

No. _____

October Term, 2024

In the
Supreme Court of the United States

Donald Sherman,

Petitioner,

v.

Jeremy Bean, Warden, *et al.*,

Respondents.

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

Motion for Leave to Proceed in Forma Pauperis

CAPITAL CASE

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Pursuant to Supreme Court Rule 39.1, Petitioner Donald Sherman requests leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. Sherman has been granted leave to do so in the following state and federal courts: United States District Court, District of Nevada, for federal habeas corpus proceedings, April 10, 2003, Case No. 2:02-cv-01349-LRH-VCF; Eighth Judicial District Court, Clark County, Nevada for all trial and post-conviction proceedings in state court. Mr. Sherman has provided the federal court's order of appointment in support of this Motion as Exhibit 1.

Dated this 2nd day of January, 2025.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ David Anthony
David Anthony
Counsel of Record
Assistant Federal Public Defender

EXHIBIT 1

EXHIBIT 1

FILED RECEIVED
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2003 APR 10 P 2:26

CLERK US DISTRICT COURT
DISTRICT OF NEVADA

BY HJ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DONALD SHERMAN,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

CV-S-02-1349-LRH(LRL)

ORDER

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, by Donald Sherman, a Nevada prisoner sentenced to death. Petitioner filed his *pro se* petition on October 11, 2002 (docket #1). He also filed a Motion for Appointment of Counsel (docket #3).

On October 24, 2002, the Court entered an Order (docket #5) appointing counsel for petitioner. The Court ordered the Federal Public Defender (FPD) to either undertake representation of petitioner or indicate to the Court its inability to do so.

On January 2, 2003, the FPD filed a "Notice of Conditional Acceptance of Appointment as Counsel for Petitioner and Disclosure of Conflict" (hereafter "Notice of Conditional Acceptance") (docket #9). In that filing, the FPD accepts representation of petitioner, the acceptance conditioned upon the Court's acceptance of certain waivers of conflicts submitted by the FPD.

1 Petitioner was convicted and sentenced to death in Nevada's Eighth Judicial District
2 Court. According to the FPD, petitioner was represented, before trial, by the Clark County Public
3 Defender's Office (CCPD), and one of the CCPD attorneys assigned to his case was Rebecca A.
4 Blaskey. *See* Exhibit 3.¹ Blaskey also represented Christine Kalter, a defendant in an unrelated case.
5 *See* Exhibits 1 and 3. According to the FPD, Kalter ended up providing information to State
6 authorities regarding petitioner, and she ultimately testified against him. *See* Exhibit 3. Therefore,
7 the CCPD withdrew from its representation of petitioner prior to his trial. Exhibit 2. The CCPD
8 also moved to withdraw from Kalter's case, but that motion was denied. Exhibit 1.

9 Blaskey is now employed by the FPD in the Capital Habeas Unit, the division of the
10 FPD that would be responsible for providing representation for petitioner in this action. Exhibit 3.

11 It appears to the Court, therefore, that there are two conflicts of interest inherent in the
12 FPD's representation of petitioner. First, the FPD would be in the position of arguing that one of its
13 own (Blaskey), or her former employer (the CCPD), was ineffective in the pretrial representation of
14 petitioner. Second, the FPD would be in the position of employing an attorney (Blaskey) who
15 represented, and therefore has duties of loyalty and confidentiality to, an individual who testified
16 against petitioner (Kalter).

17 Despite these conflicts, petitioner wishes to be represented by the FPD. Exhibit 4,
18 p. 3, ¶6.

19 The FPD indicates to the Court that it has taken the following steps to address the
20 conflicts:

21 (1) The FPD has isolated Blaskey from any involvement in the litigation of
22 petitioner's case. Notice of Conditional Acceptance, p. 2, ¶1; *see also* Exhibit 3.

23 (2) The FPD has informed petitioner that there is a conflict of interest in their
24 representation of petitioner, because an attorney cannot ethically or practically litigate the issue of his
25

26 ¹ The exhibits referred to in this Order are exhibits submitted by the FPD in support of, and
attached to, the Notice of Conditional Acceptance. Those exhibits are found in the record at docket #9.

1 or her own effectiveness, and because any conflict that affects Blaskey's ability to represent
2 petitioner also affects the rest of the office of the FPD; petitioner has waived that conflict. Notice of
3 Conditional Acceptance, p. 2, ¶1; *see also* Exhibit 4, p. 1, ¶3a.

4 (3) The FPD will allow Blaskey to be interviewed on issues relating to the CCPD's
5 representation of petitioner, and on information obtained through the CCPD's representation of
6 Kalter, only in the presence and under the supervision of Franny Forsman, the FPD herself, in order
7 to minimize any claim that the credibility of any information provided by Blaskey would be affected
8 by concerns over her continued employment by the FPD. Notice of Conditional Acceptance, p. 3,
9 ¶2; *see also* Exhibit 3.

10 (4) The FPD has disclosed to petitioner the possibility that the State would argue that
11 Blaskey's information would be less credible, because she is employed by the FPD, and petitioner
12 has waived that conflict. Notice of Conditional Acceptance, p. 3, ¶2; *see also* Exhibit 4, p. 1, ¶3c.

13 (5) The FPD has explained to petitioner the conflicts arising from Blaskey's prior
14 representation of Kalter, and petitioner has waived such conflicts. Notice of Conditional
15 Acceptance, p. 3, ¶3; *see also* Exhibit 4, p. 2, ¶¶4a-4d.

16 (6) The FPD has informed petitioner of his right to consult with independent counsel
17 regarding the conflicts inherent in the FPD's representation of him, and has offered to request that
18 the Court appoint independent counsel for the purpose of consulting with petitioner with respect to
19 this matter; petitioner has declined to consult with independent counsel, reiterating his wish to have
20 the FPD represent him. Notice of Conditional Acceptance, p. 3, ¶4; *see also* Exhibit 4, p. 3, ¶¶5 and
21 6.

22 (7) The FPD has obtained a waiver from Kalter of the conflicts involving her; the
23 FPD has also obtained a waiver by Kalter of the attorney-client privilege. Notice of Conditional
24 Acceptance, p. 3, ¶3; *see also* Exhibit 5. Before providing these waivers, Kalter consulted with
25 independent counsel. Exhibit 5, p. 2, ¶3.

1 The FPD represents that it believes that it can provide adequate representation to
2 petitioner in this action. Notice of Conditional Acceptance, p. 3, lines 27-28.

3 The Supreme Court has recognized that a criminal defendant may waive his right to
4 the assistance of an attorney unhindered by a conflict of interests. *Holloway v. Arkansas*, 435 U.S.
5 475, 483 n.5, 98 S.Ct. 1173, 1177 n.5 (1978) (*quoting Glasser v. United States*, 315 U.S. 60, 70, 62
6 S.Ct. 457, 464 (1942)).

7 In *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692 (1988), the Court addressed a
8 case where a defendant's right, under the Sixth Amendment, conflicted with the Court's interest in
9 seeing to it "that criminal trials are conducted within the ethical standards of the profession and that
10 legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 159-60. The Court held
11 that "the district court must be allowed substantial latitude in refusing waivers of conflicts of
12 interests not only in those rare cases where an actual conflict may be demonstrated before trial, but in
13 the more common cases where a potential for conflict exists which may or may not burgeon into an
14 actual conflict as the trial progresses." *Id.* at 163.

15 To determine the ethical rules that control the practice of the FPD, the Court looks to
16 the applicable Rules of Professional Conduct, found in the Nevada Supreme Court Rules.

17 Rule 156 ("Confidentiality of Information") provides, in relevant part:

18 1. A lawyer shall not reveal information relating to representation of a
19 client unless the client consents after consultation....

20 Rule 157 ("Conflict of Interest: General Rule") provides, in relevant part:

21 1. A lawyer shall not represent a client if the representation of that
22 client will be directly adverse to another client, unless:

23 (a) The lawyer reasonably believes the representation will
not adversely affect the relationship with the other client; and

24 (b) Each client consents, preferably in writing, after
25 consultation.
26

1 2. A lawyer shall not represent a client if the representation of that
2 client may be materially limited by the lawyer's responsibilities to another
3 client or to a third person, or by the lawyer's own interests, unless:

4 (a) The lawyer reasonably believes the representation will
5 not be adversely affected; and

6 (b) The client consents, preferably in writing, after
7 consultation.

8 Supreme Court Rule 157.

9 Rule 178 ("Lawyer as Witness") provides:

10 1. A lawyer shall not act as advocate at a trial in which the lawyer
11 is likely to be a necessary witness except where:

12 (a) the testimony relates to an uncontested issue;

13 (b) the testimony relates to the nature and value of legal
14 services rendered in the case; or

15 (c) disqualification of the lawyer would work substantial
16 hardship on the client.

17 2. A lawyer may act as advocate in a trial in which another lawyer
18 in the lawyer's firm is likely to be called as a witness unless precluded from
19 doing so by Rule 157 or Rule 159.

20 Supreme Court Rule 178.

21 Rule 160 provides that the disqualification of one lawyer in a firm on account of a
22 conflict of interest is imputed to the entire firm. However, Rule 160(4) provides: "A
23 disqualification prescribed by this Rule may be waived by the affected client under the conditions
24 stated in Rule 157."

25 Additionally, Rule 159 ("Conflict of Interest: Former Client") provides:

26 A lawyer who has formerly represented a client in a matter shall not thereafter:

1 1. Represent another person in the same or a substantially related
2 matter in which that person's interests are materially adverse to the interests of
3 the former client unless the former client consents, preferably in writing, after
4 consultation; or

Supreme Court Rule 159. Rule 159 appears to be inapplicable, because there is no indication that the interests of petitioner in this action are materially adverse to Kalter's interests, and because there is no indication that any information relating to the representation of Kalter would be used to her disadvantage in connection with this action.

Moreover, in light of the actions taken by the FPD to minimize the effects of the conflicts, and in light of the waivers signed by petitioner and Kalter, the Court finds reasonable the FPD's representation that they can provide adequate assistance to petitioner.

IT IS THEREFORE ORDERED that, the waivers submitted by the Federal Public Defender are accepted, and the Federal Public Defender is **APPOINTED** to represent petitioner.


UNITED STATES DISTRICT JUDGE