

OCTOBER TERM, 2023

No. \_\_\_\_\_

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

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**RUBEN GUTIERREZ,**  
Petitioner,

v.

**LUIS V. SAENZ, Cameron County District Attorney;**  
**FELIX SAUCEDA, Chief, Brownsville Police Department,**  
Respondents.

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

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

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— CAPITAL CASE —

**EXECUTION SCHEDULED FOR JULY 16, 2024**

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, was appointed as co-counsel on August 14, 2018. This Court previously granted Mr. Gutierrez leave to proceed in forma pauperis in his previous petition before this Court in 2021. These 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,

/s/ Shawn Nolan  
Shawn Nolan\*  
Anne Fisher  
Assistant Federal Defenders  
Federal Community Defender Office  
for the Eastern District of Pennsylvania  
601 Walnut Street, Suite 545 West  
Philadelphia, PA 19106  
(215) 928-0520  
Shawn\_Nolan@fd.org  
Annie\_Fisher@fd.org

*\*Counsel of record for Petitioner  
Member of the Bar of the Supreme Court*

Dated: June 25, 2024

EXHIBIT

A

1. CIR./DIST./DIV. CODE TXS		2. PERSON REPRESENTED Gutierrez, Ruben		VOUCHER NUMBER 08091000002	
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. <b>DEATH PENALTY</b>			
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: _____  (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> Date of Order: 06/11/2008 <span style="float:right">09/10/08</span> Nunc Pro Tunc Date  (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		
13. NAME AND MAILING ADDRESS OF LAW FIRM (only provide per instructions) <b>United States District Court Southern District of Texas ENTERED SEP 16 2008 Michael N. Milby, Clerk of Court By Deputy Clerk <i>[Signature]</i></b>					

**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.

- |  |   |   |   |  |  |
|--|---|---|---|--|--|
| <b>CAPITAL PROSECUTION</b>                   |   | <b>HABEAS CORPUS</b>                            |   | <b>OTHER PROCEEDING</b>  |  |
| a. <input type="checkbox"/> Pre-Trial        | e. <input type="checkbox"/> Appeal                              | g. <input type="checkbox"/> Habeas Petition     | k. <input type="checkbox"/> Petition for the U.S. Supreme Court | l. <input type="checkbox"/> Stay of Execution  |  |
| b. <input type="checkbox"/> Trial            | f. <input type="checkbox"/> Petition for the U.S. Supreme Court | h. <input type="checkbox"/> Evidentiary Hearing | i. <input type="checkbox"/> Dispositive Motions                 | m. <input type="checkbox"/> Appeal of Denial of Stay   |  |
| c. <input type="checkbox"/> Sentencing       | j. <input type="checkbox"/> Writ of Certiorari                  |   |   | n. <input type="checkbox"/> Petition for Writ of Certiorari to the U.S. Supreme Court Regarding Denial of Stay |  |
| d. <input type="checkbox"/> Other Post Trial |   |   |   | o. <input type="checkbox"/> Other  |  |

**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)
b. Interviews and Conferences with Client					OUT OF COURT TOTAL (Categories b - j)
c. Witness Interviews					
d. Consultation with Investigators and Experts					OUT OF COURT TOTAL (Categories b - j)
e. Obtaining and Reviewing the Court Record					
f. Obtaining and Reviewing Documents and Evidence					OUT OF COURT TOTAL (Categories b - j)
g. Consulting with Expert Counsel					
h. Legal Research and Writing					OUT OF COURT TOTAL (Categories b - j)
i. Travel					
j. Other (Specify on additional sheets)					OUT OF COURT TOTAL (Categories b - j)
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.)				
<b>GRAND TOTALS (CLAIMED AND ADJUSTED):</b>				

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 _____ 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).<sup>1</sup>

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*

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<sup>1</sup> 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).<sup>1</sup> 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

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<sup>1</sup> "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.").

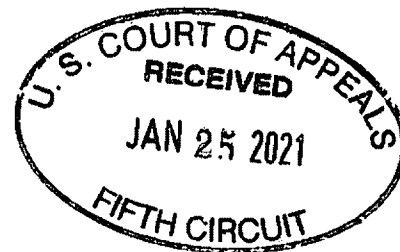
Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

Scott S. Harris  
Clerk of the Court  
(202) 479-3011

January 25, 2021

Clerk  
United States Court of Appeals for the Fifth Circuit  
600 S. Maestri Place  
New Orleans, LA 70130

Re: Ruben Gutierrez  
v. Luis V. Saenz, et al.  
No. 19-8695  
(Your No. 20-70009)



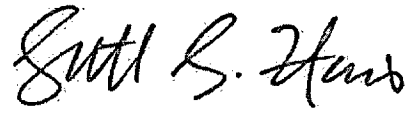
Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The June 12, 2020 order of the United States Court of Appeals for the Fifth Circuit granting the motion to vacate the stay of execution previously issued by the United States District Court for the Southern District of Texas is vacated. The case is remanded to the Court of Appeals with instructions to remand the case to the District Court for further and prompt consideration of the merits of petitioner's underlying claims regarding the presence of a spiritual advisor in the execution chamber in light of the District Court's November 24, 2020 findings of fact. Although this Court's stay of execution shall terminate upon the sending down of the judgment of this Court, the disposition of the petition for a writ of certiorari is without prejudice to a renewed application regarding a stay of execution should petitioner's execution be rescheduled before resolution of his claims regarding the presence of a spiritual advisor in the execution chamber.

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott S. Harris". The signature is written in a cursive, slightly slanted style.

Scott S. Harris, Clerk



***United States Court of Appeals***

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

January 26, 2021

Mr. Nathan Ochsner  
Southern District of Texas, Brownsville  
United States District Court  
600 E. Harrison Street  
Room 1158  
Brownsville, TX 78520

No. 20-70009 Gutierrez v. Saenz  
USDC No. 1:19-CV-185

Dear Mr. Ochsner,

Enclosed is a copy of the Supreme Court order granting certiorari.

Sincerely,

LYLE W. CAYCE, Clerk



By: \_\_\_\_\_  
Stacy M. Carpenter, Deputy Clerk