

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

Case No.: 6:17-cr-15-Orl-37KRS

v.

JARVIS WAYNE MADISON

Defendant.

MOTION TO APPOINT LEARNED COUNSEL

Steve Malone, a duly qualified “learned counsel” files this Motion to Appoint Learned Counsel pursuant to 18 U.S.C. §§ 3005 & 3599, Judicial Counsel policy, case law, American Bar Association standards and authorities, and the Fifth, Sixth, and Eighth Amendments to the United States Constitution¹ and requests that a second attorney “learned in the law applicable to capital cases” be appointed to assist previously appointed counsel. In

¹ See 18 U.S.C. § 3005 (appointment of two counsel to capital defendant); 18 U.S.C. § 3599 (counsel for financially unable defendants); Guide to Judiciary Policies and Procedures, Ch. 6, § 6.03 (authorization and payment for investigative, expert, and other services in capital cases); *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003 rev.); *Rompilla v. Beard*, 545 U.S. 374 (2005)(holding capital defendant was entitled to new penalty phase because trial counsel failed to adequately investigate and develop the client’s background, citing and discussing A.B.A. guidelines to support its ineffective assistance of counsel analysis and conclusion); *Wiggins v. Smith*, 539 U.S. 510 (2002)(finding capital counsel ineffective under the Sixth Amendment for failing to conduct a thorough and independent background investigation of the defendant, citing A.B.A. guidelines as normative); *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, prepared by Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States (May 1998)(commonly referred to as the “Spencer Report” after the Honorable James R. Spencer, Subcommittee Chair). The Judicial Conference of the United States adopted the recommendations in the Spencer Report on September 15, 1998. Those recommendations are set forth in the Guide to Judiciary Policies & Procedures Vol. VII, Chapter 6, Representation in Federal Death Penalty Cases and in Federal Capital Habeas Corpus Proceedings: Recommendations and Commentary to Chapter 6.

support, Mr. Malone states:

Necessity of “Learned Counsel”

1. Mr. Madison is presently charged by Indictment (Doc 17) with a violation of 18 U.S.C. 120(a)(1) (kidnaping resulting in death), a crime that is punishable by death.

2. I have consulted with the Office of the Federal Defender for the Middle District of Florida, as well as federal Death Penalty Resource Counsel, Steve Potolsky, and been informed that the Government has indicated they are proceeding through the Department of Justice capital case protocol and are actively considering pursuing a death sentence for Mr. Madison in this cause.

3. The Judicial Counsel recognizes the need for specially qualified counsel and the importance of investigating and developing mitigation early in the authorization process:

Recommendation 1(b) [of the Spencer Report] calls for the appointment of specially qualified counsel “at the outset” of a case, because virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase. Early appointment of “learned counsel” is also necessitated by the formal “authorization process” adopted by the Department of Justice to guide the Attorney General’s decision-making regarding whether to seek imposition of a death sentence. (See United States Attorney’s Manual § 9-10.000.) Integral to the authorization process is a presentation to Justice Department officials of the factors which would justify not seeking a death sentence against the defendant. A “mitigation investigation” therefore must be undertaken at the commencement of the representation. *Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the Justice Department is critical both to a defendant’s interests and to sound fiscal management of public funds.*

Guide to Judiciary Policies & Procedures Vol. VII, Chapter 6, Representation in Federal Death Penalty Cases and in Federal Capital Habeas Corpus Proceedings: Recommendations and Commentary to Chapter 6 at 3 (Emphasis added).

4. The Federal Death Penalty Resource Counsel Project has advised counsel that it is common for Criminal Justice Act (“C.J.A.”) attorney(s) who qualify as “Learned Counsel” to be appointed as co-counsel in federal capital cases with a Federal Public Defender Office. The Fourth Circuit has interpreted the “two attorney” requirement of 18 U.S.C. § 3005 to mean that the Federal Public Defender counts as only one of the two required attorneys. *Cf. United States v. Boone*, 245 F.3d 352 (4th Cir. 2001) (reversing where only the Federal Public Defender was appointed and defendant had requested two attorneys).

Qualifications of Steve Malone as “Learned Counsel”

1. Undersigned Steven H. Malone satisfies either set of requirements for “Learned Counsel” under 18 U.S.C. § 3599(c). He has been a member in good standing of the Florida Bar Association since 1980. He is also a member in good standing of the United States Supreme Court, Eleventh Circuit Court of Appeals, and the United States District Courts for the Northern and Middle Districts of Florida.

2. From 2006 to the present, Mr. Malone has been a program attorney for the Mexican Capital Legal Assistance Program where he has monitored and assisted in trial, appeal, and post-conviction cases for Mexican nationals facing the death penalty throughout the Southeast.

3. Over his career, Mr. Malone has worked on over 100 capital cases in all phases of the process. Importantly here, Mr. Malone has federal death penalty experience at the trial level, appearing on behalf of defendants in federal capital cases in the Middle District of Florida and the District of Puerto Rico², and obtaining a pre-authorization waiver of death from

² See *United States v. Rodriguez-Gonzales*, No. 15-0075(6) (D.P.R. filed Jan. 28, 2015);

the Department of Justice in one such case.³ He also has considerable capital experience in Florida's state courts, having represented numerous capital defendants in trial, on direct appeal, and in state habeas and post-conviction relief proceedings.⁴

4. Mr. Malone also has considerable experience handling appeals in the Eleventh Circuit. Between 1983 to 2000, while working for the Volunteer Lawyers Resource Center, the Office of Capital Collateral Representative, and the Office of the Public Defender, Fifteenth Circuit, Mr. Malone represented or assisted in representing dozens of people in state and federal post-conviction proceedings, including over 20 sentenced to death. During that time, he advocated on behalf of many in § 2254 proceedings before the Eleventh Circuit Court of Appeals.⁵

United States v. Martin, No. 8:12-cr-00205-EAK-MAP-7 (M.D. Fla. filed May 17, 2012); *United States v. Lopez*, No. 8:11-CR-269-T-23AEP (M.D. Fla. filed May 18, 2011).

³ See Notice, *Lopez*, No. 8:11-CR-269-T-23AEP (M.D. Fla. filed June 12, 2012) (R. Doc. 125).

⁴ See, e.g., *White v. State*, 729 So.2d 909 (Fla. 1999) (denial of habeas reversed, death sentence vacated); *Hitchcock v. State*, 673 So.2d 859 (Fla. 1996) (death sentence imposed after resentencing vacated on direct appeal); *Hitchcock v. State*, 614 So.2d 483 (Fla. 1993) (on direct appeal, vacating death sentence); *Maxwell v. State*, 603 So. 2d 490 (Fla. 1992) (denial of habeas reversed, death sentence vacated); *Bassett v. State*, 541 So.2d 596 (Fla. 1989) (same); *Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986) (same); see also *Hernandez-Alberto v. State*, 126 So.3d 193 (Fla. 2013) (denial of habeas affirmed), *reh'g denied* (Nov. 7, 2013); *Sims v. State*, 754 So. 2d 657 (Fla. 2000) (denial of habeas corpus relief affirmed). Mr. Malone has further appeared as counsel of record in over 100 published opinions from non-capital Florida cases. See, e.g., *Shepard v. Crosby*, 916 So.2d 861 (Fla. 4th Dist. Ct. App. 2005) (murder and attempted murder convictions vacated where appellate counsel ineffective for failing to challenge improper self-defense instruction).

⁵ See, e.g., *Sims v. Singletary*, 155 F.3d 1297 (11th Cir. 1998); *Bassett v. Singletary*, 105 F.3d 1385 (11th Cir. 1997); *Aldridge v. Dugger*, 925 F.2d 1320 (11th Cir. 1991); *Mars v. Mounts*, 895 F.2d 1348 (11th Cir. 1990); *Troedel v. Dugger*, 828 F.2d 670 (11th Cir. 1987); *Thomas v. Wainwright*, 788 F.2d 684 (11th Cir. 1986) (death warrant case); *Francois v. Wainwright*, 763

5. In 2011, he received the Sisyphus Award for his career achievements. He has taught at capital conferences sponsored by the Florida Public Defender Association and other organizations both local and national. Mr. Malone possesses the professional skills and qualification needed to assume the role of “learned counsel” on Mr. Madison’s behalf.

6. This motion is filed in the interests of justice and pursuant to the Criminal Justice Act.

Wherefore, the undersigned requests this Court appoint Steven Malone, Esq., as “learned counsel” in the above-styled cause in the interests of justice and pursuant to the Criminal Justice Act.

Dated this 24th day of January 2017.

DONNA LEE ELM
FEDERAL DEFENDER
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F.2d 1188 (11th Cir. 1985) (death warrant case); *Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir. 1984); *Dobbert v. Wainwright*, 742 F.2d 1274 (11th Cir. 1984); *Mauldin v. Wainwright*, 723 F.2d 799 (11th Cir. 1984); *see also Caseres v. Sec’y, Dep’t of Corr.*, No. 9:05-cv-80613-DMM (S.D. Fla. Nov. 7, 2006), *appeal dismissed*, No. 06-16385-D (11th Cir. Feb. 26, 2007).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Notice of Appearance* was submitted to the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to Andrew Searle, Assistant U.S. Attorney, on this 24th day of January 2017.

D. Todd Doss

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