



ALAN WILSON  
ATTORNEY GENERAL

May 31, 2016

**RECEIVED**  
MAY 31 2016  
**SC SUPREME COURT**

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

Re: Charles Christopher Williams v. State  
Appellate Case No. 2013-001945

Dear Mr. Shearouse:

The above-named individual has filed a Motion to Stay Execution in the United States District Court so that he can pursue federal habeas corpus relief. Pursuant to the Order (attached) of the Honorable J. Michelle Childs, United States District Judge, we are to file a complete record of the State Court proceedings to date. This is a request for copy of the eleven (11) volume Appendix in the above-referenced case to be filed as directed by Judge Childs.

Thank you for your assistance and cooperation.

Sincerely,

Lonetta B. Brawley  
Legal Assistant to Donald J. Zelenka  
Senior Assistant Deputy Attorney General

/lbb  
Enclosure

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION

Charles Christopher Williams,	)	Misc. No:6:16-mc-00168-JMC-KFM
	)	
Petitioner,	)	
	)	
v.	)	<b>ORDER</b>
	)	
Bryan P. Stirling, Director, South Carolina	)	
Department of Corrections; and Joseph	)	
McFadden, Warden, Lieber Correctional	)	
Institution,	)	
	)	
Respondents.	)	
_____	)	

This death penalty habeas corpus matter is before the court on Petitioner’s Motion for Stay of Execution and Appointment of Counsel, both filed on April 28, 2016, and also his Motion for Leave to Proceed *in forma pauperis* filed on May 2, 2016.<sup>1</sup> (ECF Nos. 1, 4.) Respondents submitted a response to the motions on May 3, 2016. (ECF No. 5.) Petitioner filed a Reply to the Response on May 6, 2016. (ECF No. 10.)

**1. MOTION FOR LEAVE TO PROCEED *in forma pauperis***

Petitioner requests to proceed without prepaying the filing fee by filing a completed and signed Form AO 240, which is construed as a Motion for Leave to Proceed *in forma pauperis*. (ECF No. 4.) Upon review of the motion, Petitioner’s request to proceed *in forma pauperis* is **GRANTED**.

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<sup>1</sup>The motions were filed on behalf of Petitioner by state court-appointed post-conviction relief counsel Derek J. Enderlin of Greenville, South Carolina. (ECF No. 1 at 1.)

## 2. MOTION FOR STAY

Although Petitioner's execution date has not been set, he states that it will be an "imminent execution." (ECF No. 1 at 1.) As such, Petitioner asks the court to enter a stay of execution in order to allow counsel to represent him in the preparation, presentation, and litigation of his petition for a writ of habeas corpus. (*Id.* at 1.) As Petitioner does not request a specific length of time for the requested stay, it appears that Petitioner requests that the court stay his imminent, yet unscheduled, execution.<sup>2</sup>

Respondents do not oppose a stay in this matter, but assert that the stay should be limited at this time to ninety (90) days after appointment of counsel. 28 U.S.C. § 2251(a)(3). (ECF No. 5 at 7.) Respondents also assert that "this Court should order the petition be filed within that time and allow Petitioner the opportunity to seek a further stay under the provisions of 28 U.S.C. 2251(a)(1)." (ECF No. 5 at 7.)

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). *See Gray v. Kelly*, 564 U.S. 1301 (2011) (*citing* 28 U.S.C. § 2251(a)(3)); *McFarland v. Scott*, 512 U.S. 849, 857 (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*). "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*, 512 U.S.

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<sup>2</sup>If an execution date has been scheduled, or if one is scheduled at any time in the future while this case is pending, attorneys for Petitioner and Respondents are directed to promptly notify the court.

at 857 (citing 28 U.S.C. § 2251) (emphasis in original). A federal court has jurisdiction to issue a stay of execution once a capital defendant invokes his or her right to counsel under 28 U.S.C. § 2251. *See* 28 U.S.C. § 2251(a)(3); *McFarland v. Scott*, 512 U.S. 849, 858 (1994) (“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 this action, Petitioner has filed a request for appointment of counsel. (ECF No. 1.) Thus, 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).

As such, the court finds that Petitioner should be granted a stay of execution for ninety (90) days from the date counsel is appointed as required by 28 U.S.C. § 2251(a)(3). Prior to the expiration of the ninety (90) day stay of execution, Petitioner should seek a longer stay of execution pursuant to 28 U.S.C. § 2251(a)(1), if needed, in order to submit his habeas petition within his § 2244 limitations period, to allow Respondents to file a response to his submission, and to allow the court to rule on the merits of the petition. *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.”).

### **3. MOTION TO APPOINT COUNSEL**

Petitioner seeks the appointment of Teresa L. Norris and Elizabeth Franklin-Best, both of Columbia, South Carolina, as counsel pursuant to 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 in order to pursue federal habeas corpus remedies. (ECF No. 1.) Petitioner represents that both Ms. Norris and Ms. Franklin-Best are on this Court’s Criminal Justice Act (“CJA”) appointment list for

qualified capital counsel.

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 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 (b) and (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.

In interpreting the appointment-of-counsel provisions of § 3599, courts 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). Additionally, 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. at 855–56. 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. June 25, 2008) (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.

As previously set forth, Petitioner seeks the appointment of Ms. Norris and Ms. Franklin-Best to represent him in this action. He represents that both Ms. Norris and Ms. Franklin-Best are on the CJA appointment list for qualified capital counsel and are in good standing with the South Carolina Bar. (ECF No. 1 at 4-5.) Additionally, Petitioner represents that Ms. Norris met with Petitioner at PCR counsel’s request and that, Petitioner requested the appointment of Ms. Norris and Ms. Franklin-Best to represent him in federal court proceedings.

Specifically, as to Ms. Norris, he represents that she has been a member in good standing with the South Carolina bar since November 1990 and was admitted to practice before the United States Court of Appeals in 1995. *Id.* at 4. Petitioner further represents that Ms. Norris *inter alia* served as the Senior Staff Attorney and then Director for the Center for Capital Litigation in Columbia, South Carolina and is currently a partner in the firm Blume Norris & Franklin-Best, LLC. *Id.* Additionally he states that Ms. Norris has directly represented forty-five (45) indigent capital defendants in various stages of court proceedings. *Id.*

As to Ms. Franklin-Best, Petitioner states that she has been a member in good standing with the South Carolina bar since 2004 and is a partner in the firm Blume Norrris & Franklin-Best. (ECF NO. 1 at 5.) Further, he represents that Ms. Franklin-Best has represented a “number of capital defendants on direct appeal, in state post-conviction, and in federal habeas proceedings and is currently counsel of record in the following capital habeas proceedings: *Bayan Aleksey v. Stirling*, 5:14-cv-3016-JMC-KDW; *Gary Terry v. Byars*, 4:12-cv-1798-SB-TER; *John Wood v. Byars*, 0:12-cv-03532-DCN-PJG; and *James Nathaniel Bryant III v. Stirling*, 1:13-cv-2665-CMC-SVH.

In Respondents response to Petitioner’s request for counsel, Respondents acknowledge that both Ms. Norris and Ms. Franklin-Best are well qualified for appointment. However, Respondents point out that, the workloads of Ms. Norris and Ms. Franklin-Best, as well as an order of protection covering Ms. Norris in the case of *State v. Dylann Roof* may result in delays in the instant action. (*Id.* at 3-5.) Specifically as to Ms. Norris, Respondents point out that she has a currently effective Order of Protection<sup>3</sup> in State Court for protection from state court responsibilities up to ninety (90)

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<sup>3</sup>In the October 15, 2015 Order, Judge Nicholson stated in pertinent part of counsel protection:

days after her involvement in the case of *State v. Dylann Roof* currently scheduled to be tried January 17, 2017. Respondents also note that Ms. Norris is involved in the three (3) death penalty PCR matters that are presently stayed upon her request until the resolution of the *Roof* case which could lead to expedited hearings once *Roof* is resolved. (ECF No. 5 at 3.)

As to Ms. Franklin-Best, Respondents direct the court's attention to the following pending capital litigation state court matters that she is handling pursuant to court-appointment:

*Quincy Allen v. State*, 2010-CP-40-3644 (Judge Cothran) (appeal);

*Bayan Aleksey v. State*, 2015-CP-38-00764 (Judge Early) (with Ms. Norris—affected by *Roof* protection order);

*James N. Bryant v. State*, 2013-26-6631 (Judge Culbertson);

*William O. Dickerson v. State*, 2012-CP-10-3216 (Judge G. Thomas Cooper);

*Gary D. Terry v. State*, 2012-CP-32-2718 (Judge Keesley); and

*John R. Wood v. State*, 2013-CP-23-5190 (Judge Mark Hayes).

Respondents note that these cases are entitled to preferential expedited handling pursuant to S.C. Code Ann. § 17-27-160 (2015). For the reasons set forth above, Respondents ask the court to consider appointing other counsel based on the impact of potential delay in the instant litigation due to the order of protection in the *Roof* case and the current workloads of Ms. Norris and Ms. Franklin-Best.

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“8. The court has already issued on August 26, 2015 Order of Protection for the prosecutors and attorneys in this case to allow them to focus more on this case in the coming months. To ensure effective and quality representation to the defendant, the court extends the same order of protection to Teresa L. Norris and she is excluded from appearing in other cases where she is acting as defense counsel in the courts of Common Pleas and General Sessions starting from December 1, 2015 and extending for 90 days after the resolution of the above referenced case.”

On May 6, 2016, Petitioner filed a reply. In the reply, PCR counsel, on behalf of Petitioner, states his belief that he has a duty to ensure that competent successor counsel is appointed to represent Petitioner and references the steps he undertook before suggesting that Ms. Norris and Ms. Franklin-Best be appointed counsel. PCR Counsel also indicates that he “is satisfied that both counsel have sufficient time to represent Petitioner in this matter.”<sup>4</sup> (ECF No. 10 at 1.)

Specifically, as to the *Roof* order of protection, Petitioner states that it only protects Ms. Norris from appearances in state court and “would have no impact whatsoever on this Court, or briefing requirements in any case. . . .” *Id.* at 2. Further he indicates that the *Roof* order has caused a delay in only one of Ms. Norris’ state cases—*Ron Finklea v. State* and that the other three capital cases referenced by Respondents are delayed for reasons unrelated to the *Roof* order. PCR counsel did not discuss Respondents’ concerns as to Ms. Franklin-Best.

The court has carefully considered Petitioner’s motion for appointment of counsel , as well as Respondents’ response and Petitioner’s reply. At the outset, the court notes that it considers Ms. Norris and Ms. Franklin-Best well qualified pursuant to the experience requirements of 18 U.S.C. § 3599(d). However, after careful consideration, the court agrees with Respondents that the appointment of Ms. Norris and Ms. Franklin-Best could potentially lead to delays in the instant action. As such, in an abundance of caution, the court declines to appoint both Ms. Norris and Ms. Best-Franklin as counsel in this matter.

In keeping with this District's Plan for Implementing the CJA, the court appoints William H. Ehli, II (“ Mr. Ehli”) of Greenville, South Carolina as Lead Counsel, and Ms. Norris as

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<sup>4</sup>PCR Counsel represents that he spoke with Ms. Norris and Ms. Franklin Best and both assured him that Respondents’ concerns were unwarranted. (ECF No. 10 at 2.)

Second Chair. The court has approved Mr. Ehliès as a member of the death penalty CJA panel based on his certification that he is a member in good standing of the bar of this District and that he is eligible and willing to provide representation under the CJA. As a member of the District's first-tier, or lead counsel, death penalty CJA, Mr. Ehliès has certified that he has been admitted to practice in this District for at least five years and that he does not have not less than three years' experience handling felony cases, demonstrating his compliance with § 3599.

Thus, the court finds that Mr. Ehliès and Ms. Norris are qualified to represent Petitioner under § 3599. Lead counsel, Mr. Ehliès, shall be compensated at a rate of \$183.00 per hour and Second Chair counsel Ms. Norris shall be compensated also at a rate of \$183.00 per hour. Counsel shall represent Petitioner for the duration of this matter, including every available stage of judicial proceedings before this Court. Should either attorney have a conflict not apparent in the record, or if other good cause exists to not appoint either attorney, counsel have ten (10) days from the date of this order to be relieved.

#### **4. Cost Containment and Budgeting**

The court cautions counsel that duplication of efforts and unnecessary attorney time are to be avoided. The Judicial Council of the United States Court of Appeals for the Fourth Circuit has considered adoption of a resolution governing review of attorney compensation requests in death penalty habeas corpus cases.<sup>5</sup> Under this resolution, any request for compensation in excess of certain amounts (\$50,000.00) per attorney at the district court level is deemed presumptively

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<sup>5</sup>See *Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases*, <http://www.ca4.uscourts.gov/pdf/noticeresolutionattorneycompensationcapitalcases.pdf>. (last visited May 10, 2016.)

excessive. While the effective date of this resolution has been stayed pending public comment<sup>6</sup>, the court proposes a total case budget in this matter not to exceed \$100,000.00 for expenses and fees, absent compelling circumstances.

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 Respondents' return; and (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. A copy of the proposed budget shall be submitted to this Court. Additionally, counsel shall submit interim payment vouchers every ninety (90) days to Ms. O'Donnell for payment consideration and so that costs and fees may be monitored.

#### **5. State Court Record**

For the court's reference and for case management purposes, counsel for Respondents are directed to file a complete record of all state proceedings to date in connection with this matter within thirty (30) days of the date of this order. Additionally, counsel shall provide one courtesy copy each to the assigned District Judge and Magistrate Judge.

Accordingly, the court orders the following:

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<sup>6</sup>See *Suspension of Effective Date of Special Procedures for Reviewing Attorney Compensation requests in Death Penalty Cases*, [http://www.ca4uscourts.gov/pdf/noticeof\\_suspensionresolutionattorneycompensationcapitalcases.pdf](http://www.ca4uscourts.gov/pdf/noticeof_suspensionresolutionattorneycompensationcapitalcases.pdf). (last visited May 10, 2016.)

- (1) William H. Ehliens, II, Esquire, and Teresa L. Norris, Esquire, are appointed as Petitioner's counsel;
- (2) Petitioner's Motion for Leave to Proceed *informa pauperis* is granted;
- (3) Petitioner's motion for stay of execution is granted for ninety (90) days pursuant to 28 U.S.C. § 2251(a)(3);
- (4) Within the ninety (90) day stay of execution, Petitioner is required to file the habeas petition;
- (5) Prior to the expiration of the ninety (90) day stay of execution, Petitioner may seek a longer stay of execution pursuant to 28 U.S.C. § 2251(a)(1), if needed, to file his habeas petition and to allow the court to rule on the merits of the petition;
- (6) The Clerk of Court shall assign a civil action number to this case and 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
- (7) This matter is referred to the assigned United States Magistrate Judge for preliminary proceedings, including setting a briefing schedule.

**IT IS SO ORDERED.**

*J. Michelle Childs*

United States District Judge

May 20, 2016  
Columbia, South Carolina