

OCTOBER TERM 2019

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN GUTIERREZ,
Petitioner,

v.

BRYAN COLLIER, Executive Director, Texas Department of Criminal Justice;
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional
Institutions Division; BILLY LEWIS, Warden, Texas Department of Criminal Justice,
Huntsville Unit,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE *IN FORMA PAUPERIS*

--- CAPITAL CASE ---

**EXECUTION SCHEDULED FOR AFTER
7:00 P.M. EASTERN TIME, TUESDAY, JUNE 16, 2020**

Petitioner Ruben Gutierrez, through undersigned counsel, moves pursuant to Supreme Court Rule 39.1 for leave to proceed *in forma pauperis* in his concurrently-filed Petition for Writ of Certiorari. Petitioner is indigent; he has sought and been appointed counsel throughout the proceedings below in state and federal court.

As to his federal proceedings, on September 15, 2008, the United States District Court for the Southern District of Texas appointed Margaret Schmucker as counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, Mr. Gutierrez

having satisfied the court that he was unable to employ counsel and did not wish to waive counsel. *Gutierrez v. Quarterman*, No. 1:08-mc-00008 (S.D. Tex.) (Order, ECF No. 5). On August 6, 2018, the court granted Ms. Schmucker’s motion to withdraw as counsel and appointed Richard W. Rogers, III, as substitute counsel. *Gutierrez v. Davis*, No. 1:09-cv-00022 (S.D. Tex.) (Order, ECF No. 71). Undersigned counsel, the Federal Community Defender Office for the Eastern District of Pennsylvania (“FCDO”) was appointed as co-counsel on August 14, 2018. All three orders are attached hereto as Exhibit A, pursuant to Supreme Court Rule 39.1.

Undersigned counsel hereby certify that Mr. Gutierrez is incarcerated and remains indigent at present. Mr. Gutierrez respectfully requests that this Court allow him to proceed *in forma pauperis*.

Respectfully submitted,

RICHARD W. ROGERS, III
3636 S. Alameda St., Ste. B,
#191
Corpus Christi, TX 78411
(361) 779-5281
rwrogersiii@aol.com

/s/ Matthew C. Lawry
MATTHEW C. LAWRY*
PETER WALKER
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
The Curtis – Suite 545-West
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520
matthew_lawry@fd.org

**Counsel of Record
Member of the Bar of the Supreme Court*

Dated: June 15, 2020

EXHIBIT A

1. CIR./DIST./DIV. CODE TXS	2. PERSON REPRESENTED Gutierrez, Ruben	VOUCHER NUMBER <i>08091000002</i>
3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER
6. OTHER DKT. NUMBER 1:08-000008-000		
7. IN CASE/MATTER OF (Case Name) Ruben Gutierrez v Nathani		8. TYPE PERSON REPRESENTED Other: _____
9. REPRESENTATION TYPE Death Penalty Motion		

10. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) If more than one offense, list (up to five) major offenses charged, according to severity of offense.
DEATH PENALTY

11. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix) AND MAILING ADDRESS SCHMUCKER, MARGARET 512 East 11th Street Suite 205 AUSTIN TX 78701 Telephone Number: (512) 236-1590	12. COURT ORDER <input checked="" type="checkbox"/> O Appointing Counsel <input type="checkbox"/> C Co-Counsel <input type="checkbox"/> F Subs For Federal Defender <input type="checkbox"/> R Subs For Retained Attorney <input type="checkbox"/> P Subs For Panel Attorney <input type="checkbox"/> Y Standby Counsel Prior Attorney's Name: _____ Appointment Date: _____ (A) Because the above-named person represented has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 11, who has been determined to possess the specific qualifications required by law, is appointed to represent this person in this case. (B) The attorney named in Item 11 is appointed to serve as: <input type="checkbox"/> LEAD COUNSEL <input type="checkbox"/> CO-COUNSEL Name of Co-Counsel or Lead Counsel: _____ Appointment Date: _____
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13. NAME AND MAILING ADDRESS OF LAW FIRM (only provide per instructions) United States District Court Southern District of Texas ENTERED SEP 16 2008 Michael N. Milby, Clerk of Court By Deputy Clerk <i>[Signature]</i>	(C) If you represented the defendant or petitioner in any prior proceeding related to this matter, attach to your initial claim a listing of those proceedings and describe your role in each (e.g., lead counsel or co-counsel). <input type="checkbox"/> (D) Due to the expected length of this case, and the anticipated hardship on counsel in undertaking representation full-time for such a period without compensation, interim payments of compensation and expenses are approved pursuant to the attached order. Signature of Presiding Judicial Officer or By Order of the Court <i>[Signature]</i> 9/15/08 Date of Order: 06/11/2008 Nunc Pro Tunc Date: 09/10/08 (E) Repayment or partial repayment ordered from the person represented for this service at time of appointment. <input type="checkbox"/> YES <input type="checkbox"/> NO
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CLAIM FOR SERVICES AND EXPENSES

14. STAGE OF PROCEEDING
Check the box which corresponds to the stage of the proceeding during which the work claimed at Item 15 was performed even if the work is intended to be used in connection with a later stage of the proceeding. CHECK NO MORE THAN ONE BOX. Submit a separate voucher for each stage of the proceeding.

CAPITAL PROSECUTION a. <input type="checkbox"/> Pre-Trial c. <input type="checkbox"/> Appeal b. <input type="checkbox"/> Trial f. <input type="checkbox"/> Petition for the U.S. Supreme Court d. <input type="checkbox"/> Sentencing i. <input type="checkbox"/> Dispositive Motions e. <input type="checkbox"/> Other Post Trial j. <input type="checkbox"/> Writ of Certiorari k. <input type="checkbox"/> Appeal	HABEAS CORPUS g. <input type="checkbox"/> Habeas Petition h. <input type="checkbox"/> Evidentiary Hearing i. <input type="checkbox"/> Dispositive Motions j. <input type="checkbox"/> Appeal	OTHER PROCEEDING l. <input type="checkbox"/> Stay of Execution m. <input type="checkbox"/> Appeal of Denial of Stay n. <input type="checkbox"/> Petition for Writ of Certiorari to the U.S. Supreme Court Regarding Denial of Stay o. <input type="checkbox"/> Other
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HOURS AND COMPENSATION CLAIMED	FOR COURT USE ONLY				
15. CATEGORIES (Attach itemization of services with dates)	HOURS CLAIMED	TOTAL AMOUNT CLAIMED	MATH/TECH ADJUSTED HOURS	MATH/TECH ADJUSTED AMOUNT	ADDITIONAL REVIEW
a. In-Court Hearings (Rate per Hour = \$)				IN COURT TOTAL (Category a)	IN COURT TOTAL (Category a)
b. Interviews and Conferences with Client					
c. Witness Interviews					
d. Consultation with Investigators and Experts					
e. Obtaining and Reviewing the Court Record					
f. Obtaining and Reviewing Documents and Evidence					
g. Consulting with Expert Counsel				OUT OF COURT TOTAL (Categories b - j)	OUT OF COURT TOTAL (Categories b - j)
h. Legal Research and Writing					
i. Travel					
j. Other (Specify on additional sheets)					
Totals: Categories b thru j (Rate per hour = \$)					

CLAIM FOR TRAVEL AND EXPENSES (Attach itemization of expenses with dates)

16. Travel Expenses (lodging, parking, meals, mileage, etc.)			
17. Other Expenses (other than expert, transcripts, etc.)			
GRAND TOTALS (CLAIMED AND ADJUSTED):			

18. CERTIFICATION OF ATTORNEY/PAYEE FOR THE PERIOD OF SERVICE FROM _____ TO _____	19. APPOINTMENT TERMINATION DATE IF OTHER THAN CASE COMPLETION	20. CASE DISPOSITION
21. CLAIM STATUS <input type="checkbox"/> Final Payment <input type="checkbox"/> Interim Payment Number _____ <input type="checkbox"/> Supplemental Payment Have you previously applied to the court for compensation and/or reimbursement for this case? <input type="checkbox"/> YES <input type="checkbox"/> NO If yes, were you paid? <input type="checkbox"/> YES <input type="checkbox"/> NO Other than from the court, have you, or to your knowledge has anyone else, received payment (compensation or anything of value) from any other source in connection with this representation? <input type="checkbox"/> YES <input type="checkbox"/> NO If yes, give details on additional sheets. I swear or affirm the truth or correctness of the above statements. Signature of Attorney: _____ Date: _____		

APPROVED FOR PAYMENT - COURT USE ONLY

22. IN COURT COMP.	23. OUT OF COURT COMP.	24. TRAVEL EXPENSES	25. OTHER EXPENSES	26. TOTAL AMT. APPROVED
27. SIGNATURE OF THE PRESIDING JUDICIAL OFFICER			DATE	27a. JUDGE CODE

ENTERED

August 06, 2018

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

RUBEN GUTIERREZ,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL NO. 1:09-CV-00022
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

ORDER

Before the Court are Petitioner Ruben Gutierrez’s (“Gutierrez”) July 24, 2018, Opposed Motion to Withdraw and for Appointment of Substitute Counsel filed by appointed counsel Margaret Schmucker (“Schmucker”), Dkt. No. 56; Respondent’s July 27, 2018, response to the motion, Dkt. No. 58; and Gutierrez’s August 3, 2018, reply to the response, Dkt. No. 62. The Court **GRANTS** Schmucker’s motion to withdraw and **APPOINTS** Attorney Richard W. Rogers, III, (“Rogers”) as substitute counsel. The Court further (1) **ORDERS** Gutierrez to request the appointment of an additional attorney to aid in his representation no later than **August 10, 2018**, should he intend to request such appointment; and (2) **ORDERS** Gutierrez to file any motion for a stay no later than **August 15, 2018**.

I. Background

On September 15, 2008, the Court appointed Schmucker to represent Gutierrez in his federal habeas corpus petition pursuant to 18 U.S.C. § 3599. *Gutierrez v. Quarterman*, 1:08-mc-008, Dkt. No. 5. The Court denied Gutierrez’s petition on October 3, 2013. Dkt. No. 44. The Fifth Circuit affirmed on November 13, 2014, *Gutierrez v. Stephens*, 590 F. App’x 371 (5th Cir. 2014), and the United States Supreme Court subsequently denied certiorari review, *Gutierrez v. Stephens*, ___ U.S. ___, 136 S. Ct. 35 (2015). The State of Texas has set Gutierrez’s execution for September 12, 2018.

Schmucker has moved to substitute counsel with only weeks remaining before the execution date. *See* Dkt. No. 56. On July 27, 2018, the Court ordered Petitioner to file a certificate of consent signed by Gutierrez or provide another indication that Gutierrez has been informed of, and consents to, a change in representation. Dkt. No. 59. The record suggests that Gutierrez consents to a change in representation. *See* Dkt. No. 62 at 1–2. The motion to substitute counsel is based on Schmucker’s ability to provide competent representation before Gutierrez’s execution. Dkt. No. 56 at 4–5. The motion argues that Schmucker lacks the experience necessary to litigate effectively the challenges Gutierrez anticipates raising in the short time before his execution date. *Id.* The motion further represents that, even if Schmucker could provide adequate legal assistance, Schmucker can no longer practice in the Fifth Circuit as appointed counsel. *Id.* at 5 (citing *In re Schmucker*, No. 17-98007 (5th Cir. Dec. 15, 2017)). The motion proposes appointing the Capital Habeas Unit (“CHU”) from the Federal Defender’s Office in the Western District of Texas. *Id.* at 5–6. The motion represents that the CHU currently lacks the resources to provide adequate representation to Gutierrez, but would try to find new counsel to do so. *Id.* at 6.

Respondent opposes the substitution of counsel. Dkt. No. 58. Respondent argues that Gutierrez unjustifiably delayed filing his motion until a stay of the execution date would be inevitable. *Id.* at 3–6. Respondent also argues that Schmucker is sufficiently experienced to draft any future pleadings and that any last-minute litigation would lack merit. *Id.* at 6–10. Recognizing that Schmucker can no longer appear before the Fifth Circuit as appointed counsel, Respondent asserts that she can still “practic[e] in the Fifth Circuit as non-[Criminal Justice Act] counsel.” *Id.* at 10.

Schmucker filed a reply to Respondent’s opposition. Dkt. No. 62. Schmucker does not provide any certificate of consent indicating Gutierrez’s assent to substitution, but she affirms that she discussed the need for additional counsel with Gutierrez on July 13, 2018, and that both Gutierrez and Schmucker have “attempted to find qualified counsel” since that time. *Id.* at 1–2. Schmucker

represents that she has “made multiple attempts to communicate with Mr. Gutierrez by phone and express mail in order to discuss the matter [of her withdrawal and substitution following the Court’s July 27, 2018, Order] and obtain clarity as to [Gutierrez’s] wishes.” *Id.* at 2–3. However, Schmucker represents that she “has been unsuccessful in [her] attempts [at communication with Gutierrez] but will advise the Court if and when [she successfully communicates with her client].” *Id.* at 3. Schmucker responds that she has not delayed in bringing the instant matter to the Court’s attention, but other commitments have consumed her time. *Id.* at 5–7. Schmucker argues that her disqualification in the Fifth Circuit does not impinge on her qualifications, only her practical ability to litigate in that court. *Id.* at 4–5. Even so, Schmucker expresses concern that she lacks sufficient experience to litigate a last-minute complaint pursuant to 42 U.S.C. § 1983 that she has drafted, but not filed, on Gutierrez’s behalf. *Id.* at 4–5. Schmucker argues that appointment of co-counsel who “is more familiar with § 1983 suits and who is on the Fifth Circuit’s [Criminal Justice Act] panel would largely ameliorate the concerns underlying the pending motion to withdraw.” *Id.* at 4.

The Court considers Parties’ filings.

II. Legal Standard

The United States Supreme Court has held that a court should substitute an attorney when necessary in the “interests of justice.” *Martel v. Clair*, 565 U.S. 648, 663 (2012). This “peculiarly context-specific inquiry” involves “several relevant considerations,” including: “the timeliness of the motion; the adequacy of the district court’s inquiry into the defendant’s complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client’s own responsibility, if any, for that conflict).” *Id.*; see also *Mendoza v. Stephens*, 783 F.3d 203, 208 (5th Cir. 2015) (relying on the *Martel* considerations).

Federal law guarantees that an inmate facing a death sentence will have the protection afforded by appointed counsel. See 18 U.S.C. § 3599. Once a court appoints an attorney under § 3599, that attorney “shall represent the defendant

throughout every subsequent stage of available judicial proceedings” unless that attorney is “replaced by similarly qualified counsel.” 18 U.S.C. § 3599(e) (emphasis added). Schmucker’s appointment created an obligation for her to represent Gutierrez throughout “all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures,” as well as “competency proceedings and proceedings for executive or other clemency.” *Id.*; see also *Wilkins v. Davis*, 832 F.3d 547, 557 (5th Cir. 2016).

III. Analysis

When Schmucker applied to join the Criminal Justice Act panel and accepted clients in death penalty-related matters, including this one, she explicitly and implicitly represented that she has the qualifications and experience necessary to litigate this case. The present circumstances, however, prevent Schmucker from fulfilling her obligations to her client.

On December 15, 2017, the Fifth Circuit entered an order “disqualifying [Schmucker] from performing work pursuant to the Criminal Justice Act . . . in cases before [that] court as a result of a pattern of rude and unprofessional communications with court staff.” *In re Schmucker*, No. 17-98007 (5th Cir. Dec. 15, 2017). It was incumbent on Schmucker to inform this Court of that discipline, but she did not do so. See Rule 9, Rules of Discipline, United States District Court for the Southern District of Texas, Local Rules (“A lawyer disciplined by another court in the United States shall promptly notify this court in writing and furnish to the clerk of the court a certified copy of the order of discipline.”). Only now, approximately seven months after her discipline and with little time remaining before execution, has Schmucker advised the Court of her discipline.

The pleadings suggest that Schmucker has made some efforts to prepare for Gutierrez’s execution, but has not filed any pleadings despite quickly approaching due dates for matters such as filing a clemency petition. The motion to substitute represents that potential remedies which may exist for Gutierrez include a civil rights action under 42 U.S.C. § 1983. Dkt. No. 56 at 4–5. Litigation of such an action, and other possible litigation strategies such as a stay of execution or

successive federal petition, would require an attorney who can represent Gutierrez in the Fifth Circuit. Schmucker's continued representation of Gutierrez would preclude her client from availing himself of potential avenues of relief. Gutierrez would effectively be left with "no counsel at all" for the purposes of any appeal. *Martel*, 132 S. Ct. at 1286; *see also Christeson v. Roper*, ___ U.S. ___, 135 S. Ct. 891, 895 (2015) (finding that a conflict of interests left an inmate effectively without counsel).¹

While "the delay in seeking substitution . . . might be [a] valid consideration[] [weighing against substitution of counsel] in many cases," *Christeson*, 135 S. Ct. at 895, the fact that Schmucker's continued representation would leave Gutierrez without access to an appellate attorney weighs heavily in favor of granting the motion to substitute. Gutierrez bears no responsibility for the fact that his appointed counsel can no longer practice before the Fifth Circuit.

With Gutierrez's execution fast approaching, the Court **FINDS** that the interests of justice require the substitution of counsel. The Court, therefore, **GRANTS** Gutierrez's motion to withdraw and **ORDERS** the substitution of counsel. Dkt. No. 56.

The motion to substitute represents that Schmucker has attempted to secure assistance in representing Gutierrez. *Id.* at 5–6. While this matter should have been brought to the Court's attention long before, the Court has expeditiously found qualified and competent counsel willing to represent Gutierrez. The Court hereby **APPOINTS** the following attorney to represent Gutierrez:

Richard W. Rogers, III
710 Buffalo Street, Suite 202
Corpus Christi, TX 78401
361-888-7620
Fax: 361-888-7619
Email: *rwrogersiii@aol.com*

¹ Respondent does not elaborate on how Schmucker could appear before the Fifth Circuit as "non-[Criminal Justice Act] counsel," Dkt. No. 58 at 10, and does not provide any law that would authorize her to appear forthwith on a *pro bono* basis.

Rogers will be compensated at the maximum rate pursuant to 18 U.S.C. § 3599(g)(1). Rogers may submit requests for interim payment for his work. Rogers will represent Gutierrez throughout every subsequent stage of available proceedings.

Under federal law, a capital inmate “shall be entitled to the appointment of one or more attorneys.” 18 U.S.C. § 3599(a)(2). Should Gutierrez intend to request the appointment of an additional attorney to aid in his representation, the Court **ORDERS** him to make such a request no later than **August 10, 2018**.

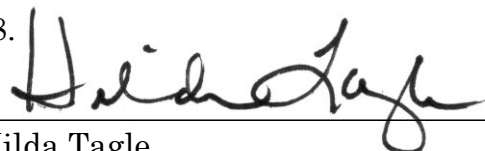
The Court notes that, given the short timeline before the scheduled execution, it is possible that the substitution of counsel may only be given effect by a stay. This Court has the authority to grant a stay of execution. *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016). However, because a prisoner condemned to death has no automatic entitlement to a stay of execution, *see McFarland v. Scott*, 512 U.S. 849, 858 (1994), the Court will address the question of a stay if and when it is fully briefed by the parties. To that end, the Court **ORDERS** Gutierrez to file any motion for a stay no later than **August 15, 2018**.

IV. Conclusion

In conclusion, the Court:

- **GRANTS** Gutierrez’s Opposed Motion to Withdraw and for Appointment of Substitute Counsel, Dkt. No. 56;
- **APPOINTS** Rogers as substitute counsel;
- **ORDERS** Gutierrez to request the appointment of an additional attorney to aid in his representation no later than **August 10, 2018**, should he intend to request such appointment; and
- **ORDERS** Gutierrez to file any motion for a stay no later than **August 15, 2018**.

SIGNED this 6th day of August, 2018.



Hilda Tagle
Senior United States District Judge

ENTERED

August 14, 2018

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

RUBEN GUTIERREZ,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL NO. 1:09-CV-00022
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

ORDER

Before the Court are Petitioner Ruben Gutierrez’s (“Gutierrez”) August 10, 2018, opposed Motion to Appoint Co-Counsel, Dkt. No. 66; Respondent Lorie Davis’ (“Davis”) August 13, 2018, Opposition to Motion to Appoint Co-Counsel, Dkt. No. 69; and Gutierrez’s August 14, 2018, reply to the opposition, Dkt. No. 70. The Court **GRANTS** Gutierrez’s motion and **CONDITIONALLY APPOINTS** the Federal Community Defender Office for the Eastern District of Pennsylvania (“FCDO-EDPA”) as co-counsel in this case.

I. Background

On August 6, 2018, the Court granted Attorney Margaret Schmucker’s (“Schmucker”) motion to withdraw from representing Gutierrez and appointed Attorney Richard W. Rogers, III, (“Rogers”) as substitute counsel. Dkt. No. 63. The motion to substitute counsel indicated that potential remedies which may exist for Gutierrez include filing a civil rights action under 42 U.S.C. § 1983. Recognizing that federal law entitles death-row inmates to the appointment of more than one attorney, the Court ordered Gutierrez to request the assistance of an additional attorney by August 10, 2018. Petitioner now seeks to the appointment of FCDO-EDPA as Rogers’ co-counsel. Dkt. No. 66. Such appointment would be conditioned on the FCDO-EDPA receiving approval to pursue out-of-district representation from (1) the Defender Services Office of the Administrative Office of the United States Courts, and (2) Fifth Circuit Chief Judge Carl E. Stewart. *Id.* at 4.

Davis opposes the appointment of co-counsel. Dkt. No. 69. Respondent provides four reasons for objecting to FCDO-EDPA serving as co-counsel: (1) Respondent objects to any delay that would result from the appointment of FCDO-EDPA, *id.* at 2-3; (2) Respondent contends that no conflict of interest exists between Gutierrez and Rogers requiring the substitution of counsel, *id.* at 3-4; (3) Respondent argues that appointed counsel does not have a statutory right to file a lawsuit under 42 U.S.C. § 1983, and thus additional attorneys for the preparation of that lawsuit are not necessary, *id.* at 4-5; and (4) the interests of justice do not require the appointment of counsel to assist in a § 1983 case which is “an extremely limited proceeding,” *id.* at 5.

Gutierrez filed a reply to Davis’ opposition. Dkt. No. 70. Gutierrez replies that any delay is not his fault, but that of Schmucker for failing to bring problems with her representation before the Court in a timely manner. *Id.* at 1–2. Gutierrez argues that Davis relies on an incorrect standard when opposing the appointment of co-counsel. *Id.* at 2. Likewise, Gutierrez contends that Davis presents a constricted view of the responsibilities of co-counsel which will encompass more than assisting in a civil rights action. *Id.* at 3. Even under the standards propounded by Davis, however, Gutierrez argues that he has an entitlement to co-counsel under the law. *Id.* at 1–4.

II. Legal Standard

Federal law entitles Gutierrez “to the appointment of one or more attorneys” 18 U.S.C. § 3599(a)(1); *see also McFarland v. Scott*, 512 U.S. 849, 854 (1994) (finding, under a former statute, that federal law “grants indigent capital defendants a mandatory right to qualified legal counsel”). The governing statute does not necessarily require the appointment of more than one attorney. After the appointment of one qualified attorney, “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.” 18 U.S.C. § 3599(d) (emphasis added). However, the federal court’s

Guide to Judiciary Policy contemplates that “[d]ue to the complex, demanding, and protracted nature of death penalty proceedings, judicial officers should consider appointing *at least* two attorneys.” Vol. 7A *Guide to Judiciary Policy* § 620.10. 20(b) (emphasis added).

III. Analysis

Respondent asks the court to apply the interests-of-justice standard when deciding whether to appoint co-counsel in this action. Dkt. 69 at 2–5; *see Christeson v. Roper*, ___ U.S. ___, 135 S. Ct. 891, 894 (2015) (applying interests-of-justice standard to motions to substitute counsel); *Martel v. Clair*, 565 U.S. 648, 663 (2012) (same). Under statutory law, however, Gutierrez only needs to show “good cause” for the appointment of another attorney. 18 U.S.C. § 3599(d). Federal judicial policy presumes that the complex nature of capital representation itself present good cause for representation by at least two attorneys.

Respondent also objects that the court should not appoint counsel because it appears that Gutierrez will soon litigate a civil rights action. Respondent contends the filing of that lawsuit should not require the services of more than one attorney. The appointment of co-counsel, however, is not limited to that one task. Once a court appoints an attorney under § 3599, that attorney “shall represent the defendant throughout every subsequent stage of available judicial proceedings” 18 U.S.C. § 3599(e). Co-counsel will have a responsibility to represent Gutierrez throughout “all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures,” as well as “competency proceedings and proceedings for executive or other clemency.” *Id.* While the filing of a civil rights action is foreseeable, so are other possible avenues of relief such as a motion for a stay of execution, state clemency, and successive habeas proceedings. Respondent’s narrow view of appointment does not fully capture the possible work co-counsel may perform.

Reviewing the pleadings and the law, and in consideration of the possible remedies available to Gutierrez, the Court finds that Gutierrez has shown good cause for the appointment of co-counsel.

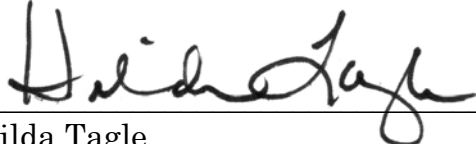
IV. Conclusion

Accordingly, the Court **GRANTS** Gutierrez's Motion to Appoint Co-Counsel. Dkt. No. 66. Finding that the requested co-counsel meets the statutory qualifications, the Court **CONDITIONALLY APPOINTS** the Federal Community Defender Office for the Eastern District of Pennsylvania as co-counsel pursuant to 18 U.S.C. § 3599(d).¹ The contact information for co-counsel is as follows:

Shawn Nolan, Chief
Capital Habeas Unit
Federal Community Defender
Eastern District of Pennsylvania
601 Walnut Street, Suite 545
West Philadelphia, PA, 19106
(215) 928-0520
Shawn_Nolan@fd.org

This appointment is effective upon the Defender Services Office's and the Fifth Circuit Chief Judge's administrative approval of the FCDO-EDPA's request to seek an out-of-district appointment. The Federal Community Defender Office will promptly notify the Court upon receiving the Defender Services Office's and the Fifth Circuit Chief Judge's response to its request.

SIGNED this 14th day of August, 2018.



Hilda Tagle
Senior United States District Judge

¹ "When cases are assigned to a federal public or community defender organization, the appointment should be made in the name of the organization (i.e., the federal public defender or community defender), rather than in the name of an individual staff attorney within the organization."). *Guide to Judiciary Policy, supra*, § 220.35; *see also* § 440 ("To ensure the effective supervision and management of the organization, federal public defenders and community defenders should be responsible for the assignment of cases within their own offices. Accordingly, appointments by the court or U.S. magistrate judge should be made in the name of the organization . . . rather than in the name of an individual staff attorney within the organization.").