

**IN THE  
SUPREME COURT OF THE UNITED STATES**

**MIKAL D. MAHDI**

**Petitioner**

v.

**BRYAN P. STIRLING and MICHAEL STEPHAN**

**Respondents**

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**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

Mikal D. Mahdi, Petitioner, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis.

Petitioner has been deemed indigent by the state and federal courts of South Carolina. The indigency determination and appointment orders of the U.S. District Court for the District of South Carolina, and of the U.S. Court of Appeals for the Fourth Circuit, are attached. Mr. Mahdi remains indigent, as he is currently incarcerated by the South Carolina Department of Corrections under a sentence of death.

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FILED: April 29, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 19-3  
(8:16-cv-03911-TMC)

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MIKAL D. MAHDI

Petitioner - Appellant

v.

BRYAN STIRLING, Commissioner, South Carolina Department of Corrections;  
WILLIE D. DAVIS, Warden of Kirkland Correctional Institution

Respondents - Appellees

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O R D E R

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The court appoints Charles Grose as lead counsel for the appellant pursuant to the provisions of 18 U.S.C. § 3599(c) and the Criminal Justice Act effective 04/26/2019.

In light of this appointment, appellate counsel is granted access to sealed district court material, with the exception of ex parte or in camera material to which defense counsel did not have access in the district court.

Counsel is referred to the [Case Budgeting and Payment Memorandum](#) for

information on budgeting requirements, appointment terms, obtaining a fee exempt PACER account for electronic access to documents in CJA cases, redacting private and sensitive data from transcripts and other documents, and maintaining time and expense records.

If counsel believes the costs of representation will exceed the court's average costs, as set forth in the memorandum, counsel must file a CJA budget proposal (ex parte) within 21 days of appointment using the entry SEALED DOCUMENT. If counsel does not believe the costs of representation will exceed the court's average costs, counsel must file a statement to this effect within 21 days of appointment using the entry SEALED DOCUMENT.

CJA authorization for preparation of transcript is obtained by submitting an AUTH-24 request in the district eVoucher system. New appellate counsel must contact district eVoucher staff for appointment to the underlying district court case in order to submit the AUTH-24 request for district judge approval and the CJA 24 voucher for transcript payment. Counsel must also submit a Transcript Order Form to the court reporter and district court and file the same in the court of appeals with the docketing statement. Upon filing of the Transcript Order Form, the Fourth Circuit will set deadlines for completion of the transcript.

CJA 30 and 31 vouchers are submitted for payment through the Fourth Circuit's CJA eVoucher system. Upon receiving email notification of this appointment from eVoucher, counsel may create CJA 30 and 31 vouchers for use in

maintaining time and expense records and paying for expert services. See [CJA eVoucher](#).

All case filings must be made using the court's Electronic Case Filing system (CM/ECF). Counsel not yet registered for electronic filing should proceed to the court's web site to register as an ECF filer. See [Required Steps for Registration as an ECF Filer](#).

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF SOUTH CAROLINA  
 ANDERSON/GREENWOOD DIVISION

Mikal D. Mahdi,	)	Case No. 8:16-mc-00402-TMC-JDA
	)	
Petitioner,	)	
	)	
v.	)	<b><u>ORDER</u></b>
	)	
Bryan Stirling, Commissioner South	)	
Carolina Department of Corrections,	)	
	)	
Respondent.	)	
_____	)	

The petitioner in this matter, Mikal D. Mahdi (“Petitioner”), is a state prisoner convicted of murder, grand larceny, and second degree burglary and is sentenced to death. This matter is before the Court on Petitioner’s motion to appoint counsel and motion to proceed in forma pauperis. [Docs. 1, 2.] Respondents filed a response on October 4, 2016, which addressed the motion to appoint counsel. [Doc. 10.] And on October 11, 2016, Petitioner filed a reply. [Doc. 17.] Accordingly, these motions are ripe for review.

**Motion for Leave to Proceed In Forma Pauperis**

Petitioner has filed a motion for leave to proceed in forma pauperis. The Court has reviewed this submission and finds that Petitioner has shown that he is indigent and qualifies to proceed in forma pauperis in this case. Accordingly, the Court grants Petitioner’s motion to proceed in forma pauperis. [Doc. 2.]

**Motion for Appointment of Counsel**

The qualifications for appointed counsel in capital cases are governed by 18 U.S.C. § 3599 and the Plan of the United States District Court for the District of South Carolina for Implementing the Criminal Justice Act. *See In re Amendments to the Plan of the U.S. Dist.*

*Ct. for the Dist. of S.C. for Implementing the Criminal Justice Act*, No. 3:10-mc-5005-CIV (D.S.C. May 5, 2010) (“CJA Plan”). The statutory authority for the federal courts to appoint legal counsel for indigent, death-sentenced prisoners seeking habeas corpus relief is contained in the following relevant portions of 18 U.S.C. § 3599:

(a)(2) 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).

. . . .

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsection[] . . . (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

Courts interpreting the appointment of counsel provisions of § 3599 have held that this “provision grants a first time, indigent, capital habeas corpus petitioner ‘a mandatory right to qualified legal counsel.’” *Staton v. Folino*, No. 3:11-cv-00144, 2011 WL 5085029, at \*1 n. 1 (W.D. Pa. Oct. 26, 2011). Also, the United States Supreme Court has held that an attorney’s assistance in preparing a capital habeas petition is crucial, owing to the complex nature of capital habeas proceedings and the seriousness of the death penalty. *McFarland v. Scott*, 512 U.S. 849, 855–56 (1994). In particular, the *McFarland* Court

stated, “the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant’s habeas claims.” *Id.* at 858. At least one federal district court and one federal circuit court of appeals have construed the language of § 3599 as allowing appointment of counsel under subsection (d) either “alternatively or in addition” to an appointment under subsection (c). See *In re Lindsey*, 875 F.2d 1502, 1057 n.3 (11th Cir. 1989); *United States v. Sampson*, NO. CR. 01-10384-MLW, 2008 WL 2563374, at \*1 (D. Mass.) (noting that the *Guide to Judicial Policies and Procedures*, vol. 7, ch. VI, §6.01(C)(3) describes § 3599(d) as a “waiver” provision, allowing appointment of an attorney whose experience level does not technically meet the requirements of §3599(c)). The CJA Plan further requires “in appointing counsel for death-sentenced state prisoners, consideration will be given to attorneys who are members of the first-tier of the death penalty CJA panel, which shall be maintained by the Office of the Clerk of Court. However, the Court shall not be precluded from making appointments from the second-tier death penalty CJA panel or from the general CJA panel.” See CJA Plan at 19.

The statute provides for appointment of “one or more” counsel. 18 U.S.C. § 3599(a)(1)(B), (a)(2).

In his motion to appoint counsel, Petitioner seeks appointment of E. Charles Grose, Jr. and Elizabeth A. Franklin-Best as counsel pursuant to 18 U.S.C. § 3599. Petitioner outlines the qualifications of both E. Charles Grose, Jr. and Elizabeth A. Franklin-Best, generally indicating that both satisfy the provisions of 18 U.S.C. § 3599 such that appointing them would be appropriate under the statute.<sup>1</sup> Respondent does not object to

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<sup>1</sup> Indeed, both Mr. Grose and Ms. Franklin-Best have been approved as lead counsel on the CJA Death Penalty Attorney List for the United States District Court in the



the appointment of counsel but notes that Petitioner does not have a constitutional right to the appointment of his counsel of choice. [Doc. 10 at 3.] Respondent further notes in its response that Ms. Franklin-Best's appointment may not be appropriate in this matter as she and state PCR counsel, Teresa Norris, may have been employed by the same firm during the pendency of the state PCR action. [Doc. 10 at 4 (citing *Fowler v. Joyner*, 753 F.3d 446 (4th Cir. 2014); *Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013)).] Petitioner confirms in his reply that Ms. Norris (who also filed the motion to stay execution, motion to appoint counsel, and motion to proceed in forma pauperis in this case) and Ms. Franklin-Best are currently members of the same firm, but Petitioner indicates that Ms. Norris will be leaving the firm on November 1, 2016. [Doc. 17 at 2.] Petitioner further indicates that "Ms. Franklin-Best has not had any involvement in this case prior to now" and that "[d]uring the state post-conviction proceedings . . . , Ms. Franklin-Best did not read any pleadings, or engage in any legal strategy discussions. Ms. Franklin-Best did not assist in selecting claims to be raised." [Doc. 17 at 3.] As such, Petitioner maintains his request that Ms. Franklin-Best be appointed in his case. [Doc. 17 at 4.]

Having reviewed the submissions by both parties and the applicable law, the Court grants in part and denies in part Petitioner's motion for appointment of counsel. The Court grants Petitioner's motion to appoint E. Charles Grose, Jr. as first chair counsel. However, in light of *Juniper*, 737 F.3d 288, and the fact that Ms. Franklin-Best and Ms. Norris are members of the same firm, out of an abundance of caution, the Court finds it prudent to deny Petitioner's motion to appoint Elizabeth A. Franklin-Best as second chair counsel. By

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District of South Carolina.

October 24, 2016, Petitioner shall suggest qualified counsel to be appointed as second chair in this case; if Petitioner does not suggest counsel, the Court will appoint qualified counsel.

### **Cost Containment and Budgeting**

The Court cautions counsel that duplication of efforts and unnecessary attorney time are to be avoided. The Judicial Council of the United States Court of Appeals for the Fourth Circuit has considered adoption of a resolution governing review of attorney compensation requests in death penalty habeas corpus cases.<sup>2</sup> Under this resolution, any request for compensation in excess of certain amounts (\$50,000) per attorney at the district court level is deemed presumptively excessive. While the effective date of this resolution has been stayed pending public comment,<sup>3</sup> the Court encourages appointed counsel to make efforts to contain expenses and fees in this matter in light of the stated figure to the extent they can do so without detracting from their representation of Petitioner's positions in this case.

Toward that end, counsel shall submit a confidential proposed litigation budget within 30 days of the appointment of second chair counsel to Claire Woodward O'Donnell with the Federal Public Defender's Office. The proposed budget shall estimate the number of hours counsel anticipates expending for the following stages of the litigation: (1) preparation and filing of the petition for habeas corpus; (2) preparation of legal memoranda in opposition to the respondent's return; and (3) evidentiary hearing, if one is sought. The proposed

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<sup>2</sup> See *Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases*,

<http://www.ca4.uscourts.gov/pdf/noticeresolutionattorneycompensationcapitalcases.pdf>.

<sup>3</sup> See *Suspension of Effective Date of Special Procedures for Reviewing Attorney Compensation requests in Death Penalty Cases*,

<http://www.ca4.uscourts.gov/pdf/noticesuspensionresolutionattorneycompensationcapitalcases.pdf>.

budget shall also contain cost estimates for investigative, expert, or other services, including law clerks and paralegals, if any. A copy of the proposed budget shall be submitted to this Court. Additionally, counsel shall submit interim payment vouchers every 60 days to Ms. O'Donnell for payment consideration and so that costs and fees may be monitored.

#### **State Court Record**

For the Court's reference and for case management purposes, counsel for Respondents are directed to file a complete record of all state court proceedings to date in connection with this matter within 30 days of the date of this Order. Additionally, counsel shall provide one courtesy copy each to the assigned District Judge and Magistrate Judge.

#### **Conclusion**

Wherefore, based upon the foregoing, Petitioner's motion to proceed in forma pauperis is GRANTED, and his motion to appoint counsel is GRANTED IN PART, DENIED IN PART. The Court appoints E. Charles Grose, Jr., Esquire, as Petitioner's first chair counsel and directs Petitioner to suggest second chair counsel by October 24, 2016. Further, counsel shall submit a confidential proposed litigation budget within 30 days of the appointment of second chair counsel and shall file a complete record of all state court proceedings within 30 days of the date of this Order.

**IT IS SO ORDERED.**

s/Jacquelyn D. Austin  
United States Magistrate Judge

October 13, 2016  
Greenville, South Carolina