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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2019-000610

Stephen Corey Bryant, ...Petitioner-Respondent,

v.

State of South Carolina, ...Respondent-Petitioner.

Reply to State's Return to Petition for Writ of *Certiorari*

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Questions I, II, and III

After properly allowing Stephen Cory Bryant's PCR application to proceed, the court below abused its discretion by denying Mr. Bryant's motions to amend his PCR application when those amendments were proper under the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10, *et. seq.*

The State's response to Stephen Cory Bryant's petition for writ of *certiorari* ("State's response"), at 10, reasserts the issue the State raised it its cross-appeal, to wit: Mr. "Bryant's PCR action should have been dismissed as improperly successive and untimely. Mr. Bryant's response to the State's petition for a writ of *certiorari* explained why the Honorable Thomas W. Cooper, Jr. properly allowed this case to proceed, and those arguments are incorporated herein by reference.

The State contends Mr. Bryant's argument for allowing the amendments to his PCR application "rests in large part on this Court's prior order that Bryant's first PCR be completed within one year."[1] State's response, at 11; *see also* A. at 1475-76 (prior scheduling order from this Court). Although that order deprived the prior PCR court of its ordinary discretion[2] and limited prior counsel's investigation, Mr. Bryant's proposed

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[1] The parties agree this Court extended the scheduling order in Mr. Bryant's prior PCR case. *Compare* petition for writ of *certiorari* at 4-5 *with* State's response, at 11. The State acknowledges that accelerating capital PCR cases is not the customary practice in our state. *See* State's petition for writ of *certiorari*, at 11, fn. 7 (ordinarily, "a capital PCR action is structured to provide intensive review by counsel with heightened qualifications, assisted by multiple experts, in a virtually limitless time period for case develop[ment].").

[2] *Mangal v. State*, 421 S.C. 85, 99-100, 805 S.E.2d 568, 575-76 (2017) ("[T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural

amendments to his PCR application invoke the protections of the Uniform Post-Conviction Procedures Act. Regarding the two Fetal Alcohol Syndrome Disorder Claims ("FASD") (Questions I and II), Mr. Bryant alleges "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). Regarding the *Hurst v. Florida*, ___, U.S. ___, 136 S. Ct. 616 (2016) claim (Question III), Mr. Bryant asserts that case 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).

The State's response, at 11-12, argues the evidence of FASD "was surely available in prior proceedings." The State, in essence, asks this Court to blame Mr. Bryant, instead of his counsel, for not raising his FASD claim at his sentencing hearing. In his direct appeal, this Court recognized Mr. Bryant is "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." *State v. Bryant*, 390 S.C. 638, 641, 704 S.E.2d 344, 345 (2011). Based on Dr. George Woods' evaluation, we now know:

> Although Mr. Bryant's IQ scores are marginally above those required to meet the criteria for intellectual disability, his adaptive functioning scores obtained by Dr. Everington's testing are consistent with someone suffering from mild intellectual disability. Mr. Bryant has the stigmata of Fetal Alcohol Spectrum Disorder (FASD).

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matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.").

A. 3589-99. In the past, this Court has declined the State's invitation to hold a capital PCR applicant to the same educational standards as appointed counsel. *E.g*. *Robertson v. State*, 418 S.C. 505, 517, 795 S.E.2d 29, 35 (2016) ("We believe it is unreasonable to think that an indigent PCR applicant, who relies on the State to appoint qualified counsel, would have the knowledge to question counsel's qualifications at the onset of the proceeding."). Ordinarily, "a capital PCR action is structured to provide intensive review by counsel with heightened qualifications, assisted by multiple experts, in a virtually limitless time period for case develop[ment]." State's petition for writ of *certiorari*, at 11, fn. 7. If prior post-conviction counsel had the customary time to investigate, then they would have discovered and presented the FASD evidence.

Next, the State's response, at 13, argues "[e]xposure to alcohol as a fetus and past social history were factors considered in the previous proceedings," points to the sentencing hearing testimony of Dr. Donna Schwartz Maddox, and contends trial counsel "can hardly be ineffective" based on the mitigation evidence presented. The United States Court of Appeals for the Fourth Circuit recently rejected this exact argument in *Williams v. Stirling*, observing:

> We note at the outset that most of trial counsels' decisions and actions on issues unrelated to FAS[D] *did* bear the hallmarks of effective assistance: trial counsel had experience in capital cases; counsel consulted with numerous experts in developing a mitigation case; and counsel spent a significant amount of time developing mitigation arguments. But as *Wiggins*[3] makes abundantly clear, an inadequate investigation into potentially mitigating evidence can be, by itself, sufficient to establish deficient performance.

[3] *Wiggins v. Smith*, 539 U.S. 510 (2003).

Williams v. Stirling, 914 F.3d 302, 313–14 (4th Cir. 2019)[4] (emphasis original) (internal citations omitted) (internal footnote added). That FASD required further investigation is the only fair way to construe Dr. Maddox's sentencing hearing testimony, thereby establishing the deficient performance prong of *Strickland*.[5] *And see Wiggins.* The prior PCR proceedings most certainly did not consider "exposure to alcohol as fetus." *Williams*.

Next, the State's response, at 14, argues Rule 15, SCRCP should not apply to this action. This Court must reject this suggestion because the South Carolina Rules of Civil Procedure apply to PCR cases, unless inconsistent with the Uniform Post-Conviction Procedure Act. Rule 71.1, SCRCP; *see also Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019) (denial of motion to amend application for postconviction relief was abuse of discretion). As discussed above and in his petition for writ of *certiorari*, at 11-28, Mr. Bryant's three proposed amendments are authorized by the Uniform Post-Conviction Procedure Act, making it an abuse of discretion to deny those motions. *Love, Mangal*.

In his petition for writ of *certiorari*, at 13, fn. 9, Mr. Bryant argued:

> The PCR court abused its discretion to the extent the court believed it lacked discretion under the Uniform Post Conviction Procedure Act and the Rules of Civil Procedure. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) ("A failure to exercise discretion amounts to an abuse of that discretion.").

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[4] On March 10, 2020, the Court of General Sessions for Greenville County re-sentenced Mr. Williams to life imprisonment without the possibility of parole. *See* https://www2.greenvillecounty.org/SCJD/PublicIndex/CaseDetails.aspx?County=23&CourtAgency=23001&Casenum=H360518&CaseType=C&HKey=847686975576861021077152727298791001108874479873122738610210051104981105383571138010471555688852 (last viewed June 24, 2020).

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

Although acknowledging the PCR court believed it did not have discretion to allow amendments, the State's response, at 15, argues the PCR court "made findings in the alternative." As discussed above and in Mr. Bryant's petition for writ of *certiorari*, at 11-28, the court below abused its discretion by refusing to allow amendments authorized by the Uniform Post-Conviction Procedure Act.

Finally, the State's response, at 18, argues the *Hurst* claim is identical to the claim he raised to the trial court pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002) and could have been raised on direct appeal. As a threshold matter, this Court should not consider the merits of the claim, *at this stage*, because Mr. Bryant was denied the right to amend his application and fully litigate this issue in the court below. Mr. Bryant's petition for writ of *certiorari*, at 23-28, however, explains why *Hurst* established a new constitutional rule requiring jurors to make all findings of fact necessary for *imposition* of the death penalty.

This Court should reverse the PCR court, allow the amendments to the PCR application, and remand for further proceedings.

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 urges this Court deny *certiorari* because it addressed this issue in *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004) and *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019). This Court, however, recently expressed its ongoing frustration with the validity of final orders in PCR cases during the oral argument in *Kevin S. Epting v.*

State, Appellate Case No. 2017-000696, on November 21, 2019, at 11:17 – 13:05.[6] One justice referred to the Attorney General's Office drafting the final PCR order as "the classic case of the fox guarding the henhouse," observed PCR applicants have the right to have their issues litigated, and called on the criminal defense bar "to fix this problem." Another justice stated the entire Court shares these concerns.

In *Fishburne*, this Court recognized the significant issues involved in drafting PCR orders:

> [B]ecause the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80.

427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). *Fishburne* set a lofty goal for "[t]he preparation and finalization of a PCR order [to be] a collaborative effort." 427 S.C. at 516, 832 S.E.2d at 589 (2019). The final order in this case was not a "collaborative effort." Although Mr. Bryant engaged in the process endorsed by *Fishburne*—reviewing the proposed order, making objections, and filing a Rule 59(e) motion—the final order is an advocacy position drafted by "the fox guarding the henhouse," rather than true judicial findings of fact and conclusions of law. Section 17-27-80, in fact, includes the requirement, "***The court*** shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented" (emphasis added). This requirement

[6] http://media.sccourts.org/videos/2017-000696.mp4 (last viewed June 22, 2020). *Epting* involved the Attorney General's Office drafting the final order, the PCR judge signing the order that failed to address all the issues, and the applicant's attorney not filing a Rule 59(e), SCRCP motion. On December 4, 2019, this Court dismissed *certiorari* as improvidently granted.

is exactly why *Hall* "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law in death penalty cases." 360 S.C. at 365, 601 S.E.2d at 341.[7]

The State's response, at 20-21, takes inconsistent positions, neither of which actually address the concerns raised by Mr. Bryant's petition for a writ of *certiorari*. First, the State contends judges drafting final PCR orders would provide "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)." Second, the State points to S.C. Code Ann. § 17-27-160(D), allowing for post-hearing briefs, and contends there would be no difference between a judge making a decision based on a "post-trial brief" as opposed to a "proposed order." These positions fail to address the issue before this Court because neither position recognizes the process contemplated by section 17-27-80. Real litigation involves more than a judge choosing which written arguments of the opposing parties becomes the order of the court. After both parties have a full and fair opportunity to present their positions, the judge alone should draft the findings of fact and conclusions of law. S.C. Code Ann. §17-27-80 mandates this procedure. This Court follows this same procedure when it considers an appeal. The State's positions are inconsistent because a PCR court considering post-hearing briefs provides the structure

[7] The State's response, at 21, fn. 9, attempts to make an issue out of Mr. Bryant submitting a proposed order following the hearing before the Honorable Thomas W. Cooper, Jr. on June 21, 2016. The State misses the point. The proposed order provided to Judge Copper was not a final order as contemplated by section 17-27-80.

The State's response, at 21, fn. 8, argues "federal law does not prohibit adoption of a proposed order;" however, in a federal habeas corpus case, pursuant to 28 U.S.C. § 2254, the United States District Court drafts its own orders.

necessary for the court to make the statutory findings of fact and conclusions of law regarding all the issues raised by the pleadings.

Next, the State's response, at 21, argues, "Nothing in the record supports [Mr. Bryant's] assertion that the PCR judge failed to exercise his independent judgement." In reality, there is nothing in the record indicating the PCR judge exercised independent judgement. The PCR judge did not provide any guidance to the Attorney General's Office regarding the final order at the end of the evidentiary hearing (A. 4073) or at the end of the hearing on Mr. Bryant's objections to the State's proposed order (A. 4089). Nor did the PCR judge provide a memorandum or email providing guidance about the final order.

Finally, the State's response, at 21, summarily argues, "There is no violation of separation of powers," pursuant to S.C. Const. Art. I, § 8. The State, however, never explains how the Attorney General's Office,[8] which is part of the Executive Branch of state government, drafting the final order in a PCR case for a judge, who is a member of the Judicial Department, is consistent with separations of powers. Nor could it because our state's constitution separated these roles of government for this very purpose.

This Court should grant the writ and consider whether the time has arrived to require circuit court judges draft the final orders in PCR cases.

(conclusion on next page)

[8] "The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." S.C. Const. Art. V, § 24. Although the Attorney General is referenced in Article V, section 1-1-110 places the Attorney General in the executive department. Cf. *State v. Langford*, 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012) (Section 1-1-110 of the South Carolina Code (2005) squarely places solicitors in the executive branch.").

CONCLUSION

For the reasons set forth in the petition for writ of certiorari and this reply, this Court should grant the writ and consider the issues.

Respectfully Submitted,

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