

Hopkins, Debbie

From: Lindsey S. Vann <lindsey@deathpenaltyresource.org>
Sent: Monday, November 25, 2013 2:50 PM
To: Hopkins, Debbie
Cc: John Blume
Subject: FW: Johnny Bennett
Attachments: 15 Order Granting Stay.pdf

Dear Ms. Hopkins,

Thank you for notifying us that the remittitur is being sent in Johnny Bennett's case today. As I mentioned in my voicemail (left at approximately 2:45), the federal district court granted a motion to stay Johnny Bennett's execution last week to allow him to file for federal habeas relief. A copy of the order granting the stay of execution is attached to this email.

If you have any questions or need any further information, please do not hesitate to contact me.

Thank you for your help. Happy Thanksgiving!

Sincerely,
Lindsey S. Vann
Fellowship Attorney
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
(803) 765-1044

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NOV 25 2013

S.C. Supreme Court

From: Jill Rider [mailto:jill@blumelaw.com]
Sent: Monday, November 25, 2013 1:32 PM
To: John Blume; lindsey@deathpenaltyresource.org
Subject: FW: Johnny Bennett

From: Hopkins, Debbie [mailto:DJHopkins@sccourts.org]
Sent: Monday, November 25, 2013 1:28 PM
To: Jill Rider
Subject: Johnny Bennett

Hey Jill,

I am sending the remittitur in this case today. I will be out of the office until Monday so if you need assistance, please contact Linda.



Thanks and have a wonderful Thanksgiving.

Debbie Hopkins
South Carolina Supreme Court
PO. Box 11330

Columbia, South Carolina 29201

803-734-1080

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

Johnny Bennett,)	C/A No. 2:13-mc-447-RMG-BHH
)	
Petitioner,)	
)	
vs.)	ORDER
)	

Bryan P. Stirling, *Commissioner, South Carolina Department of Corrections*; and
Joseph McFadden, *Warden, Lieber Correctional Institution*,

Respondents.

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S.C. Supreme Court

This matter is before the Court on Petitioner's Motion for Stay of Execution and Appointment of Counsel filed on November 14, 2013. (Dkt. No. 1.) Respondent filed a response to this motion on November 18, 2013 (Dkt. No. 10), and Petitioner replied on November 20, 2013 (Dkt. No. 12). Petitioner has also filed a Motion for Leave to Proceed *in forma pauperis*. (Dkt. No. 2.) And Lindsey S. Vann, one of the two attorneys whom Petitioner requests be appointed as his counsel, has filed an Application/Affidavit for *Pro Hac Vice* Admission, supported by the motion of John H. Blume, the other attorney whom Petitioner requests be appointed as his counsel in this case. (Dkt. No. 8.) This Order addresses Petitioner's Motion for Stay of Execution. The remaining issues will be addressed in a separate order.

Background

Review of the pleadings discloses that Petitioner was convicted of murder, kidnapping, armed robbery, and grand larceny in Lexington County, South Carolina in 1995. Petitioner was subsequently sentenced to death. On direct appeal, the Supreme

Court of South Carolina upheld Petitioner's conviction, but reversed his death sentence. See *State v. Bennett*, 328 S.C. 251, 493 S.E.2d 845 (1997). In 2000, Petitioner was again sentenced to death in the Lexington County Court of General Sessions. The Supreme Court of South Carolina affirmed Petitioner's 2000 death sentence on June 26, 2006. See *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. See *Bennett v. South Carolina*, 549 U.S. 1062 (2006); Dkt. No. 1 at 2.

Petitioner alleges that his initial application for post-conviction relief ("PCR") was filed on September 7, 2006. The post-conviction court denied post-conviction relief, and the Supreme Court of South Carolina denied Petitioner's petition for a writ of certiorari to review the lower court's decision on November 7, 2013. (Dkt. No. 1 at 2; Dkt. No. 10 at 7.) The parties agree that Petitioner has generally exhausted his available state remedies, that zero (0) days lapsed between the finality of Petitioner's convictions and sentences and the filing of Petitioner's PCR, and that Petitioner's federal time limits did not begin to run again until at least November 7, 2013, when the Supreme Court of South Carolina issued its order denying Petitioner's petition for writ of certiorari. (Dkt. No. 1 at 2-3; Dkt. No. 10 at 6-7.) Thus, Petitioner alleges that he has until November 7, 2014, to file his federal habeas corpus petition, under 28 U.S.C. § 2244(d). (Dkt. No. 1 at 3.)

Petitioner asks the Court to appoint two attorneys to represent him pursuant to 18 U.S.C. § 3599 and to stay his execution so that he may "pursue federal habeas corpus remedies." (Dkt. No. 1 at 3.) Petitioner alleges that, while an execution date for Petitioner has not been scheduled, it is imminent following the Supreme Court of South Carolina's denial of his petition for writ of certiorari. Petitioner's execution will automatically be

scheduled for the fourth Friday following the Supreme Court of South Carolina's issuance of the remittitur to the circuit court. See S.C. Code Ann. § 17-25-370; *In re: Stays of Execution in Capital Cases*, 471 S.E.2d 140, 544 n.1 (1996). Thus, as of this date, Petitioner requests that this Court stay the issuance of his execution notice.

Respondent agrees that Petitioner is entitled to appointment of counsel and does not oppose a stay, but Respondent claims that any stay entered should be limited to ninety (90) days under 28 U.S.C. 2251(a)(3). (Dkt. No. 1, 10.) Petitioner claims that limiting the stay to ninety days will cause him to have to file his habeas petition over 250 days earlier than the statute of limitations requires and, thus, render the limitations period meaningless. (Dkt. No. 12 at 2.) He requests a stay co-extensive with the limitations period. (*Id.* at 3.)

Discussion

"Federal courts cannot enjoin state-court proceedings unless the intervention is authorized expressly by federal statute or falls under one of two other exceptions to the Anti-Injunction Act." *McFarland v. Scott*, 512 U.S. 849, 857 (1994). The federal habeas corpus statute provides such express authorization here. It authorizes a federal judge to stay state court proceedings in two scenarios: when a habeas corpus proceeding is pending before it and when a state prisoner sentenced to death applies for appointment of counsel pursuant to Section § 3599. 28 U.S.C. § 2251(a)(1), (3). Because a habeas application has not yet been filed by Petitioner, a habeas corpus proceeding is not pending before this Court. 28 U.S.C. § 2251(a)(2). Thus, Section 2251(a)(3) governs the Court's issuance of a stay. This section provides that "such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn

or denied.” 28 U.S.C. § 2251(a)(3). The Court finds the language of this statute to be clear and unambiguous¹; thus, it will grant a stay that terminates ninety (90) days after counsel is appointed. Once Petitioner files a habeas petition, Petitioner can move for an indefinite stay pending the outcome of his habeas proceeding under Section 2251(a)(1).

The confusion here is caused by Congress' 2006 amendment of the federal habeas corpus statute. Prior to 2006, the statute simply authorized a federal court to stay state court proceedings when a federal habeas proceeding was pending before it. In *McFarland*, the U.S. Supreme Court interpreted the statute to mean that a federal habeas proceeding was “pending” at the time that a capital defendant invoked his right to appointed counsel; thus, the Court had jurisdiction to enter a stay at that time. 512 U.S. at 858. In accord with *McFarland*, Courts routinely entered indefinite stays or stays co-extensive with the limitations period at the time that a capital defendant invoked his right to appointed counsel.

However, in 2006, Congress amended Section 2251 to overrule the holding of *McFarland* as part of the USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006). As explained in the House Conference Report:

This section also clarifies when a habeas proceeding is ‘pending’ for purposes of 28 U.S.C. 2251, which controls the circumstances under which a federal court hearing a habeas petition may stay a State court action. Overruling *McFarland v. Scott*, 512 U.S. 849 (1994), this section provides that a habeas proceeding is not ‘pending’ until the habeas application itself is filed. For prisoners who have applied for counsel pursuant to 18 U.S.C.

¹ “There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislature. In such cases we have followed their plain meaning.” *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 544 (1940)

3599 (a)(2), there is a limited exception allowing the court to stay execution of a death sentence until after the attorney has been appointed or the application withdrawn or denied.

H.R. Rep. No. 109-333 at 109-110 (2006) (Conf. Rep.)

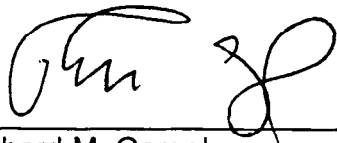
Contrary to Petitioner's contention, Section 2251(a)(3) does not render the limitations period of Section 2244(d) meaningless. This statute limits the time in which non-capital defendants may file habeas applications and forecloses untimely federal habeas applications by capital defendants whose executions are set after the expiration of statute of limitations.

Accordingly, **IT IS ORDERED THAT:**

- (1) Petitioner's Motion for Stay of Execution is **GRANTED**; the stay shall terminate ninety (90) days after the appointment of counsel;
- (2) Petitioner may seek a longer stay of execution, pursuant to 28 U.S.C. §§ 2251(a)(1) and (a)(2), after a habeas petition is filed;
- (3) An order appointing counsel and ruling on Petitioner's Motion for Leave to Proceed *in forma pauperis* will issue separately;
- (4) The Clerk of Court shall assign a civil action number to this case, and the Clerk of Court shall notify the undersigned to review the stay of execution 20 days prior to its expiration; and
- (5) This matter is referred to the assigned United States Magistrate Judge for all other preliminary proceedings.

IT IS SO ORDERED.

November 21, 2013
Charleston, South Carolina


Richard M. Gergel
United States District Judge