

Hopkins, Debbie

From: Al Simon <asimon@scag.gov>
Sent: Friday, January 26, 2018 11:19 AM
To: Hopkins, Debbie
Subject: Marion Bowman, Motion for Stay of Execution filed in federal court
Attachments: (ECF #5) FILED - Return to Motion for stay of execution and appt. of counsel - 1-19-18 - Marion Bowman (01572264xD2C78).pdf; (ECF #1) Motion for stay of execution and appointment of counsel - 1-18-18 - Marion Bowman (01570336xD2C78).pdf

Good morning Ms. Hopkins.

Please find attached the Motion for Stay of Execution and Appointment of Counsel that were filed in federal court last week. I am also attaching our response to the motion. To date, the district court has not ruled upon the motion. I will let you know when we hear something from the district court.

Please let me know if you have any questions.

Sincerely,

Al Simon

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JAN 26 2018

S.C. SUPREME COURT

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

MARION BOWMAN, Jr. #6006,)	C/A: <u>9:18-MC-0016-TLW-BM</u>
Petitioner,)	
)	
v.)	MOTION FOR STAY OF EXECUTION
)	AND APPOINTMENT OF COUNSEL
BRYAN STIRLING, Commissioner,)	
South Carolina Department of Corrections,)	
and WILLIE DAVIS, Warden,)	
Kirkland Correctional Institution,)	
Respondent.)	
_____)	

**THIS IS A CAPITAL CASE
PETITIONER'S EXECUTION WILL BE IMMEDIATELY SCHEDULED¹**

Petitioner, Marion Bowman, is an indigent prisoner under sentence of death imposed by the Dorchester County, South Carolina, Court of General Sessions. Pursuant to *In re Stays of Execution in Capital Cases*, 471 S.E.2d 140 (S.C. 1996), Mr. Bowman's execution will be imminently scheduled. Mr. Bowman requests that this Court stay his imminent execution and appoint counsel to represent him in the preparation, presentation, and litigation of his first federal petition for a writ of habeas corpus. Specifically, Mr. Bowman asks this Court to appoint Laura Young and Elizabeth Franklin-Best, of Blume Franklin-Best & Young, LLC to present him. In support of this motion, Mr. Bowman submits the following facts and argument.

I. Relevant Procedural History

¹ This Stay and Motion for Appointment of Counsel is being filed prior to the expiration of time in which Petitioner has to file a Petition for Rehearing with the South Carolina Supreme Court. This is at Petitioner's request. After consultation with Robert M. Dudek and David Alexander of the South Carolina Commission on Indigent Defense, Appellate Division (who represented Petitioner on his cert petition), and Elizabeth Franklin-Best, Petitioner has decided he does not want a Petition for Rehearing filed on his behalf. Also, counsel for Petitioner will obtain an IFP affidavit from Petitioner and submit it with the Court.

Petitioner, Marion Bowman was convicted in Dorchester County, South Carolina of murder (2001-GS-18-0348) and arson, third degree (2001-GS-18-0349). Petitioner was tried before the Honorable Judge Diane Goodstein and a jury, and was represented by Norbert E. Cummings, Jr. and Marva Hardee-Thomas. The State was represented by Solicitor Walter Bailey and Assistant Solicitor Benjamin Lafond. He was found guilty and sentenced to death on the murder conviction on May 23, 2002.

Petitioner then filed a timely appeal. He was represented by Robert M. Dudek of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court affirmed Petitioner's convictions and sentence. *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005). The Court denied his petition for rehearing on January 6, 2006. Petitioner then sought certiorari in the United States Supreme Court. The Court denied the petition on June 12, 2006.

Petitioner then filed an Application for post-conviction relief on April 7, 2006 (and while the United States Supreme Court was still considering the petition for writ of certiorari). The South Carolina Supreme Court appointed Judge James E. Lockemy to hear the case. Judge Lockemy appointed James A. Brown, Jr. and Charlie Jay Johnson to represent Petitioner. By order filed February 6, 2008, John Sinclair III was substituted in place of Mr. Johnson to represent Petitioner. An evidentiary hearing was held on September 15-18, 2008, September 29-30, 2008; November 24, 2008; and December 18, 19, and 22, 2008. On March 12, 2012, the court issued its order of dismissal. Petitioner then filed a Motion to Alter or Amend Judgment on March 19, 2012 and a memorandum in support of the motion on May 2, 2012. The court filed its order to this motion on October 31, 2012.

Petitioner then filed a petition for writ of certiorari to the South Carolina Supreme Court on October 18, 2013. The Court denied certiorari in part and granted certiorari in part. Petitioner then filed his brief on August 8, 2016. After oral argument held on April 13, 2017, the Court affirmed Petitioner's convictions and sentence by published opinion on January 10, 2018.

Pursuant to 28 U.S.C. 2244(d), Mr. Bowman must file his federal habeas petition on or before January 10, 2019.²

II. The Court must appoint counsel to represent Mr. Bowman 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.³ The right to counsel conferred by § 3559 attaches prior to the filing of a prisoner’s habeas petition. As the Supreme Court has explained, absent this pre-petition right to counsel, condemned prisoners would not have meaningful access to the remedy of habeas corpus:

Congress’ provision of a right to counsel under [§3559] reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of “the seriousness of the possible penalty and . . . the unique and complex nature of the

² No time elapsed between the date on which the judgement became final on direct review with the expiration of the time to file a petition for writ of certiorari in the United States Supreme Court which tolled the time for filing in this Court. See 28 U.S.C. 2244(d)(1)(a) (“The limitation period shall run from the latest of 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)(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”). Mr. Bowman's limitations period began to run following the South Carolina Supreme Court's opinion filed on January 10, 2018. With the entire 1-year period of limitations, Mr. Bowman has until January 10, 2019 to file his federal habeas corpus petition.

³ This statutory provision was formerly located at 21 U.S.C. § 848(q)(4)(B). Effective October 12, 2008, Congress moved this provision to 18 U.S.C. § 3599.

litigation.” An attorney’s assistance prior to the filing of a capital defendant’s habeas corpus petition is crucial, because “[t]he complexity of our jurisprudence in this area...makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.”

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

In construing § 3599 to require appointment of counsel prior to the filing of the petition, the Supreme Court explained that Congress provided for investigative and expert resources to be made available to counsel upon request and a showing of need. Since these services “may be critical in the preapplication 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 § 3599 is a right to assistance in identifying, developing, and pleading all available claims for relief, including the record-based claims already raised in the state trial and appeal proceedings, as well as the claims not raised in those proceedings because they are derived from non-record facts which require access to investigative and expert resources. Moreover, “the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant’s habeas claims. Where this opportunity is not afforded, ‘[a]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.’” *McFarland*, 512 U.S. at 858 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983)).

The appointment provision of 18 U.S.C. § 3599 requires appointment of at least one attorney who has been admitted to practice in the court of appeals for not less than five years

and who has not less than three years' experience in the handling of appeals in that court in felony cases. § 3599(c). 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).

Ms. Franklin-Best is qualified to represent Petitioner pursuant to 18 U.S.C. §§ 3599 and 3006A. "[T]he 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." 18 U.S.C. § 3599(d). Ms. Franklin-Best is currently a partner in the law firm of Blume Franklin-Best & Young, LLC. Ms. Franklin-Best graduated from the University of Wyoming College of Law in 2001. She is a member of the New York and South Carolina State bars. She is also licensed in the District Court of South Carolina, the Fourth, Fifth and Eleventh Circuit Courts of Appeal, and the United States Supreme Court. Prior to her current employment, Ms. Franklin-Best worked at the Richland County Public Defender's Office representing clients charged with major felonies, including murder. She then spent 5 years as an appellate defender with the South Carolina Commission on Indigent Defense, Appellate Division. There she worked on numerous capital appeals including *State v. Steven Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014), *State v. Norman Starnes*, 588 S.C. 590, 698 S.E.2d 604 (2010), *Angel Vazquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010), and *State v. Louis Winkler*, 388 S.C.

574, 698 S.E.2d 596 (2010). Ms. Franklin-Best has represented capital clients in almost every stage of litigation including federal habeas. She is currently representing the following capital petitioners in federal habeas proceedings in the District Court for the District of South Carolina: *John Wood v. Byars*, 0:12-cv-3532, *Gary Terry v. Byars*, 4:12-cv-1798, *Bayan Aleksey v. Stirling*, 5:14-cv-3016, and *James Nathaniel Bryant III v. Stirling*, 1:13-cv-2665. Ms. Franklin-Best is serving as *Martinez* counsel for Mr. Bryant. In addition, Ms. Franklin-Best has represented the following capital defendants in state post-conviction relief proceedings: Quincy Jovan Allen, 2010-CP-40-3644 and William Oliver Dickerson, Jr., 2012-CP-10-3216. Ms. Franklin-Best has also remained current on capital CLE's, having attended, in the recent past, three Annual Nation Habeas Corpus Seminars sponsored by The Habeas Assistance and Training Counsel (HAT) and Defender Services Office Training Division of the Administrative Office of the United States Courts (AO). She has also served on the faculty at CLE programs, speaking on a range of topics, including litigation of claims pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) and the appellate treatment of expert witnesses.

Ms. Young is in private practice with the firm of Blume Franklin-Best & Young, LLC. Ms. Young graduated from the University of Georgia School of Law in 2005. She is a member of the Georgia and South Carolina State bars. She is also licensed in the District Court of South Carolina. Prior to her current employment, Ms. Young worked at the Capital Defenders Office in Atlanta, GA, the Western Judicial Circuit Public Defenders Office in Athens, GA and the Capital Trial Division in Columbia, SC. Ms. Young has represented clients charged with major felonies including

those charged with murder and facing the death penalty. See *State of South Carolina v. Anthony Sanders*, 2007-GS-18-1295. Ms. Young has also worked as a mitigation specialist on over 20 capital cases, in both state and federal court, at almost every stage of litigation including federal habeas. Ms. Young has represented a capital defendant in a state post-conviction proceeding, Quincy Jovan Allen 2010-CP-40-3644. Currently, Ms. Young represents Bayan Aleksey in a state post-conviction proceeding as well as Gary Terry in a pending federal habeas corpus case. She and Ms. Franklin-Best are co-counsel on those cases. Ms. Young has also remained current on capital CLEs, having attended the Annual Capital Habeas Seminar sponsored by The Habeas Assistance and Training Counsel (HAT) and Defender Services Office Training Division of the Administrative Office of the United States Courts (AO) in 2015 and Making the Case for Life sponsored by the National Association of Criminal Defense Lawyers (NACDL) in 2016. She has also served as faculty at CLE programs speaking about mitigation investigation in capital cases and *Miller* juvenile LWOP cases.

Counsel has met with and discussed these proceedings with Mr. Bowman, and this Motion for Stay of Execution and Appointment of Counsel is filed at his request.

III. UPON APPOINTMENT OF COUNSEL, THIS COURT SHOULD ENTER A STAY OF EXECUTION.

This Court is authorized to issue a stay of execution based on Mr. Bowman's request for appointment of counsel to assist him in his federal habeas proceedings. 28 U.S.C. § 2251(a)(3); *McFarland v. Scott*, 512 U.S. 849 (1994). In order for the right of assistance of counsel to have meaning in federal habeas proceedings, the district courts are authorized to stay an execution. *McFarland*, 512 U.S. at 857. Mr. Bowman has affirmatively represented that he wishes to pursue federal habeas review of his case and asks this Court to appoint undersigned counsel to represent

him. This Court should therefore enter a stay of execution pending the resolution of his federal habeas corpus proceedings to allow Mr. Bowman to prepare, file, and litigate his petition for habeas relief.

IV. CONCLUSION

Wherefore, for the foregoing reasons, this Court should enter an order staying Mr. Bowman's execution and appointing Laura Young and Elizabeth Franklin-Best to assist Mr. Bowman in the preparation and filing of a timely petition for habeas relief.

Respectfully submitted,

/s/ Elizabeth Franklin-Best

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Marion Bowman, Jr., #6006,)	C/A No. 9:18-MC-0016-TLW-BM
)	(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)	
Willie Davis, Warden, Kirkland)	
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 Marion Bowman, Jr., on January 17, 2018. [Docket Entry #1]. To date, no notice of execution has been issued by the South Carolina Supreme Court. However, Respondents anticipate a notice of execution could be filed on or after January 26, 2017, the day Petitioner can no longer seek rehearing in the South Carolina Supreme Court in his appeal of his state post-conviction relief action. Petitioner has requested this Court stay this anticipated execution date 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 two attorneys to represent Petitioner. Respondents would respectfully show the Court the following:

I. PROCEDURAL HISTORY

Petitioner, Marion Bowman ("Petitioner"), is confined in Kirkland Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his Dorchester County convictions for the murder of Kandee Martin and third-degree arson. Petitioner is serving a death sentence for the murder conviction. The Dorchester County Grand Jury indicted Petitioner during the June 18, 2001 Term of Court of General Sessions for Murder (2001-GS-18-0348) and Arson, Third Degree (2001-GS-18-0349). On July 13, 2001, the State served Petitioner with a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation.

Petitioner was tried by a jury before the Honorable Diane S. Goodstein, Circuit Court Judge, from May 13, 2002-May 23, 2002. Petitioner was present and was represented by Norbert E. Cummings, Jr., Esquire, and Marva A. Hardee-Thomas, Esquire. The State was represented by Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond, both of the First Judicial Circuit. The guilt phase of the trial lasted from May 17 to May 20, 2002. Petitioner was convicted of both charges.

Petitioner exercised his right to the twenty-four hour cooling-off period provided by S.C. Code Ann. § 16-3-20(B). The sentencing phase was conducted on May 22 and 23, 2002. The jury found the existence of two of the four submitted aggravating factors: the murder was committed in the commission of a kidnapping and the murder was committed during the commission of a larceny with the use of a deadly weapon. The jury recommended Petitioner be sentenced to death. Judge Goodstein subsequently sentenced Petitioner to death for the murder conviction, and ten years confinement for the third degree arson conviction.

A timely Notice of Appeal was served and filed on May 24, 2002. On appeal, Robert M. Dudek, Assistant Appellate Defender with the South Carolina Office of Appellate Defense, represented Petitioner in his direct appeal. On July 6, 2005, Petitioner filed his Final Brief of Appellant. The State filed its Final Brief of Respondent on July 7, 2005. Petitioner also filed his Final Reply Brief of Appellant on July 6, 2005. Oral arguments were heard on October 6, 2005. The South Carolina Supreme Court affirmed Petitioner's convictions in a published Opinion filed November 28, 2005. State v. Bowman, 366 S.C. 485, 489, 623 S.E.2d 378, 380 (2005). A petition for rehearing was denied by the South Carolina Supreme Court on January 6, 2006.

On February 1, 2006, the South Carolina Supreme Court granted a stay of execution so that Petitioner could pursue certiorari review before the United States Supreme Court. Petitioner, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated April 5, 2006. A Brief in Opposition was filed by the State on May 12, 2006. The United States Supreme Court denied the certiorari petition by order dated June 12, 2006.

Petitioner filed an Application for Post-Conviction Relief on April 7, 2006. The State filed a Return, Motion to Dismiss, and Motion for Summary Judgment September 1, 2006. The South Carolina Supreme Court issued an Order dated September 7, 2006, in which it stayed the execution for the post-conviction relief action and appointed the Honorable James E. Lockemy, Circuit Court Judge to hear the case.

Judge Lockemy initially appointed James A. Brown, Jr., Esquire, and Charlie Jay Johnson, Jr., Esquire, to represent Petitioner during the post-conviction relief action. By Order filed February 6, 2008, Mr. Johnson was relieved and John Sinclair, III, Esquire,

was appointed to represent Petitioner with Mr. Brown during the PCR action. Petitioner, through counsel, filed his First Amended Application on February 28, 2007. The State filed an Amended Return, Motion to Dismiss, and Motion for Summary Judgment on March 15, 2007. A second Amended Application was filed on May 19, 2008. Petitioner filed his Third Amended Application on September 8, 2008, one week before the evidentiary hearing was set to begin.

The evidentiary hearing was held on September 15-18, 2008; September 29-30, 2008; November 24, 2008; and December 18, 19, and 22, 2008. Petitioner filed a Fourth Amended Application on June 5, 2009. Petitioner also submitted an Amended Brief Supporting the Fourth Amended Application on June 10, 2009. The State filed its Post-Trial Brief in Opposition to Application for Post-Conviction Relief on August 10, 2009. Petitioner filed a Reply to Respondent's Brief in Opposition on September 16, 2009.

On March 12, 2012, the PCR Court filed its Order of Dismissal. Petitioner filed a Motion to Alter or Amend Judgment on March 19, 2012, and a memorandum in support of the motion on April 25, 2012. The State filed a letter response to the motion on May 2, 2012. The PCR Court filed its Order denying the motion to alter or amend judgment on October 31, 2012.

Petitioner subsequently filed a Notice of Appeal. In the PCR appeal, Petitioner was represented by Robert M. Dudek, Chief Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, David Alexander, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Michael Anzelmo, Esquire. Petitioner filed his Petition for

Writ of Certiorari, raising seven arguments. The State filed a Return to the Petition for Writ of Certiorari. Petitioner subsequently filed a Reply to the Return to Petition for Writ of Certiorari. By Order filed April 15, 2016, the South Carolina Supreme Court granted the Petition for Writ of Certiorari as to Question 6, and denied certiorari upon all of the other questions presented. Petitioner filed his Brief of Petitioner on August 8, 2016. The State filed the Brief of Respondent on December 16, 2016, and Petitioner filed his Reply Brief of Petitioner on January 30, 2017.

The South Carolina Supreme Court heard oral argument in the PCR appeal on April 13, 2017. The South Carolina Supreme Court filed a published opinion affirming the order denying post-conviction relief on January 10, 2018. No petitions for rehearing have been filed.¹

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

¹ In the Motion for Stay of Execution, Petitioner indicates he does not wish to file a Petition for Rehearing. [ECF No. 1, p. 1, n. 1].

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.

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 June 12, 2006, when the United States Supreme Court denied his Petition for Writ of Certiorari. See Gonzalez v. Thaler, 565 U.S. 134, 150, 132 S. Ct. 641, 653, 181 L. Ed. 2d 619 (2012) (“For petitioners who pursue direct review all the way to [the United States Supreme] Court, the judgment becomes final at the ‘conclusion of direct review’—when [the United States Supreme] Court affirms a conviction on the merits or denies a petition for certiorari.”).

The statute of limitations has not begun to run. The statute was tolled with the filing of Petitioner’s initial Application for Post-Conviction Relief on April 7, 2006. Since

the Application was filed direct review of Petitioner's convictions and death sentence was ongoing, no time elapsed from the statute of limitations. The statute remains tolled during the pendency of the PCR action which began on April 7, 2006, and will end when Petitioner can no longer seek rehearing upon the South Carolina Supreme Court's opinion on January 26, 2018. As of this filing, no time has elapsed. However, as set forth below, Petitioner must file his federal 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 a 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, Docket Entry #8, 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.”); Stone v. Stirling, et al., C/A No. No. 2:17-cv-01221-MGL-MGB, Docket Entry #9, p. 2 (quoting 28 U.S.C. § 2251(a)(3) and granting stay of execution that would terminate ninety days after Court ruled on motion for appointment of counsel); 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 Elizabeth A. Franklin-Best, Esquire, and Laura Young, Esquire. (Motion, pp. 5-8). 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(a)(1).

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS
By: s/ Alphonso Simon Jr.

January 19, 2018