ALAN WILSON
ATTORNEY GENERAL

May 16, 2013

Brad Keith Sigmon, SK# 6008
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

RE: Brad Keith Sigmon v. William R. Byars, Jr., Commissioner, SCDC
C/A No. 8:13-mc-00206-RBH-JDA

Dear Mr. Sigmon:

Enclosed please find Respondent's Return to Motion for Stay of Execution and Motion to Appoint Counsel electronically filed with the Court today. Also enclosed is notice of electronic filing.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv

cc: The Honorable Daniel E. Shearouse, Clerk, South Carolina Supreme Court
William H. Ehlies, Esq.
Teresa L. Norris, Esq.

Responses and Replies

8:13-mc-00206-RBH-JDA
Sigmon v. Byars

DEATH,JDA-Inmate

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered by Brown, Melody on 5/16/2013 at 3:00 PM EDT and filed on 5/16/2013

Case Name: Sigmon v. Byars
Case Number: 8:13-mc-00206-RBH-JDA
Filer: William R Byars, Jr
Document Number: 9

Docket Text:
RESPONSE to Motion re [1] MOTION to Stay MOTION to Appoint Counsel Response filed by William R Byars, Jr.Reply to Response to Motion due by 5/28/2013 (Attachments: # (1) Certificate of Service)(Brown, Melody)

8:13-mc-00206-RBH-JDA Notice has been electronically mailed to:

8:13-mc-00206-RBH-JDA Notice will not be electronically mailed to:

Brad Keith Sigmon
SK#6008
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=5/16/2013] [FileNumber=5573618-0] [5d2b39ebb779e1ac28d6d4776995b62dd65aa5e57eebc4e7e9873b58a4dc24046ac 004f760c6dc3a8e86304ca14fb6b7a3a8a940818c96237b88a0d1609f8a60]]
Document description: Certificate of Service
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=5/16/2013] [FileNumber=5573618-1] [6af77edb6afb8705135fba4489c0d364b4f11db49a396ce73b8fc3aa108979d57f2 24b16890ad55cdbb247444c81adf6886d3ed710c234bc1dd266045e775501]]

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

BRAD KEITH SIGMON, SK #6008,	)	**C/A No. 8:13-mc-00206-RBH-JDA**
	)	**(Capital Case)**
Petitioner,	)	
vs.	)	
	)	**RETURN TO MOTION FOR STAY**
WILLIAM R. BYARS, JR., Commissioner,	)	**OF EXECUTION AND**
South Carolina Department of Corrections,	)	**APPOINTMENT OF COUNSEL**
	)	
Respondent.	)	
	)	

Respondent, through undersigned counsel, hereby makes a Response to the Motion for Stay of Execution and Appointment of Counsel received on May 14, 2013.[1] Petitioner is not currently scheduled for execution and likely will not be scheduled for execution in light of the pending motion for stay filed in this Court on May 10, 2013.[2] However, Petitioner has completed his state appeals, and issuance of the execution notice is the next step in the state process. Therefore, and assuming an *in forma pauperis* application is accepted by this Court, (see Motion, p. 1 n. 2), Respondent has no objection to either a stay or appointment of counsel. In support of his position, Respondent would respectfully show the Court:

STATEMENT OF CUSTODY AND GENERAL EXHAUSTION

Petitioner, Brad Keith Sigmon, is presently incarcerated as a safekeeper at Lieber

[1] Undersigned counsel received notice of the filing on Monday, May 13, 2013, but did not receive an accessible copy of the petition and attachments until Tuesday, May 14, 2013.

[2] Undersigned counsel is informed and believes the Supreme Court of South Carolina has notice of the pending Motion for Stay. Further, undersigned counsel has been informed by the Clerk's Office of the Supreme Court of South Carolina that no action is pending to send an execution notice in light of motion for stay filed in this Court.

Correctional Institution. A jury convicted Petitioner in July 2002 of murder and burglary first degree. He was sentenced to death for the murders. Since then, Petitioner has generally exhausted his available state remedies having pursued and completed both a direct appeal and a post-conviction relief action.[3] *See generally Stewart v. Warden of Lieber Corr. Inst.*, 701 F. Supp. 2d 785, 790 (D.S.C. 2010), *appeal dismissed*, 412 F. App'x. 633 (4th Cir. 2011) ("To exhaust a claim in state court, a person in custody has two primary means of attacking his conviction: filing a direct appeal and/or filing an application for relief under the South Carolina Post Conviction Procedure Act"). He now seeks a stay of execution from this Court in order to pursue federal habeas relief.

TIMELINESS

Petitioner is not presently barred by the statute of limitations in seeking habeas relief. A person held in custody under a state court judgment may challenge the legality of that custody in federal court through a habeas corpus action filed pursuant to 28 U.S.C. § 2254. 28 U.S.C. § 2244 (d)(1) imposes a one-year limitation period in actions filed pursuant to 28 U.S.C. § 2254.[4] The limitations period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

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[3] Respondent simply refers to the process and makes no comment on whether any particular issue has been properly exhausted and available for review on the merits.

[4] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), effective April 24, 1996, amended Chapter 153 of Title 28, concerning procedure for federal habeas generally, and added Chapter 154, with special procedures for capital cases. These provisions, however, are applicable only in states that meet certain eligibility requirements. South Carolina is presently waiting for the United States Department of Justice to implement regulations pursuant to 28 U.S.C. Section 2265(b), as amended 2005, establishing criteria for certification. Lacking these regulations, the State has been unable to seek certification by the Attorney General of the United States. Proposed rules were offered in February 2012, but have not yet been acted upon. Thus, Respondent relies on the general time limits in 28 U.S.C. § 2244(d).

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). However, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted ...." 28 U.S.C. § 2244 (d)(2).

Petitioner's convictions and sentence became final on June 26, 2006, when the Supreme Court of the United States denied certiorari review in the direct appeal action. Petitioner's federal time began to run thereafter. The time was tolled with the filing of his PCR application on October 13, 2006. At that time only one hundred and nine (109) days of time not tolled by the statute had lapsed. Petitioner and Respondent agree that one hundred and nine (109) days lapsed between finality and the PCR filing. (See Motion, p. 2).

Further, Petitioner's federal time limits did not begin to run again (at the earliest) until the Supreme Court of South Carolina issued the Order denying rehearing and substituting the new opinion on May 8, 2013.[5] Thus, Petitioner still has ample time in which to file a timely action.

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[5] *See* 28 U.S.C. § 2244 (d) (2) ("The time during which a properly filed application for State post-conviction ... *is pending* shall not be counted...."') (emphasis added). *Cf. Gonzalez v. Thaler*, 565 U.S. ___, ___, 132 S.Ct. 641, 654 (2012) (rejecting use of remittitur dates in applying Section (d) (1) (A)); *Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999) (rejecting "gap" theory in collateral actions: "We therefore hold that under § 2244(d)(2) the entire period of state post-conviction proceedings, from initial filing *to final disposition by the highest state court (whether decision on the merits*, denial of certiorari, or expiration of the period of time to seek further appellate review), is tolled...") (emphasis added). *But see Atchison v. Warden of Broad*

REQUEST FOR STAY

Petitioner admits there is no execution notice to stay. (Motion, p. 1). Petitioner essentially requests the issuance of the execution notice be stayed.[6] He also seeks appointment of counsel pursuant to 18 U.S.C. § 3599. (Motion, p. 2). Respondent construes the request as a request for stay of state proceedings pursuant to 28 U.S.C. § 2251 (a)(3), which provides:

> ... If a State prisoner sentenced to death applies for appointment of counsel pursuant to section 3599 (a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, but such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied.

See also McFarland v. Scott, 512 U.S. 849, 858 (1994) ("...once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution.").

River Correctional Inst., 2011 WL 2728469, * 3 (D.S.C. 2011) ("The period of limitations was thereafter tolled during the pendency of Petitioner's APCR, until the issuance of the Remittitur"). In this case, the Supreme Court of South Carolina sent the remittitur to Greenville County on May 13, 2013, thus, there is only a difference of five (5) days. Respondent would put Petitioner on notice, however, that these five (5) days may be counted against him.

[6] A stay issued under Section 2251 renders void "any such proceeding in any State court or by or under the authority of any State" which may be taken after issuance of the stay. 28 U.S.C. § 2251 (b). In this instance, the stay would essentially prevent the issuance of the execution notice – an automatic procedure under state law after completion of the appeal. *See In re Stays of Execution in Capital Cases*, 321 S.C. at 544-45, 471 S.E.2d at 140 ("If the sentence of death is upheld by this Court, the Clerk of this Court shall automatically issue the execution notice when the remittitur is sent to the circuit court."). See also S.C. Code § 17-25-370 ("... when the remittitur is sent down or the appeal is dismissed or abandoned, [the Clerk] shall notify the Commissioner of the prison system ... of the final disposition of such appeal and, on the fourth Friday after the receipt of such notice the sentence appealed from shall be duly carried out as provided by law in such cases, unless stayed by order of the Supreme Court or respite or commutation of the Governor."). As noted above, the Supreme Court of South Carolina is aware of the motion for stay filed in this Court and has not issued the notice.

Consistent with the orders entered in prior South Carolina death penalty actions before this District Court, Respondent does not oppose a stay in this matter. Such requests are generally deemed appropriate. *See, e.g., In re Hearn*, 376 F.3d 447, 457-58 (5th Cir. 2004) (stay of execution appropriate because defendant had filed petition for appointment of counsel); *Brown v. Vasquez*, 952 F.2d 1164, 1168 (9th Cir. 1991) (stay of execution issued because, while petitioner had not yet filed petition for writ of habeas, he had filed petition seeking appointment of counsel to do so). However, such a stay is limited to ninety (90) days. 28 U.S.C. 2251 (a) (3). Therefore, this Court should order the petition be filed within that time and allow Petitioner additional time to seek a further stay under the provisions of 28 U.S.C. 2251 (a)(1). *See, for example, Gray v. Kelly*, 131 S.Ct. 2956 (2011) (denying request to Circuit Justice to exercise "supervisory authority" over District Court and stay the District Court order, where District Court "stayed the execution of his death sentence for 90 days pursuant to § 2251 (a) (3)," and directed that petition be filed within that time); *Koehler v. Horn*, 2000 WL 1839137, * 3 (M.D.Pa. 2000) ("Petitioner will be granted a 90–day stay of execution in which to prepare his habeas corpus petition.").

APPOINTMENT OF COUNSEL

Petitioner requests the appointment of Teresa L. Norris, Esq., and William H. Ehlies, Esq. (Motion, pp. 4-5). Respondent takes no position on who should be appointed in this matter. Respondent acknowledges that 28 U.S.C. 3599 (a)(2) provides for the appointment of "one or more attorneys."[7] Respondent submits it would appear, having been Petitioner's PCR counsel in the state

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[7] Section 3599 (a)(2) provides: "In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment

proceedings, that Ms. Norris and Mr. Ehlies would have knowledge of both the breadth and fruits of the trial investigation and the subsequent PCR investigation. Thus, both counsel should have a familiarity with the case as a whole which would likely allow for more efficient representation in the anticipated additional collateral challenge to the same state judgment.

Within the motion for stay and appointment, Petitioner also asserts that he is entitled "to assistance in identifying, developing, and pleading all available claims for relief, including the record-based claims already raised in the state trial and appeal proceedings, as well as the claims not raised in those proceedings because they are derived from non-record facts which require access to investigative and expert resources." (Motion, p. 3). Respondent acknowledges that no request for "investigative and expert resources" has been made as counsel has not yet been appointed. See 28 U.S.C. § 3599 (f) ("... the court may authorize the defendant's attorneys to obtain such services..."). However, based on the assertion that counsel intends to request such services for issues raised and those not raised in the state proceedings, Respondent would point out that Petitioner's statement appears to reflects an incorrect standard of review and scope of the habeas action. "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1398 (2011). *See also Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) ("The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable."); *Bell v. Cone*, 535 U.S. 685, 693 (2002) ("The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state

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of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)."

prisoner applications in order to prevent federal habeas "retrials" and to ensure that state-court convictions are given effect to the extent possible under law."). Further, 28 U.S.C. § 2254 (e)(2) places great restrictions on presentation of new facts: "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court *shall not* hold an evidentiary hearing on the claim unless the applicant shows that... the claim relies on... a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; *or* ... a factual predicate that could not have been previously discovered through the exercise of due diligence; *and* ... the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." (emphasis added). The District Court in the Eastern of District of Virginia, in denying a request for funds for a mitigation specialist in a capital federal habeas action, highlighted the restricted review under AEDPA:

> AEDPA forbids petitioner from using federal habeas review to obtain a second bite at the ineffectiveness apple by presenting mitigating evidence that was not presented to the state habeas court. In other words, a petitioner has an initial opportunity to discover and present mitigation evidence at trial, and then on state habeas review, he has another opportunity to present additional mitigation evidence in support of an ineffective assistance of counsel claim. But AEDPA does not allow a petitioner a third chance to discover new mitigation evidence on federal habeas review. So long as the Supreme Court of Virginia reasonably determined the prejudice issue presented to it, no writ will issue. Put another way, § 2254(d)(1) bars federal habeas relief in cases where the state habeas court reasonably applied *Strickland* to the facts before it, *even if* a subsequent investigation reveals extensive mitigating evidence that might have undermined confidence in the outcome at sentencing had the evidence been timely presented to the state habeas court. The opposite conclusion would effectively return courts to the pre-AEDPA review scheme. ...

Powell v. Kelly, 492 F.Supp.2d 552, 559 -560 (E.D.Va. 2007). *Cf. Fautenberry v. Mitchell*, 572 F.3d 267, 269-270 (6th Cir. 2009) (finding no abuse of discretion in the District Court's decision to deny

June 2009 funding request for a "neuropsychologist to assist his attorney with the preparation of his state clemency petition" where petitioner failed to show prior "comprehensive neuropsychological assessment" from 1996 was somehow "incomplete, outdated, or unreliable" given that "Fautenberry advanced no evidence from which the district court could find that Dr. Gelbort's evaluation would not be duplicative of information already available ..."). Thus, Respondent admits the possibility of funding is present, but notes that restrictions may apply in this context.[8]

CONCLUSION

WHEREFORE, having made Return, Respondent requests that this Court issue a limited stay pursuant to the provisions of 28 U.S.C. § 2251 (a)(3). After appointment of counsel, the stay may continue for up to ninety (90) days to provide for the filing of a petition. 28 U.S.C. § 2251 (a) (3). Respondent requests the Court order that the petition for habeas corpus be filed within the period of the stay, and any new motion for stay be requested under 28 U.S.C. § 2251 (1).

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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[8] Respondent also notes that the funding section relied upon is for all defendants who face the death penalty. Thus, Section 3599 is written to apply to both trial and post conviction relief proceedings. It does not follow that the funding provision for habeas counsel somehow expands the narrow review dictated by Section 2254. *Cf. Ryan v. Gonzales*, 133 S.Ct. 696, 702 (2013) (finding funding provision "guarantees federal habeas petitioners on death row the right to federally funded counsel," and other funding for "investigative, expert, or other services" when "reasonably necessary for the representation of the defendant," but, based on review of the language in the funding statute, it did not provide any basis for stays to be entered "when habeas petitioners are found incompetent."

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

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Senior Assistant Attorney General
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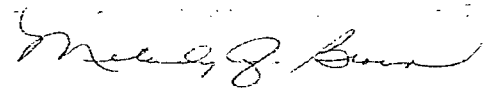

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May 16, 2013.
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