THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

C/A No. 2016-CP-43-829
Capital PCR

Stephen Corey Bryant, SCDC #5252,

Petitioner

vs.

State of South Carolina,

Respondent

Appellate Case No. 2016-002228

RESPONSE IN OPPOSITION TO PETITION TO STAY AND HOLD IN ABEYANCE THE COURT'S CONSIDERATION OF PETITIONER'S RULE 243(C), SCACR EXPLANATION

On November 16, 2016, Petitioner filed his required explanation pursuant to Rule 243(c), SCACR. With the explanation, Petitioner also moved to stay consideration of this matter until this Court issues a ruling in *Robertson v. State*, Appellate Case No. 2012-205909 (argued October 8, 2015). Respondent opposes the petition to stay consideration of Petitioner's explanation.

Respondent submits the Orders before the Court demonstrate a proper consideration of recognized exceptions to both the successive applications bar and the statute of limitations. (July 7, 2016 Order Granting Motion to Dismiss, pp. 8-12). The Honorable Thomas W. Cooper, Jr., concluded Petitioner simply failed to demonstrate that any such exception was warranted on the facts of his case. Rule 243(c) places the burden on a petitioner to show "why this determination was improper." Given a specific ruling was made, and Petitioner has now provided his

explanation as to "why this determination was improper," this matter is ripe for the Court's consideration.

Further, a motion for stay until after the *Robertson* appeal has concluded was also presented to Judge Cooper. In denying same, Judge Cooper found this case presented an ordinary application of established procedural rules. (July 7, 2016 Order Granting Motion to Dismiss, p. 13). In denying Petitioner's motion to alter or amend, Judge Cooper specifically declined to change his ruling on the stay, finding the case differs factually from the "*Robertson*-type cases," particularly given the denial of dismissal in the remaining PCR action. (September 16, 2016 Order Denying Applicant's Rule 59 (e) Motion). Judge Cooper's ruling is sound. An exception to a general rule must necessarily rest on the facts of an individual case at issue. *See Washington v. State*, 324 S.C. 232, 236, 478 S.E.2d 833, 835 (1996) (citing "the unique combination of facts in this case" as a basis for rare exception allowing successive action). A stay is not warranted to consider the application of the procedural bars to the facts of a separate, unrelated case.

Lastly, Petitioner cannot show an improper application of the procedural bars in his case. The State's motion to dismiss was properly granted on the facts of this case as the action was barred as successive and untimely. The petition for stay should be denied and the notice of appeal dismissed. In support of these positions, Respondent would respectfully show the Court:

First PCR Action

Petitioner obtained a stay from this Court on March 3, 2011, in order to seek post-conviction relief. (App. pp. 1475-1475).[1] The Court appointed the Honorable R. Ferrell Cothran to preside. Judge Cothran appointed Melissa J. Armstrong, Esq., and Heath P. Taylor, Esq., to represent Petitioner. PCR counsel filed an initial application on May 10, 2011, followed by

[1] "App." refers to the Appendix submitted in Petitioner's prior PCR appeal previously filed with this Court.

amendments filed May 21, 2012, (App. pp. 1532-1536), and October 1, 2012, (App. pp. 1632-1638). An evidentiary hearing was held October 1-3, 2012, (App. p. 1639), and proposed orders followed. (App. p. 2516-2571; Third Supplemental Appendix). By Order dated December 4, 2012, the judge denied relief and dismissed the application. (App. pp. 2572-2625). Petitioner moved to alter or amend, (App. pp. 2626-2633), which the judge denied on February 14, 2013. (App. pp. 2634-2646). Petitioner appealed the denial of relief. On March 28, 2014, Petitioner filed a petition for writ of certiorari with this Court. Respondent made a Return to the Petition for Writ of Certiorari on July 28, 2014. On March 4, 2015, this Court denied the petition. On May 6, 2015, this Court denied a timely petition for rehearing and issued the remittitur.[2]

Petitioner's Second PCR Application

On May 3, 2016, Petitioner filed a second PCR action. (C/A No. 2016-CP-43-828). Petitioner claims he is Intellectual Disabled and ineligible for a death sentence. Respondent moved to dismiss the action as impermissibly successive and time barred since this was a post-*Atkins* plea. Judge Cooper allow the second PCR to continue citing *Atkins v. Virginia*, 536 U.S. 304 (2002), and S.C. Code § 17-27-20(A)(1) (sentence in violation of the Constitution).[3]

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[2] After his state litigation was completed, Petitioner filed a federal habeas action. Petitioner included in his federal claims the unexhausted claims subsequently presented in his second and third PCR actions in state court. Petitioner did not obtain a ruling on whether the claims were exhausted or if they could be heard by exception. Rather, he requested a stay to return to state court. The federal court entered a stay on July 26, 2016. (C/A 9:16-cv-01423-DCN-BM, ECF #52). Petitioner also sought review from the Supreme Court of the United States while pursuing federal habeas relief. The Court denied Petitioner's petition for writ of certiorari on November 30, 2015. *Bryant v. South Carolina*, 136 S.Ct. 545 (2015). Though not necessary to the analysis of the state procedural bars, Respondent includes reference to the federal actions for completeness.

[3] Judge Cooper found that *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) "did not expressly address the situation where a defendant is sentenced to death after Atkins but does not discover he suffers from Intellectual Disabilities [sic] until after the conclusion of his post-conviction relief action." (July 13, 2016 Order, p. 5). Judge Cooper further found that an "*Atkins* claim cannot be waived on the basis that his trial counsel failed to raise it," thereby creating a *per*

Petitioner's Third PCR Application

On the same day as the Second Application was filed, Petitioner filed a Third Application for Post-Conviction Relief ("PCR"). Petitioner asserted he wished to press the following claims:

1. Ineffective Assistance of Counsel:

    a. trial counsel failed to discover and present evidence of intellectual disability;

    b. trial counsel failed to investigate, develop, and/or present mitigation evidence *i.e.* evidence of intellectual disability; 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;

    c. trial counsel had a conflict of interest, *i.e.* two attorneys were public defenders and a witness at sentencing was married to then public defender Hugh Ryan, Esq.;

2. Applicant was denied the right to an initial, conflict-free post-conviction relief hearing:

    a. Hugh Ryan, Esq., "personally selected" prior PCR counsel.

(Application, pp. 2-4).

Respondent also moved to dismiss the action as improperly successive and untimely. The state sentencing record[4] reflects the mitigation case at sentencing included a family history profile; a personal history profile, including reference to Petitioner's difficulties in childhood;

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se exception to time and successiveness bars. (July 13, 2016 Order, p. 6). That action is currently pending, Respondent being unable to appeal the ruling at this juncture. See Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision."); Rule 243 (a), SCACR ("A final decision entered under the Post-Conviction Relief Act shall be reviewed by the Supreme Court upon petition of either party for a writ of certiorari, according to the procedure set forth in this Rule.").

[4] Respondent provided Judge Cooper with copies of the relevant state court records as attached to its return and motion. (July 7, 2016 Order, p. 1 n. 2).

references to school records and allegations of abuse; and, an expressed concern that Petitioner's mother had exposure to alcohol during pregnancy. (Return and Motion to Dismiss Attachment 5, at Transcript pp. 812-817). Dr. Schwartz-Watts (now Maddox) testified Petitioner was not "mentally retarded" and had no organic brain damage.[5] (Return and Motion to Dismiss Attachment 6, at Transcript pp. 836-838). In addressing the allegation of conflict, Respondent pointed out Ms. Ryan stated she was married to Mr. Hugh Ryan, III, within her sentencing proceeding testimony.[6] (Return and Motion to Dismiss Attachment 7, at Transcript p. 219).

By Order dated July 7, 2016, filed July 15, 2016, Judge Cooper granted the State's motion to dismiss. A timely motion to alter or amend was denied by Order dated September 16, 2016, filed October 3, 2016.

Discussion

As evidenced in the Orders before the Court, Judge Cooper engaged in a careful review of relevant facts and considered all arguments presented before issuing a detailed order on his findings and conclusions. This matter is ripe for consideration of the Rule 243(c) explanation.

The PCR statute provides both a time limitation and a bar to successive applications. S.C. Code § 17-27-45 (A) provides a PCR action "must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code § 17-27-90 provides "[a]ll grounds for relief available to an applicant ... must be raised in his

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[5] This condition is now known as "Intellectual Disability." *See State v. Stanko*, 402 S.C. 252,741 S.E.2d 708, 724 (2013) (noting that references in the state statute to mental retardation have been deleted and replaced with term "intellectual disability" but same meaning is assigned).

[6] Ms. Ryan's testimony was limited. She testified to interaction with Petitioner around the time of the crime, and could describe the truck Petitioner was then driving, but thankfully was not subjected to violence. (See Return and Memorandum Attachment 7, at Transcript pp. 224-225).

original, supplemental or amended application." Thus, "[a]n individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal." *Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002). "The [PCR] court may grant a motion by either party for summary disposition of the [PCR] application when ... there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013) (citing S.C.Code Ann. § 17–27–70(c)).

In seeking an appeal from the summary dismissal of an action as improperly successive and/or not timely, a petitioner is required to file an explanation with the notice. Rule 243 (c), SCACR. A petitioner is tasked with showing "an arguable basis for asserting that the determination by the lower court was improper." Rule 243 (c).

Petitioner in this case has failed to make the required showing. Further, the record does not reflect an arguable basis for asserting the dismissal was improper. The petition for stay should be denied and the notice of appeal dismissed.

Statute of Limitations

Judge Cooper correctly found the facts support Petitioner's action was not timely filed. In the absence of any new law or undiscoverable fact which will start a separate one-year limitations period, see S.C. § 17-27-45 (B and C),[7] Petitioner's one year period began to run on February 2, 2011, when this Court denied the petition for rehearing and issued the remittitur. See S.C. Code § 17-27-45 (A). Petitioner's one year period expired on February 2, 2012. His present action filed May 3, 2016, is not timely by a wide margin – over four years.

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[7] As Judge Cooper reasonably found, and as supported by the transcript pages attached to the motion to dismiss, "the trial defense team had investigated various avenues of mitigation; and, Ms. Ryan's husband was named in her testimony at the time of trial." (See July 7, 2016 Order, p. 8 n. 7). Nothing supports the presence of an "undiscoverable" fact either at trial or during the prior PCR action.

In addition to the statutory provisions listed, this Court has made specific exceptions such as (1) where an applicant was denied a direct appeal due to ineffective assistance, *see Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002); or (2) where an applicant was denied an appeal from denial of post-conviction relief, *see Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999). Petitioner does not claim either of these exceptions, and neither the statutory exceptions nor the Court's exceptions apply to the facts here.[8] This action was not timely filed.

Successive Application

Further, Judge Cooper properly found the application is barred as successive. "In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application." *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008). Successive applications are historically disfavored, but are not categorically disallowed. *Id. See also* S.C. Code §17-27-45 (B) and (C) (exceptions to statute of limitations and successiveness bar include applications based upon a new retroactively applied substantive standard in criminal law, or new "evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence" if filed within one-year "after the date when the facts could have been ascertained by the exercise of reasonable diligence"); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999) ("belated review

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[8] Petitioner has not asserted the factual bases for these claims could not have been discovered previously, only that such was not discovered. The statute requires more:

> (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant *or after the date when the facts could have been ascertained by the exercise of reasonable diligence.*

S.C. Code § 17-27-45 (C) (emphasis added).

of appellate issues, or "rare procedural circumstances" are reasons to allow successive actions). None of the statutory exceptions or a "rare procedural circumstance" has been shown. Rather, Petitioner relies on an allegation that PCR counsel was ineffective in failing to raise these claims. It is well-established that such an assertion alone is not sufficient cause to allow another "bite at the apple." *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).[9] Consequently, his argument fails.

Claim of Ineffective Assistance of PCR Counsel

Judge Cooper properly rejected Petitioner's claim that former PCR counsel was ineffective and he is entitled to proceedings to prove same. Again, it has long been a settled principle in our state jurisprudence that ineffective assistance of PCR counsel alone does not demonstrate sufficient reason as to why available claims were not asserted. This Court has noted the dangers of a contrary position, specifically in capital cases:

> ... We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish.

Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Petitioner fails to argue any cognizable basis for the exercise of the "rare exception" of allowing a successive application. Petitioner's reliance on two unrelated actions, *Edward Lee Elmore v. State* , 2005-CP-24-1205, and *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600,

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[9] Respondent acknowledged there are several successive capital actions that have been filed under this theory. (*James D. Robertson; Gary Terry; John Richard Wood; James N. Bryant; Brad Keith Sigmon; Bayan Aleksey; Richard Bernard Moore; and Abdiyyah ben Alkebulanyahh*). As of the filing of this return, none of those actions have been allowed to continue on the merits. Further, with the exceptions of James Robertson and John Richard Wood, the cases are either stayed or in a *de facto* stay position pending resolution Robertson's appeal. In regard to Wood's successive action, the Honorable J. Mark Hayes granted the State's motion for summary judgment. (*John R. Wood, #6005 v. State of South Carolina*, C/A 2013-CP-23-05190).

602 n. 2 (2008), is misplaced as these cases did not establish any new rule, but, importantly, the State did not argue the correctness of the decision to allow the successive action. *See Williams v. State*, 363 S.C. 341, 61 1 S.E.2d 232 (2005). Whether the actions were proper are not has not been tested on appeal. Further, the exception to capital punishment referenced in the application (*i.e., Atkins*) was established well-before the plea in this matter. Being available before the plea and sentencing as well as for the prior PCR proceedings makes a formidable bar to any additional litigation.

In its June 20, 2002 opinion in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242 (2002), the Supreme Court of the United States held that intellectually disabled defendants are exempt from capital punishment. The Court left to the individual States the task of establishing the process for determining whether a defendant is subject to the exemption. 536 U.S. at 317. In *Franklin v. Maynard*, 356 S.C. 276, 278, 588 S.E.2d 604, 605 (2003), our Supreme Court "establish[ed] procedures implementing the *Atkins* decision." The *Franklin* case sets out that post-*Atkins* cases will have a claim of intellectual disability first determined by the trial judge, with the possibility of having the evidence of intellectual disability also submitted to the jury where the claim is rejected pre-trial.[10] 356 S.C. at 279, 588 S.C.2d at 606. For pre-*Atkins* cases, the claim may be raised as a free-standing claim under the PCR statute. 356 S.C. at 280, 588 S.C.2d at 606. *See also State v. Laney*, 367 S.C. 639, 646-47, 627 S.E.2d 726, 730 (2006) (re-affirming *Franklin* procedure).

Petitioner's plea and sentencing occurred in 2008. Petitioner's case falls in the post-*Atkins* division of *Franklin*. Consequently, *Franklin* does not provide exception to either the successiveness bar or the time bar.

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[10] This procedure is being reviewed in the pending direct appeal, *State v. Ricky Lee Blackwell*, Appellate Case No. 2014-000610.

And, again, as noted above, the transcript shows the trial defense team had investigated various avenues of mitigation, including issues related to mental status; and, Ms. Ryan's husband was named in her testimony at the time of trial. Nothing supports the presence of an "undiscoverable" fact either at trial or during the prior PCR action. Judge Cooper properly applied the procedural bars to the facts of this case.

CONCLUSION

WHEREFORE, having made the return to the petition for stay, Respondent submits that review should continue. This is the type of review that allows the Court to consider how the successiveness and time bars are being applied within individual capital cases. *See, for example, Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 461, 145 L. Ed. 2d 370 (1999) (Thomas, J., concurring in denial of the petitions for writ of certiorari) (noting prior "invitation to state and lower courts to serve as 'laboratories' in which the viability of this claim could receive further study"). This Court has been roundly deprived of the ability to see the current application of these established bars in capital cases as most other lower courts have entered stays or are holding judgment in light of *Robertson*. Respondent encourages the Court to deny the petition for stay and to consider the explanation in the normal course afforded under the appellate court rules.

Respectfully submitted,

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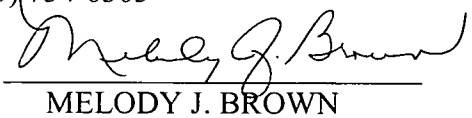
By: 

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November 28, 2016.
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CERTIFICATE OF SERVICE

I, Melody J. Brown, Senior Assistant Attorney General, certify that I have served the foregoing *Response in Opposition to Petition to Stay and Hold in Abeyance the Court's Consideration of Petitioner's Rule 243(C), SCACR Explanation* on Petitioner by depositing one copy of same in the United States mail, postage prepaid, addressed to his counsel as follows:

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