PM
To: Hopkins, Debbie
Cc: Zelenka, Don; Bob Dudek; Betsy Franklin-Best
Subject: Bayan Aleksey
Attachments: IFP.pdf; Stay & Appointment Motion.pdf

Ms. Hopkins,

A motion for stay and appointment of counsel was filed in federal court yesterday. I am attaching the filings.

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

BAYAN ALEKSEY, 5059,)
Petitioner,)
v.)
BRYAN STIRLING, Commissioner,)
South Carolina Department of Corrections,)
Respondent.)
_____)

C/A: _____

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

RECEIVED

JUN 30 2014

S.C. Supreme Court

**THIS IS A CAPITAL CASE
PETITIONER'S EXECUTION WILL BE IMMINENTLY SCHEDULED**

Petitioner, Bayan Aleksey, is an indigent prisoner under sentence of death imposed by the Orangeburg County, South Carolina, Court of General Sessions. Pursuant to *In re Stays of Execution in Capital Cases*, 471 S.E.2d 140 (S.C. 1996), an execution will be imminently scheduled. Mr. Aleksey requests that this Court stay his imminent execution and appoint counsel to represent him in the preparation, presentation, and litigation of his first federal petition for a writ of habeas corpus. Specifically, Mr. Aleksey asks this Court to appoint Teresa L. Norris and Elizabeth A. Franklin-Best, both of Blume Norris & Franklin-Best, LLC in Columbia, South Carolina, to represent him. In support of this motion, Mr. Aleksey submits the following facts and argument.

I. Relevant procedural history.

Mr. Aleksey was sentenced to death in Orangeburg County, South Carolina, following conviction for capital murder (98-GS-38-244), based on the murder of a law enforcement officer in the performance of his duties. He was tried between August 24- September 1, 1998, before The Honorable Edward B. Cottingham and a jury. Walter M. Bailey Jr. and J. Angela Garrick

represented the State. Mr. Aleksey was represented by Isaac McDuffie (“Duffie”) Stone and Thomas Ray Sims.

Mr. Aleksey timely appealed his conviction and sentence, and the South Carolina Supreme Court affirmed. *State v. Aleksey*, 538 S.E.2d 248 (S.C. 2000). The United States Supreme Court denied the petition for writ of certiorari on May 14, 2001. *Aleksey v. South Carolina*, 121 S.Ct. 1974 (2001). Mr. Aleksey then filed an application for post-conviction relief on May 31, 2001. A second amended application was filed on November 7, 2002. An evidentiary hearing was held November 12-15, 2002, and July 7-10, 2003. The order of dismissal was filed February 4, 2010. Mr. Aleksey filed a Motion to Alter and Amend Judgment Pursuant to SCRCP Rule 59 on February 26, 2010. A hearing was held on May 4, 2010, and the judge denied the motion on September 2, 2010. Mr. Aleksey timely filed a petition for writ of certiorari to the South Carolina Supreme Court, which was denied on May 23, 2014. A petition for rehearing was filed on June 5, 2014, which was denied June 26, 2014. Mr. Aleksey must file his federal habeas petition on or before June 9, 2015.

II. The Court must appoint counsel to represent Mr. Aleksey in his first federal habeas corpus proceeding.

Pursuant to 18 U.S.C. §3599, indigent death-sentenced prisoners are “entitled to the appointment of one or more attorneys” in order to pursue federal habeas corpus remedies. The right to counsel conferred by §3599 attaches prior to the filing of a prisoner’s habeas petition. As the Supreme Court has explained, absent this pre-petition right to counsel, condemned prisoners would not have meaningful access to the remedy of habeas corpus:

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.” 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.”

McFarland v. Scott, 512 U.S. 849, 855-856 (1994) (quoting *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., joined by O’Connor, J., concurring in the judgment)).

In construing §3599 to require appointment of counsel prior to the filing of the petition, the Supreme Court explained that Congress provided for investigative and expert resources to be made available to counsel upon request and a showing of need. Since these services “may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified,” Congress clearly intended counsel to be appointed prior to the filing of the habeas petition. *McFarland*, 512 U.S. at 855. It is thus plain that the right to counsel conferred by §3599 is a right to assistance in identifying, developing, and pleading all available claims for relief, including the record-based claims already raised in the state trial and appeal proceedings, as well as the claims not raised in those proceedings because they are derived from non-record facts which require access to investigative and expert resources.

The appointment provision of 18 U.S.C. §3599 requires appointment of at least one attorney who has been admitted to practice in the court of appeals for not less than five years and who has not less than three years’ experience in the handling of appeals in that court in felony cases. §3599(b). Alternatively, for good cause, this Court may appoint 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 litigation.” §3599(d).

Petitioner requests that this Court appoint Teresa L. Norris. Ms. Norris is a partner in the firm of Blume Norris & Franklin-Best, LLC. The firm restricts its practice almost exclusively to capital litigation. Ms. Norris previously served as the Director of the Center for Capital Litigation in Columbia, SC. She has represented over forty clients in capital cases in every stage of the proceedings. She has been appointed as lead counsel in capital habeas proceedings in the District of South Carolina at least six times: *Donald Allen Jones v. William Catoe*, C/A No. 6:99-1764-12AK; *Anthony Green v. Michael Moore*, 6:96-3277-18AK; *Richard Anthony Tucker v. Michael Moore*, C/A No. 0:98-681-8BD; *James Neil Tucker v. Gary Maynard*, C/A No. 3:02-MC-0001; *Shawn Paul Humphries v. Jon Ozmint*, C/A No. 8:02-CV-4276-17BI; and *Gary Terry v. Byars*, 4:12-cv-01798-SB-TER. She also served as lead counsel on all of these cases in the Fourth Circuit Court of Appeals, except for *Terry*, which remains pending in the District Court. Most recently, on June 20, 2011, in the Fourth Circuit, she was appointed as lead counsel in *United States v. David Anthony Runyon*, No. 09-11, a capital direct appeal from the United States District Court for the Eastern District of Virginia.

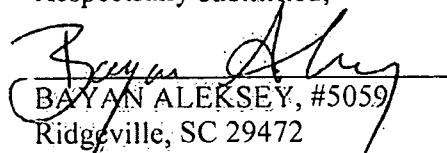
Mr. Aleksey also requests that this Court appoint Elizabeth A. Franklin-Best. Elizabeth Franklin-Best is licensed and admitted in New York, South Carolina, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit and the United States Supreme Court. She has worked as a part-time public defender for Washington County, New York, the Richland County Public Defender's Office, as an associate for Jack Swerling, and as an assistant appellate defender with the South Carolina Commission on Indigent Defense, Appellate Division. As an appellate attorney, she was second counsel on the following capital appeals: *State of South Carolina v. Steven Louis Barnes*, 753 S.E.2d 545 (S.C. 2014); *State of South Carolina v. Louis Michael Winkler*, 698 S.E.2d 596 (S.C. 2011); *John*

Edward Weik v. State of South Carolina (pending); *State of South Carolina v. Norman Starnes*, 698 S.E.2d 604 (S.C. 2010); *Angle Joe Perrie Vasquez v. State of South Carolina*, 698 S.E.2d 561 (S.C. 2010), as well as Mr. Aleksey's petition for writ of certiorari to the South Carolina Supreme Court. She has argued twenty-six cases before the South Carolina Supreme Court, and the South Carolina Court of Appeals. Ms. Franklin-Best is currently appointed by the District Court of South Carolina to the following cases: *Gary Terry v. Byars*, 4:12-cv-01798-SB-TER, *John R. Wood v. Byars*, 0:12-cv-3532-DCN-PJG, and *James N. Bryant III v. Byars*, 1:13-2665-CMC-SVH.


III. Conclusion.

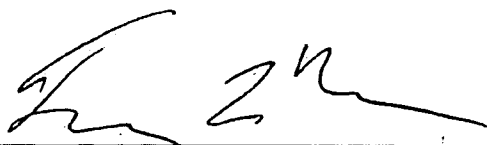
Wherefore, for the foregoing reasons, this Court should enter an order staying Petitioner's imminent execution, and appointing Teresa L. Norris and Elizabeth A. Franklin-Best to represent Mr. Aleksey in the preparation and filing of a timely petition for habeas relief.

Respectfully submitted,


BRYAN ALEKSEY, #5059
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I am willing to accept appointment in the above referenced case.


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