The Supreme Court of South Carolina

The State, Respondent,

v.

Freddie Eugene Owens, Appellant.

Appellate Case No. 2024-001397

ORDER

Freddie Eugene Owens seeks a stay of his September 20, 2024 execution to pursue post-conviction relief (PCR). Owens filed a third PCR application on August 30, 2024, alleging he discovered evidence on August 21 and August 22, 2024, which entitles him to a hearing and would invalidate his conviction and death sentence. He has also filed a petition for a writ of habeas corpus in this Court's original jurisdiction and seeks a stay pending this Court's resolution of that petition.

Pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996), a motion for a stay of execution pending the filing of a successive PCR action or a petition for a writ of habeas corpus must demonstrate exceptional circumstances warranting the issuance of the stay. Because Owens has not shown exceptional circumstances, we deny the motions to stay the execution.

Stay Pending Successive PCR

We agree with Owens that the facts in his PCR application must be accepted as true and must be viewed in the light most favorable to Owens. *See Robertson v. State*, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016). Further, when a PCR applicant alleges facts that would establish an exception to the statute of limitations or the prohibition against successive PCR applications, and those facts are not conclusively refuted, the applicant is entitled to a hearing. *Id.* We are not, therefore, required to decide whether the newly discovered evidence would entitle Owens to a new trial. Instead, we must only determine whether Owens has presented "exceptional circumstances" to warrant a stay of execution to pursue the PCR action. *See In re Stays of Execution in Cap. Cases*, 321 S.C. at 548, 471

S.E.2d at 142.

Golden Affidavit

The first piece of evidence presented as support for Owens' request for a stay of execution is an affidavit executed by one of Owens' co-defendants, Steven Andra Golden, on August 22, 2024 (the 2024 Affidavit). At Owens' trial, Golden testified it was Owens who shot the victim. He further testified he had received no promises as to his sentence in exchange for his testimony except for those set forth in his signed plea agreement. Golden's signed plea agreement was provided to Owens and introduced into evidence at trial. The signed plea agreement provided the Solicitor advised Golden and his counsel that he "will consider a recommendation of leniency" if Golden testified in accordance with his prior written statement. (Emphasis in original). The plea agreement further provided Golden faced sentences of death, life without parole (LWOP), or a minimum term of imprisonment for thirty years, and it was in the Solicitor's sole discretion to recommend leniency upon an evaluation of Golden's testimony.

In the 2024 Affidavit, Golden states his attorneys advised him the Solicitor had offered him a deal promising to drop the death penalty and LWOP if he testified consistent with his prior written statement. The 2024 Affidavit further states the prosecutor who questioned Golden about the plea agreement advised him to testify that he knew he could be sentenced to death and no guarantees had been made as to his sentence; however, Golden claims he knew he would not be sentenced to death or LWOP if he testified his prior statement was true. Owens asserts the 2024 Affidavit is evidence the State committed a *Brady*[1] violation by failing to disclose the alleged promise not to pursue the death penalty or an LWOP sentence because the promise could have been used to impeach Golden's testimony against Owens.

At trial, Owens' counsel filed a *Brady* motion seeking an unsigned affidavit prepared by one of Golden's trial counsel, Richard W. Vieth (the 1999 Draft Affidavit). At the hearing, Vieth informed the trial court he prepared the 1999 Draft Affidavit to memorialize the fact that Golden was advised of the evidence that would be presented against him and declined the plea offer in which the Solicitor offered "no guarantees except that[,] as the plea agreement indicated[,] if he cooperated, testified truthfully[,] that the Solicitor would consider leniency." According to Vieth, "if the Solicitor were ever inclined to go below life in prison

[1] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding the suppression by the State of evidence favorable to the accused upon request violates due process if the evidence is material either to guilt or punishment).

without parole[, it] would be purely in the Solicitor's discretion, never any overtures to the contrary." The Solicitor also represented to the trial court that the only agreement was the signed plea agreement introduced at trial.

Although the 1999 Draft Affidavit was prepared by Vieth for Golden to sign, Golden did not sign it. According to the 1999 Draft Affidavit, Golden was told by his lawyers that he had been offered a deal in which "the solicitor *will*" withdraw the death penalty and LWOP and "*would* agree to recommend a sentence less than the mandatory sentence for capital cases" if Golden testified in accordance with his statement. (Emphasis added). The 1999 Draft Affidavit further provides Golden was aware he "*will* receive a sentence that will allow [him] to be parole eligible" if he testified truthfully in accordance with his prior statement, but he chose not to cooperate with the State. (Emphasis added).

Owens was aware of the 1999 Draft Affidavit at the time of his trial and asked the trial court to require the State to produce it under *Brady*. The trial court conducted a hearing on the request and reviewed the 1999 Draft affidavit *in camera*. The trial court determined the 1999 Draft Affidavit was a privileged communication between Golden and his counsel and Golden had not waived the privilege. The court further found it "could not serve any benefit, would[,] therefore[,] not be prejudicial to [Owens]" and stated it was not sure it could be used as impeachment because it was not "adopted by [Golden.]" Therefore, the court denied Owens' *Brady* motion. The 1999 Draft Affidavit was marked as Court's Exhibit 4. Owens did not appeal the trial court's ruling.

To begin analyzing Owens' request for a stay of execution based on an alleged secret plea agreement with Golden, we consider the substance of the evidence in the 2024 Affidavit and the 1999 Draft Affidavit, which Owens claims corroborates the 2024 Affidavit. According to Owens, both affidavits show Golden was promised he would not face the death penalty or an LWOP sentence if he testified consistently with his prior written statement.

We do not accept Owens' interpretation of the 1999 Draft Affidavit. Vieth, who prepared the 1999 Draft Affidavit for Golden to sign, stated unequivocally to the trial court during the *Brady* hearing that the document "had nothing to do with negotiations with the Solicitor's office whatsoever. Absolutely none." Rather, Vieth explained the document "was produced by me to try to convince a client to do what I thought was in his best interest and that is all that document is. Anything trying to intimate it means anything else would be totally erroneous." Vieth reiterated to the trial court "that there had been negotiations with the Solicitor's office that offered no guarantees except that as the plea agreement indicated if he

cooperated, testified truthfully[,] that the Solicitor would consider leniency in this case." The 1999 Draft Affidavit was—as Vieth explained to the trial court—a document designed as

> . . . a cover our rear-end type letter that might be used or might not be used two or three years down the road if he ever was convicted of this crime and was sentenced to death and told any tribunal that we did not advise him of the evidence that could be used against him. So I wanted him to understand what I thought was potential evidence that could be used against him in this trial, understanding that there had been negotiations with the Solicitor's office . . . .

Thus, the 1999 Draft Affidavit was not prepared to represent the plea negotiations between the Solicitor and Golden's attorneys but, rather, was evidence of what *Vieth* told Golden to advise him of the evidence against him and try to induce him to accept the signed plea agreement. This understanding is supported by Golden's statement in paragraph 4 of his 2024 Affidavit: "During jury selection, *my lawyers told me* the prosecutors offered me a deal. *They* said that if I testified that what I said about [Owens] in my written statement was true, the prosecutors would drop the death penalty and the possibility of life without parole." (Emphasis added). Similarly, Golden's 2024 Affidavit does not indicate *the Solicitor* made him a promise of leniency. Rather, like the 1999 Draft Affidavit, Golden's statements in the 2024 Affidavit are clearly based on what he was told by his lawyers in 1999. Therefore, the allegation that *the Solicitor* promised Golden sentencing leniency is not supported by either affidavit.

However, even if we accept Owens' interpretation of the two affidavits that they show the State failed to disclose a promise made to Golden by the State not to seek the death penalty or an LWOP sentence, we deny the motion for a stay because Owens knew of the 1999 Draft Affidavit and Golden's admission that he was testifying to avoid the death penalty during his trial in February 1999. Therefore, his claim of a secret plea agreement cannot constitute material evidence discovered within one year of the date of Owens' filing of his latest PCR application. First, Golden openly conceded in his testimony at Owens' trial that he was testifying to avoid the death penalty. In addition, by exercising reasonable diligence, Owens could have obtained the 1999 Draft Affidavit and appealed the trial court's ruling on his *Brady* motion or otherwise discovered it during his first PCR action filed in 2009. In fact, it appears Owens contemplated raising the issue in his 2009 PCR action because his PCR counsel interviewed Golden prior to the PCR hearing to determine whether he had been offered anything other than what appeared in the

plea agreement introduced at trial. Although Golden denied any other deal at that time, nothing prevented Owens from obtaining the 1999 Draft Affidavit or interviewing Golden's attorneys and/or the Solicitor about the plea agreement. Therefore, evidence of the alleged secret plea agreement was available to Owens long ago, and the PCR application is not timely. *See* S.C. Code Ann. § 17-27-45(C) (2014) (providing a PCR application must be filed within one year of the actual discovery of material facts, or within one year of the date the facts could have been discovered by the exercise of reasonable diligence, that require the vacation of the conviction or sentence).

Because he has not met his burden of showing he could not have discovered the alleged secret plea deal by the time of his 2009 PCR, Owens cannot show he is entitled to file a successive PCR application based on the alleged deal. *See Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (holding as long as it was possible to raise an argument in a prior PCR application, an applicant may not raise it in a successive application, and the applicant has the burden of proving that the grounds could not have been raised in a prior PCR application).[2]

Juror Affidavit

The second piece of evidence Owens sets forth in support of his motion to stay his execution is an affidavit by a juror at Owens' trial. The affidavit states the juror noticed Owens was wearing a device on his back because it created an obvious bulge under his clothing. She stated, "[a]t the time[, she] thought it was some kind of stun device."

Initially, we question whether the juror's affidavit would be admissible at a PCR hearing. Rule 606(b), SCRE, provides:

> [A] juror may not testify as to any matter or statement occurring

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[2] In a footnote, Owens argues the State also had a secret plea deal with Nakeo Vance, another co-defendant who testified against Owens. He supports this argument with the 2024 Affidavit alleging a secret plea deal with Golden and Vance's bail form (set one week after Owens' sentence), guilty pleas to accessory to murder and armed robbery (taken two weeks later), and negotiated sentence of ten years, suspended on fourteen months of time served and five years of probation. This is not evidence of a secret plea deal with Vance, much less newly discovered evidence that would warrant a successive PCR application or application of the discovery rule of the statute of limitations. *See* S.C. Code Ann. § 17-27-45(C); *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

> during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, *except* that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

(Emphasis added).

It is unclear whether the juror's observation of the bulge under Owens' clothing is "extraneous prejudicial information" under the Rule. *See, e.g., United States v. Gambina*, 564 F.2d 22, 24 (8th Cir. 1977) (holding the defendant could not examine the jurors as to whether "security measures" used in court influenced their verdict because the security measures were not "extraneous matters" under Rule 606(b), FRE). *But see United States v. Simpson*, 950 F.2d 1519, 1521 (10th Cir. 1991) (holding the accidental viewing by jurors of a co-defendant in handcuffs was "extraneous information" under Rule 606(b), FRE).

We further question whether the juror's observation of what she believed to be a stun device was "improperly brought to the [juror's] attention" or would constitute an "outside influence [that] was improperly brought to bear upon [the] juror" as required by Rule 606(b). Outside influence is where jurors receive information from some outside source. *State v. Galbreath*, 359 S.C. 398, 405, 597 S.E.2d 845, 848–49 (Ct. App. 2004). The juror's affidavit does nothing more than recite what she observed in the courtroom and her speculation that it was some sort of stun device. Trial counsel had ample opportunity to address Owens' appearance while wearing the stun belt, and there is no indication that counsel observed anything they found concerning. Thus, there was nothing "improper" about the juror observing Owens' appearance in the courtroom.

Even if the affidavit is admissible, however, in his first PCR application, Owens raised an allegation that his 2006 resentencing counsel were ineffective in failing to ensure the jurors did not see him in restraints and his death sentence was unconstitutional because jurors saw him in restraints. In preparing for the PCR hearing, Owens' PCR counsel questioned jurors about whether they saw Owens in restraints. Although Owens filed a motion for summary judgment on these allegations, attaching affidavits from two jurors who stated they noticed Owens in

shackles, he waived the allegations at the beginning of the PCR hearing.

Although the juror who provided the affidavit was on the panel at Owens' original trial, Owens' trial counsel were aware he was wearing the stun belt, and his PCR counsel were clearly concerned about jurors seeing his restraints. There is no reason PCR counsel could not have questioned the jurors from the original trial about Owens' restraints at that proceeding. Owens has failed to show he could not have discovered, through the exercise of reasonable diligence, that jurors saw the stun belt at his original trial and raised it in his first PCR application. As such, this claim is also barred by the statute of limitations and impermissibly successive. *See* S.C. Code Ann. § 17-27-45; *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

Petition for a Writ of Habeas Corpus

Habeas corpus relief is available to prisoners in South Carolina in this Court's original jurisdiction. *See* S.C. Const. art. I, § 18. Writs of habeas corpus are seldom used—only when necessary to ensure fundamental constitutional rights—and the applicant bears a much higher burden in a habeas corpus proceeding. *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008). Therefore, a writ of habeas corpus will issue "only under circumstances where there has been a 'violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'" *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (quoting *State v. Miller*, 84 A.2d 459 (N.J. Super. 1951))); *see also Moore v. Stirling*, 436 S.C. 207, 218–19, 871 S.E.2d 423, 429 (2022) ("Two components are needed to meet the standard articulated in *Butler* and other cases. The petitioner must prove (1) the existence of a constitutional violation; and (2) the denial of fundamental fairness which, in the setting, is shocking to the universal sense of justice."); *McWee v. State*, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004) (stating a writ of habeas corpus will be granted only under "unique and compelling circumstances"). This Court has noted that "[a]t some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." *Williams*, 380 S.C. at 480, 671 S.E.2d at 603. This is the lens through which we must view Owens' allegations.

Owens contends he is entitled to a writ of habeas corpus based on the trial court's charge on implied malice from the commission of a felony and the disproportionality of his sentence.

Implied Malice Charge

The trial court initially charged the jury on implied malice as follows:

> If one intentionally kills another during the commission of a felony an implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you along with other evidence in the case. And you may give it such weight as you, the jury, determine it should receive.

When later instructing the jury on accomplice liability, the trial judge stated:

> If persons kill another in doing or attempting to doing [sic] an act amounting to a felony, the killing is murder and if a culpable homicide results from the pursuant common purpose or the conspiracy, all are alike criminally responsible. This is commonly described as the hand of one is the hand of all.

In *Lowry v. State*, 376 S.C. 499, 506, 657 S.E.2d 760, 764 (2008), the Court held an instruction like the second one given in this case, unconstitutionally shifted the burden of proof for malice from the State to the defense. However, as in this Court's recent decision in *State v. Brown*, ___ S.C. ___, 904 S.E.2d 448 (2024), the charge here did not contribute to the verdict and was harmless beyond a reasonable doubt because Owens denied participating in the crimes. "Significantly, at no point did Petitioner dispute that the armed robbery and murder of the victim occurred or that the victim's death was the result of malice." *Id.* at __, 904 S.E.2d at 450. Therefore, the erroneous instruction is not "shocking to the universal sense of justice."

Further, Owens could have raised an allegation of error in the instruction based on our 2008 *Lowry* decision in his 2009 PCR application and has presented no reason for not raising the issue then. *See* S.C. Code Ann. § 17-27-45(B) (Supp. 2014) ("When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later

than one year after the date on which the standard or right was determined to exist.").

Proportionality

Owens contends his death sentence is inherently disproportionate for a defendant who did not kill; intend to kill; or, while acting as a major participant in a felony, display reckless indifference to human life. He further contends he is entitled to a second[3] proportionality review under the standard set forth in *Moore*, 436 S.C. 207, 871 S.E.2d 423.

As to Owens' allegation that his death sentence is disproportionate because there was no specific finding by the jury that he was the triggerman, a death sentence may be disproportionate to the degree of moral culpability where the defendant merely "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund v. Florida,* 458 U.S. 782, 797 (1982). However, in *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987), the United States Supreme Court clarified that:

> *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence—the taking of human life—the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in *knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state*, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(Emphasis added). Therefore, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158.

Our first point in rejecting Owens' belated claim of disproportionality is that his assertion that he was somehow not a major participant in the murder is—to say the

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[3] This Court first conducted a proportionality review of Owens' death sentence in 2008, concluding his "sentence was neither excessive nor disproportionate." *State v. Owens*, 378 S.C. 636, 641, 664 S.E.2d 80, 82 (2008).

least—absurd. Owens' interpretation of the facts of this case has been squarely refuted by, as the Fourth Circuit Court of Appeals stated, "the long chain of events giving rise to this capital habeas action, which encompass a criminal trial, three sentencing trials, three rounds of direct appeal, and two rounds of state postconviction proceedings, in addition to the proceedings in the district court." *Owens v. Stirling*, 967 F.3d 396, 403 (4th Cir. 2020). Summarizing the actual facts of the case in its review of that "long chain" of proceedings, the Fourth Circuit described Owens' participation in the brutal murder for which he was convicted and has now been sentenced to death in three separate trials. 967 F.3d at 403–04.

The evidence at the third sentencing proceeding—including a video showing the man in the ski mask shot the clerk; testimony that Owens was wearing a ski mask, while Golden was wearing a stocking mask; and testimony that Owens admitted being the shooter—showed conclusively Owens was the person who shot the clerk. However, even if the jury determined Owens was the man in the stocking mask, he was a major participant in the murder and armed robbery who showed a reckless disregard for human life by knowingly engaging in criminal activity that carries a grave risk of death.

Owens' claim that he is entitled to a proportionality review that includes cases in which the defendant was not sentenced to death is also without merit. In *Moore*, 436 S.C. at 230, 871 S.E.2d at 435, this Court held it is not required to limit the similar cases for proportionality review to only those cases in which the death penalty was imposed. However, there is no language in *Moore* suggesting a constitutional proportionality review *requires* the consideration of cases in which the death penalty was not imposed. Further, *Moore* did not set forth a retroactive rule requiring a new proportionality review that includes cases in which the death penalty was not imposed. Instead, *Moore* merely clarified the application of section 16-3-25(C)(3) of the South Carolina Code (2015). *See Moore*, 436 S.C. at 230, 871 S.E.2d at 435 ("[A]s a point of law, we clarify our holding in [*State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982),] and hold this Court is not statutorily required to limit the pool of 'similar cases' for comparative proportionality review to only those cases in which the death penalty was imposed.").

Comparative proportionality review is an essential task for this Court to ensure the jury's decision was not the result of arbitrariness. *Moore*, 436 S.C. at 222–23, 871 S.E.2d at 431. Looking at the aggravating circumstances present in other cases is an obvious point for comparison when analyzing whether a defendant's capital sentence is the result of a jury's arbitrariness or is disproportionate to the sentences

of other offenders. *Id.* at 225, 871 S.E.2d at 433.

However, proportionality is not limited to whether the facts of the murder are similar. Instead, the jury considers both aggravating and mitigating circumstances in determining whether a murder defendant should receive a death sentence. *See Enmund*, 458 U.S. at 798 (emphasizing the focus must be on the defendant's culpability because "we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' . . . which means that we must focus on 'relevant facets of the character and record of the individual offender'" (first quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); and then quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976))); *State v. Passaro*, 350 S.C. 499, 510, 567 S.E.2d 862, 868 (2002) (noting the Court considered evidence of Passaro's individual characteristics that he suffered slight mental or emotional disturbance at the time of the murder and did not have a substantial history of violent criminal conduct).

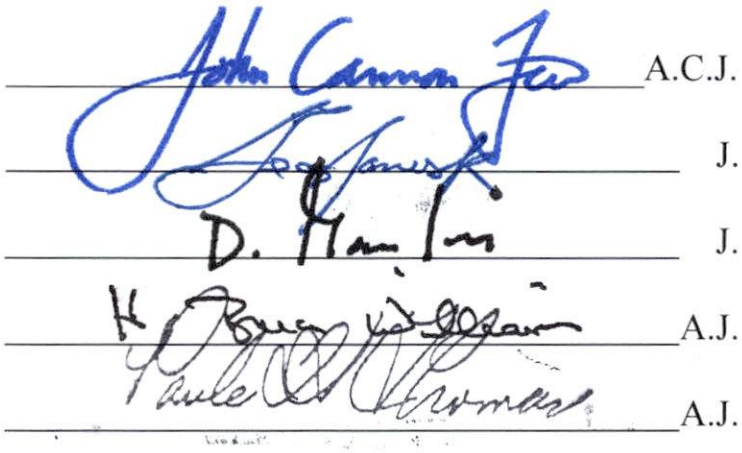
In the third sentencing proceeding, the State presented numerous facts in addition to those of the underlying murder itself to prove Owens deserved a sentence of death. In addition to evidence he committed a string of armed robberies on the same night as the robbery in which he murdered the victim, this Court summarized the many disciplinary infractions Owens committed while in jail awaiting trial. *Owens*, 378 S.C. at 639–40, 664 S.E.2d at 81–82. Most importantly, however, the State presented Owens' February 16, 1999 statement in which he admitted he brutally murdered his cellmate during the twenty-four-hour waiting period between his 1999 criminal conviction and his first sentencing trial. *See State v. Owens*, 346 S.C. 637, 653–66, 552 S.E.2d 745, 753–60 (2001) (discussing at length the admissibility of Owens' statement that he brutally murdered his cellmate); *see also Owens*, 967 F.3d at 406 ("Among other things, evidence of [Owens' future dangerousness] included testimony about Owens'[] killing of his fellow inmate on the eve of his first sentencing trial—the 'elephant in the room,' as [resentencing counsel] later referred to it.").

Considering all of this evidence and everything Owens presented to accompany his request for a second proportionality review, including the recent study conducted by Professor Baumgartner and Dr. Johnson, we again definitively find that Owens' sentence of death "was neither excessive nor disproportionate" under the constitution or section 16-3-25 of the South Carolina Code.

Conclusion

Because Owens' third PCR application is barred by the statute of limitations and is

impermissibly successive, he cannot show exceptional circumstances exist that warrant a stay of execution to pursue the successive application. Exceptional circumstances are also lacking for a stay based on the request for a writ of habeas corpus as Owens has failed to meet his burden of showing a constitutional violation that, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. We, therefore, deny the petition for a writ of habeas corpus and deny the motions for a stay of execution.



A.C.J.

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A.J.

Columbia, South Carolina
September 12, 2024

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