

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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May 21 2021

S.C. 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.

PETITION FOR REHEARING

By written order dated May 7, 2021, amended on May 11, 2021, this Court denied cross-petitions for writs of *certiorari* in this capital post-conviction relief (“PCR”) case. Pursuant to Rule 221(a), SCACR, Stephen Corey Bryant petitions for rehearing because this Court overlooked or misapprehended the matters set forth in this pleading.

Threshold Matter

The May 7, 2021 order states this Court denied the cross-“petitions seeking writs of *certiorari* to review the decision of the court of appeals.” The May 11, 2021 order states this Court denied the cross-“petitions seeking writs of *certiorari*.” Because Mr. Bryant’s case involves a “final judgment from the circuit court which includes a sentence of death,” Rule 203(D)(1)(a)(i), SCACR required the cross-notice of appeal to be filed in this Court, meaning the Court of Appeals was never involved in this case. The reference to the Court of Appeals in the May 7, 2021 order suggests this Court might not have understood (a) the

procedural posture of this case and (b) that Mr. Bryant is under a sentence of death. Although the May 11, 2021 order deletes the reference to the Court of Appeals, this order does not make it clear this Court understood the cross-petitions involved appeals from a “final judgment from the circuit court [rather than the Court of Appeals] which includes a sentence of death,” and which implicates Rule 203(D)(1)(a)(i), SCACR. This error is particularly concerning to Mr. Bryant because Questions I and II presented in Mr. Bryant’s petition for a writ of *certiorari* raise questions about the adequacy of the process provided to him by the South Carolina state courts, including this Court, during his prior PCR case.

As discussed in his petition for a writ of *certiorari* (and other pleadings in this Court and the court below), this Court departed from the ordinary procedures in Mr. Bryant’s initial PCR case when it ordered, “[A]bsent an extension of time by this Court, a final hearing shall be held and a final order issued in this matter within one year of this order.” A. 1475-76 (emphasis added). This Court thus limited the discretion of the initial PCR judge, contrary to S.C. Code Ann. § 17-27-160(C) and the longstanding discretion afforded to PCR courts. *See, e.g., Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019); *Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017); *Winkler v. State*, 418 S.C. 643, 795 S.E.2d 686 (2016). Although this Court ultimately granted Mr. Bryant’s extension requests (Supplemental A. 90-91), his evidentiary hearing convened on October 1, 2012 (A. 1639), which was within nineteen months of this Court’s order March 3, 2011 assigning Judge Cothran (A. 1475-76).

As pointed out throughout the Circuit Court and appellate records, Mr. Bryant identified only two other cases where this Court issued orders requiring capital PCR cases to be resolved within one year: *Starnes v. State*, Case No. 2011-CP-32-00830 and *Torres*

v. State, Case No. 2011-CP-42-01851 (currently pending at Appellate Case No. 2020-000842). A. 3648-70. According to a review of the Public Index while preparing this petition for rehearing, *Starnes* is still pending in the Circuit Court pre-evidentiary hearing,¹ and the Circuit Court did not conclude *Torres* until May 8, 2020 when it denied Mr. Torres Rule 59(e), SCRCP motion.² For reasons still unknown to Mr. Bryant, his prior PCR case is the only one of these three capital PCR cases that enforced this Court’s order limiting the PCR judge’s customary discretion to continue the case based on a showing of “good cause.” S.C. Code Ann. § 17-27-160(C); *see also Love, Mangal, and Winkler*.

To its credit, this Court has a history of acknowledging and correcting its errors that prejudice a litigant. In *State v. Beaty*, this Court “acknowledge[d] the general sessions benchbook this Court previously supplied to all circuit judges contained language virtually identical to the disputed language employed by the trial judge” in Mr. Beaty’s case. 423 S.C. 26, 34, fn. 2, 813 S.E.2d 502, 506, fn. 2 (2018). In *Robertson v. State*, this Court acknowledged the role played by “a memorandum,” issued by a former Chief Justice of this Court, “that was sent to all circuit court judges,” in contributing to confusion about the required qualifications of appointed counsel, pursuant to S.C. Code Ann. § 17-27-160(B), in a capital PCR case. 418 S.C. 505, 512, fn. 10, 795 S.E.2d 29, 32, fn. 10 (2016). In *Robertson*, this Court created a procedure, within the context of the Uniform Post

¹<https://publicindex.sccourts.org/Lexington/PublicIndex/CaseDetails.aspx?County=32&CourtAgency=32002&Casenum=2011CP3200830&CaseType=V&HKey=107667952849011947559811099716886110905555861228990118104486876103698351681224869501167274497881> (last viewed May 21, 2021).

²<https://publicindex.sccourts.org/Spartanburg/PublicIndex/CaseDetails.aspx?County=42&CourtAgency=42002&Casenum=2011CP4201851&CaseType=V&HKey=6847122881161214766112759012182471135011811710287122487947826999725787519811382106105105107839810211377> (last viewed May 20, 2021).

Conviction Procedures Act,³ where an aggrieved capital PCR litigant has the opportunity to demonstrate his PCR counsel was not qualified and the resulting prejudice.⁴ *Id.*, 418 S.C. at 522, 795 S.E.2d at 38. The *Robertson* procedure is consistent with this Court’s “inherent power to control the order of its business to safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

The procedure created by this Court in *Robertson* applies to a finite class. In addition to Mr. Robertson, only two other death-sentenced inmates invoked this procedure: *Stephen C. Stanko v. State*, 2008-CP-22-01446 (on remand from Appellate Case No. 2017-000211) and *Abdiyyah Ben Alkebulanyahh (AKA Tyree Roberts v. State*, Case No, 2014-CP-07-02994 (currently pending at Appellate Case No. 2019-000529). As seen, Mr. Bryant is the only capital PCR litigant prejudiced by the expedited procedure this Court imposed on the Circuit Court in his prior PCR. The Uniform Post Conviction Procedures Act is flexible enough for this Court to provide Mr. Bryant a remedy. Because of the unique circumstances of this case, providing Mr. Bryant a remedy will not open a floodgate of litigation because no other death-sentenced inmate—nor any non-capital PCR litigant for that matter—has ever been subjected an (enforced) order of this Court limiting the discretion of the Circuit Court to control the scheduling of a PCR case.⁵

³ S.C. Code Ann. § 17-27-10, *et. seq.*

⁴ *Robertson* held “non-compliance with section 17-27-160(B) constitutes deficient performance per se” under the *Strickland v. Washington*, 466 U.S. 668 (1984) test. 418 S.C. at 521, 795 S.E.2d at 37 (2016). Under the *Robertson* procedure, the aggrieved inmate must establish prejudice under the *Strickland* test. *Id.*

⁵ Providing Mr. Bryant a remedy under the unique circumstances of this case also would be consistent with other situations where this Court provides a remedy for a breakdown in the judicial system within the context of the Uniform Post-Conviction Procedures Act. *See, e.g., Mack v. State*, No. 2020-000329, 2021 WL 1659859 (S.C. Apr.

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)?

As set forth in Mr. Bryant’s petition for a writ of *certiorari* (and other pleadings in this Court and the court below), his federal *habeas* counsel was concerned about the adequacy of the pre-trial General Sessions Court and PCR court mitigation investigations, including but not limited to the failure to investigate, develop, and present evidence that Mr. Bryant suffers from Fetal Alcohol Spectrum Disorder (“FASD”), which can be mitigation evidence justifying ordering a new sentencing hearing. *See, e.g., Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019). Dr. George Woods diagnosed Mr. Bryant with FASD (A. 3589-99), and Dr. Donna Schwartz Maddox agreed with this diagnosis (A. 4061-70). In his petition for a writ of *certiorari*, Mr. Bryant contends the PCR court abused its discretion by not allowing him to amend his PCR application to assert this claim.

28, 2021) (as a matter of first impression, an applicant for post-conviction DNA testing may petition for belated appellate review of denial of application if applicant was prevented from seeking appellate review); *Robertson, supra*; *Odom v. State*, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (“Odom never received a complete ‘bite at the apple’ because both of his PCR applications were summarily dismissed before he was appointed legal counsel.”); *Carter v. State*, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987))Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.”).

The facts and legal arguments set forth in Mr. Bryant's petition for a writ of *certiorari* and his reply to the State's return to his petition for a writ of *certiorari* that support this argument are incorporated by reference.

Mr. Bryant further contends that this Court's order limiting the discretion of the initial PCR court contributed to the inability of his prior PCR counsel to investigate, develop, and present evidence of FASD. As Discussed above, Mr. Bryant respectfully requests this Court correct the prior PCR deficiencies by allowing him to amend his current PCR application, complete his FASD investigation, and proceed to an evidentiary hearing.

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)?

FASD "is a severe, chronic condition found to be closely related to intellectual disability or to require treatment similar to that required for persons with intellectual disability." S.C. Code Ann. § 44-20-30(15); *see also* A. 3899-3906 (Dr. Woods discussing diagnostic criteria for a "related disability" and the treatment he would provide Mr. Bryant). As a "related disability" (*id.*), Mr. Bryant contends FASD should be a categorical bar to capital punishment. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). In his petition for a writ of *certiorari*, Mr. Bryant contends the PCR court abused its discretion by not allowing him to amend his PCR application to assert this claim.

The facts and legal arguments set forth in Mr. Bryant's petition for a writ of *certiorari* and his reply to the State's return to his petition for a writ of *certiorari* that support this argument are incorporated by reference.

Mr. Bryant further contends that this Court's order limiting the discretion of the initial PCR court contributed to the inability of his prior PCR counsel to investigate, develop, and present evidence of FASD, which in turn led to prior PCR counsel not asserting this claim. As discussed above, Mr. Bryant respectfully requests this Court correct the prior PCR deficiencies by allowing him to amend his current PCR application, complete his FASD investigation, and proceed to an evidentiary hearing.

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. Florida*, 577, U.S. 92 (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)?

Prior to his guilty plea, Mr. Bryant requested to be sentenced by a jury. He asked this Court to intervene by filing an interlocutory petition for writ of *certiorari*, based on *Blakely v. Washington*, 542 U.S. 296 (2004), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Supplemental A. 1-89. After the conclusion of Mr. Bryant's prior PCR case, the Supreme Court of the United State decided *Hurst v. Florida*, 577, U.S. 92 (2016). Mr. Bryant contends *Hurst* 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). In his petition for a writ of *certiorari*, Mr. Bryant contends the PCR court abused its discretion by not allowing him to amend his PCR application to assert this claim.

The facts and legal arguments set forth in Mr. Bryant's petition for a writ of *certiorari* and his reply to the State's return to his petition for a writ of *certiorari* that support this argument are incorporated by reference.

Because this claim is cognizable under S.C. Code § 17-27-45(B), this Court should grant rehearing, reverse the trial court, allow the amendment, and remand this case for the PCR court to make findings of facts and conclusions of law as required by S.C. Code Ann. §17-27-80.

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?

In Mr. Bryant's prior PCR proceedings, and during the proceedings in the court below in this PCR case, the PCR courts relied on the Attorney General's office to draft the final orders. This Court frowns on that practice. *See, e.g., Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004); *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992); *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). During the pendency of this appeal, in *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019), this Court once again expressed its dissatisfaction with the process for drafting final orders in PCR cases. Final orders drafted by an advocate, rather than a judicial officer, is a systemic problem that calls into question the state-court post-conviction proceedings reviewing Mr. Bryant's death sentence. Mr. Bryant contends this Court should require PCR courts to draft the final orders in PCR cases as required by S.C. Code Ann. §17-27-80. Mr. Bryant also contends allowing

an executive officer to draft final orders in PCR cases violates the separation of powers between the judicial branch and executive branch as required by S.C. Const. Art. I, §8?

The facts and legal arguments set forth in Mr. Bryant's petition for a writ of *certiorari* and his reply to the State's return to his petition for a writ of *certiorari* that support this argument are incorporated by reference.

For the reasons set forth in Questions I, II, and III, this Court should reverse the PCR court and allow Mr. Bryant to amend his PCR application. For the reasons set forth in Question IV, this Court should require the PCR court to drafts the final order following Mr. Bryant's evidentiary hearing.

CONCLUSION

For the reasons set forth in Mr. Bryant's petition for a writ of *certiorari*, his reply to the State's return to his petition for a writ of *certiorari*, and this pleading, this Court should rehear this matter and correct the prior PCR deficiencies by allowing him to amend his second PCR application, complete his FASD investigation, and proceed to an evidentiary hearing.

IT IS SO MOVED.

Respectfully submitted,

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