STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Court of Common Pleas

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S.C. SUPREME COURT

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

THE STATE'S RETURN TO PETITIONER-RESPONDENT BRYANT'S PETITION FOR WRIT OF CERTIORARI

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BRYANT'S QUESTIONS PRESENTED

Question I

Was it an abuse of discretion for the current PCR judge to deny Stephen Cory Bryant's motion to amend his PCR application to allege he suffers from Fetal Alcohol Spectrum Disorder, which is evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(4), and when, under the unique circumstances of this case, this Court took the unusual step of limiting the prior PCR judge's discretion to continue the evidentiary hearing for 'good cause' as provided for by S.C. Code Ann. § 17-27-160(C)?

Question II

Was it an abuse of discretion for the current PCR judge to deny Stephen Cory Bryant's motion to amend his PCR application to allege a categorical bar to capital punishment for someone suffering from Fetal Alcohol Spectrum Disorder, which is evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice, pursuant to S.C. Code Ann. § 17-27-20(A)(4), and when, under the unique circumstances of this case, this Court took the unusual step of limiting the prior PCR judge's discretion to continue the evidentiary hearing for "good cause" as provided for by S.C. Code Ann. § 17-27-160(C)?

Question III

Was it an abuse of discretion for the current PCR judge to deny Stephen Cory Bryant's motion to amend his PCR application to allege that *Hurst v. Flordia,* _, U.S. _, 136 S. Ct. 616 (2016) is a constitutionally binding decision from the Supreme Court of the United States that can be raised in the current PCR application pursuant to S.C. Code § 17-27-45(B)?

Question IV

Should this Court require post-conviction relief judges to draft the final orders in PCR cases in order to ensure the findings of fact and conclusions of law, required by S.C. Code Ann. §17-27-80, are those of the court, rather than an advocate, and to preserve the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, §8?

THE STATE'S RESTATEMENT OF BRYANT'S QUESTIONS PRESENTED

I.

Whether Bryant's PCR action should have been summarily dismissed as improperly successive and untimely rendering moot the question of whether additional issues should have been added later by amendment. Alternatively, whether the PCR judge erred in denying Bryant's motions to amend his successive application where it would be improper and therefore an abuse of discretion to allow an amendment which would exceed the scope of the limited action and defeat the statutory limitations on successive and untimely actions without the proper and required showing.

[Bryant's Issues I, II, and III].

II.

Whether Bryant's suggestion that this Court should direct circuit court judges to draft their own orders in post-conviction relief actions to avoid fact-finding by a litigant is without merit because when a circuit court judge adopts the language offered in a proposed order, in whole or in part, the resulting order becomes the court's order.

[Bryant's Issue IV].

STATEMENT OF THE CASE

This appeal is from a successive PCR action. Petitioner-Respondent ("Bryant") was first denied post-conviction relief in December 2012, and this Court denied his petition for certiorari review on March 4, 2015. On May 3, 2016, after first proceeding to federal court, Bryant filed two separate 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 a variety of ineffective assistance of trial counsel claims and one allegation alleging a conflict of post-conviction relief counsel, (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. Judge Seals was thereafter appointed continuing jurisdiction over the surviving matter. (App. p. 3354).

Bryant attempted to appeal the grant of the State's motion to dismiss. See Appellate Case No. 2016-002228. 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, Order of February 9, 2017, and subsequently issued the remittitur on February 27, 2017.

An evidentiary hearing in the surviving action 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. Both petitions have been filed with this Court. The State now responds to Bryant's petition.

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,[1] and also found beyond a reasonable doubt the existence of the aggravating circumstance, "the defendant

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[1] 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).

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.

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).[2] 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

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[2] *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).

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. 2572-2625). Bryant moved to alter or amend. (App. pp. 2626-33). By 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. [3]

[3] 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 "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.

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...."

(9:16-cv-1423- DCN-BM, ECF No. 71 at 3-4).

> 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, on cross-examination, that 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). Bryant's records of IQ testing showed 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; see also pp. 3507-22; p. 3606, citing federal court records in C/A No. 9-16-01423-DCN-BM, ECF No. 37 at p. 70).

STANDARD OF REVIEW

This Court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). However, this Court "review[s] questions of law de novo, with no deference to trial courts." *Id.*, at 180-181, 819 S.E.2d at 839.

"On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure," this Court will "apply an abuse of discretion standard." *Mangal v. State,* 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017).

ARGUMENT

I.

Bryant's PCR action should have been summarily dismissed as improperly successive and untimely. Even so, the PCR judge did not err in denying Bryant's motions to amend his successive application. Bryant's successive application was allowed to go forward on one issue; it would be improper and therefore an abuse of discretion to allow an amendment which would exceed the scope of the limited action and defeat the statutory limitations on successive and untimely actions without the proper and required showing.

[Bryant's Issues I, II, and III].

The State maintains – as it has asserted in the cross-appeal – that Bryant's PCR action should have been dismissed as improperly successive and untimely. (See State's Petition for Writ of Certiorari). If so, attempts to amend later, separate, and unrelated claims to the action would not even be an issue. If this Court vacates the Order and directs the action be dismissed as improperly successive and untimely, the questions presented in Bryant's petition would be moot.

Alternatively, the record shows Bryant's arguments that he was entitled to amend are without merit. The State submits Bryant's petition should be dismissed for the following reasons:

Bryant argues that his "cause" to allow amendment rests in large part on this Court's prior order that Bryant's first PCR be completed within one year. (Petition, p. 19, 22). Of course, he admits the matter was not completed in one year, and Bryant was granted extensions as requested. (Petition, p. 19). But this is, at bottom, an attempt to use ineffective assistance of PCR counsel as cause to excuse the failure to raise all issues in his one PCR action allowed as a matter of right. This he cannot do. *Robertson v. State,* 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016) (" '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.' " (quoting *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991)). Bryant has not presented anything more than PCR counsel did not raise issues he wishes to raise by amendment. There is no indication that the one-year time limit (which did not occur) hampered viable investigation.

Further, Bryant implicitly concedes much of what he relies upon was surely available in prior proceedings as he shows the factual basis pertained to his background and personal history records and information from people who know him. (See, for example, Petition, pp. 14-16 (testing of Bryant; information from "former teachers"; using interviews and testing from Bryant's mother, grandmother and aunt)). Bryant also relies on a proffer of testimony from Dr. Maddox regarding her change in opinion. (See Petition, p. 16). But this does not help him. Besides the fact that the testimony was not admitted, (see App. p. 4061, p. 4070, and p. 3419), the testimony reflects a concession that testing was done later that was not done for her because Bryant failed to cooperate – after a test for malingering produced a score that made proceeding unwise for fear "results would not be reliable." (See App p. 4068; see also p. 838 and p. 1548).

But, again, Bryant's argument lacks the very thing needed – a showing of an *inability* to raise the issue in the prior proceedings. This is important because without that showing, the late claims are barred as improperly successive and untimely.

S.C. Code Section 17-27-90 prohibits successive applications "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application." Key to the inquiry is whether a petitioner shows "sufficient reason." *Id.* "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) (emphasis added). *See also Aice,* 305 S.C. at 451, 409 S.E.2d at 394 ("It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys," rejecting the concept that additional actions are allowed were successive "counsel could craft new arguments not raised by prior PCR counsel"); *id.,* at 305 S.C. at 452, 409 S.E.2d at 395 ("Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.").

Similarly, there are time limits that prevent amendment. S.C. Code Ann. § 17-27-45(C) allows an applicant to file a successive application if there is evidence of material facts not previously presented and heard; but, the filing must occur one year after the date of actual discovery of the facts or "*after the date when the facts could have been ascertained by the exercise of reasonable diligence.*" (emphasis added). Bryant cannot meet that showing. 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 2, 2012. His successive action, which was filed on May 3, 2016, was not timely by a wide margin – over four years. Amendments thereafter would also be subject to a statute of limitations defense. Simply, Bryant's argument that the claims were not previously discovered does not meet the statutory requirements:

> (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).

Exposure to alcohol as a fetus and past social history were factors considered in the previous proceedings. Specifically, information about possible or suspected alcohol abuse during pregnancy by Bryant's mother with detrimental results to Bryant was presented through the testimony of Dr. Donna Maddox. Dr. Maddox testified:

> And there are -the aunt, the paternal aunt Terry Caulder who I spoke with, I asked her very specifically did we know if Mr. Bryant's mother had abused alcohol during her pregnancy. As you know, alcohol can have affects on the fetus. And there was some history that I obtained through medical records that caused me concern that perhaps he had exposure to alcohol. Ms. Caulder did not see Mrs. Bryant abusing any alcohol during her pregnancy, but there were some pictures that I was provided that caused me some concern. Mr. Bryant as a very young child had attention deficit disorder, and usually when you see attention deficit disorder in a number of children it can be caused by exposure to alcohol. I looked at some pictures of him, a specific picture of when he probably would be about nine or ten years old, and he had some features that would be consistent with that but there's no evidence and I can't say with a reasonable degree of medical certainty that he was exposed to alcohol in utero but there's a question.

(App. p. 814).

Trial counsel investigated these matters and enlisted the assistance of experts to help the defense. That can hardly be ineffective. At any rate, all of Bryant's claims were available (though the State submits not meritorious) *at the time of the plea.* The amendments were barred as successive and untimely.

Even so, Bryant argues that the PCR statute, this Court's precedent, and Rule 15, SCRCP allow for the amendments. (Petition, p. 17 and p. 21). He neglects to factor in that this is not a first PCR action.

This Court has "noted in several cases that "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application." *Love v. State*, 428 S.C. 231, 241, 834 S.E.2d 196, 201 (2019) (citing *Mangal v. State,* 421 S.C. 85, 100, 805 S.E.2d 568, 576 (2017); *Robertson v. State*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016); *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999)). The Court "ha[s] also encouraged PCR courts to find ways to address the merits of 'substantial issues' within the flexibility of the Rules of Civil Procedure prior to an applicant suffering procedural default." *Id.*, (citing *Mangal*, 421 S.C. at 99-100, 805 S.E.2d at 575-76). The encouragement to do so rests on the very goal of having one full and fair bite at the apple. *Mangal*, 421 S.C. at 100, 805 S.E.2d at 576. What the Court has not encouraged, however, is total avoidance of the successive application and time limitations.

"Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were.' " *Robertson v. State*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016) (quoting *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999)). In *Robertson*, this Court recognized that changes to the statute's clear limitations must be "instituted by the Legislature." *Robertson,* 418 S.C. at 516, 795 S.E.2d at 34 ("because the PCR Act is a legislatively created scheme, any post-*Martinez* change to PCR proceedings

must be instituted by the Legislature"). The Court rejected a request to allow successive PCR applications in capital cases by claiming ineffective assistance of PCR and allowing new proceedings with issues not raised in the prior action. Bryant's position on amendments is another argument to the same end. It should be similarly rejected.

Additionally, though Bryant asserts Judge Seals abused his discretion by thinking he had none in light of Judge Cooper's order, (see Petition, p. 13 n. 9, p. 23 n. 16, p. 24 n. 17), the record also shows that Judge Seals made findings in the alternative – findings showing the claims were barred as improperly successive, untimely, Rule 15 did not apply for specific reasons, and that the claims not supported by new law. (App. pp. 3361-63; pp. 3367-68; 3376-80; see also pp. 3374, Order denying second motion for summary judgment, "Amendment to this restricted action is not authorized by Judge Cooper's order, by this Court's prior order, by the PCR statute, or by new United States Supreme Court precedent."). Bryant's focus on the limited-scope-of-the-action finding fails to take into account these alternate rulings with well-reasoned support, factually and legally. Consideration of the offered claims individually fares no better for Bryant.

Bryant was allowed to proceed because Judge Cooper found "sufficient cause" to allow one precise claim to continue. (See App. p. 3361). That claim was limited to an allegation of Intellectually Disability and exemption from capital punishment pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). Judge Cooper granted the State's motion to dismiss a second action finding all grounds presented were improperly successive and untimely.[4] Judge Cooper's ruling

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[4] Bryant alleged in the separate action:

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

does not allow or warrant amendment to other, non-related claims. *See generally Robertson*, 418 S.C. at 522, 795 S.E.2d at 38 (holding summary dismissal not warranted where conflicting evidence on a critical fact exists, and, though the action may ultimately be dismissed as untimely or successive or on the merits, the applicant must "be afforded a hearing *on this limited issue*") (emphasis added).

The *Atkins* Court held people who are intellectually disabled are categorically excluded from capital punishment. *Atkins*, 536 U.S. at 320-21. Bryant conceded that he could not meet the required showing, but nonetheless sought to establish that he actually has Fetal Alcohol Spectrum Disorder (FASD) and is developmentally impaired in a manner "similar" to that defined in *Atkins*. In short, he hoped to establish another class of persons as exempted from the death penalty. There is no new standard by which he could excuse the untimeliness of the new claim.

To the extent Bryant wished to develop new mitigation, that position adds additional bars. In the companion case, filed at the same time as his *Atkins* claim application, Petitioner attempted to raise an ineffective assistance claim regarding mitigation investigation. (See n. 4, supra). Judge Cooper denied those claims. Petitioner argues no law that would allow him to re-

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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 postconviction relief hearing:
   a. Hugh Ryan, Esq., "personally selected" prior PCR counsel.

(Appellate Case No. 2016-002228, Order Granting Respondent's Motion to Dismiss, pp. 7-8 (quoting Application, pp. 2-4)).

litigate that decision by amending this action. Even so, there is no *per se* deficient performance or prejudice for failing to present evidence regarding fetal alcohol exposure. Bryant cites to *William v. Stirling*, 914 F.3d 302 (4th Cir. 2019) to support an assertion that failure to discover and present evidence of fetal alcohol issues may be prejudicial and support a new sentencing hearing. (Petition, p. 20). It did in that case. However, that was finding trial counsel Nettles and Mauldin were deficient in representation – an allegation made in Williams' first PCR action. *See Williams v. Stirling,* 914 F.3d 302, 314 (4th Cir.), *as amended* (Feb. 5, 2019), *cert. denied,* 140 S. Ct. 105, 205 L. Ed. 2d 38 (2019).[5] That is not the case here. It is not the same counsel here. Further, other courts have found the opposite. *See Floyd v. Filson*, 949 F.3d 1128, 1140–41 (9th Cir. 2020) (rejecting an ineffective assistance claim for failure to present expert opinion on fetal alcohol spectrum disorder and distinguishing *Williams v. Stirling*); *Anderson v. Kelley,* 938 F.3d 949, 957 (8th Cir. 2019) (rejecting an ineffective assistance claim finding "[t]hough his case may have benefitted had his counsel investigated FASD, we consider 'not what is prudent or appropriate, but only what is constitutionally compelled'") (quoting *Burger v. Kemp*, 483 U.S. 776 (1987)).

As to his claim concerning *Hurst v. Florida,* 577 U.S. ___, ___, 136 S.Ct. 616 (2016), as a matter of clearly-established federal law, *Hurst* cannot afford relief in a collateral proceeding. The Supreme Court of the United States has expressly held that "*Ring* and *Hurst* do not apply retroactively on collateral review." *McKinney v. Arizona*, 589 U.S. ___, ___,140 S.Ct. 702 (2020) (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding *Ring* did not apply

[5] The Williams Court also noted the double-edged nature of the evidence – that it may also show future dangerousness to the jury. 914 F.3d at 318 n. 8.

retroactively on collateral review)).[6] The claim is not only unavailable for that reason, but it is also procedurally barred in two ways under state law. Bryant's urging that *Hurst* was new law is incorrect under the cited Supreme Court precedent. Further, Bryant raised the *Ring* issue in his trial court level proceedings. (See App. pp. 1902-1905). Bryant's attempt to raise the issue again is also barred by the Simmons Doctrine. *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.").[7] But in addition to these procedural bars, relief is not warranted on the merits. This Court has already ruled, repeatedly, that the issue is without merit. *See, e.g., State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004). The federal courts have likewise found the issue without merit in review of South Carolina's statute. *See, e.g., Allen v. Stephan*, No. 0:18-CV-01544-DCC, 2020 WL 1446717, at *35 (D.S.C. Mar. 25, 2020). But again, this issue is not available for merits review.

Lastly, Bryant may not use Rule 15 to defeat the clear limitations imposed by statute. See also Rule 71.1, SCRCP ("The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act.") (emphasis added). Rule 15 may not be interpreted to allow broad amendment when the statutory limitations regarding successive actions and time bars control. *See Hendricks v. State*, 387 S.C. 221, 223, 692 S.E.2d 892, 893

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[6] *Ring v. Arizona*, 536 U.S. 584 (2002). As observed in *McKinney*, in "*Hurst*, the Court applied *Ring*" in reaching its decision on the Florida procedure. 140 S.Ct. at 707.

[7] It is also without merit because Bryant made a knowing and voluntary waiver. Bryant specifically waived his right to challenge the constitutionality of the controlling statute on sentencing. (App. p. 1344).

(2010) (declining to find Rule 60(b) applicable in post-conviction relief, "Where, as here, the General Assembly has provided a specific procedure to be followed in PCR cases, and that method is inconsistent with the more general procedure of the SCRCP, the statutory procedure must be followed."); *Marichris, LLC v. Derrick,* 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009) ("A rule of civil procedure may not limit the provisions of a statute.") (citing S.C. Const., art. V, § 4 (2009) ("*Subject to the statutory law*, the Supreme Court shall make rules governing the practice and procedure in all such courts.")) (emphasis by court).

Rather than demonstrating an abuse of discretion, Judge Seals' rulings reflect the proper upholding of the statutory restrictions placed on successive and untimely applications.

For all of these reasons, Bryant fails to show any error in Judge Seals' orders denying his attempts to amend the successive PCR application allowed to go forward on the sole issue of an *Atkins* exemption.

II.

> Bryant's suggestion that this Court should direct circuit court judges to draft their own orders in post-conviction relief actions to avoid fact-finding by a litigant is without merit. When circuit court judges adopt the language offered in a proposed order, in whole or in part, the resulting order becomes the court's order.
>
> [Bryant's Issue IV].

This Court has written on this matter in *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). *Hall* did not prevent the practice of submitting a proposed order:

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge 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. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.

360 S.C. at 365, 601 S.E.2d at 341.

More recently, this Court has again acknowledged that calling for proposed orders from litigants remains routine; however, care must be taken in the process:

> The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency."). When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019).

With the Court having just recently spoken on the safeguards to ensure fairness in the procedure, it is unnecessary to scrap the precedent in favor of less structure – essentially placing all requesting of additional findings or reconsideration before the court in the Rule 59 stage (a later submission with the same presentation). Bryant is silent as to allowing adoption of proposed findings through Rule 59 motions. And, as a practical matter, the capital post-conviction relief statute allows for the presentation of post-trial briefing, which is, necessarily, presented in a litigant's preferred phrasing:

> Within thirty days from the receipt of the transcript, or if the judge requests post trial briefs, within thirty days from the receipt of the post trial briefs, the hearing judge in writing shall make specific findings of fact and state expressly the judge's conclusions of law relating to each issue. ....

S.C. Code Ann. § 17-27-160 (D).

Whether taken from a document titled "post-trial brief" or a document submitted as a proposed order, if the PCR judge after careful consideration adopts the language offered, that language becomes the Court's order. The judge is free to accept or reject a proposed phrasing or finding as the Court deems appropriate. What is critical is whether the judge has considered the submission(s) and made the proposed language his own.[8]

As was the case in *Hall*, the record here reflects the PCR judge spent an adequate amount of time reviewing the order before adopting it, and that each party was active in the discussion of the proposed order, and allowed to argue against the adopted findings. (See App. pp. 3381-82, Order Overruling Objections to Proposed Order of Dismissal, outlining procedures and the review of the proposed order "in detail").

The procedure used by the PCR Court was fair and equal, and the arguments for and against fully disclosed and vetted.[9]

Nothing in this record supports Petitioner's assertion that the PCR judge failed to exercise his independent judgment. There is no violation of separation of powers. The Order becomes the judge's order – whether it was Judge Cooper's adoption of Bryant's proposed order, or Judge Seals' adoption of Respondent's proposed order. Bryant's reliance on *Hall* to argue the procedure was infirm and unfair is misplaced.

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8 Similarly, federal law does not prohibit adoption of a proposed order. *See Jefferson v. Upton*, 560 U.S. 284, 293-94 (2010) (acknowledging prior holdings that "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court though recognizing it had "also criticized that practice.") (citing *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)).

9 In fact, in this same action, Judge Cooper adopted the proposed order offered by Bryant. Bryant certainly did not decline to present a proposed order as requested. See generally *Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) ("a party may not complain on appeal of error or object to a trial procedure which his own conduct has induced").

CONCLUSION

Based on the foregoing, the State asks this Court to deny Bryant's petition.

Respectfully submitted,

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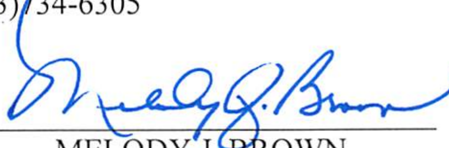
By: 
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May 5, 2020

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