

No. _____

OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL JOSEPH MULDER, Petitioner,

v.

WILLIAM GITTERE, Warden, Respondent.

=====

*On Petition for Writ of Certiorari to the
Supreme Court of the State of Nevada*

=====

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

=====

CAPITAL CASE

Rene L. Valladares
Federal Public Defender of Nevada
Heather Fraley*
Assistant Federal Public Defender
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Katherine Tanaka
Assistant Federal Public Defender
Katherine_Tanaka@Fd.Org
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
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Counsel for Petitioner

** Counsel of Record*

Pursuant to Supreme Court Rule 39.1, Petitioner Michael Joseph Mulder requests leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Mr. Mulder has been granted leave to do so in state court and federal court. In state court, counsel were appointed to represent Mr. Mulder at trial, direct appeal, and initial state post-conviction proceedings.

On October 23, 2009, the United States District Court appointed the Federal Public Defender for the District of Nevada (“FPD”) to represent Mr. Mulder during federal post-conviction proceedings. *See* Exhibit 1. In 2015, Mr. Mulder returned to state court to exhaust claims in his federal petition. FPD counsel informed the state court on the record that the FPD was counsel of record for Mr. Mulder and that they were replacing prior state-appointed counsel. *See* Exhibit 2 at 6–7. The state court accepted counsel’s proffer, and the FPD has continued to represent Mr. Mulder throughout his state post-conviction proceedings.

DATED this 18th day of January, 2019.

Respectfully submitted,

/s/ Heather Fraley
Assistant Federal Public Defender

EXHIBIT 1

EXHIBIT 1

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL JOSEPH MULDER,)
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Petitioner,)
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vs.)
)
E.K. McDANIEL, *et al.*,)
)
Respondents.)
)
_____ /

3:09-CV-00610-PMP-RAM

ORDER

This action is a petition for a writ of habeas corpus under 28 U.S.C. §2254 by Michael J. Mulder, a Nevada prisoner sentenced of death. Mulder’s habeas corpus petition was filed on October 15, 2009. Docket #1. He has paid the \$5 filing fee for this action.

Mulder also filed a motion for appointment of counsel, which he followed with a supplement demonstrating that he lacks the resources necessary to employ counsel to prosecute this capital habeas corpus proceeding. Docket ## 2/3. Pursuant to 18 U.S.C. § 3599(a), the Federal Public Defender for the District of Nevada (“FPD”) shall be appointed to represent Mulder. The FPD shall represent him in all future federal proceedings in this court relating to this matter, including subsequent actions, and appeals therefrom, pursuant to 18 U.S.C. § 3599(e), until allowed to withdraw.

IT IS THEREFORE ORDERED that petitioner’s Motion for Appointment of

1 Counsel (docket #2/3) is **GRANTED**. The Federal Public Defender for the District of Nevada is
2 appointed to represent petitioner.

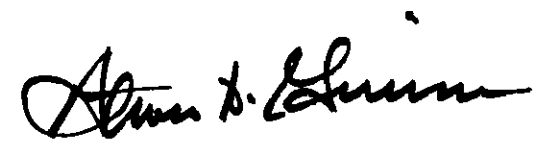
3 **IT IS FURTHER ORDERED** that the Clerk shall serve the respondents, via
4 electronic mail, with a copy of the petition for writ of habeas corpus (docket #1) and a copy of this
5 order. Respondents' counsel shall file a Notice of Appearance of Counsel within **thirty (30) days**
6 from the date of entry of this order, but shall not answer the habeas corpus petition until the court
7 orders otherwise.

8 DATED: October 23, 2009

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11 UNITED STATES DISTRICT JUDGE
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EXHIBIT 2

EXHIBIT 2



CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

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9 THE STATE OF NEVADA,

CASE NO.: C138790

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Plaintiff,

DEPT. XII

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vs.

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13 MICHAEL JOSEPH MULDER,

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Defendant.

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16 BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

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TUESDAY, JANUARY 27, 2015

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**TRANSCRIPT OF PROCEEDINGS
PETITION FOR WRIT OF HABEAS CORPUS**

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20 APPEARANCES:

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For the State:

STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

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For the Defendant:

HEATHER FRALEY, ESQ.
DAVID ANTHONY, ESQ.
Asst. Federal Public Defenders

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RECORDED BY: KRISTINE CORNELIUS, COURT RECORDER/TRANSCRIBER

1 LAS VEGAS, NEVADA, TUESDAY, JANUARY 27, 2015 at 8:43 A.M.

2
3 MR. ANTHONY: Page 12, Your Honor, --

4 THE COURT: Sure.

5 MR. ANTHONY: -- State v. Mulder.

6 THE COURT: C138790 -- he's not present. He's in the Nevada
7 Department of Corrections.

8 MR. RYAN: He's in the department of corrections, Your Honor, and we'll
9 waive his presence for the purpose of this hearing.

10 THE COURT: Okay.

11 And I have received your petition. So, Mr. Owens, how much time
12 do you want to respond? It's quite lengthy.

13 MR. OWENS: Good morning, Steve Owens for the State. Yeah, it's 150
14 pages. I've already been looking at it and reviewing the federal proceedings
15 that have been going on for the past five years. I'm gonna need about 60 more
16 days to have a response.

17 THE COURT: What issue was specifically -- I mean I remember this one
18 for some reason very well -- did you have it, Mr. Owens?

19 MR. OWENS: Yes. Yes.

20 THE COURT: Okay -- it was in the -- it was so long ago it was in the
21 other courthouse.

22 MR. OWENS: It was with Chris Oram and there were issues about
23 competency --

24 THE COURT: Yes.

25 MR. OWENS: -- and he had a stroke in --

1 THE COURT: Methamphetamines --

2 MR. OWENS: -- prison and --

3 THE COURT: -- stroke in prison.

4 MR. OWENS: -- mental retardation and all kinds of things --

5 THE COURT: Yes.

6 MR. OWENS: -- like that.

7 THE COURT: So, I'm just wondering what issues have not been
8 exhausted that the federal court sent back here?

9 MR. COFFEE: Well, Your Honor, there were a couple.

10 One of them that's important is that there is another competency
11 issue. Subsequent to the Court's last hearing here, the federal judge, Judge
12 Pro, held a hearing on competency and found that Mr. Mulder was permanently
13 incompetent. And so that was one of the issues that we need to be -- need to
14 bring back here is that issue about competence.

15 The other issue that's very prominent that we have put forward in
16 the petition is the issue regarding whether or not Mr. Mulder ought to be
17 categorically excluded from the death penalty. I know that last time there were
18 debates going back and forth about what are the strict terms of the word
19 mental retardation --

20 THE COURT: Right.

21 MR. COFFEE: -- and there was an issue that was -- arose about whether
22 it came before or after the developmental period. And subsequent to that, the
23 Supreme Court has come forward with intervening authority.

24 There's a case called Hall v. Florida where they look at -- the
25 functional approach to the way a person is able to perform in the community.

1 So one of the issues that we're gonna be talking about in the petition is
2 whether or not Mr. Mulder may meet the terms for categorically being excluded
3 from the death penalty even though during the prior proceeding he wasn't able
4 to show the -- requirements for being mentally retarded. So that is -- at least
5 one issue. I mean there are a lot of others, Your Honor, but that's a --

6 MS. FRALEY: Another new issue, Your Honor, has to do with the
7 conditions of his confinement and whether the conditions of his confinement in
8 the context of him having physical and mental disabilities make his punishment
9 cruel and unusual.

10 THE COURT: Okay.

11 So, 60 days?

12 MR. OWENS: Yes.

13 MR. COFFEE: And we would like 45 days if that's all right with Your
14 Honor --

15 THE COURT: Sure.

16 MR. COFFEE: -- to oppose.

17 And we'd alert the Court to the fact that we would probably file a
18 motion regarding competency in light of Judge Pro's findings and our ethical
19 obligation to take protective measures for a client who's under disabilities, so I
20 just wanted to let the Court know that we would file a competency-type motion
21 when we file our opposition. So, we would anticipate that that would be an
22 issue that we would at least talk about when we have our hearing on the
23 petition, or how the Court may want to proceed in light of Judge Pro's findings
24 on competency.

25 THE COURT: He's -- if he's permanently incompetent, can he litigate his

1 post-conviction?

2 MR. COFFEE: Well, that's actually --

3 THE COURT: Is that the issue?

4 MR. COFFEE: -- the issue. That's the issue that we were gonna bring
5 up, Your Honor, whether it would be appropriate to litigate a guardian ad litem
6 type situation or whether it would be appropriate to seek a special guardian. I
7 know that that might require filings in the district where the client is located
8 which is up in White Pines, so there's -- there's a couple of issues we need to
9 work through but that's something that we wanted to make the Court aware of
10 that we anticipate talking about on the date that we set for the hearing on the
11 petition. So, I just wanted to alert the Court that we would be filing something
12 on that issue as the Court mentioned something possibly about guardianship.

13 THE COURT: Okay, 60 days for the State.

14 THE CLERK: March --

15 MR. COFFEE: And -- sorry.

16 THE CLERK: [Indiscernible]. March 31.

17 THE COURT: Forty-five days -- I'm -- 45 days for the federal public
18 defender.

19 THE CLERK: May 15.

20 [Colloquy between Court and clerk]

21 THE CLERK: June 11, 10:30 for a hearing.

22 MS. FRALEY: Your Honor, were you gonna give the State the
23 opportunity to reply or to file an opposition to our competency motion after we
24 file on May 15th?

25 MR. COFFEE: The State might also want to file --

1 THE COURT: Oh, on --

2 MR. COFFEE: -- a reply to the --

3 THE COURT: -- May 15th --

4 MR. COFFEE: -- motion to dismiss.

5 THE COURT: -- that's what you want --

6 MR. COFFEE: I --

7 THE COURT: -- that's when you want to file your motion?

8 MR. COFFEE: It'd be opposition to motion to dismiss and the motion
9 regarding competency.

10 THE COURT: Okay.

11 MR. COFFEE: We'll file those the same day.

12 THE COURT: Okay, then the State will need 30 days to respond.

13 MR. OWENS: Yes.

14 THE COURT: Okay, 30 days.

15 THE CLERK: So it will be May --

16 THE COURT: Ah-huh, May --

17 THE CLERK: June 16.

18 THE COURT: June 16th, and then 30 days from that for --

19 THE CLERK: New date will be July 14th, 10:30.

20 MS. FRALEY: Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. COFFEE: One more thing for the record, Your Honor. I think that
23 the record right now reflects that Christopher Oram is counsel for Mr. Mulder. I
24 just wanted to state for the record that, you know, Mr. Mulder [sic] was
25 counsel in the prior proceeding and now the federal public defender's office is

1 counsel of record for Mr. Mulder. We hadn't filed a motion requesting
2 appointment but we still wanted to make that clear for the record that we're
3 current counsel.

4 THE COURT: Okay, Mr. Oram has now withdrawn.

5 MR. COFFEE: Mr. -- yeah, he -- I don't know if he's filed an official
6 motion to withdraw. Obviously, he isn't any part of this new proceeding. This
7 is a new petition.

8 MS. FRALEY: And we were appointed counsel in federal court a number
9 of years ago --

10 THE COURT: Okay.

11 MS. FRALEY: -- so we've been representing him for awhile now.


12 THE COURT: Okay, thank you.

13 MS. FRALEY: Thank you, Judge.

14 MR. COFFEE: Thank you, Your Honor.

15 [Proceedings concluded at 8:49 a.m.]

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20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio/video recording in the above-entitled case to the best of my ability.

22 
23 CYNTHIA GEORGILAS
24 Court Recorder/Transcriber
25 District Court Dept. XIII
702 671-4425