

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

|                                 |   |           |
|---------------------------------|---|-----------|
| _____,'                         | § |           |
|                                 | § |           |
|                                 | § |           |
| Petitioner,                     | § |           |
|                                 | § |           |
| V.                              | § | CIVIL NO. |
|                                 | § |           |
| NATHANIEL QUARTERMAN, Director, | § |           |
| Texas Department of Criminal    | § |           |
| Justice, Correctional           | § |           |
| Institutions Division,          | § |           |
|                                 | § |           |
| Respondent.                     | § |           |

**ORDER APPOINTING COUNSEL AND SETTING DEADLINES**

The matters before this Court are (1) the petitioner's motion for appointment of counsel, filed October 14, 2008, and (2) the status of this case. Petitioner has paid the five dollar filing fee in this cause but has not filed an application for leave to proceed *in forma pauperis*. This Court will direct petitioner to satisfy the requirements for establishing that petitioner is indigent for purposes of having counsel appointed to represent petitioner herein. Given the substantial likelihood petitioner will establish his indigence, this Court will address the merits of petitioner's motion for appointment of counsel in this federal habeas corpus action.

Background

In March, 2003, a Bexar County jury convicted petitioner of capital murder for capital murder and sentenced him to death. The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence on direct appeal in an unpublished opinion. Petitioner did not thereafter seek further review of his conviction or sentence from the United States Supreme Court.

Petitioner filed an application for state habeas corpus relief which the Texas Court of Criminal Appeals recently denied in an unpublished *per curiam* Order.

Counsel who represented petitioner during petitioner's state habeas corpus proceeding prepared petitioner's motion for appointment of counsel in this Court but explains he does not wish to continue to serve as petitioner's federal habeas counsel and requests this Court appoint another attorney as counsel of record for petitioner in this federal habeas corpus proceeding.

Motion for Appointment of Counsel

As noted by the Supreme Court in its opinion in *McFarland v. Scott*, 512 U.S. 849, 855-58, 114 S.Ct. 2568, 2572-73, 129 L.Ed.2d 666 (1994), a state prisoner facing a death sentence has a qualified statutory right to the appointment of counsel in connection with a federal habeas corpus proceeding challenging his criminal conviction and death sentence. *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995), *cert. denied*, 516 U.S. 1050 (1996). Petitioner requests this Court to appoint counsel to

represent him herein pursuant to Title 21 U.S.C. Section 848(q)(4)(B) and the Supreme Court's holding in *McFarland*. In March, 2006, Congress repealed Title 21 U.S.C. Section 848(q) and simultaneously re-enacted same in substantially similar form as new Title 18 U.S.C. Section 3599. The Court will grant petitioner's request.

The Court finds that attorney \_\_\_\_\_, who has been admitted to practice before this Court for \_\_\_\_\_ years and who has ably represented several death row inmates in previous federal habeas corpus proceedings in this Court fully qualifies for appointment of counsel to represent petitioner herein under the criteria set forth in Title 18 U.S.C. Section 3599(b) & (c).

The Court advises petitioner's counsel she is eligible to receive interim payments from this Court in connection with her representation of petitioner this cause upon the filing of a motion requesting same.

Accordingly, it is hereby **ORDERED** that:

1. Petitioner's motion for appointment of counsel is **GRANTED** as follows: in accordance with Title 18 U.S.C. Section 3599, \_\_\_\_\_, is appointed counsel of record for petitioner herein. The Clerk shall send to said counsel a copy of this Order and all forms and vouchers necessary to permit said counsel to comply with all requirements for obtaining

reimbursement for expenses and payment for attorneys fees for services rendered in connection with this cause.

2. On or before \_\_\_\_\_, petitioner shall file, and serve on the Post-Conviction Litigation Division of the Office of the Texas Attorney General, his federal habeas corpus petition in this cause and include therein all grounds for federal habeas corpus relief petitioner wishes this Court to consider in connection with his capital murder conviction and death sentence.

3. Respondent shall file his answer to petitioner's federal habeas corpus petition or other responsive pleading on or before sixty (60) days after receipt of a copy of petitioner's federal habeas petition. Respondent's answer or other responsive pleading shall conform to the requirements of Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 12 of the Federal Rules of Civil Procedure.

4. Respondent shall serve petitioner's counsel of record with a copy of said answer or other responsive pleading in accordance with the provisions of Rule 5(b), Federal Rules of Civil Procedure.

5. Exhaustion and Procedural Bar Issues Respondent shall clearly and directly respond to the issue of whether petitioner has exhausted available state remedies with regard to each of the grounds for federal habeas corpus relief set forth in

petitioner's pleadings filed in this cause as of this date. If respondent denies that petitioner has exhausted available state remedies with regard to each ground for federal habeas relief set forth in petitioner's pleadings herein, respondent shall explain, in detail, those state remedies still available to petitioner with regard to each unexhausted claim. In the event that respondent wishes to assert the defense that the petitioner has procedurally defaulted on any claim for relief contained in petitioner's federal habeas corpus petition, respondent shall explicitly assert that defense and identify with specificity which of the petitioner's claims the respondent contends are procedurally barred from consideration by this Court.

6. Abuse of the Writ In the event that respondent wishes to assert the defense that the petitioner has abused the writ, respondent shall explicitly assert that defense and identify with specificity which of the petitioner's claims herein either were included in a prior federal habeas corpus petition by petitioner or could, with the exercise of diligence on petitioner's part, have been included in an earlier federal habeas petition by petitioner.

7. Second or Successive Petition In the event that the respondent wishes to assert the defense that this is a second or successive petition filed by the petitioner attacking the same state criminal proceeding and that the petitioner has failed to

comply with the requirements of Title 28 U.S.C. Section 2244, the respondent shall explicitly assert that defense.

8. Limitations In the event that respondent wishes to assert the defense that the petitioner has failed to file this federal habeas corpus action within the one-year statute of limitations set forth in Title 28 U.S.C. Section 2244(d), respondent shall explicitly assert that defense and identify with specificity the date on which the one-year limitations period began to run and all time periods during which that limitations period was tolled.

9. State Court Records On or before thirty (30) days after the date respondent files his answer or other responsive pleading in this cause, respondent shall submit to the Clerk of this Court true and correct copies of all pertinent state court records from petitioner's state court proceedings.

10. Petitioner's Reply On or before twenty (20) days after the date respondent serves petitioner's counsel of record with a copy of respondent's answer or other responsive pleading, petitioner shall file with the Clerk of this Court and serve on respondent's counsel of record any reply he wishes to make to respondent's answer or other responsive pleading.

11. The Clerk shall forward to petitioner's counsel of record

one blank *in forma pauperis* application; petitioner's counsel shall forward same, along with a copy of this Order, to petitioner.

12. On or before thirty (30) days from the date of this Order, petitioner shall submit to the Clerk of this Court a properly completed application for leave to proceed *in forma pauperis*, including a completed certificate of inmate trust account statement. Petitioner is advised he may obtain a copy of his inmate trust account statement from the law librarian at his Texas Department of Criminal Justice facility. Petitioner is also advised it is his responsibility to establish he is currently indigent for purposes of obtaining court-appointed counsel.

13. Any party seeking an extension on any of the foregoing deadlines shall file a written motion requesting such extension prior to the expiration of the deadline in question and shall set forth in such motion a detailed description of the reasons why that party, despite the exercise of due diligence, will be unable to comply with the applicable deadline.

14. Petitioner is advised his court-appointed counsel is not required to accept collect telephone calls from petitioner or any person acting on petitioner's behalf and that said counsel is not required to expend said counsel's own funds to investigate any claim or potential claim in this cause.

15. The Clerk shall send a copy of this Order via first class mail with a receipt acknowledgment card enclosed to the Post-Conviction Litigation Division of the Office of the Attorney General of the State of Texas, *attention Erich Dryden*.

**IT is so ORDERED.**

**SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.**

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**United States District Judge**