

**CAPITAL CASE**

No.

IN THE  
SUPREME COURT OF THE UNITED STATES

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DAVID IVY,

Petitioner

vs.

STATE OF TENNESSEE,

Respondent

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE TENNESSEE SUPREME COURT

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MOTION TO PROCEED IN FORMA PAUPERIS  
PETITION FOR WRIT OF CERTIORARI

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Kelley J. Henry  
Supervisory Assistant Federal Public  
Defender, Capital Habeas Unit

Amy D. Harwell  
Assistant Federal Public Defender  
810 Broadway, Suite 200  
Nashville, Tennessee 37203  
(615) 736-5047

Counsel for David Ivy

David Ivy, by counsel, hereby requests leave of this Court to proceed *in forma pauperis* in connection with the attached Petition for Writ of Certiorari. Mr. Ivy is a Tennessee death row inmate. He is indigent and without income or assets. He was represented by appointed counsel and was permitted to proceed *in forma pauperis* in the Court below. A copy of the appointment order is Attached. Attachment A. Counsel were appointed pursuant 18 U.S.C. § 3599 and authorized by that same court to represent Mr. Ivy in these proceedings. Attachment B.

Respectfully submitted,

/s/ Kelley J. Henry

Kelley J. Henry\*

Supervisory Assistant Federal Public  
Defender, Capital Habeas Unit

\*Counsel of Record

Amy D. Harwell

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810 Broadway, Suite 200

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari, and accompanying appendix, were served upon counsel for Respondent, Andrew Coulam, Assistant Attorney General, 425 Fifth Avenue North, Nashville, Tennessee, 37203, this 11th day of October, 2018.

/s/ Kelley J. Henry  
Kelley J. Henry

# ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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DAVID IVY,

Petitioner,

vs.

WAYNE CARPENTER, Warden,  
Riverbend Maximum Security  
Institution,

Respondent.

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No. 13-2374-SHM-cgc

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ORDER GRANTING MOTION TO PROCEED IN FORMA PAUPERIS  
ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR APPOINTMENT  
OF COUNSEL  
AND  
ORDER DIRECTING CLERK TO SERVE HABEAS PETITION

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On June 3, 2013, Petitioner David Ivy, Tennessee Department of Correction prisoner number 204455, an inmate at Riverbend Maximum Security Institution ("RMSI") in Nashville, Tennessee, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, a motion to appoint counsel, and a motion for leave to proceed in forma pauperis. (ECF Nos. 1-3.) The Clerk shall record the respondent as Wayne Carpenter.

Petitioner has, pursuant to 28 U.S.C. § 1915, submitted an affidavit of indigency and certified trust fund account statement in support of his in forma pauperis motion. Based on the information provided, Petitioner's motion for leave to proceed in forma pauperis (ECF No. 3) is GRANTED.

Petitioner requests that the Court appoint Kelley Henry on behalf of the Office of the Federal Public Defender for the Middle District of Tennessee as counsel. (ECF No. 2 at 4.) Attorneys from the Office of the Federal Public Defender for the Middle District of Tennessee are routinely appointed to represent capital habeas petitioners in this district. Eighteen U.S.C. § 3599(a)(2) reads as follows:

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).

The materials submitted in conjunction with Petitioner's motion to proceed in forma pauperis demonstrate that he is "financially unable to obtain adequate representation" and therefore, entitled to the appointment of counsel.

Petitioner's motion to appoint counsel (ECF No. 2) is GRANTED IN PART, to the extent the Office of the Federal Public Defender for the Middle District of Tennessee is appointed as counsel for Petitioner pursuant to 18 U.S.C. § 3599. The motion to appoint counsel is DENIED IN PART, to the extent the Court will not appoint Kelley Henry as counsel.<sup>1</sup>

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<sup>1</sup> Judges are to appoint the Office of the Federal Public Defender, not individual staff attorneys. See Administrative Office of U.S. Courts, CJA Guidelines & Forms, Vol. 7, Part A, Ch. 4, § 440, <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter4.aspx#440> (last accessed June 3, 2013).

It is ORDERED, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, that the Clerk shall send a copy of the petition and this order to Respondent and to the Tennessee Attorney General and Reporter by certified mail. Pursuant to Rule 5 of the Rules Governing Section 2254 Cases, Respondent will not be required to answer the petition until ordered to do so by the Court.

IT IS SO ORDERED this 10<sup>th</sup> day of June, 2013.

*s/ Samuel H. Mays, Jr.*  
SAMUEL H. MAYS, JR.  
UNITED STATES DISTRICT JUDGE

# ATTACHMENT B



**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

DAVID IVY,	)	
	)	
Petitioner	)	
	)	No. 2:13-cv-02374-SHM-cgc
v.	)	
	)	
WAYNE CARPENTER, Warden	)	
	)	
Respondent.	)	

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**ORDER GRANTING PETITIONER’S MOTION FOR AUTHORIZATION  
TO REPRESENT PETITIONER IN STATE COURT PROCEEDINGS**

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On July 29, 2015, Petitioner David Ivy, through counsel, filed a motion to authorize his appointed federal habeas counsel to represent him in state court for the limited purpose of presenting an intellectual disability claim pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). (Electronic Case Filing (“ECF”) No. 53 at 1-2.) Petitioner represents that Respondent’s counsel has been consulted and that Respondent takes no position on this motion. (*Id.* at 5-6.)

Petitioner has asserted an unexhausted *Atkins* claim in Claim 7 of his Amended Petition. (ECF No. 14 at 15-16; *see* ECF No. 16 at 41-42.) He argues that his federal habeas counsel has investigated the issue of Petitioner’s intellectual disability and consulted with an intellectual disability expert to prepare and present evidence. (ECF No. 53 at 2.) Petitioner must exhaust his state court remedies under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) before bringing the claim in the federal habeas proceedings. (*Id.* at 1.) He has pursued state post-conviction remedies and bar complaints against his former state court counsel and asserts that a conflict of interest now exists which prevents their further representation. (*Id.*

at 2-3.)

Petitioner asserts that, because of his federal habeas counsel's investigation of his *Atkins* claim and presentation of similar *Atkins* issues in state court, their representation would "preserve scarce public funds" and "facilitate the expeditious resolution" of his claim in state court. (*Id.* at 2-3.) Petitioner contends that the appointment of federal habeas counsel is appropriate for this ancillary matter under 18 U.S.C. §§ 3006A(c) and 3599. (*Id.* at 4-5.) He relies on *Harbison v. Bell*, 556 U.S. 180 n.7 (2009), to argue that his federal habeas counsel's limited appearance in the state court proceedings is appropriate where the AEDPA requires exhaustion of state court remedies. (*Id.* at 5.)

Section 3599(e) provides:

Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

18 U.S.C. § 3599(e). In *Harbison*, the Supreme Court held that 18 U.S.C. § 3599 authorizes federally appointed counsel to represent a prisoner in state clemency proceedings. *Harbison*, 556 U.S. at 194. The court stated that subsection (e) authorizes counsel to represent a client in "subsequent" stages of available judicial proceedings" recognizing that state post-conviction litigation sometimes follows the initiation of federal habeas proceedings. *Id.* at 189-90. With regard to "'other appropriate motions and procedures,' a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation." *Id.* at 190 n.7.

Petitioner's federal habeas counsel has investigated and developed evidence to support Petitioner's *Atkins* claim and, through their involvement in other state court *Atkins* proceedings, are familiar with the unique and complex nature of the claim. Appointment of new counsel for the state court proceedings would cause unwarranted delay and disrupt the proceedings and the attorney-client relationship. The Court, in its discretion under *Harbison*, finds it appropriate to allow Petitioner's appointed federal habeas counsel to represent him in state court proceedings for the limited purpose of exhausting his *Atkins* intellectual disability claim.

Petitioner's motion is GRANTED.

IT IS SO ORDERED this 29<sup>th</sup> day of July 2015.

s/ Samuel H. Mays, Jr.  
SAMUEL H. MAYS, JR.  
UNITED STATES DISTRICT JUDGE