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NOV 16 2016

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY  
Court of General Sessions  
Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 2016-002228

Stephen Cory Bryant, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

**Rule 243(c), SCACR Explanation and  
Petition to Stay and Hold in Abeyance Pending Decision in *Robertson v. State***

Pursuant to Rule 243(c), SCACR, the petitioner, Stephen Cory Bryant, provides the following explanation about why his successive post-conviction relief application is meritorious. Mr. Bryant also petitions this Court for an order staying this appeal and holding it in abeyance until this Court issues an opinion in *Robertson v. State*, Appellate Case No. 2012-205909, considering how our state will address unexhausted claims pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), will be important.

**I. Relevant Factual and Procedural Background.**

On August 18, 2008, Bryant pled guilty to three counts of murder, armed robbery, two counts of first-degree burglary, second-degree burglary, second-degree arson, assault and battery with intent to kill, possession of a stolen handgun, and threatening the life of a public official. On September 11, 2008, the Court of General Session found the murder of Willard Tietjen was committed during the commission of an armed robbery and sentenced Bryant to death. The Court imposed additional sentences, including several

concurrent life sentences without the possibility of parole. The South Carolina Supreme Court affirmed the convictions and sentences on January 7, 2011. *State v. Bryant*, 390 S.C. 638, 704 S.E.2d 344 (2011). Bryant's initial application for post-conviction relief was filed on May 10, 2011. The post-conviction court denied post-conviction relief, and the Supreme Court of South Carolina denied Bryant's petition for a writ of *certiorari* to review the lower court's denial on March 4, 2015. The Supreme Court denied the petition for rehearing and issued the remittitur on May 6, 2015. The Supreme Court of the United States subsequently denied Bryant's petition for a writ of *certiorari* on November 30, 2015. *Bryant v. South Carolina*, 136 S. Ct. 545 (2015).

On June 24, 2015, the Honorable David C. Norton, United States District Court Judge, issued an order staying Bryant's execution so that he could file a petition for writ of *habeas corpus*. On September 18, 2015, Judge Norton extended the stay. Pursuant to Judge Norton's order dated January 13, 2016, Bryant filed his "place holder" petition for writ of *habeas corpus* on January 14, 2016. Also on January 14, 2016, Judge Norton extended the stay of execution until Bryant's *habeas* petition is resolved. Bryant amended his petition on April 28, 2016. As set out more fully in the amended *habeas* petition, post-conviction counsel overlooked several meritorious challenges to Bryant's convictions and sentences that were apparent from the trial record or could have been discovered through adequate post-conviction investigation. See Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. 913, 1086 (2003) ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues."); *id.* ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline

10.7.”). Contemporaneously with filing the amended petition with this Court, Bryant filed two successor applications for post-conviction relief in the Court of Common Pleas for Sumter County.

The application at issue raises four grounds for relief. First, trial counsel was ineffective for not investigating and presenting Bryant’s *Atkins* claim. Second, trial counsel failed to investigate, develop, and/or present mitigation evidence that was available at the time of the sentencing hearing. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668, 688 (1984); and *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008). The third and fourth grounds allege a conflict of interest resulting from Barbara Cusso Ryan testifying as a witness for the prosecution during Bryant’s sentencing hearing. PCR Appendix, pp. 218-28. At the time of the crimes, Ms. Ryan was married to James Hugh Ryan, III, then an Assistant Public Defender in Sumter County<sup>1</sup> and later an Assistant Solicitor in Sumter County and later Deputy Director and General Counsel for the South Carolina Commission on Indigent Defense with oversight responsibility for funding capital cases.<sup>2</sup>

The State moved to dismiss both these applications. By written order dated May 31, 2016, the Chief Justice assigned the Honorable Thomas W. Cooper, Jr. “for the sole purpose of hearing and ruling on the State’s motions to dismiss.” Judge Cooper allowed Mr. Bryant to proceed on the petition alleging his death sentence is unconstitutional

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<sup>1</sup>

Based on Ryan’s South Carolina Commission on Indigent Defense biography, it is not clear the exact dates he was an Assistant Public Defender for Sumter County, but there appears to be an overlap.

<sup>2</sup>

Barbara Ryan and Hugh Ryan have two children together.

pursuant to *Atkins*. By written order dated August 1, 2016, the Chief Justice assigned the Honorable William H. Seals, Jr. to preside over that case. Judge Cooper, however, dismissed the application raising claims of ineffective assistance of counsel. This appeal follows.

## **II. Relevant legal Authority.**

### **A. Mr. Bryant is entitled to pursue this PCR Application because his initial PCR counsel provided ineffective representation in his initial PCR proceedings.**

The PCR Application involved in this appeal sets forth viable claims for relief initial PCR counsel failed to raise or failed to raise adequately. *See* PCR Application, ¶¶ 10 and 11. By not conducting an adequate mitigation investigation, trial counsel and prior PCR counsel failed to discover that Mr. Bryant suffers from Intellectual Disabilities which makes him ineligible for the death penalty. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002); and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). Also as a result of an inadequate mitigation investigation, trial counsel and prior PCR counsel failed to investigate, develop, and present evidence of Mr. Bryant's inability to function in school, childhood physical trauma, the full nature and extent of the childhood sexual abuse perpetrated on Mr. Bryant by multiple abusers, and other mitigating social history.

Initial PCR counsel's performance in failing to raise these claims adequately, or at all, was objectively unreasonable and outside the range of competent assistance. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The entire purpose of state collateral proceedings is to test the legality of the conviction and (especially in capital cases) the sentence. That can only be achieved through a thorough investigation of all

aspects of the case,<sup>3</sup> through the appropriate utilization of investigators and experts,<sup>4</sup> and through presentation of all meritorious claims in PCR proceedings.<sup>5</sup> Because initial PCR counsel were ineffective, the court should have allowed permit the PCR application to go forward.

**B. Mr. Bryant is entitled to pursue the present post-conviction relief application as a matter of state and federal law.**

**1. Mr. Bryant is entitled to pursue the present PCR application as a matter of state law.**

Relying on *Wade v. State*, 348 S.C. 255, 599 S.E.2d 843 (2002) and *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), the respondent argued below that the PCR Application should be dismissed as impermissibly successive. See Motion to Dismiss, pp. 7-13. In *Aice*, the South Carolina Supreme Court observed that successive PCR applications generally should not be entertained ““unless the court finds a ground for relief asserted which for *sufficient reason* was not asserted or was inadequately raised in

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See ABA Guidelines 10.15.1, commentary (“[C]ollateral counsel cannot rely on the previously compiled [trial counsel] record but must conduct a thorough, independent investigation.”). The guidelines have been cited with approval by the Supreme Court of the United States on several different occasions, *see, e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and are applicable to trial, appellate and post-conviction counsel. See Eric Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. App. Prac. & Process 325 (2003). While set out in the guidelines, this is also a matter of common sense. If PCR counsel could blindly rely on trial counsel’s investigation, the process would be pointless. And that is why, in South Carolina, and other jurisdictions, the prevailing professional norms in capital post-conviction practice require a comprehensive re-investigation of the case.

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Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. 913, 1086 (2003) (“[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7.”).

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Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. 913, 1086 (2003) (“[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues.”).

the original, supplemental or amended application.” *Id.* at 450, 409 S.E.2d at 394 (emphasis in original) (quoting S.C. Code Ann. § 17-27-90). The Court held, however, that there are exceptions to the general rule, including “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.” *Id.* at 451, 509 S.E.2d at 394.

In *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996), the Court invoked this exception and permitted a successive PCR application to go forward because of the ineffective assistance of initial PCR counsel and various other procedural irregularities. *Id.* at 235-36, 478 S.E.2d at 834-35. The Court has also applied similar exceptions in other cases. For example, in *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982), the Court held that a “unique” combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR proceeding. The Court later noted that under these circumstances it was “highly doubtful” that Case would have been able to raise the appropriate arguments in his initial PCR. *Aice*, 305 S.C. at 451, n.1, 409 S.E.2d at 394, n.1; *see also Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (allowing a successive PCR where initial PCR counsel was the same as trial counsel).

The Circuit Courts in at least two prior capital PCR cases have also permitted successive PCR applications in the same or similar circumstances. The Honorable Marc H. Westbrook permitted Luke Williams to pursue a second PCR proceeding, over the State’s objection, on the basis that Williams’ initial PCR counsel were not qualified. *See Williams v. Ozmint*, 494 F.3d 474, 484 (4th Cir. 2007) (“Williams filed two applications for state post-conviction relief, the second of which was granted by the circuit court

(PCR court).”). Although the South Carolina Supreme Court ultimately reversed the circuit court’s grant of relief in that case, it did so on the merits, not on the ground that Williams’ second application was procedurally barred. *See Williams v. State*, 363 S.C. 341, 611 S.E.2d 232 (2005). Another capital PCR applicant, Edward Elmore, was also permitted to proceed on a successive PCR application over the State’s objection, and the Honorable J. Mark Hayes granted Elmore penalty-phase relief from his death sentence on February 1, 2010. The State did not appeal this order.

This case is directly on par with *Williams* and *Elmore*. Mr. Bryant’s initial PCR counsel failed to competently represent Applicant in his first post-conviction proceeding. All death-sentenced inmates are entitled to one full and fair opportunity at post-conviction relief with the assistance of qualified and competent counsel. The general rule against successive PCR applications is intended to enforce that limit. But the courts have adopted exceptions to ensure that all PCR applicants actually receive their one fair chance at meaningful post-conviction review. As in *Williams* and *Elmore*, Bryant is simply asking for his one fair chance. There is no principled distinction between the procedural circumstances in *Williams* and *Elmore* and the circumstances here. It would be fundamentally unfair for this Court to arbitrarily deny Mr. Bryant the opportunity that Williams and Elmore rightfully received. This Court should permit Applicant’s PCR application to go forward so that he may have the one opportunity to which he is entitled under state law.

### III. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

1. ***Martinez v. Ryan*, 132 S. Ct. 1309 (2012) provides additional incentive for this Court to refrain from dispensing with the previously established state court practice.**

The Supreme Court of the United States decision in *Martinez* reinforces the need for this Court to adhere to the precedent established by *Williams* and *Elmore*. In *Martinez*, the Court expressed a clear preference for the state courts to act as the primary forum for the development and resolution of claims of ineffective assistance of trial counsel. 132 S. Ct. at 1318. Moreover, the Court acknowledged that the assistance of competent collateral counsel is crucial if state prisoners are to obtain meaningful review of such claims. *Id.* at 1317. This is because “claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy,” and “[w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.” *Id.* “To present a claim of ineffective assistance at trial in accordance with the State’s procedures, then, a prisoner likely needs an effective attorney.” *Id.* If a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review, then further federal development and merits review will not be precluded. *Id.* at 1320.

While the Court’s decision does not require state courts to provide a second PCR proceeding where initial PCR counsel were ineffective, *Martinez* “permits a State to elect between appointing [effective] counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings.”<sup>6</sup> *Id.* at 1320. Respondent’s contention that Mr. Bryant is “mix[ing] concepts involved in *Martinez* and *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013), is

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To ensure the state’s appointment of effective counsel during the initial-review collateral proceedings, and thus the state’s ability to assert a procedural default in federal court, a state has the option of creating a state forum for addressing ineffective assistance of initial-review collateral counsel—i.e., a second-in-time PCR application.

simply incorrect. Motion to Dismiss, p. 10. The South Carolina Supreme Court’s decision in *Kelly* was correct in observing that *Martinez* is directed at federal courts, not state courts, but *Kelly* did not reach or resolve the separate question of how state courts themselves should respond to the choice *Martinez* affords them. Instead, the question is now squarely before this Court in *Robertson*, which the Court has chosen to consider and decide.<sup>7</sup> Thus, *Kelly* is not the final word—or even a temporarily dispositive word—on the availability of a *Martinez*-related remedy in South Carolina.

Thus, although *Martinez* does not require that this Court provide Applicant the opportunity to present his second PCR application with the aid of competent, effective counsel, it does establish that if this Court chooses not to do so, the federal courts will take responsibility for the development and resolution of Mr. Bryant’s claims instead. In order to preserve the role of South Carolina PCR courts as the primary arbitrators of ineffective assistance of trial counsel claims, this Court should deny Respondent’s motion to dismiss and allow for further PCR proceedings.

**2. This Court should stay these proceedings pending the decision in *Robertson*.**

Most of the threshold questions raised in Respondent’s Motion to Dismiss will also be considered and decided in *Robertson*, which is now pending before this Court. In *Robertson*, the Court is considering whether (and under what circumstances), a death-sentenced inmate can raise previously un-adjudicated claims in a second state PCR

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The South Carolina Supreme Court held oral argument in *Robertson* on October 8, 2015, considering whether, in light of *Martinez* and past South Carolina precedent, *Robertson* should be allowed to proceed with a second-in-time PCR application when his initial PCR counsel provided ineffective assistance. As of the filing of this pleading, the Supreme Court has not issued a ruling in *Robertson*.

application.<sup>8</sup> Because this Court's decision will almost certainly delimit the existence and scope of an available state remedy for Mr. Bryant's claims, this Court stay these proceedings until *Robertson* is decided. This Court should then stay these PCR proceedings while *Robertson* remains pending in order to preserve judicial resources.

Courts in this State routinely stay proceedings "when there is another issue pending between the same parties in another action and the resolution of that issue will affect the actions sought to be stayed." *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 328 S.E.2d 621 (1985). The interests of judicial and fiscal economy will be served by staying this proceeding until the South Carolina Supreme Court renders its decision in *Robertson*. See also *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (Court issued procedures to follow in capital cases in order to apply the U.S. Supreme Court *Atkins*<sup>9</sup> decision and noted that multiple cases raising similar claims of mental retardation had their cases stayed pending the Court's decision as to how to proceed).

In footnote 7, at p. 10, of the Motion to Dismiss, the State acknowledges "that there are several successive capital actions that have been filed under this theory." In addition to James D. Robertson, whose case is pending before this Court, these applicants are Gary Terry, John Richard Wood, James N. Bryant, Brad Keith Sigmon, Bayon

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The decision in *Robertson* will likely also address Respondent's argument that a second PCR proceeding would "frustrate the important need for finality of litigation." The Court's decision regarding if, and when, it is appropriate to allow a second PCR proceeding when initial PCR counsel were ineffective will necessarily indicate whether the desire for state courts to address the merits of a death-sentenced inmate's collateral review claims outweigh the need for finality in litigation.

*Atkins v. Virginia*, 536 U.S. 304 (2005) (Decision barred imposition of the death penalty against a mentally retarded defendant, but left it to the States to establish appropriate judicial procedures).

Aleksey, Richard Bernard Moore, and Abdiyyah ben Alkebulanyahh. All of these cases, except for *Wood*, are stayed pending the decision in *Robertson*.

**IV. Conclusion.**

This Court should stay these proceedings and hold this appeal in abeyance until it issues an opinion in *Robertson v. State*.

Respectfully Submitted,

By: \_\_\_\_\_



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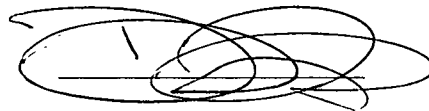
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