[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11029

D.C. Docket No. 5:16-cv-00590-WTH-PRL

BILL PAUL MARQUARDT,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(December 28, 2017)

Before ED CARNES, Chief Judge, HULL and ROSENBAUM, Circuit Judges.

PER CURIAM:

Exhibit A

Bill Paul Marquardt, a prisoner sentenced to death, filed an action pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence. During the course of the district-court proceedings, the district court denied Marquardt's motion to proceed *pro se* and for appointment of standby counsel, as well as his motion to fire appointed counsel. Over Marquardt's objection, the district court also granted appointed counsel's motion to stay the § 2254 proceedings pending resolution of state proceedings that appointed counsel initiated to exhaust state remedies. Marquardt seeks to interlocutorily appeal all of these orders.

I.

A.

Marquardt was charged by the State of Florida with, among other crimes, the first-degree murders of Margarita Ruiz and her daughter Esperanza "Hope" Wells. Before the trial, Marquardt decided that he wished to represent himself. After a *Faretta*[1] inquiry, the state court allowed Marquardt to proceed pro se and appointed the Office of Regional Criminal Conflict and Civil Regional Counsel ("CCCRC") to act as standby counsel.

As relevant here, a jury convicted Marquardt of both counts of first-degree murder. Marquardt then waived a penalty-phase jury recommendation and proceeded to sentencing before the trial judge. He once again elected to represent

[1] *Faretta v. California*, 422 U.S. 806 (1975).

himself during the penalty phase. At the penalty phase, Marquardt chose not to present mitigation evidence, instead stating that it was in his best interest to receive the death penalty. In support of that position, Marquardt presented several aggravating circumstances that he argued justified the imposition of the death penalty.

The trial court appointed previously appointed standby counsel (CCCRC) to assist the trial court by presenting mitigation evidence. CCCRC did so.

Ultimately, the trial court imposed the death penalty, concluding that the four aggravating factors it found outweighed the two mitigating factors it found.

B.

In September 2016, Marquardt filed a *pro se* petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. After the magistrate judge granted Marquardt leave to proceed *in forma pauperis*, Marquardt filed several motions. As relevant here, he moved to appoint standby counsel for his § 2254 proceedings. In his motion, he stated that he wished to represent himself and have standby counsel available to assist him if the need arose.

The State of Florida opposed the motion. It noted that Florida had appointed Marquardt counsel in the form of the Office of Capital Collateral Regional Counsel ("CCRC-M"), to assist in state and federal post-conviction proceedings, and Marquardt had not identified any conflicts or deficiencies with appointed counsel.

Marquardt responded by moving to fire CCRC-M counsel. In his motion he complained that counsel had sought a new trial for him in state court, based on a claim that Marquardt was not competent and should not have been allowed to represent himself. Marquardt also sought a competency hearing.

When CCRC-M made an appearance in this case on December 15, 2016, it noted that it had been appointed to represent Marquardt in state court on May 4, 2015, had filed its notice of appearance three days later, and had continuously represented him since that time. Counsel then recounted that two motions it had filed were then pending before the Florida courts: (1) a motion to vacate convictions and sentences, pursuant to Fla. R. Crim. P. 3.851; and (2) a motion for determination of competency, pursuant to Fla. R. Crim. P. 3.851(g). Counsel further asserted that it had a "good faith basis to believe [Marquardt] is currently incompetent to proceed" and noted that the state trial court had recently appointed three doctors to determine Marquardt's competency. Because of this, counsel stated, the state court did not intend to proceed on Marquardt's Rule 3.851 motion until the competency issue was resolved. Finally, counsel opined that Marquardt had "numerous meritorious post-conviction claims that were not included in his limited *pro se* petition and which remain unexhausted in state court." For this reason, counsel suggested that Marquardt's § 2254 proceeding be stayed and

abeyed, and counsel offered to file an amended petition that included all of Marquardt's post-conviction claims.

On December 20, 2016, a magistrate judge denied Marquardt's motion for appointment of standby counsel and leave to proceed *pro se* and his motion to fire appointed CCRC-M. But the magistrate judge granted CCRC-M's motion to hold the case in abeyance.

This ruling precipitated a second wave of motions from Marquardt. Among others, Marquardt filed a second motion for appointment of standby counsel and a motion for reconsideration of the magistrate judge's December 20, 2016, order.

In the meantime, CCRC-M filed a status report noting that the state court had directed the three appointed doctors to evaluate Marquardt's competency and submit written reports by March 13, 2017. It also asked the court to continue to hold the case in abeyance.

On February 22, 2017, the district court denied Marquardt's motion for reconsideration of the magistrate judge's December 20, 2016, order. More specifically, the district court agreed with the magistrate judge's denial of Marquardt's motion to fire CCRC-M and proceed *pro se* with the appointment of standby counsel. Along the same lines, the district court also denied Marquardt's second motion for appointment of standby counsel. In its order, the district court also granted CCRC-M's motion to continue to hold the case in abeyance pending

counsel's filing of a motion to stay and abey, along with a motion to amend Marquardt's § 2254 petition to add the claims that Marquardt had not included in his original filing.[2]

Marquardt appeals the district court's February 22, 2017, order. In his notice of appeal, Marquardt states he specifically challenges the district court's decisions to hold his § 2254 petition in abeyance and to deny standby counsel.

II.

We begin with the district court's denial of Marquardt's motion for appointment of standby counsel and the related issues it raises, namely the denial of Marquardt's request (1) to fire appointed counsel; (2) to proceed *pro se*; and (3) for the appointment of standby counsel. Before we may address the merits of Marquardt's appeal of these issues, however, we must first satisfy ourselves that we have jurisdiction. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) ("[A] federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking.").

As a general rule, we have jurisdiction to review only "final decisions of the district courts." 28 U.S.C. § 1291; *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981). We have explained that a final decision "ends the litigation

[2] CCRC-M has since filed a motion seeking to amend the § 2254 petition and to hold the proceedings in abeyance pending resolution of the state proceedings, and the district court granted the motion. Following the entry of this order, in November, CCRC-M reported that all three doctors appointed to evaluate Marquardt have opined that he is not competent to proceed.

on the merits and leaves nothing for the court to do but execute the judgment." *CSX Transp., Inc. v. City of Garden City*, 235 F.3d 1325, 1327 (11th Cir. 2000) (citation and quotation marks omitted).

But every rule has an exception. And as relevant here, the collateral-order doctrine provides that we may review an order that does not end the litigation on the merits if three conditions are satisfied: the order must (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment." *Risjord*, 449 U.S. at 375 (citation and quotation marks omitted). When these circumstances apply, the interlocutory order sought to be appealed is essentially considered a "final judgment," so it is reviewable. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). Nevertheless, the Supreme Court has emphasized that the collateral-order exception is a "narrow" one." *Id.*

In determining whether an issue qualifies for interlocutory appeal, we do not conduct an "individualized jurisdictional inquiry." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (citation and quotation marks omitted). Instead, we consider "the entire category to which a claim belongs." *Id.* (citation and quotation marks omitted). This means that we evaluate whether "the class of claims, taken as a whole, can be adequately vindicated by other means." *Id.*

(citation and quotation marks omitted). Only if it may not may the issue qualify for interlocutory review under the collateral-order doctrine. *Id.*

Keeping these considerations in mind, we first note that we have held that an order denying a motion for leave to proceed *pro se* is immediately appealable under the collateral-order doctrine. *Devine v. Indian River Cty. Sch. Bd.*, 121 F.3d 576, 578-81 (11th Cir. 1997), *overruled in part on other grounds by Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007). In *Devine*, we explained that the second prong of the collateral-order doctrine—that the appeal "resolve an important issue completely separate from the merits of the action"—is met in an appeal of the denial of a motion to proceed *pro se* when the denial is "separate from the merits of the underlying claim." *Id.* at 579. And the third circumstance—that the denial be effectively unreviewable from a final judgment—is satisfied because the right to self-representation "is effectively lost if not immediately vindicated. The harm in erroneously denying a party leave to proceed *pro se* is that it injures his/her dignity and autonomy, and this harm cannot be repaired after a judgment on the merits." *Id.* at 580.

Florida suggests, however, that the district court's denial of authorization for Marquardt to proceed *pro se* is not immediately appealable because the decision fails to fulfill the first collateral-order-doctrine requirement: in particular, Florida asserts that "the court could still reverse its decision and grant Marquardt's request

at a later time." True, but a district court may always reverse an earlier decision, and the court could have done that in the *Devine* case as well. And here, the order is phrased in conclusive terms and agrees with the magistrate judge's determination that "allowing [Marquardt] to proceed *pro se* will not promote the integrity and efficiency of the federal proceedings." This conclusion is neither conditional nor limited. Rather, the order relies on circumstances that are highly unlikely to change, namely the complexity of the case and Marquardt's lack of understanding of the proceedings:

> [Marquardt's] lack of understanding of the proceedings both in state and federal court underscore why his request for self-representation was denied. The Magistrate Judge correctly found that [Marquardt's] counsel are experienced post-conviction attorneys and there is nothing before the Court to reflect any deficiencies in their representation. Counsel's efforts to pursue and preserve [Marquardt's] claims, along with the competency issues that are being addressed by them in state court, also underscore why his requests for standby or different counsel are denied.

We therefore disagree with Florida that the order does not speak in terms sufficiently conclusive to meet the collateral-order doctrine's first requirement. Because all three collateral-order-doctrine conditions are satisfied, we have jurisdiction to review on interlocutory appeal the district court's denial of permission to proceed *pro se*.

Having established jurisdiction over the decision to deny *pro se* status, we address the merits of this issue. A § 2254 petition—a collateral appeal—is, of course, a type of appeal. We therefore review for abuse of discretion a district court's decision declining to allow a § 2254 petitioner to proceed *pro se*. *See Martinez v. Ct. of App. of Cal. 4th App. Dist.*, 528 U.S. 152, 163 (2000) (noting that courts "may . . . exercise their discretion to allow a lay person to proceed *pro se*" on appeal). Here, we find no abuse.

The Supreme Court has held that the Sixth Amendment "necessarily implies the right of self-representation" at a criminal trial. *Faretta*, 422 U.S. 806, 832 (1975). But the Supreme Court has found that no such right exists on appeal. *Martinez*, 528 U.S. at 163. As the Court has explained, a criminal defendant is differently situated at trial than he is on appeal. *Id.* at 163. At trial, the prosecution brings the case against a defendant who is presumed innocent. *Id.* at 162. On appeal, however, the convicted defendant, who is no longer presumed innocent, prosecutes the appeal. *Id.* So unlike a criminal trial, state "appellate proceedings are simply not a case of haling a person into its criminal courts." *Id.* at 163 (citation, internal quotation marks, and alteration omitted). As a result, the balance between the court's "interest in ensuring the integrity and efficiency of the trial" and "the defendant's interest in acting as his own lawyer" favors the court's

interest during an appeal, and a court has the discretion to allow a defendant to proceed *pro se* on appeal. *Id.* at 162-63.

The district court here declined to allow Marquardt to proceed *pro se* for several reasons. It noted that Marquardt "is not formally trained in the law, and the issues governing his case are complex, including the exhaustion of state remedies regarding claims that are raised in a federal petition." In addition, the court expressed concern over "[t]he issues surrounding [Marquardt's] competency . . . and the matter of a potential abeyance" pending the state court's resolution of additional claims. The district court also observed that specific CCRC-M counsel representing Marquardt "are experienced post-conviction attorneys and there [wa]s nothing before the Court to reflect any deficiencies in their representation." Finally, the district court agreed with the magistrate judge's conclusion that allowing Marquardt to proceed *pro se* would "not promote the integrity and efficiency of the federal proceedings." Based on this record and reasoning, we cannot say that the district court abused its discretion in reaching this decision.

As we have noted, Marquardt also seeks to appeal the district court's denial of his motion to terminate appointed counsel and to appoint standby counsel. But Marquardt seeks reversal of these orders only in connection with his quest to represent himself. Under these circumstances, the district court's rulings denying the motions to terminate appointed counsel and to appoint standby counsel are

necessarily intertwined with that of authorization to proceed *pro se*. Because the district court did not abuse its discretion in declining to allow Marquardt to proceed *pro se*, the issues concerning termination of appointed counsel and appointment of standby counsel are moot.

III.

We now turn to the district court's order granting the motion to stay and abey the proceedings pending resolution of the state proceedings. Once again, we must begin by considering our jurisdiction. And once again, we recognize the usual rule that only final judgments may be appealed. But once again, we must consider whether an exception may apply: this time, it's the effectively-out-of-court doctrine.[3]

Though an order staying a federal proceeding generally does not qualify as final under § 1291 for purposes of appeal, such an order does so qualify if it puts the appellant "effectively out of court." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983); *see also Hines v. D'Artois*, 531 F.2d 726, 730 (5th Cir. 1976). "Effectively out of court" means that the stay, as a practical matter, has rendered the action "effectively dead," including a stay that results in "any extended state of suspended animation." *Id.*; *see also CTI-Container Leasing*

[3] The collateral-order doctrine and the effectively-out-of-court doctrine are related, but our predecessor court has explained that they are not the same. *See Hines v. D'Artois*, 531 F.2d 726, 730 (5th Cir. 1976).

Corp. v. Uiterwyk Corp., 685 F.2d 1284, 1287 (11th Cir. 1982). In determining whether the effectively-out-of-court doctrine applies, we also balance the inconvenience and cost of piecemeal review against the danger of denying justice by delay. *Id.*

Where, as here an order stays a federal case pending the conclusion of related proceedings in state court, ordinarily, such an order is immediately appealable because of "[c]oncerns about protecting federal court decisional authority." *See Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1195 (11th Cir. 2009). But in the specific context of an order granting a stay in a § 2254 action pending exhaustion of state remedies, the answer is not so clear. Indeed, the entire purpose of the stay in the § 2254 action is to protect federal jurisdiction over yet-unexhausted claims. So the purpose behind the ordinary rule rendering final a stay pending the conclusion of related proceedings in state court does not apply.

We need not get bogged down in this issue, though, because another jurisdictional problem precludes us from considering Marquardt's appeal of the order granting the stay, regardless of whether the order would otherwise be appealable under the effectively-out-of-court doctrine. We have explained that Article III requires litigants to demonstrate their standing "not only to bring claims, but also to appeal judgments." *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1353 (11th

Cir. 2003). Though we have described the doctrines of trial and appellate standing as "similar and overlapping," we have recognized that they are not the same. *Id.* "The primary limitation on a litigant's appellate standing is the adverseness requirement" that applies peculiarly on appeal. *Id.* (citation, quotation marks, and alterations omitted). Specifically, only a litigant whom the district court judgment aggrieves has standing to appeal. *Id.* And generally, a party who prevails in the district court is not harmed and therefore not aggrieved by the district court's ruling. *Agripost, Inc. v. Miami-Dade Cty.*, 195 F.3d 1225, 1230 (11th Cir. 1999).

In this case, we also account for the significant fact that an attorney is generally deemed to act as the client's representative. *See Maples v. Thomas*, 565 U.S. 266, 923 (2012). We have noted that in a habeas case—even a capital case—a § 2254 petitioner may be bound by his counsel's strategic decisions, unless the attorney acts with divided loyalty or in bad faith. *See Thomas v. Att'y Gen., Fla.*, 795 F.3d 1286, 1295-96 (11th Cir. 2015). On the other hand, under the "next friend" doctrine established in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), a mentally competent petitioner has the right of self-determination and freedom to make fundamental choices affecting his life, including whether he wishes for the federal proceedings to be stayed to allow for exhaustion of state remedies. *See Sanchez-Velasco v. Sec'y of Dep't Corr.*, 287 F.3d 1015, 1033 (11th Cir. 2002).

Here, Marquardt's competency at this point in time is in real question.[4] And as we have explained, the district court did not abuse its discretion in denying Marquardt's motion to proceed *pro se*. Under these particular circumstances, Marquardt's counsel therefore acted on Marquardt's behalf when counsel moved to stay the federal proceedings pending exhaustion of the state remedies. This type of decision is a strategic one by which Marquardt is bound unless counsel sought the stay in bad faith or with divided loyalty to Marquardt. Nothing in the record allows us to conclude that counsel here acted either in bad faith or with divided loyalty to Marquardt. Marquardt is therefore bound by counsel's decision to seek the stay. And since counsel, representing Marquardt, prevailed on the motion to stay, Marquardt is not an aggrieved party. He therefore lacks standing to appeal the order granting stay. As a result, Article III jurisdiction is lacking, and we cannot review the district court's decision granting the stay.

IV.

For the reasons we have discussed, we affirm the district court's order denying Marquardt self-representation. We dismiss as moot that aspect of the appeal challenging the district court's denial of Marquardt's motions to terminate appointed counsel and for the appointment of standby counsel. And we dismiss the appeal for lack of jurisdiction as the appeal relates to the district court's order

[4] We do not purport to opine on Marquardt's competency at the time of trial.

granting a stay of the federal proceedings pending resolution of the state proceedings.

AFFIRMED IN PART and DISMISSED IN PART.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11029-P

BILL PAUL MARQUARDT,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, ROSENBAUM and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Robin S. Rosenbaum

UNITED STATES CIRCUIT JUDGE

ORD-42

Exhibit B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

BILL PAUL MARQUARDT,

Petitioner,

v. **Case No: 5:16-cv-590-Oc-10PRL**

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL

Respondents.

ORDER

On September 23, 2016, Petitioner, a prisoner in the Florida penal system who is under a sentence of death, filed a *pro se* Petition for writ of habeas corpus in this Court. (Doc. 1). Petitioner attacks a Florida state court judgment of conviction for first degree murder and burglary. Id. There are several matters before the Court with regard to Petitioner's desire to proceed *pro se*, motions related to his Interlocutory Appeal, and his counsel's request for a continued abeyance of the proceedings. Having considered the Parties' arguments and the United States Magistrate Judge's rulings, the Court enters this Order on the pending motions. (Docs. 7, 8, 9, 11, 22, 28, 29, 30, 31, 35, 36, 37 and 40).

I. Motion for Reconsideration

In October 2016, Petitioner filed a Motion to Appoint Standby Counsel. (Doc. 10). Petitioner advised the Court that he wished to proceed *pro se*, but requested the appointment of counsel in case he needed assistance with legal research. Id. Petitioner also filed a "Motion to Fire Attorneys DeLiberato and Fontan." (Doc. 21). Petitioner contended that Attorney

DeLiberato went against his wishes in state court by filing a frivolous motion, and he is in the process of "firing" DeLiberato and Fontan in state court. Id.

The Office of Capital Collateral Regional Counsel – Middle Region subsequently notified the Court that attorneys with the office have continuously represented Petitioner since May of 2015. Counsel advised the Court that they currently represent Petitioner in state court and are statutorily authorized to represent him in federal court. (Doc. 23, citing Fla. Stat. § 27.702(1)). On December 15, 2016, Maria DeLiberato, Esq., Julissa Fontan, Esq. and Chelsea Enright, Esq. filed notices of appearance on behalf of Petitioner. (Docs. 24, 25, 26).

By Order dated December 20, 2016, the United States Magistrate Judge denied Petitioner's Motions finding that his counsel are experienced post-conviction attorneys and the Court had no factual basis to believe that there were any conflicts or deficiencies in their representation. (Doc. 27). As such, the Order provides that allowing Petitioner to proceed *pro se* will not promote the integrity and efficiency of the federal proceedings. Id. The Order also granted his counsel's motion to hold the *pro se* petition in abeyance in light of Petitioner's pending state court proceedings. Id.

Petitioner has filed a *pro se* Motion for Reconsideration of the December 20, 2016 Order, which the Court construes as a request for the District Judge to review the Order pursuant to Rule 72 of the Federal Rules of Civil Procedure. (Doc. 31).[1] Petitioner argues that he fired the Capitol Collateral Regional Counsel as his counsel on September 16, 2016, and the office is an opposing party to his federal petition. Id.

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[1] Rule 72 provides that a district judge may modify or set aside any part of a magistrate judge's order on a matter "not dispositive of a party's claim or defense" if objections are timely filed and if the challenged portion is "clearly erroneous or contrary to law."

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). Criminal defendants also have a Sixth Amendment right to self-representation at the time of their criminal trial. Id. at 819. However, the Supreme Court has held that the right to self-representation vanishes once an individual is convicted of a crime. See Martinez v. Court of Appeal of California, 528 U.S. 152, 163 (2000). The Martinez Court reasoned that after a conviction, the presumption of innocence changes to a presumption of guilt, and the balance of interests therefore shifts in the State's favor. Id. at 162. Therefore, a federal district court has the discretion to determine whether to allow self-representation. Id. at 163.

Furthermore, beyond the direct appeal stage, there is no constitutional right to counsel in post-conviction proceedings. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Therefore, it logically follows that any right to counsel or self-representation recognized in Faretta does not extend to federal habeas proceedings, and any right that Petitioner may have is statutory. See McCoy v. Sec'y, Fla. Dep't of Corr., No. 3:13-CV-706-J-32JRK, 2015 WL 3465780, at *1 (M.D. Fla. June 1, 2015); Rose v. Crosby, 2006 WL 4701821, at *4-5 (M.D. Fla. Apr. 26, 2006).

Although 28 U.S.C. § 1654 provides that individual parties may "plead and conduct their own cases personally. . . ." in federal court, the Court may still exercise its discretion to determine whether Petitioner should be allowed to proceed *pro se*. See Martinez, 528 U.S. at 163.

Here, there are several dangers inherent in self-representation. Petitioner is not formally trained in the law, and the issues governing his case are complex, including the exhaustion of state remedies regarding claims that are raised in a federal petition. While Petitioner represents to the Court that he has fired his attorneys on September 16, 2016, before the commencement of this

action, they have notified the Court that they are still in fact currently representing him in state court and are required under Florida law to represent him in state and federal court. (Doc. 23).

The attorneys state that Petitioner has numerous meritorious post-conviction claims that were not included in his limited *pro se* petition, and which remain unexhausted in state court. Id. The attorneys also provide that they have filed in state court a motion to vacate judgments of convictions and sentences pursuant to Florida Rule of Criminal Procedure 3.851 and a motion for determination of competency pursuant to Florida Rule of Criminal Procedure 3.851(g). Id. The state circuit court held a hearing and has directed three experts to conduct a competency evaluation of Petitioner and submit reports regarding their findings. (Doc. 40). A competency hearing will apparently occur at some time in the future. Id.

Upon due consideration, Petitioner's Motion for Reconsideration (Doc. 31) is due to be denied. The issues surrounding Petitioner's competency, pursuit of unexhausted claims in state court, and the matter of a potential abeyance render this matter complex. Petitioner's lack of understanding of the proceedings both in state and federal court underscore why his request for self-representation was denied. The Magistrate Judge correctly found that Petitioner's counsel are experienced post-conviction attorneys and there is nothing before the Court to reflect any deficiencies in their representation. Counsel's efforts to pursue and preserve Petitioner's claims, along with the competency issues that are being addressed by them in state court, also underscore why his requests for standby or different counsel are denied.

Further, any opposition to the Magistrate Judge's decision to hold the case in abeyance as provided in the December 20, 2016 Order is moot because the Court has determined that holding the case in abeyance, at least temporarily, is warranted as discussed further in Section II of this Order.

Accordingly, Petitioner's Second Motion for a Court Appointed Attorney (Doc. 30) is also denied.

II Request to Hold Proceeding in Abeyance

In addition to the status report filed on December 15, 2016, Petitioner's counsel moved to hold the Petition in abeyance in light of the state competency proceeding. (Doc. 23). In the December 20, 2016 Order, the Magistrate Judge granted the request and directed counsel to file a status report on or before January 31, 2017. (Doc. 27).

On January 26, 2017, Respondents filed a Status Report and take the position that a continued abeyance is not necessary because Petitioner waived his penalty phase jury, and never raised or preserved a Constitutional sentencing claim in state court. (Doc. 39). Accordingly, Respondents argue that Petitioner cannot be affected by recent changes in capital sentencing law. Id.

On January 30, 2017, Petitioner's counsel filed a Status Report and requests that the Court continue to hold the case in abeyance given the competency issue pending before the state court. (Doc. 40). Counsel maintains that the competency evaluations and subsequent hearing will occur. Id. Counsel also states that Petitioner has unexhausted claims, including a newly discovered Brady claim, prosecutorial misconduct claims and arguments challenging the procedure by which he was ultimately found competent to proceed to trial. Id. Petitioner's counsel state that they are prepared to file a separate motion to stay and abate, accompanied by an amended petition, which includes all of Petitioner's "current post-conviction claims, and all of his direct appeals claims." Id. Counsel states that the case should not be dismissed "to protect Mr. Marquardt's due process rights to federal habeas review." Id.

Petitioner's counsel adds that Respondents are mistaken that the continued abeyance is based on the uncertainty of Florida's death penalty decisions, and argue that Petitioner did challenge the constitutionality of his conviction and sentence on direct appeal. Id. Counsel states that the direct appeal claims, as well as any direct appeal claims that were not raised due to ineffective assistance of direct appeal counsel, would properly be included in a federal habeas petition when the post-conviction proceedings are complete. Id.

Upon due consideration, the Court finds that the request to continue the abeyance (Doc. 40) is due to be granted at least to allow Petitioner, through counsel, to file the "motion to stay and abey," to be accompanied by a motion to amend the Petition.

III. Interlocutory Appeal

On or about January 3, 2017, Petitioner filed a Notice of Interlocutory Appeal of the Magistrate Judge's December 20, 2016 Order. (Doc. 32). Pursuant to 28 U.S.C. § 1292(b), a district court may certify an appeal of an interlocutory order if: (1) the order involves a controlling question of law; (2) appealing the order may materially advance the ultimate termination of the litigation; and (3) there is substantial ground for difference of opinion as to the question of law. 28 U.S.C. § 1292(b). The party seeking certification to appeal an interlocutory order has the burden of establishing the existence of such exceptional circumstances. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

Here, Petitioner has not shown that any of the circumstances for certification under § 1292(b) are satisfied. The appeal is not taken in good faith under Rule 24(a)(3) of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1915(a)(3), and the Court declines to certify the order for interlocutory appeal. In accordance with the finding that the appeal was not taken in good faith, the Petitioner is not entitled to appeal as a pauper. See Rule 24 of the Federal Rules

of Appellate Procedure and 28 U.S.C. § 1915(a)(3). As such, Petitioner's Motion (Doc. 36) is due to be denied, along with his request for an appointment of counsel to assist with the Interlocutory Appeal. (Doc. 35).[2]

IV. *Pro Se* Filings

Because Petitioner has been represented by counsel at all times during the pendency of this case, he is not permitted to file *pro se* pleadings. See Local Rule 2.03(d) of the Middle District of Florida ("[a]ny party for whom a general appearance of counsel has been made shall not thereafter take any step or be heard in the case in proper person, absent prior leave of court."). Accordingly, Docs. 7, 8, 9, 11, 22, 28, 29 and 37 are due to be terminated.

CONCLUSION

Based on the foregoing, Petitioner's Second Motion for an Appointment of Counsel, Motion for Reconsideration, Motion for an Appointment of Counsel for the Interlocutory Appeal, and Motion for Leave to Proceed as a Pauper on Appeal (Docs. 30, 31, 35, 36) are **DENIED**.

Counsel for Petitioner's request to continue the abeyance of this case (Doc. 40) is **GRANTED** to the extent that counsel is directed to file their "motion to stay and abey" **on or before March 6, 2017**. Within the motion, counsel is directed to show cause why a stay/abeyance is necessary and why dismissal of this action in its entirety to allow Petitioner to exhaust his state claims is not warranted. Counsel is also directed to file a motion to amend the Petition, to include a proposed Amended Petition, within the allotted time.[3] Respondents are directed to file a response to these motions **on or before March 30, 2017.**

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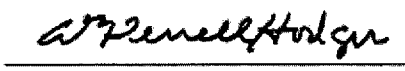
[2] The Court notes that the Interlocutory Appeal was filed *pro se* despite the fact that Petitioner is represented by counsel. In any event, if Petitioner did file a proper Interlocutory Appeal, it may be that the Capital Collateral Regional Counsel would represent him at that proceeding before the Eleventh Circuit. See Doc. 23, citing Fla. Stat. § 27.702.

[3] Counsel states that the amended petition will include all of Petitioner's current post-conviction

The Clerk is directed to **STRIKE** Docs. 7, 8, 9, 11, 22, 28, 29 and 37.

IT IS SO ORDERED.

DONE and **ORDERED** in Ocala, Florida on February 22nd, 2017.



UNITED STATES DISTRICT JUDGE

Copies furnished to:
Petitioner
Counsel of Record

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claims, and all of his direct appeals claims. (Doc. 40).