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CLERK U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

*JPL*

DEPUTY

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SUSAN DIANNE EUBANKS,  
Petitioner,

v.

DERRAL ADAMS, Acting Warden of  
Central California Women's Facility at  
Chowchilla,  
Respondent.

Case No.: 17cv0016 DMS (MDD)

**DEATH PENALTY CASE**

**ORDER:  
(1) GRANTING REQUEST FOR  
APPOINTMENT OF COUNSEL AND  
(2) APPOINTING COUNSEL  
PURSUANT TO  
RECOMMENDATION OF  
SELECTION BOARD**

On January 4, 2017, Petitioner Susan Eubanks filed a request for appointment of counsel for federal habeas proceedings, an accompanying declaration, and a civil cover sheet. (ECF No. 1.) On January 12, 2017, the Court issued an Order Re Action Required to Avoid Dismissal, noting the Petitioner had neither moved to proceed in forma pauperis ["IFP"] nor paid the \$5.00 filing fee and stating that the Court could not proceed until Petitioner either paid the filing fee or qualified to proceed IFP. (ECF No. 2.) On March 7, 2017, Petitioner filed a motion for leave to proceed IFP along with a trust account statement which reflected a \$90.70 balance in her prison trust account. (ECF No. 3.) On March 13, 2017, the Court denied that motion and advised Petitioner that without payment of the

1 filing fee, the case was subject to dismissal without prejudice. (ECF No. 4 at 1-2.) On  
2 March 16, 2017, Petitioner paid the \$5.00 filing fee. (ECF No. 5.) Accordingly, the Court  
3 now turns to Petitioner’s request for appointment of counsel.

4 **I.**

5 **BACKGROUND**

6 Petitioner was convicted in San Diego County Superior Court of four counts of first  
7 degree murder with the special circumstance of multiple murder and sentenced to death.  
8 On December 19, 2011, the California Supreme Court affirmed the convictions and  
9 sentence on direct appeal. People v. Eubanks, 53 Cal. 4th 110 (2011). Petitioner states  
10 that she did not file a petition for a writ of certiorari in the United States Supreme Court.  
11 (ECF No. 1 at 2.) The California Supreme Court issued the Remittur in the case on January  
12 19, 2012.

13 On February 7, 2011, while the direct appeal was still pending, Petitioner filed a  
14 habeas petition (Case No. S190405) with the California Supreme Court. An informal  
15 response was filed on September 8, 2011, and a reply was filed on September 20, 2012.  
16 The California Supreme Court has not yet ruled on the state habeas petition.

17 **II.**

18 **DISCUSSION**

19 In the declaration accompanying her request for appointment of counsel, Petitioner  
20 states that she has a pending and fully-briefed state habeas petition in the California  
21 Supreme Court “unless and until the court issues an order to show cause or orders  
22 supplemental briefing.” (ECF No. 1 at 3.) Petitioner states that “[t]he court may issue a  
23 summary denial at any time, which is final immediately,” notes “[a]t that point, the time  
24 for seeking federal review will begin running,” and declares: “I am submitting a request  
25 for counsel now in anticipation of this contingency.” (Id.) Petitioner indicates that the  
26 attorneys who represented her on her state appeal and in her state habeas proceedings have  
27 each advised that they are not available to represent Petitioner in the federal proceedings.  
28

1 (Id.) Petitioner also states that: “I am indigent and do not have the assets to retain an  
2 attorney to represent me in these proceedings.” (Id.)

3 The Ninth Circuit previously stated that “[w]hen . . . an appeal of a state criminal  
4 conviction is pending, a would-be habeas corpus petitioner must await the outcome of his  
5 appeal before his state remedies are exhausted . . . .” Sherwood v. Tomkins, 716 F.2d 632,  
6 634 (9th Cir. 1983); see also 28 U.S.C. § 2254(b)-(c). While Petitioner’s state habeas  
7 petition is currently pending in state court, the Ninth Circuit has more recently specified  
8 that Sherwood applies only to a pending direct appeal. See Henderson v. Johnson, 710  
9 F.3d 872, 873-74 (9th Cir. 2013) (per curiam) (rejecting district court’s reliance on  
10 Sherwood to dismiss mixed federal habeas petition filed while state habeas petition was  
11 pending without allowing leave to amend or considering a stay, clarifying that “Sherwood  
12 stands for the proposition that a district court may not adjudicate a federal petition while a  
13 petitioner’s *direct state appeal* is pending.”) (emphasis added.) As noted above,  
14 Petitioner’s state appeal is concluded, as the California Supreme Court issued a remittur.  
15 See Cal. Rules of Court, Rules 8.532, 8.540, 8.642.

16 The relevant federal statute which provides for the appointment of counsel in capital  
17 habeas proceedings simply states that: “In any post conviction proceeding under section  
18 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence,  
19 any defendant who is or becomes financially unable to obtain adequate representation or  
20 investigative, expert, or other reasonably necessary services shall be entitled to the  
21 appointment of one or more attorneys and the furnishing of such other services in  
22 accordance with subsections (b) through (f).” 18 U.S.C. § 3599(a)(2). This district’s local  
23 rules provide for the appointment of federal habeas counsel “at the earliest practicable  
24 time.” See CivLR HC.3(d)(1). Upon review of this matter with reference to the above  
25 authorities, Petitioner’s request for appointment of counsel appears reasonable and is  
26 therefore **GRANTED**.

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1 During the pendency of this matter, the Court received a letter from the Selection  
2 Board, in connection with Petitioner's request for counsel.<sup>1</sup> Based on the Selection Board's  
3 determination that recommended counsel have the requisite familiarity with federal and  
4 capital case work, experience with the type of issues presented in this particular case, and  
5 the Board's statement that counsel are willing to represent Petitioner, the Court  
6 **APPOINTS** Attorneys Rebecca Jones and Ellis M. Johnston as counsel for Petitioner in  
7 this matter.

8 **III.**

9 **CONCLUSION**

10 Pursuant to Local Rule HC.3(d) and 18 U.S.C. § 3599, Petitioner's request for  
11 appointment of counsel is **GRANTED**, and pursuant to Local Rule HC.3(d) and the  
12 recommendation of the Selection Board for the United States District Court for the  
13 Southern District of California, the Court **APPOINTS** Rebecca Jones and Ellis M.  
14 Johnston to represent Petitioner Susan Eubanks in her capital habeas corpus proceedings.

15 The Clerk of the Court shall serve a certified copy of this order on Petitioner Susan  
16 Eubanks; Attorney Rebecca Jones; Attorney Ellis M. Johnston; Attorney Patrick M. Ford;  
17 Attorney Michael Meaney; Respondent Derral Adams, Acting Warden of Central  
18 California Women's Facility at Chowchilla; the Clerk of the San Diego County Superior  
19 Court; Xavier Becerra, Attorney General of the State of California; Meagan J. Beale,  
20 Deputy Attorney General of the State of California; Office of the District Attorney of San  
21 Diego County; Elaine A. Alexander, Appellate Defenders, Inc.; Joseph Schlesinger,

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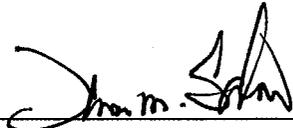
27 <sup>1</sup> That letter was sent directly to the undersigned's chambers. Pursuant to this Order, that  
28 letter will be filed under seal in the Court file.

1 California Appellate Project, San Francisco; Reuben C. Cahn, Federal Defenders of San  
2 Diego, Inc.; and Attorney Charles M. Sevilla.

3 **IT IS SO ORDERED.**

4 Dated: [Date]

5 3-22-17

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8 Hon. Dana M. Sabraw  
9 United States District Judge  
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