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Jul 27 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

NICHOLAS BENJAMIN CHHITH-BERRY,

Appellant.

Appellate Case No. 2019-000352

**MOTION FOR FIFTH EXTENSION OF TIME TO FILE
INITIAL BRIEF OF RESPONDENT AND
DESIGNATION OF MATTER**

The undersigned counsel would respectfully request a thirty (30) day extension in which to file the Initial Brief of Respondent in the above-referenced case. Opposing counsel, Susan B. Hackett, Esq., Appellate Defender has consented to the extension request through July 31, 2020. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

Respondent's Initial Brief is due today, July 27, 2020. The undersigned attorney has completed a portion of the Initial Brief but had a number of other state and federal matters to attend since June 26, 2020. Specifically,

1. Counsel for Respondent has been out of the office on medical leave and is on a

reduced work schedule due to a continuous and on-going health condition. Counsel has been approved for transplant and placed on the transplant waiting list at Duke University Medical Center, Durham, North Carolina for a heart and kidney transplant; counsel has had various medical issues related to said on-going health condition including doctors' appointments, blood draws, ocular migraine headaches, stomach issues with an LVAD implant; and counsel was also asked to leave the office on **March 12, 2020 due to COVID 19**. Counsel is working remotely from home due to safety concerns regarding his immune system and the current situation regarding the Coronavirus.

2. Counsel prepared and filed the Initial Brief of Respondent in State v. Adriel Garnett, Appellate Case No. 2019-000722, a Spartanburg County murder appeal matter now pending in this Court, **filed today, July 27, 2020**;

3. Counsel prepared and filed the Final Brief of Respondent in the matter of State v. Rajshun Bernard Foster, Appellate Case No. 2019-001571, a Cherokee County murder appeal matter now pending in this Court, **filed on Thursday, July 23, 2020**;

4. Counsel prepared and filed the Reply to Petitioner's Response to Motion for Summary Judgment in Alfonzo Staton v. Warden (Murder, Kidnapping, Conspiracy)[Federal Habeas Corpus] on **Monday, June 29, 2020** in United States District Court. The Petitioner is raising an actual innocence claim, in his 26 page Response to the State's summary judgment motion, to overcome procedural defaults, that has required undersigned counsel to review the entire transcript of Petitioner and his co-defendants' trial from 1997 and brief the U.S. District Court on the evidence of Petitioner's guilt and respond to Petitioner's claims in his Response. This has required a significant amount of time and work by counsel. Petitioner was tried with 5

co-defendants in Marlboro County for the murder of Darlene Patterson, whose duct-taped body was found floating in a creek on Burnt Factor Road on Thanksgiving Day 1994.¹

5. Counsel for Respondent prepared and filed a Status Report in Kinjta Sadler v. Warden, C/A No. 8:19-0113-TMC-JDA (Federal Habeas Corpus) **on July 21, 2020**;

6. Counsel prepared and filed the Reply to Petitioner's Response to the Motion for Summary Judgment in the matter of Kentrell Treville Liburd v. Warden Charles Williams, Jr., C/A No. 0:20-1746-SAL-PJG (Federal Habeas Corpus) (Voluntary Manslaughter and Armed Robbery) **on July 13, 2020**, in the United States District Court for the District of South Carolina;

7. Counsel also prepared and filed the Response to Petitioner's Motion to Stay in Timothy Dingle v. Warden (Federal Habeas Corpus)(Murder (2 counts) and Arson 1st degree), **filed on July 16, 2020** in United States District Court for the District of South Carolina;

8. Counsel prepared and filed the Response to the Motion to Amend/Correct the Federal Habeas Petition in Dennis Rodger Davis, Jr. v. Tonya James, C/A No. 0:19-2720-TLW-PJG **on July 7, 2020**, in United States District Court;

9. Due to the issues raised in this case, counsel has requested evidence from the Lexington County Solicitor's Office which has not been received as of the date of the filing of this extension request and which is necessary for the completion of the initial brief;

10. Counsel has been involved in working **on other matters in state and federal court** as well. However, due to counsel's medical condition, treatment, and preventative safety measures, and the other matters counsel has been working on and/or filed in this Court and United States District Court, counsel was unable to timely complete the Initial Brief of

¹ This federal habeas petitioner, Alfonzo Staton, was tried jointly with Leroy Staton, Ricky Stuckey, Robert Graham, Martin McIntosh, and Jeffrey Walls. Ringo Pearson was also a co-defendant. The trial transcript exceeds 1.000 pages.

Respondent and Designation of Matter in this matter. Opposing counsel has graciously consented to this extension request.

Respondent will make this brief a priority in the next 30 days. Respondent's attorney has previously requested evidence from the Lexington County Solicitor's Office, and has re-requested the same evidence mentioned above.

WHEREFORE, for extraordinary circumstances shown, counsel respectfully requests a thirty (30) day extension of time to serve and file the Initial Brief of Respondent and Designation of Matter. This request is made in good faith, and not for the purposes of delay.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Senior Assistant Attorney General
No. 11973

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By: s/J. Anthony Mabry
J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

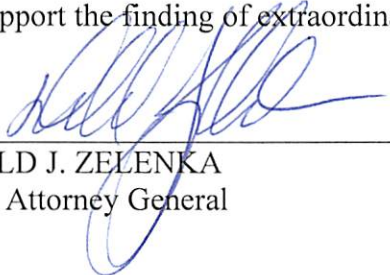
July 27, 2020

I hereby support the finding of extraordinary circumstances.



MELODY J. BROWN
Senior Assistant Deputy Attorney General

I too support the finding of extraordinary circumstances.



DONALD J. ZELENKA
Deputy Attorney General

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NICHOLAS BENJAMIN CHHITH-BERRY,

Appellant.


Appellate Case No. 2019-000352

PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Fifth Extension of Time to File Initial Brief of Respondent and Designation of Matter has been forwarded to appellant's counsel, Susan B. Hackett, Esq., via email today, July 27, 2020 to shackett@sccid.sc.gov, and to her assistant kkasperski@sccid.sc.gov and by depositing one copy of the same in the United States mail, postage prepaid, and addressed to his attorney of record: Susan B. Hackett, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201.

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

This 27th day of July, 2020.



Donna D'Alessio, Legal Assistant to
J. Anthony Mabry,
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

Donna D'Alessio

From: Donna D'Alessio
Sent: Monday, July 27, 2020 9:21 AM
To: shackett@sccid.sc.gov
Cc: Kasperski, Katriel (kkasperski@sccid.sc.gov)
Subject: Chhith-Berry, Nicholas B. - Appellate Case No. 2019-000352 - Fifth Ext of time to file IBOR
Attachments: Chhith-Berry, Nicholas B. - Appellate Case No. 2019-000352 - Mtn for 5th ext of time to file IBOR (02335370xD2C78).pdf

Dear Ms. Hackett:

Attached is a scanned copy of the Respondent's Fifth Extension of Time to file Initial Brief of Respondent and Designation of Matter, and Certificate of Service regarding the above matter. A paper copy is being mailed to you this afternoon. The Fifth Extension of Time and supporting documents are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Hope you are well, and thank you.

Donna D'Alessio, Legal Assistant
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