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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS SCOTT MICKEY,

Petitioner,

v.

RON DAVIS, Warden of San Quentin State
Prison

Respondent.

Case No. 93-00243

**ORDER GRANTING MOTION TO
APPOINT ADDITIONAL COUNSEL**

Re: Dkt. No. 230

INTRODUCTION

On June 15, 2018, petitioner filed a motion to appoint additional counsel. Petitioner requests that the Arizona Federal Public Defender (“FPD”) be appointed to prepare a clemency petition on his behalf. On July 3, 2018, respondent filed an opposition. On July 8, 2018, petitioner filed a reply. For the reasons stated below, the Court GRANTS petitioner’s motion.

BACKGROUND

Petitioner was convicted and sentenced to death in San Mateo County Superior Court in 1983. The California Supreme Court affirmed his conviction and sentence on direct appeal in 1991. *People v. Mickey*, 54 Cal. 3d 612 (1991). Petitioner’s petition for writ of certiorari was denied by the United States Supreme Court. *Mickey v. California*, 506 U.S. 819 (1992).

Petitioner filed a federal habeas petition on December 1, 1995. On November 17, 2006, his petition was denied as to his guilt phase claims, but relief was granted in relation to a penalty phase claim. (ECF Dkt. No. 207). The Ninth Circuit affirmed the denial of guilt phase claims but reversed the grant of relief on petitioner’s penalty phase claim. *Mickey v. Ayers*, 606 F.3d 1223 (9th Cir. 2010). Petitioner’s petition for a writ of certiorari was denied by the United States Supreme Court on October 11, 2011. *Mickey v. Ayers*, 565 U.S. 952 (2011). The Ninth Circuit

1 issued its mandate on October 13, 2011. (ECF Dkt. No. 222).

2 **PARTIES' CONTENTIONS**

3 Petitioner, through his counsel Frank McCabe and Neoma Kenwood, requests that the
4 Capital Habeas Unit of the Arizona FPD be appointed to help prepare his application for
5 clemency. Mr. McCabe and Ms. Kenwood were appointed in 1994 to represent petitioner in his
6 federal habeas proceedings. Mr. McCabe, now 74 years old, is currently a sole practitioner
7 working from his home office. He is winding down his practice and plans to retire. Ms. Kenwood
8 currently works 80% time at the California Appellate Project and devotes 20% of her time to
9 private practice. Given that Mr. McCabe and Ms. Kenwood are sole practitioners with no prior
10 clemency-related experience, they seek the assistance of the Arizona FPD for the preparation of
11 petitioner's clemency petition. The Arizona FPD has a capital habeas unit with a full-time staff of
12 experienced capital litigators, investigators and paralegals, including staff with clemency
13 experience. In support of his request, petitioner cites *Harbison v. Bell*, 556 U.S. 180 (2009),
14 which holds that 18 U.S.C. § 3599 authorizes federally appointed counsel to represent prisoners in
15 state clemency proceedings.

16 Respondent opposes petitioner's request. He asserts that *Harbison* applies only to
17 situations where a petitioner is unable to obtain state-furnished representation. (ECF Doc. No. 235
18 at 2-3). Respondent contends that since California provides counsel for clemency proceedings,
19 petitioner should direct his request for additional counsel to the California Supreme Court.

20 **DISCUSSION**

21 Title 18 U.S.C. § 3599 provides for the appointment of counsel in federal capital trial and
22 post-conviction proceedings, including clemency proceedings. Section 3599(a)(2) states:

23 In any post conviction proceeding under section 2254 or 2255 of
24 title 28, United States Code, seeking to vacate or set aside a death
25 sentence, any defendant who is or becomes financially unable to
26 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
accordance with subsections (b) through (f).

27 Section 3599(e) provides that each appointed attorney shall:

28 [R]epresent the defendant throughout every subsequent stage of

1 available judicial proceedings, including pretrial proceedings, trial,
2 sentencing, motions for new trial, appeals, applications for writ of
3 certiorari to the Supreme Court of the United States, and all
4 available post-conviction process, together with applications for
stays of execution and other appropriate motions and procedures,
and shall also represent the defendant in such competency
proceedings and *proceedings for executive or other clemency as may
be available to the defendant.* (Emphasis added).

5 In *Harbison*, the United States Supreme Court granted certiorari to decide whether
6 “§ 3599(e)’s reference to ‘proceedings for executive or other clemency as may be available to the
7 defendant’ encompasses state clemency proceedings.” 566 U.S. at 183. The United States
8 Supreme Court concluded that it does, reasoning that under a straightforward reading of the
9 statute, counsel who had been appointed to represent Mr. Harbison in federal corpus proceedings
10 were obliged by virtue of that appointment to represent him in his state executive clemency
11 proceedings. *Id.* at 185-186. The United States Supreme Court explained:

12 [O]nce federally funded counsel is appointed to represent a state
13 prisoner in § 2254 proceedings, she “shall also represent the
14 defendant in such ... proceedings for executive or other clemency as
15 may be available to the defendant.” § 3599(e). Because state
16 clemency proceedings are “available” to state petitioners who obtain
representation pursuant to subsection (a)(2), the statutory language
indicates that appointed counsel’s authorized representation includes
such proceedings.

17 *Id.* The United States Supreme Court arrived at this conclusion after noting, in its
18 statement of the case, that but for § 3599, Mr. Harbison would have been entirely without
19 clemency counsel because Tennessee law did not authorize the appointment of state public
20 defenders as clemency counsel. *Id.* at 182. This fact, however, did not play a role in the Supreme
21 Court’s analysis of the scope of the clemency clause in § 3599(e).

22 Respondent argues that under *Harbison*, § 3599(e) provides for the appointment of counsel
23 only when a petitioner is unable to obtain adequate state representation. In support of this
24 argument, he cites a portion of *Harbison* discussing the government’s argument that reading
25 § 3599(e) to authorize federally funded counsel for state clemency proceedings would require
26 federally appointed counsel to represent a petitioner in all additional state court proceedings,
27 including any federally mandated state retrial. Addressing this argument, the United States
28 Supreme Court stated:

1 We do not read subsection (e) to apply to state-court proceedings
2 that follow the issuance of a federal writ of habeas corpus. When a
3 retrial occurs after postconviction relief, it is not properly
4 understood as a “subsequent stage” of judicial proceedings but
5 rather as the commencement of new judicial proceedings. *Moreover,*
6 *subsection (a)(2) provides for counsel only when a state petitioner is*
7 *unable to obtain adequate representation.* States are constitutionally
8 required to provide trial counsel for indigent defendants. Thus, when
9 a state prisoner is granted a new trial following § 2254 proceedings,
10 his state-furnished representation renders him ineligible for § 3599
11 counsel until the commencement of new § 2254 proceedings.

12 *Id.* at 189 (emphasis added).

13 Respondent argues that the United States Supreme Court’s statement that “subsection
14 (a)(2) provides for counsel only when a petitioner is unable to obtain adequate representation”
15 restricts *Harbison*’s holding to situations where states have no process for the appointment of
16 clemency counsel. Respondent argues that because the California Supreme Court provides
17 representation for clemency proceedings, *see* Supreme Court Policies Regarding Cases Arising
18 From Judgments Of Death, www.courts.ca.gov/documents/policiesmar2012.pdf, *Harbison* does
19 not allow for the appointment of counsel in petitioner’s case. *See also Irick v. Bell*, 636 F.3d 289
20 (6th Cir. 2011) (because state law provided prisoner with adequate counsel, prisoner was not
21 entitled to representation under 18 U.S. § 3599); *Samoya v. Davis*, No. 00cv2118-W, (S.D. Cal.
22 May 21, 2018) (denying appointment of Federal Public Defender for the District of Arizona as
23 counsel for state clemency proceedings).

24 Petitioner disagrees with respondent’s statutory interpretation and argues that numerous
25 cases address the clemency clause of § 3599(e) without any discussion of the availability of
26 clemency counsel funded by the state. *See, e.g. Wilkins v. Davis*, 832 F.3d 547 (5th Cir. 2016);
27 *Battaglia v. Stephens*, 824 F.3d 470, 473-74 (5th Cir. 2016). Petitioner asserts that in California,
28 several district courts have appointed federal counsel to represent death-sentenced defendants in
state clemency proceedings without conditioning such appointment on the unavailability of state-
funded counsel. *See Raley v. Davis*, No. 10-cv-04304 (N.D. Cal. May 9, 2018) (appointing
Arizona FPD as co-counsel for state clemency proceedings); *Boyer v. Davis*, No. 06-cv-07584
(C.D. Cal. Nov. 28, 2017) (same). He asserts that the Arizona FPD has also been appointed under
§ 3599(e) to represent death-sentenced defendants in state clemency proceedings in Ohio and

1 Oklahoma. (ECF Doc. No. 236 at 6). Petitioner further asserts that even the guidelines for
2 administering the Criminal Justice Act, as set forth in the United States Judicial Conference’s
3 Guide To Judiciary Policy, contemplate that the appointment of clemency counsel under § 3599(e)
4 be “self-executing” rather than conditioned on the availability of clemency counsel funded by the
5 state. (ECF Doc. No. 236 at 5-6).

6 Even under the narrow reading of *Harbison* advanced by respondent, the
7 appointment of the Arizona FPD as co-counsel is warranted because it appears that otherwise,
8 petitioner will be unable to obtain “adequate representation”. *See Harbison*, 556 U.S. at 189.
9 Petitioner’s federally appointed counsel, Ms. Kenwood and Mr. McCabe, were appointed by the
10 California Supreme Court to represent petitioner in all “appropriate post appeal representation”.
11 (ECF Doc. No. 236 at 21). They aver, however, that they are not in a position to provide adequate
12 representation with respect to clemency. As previously noted, Mr. McCabe, who was first
13 appointed to represent petitioner in 1994, is winding down his business and intends to retire. Ms.
14 Kenwood works 80% time at the California Appellate Project. Neither has any clemency-related
15 experience. The Arizona FPD, however, has the necessary staff and resources to assist with
16 clemency. Furthermore, while the California Supreme Court’s payment guidelines provide for a
17 benchmark of only 40-80 hours for state clemency representation, *see* ECF Doc. No. 236 at 8, the
18 Arizona FPD is prepared to shoulder all of petitioner’s clemency-related costs. Finally, contrary
19 to respondent’s assertion, the appointment of the Arizona FPD, an out-of-state entity, is one that
20 the state court might not be able to make. *See* Supreme Court Policies Regarding Cases Arising
21 From Judgments Of Death at 5, www.courts.ca.gov/documents/policiesmar2012.pdf; Cal. Rules of
22 Court 8.605.

23 As recognized by the United States Supreme Court in *Harbison*, clemency “is the historic
24 remedy for preventing miscarriages of justice where judicial process has been exhausted . . . we
25 have called it ‘the fail safe’ in our criminal justice system.” 556 U.S. 192. In light of the
26 circumstances above, appointing the Arizona FPD as co-counsel will allow petitioner to receive
27 adequate representation during a critical stage of his proceedings.
28

1 **CONCLUSION**

2 For the above-mentioned reasons, petitioner is entitled to the appointment of the Arizona
3 FPD as co-counsel with Ms. Kenwood and Mr. McCabe. Accordingly, petitioner's motion is
4 GRANTED.

5
6 **IT IS SO ORDERED.**

7 Dated: August 2, 2018

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9 EDWARD J. DAVILA
10 United States District Judge

United States District Court
Northern District of California

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