

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Court of Common Pleas

CAPITAL PCR ACTION

APPEAL FROM SUMTERCOUNTY
Honorable William H. Seals, Jr., Circuit Court Judge

STEPHEN COREY BRYANT PETITIONER- RESPONDENT

v.

STATE OF SOUTH CAROLINA RESPONDENT-PETITIONER.

Appellate Case No. 2019-000610

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QUESTION PRESENTED

Whether the PCR judge erred in denying the State's motion to dismiss the untimely and successive PCR application causing significant and unwarranted delay where a proper application of the established statutory time limitation and bar to successive actions would have prevented such delay and directed the litigation to more appropriate channels?

STATEMENT OF THE CASE

On May 3, 2016, Petitioner-Respondent ("Bryant") filed successive actions for Post-Conviction Relief ("PCR"), one alleging Intellectual Disability as an exemption to capital punishment, (C/A No. 2016-CP-43-828), and another alleging separate claims also not raised in his prior PCR action, (C/A No. 2016-CP-43-829). The State made its return and moved to dismiss both actions as improperly successive and untimely. (App. pp. 3432-45). This Court assigned the Honorable W. Thomas Cooper to hear the motion to dismiss. (App. p. 3345). Judge Cooper heard arguments on the motions on June 21, 2016. By Order filed July 15, 2016, Judge Cooper denied the State's motion to dismiss in this action, (App. pp. 3347-53), and granted the State's motion in the separate action filed May 3, 2016.¹ Judge Seals was thereafter appointed continuing jurisdiction over the surviving matter. (App. p. 3354).

An evidentiary hearing was convened on October 1, 2018. A formal Order of Dismissal was filed on January 4, 2019. (App. pp. 3383-3420). Bryant's petition for rehearing was denied by order filed March 11, 2019. (App. p. 3421). Bryant served a notice of appeal on April 9, 2019. On April 12, 2019, the State served its notice of cross-appeal to appeal the original denial of the State's motion to dismiss as successive and untimely. This petition follows.

¹ Bryant attempted to appeal the grant of the motion to dismiss. This Court denied the petition by order dated February 9, 2017, finding, after review of the Rule 243(c), SCACR required explanation, that "petitioner has failed to show that there is an arguable basis for asserting that the determination by the lower court was improper." *Bryant v. State*, Appellate Case No. 2016-002228. This Court subsequently issued the remittitur on February 27, 2017.

Trial History

Bryant was indicted by Sumter County and Richland County grand juries on multiple charges including three (3) counts of murder. The State sought the death penalty for the murder of Mr. Tietjen in Sumter County. Applicant was initially represented by Jack D. Howle, Jr., Esq., and James H. Babb, Esq. Prior to resolution, Mr. Babb was removed due to an incapacitating medical condition and replaced, on July 18, 2008, by John D. Clarke, Esq. (App. pp. 1309-14).

On August 18, 2008, Bryant entered guilty pleas to the following crimes: burglary second degree [2006-GS-43-696]; burglary first degree [2006-GS-43-697]; assault and battery with intent to kill [2004-GS-40-10096]; three (3) counts of murder [2006-GS-43-698, 699, 700]; assault and battery with intent to kill [2006-GS-43-701]; threatening the life of a public employee [2006-GS-43-702]; armed robbery [2006-GS-43-699]; possession of stolen handgun [2006-GS-43-699]; another count of burglary first degree [2006-GS-43-698]; and, arson, second degree [2006-GS-43-698]. (App. pp. 1334-38). Judge Russo deferred sentencing on all convictions. (App. p. 1384).

The sentencing proceeding for the murder of Mr. Tietjen began on September 2, 2008. On September 11, 2008, Judge Russo imposed sentence on all non-capital convictions,² and also found beyond a reasonable doubt the existence of the aggravating circumstance, “the defendant committed the murder while in the commission of a robbery while armed with a deadly weapon,” and sentenced Bryant to “death by electrocution or lethal injection” for Mr. Tietjen’s murder. (App. pp. 1047-1051). Bryant appealed.

² Thirty (30) days, (threatening public employee); twenty (20) years, (ABIK); twenty (20) years, (ABIK); life, (murder); life, (burglary first degree); fifteen (15) years, (burglary second degree); twenty-five (25) years, (arson second degree); life (burglary first degree); life, (murder), five (5) years, (possession of stolen handgun); thirty (30) years, (armed robbery); and life (murder).

Senior Appellate Defender Joseph L. Savitz represented Bryant on appeal. Appellate counsel presented one issue challenging the exclusion of “testimony that Bryant’s aunt had been sexually abused by her father (Bryant’s paternal grandfather)...” (App. p. 1396). This Court heard oral argument on November 30, 2010, and, on January 7, 2011, issued an opinion affirming the convictions and sentences. (App. pp. 1452-1457).³ On January 24, 2011, appellate counsel filed a petition for rehearing. (App. pp. 1458-1459). On February 2, 2011, the Court denied the petition and issued the remittitur. (App. p. 1461 and p. 1463). Bryant did not seek further review from the Supreme Court of the United States.

First PCR Action

Bryant obtained a stay from the South Carolina Supreme Court on March 3, 2011, in order to seek post-conviction relief. (App. pp. 1475-1475). In the Order granting the stay, the Court appointed the Honorable R. Ferrell Cothran to preside over the action. (App. p. 1476). On April 1, 2011, Judge Cothran held a hearing to determine whether Bryant wished to be appointed counsel for his PCR action. Judge Cothran also determined that Bryant did not object to the appointment of Melissa J. Armstrong, Esq., and Heath P. Taylor, Esq., and appointed counsel at that time. (App. pp. 1477- 79). Counsel for Bryant filed an initial application on May 10, 2011, (App. pp. 1483-1485), followed by amendments filed May 21, 2012, (App. pp. 1532-36), and October 1, 2012, (App. pp. 1632-1638). An evidentiary hearing was held October 1-3, 2012. (App. p. 1639). At the conclusion of the hearing, Judge Cothran heard summation arguments and took the matter under advisement. (App. pp. 2122-69).

By Order dated December 4, 2012, Judge Cothran denied relief and dismissed the application. (App. pp. 2572-25). Bryant moved to alter or amend. (App. pp. 2626-33). By

³ *State v. Bryant*, Op. No. 26906 (S.C.Sup.Ct. filed January 7, 2011), reported at 390 S.C. 638, 704 S.E.2d 344 (2011).

Order dated February 14, 2013, Judge Cothran denied the motion. (App. pp. 2634 - 46). Bryant appealed the denial of relief.

On March 28, 2014, Bryant 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, the Court denied a timely petition for rehearing and also issued the remittitur. On June 3, 2015, the Court issued an Execution Notice. Bryant obtained a stay of execution from the United States District Court in order to pursue federal habeas remedies. While the stay was in place, Bryant also sought review of PCR appeal issues from the Supreme Court of the United States. The Supreme Court denied Bryant's petition for writ of certiorari on November 30, 2015. *Bryant v. South Carolina*, 136 S.Ct. 545 (2015).

Federal Habeas Action

As noted above, Bryant sought a stay from the United States District Court in order to pursue federal habeas corpus remedies. The District Court stayed the execution for that purpose. See C/A No. 9:15-mc-00217-DCN-BM (Federal District Court, District of South Carolina). Bryant subsequently filed a petition. In the amended petition, he raised the instant claim that he was Intellectually Disabled. (ECF No. 37, Ground Seven). Respondent Warden offered to waive exhaustion but Bryant argued against the waiver and maintained he should be allowed to return to state court. The District Court entered a stay on July 26, 2016 to allow Bryant an opportunity to litigate in state court. The federal action has remained stayed since that time.⁴

⁴ The Warden moved to lift the stay when Bryant admitted he had no evidence to support a diagnosis of Intellectual Disability. (9:16-cv-1423- DCN-BM, ECF No. 68; see also App. p. 3615). The District Court denied the motion finding:

STATEMENT OF FACTS

This Court set out the general facts of the case in the direct appeal opinion:

Appellant began a crime spree with a first degree burglary on October 5, 2004. By the time the spree ended eight days later, appellant had committed three murders, assault and battery with intent to kill (ABIK), two more burglaries, and arson. While incarcerated awaiting trial, appellant threatened a correctional officer and subsequently attacked and seriously injured another. Appellant “cased” isolated rural homes looking for vulnerable victims. He would appear midday at homes, claiming to be looking for someone or having car trouble. Appellant burglarized Dennis’s home office a day after visiting Dennis’s home. He next broke into Ammons’ home while no one was there, cutting the phone wires and stealing a pistol and ammunition. Later that same day he shot victim Brown, who was fishing along the Wateree River, in the back.

On October 9, appellant killed an acquaintance (victim Gainey), leaving his body on a rural road, then stole electronics and an aquarium from Mr. Gainey’s trailer before setting it on fire. Two days later, appellant went to victim Tietjen’s home, shot him nine times, and looted the house. Appellant answered several calls made to Mr. Tietjen’s cell phone by Mr. Tietjen’s wife and daughter, telling both of them that he was the “proowler” and that Mr. Tietjen was dead. He burned Mr. Tietjen’s face and eyes with a cigarette. Appellant left two notes on paper and scrawled a message on the wall: “victim number four in two weeks, catch me if you can.” On another wall the word “catch” and some letters were written in blood.

The PCR court’s denial of the PCR application and Petitioner’s concession that he does not have evidence to support one prong of the Intellectual Disability diagnosis calls into question whether Petitioner can still meet all of the Rhines factors— in particular, whether his PCR action is not plainly meritless under *Rhines*. See *Rhines*, 544 U.S. at 277 (“[E]ven if a petitioner had good cause for that failure [to exhaust], the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.”). However, in light of the information provided to the court regarding the arguments and claims presently before the state court, the court finds it appropriate to stay the instant action until the PCR court’s order becomes final, in accordance with the initial order staying this case....”

Two days later appellant met victim Burgess at a convenience store around 4:30 am. They left together, and less than two hours later, a hunter found Mr. Burgess dead from gunshot wounds on a road bed in a rural area.

...

Appellant was unquestionably a deeply troubled individual who was first institutionalized in the South Carolina Department of Juvenile Justice (DJJ) when he was eleven years old, and whose elementary school records showed low intelligence and placement in emotionally handicapped classes. He had sought mental health counseling in September 2004 before beginning this crime spree. After his arrest in October 2004, he was diagnosed with Post-Traumatic Stress Disorder (PTSD) based on childhood sexual abuse by family members, Attention Deficit Disorder (ADD), and chronic depression. The ADD and depression diagnoses had first been made when appellant was incarcerated in DJJ. Appellant also regularly abused marijuana sprayed with RAID insecticide, methamphetamine, and Benadryl ...

State v. Bryant, 390 S.C. 638, 639-41, 704 S.E.2d 344, 344-45 (2011).

The mitigation case at sentencing included a family history profile, and a personal history profile – including review of IQ tests that “basically show that [Bryant] was functioning in the low average range of intelligence.” (App. p. 816). Dr. Schwartz-Watts (now Maddox) testified:

There were times where his intelligence testing would be lower, but that was in my opinion secondary to his not being medicated. He had a history of Attention Deficit Disorder.

(App. p. 816).

Dr. Schwartz-Watts (Maddox) also testified Bryant was not mentally retarded, and had no “organic brain damage.” (App. pp. 836-38). She recounted multiple tests that she had ordered, including an MRI (which was normal), and evaluation by a neurologist who reported “a perfectly normal neurological exam.” (App. pp. 837-38).

In PCR, the records showed IQ testing show the lowest score was 79 in 1993 and “all other tests show[ed] a significant increase in ability – a 86 in June 6, 1994 testing, and 92 in

March 8, 1996 testing, and finally a 93 in May 9-10, 1996 evaluation.” (App. pp. 3405-3406, Order of Dismissal).

STANDARD OF REVIEW

– Appellate courts “review questions of law de novo, with no deference to trial courts.” *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). “Questions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below.” *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

– “The [PCR] court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” S.C. Code Ann. § 17-27-70(c). “When considering the State’s motion for summary dismissal of an application for PCR, a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.” *Wilson v. State*, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002). “Similarly, when reviewing the propriety of a dismissal, this Court must view the facts in the same fashion.” *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). This “Court will reverse the PCR judge’s decision when it is controlled by an error of law.” *Leamon v. State*, 363 S.C. 432, 435, 611 S.E.2d 494, 495 (2005).

ARGUMENT

The PCR judge erred in denying the State's motion to dismiss the untimely and successive PCR application causing significant and unwarranted delay where a proper application of the established statutory time limitation and bar to successive actions would have prevented such delay and directed the litigation to more appropriate channels.

The record before the lower court conclusively demonstrated that Bryant's free-standing claim of Intellectual Disability was not timely, and was presented in a clearly successive application. The PCR court erred in allowing the claim – which Bryant ultimately conceded lacked necessary proof, App. p. 3615-16 – to go to hearing and delay finality which, in turn, has delayed resumption of the federal habeas corpus proceedings. Had the application been properly dismissed, the matter would have returned to federal court in July of 2016 and the claim litigated along with the remaining claims. The delay was unwarranted under a plain reading of the statute. Further, because this error is capable of repetition (and is, in fact, in two other pending cases in the circuit court, *Aleksey v. State* and *Stone v. State*), the State respectfully seeks the Court's review of this important issue.⁵

Analysis

In its June 20, 2002 opinion *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.

⁵ A third case is currently on appeal pending resolution of the State's petition for rehearing. *Woods v. State*, 2019-MO-044 (S.C. S.Ct., Dec. 18, 2019) (Justices Few and James not participating) (Shear. Adv. Sheets vol. 49). In that case, the circuit court dismissed as successive and untimely, but this Court reversed for a hearing. The State is seeking rehearing as it was not given an opportunity to express its position in briefing or argument.

In *Franklin v. Maynard*, 356 S.C. 276, 278, 588 S.E.2d 604, 605 (2003), this 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. 356 S.C. at 279, 588 S.C.2d at 606; *see also State v. Blackwell*, 420 S.C. 127, 166, 801 S.E.2d 713, 733–34 (2017), *cert. denied* (Feb. 20, 2018), *cert. denied*, 138 S. Ct. 985, 200 L. Ed. 2d 263 (2018) (“Even though this procedure may be perceived as affording a defendant the opportunity to re-litigate the denial of a pre-trial *Atkins* determination, we believe the pre-trial and penalty phase presentations effectuate the procedure identified in *Franklin*.”). 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). Critically, this Court recognized in *Franklin* that intellectual disability claims are subject to the PCR statute of limitations. *See Id.* at 280 & n. 7, 588 S.E.2d at 606 & n. 7 (citing to S.C. Code Ann. § 17–27–45(B) (2003), the Court found that “[a]n applicant is not barred from raising the mental retardation issue in a second PCR application,” filed within one year of the *Atkins* decision, since the new Constitutional rule announced in *Atkins* – that the Eighth Amendment bars the execution of a mentally retarded defendant - created a “substantive standard not previously recognized or right not in existence at time of state court trial, and ... [this new rule was] intended to be applied retroactively”).

Bryant’s plea and sentencing occurred in 2008. Thus, Bryant’s case falls in the post-*Atkins* division of *Franklin*. “Issues 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.” *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993). So, as an initial matter, Bryant’s freestanding claim of error cannot be reached by operation of statute, specifically S.C. Code Section 17-27-20(b).⁶ But further, as noted above, *Franklin* does not provide an exception for post-*Atkins* cases regarding time and successive application limitations. These are statutory provisions that are meant to be considered in all PCR actions.

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 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). This Court has recently reaffirmed that this is equally as true in capital PCR action as in non-capital ones.⁷ See *Robertson v. State*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016).

In *Robertson*, this Court carved out a narrow exception to the bar of claims asserting ineffective assistance of PCR counsel to harmonize different sections within the PCR Act. *Id.* at

⁶ The fact that the issue is one of exemption does not affect the procedural bar. For instance, the Fourth Circuit has upheld a procedure bar to an *Atkins* claim in a collateral proceeding, reinforcing that *Atkins* does not have a concomitant directive to relax well-established state procedural rules. *Prieto v. Zook*, 791 F.3d 465, 468-69 (4th Cir.), cert. denied sub nom. *Prieto v. David Zook*, 136 S. Ct. 28, 192 L. Ed. 2d 999 (2015).

⁷ It should be noted, too, that a capital PCR action is structured to provide intensive review by counsel with heightened qualifications, assisted by multiple experts, in a virtually limitless time period for case develop. This Court then reviews any appellate issue from that process. After state remedies are exhausted, there is also a federal habeas action and appeal route to pursue. Additionally, there is always state habeas. There is no lack of ability to raise claims. In these cases, more so than any other, there should be a moderating requirement to prevent abuse of the process.

34-36, 418 S.E.2d at 516-19. Further, the Court in *Robertson* held that some proof must be made to show both a lack of proper qualification *and* prejudice from the lack of qualification. *Id.* at 37-38, 418 S.E.2d at 520-22. The Court limited relief to “afford[ing] a hearing *on this limited issue*”) *Id.* at 38, 418 S.E.2d at 522 (emphasis added).

In contrast to the reasoned decision in *Robertson*, the PCR court’s order denying the State’s motion to dismiss completely abandoned the statutory structure of the PCR Act and recognized no limitation on timing or proof. This leads to precisely the type of abuse that statutes of limitations and successiveness bars work to prevent. *See generally Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S. Ct. 1517 (1997) (“A State’s procedural rules are of vital importance to the orderly administration of its criminal courts....”); *Williams v. Ozmint*, 380 S.C. 473, 480, 671 S.E.2d 600, 603 (2008) (“At some juncture judicial review must stop, with only the very rarest of exceptions, 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.”).

Further, it is uniformly accepted that an applicant seeking to file a successive action must bear some burden. *See, e.g.*, Rule 71.1(e), SCRCP; 39A C.J.S. *Habeas Corpus* § 471 (“The burden rests with the government to plead abuse of the writ of habeas corpus, and once the government properly pleads abuse of the writ, the burden shifts to the defendant to disprove the abuse.”). As the *Atkins* Court recognized, “[n]ot all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus.” *Atkins*, 536 U.S. at 317. Wholesale abandonment of the established procedural bars removes all incentive to timely bring the claim. In fact, such abandonment encourages late, bare bones claims prompting unwarranted delay. Even requiring a

simple intermediate step – such as an affidavit from a qualified examiner to the effect that upon initial review the applicant is likely to be able to meet the three prongs set out by our statute, *see Franklin*, 356 S.C. at 278-79, 588 S.E.2d at 605 (recognizing definition set out in S.C. Code Ann. § 16-3-20(C)(b)(10)) – would have at the very least harmonized with the § 17-27-90 requirement of showing cause to excuse the procedural bars, and the limited exception of *Robertson*, which similarly imposed a specific burden of proof regarding counsel qualification. *See also State v. Williams*, 831 So.2d 835, 858 n. 33 (La. 2002) (“[T]he granting of an evidentiary hearing on the issue of mental retardation is not a perfunctory matter or a ministerial duty of the trial court, and is not guaranteed to every [defendant] in every [capital] case. There is no automatic right to a hearing on the issue of mental retardation, whether the hearing is sought pre-trial, while the case is on appeal, or as post-conviction relief”) (internal citation and quotation omitted); *Bowling v. Com.*, 377 S.W.3d 529, 537 (Ky. 2012) (“We hold that to be entitled to an evidentiary hearing on a claim of entitlement to the mental retardation exemption provided by KRS 532.140(1), a defendant must produce some evidence creating a doubt as to whether he is mentally retarded”); *In re Campbell*, 82 Fed.Appx. 349 (5th Cir. 2003) (denying applicant’s motion for authorization to file successive federal habeas petition based on failure to make prima facie case of intellectual disability); *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (holding that a petitioner claiming he is intellectually disabled “also must demonstrate that there is a reasonable likelihood that he is in fact [intellectually disabled]” and emphasizing that “[w]ere it otherwise, then literally any prisoner under a death sentence could bring an *Atkins* claim in a second or successive petition regardless of his or her intelligence. No rational argument can possibly be made that this result is appropriate under [28 U.S.C. § 2244(b)]”); *In re Wood*, 648 F. App’x 388, 391 (5th Cir. 2016) (“to obtain authorization for a successive habeas

petition, Wood must ... make a prima facie showing that his *Atkins* claim was previously unavailable, that he is intellectual disabled, and that his claim is not barred by the statute of limitations”); *Woods v. Buss*, 234 F. App’x 409, 411 (7th Cir. 2007) (holding petitioner’s *Atkins* claim was barred by statute of limitations). Cf. *Boulb v. United States*, 818 F.3d 334, 341 (7th Cir. 2016) (holding conclusory allegations of an intellectual disability by a *pro se* petitioner do not justify an evidentiary hearing on equitable tolling). Requiring only the simple allegation of a claim is an open invitation to the very abuse curtailed by *Aice*:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, 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. See *Butler v. State*, 397 S.E.2d 87 (S.C.1990). ***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) (emphasis added).

Like *Robertson*, the PCR statute should be applied without exception to this claim as it would to any other.⁸

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), Bryant’s one year period began to run on February 2, 2011, when this Court denied the petition for rehearing and issued the remittitur in the direct appeal. See S.C. Code § 17-27-45 (A). Bryant’s one year period expired on February

⁸ The Act is concrete in what is allowed. However, this Court has repeatedly emphasized for extraordinary cases, there remains the avenue of state habeas corpus. See *Butler v. State*, 302 S.C. 466, 467, 397 S.E.2d 87, 87 (1990), *cert. denied*, 498 U.S. 972 (1990) (writ of habeas corpus issued under circumstances where there was a violation, which, in the setting, constituted a denial of fundamental fairness shocking to the universal sense of justice). See also *Tucker v. Catoe*, 346 S.C. 483, 485, 552 S.E.2d 712, 713 (2001) (granting relief); *Drayton v. Evatt*, 312 S.C. 4, 9 n. 2, 430 S.E.2d 517, 520 n. 2 (1993). Further, as noted above, Bryant still has his federal habeas remedies to pursue.

2, 2012. His present action filed on May 3, 2016, is not timely by a wide margin – over four years. Bryant did not argue evidence going to a possible claim of intellectual disability could not have been discovered previously, only that it was not discovered previously. 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).

This action, consequently, is not timely filed.

Further, (though the one claim presented technically could not even have been raised as a free-standing claim in the prior PCR action)⁹ the application is barred as successive. *Cf. Graham v. State*, 378 S.C. 1, 3-4, 661 S.E.2d 337, 338 (2008) (error in applying statute of limitations in regard to claim of denial of right to appeal, but finding claim barred as successive).

⁹ Again, the scope of this litigation is limited by S.C. Code § 17-27-20(b), which provides, in part: “This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.” Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert, or argue again, any issues in his PCR action that could have been raised at trial and on direct appeal or were so raised at trial and on appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“Errors in a petitioner’s trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings”). *See also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“The *Simmons* rule gives effect to the Legislature’s clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”). If Section 17-27-20 (a) is read without the companion paragraph (b), the express limitation in the statute is meaningless and all claims that were and could have been raised on direct appeal may be reasserted in the PCR. This offends notions of *res judicata* as well as undermining judicial economy and efficiency. It also would implicitly overrule *Simmons* and *Drayton*.

Successive applications are historically disfavored, but are not categorically disallowed. See 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 of appellate issues, or “rare procedural circumstances” are reasons to allow successive actions). None of the exceptions, however, are alleged in regard to Bryant’s successive PCR action.

“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). To the extent that Bryant would claim PCR counsel was ineffective in failing to raise this claim, it is well-established that such an assertion alone is not sufficient cause and such an argument does not allow for another “bite at the apple.” *Aice*, 305 S.C. at 451, 409 S.E.2d at 394; *see also Robertson, supra*.

Consequently, the State was entitled to summary dismissal. The PCR court order denying the State’s motion to dismiss should be reversed. However, given that the action was allowed to go to hearing, at a minimum, this Court should consider the incorrect denial of the State’s motion to be an additional sustaining ground to the denial of relief and address the failure to apply the well-established procedural bars in order to guide the lower court in the proper consideration of similar cases to avoid offending the statute and creating unwarranted delay in future cases.

CONCLUSION

Based on the foregoing, the State asks this Court to grant the petition.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 27, 2019
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY
The Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-000610

STEPHEN COREY BRYANT

PETITIONER-RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

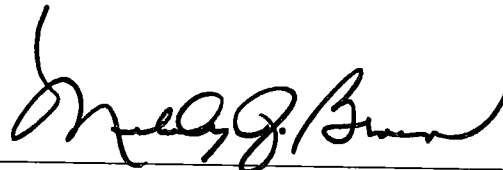
RESPONDENT-PETITIONER.

CERTIFICATE OF SERVICE

I, Melody J. Brown, counsel for the Respondent-Petitioner, certify that I have served the within Petition for Writ of Certiorari on the Petitioner-Respondent by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, E. Charles Grose, Jr., Esq., Grose Law Firm, 404 Main Street, Greenwood, South Carolina 29646.

I further certify that all parties required by Rule to be served have been served.

This 27th day of December, 2019.



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