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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

Case No. 2016-CP-43-00828

Stephen Cory Bryant, ..... Appellant,

v.

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

**Motion to Appoint Counsel**

Stephen Cory Bryant moves this Court for an order appointing undersigned counsel so that Mr. Bryant will have continuity of counsel. Continuity of counsel is particularly important because of the relationship between Mr. Bryant's current appeal and his federal petition for a writ of *habeas corpus*.

**PROCEDURAL BACKGROUND**

On August 18, 2008, Mr. 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 Mr. Bryant to death. The Court imposed additional sentences, including several concurrent life sentences without the possibility of parole. This Court affirmed the

convictions and sentences on January 7, 2011. *State v. Bryant*, 390 S.C. 638, 704 S.E.2d 344 (2011).

Mr. Bryant filed his initial application for post-conviction relief on May 10, 2011. The post-conviction court denied relief, and this Court denied Mr. Bryant's petition for a writ of *certiorari* on March 4, 2015. This 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 Mr. Bryant's execution so that he could file a petition for writ of *habeas corpus*. The District Court appointed undersigned counsel and Jon Sheldon[1] to represent Mr. Bryant. On September 18, 2015, Judge Norton extended the stay. Pursuant to Judge Norton's order dated January 13, 2016, Mr. 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. Mr. Bryant amended his *habeas* petition on April 28, 2016.

Contemporaneously with filing the amended *habeas* petition with the District Court, Mr. Bryant filed two successor applications for post-conviction relief in the Court of Common Pleas for Sumter County. The first PCR application alleged Mr. Bryant is ineligible for the death penalty because he suffers from an intellectual disability pursuant to *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 304 (2002), and

[1] Mr. Sheldon is a member of the Bar in the Commonwealth of Virginia, and the District Court appointed him *pro hoc vice*. A copy of the order of appointment is attached as Exhibit A.

*Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) ("*Atkins* claim"). The second application raised four grounds for relief. First, trial counsel was ineffective for not investigating and presenting Mr. 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 alleged a conflict of interest resulting from Barbara Cusso Ryan testifying as a witness for the prosecution during Mr. Bryant's sentencing hearing. The State moved to dismiss both PCR applications.

By written order dated May 31, 2016, the Honorable Costa M. Pleicones, Chief Justice of the South Carolina Supreme Court, assigned the Honorable Thomas W. Cooper, Jr. jurisdiction to adjudicate the State's motions to dismiss. Judge Cooper appointed undersigned counsel and Diana Holt[2] to represent Mr. Bryant. By written order July 16, 2016, Judge Cooper denied the State's motion to dismiss Mr. Bryant's first PCR application—the *Atkins* claim. By written order dated July 7, 2016, Judge Cooper granted the State's motion to dismiss Mr. Bryant's second PCR application.

By written order dated August 1, 2016, Chief Justice Pleicones assigned the Honorable William H. Seals, Jr. jurisdiction to adjudicate Mr. Brant's *Atkins* claim. This

[2] A copy of the order of appointment is attached as Exhibit B (*see* fn. 1). Ms. Holt is also Mr. Bryant's mitigation investigator in the federal *habeas* case.

order provided, "Diana Holt and Charles Grose, who were appointed by Judge Cooper to represent applicant in these matters, shall remain counsel for applicant."[3]

On January 9, 2017, pursuant to S.C. Code § 17-27-45(B), Mr. Bryant filed an amended PCR application alleging *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616 (2016) is a new substantive standard of constitutional law, binding on state court criminal procedures, that applies retroactively. ("*Hurst* claim). By written orders dated March 13, 2017 and May 12, 2017, the PCR court granted the State's motion to dismiss Mr. Bryant's *Hurst* claim.

On May 9, 2018, Mr. Bryant moved to amend his PCR application to allege:

> 10(c) Mr. Bryant's sentence of death violates the Eighth Amendment of the United States Constitution because he suffers from Fetal Alcohol Spectrum Disorder ("FASD"). FASD is present during the developmental period, and people suffering from FASD suffer from impairments to an equal or greater exten[t] as people suffering from Intellectual Disabilities. In fact, the information concerning FASD was developed during the natural course of investigation of Intellectual Disabilities because the two disorders involve significant overlaps. A categorical ban on imposing the death penalty on people suffering from FASD is a natural extension of *Hall* and *Atkins, supra.*
>
> 10(d) In the alternative to 10(c), Mr. Bryant's FASD is evidence of material facts not preciously presented to a sentencing authority that should be considered before imposing sentence.

By written order dated July 22, 2018, the PCR court denied Mr. Bryant's motion to amend his PCR application and the State's second motion for summary judgment.

On October 1, 2018, the PCR court convened a hearing on Mr. Bryant's PCR application. By written order dated January 3, 2019, the PCR court dismissed Mr. Bryant's PCR application. By written order dated March 3, 2019, the PCR court denied Mr.

[3] A copy of this order is attached as Exhibit C.

Bryant's Rule 59(e), SCRCP motion. On April 9, 2019, Mr. Bryant filed his notice of intent to appeal.

## DISCUSSION

South Carolina recognizes the right to appointed counsel in PCR cases. Rule 71.1(d), SCRCP; *see also* S.C. Code Ann. § 17-27-90; *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999). Although an indigent litigant does not have the right to the initial appointment of counsel of his choice, he has a right to continuity of counsel once he has formed an attorney-client relationship. As one court noted:

> A superficial response is that the defendant does not pay his [lawyer's] fee, and hence has no ground to complain as long as the attorney currently handling his case is competent. But the attorney-client relationship is not that elementary: it involves not just the causal assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorneys responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service.

*Smith v. Superior Court of Los Angeles County*, 68 Cal. 2d 547, 561-62, 440 P.2d 65, 74 (1968).

"The Sixth Amendment provides that [i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense. [The Supreme Court of the United States has] previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (internal quotations omitted). "With respect to continued representation...there is no distinction between indigent defendants and non-indigent defendants." *Lane v. State*, 80 So. 3d 280, 295 (Ala. Crim.

App. 2010), rehearing denied (Apr. 16, 2010), *cert. quashed,* 80 So. 3d 303 (Ala. 2011) *cert. denied,* 132 S. Ct. 1144 (2012). Therefore, "[a]lthough an indigent defendant does not have the right to force a trial court to appoint counsel of his or her own choosing, once counsel is appointed, the trial judge is obliged to respect the attorney-client relationship created through the appointment.... The attorney-client relationship between appointed counsel and an indigent defendant is no less inviolate than if counsel is retained." *Id.* at 297.

In *Amadeo v. State*, 259 Ga. 469, 470, 384 S.E.2d 181, 182 (1989), the Supreme Court of Georgia considered "the issue of the extent to which a trial court must consider the reappointment of lawyers with whom the defendant has already developed a close relationship." Amadeo's prior lawyers had secured *habeas corpus* relief for him in the Supreme Court of the United States, had developed with him a relationship of trust, confidence, and allegiance, and were thoroughly familiar with his case. "[T]he court's exercise of its discretion is to be reviewed in light of the factors before the court at the time of its decision." *Id.* The Georgia Supreme Court concluded, "[w]hen that statement of preference [to continue with prior counsel], timely made, is supported by objective considerations of the consequence here involved, and where there are no countervailing considerations of comparable weight, it is an abuse of sound judicial discretion to deny the defendant's request to appoint the counsel of his preference." *Id.* 259 Ga. At 470, 384 S.E.2d at 183 (citing *Harris v. People,* 19 Cal.3d 786, 140 Cal.Rptr. 318, 327, 567 P.2d 750, 759 (1977)).

The Supreme Court of Georgia addressed this issue again in *Davis v. State*, 261 Ga. 221, 222, 403 S.E.2d 800, 801 (1991) and concluded the "defendant's choice of counsel is

supported by several weighty considerations" including prior counsel were "already familiar with the case, which is both legally and factually complex," and had "a long-standing relationship with the defendant, who they contend is in a fragile state of mental health." *Id.* See also *Grant v. State*, 278 Ga. 817, 817, 607 S.E.2d 586, 587 (2005) (reversing trial court for removing existing counsel base on "the strong interest of the defendant and of the court system in sustaining an existing, close relationship between a death penalty defendant and his counsel").

This Court's precedent is consistent with *Gonzalez-Lopez, Lane, Amadeo, Davis, Grant, and Harris*. "[T]he right to be represented by an attorney of one's choosing could, in effect, determine the action, and it is closely related to the right to a particular mode of trial, which is an established substantial right." *State v. Wilson*, 387 S.C. 597, 602, 693 S.E.2d 923, 925 (2010). The right is so significant that "an order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed." *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005); *see also State v. Cottrell*, 421 S.C. 622, 634, 809 S.E.2d 423, 430 (2017) ("*erroneous* deprivation of a defendant's counsel of choice is a structural error in violation of the Sixth Amendment" (emphasis supplied by Court)).

## CONCLUSION

This Court should appoint undersigned counsel to represent Mr. Bryant so that Mr. Bryant will have continuity of counsel. Continuity of counsel is particularly important because of the relationship of Mr. Bryant's current appeal to his federal petition for a writ of *habeas corpus*.

(signature on next page)

IT IS SO MOVED.

Respectfully submitted,

By _____

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April 9, 2019
Greenwood, South Carolina

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

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Case No. 2016-CP-43-00828

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Stephen Cory Bryant,..... Appellant,

v.

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

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**Certificate of Service**

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I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

Melody J. Brown, Esquire
Sherrie Butterbaugh, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
E-mail: charles@groselawfirm.com

April 9, 2019.

# Exhibit A
# District Court Order of Appointment

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

| | |
|---|---|
| Stephen Corey Bryant,<br><br>Plaintiff,<br><br>v.<br><br>Bryan P. Stirling, Commissioner, South Carolina Department of Corrections; Joseph McFadden, Warden, Lieber Correctional Institution,<br><br>Defendant. | Civil Action No. 9:15-mc-0217-DCN-BM<br><br>**ORDER** |

The Petitioner in this capital habeas corpus matter, Stephen Corey Bryant ("Petitioner"), is a state prisoner convicted of 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 and sentenced to death. This matter is before the court on Petitioner's Motion for Appointment of Counsel (ECF No. 1) and Motion for Leave to Proceed *In Forma Pauperis* (ECF No. 3).[1] Respondents filed a response on June 22, 2015 (ECF No. 6) and Petitioner replied on June 23, 2015 (ECF No. 8). Accordingly, these motions are ripe for review.

**Motion for Leave to Proceed *In Forma Pauperis***

Petitioner has filed a motion for leave to proceed *in forma pauperis*. The court has reviewed

[1] Petitioner has also filed a motion to stay his execution (ECF No. 1). That motion was addressed by the Honorable David C. Norton, United States District Judge, in a separate order filed this date.

this submission and finds that Petitioner has shown that he is indigent and qualifies to proceed *in forma pauperis* in this case. Accordingly, the court **GRANTS** Petitioner's Motion to Proceed *In Forma Pauperis* (ECF No. 3).

**Motion for Appointment of Counsel**

Pursuant to 18 U.S.C. § 3599(a)(2), indigent death-sentenced prisoners are "entitled to the appointment of one or more attorneys" to pursue federal habeas corpus remedies. Further, "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994). Thus, § 3599 contemplates the appointment of qualified counsel prior to the filing of a petition for writ of habeas corpus.

In addition, § 3599 sets forth the required qualifications for appointed counsel in capital cases:

> (c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.
>
> (d) With respect to subsection[] . . . (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

In his motion, Petitioner requests that this court appoint Charles Grose and Jon Sheldon to represent him in this action. Charles Grose was admitted to practice in this court on February 23, 1994. He has served as an Assistant Public Defender, Deputy Public Defender, and Chief Public Defender throughout South Carolina and is currently a sole practitioner in Greenwood, South Carolina. Mr. Grose has fairly extensive capital post-conviction relief experience on the state level and is the current Chair of the Board of Directors of the Death Penalty Resource & Defense Center,

a designated Community Defender Organization in Columbia, South Carolina. In addition, Mr. Grose has received significant death penalty training and has applied to serve on this court's CJA Death Penalty Attorney Panel. Accordingly, the court finds that Mr. Grose meets the requirements of § 3599(c).

Jon Sheldon worked on federal capital habeas cases as a private practitioner for ten years. In addition, he has served as an attorney-advisor for the Federal Courts, focusing on training attorneys in federal capital habeas practice. Mr. Sheldon has received extensive training in federal capital habeas cases and currently serves as the Chair of the Virginia State Bar's annual conference on how to defend a capital murder case. Based on Mr. Sheldon's background, knowledge, and experience, the court finds good cause under § 3599(d) to appoint him to represent Petitioner.

Respondents have not objected to the appointment of either of these attorneys and the court finds that they are qualified to represent Petitioner in this matter. Accordingly, the court **GRANTS** Petitioner's Motion for Appointment of Counsel (ECF No. 1) and appoints Charles Grose and Jon Sheldon as counsel for Petitioner.

**Cost Containment and Budgeting**

The court cautions counsel that duplication of efforts and unnecessary attorney time are to be avoided. The Judicial Council of the United States Court of Appeals for the Fourth Circuit has considered adoption of a resolution governing review of attorney compensation requests in death penalty habeas corpus cases.[2] Under this resolution, any request for compensation in excess of certain amounts ($50,000) per attorney at the district court level is deemed presumptively excessive. While

[2] *See Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases*, http://www.ca4.uscourts.gov/pdf/noticeofresolutionattorneycompensationcapitalcases.pdf

the effective date of this resolution has been stayed pending public comment,[3] the court encourages appointed counsel to make efforts to contain expenses and fees in this matter in light of the stated figure to the extent they can do so without detracting from their representation of Petitioner's positions in this case.

Toward that end, counsel shall submit a confidential proposed litigation budget within 30 days of the date of this order to Claire Woodward O'Donnell, Panel Administrator, Federal Public Defender's Office. The proposed budget shall estimate the number of hours counsel anticipates expending for the following stages of the litigation: (1) preparation and filing of the petition for habeas corpus; (2) preparation of legal memoranda in opposition to the respondent's return; and (3) evidentiary hearing, if one is sought. The proposed budget shall also contain cost estimates for investigative, expert, or other services, including law clerks and paralegals, if any.[4] A copy of the proposed budget shall be submitted to this court. Additionally, counsel shall submit interim payment vouchers every 60 days to Ms. O'Donnell for payment consideration and so that costs and fees may be monitored.

**State Court Record**

For the court's reference and for case management purposes, counsel for Respondents are directed to file a complete record of all state court proceedings to date in connection with this matter within 30 days of the date of this order. Additionally, counsel shall provide one courtesy copy each

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[3] *See Suspension of Effective Date of Special Procedures for Reviewing Attorney Compensation requests in Death Penalty Cases*, http://www.ca4.uscourts.gov/pdf/noticeofsuspensionresolution attorneycompensationcapitalcases.pdf.

[4] As Mr. Sheldon is from Virginia, the Court had an initial concern relating to potential travel costs which might be incurred or requested. However, Mr. Sheldon has advised the Court that he does not intend to charge for any travel time from Virginia to South Carolina that may be required, exclusive of reasonable expenses incurred.

to the assigned District Judge and Magistrate Judge.

In sum, the court orders the following:

1. Petitioner's Motion to Proceed *In Forma Pauperis* (ECF No. 3) is **GRANTED**;
2. Petitioner's Motion for Appointment of Counsel (ECF No. 1) is **GRANTED**;
3. Petitioner's counsel shall submit a confidential proposed litigation budget within 30 days of this order; and
4. Respondents' counsel shall file a complete record of state court proceedings related to this matter within 30 days of this order.

**IT IS SO ORDERED.**

Bristow Marchant
United States Magistrate Judge

June 24, 2015
Charleston, South Carolina

# Exhibit B
# Circuit Court Order of Appointment

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JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

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|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE THIRD JUDICIAL CIRCUIT |
| COUNTY OF SUMTER | ) | |
| | ) | Case No. 2016-CP-43-828 |
| Stephen Cory Bryant, | ) | |
| Applicant | ) | |
| | ) | |
| vs. | ) | **Order Denying State's Motion to Dismiss** |
| | ) | |
| | ) | |
| State of South Carolina, | ) | |
| Respondent. | ) | |
| | ) | |

CERTIFIED TRUE COPY
OF ORIGINAL FILED
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter came before this Court on June 21, 2016 on the State's motion to dismiss the applicant, Stephen Cory Bryant's, application for post-conviction relief.[1] After considering the pleadings, supporting documentation, and argument of counsel, the Court finds that the State's motion to dismiss should be denied.

## FACTUAL AND PROCEDURAL BACKGROUND

On August 18, 2008, Mr. 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 Honorable Thomas A. Russo 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).

[1] Mr. Bryant also filed an application for post-conviction relief in Case Number 2016-CP-43-829, and the State's Motion to dismiss that case is addressed by separate order. Additionally, the Court appointed Diana Holt and Charles Grose to represent Mr. Bryant regarding the current state court proceedings.

Mr. Bryant's initial application for post-conviction relief was filed on May 10, 2011. The Honorable R. Ferrell Cothran, Jr. 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 Mr. Bryant's petition for a writ of *certiorari* on November 30, 2015. *Bryant v. South Carolina*, 136 S. Ct. 545 (2015).

On June 19, 2015, Mr. Bryant filed motion for stay of execution and for appointment of counsel in the United States District Court for the District of South Carolina so that he could pursue a petition for writ of *habeas corpus*.[2] On June 24, 2015, the Honorable David C. Norton granted the stay of execution for ninety days. Also on June 24, 2015, the Honorable Bristow Marchant appointed Charles Grose and Jon Sheldon[3] to represent Mr. Bryant. By order dated September 18, 2015, Judge Norton extended the stay of execution until January 14, 2016. Pursuant to Judge Norton's order dated January 13, 2016, Mr. 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 "resolution of Petitioner's *habeas corpus* petition." On April 28, 2016, Mr. Bryant amended his *habeas* petition.

Also on April 28, 2016, Mr. Bryant served two applications for post-conviction relief. The first application alleges his Intellectual Disabilities makes him ineligible for the death penalty. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *Atkins v. Virginia*, 536

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[2] *Bryant v. Stirling et. al.*, Civil Action Case Number 9:16-cv-01423-DCN-BM.

[3] Mr. Sheldon is admitted to the practice of law in Virginia. The District Court admitted him *pro hac vice* to represent Mr. Bryant.

U.S. 304 (2002); and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). The second application alleges several claims for post-conviction relief that have not been exhausted in state court because of ineffective assistance of prior post-conviction counsel. Contemporaneously with serving these applications for post-conviction relief, Mr. Bryant moved to stay the District Court proceedings pending exhaustion of state remedies.

On May 24, 2016, the State served its motions to dismiss these actions. By written order dated May 31, 2016, the Honorable Costa M. Pleicones, Chief Justice of the South Carolina Supreme Court, assigned this Court for the sole "purpose of hearing and ruling on the motions to dismiss filed by the State." On June 10, 2016, Mr. Bryant filed his memorandums on opposition to the State's motions to dismiss.[4] On June 21, 2016, this Court convened a hearing.

## CONCLUSIONS OF LAW

The Supreme Court of the United States observed:

> Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

[4] Mr. Bryant's memorandum in this case incorporated by reference his memorandum in Case Number 2016-CP-43-829.

*Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 2252, 153 L. Ed. 2d 335 (2002) (internal quotations and citations omitted). *Atkins*, accordingly, held that offenders suffering from Intellectual Disabilities[5] are not eligible for capital punishment.

S.C. Code Ann. § 17-27-20(A)(1) provides:

> Any person who has been convicted of, or sentenced for, a crime and who claims that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

This Court concludes that § 17-27-20(A)(1) authorizes this action. *Atkins's* and *Hall's* prohibition against executing people with Intellectual Disabilities is rooted in prohibition against cruel and unusual punishment found in the Eighth Amendment of the United States Constitution. The constitutional prohibition against executing people with Intellectual Disabilities presents special considerations, first addressed by our Supreme Court in *Franklin*.[6] For post-*Atkins* trial cases, *Franklin* established a procedure where the trial judge first considers whether Intellectual Disabilities has been for determining Intellectual Disabilities in future capital trial cases. *Franklin* declined to adopt a definition of Intellectual Disabilities "different from the one already established by the legislature in S.C. Code Ann. § 16-3-20(C)(b)(10)" or "establish procedures for cases where the defendant was sentenced to death prior to *Atkins*, [because] such procedures already exist" under the Uniform Post-Conviction Relief Act. 356 S.C. at 278-81, 588

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[5] The terms "Mental Retardation" and "Intellectual Disabilities" are interchangeable. Previous opinions of this Court have employed the term "mental retardation." *See Hall*, 134 S. Ct. at 1990 ("This opinion uses the term "intellectual disability" to describe the identical phenomenon" of mental retardation).

[6] *And see State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006) (reaffirming procedures established in *Franklin*). *Laney* involved a direct appeal of a capital sentence and not a post-conviction relief procedure.

S.E.2d at 606.

*Franklin*, therefore, did not expressly address the situation where a defendant is sentenced to death after *Atkins* but does not discover he suffers from Intellectual Disabilities until after the conclusion of his post-conviction relief action. The natural extension of *Franklin*, however, allows this action to proceed, and if Mr. Bryant Intellectual Disabilities "is proven, the PCR court will vacate the death sentence and impose a life sentence." *Id.* Because of the unique considerations involved, Mr. Bryant cannot be precluded from raising Intellectual Disabilities at this time in this manner. This procedure is authorized under *Franklin v. Maynard* and the Uniform Post-Conviction Relief Act and has previously been utilized by other courts in our state in *Edward Lee Elmore v. State*, Greenwood County Case Number 2005-CP-24-1205

Relying on *Drayton v.* Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993), the State contends Mr. Bryant "freestanding claim of error cannot be reached" because "[i]ssues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Motion to Dismiss, pp. 12-13. Respondent is mistaken. *Atkins* sets forth a categorical ban under the Eighth Amendment, which is qualitatively different from other kinds of constitutional violations at trial that may be subject to procedural default. The United States Supreme Court has held that the states are *prohibited* by the constraints of the Eighth Amendment from executing persons with mental retardation. *Atkins*, 536 U.S. at 320 (holding that executing the mentally retarded is "excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender'"). Mental retardation is "a condition, the existence of which disqualifies a

person from capital punishment." *Davis*, 611 F.Supp.2d at 474. As such, Mr. Bryant's *Atkins* claim cannot be waived on the basis that his trial counsel failed to raise it. Respondent's argument advances a result whereby the state may circumvent the clear confines of the Eighth Amendment simply because a PCR applicant was further denied the protections of the Sixth Amendment right to the effective assistance of counsel.[7]

Post-conviction relief, moreover, is not limited to claims of ineffective assistance of counsel, but rather extends to any constitutional violation. *See e.g. Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) (post-conviction relief granted based on solicitor's failure to disclose impeachment evidence constituted *Brady* violation, and State's failure to correct co-defendant's false testimony at trial). In deciding this motion, the Court took judicial notice of a number of court filings in *Edward Lee Elmore v. State, supra*,[8] where a successor post-conviction relief action was utilized to adjudicate Mr. Elmore's

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[7] An analogy demonstrates the error of respondent's argument. In *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court held that the Eighth Amendment bans the execution of individuals who were under age of 18 at the time of the crime. The Court based its holding in *Roper* on much of the same reasoning as in *Atkins*. Going forward, if trial counsel were to fail to discover and raise the argument that a criminal defendant is categorically exempt from the death penalty under *Roper*, respondent would apparently argue that the State could nonetheless execute that defendant, despite the clear Eighth Amendment ban, absent a showing of ineffective assistance of counsel. Such a result would be legally incorrect. And for the same reason, executing a mentally retarded offender absent a showing of ineffective assistance of counsel would likewise be the wrong result.

[8] These court documents are (1) Mr. Elmore's Application for post-conviction relief alleging Intellectual Disabilities pursuant to *Atkins v. Virginia*; (2) the State's return and motion to dismiss as barred and untimely and alternatively barred as issue preclusion; (3) Mr. Elmore's return to State's motion to dismiss; (4) the State's reply to return to motion to dismiss; (5) the Honorable J. Mark Hayes, II's order denying State's motion to dismiss; and (6) Judge Hayes' order granting post-conviction relief pursuant to *Atkins v Virginia*, vacating death sentence and remanding to Court of General Sessions for entry of life sentence.

Intellectual Disabilities. Additionally, holding that an *Atkins* claim is subject to procedural default would result in an unnecessary waste of judicial time and resources and, based on a incorrectly applied technicality, the wrongful execution of a person who is Constitutionally ineligible for the death penalty.

This Court, therefore, finds it appropriate for the post-conviction court to address Mr. Brant's *Atkins* claim, and, if appropriate, grant relief by entering an order vacating the death sentence and imposing a life sentence in accordance with *Franklin v. Maynard.*

Therefore, it is ordered that the State's motion to dismiss this action is denied.

IT IS SO ORDERED.

Thomas W. Cooper, Jr.
Presiding Judge by Special Assignment of the South Carolina Supreme Court

July 13, 2016
Manning, South Carolina

# Exhibit C
# South Carolina Supreme Court Order of Appointment

# The Supreme Court of South Carolina

Stephen Corey Bryant, Applicant,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-000974
Lower Court Case No. 2016-CP-43-000828

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ORDER

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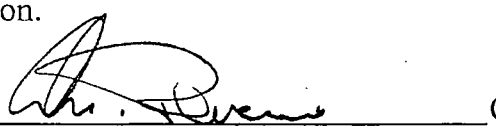
By order dated May 31, 2016, the Honorable Thomas W. Cooper, Jr. was assigned to hear the State's motions to dismiss two post-conviction relief (PCR) applications filed by applicant. The order indicated that, if one or both of the motions to dismiss were denied, a new judge would be assigned to hear the matter(s). Judge Cooper has now issued his orders granting the motion to dismiss in 2016-CP-43-000829 and denying the motion to dismiss in 2016-CP-43-000828.

The Honorable William H. Seals, Jr. is hereby assigned to preside over applicant's PCR action in 2016-CP-43-000828. Judge Seals shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard as to whether there is a term of court scheduled.

Diana Holt and Charles Grose, who were appointed by Judge Cooper to represent applicant in these matters, shall remain counsel for applicant. Within sixty days of the date of this order, Judge Seals 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(s) shall be provided to counsel, this Court, and Court Administration.



C.J.

FOR THE COURT

Columbia, South Carolina

August 1, 2016

cc:
E. Charles Grose, Jr., Esquire
Diana L. Holt, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
Donald J. Zelenka, Esquire
Melody Jane Brown, Esquire
The Honorable James C. Campbell
The Honorable Thomas W. Cooper, Jr.
The Honorable William H. Seals

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

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Case No. 2016-CP-43-00828

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Stephen Cory Bryant,..... Appellant,

v.

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

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**Certificate of Service**

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I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

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April 9, 2019.