

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

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| Bobby Wayne Stone, |) | C/A No. 2:17-cv-01221-MGL-MGB |
| |) | (Capital Case) |
| |) | |
| Petitioner, |) | |
| |) | RESPONDENTS' RESPONSE TO |
| vs. |) | MOTION FOR STAY OF EXECUTION |
| |) | |
| Bryan P. Stirling, Commissioner, South |) | |
| Carolina Department of Corrections, and |) | |
| Joseph McFadden, Warden, Lieber |) | |
| Correctional Institution, |) | |
| |) | |
| |) | |
| Respondents. |) | |
| _____ |) | |

Come now Respondents, above named, by and through the Office of the South Carolina Attorney General, and hereby respond to Petitioner’s Motion for a Stay of Execution filed November 20, 2017 [Docket Entry #52]. In light of the filing of a placeholder federal habeas petition by Petitioner on November 20, 2017 [Docket Entry #51], Respondents agree that the issuance of a stay of execution is warranted under 28 U.S.C. § 2251(a)(1). In support of this response, Respondents would show this Court the following:

I. 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 the South Carolina Supreme 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. The South Carolina Supreme 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 the South Carolina Supreme 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, the South Carolina Supreme 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. The South Carolina Supreme 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. [Docket Entry #1]. In his Motion, Petitioner requested John H. Blume, III, Esquire, and Emily Paavola, Esquire be appointed to serve as his federal habeas counsel. [See Docket Entry #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). In support of the latter motion, Petitioner 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.

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

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.

Respondents filed their Return to Motion for Stay of Execution and Appointment of Counsel on April 6, 2017. [Docket Entry # 7]. In the Return, Respondents had no objection to the issuance of a stay of execution or to the appointment of requested counsel. 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. 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. Respondents 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. [Docket Entry # 9]. 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. [Docket Entry # 13]. 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.

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.

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.

On November 3, 2017, Respondents filed a Status Report. [Docket Entry # 39]. In this Status Report, Respondents updated this Court regarding the filings in the United States Supreme Court. Respondents also noted that no stay of execution was in place, and that a copy of the Status Report would be provided to the South Carolina Supreme Court. A copy of the Status Report was sent to the South Carolina Supreme Court on November 3, 2017.

On November 6, 2017, the South Carolina Supreme Court issued a Notice of Execution. Petitioner sought a stay of execution in state court by filing a Motion for Stay

of Execution in the South Carolina Supreme Court on November 7, 2017. By Order filed November 16, 2017, the South Carolina Supreme Court denied the motion for a stay of execution.

On November 13, 2017, the Honorable Mary Gordon Baker, United States Magistrate Judge, held a telephonic status conference regarding this matter. During the conference, Judge Baker asked if the parties would be amenable to a procedure in which Petitioner filed a placeholder petition as a means of qualifying for a stay of execution. Counsel for Respondents stated Respondents had no objections to the suggested procedure. Further, Respondents indicated they would not object to any amendments to the placeholder petition as long as the amendments were filed within the statute of limitations. Judge Baker then requested Petitioner file a placeholder petition for a writ of federal habeas corpus and a motion for a stay of execution by November 21, 2017. Respondents were instructed to file their response to the motion for stay of execution by November 28, 2017. Those deadlines were further confirmed by text order filed by Judge Baker on November 13, 2017. [Docket Entry # 48].

Petitioner subsequently filed a placeholder petition for a writ of federal habeas corpus on November 20, 2017. [Docket Entry #51]. Petitioner also filed a Motion for Stay of Execution on November 20, 2017. [Docket Entry #52]. This Response follows.

II. A Stay of Execution is warranted under 28 U.S.C. § 2251(a).

Respondents submit a stay of execution is warranted under 28 U.S.C. § 2251(a)(1). Section 2251(a)(1) states,

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person

detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

28 U.S.C. § 2251. For the purposes of § 2251(a), a habeas corpus proceeding is not pending until the application is filed. 28 U.S.C. § 2251(a)(2). On November 20, 2017, Petitioner filed a petition for a writ of federal habeas corpus. [Docket Entry # 51]. In so doing, Petitioner has initiated a habeas corpus proceeding before this Court, and that habeas corpus proceeding is now pending. Thus, as counsel for Respondents indicated during the telephonic status conference held on November 13, 2017, Respondents have no objections to the motion for stay of execution. Respondents submit a stay of execution is warranted under these circumstances.

III. 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 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).

“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. § 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.”). A petitioner who does not meet the jurisdictional requirements for seeking review from the United States Supreme Court, however, would not be entitled to tolling of the additional ninety days for seeking certiorari. See, e.g., Eisermann v. Penarosa, 33 F.Supp.2d 1269, 1273 n. 5 (D.Hawai’i 1999) (finding Petitioner’s failure to apply for certiorari at the state level divested the United States Supreme Court of jurisdiction to grant or deny a writ of certiorari, thus ninety (90) day period to seek certiorari did not apply).

Petitioner could not seek review before the United States Supreme Court from his direct appeal because he 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).

[Docket Entry # 21-3, pp. 207-23]. While Petitioner did highlight some consistencies with federal constitutional law in his argument, the argument presented on appeal was solely a state law issue. Second, Petitioner could not present a federal question to the United States Supreme Court because the issue presented on appeal was not preserved for appellate review. See, e.g., Street v. New York, 394 U.S. 576, 582, 89 S. Ct. 1354, 1360, 22 L. Ed. 2d 572 (1969) ("[W]hen ... the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."). In its opinion affirming Petitioner's death sentence, the South Carolina Supreme Court stated, Petitioner "argues that the victim's widow's testimony regarding her suicide attempt impermissibly injected an arbitrary factor into the jury's deliberations." State v. Stone, 376 S.C. 32, 35, 655 S.E.2d 487, 488 (2007). The South Carolina Supreme Court held Petitioner's argument was not preserved for appellate review, finding the argument presented on appeal abandoned the issue of relevance presented at trial and addressed only the effect the testimony at issue would have had on the jury. Id. at 36, 655 S.E.2d at 489. Altogether, Petitioner is not entitled

to the additional ninety days available for seeking certiorari to the United States Supreme Court.

Since a federal question was not raised in the appeal to the South Carolina Supreme Court, and a federal question could not be raised to the United States Supreme Court in a petition for writ of certiorari, 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.").

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 236 days have lapsed. Thus, at this time, a total of 313 days have lapsed. 28 U.S.C. § 2244(d). By Respondents' calculations, the statute of limitations expires on January 11, 2017.

CONCLUSION

WHEREFORE, having made Return, Respondents submit a stay of execution is warranted in this action since a federal habeas is now pending. Thus, Respondents have no objections to Petitioner's request that this Court issue a stay of execution pursuant to the provisions of 28 U.S.C. § 2251(a)(1).

Respectfully submitted,

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November 20, 2017

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