

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SUMTER COUNTY  
Court of General Sessions

**S.C. SUPREME COURT**

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 1997-004151

The State, ..... Respondent,

v.

Bobby Wayne Stone, ..... Appellant.

MOTION FOR STAY OF EXECUTION

**DEATH PENALTY CASE – EXECUTION SCHEDULED DECEMBER 1, 2017**

Appellant Bobby Wayne Stone is currently pursuing habeas relief in federal court. His federal habeas petition is due to be filed March 29, 2018, and Judge Mary Geiger Lewis has appointed three lawyers to represent Mr. Stone—John H. Blume, III, Emily C. Paavola, and John L. Warren III. The federal government has spent considerable time and money on Mr. Stone's habeas case, as have the undersigned counsel. Yet, despite the nearly four-and-one-half months remaining on Mr. Stone's statute of limitations, the State has asked this Court to set an execution date so that Mr. Stone can be executed prior to the consummation of his statutory right to file a federal habeas petition. The Clerk of Court, pursuant to his ministerial duty, granted the State's request.

As detailed below, the State's request is designed to frustrate Mr. Stone's ability to conduct the needed investigation necessary to identify all potentially viable claims for relief and to prepare and file an adequate petition for writ of habeas corpus. Under the circumstances of this case, this Court should enter a stay of execution until March 29, 2018 so that Mr. Stone can investigate, draft, and file his federal habeas petition. *See In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996) (allowing this Court to grant a request for a stay of execution when "there are exceptional circumstances warranting the issuance of the stay"). Alternatively, this Court should revisit *In Re Stays* entirely given material changes in the relevant legal landscape in the twenty-one years since it was issued.

### **PROCEDURAL HISTORY**

Mr. Stone was originally convicted and sentenced to death in 1997. On direct appeal, this Court affirmed Mr. Stone's convictions but reversed the death sentence based on erroneous jury instructions. *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002). Thereafter, Mr. Stone was resentenced to death in 2005. Mr. Stone's application for post-conviction relief was denied, and this court affirmed.<sup>1</sup> *Stone v. State*, 419 S.C. 370, 798 S.E.2d 561 (2017).

Following the conclusion of his PCR appeal, Mr. Stone filed a Motion for Stay of Execution and Appointment of Counsel with the United States District Court. In that Motion, Mr. Stone moved for appointment of counsel in order to pursue all available federal habeas corpus remedies pursuant to 18 U.S.C. § 3599,<sup>2</sup> as well as a stay of execution pursuant to 28 U.S.C. §

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<sup>1</sup> Mr. Stone filed a Petition for Writ of Certiorari with the Supreme Court of the United States, which was denied on October 30, 2017. *Stone v. South Carolina*, Case No. 17-5756, 2017 WL 3720061 (Oct. 30, 2017).

<sup>2</sup> Critically, the Supreme Court of the United States has recognized that death-sentenced habeas petitioners are entitled to counsel *prior to* the filing of the habeas petition, so that petitioners may conduct a thorough investigation by and through competent legal counsel in order to have

2251(a)(3).<sup>3</sup> Specifically, Mr. Stone requested that his PCR counsel—John H. Blume, III and Emily C. Paavola—remain his counsel of record in the federal habeas proceeding.

On April 10, 2017, Judge Lewis entered an Order Granting Petitioner’s Motion to Stay His Execution and Holding in Abeyance His Motion for the Appointment of Counsel. Substantively, the Court requested further briefing on Mr. Stone’s request for Mr. Blume and Mrs. Paavola to remain as counsel in light of *Martinez v. Ryan*, which held that inadequate assistance of PCR counsel “may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” 566 U.S. 1, 9 (2012). After further briefing, on May 4, 2017, Judge Lewis appointed Mr. Blume and Ms. Paavola as Mr. Stone’s habeas counsel and appointed the undersigned, John L. Warren III, as independent counsel to conduct a *Martinez* review of Mr. Blume and Ms. Paavola’s performance as PCR counsel so that Mr. Stone would have the opportunity to establish cause for any claims defaulted by PCR counsel.<sup>4</sup> Pursuant to 28 U.S.C. § 2251(a)(3), Mr. Stone’s statutory, 90-day stay of execution began to run as of the date of Judge Lewis’s order appointing counsel and expired on August 2, 2017.

On November 3, 2017, the State wrote a letter to this Court requesting entry of an Execution Notice. (Attorney General's Letter, attached as Ex. A). On November 6, 2017, the undersigned indicated to the Clerk's Office via email that they opposed the State's request and would be hand

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meaningful access to the remedy of habeas corpus. *McFarland v. Scott*, 512 U.S. 849, 855–56 (1994).

<sup>3</sup> “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.” 28 U.S.C. § 2251(a)(3).

<sup>4</sup> At the time of Mr. Warren’s appointment, he had no previous involvement in the case and has been diligently engaged in reading the voluminous state court record.

delivering a formal response later that afternoon. (Email from Mr. Warren to Mrs. Hopkins, attached as Ex. B). A short time later, the Clerk's Office indicated by email that the Clerk would be fulfilling his "ministerial duty" by setting an execution date. (Email from Mr. Shearouse, attached as Ex. C). This Motion follows.

### **ARGUMENT AND AUTHORITIES**

#### **I. Statutory Backdrop and Reasons for Granting Stay.**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established an orderly and restrictive process for litigating federal habeas cases. Perhaps most importantly, AEDPA imposed a one-year statute of limitations on filing a federal habeas petition. *See* 28 U.S.C. § 2244(d). This statute of limitations begins running from the date on which the inmate's judgment became final by the conclusion of direct review or the expiration of time for seeking such review, *see* § 2244(d)(1)(A), with the caveat that the time during which a properly filed application for state post-conviction relief is pending shall not be counted towards the statute of limitations, *see* § 2244(d)(2). Here, Mr. Stone's statute of limitations began to run March 29, 2017, when the substituted opinion in Mr. Stone's PCR appeal was issued.<sup>5</sup> *See Stone v. State*, 419 S.C. 370, 798 S.E.2d 561 (2017). Thus, Mr. Stone has until March 29, 2018 to file his federal habeas petition.

Since that time the undersigned counsel have been diligently investigating, researching and preparing Mr. Stone's federal habeas claims. Rather than allowing Mr. Stone to exercise his

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<sup>5</sup> This Court denied rehearing on Mr. Stone's appeal from resentencing on January 23, 2008. Mr. Stone did not seek a petition for writ of certiorari from the Supreme Court of the United States, and his time to do so expired on April 22, 2008. *See* Sup. Ct. R. 13 (noting that a petition for writ of certiorari from a state court of last resort is timely when it is filed within 90 days after entry of the judgment). Prior to the expiration of that time, Mr. Stone filed an application for PCR on April 7, 2008, which tolled the AEDPA statute of limitations. Mr. Stone's appeal from the denial of his PCR application became final on March 29, 2017, which began the one-year statute of limitations under AEDPA.

statutory right to file this habeas petition by March 29, 2018, the State asked this Court to short circuit all available federal remedies by setting an execution date. The State relied on *In re Stays of Execution of Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), which established a procedure for dealing with execution dates and stays of execution in South Carolina courts and directs death-sentenced inmates to direct requests for stays of execution to the federal courts. For the reasons detailed below, Mr. Stone cannot request a stay of execution from the federal court, and *In re Stays* did not contemplate the current landscape of federal and state post-conviction litigation. This Court should exercise its inherent authority and grant a stay of execution in this case,

*In re Stays* was issued on April 8, 1996, which was prior to the enactment of AEDPA<sup>6</sup> and the State corollary, the South Carolina Effective Death Penalty Act ("SCEDPA").<sup>7</sup> Both of these statutes set very strict procedures and limitations periods for filing collateral actions. For example, AEDPA significantly changed the entire landscape of federal habeas proceedings and has imposed an entirely different set of timelines for filing and procedures for obtaining stays of execution than were in place when *In re Stays* was enacted. Prior to *In re Stays*, a death-sentenced prisoner could file a federal habeas petition at any time, subject only to the equitable defense of laches, which meant that prisoners could literally wait years before filing in federal court without fear of dismissal. Now, death-sentenced inmates, such as Mr. Stone, are required to file a federal habeas petition during a very strictly construed one-year statute of limitations, and District Courts have been ordered to dispose of pending habeas cases on an expedited basis. *See In re Matter of Death Penalty Representation*, Order No. 113 (4th Cir. 2008) (attached as Ex. D).

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<sup>6</sup> AEDPA was signed into law on April 24, 1996.

<sup>7</sup> S.C. Code Ann. § 17-27-160. SCEDPA was adopted on June 18, 1996.

The procedure for obtaining a stay of execution under AEDPA in federal court is critical to the issue at bar. Stays of execution are permitted for 90 days after appointment of counsel, 28 U.S.C. § 2251(a)(3),<sup>8</sup> and after a federal habeas petition is actually filed. 28 U.S.C. § 2251(a)(9). This creates a clear gap in the statutory scheme, as there is no mechanism for a death-sentenced inmate to seek a stay of execution from the federal court during the period (of up to nine months) after the expiration of 90 days after appointment of counsel but before the filing of a habeas petition. While it would seem that the federal court would have the inherent authority to effectuate its jurisdiction by entering or extending a stay during this nine-month period, the State has repeatedly maintained in federal court filings that the federal courts do not have the authority to do so. This type of "heads I win, tails you lose" gamesmanship illustrates the improper motives in the State's request for an execution notice and demonstrates that *In re Stays* should be revisited given subsequent doctrinal developments..

The Supreme Court's recent decision in *Martinez v. Ryan*<sup>9</sup> heightens the need for a re-examination of the procedures outlined in *In re Stays*. As this Court knows, *Martinez* held that inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel. Because of this, most capital habeas applicants are now required to obtain new counsel in federal habeas proceedings, so that habeas counsel can independently evaluate the performance of PCR counsel in order to properly bring otherwise defaulted claims. In fact, the State has specifically opposed any continuity of counsel in federal habeas proceedings relying on *Martinez*. This means that habeas counsel will

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<sup>8</sup> This ninety-day stay provision was enacted in 2006 with the adoption of the USA Patriot Improvement and Reauthorization Act of 2005—nearly ten years after *In re Stays* was issued. *See* Pub. L. No. 109-177, 120 Stat. 192.

<sup>9</sup> 566 U.S. 1 (2012).

almost always be (as Mr. Warren was at the time of his appointment) entirely unfamiliar with the petitioner's voluminous state court record. If this Court declines to issue a stay of execution, this Court will constructively change the statute of limitations under AEDPA in South Carolina, as habeas lawyers will now only have 90 days to try to familiarize themselves with the thousands of pages of state court records, develop a relationship with the client, and draft the required pleadings and other documents to initiate a federal habeas corpus proceeding. This is simply an unobtainable standard for any lawyer to meet, particularly in light of the gravity of any capital case.

**II. Setting an Execution Date Generates Unnecessary Work for All Concerned While Doing Nothing to Accelerate Federal Review.**

Appellant acknowledges this Court has an interest in maintaining an orderly process and procedure for setting an execution date at the conclusion of a death-sentenced inmate's federal habeas proceeding. But, that is not this case. Mr. Stone has just entered federal habeas corpus proceedings and is doing nothing more than pursuing his statutory right to prepare and file a timely federal habeas petition during the one-year AEDPA statute of limitations. The State's request for an execution date is, at bottom, asking this Court to tell Judge Lewis how to manage her docket. The Attorney General has conceded in their federal filings that the federal limitations period in this case does not expire until the Spring of 2018, and undersigned counsel should be given until then to file the federal petition.

If this Court does not stay Mr. Stone's execution, the State will almost certainly make similar (and premature) requests to set execution dates in other pending federal habeas cases, which will waste the resources of this Court, the federal courts, counsel for the Petitioner, counsel for the State, and the South Carolina Department of Corrections ("SCDC").<sup>10</sup> But more

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<sup>10</sup> SCDC will likely have to put inmates on death watch and prepare for numerous executions that will not take place.

importantly, it will have significant impact on the ability of court-appointed counsel to adequately conduct the necessary investigation, legal research and drafting that is necessary to competently represent a death sentenced inmate in federal habeas corpus proceedings. There is no good reason to do so. The underlying purpose of *In Re Stays* was satisfied when Mr. Stone invoked the federal court's jurisdiction and requested the appointment of counsel. Counsel have been appointed and are proceeding expeditiously in conformity with AEDPA's limitations period. Until such time as Mr. Stone completes federal habeas corpus proceedings, this Court does not have a *bona fide* interest in micromanaging a federal judge's docket by refusing to stay an execution date that is premature and unnecessary.

### **CONCLUSION**

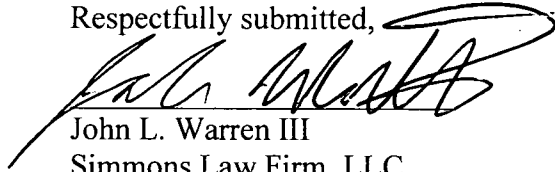
Therefore, Mr. Stone, by and through the undersigned counsel, respectfully requests that this Court stay the execution date set by the Clerk fulfilling his ministerial duty, and allow Mr. Stone's counsel to continue to do the job that the federal court has appointed them to do—investigate, prepare, and file a federal habeas petition by March 29, 2018. In order to accomplish this, Mr. Stone respectfully requests that the Court revisit or modify *In re Stays* to make clear that a stay is warranted under these circumstances.

The undersigned respectfully request oral argument, and can be ready to argue the issues raised herein on short notice. If oral argument is granted, Mr. Stone requests leave to argue against precedent pursuant to Rule 217, SCACR.

**(Signature Page Follows)**

November 7, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, John L. Warren III, certify that I have served a copy of the Motion for Stay of Execution by depositing the same in the United States Mail, postage prepaid, this 7th day of November, 2017, addressed to:

Melody Brown  
Alphonso Simon, Jr.  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211-1549

  
John L. Warren III