

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Sumter County
Court of General Sessions
R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 1997-004151

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

BOBBY WAYNE STONE,

PETITIONER.

RETURN TO MOTION FOR STAY OF EXECUTION

Comes now Respondent, above named, by and through the Office of the South Carolina Attorney General, and files its return to Petitioner's Motion for Stay of Execution filed November 7, 2017. Respondent opposes Petitioner's Motion for a Stay of Execution. Respondent submits Petitioner has failed to present any exceptional circumstances that would warrant the issuance of a stay pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996). While Petitioner has federal remedies that could be pursued, he has failed to request a stay pursuant to well-established federal procedure. No stay of execution has been in place since August 2, 2017. Pursuant to In re Stays, any request for a stay of execution relating to Petitioner's yet to be filed federal habeas action should be handled by the United States District Court for the District of South Carolina. In support of this Return, Respondent would show this Court the following:

PROCEDURAL HISTORY

Petitioner, Bobby Wayne Stone ("Petitioner"), is presently confined in the Kirkland Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his Sumter County convictions and death sentence for the murder of Sumter County Sheriff's Deputy Charlie Kubala, first-degree burglary, and possession of a weapon during the commission of a violent crime. On January 23-28, 1997, Petitioner was tried by a jury before the Honorable R. Markely Dennis, Jr. Petitioner was convicted of all charges. After the jury found the existence of two aggravating factors and recommended a sentence of death, Judge Dennis sentenced Petitioner to death for the murder conviction; thirty (30) years confinement for first degree burglary conviction to be served consecutively; and five (5) years confinement for the possession of a weapon during the commission of a violent crime conviction, to be served consecutively to the other two sentences. Petitioner's convictions were affirmed, but his death sentence was reversed on appeal by this Court, and his case was remanded for a new sentencing proceeding. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002).

On February 22-27, 2006, Petitioner received a new sentencing proceeding before the Honorable Howard P. King and a jury. After the jury found the existence of one aggravating circumstance and recommended a sentence of death, Judge King imposed a death sentence for the murder conviction. This Court affirmed Petitioner's death sentence on appeal in an opinion filed December 20, 2007. State v. Stone, 376 S.C. 32, 655 S.E.2d 487 (2007).

On January 23, 2008, Petitioner filed in this Court 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), to pursue a post-conviction relief action. On February 21, 2008, this Court issued an Order staying the execution to litigate the post-conviction relief action pursuant to In re Stays. During the post-

conviction relief action and at the evidentiary hearing, Petitioner was represented by John H. Blume and Robert E. Lominack.¹ On May 2, 2013, the PCR Court filed its Order dismissing the Application for Post-Conviction Relief. After hearing motions, on August 14, 2013, the PCR Court filed its Amended Order, again denying the application for post-conviction relief.

Petitioner subsequently appealed. On appeal, Petitioner was represented by Mr. Blume and Ms. Paavola. This Court filed a published opinion affirming the order denying post-conviction relief on February 8, 2017. After both parties filed Petitions for Rehearing, this Court filed an Order on March 29, 2017 denying both petitions. This Court also filed a revised published opinion. The Remittitur was issued on March 29, 2017. This Court also issued an Execution Notice on March 30, 2017.

On March 31, 2017, Petitioner filed a Motion for Stay of Execution and Appointment of Counsel in the United States District Court for the District of South Carolina. In his Motion, Petitioner requested John H. Blume, III, Esquire, and Emily Paavola, Esquire be appointed to serve as his federal habeas counsel. (See Attachment No. 1). Petitioner also moved to waive an investigation into claims that could potentially be raised in his federal habeas action under Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012).² In support of the latter motion, Petitioner

¹ After the evidentiary hearing was completed, but before briefing, Mr. Lominack was relieved as counsel and Ms. Paavola was appointed to represent Petitioner.

² In Martinez, the United States Supreme Court held,

when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland v. Washington, 466 U.S. 668,

also attached affidavits from Petitioner, Charles Grose, Esquire, and John Warren, Esquire, both of whom consulted with Petitioner regarding his ability to raise claims in a federal habeas action under Martinez. In Petitioner's affidavit, he indicated he wished to keep his current attorneys, and he wished to waive a Martinez investigation. Both Mr. Grose and Mr. Warren indicated in their affidavits that they advised Petitioner about the significance of the Martinez opinion, Petitioner's right to request independent counsel, and the risks and consequences of waiving an investigation into potential claims that could be presented under Martinez. Both also indicated they believed Petitioner understood the Martinez opinion, and he was voluntarily, knowingly and intelligently waiving any Martinez claims so he could keep his state post-conviction relief counsel in his federal habeas action.

The Respondents to the Motion for Stay filed their Return to Motion for Stay of Execution and Appointment of Counsel on April 6, 2017. (Attachment No. 2). In the Return, the Respondents had no objection to the issuance of a stay of execution or to the appointment of requested counsel. The Respondents noted that at the time of the filing of its Return, eighty-five (85) days of the statute of limitations for filing the federal habeas action had elapsed. The Respondents also noted that the initial stay of execution was limited to ninety (90) days under 28 U.S.C. § 2251(a)(3), and that Petitioner would need to request an additional stay from the federal court under 28 U.S.C. § 2251(a)(1) before the expiration of the initial stay. The Respondents

104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue).

Martinez, 566 U.S. at 14, 132 S. Ct. at 1318-19.

further asserted Petitioner would need to file a federal habeas petition to obtain a stay under 28 U.S.C. § 2251(a)(1).

By Order filed April 10, 2017, the Honorable Mary Geiger Lewis, United States District Judge, filed an Order Granting Petitioner's Motion to Stay his Execution and Holding in Abeyance his Motion for the Appointment of Counsel. (Attachment No. 3). The Order stated the stay would terminate ninety days after the District Court ruled upon the motion for appointment of counsel. The Order also requested the parties further brief three questions relating to Petitioner's request to waive his potential claims against state collateral counsel under Martinez, and whether independent counsel should be appointed. On May 4, 2017, after briefing from the parties, Judge Lewis filed an Order Granting Petitioner's Motion for Appointment of Counsel as Modified. (Attachment No. 5). In the Order, Judge Lewis appointed Mr. Blume and Ms. Paavola to represent Petitioner in his federal habeas proceeding. Judge Lewis also appointed Mr. Warren to serve as independent Martinez counsel out of an abundance of caution. In making this appointment, Judge Lewis stated,

It is also worthy of note Mr. Warren has already met with Petitioner, developed an initial rapport, and spent a significant amount of time reviewing the files and other case materials in order to properly advise Petitioner regarding Martinez issues. In light of Mr. Warren's experience, knowledge, and preexisting relationship with Petitioner, the Court holds it has good cause for his appointment as Martinez counsel pursuant to § 3599(d).

Based upon the date of the appointment of counsel, the stay of execution entered by the United States District Court for the District of South Carolina was set to expire on August 2, 2017.

On August 4, 2017, counsel for Respondents in federal court emailed Petitioner's federal habeas counsel to confirm Respondents' calculations for the expiration for the stay was consistent with Petitioner's calculations. (Attachment No. 6). Undersigned counsel received a

response from Mr. Warren stating that Respondents' calculation for the expiration of the stay was consistent with Petitioner's calculations. (Attachment No. 7). Undersigned counsel sent an email in response asking when Petitioner would be filing for a new stay of execution. (Attachment No. 8). By email sent by Mr. Blume on August 7, 2017, Petitioner's counsel indicated they did not intend to seek an additional stay. (Attachment No. 9). Counsel noted they were preparing to file a petition for writ of certiorari in the United States Supreme Court, and that counsel were working on a federal habeas petition that would be filed before the expiration of the statute of limitations.

On August 15, 2017, Respondents in the federal habeas action filed a Status Report in the United States District Court for the District of South Carolina. (Attachment No. 10). In the Status Report, the Respondents noted the stay of execution had expired. The Respondents also provided a copy of the Status Report to this Court on the same day. (Attachment No. 11).

Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court on August 24, 2017. The State filed a Brief in Opposition on September 28, 2017. Petitioner also filed a Reply to the Brief in Opposition. The Petition for Writ of Certiorari was denied by the United States Supreme Court on October 30, 2017. At no point prior to or during the pendency of the petition for writ of certiorari before the United States Supreme Court did Petitioner seek a stay of execution from this Court.

On November 3, 2017, the Respondents in federal court filed a Status Report. In this Status Report, the Respondents updated the United States District Court regarding the filings in the United States Supreme Court. The Respondents also again noted that no stay of execution was in place, and that a copy of the Status Report would be provided to this Court. Undersigned counsel provided a copy of the Status Report to this Court on November 3, 2017.

On November 6, 2017, counsel for the parties in federal court received an email from the law clerk for the Honorable Mary Gordon Baker, United States Magistrate Judge, who is assigned to hear the future federal habeas action. (Attachment No. 12). The email reflected that chambers had received an inquiry from this Court into whether a stay of execution was in place in federal court. The email further reflected the federal court had responded that no stay of execution was in place, and no federal habeas action had been filed by Petitioner.

This Court issued a Notice of Execution on November 6, 2017. Petitioner filed his Motion for a Stay of Execution on November 7, 2017. This Return follows:

REASONS A STAY OF EXECUTION SHOULD NOT BE GRANTED

I. Petitioner can request a stay of execution in federal court; he merely needs to file a federal habeas petition.

Petitioner's contention that he cannot request a stay of execution in federal court is incorrect. Petitioner can seek a stay of execution under 28 U.S.C. § 2251(a)(1). All that is required is Petitioner file a federal habeas petition so a federal habeas proceeding is pending in federal court. Petitioner has not been prevented from filing a federal habeas petition or a motion for a stay in federal court. Petitioner has neither filed a federal habeas petition nor sought a stay in the federal district court since the expiration of the initial stay on August 2, 2017.

The grant of the initial ninety day stay by the federal district court is consistent with the United States District Court's procedures. Similar stays have been issued by the district court in other capital cases where a capital defendant sought appointment of counsel prior to filing a federal habeas petition. See Sigmon v. Byars, C/A No. 8:13-mc-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.”); Aleksey v. Stirling, C/A No. Misc. No. 5:14-00200-JMC, Docket Entry #16, pp. 2-4 (D.S.C. July 28, 2014) (“The 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). Additionally, prior to the expiration of the ninety (90) day stay of execution, Petitioner should seek a longer stay of execution pursuant to 28 U.S.C. § 2251(a)(1), if needed, in order to submit his habeas petition within his § 2244 limitations period, to allow Respondent to file a response to his submission, and to allow the court to rule on the merits of the petition. See Lonchar v. Thomas, 517 U.S. 314, 320, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996) (“If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot.”)”; Moore v. Stirling, et al., C/A No. 4:14-4691-MGL-TER, Docket Entry #22, p. 3 (D.S.C. Dec. 22, 2014)(granting a stay for ninety days after date counsel was appointed and noting that “[o]nce Petitioner files his habeas petition, he may move for an indefinite stay pending the outcome of his habeas proceeding under § 2251(a)(1).”); Bryant v. Stirling et al., C/A No. 9:15-mc-00217-DCN-BM. Docket Entry #11, pp. 2-3 (D.S.C. June 24, 2015)(granting stay of execution for ninety days after appointment of counsel, and recognizing petitioner can file for an indefinite stay under 28 U.S.C. § 2251(a)(1) once Petitioner files his habeas petition); Owens v. Stirling et al., C/A No. 0:15-mc-00254-TLW-PJG Docket Entry #9, p. 2 (D.S.C. August 7, 2015)(granting stay of execution for ninety days after appointment of counsel, and stating parties may seek an additional stay of execution as necessary pursuant to 28 U.S.C. § 2251(a)(1); Stokes v. Stirling, et al., C/A No.: 1:16-mc-00073-RBH, pp. 2-3 (D.S.C. March 16, 2016)(“The Court finds that Petitioner should be granted a stay of execution. Pursuant to 28

U.S.C. § 2251(a)(3), the stay shall terminate not later than ninety (90) days from the date counsel is appointed. Further, within the ninety (90) day stay of execution, Petitioner shall file the habeas petition. Additionally, prior to the expiration of the ninety (90) day stay of execution, Petitioner must seek a longer stay of execution pursuant to 28 U.S.C. § 2251(a)(1) in order to allow this Court to rule on the merits of the habeas petition.”); Williams v. Stirling et al., C/A No. 6:16-mc-00168-JMC-KFM, Docket Entry # 11, p. 3 (D.S.C. May 23, 2016)(granting stay of execution for ninety days from date counsel is appointed, and instructing Petitioner to seek a longer stay of execution pursuant to 28 U.S.C. § 2251(a)(1)); Mahdi v. Stirling, C/A No. 8:16-mc-402-TMC-JDA, Docket Entry #12, at p. 2 (D.S.C. Oct. 5, 2016)(granting stay of execution for ninety days from date counsel is appointed as provided in 28 U.S.C. § 2254(a)(3), noting the stay will terminate after ninety days, and further noting that Petitioner may seek an additional stay of execution as necessary pursuant to 28 U.S.C. § 2251(a)(1)).

In each of these cases in federal court, the petitioners have sought and obtained additional stays of execution from the United States District Court for the District of South Carolina in order to litigate their federal habeas proceedings. In some of those cases, the petitioner sought extensions of the original ninety day stay of execution. (Aleksey, Owens, Bryant). In other cases, the petitioners have filed placeholder federal habeas petitions to invoke 28 U.S.C. § 251(a)(1). (See, for example, Mahdi, C/A No. 8:16-cv-03911-TMC-JDA). Respondent would note that a telephonic status conference was held before the Honorable Mary Gordon Baker, United States Magistrate Judge this morning, and pursuant to that conference, Judge Baker has ordered Petitioner to file a placeholder petition along with a motion for stay of execution by November 21, 2017. (Attachment No. 13). The Respondents are also ordered to file a response to the Motion for Stay of Execution by November 28, 2017. Counsel for Respondents stated

during the status conference that Respondents have no objection to the issuance of a stay of execution based upon the filing of a placeholder petition in federal court.

II. Petitioner has not established there is an extraordinary circumstance that warrants a stay of execution from this Court.

In In re Stays, this Court noted,

A request for a stay of execution at any later time, to include a request for a stay pending the filing of a successive action for post-conviction relief or habeas corpus in the circuit court or in the original jurisdiction of this Court, shall be made by motion to this Court no later than fifteen (15) days prior to the date of the scheduled execution. The motion must demonstrate that there are exceptional circumstances warranting the issuance of the stay.

In re Stays, 321 S.C. at 548, 471 S.E.2d at 142. This Court also specifically instructed that a request for a stay of execution pending federal habeas corpus proceedings should be made to the federal courts, not the South Carolina Supreme Court. Id.

Petitioner here is not seeking a stay pending the filing of a state court action. He is not requesting the stay for the purposes of filing a successive post-conviction relief action, and he is not seeking to file a state habeas action. Further, Petitioner has not demonstrated there are exceptional circumstances warranting the issuance of a stay. There is nothing exceptional about Petitioner's circumstances. He has not filed any action in either state or federal court that would warrant the issuance of a stay by this Court. Respondent would note Petitioner did not seek a stay of execution from this Court when he was clearly entitled to one to file his petition for writ of certiorari in the appeal of the post-conviction relief action. Petitioner has the ability and opportunity to seek a stay in federal court, but to this date he has chosen not to do so. The transition to federal court after state court proceedings is far from unique. This Court has accounted for that transition in In re Stays. This Court clearly directed death sentenced inmates to seek a stay from the federal court to hear federal habeas actions.

III. In re Stays of Execution in Capital Cases Does Not Need to be Revisited.

In re Stays does not need to be revisited. First, in In re Stays, this Court specifically left the determination of the issuance of stays relating to federal habeas proceedings to the federal courts. Specifically, this Court stated, “[a]ny request for a stay pending federal habeas corpus proceedings should be made to the federal court. In the event a federal court grants a stay of execution, the Clerk of this Court shall issue an execution notice once the stay expires or is dissolved by the federal court.” In re Stays, 321 S.C. at 548, 471 S.E.2d at 142. Petitioner has not presented a valid reason why this should change. The concerns raised by Petitioner relate solely to the Anti-Terrorism and Effective Death Penalty Act (AEDPA) statute of limitations and the United States Supreme Court’s opinion in Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012). These concerns relating to the application of federal law to a federal habeas petition that has not yet been filed are matters Petitioner should raise in federal court, not state court. Petitioner has not attempted to present any of these contentions to the district court.

Second, Petitioner’s reliance upon the implications of Martinez v. Ryan upon the filing of his federal habeas petition is misguided. Petitioner’s concern derives from Juniper v. Davis, 737 F.3d 288 (4th Cir. 2013). In Juniper, the Fourth Circuit held,

if a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under Martinez in a state where the petitioner may only raise ineffective assistance claims in an ‘initial-review collateral proceeding,’ qualified and independent counsel is ethically required.

Juniper, 737 F.3d at 290. Unlike other capital defendants who are represented by counsel who did not represent them in their state court proceedings, Petitioner is represented by two attorneys who represented him in his state post-conviction relief action and his appeal in the post-conviction relief action. Contrary to Petitioner’s claim in this motion, the Respondents in federal

court did not oppose the continuity of counsel in his potential federal case. Mr. Blume has represented Petitioner since May 2008, and Ms. Paavola has represented Petitioner since the close of evidence in the state post-conviction relief evidentiary hearing on August 10, 2012. (App. 7110-11). Furthermore, while Mr. Warren was not involved in any of the state court proceedings, he was appointed as independent counsel in federal court, in part, because he had spent a significant amount of time reviewing the files and other case materials in order to advise Petitioner about the implications of Martinez v. Ryan. (Attachment No. 5, pp. 5-6). Furthermore, at the time of this filing, counsel have been representing Petitioner in federal court for 193 days without filing a federal habeas petition, and 103 days without seeking a new stay in federal court.

Third, Petitioner is incorrect about the amount of time he has remaining under the statute of limitations to file his federal habeas claims. Contrary to Petitioner's assertions, the State has never conceded the statute of limitations for his federal habeas claims expires in the Spring of 2018. The Respondents in federal court specifically argued that eighty-five days elapsed from the statute of limitations on the date the Return to Motion for Stay of Execution and Appointment of Counsel was filed on April 6, 2017. By Respondent's calculations, the statute of limitations expires on January 11, 2017.

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. 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 January 23, 2008, when the South Carolina Supreme Court denied his Petition for Rehearing. See Gonzalez v. Thaler, 565 U.S. 134, 150, 132 S. Ct. 641, 653-54, 181 L. Ed. 2d 619 (2012) (For those who do not appeal all the way to the United States Supreme Court in the direct appeal, “the judgment becomes final at the ‘expiration of the time for seeking such review’ – when the time for pursuing direct review in this [the United States Supreme] Court, or in state court, expires.”). Petitioner could not seek further review. Petitioner did not present a federal question in his direct appeal. The issue raised on appeal was as follows:

The trial judge committed reversible error by permitting the victim’s widow to testify that she had attempted suicide when she learned - from a message left on her answering machine - that the Supreme Court had reversed Stone’s death sentence and “they were going to retry this case over again,” as this testimony introduced an arbitrary factor into Stone’s resentencing, in violation of S.C. Code Section 16-3-25-(C)(1).

“When a challenge to a state court conviction presents a federal question, the Supreme Court has held that ‘the process of direct review ... includes the right to petition this Court for a writ of certiorari.’” Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999) (quoting Barefoot v. Estelle,

463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)). See also U.S. Sup.Ct. R. 10(b) (stating that certiorari is considered where “state court of last resort” has decided an important federal question); 28 U.S.C.A. § 1257 (a) (noting final judgments of a State’s highest court may be reviewed by the Supreme Court by writ of certiorari when “the validity of a treaty or statute of the United States is drawn in question,” “the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States,” or “any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.” Since a federal question was not raised in the appeal to the South Carolina Supreme Court, Petitioner is not entitled to the additional ninety days available for seeking certiorari to the United States Supreme Court. His federal time began to run from January 23, 2008.

The time was tolled with the filing of his initial Application for Post-Conviction Relief on April 9, 2008. Seventy-seven days elapsed in that period. The statute remained tolled during the pendency of the PCR action which began on April 9, 2008, and lasted until the petitions for rehearing in the PCR appeal were denied on March 29, 2017. As of this filing, an additional 229 days have lapsed. Thus, at this time, a total of 306 days have lapsed, with additional time accruing until a federal habeas petition is filed. 28 U.S.C. § 2244(d).

Fourth, Respondent submits Petitioner has not established an adequate basis for revisiting In re Stays. In In re Stays, this Court very logically and reasonably left the determination of the granting of stays of execution to seek federal habeas relief in the hands of the federal court. To change now, especially in a case in which the Petitioner has not even sought an additional stay of execution when one could easily be sought in federal court, runs the risk of interfering with the

federal district court's ability to manage its own docket and contravenes Congress's express directives outlined in 28 U.S.C. § 2251(a).

Finally, Respondent would note that any additional work created by this Court's filing of an execution notice on November 6, 2017 is solely the result of Petitioner's failure to comply with federal law by not filing a federal habeas petition and seeking a stay under 28 U.S.C. § 2251(a)(1). Denying Petitioner's motion here would not lead to future letters in other pending federal habeas cases; it would instead serve as a reminder to federal habeas petitioners that the federal district court is the proper venue for requesting a stay of execution while pursuing federal habeas relief. Eight other petitioners currently seeking federal habeas relief clearly understand that. Petitioner in this case should be no different. Petitioner's motion for stay of execution should therefore be denied.

Respectfully Submitted,

ALAN WILSON
Attorney General

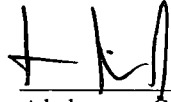
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ATTORNEYS FOR RESPONDENT

November 13, 2017

Attachment No. 1

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

BOBBY WAYNE STONE)	
	)	CIVIL ACTION NO. <u>2:17-mc-00136-MGL-MGB</u>
<i>Petitioner,</i>)	
v.	)	MOTION FOR STAY OF EXECUTION
BRYAN P. STIRLING, Commissioner,	)	AND APPOINTMENT OF COUNSEL
South Carolina Department of Corrections,)	
and JOSEPH MCFADDEN, Warden,)	
Lieber Correctional Institution)	
)	
<u><i>Respondents.</i></u>)	

THIS IS A CAPITAL CASE.

Bobby Stone is an indigent prisoner under sentence of death imposed by the Sumer County, South Carolina, Court of General Sessions. Through undersigned counsel, Stone requests that this Court stay his execution, which is **currently scheduled for Friday, April 21, 2017,**¹ and appoint counsel to represent him in the preparation, presentation, and litigation of his first federal petition for a writ of habeas corpus. Specifically, Stone requests that this Court appoint John H. Blume, of Ithaca, New York, and Emily C. Paavola, of Columbia, South Carolina, to represent him. In support of this motion, counsel submit the following facts and argument.

I. RELEVANT PROCEDURAL HISTORY.

Stone was convicted and sentenced to death on January 28, 1997, for the shooting death of a sheriff's deputy in Sumter, South Carolina. On direct appeal, the South Carolina Supreme Court reversed the death sentence and remanded for a new sentencing proceeding. *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002). Following a second sentencing proceeding, Stone was again

¹ The South Carolina Supreme Court issued the remittitur on March 29, 2017, and served the death warrant on March 30, 2017. Per South Carolina law, Stone's execution is scheduled for the fourth Friday following 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, 546-47, 471 S.E.2d 140, 141 (1996). Accordingly, the execution date is April 21, 2017.

sentenced to death on February 27, 2005. He timely appealed, and the South Carolina Supreme Court affirmed his second death sentence on direct review. *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487 (2007). Rehearing was denied on January 23, 2008. Stone did not seek a petition for writ of certiorari from the United States Supreme Court, and his time to do so expired on April 22, 2008.

Stone properly filed an application for post-conviction relief (“PCR”) on April 7, 2008. 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). This is because the federal statute of limitations does not begin running until “the date on which the judgment became final by the conclusion of direct review *or the expiration of the time for seeking such review.*” 28 U.S.C. 2244(d)(1)(A) (emphasis added); *see also, Crawley v. Catoe*, 257 F.3d 395, 400 (4th Cir. 2001) (“the limitation of action begins to run when the conviction is final under § 2244(d)(1)(A) only when the availability of direct appeal has been exhausted, which includes the denial of a certiorari petition to the United States Supreme Court *or the expiration of time for seeking such review.*”) (emphasis added).

The state PCR court held an evidentiary hearing at which Stone was represented by John Blume and Robert Lominack. At the conclusion of the hearing, and with the consent of Stone, Robert Lominack was relieved and Emily Paavola was substituted as counsel for Stone. The PCR court denied relief and Stone timely appealed. He was represented for the duration of the PCR appeal by Blume and Paavola, and the South Carolina Supreme Court’s denial of relief became final on March 29, 2017. Stone’s PCR application remained pending, and operated to toll the limitations period, until March 29th, on which date his 365 days on the federal statute of limitations began running. *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.”). Thus, Stone has until March 29, 2018 to file his federal habeas corpus petition.

II. THE COURT MUST ENTER A STAY AND APPOINT COUNSEL TO REPRESENT MR. STONE 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. The right to counsel conferred by section 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 ‘the 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 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 section 3599 is a right to assistance in identifying, developing, and pleading all available claims for relief.

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.’” *Id.* 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 of 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 the Yale Divinity School (1982), and a J.D. 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, S.C. (McClain & Derfner), Charleston, SC), a partner in a Columbia S.C. law firm (Bruck & Blume), the Executive Director of the South Carolina Death Penalty Resource Center and, since 1997, a Professor of Law at

Cornell Law School 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 appeal 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 sentenced inmates in the District of South Carolina on multiple occasions from 1986 to the present. He is presently on this Court's CJA Death Penalty Panel Attorney List as approved lead counsel.

Emily C. Paavola is the Legal Director of Justice 360 (formerly "the Death Penalty Resource & Defense Center"). She is a 2005 graduate of Cornell Law School. She is licensed and admitted in New York, South Carolina, the United States District Court for the District of South Carolina, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States. After law school, she served as a Project Fellow for the Cornell Death Penalty Project in Ithaca, New York, and then practiced as an associate in the business litigation practice group at Baker & Daniels LLP in Indianapolis, Indiana, where she handled civil matters primarily in federal court and also provided *pro bono* representation to death sentenced inmates in capital post-conviction proceedings. Ms. Paavola moved to South Carolina in 2008, and has spent the past nine years exclusively handling death penalty cases in state and federal court. She has represented approximately twenty 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. She is also listed as approved lead counsel on this Court's CJA Death Penalty Panel Attorney List.

III. STONE WAIVES AN INVESTIGATION UNDER *MARTINEZ V. RYAN*.

As indicated above in section II, Bobby Stone was represented in his state collateral review proceedings by both Blume and Paavola. Under *Martinez v. Ryan*, 566 U.S. 1 (2012), Stone is permitted to request new, independent counsel to investigate whether prior collateral review counsel (i.e., Blume and Paavola) were ineffective, which Stone could assert as “cause” to excuse otherwise procedurally barred ineffective-assistance-of-trial-counsel claims. See, e.g., *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013); *Gray v. Pearson*, 526 Fed. Appx. 331, 334 (4th Cir. 2013). Thus, if Stone desired to pursue an investigation into potential *Martinez* claims, he would be entitled to the appointment of at least one independent attorney because undersigned counsel cannot reasonably be expected to identify and investigate potential errors that they themselves may have made in state post-conviction proceedings. See *Gray*, 526 Fed. Appx. at 334.

However, as set forth in his attached declaration, Stone strongly desires to retain current counsel for his federal habeas corpus proceedings, and he does not wish to investigate or pursue potential *Martinez* claims. See Exhibit A, Declaration of Bobby Wayne Stone. He therefore wishes to waive any rights he has under *Martinez v. Ryan*, 566 U.S. 1 (2012). Because this course of action involves the waiver of undersigned counsel’s own potential ineffectiveness, Blume and Paavola requested that Stone meet with two experienced attorneys who could offer him independent advice on this decision. As set forth in their respective affidavits, attorneys John Warren and Charles Grose met with Stone to ensure that he fully understands the rights he now seeks to waive and that his waiver was made knowingly and intelligently. See Exhibits B and C. After receiving outside advice from attorneys Warren and Grose, Stone maintains his position that he wishes to waive a *Martinez* investigation in order to retain Blume and Paavola as his federal habeas counsel.

IV. CONCLUSION.

Wherefore, for the foregoing reasons, this Court should enter an order staying Stone's execution and appointing John H. Blume as lead counsel, and Emily C. Paavola as second-chair to assist Stone in the preparation and filing of a timely petition for habeas relief.

Respectfully submitted,

s/Emily C. Paavola

John H. Blume, Fed ID #1630
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(607) 255-1030
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Emily C. Paavola, Fed ID#11488
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Columbia, South Carolina 29201
(803) 765-1044
Emily@justice360sc.org

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

BOBBY WAYNE STONE)	
	)	CIVIL ACTION NO. <u>2:17-mc-00136-MGL-MGB</u>
<i>Petitioner,</i>)	
v.)	
BRYAN P. STIRLING, Commissioner,)	
South Carolina Department of Corrections,)	
and JOSEPH MCFADDEN, Warden,)	
Lieber Correctional Institution)	
)	
<u><i>Respondents.</i></u>)	

I, Emily C. Paavola, hereby certify that I have this date served the Motion for Stay of Execution and Appointment of Counsel in the above-captioned case upon counsel for respondent via US mail:

Alphonso Simon
SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

March 31, 2017

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

Bobby Wayne Stone,)	
)	
Petitioner,)	
)	
v.)	
)	
Bryan P. Stirling, Commissioner,)	
South Carolina Department of Corrections,)	
)	
Respondent.)	

DECLARATION OF BOBBY WAYNE STONE

1. I, Bobby Wayne Stone, am the petitioner in the above captioned case. I am incarcerated at Lieber Correctional Institution in Ridgeville, South Carolina.

2. I understand that the South Carolina state courts have denied relief on all of my direct appeal and post-conviction relief claims, and my case is now ready for federal habeas corpus review.

3. I further understand that under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), I may have new attorneys appointed to represent me in my federal habeas proceedings who could then investigate to see if there are any claims of ineffective assistance of trial counsel that my current post-conviction attorneys, John Blume and Emily Paavola, failed to raise in my state post-conviction relief proceedings. However, I do not want to have new attorneys appointed to represent me. Instead, I want to keep my current attorneys and waive any investigation into potential *Martinez* claims and my right to raise *Martinez* claims if any would be uncovered.

4. Mr. Blume and Ms. Paavola have advised me about the decision in *Martinez*, its importance in capital habeas cases, and the risks involved with my decision to waive my rights

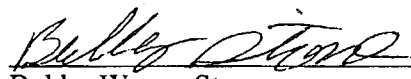
under that case. They also told me they wanted me to speak privately with independent attorneys who could offer me their own advice about these issues.

5. On March 10, 2017, I met with attorneys Charles Grose and John Warren, who also spoke to me about *Martinez* and the consequences of the decision I was considering.

6. After receiving this advice and thinking about this issue carefully, I still strongly desire to keep my current attorneys and waive a *Martinez* investigation. I understand that by waiving this investigation, I cannot raise new claims of ineffective assistance of trial counsel in my petition for federal habeas corpus that were not already raised in my state court proceedings below.

7. This decision was my own decision and no one pressured or even encouraged me to waive potential *Martinez* claims.

I declare, under the penalty of perjury, that the above statements are true and correct.


Bobby Wayne Stone

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Bobby Wayne Stone,)
)
Petitioner,)
)
v.)
)
Bryan P. Stirling, Commissioner, South)
Carolina Department of Corrections,)
)
Respondent.)
_____)

AFFIDAVIT OF JOHN L. WARREN III

1. I, John L. Warren III, am an attorney with Simmons Law Firm, LLC in Columbia, South Carolina.

2. I am a member of the South Carolina Bar and am also admitted to practice before the United States District Court, District of South Carolina and the Fourth Circuit Court of Appeals.

3. I graduated from the University of South Carolina with Honors from the South Carolina Honors College in 2009 and Elon University School of Law in 2013. I became a member of the South Carolina Bar on November 18, 2013.

4. During my time in law school, I clerked exclusively for John S. Simmons of Simmons Law Firm. During such time, I worked on various medical malpractice, criminal defense, wrongful death, personal injury, and *qui tam* whistleblower cases. I also drafted a victorious appellate brief in a multi-million dollar civil lawsuit in the Fourth Circuit Court of Appeals.

5. Following graduation from law school, I accepted a position as a law clerk to Justice John W. Kittredge of the South Carolina Supreme Court. I clerked for Justice Kittredge for two years. In that position, I was exposed to many aspects of South Carolina law, including complex

constitutional, civil, criminal, and death penalty cases. My primary job responsibilities included researching complex legal questions and drafting bench memoranda for members of the Court. During this time, I learned a great deal about capital litigation in the State of South Carolina and worked on several capital cases.

6. In August 2016, after the conclusion of my two-year judicial clerkship, I began working for Simmons Law Firm as an Associate Attorney. Simmons Law Firm is a small boutique litigation firm in Columbia, South Carolina that currently employs three attorneys. Although we are a general practice, we typically litigate medical malpractice, constitutional litigation, personal injury, white-collar criminal defense, and *qui tam* whistleblower actions.

7. In addition to the practice areas outlined above, I have recently been appointed second chair counsel for Mikal Deen Mahdi in a pending capital habeas case assigned to Judge Cain in the District of South Carolina.

8. My representation of Mr. Mahdi entails dealing with a number of complex substantive and procedural legal issues, including claims pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Accordingly, I have become very familiar with the legal issues surrounding *Martinez* and the importance of litigating *Martinez* claims in order to establish cause for default of claims of ineffective assistance of counsel.

9. Sometime in late February, Emily Paavola asked me to meet with her client, Bobby Wayne Stone. Ms. Paavola explained that Mr. Stone had recently expressed a strong preference for waiving an investigation into potential *Martinez* claims in order to retain his current state post-conviction counsel, Ms. Paavola and John Blume, for his federal habeas corpus proceedings. Ms. Paavola stated that she and Mr. Blume believed that Mr. Stone should receive independent counsel and advice on this issue and asked if I would be willing to discuss the matter with Mr. Stone. On

March 10, 2017, I, along with Charles Grose, met with Bobby Wayne Stone at Lieber Correctional Institution.

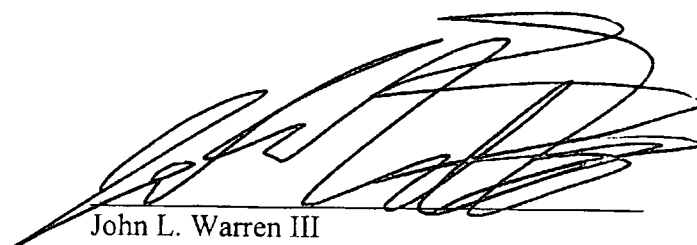
10. I am generally familiar with Mr. Stone's case, having read the published opinions by the Supreme Court of South Carolina related to his capital case.

11. During that meeting, Mr. Grose and I counseled Mr. Stone about the importance of *Martinez*, its role in capital habeas cases, and the risks associated with Mr. Stone's proposed plan to waive an investigation into any potential *Martinez* claims.

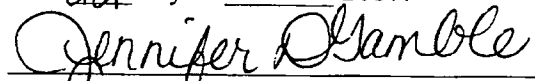
12. Mr. Grose and I spent approximately two hours with Mr. Stone. Based on my lengthy meeting with Mr. Stone, it is my opinion that Mr. Stone understands the Court's decision in *Martinez*; he understands the importance and potential benefits of being able to raise *Martinez* claims if his state post-conviction counsel failed to raise any meritorious issues; and, he has voluntarily, knowingly, and intelligently chosen to waive any *Martinez* claims so that he can retain his current state post-conviction counsel during his federal habeas case.

13. To that end, Mr. Stone emphasized that no one has pressured him into waiving potential *Martinez* claims and that he has made the choice to do so of his own free will.

FURTHER AFFIANT SAYETH NOT.


John L. Warren III

State of South Carolina
County of Richland
Sworn to and subscribed before me
This 22 day of March 2017.



Notary Public

My Commission Expires: 8/30/20

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF E. CHARLES GROSE, JR.
COUNTY OF GREENWOOD)

E. Charles Grose, Jr., being first duly sworn, swears and affirms that the following is true to the best of my knowledge:

1) I was admitted to practice law in the State of South Carolina on May 17, 1993 and the United States District Court for the District of South Carolina on February 23, 1994. I am also admitted to practice law in the Supreme Court of the United States and the United States Court of Appeals for the Fourth Circuit.

2) From 1993-1996, I was an Associate Attorney with Grimball & Cabanis P.A. in Charleston South Carolina. In 1996, I became an Assistant Public Defender in Orangeburg County, South Carolina. When I left that office in 1999, I was the Deputy Public Defender. From 1999-2008, I was the Chief Public Defender for Greenwood and Abbeville Counties, South Carolina. Upon implementation of the Indigent Defense Act of 2007, I was appointed the Circuit Public Defender for the Eighth Judicial Circuit (Abbeville, Greenwood, Laurens, and Newberry Counties), serving a term from August 2008 to August 2012. I am currently a sole practitioner in Greenwood, South Carolina. Throughout my career I have tried numerous felony cases.

3) I am certified by the South Carolina Supreme Court to be lead counsel in capital cases and am approved as first chair on the CJA Death Penalty Attorney List for the United States District Court for the District of South Carolina. My capital trial court experience includes: *State v. Bennie Ray Brown*, Laurens County Warrant Numbers I-556766-67, J-619971-77, who was found to suffer from Intellectual Disabilities pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002); *State v. Bixby*, Abbeville County Case

Numbers 2004-GS-01-321, 322 and *State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010) as trial and appellate counsel; *State v. Steven A. Tinch*, Abbeville County Case Number 2006-GS-01-417, 419, which resulted in a guilty plea and a forty-five year sentence; *State v. Domonique O. Brown*, Laurens County Case Number 2007-GS-30-220, which resulted in a guilty plea and a thirty-year sentence; *State v. Anthony A. Myers*, Greenwood County Case Number 2000-GS-24-1170, which resulted in a guilty plea and sentence of life imprisonment without the possibility of parole; and *State v. Barry L. Ervin*, Greenwood County Case Number 1998-GS-24-1770, which resulted in a guilty plea and sentence of life imprisonment without the possibility of parole. I represented John Kennedy Hughey in his capital post-conviction relief case, subsequent appeals, and resentencing to life imprisonment. Abbeville County Case No. 1996-GS-01-220 and 2000-CP-01-210 and *Hughey v. State*, (S.C.S.Ct. Op. No. 2015-UP-029) (Filed May 13, 2015) *cert. denied South Carolina v. Hughey*, 136 S.Ct. 1659 (2016). I am currently state post-conviction counsel in *William O. Dickerson, Jr. v. State*, Charleston County Cases Number 2012-CP-10-3216, and *Jerry Buck Inman v. State*, Pickens County Case Number 2012-CP-39-00918. I am counsel in *Donald Jones v. State*, Lancaster County Case No. 2001-CP-29-1030, a competency to be executed proceeding. I am federal *habeas* counsel in *Mikal D. Mahdi v. Sterling, et. al.*, 8:16-cv-03911-TMC-JDA and *Stephen Corey Bryant v. Sterling et. al.*, 9:16-cv-01423-DCN-BM, which is stayed pending a state court determination of Intellectual Disabilities pursuant to *Atkins* in *Bryant v. State* in *Bryant v. State*, Sumter County Case No. 2016-CP-43-828.

3) My death penalty training includes but is not limited to the Annual National Federal *Habeas Corpus* Seminar, (2015, 2014, 2013, and 2011); NAACP Legal

Defense & Educational Fund, Inc.'s Annual Capital Punishment Training Conference, Airlie Conference Center, Warrenton, VA (2012, 2010, and 2005); and Capital Case Initiative, sponsored by South Carolina Commission on Indigent Defense (2013, 2012, 2011, and 2010).

4) I am also a former member of the Board of Directors of Justice 360, which was formerly known as the Death Penalty Resource & Defense Center and 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.

5) I am familiar with *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). My representations of Mr. Mahdi and Mr. Bryant involve investigating potential *Martinez* issues. I am also familiar with *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir 2014) holding, "If a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under *Martinez* in a state [like South Carolina] where the petitioner may only raise ineffective assistance claims in an 'initial review collateral proceeding,' qualified and independent counsel is ethically required."

6) John Blume and Emily Paavola represent Bobby Wayne Stone in his state capital post-conviction relief case. Because Mr. Stone expressed a strong preference for retaining his current counsel for his federal habeas petition, Mr. Blume and Ms. Paavola

asked John Warren and me to meet with Mr. Stone to make sure he understands his right to independent counsel to investigate potential *Martinez* claims.

7) On March 10, 2017, Mr. Warren and I met with Mr. Stone at length at Lieber Correctional Institution. During the meeting, we counseled Mr. Stone about the significance of *Martinez*, its role in capital cases, his right to request independent counsel, and the risks and consequences of waving an investigation into potential *Martinez* claims. Mr. Stone explained why he desires to continue with current counsel. We answered all of Mr. Stone's questions.

8) Based on the meeting, it is my opinion that Mr. Stone understands *Martinez*, the potential benefits of being able to investigate and raise *Martinez* claims, and the risks and consequences of waiving independent counsel to investigate potential *Martinez* claims. It is also my opinion that Mr. Stone knowingly and intelligently decided to waive independent counsel to investigate potential *Martinez* claims.

9) Based on the meeting, it is also my opinion that Mr. Stone has made a voluntary decision to waive independent counsel to investigate potential *Martinez* claims and continue with his current counsel. He stated that no one has pressured or coerced him to make this decision and expressed a strong desire to continue with current counsel.

Further affiant sayeth naught.



E. Charles Grose, Jr.

Sworn to and subscribed before me

this 24th day of March, 2017

May J. Loveland

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 5-30-17

Attachment No. 2

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Bobby Wayne Stone, #5051,	) C/A No. 2:17-MC-00136-MGL-MGB
	) (Capital Case)
)
Petitioner,)
	) RETURN TO MOTION FOR STAY
vs.	) 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 respond to the Motion for Stay of Execution and Appointment of Counsel filed by Petitioner Bobby Wayne Stone on March 31, 2017. [Docket Entry #1]. Petitioner currently scheduled to be executed on April 21, 2017. (See Attachment No. 1). He has requested this Court stay his execution and appoint counsel to represent him in the preparation and litigation of his first federal petition for a writ of habeas corpus. Respondents have no objection to either a stay of execution or the appointment of appointment of two attorneys to represent Petitioner. Respondents would respectfully show the Court the following:

I. PROCEDURAL HISTORY

Petitioner, Bobby Wayne Stone ("Petitioner"), is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his Sumter County convictions and death sentence for the murder of Sumter County Sheriff's Deputy Charlie Kubala, first-degree burglary, and possession of a weapon during the commission of a violent crime. The Sumter County Grand Jury

indicted Petitioner during the August 1996 term for one count of murder, one count of first-degree burglary, and one count of possession of a weapon during a the commission of a violent crime (96-GS-43-0698). The State served Petitioner with its Notice of Intent to Seek the Death Penalty and its Notice of Evidence in Aggravation.

On January 23-28, 1997, Petitioner was tried by a jury before the Honorable R. Markely Dennis, Jr. Petitioner was represented in this first trial by Cameron B. Littlejohn, Jr., and James H. Babb; Solicitor Wade S. Kolb of the Third Judicial Circuit prosecuted the case for the State. Petitioner was convicted of all charges. After the jury found the existence of two aggravating factors and recommended a sentence of death, Judge Dennis sentenced Petitioner to death for the murder conviction; thirty (30) years confinement for first degree burglary conviction to be served consecutively; and five (5) years confinement for the possession of a weapon during the commission of a violent crime conviction, to be served consecutively to the other two sentences.

A timely Notice of Appeal was filed and served on January 31, 1997. Following briefing and oral argument, the South Carolina Supreme Court affirmed the convictions but reversed the sentencing phase and remanded for resentencing. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002).

On February 22-27, 2006, Petitioner received a new sentencing proceeding before the Honorable Howard P. King and a jury. Petitioner was again represented by Mr. Babb and Mr. Littlejohn. The case was prosecuted by Solicitor Kelly Jackson and Assistant Solicitor Dudley Saleeby, both of the Third Judicial Circuit. After the jury found the existence of one aggravating circumstance and recommended a sentence of death, Judge King imposed a death sentence for the murder conviction.

Petitioner timely filed and served a notice of appeal. Chief Appellate Defender Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented Petitioner on appeal from the resentencing. On September 6, 2007, Petitioner filed a Final Brief of Appellant. The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent. Following oral argument, the South Carolina Supreme Court issued an opinion on December 20, 2007 affirming the death sentence. State v. Stone, 376 S.C. 32, 655 S.E.2d 487 (2007). Petitioner subsequently filed a Petition for Rehearing on January 4, 2008. The Petition was denied on January 23, 2008.

Petitioner then filed on January 23, 2008 a Petition for Stay of Execution to pursue a post-conviction relief action. The State responded by letter indicating it did not object to the stay. On February 21, 2008, the South Carolina Supreme Court issued an Order staying the execution to litigate the post-conviction relief action. Jim Brown and Robert E. Lominack were initially appointed to represent Petitioner. During the action and at the evidentiary hearing, Petitioner was represented by John H. Blume and Robert E. Lominack.

On April 9, 2008, Petitioner filed an Application for Post-Conviction Relief. The State served its Return, Motion to Dismiss, and Motion for Summary Judgment on May 12, 2008. Petitioner served an Amended Application dated May 4, 2009. The State served its Amended Return, Motion to Dismiss and Motion for Summary Judgment on June 3, 2009. Petitioner served his Second Amended Application for Post-Conviction Relief on June 26, 2009. Petitioner served his Third Amended Application for Post-Conviction Relief on March 22, 2012. The State served its Return, Motion to Dismiss

and Motion for More Definite Statement to Third Amended Application for Post-Conviction Relief on April 18, 2012. The evidentiary hearing was held on April 23-24, 2012 and on August 10, 2012. Petitioner was present and was represented by Mr. Blume and Mr. Lominack.¹ The State was represented by Senior Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Alphonso Simon. After the hearing, both parties submitted post-trial briefs.

On May 2, 2013, the PCR Court filed its Order dismissing the Application for Post-Conviction Relief. Petitioner filed a Motion to Alter or Amend Judgment on May 10, 2013. The State also filed a Motion to Alter or Amend Judgment on May 17, 2013. A hearing on the motions was convened by the PCR Court on August 2, 2013. Petitioner was present and was presented by Mr. Blume and Ms. Paavola. The State was represented by Mr. Zelenka and Mr. Simon. On August 14, 2013, the PCR Court filed its Amended Order, again denying the application for post-conviction relief.

Petitioner subsequently filed a Notice of Appeal on September 17, 2013. Petitioner filed his Petition for Writ of Certiorari. Respondent filed its Return to the Petition for Writ of Certiorari. Petitioner then filed a Reply to Petition for Writ of Certiorari. By Order filed July 23, 2015, the South Carolina Supreme Court granted the Petition for Writ of Certiorari. Petitioner filed his Brief of Petitioner on September 22, 2015. The State filed the Brief of Respondent on December 29, 2015, and Petitioner filed his Reply Brief of Petitioner on January 19, 2016.

The South Carolina Supreme Court filed a published opinion affirming the order denying post-conviction relief on February 8, 2017. Both parties filed Petitions for

¹ After the evidentiary hearing was completed, but before briefing, Mr. Lominack was relieved as counsel and Ms. Paavola was appointed to represent Petitioner.

Rehearing. In an Order filed March 29, 2017, the South Carolina Supreme Court denied both Petitions for Rehearing. The Supreme Court also filed a revised published opinion. The Remittitur was issued on March 29, 2017. The South Carolina Supreme Court issued the Execution Notice on March 30, 2017.

Altogether, Petitioner has generally exhausted his available state remedies having pursued and completed both a direct appeal and a post-conviction relief action.² 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").

II. 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. 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

² 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.

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 January 23, 2008, when the South Carolina Supreme Court denied his Petition for Rehearing.³ See Gonzalez v. Thaler, 565 U.S. --, --, 132 S. Ct. 641, 653-54, 181 L. Ed. 2d 619 (2012) (For those who

³ Respondents would note that Petitioner did not present a federal question in his direct appeal. The issue raised on appeal was as follows:

The trial judge committed reversible error by permitting the victim’s widow to testify that she had attempted suicide when she learned - from a message left on her answering machine - that the Supreme Court had reversed Stone’s death sentence and “they were going to retry this case over again,” as this testimony introduced an arbitrary factor into Stone’s resentencing, in violation of S.C. Code Section 16-3-25-(C)(1).

“When a challenge to a state court conviction presents a federal question, the Supreme Court has held that ‘the process of direct review ... includes the right to petition this Court for a writ of certiorari.’” Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999) (quoting Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)). See also U.S. Sup.Ct. R. 10(b) (stating that certiorari is considered where “state court of last resort” has decided an important federal question); 28 U.S.C.A. § 1257 (a) (noting final judgments of a State’s highest court may be reviewed by the Supreme Court by writ of certiorari when “the validity of a treaty or statute of the United States is drawn in question,” “the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States,” or “any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.” Since a federal question was not raised in the appeal to the South Carolina Supreme Court, Respondents submit Petitioner is not entitled to the additional ninety days available for seeking certiorari to the United States Supreme Court.

do not appeal all the way to the United States Supreme Court in the direct appeal, “the judgment becomes final at the ‘expiration of the time for seeking such review’ – when the time for pursuing direct review in this [the United States Supreme] Court, or in state court, expires.”). Since Petitioner could not seek further review, his convictions became final on January 23, 2008.

His federal time began to run from January 23, 2008. The time was tolled with the filing of his initial Application for Post-Conviction Relief on April 9, 2008. Seventy-seven days elapsed in that period. The statute remained tolled during the pendency of the PCR action which began on April 9, 2008, and lasted until the petitions for rehearing in the PCR appeal were denied on March 29, 2017. As of this filing, an additional eight days have lapsed. Thus, at this time, a total of eighty-five (85) days have lapsed, with additional time accruing until a federal habeas petition is filed. 28 U.S.C. § 2244(d). However, as set forth below, Petitioner must file his habeas petition within ninety (90) days of appointment of counsel to comply with the stay of execution requirements.

III. REQUEST FOR STAY

Petitioner moves for a stay of execution and seeks appointment of counsel pursuant to 18 U.S.C. § 3599. Pursuant to 28 U.S.C. § 2251(a)(3):

... 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.”). Consistent with the responses and 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 federal habeas 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). Sigmon v. Byars, C/A No. 8:13-mc-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.”); Mahdi v. Stirling, C/A No. 8:16-mc-402-TMC-JDA, Docket Entry #12, at p. 2 (D.S.C. Oct. 5, 2016)(granting stay of execution for ninety days from date counsel is appointed as provided in 28 U.S.C. § 2254(a)(3), noting the stay will terminate after ninety days, and further noting that Petitioner may seek an additional stay of execution as necessary pursuant to 28 U.S.C. § 2251(a)(1)); Moore v. Stirling, et al., C/A No. 4:14-4691-MGL-TER, Docket Entry #22, p. 3 (D.S.C. Dec. 22, 2014)(granting a stay for ninety days after date counsel was appointed and noting that “[o]nce Petitioner files his habeas petition, he may move for an indefinite stay pending the outcome of his habeas proceeding under § 2251(a)(1).”);

Stokes v. Stirling, et al., C/A No.: 1:16-mc-00073-RBH, pp. 2-3 (D.S.C. March 16, 2016)(“The Court finds that Petitioner should be granted a stay of execution. Pursuant to 28 U.S.C. § 2251(a)(3), the stay shall terminate not later than ninety (90) days from the date counsel is appointed. Further, within the ninety (90) day stay of execution, Petitioner shall file the habeas petition. Additionally, prior to the expiration of the ninety (90) day stay of execution, Petitioner must seek a longer stay of execution pursuant to 28 U.S.C. § 2251(a)(1) in order to allow this Court to rule on the merits of the habeas petition.”); 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.”).

IV. APPOINTMENT OF COUNSEL

Petitioner requests the appointment of John H. Blume, Esquire, and Emily C. Paavola, Esquire. (Motion, pp. 4-5). 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").

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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April 6, 2017

ATTORNEYS FOR RESPONDENTS
By: s/ Alphonso Simon Jr.

The Supreme Court of South Carolina

The State, Respondent,

v.

Bobby Wayne Stone, Appellant.

The Honorable R. Markley Dennis, Jr.
Sumter County
Trial Court Case No. 1996GS430698

EXECUTION NOTICE

TO THE HONORABLE BRYAN P. STIRLING, DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the above case from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court of South Carolina and the remittitur has been sent to the Clerk of the Court of General Sessions for Sumter County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said defendant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant.


CLERK

Columbia, South Carolina

March 30, 2017

cc:

Donald J. Zelenka, Esquire
Alphonso Simon, Jr., Esquire
Emily Paavola, Esquire
John H. Blume, III, Esquire
The Honorable Henry McMaster
Salley W. Elliott, Esquire

Attachment No. 3



**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

BOBBY WAYNE STONE,

Petitioner,

vs.

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

§
§
§
§
§ MISC. ACTION NO. 2:17-0136-MGL-MGB
CAPITAL CASE
§
§
§
§
§

**ORDER GRANTING PETITIONER'S MOTION TO STAY HIS EXECUTION
AND HOLDING IN ABEYANCE HIS MOTION
FOR THE APPOINTMENT OF COUNSEL**

I. INTRODUCTION

This is a state capital case filed under 28 U.S.C. § 2254. The matter is before the Court for consideration of Petitioner's motions to stay his execution and for the appointment of counsel. Having considered the motions, the response, the record, and the applicable law, the Court will grant Petitioner's motion to stay his execution and hold in abeyance his motion for the appointment of counsel pending briefing and further order of this Court.

II. PETITIONER'S MOTION TO STAY HIS EXECUTION

Petitioner moves the Court to stay his execution. Respondents do not object. Petitioner's execution is currently set for April 21, 2017.

Section 2251(a)(3) provides:

If a State prisoner sentenced to death applies for appointment of counsel pursuant to [the federal statute mandating the appointment of counsel for indigent petitioners who have been sentenced to death] 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.

Id. The Court will grant Petitioner's motion to stay his execution. The stay will terminate ninety days after the Court rules on Petitioner's motion for the appointment of counsel.

III. PETITIONER'S MOTION FOR THE APPOINTMENT OF COUNSEL

Petitioner also moves the Court to appoint John H. Blume, of Ithaca, New York, and Emily C. Paavola, of Columbia, South Carolina, as his counsel in this action. They represented him during his post-conviction relief proceedings (PCR). Respondents offer no opposition to the motion.

A petitioner in a § 2254 action is entitled to bring ineffective assistance of counsel claims against his PCR counsel. *See Martinez v. Ryan*, 566 U.S. 1, 9 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."). "[I]f a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, [however,] and the petitioner requests independent counsel . . . to investigate and pursue claims under *Martinez* in a state where the petitioner may only raise ineffective assistance claims in an initial-review collateral proceeding, qualified and independent counsel is *ethically* required." *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013) (citation omitted) (internal quotation marks omitted).

Petitioner has waived his right to bring any ineffective-assistance-of-counsel claims against his PCR counsel. And he has not requested independent counsel to pursue any *Martinez* claims. Nevertheless, the Court is reticent to accept his waiver. This, of course, is not to suggest the Court has concluded Petitioner might have any colorable claims in this regard. Instead, the Court's hesitancy springs from an abundance of caution.

Therefore, the Court will require briefing on the following issues:

1. Whether there is any appellate authority in which a court has allowed the petitioner to waive his ineffective-assistance-of-counsel claims against his counsel in his state collateral proceedings so counsel could represent him during his federal habeas proceedings.
2. Whether, in addition to appointing Mr. Blume and Ms. Paavola, it would be appropriate for the Court to appoint independent counsel to investigate and, if warranted, bring any ineffective-assistance-of-counsel claims as to Petitioner's PCR counsel.
3. Whether Petitioner wishes to request a specific statutorily qualified attorney in the event the Court concludes it is necessary to appoint independent counsel to investigate and, if warranted, bring any ineffective-assistance-of-counsel claims as to Petitioner's PCR counsel.

Petitioner shall file his brief on these issues not later than April 17, 2017. If Respondents wish to file a response, they must do so not later than April 24, 2017. If they decide not to file a response, they shall inform the Court as soon as that decision is made. If Respondents file a response, Petitioner must file his reply to the response not later than April 31, 2017.

IV. CONCLUSION

Wherefore, as discussed above, Petitioner's motion to stay his execution is **GRANTED** and his motion for the appointment of counsel is **HELD IN ABEYANCE** pending briefing and further order of this Court. Petitioner's execution is **STAYED** until ninety days after the Court rules on Petitioner's motion for the appointment of counsel.

IT IS SO ORDERED.

Signed this 10th day of April, 2017, in Columbia, South Carolina.

/s/Mary Geiger Lewis

MARY GEIGER LEWIS

UNITED STATES DISTRICT JUDGE

Attachment No. 4

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

BOBBY WAYNE STONE,)	
)	
Petitioner,)	
	)	MISC. ACTION NO. 2:17-0136-MGL-MGB
vs.	)	<u>CAPITAL CASE</u>
)	
BRYAN P. STIRLING, Commissioner,)	
South Carolina Department of Corrections,)	
and JOSEPH MCFADDEN, Warden,)	
Lieber Correctional Institution,)	
)	
Respondents.)	

PETITIONER’S SUPPLEMENTAL BRIEF
REGARDING APPOINTMENT OF COUNSEL

I. INTRODUCTION.

On March 31, 2017, petitioner, Bobby Stone, moved this Court for a stay of execution and the appointment of counsel to represent him in his first federal habeas corpus proceeding. [Dkt. Entry #1]. He requested that his state post-conviction attorneys, John Blume and Emily Paavola, be appointed as his federal habeas counsel, and he submitted a written declaration specifically waiving his rights under *Martinez v. Ryan*, 566 U.S. 1 (2012). Respondent did not oppose a stay of execution or the appointment of counsel. [Dkt. Entry #7]. On April 10, 2017, this Court stayed petitioner’s execution and requested additional briefing regarding the appointment of counsel, which petitioner now submits.

II. PETITIONER’S WAIVER OF RIGHTS UNDER *Martinez v. Ryan*.

As this Court correctly observed, if petitioner had requested independent counsel to investigate and pursue potential *Martinez* claims, then the appointment of independent counsel would be required. *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013). However, in this instance petitioner does not request the appointment of independent counsel and has, instead, explicitly

waived his right to a *Martinez* investigation so that he may maintain continuity of counsel with whom he has developed a close and trusted working relationship.¹

Undersigned counsel have researched this issue thoroughly but found no previous case in which an appellate court has specifically addressed this particular issue, although counsel are aware of cases in which state post-conviction counsel also represented the petitioner in federal habeas corpus proceedings. Additionally, some courts have appointed “supplemental” counsel (without removing other habeas counsel) to independently determine whether there are any viable *Martinez* claims. *See, e.g., Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015); *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015); *Parker v. Joyner*, No. 5:03-HC-966-H, 2014 WL 6630108 (E.D.N.C. Nov. 21, 2014); *see also, Rhines v. Young*, No. 5:00-cv-05020-KS, 2015 WL 4651090 (D. South Dakota Aug. 5, 2015) (holding that the appointment of supplemental counsel was not necessary because the petitioner had already received the benefit of independent counsel). Thus, the Court’s proposal to appoint a supplemental attorney to investigate potential *Martinez* claims would be appropriate. If the Court is inclined to make such an appointment, petitioner suggests Mr. John Warren, with whom Mr. Stone has already met and established initial rapport. Mr. Warren’s affidavit describing his background and qualifications was attached to the Motion for Stay of Execution and Appointment of Counsel [Docket Entry #1] as Exhibit C. He has indicated he is available and willing to serve as *Martinez* counsel if appointed by this Court.

¹ The CJA Guidelines for appointment of counsel in capital cases emphasize the importance of continuity of counsel, absent a conflict of interest. *See* Guide to Judiciary Policy, Vol. 7, Part A Guidelines for Administering the CJA and Related Statutes, § 620.70 (“In the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel, if qualified under Guide, Vol. 7A § 620.60, when the case enters the federal system.”).

III. CALCULATION OF THE FEDERAL STATUTE OF LIMITATIONS PERIOD.

Respondent argues that petitioner's federal statute of limitations period began running on January 23, 2008, when the South Carolina Supreme Court denied his petition for rehearing on direct review, resulting in the expiration of seventy-seven days until the statute was tolled by the filing of petitioner's initial Application for Post-Conviction Relief. That is incorrect. Under the plain language of the statute, the limitations period does not begin to run until "the date on which the judgment became final by the conclusion of direct review *or the expiration of the time for seeking such review.*" 28 U.S.C. § 2244(d)(1)(A) (emphasis added); *see also, Crawley v. Catoe*, 257 F.3d 395, 400 (4th Cir. 2001) ("the limitation of action begins to run when the conviction is final under § 2244(d)(1)(A) only when the availability of direct appeal has been exhausted, which includes the denial of a certiorari petition to the United States Supreme Court *or the expiration of time for seeking such review.*") (emphasis added). Respondent asserts that petitioner did not present a federal question in his direct appeal. That is also incorrect. In his Final Brief of Appellant, petitioner argued that a violation of his federal constitutional rights occurred when the victim's widow testified at his re-sentencing proceeding that she attempted suicide when she learned that petitioner's original death sentence had been reversed on appeal. Specifically, petitioner stated, "the Due Process Clause of the Fourteenth Amendment prevents the State 'from penalizing a defendant for choosing to exercise his right to appeal.'" *State v. Stone*, Final Brief of Appellant, 2007 WL 2892432, *12 (2007) (internal citation omitted). Petitioner's brief also cited *North Carolina v. Pearce*, 395 U.S. 711 (1969), and a South Carolina Supreme Court case relying on its holding. *Id.* It is well-established that to fairly present a federal claim for state court review, a petitioner is not required "to cite book and verse on the federal constitution so long as the constitutional substance of the claim is evident." *West v. Wright*, 931 F.2d 262, 266 (4th Cir. 1991)

(internal quotation marks omitted), *rev'd on other grounds*, 505 U.S. 277 (1992). The Supreme Court has held that a “litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim . . . a case deciding such a claim on federal grounds.” *Baldwin v. Reese*, 541 U.S. 27, 32 (2004).

Petitioner’s limitations period did not begin running until ninety days after the South Carolina Supreme Court denied rehearing on direct review, which occurred on April 22, 2008. At that time, petitioner had already properly filed his initial application for post-conviction relief, which operated to toll the limitations period until the state court’s denial of post-conviction relief became final on March 29, 2017.² On that date, petitioner’s 365 days on the federal statute of limitations began running, and he therefore has until March 29, 2018 to file his petition for a writ of federal habeas corpus.

CONCLUSION.

For the reasons set forth above, and in petitioner’s original motion for the appointment of counsel, this Court should enter an order appointing John Blume as lead counsel, Emily Paavola as second-chair, and, if this Court deems it necessary, John Warren as supplemental *Martinez* counsel, to assist Stone in the preparation and filing of a timely petition for habeas relief.

Respectfully submitted,

s/Emily C. Paavola

² Petitioner asserts that his initial application for post-conviction relief was filed on April 7, 2008, but respondent asserts that it was not filed until April 9, 2008. Because both dates occurred before petitioner’s time to seek a petition for writ of certiorari from the United States Supreme Court expired, this minor dispute is of no consequence.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Bobby Wayne Stone, #5051,) C/A No. 2:17-MC-00136-MGL-MGB
	) (Capital Case)
)
Petitioner,)
	) RESPONDENT'S SUPPLEMENTAL
vs.	) BRIEF REGARDING
	) 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 respond to this Court's Order filed April 10, 2017, [Docket Entry #9], and Petitioner's Supplemental Brief Regarding Appointment of Counsel filed April 17, 2017, [Docket Entry #11]. Respondents would show this Court the following:

In the April 10, 2017 Order, this Court requested briefing upon three questions.

1. Whether there is any appellate authority in which a court has allowed the petitioner to waive his ineffective-assistance-of-counsel claims against his counsel in his state collateral proceedings so counsel could represent him during his federal habeas proceedings.

Undersigned counsel has found no appellate authority that directly addresses the issue presented in the first question of the Order. As noted by this Court, the Fourth Circuit has made it clear,

if a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under Martinez¹ in a state where the petitioner may only raise ineffective assistance claims in

¹ Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012).

an 'initial-review collateral proceeding,' qualified and independent counsel is *ethically required*. "

Juniper v. Davis, 737 F.3d 288, 290 (4th Cir. 2013)(emphasis in original).

The decision in Juniper followed the Fourth Circuit's unpublished opinion in Gray v. Pearson, 526 F. App'x 331, 334 (4th Cir. 2013). In Gray, the Fourth Circuit found appointment of independent counsel was warranted because "a clear conflict of interest exists in requiring Gray's counsel to identify and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness of trial counsel while they represented Gray in his state post-conviction proceedings." Gray, 526 F. App'x at 334.

Undersigned counsel has found no appellate authority addressing whether a federal habeas petitioner can waive the conflict and choose to continue with state collateral counsel serving as federal habeas counsel, thereby waiving claims that may be potentially viable with the application of Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012), as an excuse to the procedural default that may have been the result of ineffective assistance of collateral counsel. Counsel has only found one case, from the United States District Court for the District of Nevada, that has recognized that a waiver of the conflict of interest may be possible, at least in the context of non-capital federal habeas actions. Farnum v. Legrand, No. 2:13-CV-1304-APG-PAL, 2013 WL 5817033, at *2 (D. Nev. Oct. 9, 2013). In Farnum, the respondents had moved to disqualify federal habeas counsel because of the conflict that was created by the fact counsel had represented the petitioner in his state post-conviction proceedings.

In an unpublished order addressing the motion, the district court noted the concerns regarding whether to accept a waiver of a conflict of interest that were

presented in Wheat v. U.S., 486 U.S. 153, 108 S.Ct. 1692 (1988).² The district court also acknowledged there is no constitutional right to counsel in federal habeas corpus proceedings, and thus, there could be no secondary right to conflict-free counsel. Thus, “a petitioner may be able to waive any conflict of interest perceived to exist as to representation by counsel.” Farnum, No. 2:13-CV-1304-APG-PAL, 2013 WL 5817033, at *2. The district court further elaborated that it may allow the petitioner to continue with his counsel of choice if he filed a waiver of any actual or potential as it related to selected counsel and any purportedly defaulted claims of ineffective assistance of counsel that could have been raised under Martinez. Farnum, No. 2:13-CV-1304-APG-PAL, 2013 WL 5817033, at *3. The petitioner was advised to consult with independent, outside counsel.³ Id. This Order does not appear to have been reviewed in an appeal.

2. Whether, in addition to appointing Mr. Blume and Ms. Paavola, it would be appropriate for the Court to appoint independent counsel to investigate and, if warranted, bring any ineffective-assistance-of-counsel claims as to Petitioner’s PCR counsel.

If this Court finds Petitioner can waive the conflict of interest presented by state collateral counsel serving as federal habeas counsel, it may be appropriate to appoint independent counsel to assess whether state collateral counsel was ineffective under Martinez. As noted by Petitioner, there have been some courts that have appointed independent counsel in addition to previously appointed federal habeas counsel to

² In Wheat, the U.S. Supreme Court indicated that a district court must be allowed broad latitude in refusing waivers of conflicts of interests in criminal trials. 486 U.S. at 163, 108 S. Ct. at 1699.

³ Farnum is distinguishable from the situation presented in this case in several respects. First, Farnum appears to be a non-capital case, and counsel was retained at the petitioner’s expense. Second, a petition had already been filed. As part of the resolution of the order in Farnum, the district court required the respondents to identify the procedurally defaulted claims, and the petitioner was required to file a waiver if those claims were subject to a potential conflict of interest. Farnum, No. 2:13-CV-1304-APG-PAL, 2013 WL 5817033, at *3.

determine if there were any viable Martinez claims. See, e.g., Speer v. Stephens, 781 F.3d 784 (5th Cir. 2015); Mendoza v. Stephens, 783 F.3d 203 (5th Cir. 2015); Parker v. Joyner, No. 5:03-HC-966-H, 2014 WL 6630108 (E.D.N.C. Nov. 21, 2014). These cases are distinguishable from Petitioner's case, however, because the appointment of independent counsel was after some substantial work had been performed by prior appointed counsel. In Speer, the appointment of independent counsel was after original federal habeas counsel moved to withdraw from representation while on appeal in light of the conflict of interest. Speer, 781 F.3d at 785. Similarly, in Mendoza, the appointment of independent supplemental counsel came after the petitioner moved to stay his appeal and requested a remand to the district court for appointment of additional counsel. See Mendoza, 783 F.3d at 204. In Parker, the federal habeas action was pending when Juniper was decided, and the motion for appointment of independent counsel was made in light of Juniper. Parker, No. 5:03-HC-966-H, 2014 WL 6630108, at *1.

No petition has been filed in this case. This Court may find that it is more efficient to only appoint independent counsel, or to appoint Petitioner's desired counsel with an additional independent counsel. Respondents take no position on who should be appointed, and leaves it within the Court's discretion to decide how to proceed.

3. **Whether Petitioner wishes to request a specific⁶ statutorily qualified attorney in the event the Court concludes it is necessary to appoint independent counsel to investigate and, if warranted, bring any ineffective-assistance-of-counsel claims as to Petitioner's PCR counsel.**

If this Court finds independent counsel is warranted, Respondents take no position on who should be appointed, 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").

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS
By: s/ Alphonso Simon Jr.

April 24, 2017

Attachment No. 5



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

BOBBY WAYNE STONE,	§	
Petitioner,	§	
	§	
vs.	§	MISC. ACTION NO. 2:17-0136-MGL-MGB
	§	<u>CAPITAL CASE</u>
	§	
BRYAN P. STIRLING, Commissioner,	§	
South Carolina Department of Corrections,	§	
and JOSEPH MCFADDEN, Warden,	§	
Lieber Correctional Institution,	§	
Respondents.	§	

**ORDER GRANTING PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL
AS MODIFIED**

I. INTRODUCTION

This is a state capital case filed under 28 U.S.C. § 2254. On March 31, 2017, Petitioner Bobby Wayne Stone requested this Court appoint two attorneys, John Blume and Emily Paavola, to represent him. They have already represented him during his state post-conviction relief (PCR) proceedings.

Petitioner proposed to waive his right under *Martinez v. Ryan*, 566 U.S. 1 (2012), to an investigation into whether Mr. Blume and Ms. Paavola may have provided ineffective assistance of counsel during his PCR proceedings. Having considered the motion, the response, the reply, supplemental briefs, the record, and the relevant law, the Court will grant Petitioner's motion as modified, and appoint Mr. Blume and Ms. Paavola as Petitioner's habeas counsel. Additionally, the Court will appoint attorney John Warren as independent counsel to conduct a *Martinez* review.

II. PETITIONER'S MOTION FOR THE APPOINTMENT OF COUNSEL

Under 18 U.S.C. § 3599(a)(2) and § VII(A)(1) of this district's Plan for Implementing the Criminal Justice Act (the CJA Plan), indigent death-sentenced prisoners are "entitled to the appointment of one or more attorneys" to pursue federal habeas corpus remedies. *See In re Amendments to the Plan of the U.S. Dist. Ct. for the Dist. of S.C. for Implementing the Criminal Justice Act*, No. 3:10-mc-5005-CIV (D.S.C. May 5, 2010). Further, the Guide to Judicial Policies and Procedures (the Guide) states, in capital habeas matters, "[d]ue to the complex, demanding, and protracted nature of [the] proceedings, judicial officers should consider appointing at least two attorneys." The Guide, vol. 7, ch.6, § 620.10.20(b).

Under § 3599, appointed counsel must satisfy the following requirements:

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsection[] . . . (c), the court, for good cause, may 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.

In addition, the CJA Plan requires "[a]t least one attorney appointed must have been admitted to practice in the District of South Carolina for at least five (5) years or must be on the court's first-tier death penalty list." CJA Plan § VII(A)(1). In appointing counsel for death-sentenced state prisoners, the Court is to give "consideration . . . to attorneys who are members of the first-tier of the death penalty CJA panel." *Id.* § VII(a)(2). "However, the Court

shall not be precluded from making appointments from the second-tier death penalty CJA panel or from the general CJA panel." *Id.*

Mr. Blume satisfies all of the above requirements. He was admitted to practice in the District of South Carolina and in the Fourth Circuit Court of Appeals in 1986, and he has been involved in the handling of numerous capital habeas cases since that time. He is therefore qualified pursuant to § 3599(c). He is also listed on the Court's first-tier death penalty list.

Ms. Paavola also satisfies the qualification requirements. She has not been admitted to practice in the appellate court for a minimum of five years as required by subsection (c). However, she has been working in capital defense for the past nine years and has represented approximately twenty defendants facing the death penalty at trial, on direct appeal and in collateral proceedings, including four petitioners for federal habeas corpus relief in this district, *see Robertson v. Ozmint*, 2:11-cv-00063-SB-BHH; *Wood v. Byars*, 0:12-cv-3532-DCN-PJG; *Alkebulanyahh v. Byars*, 6:13-cv-918-TLW-KFM; and, *Mercer v. Stirling*, 0:14-cv-02607-RBH-PJG (non-capital), and one appellant in the Fourth Circuit Court of Appeals, *see Alkebulanyahh v. Byars*, No. 15-3. She is also approved on this Court's first-tier death penalty list. She is therefore qualified pursuant to § 3599(d). Although Blume and Paavola are statutorily qualified to represent petitioner before this Court, they also represented him in his state PCR proceedings. Pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), Petitioner is permitted to request new, independent counsel to investigate whether prior PCR counsel were ineffective, which Stone could assert as "cause" to excuse otherwise procedurally barred

ineffective-assistance-of-trial-counsel claims. *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013).

In this instance, Petitioner did not request independent counsel, but sought, instead, to waive his right to a *Martinez* investigation to allow Mr. Blume and Ms. Paavola to continue their representation of him. Out of an abundance of caution, however, this Court was hesitant to accept such a proposed waiver and requested additional briefing on the following three questions:

- (1) Whether there is any appellate authority in which a court has allowed the petitioner to waive his ineffective-assistance-of-counsel claims against his counsel in his state collateral proceedings so counsel could represent him during his federal habeas proceedings.
- (2) Whether, in addition to appointing Mr. Blume and Ms. Paavola, it would be appropriate for the Court to appoint independent counsel to investigate and, if warranted, bring any ineffective-assistance-of-counsel claims as to Petitioner's PCR counsel.
- (3) Whether Petitioner wishes to request a specific statutorily qualified attorney in the event the Court concludes it is necessary to appoint independent counsel to investigate and, if warranted, bring any ineffective-assistance-of-counsel claims as to Petitioner's PCR counsel.

ECF No. 9.

Both Petitioner and Respondent filed supplemental briefs addressing these issues. Neither party located any appellate authority that directly addresses the particular issue presented in the Court's first question. Concerning the Court's second question, Petitioner and Respondent agree it may be appropriate to appoint independent *Martinez* counsel, as other courts have done. *See, e.g., Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015); *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015); *Parker v. Joyner*, No. 5:03-HC-966-H, 2014 WL 6630108 (E.D.N.C. Nov. 21, 2014). In this regard, Petitioner suggests this Court appoint Mr. John Warren, with whom Petitioner has

already met and discussed *Martinez* issues, as independent counsel. Respondent does not oppose the appointment of counsel and takes no position on any particular attorney as long as he or she is qualified.

John Warren is an attorney with Simmons Law Firm, LLC in Columbia, South Carolina. Following his graduation from law school, Mr. Warren clerked with the Honorable John W. Kittredge of the South Carolina Supreme Court, during which time he gained experience and knowledge in the area of capital litigation by working on several capital appeals. Mr. Warren has previously been appointed as capital federal habeas counsel for Mikal Deen Mahdi. *See Mahdi v. Stirling*, No. 8:16-mc-00402-TMC-JDA, ECF No. 26 (D.S.C. Nov. 2, 2016). Mr. Warren's representation of Mr. Mahdi involves a number of claims raised pursuant to *Martinez*, and he is therefore intimately familiar with investigating and litigating *Martinez* claims. Mr. Warren has undergone extensive training on capital habeas representation, including attending the 2016 National Habeas Institute in Washington, D.C., a four-day training program involving comprehensive capital habeas training. *See Mahdi*, at ECF No. 22.

It is also worthy of note Mr. Warren has already met with Petitioner, developed an initial rapport, and spent a significant amount of time reviewing the files and other case materials in order to properly advise Petitioner regarding *Martinez* issues. In light of Mr. Warren's experience, knowledge, and preexisting relationship with Petitioner, the Court holds it has good cause for his appointment as *Martinez* counsel pursuant to § 3599(d).

III. CONCLUSION

Wherefore, as discussed above, Petitioner's motion for the appointment of counsel is **GRANTED AS MODIFIED**. Attorneys John Blume and Emily Paavola are appointed as

Petitioner's habeas counsel. In addition, attorney John Warren is appointed as independent counsel to conduct an investigation into whether Petitioner has any potential *Martinez* claims he wishes to raise in his federal habeas corpus petition.

IT IS SO ORDERED.

Signed this 4th day of May, 2017, in Columbia, South Carolina.

/s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

Attachment No. 6

Al Simon

From: Al Simon
Sent: Friday, August 04, 2017 1:33 PM
To: 'Emily Paavola'; John Blume (john@blumelaw.com); John Warren (jwarren@simmonsfirm.com)
Cc: Sherrie Butterbaugh
Subject: Stone v. Stirling et al, Question regarding FHC Stay of Execution

Good afternoon.

I have a couple of questions regarding the District Court's stay of execution in Stone. In Judge Lewis' Order granting the stay filed on April 10, 2017, the stay was to last for 90 days after the District Court ruled on the motion for appointment of counsel. Judge Lewis ruled on that motion on May 4, 2017. By our calculations, the 90th day was Wednesday, August 2. Is that consistent with your calculations? If not, what date do you have for the expiration of the stay?

Please let me know as soon as possible.

Sincerely,

Al Simon

Alphonso Simon Jr.
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803) 734-6307 (Phone)
(803) 734-4035 (Fax)
asimon@scag.gov

Attachment No. 7

Al Simon

From: John Warren <jwarren@simmonsfirm.com>
Sent: Friday, August 04, 2017 5:25 PM
To: Al Simon
Cc: Emily Paavola; John Blume (john@blumelaw.com); Sherrie Butterbaugh
Subject: Re: Stone v. Stirling et al, Question regarding FHC Stay of Execution

Al,
That is consistent with our calculations.

-John Warren

Sent from my iPhone

On Aug 4, 2017, at 1:32 PM, Al Simon <asimon@scag.gov> wrote:

Good afternoon.

I have a couple of questions regarding the District Court's stay of execution in Stone. In Judge Lewis' Order granting the stay filed on April 10, 2017, the stay was to last for 90 days after the District Court ruled on the motion for appointment of counsel. Judge Lewis ruled on that motion on May 4, 2017. By our calculations, the 90th day was Wednesday, August 2. Is that consistent with your calculations? If not, what date do you have for the expiration of the stay?

Please let me know as soon as possible.

Sincerely,

Al Simon

Alphonso Simon Jr.
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803) 734-6307 (Phone)
(803) 734-4035 (Fax)
asimon@scag.gov

Attachment No. 8

Al Simon

From: Al Simon
Sent: Friday, August 04, 2017 5:50 PM
To: 'John Warren'; John Blume (john@blumelaw.com); Emily Paavola
Cc: Sherrie Butterbaugh
Subject: RE: Stone v. Stirling et al, Question regarding FHC Stay of Execution

When will you be filing for a new stay of execution?

Al

From: John Warren [<mailto:jwarren@simmonsfirm.com>]
Sent: Friday, August 04, 2017 5:25 PM
To: Al Simon
Cc: Emily Paavola; John Blume (john@blumelaw.com); Sherrie Butterbaugh
Subject: Re: Stone v. Stirling et al, Question regarding FHC Stay of Execution

Al,
That is consistent with our calculations.

-John Warren

Sent from my iPhone

On Aug 4, 2017, at 1:32 PM, Al Simon <asimon@scaq.gov> wrote:

Good afternoon.

I have a couple of questions regarding the District Court's stay of execution in Stone. In Judge Lewis' Order granting the stay filed on April 10, 2017, the stay was to last for 90 days after the District Court ruled on the motion for appointment of counsel. Judge Lewis ruled on that motion on May 4, 2017. By our calculations, the 90th day was Wednesday, August 2. Is that consistent with your calculations? If not, what date do you have for the expiration of the stay?

Please let me know as soon as possible.

Sincerely,

Al Simon

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Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803) 734-6307 (Phone)
(803) 734-4035 (Fax)
asimon@scaq.gov

Attachment No. 9

Al Simon

From: John Blume <john@blumelaw.com>
Sent: Monday, August 07, 2017 11:11 AM
To: Al Simon; John Warren; Emily Paavola
Subject: RE: Stone v. Stirling et al, Question regarding FHC Stay of Execution

Good morning Al.

We do not intend to seek an additional stay. Mr. Stone does not have an execution date and we are currently preparing a cert petition in the Supreme Court of the United States which we will file later this month. Additionally, Emily and I are in the process of preparing a federal petition for writ of habeas corpus raising the exhausted claims which we will obviously file before the expiration of the limitations period, and John Warren is conducting an investigation under Martinez to determine if there are any viable claims that were not raised in the State PCR proceedings.

John

From: Al Simon [mailto:asimon@scag.gov]
Sent: Friday, August 4, 2017 5:50 PM
To: John Warren <jwarren@simmonsfirm.com>; John Blume <john@blumelaw.com>; Emily Paavola <Emily@justice360sc.org>
Cc: Sherrie Butterbaugh <SButterbaugh@scag.gov>
Subject: RE: Stone v. Stirling et al, Question regarding FHC Stay of Execution

When will you be filing for a new stay of execution?

Al

From: John Warren [mailto:jwarren@simmonsfirm.com]
Sent: Friday, August 04, 2017 5:25 PM
To: Al Simon
Cc: Emily Paavola; John Blume (john@blumelaw.com); Sherrie Butterbaugh
Subject: Re: Stone v. Stirling et al, Question regarding FHC Stay of Execution

Al,
That is consistent with our calculations.

-John Warren

Sent from my iPhone

On Aug 4, 2017, at 1:32 PM, Al Simon <asimon@scag.gov> wrote:

Good afternoon.

I have a couple of questions regarding the District Court's stay of execution in Stone. In Judge Lewis' Order granting the stay filed on April 10, 2017, the stay was to last for 90 days after the District Court ruled on the motion for appointment of counsel. Judge Lewis ruled on that motion on May 4, 2017. By our calculations, the 90th day was Wednesday, August 2. Is that consistent with your calculations? If not, what date do you have for the expiration of the stay?

Please let me know as soon as possible.

Sincerely,

Al Simon

Alphonso Simon Jr.
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803) 734-6307 (Phone)
(803) 734-4035 (Fax)
asimon@scag.gov

Attachment No. 10

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Bobby Wayne Stone,	)	C/A No. 2:17-cv-01221-MGL-MGB
	)	(Capital Case)
)	
Petitioner,)	
	)	STATUS REPORT
vs.)	
)	
Bryan P. Stirling, Commissioner, South)	
Carolina Department of Corrections, and)	
Joseph McFadden, Warden, Lieber)	
Correctional Institution,)	
)	
)	
Respondents.)	
)	

Comes now Respondents, above named, by and through the Office of the South Carolina Attorney General, and hereby file this Status Report.

1. Joseph McFadden is no longer the warden at Lieber Correctional Institution. Earlier this month, Joel Anderson was named interim warden at the institution.
2. By Respondents' calculations, there is no longer a stay of execution in place. On April 10, 2017, this Court filed an Order Granting Petitioner's Motion to Stay his Execution and Holding in Abeyance his Motion for the Appointment of Counsel. [Docket Entry #9]. In the Order, Petitioner's execution was stayed "until ninety days after the Court rules on Petitioner's motion for the appointment of counsel." [Docket Entry #9, p. 4].

On May 4, 2017, this Court filed its Order Granting Petitioner's Motion for Appointment of Counsel as Modified. [Docket Entry #13]. In the Order, this Court appointed John Blume, Esq., and Emily Paavola, Esq., to represent Petitioner as habeas counsel. This Court also appointed John Warren, Esq. to serve as independent

counsel to conduct an investigation into whether Petitioner has any potential Martinez¹ claims he may wish to raise in his federal habeas corpus petition.

Pursuant to this Court's April 10, 2017 Order, Petitioner's stay of execution was set to elapse ninety days after the Order filed on May 4, 2017. Respondents' calculations reflect that Wednesday, August 2, 2017 was the ninetieth day. Thus, on Thursday, August 3, 2017, the stay of execution issued by this Court expired. Counsel for Respondents has conferred with Petitioner's counsel regarding this calculation via email. Counsel for Petitioner indicated this calculation is consistent with their calculations.² Counsel also indicated that Mr. Blume and Ms. Paavola are preparing a petition for writ of certiorari to file in the United States Supreme Court later this month, and are in the process of preparing a federal habeas petition. Counsel also indicated Mr. Warren is conducting his Martinez investigation.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
ID No. 10199

SHERRIE BUTTERBAUGH
Assistant Attorney General

¹ Martinez v. Ryan, 566 U.S. 1 (2012).

² A copy of this Status Report is being provided to the South Carolina Supreme Court.

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734 6305

August 15, 2017

ATTORNEYS FOR RESPONDENTS
By: s/ Alphonso Simon Jr.

Attachment No. 11



ALAN WILSON
ATTORNEY GENERAL

August 15, 2017

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211
Attention: Debbie Hopkins

Re: Bobby Wayne Stone vs. Bryan P. Stirling, Commissioner, South Carolina Department of Corrections, and Joseph McFadden, Warden, Lieber Correctional Institution
C/A No. 2:17-01221-MGL-MGB

Dear Ms. Hopkins:

Please find enclosed a Status Report filed by the Respondents in the above-named action.

If you should have any questions, or if I can be of any assistance to you, please do not hesitate to contact me.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures

cc: Emily C. Paavola
John H. Blume, III
John F. Warren, III

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Bobby Wayne Stone,	)	C/A No. 2:17-cv-01221-MGL-MGB
	)	(Capital Case)
)	
Petitioner,)	
	)	STATUS REPORT
vs.)	
)	
Bryan P. Stirling, Commissioner, South)	
Carolina Department of Corrections, and)	
Joseph McFadden, Warden, Lieber)	
Correctional Institution,)	
)	
)	
Respondents.)	
)	

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1. Joseph McFadden is no longer the warden at Lieber Correctional Institution. Earlier this month, Joel Anderson was named interim warden at the institution.
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counsel to conduct an investigation into whether Petitioner has any potential Martinez¹ claims he may wish to raise in his federal habeas corpus petition.

Pursuant to this Court's April 10, 2017 Order, Petitioner's stay of execution was set to elapse ninety days after the Order filed on May 4, 2017. Respondents' calculations reflect that Wednesday, August 2, 2017 was the ninetieth day. Thus, on Thursday, August 3, 2017, the stay of execution issued by this Court expired. Counsel for Respondents has conferred with Petitioner's counsel regarding this calculation via email. Counsel for Petitioner indicated this calculation is consistent with their calculations.² Counsel also indicated that Mr. Blume and Ms. Paavola are preparing a petition for writ of certiorari to file in the United States Supreme Court later this month, and are in the process of preparing a federal habeas petition. Counsel also indicated Mr. Warren is conducting his Martinez investigation.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
ID No. 10199

SHERRIE BUTTERBAUGH
Assistant Attorney General

¹ Martinez v. Ryan, 566 U.S. 1 (2012).

² A copy of this Status Report is being provided to the South Carolina Supreme Court.

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734 6305

August 15, 2017

ATTORNEYS FOR RESPONDENTS
By: s/ Alphonso Simon Jr.

Attachment No. 12

Al Simon

From: Allison_Rogers@scd.uscourts.gov
Sent: Monday, November 06, 2017 11:22 AM
To: djhopkins@sccourts.org; john@blumelaw.com; Lonnie Brawley; Melody Brown; Sherrie Butterbaugh; emily@justice360sc.org; Al Simon; jgamble@simmonsfirm.com; jwarren@simmonsfirm.com
Cc: Sara_Samsa@scd.uscourts.gov
Subject: response to inquiry in death penalty habeas case of 2:17-cv-01221-MGL-MGB Stone v. Stirling et al
Attachments: Stone v. Stirling.public docket.pdf

Good morning--

The Clerk's Office received a phone call this morning inquiring whether there was a stay of execution in the above-referenced case. (The caller is on this email chain and is either a Mr. or Ms. Hopkins from the South Carolina Supreme Court.)

To answer that question received from Mr. or Ms. Hopkins: there is no stay of execution in place in this case. Pursuant to Judge Lewis' Order of April 10, 2017, the execution of Petitioner Bobby Wayne Stone was stayed such that the stay terminated 90 days after the court ruled on Stone's Motion to Appoint Counsel. (See Dkt. No. 9.) Counsel was appointed for Petitioner Stone on May 4, 2017, meaning the stay of execution expired (by my calculation) on August 2, 2017.

Petitioner's counsel has not sought to extend the stay. I additionally note that the petition for writ of habeas corpus itself has not yet been filed.

Attached is a public docket sheet of the Stone v. Stirling case. I hope this helps.

FYI counsel, Mr. or Ms. Hopkins who called from the SC Supreme Court indicated that if no stay was entered, the State planned to schedule the execution.

Thank you, and best regards,

(See attached file: Stone v. Stirling.public docket.pdf)

Allison Smith Rogers
Law Clerk to the Honorable Mary Gordon Baker Allison_Rogers@scd.uscourts.gov
(843) 579-1443

DEATH,MGB-Inmate

**U.S. District Court
District of South Carolina (Charleston)
CIVIL DOCKET FOR CASE #: 2:17-cv-01221-MGL-MGB**

Stone v. Stirling et al
Assigned to: Honorable Mary Geiger Lewis
Referred to: Magistrate Judge Mary Gordon Baker
Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

Date Filed: 05/11/2017
Jury Demand: None
Nature of Suit: 535 Death Penalty - Habeas Corpus
Jurisdiction: Federal Question

Petitioner

Bobby Wayne Stone

represented by **Emily Paavola**
Justice 360
900 Elmwood Avenue
Suite 101
Columbia, SC 29201
803-765-1044
Email: Emily@justice360sc.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John H Blume
Blume Franklin Best and Young LLC
900 Elmwood Avenue
Suite 200
Columbia, SC 29201
803-765-1044
Fax: 803-765-1143
Email: john@blumelaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John LaFitte Warren , III
Simmons Law Firm
1711 Pickens Street
Columbia, SC 29201
803-779-4600
Email: jwarren@simmonsfirm.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Respondent

Bryan P Stirling
Commissioner, South Carolina Department of Corrections

represented by **Alphonso Simon , Jr**
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211
803-734-6307
Email: asimon@scag.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Melody Jane Brown
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211
803-734-3970
Fax: 803-734-4035
Email: mbrown@scag.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sherrie Ann Butterbaugh
Office of the Attorney General

PO Box 11549
 Columbia, SC 29211
 803-734-0128
 Email: sbutterbaugh@scag.gov
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

Respondent

Joseph McFadden
 Warden, Lieber Correctional Institution

represented by **Alphonso Simon , Jr**
 (See above for address)
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

Melody Jane Brown
 (See above for address)
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

Sherrie Ann Butterbaugh
 (See above for address)
 LEAD ATTORNEY
 ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/31/2017	<u>1</u>	APPLICATION for Stay of Execution and MOTION to Appoint Counsel, filed by Bobby Wayne Stone. (Attachments: # <u>1</u> Declaration of Bobby Wayne Stone, # <u>2</u> Affidavit of John L. Warren, III, # <u>3</u> Affidavit of E. Charles Grose, Jr.)(ssam,). (Entered: 03/31/2017)
03/31/2017	<u>2</u>	MOTION for Leave to Proceed in forma pauperis (Restricted Access) by Bobby Wayne Stone. Response to Motion due by 4/14/2017. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. (Attachments: # <u>1</u> IFP Application signed by Bobby Stone)Motions referred to Mary Gordon Baker.(ssam,) (Entered: 03/31/2017)
03/31/2017	<u>5</u>	ORDER granting <u>2</u> Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Mary Gordon Baker on 3/31/2017. (ssam,) (Entered: 03/31/2017)
04/03/2017	<u>6</u>	TEXT ORDER directing Respondents to file their response to Petitioner's Application for Stay of Execution and Motion to Appoint Counsel <u>1</u> not later than Friday, April 7, 2017. Entered at the direction of Honorable Mary Geiger Lewis on 4/3/2017. (ssam,)(ssam,) (Entered: 04/03/2017)
04/06/2017	<u>7</u>	RESPONSE to Motion re <u>1</u> MOTION to Stay MOTION to Appoint Counsel Response filed by Joseph McFadden, Bryan P Stirling.Reply to Response to Motion due by 4/13/2017 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Attachments: # <u>1</u> State Court Documents Attachment No. 1, Execution Notice)(Simon, Alphonso) (Entered: 04/06/2017)
04/06/2017	<u>8</u>	NOTICE of Appearance by Alphonso Simon, Jr on behalf of Joseph McFadden, Bryan P Stirling (Simon, Alphonso) (Entered: 04/06/2017)
04/10/2017	<u>9</u>	ORDER granting <u>1</u> Motion to Stay; holding in abeyance <u>1</u> Motion to Appoint Counsel pending briefing and further order of this Court. Petitioner shall file his brief on these issues not later than April 17, 2017. If Respondents wish to file a response, they must do so not later than April 24, 2017. If they decide not to file a response, they shall inform the Court as soon as that decision is made. If Respondents file a response, Petitioner must file his reply to the response not later than April 31, 2017. Petitioner's execution is STAYED until ninety days after the Court rules on Petitioner's motion for the appointment of counsel. Signed by Honorable Mary Geiger Lewis on 4/10/2017. (ssam,) (Entered: 04/10/2017)
04/17/2017	<u>11</u>	RESPONSE in Support re <u>1</u> MOTION to Stay MOTION to Appoint Counsel <i>Petitioner's Supplemental Brief</i> Response filed by Bobby Wayne Stone. (Paavola, Emily) (Entered: 04/17/2017)
04/24/2017	<u>12</u>	RESPONSE to Motion re <u>1</u> MOTION to Stay MOTION to Appoint Counsel Response filed by Joseph McFadden, Bryan P Stirling.Reply to Response to Motion due by 5/1/2017 Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6. (Simon, Alphonso) (Entered: 04/24/2017)
05/04/2017	<u>13</u>	ORDER granting as modified <u>1</u> Motion to Appoint Counsel. Attorneys John Blume and Emily Paavola are appointed as Petitioner's habeas counsel. In addition, attorney John Warren is appointed as independent counsel to conduct an investigation into whether Petitioner has any potential Martinez claims he wishes to raise in his federal habeas corpus petition. Signed by Honorable Mary Geiger Lewis on 5/4/2017. (ssam,) Modified to attach document on 5/4/2017 (ssam,). (Entered: 05/04/2017)
05/04/2017	<u>14</u>	TEXT CJA 30 APPOINTMENT ORDER appointing Emily Paavola, John H. Blume, and John LaFitte Warren, III, to represent Bobby Wayne Stone. Entered at the direction of Honorable Mary Geiger Lewis on 5/4/2017. (ssam,) (Entered: 05/04/2017)

- 05/11/2017 15 **ORDER that (1) Petitioner's counsel shall submit a confidential proposed litigation budget within thirty (30) days of the date of this Order; (2) Respondents' counsel shall file a complete record of state court proceedings related to this matter within thirty (30) days of the date of this Order; and (3) The Clerk of Court shall assign a civil action number to this case. Further details set forth in Order. Signed by Magistrate Judge Mary Gordon Baker on 5/10/2017. (ssam,) (Entered: 05/11/2017)**
- 05/11/2017 17 NOTICE OF CHANGE OF CASE NUMBER from Miscellaneous Case Number 2:17-mc-00136-MGL-MGB to Civil Action Number 2:17-cv-01221-MGL-MGB. Please use the new case number on all future filings. (ssam,) (Entered: 05/11/2017)
- 06/09/2017 19 NOTICE of Appearance by Sherrie Ann Butterbaugh on behalf of Joseph McFadden, Bryan P Stirling (Butterbaugh, Sherrie) (Entered: 06/09/2017)
- 06/09/2017 20 COUNTY COURT RECORD from Sumter. (Attachments: # 1 State Court Documents attach no 1 - appendix - vol 1 (pages 1-238), # 2 State Court Documents attach no 1 - appendix - Vol 1 (pages 239-496), # 3 State Court Documents attach no 1 - appendix - vol 2 (pages 497-734), # 4 State Court Documents attach no 1 - appendix - vol 2 - (pages 735-992), # 5 State Court Documents attach no 1 - appendix - vol 3 - (pages 993-1230), # 6 State Court Documents attach no 1 - appendix - vol 3 (pages 1231-1488), # 7 State Court Documents attach no 1 - appendix - vol 4 (pages 1489-1726), # 8 State Court Documents attach no 1 - appendix - vol 4 - (pages 1727-1984), # 9 State Court Documents attach no 1 - appendix - vol 5 - (pages 1985-2222), # 10 State Court Documents attach no 1 - appendix - vol 5 (pages 2223-2480), # 11 State Court Documents attach no 1 - appendix - vol 6 (pages 2481 - 2709), # 12 State Court Documents attach no. 1 - appendix - Vol 6 (pages 2710-2975))(Simon, Alphonso) Modified to add additional attachments 21 , 22 , 24 , 25 on 6/9/2017 (ssam,). Modified to add link to 38 Supplement on 11/3/2017 (ssam,). (Entered: 06/09/2017)
- 06/09/2017 21 Additional Attachments to Main Document 20 County Court Record,,,, First attachment description: attach no 1 - appendix - Vol 7 (pages 2976-3213) . (Attachments: # 1 State Court Documents attach no 1 - appendix - Vol 7 (pages 3214-3473), # 2 State Court Documents attach no 1 - appendix - Vol 8 (pages 3474-3711), # 3 State Court Documents attach no 1 - appendix - Vol 8 (pages 3712-3969), # 4 State Court Documents attach no 1 - appendix - vol 9 (pages 3970-4205), # 5 State Court Documents attach no 1 - appendix - vol 9 (pages 4206-4463), # 6 State Court Documents attach no 1 - appendix - vol 10 (pages 4464-4579), # 7 State Court Documents attach no 1 - appendix - vol 10 (pages 4580-4695), # 8 State Court Documents attach no 1 - appendix - vol 10 - (pages 4696-4942), # 9 State Court Documents attach no 1 - appendix - vol 10 (pages 4943-4959), # 10 State Court Documents attach no 1 - appendix - vol 11 (pages 4960-5134), # 11 State Court Documents attach no 1 - appendix - vol 11 (pages 5135-5250), # 12 State Court Documents attach no 1 - appendix - Vol 11 (pages 5251-5411), # 13 State Court Documents attach no 1 - appendix - vol 11 (pages 5412-5455))(Simon, Alphonso) (Entered: 06/09/2017)
- 06/09/2017 22 Additional Attachments to Main Document 20 County Court Record,,,, First attachment description: attach no 1 - appendix - vol 12 (pages 5456-5596) . (Attachments: # 1 State Court Documents attach no 1 - appendix - vol 12 - (pages 5597-5802), # 2 State Court Documents attach no 1 - appendix - vol 12 - 5803-5951, # 3 State Court Documents attach no 1 - appendix - vol 13 (pages 5952-6086, # 4 State Court Documents attach no 1 - appendix - vol 13 - (pages 6087-6191), # 5 State Court Documents attach no 1 - appendix - vol 13 (pages 6192-6297), # 6 State Court Documents attach no 1 - appendix - vol 13 (pages 6298 - 6407), # 7 State Court Documents attach no 1 - appendix - vol 13 (pages 6408-6447), # 8 State Court Documents attach no 1 - appendix - vol 14 (pages 6448 - 6591, # 9 State Court Documents attach no 1 - appendix - vol 14 (pages 6592 - 6779), # 10 State Court Documents attach no 1 - appendix - vol 14 (pages 6780 - 6943), # 11 State Court Documents attach no 1 - appendix - vol 15 (pages 6944 - 7099), # 12 State Court Documents attach no 1 - appendix - vol 15 (pages 7100 - 7291), # 13 State Court Documents attach no 1 - appendix - vol 15 (pages 7292 - 7372))(Simon, Alphonso) (Entered: 06/09/2017)
- 06/09/2017 24 Additional Attachments to Main Document 20 County Court Record,,,, First attachment description: attach no. 2 - supplemental appendix - Vol 1 (pages 1-301) . (Attachments: # 1 State Court Documents attach no 2 - supplemental appendix - vol 1 (pages 302-500), # 2 State Court Documents attach no 2 - supplemental appendix - vol 2 (pages 501-766), # 3 State Court Documents attach no. 2 - supplemental appendix - vol 2 (pages 767-1017), # 4 State Court Documents attach no 2 - supplemental appendix - vol 2 (pages 1018-1053), # 5 State Court Documents attach no 3 - final brief of respondent, # 6 State Court Documents attach no 4 - remittitur dated 7-31-02, # 7 State Court Documents attach no 5 - remittitur dated 1-23-08, # 8 State Court Documents attach no 6 - Petition for stay of execution, # 9 State Court Documents attach no 7 - OAG letter filed in lieu of formal return to petition for stay of execution, # 10 State Court Documents attach no 8 - SC Supreme Court Order filed 2-2-108, # 11 State Court Documents attach no 9 - return and motion to dismiss, # 12 State Court Documents attach no 10 - amended return to APCR, # 13 State Court Documents attach no 11 - Return and Motion to dismiss third amended APCR, # 14 State Court Documents attach no 12 - PCR Evidentiary Hearing transcript 2008-CP-43-905, # 15 State Court Documents attach no 13 - Applicant's Post-trial brief 2008-CP-43-905, # 16 State Court Documents attach no 14 - Petition for writ of certiorari)(Simon, Alphonso) (Entered: 06/09/2017)
- 06/09/2017 25 Additional Attachments to Main Document 20 County Court Record,,,, First attachment description: attach no. 15 - Return to Petition for writ of certiorari . (Attachments: # 1 State Court Documents attach no. 16 - Petitioner's reply, # 2 State Court Documents attach no 17 - SC Supreme Court Order dated 7-23-15, # 3 State Court Documents attach no 18 - amended brief of petitioner, # 4 State Court Documents attach no 19 - brief of respondent, # 5 State Court Documents attach no 20 - Petitioner's reply brief, # 6 State Court Documents attach no 21 - SC Supreme Court published opinion filed 2-8-17, # 7 State Court Documents attach no 22 - petition for rehearing, or in the alternative, motion to stay issuance of the remittitur, # 8 State Court Documents attach no 23 - respondent's petition for rehearing, # 9 State Court Documents attach no 24 - reply to respondent's petition for rehearing, # 10 State Court Documents attach no 25 - SC Supreme Court Order March 29, 2017, # 11 State Court Documents attach no 26 - Modified South Carolina Supreme Court published opinion filed 3-29-17, # 12 State Court Documents attach no 27 - remittitur, # 13 State Court Documents attach no 28 - Pgs. 3912, 3913, 5875 and 5914 from Vol. 12 of Appendix, # 14 State Court Documents attach no 29 - pages from first trial transcript, # 15 State Court Documents attach no 30 - Pages from second trial transcript, # 16 State Court Documents attach no 31 - transcript of portion of jury voir dire from second trial)(Simon, Alphonso) (Entered: 06/09/2017)
- 08/15/2017 35 STATUS REPORT by Joseph McFadden, Bryan P Stirling. (Simon, Alphonso) (Entered: 08/15/2017)

- 11/02/2017 38 SUPPLEMENT by Joseph McFadden, Bryan P Stirling to 20 County Court Record. (Attachments: # 1 State Court Documents Attachment No. 32, Petition for Writ of Certiorari to the Supreme Court of South Carolina, # 2 State Court Documents Attachment No. 33, Brief in Opposition, # 3 State Court Documents Attachment No. 34, Reply to Brief in Opposition, # 4 State Court Documents Attachment No. 35, letter from US Supreme Court dated 10-30-17)(Simon, Alphonso) Modified to edit text to link event to correct associated event on 11/3/2017 (ssam,). (Entered: 11/02/2017)
- 11/03/2017 39 STATUS REPORT by Joseph McFadden, Bryan P Stirling. (Attachments: # 1 Exhibit Letter to Clerk of South Carolina Supreme Court dated 11-3-17)(Simon, Alphonso) (Entered: 11/03/2017)
- 11/03/2017 40 NOTICE of Appearance by Melody Jane Brown on behalf of Joseph McFadden, Bryan P Stirling (Brown, Melody) (Entered: 11/03/2017)

Attachment No. 13

Al Simon

From: SCDEfilingstat@scd.uscourts.gov
Sent: Monday, November 13, 2017 10:29 AM
To: scd_ecf_nef@scd.uscourts.gov
Subject: Activity in Case 2:17-cv-01221-MGL-MGB Stone v. Stirling et al Telephone Conference

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 11/13/2017 at 10:28 AM EST and filed on 11/13/2017

Case Name: Stone v. Stirling et al
Case Number: 2:17-cv-01221-MGL-MGB
Filer:
Document Number: 48(No document attached)

Docket Text:

Minute Entry. Proceedings held before Magistrate Judge Mary Gordon Baker: Telephone Status Conference held on 11/13/2017. Court orders the Petitioner's Placeholder Petition and Motion to Stay Execution be filed by November 21, 2017 and the Respondents' Response to the Motion to Stay Execution due by November 28, 2017. Court Reporter Debbie Potocki. (obri,)

2:17-cv-01221-MGL-MGB Notice has been electronically mailed to:

John H Blume john@blumelaw.com

Melody Jane Brown mbrown@scag.gov, lbrawley@scag.gov

Alphonso Simon, Jr asimon@scag.gov

Emily Paavola Emily@justice360sc.org

John LaFitte Warren, III jwarren@simmonsfirm.com, jgamble@simmonsfirm.com

Sherrie Ann Butterbaugh sbutterbaugh@scag.gov

2:17-cv-01221-MGL-MGB Notice will not be electronically mailed to:

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 13 2017

Appeal from Sumter County
R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 1997-004151

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

BOBBY WAYNE STONE,

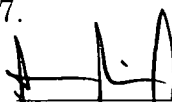
APPELLANT.

PROOF OF SERVICE

I, Alphonso Simon, Jr., of counsel for the Respondent, certify that I have served two (2) copies of the within Return to Motion for Stay of Execution via U.S. mail to his attorneys of record, John L. Warren, III, Simmons Law Firm, 1711 Pickens Street, Columbia, South Carolina 29201; Emily C. Paavola, Esq., Justice 360, 900 Elmwood Ave., Suite #200, Columbia, South Carolina 29201; and John H. Blume, III, Esq., Blume, Franklin-Best & Young, LLC, 900 Elmwood Avenue, Suite #200, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 13th day of November, 2017.



ALPHONSO SIMON, JR.
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305