



**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.

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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stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied.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