

No.

OCTOBER TERM 2018

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID DEWAYNE RILEY,
Petitioner,

v.

ALABAMA,
Respondent.

On Petition for a Writ of Certiorari
to the Alabama Supreme Court

MOTION TO PROCEED IN FORMA PAUPERIS

Christine A. Freeman, Executive Director
John Anthony Palombi*
Natalie Rezek Olmstead
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**Counsel of Record*

January 22, 2019

Petitioner, David Riley, asks leave to file his Petition for Certiorari without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39. Undersigned counsel, has moved to be appointed to represent Mr. Riley by appointment. That motion is still pending in the District Court for the Northern District of Alabama. The motion to proceed *in forma pauperis* and the supporting documents are attached to this motion.

Respectfully submitted,

/s/ John Palombi

John Anthony Palombi
Assistant Federal Defender
Federal Defenders for the Middle District of Alabama
817 S. Court Street
Montgomery, AL 36104
(334)-834-2099
Counsel of Record for Petitioner

Executed on January 22, 2019

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

DAVID DEWAYNE RILEY,)
Petitioner,)
v.) Case No.
COMMISSIONER,)
ALA. DEPT. OF CORRECTIONS,)
Respondent.)

**MOTION FOR APPOINTMENT OF COUNSEL IN CAPITAL HABEAS
CORPUS PROCEEDING PURSUANT TO 18 U.S.C. § 3599**

David Riley is an indigent prisoner presently under a sentence of death arising from a capital murder conviction in Lauderdale County, Alabama. On May 4, 2018, state post-conviction counsel filed a writ of certiorari to the Alabama Supreme Court from the denial of his state post-conviction petition. That petition was denied on August 24, 2018.

To assist in the preparation and timely filing of a § 2254 petition, Mr. Riley respectfully requests that this Court appoint qualified federal habeas counsel pursuant to 18 U.S.C. § 3599. For the reasons set out below, Mr. Riley requests that this Court appoint the Federal Defenders for the Middle District of Alabama to represent him,

and specifically, John Anthony Palombi, Assistant Federal Defender, as counsel of record.

I. Procedural History

In 2007, Mr. Riley was convicted of capital murder after a jury trial in Lauderdale County, Alabama. In 2009, his conviction was vacated by the Alabama Court of Criminal Appeals and his case was remanded for a new trial.¹ His retrial ended with a conviction and death sentence in 2011.

The Alabama Court of Criminal Appeals affirmed that conviction in 2013. He filed a state post-conviction petition in 2015, and it was dismissed in 2016. That dismissal was affirmed by the Alabama Court of Criminal Appeals in 2018.² He requested discretionary review from the Alabama Supreme Court and that petition was denied on August 24, 2018. Undersigned counsel has calculated that Mr. Riley's habeas corpus petition is due on February 26, 2018.

II. Mr. Riley has a right to appointment of counsel to litigate his habeas corpus petition because he is indigent and undersigned counsel meets the qualification requirements for appointment.

Mr. Riley's state post-conviction counsel wrote to undersigned counsel asking if the Federal Defenders could represent Mr. Riley in his federal habeas corpus

¹ *Riley v. State*, 48 So.3d 671 (Ala. Crim. App. 2009).

² *Riley v. State*, 2018 WL 797617 (Ala. Crim. App. 2018).

proceedings. State post-conviction counsel confirmed with Mr. Riley that he wanted the Federal Defender's Office to represent him in his federal habeas corpus proceedings. Undersigned counsel met with Mr. Riley on October 11, 2018, and confirmed that Mr. Riley did want the Federal Defender's Office to represent him going forward.

Under 18 U.S.C. § 3599(a)(2), indigent death-sentenced inmates are “entitled to the appointment of one or more attorneys” in order to pursue federal habeas corpus remedies under 28 U.S.C. § 2254. “Under a straightforward reading of the statute, subsection (a)(2) triggers the appointment of counsel for habeas petitioners, and subsection (e) governs the scope of appointed counsel’s duties.”³ It requires that at least one of the attorneys appointed to represent a capital habeas corpus petitioner must have been admitted to practice in the court of appeals for at least five years, with at least three years’ experience handling felony appeals in that court.⁴ Mr. Riley is indigent and undersigned counsel, John Palombi, meets those qualifications.

A. Mr. Riley is indigent.

³ *Harbison v. Bell*, 556 U.S. 180, 185 (2009).

⁴ 18 U.S.C. § 3599(c).

Mr. Riley proceeded as an indigent litigant on his direct appeal⁵ and in state post-conviction proceedings.⁶ Mr. Riley has been on death row in Alabama since his conviction in 2007. Mr. Riley has also filled out an application to proceed *in forma pauperis*, which is attached to this motion.⁷

B. Undersigned counsel is qualified to represent Mr. Riley under 18 U.S.C. § 3599.

The Capital Habeas Unit of the Federal Defenders' Office for the Middle District of Alabama is prepared to represent Mr. Riley in his habeas corpus proceedings and subsequent proceedings under 18 U.S.C. § 3599. The office is prepared to assign two (or more) counsel to this case, and one is undersigned counsel, John Palombi, who meets the qualification requirements of § 3599.

The Capital Habeas Unit of the Federal Defenders for the Middle District of Alabama represents clients in all three of Alabama's federal court districts. Further, because the Unit has its own litigation budget, appointment of the Federal Defenders would obviate the need for a budget conference. In addition, Federal Defender offices are encouraged to seek early appointment in capital habeas cases.

⁵ See Exhibit B, Transcript of Court finding Mr. Riley indigent.

⁶ See Exhibit C, Docket Sheet from Rule 32 Appeal.

⁷ See Exhibit D, Application to Proceed Without Prepayment of Costs or Fees.

Undersigned counsel has been licensed to practice law since 1987. Counsel has been employed as an Assistant Federal Defender since September 2, 2008. Because of his employment as an Assistant Federal Defender, he is authorized to practice in the Court of Appeals for the Eleventh Circuit, and the Northern, Middle, and Southern Districts of Alabama.

Undersigned counsel is licensed in state court in Illinois and in Kentucky. He is also licensed to practice in the following federal courts: United States Supreme Court, United States Court of Appeals for the Sixth Circuit, Federal District Court for the Northern District of Illinois, Federal District Court for the Eastern District of Kentucky and Federal District Court for the Western District of Kentucky.

Undersigned counsel has extensive training and experience representing death-sentenced inmates in state and federal courts. Undersigned counsel has represented death-sentenced inmates in the following cases in federal court:

United States Supreme Court

Moody v. Alabama, 138 S.Ct. 1590 (2018)
Eggers v. Alabama, 138 S.Ct. 1278 (2018)
Sharifi v. Alabama, 138 S.Ct. 935 (2018)
McNabb v. Dunn, 138 S.Ct. 369 (2017)
Borden v. Alabama, 138 S.Ct. 312 (2017)
Melson v. Dunn, 137 S. Ct. 1664 (2017)
Smith v. Alabama, 137 S. Ct. 713 (2016)
Brooks v. Dunn, 136 S. Ct. 979 (2016)
Brooks v. Alabama, 136 S. Ct. 708 (2016)
Melson v. Thomas, 134 S. Ct. 905 (2014)

Smith v. Thomas, 134 S. Ct. 513 (2013)
Hardy v. Comm'r, 133 S. Ct. 2768 (2013)
Powell v. Alabama, 131 S. Ct. 3017 (2011)
Powell v. Comm'r, 131 S. Ct. 3018 (2011)
Melson v. Allen, 560 U.S. 1001 (2010)
Baze v. Rees, 553 U.S. 35 (2008)
Foley v. Simpson, 553 U.S. 1068 (2008)
Baze v. Kentucky, 549 U.S. 1344 (2007)
Simmons v. Kentucky, 549 U.S. 1176 (2007)
Thompson v. Kentucky, 545 U.S. 1142 (2005)

United States Court of Appeals, Eleventh Circuit

Freeman v. Comm'r, No. 18-13995 (pending)
Lee v. Comm'r et al., 731 Fed. App'x. 885 (2018)
Hamm v. Comm'r, 725 F. App'x. 836 (2018)
West et al. v. Comm'r et al., 869 F.3d 1289 (11th Cir. 2017)
Grayson et al. v. Comm'r et al., 869 F.3d 1204 (11th Cir. 2017)
Eggers v. State, 876 F.2d 1086 (11th Cir. 2017)
Moody v. Comm'r, 682 F. App'x. 802 (11th Cir. 2017)
Grayson (Smith) v. Warden, No. 16-17167 (11th Cir. Dec. 7, 2016)
Brooks v. Warden, 810 F.3d 812 (11th Cir. 2016)
McNabb v. Comm'r, 727 F.3d 1334 (11th Cir. 2013)
Burgess v. Comm'r, 723 F.3d 1308 (11th Cir. 2013)
Melson v. Comm'r, 713 F.3d 1086 (11th Cir. 2013)
Hardy v. Comm'r, 684 F.3d 1066 (11th Cir. 2012)
Smith v. Comm'r, 703 F.3d 1266 (11th Cir. 2012)
Powell v. Comm'r, 643 F.3d 1300 (11th Cir. 2011)

United States Court of Appeals, Sixth Circuit

In re Bowling, 2007 WL 4943732 (6th Cir. 2007)
Moore, et al. v. Rees, et al., 07-6270 (6th Cir. 2007)
Bowling v. Haeberline, 04-6378 (6th Cir. 2004)

District Court for the Northern District of Alabama

Ingram v. Stewart, 1:17-cv-1464-LSC

Sharp v. Stewart, 5:17-cv-01077-AKK
Eggers v. State, 2:13-cv-01460-LSC
Melson v. Campbell, 4:04-cv-03422-VEH-HGD
Smith v. Campbell, 5:05-cv-01547-LSC-JEO
Burgess v. Allen, 3:07-cv-00474-SLB-JEO
Hardy v. Allen, 5:07-cv-01222-IPJ-RRA

District Court for the Middle District of Alabama

McNabb v. Thomas, 2:08-cv-00683-MEF-SRW
Powell v. Thomas, et al., 2:11-cv-00376-WKW
Grayson et al. v. Thomas, et al., 2:12-cv-00316-MHT-CSC
Wilson v. Dunn et al., 2:16-cv-00364-WKW

District Court for the Southern District of Alabama

Lee v. Dunn et al., 1:16-cv-00473-WS-B

District Court for the Eastern District of Kentucky

Moore v. Rees, et al., 3:06-cv-00022-KKC
Bowling et al. v. Haas, et al. 3:07-cv-00007-KKC, -00032-KKC
Bowling v. Simpson, 5:05-cv-0523-JBC

District Court for the Western District of Kentucky

Simmons v. Simpson, 3:07-cv-00059-CRS-DW

Undersigned counsel has represented death-sentenced inmates in State Supreme Courts in the following cases:

Supreme Court of Illinois

People v. Ramey, 154 Ill.2d 41 (Ill. 1992) (argued)

Kentucky Supreme Court

Foley v. Commonwealth, 306 S.W.3d 28 (Ky. 2010)
Foley v. Commonwealth, 2010 WL 1005873 (Ky. 2010)
Bowling v. Dept. of Corr., 301 S.W.3d 478 (Ky. 2009) (argued)
Foley v. Commonwealth, 2009 WL 1110333 (Ky. 2009)
Baze v. Commonwealth, 276 S.W.3d 761 (Ky. 2008) (argued)
Baze v. Rees, 217 S.W.3d 207 (2006)
Simmons v. Commonwealth, 191 S.W.3d 557 (Ky. 2006)
Johnson v. Commonwealth, 103 S.W.3d 687 (Ky. 2003) (argued)
Hodge v. Commonwealth, 68 S.W.3d 338 (Ky. 2001) (argued)

C. Mr. Riley's case warrants pre-petition appointment.

“[I]ndigent state capital inmates are entitled to the appointment of federally funded counsel to assist them in the preparation and filing of a § 2254 federal habeas petition, perhaps even before they have sought state collateral relief.”⁸ Mr. Riley has been found indigent at all phases of the proceedings, and is presently indigent. And he has requested the representation from this Federal Defender’s Office, which has qualified federal habeas counsel. As such, he is entitled to appointed counsel under 18 U.S.C. §3599. It is within this Court’s discretion to appoint federal habeas counsel now.

⁸ *Lugo v. Sec'y, Florida Dep't of Corr.*, 750 F.3d 1198, 1213 (11th Cir. 2014); *See* 18 U.S.C. § 3599(a)(2); *McFarland v. Scott*, 512 U.S. 849, 855–56 (1994) (holding that the right to appointed counsel in federal habeas proceedings “adheres prior to the filing of a formal, legally sufficient habeas corpus petition” because it “includes a right to legal assistance in the preparation of a habeas corpus application”).

Mr. Riley was denied discretionary review of the denial of his state post-conviction pleading by the Alabama Supreme Court on August 24, 2018. Counsel has calculated that his federal statute of limitations for filing his habeas petition will expire on February 26, 2019. Pre-petition appointment will allow expenditure of federal funds to investigate and prepare Mr. Riley's habeas corpus petition. Early appointment will also allow counsel to assemble the required records and file Mr. Riley's petition in a timely manner.

Counsel meets the qualifications for appointment under that statute and moves that this Court appoint the Federal Defenders for the Middle District of Alabama, specifically Assistant Federal Defender John Anthony Palombi, to represent Mr. Riley, pursuant to 18 U.S.C. § 3599.

Respectfully submitted,

/s/ John Anthony Palombi
John Anthony Palombi
Assistant Federal Defender
KY Bar #86784
Federal Defenders, Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Phone: (334) 834-2099
Fax: (334) 834-0353

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

/s/ John Anthony Palombi
John Anthony Palombi

1 your defense team. The jury heard those things. The jury
2 weighed the aggravating circumstances against the mitigating
3 circumstances and they unanimously decided that the
4 appropriate punishment for you under these circumstances was
5 to be executed. But that's not the final decision. The
6 final decision is mine. So I have also weighed the
7 aggravating circumstances against the mitigating
8 circumstances and, Mr. Riley, I've gone a step further than
9 that. I have reviewed the evidence presented at the first
10 trial concerning mitigating circumstances, and not only
11 mitigating circumstances. Nothing in the prior trial that in
12 any way was against you has ever been considered by this
13 court at this time, but anything in that first trial that was
14 presented that could in any way be considered mitigating
15 circumstances I am going to consider.

16 And I put all that together. The fact there's one
17 aggravating and lots of mitigating doesn't decide the issue.
18 It's which of those two carries the greater weight. The jury
19 decided that the aggravating circumstance outweighed the
20 mitigating circumstances and, Mr. Riley, taking everything
21 into consideration I agree. The appropriate punishment for
22 your crime under these circumstances is death by legal
23 injection; that will be the sentence imposed by the Court.

24 As you know, Mr. Riley, you will get an automatic
25 appeal. You are indigent so an attorney will be appointed to

1 represent you on the appeal. You have the right to a copy of
2 the transcript of the record. They will all be provided for
3 you at no cost. Do you understand your situation?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you understand your sentence?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you understand your rights?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you have any complaint or
10 argument or disagreement about the way your attorneys have
11 represented you in this case?

12 THE DEFENDANT: Only one thing. I believe it
13 would have helped made a difference if I had brought the
14 attention that -- Mrs. Jackie Beavers had got on the stand
15 and admitted to all three cameras working properly with no
16 malfunctions. And out of three cameras only one didn't have
17 sound, and I've told my attorneys from day one that as I
18 walked backed there to that -- where everything went down,
19 that I told Mr. Kirtley I did not intend to hurt him or harm
20 him or kill him at all. And I asked them to look into why
21 the one tape didn't have no sound and it never came up in
22 court. I don't know why if it was talked about or what, but
23 as for that that's right now the only thing I -- that's been
24 on my mind since I went to trial.

25 THE COURT: Well Mr. Kirtley died at your

ACR371

ALABAMA JUDICIAL DATA CENTER
IN THE CIRCUIT COURT OF LAUDERDALE COUNTY
NOTICE OF APPEAL TO THE ALABAMA COURT OF CRIMINAL APPEALS
BY THE TRIAL COURT CLERK

JUDGE: HON. MIKE T. JONES

APPEAL DATE: 11/22/2016 || STATE OF ALABAMA VS RILEY DAVID DEWAYNE

INDIGENCY STATUS:

GRANTED INDIGENCY STATUS AT TRIAL COURT:	<input checked="" type="checkbox"/>	YES	NO	
APP. TRIAL COUNSEL PERMITTED TO W/D ON APPEAL:	<input type="checkbox"/>	YES	<input checked="" type="checkbox"/>	NO
INDIGENT STATUS REVOKED ON APPEAL:	<input type="checkbox"/>	YES	<input checked="" type="checkbox"/>	NO
INDIGENT STATUS GRANTED ON APPEAL:	<input checked="" type="checkbox"/>	YES	<input type="checkbox"/>	NO

DEATH PENALTY: NO

APPEAL TYPE: RULE 32 PETITION

THIS APPEAL IS FROM AN ORDER DENYING A PETITION (I.E., RULE 32 PETITION, WRIT OF HABEAS CORPUS, ETC) OR FROM ANY OTHER ISSUED BY THE TRIAL JUDGE.

CO/CASE NUMBER: 41/CC 2005 000431.60

ORDER ENTERED (DATE): 10132016 PETITION: DISMISSED DENIED GRANTED

POST-JUDGMENT MOTIONS FILED:	DT FILED	DT DENIED	CON BY AGREE
MOTION FOR NEW TRIAL	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
MOTION FOR JUDG. OF ACQUIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
MOTION TO W/D GUILTY PLEA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
MOTION FOR ATTY TO W/DRAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
OTHER	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

COURT REPORTER(S):
ADDRESS:SEGARS CINDY
200 S COURT ST
FLORENCE, AL 35630APPELLATE COUNSEL #1:
ADDRESS:GARDNER GREGORY
P.O. BOX 2366

EMAIL ADDRESS:

BOULDER, CO 80306 0000
303-552-2979
GARDNERLEGAL@GMAIL.COMAPPELLATE COUNSEL #2:
ADDRESS:PHONE NUMBER:
EMAIL ADDRESS:APPELLANT (PRO SE):
ADDRESS:RILEY DAVID DEWAYNE
AIS#Z-738 HOLMAN C.F.
ATMORE, AL 36503 3700
000000

AIS #:

APPELLEE (IF CITY APPEAL):
ADDRESS:I CERTIFY THAT THE INFORMATION PROVIDED
ABOVE IS ACCURATE TO THE BEST OF MY
KNOWLEDGE AND I HAVE SERVED A COPY OF
THIS NOTICE OF APPEAL ON ALL PARTIES TO
THIS ACTION ON THIS 22nd DAY OF November 2016

OPERATOR: DEM

PREPARED: 11/22/2016

CIRCUIT COURT CLERK

TMM

AO 240 (Rev. 07/10) Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)

UNITED STATES DISTRICT COURT

for the

Northern District of Alabama

David Riley)
Plaintiff/Petitioner)
v.)
Commissioner, Alabama Department of Corrections)
Defendant/Respondent)

Civil Action No.

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS
(Short Form)

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury:

1. *If incarcerated.* I am being held at: Holman Correctional Facility.

If employed there, or have an account in the institution, I have attached to this document a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months for any institutional account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.

2. *If not incarcerated.* If I am employed, my employer's name and address are:

My gross pay or wages are: \$ 0.00, and my take-home pay or wages are: \$ 0.00 per
 (specify pay period) _____.

3. *Other Income.* In the past 12 months, I have received income from the following sources (check all that apply):

(a) Business, profession, or other self-employment	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
(b) Rent payments, interest, or dividends	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
(c) Pension, annuity, or life insurance payments	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
(d) Disability, or worker's compensation payments	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
(e) Gifts, or inheritances	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
(f) Any other sources	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

If you answered "Yes" to any question above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

AO 240 (Rev. 07/10) Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)

4. Amount of money that I have in cash or in a checking or savings account: \$ 0.00.

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name (*describe the property and its approximate value*): none

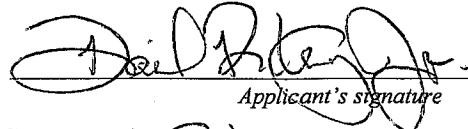
6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses (*describe and provide the amount of the monthly expense*): none

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support: none

8. Any debts or financial obligations (*describe the amounts owed and to whom they are payable*):

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: September 4th 2018


Applicant's signature

David Riley Jr.
Printed name