STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
(Capital PCR Action)
R. Ferrell Cothran, Jr., Circuit Court Judge
Appellate Case No.: 2013-000518

Petition for Writ of Certiorari denied March 4, 2015
Petition for Rehearing denied May 6, 2015
Remittitur Issued May 6, 2015

Stephen Corey Bryant, Petitioner,

vs.

State of South Carolina, Respondent.

RETURN TO PETITION FOR STAY OF EXECUTION

Respondent submits Petitioner has failed to make the required showing for obtaining a stay from this Court in order to seek certiorari review from the Supreme Court of the United States. The petition should be denied.

In support of his motion, Petitioner alleges his issues should be considered "sufficiently meritorious" to allow for certiorari review. However, the alleged errors were rejected after careful review by the PCR court, and this Court found none of the issues worthy of the grant of certiorari review in the appeal. In *Graves v. Barnes*, 405 U.S. 1201, 92 S.Ct. 752 (1972) (J. Powell, Circuit Justice), a request for stay was denied upon finding that "[t]he case received careful attention by the three-judge court, the members of which were 'on the scene' and more familiar with the situation than the Justices of this Court; and the opinions attest to a conscientious application of principles enunciated by this Court." 405 U.S. at 1204. Petitioner's request for stay should

likewise be denied here under the Supreme Court's sound reasoning. Petitioner fails to make the required showing for a stay of execution. In further support of this position, Respondent would respectfully show the Court:

1. This Court issued the remittitur in this matter on May 6, 2015, after denying certiorari review and Petitioner's request for rehearing. By operation of statute, this Court will issue the execution notice. S.C. Code § 17-25-370 ("when the remittitur is sent down or the appeal is dismissed or abandoned, [this Court] shall notify the Commissioner of the prison system ... of the final disposition of such appeal..."); *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 547, 471 S.E.2d 140, 141-142 (1996) ("the Clerk of this Court shall issue an execution notice when the remittitur is sent to the circuit court"). On May 12, 2015, Petitioner filed a petition for stay of execution to allow for the filing of a petition for writ of certiorari in the Supreme Court of the United States.

2. This Court has provided a structure for seeking a stay after the PCR appeal process is completed and the death-sentenced inmate wishes to seek further review in the Supreme Court of the United States which requires him to "show 'that there is 'a reasonable probability that four Members of the [United States Supreme] Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction.'" *In re Stays*, *quoting Graves v. Barnes*, 405 U.S. at 1203. Jurisdiction is likely available. See 28 U.S.C. § 1257 (a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where" federal law question presented); Rule 13, Supreme Court Rules (time to file petition begins either from denial of certiorari review or, if one is filed, the denial of petition for rehearing). However, as noted, Petitioner must also show an "issue sufficiently meritorious to grant certiorari" may be presented. *In re Stays, supra, Graves, supra.* Petitioner fails to accomplish this showing.

3. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." Rule 10, Supreme Court Rules. Factors that may be considered include whether the state court decision at issue conflicts with a decision of the Supreme Court, another "state court of last resort," or a federal Court of Appeals. *Id.* Such review is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Thus, ordinary application of well-established federal law will seldom, if ever, warranted certiorari review. Even a liberal reading of Petitioner's issues (1), (3), (4) and (5) demonstrate these issues fall within the realm of seldom reviewed issues – issues reflecting ordinary application of the properly stated *Strickland v. Washington*[1] standard:

> Issue (1): Petitioner alleges counsel was ineffective when counsel gave "erroneous advice" that a plea was beneficial in that he may have had an increased chance at a life sentence if sentenced by a judge rather than a jury. This is a well-established strategy recognized in several jurisdictions. *See, e.g., United States v. Fulks*, 683 F.3d 512, 519 (4th Cir. 2012) (*cert. denied* 134 S.Ct. 52 (2013)) ("given the unpalatable hand the defense team was dealt, having Fulks speak to the authorities and then plead guilty were reasonable litigation tactics, though [attorney] obtained no palpable quid pro quo from the government"); *Thacker v. Workman*, 678 F.3d 820, 846 (10th Cir. 2012) (*cert. denied*, 133 S.Ct. 878 (2013)) (finding no *Strickland* error where "trial counsel considered all of the available strategic options for defending Thacker and concluded, in the end, that the best strategy was to have Thacker enter a blind guilty plea and be sentenced by the state trial judge rather than the jury"); *State v. Ketterer*, 855 N.E.2d 48, 63 (Ohio 2006) (*cert. denied* 550 U.S. 942, 127 S.Ct. 2266 (2007)) (rejecting claim that counsel "are per se ineffective" to advise a plea in a capital case "without first securing an agreement" for a life sentence, assuming counsel so advised, "[c]ounsel may have reasonably believed that a guilty plea could minimize the effect of gruesome facts and a brutal murder, especially before a three-judge panel"); *Braun v. State*, 909 P.2d 783 (Okla.Crim.App. 1995) (*cert. denied*, 517 U.S. 1144, 116 S.Ct.1438 (1996)) ("Petitioner admitted he elected to plead [without a deal for a life sentence] in front of the judge because he thought he had a better chance of receiving life without parole. Under the circumstances, this seems a sound strategic choice.").[2]

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[1] *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984). *See also Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366 (1985) (application of *Strickland* test to guilty pleas, and for prejudice, requiring the convicted individual show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

[2] Petitioner's reference to the ABA Guidelines for the proposition it is "patently

Issue (3): Petitioner claims counsel was ineffective for failing to object to the solicitor's closing argument for the trial judge to "send a message." However, the PCR judge rejected factually Petitioner's argument that the argument was for a message to the community; rather, the argument referenced sending a message *to Petitioner*. (App. p. 2598). (See also R. pp. 1026-1027, addressing judge, "... And I ask you to send a message as a representative of our community to Stephen Corey Bryant with what you now know.").

Issue (4) Petitioner alleges counsel was ineffective in not challenging "additional" victim's impact evidence. The PCR judge found no factual basis for Petitioner's argument that the state was allowed to introduce additional victim impact testimony by allowing victims of all crimes to speak at sentence. (See App. p. 2602). Petitioner's crime spree involved multiple victims. The PCR judge correctly found no *Strickland* error in that the procedure used by the plea judge was consistent with the Victim Bill of Rights and use of victim impact evidence for non-capital crimes. S.C. Code Ann. Section 16-3-1550 (C). (App. pp. 2603-2605).

Issue (5) Petitioner alleges counsel was ineffective in the treatment of Mr. Gause's testimony. Having reviewed the record, the PCR hearing testimony and an affidavit, the PCR judge found no error in counsel's handling of the testimony that Mr. Gause would offer. He noted plea counsel "promptly brought the matter to the Court's attention and requested the ability to present Mr. Gause." (App. p. 2609). He also found Mr. Howle "underscored that the testimony was expected to go to Applicant's mental state which was a major portion of the mitigation case," but had no other information to proffer as he had not yet spoken to Mr. Gause. (App. p. 2609). The PCR judge found no *Strickland* error as to trial counsel in these discrete circumstances. (App. p. 2609). Further, the PCR judge found Petitioner failed to show ineffective assistance of appellate counsel, finding appellate counsel was "an experience attorney particularly in capital appeals, [who] made his professional review of the record and determined not to raise the issue. There is no indication of neglect or inadvertence." (App. p. 2610). The PCR judge agreed with appellate counsel's testimony that "the proffer of testimony was vague and not clearly connected to any of the crimes." (App. p. 2611). Further, the PCR judge rejected the assertion of prejudice. Mr. Gause was presented at the PCR hearing. Upon careful assessment with specific reasons cited in the order, the PCR judge declined to give the testimony "any significant weight." (App. p. 2611).

The remaining proposed issues fare no better, but for slightly different reasons:

Issue (6) Petitioner alleges the State failed to disclose certain computer

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unreasonable" to allow a client to plead guilty without an agreement, (see Petition for Writ of Certiorari, p. 15), is not dispositive. The guidelines do not express a checklist of commandments that each and every defense attorney in a capital case must follow to meet constitutional demands. *See Bobby v. Van Hook*, 558 U.S. 4, 9, 130 S.Ct. 13, 17 (2009) (Supreme Court does not recognize guidelines as mandatory or dispositve as to constitutionally sound representation).

evidence that supported his statements and his medical evidence. This similarly falls under a fact-based argument where the state court at issue applied the proper standard, however, the proper standard is *Brady v. Maryland*[3] instead of *Strickland*. Respondent initially notes that certain computer evidence was not turned over. However, Petitioner failed to prove the critical and essential materiality of that evidence as the evidence in question revealed the internet history from *the day before the murder*. (App. p. 2622). Petitioner contended in PCR that the information obtained from the computer corroborated his statements to police – that victim (or whoever had access) had been browsing/visiting pornography sites as early as June 2004 according to the computer's internet history. In turn, such pornography "explained" the mutilation of the eyes; and "lent credibility to his revelations of childhood sexual abuse" in his statement if his assertion of seeing pornography on the computer (also in the statement) may have been true. (Petition for Writ of Certiorari, pp. 69-70; p. 75). However, Petitioner's own statements reflected that he did not view the pornography until *after* the murder. Further still, the history tended to disprove Petitioner's statements of the type of pornography he claimed to have viewed on the computer. As to the mental health claims, Dr. Donna Schwartz-Watts, in testimony before the PCR Court, confirmed that Petitioner had reported that he looked at the computer *after* the killing. (App. pp. 2064-2066). Moreover, a bestiality image Petitioner referenced was not found on the computer. Though according to Dr. Schwartz-Watts at the PCR evidentiary hearing, the computer history would have corroborated her conclusions, perhaps worked to "insulate" her on cross-examination to an extent, she did not indicate any change in her opinion, and she did not appear to address the tension in the statement compared to the actual history. (See App. pp. 2080). For all these reasons, Petitioner failed to show materiality. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985). Thus, as the PCR judge correctly found, Petitioner was not entitled to any relief. (App. p. 2622).

Issue (2) Petitioner argues a deprivation of the Sixth Amendment Right to two attorneys when neither the text of the amendment nor interpreting Supreme Court or circuit precedent supports that position. *See, for example, United States v. Shepperson,* 739 F.3d 176, 180 (4th Cir. 2014) ("Because the right to additional counsel under § 3005 is solely statutory, we hold that the district court was not required to call it to the attention of Shepperson"); *United States v. Blankenship*, 548 F.2d 1118, 1121 (4th Cir.), *cert. denied* 425 U.S. 978, 96 S.Ct. 2182 (1976) ("Nothing in section 3005 indicates that the constitutional requirement that a defendant be afforded effective assistance of counsel may not be satisfied in a capital case by the appointment of a single attorney; that section merely provides authority for the court to assign additional counsel when necessary in a capital case.").

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[3] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "The suppression by the [State] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194.

Issue (7) Lastly, Petitioner would complain of a "wholesale adoption of the state's proposed order," however, as the State noted in the return to the petition for writ of certiorari, Petitioner did not object to the proposed order process and also presented a proposed order to the PCR judge. Any objection to the proposed order procedure was waived with the consent to the procedure and the filing of Petitioner's own proposed order. *See Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) ("a party may not complain on appeal of error or object to a trial procedure which his own conduct has induced"). *See generally State v. Smart*, 278 S.C. 515, 521, 299 S.E.2d 686, 690 (1982) (*overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)) (noting the failure to object to a procedure known and accepted by participants in rejecting claim of error). Moreover, there were multiple changes to the order which supported a detailed reviewed of the order before adoption and would not support factually the argument of "wholesale" adoption. Further, such adoption of a proposed order would not necessarily be error under Supreme Court precedent. In *Jefferson v. Upton*, 560 U.S. 284, 130 S.Ct. 2217 (2010), the Supreme Court did not vacate the state court order, but remanded it to the district court in a federal habeas corpus proceeding to determine "whether the state court's factual findings warrant a presumption of correctness...." 560 U.S. at 294, 130 S.Ct. at 2223. The Court expressed concerned that the judge had contacted the State's counsel *ex parte* but no similar request was made of the defendant's counsel, and that the proposed order included statements by individuals who did not testify or otherwise participate in the case. *Jefferson*, 560 U.S. at 287-288, 130 S.Ct. 2219-20. In this case, both parties were allowed to present proposed orders and exchange proposed orders at the time the orders were submitted. Respondent's proposed order was not solicited *ex parte*, Petitioner's counsel was provided the opportunity to review the proposed order, and the order did not include reference to material and evidence not submitted at the hearing. Further, in *Jefferson*, the Supreme Court acknowledged that it had held that "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court though it had "also criticized that practice." *Jefferson*, 560 U.S. at 293-294, 130 S.Ct. 2223, *citing Anderson v. Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504 (1985).

Thus, none of the issues referenced in the petition for stay show that Petitioner can meet the standard for issuance of a stay at this time.

4. As asserted above, it is of no little note that the alleged errors were reviewed and rejected by the PCR court, and this Court found none of the issues presented worthy of the grant of certiorari review in the appeal. As in *Graves,* "[t]he case received careful attention by the ... court, ... and the opinions attest to a conscientious application of principles enunciated by [the Supreme] Court." 405 U.S. at 1204, 92 S.Ct. at 754. Also as in *Graves,* a stay is not warranted.

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CONCLUSION

Based on the foregoing, Respondent submits Petitioner has failed to make the required showing for obtaining a stay from this Court in order to seek certiorari review from the Supreme Court of the United States. The petition should be denied.

Respectfully submitted,

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May 18, 2015.
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PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the State's *Return to Petition for Stay of Execution* on Petitioner by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorneys of record:

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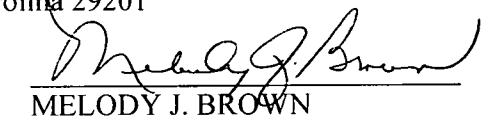
This 18th day of May, 2015.



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