



ALAN WILSON
ATTORNEY GENERAL

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OCT 27 2014

S.C. Supreme Court

October 27, 2014

The Honorable Beth Carrigg, Clerk of Court
Lexington County Courthouse
205 E. Main Street
Lexington, South Carolina 29072

Re: *Gary Dubose Terry, #5054 v. State of South Carolina*
2012-CP-32-02718

Dear Ms. Carrigg:

Enclosed herein please find the Respondent's Response Opposing Motion to Stay Proceedings Pending Decision by South Carolina Supreme Court in *Robertson v. South Carolina* with attachments, and Certificate of Service with reference to the above matter. The Honorable William P. Keesley and opposing counsel are copied with this letter and has been served with these pleadings today, via United States mail.

Please file same in your office and return a clocked in copy of same to the undersigned in the self-addressed stamped envelope provided.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures

cc: The Honorable William P. Keesley (w/encls., via U.S. mail)
Elizabeth A. Franklin-Best, Esquire (w/encls., via U.S. mail)
Derek J. Enderlin, Esquire (w/encls., via U.S. mail)
Debbie Hopkins, South Carolina Supreme Court (w/copy of encls.)
Trisha Allen (Victim Services) (w/encls.)

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

RECEIVED

Gary Dubose Terry, #5054,)

2012-CP-32-02718

OCT 27 2014

Applicant,)

S.C. Supreme C

v.)

RESPONSE OPPOSING MOTION TO

STAY PROCEEDINGS PENDING

State of South Carolina,)

DECISION BY SOUTH CAROLINA

SUPREME COURT IN

Respondent.)

ROBERTSON V. SOUTH CAROLINA

Respondent opposes the motion of Applicant, Gary Dubose Terry, #5054 (Terry) to stay the current proceedings, which are subject to summary dismissal because his Application is barred by the Post-Conviction Relief (PCR) statute of limitations and the bar against successive PCR applications. South Carolina law does not permit successive Applications asserting ineffective assistance of original PCR counsel and there is no United States Supreme Court precedent requiring such actions:

Terry filed his successive PCR Application, through counsel, on June 29, 2012. Respondent made its original Return and Motion to Dismiss on July 30, 2012. The South Carolina Supreme Court filed an Order on September 16, 2014, assigning the Honorable William P. Keesley to preside over this case and directing him to conduct a hearing on Terry's desires regarding counsel within thirty days of the date of its Order. Respondent filed an Amended Return and Motion to Dismiss dated October 2, 2014.

The Court held a hearing in Dorchester County on October 15, 2014. Terry was present at the hearing, as were Derek J. Enderlin and Elizabeth Franklin-Best, Esquires, and counsel for the State, Senior Assistant Attorney General William Edgar Salter, III. Upon questioning by the Court, Terry indicated that he desired Mr. Enderlin and Ms. Franklin-Best act as his counsel.

Also, both attorneys indicated that they were qualified pursuant to S.C. Code Ann. § 17-27-160 (Supp. 2014), that they were familiar with the case, and that they were willing to accept the appointment. The Court appointed Mr. Enderlin and Ms. Franklin-Best to represent Terry and directed Mr. Enderlin to prepare an Order appointing counsel.

On October 20, 2014 - the same day on which Respondent was served with a proposed Order appointing counsel, which was signed by this Court on October 21st - counsel moved for a stay of the current proceedings, pending the South Carolina Supreme Court's decision in *James D. Robertson v. State of South Carolina*, Appellate Case No. 2012-205909, an appeal in a capital PCR case in which the Court granted certiorari on September 24, 2014. Respondent hereby opposes Terry's motion for a stay:

The circuit court has discretion whether to grant a stay of a matter pending before the court. *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 119, 328 S.E.2d 621, 623 (1985); *City of Spartanburg v. Belk's Dep't Store of Clinton*, 199 S.C. 458, 480, 20 S.E.2d 157, 167 (1942). "An abuse of discretion arises where the [circuit] court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999). Respondent submits that granting a stay, at least before the Court has ruled on the State's Motion to Dismiss, would amount to an abuse of discretion.

First, Terry's motion for a stay contravenes the South Carolina Supreme Court's September 16, 2014 Order. In part, the Court ordered that:

Within sixty days of the date of this order, Judge Keesley shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the Status of this matter

every sixty days under In re Stays of Execution in Capital Cases, *supra*, 321 S.C. 544, 471 S.E.2d 140 (1996), Judge Keesley is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

Obviously, the South Carolina Supreme Court's September 16th Order contemplates a reasonably expeditious resolution of this case and it clearly does not contemplate this Court granting a stay to further delay a two year old case.

Second, the issue on which the Court granted certiorari was stated as follows:

Whether, in light of *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and the past treatment of similarly situated South Carolina prisoners, Robertson should be permitted to proceed with a second-in-time application for post-conviction relief asserting colorable claims of ineffective assistance of trial counsel that prior PCR counsel ineffectively failed to investigate or present?

While at first blush the present case and the issue before the Court in *Robertson* appear similar, the two cases are factually different in several important respects. For instance, Terry has not attacked the qualifications of his original PCR counsel under § 17-27-160 or the Order appointing counsel, whereas Robertson has attacked both. In fact Robertson has gone so far as to assert that the September 23, 2005 hearing to appoint counsel was never held, a false representation that is not only refuted by the Order of Dismissal signed by the Honorable John C. Few in that case as well as the representations of the undersigned counsel who was present, it is contradicted by at least one contemporaneously-written article that Respondent has found, which obtained the information in its story from the *Rock Hill Herald*. See [http://lists.washlaw.edu/pipermail/deathpenalty/2005 September/003498.html](http://lists.washlaw.edu/pipermail/deathpenalty/2005%20September/003498.html).

Another factor distinguishing this case from *Robertson* is that Robertson claims that one of his original PCR attorneys, Michael L. Brown, "did not competently represent him during his initial PCR proceeding" because Brown was supposedly "abusing alcohol at this time" and

violated Court-ordered rehabilitation requirements during the time Robertson's PCR Application was pending. He also relies upon *In re Michael Langford Brown, Jr.*, 396 S.C. 251, 721 S.E.2d 783 (2011), which involved Mr. Brown's arrest and 2011 guilty plea to the charge of resisting arrest, following a July 2007 altercation with police that was the result of counsel's admitted use and abuse of alcohol and which occurred long after the January 29-31, 2007, evidentiary hearing in Robertson. There is no such allegation in this case. Thus, the present case is factually distinguishable from Robertson.

Likewise, the Supreme Court of South Carolina has previously found that *Martinez v. Ryan* does not require a successive state PCR hearing in the non-capital case of *Kelly v. State*, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013). As reflected in the Court's decision in *Kelly*, courts in other jurisdictions have reached this same conclusion. *See also Aice v. State*, 305 S.C. 448, 450-51, 409 S.E.2d 392, 394 (1991). Respondent submits that there is no meaningful basis upon which to distinguish the rights available to capital PCR applicants from the rights available to non-capital applicants and would note that Terry has not advanced any such reason.

Nor is there any guarantee that the Court in *Robertson* will issue an Opinion that "will almost certainly delimit the existence and scope of an available state remedy for Terry's claims of ineffective assistance of trial counsel (and inadequate assistance of state post-conviction counsel)," as Terry suggests.

Further and as argued in the Amended Motion to Dismiss, Respondent has argued that Terry's 2012 Application should be summarily dismissed for several reasons:

- It is barred by the statute of limitations;
- It is successive to his original PCR Application (2000-CP-32-3470), which resulted in an Opinion by The South Carolina Supreme Court in *Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011), *cert. denied*, 132 S.Ct. 1548 (2012) (*Terry II*);

- None of the exceptions to the rule barring successive applications apply to Terry's case;
- The United States Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309, 1318-19 (2012) *Martinez* does not mandate a successive collateral state court proceeding;
- The South Carolina Supreme Court has held, in a non-capital case, that *Martinez* does not require a successive state PCR hearing. See *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013); and
- In the absence of any basis for exercise of a "rare exception" of allowing a successive application, there is no reason to tax an already overburdened judicial system with wasteful litigation which is not constitutionally mandated and that would reward a dilatory filing in this case that is designed to delay the proper course of the appeals process.

Moreover, Robertson's attorneys have already sought to delay the date on which the Brief of Petitioner is due to be filed. Robertson's Brief of Petitioner was originally due to be filed on October 24, 2014. However, on October 15, 2014, one of his then-current attorneys, Chief Appellate Defender Robert M. Dudek wrote the Court and informed it that Robertson would soon write the Court and request representation by his original attorneys in the successive PCR action, Keir M Weyble and Emily C. Paavola, Esquires. On October 20, 2014, the same day of Terry's stay motion, Mr. Weyble and Ms. Paavola filed and served a "Notice of Appearance and Motion for Substitution of *Pro Bono* Counsel" in *Robertson*.

The following day, Ms. Paavola wrote the Supreme Court and requested a thirty day extension within which to file Robertson's Brief of Petitioner. On October 24, 2014, Mr. Dudek filed a motion in the Supreme Court requesting an extension. The request for a continuance is currently pending. There is no guarantee that further delay will not be sought in the *Robertson* case. Thus, this Court should not grant a stay based upon the grant of certiorari in *Robertson*, at least until it has heard and ruled upon the State's Motion to Dismiss.

Finally, Respondent would note that after Terry obtained a stay of his execution in the United States District Court for the District of South Carolina in order to pursue habeas corpus relief, he filed his Petition for Writ of Habeas Corpus on June 29, 2012. *Terry v. Byars*, 4:12-cv-01798-SB-TER [PACER Doc. No. 16]. However, he also filed a motion for a stay and abeyance on the same day, so that he could pursue this PCR Application. [PACER Doc. No. 17]. Respondent filed a Response Opposing his stay request on July 16, 2012. [PACER Doc. No. 25]. On July 25, 2012, Terry filed a Reply to Respondent's response to his motion. [PACER Doc. No. 28]. On December 10, 2012, United States Magistrate Judge Thomas E. Rogers, III, filed an Order granting the motion for a stay. [PACER Doc. No. 28]. In that Order, counsel for the parties were "encouraged to seek expedited proceedings before the Court of Common Pleas." (Emphasis in original).

Terry and his lawyers have done nothing to expedite the case in over two years. Now, they seek to engender further and needless delay by having this Court enter a stay, and Respondent opposes their request. Because counsel now seeks yet further delay in state court, Respondent will move to lift the stay in federal court.

Finally, Respondent has attached the following documents to this Response and incorporates the same by reference:

1. The September 14, 2012 Petition for Writ of Certiorari in *Robertson v. State*;
2. The January 25, 2013 Return to Petition for Writ of Certiorari in *Robertson v. State*;
3. The September 24, 2014 Order granting certiorari in *Robertson v. State*;
4. The October 15, 2014 letter from Chief Appellate Defender Robert M. Dudek, Esquire to the Honorable Daniel E. Shearouse, Clerk of the South Carolina Supreme Court in *Robertson v. State*;
5. The October 20, 2014 a "Notice of Appearance and Motion for Substitution of *Pro Bono* Counsel" in *Robertson v. State*;

6. The October 21, 2014, letter from Ms. Paavola to the Supreme Court, requesting a thirty day extension within which to file the Brief of Petitioner in *Robertson v. State*; and
7. The October 24, 2014 motion for an extension of time to file the Brief of Petitioner filed by Mr. Dudek.

Wherefore, based upon the present motion, Respondent submits that Terry is being dilatory and opposes the stay.

Respectfully submitted,

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Attorney General

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By: 
ATTORNEYS FOR RESPONDENT

October 27, 2014.