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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

S.C. Supreme Court

JOHNNY BENNETT)
)
) *Petitioner,*)
)
) v.)
) BRYAN P. STIRLING, Commissioner,)
) South Carolina Department of Corrections,)
) and JOSEPH MCFADDEN, Warden,)
) Lieber Correctional Institution)
)
) *Respondents.*)

CIVIL ACTION NO. 2:13-mc-447-RMG-BHH

MOTION FOR STAY OF EXECUTION AND APPOINTMENT OF COUNSEL

THIS IS A CAPITAL CASE.

Johnny Bennett is an indigent prisoner under sentence of death imposed by the Lexington County, South Carolina, Court of General Sessions. Through undersigned counsel, Mr. Bennett requests that this Court stay his imminent execution¹ and appoint counsel to represent him in the preparation, presentation, and litigation of his first federal petition for a writ of habeas corpus. Specifically, Mr. Bennett requests that this Court appoint John H. Blume and Lindsey S. Vann of Columbia, South Carolina to represent him.² In support of this Motion, counsel submit the following facts and argument.³

¹ While an execution date for Mr. Bennett has not been scheduled, it is nevertheless imminent following the Supreme Court of South Carolina's denial of his petition for writ of certiorari, seeking review of the denial of post-conviction relief. The Supreme Court of South Carolina denied certiorari on November 7, 2013 and Mr. Bennett's execution will be scheduled for the fourth Friday following the Supreme Court of South Carolina's issuance of the remittitur to the circuit court. S.C. Code § 17-25-370; *In re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). In order to proceed expeditiously, undersigned counsel submits this motion on Mr. Bennett's behalf in anticipation of issuance of the remittitur and an execution warrant.

² The attorney most recently representing Mr. Bennett on appeal of the denial of state post-conviction relief, Robert Lominack, no longer practices law. Mr. Bennett, therefore, requests appointment of Mr. Blume and Ms. Vann, despite the fact they did not represent him in his state post-conviction proceedings.

³ Mr. Bennett has completed an Application to Proceed Without Payment of Fees and files it simultaneously with this motion, along with a Motion to Proceed *In Forma Pauperis*, in accordance with Rule 3(a) of the Rules Governing Section 2254 Cases.

I. RELEVANT PROCEDURAL HISTORY.

Mr. Bennett was convicted of murder, kidnapping, armed robbery, and grand larceny in Lexington County, South Carolina in 1995. Mr. Bennett was subsequently sentenced to death. On direct appeal, the Supreme Court of South Carolina upheld Mr. Bennett's conviction, but reversed his death sentence. *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997). In 2000, Mr. Bennett was again sentenced to death in the Lexington County Court of General Sessions. The Supreme Court of South Carolina affirmed Mr. Bennett's 2000 death sentence on June 26, 2006. *State v. Bennett*, 369 S.C. 219, 632 S.E.2d 281 (2006). The Supreme Court of the United States denied certiorari on November 27, 2006. *Bennett v. South Carolina*, 549 U.S. 1062 (2006). Mr. Bennett's initial application for post-conviction relief was filed on September 7, 2006. The post-conviction court denied post-conviction relief, and the Supreme Court of South Carolina denied Mr. Bennett's petition for a writ of certiorari to review the lower court's denial on November 7, 2013.⁴

At that time, zero (0) days had elapsed on the one year limitations period for filing a federal habeas corpus petition as prescribed by 28 U.S.C. § 2244(d). None of the limitations period for filing a federal habeas petition had elapsed because the application for state post-conviction relief was filed prior to the Supreme Court of the United States' denial of the petition for writ of certiorari on Mr. Bennett's direct appeal. *See* 28 U.S.C. § 2244(d)(2) ("The 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 toward any period of limitation under this subsection"); *see also Artuz v. Bennett*, 531 U.S. 4 (2000) (construing the

⁴ Pursuant to *In re: Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), following denial of a petition for a writ of certiorari to review the lower court's denial of post-conviction relief, the Clerk of the South Carolina Supreme Court "shall issue an execution notice when the remittitur is sent to the circuit court." *Id.* at 547, 471 S.E.2d at 141.

statutory phrase “properly filed application”). The 365 days remaining on Mr. Bennett’s limitations period began to run following the South Carolina Supreme Court’s November 7, 2013, denial of his petition for writ of certiorari. Thus, Mr. Bennett has until November 7, 2014 to file his federal habeas corpus petition.

II. THE COURT MUST APPOINT COUNSEL TO REPRESENT MR. BENNETT IN HIS FIRST FEDERAL HABEAS CORPUS PROCEEDING.

Pursuant to 18 U.S.C. § 3599, indigent death-sentenced prisoners are “entitled to the appointment of one or more attorneys” in order to pursue federal habeas corpus remedies.⁵ The right to counsel conferred by § 3559 attaches prior to the filing of a prisoner’s habeas petition. As the Supreme Court has explained, absent this pre-petition right to counsel, condemned prisoners would not have meaningful access to the remedy of habeas corpus:

Congress’ provision of a right to counsel under [§3559] reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of “the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.” An attorney’s assistance prior to the filing of a capital defendant’s habeas corpus petition is crucial because “[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.”

McFarland v. Scott, 512 U.S. 849, 855-856 (1994) (quoting *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., joined by O’Connor, J., concurring in the judgment)).

In construing § 3599 to require appointment of counsel prior to the filing of the petition, the Supreme Court explained that Congress provided for investigative and expert resources to be made available to counsel upon request and a showing of need. Since these services “may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and

⁵ This statutory provision was formerly located at 21 U.S.C. § 848(q)(4)(B). Effective October 12, 2008, Congress moved this provision to 18 U.S.C. § 3599.

their factual bases are researched and identified,” Congress clearly intended counsel to be appointed prior to the filing of the habeas petition. *McFarland*, 512 U.S. at 855. It is thus plain that the right to counsel conferred by § 3599 is a right 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.

Moreover, “the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant’s habeas claims. Where this opportunity is not afforded, ‘[a]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.’” *McFarland*, 512 U.S. at 858 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983)). Accordingly, once a capital defendant invokes his right to appointed counsel, this Court has jurisdiction to enter a stay of execution. *Id.*; see also *id.* at 857 (“Even if the District Court had granted *McFarland*’s motion for appointment of counsel and had found an attorney to represent him, this appointment would have been meaningless unless *McFarland*’s execution also was stayed.”).

The appointment provision of 18 U.S.C. § 3599 requires appointment of at least one attorney who has been admitted to practice in the court of appeals for not less than five years and who has not less than three years experience in the handling of appeals in that court in felony cases. § 3599(b). Alternatively, for good cause, this Court may appoint counsel “whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of litigation.” § 3599(d).

Undersigned counsel, John H. Blume, received a B.A. from the University of Chapel Hill (1978), a M. Div. from Yale Divinity School (1982), and a J.D. from Yale Law School (1984). After graduating from law school, he clerked for the Honorable Thomas A. Clark, United States Court of Appeals for the Eleventh Circuit, and was admitted to the South Carolina Bar in 1985. Since that time, he has been an Associate at a law firm in Charleston, South Carolina (McClain & Derfner), a partner in a Columbia, South Carolina law firm (Bruck & Blume), the Executive Director of the South Carolina Death Penalty Resource Center, and, since 1997, a Professor of Law at Cornell University where he also serves as Director of the Cornell Death Penalty Project. Mr. Blume has argued eight capital cases in the Supreme Court of the United States and numerous cases in the federal courts of appeals, including arguments before the Second, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits. He represents or has represented more than seventy-five death row inmates or persons facing the death penalty at trial, on direct appeal, and in state and federal post-conviction proceedings in South Carolina, as well as in Alabama, California, Georgia, Illinois, Texas, and Virginia. He has been appointed to represent indigent death sentence inmates in the District of South Carolina on multiple occasions from 1986 to the present.

Lindsey S. Vann is an attorney at the Death Penalty Resource & Defense Center in Columbia, South Carolina. The Death Penalty Resource & Defense Center was formerly known as the Center for Capital Litigation, and was designated by this Court as a Community Defender Organization authorized to provide representation, assistance, information and other matters related to federal death penalty habeas corpus cases. *See In re: Amendments to the Plan on the United States District Court for the District of South Carolina for Implementing the Criminal Justice Act*, filed May 25, 2010. Ms. Vann is a 2012 graduate of the University of Richmond

School of Law. She is licensed to practice law and admitted to the bar in Virginia, the District Courts for the Eastern and Western Districts of Virginia, and the Fourth Circuit Court of Appeals. After law school, she served as a law clerk to the Honorable James R. Spencer, United State District Court for the Eastern District of Virginia. Ms. Vann moved to South Carolina in August of 2013 and will be admitted to practice in the Supreme Court of South Carolina on November 18, 2013.⁶ She is in the process of completing the requirements listed in Rule 403(b) of the South Carolina Appellate Court Rules, but she has not yet completed all of the required trial experiences.⁷ Thus, in conjunction with this Motion for Stay of Execution and Appointment of Counsel, she has filed the appropriate forms and fee for admission to this Court pro hac vice.⁸ Mr. Blume will comply with the requirements for local counsel.

Ms. Vann has prior experience in post-conviction representation of death sentenced inmates in federal court through prior work with the Office of the Federal Public Defender for the Eastern District of Virginia and the Virginia Capital Representation Resource Center. Through her current work at the Death Penalty Resource & Defense Center, she is assisting in the representation of two death-sentenced inmates in South Carolina, one in federal habeas proceedings and the other in state post-conviction proceedings. She has also received significant

⁶ On October, 25, 2013, Ms. Vann was notified that she passed the July 2013 South Carolina Bar Examination. The swearing-in ceremony before the Supreme Court of South Carolina is scheduled for November 18, 2013.

⁷ Upon conferring with the Supreme Court of South Carolina, Ms. Vann determined that she must complete the Rule 403(b) trial experiences despite spending a year as a judicial law clerk for a federal judge in the Eastern District of Virginia. If she had served as a judicial law clerk for a judge within South Carolina, she would have already completed her required trial experiences, pursuant to Rule 403(h) and her observation of an administrative proceeding, which she completed on October 31, 2013. Ms. Vann has already completed two of the required four trial experiences in South Carolina, and she anticipates completing the final Rule 403(b) requirements by the end of the year.

⁸ Ms. Vann will notify this Court as soon as her completed Rule 403 certificate has been filed and approved. She will then move for admission to the bar of the this Court.

training regarding federal habeas through the Habeas Assistance & Training Counsel Project's *National Habeas Corpus Seminar*, in August of 2013, and *National Seminar on the Development and Integration of Mitigation Evidence*, in April of 2013. Ms. Vann is a member in good standing of the Virginia State Bar, and the bars of the Supreme Court of Virginia, the United States District Court for the Eastern District of Virginia, the United States District Court for the Western District of Virginia, and the United States Court of Appeals for the Fourth Circuit.

On November 13, 2013, Ms. Vann met with Mr. Bennett at the request of his former counsel, Robert Lominack. Mr. Bennett indicated that he desires to pursue federal habeas relief and requests Mr. Blume and Ms. Vann be appointed to represent him in the federal court proceedings, given Mr. Lominack's unavailability.

III. CONCLUSION.

Wherefore, for the foregoing reasons, this Court should enter an order staying Mr. Bennett's imminent execution and appointing John H. Blume and Lindsey S. Vann to assist Mr. Bennett in the preparation and filing of a timely petition for habeas relief.

Respectfully submitted,

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BY: s/John H. Blume

November 14, 2013.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Johnny Bennett, #5023,) C/A No. 2:13-MC-447-RMG-BHH
) (Capital Case)
)
Petitioner,)
)
vs.) RETURN TO MOTION FOR STAY
) OF EXECUTION AND
) APPOINTMENT OF COUNSEL
Bryan P. Stirling, Commissioner, South)
Carolina Department of Corrections, and)
Joseph McFadden, Warden, Lieber)
Correctional Institution,)
)
)
Respondents.)
_____)

Respondents, above named, through undersigned counsel, hereby make a Response to the Motion for Stay of Execution and Appointment of Counsel filed on November 14, 2013. 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 November 14, 2013. 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. 3), Respondents have no objection to either a stay or appointment of counsel. In support of their position, Respondents would respectfully show the Court:

STATEMENT OF CUSTODY AND GENERAL EXHAUSTION

Petitioner, Johnny Olandis Bennett ("Petitioner"), is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his Lexington County convictions and death sentence for the murder, armed robbery, kidnapping, and grand larceny of Benton Smith. The Lexington County

Grand Jury originally indicted Petitioner during the March 1991 Term of Court. That indictment was nolle prossed by the State due to errors contained in the indictment. Petitioner was subsequently re-indicted during the September 1993 term of court for murder, kidnapping, armed robbery, and grand larceny (1993-GS-32-2354). In March 1993, the State served Petitioner with a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation.

On October 9-18, 1995, Petitioner received a jury trial before the Honorable Ralph King Anderson, Jr. At trial, Petitioner was represented by Wayne Floyd, Esquire, and Pat McWhirter, Esquire. The jury convicted him on all charges and imposed a death sentence following a separate sentencing proceeding.

A timely Notice of Appeal was served and filed. On appeal, Daniel T. Stacey, Esquire, Chief Attorney of the South Carolina Office of Appellate Defense, represented Petitioner in his first appeal. Senior Assistant Attorney General William Edgar Salter, III, Esquire, represented the State. On August 4, 1997, Applicant filed his Final Brief of Appellant. The State also filed its Final Brief of Respondent on August 4, 1997. Oral arguments were heard on October 7, 1997. The South Carolina Supreme Court affirmed Petitioner's convictions, but reversed his death sentence and ordered a new sentencing trial in a published Opinion. State v. Bennett, 328 SC 251, 493 S.E.2d 845 (1997) (Bennett I).

Following motions hearings on June 30, 2000, Petitioner received a new sentencing proceeding before the Honorable Marc H. Westbrook and a jury on July 10 – 16, 2000. Wayne Floyd, Esquire, and Hervery B.O. Young, Esquire, represented

Petitioner at trial. Eleventh Circuit Solicitor Donald V. Myers, Deputy Solicitor Dayton Riddle, and Assistant Solicitor Shawn Graham prosecuted the case.

The jury found the statutory aggravating circumstances that the murder was committed while in commission of a robbery while armed with a deadly weapon; that the murder was committed while in the commission of larceny while armed with a deadly weapon; that the murder was committed while in the commission of kidnapping; and that the murder was committed while in the commission of physical torture. S.C. Code Ann. §16-3-20(C)(a)(1)(b), (d)-(e) & (h) (Supp. 2005). The jury recommended the death penalty, and Judge Westbrook sentenced Petitioner to death for murder. Judge Westbrook imposed a thirty year concurrent sentence for the armed robbery conviction; a five year concurrent sentence for the grand larceny of a motor vehicle conviction; and a thirty-year sentence for kidnapping, which was subsumed by the murder conviction.

Petitioner timely served and filed a Notice of Appeal. Assistant Appellate Defenders Robert M. Dudek and Aileen P. Clare represented Petitioner before the South Carolina Supreme Court. On January 30, 2006, Petitioner filed a Final Brief of Appellant. The State filed the Final Brief of Respondent on January 10, 2006. Petitioner also filed a Final Reply Brief of Appellant on January 30, 2006.

Following oral arguments, this Court affirmed Petitioner's death sentence in a published Opinion filed on June 26, 2006. State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006). The Court also conducted the proportionality review required by S.C. Code Ann. § 16-3-25 (2003) and concluded that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor.

Petitioner then filed a Petition for Stay of Execution, pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could file a Petition for Writ of Certiorari in the United States Supreme Court. The State filed a July 11, 2006 letter in lieu of a Return to the Petition for Stay. The Remittitur was sent to the Lexington County Clerk of Court on July 12, 2006; and the South Carolina Supreme Court granted a stay of execution in an Order filed on July 20, 2006.

Assistant Appellate Defenders Robert M. Dudek and Aileen P. Clare represented Petitioner in the United States Supreme Court. Bennett filed a Petition for Writ of Certiorari on September 22, 2006 (Docket No. 06-6780). The State filed a Brief in Opposition on October 27, 2006. The United States Supreme Court denied certiorari on November 27, 2006. Bennett v. South Carolina, 549 U.S. 1061 (2006). Petitioner also filed his initial Application for Post-Conviction Relief (PCR) on September 7, 2006.

On October 19, 2006, The State made a Return to the Application filed on September 7, 2006. On April 1, 2008, Petitioner filed his First Amended Application for Post-Conviction Relief. Petitioner thereafter filed his Second Amended Application for Post-Conviction Relief (PCR) dated April 4, 2008. The State made its Return thereto on May 1, 2008.

Evidentiary hearings were held before the Honorable James R. Barber, III, Circuit Court Judge on May 27, 2008, and July 11, 2008. Petitioner was present at the first hearing, and he waived his presence at the second hearing. During his post-conviction relief action, Petitioner was represented by Robert Lominack, Esquire, and Derek Enderlin, Esquire. Senior Assistant Attorney General William Edgar Salter, III and Assistant Attorney General Alphonso Simon Jr. represented the State. After the

evidentiary hearing, Petitioner submitted a post-trial memorandum, and the State submitted a proposed order. Post-hearing arguments were heard by Judge Barber on February 17, 2009. Subsequent to the arguments on the briefing, Petitioner submitted a proposed order. On April 3, 2009, the PCR Court filed its Order of Dismissal.

Petitioner filed a Motion to Alter or Amend Judgment on April 17, 2009. The State filed a Return to the Motion. The PCR Court filed its Order Denying Applicant's Motion to Alter or Amend Judgment on October 1, 2009. On that same date, the PCR Court also filed its Amended Order of Dismissal.

Petitioner timely filed a Notice of Appeal. He subsequently filed a Petition for Writ of Certiorari on October 7, 2010. The State filed its Return to the Petition on January 18, 2010. By Order filed by the South Carolina Supreme Court on November 7, 2013, the Petition for Writ of Certiorari was denied.

Altogether, Petitioner has generally exhausted his available state remedies having pursued and completed both a direct appeal and a post-conviction relief action.¹ 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").

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

¹ Respondents simply refer to the process and make no comment on whether any particular issue has been properly exhausted and available for review on the merits.

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. 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;
- (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 November 27, 2006, when the Supreme Court of the United States denied certiorari review in the direct appeal action. The statute of limitations did not begin to run at that time as Petitioner had filed his Application for Post-Conviction Relief before his conviction became final. Petitioner and Respondents agree that zero days lapsed between finality of his convictions and sentences 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 the petition for writ

of certiorari in his appeal of his post-conviction relief action on November 7, 2013.² Thus, Petitioner still has ample time in which to file a timely action.

REQUEST FOR STAY

Petitioner admits there is no execution notice to stay. (Motion, p. 1, n. 1). Petitioner essentially requests the issuance of the execution notice be stayed.³ He also seeks appointment of counsel pursuant to 18 U.S.C. § 3599. (Motion, p. 3). Respondents construe 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.

² 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 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”).

³ 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.”).

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.”). Consistent with the orders entered in prior South Carolina death penalty actions before this District Court, Respondents do 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.”); Sigmon v. Byars, C/A No. Misc. No. 8:13-206-RBH-JDA, Docket Entry #17, at p. 4 (D.S.C. May 23, 2013)(“This Court finds that Petitioner should be granted a stay of execution for ninety (90) days from the date counsel is appointed as prescribed by 28 U.S.C. § 2251(a)(3). Further, within the ninety (90) day stay of execution, Petitioner should be required to file the habeas petition.”).

APPOINTMENT OF COUNSEL

Petitioner requests the appointment of John H. Blume, Esquire, and Lindsay S. Vann, Esquire. (Motion, pp. 3-7). Respondents take no position on who should be appointed in this matter. Respondents acknowledge that 28 U.S.C. 3599(a)(2) provides for the appointment of "one or more attorneys."

Respondents do not oppose the appointment of any individual attorney, assuming that Petitioner satisfies the *in forma pauperis* requirements. Respondents also take no position on who should be appointed in this matter, as long as: (1) anyone appointed satisfies the qualifications set forth in 18 U.S.C. § 3599(c), which requires that attorneys appointed to capital habeas cases have both five years' membership in the bar of the Fourth Circuit, as well as three years' experience in handling appeals in felony cases, or (2) this Court finds qualification appropriate under 18 U.S.C. § 3599(d), which allows the Court "for good cause, [to] appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation". Cf. 28 U.S.C. § 2261(e) ("...limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal postconviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings").

In at least one reported opinion, a capital defendant raised the claim that 18 U.S.C. § 3599(d) only means that "another attorney" can be appointed in addition to one who meets the statutory qualifications under 18 U.S.C. § 3599(c), and thus he was

denied his statutory rights when his counsel did not have the requisite five and three years' experience. In re Lindsey, 875 F.2d 1502 (11th Cir. 1989) (addressing the predecessor statute to 18 U.S.C. § 3599, which reads the same). Lindsey reasoned, however, that the "good cause" provision in 18 U.S.C. § 3599(d) allowed appointment of generally experienced counsel in lieu of one who met the specific qualifications of 3599(c), based on the "another attorney" language and the legislative history. Other orders have similarly qualified counsel under § 3599(d); this has been typically done where counsel had experience in other circuits, where counsel already had worked on the case, or where one counsel did meet the qualifications.

It is important to note, again, that Respondents have no desire to interject in Petitioner's attorney-client relationship or to seek or oppose any particular attorney as counsel for Petitioner. Respondents only point out these issues to ensure that Petitioner receives any statutory rights he has to qualified appointed counsel, and to ensure that the current process is not later impeded or undone due to a later claim that Petitioner was unaware of these issues and did not receive the benefit of any rights he has under 18 U.S.C. § 3599. It may be warranted to have an affidavit or colloquy with Petitioner in which he notes he has been advised of these issues but desires to continue with Mr. Blume and Ms. Vann.

Ultimately, though, given that this particular issue involves who will represent Petitioner, Respondents leave resolution of them to the Court's discretion. Again, Respondents only want to ensure that the process is fair and that there are no later complaints that the current action should be undone because the statute was not honored.

CONCLUSION

WHEREFORE, having made Return, Respondents request 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). Respondents request 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,

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November 18, 2013

ATTORNEYS FOR RESPONDENTS
By: s/ Alphonso Simon Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Johnny Bennett, #5023,)	C/A No. 2:13-MC-447-RMG-BHH
)	(Capital Case)
)	
Petitioner,)	
)	CERTIFICATE OF SERVICE
vs.)	
)	
Bryan P. Stirling, Commissioner, South)	
Carolina Department of Corrections, and)	
Joseph McFadden, Warden, Lieber)	
Correctional Institution,)	
)	
)	
Respondents.)	
_____)	

I, Alphonso Simon, Jr., do hereby certify that on this date, I served the Respondents' Return to Motion for Stay of Execution and Appointment of Counsel, in the foregoing action on counsel for the Petitioner by depositing one copy of the same in the United States mail, first-class postage prepaid, and addressed as follows:

John H. Blume, Esq.
Blume, Norris & Franklin-Best, LLC
900 Elmwood Ave., Ste. #101
Columbia, SC 29201

Lindsay S. Vann, Esq.
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Ste. #101
Columbia, SC 29201

This 18th day of November, 2013.

By: s/Alphonso Simon, Jr.
ATTORNEYS FOR RESPONDENTS

- (6) Additional Bar Membership. I have been admitted to practice before the following courts: (List all of the courts Applicant has been admitted to practice before: United States District Courts; United States Circuit Courts of Appeals; the Supreme Court of the United States; and courts of other states or the District of Columbia.) By signing this Affidavit, I certify that I am a member in good standing of each of the listed bars unless otherwise noted.

Court	Date Admitted	Good Standing
Supreme Court of Virginia	1/8/2013	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
United States District Court for the ED Va.	8/8/2013	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
United States District Court for the WD Va.	9/4/2013	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
United States Court of Appeals for the Fourth Circuit	5/16/2013	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

- (7) Pending Disciplinary Matters. Are you presently the subject of any formal suspension or disbarment proceedings, and have you been notified by any disciplinary agency of the initiation of formal procedures? Yes No
 (If "yes," give particulars, such as jurisdiction, court, date, grounds. Information to comply with this paragraph may be provided *in camera* but that fact shall be revealed below.)
-
-

- (8) Curtailment of Prior *Pro Hac Vice* Admissions. Have you ever had any application for admission *pro hac vice* in this or any other jurisdiction denied or any *pro hac vice* admission revoked?
 Yes No
 (If "yes," give particulars, such as date, court, docket number, judge, circumstances; attach a copy of any order of denial or revocation.)
-
-

- (9) Sanctions. Have you ever had any certificate or privilege to appear and practice before any judicial or administrative body suspended or revoked, or received a public reprimand or greater sanction?
 Yes No
 (If "yes," give particulars, e.g., judicial or administrative body, date of suspension, and reinstatement.)
-
-

- (10) Criminal Sanctions. Have you ever been convicted of a felony under the laws of the District of Columbia or of any State or under the laws of the United States?
 Yes No
 (If "yes," give particulars, such as date, court, judge, circumstances, and ultimate disposition.)
-
-

- (11) Present and Previous *Pro Hac Vice* in this Court. Have you, within the last ten (10) years, filed an application to appear *pro hac vice* in the United States District Court for the District of South Carolina or another court in the state of South Carolina?

Revised 10/11/05

Yes No

(If "yes," give court, case name, docket number, and status of litigation, year of application, local counsel of record in each case, and state whether application is pending or was granted.) Attach additional pages if necessary.

(12) Designated Local Counsel. Local counsel of record associated with Applicant in this case is:

Attorney Name:	<u>John H. Blume</u>
Firm Name:	<u>Blume, Norris & Franklin Best, LLC</u>
Street Address or Post Office Box:	<u>900 Elmwood Ave., Suite 101</u>
City, State, and Zip Code:	<u>Columbia, SC 29201</u>
Telephone Number:	<u>(803) 765-1044</u>
E-Mail Address:	<u>john@blumelaw.com</u>

I understand that local counsel of record is required to: (1) personally sign each pleading, motion, discovery procedure, or other document served or filed in this Court; (2) accept service of all pleadings and notices as required on behalf of all counsel for the party represented; (3) be present at all pretrial conferences, hearings and trials, unless excused by the Court; (4) be prepared to participate actively as may be necessary; and (5) assure compliance with Local Civil Rules 83.I.04, 83.I.05, and 83.I.06 or Local Criminal Rules 57.I.04, 57.I.05, and 57.I.06 as appropriate. Local counsel of record may attend discovery proceedings.

(13) Associated Counsel. In addition to local counsel designated above, the following counsel are also associated with the undersigned in this case.


None

(14) Application Fee. I affirm that the application fee of two hundred and fifty dollars (\$250) has been paid in accordance with Local Civil Rule 83.I.05 or Local Criminal Rule 57.I.05 or paid herewith.

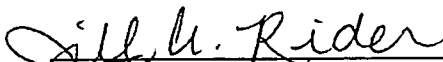
(15) Electronic Notification. By submitting this application, I consent to electronic notification.

(16) Represented Party/Parties. I seek to represent the following party/parties:

Johnny Bennett, Petitioner


Signature of Applicant

Sworn to and subscribed before me
this 14th day of November, 20 13.


A Notary Public
of the State of South Carolina

My Commission expires: 6-19-16
Revised 10/11/05

Supreme Court of Virginia

AT RICHMOND

Certificate

I, Patricia L. Harrington, Clerk of the Supreme Court of Virginia,
do hereby certify that

LINDSEY STERLING VANN

was admitted to practice as an attorney and counsellor at the bar of this Court on
January 8, 2013.

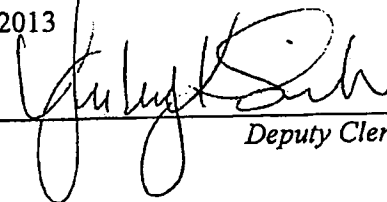
I further certify that so far as the records of this office are
concerned, LINDSEY STERLING VANN is a member of the bar of this
Court in good standing.

Witness my hand and seal of said Court

This 23rd day of January

A.D. 2013

By:



Deputy Clerk

THE UNITED STATES OF AMERICA

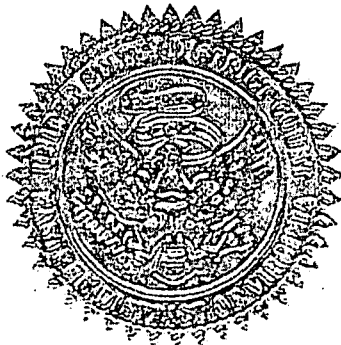


Eastern District of Virginia

I, Fernando Galindo Clerk of the United States District Court,
certify that

LINDSEY STERLING VANN

was duly admitted and qualified to practice as an Attorney in the
District Court on the 8th day of August, 2013



In testimony whereof, I sign my name and affix the seal of this
Court, on this 12th day of August, 2013
Fernando Galindo, Clerk

By: Kathy B. Hancock
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
(COLUMBIA DIVISION)

JOHNNY BENNETT,
Petitioner,

v.
BRYAN P. STIRLING, Commissioner,
South Carolina Department of Corrections,
and JOSEPH MCFADDEN, Warden,
Lieber Correctional Institution,
Respondents.

)
) Case No. 2:13-mc-447-RMG-BHH
)

) **Motion**
) **in Support of**
) **Pro Hac Vice Application**

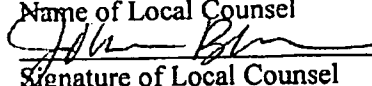
The undersigned local counsel hereby moves, together with the attached Application and Affidavit, that Lindsey S. Vann be admitted *pro hac vice* in the above-captioned case as associate counsel. As local counsel, I understand that:

1. I will personally sign and include my District of South Carolina federal bar attorney identification number on each pleading, motion, discovery procedure, or other document that I serve or file in this court; and
2. All pleadings and other documents that I file in this case will contain my name, firm name, address, and phone number and those of my associate counsel admitted *pro hac vice*; and
3. Service of all pleadings and notices as required shall be sufficient if served upon me, and it is my responsibility to serve my associate counsel admitted *pro hac vice*; and
4. Unless excused by the court, I will be present at all pretrial conferences, hearings, and trials and may attend discovery proceedings. I will be prepared to actively participate if necessary.
5. Certification of Consultation (Local Civil Rule 7.02).

- Prior to filing this Motion, I conferred with opposing counsel who has indicated the following position as to this Motion: will likely oppose; does not intend to oppose
- Prior to filing this Motion, I attempted to confer with opposing counsel but was unable to do so for the following reason(s):

- No duty of consultation is required because the opposing party is proceeding pro se.

Blume, Norris & Franklin-Best, LLC
Firm Name
900 Elmwood Ave., Suite 101
Street Address or Post Office Box
Columbia, SC 29201
City, State, Zip Code
(803) 765-1044
Telephone Number
John@blumelaw.com
E-Mail Address

John H. Blume
Name of Local Counsel

Signature of Local Counsel
Local Counsel for the _____
District of South Carolina

