UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JUDICIAL COUNCIL

In the Matter of Death Penalty Representation	*	
		No. 113
In the Fourth Circuit	*	

O R D E R

The Report of the Death Penalty Committee, which is attached to and made a part of this Order, is hereby adopted by the Fourth Circuit Judicial Council. The official policy of the Fourth Circuit shall be:

(1) Federal Public Defenders may be appointed to represent individuals charged with federal capital crimes and collateral attacks on federal capital convictions and sentences.

(2) Federal Public Defenders shall not be appointed to represent criminal defendants petitioning pursuant to 28 U.S.C.A. Section 2254 for relief from a state death sentence.

(3) The limitations on time for decision set forth in 28 U.S.C.A. Section 2266 shall apply at the district and circuit court levels and the Circuit Executive is authorized to inquire into the reasons for any noncompliance with the limitations.

and it is so ORDERED.

FOR THE COUNCIL:

/s/ J. Harvie Wilkinson III
Chief Judge

Date: October 3, 1996
Amended: October 1, 2008

DEATH PENALTY REPRESENTATION IN THE FOURTH CIRCUIT

I. STATUTORY PROVISIONS PRESENTLY APPLICABLE TO APPOINTMENT OF ATTORNEYS FOR CAPITAL REPRESENTATION

A. APPOINTMENT OF COUNSEL FOR INDIGENT CAPITAL DEFENDANTS IS STATUTORILY GUARANTEED FOR FEDERAL TRIALS, DIRECT APPEAL FROM FEDERAL CONVICTIONS, § 2255 PROCEEDINGS, AND § 2254 PROCEEDINGS.

Congress has enacted special provisions guaranteeing that "in every criminal action in which a defendant is charged with a crime which may be punishable by death" and in "any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation ... shall be entitled to the appointment of one or more attorneys." 18 U.S.C.A. § 3599(a)(1) & (2). Any defendant indicted for a federal capital crime is entitled to have two attorneys appointed. 18 U.S.C.A. § 3005.

B. THE MINIMUM QUALIFICATIONS OF APPOINTED COUNSEL ARE STATUTORILY DEFINED.

The lead attorney appointed to represent one indicted on an offense punishable by death "must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court." 18 U.S.C.A. § 3599(b). And, at least one of the attorneys appointed to represent a defendant indicted with a federal capital crime must "be learned in the law applicable to capital cases." 18 U.S.C.A. § 3005.

A lead attorney appointed after conviction to represent a capital defendant on direct appeal, or during § 2255 proceedings, "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." 18 U.S.C.A. § 3599(c).

A court may, for good cause shown, appoint another attorney who does not meet the requirements set forth in 18 U.S.C.A. § 3599(b)-(c), but whose experience otherwise enables him or her to adequately represent the defendant. 18 U.S.C.A. § 3599(d).

Attorneys that have been appointed typically continue the representation on appeal. See 18 U.S.C.A. § 3599(e) (providing that once appointed attorneys continue representation throughout subsequent proceedings); 18 U.S.C.A. § 3006A(c).

C. COMPENSATION FOR FEES IS PRESENTLY LIMITED ONLY TO A "REASONABLE FEE" IN THE VIEW OF THE DISTRICT COURT.

Attorneys appointed pursuant to § 3599 may be compensated at the rate authorized by the Judicial Conference pursuant to 3599(g)(1). Counsel is also bound by the limitation of $7,500 for investigative, expert, and other reasonably necessary expenses unless a higher fee is approved by the court. 18 U.S.C.A. § 3599(g)(2).

II. RECOMMENDATIONS

A. SOLICIT QUALIFIED AND INTERESTED COUNSEL AND MAINTAIN LISTS OF ATTORNEYS QUALIFYING FOR APPOINTMENT AS LEAD COUNSEL AND SECOND-CHAIR COUNSEL.

District Court

** **It is recommended that a plan be adopted under which the district court would contact the bar and solicit applications for a panel of attorneys qualified to represent capital defendants.**

Some districts have experienced difficulty in locating qualified and interested counsel to undertake capital representation. But, it is believed that there are many attorneys who would seek the opportunity for appointment if they were made aware of that opportunity. Accordingly, it is recommended that on a district-by-district basis, a program of solicitation of the bar should be implemented in order to increase the number of attorneys seeking appointment.

** **It is recommended that the district courts maintain lists of those attorneys qualified to represent capital defendants as lead counsel and as second-chair counsel and that these attorneys' expertise in trial, appellate, and habeas representation be identified.**

Because the statutory requirements for lead counsel are more stringent than those for second-chair counsel, courts should maintain separate lists of those attorneys who are qualified for each type of appointment. In addition to the statutory qualifications, specialized skills and experience are necessary to represent capital defendants in trial, appellate, and habeas proceedings. Courts may find separate lists of attorneys with trial, appellate, and/or habeas experience useful. Alternatively, courts may conclude that some other method of identifying various types and levels of expertise is preferable.

In ascertaining which attorneys of those expressing an interest in capital representation and seeking appointment are qualified to be placed on lists of those available for appointment as lead and second-chair counsel, the court may wish to consider appointment of an oversight committee composed of district judges, magistrate judges, district court clerks, and the Federal Public Defender, see 18 U.S.C.A. § 3005.

It is envisioned that over time attorneys chosen for appointment from the second-chair counsel list will develop the qualifications to be placed on the lead counsel list, and that appointment of second-chair attorneys is desirable in order to develop a wider range of expertise available for lead counsel appointment. In addition, special consideration should be given to

appointment of the attorney who represented a § 2254 petitioner during state collateral proceedings, if interested in appointment and qualified for it. See 18 U.S.C.A. § 3599(d).

Circuit Court

** **It is recommended that the circuit court solicit the bar for applications, maintain lists of those attorneys qualified to represent capital defendants as lead counsel and as second-chair counsel, and identify attorneys' expertise in appellate and habeas representation.**

Although attorneys that have been appointed at the district court level typically continue their representation on appeal, from time to time it is necessary to appoint attorneys pursuant to § 3599 during appellate proceedings. Consequently, it is recommended that a plan to solicit the bar for applications for appointment to capital representation be adopted and that lists of those attorneys qualified and interested in capital representation as lead and second-chair counsel be maintained.

B. USE FEDERAL PUBLIC DEFENDERS FOR REPRESENTATION OF FEDERAL CAPITAL CHARGES AND COLLATERAL ATTACKS ON FEDERAL CAPITAL CONVICTIONS AND SENTENCES; DO NOT UTILIZE FEDERAL PUBLIC DEFENDERS FOR PROSECUTION OF HABEAS PROCEEDINGS FILED BY STATE PRISONERS.

** **It is recommended that Federal Public Defenders be utilized for representation of individuals charged with federal capital crimes and collateral attacks on federal capital convictions.**

Providing representation for defendants charged with federal crimes punishable by the death penalty is within the statutory responsibility of the Federal Public Defender (FPD) to provide representation for all indigents charged with federal crimes. It is contemplated that FPDs will be placed in the pool of attorneys available to represent capital defendants in federal capital trials, on direct appeal, and in § 2255 proceedings. For some period of time, until FPDs develop the qualifications and experience, their appointments may be limited to second-chair positions. See 18 U.S.C.A. § 3599(d). However, such appointments should be encouraged whenever possible in order to permit FPDs to attain expertise in this area.

** **It is recommended that FPDs not be appointed to represent criminal defendants petitioning pursuant to 28 U.S.C.A. § 2254 for relief from a state death sentence.**

The consensus of opinion among FPDs in the circuit is that FPD representation in § 2254 proceedings challenging a state sentence of death is undesirable for a number of reasons. First, the prospect of a federal agency opposing the validity of state convictions creates the appearance of an unacceptable conflict between separate and independent sovereigns. Second, although the FPD is authorized to represent defendants seeking a writ of habeas corpus, encouraging such representation is problematic because litigation of collateral state-court proceedings and issues may be necessary, raising the question of the appropriateness of FPDs appearing in state court and presenting issues outside their traditional area of expertise. Finally, appointing FPDs to represent § 2254 petitioners could be viewed as an attempt to circumvent the

will of Congress, given its recent decision to withdraw funding from death penalty resource centers.

C. IMPOSE RESTRAINTS ON TIME FOR DECISION.

** **It is recommended that the limitations on time for decision set forth in 28 U.S.C.A. § 2266 be adopted at the district and circuit court levels and that the Circuit Executive be authorized to inquire into the reasons for any noncompliance with the limitations.**

Under 28 U.S.C.A. § 2266 (enacted by the Antiterrorism and Effective Death Penalty Act of 1996), proceedings brought pursuant to § 2254 that are governed by Chapter 154 of Title 28 and proceedings brought pursuant to § 2255 in which the defendant was sentenced to death must be decided by the district court and the circuit court within specified time limits. The district court is required to render a decision and enter a final judgment (including a resolution of any motion to alter or amend the judgment) within 450 days of the date on which the petition is filed or 60 days after the date on which the case is submitted for decision, whichever is earlier, subject to an extension of up to 30 days if the district court determines that the ends of justice would best be served by the delay. See 28 U.S.C.A. § 2266(a)-(b). The court of appeals is required to render a decision within 120 days of the date on which the reply brief is filed and to rule on any petition for rehearing or rehearing en banc within 30 days of the date the petition is filed or the date a response thereto is filed, whichever is later. See 28 U.S.C.A. § 2266(c). Furthermore, if the petition is granted, any hearing must be conducted and a final decision rendered within 120 days of the entry of the order granting rehearing. Id. And, following a remand by the court of appeals en banc or the Supreme Court for further proceedings, the period for decision runs from the date the remand is ordered. Id.

The time limitations imposed by § 2266 are applicable only in those § 2254 proceedings governed by Chapter 154, (i.e., those challenging a state death sentence where the state has adopted specified procedures for appointment of counsel to represent the defendant in state post-conviction proceedings) and in § 2255 proceedings in which the defendant was sentenced to death. As such, the limitations presently will not apply to the majority of § 2254 petitions challenging a death sentence because of the relatively recent adoption of those mechanisms. See Bennett v. Angelone, No. 95-4004, 1996 WL 469705, at *4 (4th Cir. Aug. 20, 1996) (stating that question of whether Virginia's mechanism for appointment of counsel satisfied requirements for application of Chapter 154 was irrelevant because Chapter 154 would not apply when the mechanism was not in place during the petitioner's state collateral proceedings). Time constraints, however, are sorely needed at present. See, e.g., Correll v. Thompson, 63 F.3d 1279, 1285 n.4 (4th Cir. 1995), cert. denied, 116 S. Ct. 688 (1996) (noting that § 2254 petition was pending in district court for in excess of three years prior to final decision). Consequently, it is recommended that the time limitations for decision imposed by § 2266 be adopted and implemented by rule immediately. It is contemplated that the limitations would apply to cases pending when the rule became effective, but that the limitations would apply prospectively. (For example, an appeal in a § 2255 proceeding challenging a death sentence that had been argued to this court and was pending decision would have to be decided within 120 days of the date the rule becomes effective.)

Additionally, it is recommended that a mechanism be established to track cases to which the time limitations apply, and in the event that cases remain pending after the date on which they were due to be decided, the Circuit Executive be authorized to make appropriate

inquiry on behalf of the Judicial Council to seek an explanation of the reasons why the judge or panel of judges failed to comply with the time limitation.