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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

REPLY TO RESPONSE TO MOTION TO RECONSIDER STAY OF EXECUTION NOTICE

Appellant Terry's Response to Respondent's Motion April 13, 2022 Motion to Reconsider Stay of Execution Notice underscores the merits of Respondent's motion and demonstrates that he cannot prevail on the allegations in his frivolous second successive Application for Post-Conviction Relief.

Separate and apart from the fact Terry did not request a stay to pursue his claim that he is intellectually disabled and thus not eligible for the death penalty under *Atkins v. Virginia,* 536 U.S. 304, 321 (2002), Respondent submits that Terry's attack on the neuropsychological testing by Dr. Robert Deysach lacks merit. He attacks that testing because (1) it was done five years before the United States Supreme Court's decision in *Atkins*, (2) "At the time, mental health professionals (and lawyers for capital defendants) did not have the incentive to conduct the type of analysis and investigation necessary to distinguish between intellectual disability and borderline or low-average

functioning … because nothing of legal consequence flowed from doing so," and (3) Dr. Deysach's testimony was "offered by the defense in mitigation of punishment as part of a (poorly conceived and implemented) assertion of brain damage." None of these points is meritorious.

First, *Atkins* did not alter the definition of "mental retardation or, as it is recently termed, "intellectual disability." *Id*. at 318. As Respondent argued in the original motion, *Atkins* was decided in 2002, and this Court's decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003),[1] was decided the next year. At any point since those decisions, Terry could have filed the current Application but chose not to do so. Specifically, he could have pursued this claim in his first successive PCR Application, (2012-CP-32-02718), which he filed on June 29, 2012, or in federal habeas corpus. His failure to raise the claim until awaiting an execution notice after exhausting all other available state and federal appellate remedies is telling as to the true nature of his current Application. Why else would he wait to present a claim that makes him ineligible for the death penalty if not to delay his lawful execution?

Second, Terry's efforts to explain away the inability to go behind Dr. Deysach's testimony and conclusions underscores that his current Application is frivolous and dilatory. In particular, he admits in footnote 1 that his attorneys, despite their best efforts, "have been unable to obtain raw data or the file from [Dr. Deysach]." He further admits that Dr. Deysach "is now retired and elderly," and that Dr. Deysach's file relating to his evaluation of "Terry was most likely destroyed many years ago." Thus, he cannot prove his contention that neither trial counsel nor Dr. Deysach had "the

[1] Respondent notes that *Franklin* does not provide an exception for post-*Atkins* cases regarding time and successive application limitations. These are statutory provisions applicable to all PCR actions. Again, Respondent would seek to present these affirmative defenses, as discussed in the original motion. Also, the defense of laches should be available as well. *See* discussion, *infra*.

incentive to conduct the type of analysis and investigation necessary to distinguish between intellectual disability and borderline or low-average functioning" because the relevant records have been destroyed. His claim in that regard is purely speculative.

This claim likewise appears to be inconsistent with the trial record. Dr. Deysach testified that he had "reviewed a series of hospital records," including Terry's records from Charter Rivers 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***. In addition, social worker Janet Vogelsang, who the psychosocial assessment of Terry, testified that she interviewed Terry (four times); Lou Ann Terry (twice); Patricia Terry (seven times); his sister; his father (seven times); his brother, Billy; his sister, Faye, his brother, Johnny; Johnny's wife; a former girlfriend, Rhonda; his sister-in-law, Patty; Tammy Griffin; his sons Morgan and Dubose (twice); his daughter, Ashley; his aunt, Marie Steel; and, by telephone his great aunt, Louise Mauldin. She also attempted to speak with other people. ***App. 1953-54***. Additionally, she reviewed a number of records for Terry and his family,[2] and she spoke to the defense experts in the case. ***App. 1954-56***. It is unrealistic to assume that Ms. Vogelsang did not share her findings with the experts

[2] She reviewed roughly four years of Mrs. Terry's diary entries, which spanned from when Terry was twelve until his arrest; school records for his immediate family and more distant relatives; DSS records on Lou Ann and Terry; DSS records on his brothers, Billy and Johnny; "records .. or documents on two of Billy's sons; the custody papers for his sister Faye; Terry's "corrections records, ... the priors on him, ... and his two brothers and two of his uncles;" medical records of Terry, his parents and his brothers; mental health records and psychological evaluations of Terry, his sister Faye, his brother Johnny, and two of his nieces; the school psychosocial education evaluations for one son and his daughter Ashley; "the reports of the crime" and crime scene photographs; the SPECT scan report from the radiologist; a statement from Dr. Jim Steele concerning the treatment of Terry's father; marriage and birth certificates; and a portion of Terry's taped statement. ***App. 1954-56***.

and vice versa.

At the very least, Terry's representations to this Court demonstrate that either he will not be able to meet his burden of proof because he has presented evidence at trial contrary to his present claim, or that Respondent has the potential defense of laches that it should be allowed to present as a matter of fairness because Respondent cannot obtain the raw test data from Dr. Deysach's testing or his file. See *Mid-State Tr., II v. Wright*, 323 S.C. 303, 307, 474 S.E.2d 421, 423–24 (1996) (defining laches as neglect in bringing a claim for an unreasonable period that results in material prejudice to the opposing party and stating whether laches applies is highly fact-specific, "so each case must be judged on its own merits"); *Sloan v. Dep't of Transp.*, 379 S.C. 160, 174, 666 S.E.2d 236, 243 (2008) (laches bars a cause of action "if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position") (quoting *Chambers of S.C., Inc. v. Cty. Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993).

Of course, Terry's assertion that "nothing of legal consequence" would have resulted from a diagnosis of mental retardation is legally incorrect because §16-3-20(C)(b)(10) (Supp. 1997) provided that mental retardation was a statutory mitigating circumstance and the statutory mitigator was defined in terms similar to those presently used to define intellectually disabled. So, a conclusion that Terry was mentally retarded would have been yet another statutory mitigating circumstance that trial counsel could have presented to the sentencing phase jury.

Nor does his reliance on other cases, such as *Elmore v. State* No. 05-CP-24-1205, *Bell v. State* No. 2003-CP-04-1857, *Simmons v. State* No. 05-CP-18-1368 support the grant of a stay in this case. Those cases say nothing about Terry's intellectual functioning or the merits of Terry's second

successive PCR action. Further, in *Bell*, there was evidence presented in the original PCR tending to suggest that he was mentally retarded, contrary to Terry's representation. *See* ***PCR App. 2079-92***. *See also* ***Feb. 12, 1996 PCR transcript vol. 3, pp. 47-48*** (testimony of Dr. George Wood). Moreover, in *Bryant v. State*, Appellate Case No. 2019-000610 (certiorari denied May 7, 2021), a stay was granted and the case delayed for years even though Bryant did not have evidence he met the first prong for an intellectual disability claim.

Finally, Respondent again asserts that at least, it should be heard on its affirmative defenses of statute of limitations, successiveness, and laches. As the Supreme Court in *Atkins* recognized, "Not all people who claim to be [intellectually disabled] will be so impaired as to fall within the range oof [intellectually disabled] offenders about whom there is a national consensus. *Atkins*, 536 U.S. at 317. Wholesale abandonment of well settled procedural bars removes all incentive to timely bringing the claim and encourages late, bare bones claims prompting unwarranted delay. *Cf. Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish").

THEREFORE, for the foregoing reasons, Respondent submits the Court should grant the motion to reconsider and lift the previously issued stay.

Respectfully Submitted,

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