

Hopkins, Debbie

From: Donna D'Alessio <DDAlessio@scag.gov>
Sent: Tuesday, December 23, 2014 11:39 AM
To: John McIntosh; Adam Piper; Mark Powell; Zelenka, Don
Cc: Tatarsky.David@doc.state.sc.us; Barnette, Barry; Capital Litigation; Creighton Waters; Hopkins, Debbie; Victim Services; Trisha Allen; Salley Elliott
Subject: Richard Bernard Moore - Spartanburg Death Penalty - Order granting Motion to stay
Attachments: Order granting motion to stay (Doc. #22) 12-22-14 (00511280xD2C78).pdf

Attached hereto is the Order granting the motion to stay which was filed in the District Court on December 22, 2014.

Donna D'Alessio, Legal Assistant
Capital Litigation
Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305
(803) 734-4035 – Fax
(803) 734-1494 – Direct Line

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

Richard Bernard Moore,)
)
Petitioner,)
)
v.)
)
Bryan P. Stirling, Commissioner,)
South Carolina Department of Corrections;)
Joseph McFadden, Warden, Lieber)
Correctional Institution,)
)
Respondents.)
_____)

Civil Case No. 4:14-4691-MGL-TER

ORDER

RECEIVED
U.S. DISTRICT COURT
SOUTH CAROLINA
2014 DEC 22 10 53 AM '14

The petitioner in this capital habeas corpus matter, Richard Bernard Moore ("Petitioner") is a state prisoner convicted of murder, assault with intent to kill, and armed robbery, and sentenced to death. This matter is before the court on Petitioner's Motion for Stay of Execution (ECF No. 8). Respondents filed a response to this motion on December 16, 2014 (ECF No. 13), and Petitioner replied on December 17, 2014 (ECF No. 16). Accordingly, the motion to stay is ripe for the court's consideration.

Background

Petitioner was convicted of murder, assault with intent to kill, and armed robbery in Spartanburg County, South Carolina, and subsequently sentenced to death in 2001. Petitioner timely appealed and, on March 1, 2004, the South Carolina Supreme Court upheld his convictions and sentence. On March 16, 2004, Petitioner filed a petition for stay of execution in the South Carolina Supreme Court so he could pursue available Post-Conviction Relief ("PCR") remedies. The state court granted Petitioner's request on April 4, 2004. Petitioner filed an initial PCR application on August 8, 2004, an amended application on December 31, 2010, and

supplemental amendments on January 5, 2011. On August 1, 2011, the court dismissed Petitioner's PCR application.

Petitioner appealed the court's dismissal and filed a Petition for Writ of Certiorari on July 18, 2012. The South Carolina Supreme Court denied certiorari on September 11, 2014. Shortly thereafter, on September 26, 2014, Petitioner filed a petition for rehearing, which the South Carolina Supreme Court denied on October 24, 2014.

On October 31, 2014, Petitioner filed a second petition for stay of execution in the South Carolina Supreme Court so that he could pursue a Writ of Certiorari in the United States Supreme Court. The Supreme Court of South Carolina, on December 10, 2014, denied that petition and, on December 12, 2014, issued an execution notice, scheduling Petitioner's execution for January 9, 2015. *See In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140, 142 (1996).

Discussion

The federal habeas corpus statute authorizes a federal judge to stay state court proceedings in two circumstances: when a habeas corpus proceedings is pending before the court and when a state prisoner sentenced to death applies for appointment of counsel pursuant to 28 U.S.C. § 3599. 28 U.S.C. § 2251(a)(1), (3)¹; *McFarland v. Scott*, 512 U.S. 849, 857 (1994). Because Petitioner has not yet filed his petition for habeas corpus, a habeas corpus proceeding is not pending before this court. *See* 28 U.S.C. § 2251(a)(2). However, Petitioner has moved for

¹ The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended Chapter 153 of Title 28, which concerns the procedures for the federal habeas remedy generally, and added Chapter 154, which sets forth special procedures applicable to capital habeas cases, but only in states that meet certain eligibility requirements. One such procedure is the mandatory issuance of a stay. *See* 28 U.S.C. § 2262. Currently, South Carolina is waiting for the United States Department of Justice to implement final regulations pursuant to 28 U.S.C. § 2265(b), as amended 2005, establishing the criteria for certification under Chapter 154. Absent the applicable federal regulations, the State has been unable to seek certification by the Attorney General of the United States. Thus, Chapter 154's mandatory stay provision is not applicable in this case and the court has proceeded under Chapter 153.

counsel under § 3599. (*See* ECF No. 1.) Thus, § 2251(a)(3) governs the court's issuance of a stay in this case.

Section 2251(a)(3) 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." The United States Magistrate Judge assigned to this case appointed counsel for Petitioner on December 17, 2014, (ECF No. 15), thus, the court will grant a stay that terminates ninety (90) days after that date. Once Petitioner files his habeas petition, he may move for an indefinite stay pending the outcome of his habeas proceeding under § 2251(a)(1).

Respondents do not oppose a stay of execution (ECF No. 13 at 2, 12), however there is some confusion regarding Petitioner's deadline for filing a federal habeas petition in this court. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one year limitations period to file a habeas petition pursuant to 28 U.S.C. § 2254. 28 U.S.C. § 2244. That 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.

§ 2244(d)(1). However, the limitations period is tolled while a properly filed application for state post-conviction relief or other collateral review pertinent to the claim is pending. § 2244(d)(2).

Both parties agree that Petitioner's convictions became final on May 31, 2004, and that sixty-nine (69) days elapsed between that date and the date on which Petitioner filed his PCR application, August 8, 2004. Respondents assert that the limitations period began running again on September 11, 2014, the day the South Carolina Supreme Court denied certiorari on Petitioner's PCR appeal. Petitioner, on the other hand, argues that the limitations period was tolled until October 24, 2014, when the South Carolina Supreme Court denied Petitioner's motion for rehearing. On this point, the court agrees with Petitioner. *See* § 2244(d)(2); *Crawley v. Catoe*, 257 F.3d 395, 398 (4th Cir. 2001) ("Crawley's application for state post-conviction relief was continuously pending before the South Carolina courts . . . until January 8, 1998, when the South Carolina Supreme Court denied her request for rehearing."). Thus, Petitioner has until August 16, 2015, to file his federal habeas petition.

Accordingly, Petitioner's Motion for Stay of Execution (ECF No. 8) is GRANTED. The stay shall terminate ninety (90) days after the appointment of counsel. This matter is referred to the assigned United States Magistrate Judge for all other preliminary proceedings.

IT IS SO ORDERED.

s/ Mary G. Lewis
Mary G. Lewis
United States District Judge

December 22, 2014
Florence, South Carolina