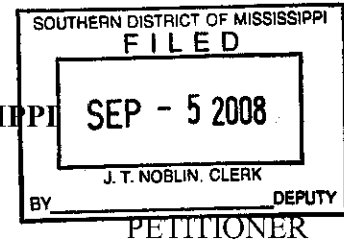


UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION



JEFFREY HAVARD,

v.

NO. 5:08CV275KS

CHRISTOPHER EPPS, Commissioner, Mississippi
Department of Corrections, and
JIM HOOD, Attorney General of the State of Mississippi

RESPONDENTS

MOTION FOR APPOINTMENT OF COUNSEL

Jeffrey Havard, an indigent death sentenced inmate, hereby requests this Court to appoint counsel to represent him in the litigation of his petition for writ of habeas corpus. Specifically, Petitioner requests the appointment of Mark Jicka and James M. Priest, Jr. Neither Mr. Jicka nor Mr. Priest represented Petitioner in state post-conviction proceedings. In support of this motion, Petitioner submits the following facts and argument.

I. Relevant Facts and Procedural History.

Petitioner was convicted and sentenced to death for capital murder in Adams County, Mississippi. The Mississippi Supreme Court affirmed the conviction and death sentence on February 9, 2006. *Havard v. State*, 928 So. 2d 771 (Miss. 2006). A timely filed petition for a writ of certiorari was denied on January 8, 2007. *Havard v. Mississippi*, 127 S. Ct. 931 (2007).

A petition for state post-conviction relief was properly filed on May 25, 2007, which tolled the federal limitations period. 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection"). The state supreme court denied post-conviction relief on May 22, 2008. *Havard v. State*, ___ So. 2d ___, 2008 WL 2139564 (Miss.

2008). A timely motion for rehearing was denied on August 28, 2008. The federal statute of limitations, which began to run again after rehearing was denied, will expire on or about April 13, 2009.

II. This Court Must Appoint Counsel to Represent Petitioner in His First Federal Petition for a Writ of Habeas Corpus.

Congress has declared that indigent death-sentenced inmates have the right to the appointment of counsel for federal habeas corpus proceedings. *See* 18 U.S.C. § 3599 (formerly 21 U.S.C. § 848(q)(4)-(10));¹ *see also* 18 U.S.C. § 3005. The United States Supreme Court has also recognized the right to qualified counsel given “the seriousness of the penalty and . . . the unique and complex nature of the litigation.” *McFarland v. Scott*, 512 U.S. 849, 855 (1994) (quoting 21 U.S.C. § 848(q)(7)).

The right to counsel attaches prior to the filing of a habeas petition; otherwise, condemned prisoners would not have meaningful access to the remedy of habeas corpus without the assistance of counsel. *See* 18 U.S.C. § 3599(2) (a death penalty defendant in post conviction proceedings who is “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 construing the identical provision formerly set forth in 21 U.S.C. § 848(q)(4)(B), the United States Supreme Court recognized that

¹ In 2006, Congress moved the federal provisions on appointment of counsel for habeas petitioners challenging death sentences to 18 U.S.C. § 3599 from 21 U.S.C. § 848(q)(4)-(10). *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 192, 231 (2006).

Congress' provision of a right to counsel under § 848(q)(4)(B) [now 18 U.S.C. § 3599(a)(2)] reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation." § 848(q)(7) [now 18 U.S.C. § 3599(d)]. An attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial because "the complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."

McFarland, 512 U.S. at 855-56 (quoting *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., joined by O'Connor, J., concurring in the judgment)). The Court further explained that with the provision making investigative and expert resources available to counsel upon request and a showing of petitioner's financial need, Congress clearly intended the appointment of counsel prior to the filing of the habeas petition since these services "may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *Id.* at 855.

In other words, the right to counsel mandated by Title 18, Section 3599 is a right to assistance in pleading all available claims for relief including the record-based claims already raised in the state trial and appellate proceedings and claims not previously raised because of a need for access to the investigative and expert resources required to adequately identify and develop the necessary non-record facts.

More specifically, Section 3599 requires appointment of at least one counsel who has been admitted to practice in the court of appeals for not less than five years and who has not less than three years experience in the handling of felony appeals in that court. *See* 18 U.S.C. § 3599©. Alternatively, for good cause, this Court may appoint counsel "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 litigation." 18 U.S.C. § 3599(d).

Petitioner requests that this Court to appoint Mark Jicka to serve as lead counsel in this matter. Mr. Jicka is a member of the Mississippi Bar and currently represents Justin Underwood in capital habeas corpus proceedings. *Underwood v. Epps*, No. 3:06-CV-00273-DPJ (S.D. Miss.). He is a member of the bars of United States Supreme Court, United States Court of Appeals for the Fifth Circuit, United States District Courts for both the Northern and Southern District of Mississippi. Mr. Jicka has been appointed to the CJA Panel for indigent defense and for Habeas Corpus. Mr. Jicka has experience in appellate matters including successful appeals to the Mississippi Supreme Court, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court.

Petitioner also requests that the Court appoint James M. Priest, Jr., as co-counsel to assist Mr. Jicka. He is a member of the bars of the United States Courts of Appeal for the Third and Fifth Circuits and the United States District Courts for the Northern and Southern Districts of Mississippi. Mr. Priest has experience in complex federal civil litigation and has experience in appellate litigation before the Third Circuit, Fifth Circuit, Mississippi Supreme Court, and Mississippi Court of Appeals. Mr. Priest has assisted other counsel in the representation of Mississippi death row inmates Earl Berry and Dale Bishop in connection with attempts to secure relief in successive collateral proceedings including numerous petitions to the United States Supreme Court. In addition, he is counsel for several death row plaintiffs in *Walker, et. al v. Epps, et al.*, No. No. 4:07-civ-00176 WAP-DAS (N.D. Miss.), a suit challenging the constitutionality of Mississippi's lethal injection procedure. He has applied for membership on the CJA Panel for Capital Cases in the Southern District.

III. Conclusion.

For the foregoing reasons, Petitioner requests this Court to appoint Mark Jicka and James M. Priest, Jr., to represent him in federal habeas corpus proceedings and allow them until April 13, 2009, or the expiration of the statute of limitations to file a petition for a writ of habeas corpus

Respectfully submitted,

JEFFREY HAVARD

By: 

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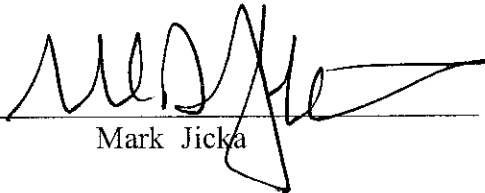
James M. Priest, Jr.
Gill, Ladner & Priest, PLLC
403 South State Street
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(601) 352-5700

Date: September 5, 2008

CERTIFICATE OF SERVICE

I, Mark Jicka, do hereby certify that I have this day, September 5, 2008, caused to be delivered via United States Mail, first class postage prepaid, a true and correct copy of the foregoing Motion for Appointment of Counsel to the following:

Jim Hood
Attorney General
P. O. Box 220
Jackson, MS 39205


Mark Jicka