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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 STEVEN M. BELL,

12 Petitioner,

13 v.

14 RONALD DAVIS, Warden of San  
15 Quentin State Prison

16 Respondent.

Case No.: 17cv1051-WQH-JLB

**DEATH PENALTY CASE**

**ORDER:**

**(1) GRANTING REQUEST TO  
PROCEED IN FORMA PAUPERIS;**

**(3) GRANTING REQUEST FOR  
APPOINTMENT OF COUNSEL; AND**

**(3) REFERRING MATTER TO  
SELECTION BOARD FOR  
SUGGESTION OF APPOINTED  
COUNSEL**

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22 On May 23, 2017, Petitioner Steven M. Bell filed a request for appointment of  
23 counsel for federal habeas proceedings and an accompanying declaration. (ECF No. 1.)  
24 Petitioner has also filed a motion for leave to proceed in forma pauperis [“IFP”]. (ECF  
25 No. 2.) For the reasons discussed below, the Court **GRANTS** the request to proceed IFP,  
26 **GRANTS** the request for appointment of counsel, and **REFERS** the matter to the Selection  
27 Board for the Southern District of California for the recommendation of one or more  
28 attorneys for appointment.

1 **I. BACKGROUND**

2 Petitioner was convicted in San Diego County Superior Court of one count of first  
3 degree murder with the special circumstances of robbery-murder and was sentenced to  
4 death. On February 15, 2007, the California Supreme Court affirmed the convictions and  
5 sentence on direct appeal. *People v. Bell*, 151 P.3d 292 (Cal. 2007). The petition for a  
6 writ of certiorari was denied by the United States Supreme Court on October 1, 2007. *Bell*  
7 *v. California*, 552 U.S. 826 (2007).

8 On March 29, 2007, Petitioner filed a habeas petition (Case No. S151362) with the  
9 California Supreme Court, and on June 22, 2009, Petitioner filed an amended petition  
10 accompanied by declarations and exhibits. An informal response was filed on October 15,  
11 2009, and a reply was filed on September 28, 2010. The California Supreme Court issued  
12 an order to show cause on January 21, 2014. A return was filed on May 14, 2014 and a  
13 Traverse was filed on September 25, 2014. The California Supreme Court ordered a  
14 reference hearing on November 12, 2014 and appointed a referee. After the hearing, the  
15 referee submitted a report on March 21, 2016. After the submission of additional briefing,  
16 the California Supreme Court held oral arguments on April 5, 2017. On June 8, 2017, the  
17 California Supreme Court issued an opinion stating that “[b]ecause no misconduct has been  
18 proven, we will discharge the order to show cause and, by separate order, deny Bell’s  
19 petition for writ of habeas corpus.” *In re Steven M. Bell on Habeas Corpus*, \_\_\_ P. 3d \_\_\_,  
20 2017 WL 2472824, at \*1 (Cal. June 8, 2017). In that opinion, the California Supreme  
21 Court also stated that “[b]ecause our order to show case and our reference order were  
22 limited to this claim, we do not here address any other claim set forth in the petition. The  
23 remaining claims will be resolved by a separately filed order.” *Id.* at \*7.

24 **II. REQUEST TO PROCEED IFP**

25 With respect to the motion to proceed in forma pauperis, Petitioner has attached a  
26 declaration and trust account statement, which reflects that Petitioner has \$0.02 in his  
27 account at San Quentin State Prison, where he is presently confined. (ECF No. 2 at 4.)  
28 Petitioner cannot afford the \$5.00 filing fee. Accordingly, the Court **GRANTS** Petitioner’s

1 motion for leave to proceed in forma pauperis and allows Petitioner to proceed in the  
2 above-referenced matter without being required to prepay fees or costs and without being  
3 required to post security.

### 4 **III. REQUEST FOR APPOINTMENT OF COUNSEL**

5 In a signed declaration dated May 1, 2017, Petitioner states that “[t]he habeas case  
6 is currently under submission for decision, which will come within ninety days of oral  
7 argument. At that point, the time for seeking federal habeas corpus review will begin  
8 running.” (ECF No. 1 at 3.) Petitioner states that: “I am submitting a request for counsel  
9 now in anticipation of this contingency,” and asserts that if his state petition is denied, he  
10 intends to file a federal habeas petition and needs the assistance of counsel to prepare and  
11 litigate a federal petition. *Id.* Petitioner also indicates that he has been advised that both  
12 his state appellate counsel and his state habeas counsel are unavailable to represent him in  
13 federal habeas proceedings and states that: “I am indigent and do not have the assets to  
14 retain an attorney to represent me in these federal habeas corpus proceedings.” *Id.*

15 On June 8, 2017, during the pendency of the instant request, the California Supreme  
16 Court issued an opinion discharging the order to show cause on the juror misconduct claim  
17 and stated that it would resolve the remaining claims in the state habeas petition by separate  
18 order. At present, the state docket does not indicate that any such separate order has been  
19 filed and the state court’s website reflects the case status as: “opinion issued.” (*See*  
20 [http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc\\_id=](http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1883040&doc_no=S151362)  
21 [1883040&doc\\_no=S151362](http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1883040&doc_no=S151362), last visited June 16, 2017.) The Ninth Circuit has held that  
22 “when . . . an appeal of a state criminal conviction is pending, a would-be petitioner must  
23 await the outcome of his appeal before his state remedies are exhausted.” *Sherwood v.*  
24 *Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983); *see also* 28 U.S.C. § 2254(b)-(c). As noted  
25 above, Petitioner’s direct appeal is long concluded, as the United States Supreme Court  
26 denied the petition for writ of certiorari in 2007. While Petitioner’s state habeas petition  
27 remains pending before the California Supreme Court, the Ninth Circuit has clarified that  
28 *Sherwood* applies only to pending direct appeals. *See Henderson v. Johnson*, 710 F.3d

1 872, 874 (9th Cir. 2013) (rejecting district court’s reliance on *Sherwood* to dismiss federal  
2 habeas action filed while state habeas petition was pending without allowing leave to  
3 amend or considering a stay, stating that “*Sherwood* stands for the proposition that a district  
4 court may not adjudicate a federal petition while a petitioner’s direct state appeal is  
5 pending.”).

6 The relevant federal statute, which provides for the appointment of counsel in capital  
7 habeas actions, simply states that: “In any post conviction proceeding under section 2254  
8 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any  
9 defendant who is or becomes financially unable to obtain adequate representation or  
10 investigative, expert, or other reasonably necessary services shall be entitled to the  
11 appointment of one or more attorneys and the furnishing of such other services in  
12 accordance with subsections (b) through (f).” 18 U.S.C. § 3599(a)(2). Meanwhile, this  
13 district’s local rules provide for the appointment of federal capital habeas counsel “at the  
14 earliest practicable time.” *See* CivLR HC.3(d)(1). Based on these considerations,  
15 Petitioner’s request for appointment of counsel appears reasonable and is therefore  
16 **GRANTED**.

#### 17 **IV. CONCLUSION AND ORDER**

18 For the reasons discussed above, the Court **GRANTS** Petitioner’s motion to proceed  
19 in forma pauperis and **GRANTS** Petitioner’s request for appointment of counsel. It is  
20 **HEREBY ORDERED** that this matter be referred to the Selection Board for the United  
21 States District Court, Southern District of California, for suggestion of one or more counsel  
22 to be appointed to represent Petitioner in his federal habeas corpus proceedings.

23 The Clerk of the Court shall serve a certified copy of this order on Petitioner Steven  
24 M. Bell; Attorney Anthony Dain; Attorney Miro F. Cizin, Habeas Corpus Resource Center;  
25 Respondent Ron Davis, Warden of San Quentin Prison; the Clerk of the San Diego County  
26 Superior Court; Xavier Becerra, Attorney General of the State of California; Lynne  
27 McGinnis, Deputy Attorney General of the State of California; Office of the District  
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1 Attorney of San Diego County; Joseph Schlesinger, California Appellate Project, San  
2 Francisco; and Elaine Alexander, Appellate Defenders, Inc.

3 **IT IS SO ORDERED.**

4 Dated: June 19, 2017

  
5 Hon. William Q. Hayes  
6 United States District Court

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