

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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MAY 22 2013

**COUNTY OF CHARLESTON
Court of Common Pleas
The Honorable Edgar W. Dickson, Circuit Court Judge**

S.C. Supreme Court

**C/A No. 2012-CP-10-3216
(Capital PCR Action)**

William O. Dickerson, #6030.....Applicant,

vs.

State of South Carolina.....Respondent.

**RETURN TO PETITION FOR COURT
TO REVIEW ASSIGNMENT OF PCR JUDGE**

On May 17, 2013, Applicant's counsel served a copy of his petition requesting review of the assignment of the PCR judge on counsel for Respondent. Respondent now makes this return. Respondent opposes the filing and the requested relief. Rather than waiting for factual development and resolution of issues through the PCR action, Applicant seeks to bypass proper litigation and/or appellate remedies by seeking removal of the PCR judge through this Court's administrative authority. His request – which is heavily dependent on a presumption of judicial bias – is at best premature. A hearing on Applicant's motion requesting the PCR judge withdraw from presiding over the PCR action is scheduled for June 17, 2013. Applicant's petition for review of assignment should be denied. In support of this position, Respondent would respectfully show the Court:

Procedural Background in the PCR Action

1. This is a capital post-conviction relief action. Applicant filed a *pro se* application on May 16, 2012. Respondent made its return on June 27, 2012. On June 26, 2012, the Honorable Deadra Jefferson appointed Rodney D. Davis, Esq., and Laura S. Knobloch, Esq., to represent Applicant.

2. By Order dated July 13, 2012, this Court assigned the Honorable Edgar W. Dickerson to preside over the action. On August 17, 2012, Judge Dickson held a hearing on Applicant's desire to continue his PCR action and heard his request to substitute counsel. Applicant requested that E. Charles Grose, Jr., and Elizabeth Franklin-Best, Esq., who were present at the hearing and requested appointment, be appointed to represent him. By Order dated August 20, 2012, Judge Dickson relieved Mr. Davis and Ms. Knobloch and appointed Mr. Grose and Ms. Franklin-Best.

3. Mr. Grose and Ms. Franklin-Best suggested an evidentiary hearing date of "no later than August 26th, 2013." Respondent, based on the provisions in S.C. Code § 17-27-160 (C), requested the hearing be scheduled to begin "no later than February 11, 2013." Judge Dickson set the hearing date as June 17, 2013, and later agreed to take additional testimony June 27 and/or 28, 2013, as needed.

4. This action has been heavily litigated on procedure alone. For example, Applicant has moved for court supervision of any and all of trial counsel's disclosures to representatives of the Attorney General's Office (which, of course, is outside the provisions of S.C. Code § 17-27-130 (1996), and *Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009)), and to prohibit any and all proposed orders by the State. Applicant has also filed: a memorandum addressing Applicant's contention that he is constitutionally entitled to be present at any future hearings (not just the

evidentiary hearings or hearings where evidence is taken); numerous documents with memoranda expressing “concerns” for scheduling the evidentiary hearing in June (based, in large part, on the assertion that such actions are not commonly completed within one year); and moved for reconsideration of even the simplest of orders (such as directing counsel to set out how they would respond to the Attorney General’s request for information in order to determine what, if any, additional orders needed to be entered in regard to discovery). Applicant has also filed, and has pending, a motion seeking to have any and all requests for “investigative and expert services and fees” heard *ex parte* and *in camera*.¹ Applicant also has pending a motion requesting the PCR judge withdraw² from presiding because his law clerk has expressed interest in criminal prosecution and sought employment in the Ninth Circuit Solicitor’s Office (where he was formerly employed as a clerk while in law school), with the Commission on Prosecution Coordination (again, where he was formerly employed and volunteered as a clerk while in law school), and with the Attorney General’s Office (where he has not been employed and was not offered a position).

5. In the instant petition, Applicant asks this Court to reconsider the appointment of Judge Dickson as the PCR judge in this matter. He opines Judge Dickson must have a conflict of interest for a scattering of reasons, such as: funding requests were denied; his investigator was removed; the judge opted not to seal the last order regarding funding; the judge scheduled the hearing for June instead of August as Applicant requested; and, that the judge has generally

¹ Respondent, in addition to responding to the filing in this Court, is also preparing a formal response in opposition to Applicant’s motion requesting *ex parte* proceedings.

² Applicant also had a motion to hold all rulings in abeyance pending the resolution of the motion to withdraw. That motion was granted by Judge Dickson on May, 17, 2013. No further rulings will issue *by request of the Applicant* until Judge Dickson rules on the motion to withdraw. Again, that motion is scheduled to be heard on June 17, 2013.

issued unfavorable rulings. He also points to the judge's law clerk's seeking employment with prosecution agencies as apparently suspect activity.³ Applicant specifically requests this Court find a conflict of interest and remove the PCR judge. (Petition, p. 51).

Discussion

6. The PCR action is currently being litigated. Appeal from adverse rulings may be presented in the normal course of appellate litigation. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005) (citing *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C. Code Ann. § 14-3-330(1)(1976); Rule 72, SCRCF; Rule 201 (a), SCACR) (“An appeal ordinarily may be pursued only after a party has obtained a final judgment.”). Applicant is not without an available remedy for any of the complaints forwarded in the petition. However, Applicant requests this Court, by and through its supervisory duty,⁴ find a conflict of interest based on the allegations contained in the petition, disqualify the judge, and vacate all the orders adverse to Applicant (or, alternatively, allow a replacement judge such authority).⁵ (Petition, p. 51). The Court should deny the petition and allow the case to develop in the circuit court.

³ Respondent is not aware of whether the clerk has applied for any criminal defense related positions. Under Applicant's theory, though, interest and application to either instantly renders a clerk's participation suspect for one of the parties.

⁴ *See generally* S.C. Const. art. V§ 24 (“The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. ... The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system.”)

⁵ Applicant essentially requests a *writ of prohibition*, which, if filed as such, he would not be entitled to receive as, again, there are remedies already available in the normal course of appellate review. *See State Bd. of Bank Control v. Sease*, 198 S.E. 602, 604 (1938) (denying writ, favoring development of issue below and finding right to appeal sufficient). However, his petition is filed seeking redress under the administrative authority of the Chief Justice. Though

7. The petition clearly evidences an attempt to avoid litigation and the bar to interlocutory appeals by invoking the supervisory and administrative duties of the Court and is improper. But, perhaps more troubling is Applicant's reliance on numerous untested allegations. As noted above, Judge Dickson has granted a continuance of the evidentiary hearing and scheduled a hearing on the motion to withdraw for June 17, 2013. At this point, all allegations of possible conflict and/or appearance of impropriety are just that – allegations. These allegations have yet to be tested or a ruling made. Consequently, any action based on the potential disqualification of the PCR judge is premature.

8. This Court rarely, if ever, will sit to resolve factual disputes. S.C. Code § 14-3-330 (“The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases....”). *Cf. Hughes v. State*, 367 S.C. 389, 395, 626 S.E.2d 805, 808 (2006) (in cases where capital defendant wishes to waive his appeals and be executed, “... it has been out practice to remand to the circuit court for a hearing and ruling on whether the appellant is mentally competent ... when we deem it necessary to further develop or explore the facts of a case.”).

Applicant surely disagrees with the judge's rulings (or possible rulings) against him, it would be extraordinary to rest any preemptive or remedial ruling on supervisory authority alone. *See Gray v. Kelly*, 131 S.Ct. 2956, 2957 (2011) (Chief Justice, acting as Circuit Justice, denying request for stay of District Court's scheduling order requiring habeas petition be filed within ninety-day stay granted in the lower court: “Although Gray's application invokes the familiar standard for securing a stay of a judgment subject to this Court's review ..., that standard is inapplicable here because Gray does not seek a stay of such a judgment. Gray's request that this Court exercise its ‘supervisory authority’ over the District Court, Reply to Opposition to Application for Stay 2, implicates a standard even more daunting than that applicable to a stay of a judgment subject to this Court's review.”); *Ehrlichman v. Sirica*, 419 U.S. 1310, 1312-1313, 95 S.Ct. 6, 7-8 (1974) (Chief Justice, acting as Circuit Justice, declining to exercise supervisory authority on issue of continuance requested in concern of pretrial publicity: “Such matters are essentially within the sound judicial discretion of the trial judge who must be presumed to be intimately aware of the case at hand and other factors which bear upon the relief sought ... The resolution of these issues should they arise after verdict must await the normal appellate processes.”).

Yet, Applicant not only requests factual findings on bias, but in arguing for the finding of bias, also requests factual findings on multiple matters, including matters resting in the PCR judge's discretion that are presently pending but have not been heard. At bottom, this case is not ripe for resolution by way of this extraordinary motion.

9. Even where a ruling has issued, Applicant asks this Court to find judicial bias based on the adverse decision alone. To consider the fact of the denial without development of the reason for the denial would not present a true picture. For example, Applicant complains of the denial of funding requests for mental health experts.⁶ Respondent submits the mere fact that PCR counsel may hope for different findings from different mental health experts than the mental health experts Applicant presented at trial may very likely be insufficient to support a funding request.⁷ See *Thames v. State*, 325 S.C. 9, 11, 478 S.E.2d 682, 682-683 (1996) (finding

⁶ He also complains Judge Dickson has "pre-judged" the lack of merit to his *Batson* related ineffective assistance of counsel claim. (*Batson v. Kentucky*, 476 U.S. 79 (1986)). Applicant bases that complaint on Judge Dickson's reference to the trial motion in the e-mail communication advising the parties of his ruling denying the motion to compel the solicitor's office to disclose privileged documents. The trial record, however, is properly before the PCR judge. See S.C. Code § 17-27-70 (a) ("If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."). There is no error in referencing same. In another example, Applicant makes very serious allegations of the possible submission of false evidence (completely unidentified) or *Brady* evidence (again, unidentified) that was withheld. Yet, Applicant has made no allegation of a *Brady v. Maryland*, 373 U.S. 83 (1963) violation in his amended application. Specific discovery (by either party) to litigate same is hampered by Applicant's own failing. This is by no means an exhaustive account of all the incomplete or inaccurate presentation of facts in the petition, and Respondent does not waive the right to contest any and all allegations. It is, however, illustrative of the need for factual development and resolution in the circuit court, and a complete record for fair review.

⁷ It should not be lost that Applicant has admitted that he had knowledge of an issue of a possible missed diagnosis and failed to make any relevant allegation that would have allowed Respondent to ask either counsel or the expert if this diagnosis was considered and rejected. See generally S.C. Code § 17-27-130 ("Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any

no abuse of discretion in denying funding request for another expert: "Petitioner had been examined by two experts prior to trial and the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to warrant the authorization of funds to pay an expert."). The funding request and all attending circumstances, though, have not been developed for this petition. Similarly, Applicant argues that bias is demonstrated in that Judge Dickson failed to seal an order regarding funding. However, there is no right to *ex parte* requests for funding in post-conviction relief proceedings. *Thames v. State*, 325 S.C. at 11, 478 S.E.2d at 682 n. 1 (1996). Applicant has a pending motion for *ex parte* proceedings. The pending motion indicates the matter may be litigated and developed below.⁸ Applicant's complaints merely show the interlocutory nature of his petition.

procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation."). There is every indication that investigation authorized by discovery available to every other civil litigant would bear not only on funding, but also on preparation.

⁸ Respondent acknowledges the ethical rule that allow a trial judge to hold *ex parte* communication in discrete circumstances. See Rule 501, SCACR, Canon 3 (B) (7) (a), Code of Judicial Conduct ("Where circumstances require, *ex parte* communication for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and (ii) The judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond."). Respondent does not object to holding such a conference pursuant to this authority; however, Respondent agrees with Judge Dickson that *ex parte* funding requests are neither provided for not mandated. Respondent has received (by accident and despite counsel's best attempt not to receive same) a copy of the transcript from March 6, 2013. Applicant has liberally argued from the proceedings, but Respondent was neither privy to, nor has reviewed the transcript of, the proceedings. Respondent requested by letter to Judge Dickson (dated May 17, 2013 with copies to opposing counsel) to review the transcript. Judge Dickson is holding a ruling on the request in abeyance until after the June 17th motion hearing. By e-mail dated May 20, 2013, undersigned counsel for Respondent notified opposing counsel that undersigned counsel will consider the transcript as authorized to be *ex parte*, and

10. In sum, matters should be litigated and rulings obtained before being raised to this Court. In light of the record here (which decisively shows matters still need to be litigated, factual findings made, and rulings obtained), Applicant's appeal to the Court's administrative authority to make factual findings and rulings on contested matters is doubly improper. He is not entitled to any relief.

WHEREFORE, having responded to the petition, Respondent submits, for all the foregoing reasons, that the Petition for Court to Review Assignment of PCR Judge should be dismissed. Applicant should not be allowed to circumvent the well-established and available judicial and appellate remedies simply because he disagrees with the PCR judge's rulings.

Respectfully submitted,

ALAN WILSON
Attorney General

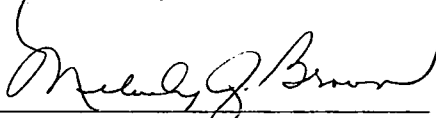
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will not review until granted permission to do so. Undersigned counsel also offered to either mail, shred, or retain the copy without review at opposing counsel's direction. As of this filing, opposing counsel has not responded. The transcript remains un-reviewed. Respondent is presently hampered by this lack of ruling in addressing any specifics of the hearing – again, a reason to let the action continue below for full development of the record.

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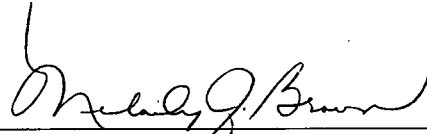
PROOF OF SERVICE

I, Melody J. Brown, certify that I have served Respondent's *Return to Petition for Court to Review Assignment of PCR Judge* on Applicant by depositing one copy to each of his counsel of record, postage prepaid, addressed as follows:

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This 22nd day of May, 2013.



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