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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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MELONIE LYNN SHEPPARD,

Case No. 3:14-cv-00059-MMD-VPC

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Petitioner,

ORDER

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v.

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SHERYL FOSTER, et al.,

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Respondents.

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This habeas matter comes before the Court: (a) on petitioner's application to proceed *in forma pauperis* (dkt. no. 1); (b) for initial review of the petition under Rule 4 of the Rules Governing Section 2254 Cases; and (c) on a motion for appointment of counsel (dkt. no. 1-5) and motion to file excess pages (dkt. no. 1-4) submitted with the petition.

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I. PAUPER APPLICATION

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Petitioner did not attach sufficient financial attachments with the pauper application. Under 28 U.S.C. § 1915(a)(2) and Local Rules LSR1-1 through 1-3, a petitioner must: (a) use the Court's required pauper form; and (b) attach both a financial certificate executed by an authorized institutional officer and a statement of her inmate trust account for the prior six months. Petitioner did not attach a statement of her inmate trust account for the prior six (6) months. Moreover, the federal financial certificate submitted seeks to incorporate a financial certificate from an apparently state court form. Petitioner must use the Court's form in full, without incorporation of state court forms.

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1 The Court therefore will deny the pauper application without prejudice to the filing
2 of a properly completed application.

3 Meanwhile, as discussed further below, the Court finds that a provisional grant of
4 petitioner's motion for appointment of counsel is in the interests of justice, assuming
5 financial eligibility. The Court is proceeding with provisionally appointing counsel now so
6 that counsel can begin investigation and preparation as early as possible in the federal
7 case. However, petitioner still must timely either pay the filing fee or submit a properly-
8 completed pauper application. If petitioner fails to do so timely, the action will be
9 dismissed without further advance notice. If she fails to confirm her financial eligibility as
10 reflected by the current partial materials, the provisional appointment of counsel will not
11 be confirmed.

12 With these qualifications, the Court turns to the motion for appointment of
13 counsel.

14 **II. APPOINTMENT OF COUNSEL**

15 Petitioner Melonie Lynn Sheppard challenges her Nevada state conviction of,
16 *inter alia*, first degree murder with the use of a deadly weapon, on the basis of felony
17 murder in connection with a robbery. It appears from the information available that she
18 will be in her seventies before she possibly first could be released to a non-institutional
19 parole outside of a prison. The federal petition is untimely on its face, but petitioner
20 seeks to overcome state and federal procedural bars based upon a claim of alleged
21 actual innocence.

22 Against the backdrop of the foregoing strictly preliminary and non-definitive
23 review, the Court finds that appointment of counsel is in the interests of justice given:
24 (a) the lengthy sentence structure, under which petitioner will be in prison until at least
25 her seventies; (b) the potential number and complexity of the procedural and
26 substantive issues that may be presented; and (c) the likelihood that appointed counsel
27 will provide the Court with all potentially relevant materials, including a complete trial

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1 transcript, for consideration of petitioner's claim of actual innocence as a basis for
2 overcoming procedural bars.

3 The motion for appointment of counsel therefore will be provisionally granted,
4 subject to timely satisfaction of the filing fee requirement (via payment or a pauper
5 application) and confirmation of petitioner's financial eligibility for appointment of
6 counsel.

7 **III. MOTION TO FILE EXCESS PAGES**

8 Petitioner's motion (dkt. no. 1-4) to file excess pages will be granted to the extent
9 that the Court will direct the filing of the *pro se* petition as presented. The Court does not
10 address any deficiencies in the *pro se* original petition given that a counseled pleading
11 will be filed.¹

12 **IV. CONCLUSION**

13 It is therefore ordered that the application to proceed *in forma pauperis* (dkt. no.
14 1) is denied without prejudice. Petitioner shall have thirty (30) days within which to either
15 pay the filing fee or submit a properly completed pauper application. The action will be
16 dismissed without further advance notice if petitioner does not do so timely.

17 It is further ordered that the Clerk of Court shall file the petition.

18 It is further ordered that the Clerk shall file the motion to file excess pages (dkt.
19 no. 1-4) submitted with the petition, that the motion is granted to the extent that the
20 Court authorizes the filing of the *pro se* original petition without regard to any
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23 ¹The Court has not found where petitioner signed the original petition and further
24 verified the allegations of *the petition* in a declaration under penalty of perjury. The
25 papers on file include a signed affirmation that the petition does not contain any social
26 security number of any person. The papers further include a certificate of mailing along
27 with a declaration under penalty of perjury that *the information in the certificate of*
28 *mailing* is correct. See dkt. no. 1-2, at 89-90. Neither of those signed pages constitutes
either a signature of *the petition* or a declaration under penalty of perjury verifying the
allegations of *the petition*. To the extent that the timeliness of petitioner's claims and/or
relation back to the original petition potentially may be contingent upon the original
petition itself being both signed and verified, appointed counsel perhaps may consider
the advisability of correcting these particular deficiencies earlier rather than later.

1 deficiencies therein, and that the Clerk shall reflect the grant of the motion by this order
2 in the docket entry for the motion.

3 It is further ordered that the Clerk shall file the motion for appointment of counsel
4 (dkt. no. 1-5) submitted with the petition, that the motion is provisionally granted as per
5 the remaining provisions below, and that the Clerk shall reflect the provisional grant of
6 the motion by this order in the docket entry for the motion. The counsel appointed will
7 represent petitioner in all proceedings related to this matter, including any appeals or
8 *certiorari* proceedings, unless allowed to withdraw. The provisional grant of the motion
9 is subject to petitioner, within thirty (30) days of entry of this order: (a) paying the filing
10 fee or submitting a properly completed pauper application; and (b) if no pauper
11 application is filed, submitting a current account statement confirming her financial
12 eligibility for appointment of counsel.

13 It is further ordered that the Federal Public Defender shall be provisionally
14 appointed as counsel and shall have thirty (30) days to undertake direct representation
15 of petitioner or to indicate an inability to do so. If the Federal Public Defender is unable
16 to represent petitioner, the Court will appoint alternate counsel. A deadline for the filing
17 of an amended petition will be set after counsel has entered an appearance. The Court
18 anticipates setting the deadline, taking into account the discussion herein, for
19 approximately one hundred eighty (180) days from entry of the formal order of
20 appointment. Petitioner potentially also will be able to file a motion for a stay with the
21 amended petition if it includes unexhausted claims. Any deadline established and/or any
22 extension thereof will not signify any implied finding of a basis for tolling during the time
23 period established. Petitioner at all times remains responsible for calculating all
24 limitation periods and timely presenting claims.


25 It is further ordered, so that the respondents may be electronically served with
26 any papers filed through counsel, that the Clerk shall add Attorney General Catherine
27 Cortez Masto as counsel for respondents and shall make informal electronic service of
28 this order upon respondents by directing a notice of electronic filing to her.

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Respondents' counsel shall enter a notice of appearance within twenty-one (21) days of entry of this order, but no further response shall be required from respondents until further order of this Court.

The Clerk accordingly shall send a copy of this order to the *pro se* petitioner (along with a copy of the petition), the Nevada Attorney General, the Federal Public Defender, and the CJA Coordinator. The Clerk further shall regenerate notices of electronic filing of all prior filings herein to both the Nevada Attorney General and the Federal Public Defender.

DATED THIS 30th day of January 2014.


MIRANDA M. DU
UNITED STATES DISTRICT JUDGE