

motions. On March 7, 2016, the Clerk of the South Carolina Supreme Court issued the “Execution Notice,” pursuant to S.C. Code Ann. § 17-25-370, which sets the date of execution as April 1, 2016.

A stay of execution for a sentence of death imposed by a court of a state is governed by 28 U.S.C. § 2251(a)(1) and (a)(3). *See Gray v. Kelly*, 131 S. Ct. 2956 (2011) (citing 28 U.S.C. § 2251(a)(3)); *McFarland v. Scott*, 512 U.S. 849 (1994); *Powell v. Kelly*, 492 F. Supp. 2d 552, 556–57 (E.D. Va. 2007) (applying 28 U.S.C. § 2251(a)(3)); Donald E. Wilkes, Jr., Federal Postconviction Remedies Handbook § 7:20 (May 2013) (explaining that the Patriot Act amended 28 U.S.C. § 2251 to expressly ratify the holding in *McFarland*). “The federal habeas corpus statute grants any federal judge ‘before whom a habeas corpus proceeding is pending’ power to stay a state-court action ‘for any matter involved in the habeas corpus proceeding.’” *McFarland*, 512 U.S. at 857 (citing 28 U.S.C. § 2251) (emphasis in original). When a capital defendant invokes his or her right to counsel under 28 U.S.C. § 2251, a federal court has jurisdiction to issue a stay of execution. *See* 28 U.S.C. § 2251(a)(3); *McFarland*, 512 U.S. at 858 (“once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution”).

Petitioner seeks the appointment of Diana L. Holt, Esq. and Marta K. Kahn, Esq. to represent him in the preparation and filing of a timely petition for habeas relief. Because Petitioner has invoked his right to appointed counsel, this “court . . . has jurisdiction under § 2251 to enter a stay of execution.” *McFarland*, 512 U.S. at 858; *see also* 28 U.S.C. § 2251(a)(3).

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 Lonchar v. Thomas*, 517 U.S. 314, 320 (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.”).

Accordingly, this Court orders the following:

- (1) Petitioner’s motion for stay of execution is granted. The stay shall expire ninety (90) days from the date counsel is appointed pursuant to 28 U.S.C. § 2251(a)(3);
- (2) Within the ninety (90) day stay of execution, Petitioner is required to file the habeas petition;
- (3) Prior to the expiration of the ninety (90) day stay of execution, Petitioner is required to 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;
- (4) An order appointing counsel and ruling on the motion for leave to proceed in forma pauperis will issue separately;
- (5) The Clerk of Court shall assign a civil action number to this case and list the parties on the docket as they are listed in the caption of this order;
- (6) The Clerk of Court shall notify the undersigned to review the stay of execution twenty (20) days prior to the expiration of the ninety (90) day stay of execution; and
- (7) This matter is referred to the assigned United States Magistrate Judge for preliminary proceedings.

(signature page to follow)

IT IS SO ORDERED.

March 16, 2016
Florence, South Carolina

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge