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S.C. Supreme Court

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

FREDDIE OWENS)
Petitioner,)
v.)
BRYAN P. STIRLING, Commissioner,)
South Carolina Department of Corrections,)
and JOSEPH MCFADDEN, Warden,)
Lieber Correctional Institution)
Respondents.)

CIVIL ACTION NO. _____

MOTION FOR STAY OF EXECUTION AND APPOINTMENT OF COUNSEL

THIS IS A CAPITAL CASE.

Freddie Owens is an indigent prisoner under sentence of death imposed by the Greenville County, South Carolina, Court of General Sessions. Through undersigned counsel, Mr. Owens requests that this Court stay his imminent execution¹ 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. Owens requests that this Court appoint Emily C. Paavola and Lindsey S. Vann of Columbia, South Carolina to represent him.² In support of this Motion, counsel submit the following facts and argument.³

¹ While an execution date for Mr. Owens has not been scheduled, it is nevertheless imminent following the Supreme Court of South Carolina's denial of his petition for writ of certiorari, seeking review of the denial of post-conviction relief. The Supreme Court of South Carolina denied Mr. Owens' Petition for Rehearing on the denial of certiorari and issued the remittitur on July 23, 2015. Per South Carolina law, the South Carolina Supreme Court is expected to schedule Mr. Owens' execution for the fourth Friday following issuance of the remittitur to the circuit court. S.C. Code § 17-25-370; In re: Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). In order to proceed expeditiously, undersigned counsel submits this motion on Mr. Owens' behalf in anticipation of issuance of an execution warrant.

² Mr. Owens was represented in his state post-conviction proceedings by Ms. Paavola and Mr. Keir Weyble. Mr. Weyble now resides in Ithaca, New York, and teaches full time at Cornell Law School. He remains available to serve as consulting counsel on a pro bono basis, but he is not seeking formal appointment in this case. Mr. Owens therefore requests appointment of Ms. Paavola and Ms. Vann.

³ Undersigned counsel plan to meet with Mr. Owens on Monday, July 27, 2015 at which time, Mr. Owens will complete an Application to Proceed Without Payment of Fees and file it along

I. RELEVANT PROCEDURAL HISTORY.

Mr. Owens was tried, convicted, and sentenced to death on February 17, 1999, for his role in an armed-robbery shooting that resulted in the death of a cashier at a Speedway convenience store in Greenville, South Carolina. The South Carolina Supreme Court reversed the death sentence on two occasions, *see State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004); *State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001), before the State ultimately obtained a third death sentence. The state court affirmed Mr. Owens' third sentence, *State v. Owens*, 378 S.C. 636, 664 S.E.2d 80 (2008), and denied rehearing on August 8, 2008. *Id.* The United States Supreme Court denied *certiorari* on January 21, 2009. *Owens v. South Carolina*, 555 U.S. 1141 (2009).

Mr. Owens filed an initial application for post-conviction relief *pro se* on January 29, 2009. Through the assistance of counsel, Keir Weyble and Emily Paavola, Mr. Owens subsequently amended his PCR Application on two occasions. Following an evidentiary hearing, the trial court denied post-conviction relief, and the South Carolina Supreme Court denied review of this decision on July 23, 2015.⁴

At that time, eight (8) days had elapsed on the one year limitations period for filing a federal habeas corpus petition as prescribed by 28 U.S.C. § 2244(d). Only eight (8) days of the limitations period for filing a federal habeas petition had elapsed because his conviction became final on January 21, 2009, when the Supreme Court denied review, § 2244(d)(1)(A), and because

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

⁴ Pursuant to *In re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), following denial of a petition for a writ of certiorari to review the lower court's denial of post-conviction relief, the Clerk of the South Carolina Supreme Court "shall issue an execution notice when the remittitur is sent to the circuit court." *Id.* at 547, 471 S.E.2d at 141.

the application for state post-conviction relief was filed on January 29, 2009, and remained pending until the South Carolina Supreme Court denied review of the lower court's denial of post-conviction relief. *See* § 2244(d)(2) (“The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection”); *see also Artuz v. Bennett*, 531 U.S. 4 (2000) (construing the statutory phrase “properly filed application”). The 357 days remaining on Mr. Owens’ limitations period began to run following the South Carolina Supreme Court’s July 23, 2015 denial of rehearing on Mr. Owens’ petition for certiorari and issuance of the remittitur. Thus, Owens has until July 14, 2016 to file his federal habeas corpus petition.

II. THE COURT MUST APPOINT COUNSEL TO REPRESENT OWENS 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.⁵ The right to counsel conferred by § 3559 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 [§3559] 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 “[t]he 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.”

⁵ This statutory provision was formerly located at 21 U.S.C. § 848(q)(4)(B). Effective October 12, 2008, Congress moved this provision to 18 U.S.C. § 3599.

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.

Moreover, “the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant’s habeas claims. Where this opportunity is not afforded, ‘[a]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.’” *McFarland*, 512 U.S. at 858 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983)). Accordingly, once a capital defendant invokes his right to appointed counsel, this Court has jurisdiction to enter a stay of execution. *Id.*; *see also id.* at 857 (“Even if the District Court had granted *McFarland*’s motion for appointment of counsel and had found an attorney to represent him, this appointment would have been meaningless unless *McFarland*’s execution also was stayed.”).

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).

Undersigned counsel, Emily Paavola, is an attorney at the Death Penalty Resource & Defense Center in Columbia, South Carolina. The Death Penalty Resource & Defense Center was formerly known as the Center for Capital Litigation, and was designated by this Court as a Community Defender Organization authorized to provide representation, assistance, information and other matters related to federal death penalty habeas corpus cases. *See In re: Amendments to the Plan on the United States District Court for the District of South Carolina for Implementing the Criminal Justice Act*, filed May 25, 2010. Ms. Paavola is a 2005 graduate of Cornell Law School. She is licensed and admitted in New York, Indiana, South Carolina, the United States District Court for the Southern District of Indiana, the United States District Court for the District of South Carolina, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States. After law school, she served as a Project Fellow for the Cornell Death Penalty Project in Ithaca, New York, and then practiced as an associate in the business litigation practice group at Baker & Daniels LLP in Indianapolis, Indiana, where she handled civil matters primarily in federal court and also provided *pro bono* representation to death sentenced inmates in capital post-conviction proceedings. Ms. Paavola moved to South Carolina in 2008, and has spent the past seven years exclusively

handling death penalty cases in state and federal court. She represents or has represented approximately twenty death-row inmates or persons facing the death penalty at trial, on direct appeal and in state and federal post-conviction proceedings in South Carolina.

Lindsey S. Vann is also an attorney at the Death Penalty Resource & Defense Center in Columbia, South Carolina. Ms. Vann received a B.S. from Cornell University in 2005 and a J.D. from the University of Richmond School of Law in 2012. She was admitted to the Virginia bar in 2012 and the South Carolina bar in 2013. She was admitted to the bars of the Fourth Circuit Court of Appeals and the Eastern and Western Districts of Virginia in 2013 and the bar of this Court in 2014. After law school, Ms. Vann served as a law clerk to the Honorable James R. Spencer, United States District Court for the Eastern District of Virginia. Since that time, Ms. Vann has been an attorney at the Death Penalty Resource & Defense Center, where her practice is devoted to representing South Carolina death sentenced inmates in their state and federal post-conviction proceedings. She is currently appointed as counsel for Johnny O'Landis Bennett, Abdiyyah Ben Alkebulanyahh, and Richard Moore in their capital habeas case pending before this Court. *See Bennett v. Stirling*, No. 2013-CV-03191; *Alkebulanyahh v. Byars*, No. 6:13-cv-918; *Moore v. Stirling*, No. 4:14-cv-4691. She has also been appointed by South Carolina courts as counsel for Stephen C. Stanko, *Stanko v. State*, No. 2014-CP-26-035, and James Nathaniel Bryant, III, *Bryant v. State*, No. 2013-CP-26-6631, in their state post-conviction proceedings.

Further, Ms. Vann has prior experience in post-conviction representation of death sentenced inmates in federal court through prior work with the Office of the Federal Public Defender for the Eastern District of Virginia and the Virginia Capital Representation Resource Center. Ms. Vann has also received significant training regarding federal habeas through the

Habeas Assistance & Training Counsel Project's *National Habeas Corpus Seminar*, in August of 2013, the *National Seminar on the Development and Integration of Mitigation Evidence*, in 2015, and *The Anthony G. Amsterdam Capital Post-Conviction Skills Seminar*, in July of 2014.

Mr. Owens has indicated that he desires to pursue federal habeas relief and requests Ms. Paavola and Ms. Vann be appointed to represent him in his federal court proceedings.⁶

III. CONCLUSION.

Wherefore, for the foregoing reasons, this Court should enter an order staying Mr. Owens' imminent execution and appointing Emily C. Paavola as lead counsel, and Lindsey S. Vann as second-chair to assist Mr. Owens in the preparation and filing of a timely petition for habeas relief.

Respectfully submitted,

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BY: s/Lindsey S. Vann

July 24, 2015.

⁶ Both Ms. Paavola and Ms. Vann are listed on the CJA panel as qualified counsel in capital cases.

