



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JAN 28 2015

S.C. Supreme Court

January 28, 2015

The Honorable Beth Carrigg, Clerk of Court
Lexington County Courthouse
205 E. Main Street
Lexington, South Carolina 29072

Re: *Gary Dubose Terry, #5054 v. State of South Carolina*
2012-CP-32-02718

Dear Ms. Carrigg:

Enclosed herein please find the Respondent's Proposed Order Denying Motion to Stay Proceedings Pending Decision of South Carolina Supreme Court in *Robertson v. South Carolina*, and Certificate of Service with reference to the above matter. The Honorable William P. Keesley and opposing counsel are copied with this letter and have been served with this pleading today, via United States mail and via email.

Please file same in your office and return a clocked in copy of same to the undersigned in the self-addressed stamped envelope provided.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: The Honorable William P. Keesley (w/encls., via U.S. mail)
Elizabeth A. Franklin-Best, Esquire (w/encls., via U.S. mail)
Derek J. Enderlin, Esquire (w/encls., via U.S. mail)
Debbie Hopkins, South Carolina Supreme Court (w/copy of encls.) ✓
Trisha Allen (Victim Services) (w/encls.)

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

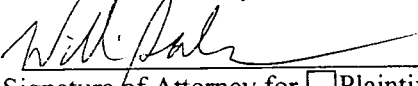
Gary Dubose Terry, #5054,
 Plaintiff)

CASE NO.
2012-CP-32-02718

v.)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

State Of South Carolina
 Defendant.)

Plaintiff's Attorney: Derek J. Enderlin, Esq, Bar No. Address: 330 East Coffee St., Greenville, SC 29601 Elizabeth Franklin-Best, 900 Elmwood Ave., Ste. #101, Columbia, SC 29201 phone: fax: e-mail: other:	Defendant's Attorney: William E. Salter, Iii, Bar No. 4806 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-6305 fax: (803) 734-4035 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	<u>January 28, 2015</u> Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Date Filed: _____ Collected by: _____	
<input type="checkbox"/> MOTION FEE COLLECTED: _____	

CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Gary Dubose Terry, #5054,

2012-CP-32-02718

Applicant,

v.

State of South Carolina,

Respondent.

ORDER DENYING MOTION TO STAY
PROCEEDINGS PENDING DECISION OF
SOUTH CAROLINA SUPREME COURT
IN *ROBERTSON V. SOUTH CAROLINA*

This case involves a successive Post-Conviction Relief Application filed on June 29, 2012, by Lexington County death row inmate Gary Dubose Terry, #5054. Respondent subsequently filed both a Return and Motion to Dismiss and an Amended Return and Motion to Dismiss. On October 20, 2014, Terry's counsel, Derek J. Enderlin and Elizabeth Franklin-Best, Esquires, moved for a stay of proceedings in Terry's case, pending the South Carolina Supreme Court's decision in the capital PCR appeal of *James D. Robertson v. State of South Carolina*, Appellate Case No. 2012-205909. Respondent opposed the motion to stay in a Response dated October 27, 2014.¹

The Court held a hearing on counsel's motion on December 12, 2014, at the Edgefield County Courthouse. Although Terry previously waived his right to be present at this hearing, both Mr. Enderlin and Ms. Elizabeth Franklin-Best were present at the hearing on his behalf.

¹ The parties have informed the Court that this same issue is present in the following cases where capital have filed successive PCR Applications but then requested a stay of the proceedings pending a ruling in *Robertson*: *James Nathaniel Bryant, III, # 6001 v. State*, 2013-CP-26-6631; *Brad K. Sigmon, # 6008 v. State*, 2014-CP-23-04632; *John Richard Wood v. State*, 2013-CP-23 - 5190; and *Abdiyyah Ben Alkebulanyahh, # 6012, aka Tyree Roberts v. State*, 2014-CP-07-2994. This Court is further informed that the State has opposed a stay in each case. In *Sigmon*, the PCR judge indicated at an in-chambers hearing on November 13, 2014, that he would not grant a stay before hearing the State's motion to dismiss and the judge will hear that motion on the week of February 9, 2015. The PCR judge in *Bryant* issued an Order staying a ruling on the State's motion to dismiss until after the decision in *Robertson* but allowing only the applicant to proceed with discovery. However, the Court has been informed that the South Carolina Commission of Indigent Defense has asked the PCR judge to reconsider his ruling. Following a December 18, 2014 hearing on the stay request in *Wood*, the PCR judge in that case has indicated that he will address both the request for a stay and the motion to dismiss at the same hearing which has not been scheduled.

Senior Assistant Attorney General William Edgar Salter, III, represented Respondent. After considering the pleadings filed and the argument of the attorneys, as well as the position of South Carolina Commission of Indigent Defense, the Court denies the request for a stay for the following reasons:

I.

Terry is currently under a death sentence for murdering Urai Jackson in Lexington County, South Carolina on or about May 30, 1994. He was indicted him in July 1995 for murder, burglary in the first degree, criminal sexual conduct in the first degree, and malicious injury to telephone system. The State timely served a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation of Punishment. Lexington County Public Defender Elizabeth C. Fullwood, and Isaac McDuffie Stone, III, Esquire, represented Terry at trial.

Terry received a jury trial before the Honorable Gary E. Clary on September 15-21, 1997. The jury convicted him of all charges and, after a sentencing hearing, recommended a death sentence. Judge Clary imposed the sentence of death for murder, as well as consecutive sentences of life imprisonment for burglary in the first degree, thirty years imprisonment for criminal sexual conduct in the first degree, and ten years imprisonment for malicious injury to a telephone system. **R. pp. 2128-30.**

The South Carolina Supreme Court affirmed Terry's convictions and sentences on direct appeal (**App. 2318-27**) and the United States Supreme Court denied certiorari on October 2, 2000. **App. 2443.** *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), *cert denied*, 531 U.S. 882 (2000). Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, represented Terry on direct appeal.

Terry then filed his original PCR Application (2000-CP-32-3470) on or about November 30, 2000. **App. 2444-56.** Respondent filed a Return, and the Honorable John C. Few held a hearing into the matter on July 10-12, 2006, at the Lexington County Courthouse. Terry was present at this hearing; and H. Wayne Floyd and Lisa R. Kimbrough, Esquires, represented him. Mr. Salter and Assistant Attorney General Melody J. Brown represented Respondent. Judge Few allowed Terry to amend his PCR Application during the hearing. **App. 2481-82; 2513-15; 2736-38.**

Terry filed a Post-Hearing Memorandum of Law In Support of His Application For Post Conviction Relief on February 20, 2007. **App. 2804-74.** Respondent filed a Proposed Order of Dismissal on September 11, 2008. **App. 2875-2988.** Terry filed objections to the proposed Order (**App. 2989-3013**), but Judge Few denied relief in an Order of Dismissal filed on February 18, 2009. **App. 3014-3125.** Terry filed Applicant's Motion for Reconsideration In Re: Final Order of Dismissal on March 11, 2009. **App. 3126.** Judge Few denied Terry's motion for reconsideration on March 12, 2009. **App. 3127.**

Terry timely served and filed a notice of appeal, and Teresa L. Norris, Esquire, was appointed to represent him. He filed a Petition for Writ of Certiorari raising following claims:

Was Petitioner denied the effective assistance of counsel during trial due to (1) counsel's failure to object to exclusion of his inculpatory statement to police based on prosecutorial misconduct in "sandbagging;" and (2) counsel's failure to adjust their defense strategy in order to maintain credibility with the jury in sentencing?

Respondent made its Return to Petition for Writ of Certiorari on January 13, 2010. The South Carolina Supreme Court filed a November 5, 2010 Order granting Terry's Petition and directing the parties to brief the issues raised. Terry filed a Brief of Petitioner on January 5, 2011, and Respondent filed the Brief of Respondent on April 5, 2011. The South Carolina Supreme

Court filed its published decision affirming the denial of relief on August 29, 2011. *Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011) (*Terry II*).

On November 28, 2011, Terry filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, in the United States Supreme Court. He presented two questions for review:

I. Whether it is prosecutorial misconduct and a violation of due process for a prosecutor to deliberately mislead capital defense counsel to believe that the defendant's partially inculpatory and partially exculpatory statement will be presented during trial, leading defense counsel to detrimentally rely on this belief, when the prosecution then deliberately excludes the statement from the jury's consideration after defense counsel has informed the jury that the evidence will be presented?

II. Whether prejudice in the Sixth Amendment analysis of counsel's ineffectiveness in a capital sentencing can be established solely by showing the loss of credibility to the defendant and the defense as a result of counsel's actions?

Respondent made its Brief in Opposition on December 29, 2011. The United States Supreme Court denied certiorari in a letter Order filed on February 21, 2012. *Terry v. South Carolina*, 132 S.Ct. 1548 (2012).

On March 26, 2012, the South Carolina Supreme Court filed an Order setting Terry's execution date for the fourth Friday following the date of service, and Terry was scheduled for execution on Friday, April 20, 2012. On April 5, 2012, he obtained an Order staying his execution from the Honorable Sol Blatt, Jr., United States District Judge, so that he could pursue federal habeas corpus remedies.

Terry filed his Petition for Writ of Habeas Corpus on June 29, 2012. *Terry v. Byars*, 4:12-cv-01798-SB-TER [**PACER Doc. No. 16**]. He also filed a motion for a stay and abeyance on the same day, so that he can pursue this PCR Application and raise claims that he contends were not raised by his original PCR attorneys because of ineffective assistance of counsel. [**PACER Doc. No. 17**]. Respondent filed a Response Opposing his stay request on July 16, 2012. [**PACER**

Doc. No. 25]. On July 25, 2012, Terry filed a Reply to Respondent's response to his motion. **[PACER Doc. No. 28]**. Respondent then filed both a Return and Memorandum of Law in Support of Motion for Summary Judgment **[PACER Doc. No. 31]** and a Motion for Summary Judgment **[PACER Doc. No. 32]** on August 27, 2012. On December 10, 2012, United States Magistrate Judge Thomas E. Rogers, III, filed an Order granting the motion for a stay. **[PACER Doc. No. 28]**.

Terry filed his successive PCR Application, through counsel, on June 29, 2012. Respondent made its original Return and Motion to Dismiss on July 30, 2012. The South Carolina Supreme Court filed an Order on September 16, 2014, assigning the undersigned to preside over this case and directing me to conduct a hearing on Terry's desires regarding counsel within thirty days of the date of its Order. Respondent filed an Amended Return and Motion to Dismiss dated October 2, 2014.

Pursuant to that Order, this Court held a hearing in Dorchester County on October 15, 2014. Terry was present at the hearing, as were Mr. Enderlin and Ms. Franklin-Best. Mr. Salter was also present and represented Respondent. After this hearing, the Court appointed Mr. Enderlin and Ms. Franklin-Best to represent Terry. The Court signed a formal Order appointing them on October 21, 2014.

On October 20, 2014, counsel moved for a stay of the current proceedings, pending the South Carolina Supreme Court's decision in *James D. Robertson v. State of South Carolina*, Appellate Case No. 2012-205909. In *Robertson*, the South Carolina Supreme Court granted certiorari on September 24, 2014 to hear the appeal of summary dismissal in a successive capital PCR case. Respondent filed a Response opposing Terry's motion for a stay on October 27, 2014.

II.

A circuit court judge has discretion whether to grant a stay of a matter pending before the court. *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 119, 328 S.E.2d 621, 623 (1985); *City of Spartanburg v. Belk's Dep't Store of Clinton*, 199 S.C. 458, 480, 20 S.E.2d 157, 167 (1942). Therefore, this Court has the authority to enter a stay of these proceedings. However, “[a]n abuse of discretion arises where the [circuit] court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support.” *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999). Here, the Court finds that granting a stay before the Court has ruled on the State’s Motion to Dismiss would amount to an abuse of discretion.

Specifically, Respondent has argued in both its Return and Motion to Dismiss and its October 27, 2014 Response opposing a stay that Terry’s 2012 Application should be summarily dismissed because (1) it is barred by the statute of limitations; (2) it is successive to his original PCR Application (2000-CP-32-3470), which resulted in an Opinion by the South Carolina Supreme Court in *Terry II*, *supra*, and none of the exceptions to the rule barring successive applications apply to Terry’s case; (3) the United States Supreme Court’s decision in *Martinez v. Ryan*, 132 S.Ct. 1309, 1318-19 (2012) does not mandate a successive state court PCR proceeding; (4) the South Carolina Supreme Court has held, in the non-capital case of in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013), that *Martinez* does not require a successive state PCR hearing; and (5) in the absence of any basis for exercise of a “rare exception” for allowing a successive application, the interests of judicial economy are best served by summary dismissal.

The Court agrees that it would be in the interests of judicial economy to deny the stay, until it has addressed Respondent’s motion to dismiss, because the motion for a stay will be rendered moot if the Court finds that the Application should be summarily dismissed for any or

all of the reasons argued by Respondent. The Court further finds that first considering Respondent's motion to dismiss before entering a stay satisfies the concerns of the South Carolina Commission of Indigent Defense that this Court not approve the expenditure of funds from that agency to pay for the investigation, preparation and presentation of a PCR hearing when the Supreme Court may rule in *Robertson* that death row PCR applicants do not have the right to pursue successive PCR applications.

The Court also finds that Terry's motion for a stay is inconsistent with the South Carolina Supreme Court's September 16, 2014 Order. In part, the Court ordered that:

Within sixty days of the date of this order, Judge Keesley shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the Status of this matter every sixty days under In re Stays of Execution in Capital Cases, *supra*, 321 S.C. 544, 471 S.E.2d 140 (1996), Judge Keesley is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

The South Carolina Supreme Court's Order clearly contemplates a reasonably expeditious resolution of this case and does not contemplate this Court granting a stay to further delay a two year old case.

Also, Terry's argument that *Robertson* will address the issue before this Court is speculative. The issue on which the South Carolina Supreme Court granted certiorari was stated as follows:

Whether, in light of *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and the past treatment of similarly situated South Carolina prisoners, *Robertson* should be permitted to proceed with a second-in-time application for post-conviction relief asserting colorable claims of ineffective assistance of trial counsel that prior PCR counsel ineffectively failed to investigate or present?

At first blush, the present case and the issue before the Court in *Robertson* appear similar. However, based upon a review of the documents from the *Robertson* case attached to Respondent's Response, the Court finds that the two cases are factually different in several important respects. For instance, Terry has not attacked the qualifications of his original PCR counsel under S.C. Code Ann. § 17-27-160 (2003) or the Order appointing counsel, whereas *Robertson* has attacked both.

Another factor distinguishing this case from *Robertson* is that *Robertson* claims that one of his original PCR attorneys, Michael L. Brown, "did not competently represent him during his initial PCR proceeding" because Brown was supposedly "abusing alcohol at this time" and violated Court-ordered rehabilitation requirements during the time *Robertson*'s PCR Application was pending. He also relies upon *In re Michael Langford Brown, Jr.*, 396 S.C. 251, 721 S.E.2d 783 (2011), which involved Mr. Brown's arrest and 2011 guilty plea to the charge of resisting arrest, following a July 2007 altercation with police that was the result of counsel's admitted use and abuse of alcohol and which occurred after the January 29-31, 2007, evidentiary hearing in *Robertson*. Whatever the merits may be of the allegations in *Robertson*, no similar allegations exist in this case.

Thus, the present case is factually distinguishable from *Robertson*. In light of these factual differences, the Court finds that there cannot be any guarantee that the Court in *Robertson* will issue an Opinion that "will almost certainly delimit the existence and scope of an available state remedy for Terry's claims of ineffective assistance of trial counsel (and inadequate assistance of state post-conviction counsel)," as Terry suggests. To the contrary, and assuming that the South Carolina Supreme Court grants relief in *Robertson*, that Court may find it unnecessary to grant under *Martinez*.

Rather, the Supreme Court may conceivably find that Robertson is entitled to file a successive Application under the unique facts of his case and contrary to the general rule in *Aice v. State*, 305 S.C. 448, 450-51, 409 S.E.2d 392, 394 (1991), either because of a perceived deficiency in counsel's statutory qualifications or because of matters giving rise to the disciplinary proceedings. Similar relief was granted in *Washington v. State*, 324 S.C. 232, 234-236, 478 S.E.2d 833, 834-35 (1996), where the Court allowed a successive PCR application because the Court found that the applicant was denied due process based on numerous procedural irregularities. *See also Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982) (allowing successive application, where the applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing).

Finally, the South Carolina Supreme Court has previously found that *Martinez* does not require a successive state PCR hearing in the non-capital case of *Kelly v. State*, *supra*. As reflected in the Court's decision in *Kelly*, courts in several other jurisdictions have reached this same conclusion. *See also Aice*, 305 S.C. at 450-51, 409 S.E.2d at 394. Although there is a possibility that the South Carolina Supreme Court will carve out an exception for applicants who are under a death sentence, this Court finds that there is currently no meaningful basis upon which to distinguish the rights available to capital PCR applicants from the rights available to non-capital applicants. Nor has Terry advanced any such meaningful basis.

Therefore, the Court denies Terry's motion for stay.

William P. Keesley, Judge

_____, 2015.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Gary Dubose Terry, #5054,)

2012-CP-32-02718

Applicant,)

v.)

CERTIFICATE OF SERVICE


State of South Carolina,)

Respondent.)

The undersigned certifies that on the 28th day of January, 2015, he served Respondent's Proposed Order Denying Motion to Stay Proceedings Pending Decision of South Carolina Supreme Court in *Robertson v. South Carolina* on counsel for Applicant by depositing same in the United States Mail, first class, postage prepaid, and addressed as follows:

Derek J. Enderlin, Esq.
Ross & Enderlin, PA
330 East Coffee Street
Greenville, South Carolina 29601

Elizabeth Franklin-Best, Esq.
Blume, Norris & Franklin-Best, LLC
900 Elmwood Avenue, Suite #101
Columbia, South Carolina 29201


WILLIAM EDGAR SALTER, III
Attorney for Respondent