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

Case No. 2016-CP-43-00829

Stephen Cory Bryant, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Notice of Appeal

The petitioner, Stephen Cory Bryant, appeals the order of the Honorable Thomas W. Cooper, Jr., dated, July 7, 2016, dismissing his application for post-conviction relief. This appeal is taken from the order of Judge Cooper dated September 26, 2016 and filed on October 3, 2016, denying his Rule 59(e), SCRCP motion.

Respectfully Submitted,

By: _____

E. Charles Grose, Jr.
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The Grose Law Firm, LLC
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October 31, 2016

Attorneys for Stephen Cory Bryant

Other Counsel of Record:

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

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v.

State of South Carolina, ... Respondent.

Certificate of Service

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

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

October 31, 2016

E. Charles Grose, Jr.
The Grose Law Firm, LLC.
404 Main Street
Greenwood, SC 29646
(864) 538-4466

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
IN THE COURT OF COMMON PLEAS

RECORDED
2016 OCT -4 PM 12:55
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP4300829

Stephen Corey #5252 Bryant		South Carolina State of	
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by: Clerk of Court		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

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

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: **See attached Order.**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2099 Judge Code	10/4/2016 Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

E. Charles Grose Jr. 404 Main Street Greenwood, SC 29646

Alan McCrory Wilson PO Box 11549 Columbia, SC 29211-1549
Melody Jane Brown PO Box 11549 Columbia, SC 29211-1549
Donald J. Zelenka PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James C. Campbell

Court Reporter

James C. Campbell - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	
COUNTY OF SUMTER)	

Stephen Corey Bryant, SCDC #5252,)	**C/A No. 2016-CP-43-829**
)	***CAPITAL PCR***
Applicant,)	
vs.)	
)	**ORDER DENYING APPLICANT'S**
State of South Carolina,)	**RULE 59(E) MOTION**
)	
Respondent.)	
)	

By Order dated July 7, 2016, filed July 15, 2016, this Court denied Applicant's motion to stay and granted Respondent's motion to dismiss the action as improperly successive and barred by the statute of limitations. By motion dated July 25, 2016, filed July 28, 2016, Applicant moved to alter or amend the Court's ruling, requesting either the stay be granted and/or Respondent's motion to dismiss be denied. Respondent did not file a written response.

On August 23, 2016, this Court held a hearing on the motion.[1] Charles Grose, Esq., and Diana Holt, Esq., represented Applicant at the hearing. Applicant's presence was waived by counsel. Senior Assistant Attorney General Melody Brown and Senior Assistant Deputy Attorney General Donald Zelenka represented Respondent. In consideration of the pleadings in this matter, the motion, and the arguments presented for and against the motion to alter or amend at the August 23, 2016 hearing, this Court denies the motion. The following factual findings and conclusions are set out in support of the Court's ruling:

[1] The undersigned requested a court reporter for the hearing; however, due to a shortage of available personnel, Court Administration was unable fulfill the request. This Order may serve as a substitute for a transcript if one becomes necessary for future review, and reflects the basic arguments of counsel in addition to the findings and conclusions of the Court.

1. Applicant first argues that the Court's findings and conclusions regarding the appointment of counsel to proceedings on Respondent's motion to dismiss are "overly restrictive." (Rule 59 Motion, p. 3). This Court finds Applicant's arguments regarding appointment were rendered moot by the August 1, 2016 Order of the Supreme Court of South Carolina appointing counsel in the surviving action, 2016-CP-43-828.

2. Applicant next argues this Court erred in failing to find "sufficient reason" to allow the instant action to survive in light of the successive application and time bars. (Rule 59 Motion, pp. 4-7). Applicant contends this Court failed to recognize this action "is directly on par with [Luke] *Williams* and [Edward] *Elmore*," two capital cases in which successive applications were allowed. (Rule 59 Motion, p. 6). However, these cases were previously referenced in the response in opposition to the motion to dismiss and discussed at the hearing on June 21, 2016. This Court included a discussion of the cases on page 11 of its Order Granting Respondent's Motion to Dismiss. This Court disagrees with Applicant on the import of these cases. Again, though each was a capital case where a successive PCR action was heard (with disparate results – one ultimately successfully on a claim raised, the other not) the propriety of those successive actions under the procedural rules was not considered and addressed by an appellate court as the State did not appeal. Therefore, this Court has been guided by the plain language of the PCR statute and appellate decisions regarding application of the procedural bars. This Court finds no cause to alter or amend its decision.

3. This Court also finds no cause to alter or amend its ruling as Applicant has failed to show sufficient grounds to prevent the application of the general rule barring submission of a successive 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). Further, in addition to the reasons set out in the Order Granting Respondent's Motion to Dismiss, pp. 11-12, this Court finds Applicant's "exceptional circumstances" argument fails, in part, because the companion case survives. Success in that case would grant Applicant the relief sought in this case, *i.e.,* vacating his death sentence and a declaration that he is ineligible to receive the death penalty because he suffers from Intellectual Disability. Should he be unsuccessful in that case because he does not suffer from Intellectual Disability, then his prior lawyers cannot be found ineffective for failing to discover or present evidence of such a disability. The same reasoning applies to the Statute of Limitations and Equitable Tolling Issues. As such, this Court declines to alter or amend its ruling.

4. To the extent Applicant also claims incompetency may have hindered the presentation of claims in the prior PCR action, (Rule 59 Motion, p. 8), this Court rejects the argument on the facts of record. Applicant asserted incompetency in the prior PCR action and Judge Cothran suspended the proceedings to ensure that Applicant was competent to assistant his PCR counsel. Dr. Donna Schwartz-Watts (now Maddox), a seasoned forensic psychiatrist, closely monitored and worked with Applicant to ensure his competency for the proceedings. (See, for example, PCR Appeal Appendix, pp. 1537, 1540-1550, 1566-1570). Applicant has failed to produce any evidence to the contrary either in the response in opposition to the motion to dismiss, the argument presented at the June 21, 2016 hearing, or the argument presented at the August 23, 2016 hearing. As such, this Court declines to alter or amend its ruling.

5. Applicant concedes that *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309 (2012), does not provide an exception to the State's procedural rules. (Rule 59 Motion, p. 10). However, he argues that the concept which flows from that case, *i.e.,* allowing a federal court to consider

ineffective assistance of trial counsel claims "in the first instance," is incentive for this Court to disregard the procedural bars as applied. Id. This Court finds no cause to disregard the procedural bars. The federal habeas proceedings will continue regardless of the state actions.[2] Further, there is no cause to do damage to the State's procedural limitations in an effort to circumvent review in federal court. Under that logic, there should be no successive application bar or limitations period which is plainly not the case. Regardless, the application of *Martinez* is for the federal court. As such, this Court declines to alter or amend its ruling.

6. Applicant also asks the Court to consider there is "no prejudice" to the State in disregarding the procedural bars at issue and allowing the claims to be heard as the State waived the exhaustion requirement in federal court which would have avoided a procedural bar in that forum. (Rule 59 Motion, pp. 11-12). Applicant, however, continued with his desire to return to state court in the federal action, relying on this Court's previous determination that the separate successive action, 2016-CP-43-828, could continue.[3] The federal court, noting Applicant's

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[2] This Court acknowledges Applicant's present PCR counsel's assertion made at the August 23, 2016 hearing that all state and federal actions will "go away" if the State will offer a life sentence. This Court does not find that assertion persuasive as the federal action contests the plea itself, not just the sentence. Additionally, those claims, and potentially others, may still be addressed in future litigation. *See, for example, Sanders v. State*, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015) (while "recognize[ing] the value in allowing defendants to waive certain rights in exchange for concessions by the State," finding "a rule in which a defendant is precluded from challenging the very advice he received in agreeing to that waiver" was not acceptable). At any rate, this Court makes the decision on the record presented.

[3] As Respondent correctly pointed out at the August 23, 2016, hearing, Respondent has argued and preserved their position that the separate action is also barred as improperly successive and untimely, but Respondent is unable to seek to alter or amend the ruling and/or seek an appeal as the issue is not dispositive to the action. This Court recognizes and fully agrees that some interlocutory appeals may be wise to avoid continuing litigation that may ultimately be rendered a nullity (and is cognizant of circumstances where that has happened); however, our state appellate structure rarely allows such action. It is this Court's hope, however, that the litigation will be expedited and not cause exceptional delay in either relief, or, in the absence of relief, the prompt return to federal court.

objection, declined the offer of waiver and granted Applicant's motion to stay. (July 26, 2016 Order in 9:16-cv-01423-DCN-BM, filed in this action on July 29, 2016). In other words, there was an opportunity to go forward in federal court which Applicant argued should be rejected, and it was. Any prejudice to him is of his own making. This Court, much like Respondent in the federal action,[4] recognizes that there is conflict between the treatment of Applicant's successive applications, but this Court has considered the separately filed actions independently, and has issued Orders based on its assessment of each action independently. This Court declines to alter or amend its ruling.

7. Lastly, this Court finds, for all the reasons set out above – particularly as to the dispositive nature of the surviving action as to whether any related ineffective assistance claims would be meritorious if heard – there are sufficient distinctions between this case and the *Robertson*-type cases to deny the request to stay these proceedings pending a ruling in that case. *See James D. Robertson v. State*, Appellate Case No. 2012-205909 (argued October 8, 2015). This Court declines to alter or amend its ruling.

8. Upon consideration of the arguments presented,[5] this Court reaffirms its rulings denying Applicant's motion to stay the proceedings and granting Respondent's motion to dismiss. The action is barred as successive and untimely.

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[4] The federal stay order recognizes Respondent's offer of waiver was based on the uncertainty in application of state procedural bar in capital actions, "and in an effort to promote timely adjudication and finality of the conviction while providing Petitioner opportunity to litigate his claim of ineligibility of a death sentence...."). (July 26, 2016 Order in 9:16-cv-01423-DCN-BM, p. 7, filed in this action on July 29, 2016).

[5] Applicant included other assertions in his introduction in the Rule 59 Motion; however, these assertions were not presented as argument and have neither been considered nor addressed herein. Further, Applicant footnotes in his opening paragraph that the Court's Order was drafted by the Attorney General's Office. (Rule 59 Motion, p. 1 n. 1). That is correct. It is also correct this Court carefully reviewed and considered every word of the Order apart from the caption

CONCLUSION

THEREFORE, for all the reasons set out above, this Court DENIES Applicant's motion to alter or amend the Court's judgment.

IT IS SO ORDERED.

s/
The Honorable Thomas W. Cooper, Jr.
South Carolina Circuit Court Judge

9/26/16, 2016.
Manning, South Carolina.

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which this Court later amended. This Court has again considered its Order and again affirms its adoption of the proposed order. The findings and conclusion are the Court's findings and conclusions. Respondent correctly noted at the August 23, 2016 hearing that the Court asked for proposed orders from the State in this case and Applicant in the surviving case and that Applicant lodged no objection to this process at the time the Court requested the Orders. In fact, Applicant submitted his own order in the surviving action which this Court treated the same as the proposed order at issue here. Further, each proposed order was based on the Court's ruling announced at the conclusion of the June 21, 2016 hearing. At any rate, this Court is cognizant of the preference announced in *Hall v. Catoe*, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004) that PCR judges "draft their own findings of facts and conclusions of law in death penalty case," and is equally aware of the fact that failure to do so is not *per se* error. This Court notes our Supreme Court, while announcing the preference in *Hall*, simultaneously acknowledged "that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." 360 S.C. at 364, 6601 S.E.2d at 341. What is at issue is whether the PCR judge actually considered and accepted the proposed findings and conclusions as his own. This is shown by a judge's adequate review of the proposed language before its adoption. *Id.* This Court made a detailed and careful review of each finding and conclusion in the proposed order language and the Order is, and should be considered without question, the Court's order in this matter. This Court makes these findings should the issue later arise. However, Applicant made no argument to the contrary either in his Rule 59 motion or in argument at the August 23, 2016 hearing.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
IN THE COURT OF COMMON PLEAS

RECORDED
2016 AUG 23 AM 11:05
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP4300829

Stephen Corey #5252 Bryant	South Carolina State of
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: Clerk of Court	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

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

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: **See attached Order.**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2099 Judge Code	8/23/2016 Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

E. Charles Grose Jr. 404 Main Street Greenwood, SC 29646

Alan McCrory Wilson PO Box 11549 Columbia, SC 29211-1549
Melody Jane Brown PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James C. Campbell

Court Reporter

James C. Campbell - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)		**IN THE COURT OF COMMON PLEAS**
COUNTY OF SUMTER)		
Stephen Corey Bryant, SCDC #5252,)	**C/A No. 2016-CP-43-829**	
Applicant,)	***CAPITAL PCR***	
vs.)		
State of South Carolina,)	**ORDER AMENDED ORDER GRANTING RESPONDENT'S MOTION TO DISMISS**	
Respondent.)		

RECORDED
2016 AUG 23 AM 10:58
JAMES T. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

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

On July 15, 2016, the Sumter County Clerk filed the Court's Order Granting Respondent's Motion to Dismiss in the above captioned case. Upon review, it appears the description "**Proposed**" was inadvertently left in the title of the document. To correct the scrivener's error, this Court orders the substitution of page one of the Order with the attached corrected page. No changes to the substance of the Order have been made by this amendment and the controlling filing date remains July 15, 2016.

IT IS SO ORDERED.

The Honorable Thomas W. Cooper, Jr.
South Carolina Circuit Court Judge

Aug 23, 2016.

Manning, South Carolina.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER)

Stephen Corey Bryant, SCDC #5252,) C/A No. 2016-CP-43-829

Applicant,) *CAPITAL PCR*

vs.) **PROPOSED**

) ORDER GRANTING RESPONDENT'S

State of South Carolina,) MOTION TO DISMISS

)

Respondent.)

On May 3, 2016, Applicant filed a Third Application for Post-Conviction Relief ("PCR"). By motion dated May 24, 2016, filed May 25, 2016, the State moved to dismiss the action as successive and time-barred. The Supreme Court of South Carolina, by Order dated May 31, 2016, appointed the undersigned exclusive jurisdiction for the limited purpose of ruling on the State's motion, and also provided that disposition of the motion was due within forty-five (45) days of the date of the Order, on or before July 15, 2016.

In keeping with the expedited provisions of the May 31, 2016 Order, the undersigned held a hearing on the State's motion on June 21, 2016, in Manning, South Carolina. Applicant was present and requested appointment of counsel for purposes of the hearing. The undersigned appointed Charles Grose, Esq., and Diana Holt, Esq., for representation in the motion proceedings without objection by Respondent.[1] In addition to its prior review of the pleadings,[2]

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[1] The Supreme Court Order limits the undersigned's authority to the motion to dismiss. Thus, the appointment is limited to the motion proceeding.

[2] Counsel for Respondent provided the Court with copies of the Application and the Return and Motion by email dated June 1, 2016, with the attachments to the return sent separately via express mail on June 2, 2016, due to size limitations. Applicant thereafter submitted a response to the motion to dismiss. The Court had received and reviewed all documents, and considered the written positions and referenced case law as presented by both parties in the individual pleadings, well-before the hearing on June 21, 2016.

this Court heard argument from counsel. After consideration of the pleadings and arguments of counsel, this Court resolved to grant the State's motion. In support of its ruling, this Court sets out the following findings of facts and conclusions of law:

PROCEDURAL HISTORY

Applicant, Stephen Corey 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. 1309-1314).[3]

On August 18, 2008, Applicant 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,[4] and also

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[3] "App." Refers to the PCR Appendix prepared for the PCR appeal.

[4] 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),

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 Applicant to "death by electrocution or lethal injection" for Mr. Tietjen's murder. (App. pp. 1047-1051). Applicant appealed.

Senior Appellate Defender Joseph L. Savitz represented Applicant 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). The South Carolina Supreme 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).[5] 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). Applicant did not seek further review from the Supreme Court of the United States.

First PCR Action

Applicant 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 Applicant wished to be appointed counsel for his PCR action. Judge Cothran also determined that Applicant 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- 1479). Counsel for Applicant filed an initial

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five (5) years, (possession of stolen handgun); thirty (30) years, (armed robbery); and life (murder).

5 *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).

application on May 10, 2011, followed by 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). At the conclusion of the hearing, Judge Cothran heard summation arguments and took the matter under advisement. (App. pp. 2122-2169). Judge Cothran also accepted proposed orders from both parties. (App. p. 2516-2571; Third Supplemental Appendix). By Order dated December 4, 2012, Judge Cothran denied relief and dismissed the application. (App. pp. 2572-2625). Applicant moved to alter or amend. (App. pp. 2626-2633). By Order dated February 14, 2013, Judge Cothran denied the motion. (App. pp. 2634-2646). Applicant appealed the denial of relief.

On March 28, 2014, Applicant filed a petition for writ of certiorari with the Supreme Court of South Carolina. Respondent made a Return to the Petition for Writ of Certiorari on July 28, 2014. On March 4, 2015, the Supreme Court of South Carolina denied the petition. On May 6, 2015, the Court denied a timely petition for rehearing and issued the remittitur. On June 3, 2015, the Court issued an Execution Notice. Applicant obtained a stay of execution from the United States District Court in order to pursue federal habeas remedies. While the stay was in place, Applicant also sought review of PCR appeal issues from the Supreme Court of the United States. The Supreme Court denied Applicant's petition for writ of certiorari on November 30, 2015. *Bryant v. South Carolina*, ___ U.S. ___, 136 S.Ct. 545 (2015).

Federal Habeas Action

As noted above, Applicant sought a stay from the United States District Court in order to pursue federal habeas corpus remedies. The District Court has stayed the execution. See C/A No. 9:15-mc-00217-DCN-BM (Federal District Court, District of South Carolina). Applicant is

currently pursuing habeas relief, but has also asked for a stay of proceedings to return to state court.[6]

Applicant's Second PCR Application

On the same day as the instant action was filed, Applicant filed another, separate, PCR action. (C/A No. 2016-CP-43-828). That action is addressed by separate order.

STATEMENT OF FACTS

The South Carolina Supreme Court set out the general facts of the case in *State v. Bryant*, 390 S.C. 638, 639-40, 704 S.E.2d 344, 344-45 (2011). The Court noted the following facts and evidence presented at sentencing:

> 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,

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[6] Applicant asserts in his PCR application that he is moving to stay his federal habeas action "so that he can pursue this remedy in state court." (Application, p. 5). There is no requirement that the federal habeas be stayed as a pre-requisite to the state court's considering and dismissing the application. This Court may consider dismissal of the application, or, for that matter, take any action, regardless of whether a stay is eventually issued for the federal litigation.

> telling both of them that he was the "prowler" 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.
>
> 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 transcript of sentencing reflects the mitigation case at sentencing included a family history profile and a personal history profile. The mitigation case included reference to Applicant's difficulties in childhood, school and allegations of abuse, and an expressed concern that Applicant's mother had exposure to alcohol during pregnancy. (See Return and Motion to Dismiss, Attachment 5, Transcript pp. 812-817). Dr. Schwartz-Watts (now Maddox) testified Applicant was not mentally retarded. (Return and Motion to Dismiss, Attachment 6, Transcript pp. 836-838).

Further, as Applicant rests several allegations in the instant action on perceived "conflicts" based upon Ms. Barbara Cusso Ryan's testimony at sentencing, Respondent included that portion of the record with its Return and Motion. The transcript shows Ms. Ryan testified that on or about September 28, 2004, Applicant had approached her at her house. She related her interaction with Applicant which did not include any physical harm but reflected an attempt to seek entry into the home which was approximately one mile from Mr. Tietjen's home. (Return and Motion to Dismiss, Attachment 7 at Transcript p. 220). Within her testimony, Ms. Ryan stated she was married to Mr. Hugh Ryan, III. (Return and Motion to Dismiss, Attachment 7, at Transcript p. 219). Applicant asserts a "conflict" arose at some point as Mr. Ryan was a former public defender and later worked for Indigent Defense – the agency responsible for paying appointed counsel in capital collateral actions.

ALLEGATIONS

In this Third Application for Post-Conviction Relief, Applicant asserts he wishes 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).

DISCUSSION

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 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). *Accord In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996) (to receive a stay from the state to pursue "a successive action for post-conviction relief or habeas corpus in the circuit court or in the original jurisdiction of this Court" death-sentenced applicant "must demonstrate that there are *exceptional circumstances* warranting the issuance of the stay") (emphasis added).

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] Applicant's one year period began to run on February 2, 2011, when the Supreme Court of South Carolina denied the petition for rehearing and issued the remittitur. See S.C. Code § 17-27-45 (A). Applicant's one year period expired on

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[7] The above referenced excerpts from the transcript of the sentencing proceeding confirm the trial defense team had investigated various avenues of mitigation; and, also that Ms. Ryan's husband was named in her testimony. Nothing supports the presence of an "undiscoverable" fact either in trial preparation/plea proceedings or during the prior PCR action.

February 2, 2012. His present action filed on May 3, 2016, is not timely by a wide margin – over four years.

In addition to the statutory provisions listed, our Supreme Court has made specific exceptions, as well. To ensure one full round of remedies, the Court has found the one year limitations period does not apply (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); and (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). Applicant does not claim any of these exceptions. Thus, neither the statutory exceptions nor the Court's exceptions apply to the instant action.[8] This action, consequently, is not timely filed. Further, 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).

This Court agrees with Respondent that 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

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[8] Applicant does not assert the 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).

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 Applicant's successive PCR action, and it is Applicant's burden to show sufficient cause to overcome the procedural bar.

"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 Applicant would claim PCR counsel was ineffective in failing to raise these claims, it is well-established that such an assertion alone does not show sufficient cause for another "bite at the apple." *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).[9] Our Supreme Court has noted the dangers of a contrary position, specifically in capital cases:

> 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. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. See *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

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

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[9] Further, to the extent Applicant is seeking to establish cause to excuse the default in his federal litigation, (Application, p. 5), he has mixed concepts. The Supreme Court of South Carolina so found in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013) (fact of available default exception in federal habeas litigation has no application or bearing on state proceedings).

Applicant has argued in opposing Respondent's motion to dismiss that successive applications are not inevitably barred. As noted above, he is not incorrect but he still must show sufficient cause to be heard. Applicant argues some successive actions have been allowed based "ineffective assistance of initial PCR counsel and other procedural irregularities" including lack of counsel or counsel for trial being counsel for the PCR. He further argues that two other capital cases (*Luke Williams; Edward Elmore*) were allowed successive actions. (Response, pp. 7-9). Applicant fails to show a viable exception here.

First, Applicant has failed to demonstrate a procedural irregularity, lack of counsel, or some recognized and plain issue with counsel such as counsel for trial also serving as counsel on appeal – some direct conflict in regard to his own case. The record shows, to the contrary, that Applicant received prior review in post-conviction action and that new, qualified and experienced counsel represented Petitioner. Second, Applicant's reliance on the fact that successive actions were allowed in two other capital cases is misplaced. This Court notes that the fact Applicant can rely on only two instances greatly undercuts his position. But importantly, the State did not raise the procedural bar on appeal in either of those noted cases. Consequently, there is absolutely no guidance from our appellate courts as to whether the successive actions should have been allowed in those discrete circumstances. In light of this fact, the undersigned returns to application of the bars as guided by the plain language of the statute and appellate decisions on same.

As noted above, Applicant fails to show any fact that could not have been discovery in the prior PCR action. The transcript shows the trial defense team had investigated various avenues of mitigation with the assistance of a social work expert Dr. Marti Loring and well-

known psychiatrist, Dr. Schwartz-Watts.[10] The transcript also shows Ms. Ryan's husband was named in her testimony. Again, nothing supports the presence of an "undiscoverable" fact either at trial or during the prior PCR action. Further still, the exception to capital punishment referenced in the application, *i.e.* intellectual disability, was announced in 2002 well-before the 2008 plea and sentencing in this matter.[11] Being available before the plea and sentencing as well as for the prior PCR proceedings makes a formidable bar to litigation.

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[10] To the extent Applicant alleges these experts were incorrect; or failed to find addition facts; or failed to assign correct weight to certain facts; he complains about experts, not counsel, which is not a cognizable Sixth Amendment claim:

> The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate. *See Harris v. Vasquez,* 949 F.2d 1497, 1518 (9th Cir.1990); *Silagy v. Peters,* 905 F.2d 986, 1013(7th Cir.1990). Furthermore, it would undermine the finality of state criminal convictions, which would constantly be subject to psychiatric reappraisal years after the trial had ended. *Harris,* 949 F.2d at 1517-18; *Silagy,* 905 F.2d at 1013.

Wilson v. Greene, 155 F.3d 396, 401 (4th Cir.1998) (emphasis added) (quoting *Waye*, 884 F.2d at 767). *Compare Winston v. Kelly*, 784 F.Supp.2d 623, 633 (W.D.Va. 2011) (counsel ineffective where "counsel had in their hands, but did not read, a school record reflecting that Winston was eligible for special education due to 'mild retardation' and that Winston 'demonstrate [d] a reduced rate of intellectual development and a level of academic achievement below that of age peers' and 'concurrently demonstrate[d] deficits in adaptive behavior.'"). *Winston v. Kelly*, 784 F. Supp. 2d 623, 633 (W.D. Va. 2011), *aff'd sub nom. Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012).

[11] 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. 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

Consequently, for all the foregoing reasons, this Court GRANTS Respondent's motion. S.C. Code § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the application is not entitled to post-conviction relief and no purpose would be served by any further proceedings...."); S.C. Code § 17-27-70 (c) (summary disposition allowed if "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). Applicant has already had a full round of PCR remedies and the instant action is both untimely and improperly successive. *See Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002) ("An individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal").

MOTION FOR STAY

Applicant also moved for a stay pending resolution of the appeal in *James D. Robertson v. State*, Appellate Case No. 2012-205909 (argued October 8, 2015). [12] This Court finds the state procedural bars relied upon are well-established and controlling and denies the motion for stay.

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). Applicant's plea and sentencing occurred in 2008. Applicant's case falls in the post-*Atkins* division of *Franklin*. Not only PCR counsel, but also plea counsel, had the legal precedent available for consideration.

[12] Both Applicant and Respondent have advised the Court that 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 Order, 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 in a *de facto* stay position pending resolution Robertson's appeal. The appeal from the summary dismissal of Robertson's successive application was argued in the Supreme Court of South Carolina on October 8, 2015. No opinion has been issued in the matter.

In regard to Wood's successive action, the Honorable J. Mark Hayes has granted the State's motion for summary judgment. (*John R. Wood, #6005 v. State of South Carolina*, C/A

CONCLUSION

THEREFORE, for all the reasons set out above, this Court DENIES Applicant's motion to stay; and GRANTS the State's motion to dismiss.

IT IS SO ORDERED.

The Honorable Thomas W. Cooper, Jr.
South Carolina Circuit Court Judge

July 7, 2016.

Manning, South Carolina.

2013-CP-23-05190) (pending final written order). Though this Court has considered the fact that other cases have been handled differently, this Court tends to agree with Judge Hayes that summary dismissal may be considered under presently existing rules.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
IN THE COURT OF COMMON PLEAS

RECORDED
2016 OCT -4 PM 2:05
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP4300829

Stephen Corey #5252 Bryant		South Carolina State of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by: Clerk of Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

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

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: **See attached Order.**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2099 Judge Code	10/4/2016 Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

E. Charles Grose Jr. 404 Main Street Greenwood, SC 29646

Alan McCrory Wilson PO Box 11549 Columbia, SC 29211-1549
Melody Jane Brown PO Box 11549 Columbia, SC 29211-1549
Donald J. Zelenka PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James C. Campbell

Court Reporter

James C. Campbell - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF SUMTER	)	

Stephen Corey Bryant, SCDC #5252,	)	**C/A No. 2016-CP-43-829**
	)	***CAPITAL PCR**
Applicant,	)	
vs.	)	
	)	**ORDER DENYING APPLICANT'S**
State of South Carolina,	)	**RULE 59(E) MOTION**
	)	
Respondent.	)	
	)	

By Order dated July 7, 2016, filed July 15, 2016, this Court denied Applicant's motion to stay and granted Respondent's motion to dismiss the action as improperly successive and barred by the statute of limitations. By motion dated July 25, 2016, filed July 28, 2016, Applicant moved to alter or amend the Court's ruling, requesting either the stay be granted and/or Respondent's motion to dismiss be denied. Respondent did not file a written response.

On August 23, 2016, this Court held a hearing on the motion.[1] Charles Grose, Esq., and Diana Holt, Esq., represented Applicant at the hearing. Applicant's presence was waived by counsel. Senior Assistant Attorney General Melody Brown and Senior Assistant Deputy Attorney General Donald Zelenka represented Respondent. In consideration of the pleadings in this matter, the motion, and the arguments presented for and against the motion to alter or amend at the August 23, 2016 hearing, this Court denies the motion. The following factual findings and conclusions are set out in support of the Court's ruling:

[1] The undersigned requested a court reporter for the hearing; however, due to a shortage of available personnel, Court Administration was unable fulfill the request. This Order may serve as a substitute for a transcript if one becomes necessary for future review, and reflects the basic arguments of counsel in addition to the findings and conclusions of the Court.

1. Applicant first argues that the Court's findings and conclusions regarding the appointment of counsel to proceedings on Respondent's motion to dismiss are "overly restrictive." (Rule 59 Motion, p. 3). This Court finds Applicant's arguments regarding appointment were rendered moot by the August 1, 2016 Order of the Supreme Court of South Carolina appointing counsel in the surviving action, 2016-CP-43-828.

2. Applicant next argues this Court erred in failing to find "sufficient reason" to allow the instant action to survive in light of the successive application and time bars. (Rule 59 Motion, pp. 4-7). Applicant contends this Court failed to recognize this action "is directly on par with [Luke] *Williams* and [Edward] *Elmore*," two capital cases in which successive applications were allowed. (Rule 59 Motion, p. 6). However, these cases were previously referenced in the response in opposition to the motion to dismiss and discussed at the hearing on June 21, 2016. This Court included a discussion of the cases on page 11 of its Order Granting Respondent's Motion to Dismiss. This Court disagrees with Applicant on the import of these cases. Again, though each was a capital case where a successive PCR action was heard (with disparate results – one ultimately successfully on a claim raised, the other not) the propriety of those successive actions under the procedural rules was not considered and addressed by an appellate court as the State did not appeal. Therefore, this Court has been guided by the plain language of the PCR statute and appellate decisions regarding application of the procedural bars. This Court finds no cause to alter or amend its decision.

3. This Court also finds no cause to alter or amend its ruling as Applicant has failed to show sufficient grounds to prevent the application of the general rule barring submission of a successive 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). Further, in addition to the reasons set out in the Order Granting Respondent's Motion to Dismiss, pp. 11-12, this Court finds Applicant's "exceptional circumstances" argument fails, in part, because the companion case survives. Success in that case would grant Applicant the relief sought in this case, *i.e.,* vacating his death sentence and a declaration that he is ineligible to receive the death penalty because he suffers from Intellectual Disability. Should he be unsuccessful in that case because he does not suffer from Intellectual Disability, then his prior lawyers cannot be found ineffective for failing to discover or present evidence of such a disability. The same reasoning applies to the Statute of Limitations and Equitable Tolling Issues. As such, this Court declines to alter or amend its ruling.

4. To the extent Applicant also claims incompetency may have hindered the presentation of claims in the prior PCR action, (Rule 59 Motion, p. 8), this Court rejects the argument on the facts of record. Applicant asserted incompetency in the prior PCR action and Judge Cothran suspended the proceedings to ensure that Applicant was competent to assistant his PCR counsel. Dr. Donna Schwartz-Watts (now Maddox), a seasoned forensic psychiatrist, closely monitored and worked with Applicant to ensure his competency for the proceedings. (See, for example, PCR Appeal Appendix, pp. 1537, 1540-1550, 1566-1570). Applicant has failed to produce any evidence to the contrary either in the response in opposition to the motion to dismiss, the argument presented at the June 21, 2016 hearing, or the argument presented at the August 23, 2016 hearing. As such, this Court declines to alter or amend its ruling.

5. Applicant concedes that *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309 (2012), does not provide an exception to the State's procedural rules. (Rule 59 Motion, p. 10). However, he argues that the concept which flows from that case, *i.e.,* allowing a federal court to consider

ineffective assistance of trial counsel claims "in the first instance," is incentive for this Court to disregard the procedural bars as applied. Id. This Court finds no cause to disregard the procedural bars. The federal habeas proceedings will continue regardless of the state actions.[2] Further, there is no cause to do damage to the State's procedural limitations in an effort to circumvent review in federal court. Under that logic, there should be no successive application bar or limitations period which is plainly not the case. Regardless, the application of *Martinez* is for the federal court. As such, this Court declines to alter or amend its ruling.

6. Applicant also asks the Court to consider there is "no prejudice" to the State in disregarding the procedural bars at issue and allowing the claims to be heard as the State waived the exhaustion requirement in federal court which would have avoided a procedural bar in that forum. (Rule 59 Motion, pp. 11-12). Applicant, however, continued with his desire to return to state court in the federal action, relying on this Court's previous determination that the separate successive action, 2016-CP-43-828, could continue.[3] The federal court, noting Applicant's

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[2] This Court acknowledges Applicant's present PCR counsel's assertion made at the August 23, 2016 hearing that all state and federal actions will "go away" if the State will offer a life sentence. This Court does not find that assertion persuasive as the federal action contests the plea itself, not just the sentence. Additionally, those claims, and potentially others, may still be addressed in future litigation. *See, for example, Sanders v. State*, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015) (while "recognize[ing] the value in allowing defendants to waive certain rights in exchange for concessions by the State," finding "a rule in which a defendant is precluded from challenging the very advice he received in agreeing to that waiver" was not acceptable). At any rate, this Court makes the decision on the record presented.

[3] As Respondent correctly pointed out at the August 23, 2016, hearing, Respondent has argued and preserved their position that the separate action is also barred as improperly successive and untimely, but Respondent is unable to seek to alter or amend the ruling and/or seek an appeal as the issue is not dispositive to the action. This Court recognizes and fully agrees that some interlocutory appeals may be wise to avoid continuing litigation that may ultimately be rendered a nullity (and is cognizant of circumstances where that has happened); however, our state appellate structure rarely allows such action. It is this Court's hope, however, that the litigation will be expedited and not cause exceptional delay in either relief, or, in the absence of relief, the prompt return to federal court.

objection, declined the offer of waiver and granted Applicant's motion to stay. (July 26, 2016 Order in 9:16-cv-01423-DCN-BM, filed in this action on July 29, 2016). In other words, there was an opportunity to go forward in federal court which Applicant argued should be rejected, and it was. Any prejudice to him is of his own making. This Court, much like Respondent in the federal action,[4] recognizes that there is conflict between the treatment of Applicant's successive applications, but this Court has considered the separately filed actions independently, and has issued Orders based on its assessment of each action independently. This Court declines to alter or amend its ruling.

7. Lastly, this Court finds, for all the reasons set out above – particularly as to the dispositive nature of the surviving action as to whether any related ineffective assistance claims would be meritorious if heard – there are sufficient distinctions between this case and the *Robertson*-type cases to deny the request to stay these proceedings pending a ruling in that case. *See James D. Robertson v. State*, Appellate Case No. 2012-205909 (argued October 8, 2015). This Court declines to alter or amend its ruling.

8. Upon consideration of the arguments presented,[5] this Court reaffirms its rulings denying Applicant's motion to stay the proceedings and granting Respondent's motion to dismiss. The action is barred as successive and untimely.

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[4] The federal stay order recognizes Respondent's offer of waiver was based on the uncertainty in application of state procedural bar in capital actions, "and in an effort to promote timely adjudication and finality of the conviction while providing Petitioner opportunity to litigate his claim of ineligibility of a death sentence...."). (July 26, 2016 Order in 9:16-cv-01423-DCN-BM, p. 7, filed in this action on July 29, 2016).

[5] Applicant included other assertions in his introduction in the Rule 59 Motion; however, these assertions were not presented as argument and have neither been considered nor addressed herein. Further, Applicant footnotes in his opening paragraph that the Court's Order was drafted by the Attorney General's Office. (Rule 59 Motion, p. 1 n. 1). That is correct. It is also correct this Court carefully reviewed and considered every word of the Order apart from the caption

CONCLUSION

THEREFORE, for all the reasons set out above, this Court DENIES Applicant's motion to alter or amend the Court's judgment.

IT IS SO ORDERED.

s/
The Honorable Thomas W. Cooper, Jr.
South Carolina Circuit Court Judge

9/26/16, 2016.
Manning, South Carolina.

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which this Court later amended. This Court has again considered its Order and again affirms its adoption of the proposed order. The findings and conclusion are the Court's findings and conclusions. Respondent correctly noted at the August 23, 2016 hearing that the Court asked for proposed orders from the State in this case and Applicant in the surviving case and that Applicant lodged no objection to this process at the time the Court requested the Orders. In fact, Applicant submitted his own order in the surviving action which this Court treated the same as the proposed order at issue here. Further, each proposed order was based on the Court's ruling announced at the conclusion of the June 21, 2016 hearing. At any rate, this Court is cognizant of the preference announced in *Hall v. Catoe*, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004) that PCR judges "draft their own findings of facts and conclusions of law in death penalty case," and is equally aware of the fact that failure to do so is not *per se* error. This Court notes our Supreme Court, while announcing the preference in *Hall*, simultaneously acknowledged "that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." 360 S.C. at 364, 6601 S.E.2d at 341. What is at issue is whether the PCR judge actually considered and accepted the proposed findings and conclusions as his own. This is shown by a judge's adequate review of the proposed language before its adoption. *Id.* This Court made a detailed and careful review of each finding and conclusion in the proposed order language and the Order is, and should be considered without question, the Court's order in this matter. This Court makes these findings should the issue later arise. However, Applicant made no argument to the contrary either in his Rule 59 motion or in argument at the August 23, 2016 hearing.

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