Case No.___

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSISSIPPI,
Respondent.

v.

JAMES COBB HUTTO,
Applicant.

ON APPLICATION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO JUSTICE SAMUEL A. ALITO, JR. OF THE SUPREME COURT OF THE UNITED STATES

MOTION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Samuel A. Alito, Jr., Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the 5th Circuit.

Pursuant to Supreme Court Rule 13.5, Applicant James Cobb Hutto III, respectfully requests that the time to file a petition for a writ of certiorari in this matter be extended by 60 days, up to and including December 22, 2024. In support thereof, Applicant states as follows:

1. The judgment from which review is sought is an *en banc* order by the Mississippi Supreme Court denying Applicant's Motion for Leave to File a Successive Petition for Post-Conviction Relief. A copy of that decision is attached as Appendix 1.

2. The current deadline for filing a petition for writ of certiorari is October 23, 2024.

3. The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE REQUESTED EXTENSION OF TIME

Applicant respectfully submits that a 60-day extension of time within which to file a petition for writ of certiorari is necessary and appropriate for the following reason: An extension of time will help to ensure that significant issues relating a death-sentenced inmate's competency during his post-conviction proceeding is adequately developed and presented to this Court for its consideration.

Applicant's counsel, Elizabeth Franklin-Best has been engaged in a number of professional matters including: Filing an opening brief and relevant excerpts in the

Fifth Circuit Court of Appeals on September 3, 2024, *United States v. James Peabody*, Case No. 24-10270; filing an amended brief in the D.C. Circuit Court of Appeals on September 17, 2024, *United States v. Daniel Phipps*, Case No. 23-3142; two federal sentencing proceedings on August 29, 2024 and September 3, 2024, *United States v. Martrell Johnson-Cooke*, C/A 3:23-cr-00594-MGL and *United States v. Tyrese Young*, C/A: 3:23-cr-00228-MGL, respectively; filing opening brief and joint appendix on September 30, 2024 in the Fourth Circuit Court of Appeals, *United States v. Jaquate Simpson* (with 3 other co-defendants), Case No. 24-4073; and an oral argument in the D.C. Circuit Court of Appeals on October 25, 2024, *United States v. Barry Ramey*, Case No. 23-3119. She also has an oral argument December 3 in the Ninth Circuit Court of Appeals. *United States v. Mark Baker*, Case No. 24-1242.

Applicant's second counsel, Ms. Caroline Ivanov, also has several professional commitments that militate in favor of an extension in this matter. She has a civil trial in Harrison County Circuit Court in Mississippi starting on October 14, 2024. *Pezzarossi v. Sherwin-Williams Company et al.*, Civil Action No. 24CI1:22-CV-0082. It is expected to last one week. She also has a Fed. R. Civ. P. 59(e) Motion due on October 21 in *Keller v. Cain*, 1:21-CV-00134-KHJ. And she also has expert designations due October 14, 2024 in a civil case in Texas.

Applicant submits that the requested extension of time would neither prejudice the Respondent nor result in undue delay in the Court's consideration of the petition, and that good cause exists to grant the requested extension.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that an order be entered extending the time for filing a petition for writ of certiorari to and including December 22, 2024.

Respectfully submitted,

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October 10, 2024

APPENDIX 1

Serial: **250559**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-DR-01207-SCT

JAMES COBB HUTTO, III A/K/A JAMES C. HUTTO, III A/K/A JAMES C. HUTTO A/K/A JAMES HUTTO, III A/K/A JAMES HUTTO A/K/A JAMIE HUTTO A/K/A THE HITMAN A/K/A JAMES COBB HUTTO ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

EN BANC ORDER

This matter is before the Court, *en banc*, on the Motion for Leave to File Successive Petition for Post-Conviction Relief filed by James Cobb Hutto, III. The State of Mississippi has filed a Response and Hutto has filed a Reply.

Hutto was convicted of capital murder and sentenced to death. This Court affirmed his conviction and sentence in ***Hutto v. State (Hutto I)***, 227 So. 3d 963 (Miss. 2017). We denied Hutto's first, timely application for leave to file a motion for post-conviction relief. ***Hutto v. State (Hutto II)***, 286 So. 3d 653 (Miss. 2019). Hutto petitioned the United States District Court for the Southern District of Mississippi for a writ of *habeas corpus*. The district court stayed Hutto's federal *habeas* proceedings to allow him to exhaust certain claims not previously raised in state court. Memorandum Opinion and Order on Motion to Stay, ***Hutto v. Cain***, No. 3:20-CV-98-DPJ (S.D. Miss. Nov. 10, 2021). Hutto filed the instant motion on May 8, 2023.

Under the Uniform Post-Conviction Collateral Relief Act (UPCCRA), the Court will grant leave to proceed "only if the application, motion, exhibits, and prior record show that the claims are not . . . barred and that they 'present a substantial showing of the denial of a state or federal right.'" ***Ronk v. State***, 267 So. 3d 1239, 1247 (Miss. 2019) (quoting Miss. Code Ann. § 99-39-27(5) (Rev. 2015)). The mandate in Hutto's direct appeal issued on August 17, 2017. The instant motion was filed on May 8, 2023, and is subject to the one-year time bar. Miss. Code Ann. § 99-39-5(2) (Rev. 2020). The motion is subject to the successive writ bar set forth in Mississippi Code Section 99-39-27(9) (Rev. 2020).

Hutto raises four claims that his prior post-conviction counsel rendered constitutionally ineffective assistance. He argues also that he is incompetent to assist his present attorneys with the instant motion. Hutto asserts that his ineffective-assistance claims are unbarred under ***Grayson v. State***, 118 So. 3d 118, 126 (Miss. 2013), which held that a death-penalty petitioner's meritorious claim of ineffective assistance of post-conviction counsel is excepted from statutory bars that otherwise would prohibit its consideration. On January 11, 2024, this Court "overrule[d] ***Grayson*** to the extent it crafted an exception for ineffective-assistance-of-post-conviction-counsel claims in death-penalty cases." ***Ronk v. State***, No. 2021-DR-00269-SCT, 2024 WL 131639, at *4 (Miss. Jan. 11, 2024). ***Ronk***'s holding rested on this Court's recent decision in ***Howell v. State***, 358 So. 3d 613 (Miss. 2022). ***Ronk*** overruled ***Grayson***'s exception "because ***Howell*** supports that no judicially crafted exception—even for fundamental rights—applies to the UPCCRA's substantive, constitutional bars . . . ." ***Ronk***, 2024 WL 131639, at *4.

Because ***Ronk*** overruled ***Grayson***'s exception to the bars of the UPCCRA, Hutto's claims of ineffective assistance of post-conviction counsel, which are based solely on ***Grayson***, are barred. Notwithstanding that the claims are barred, Hutto has shown no entitlement to relief. Hutto has not shown that post-conviction counsel's performance was deficient or that the defense was prejudiced as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984).

Hutto argues that post-conviction counsel rendered deficient performance by not raising trial counsel's failure to present expert testimony in mitigation establishing a biological explanation for his inappropriate and disruptive behavior during the proceedings. In support, he has submitted a report from a neuropsychologist, Dr. Robert Ouaou, opining that Hutto has deficits in his executive functioning and learning and memory deficits associated with damage to or diminished development of the frontal lobe and associated with general neurological disorders. Hutto argues that, if such evidence had been presented in mitigation, a reasonable probability exists that at least one juror would have voted against the death penalty.

The State responds that the claim is barred by *res judicata*. Hutto refused to participate fully in two pretrial psychological evaluations. ***Hutto I***, 227 So. 3d at 973. In ***Hutto II***, this Court held that, regarding trial counsel's attempts to develop expert psychological evidence, "'counsel did all that they could, within the limitations placed on them by' Hutto [,]" ***Hutto II***, 286 So. 3d at 662 (quoting ***Bishop v. State***, 882 So. 2d 135, 143 (Miss. 2004)), and Hutto had failed to show that testimony from "any other psychologist" would have made a difference. ***Id.*** at 660. Because this Court held in ***Hutto II*** that trial counsel did all they could

to procure expert psychological evaluations of Hutto but were blocked in those efforts by Hutto himself and because this Court held that additional psychological testimony would not have affected the outcome, we find that Hutto cannot now relitigate the issue. ***Brown v. State***, 306 So. 3d 719, 734 (Miss. 2020) (holding that claims that were raised and rejected in prior PCR proceedings are barred by the doctrine of *res judicata*). The issue is barred by *res judicata*.

Hutto argues that his trial counsel was ineffective for failing to object to the prosecutor's "send a message" closing argument "so it could be raised as an issue on appeal." He contends that "PCR counsel rendered ineffective assistance of counsel by failing to raise this claim during Petitioner's initial PCR case." Because the record shows that trial counsel did object and the objection was overruled, Hutto cannot show deficient performance by trial counsel. To the extent that Hutto argues that his appellate counsel was ineffective for not raising the issue on appeal as plain error, the claim fails. Because this Court has held that the State's use of a send-a-message argument in the sentencing phase is appropriate, Hutto cannot show deficient performance or prejudice. ***Thorson v. State***, 895 So. 2d 85, 113 (Miss. 2004) (quoting ***King v. State***, 784 So. 2d 884, 890 (Miss. 2001)).

Hutto contends that the prosecutor's closing argument that there was no nexus between Hutto's childhood abuse and his crime had the effect of instructing the jury not to consider all of the mitigation evidence in violation of ***Boyde v. California***, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), and ***Eddings v. Oklahoma***, 455 U.S. 104, 113-14, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). Therefore, he argues, trial counsel was deficient by failing to object to the argument, and post-conviction counsel was ineffective for not raising the issue.

When a defendant claims that a prosecutor's closing arguments influenced the jury's interpretation of the sentencing-phase jury instructions, the standard is "whether there is a reasonable likelihood that the jury has applied the instructions in a way that prevents it from considering constitutionally relevant evidence." ***O'Brian v. Dretke***, 156 F. App'x 724, 736 (5th Cir. 2005) (citing ***Boyde***, 494 U.S. at 380). Jurors are presumed to have followed the court's instructions. ***Evans v. State***, 226 So. 3d 1, 26 (Miss. 2017) (citing ***Johnson v. State***, 475 So. 2d 1136, 1142 (Miss. 1985)). We find that Hutto has not shown a reasonable likelihood that the jury did not follow its instructions due to the prosecutor's "nexus" argument. Further, "[c]omplaints concerning counsel's failure to file certain motions, call certain witnesses, ask certain questions, and make certain objections fall within the ambit of trial strategy." ***Cole v. State***, 666 So. 2d 767, 777 (Miss. 1995) (quoting ***Murray v. Maggio***, 736 F.2d 279 (5th Cir. 1984)). Hutto's trial counsel objected four times during the initial closing argument and may well have made a "strategic decision to avoid additional comment." ***Cabello v. State***, 524 So. 2d 313, 318 (Miss. 1988).

Hutto argues that his trial counsel rendered ineffective assistance by not exercising a peremptory challenge on Juror Glenn Miller. He asserts that Miller's answers in his juror questionnaire and during *voir dire* showed that he would have imposed the death penalty automatically upon a finding that Hutto was guilty of capital murder. *See* ***Morgan v. Illinois***, 504 U.S. 719, 729, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). The record shows that, during Miller's questioning by the trial court, the prosecutor, and defense counsel, he repeatedly affirmed that he would not vote for death automatically upon a finding of guilt but would

consider and weigh the mitigating evidence. Hutto has not shown that trial counsel did not act strategically in declining to challenge Miller, nor has he shown prejudice.

Hutto's final argument is that he is incompetent to proceed with these post-conviction proceedings. Because, after ***Ronk***, Hutto's claims of ineffective assistance of post-conviction counsel are barred, the issue of Hutto's competency to bring those claims is moot. Moreover, Hutto has no right of competency in post-conviction proceedings. ***Powers v. State***, 371 So. 3d 629, 643 (Miss. 2023) (quoting Corrected En Banc Order, ***Powers v. State***, No. 2017-DR-00696-SCT, at *1-2 (Miss. June 21, 2022)).

After a full review of Hutto's motion, we find that his claims of ineffective assistance of post-conviction counsel are statutorily barred. Notwithstanding the bars, they are without merit. Hutto's competency claim is moot; further, he has no right of competency in post-conviction proceedings. We find that Hutto's motion for leave to proceed should be denied.

IT IS THEREFORE ORDERED that the Motion for Leave to File Successive Petition for Post-Conviction Relief filed by James Cobb Hutto, III, is denied.

SO ORDERED, this the 24 day of July, 2024.

ROBERT P. CHAMBERLIN, JUSTICE
FOR THE COURT

AGREE: RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ.

KITCHENS, P.J., AGREES TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY KING, P.J.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-DR-01207-SCT

James Cobb Hutto, III a/k/a James C. Hutto, III a/k/a James C. Hutto a/k/a James Hutto, III a/k/a James Hutto a/k/a Jamie Hutto a/k/a The Hitman a/k/a James Cobb Hutto

v.

State of Mississippi

KITCHENS, PRESIDING JUSTICE, AGREEING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

I agree that Hutto's motion should be denied. I write separately to clarify that I would deny because his arguments are without merit. I would not find that his claims are barred from consideration. *See* ***Ronk v. State***, No. 2021-DR-00269-SCT, 2024 WL 131639, at * 23 (Miss. Jan. 11, 2024) (Kitchens, P.J., dissenting) (disagreeing with the Court's partial overruling of ***Grayson v. State***, 118 So. 3d 118 (Miss. 2013)); ***Howell v. State***, 358 So. 3d 613, 617 (Miss. 2023) (Kitchens, P.J., dissenting) (disagreeing with the Court's elimination of the fundamental rights exception articulated in ***Rowland v. State***, 42 So. 3d 503, 506 (Miss. 2010)); ***Powers v. State***, 371 So. 3d 629, 719 (Miss. 2023) (Kitchens, P.J., dissenting) (disagreeing with the Court's determination that a defendant is not entitled to competency during post-conviction proceedings).

KING, P.J., JOINS THIS SEPARATE WRITTEN STATEMENT.