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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

Respondent,

v.

GARY DUBOSE TERRY,

Appellant.

Appellate Case No. 1997-006197

MOTION TO RECONSIDER STAY OF EXECUTION NOTICE

On January 10, 2022, Appellant Terry filed a Motion to Stay the Setting of an Execution Date Pursuant *to State v. Sigmon*, No. 2000-024388 (June 16, 2021), and *State v. Owens*, 2006-038802 (June 16, 2021). Respondent opposed the motion in a Response in Opposition to Stay of Execution Notice filed March 28, 2022. The Court then filed an April 6, 2022 Order, in which it granted a stay because Terry had filed a second successive PCR application "alleging he has an intellectual disability that renders him ineligible for the death penalty under *Atkins v. Virginia,* 536 U.S. 304, 321 (2002). The Court's Order stayed issuance of the Execution Notice "while he pursues this PCR action." Respondent would move the Court to reconsider its April 6th Order for the following reasons:

As noted on p. 3 of the March 28 Return, Terry did not request "a stay so that he can litigate a second successive PCR action in *Gary Dubose Terry v. State*, 2022-CP-32-00924." Because he did not assert this action as a reason for granting a stay, Respondent did not assert facts that warrant

denial of a stay because Terry cannot show "exceptional circumstances warranting the issuance of the stay," *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996), in his case.

First, Terry's trial counsel affirmatively presented evidence to the sentencing jury that he was not intellectually disabled. Although the primary focus of counsel's sentencing phase presentation was that he had brain damage and this brain damage explained his willingness to confess to crimes he did not commit and explained his violent criminal history. However, trial counsel also presented evidence that he had been tested for and was found not to be mentally retarded, or as it is presently called, intellectually disabled. Specifically, Dr. Robert Deysach, a clinical neuropsychologist who is board certified as a forensic psychologist with a specialty in neuropsychology (***App. 1994-97***) "reviewed a series of hospital records," including Terry's records from Charter Rivers[1] and his school records, to decide whether additional neuropsychological testing was warranted because the Charter Rivers records indicated both explosive behavior by Terry and an abnormal CAT scan, which depicted a "lunar infarction, [or] dead cells involving the basal ganglia in his brain." ***App. 1997-2004***.

This area of the brain is "up in the right frontal area and it serves sort of as a relay station for information that's going down to the body assisting in its movement and its actions." After seeing this information, Dr. Deysach met with Terry twice and he did general ability testing. This revealed that Terry's intellectual functioning was "in the low average range," but that he was not intellectually disabled. Other testing reflected that there was no damage to the left side of Terry's brain. He also

[1] The Charter Rivers Hospitalization occurred outside of the developmental period when he was married to Lou Ann Terry. *E.g.,* ***App. 1894; 1936***.

did not have any problems with the right portion of his brain that is involved in perceiving information. Yet, there were problems with Terry's right frontal lobe. In particular, he performed in the "abnormal range" for his age and he had "specific difficulties in ... inhibiting and focusing [his] attention," as well as similar tasks. Dr. Deysach explained that Terry had "an abnormal condition of the brain that tends to be a powerful factor in controlling abnormal behavior." ***App. 2004-12***.

Dr. Deysach opined that Terry had "a neuropsychological deficit that ... appeared to be consistent with the indication he had of brain injury and that it was due to an abnormality of the brain." This was consistent with Terry's 1994 diagnosis and the CAT scan. Dr. Deysach further opined that persons with this type of deficit often cannot manage themselves in unpredictable daily living conditions. However, they adapt to a structured environment. ***App. 2013-14***.

The following exchange between Terry's lead trial counsel and Dr. Deysach unequivocally demonstrates the patently frivolous nature of any claim that Terry is intellectually disabled and that the current action is nothing more than a dilatory tactic designed to frustrate justice and Terry's lawful execution:

> Q DID YOU RELY ON [A CAT SCAN] IN MAKING YOUR DETERMINATION CONCERNING MY QUESTIONS?
>
> A YES. WHAT I DECIDED ON THE BASIS OF THAT WAS THAT [THE CAT SCAN] WAS SUFFICIENT FOR ME TO THEN TAKE THE NEXT STEP AND THAT WAS TO ACTUALLY MEET WITH AND TEST MR. TERRY.
>
> Q NOW, DID YOU MEET WITH AND TEST MR. TERRY?
>
> A YES, I DID ON TWO SEPARATE OCCASIONS.
>
> Q ALL RIGHT. AND WHAT WERE THESE TESTING PROCEDURES THAT YOU DID?
> A … ACTUALLY, … I WAS ATTEMPTING TO DO TWO THINGS.
>
> THE FIRST THING THAT I DID WAS I DID SOME GENERAL ABILITY

TESTING. **I GAVE HIM A BATTERY OF TESTS IN WHICH I WANTED TO MAKE A DETERMINATION OF WHETHER OR NOT … I WAS DEALING WITH SOMEBODY WHOSE BEHAVIOR FELL IN** THE RETARDED RANGE, **MENTALLY RETARDED RANGE OR NOT**. DEPENDING ON WHETHER OR NOT HIS PERFORMANCE IS RETARDED, THEN I WOULD EXPECT, PERHAPS, PROBLEMS IN A LOT OF DIFFERENT AREAS.

… IF HIS INTELLIGENCE WAS, HOWEVER, IN THE NORMAL RANGE, THEN IT MIGHT ALLOW ME TO TAKE THE NEXT STEP AND THAT IS TO DO SOME TESTING THAT WOULD ALLOW ME TO SPECIFICALLY LOOK AT PARTICULAR PARTS OF THE BRAIN AND THE RELATIONSHIPS WITH BEHAVIOR THAT THAT PART OF THE BRAIN CONTROLS.

Q **WAS GARY TERRY RETARDED**---

A **NO**, HIS---

Q ---EXCUSE ME, LET ME REPHRASE THAT. **DID YOUR TEST REFLECT THAT GARY TERRY WAS RETARDED**?

A **NO. HIS PERFORMANCE FELL IN THE LOW AVERAGE RANGE**.

Q OKAY. BUT NOT RETARDED?

A **BUT NOT REGARDED**. [(Sic)]

Q OKAY. WHAT DID YOUR TEST REFLECT?

A … ON THAT BATTERY OF TESTS WHICH IS A TEST OF GENERAL INTELLIGENCE, THERE IS ONE OF THOSE SUB-TESTS THAT TENDS TO BE THE MOST SENSITIVE TO ABNORMAL BRAIN FUNCTIONING AND OF THE ELEVEN SUB-TESTS ON THAT BATTERY, THE ONE THAT WAS THE MOST SENSITIVE, MOST LIKELY TO BE AFFECTED BY ABNORMAL BEHAVIOR WAS THE ONE THAT WAS THE LOWEST.

SO AGAIN, IT DOESN'T TELL ME ABOUT BRAIN DAMAGE OR NOT BRAIN DAMAGE, BUT, AGAIN, IT'S SUGGESTIVE OF INFORMATION THAT WOULD ALLOW ME THEN TO TAKE THE SUBSEQUENT STEP AND THAT IS TO DO A SERIES OF TESTS IN AREAS SOME OF WHICH I EXPECTED HIM TO PERFORM NORMALLY BECAUSE THEY WERE REFLECTING SKILLS THAT WERE IN PARTS OF THE BRAIN THAT I DID NOT FEEL THAT THERE WAS ANY INDICATION OF DAMAGE AND SOME OF THOSE---

App. 2005, l. 8 – 2007, l. 5 (emphasis added).

The Court may have overlooked this affirmative presentation of expert testimony Terry is not intellectually disabled.

Additionally, the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), was filed twenty years ago, and this Court's decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), was decided the next year. Terry could have filed the current Application at any point after these cases but chose not to do so. In particular, Terry's request was unique because this is Terry's second successive PCR. To the extent there is any plausible merit to the claim he is intellectually disabled, he could have raised the claim no later than in his first successive PCR Application, (2012-CP-32-02718), which he filed on June 29, 2012, or almost a decade ago. Again, he chose not to do so. Instead, he chose to delay the filing until twenty-five years after his conviction and sentence, and after he had exhausted all other available state and federal appellate remedies.

Under these circumstances, his second successive Application should be barred by the affirmative defenses of the statute of limitations, S.C. Code Ann. § 17-27-45(A) (Supp. 2022), and as impermissibly successive to his original PCR Application and his first successive Application. At the very least, a motion hearing should be held to address these defenses. Otherwise, the Court has frustrated the much needed principle of finality of litigation and deprived the victim's family and the State of the closure and justice that has already been a quarter century in coming.

"[T]he principle of finality ... is essential to the operation of our criminal justice system" because "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). *Teague* added, "[t]he fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none.' " *Id*. (Citation omitted). *See also*

Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). In observing the balance of equities disfavors last-minute delay, the Supreme Court continues to recognize: "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1133 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). And, this Court stated in *Williams v. Ozmint*, 380 S.C. 473, 480, 671 S.E.2d 600, 603 (2008), that:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. [*Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *Id*.

It is evident that the balance does not tilt in Terry's favor in this latest request.

Finally, the issuance of a stay to Terry to pursue a claim that he is intellectually disabled twenty-five years after his trial counsel affirmatively presented the sentencing jury with evidence that he was tested for mental retardation (intellectual disability) by a neuropsychologist but found not to be mentally retarded would all but guarantee that every death sentenced inmate will pursue such a claim, no matter how frivolous. *Contra Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (" '[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true' ") (quoting Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)); *Stein v. New York*, 346 U.S. 156, 197 (1953) ("The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law").

THEREFORE, for the foregoing reasons, Respondent submits the Court should grant this motion

and lift the previously issued stay.

Respectfully Submitted,

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