

The Supreme Court of South Carolina

James D. Robertson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-205909

ORDER

The request for an extension to serve and file the Petition for a Writ of Certiorari is granted and extended until June 6, 2012. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

May 8, 2012

cc: Robert Michael Dudek
W. Edgar Salter, III



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

MAY - 7 2012

May 7, 2012

S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: James D. Robertson v. State of South Carolina (Capital Case)

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter, I am informing Donald J. Zelenka, Esquire, of the Office of the Attorney General, of this extension request.

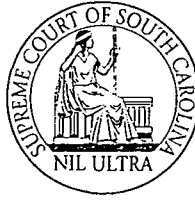
Thanking you for your cooperation and assistance in this matter.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/kam

cc: Donald J. Zelenka, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 5, 2012

Senior Assistant Attorney General William Edgar Salter, III
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Robertson, James v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Dismiss in the above entitled case on appeal.

“Motion to dismiss is denied.

s/ Costa M. Pleicones J.
For the Court

April 5, 2012.”

By copy of this letter we are advising opposing counsel the Petition for a Writ of Certiorari and Appendix should be served and filed within thirty (30) days of the date of this letter.

Very truly yours,



CLERK

DES/dmh

Robertson, James v. State

Page Two

April 5, 2012

cc: Chief Appellate Defender Robert M. Dudek
Emily C. Paavola, Esquire

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 28 2012

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge

S.C. Supreme Court

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF SUPPLEMENTAL AUTHORITY

In Martinez v. Ryan, --- S.Ct. ----, 2012 WL 912950 (U.S., Mar. 20, 2012), a 7-2 majority of the Supreme Court of the United States held that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Id.* at *5. The Court did not decide whether there is a Sixth Amendment right to counsel (and thus a constitutional right to the effective assistance of counsel) in jurisdictions such as South Carolina where claims of ineffective assistance of counsel

must be raised in post-conviction proceedings. Rather, it reserved that question for another case and another day. However, it did hold that, as a matter of equity, ineffective assistance of post-conviction counsel is a gateway to consideration of a claim of ineffective assistance of trial counsel not raised in a prior post-conviction proceeding. *Id.* at *8 (“Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney’s errors . . . caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.”).

In creating this new exception to consideration of claims previously barred from federal review, the Court relied upon several considerations. First, the Court recognized that because PCR is the “first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim.” *Id.* at *7. Second, the Court noted that “[w]ithout the help of an adequate attorney, a prisoner will have . . . difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim.” *Id.* Thus the Court concluded that:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at *11.

Currently pending before this Court is applicant’s appeal from the summary denial of his second application for post-conviction relief. In that application, petitioner alleged both that his initial trial counsel were ineffective under Strickland v. Washington, 466 U.S. 668 (1984), and

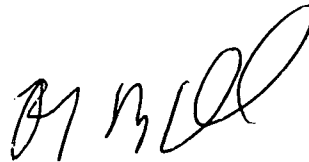
that his initial post-conviction counsel provided ineffective assistance of counsel during the post-conviction relief proceedings. The PCR judge, however, summarily dismissed the application for post-conviction relief on the basis that ineffective assistance of PCR counsel did not provide a triggering mechanism for filing a second PCR action. September 20, 2011 Order of Dismissal at p.26 (“there is no presumed prejudice from the failure to follow a technical requirement of a statute that is not a right guaranteed by the United States or State Constitutions.”); *id.* at p.29 (concluding that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases “do not and cannot apply to collateral counsel’s performance because there is no Sixth Amendment right to counsel in PCR.”). Counsel for the State has also moved to dismiss this appeal on the same grounds.

Martinez has changed the legal landscape of this case. While the United States Supreme Court’s decision does not mandate that this Court, at least at this time, create a similar equitable exception to the generally recognized bar against second PCR applications, it certainly provides a basis for doing so. First the Court left open the question of whether there is a Sixth Amendment right to counsel in cases where a claim must be raised as an initial matter in state post-conviction proceedings. Given the Court’s recognition that an initial PCR challenge raising claims that must be raised for the first time on collateral review is very similar to a direct appeal, it seems likely that the Court will eventually answer that question in the affirmative. Douglas v. California, 372 U.S. 353 (1963) (holding that an indigent defendant has the right to counsel on direct appeal); Jones v. Barnes, 463 U.S. 745 (1983) (recognizing the right to effective assistance of counsel on direct appeal). Second, the Court’s recognition of the importance of a) the right to the effective assistance of counsel at trial as an essential component of the adversary system, b) collateral review in vindicating the right to effective assistance of counsel, and c) adequate post-

conviction representation to investigate and present substantial claims of ineffective assistance of trial counsel, the same equitable considerations that led the Court to recognize ineffective assistance of state post-conviction counsel as “cause” for a procedural default in federal habeas corpus proceedings, should lead this Court to adopt a similar exception to the bar against second or successive PCR applications.

Thus, this Court should deny the state’s motion to dismiss the appeal and adhere to its previous determination to allow the case to proceed in the ordinary course so that the Court may resolve this important question.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

March 28, 2012

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable Lee S. Alford, Circuit Court Judge

RECEIVED

MAR 28 2012

S.C. Supreme Court

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the notice of supplemental authority in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 26th day of March, 2012.



Robert M. Dudek

Chief Appellate Defender

ATTORNEY FOR PETITIONER.

March 28, 2012

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

Appeal from York County

Honorable Lee S. Alford, Circuit Court Judge

RECEIVED
FEB 29 2012
S.C. Supreme Court

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO MOTION TO DISMISS

Petitioner makes the following return to the State's motion to dismiss:

1) Petitioner's post-conviction relief counsel, Emily Paavola, properly set forth her Rule 243(c), SCACR, reasons why this case should proceed where it is was ruled successive by the lower court at the time she filed the notice of intent to appeal. Counsel set forth "sufficient facts, argument, and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper."

2) Counsel was notified on February 10, 2012 that the present case would proceed before this Court and that it was "proceeding in accordance with the South Carolina Appellate Court Rules. The petition for writ of certiorari and appendix are currently due March 26, 2012." A copy of that notification is attached as Exhibit A.

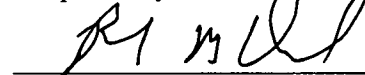
2) Petitioner would also note that the Federal District Court has stayed petitioner's federal habeas case, and issued a stay of execution so the present action could be resolved before this Court. The state's attempts to lift that stay in Federal Court were denied by orders dated November 30, 2011 and February 15, 2012. Robertson v. Ozmint, #2:11-cv-00063-SB-BHH. See Exhibit B (Docket Text).

3) Petitioner submits that the State's present motion to dismiss is an improper motion. There is no provision allowing it in Rule 243(c), SCACR, and this Court has already determined that the case will proceed on the basis of the showing made by petitioner. As stated above, counsel for petitioner properly set forth her reasons why this case should not be dismissed as successive or as barred by the statute of limitations in a separate document when she filed the notice of intent to appeal on behalf of petitioner. As evidenced by the Exhibit A, those reasons were accepted by this Court and this case was allowed to go forward.

4) Further, as Rule 243(c), SCACR, implicitly contemplates, arguments like those set forth in the State's motion to dismiss are properly raised in a return to the petition for a writ of certiorari, rather than in an unauthorized request to terminate the ordinary process of review at the notice of appeal stage.

WHEREFORE, the State's motion to dismiss should be denied.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

February 29, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge

RECEIVED
FEB 29 2012

S.C. Supreme Court

JAMES ROBERTSON,

PETITIONER,

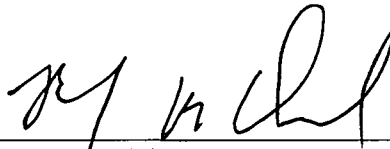
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the return to motion to dismiss in the above-referenced case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of February, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of February, 2012

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014

EXHIBIT A

From: Hopkins, Debbie <DJHopkins@sccourts.org>

To: Emily@deathpenaltyresource.org

Cc:

Date: Friday, February 10, 2012 01:18 pm

Subject: James Robertson PCR Appeal

Attachments:

Dear Ms. Paavola,

In response to your telephone request, please be advised Mr. Robertson's appeal from the denial of his post-conviction relief action is currently pending in the South Carolina Supreme Court and is proceeding in accordance with the South Carolina Appellate Court Rules.

The Petition for a Writ of Certiorari and Appendix are currently due March 26, 2012.

Please feel free to contact this office if additional information is needed.

Sincerely,

*Debbie M. Hopkins
South Carolina Supreme Court
P. O. Box 11330
Columbia, South Carolina 29211
(803) 734-1080*

EXHIBIT B

DEATH, STAYED

**U.S. District Court
District of South Carolina (Charleston)
CIVIL DOCKET FOR CASE #: 2:11-cv-00063-SB -BHH**

Robertson v. Ozmint
Assigned to: Honorable Sol Blatt, Jr
Referred to: Magistrate Judge Bruce Howe Hendricks
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 01/07/2011
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

Petitioner**James D Robertson**

represented by **Emily Paavola**
John H Blume Law Office
PO Box 11744
Columbia, SC 29211
803-765-1044
Email:
emily@deathpenaltyresource.org
PRO HAC VICE
ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

V.

Respondent

Jon Ozmint
*Commissioner, South Carolina
Department of Corrections*

represented by **William Edgar Salter , III**
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211
803-734-6305

Fax: 803-734-4035
 Email: agesalter@ag.state.sc.us
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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 Columbia, SC 29211
 803-734-6305
 Fax: 803-734-4035
 Email: agdzelenka@scag.gov
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/27/2010	<u>1</u>	MOTION for Stay of Execution, MOTION to Appoint Counsel by James D Robertson. Motions referred to Bruce Howe Hendricks.(kbos) (Entered: 11/01/2010)
11/01/2010		TRUE DIVISION FOR TRIAL: Rock Hill. (kbos) (Entered: 11/01/2010)
11/01/2010	<u>3</u>	RESPONSE to Motion re <u>1</u> MOTION to Stay MOTION to Appoint Counsel Response filed by Jon Ozmint.Reply to Response to Motion due by 11/12/2010 (Attachments: # <u>1</u> State Court Documents SC Sct. Order of Oct. 27, 2010 setting Date.of Execution, # <u>2</u> State Court Documents Remittitur Letter, # <u>3</u> State Court Documents Robertson v. State - Order denying Certiorari October 6, 2010, # <u>4</u> Certificate of Service)(Zelenka, Donald) (Entered: 11/01/2010)
11/02/2010	<u>5</u>	MOTION to Appear Pro Hac Vice by Emily Paavola by James D Robertson. Response to Motion due by 11/19/2010 (Attachments: # <u>1</u> Affidavit)Proposed order is being emailed to chambers with copy to opposing counsel(Weyble, Keir) (Main Document 5 replaced on 11/3/2010) (ncha,). Modified on 11/3/2010 to replace incorrect document with corrected document as provided by filing user (ncha,). (Entered: 11/02/2010)
11/03/2010	<u>7</u>	MOTION for Leave to Proceed in forma pauperis (Restricted Access) by James D Robertson. Response to Motion due by 11/22/2010 (Attachments: # <u>1</u> Affidavit Form AO 240, # <u>2</u> Affidavit Certified Trust Account)Proposed order is being emailed to chambers with copy to opposing counselMotions referred to Bruce Howe Hendricks.(Weyble, Keir) (Entered: 11/03/2010)
11/04/2010	<u>10</u>	ORDER granting Petitioner's <u>1</u> Motion for Stay of Execution signed by Honorable Sol Blatt, Jr on November 4, 2010.(ncha,) (Main Document 10 replaced on 11/18/2010) (ncha,). Modified on 11/18/2010 to replace main document to add filing headers (ncha,). (Entered: 11/04/2010)
11/05/2010	<u>11</u>	ORDER granting <u>5</u> Motion for Emily C. Paavola to Appear Pro Hac Vice signed by Honorable Sol Blatt, Jr on November 4, 2010.(ncha,) (Entered: 11/05/2010)
11/08/2010	<u>12</u>	NOTICE of Appearance by William Edgar Salter, III on behalf of Jon Ozmint

		(Attachments: # <u>1</u> Certificate of Service)(Salter, William) (Entered: 11/08/2010)
11/08/2010	<u>14</u>	ORDER granting <u>7</u> Motion for Leave to Proceed in forma pauperis ; granting in part and denying in part <u>1</u> Motion to Appoint Counsel. John H. Blume, a member of this Court's Death Penalty Attorney Panel, is appointed as lead counsel for Petitioner in this capital habeas corpus case. Keir M. Weyble is appointed second chair counsel in Petitioner's capital habeas corpus case. Signed by Magistrate Judge Bruce Howe Hendricks on November 8, 2010. (ncha,) (Entered: 11/08/2010)
11/09/2010	<u>17</u>	SUPPLEMENTAL ORDER appointing Emily C. Paavola as third chair counsel for the Petitioner. Signed by Magistrate Judge Bruce Howe Hendricks on November 9, 2010. (ncha,) (Entered: 11/09/2010)
11/18/2010	<u>18</u>	***DOCUMENT FAXED: <u>10</u> Order on Motion to Stay to SCDC, ATTN: David Tatarsky, 803-896-1766. (ncha,) (Entered: 11/18/2010)
01/07/2011	<u>20</u>	Petition for Writ of Habeas Corpus. (Attachments: # <u>1</u> Exhibit, State Court Judgment and Order # <u>2</u> Exhibit, Supreme Court Letter)Weyble, Keir) Modified on 1/7/2011 to edit text (ncha,). (Entered: 01/07/2011)
01/07/2011	<u>21</u>	MOTION to Stay <i>Proceedings Pending Exhaustion of State Remedies</i> by James D Robertson. Response to Motion due by 1/24/2011 No proposed orderMotions referred to Bruce Howe Hendricks.(Weyble, Keir) (Entered: 01/07/2011)
01/07/2011	<u>23</u>	NOTICE OF CHANGE OF CASE NUMBER from Miscellaneous Case Number 6:10-mc-00158-SB-BHH. (ncha,) (Entered: 01/07/2011)
01/07/2011	<u>24</u>	MOTION to Strike <u>20</u> Petition for Writ of Habeas Corpus by Jon Ozmint. Response to Motion due by 1/24/2011 (Attachments: # <u>1</u> Certificate of Service)No proposed orderMotions referred to Bruce Howe Hendricks.(Salter, William) (Entered: 01/07/2011)
01/07/2011	<u>25</u>	Petition for Writ of Habeas Corpus (<i>Verified</i>). Weyble, Keir) (Additional attachment(s) added on 1/20/2011: # <u>1</u> Exhibit, State Court Judgment and Order, # <u>2</u> Exhibit, State Court letter) (ncha,). (Entered: 01/07/2011)
01/24/2011	<u>28</u>	RESPONSE in Opposition re <u>21</u> MOTION to Stay <i>Proceedings Pending Exhaustion of State Remedies</i> Response filed by Jon Ozmint.Reply to Response to Motion due by 2/3/2011 (Attachments: # <u>1</u> attach no 1 - SC Sup Crt's memo 8-13-03, # <u>2</u> attach no 2 - Order of appt of legal counsel 9-9-05, # <u>3</u> attach no 3 - reply to response to mtn to remand, # <u>4</u> attach no 4 - SC Sup Crt order denying mtn, # <u>5</u> Certificate of Service)(Salter, William) (Entered: 01/24/2011)
01/27/2011	<u>30</u>	TEXT ORDER finding as moot <u>24</u> Motion to Strike the <u>20</u> Petition for Writ of Habeas Corpus. The petition has now been verified by counsel. As Respondent concedes, this is sufficient. Order signed by Magistrate Judge Bruce Howe Hendricks on January 27, 2011.(ncha,) (Entered: 01/27/2011)
02/01/2011	<u>32</u>	ORDER authorizing service of process and apprising the respondent of deadline for filing dispositive motions. Return and Memorandum due by

		3/28/2011. Signed by Magistrate Judge Bruce Howe Hendricks on 2/1/11. (Attachments: # <u>1</u> Verified Petition, # <u>2</u> State Court Documents, # <u>3</u> State Court Letter)(kmca) (Entered: 02/01/2011)
02/01/2011	<u>33</u>	REPLY to Response to Motion re <u>21</u> MOTION to Stay <i>Proceedings Pending Exhaustion of State Remedies</i> Response filed by James D Robertson. (Attachments: # <u>1</u> Exhibit Order in Elmore v Ozmint)(Weyble, Keir) (Entered: 02/01/2011)
02/09/2011	<u>34</u>	ADMINISTRATIVE NOTICE RE: Docket (sdon,) (Entered: 02/09/2011)
03/28/2011	<u>35</u>	MOTION for Summary Judgment by Jon Ozmint. Response to Motion due by 4/14/2011 No proposed orderMotions referred to Bruce Howe Hendricks. (Salter, William) (Entered: 03/28/2011)
03/28/2011	<u>36</u>	Return and Memorandum to <u>25</u> Petition for Writ of Habeas Corpus by Jon Ozmint. (Attachments: # <u>1</u> attach no 2 - TOR 11-20-98, # <u>2</u> attach no 3 - TOR 12-18-98, # <u>3</u> attach no 4 - TOR 2-12-99, # <u>4</u> attach no 5 - TOR 2-19-99-part 1, # <u>5</u> attach no 5 - TOR 2-19-99 - part 2, # <u>6</u> attach no 6 - pet for writ of cert, # <u>7</u> attach no 7 - order denying cert, # <u>8</u> attach no 9 - return to mtn dated 9-11-00, # <u>9</u> attach no 10 - order dated 10-6-00, # <u>10</u> attach no 11 - order dated 2-2-01 appting Wellborn Esq., # <u>11</u> attach no 12 - order dated 2-15-01 re evaluation, # <u>12</u> attach no 13 - ltr and affidavit of robertson dated 3-15-01, # <u>13</u> attach no 14 - report dated 10-12-01, # <u>14</u> attach no 15 - Order 11-15-01 relieving Dudek, # <u>15</u> attach no 16 - IBOA 4-15-02)(Salter, William) ADDITIONAL ATTACHEMNTS filed as entry <u>37</u> , <u>38</u> , <u>39</u> , <u>40</u> , <u>41</u> , <u>42</u> , <u>43</u> . Modified title and added link on 3/29/2011(hhil,). Modified on 3/30/2011 and 4/4/2011 to add additional links (hhil,). ADDITIONAL ATTACHMENTS filed as entry <u>49</u> . Modified on 6/3/2011 to add link (hhil,). (Entered: 03/28/2011)
03/28/2011	<u>37</u>	Additional Attachments to Main Document <u>36</u> Return and Memorandum. (Attachments: # <u>1</u> attach no 17 - ltr dated 4-18-02 relieving Savitz, # <u>2</u> attach no 18 - order denying Savitz 5-16-02, # <u>3</u> attach no 19 - ltr to SC Sup Crt dated 6-3-02, # <u>4</u> attach no 20 - order dated 6-26-02, # <u>5</u> attach no 21 - report dated 10-28-02, # <u>6</u> attach no 22 - pro se IBOA dated 7-25-03, # <u>7</u> attach no 23 - IBOR 12-31-03, # <u>8</u> attach no 24 - order dated 11-22-04, # <u>9</u> attach no 25 - Memo dated 2-14-05, # <u>10</u> attach no 26 - report dated 2-23-05, # <u>11</u> attach no 27 - Order dated 6-3-05, # <u>12</u> attach no 28 - Order granting stay 7-7-05, # <u>13</u> attach no 29 - Order appting atty dated 9-9-05)(Salter, William) Modified title on 3/29/2011 (hhil,). (Entered: 03/28/2011)
03/29/2011	<u>38</u>	Additional Attachments to Main Document <u>36</u> Return and Memorandum. (Attachments: # <u>1</u> attach no 34 - return and mtn to dismiss dated March 24, 2011, # <u>2</u> attachment to attach no 34 - Order of dismissal - part 1, # <u>3</u> attachment to attach no 34 -Order of Dismissal - part 2, # <u>4</u> attachment to attach no 34 - Order of dismissal - part 3, # <u>5</u> attach no 35 - proposed Conditional order of dismissal)(Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
03/29/2011	<u>39</u>	Additional Attachments to Main Document <u>36</u> Return and Memorandum. (Attachments: # <u>1</u> attach no 1 - appendix - vol 1 - part 1, # <u>2</u> attach no 1 - appendix - vol 1 - part 2, # <u>3</u> attach no 1 - appendix - vol 1 - part 3, # <u>4</u> attach

		no 1 - appendix - vol 1 - part 4, # <u>5</u> attach no 1 - appendix - vol 1 - part 5, # <u>6</u> attach no 1 - appendix - vol 1 - part 6, # <u>7</u> attach no 1 - appendix - vol 1 - part 7, # <u>8</u> attach no 1 - appendix - vol 2 - part 1, # <u>9</u> attach no 1 - appendix - vol 2 - part 2)(Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
03/29/2011	<u>40</u>	Additional Attachments to Main Document <u>36</u> Return and Memorandum. (Attachments: # <u>1</u> attach no 1 - appendix - vol 2-part 3, # <u>2</u> attach no 1 - appendix - vol 2 - part 4, # <u>3</u> attach no 1 - appendix - vol 2-part 5, # <u>4</u> attach no 1 - appendix - vol 2 - part 6, # <u>5</u> attach no 1 - appendix - vol 2-part 7, # <u>6</u> attach no 1 - appendix - vol 3 part 1, # <u>7</u> attach no 1 - appendix - vol 3 part 2, # <u>8</u> attach no 1 - appendix - vol 3 - part 3)(Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
03/29/2011	<u>41</u>	Additional Attachments to Main Document <u>36</u> Return and Memorandum. (Attachments: # <u>1</u> attach no 1 - appendix - vol 3-part 4, # <u>2</u> attach no 1 - appendix - vol 3 - part 5, # <u>3</u> attach no 1 - appendix - vol 3-part 6, # <u>4</u> attach no 1 - appendix - vol 4 part 1, # <u>5</u> attach no 1 - appendix - vol 4 - part 2, # <u>6</u> attach no 1 - appendix - vol 5 - part 1, # <u>7</u> attach no 1 - appendix - vol 5-part 2, # <u>8</u> attach no 1 - appendix - vol 6 part 1, # <u>9</u> attach no 1 - appendix - vol 6-part 2) (Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
03/29/2011	<u>42</u>	Additional Attachments to Main Document <u>36</u> Return and Memorandum. (Attachments: # <u>1</u> attach no 1 - appendix - vol 7 - part 1, # <u>2</u> attach no 1 - appendix - vol 7 - part 2, # <u>3</u> attach no 1 appendix - vol 7 part 3, # <u>4</u> attach no 1 -appendix - vol 7 - part 4, # <u>5</u> attach no 1 - appendix - vol 8 part 1, # <u>6</u> attach no 1 appendix vol 8 - part 2, # <u>7</u> attach no 8 - Ltr from Robertson to Crt, # <u>8</u> attach no 24 - Order 11-22-04, # <u>9</u> attach no 30 - pet for writ of cert, # <u>10</u> attach no 31 - return to pet for writ of cert, # <u>11</u> attach no 32 - Order 10-6-10, # <u>12</u> attach no 33 - remittitur 10-22-10, # <u>13</u> attach no 36 - Order 11-21-02, # <u>14</u> attach no 37 - return to mtn to relieve counsel 9-11-00)(Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
04/01/2011	<u>43</u>	Additional Attachments to Main Document <u>36</u> Return and Memorandum. (Attachments: # <u>1</u> attach no 38 - ltr of Paavola dated 3-29-11 and Respondent's ltr to Shearouse dated 4-1-11)(Salter, William) Modified title on 4/1/2011 (hhil,).Modified on 4/8/2011 to add docket text (hhil,). (Entered: 04/01/2011)
04/08/2011	<u>44</u>	ORDER granting <u>21</u> Motion to Stay. The petitioner shall notify the Court within five (5) days of resolution of his state court PCR application. Thereafter, the respondent will have thirty(30) days to amend his motion for summary judgment, as necessary. Signed by Magistrate Judge Bruce Howe Hendricks on 4/8/11.(hhil,) (Entered: 04/08/2011)
04/15/2011	<u>46</u>	MOTION for Reconsideration re <u>44</u> Order on Motion to Stay, by Jon Ozmint. Response to Motion due by 5/2/2011 (Attachments: # <u>1</u> attach no 1 - Emily Paavola Ltr dated 3-29-11, # <u>2</u> attach no 2 - Ltr to Shearouse dated 4-1-11)No proposed orderMotions referred to Bruce Howe Hendricks.(Salter, William) ADDITIONAL ATTACHMENTS FILED 9/23/11 as entry <u>53</u> . Modified on 9/26/2011 to add link(hhil,). (Entered: 04/15/2011)
04/19/2011	<u>47</u>	RESPONSE in Opposition re <u>46</u> MOTION for Reconsideration re <u>44</u> Order on

		Motion to Stay, MOTION for Reconsideration re <u>44</u> Order on Motion to Stay, Response filed by James D Robertson. Reply to Response to Motion due by 4/29/2011 (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit)(Weyble, Keir) (Entered: 04/19/2011)
06/02/2011	<u>49</u>	Additional Attachments to Main Document <u>36</u> Return and Memorandum. (Attachments: # <u>1</u> attachment no 39 - SC Sup Crt order dated 5-31-11)(Salter, William) Modified title on 6/3/2011 (hhil,). (Entered: 06/02/2011)
09/23/2011	<u>53</u>	Additional Attachments to Main Document <u>46</u> MOTION for Reconsideration re <u>44</u> Order on Motion to Stay, MOTION for Reconsideration re <u>44</u> Order on Motion to Stay,. (Attachments: # <u>1</u> attach no 1 - applicant's response in opp to mtn to dismiss, # <u>2</u> attach no 2 - respondent's reply to applicant's response to return and mtn to dismiss, # <u>3</u> attach no 3 - Ltr from Judge Alford to WES, # <u>4</u> attach no 4 - Order dated 9-20-11)(Salter, William) (Entered: 09/23/2011)
09/26/2011	54	TEXT ORDER : It appears from the most recent filings of the Respondent that the Petitioner's state PCR application has been denied. Within 3 days of this Order or as soon as practicable, the parties should briefly indicate their belief as to whether the stay of this matter should now be lifted. Signed by Magistrate Judge Bruce Howe Hendricks on 9/26/11. (hhil,) (Entered: 09/26/2011)
09/29/2011	<u>55</u>	STATUS REPORT <i>Petitioner's Memorandum on Maintaining the Stay of These Proceedings Pending Exhaustion of State Remedies</i> by James D Robertson. (Attachments: # <u>1</u> State Court Motion to Alter or Amend with Supporting Exhibits 1-3) (Weyble, Keir) Modified on 10/4/2011 to add attachment description (hhil,). (Entered: 09/29/2011)
09/29/2011	<u>56</u>	STATUS REPORT <i>Respondent's Response to Text Order [Doc. #54]</i> by Jon Ozmint. (Salter, William) (Entered: 09/29/2011)
10/14/2011	<u>57</u>	MOTION to Amend/Correct <u>55</u> Status Report, by James D Robertson. Response to Motion due by 10/31/2011 (Attachments: # <u>1</u> Exhibit)No proposed orderMotions referred to Bruce Howe Hendricks.(Weyble, Keir) (Entered: 10/14/2011)
11/08/2011	58	TEXT ORDER granting <u>57</u> Motion to Amend/Correct. Signed by Magistrate Judge Bruce Howe Hendricks on 11/8/11.(hhil,) (Entered: 11/08/2011)
11/30/2011	<u>59</u>	ORDER denying <u>46</u> Motion for Reconsideration re <u>44</u> Order on Motion to Stay. It is ORDERED that the stay, already in effect in this case, shall not be lifted. Additionally, the respondents motion to reconsider [Doc. 46] is DENIED. The petitioner shall notify the Court within five (5) days of resolution of the pending motion to alter or amend in the PCR Court. See Rhines, 544 U.S. at 278. Thereafter, the respondent will have five (5) days to indicate to the Court whether or not it continues to believe the stay should be lifted. Signed by Magistrate Judge Bruce Howe Hendricks on 11/30/11.(hhil,) (Entered: 11/30/2011)
12/21/2011	<u>60</u>	MOTION FOR RECONSIDERATION ON <u>44</u> Order granting <u>21</u> Motion to Stay by Jon Ozmint with REPLY to <u>59</u> Order on Motion for Reconsideration.

		(Attachments: # <u>1</u> attach no 1 - Order of Judge Lee S. Alford filed on 12-8-11) (Salter, William) Modified on 12/22/2011 to correct event type(hhil,). (Entered: 12/21/2011)
12/22/2011	<u>61</u>	RESPONSE in Opposition re <u>60</u> MOTION for Reconsideration Response filed by James D Robertson.Reply to Response to Motion due by 1/3/2012 (Weyble, Keir) (Entered: 12/22/2011)
02/14/2012	<u>63</u>	MOTION for Leave to File <i>State Court Status Update</i> by James D Robertson. Response to Motion due by 3/2/2012 (Attachments: # <u>1</u> Supreme Court Status Email)No proposed orderMotions referred to Bruce Howe Hendricks.(Weyble, Keir) Modified on 2/16/2012 to correct attachment description (hhil,). (Entered: 02/14/2012)
02/15/2012	64	TEXT ORDER denying <u>60</u> Motion for Reconsideration re <u>44</u> Order on Motion to Stay ; granting <u>63</u> Motion for Leave to File State Court Status Update. Signed by Magistrate Judge Bruce Howe Hendricks on 2/15/12. (hhil,) (Entered: 02/15/2012)

PACER Service Center			
Transaction Receipt			
02/27/2012 11:03:43			
PACER Login:	bw0999	Client Code:	Robertson
Description:	Docket Report	Search Criteria:	2:11-cv-00063-SB - BHH
Billable Pages:	6	Cost:	0.48

STATE OF SOUTH CAROLINA
In the Supreme Court

On Rule 243 (c), SCACR Permission to File Petition for Writ of Certiorari
Capital PCR: Court of Common Pleas
York County

RECEIVED

FEB 14 2012

S.C. Supreme Court

James D. Robertson, #5067,

Petitioner,

vs.

State of South Carolina,

Respondent.

MOTION TO DISMISS

This matter comes before the Court by way of Petitioner's notice and explanation seeking permission to appeal the denial of a successive and untimely Application for Post-Conviction Relief (PCR) filed by death-sentenced inmate, James D. Robertson (Robertson) through counsel, on January 7, 2011. See Rule 243(c), SCACR. This Court has not yet entered a formal order either dismissing or allowing the appeal.¹ Respondent would move for dismissal because Petitioner has not satisfied the requirement of Rule 243(c), SCACR. In support of this motion, Respondent would respectfully show the Court:

¹ Respondent has received a copy of e-mail correspondence between former counsel for Robertson, Emily Paavola, Esq., (who now represents Robertson in a federal habeas action), and clerk office staff indicating the appeal is pending and petition is due March 26, 2012. However, counsel for respondent has not been advised of any formal action on the notice and permission to appeal.

On March 24, 2011, Respondent made its Return and Motion to Dismiss in the circuit court.² At the hearing appointing counsel for Petitioner, Judge Alford heard oral argument on the state's motion. He thereafter received briefing by the parties. On September 20, 2011, Judge Alford dismissed the application as successive and untimely. On November 28, 2011, Judge Alford denied Robertson's motion to alter or amend the judgment. Respondent incorporates Judge Alford's Orders and the reasons for dismissal by reference.

On January 19, 2012, Robertson filed his notice and explanation seeking permission to appeal. In his explanation, Robertson asserts, among other reasons, that a September 23, 2005 hearing to appoint counsel was never held. He also seeks to provide reasons why his successive and time barred Application should not have been summarily dismissed. Those arguments are meritless and dilatory.

This Court has rejected the repeated successive filings of PCR applications based ineffective assistance of PCR counsel. This Court has correctly noted the nearly unexhaustable availability of new claims if the Court would allow such action:

It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view. Aice protests that only those new arguments of true merit would be advanced in successive applications and that hence our fears are unfounded. Yet, the very arguments Aice advances lack merit and demonstrate that our fears are real.

² Respondent originally moved for summary dismissal because the 2011 Application (1) was not verified by Robertson; (2) is barred by the one year statute of limitations governing PCR applications, S.C. Code Ann. § 17-27-45(A) (Supp. 2011); (3) is impermissibly successive to a previously filed application and this Court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel or PCR counsel's lack of statutory qualifications; (4) the supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge; (5) laches bars relief because Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application; and (6) the argument that he is entitled to relief based upon the supposed lack of qualification of original PCR counsel lacks merit as a matter of state law.

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).

Plainly, “successive PCR applications are disfavored, and the applicant has the burden of proving that the grounds could not have been raised in a prior PCR application.” *Bray v. State*, 366 S.C. 137, 141, 620 S.E.2d 743, 745 (2005). Here, Robertson asks for permission to re-opened his fully litigated collateral state remedy on highly speculative grounds – namely, that the United States Supreme Court may recognize an exception to the rule. However, the PCR court properly rejected his claim.

In a document titled, “Supplement to Notice of Appeal and Required Explanation,” dated January 19, 2012, Robertson asserts that Mr. Brown was not appointed at a hearing taking place on September 23, 2005. The undersigned was present at the hearing held in Greenville which confirmed Mr. Brown appointment. Robertson and Mr. Brown were also present and participated in this hearing, which was held at 10:30 a.m. on September 23, 2005. The only record the undersigned can find of this hearing is the contemporaneously generated Attorney’s Report of Trial or Hearing (which was mandated by Attorney General McMaster), required after appearance by all attorneys), generated September 26, 2005, and signed by the undersigned. This form is attached and incorporated by reference.

Although not a participant in the proceedings, Respondent would note that a reporter from the Rock Hill *Herald* was likewise present. The actual appointment order, captioned, “Order of Appointment of Legal Counsel of Indigent Defendant,” filed September 22, 2005. This Order is also attached and incorporated by reference. Respondent would further note that he sent Mr. Brown a copy of that Order on November 2, 2005.

Further, Petitioner cannot raise this or any other allegation now in a successive Application. *Aice*. See also *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 843 (1992), *cert. denied*, 507 U.S. 927 (1993); *Hunter v. State*, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of prior applications but did not raise it); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application); *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002). Therefore, this Application was properly dismissed as impermissibly successive.

Also, laches bars relief. Laches is an equitable doctrine, which "arises upon the failure to assert a known right." *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971).³ As the Court explained in *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005),

Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), *citing Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

In this case, the transcript of the September 23, 2005 hearing is not in the files of the Attorney General's Office and Respondent did not order this transcript because Robertson did not contest counsel's qualifications in state PCR. Moreover, Robertson concedes that a copy of

³ Laches is an affirmative defense that must be pleaded pursuant to Rule 8(c), SCRCP. See also *Adams v. B & D, Inc.*, 297 S.C. 416, 377 S.E.2d 315 (1989).

that transcript is unavailable because the tapes of the hearing do not exist. *See* Rule 607(i), SCACR. Respondent submits that Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application and is barred by laches.

Moreover, Robertson's allegations 10 & 11(c)-10 & 11(f) of the Amended Application do not state a claim upon which Post-Conviction Relief may be granted because each is alleged as a free-standing, substantive claim of trial court error. The jurisdiction of the PCR court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). Post-conviction relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). *See also Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (same); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885-86 (1975) (same). Finally, his allegations 10 & 11(h)-10 & 11(i) of the Amended Application do not state a claim upon which Post-Conviction Relief may be granted because neither is cognizable as a matter of state law and neither has been recognized as a ground for relief by the United States Supreme Court. As a result, these allegations were properly subject to summary dismissal for this additional reason.

Wherefore, Respondent moves for dismissal of this case.

Respectfully submitted,

ALAN WILSON
Attorney General

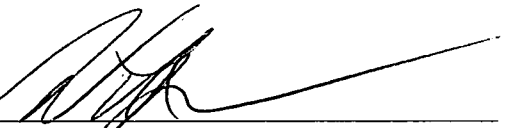
JOHN W. McINTOSH

Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 
ATTORNEYS FOR RESPONDENT

February 14, 2012.

Motion to dismiss is denied.



For the Court

April 5, 2012

STATE OF SOUTH CAROLINA
In the Supreme Court

On Rule 243 (c), SCACR Permission to File Petition for Writ of Certiorari
Capital PCR: Court of Common Pleas
York County

RECEIVED

FEB 14 2012

James D. Robertson, #5067,

Petitioner,

S.C. Supreme Court

vs.

State of South Carolina,

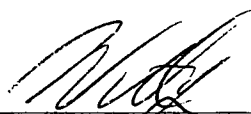
Respondent.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's Motion to Dismiss in the foregoing action on counsel for Petitioner, by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows: Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina, 29201. Although his federal habeas corpus counsel no longer represent him in this appeal, Respondent has also served federal habeas corpus counsel, by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Emily C. Paavola, Esq.
Death Penalty Resource & Defense Ctr
P.O. Box 11311
Columbia, SC 29211

This 14th day of February, 2012.

A stylized, handwritten signature in black ink, appearing to read 'WES' or similar, positioned above a horizontal line.

WILLIAM EDGAR SALTER, III

Attorney's
Report of Trial or Hearing

To be prepared by the attorney and submitted to the Attorney General and Chief Deputy each time an attorney appears in any court.

Attorney: Ed Salter Section: Capital Litigation

Other AAG(s) appearing: Don Zelenka

Opposing counsel: n/a

Case name: James Robertson v. State

Day & date of appearance: 9/23/05 Time: 10:30

Court: Common Pleas County: Greenville/York (origination)

Judge: Few

Type of trial or hearing: Appointment hearing
(eg. Jury trial, bench trial, motions(s), jury selection, guilty plea, sentencing, appellate argument, roster meeting, post-conviction relief hearing.)

Description of event, issues and result _____

Hearing to determine Robertson present desire. Mike Brown of Rock Hill
appointed to represent him on PCR.

9/26/05
Date

Will Salter
Attorney

Distribution
Original - Attorney General
Copies - Chief Deputy
Legal file

Confirmation Report - Memory Send

Date & Time: Nov-02-2005 10:33am
Tel line : 803-734-4035
Machine ID : SC ATTORNEY GENERAL CAPITAL LITIGATION

Job number : 801
Date & Time : Nov-02 10:32am
To : 918033280523
Number of pages : 004
Start time : Nov-02 10:32am
End time : Nov-02 10:33am
Pages sent : 004
Status : OK

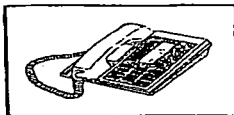
Job number : 801

*** SEND SUCCESSFUL ***



The State of South Carolina OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL



CAPITAL LITIGATION, HOMICIDE APPEALS FEDERAL HABEAS CORPUS SECTION

FAX TRANSMISSION FORM

TO: Michael Brown FAX NUMBER: 803-328-0523
DATE: 11/2/05
FROM: Ed Salter OFFICE: (803) 734-6305
FAX: (803) 734-4035
MESSAGE: Per your request

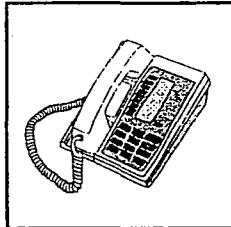
TOTAL NUMBER OF PAGES IN TRANSMISSION INCLUDING COVER:

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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL



**CAPITAL LITIGATION, HOMICIDE APPEALS
FEDERAL HABEAS CORPUS SECTION**

FAX TRANSMISSION FORM

TO: Michael Brown FAX
NUMBER: 803-328-0523

DATE: 11/2/05

FROM: Ed Salter OFFICE: (803) 734-6305

FAX: (803) 734-4035

MESSAGE: Per your request.

TOTAL NUMBER OF PAGES IN TRANSMISSION INCLUDING COVER: _____

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2005 SEP 22 PM 12:09

DEFENSE OF INDIGENTS ACT

FORM NO. IV

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
DOCKET NO. _____)

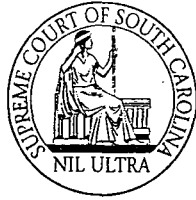
STATE OF SOUTH CAROLINA)
VS.)
JAMES D. ROBERTSON)
DEFENDANT)
_____)

ORDER OF APPOINTMENT OF LEGAL
COUNSEL OF INDIGENT DEFENDANT

The defendant contends that he is indigent and in need of services of an attorney as contemplated by law. THEREFORE, MICHAEL BROWN, Attorney-at-Law, is appointed as Counsel for the Defendant.

This 9TH day of SEPTEMBER,
2005, at 8:51 AM

PCR - DEATH PENALTY
PC DRAWER 33250
ROCK HILL, SC 29732
803-329-4200
SEE ATTACHED MEMO
FROM JUDGE FEW.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 27, 2012

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P. O. Box 11589
Columbia, SC 29211

Re: Robertson, James v. State

Dear Counsel:

This is in response to your request for an extension of time to serve and file the Petition for a Writ of Certiorari in the above entitled matter.

Please be advised the Motion to Dismiss filed in this matter holds all time limits in abeyance, therefore no action will be taken on your extension request.

Very truly yours,

CLERK

DES/dmh

cc: Senior Assistant Attorney General William Edgar Salter, III

ORIGINAL



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

March 26, 2012

MAR 26 2012

S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: James D. Robertson v. State of South Carolina (Capital Case)

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today, in the event the case is not being held in abeyance pending the disposition of the state's motion to dismiss. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter, I am informing Donald J. Zelenka, Esquire, of the Office of the Attorney General, of this extension request.

Thanking you for your cooperation and assistance in this matter.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/kam

cc: Donald J. Zelenka, Esquire



ALAN WILSON
ATTORNEY GENERAL

February 14, 2012

VIA HAND DELIVERY AND FIRST CLASS MAIL

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P. O. Box 11330
Columbia, South Carolina 29211

RECEIVED

FEB 14 2012

S.C. Supreme Court

Re: James D. Robertson v. The State

Dear Mr. Shearouse:

Please find enclosed the original and six (6) copies of Respondent's *Motion to Dismiss*. By copy of this letter, I am serving opposing counsel.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES,III/arb

cc: Emily C. Paavola, Esquire
Robert M. Dudek, Chief Appellate Defender
Ms. Sandi Wofford, Victim Services

The Supreme Court of South Carolina

James D. Robertson,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Lee S. Alford
York County
Trial Court Case No. 2011-CP-46-00072

ORDER

For good cause having been shown, the time for serving and filing the Return to Motion to Dismiss in the above entitled matter is hereby extended until February 29, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

February 24, 2012

cc: Chief Appellate Defender Robert M. Dudek
Emily C. Paavola, Esquire
Senior Assistant Attorney General William Edgar Salter, III



ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 23, 2012

RECEIVED

FEB 23 2012

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

S.C. Supreme Court

Re: James D. Robertson v. The State (Capital Appeal)

Dear Mr. Shearouse:

The Return in Opposition to the motion to dismiss in the above-referenced case is due to be served and filed today. However, because of my current caseload, I have been unable to complete this return for service. Therefore, I am requesting a six day extension, **until February 29, 2012** in which to file and serve the reply to the motion to dismiss.

Counsel has spoken with William Edgar Salter, III and he kindly does not oppose this one time extension request. Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD:lec

cc: William Edgar Salter, III, Esquire
Emily Paavola, Esquire

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

January 30, 2012

RECEIVED

JAN 30 2012

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

S.C. Supreme Court

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

James Robertson v. State

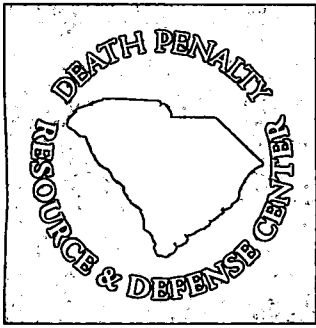
1/26/2012

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Kimberly McCall
Legal Assistant



RECEIVED

JAN 20 2012

S.C. SUPREME COURT

January 24, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *James Robertson v. South Carolina, 2011-CP-46-00072*

Dear Mr. Shearouse:

Please be advised that my office has relocated. My telephone number remains the same, but my new mailing address is:

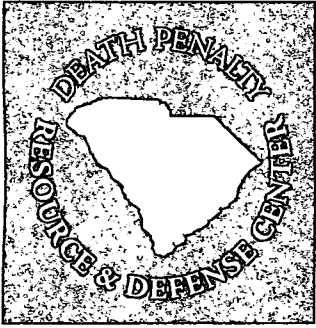
900 Elmwood Avenue
Suite 101
Columbia, SC 29201

If you should have any questions, please do not hesitate to contact me.

Sincerely yours,

Emily C. Paavola

cc: William Edgar Salter, III, Esquire



January 25, 2012

Michael R. Watts
489 Edgewater Drive
Gaffney, SC 29340

Re: *Robertson v. South Carolina*, C.A. No.: 2011-CP-46-00072

Dear Mr. Watts:

On January 16, 2012, I sent you a request for the transcript in regards to this case. I am withdrawing my request for the transcript since the Office of Appellate Defense will be handling this appeal.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Emily C. Paavola

cc: Hon. Daniel Shearouse
Office of Court Administration
James Robertson
William Edgar Salter, III, Esq.
Keir Weyble, Esq.

RECEIVED
JAN 26 2012
S.C. SUPREME COURT



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

January 25, 2012

Mr. Michael Watts
Circuit Court Reporter
489 Edgewater Drive
Gaffney, SC 29340

Dear Mr. Watts:

RECEIVED

JAN 25 2012

S.C. Supreme Court

Please provide us with the following transcript:

James Robertson v. State

Case #:

County: York

Date of Trial: July 5, 2011

Presiding Judge: Lee S. Alford

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

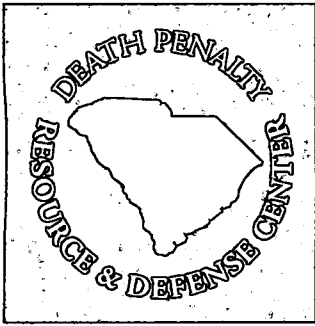
Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Lauren E. Cruse
Legal Assistant

cc: S.C. Supreme Court
Attorney General's Office



January 19, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *James Robertson v. South Carolina, 2011-CP-46-00072*

Dear Mr. Shearouse:

Enclosed please find for filing, with proof of service, the original and one copy of Applicant's Supplemental Notice of Appeal and Required Explanation in regards to the above referenced case. Please clock-in the extra copy and return it to me in the enclosed self addressed stamped envelope. By way of this letter, I am also filing this pleading in the lower court.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

Emily C. Paavola

cc: David Hamilton, Clerk of Court
William Edgar Salter
James Robertson

RECEIVED

JAN 28 2012

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2011-CP-46-0072

James D. Robertson, #5067,

v.

State of South Carolina.

**SUPPLEMENT TO NOTICE OF APPEAL
AND REQUIRED EXPLANATION**

Appellant, James D. Robertson, filed a notice of appeal along with a written explanation required by Rule 243(c), SCACR, on January 6, 2012. As Robertson explained in that filing, the lower court dismissed his application for post-conviction relief and, among other things, resolved disputed material facts in Respondent's favor without affording Robertson an evidentiary hearing or the basic tools of fact discovery and development. In particular, Respondent alleged that Judge John Few held an appointment hearing at the Greenville County Courthouse on September 23, 2005, at which the appointment of Mr. Michael Brown as PCR counsel was "confirmed."¹

¹ Respondent did not allege, however, that the issue of Brown's statutory qualification (or lack thereof) was even discussed at this hearing, but only that his appointment was "confirmed." Moreover, Respondent conceded that there is no record of this alleged September 23rd hearing. *See id. at p.8 n.8* ("The transcript of the September 23, 2005 hearing is not in the files and Respondent apparently did not order this transcript.").

RECEIVED

JAN 28 2012

S.C. SUPREME COURT

Robertson, on the other hand, alleged that although an appointment hearing was scheduled, it did not actually take place because Mr. Brown failed to attend. He further argued that this disputed material fact must be examined through an appropriate post-conviction investigation and hearing. The lower court refused to grant a hearing and instead resolved this materially disputed fact in Respondent's favor, finding not only that an appointment hearing took place, but further that Judge Few determined that Brown was, in fact, properly qualified during this supposed hearing.

After the notice of appeal was filed, Robertson located a letter from Mr. Brown in Robertson's personal files in which Brown stated that he did not become aware of his appointment as PCR counsel until October, 2005. Specifically, Mr. Brown and Mr. Salter (on behalf of Respondent) prepared a consent order stating:

The above-named Defendant, JAMES D. ROBERTSON, was appointed MICHAEL L. BROWN, JR., attorney at law, on September 22, 2005. Due to an error in mailing the Order from the Clerk's office, counsel for the Defendant did not receive the Notice of Appointment until the first week in October, 2005.

See Correspondence to James Robertson from Michael Brown, attached as Exhibit A. Thus, this letter is further evidence in support of Robertson's assertion that no appointment hearing took place on September 23, 2005, since Mr. Brown asserted that he did not even know of his appointment until October, 2005. Accordingly, Robertson respectfully requests that this Court consider the attached correspondence along with his previously filed Notice of Appeal and Required Explanation.

Respectfully submitted,

EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, South Carolina 29211
(803) 765-1044

KEIR M. WEYBLE

Cornell Law School
101 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-3805

BY: 
COUNSEL FOR PETITIONER

January 19, 2012

Exhibit A

The Law Offices of
MICHAEL L. BROWN, JR.

223 Main Street, Suite 550, Rock Hill, SC • PO Box 1025, Rock Hill, SC 29731

Telephone: (803)328-8822

Facsimile: (803)328-0523

November 2, 2005

James D. Robertson
SK5067RA136 CCI
P.O. Box 205
Ridgeville, South Carolina 29472

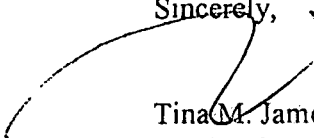
Re: State v. James D. Robertson

Dear James:

Please be advised that we were granted an Order of Extension of time to prepare and file for your PCR. The deadline is now March 1, 2006. I have enclosed a copy of the Order as well as other correspondence forwarded to Judge Few.

Please do not hesitate to contact me should you have any questions.

Sincerely,



Tina M. James
Paralegal

/tmj

The Law Offices of
MICHAEL L. BROWN, JR.

223 Main Street, Suite 550, Rock Hill, SC • PO Box 1025, Rock Hill, SC 29731

Telephone: (803)328-8822

Facsimile: (803)328-0523

November 11, 2005

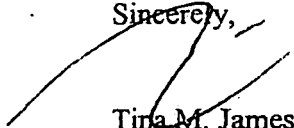
Honorable John C. Few
318 Courthouse
304 E. North Street
Greenville, South Carolina 29601

Re: State v. James D. Robertson

Dear Judge Few:

Please find the original Consent Order executed by Mr. Salter and Mr. Brown in connection with the above-referenced matter.

Sincerely,



Tina M. James
Paralegal

/tmj
Enclosure

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

vs.

JAMES D. ROBERTSON,

Defendant.

**CONSENT ORDER
TO EXTEND TIME TO FILE POST
CONVICTION RELIEF**

The above-named Defendant, JAMES D. ROBERTSON, was appointed MICHAEL L. BROWN, JR., attorney at law, on September 9, 2005; said Order of Appointment was filed September 22, 2005. Due to an error in mailing the Order from the Clerk's office, counsel for the Defendant did not receive the Notice of Appointment until the first week in October, 2005.

The Defendant was originally given sixty (60) days in which to decide whether or not to file a Post Conviction Relief in the above-referenced matter. The Defendant has decided to file the Post Conviction Relief. The attorney for the Defendant, due to the logistics involved and the amount of work involved, needs an extension of time to file the Post Conviction Relief.

Counsel for the State has no objection and consents to this extension of time. The Defendant requests a four (4) month extension of time.

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED, that the Defendant, JAMES D. ROBERTSON, is given a four (4) months extension of time from November 1, 2005, in which to file his Post Conviction Relief in the above-referenced matter.

Counsel for the Defendant has until March 1, 2006, to file said Post Conviction Relief.

HONORABLE JOHN C. FEW

I SO MOVE:


MICHAEL L. BROWN, JR.
Attorney for Defendant

I SO CONSENT:


WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Counsel for the State of South Carolina

November 7, 2005.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 11-CP-46-0072

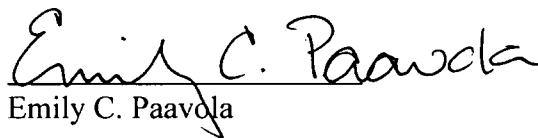
James D. Robertson, #5067,
v.

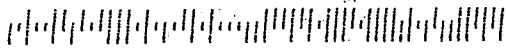
State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Supplemental Notice of Appeal and Required Explanation has been served upon Respondent's counsel by first class mail, postage prepaid, this 19th day of January, 2012, upon the following:

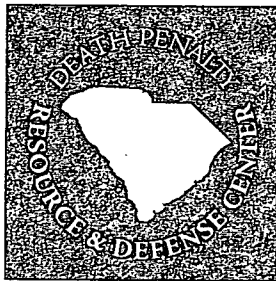
William Edgar Salter
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Emily C. Paavola



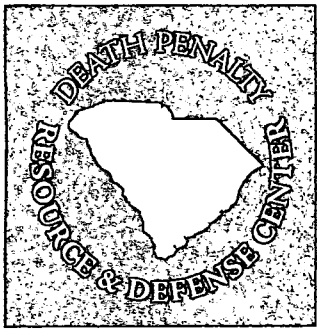
COLUMBIA SC 292

THU 19 JAN 2012 PM



P.O. Box 11311
Columbia, SC 29211

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211



January 16, 2012

Michael R. Watts
489 Edgewater Drive
Gaffney, SC 29340

Re: *Robertson v. South Carolina*, C.A. No.: 2011-CP-46-00072

Dear Mr. Watts:

I am writing to inform you that a notice of appeal was filed in the above captioned case on January 6, 2012. A hearing was held in this case at the Moss Justice Center in York, South Carolina, on July 5, 2011. Please provide a transcript of this proceeding and send it to me, along with an invoice, at the following address:

P.O. Box 11311
Columbia, SC 29211

Thank you for your time and attention to this matter.

Sincerely,

Emily C. Paavola

cc: Hon. Daniel Shearouse
Office of Court Administration
James Robertson
William Edgar Salter, III, Esq.
Keir Weyble, Esq.

RECEIVED

JAN 18 2012

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 09 2012

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2011-CP-46-0072

James D. Robertson, #5067,

v.

State of South Carolina.

NOTICE OF APPEAL AND REQUIRED EXPLANATION

The applicant, James D. Robertson, hereby appeals from the order of the Circuit Court, Hon. Lee S. Alford, presiding judge, dismissing the Application for Post-Conviction Relief in this case on September 20, 2011. On December 8, 2011, the Circuit Court entered an order denying Robertson's Motion to Alter or Amend the Judgment. Copies of these orders are enclosed with this notice.

The lower court's order dismisses the application on six basic grounds: (1) the Application is barred by the one year statute of limitations; (2) the Application is impermissibly successive; (3) Robertson waived his right to qualified counsel at his initial PCR; (4) Robertson cannot demonstrate prejudice as a result of his initial PCR counsel's lack of qualifications; (5) no due process or equal protection violation occurred during Robertson's initial PCR; and, (6)

laches bars relief. Robertson hereby offers the following explanation as to why the lower court's determination was erroneous.

I. PROCEDURAL HISTORY

Robertson was convicted and sentenced to death in the York County, South Carolina Court of General Sessions in March, 1999. Following the dismissal of his direct appeal, Robertson sought post-conviction relief. South Carolina's Uniform Post-Conviction Procedure Act requires appointment of qualified PCR counsel to assist indigent death row prisoners in the identification, development and litigation of challenges to their convictions and sentences. S.C. Code Ann. § 17-27-160(B). At least one attorney "must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense." *Id.* On September 22, 2005, Judge John C. Few filed an order appointing counsel to represent Robertson in his capital PCR proceedings. *Order p.7.* This order states, in full:

The defendant contends that he is indigent and in need of services of an attorney as contemplated by law. THEREFORE, MICHAEL BROWN, Attorney-at-Law, is appointed as Counsel for the Defendant.

See Appointment Order, attached as Exhibit 1. This order does not address whether Brown was qualified in accordance with § 17-27-160(B). Joseph David Matlock later appeared with Brown at Robertson's evidentiary hearing. There is no record of Matlock's appointment. The record of

Robertson's initial PCR contains no indication that either attorney met the statutory criteria for appointment as qualified PCR counsel in a capital case.

In March 2006, approximately six months after their appointment, counsel filed a PCR application on Robertson's behalf. The sum total of the allegations contained in the application was "Ineffective assistance of counsel – specifics to be amended later." By the time of the January 29-31, 2007, evidentiary hearing, no amended application had been filed. In response to questioning by the PCR judge about the claims they intended to pursue at the hearing, counsel identified approximately a dozen theories under which trial counsel assertedly had been ineffective. At the evidentiary hearing, counsel called three witnesses: Robertson, trial attorney James Hancock, and trial attorney James Boyd. Consistent with the limited presentation before the PCR court, the records reviewed by undersigned counsel indicate that Robertson's PCR attorneys did not perform an independent investigation to determine the existence of claims for relief based on evidence not contained within the record generated at trial.¹ Judge John C. Few denied post-conviction relief in a written order dated March 7, 2008.

On October 6, 2010, this Court denied Robertson's petition for a writ of certiorari. Undersigned counsel was appointed by the United States District Court for the District of South Carolina to represent Robertson in his federal habeas corpus proceedings on November 8, 2010. On January 7, 2011, undersigned counsel filed a PCR application containing a number of viable

¹ See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1 and Commentary, reported in 31 HOFSTRA L. REV. 913, 1085-86 (2003) ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."); see also, Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. at 1086 ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues.").

issues which could – and should – have been raised by initial PCR counsel as grounds for post-conviction relief.²

Respondent moved to dismiss the application. Robertson responded to the Motion to Dismiss, arguing that: (1) the application is timely; (2) Robertson is entitled to pursue the present PCR application as a matter of state law because his initial PCR counsel were not qualified and failed to competently represent him, and other PCR applicants have been permitted to go forward with similar applications under the same circumstances; (3) Robertson is entitled to pursue the application as a matter of federal constitutional law; and, (4) the United States Supreme Court is currently considering a series of cases that may provide additional grounds under which the federal constitution would require Robertson's application to go forward, *see Maples v. Maples*, 2011 WL 940889; *Martinez v. Ryan*, 2011 WL 380903; *Foster v. Texas*, 2011 WL 4360018. Robertson offered an affidavit from Joseph Matlock stating:

- (1) I was appointed to represent James D. Robertson in his capital post-conviction relief proceedings. I served as second-chair with attorney Michael Brown.
- (2) At the time of my appointment and through to the conclusion of Mr. Robertson's PCR, I had never previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings, although I had previously served as counsel on a non-capital murder trial.
- (3) At the time of my appointment and through to the conclusion of Mr. Robertson's PCR, I had never attended a continuing legal education seminar or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

² These claims are merely those that are evident from a review of the record. Undersigned counsel have not had an opportunity to conduct an adequate and independent investigation – one which prior counsel should have performed. Such an investigation would most certainly uncover other claims for post-conviction relief.

Affidavit of Joseph D. Matlock, attached as Exhibit 2. Moreover, Robertson offered an affidavit from John H. Blume, who stated that he spoke to Michael Brown on September 27, 2011. Brown likewise had never previously represented a death-sentenced inmate in post-conviction, nor had he attended any training primarily involving advocacy in the field of capital appellate and/or post-conviction defense at the time of his representation of Robertson. *See Affidavit of John H. Blume, attached as Exhibit 3.* Brown was not aware of the statutory provisions governing the appointment of counsel in a capital PCR case. *Id.*

Finally, Robertson presented the lower court with a copy of this Court's recent opinion in the Matter of Michael L. Brown. *See In re Brown, attached as Exhibit 4.* This opinion finds that Brown was arrested in July 2007, "following an altercation with police officers at a bar" – an incident Brown admitted "was a result of his use and abuse of alcohol." *Id.* Despite four years of substance abuse treatment, however, Brown was arrested again in July 2011 and pled guilty to resisting arrest. *Id.* Brown served as Robertson's PCR counsel from September 2005 to March 2008. Thus, *In re Brown* further supports Robertson's argument that Brown did not competently represent him during his initial PCR proceeding, as he was abusing alcohol at this time and was ordered to attend both "in-patient and out-patient rehabilitation" while the PCR application was pending. Brown apparently failed to comply with these requirements, as evidenced by his most recent arrest, and this Court held that his conduct violated Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) of the Rules of Professional Conduct, Rule 407, SCACR. Moreover, this Court disciplined Brown according to Rule 7(a)(5) (it shall be ground for discipline for a lawyer to engage in conduct tending to pollute the administration

of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Robertson requested an opportunity to investigate and fully develop the facts in support of his January 2011 PCR application. He asserted that, to the extent that there was any dispute about his initial PCR counsel's lack of qualification, the lower court should, at a minimum, hold an evidentiary hearing to determine that issue. Alternatively, Robertson argued that the lower court should hold his case in abeyance until the United States Supreme Court has resolved the *Maples*, *Martinez*, and *Foster* line of cases which could dictate that this case be allowed to go forward as a matter of federal constitutional law, regardless of South Carolina's state law rules regarding successive petitions.

The lower court rejected Robertson's arguments and dismissed his application, resolving a number of factual disputes in respondent's favor without holding an evidentiary hearing or providing Robertson with the time or opportunity to investigate. Because the lower court's determination was erroneous, Robertson must be permitted to proceed with this appeal. *See* Rule 243(c), SCACR.

II. ARGUMENT

A. ROBERTSON IS ENTITLED TO PURSUE HIS PCR APPLICATION AS A MATTER OF STATE LAW.

The lower court's September 20th Order [hereafter, "the Order"] finds that Robertson's application must be dismissed as successive. *See Order at p.18*. This determination is incorrect. In *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991), this Court observed that successive PCR applications generally should not be entertained "unless the court finds a ground for relief asserted which for *sufficient reason* was not asserted or was inadequately raised in the original, supplemental or amended application." *Id.* at 450, 409 S.E.2d at 394 (emphasis

in original) (quoting S.C. Code Ann. § 17-27-90). The Court held, however, that there are exceptions to the general rule, including “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.* at 451, 509 S.E.2d at 394.

In *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996), the Court invoked this exception and permitted a successive PCR application to go forward because of the ineffective assistance of initial PCR counsel and various other procedural irregularities. *Id.* at 235-36, 478 S.E.2d at 834-35. The Court has also applied similar exceptions in other cases. For example, in *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982), the Court held that a “unique” combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR proceeding. The Court later noted that under these circumstances it was “highly doubtful” that Case would have been able to raise the appropriate arguments in his initial PCR. *Aice*, 305 S.C. at 451, n.1, 409 S.E.2d at 394, n.1; *see also, Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (allowing a successive PCR where initial PCR counsel was the same as trial counsel).

The Circuit Courts in at least two prior capital PCR cases have also permitted successive PCR applications in the same or similar circumstances. The Honorable Marc H. Westbrook permitted Luke Williams to pursue a second PCR proceeding, over the State’s objection, on the basis that Williams’ initial PCR counsel was not qualified. *See Williams v. Ozmint*, 494 F.3d 474, 484 (4th Cir. 2007) (“Williams filed two applications for state post-conviction relief, the second of which was granted by the circuit court (PCR court).”). While this Court ultimately reversed the circuit court’s grant of relief in that case, it did so on the merits, not on the ground that Williams’ second application was procedurally barred. *See Williams v. State*, 363 S.C. 341,

611 S.E.2d 232 (2005). Another capital PCR applicant, Edward Elmore, was also permitted to proceed on a successive PCR application over the State's objection, and the Honorable Mark J. Hayes granted Elmore penalty-phase relief from his death sentence on February 1, 2010. The State did not appeal this order.

This case is directly on par with *Williams* and *Elmore*. Robertson's initial PCR counsel were not qualified to represent him in a capital post-conviction case under the plain language of S.C. Code § 17-27-160(B). Moreover, initial PCR counsel failed to competently represent Robertson in his first post-conviction proceeding. All death-sentenced inmates are entitled to one full and fair opportunity at post-conviction relief with the assistance of qualified and competent counsel. The general rule against successive PCR applications is intended to enforce that limit. But the courts have adopted exceptions to ensure that all PCR applicants actually receive their one fair chance at meaningful post-conviction review. As in *Williams* and *Elmore*, Robertson is simply asking for his one fair chance. There is no principled distinction between the procedural circumstances in *Williams* and *Elmore* and the circumstances here. It would be fundamentally unfair for Robertson to be arbitrarily denied the opportunity that Williams and Elmore rightfully received.

1. Robertson's Initial PCR Counsel Were Not Qualified To Represent Him in a Capital Post-Conviction Proceeding Pursuant to the Requirements of S.C. Code §17-27-160(B).

In its motion to dismiss, respondent alleged that Judge Few held an appointment hearing at the Greenville County Courthouse on September 23, 2005, at which the appointment of Mr. Brown was "confirmed." *Motion to Dismiss at p.8*. Respondent did not allege, however, that the issue of Brown's statutory qualification (or lack thereof) was even discussed at this hearing, but only that his appointment was "confirmed." Moreover, Respondent conceded that there is no

record of this alleged September 23rd hearing. *See id. at p.8 n.8* (“The transcript of the September 23, 2005 hearing is not in the files and Respondent apparently did not order this transcript.”).

Robertson, on the other hand, alleged that although an appointment hearing was scheduled, it did not actually take place because initial PCR counsel failed to attend. *Response in Opposition to Motion to Dismiss at p.17*. He further argued that this disputed material fact must be examined through an appropriate post-conviction investigation and hearing.³ *Id.*

Although the lower court took no evidence and refused to authorize Robertson to begin a post-conviction investigation, it nonetheless resolved this materially disputed fact in respondent’s favor, finding not only that an appointment hearing took place, but further that: (a) Robertson was present at this hearing; (b) Assistant Attorney General, Mr. Edgar Salter, was also present; and, (c) Brown was, in fact, properly qualified. *Order at pp.8, 22*. These findings are inconsistent with both state and federal law. *See, e.g., Herman v. Claudy*, 350 U.S. 116, 119 (1965) (“allegations not patently frivolous or false on a consideration of the whole record . . . should not be summarily dismissed merely because a state prosecuting officer files an answer denying some or all of the allegations”); *Coleman v. Alabama*, 377 U.S. 129 (1964) (same); *Palmer v. Ashe*, 342 U.S. 134 (1952) (same); *Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) (holding summary dismissal without a hearing is only appropriate when it is apparent on the face of the application that there is no need for a hearing to develop any facts).

³ As explained above, there is no record of Mr. Matlock’s appointment at all. The Court, and Respondent who drafted the Order, apparently concede that he was not properly qualified. The Order notes only that he was appointed to assist Mr. Brown at some unknown date. *Order at p.8*. This language is identical to Respondent’s Motion to Dismiss at p.8.

The lower court further found that Brown was specifically qualified according to Chief Justice Toal's Memorandum dated August 13, 2003.⁴ *Order pp.23-24*. The Order acknowledges that Chief Justice Toal herself has recently stated that her memorandum is not an authoritative interpretation of the statute, but nonetheless concludes that "while not binding authority" her memorandum "remains authority." *Order p.25*. The Order then speculates that, although Judge Few's September 9, 2005 order appointing Brown, "did not expressly rely upon the . . . Memorandum," (nor did the order mention the memorandum at all), Judge Few "presumably" relied on it in finding Brown qualified. *Order p.24*. Thus, the lower court's rejection of Robertson's arguments rests on nothing more than a series of speculative guesses, including the court's assumptions that: (a) an appointment hearing actually took place on September 23, 2005; (b) Brown's qualifications (or lack of qualifications) under South Carolina's capital PCR statute were actually discussed and conclusively determined at this hearing; (c) at the time of the hearing, Judge Few was aware of Justice Toal's memorandum; (d) although he was not bound by her memorandum, Judge Few nonetheless viewed it as "authority" and agreed with Justice Toal's interpretation of the statute; (e) Judge Few specifically applied that interpretation to Brown; and, (f) Judge Few specifically found that Brown met that interpretation. It is inappropriate for the lower court to reach a decision by such "resort to speculation and surmise." *Palmer*, 342 U.S. at 137.

⁴ This memorandum is at odds with the statutory language and concludes that § 17-27-160 (B) does *not* require that a capital PCR applicant must have at least one attorney who has: (a) previously represented a death-sentenced inmate; or (b) meets the minimum qualifications to represent a capital defendant at trial AND has completed twelve hours of capital-specific CLE training, as the clear language of the statute plainly states.

2. Applicant's Initial PCR Counsel Did Not Perform Competently.

Undersigned counsel's review of the record indicates that Robertson's initial PCR counsel conducted no investigation, and neither sought nor secured any assistance from investigators or expert witnesses. Counsel waited six months after their appointment before filing a PCR application, and even then only alleged "Ineffective assistance of counsel – specifics to be amended later." Counsel failed to file any amended application, and the bulk of the post-conviction relief hearing consisted of Robertson's testimony expressing his dissatisfaction with trial counsel. As explained above, there were a number of other potentially viable claims evident from the record which could and should have been raised. An adequate investigation – which prior counsel should have performed but did not – will almost certainly uncover other viable claims for post-conviction relief.

The American Bar Association Guidelines, which are applicable to trial, appellate and post-conviction counsel, have been cited with approval by the Supreme Court of the United States, *see, e.g., Rompilla v. Beard*, 545 U.S. 374, (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003), and by this Court, *see Council v. State*, 670 S.E. 2d 356, 363 (S.C. 2008); *Ard v. Catoe*, 642 S.E.2d 590, 597 (S.C. 2007). Guidelines 10.15.1 (C) and (E) explicitly state:

C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:

1. maintain close contact with the client regarding litigation developments;
2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;
3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and,
4. continue an aggressive investigation of all aspects of the case.⁵

Based on all available information, Robertson's prior counsel did not fulfill these obligations. Thus, their appointment not only ignored the criteria established by the General Assembly, it also worked to Robertson's clear detriment.

B. ROBERTSON DID NOT WAIVE HIS RIGHT TO QUALIFIED PCR COUNSEL AND LACHES DOES NOT APPLY.

The lower court found that even if his initial PCR counsel was not qualified, Robertson waived his right to qualified PCR counsel by not objecting at the time of their appointment. *See Order at p.17* (finding that "the appointment hearing was **the only time** to properly complain about the defects in counsel's eligibility for appointment pursuant to § 17-27-160(B)") (emphasis in original); *see also, id. at p.21*.⁶ The Order also invokes laches for the same basic reason. *Order at p.35*. This finding is erroneous in that it suggests the courts bear no independent responsibility for ensuring that counsel appointed under the capital PCR statute are actually qualified. The purpose of the statute is to ensure that competent and qualified counsel is afforded to indigent capital PCR applicants. The statute does not require that the indigent

⁵ The commentary to the guideline states that "collateral counsel cannot rely on the previously compiled record but must conduct a thorough independent investigation. . . ."

⁶ This finding is particularly curious with regard to Mr. Matlock, since no party has even alleged that he was present at an appointment hearing.

applicant *himself* be aware of the statute's requirements, personally investigate post-conviction counsel's lack of qualifications, raise objections based on that investigation, and thereby ensure that the statute's protections are actually afforded to him. Such a requirement is illogical and inconsistent with the plain language of the statute. It is also inconsistent with the basic fairness requirements of due process.⁷

C. NO OUTCOME-DETERMINATIVE SHOWING OF PREJUDICE IS REQUIRED BEFORE ROBERTSON'S PCR APPLICATION MAY PROCEED.

The lower court found that, before he may proceed, Robertson must first demonstrate prejudice "from the failure to follow a technical requirement of a statute that is not a right guaranteed by the United States or State Constitutions." *Order at p.26*. This finding is inconsistent with this and other South Carolina courts' treatment of capital cases, including *Williams v. State*, 363 S.C. 341, 611 S.E.2d 232 (2005); *Elmore v. State*, 2005-CP-24-1205 (order filed February 1, 2010); and, most recently, *Terry v. State*, --- S.C. ---, --- S.E.2d ---, 2011 WL 3804573 (2011).

First, the Honorable Marc H. Westbrook permitted Luke Williams to pursue a second PCR application, over the State's objection, on the ground that his initial PCR counsel were not qualified under the plain language of S.C. Code Ann. § 17-27-160(B). Williams was not required to demonstrate that his second PCR application would merit relief *before* he was even allowed to proceed to a hearing. Similarly, Edward Elmore was not required to prove the merits of his claims *before* he was permitted to investigate and offer proof at an evidentiary hearing. Judge Mark J. Hayes granted Elmore penalty-phase relief from his death sentence on the merits

⁷ In no other context does such a draconian waiver rule apply. For example, a criminal defendant is not required to personally object at the time of trial counsel's deficiency in order to avoid waiving his right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

of his claim, and the State did not appeal this order. Finally, capital PCR applicant, Gary Terry, raised two claims in his appeal from the denial of PCR which, at oral argument, he conceded were arguably procedurally defaulted. This Court decided these claims *on the merits*, despite respondent's arguments that they should be dismissed due to a procedural bar. *See Terry*, 2011 WL 3804573 (2011).

Thus, there is no threshold requirement that a capital PCR applicant must demonstrate outcome-determinative prejudice before he may proceed with a permissible second PCR application. If there were such a requirement, this Court would have reversed Williams' grant of relief on procedural grounds, and it would have taken Respondent's invitation to dismiss Terry's appeal on procedural grounds. But this Court did neither. Thus, the lower court's Order creates a new requirement that contradicts existing law which demands that a prisoner prove – not merely allege – entitlement to relief at the initial pleading stage, and without access to the ordinary tools of fact development contemplated (and routinely made available) in South Carolina capital post-conviction relief cases. Such a scheme is designed to preclude review regardless of merit.

The lower court's Order purports to distinguish Robertson's case from *Elmore* and *Williams*, but the court's arguments raise only distinctions without a difference. *Order pp.18, 22-23*. First, with regard to *Elmore*, the Order states that: (a) Elmore filed a successive PCR application raising a mental retardation claim; (b) the State moved to dismiss the application on procedural grounds; (c) the PCR judge held the motion to dismiss in abeyance pending an evidentiary hearing on mental retardation; (d) the PCR court found Elmore mentally retarded; and, (e) the State did not appeal "because an appeal would be futile." *Id. at p.22*. This account of the procedural history of *Elmore* fails to explain how or why *Elmore* is distinguishable here.

Like Robertson, Elmore was a death-sentenced inmate who filed a second PCR application. The fact that Elmore was allowed to proceed to a hearing on his second application, and that the PCR court rendered a decision on the merits of his claim, actually *supports* Robertson's arguments here.

Williams is even more closely analogous. Like Robertson, Williams argued that his second PCR application should be allowed to go forward because his initial PCR counsel were not qualified and did not competently represent him during his initial PCR proceedings. Williams was allowed to proceed to a hearing and was not required to prove the merits of his claims before he was allowed that process. The Order concludes that *Williams* is distinguishable because Robertson's lead PCR counsel, Mr. Brown, "was properly qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011), unlike Williams' original PCR attorneys." *Order at p.22*. However, Brown's qualification (or lack of qualification) is a question of fact about which there is a material dispute. It is improper for the lower court to simply resolve material disputed facts against Robertson without a hearing. *See, e.g., Herman*, 350 U.S. 116; *Coleman*, 377 U.S. 129; *Palmer*, 342 U.S. 134; *Al-Shabazz*, 338 S.C. at 363, 527 S.E.2d at 747.

It is likewise error for the lower court to fault Robertson for not conducting a complete investigation of the state court allegations since undersigned counsel's appointment by the federal district court in November of 2010. *See Order at p.28* ("Robertson's present counsel were appointed by the United States District Court for the District of South Carolina to represent Robertson in his federal habeas proceeding on November 8, 2010. To this date, they can only point out that they would have handled the first PCR differently. . . "); *see also, December 8, 2011 Order Denying Applicant's Motion to Alter or Amend at p.2* ("Applicant's present counsel has had about a year to raise new issues, but has not done so."). This conclusion is both incorrect

and unfair. The federal district court does not fund state-court investigation, nor would it have been proper for counsel to make such a request. The only other alternative would have been for undersigned counsel to personally fund an investigation, prior to the resolution of respondent's motion to dismiss, and without access to access to resources, basic process, discovery or a hearing. This alternative is equally unreasonable.

D. THE LOWER COURT'S ORDER VIOLATES FEDERAL LAW.

The lower court's Order includes a number of findings that violate well-established federal principles that state courts must follow when adjudicating federal claims such as those properly pleaded in Robertson's current PCR Application.

The Order faults Robertson for not providing particularized proof of initial PCR counsel's lack of qualifications, and thereby leaving the Court to "speculate." *Order at p.23* ("it is left up to this Court to speculate on [initial PCR counsel's] qualifications since there is no record or information provided to the Court."). The Order finds that "in the absence of evidence to the contrary, this Court must assume that Judge Few appointed qualified counsel to represent Robertson in his first PCR application." *Id.* The Order also characterizes Robertson's allegations as merely claims that current PCR counsel would have handled his proceedings "differently," and finds that this allegation "does not establish that PCR counsel were deficient, nor any prejudice to Robertson." *Order at p.27.* This is not a fair characterization of Robertson's allegations, nor is it a reasonable response to them. Robertson has plainly:

- (1) identified recognized standards by which initial PCR counsel's performance should be measured;
- (2) alleged facts showing that initial PCR counsel did not meet those standards and stated that there is no record establishing the contrary;

(3) directed the Court's attention to obvious, fundamental deficiencies in initial PCR counsel's performance prior to and at the PCR hearing, including that they:

- (a) conducted no PCR investigation;
- (b) failed to seek or secure any assistance from investigators or expert witnesses;
- (c) waited six months after appointment before filing a PCR application, and even then only alleged "[i]neffective assistance of counsel – specifics to be amended later."
- (d) failed to file any amended application;
- (e) primarily relied on Robertson's own testimony at the PCR hearing about his general dissatisfaction with trial counsel; and,
- (f) failed to raise a number of potentially meritorious claims which are plainly evident from the record.

(4) alleged that, with the aid of competent counsel, Robertson could prove errors entitling him to relief; and,

(5) asserted that, to the extent there is any question about counsel's qualifications, a hearing should be convened at which the evidence can be developed without resort to "speculation."

See Response in Opposition to Motion to Dismiss at pp.2-3, 5-11, 13. Without access to resources, process or a hearing, Robertson cannot reasonably be expected to have done any more than that.

Thus, Robertson agrees that the lower court should not speculate, and it was improper for the lower court to do so in lieu of affording him the basic process due to any litigant whose claim for relief turns on the resolution of a disputed fact. *See, e.g., Palmer*, 342 U.S. at 137 (the right to counsel "is too valuable in our system to dilute it by such untrustworthy reasoning" as that conducted by "speculation and surmise"). It is error for the lower court to fault Robertson for failing to prove facts outside the existing record without providing him with a hearing and the

investigative tools with which to prove them. *See, e.g., Wellon v. Hall*, 130 S.Ct. 727, 730 n.3 (2010) (per curiam); *Coleman*, 377 U.S. at 133 (“Since . . . the record shows that petitioner was not permitted to offer evidence to support his claim, the judgment of affirmance must fall.”); (citing *Carter v. Texas*, 177 U.S. 442, 448-449 (1990) (“where the state court found that the motion was but a mere tender of the issue, unaccompanied by any supporting testimony, this Court must reverse on the ground that the defendant offered to introduce witnesses to prove the allegations and the court declined to hear any evidence upon the subject”) (internal quotations omitted)).

The lower court admits that “the only way for it to determine whether prior collateral counsel’s performance was incompetent is to hold an evidentiary hearing, where prior collateral counsel could testify as to their investigation and what issue(s) they may have investigated but did not pursue at the evidentiary hearing.” *Order at p.30*. Robertson agrees. Accordingly, it is improper for the lower court to purport to find, elsewhere in the Order, that initial PCR counsel was actually qualified and competent. *See Order at pp.22, 23, 26, 27*. It is contradictory for the lower court to purport to hold to both of these competing conclusions.

The Order places heavy emphasis on the fact that there is currently no federal constitutional right to state post-conviction relief proceedings, calling state PCR “a matter of legislative grace.” *Order at p. 31*; *see also, id. at pp.29-33* (citing, *inter alia*, *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (observing that “the right to appointed counsel extends to the first appeal of right, and no further”); *Murray v. Giarratano*, 492 U.S. 1, 10, 13 (1989) (applying this rule to capital cases)). However, the Order fails to address Robertson’s arguments that, in South Carolina, state post-conviction *is* the first appeal of right for many claims, such as

ineffective assistance of counsel, since they cannot be raised on direct appeal. *See Response in Opposition to Motion to Dismiss at p.11 n.8.*

Nor does the Order address Robertson's arguments that a state-created right, even if only a "legislative grace," must still be provided in accordance with the basic principles of due process. *See id. at pp.10-13; Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (noting that although the Constitution does not require States to grant appeals as of right to criminal defendants, nonetheless if a State has created a criminal appellate process, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protections Clauses of the Constitution"); *see also, Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that even though a state is not constitutionally required to provide direct review, once a state chooses to do so, it must provide indigent defendants with a free copy of the trial transcript in order to give them a fair opportunity to obtain an adjudication on the merits of the appeal); *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that a procedure whereby indigent defendants must demonstrate the merit of their case before obtaining counsel on appeal "does not comport with fair procedure"); *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977) (asserting that it is "beyond doubt that prisoners have a constitutional right of access to the courts" which must be "adequate, effective, and meaningful").

The Order glosses over the fact that the United States Supreme Court has recently granted certiorari in two cases – *Maples v. Maples*, 2011 WL 940889 (U.S.) and *Martinez v. Ryan*, 2011 WL 380903 (U.S.) – that can only be seen as vehicles through which the Supreme Court will revisit at least some of the rules established in *Finley*, *Giarratano* and their progeny. The Order erroneously purports to predict that *Maples* and *Martinez* will, at most, announce only a new way to overcome procedural default in federal habeas corpus proceedings. *Order at p.33* This

prediction is most certainly inaccurate. The context of *Maples* may be limited to procedural default in federal habeas corpus, but *Martinez* squarely presents the question of whether the Sixth Amendment extends to the first post-conviction relief proceeding as of right. The question presented in *Martinez* is:

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

See *Petition for Writ of Certiorari in Martinez v. Ryan*, attached as Exhibit 5. The lower court's attempt to distinguish Robertson's case from *Martinez* on the ground that Arizona's post-conviction procedures occur under criminal, rather than civil rules of procedure, is also quite weak. See *Order at p.33 n.16*. The salient feature is that, in both schemes, ineffective assistance of counsel cannot be raised until state post-conviction. To characterize the schemes otherwise is disingenuous.

Moreover, on September 20, 2011, the Supreme Court granted a stay of execution pending the disposition of the petition for a writ of certiorari in *Foster v. Texas*, --- S.Ct. ---, 2011 WL 4360018. Like *Martinez*, Foster's petition squarely addresses the issue of ineffective representation by state post-conviction counsel. The question presented is:

When a state habeas corpus proceeding represents a death-sentenced state prisoner's first opportunity to raise claims of innocence or ineffective assistance of trial counsel, does the federal constitution guarantee him effective assistance of counsel in presenting those claims?

The lower court also erred by anticipatorily declaring that any rule announced in either *Maples* or *Martinez* would be a "new" rule and therefore inapplicable to a case like Robertson's

under *Teague v. Lane*, 489 U.S. 288 (1989). *Order at p.35*. As the Supreme Court has made clear, *Teague* is not binding on state courts. *Danforth v. Minnesota*, 552 U.S. 264 (2008). Furthermore, even if *Teague* were applicable, a “new” rule extending the right to counsel would be sufficiently fundamental that it would very likely be retroactive. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (identifying *Gideon v. Wainwright*, 372 U.S. 335 (1963), as the paradigmatic new, but retroactive rule).

E. The PCR Application is timely.

The lower court found that “[a]lthough he does not refer to this subsection in his Response,” Robertson “is attempting to rely in § 17-27-45(C),” which governs claims based on newly discovered evidence. *Order at p.16*. The court then determined that Robertson’s application is untimely because “his reliance on § 17-27-45(C) is misplaced.” *Id.* This is not Robertson’s position. He did not rely on § 17-27-45(C). Rather, Robertson argued that when a second PCR application is permitted under certain exceptional circumstances, which are present here, the statute of limitations does not apply, *see Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999), or *at a minimum* should be implicitly or equitably tolled for the period during which the initial PCR application was pending. *See Response in Opposition to Motion to Dismiss at pp.15-16*. The Order incorrectly identifies Robertson’s position as based on section 17-27-45(C) and fails to address any of the arguments that Robertson did raise regarding the statute of limitations.

CONCLUSION

For all of the reasons stated above, this Court should permit Robertson to file a petition for writ of certiorari and allow his appeal to proceed.

Respectfully submitted,

EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, South Carolina 29211
(803) 765-1044

KEIR M. WEYBLE

Cornell Law School
101 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-3805

BY: Emily C. Paavola
COUNSEL FOR PETITIONER

January 6, 2012

Exhibit 1

RECEIVED
2005 SEP 22 PM 12:09

DEFENSE OF INDIGENTS ACT

FORM NO. IV

HILTON
& G.S.
WINY, SC

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
DOCKET NO. _____)

STATE OF SOUTH CAROLINA)
VS.)
JAMES D. ROBERTSON)
DEFENDANT)
_____)

ORDER OF APPOINTMENT OF LEGAL
COUNSEL OF INDIGENT DEFENDANT

The defendant contends that he is indigent and in need of services of an attorney as contemplated by law. THEREFORE, MICHAEL BROWN, Attorney-at-Law, is appointed as Counsel for the Defendant.

This 9TH day of SEPTEMBER,
2005, at 8:51 AM

PCF INATHPENAE
EVERYWHERE 213031
ROCK HILL, SC 29732
803-329-4200
SEE ATTACHED MEMO
FROM JUDGE FEW.

Exhibit 2

STATE OF SOUTH CAROLINA)

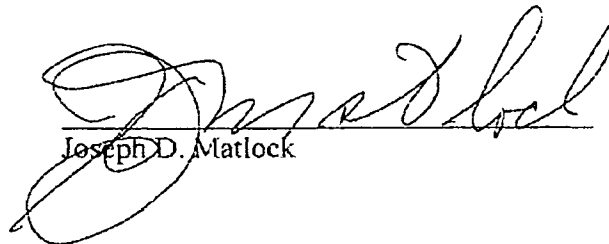
COUNTY OF York)

AFFIDAVIT

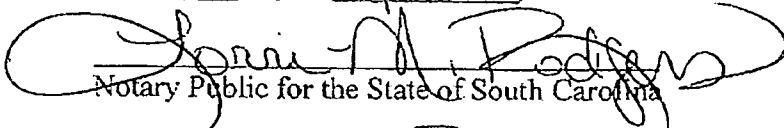
Joseph D. Matlock, Esq., who appeared personally before me, affirms and states the following:

1. I was appointed to represent James D. Robertson in his capital post-conviction relief proceedings. I served as second-chair with attorney Michael Brown.
2. At the time of my appointment, and through to the conclusion of Mr. Robertson's PCR, I had never previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings, although I had previously served as counsel on a non-capital murder trial.
3. At the time of my appointment, and through to the conclusion of Mr. Robertson's PCR, I had never attended a continuing legal education seminar or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

I affirm, under the penalty of perjury, that the above information is true and correct.


Joseph D. Matlock

Sworn to and subscribed before me
This 28th day of September, 2011.


Notary Public for the State of South Carolina

My commission expires: February 28, 2021

Exhibit 3

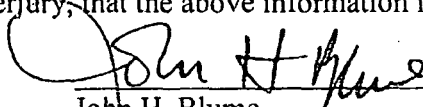
STATE OF NEW YORK)
)
COUNTY OF TOMPKINS)

AFFIDAVIT

John H. Blume, Esq., who appeared personally before me, affirms and states the following:

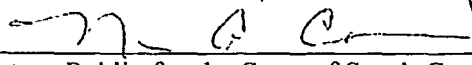
1. On September 27, 2011, I spoke with Michael Brown, who was appointed to represent James D. Robertson in his initial capital post-conviction relief proceedings.
2. Mr. Brown informed me that at the time of his appointment, he had not previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings. While he had been counsel in several capital trial level cases, he had no capital post-conviction experience.
3. Mr. Brown also informed me that at the time of his appointment, and through to the conclusion of Mr. Robertson's PCR, he had not attended a continuing legal education seminar or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.
4. Mr. Brown also informed me that at the time of his appointment, he was not aware that there were different statutory provisions governing the appointment of counsel in a capital post-conviction case and a capital trial case.
5. As the former Director of the South Carolina Death Penalty Resource Center, and thus as one who monitored developments in South Carolina post-conviction cases and assisted in the recruitment of counsel in capital post-conviction cases, Mr. Brown's representations are consistent with my first hand knowledge that he had not previously been counsel in a capital post-conviction proceeding. Furthermore, I have spoken with Teresa Norris, who was the successor as Director of the Center (later known as the Center for Capital Litigation), and her recollection is consistent with both my memory and Mr. Brown's representations.

I affirm, under the penalty of perjury, that the above information is true and correct.


John H. Blume

Sworn to and subscribed before me

This 28th day of September, 2011


Notary Public for the State of South Carolina

My commission expires: NAN A. COLVIN
Notary Public, State of New York

No. 4674392

Qualified in Tompkins County

Commission Expires

12/31/14

Exhibit 4

**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

In the Matter of Michael Langford Brown, Jr.,
Respondent.

Opinion No. 27058
Submitted September 26, 2011 – Filed October 24, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel,
and Barbara M. Seymour, Deputy
Disciplinary Counsel, both of Columbia, for
Office of Disciplinary Counsel.

Desa A. Ballard, of Ballard Watson &
Weissenstein, of West Columbia, for
respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of either an admonition or public reprimand with the following conditions: 1) to fully comply with the terms of his current contract with Lawyers Helping Lawyers (LHL) which was renewed in October 2010; 2) to submit an affidavit to ODC attesting to his compliance with the terms of his contract with LHL every three months for a period of one year from the date of the Court's order imposing discipline; 3) to submit to ODC statements from his medical treatment provider and his LHL monitor attesting to his compliance with his LHL contract every three months for a period of one year from the date of the Court's order imposing discipline; 4) to submit his affidavit to ODC attesting to completion of the terms of the LHL contract one year after the date of the Court's order imposing discipline; 5) to submit a letter to ODC signed by his LHL monitor and a representative of the South Carolina Bar responsible for administration of LHL confirming respondent's completion with the terms of his LHL contract one year after the date of the Court's order imposing discipline; 6) to submit a letter to ODC signed by respondent's medical treatment provider confirming respondent's compliance with his treatment program and providing his prognosis and plan for future treatment, if any, one year after the date of the Court's order imposing discipline;

7) to allow an investigative panel to review this matter one year after the date of the Court's order imposing discipline and to unilaterally extend the above six conditions for one additional year; 8) to bear all costs of compliance with the terms of the Agreement and to be personally responsible for obtaining and submitting the required documentation; and 9) to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of imposition of discipline. We accept the agreement, issue a public reprimand, and order respondent to comply with each of the conditions set forth above.

The facts, as set forth in the Agreement, are as follows.

FACTS

In July 2007, respondent was arrested following an altercation with police officers at a bar. In July 2011, respondent pled guilty to resisting arrest and was sentenced to pay a fine and complete community service. Respondent paid the fine and is in the process of completing his community service.

Respondent acknowledges the incident in July 2007 was a result of his use and abuse of alcohol. With the assistance of Lawyers Helping Lawyers, respondent has been in treatment for substance abuse since the time of his arrest in July 2007. The treatment has included in-patient and out-patient rehabilitation, active participation in Alcoholics Anonymous, peer monitoring, and random testing for alcohol use.

LAW

Respondent admits that, by his misconduct, he has violated Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), of the Rules

Professional Conduct, Rule 407, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand with conditions. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Respondent shall: 1) fully comply with the terms of his current contract with LHL which was renewed in October 2010; 2) submit an affidavit to ODC attesting to his compliance with the terms of his contract with LHL every three months for a period of one year from the date of this order; 3) submit statements to ODC from his medical treatment provider and his LHL monitor attesting to his compliance with his LHL contract every three months for a period of one year from the date of this order; 4) submit his affidavit to ODC attesting to completion of the terms of the LHL contract one year after the date of this order; 5) submit to ODC a letter signed by his LHL monitor and a representative of the South Carolina Bar responsible for administration of LHL confirming

respondent's completion with the terms of his LHL contract one year after the date of this order; 6) submit a letter to ODC signed by respondent's medical treatment provider confirming respondent's compliance with his treatment program and providing his prognosis and plan for future treatment, if any, one year from the date of this order; 7) allow an investigative panel to review this matter one year after the date of this order and to unilaterally extend the above six conditions for one additional year; 8) bear all costs of compliance with the terms of the Agreement and to be personally responsible for obtaining and submitting the required documentation; and 9) pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of the date of this order.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

Exhibit 5

No. 10-

IN THE
Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

v.

DORA SCHRIRO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

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OPINIONS BELOW

The relevant decisions and opinions of the Maricopa County Superior Court, the Arizona Court of Appeals, the Supreme Court of Arizona, United States Magistrate Judge Mark E. Aspey, the United States District Court for the District of Arizona, and the Ninth Circuit Court of Appeals and are reproduced in the Appendix to this Petition. The panel opinion of the Ninth Circuit Court of Appeals is reported as *Martinez v. Schriro*, 623 F.3d 731 (9th Cir. 2010).

JURISDICTION

The Court of Appeals denied rehearing on November 5, 2010. (App. at 84a). This petition is being filed within 90 days after entry of that judgment, pursuant to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

The Fourteenth Amendment to the United States Constitution provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

I. State Court Proceedings

A. Evidence Presented at Trial

1. Petitioner was charged in the state trial court with two counts of sexual conduct with a person under the age of fifteen. 623 F.3d at 733 (App. at 3a). The State's theory was that Petitioner had sexual intercourse with his stepdaughter, Lacey, on two occasions during the morning of July 10, 1999. (Federal Habeas Corpus Petition [hereinafter "Habeas Pet."], District Court DN 1, at 8.)

2. Lacey testified at some length at trial, but she stated that she did not remember much of what had (or had not) happened on July 10, 1999 and for the weeks that followed. (*Id.*). On cross-examination, however, Lacey testified that Petitioner did **not** try to have sex with her or "put his penis up against" her. (*Id.*).

3. Although Lacey's trial testimony did not inculpate Petitioner, the State was permitted to offer testimony that Lacey had made statements prior to trial indicating that Petitioner had rubbed her "private area" and twice had put his "private area" inside her "private area." (*Id.*). On the other hand, there was evidence that Lacey had recanted her accusations against Petitioner during later pretrial conversations with several people. (*Id.*). Lacey's recantations were consistent with Petitioner's exculpatory statements to the police. (*Id.* at 67).

4. The prosecution sought to explain Lacey's recantations primarily by arguing that they were the result of her mother's failure to believe or support Lacey's

initial accusations against Petitioner. (*Id.* at 11)). In this regard, the prosecution relied heavily on expert testimony by a social worker, Wendy Dutton, that “a range of research” indicated that recantations by children of true accusations of sexual abuse most commonly were caused by a “lack of support from the mother of the victim.” (*Id.*). Defense counsel did not seek to obtain or present expert testimony to refute Ms. Dutton’s opinions, even though such testimony was available. (*Id.* at 12-13).

5. The State presented evidence that a nightgown that Lacey was wearing when the police arrived at the Martinez residence on the morning of July 10, 1999 contained semen stains that matched Petitioner’s DNA. (*Id.*). However, the evidence also indicated that it was not possible to determine when the semen had been deposited on the nightgown, that semen still could be found on a garment even after it had been washed, that the extremely low sperm count in the semen samples on the nightgown could have resulted from washing, and that Lacey might have taken her nightgown from a pile of dirty laundry. (*Id.*). Moreover, vaginal swabs collected during a sexual assault examination on the day of the alleged assaults did not contain semen; and the same examination also did not disclose any evidence of injury or trauma on Lacey’s body, including her vaginal area. (*Id.*).¹

6. Petitioner was convicted on both of the counts against him, and he was sentenced to consecutive terms of 35 years to life. 623 F.3d at 733 (App. at 3a).

1. Trial counsel ineffectively failed to present additional evidence providing an exculpatory explanation for the State’s DNA evidence. (*Id.* at 17-19).

B. State Appellate and Post-Conviction Proceedings

1. On direct appeal, Petitioner raised issues that are not relevant to this Petition. The Arizona Court of Appeals affirmed Petitioner's convictions, and the Arizona Supreme Court denied review. *Id.*

2. In May 2002, during the pendency of Petitioner's direct appeal but without his authorization, his court-appointed appellate counsel, Harriette Levitt, filed a Notice of Post-Conviction Relief. *Id.* at 733-34 (App. at 3a-4a). Under Arizona law, a convicted defendant commences a post-conviction relief proceeding by filing a "notice" of post-conviction relief" that does not include the defendant's claims for relief, which are to be stated in a subsequent "petition." *Id.* at 734 (App. at 3a).

3. There was no reason for Ms. Levitt to file a Notice of Post-Conviction Relief before the conclusion of Petitioner's direct appeal.² That Ms. Levitt in fact had no such reason became apparent in February 2003, when -- without having communicated with Petitioner's trial counsel, and without Petitioner's consent -- she filed with the state trial court a statement (a) asserting that she had "reviewed the transcripts and trial file and [could] find no colorable claims pursuant to Rule 32" and (b) requesting that the court issue an order granting Petitioner 45 days to file a pro se petition for post-conviction relief. *Id.* (App. at 4a); Habeas Pet. at 35. Ms. Levitt then failed effectively

2. Under Ariz.R.Crim.P. 32.4(a), a notice of post-conviction relief must be filed "within 30 days after the issuance of the order and mandate in the direct appeal."

to inform Petitioner that he needed to file his own petition,³ and he did not do so. 623 F.3d at 734 (App. at 4a). On April 28, 2003, the state trial court dismissed the pending post-conviction Notice. *Id.*

4. Represented by new counsel, Petitioner filed a Notice of Post-Conviction Relief in the state trial court on October 18, 2004, and a timely Petition for Post-Conviction Relief on February 7, 2005. *Id.* The Petition alleged that Petitioner's trial counsel was ineffective, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, in several respects including failing to object to Ms. Dutton's expert testimony regarding the alleged victim's recantations, even though that testimony was inadmissible under state law; failing to research the purported basis for Ms. Dutton's testimony or to present readily available expert testimony that Ms. Dutton's testimony was inaccurate and misleading in light of the empirical literature in the field; failing to impeach an important prosecution witness with his own police report; failing to discover or present additional compelling evidence that the alleged victim's initial accusations were false and her subsequent recantations true; and failing to present exculpatory evidence relating the State's DNA evidence. *Id.* (App. at 4a); Habeas Pet. at 10-20, 22-25.⁴

3. Ms. Levitt's letters to Petitioner were written in English -- even after Petitioner had informed her, in Spanish, that he did not read English and did not "understand anything of what is happening." (Habeas Pet. at 36).

4. Petitioner also argued in the second post-conviction relief proceeding -- in the state trial court, the Arizona Court of Appeals, and the Arizona Supreme Court -- that he had a federal constitutional right to effective assistance of **first** post-conviction

5. The state trial court dismissed the post-conviction relief Petition without a hearing, finding that Petitioner's claims were "precluded," under Ariz.R.Crim.P. 32.2(a), because Ms. Levitt had not raised those claims in the aborted first post-conviction relief proceeding described above. 623 F.3d at 734 (App. at 5a). The Arizona Court of Appeals granted review but denied relief, solely on the ground that Petitioner's claim was precluded because it could have been raised in the previous post-conviction proceeding. *Id.*; App. at 81a-83a. The Arizona Supreme Court denied review without opinion. 623 F.3d at 734 (App. at 5a).

II. Federal Habeas Corpus Proceedings

1. Petitioner filed a Petition for a Writ of Habeas Corpus on April 24, 2008, pursuant to 28 U.S.C. §§ 2241(a) and 2254(a). *Id.* The Petition asserted the above-referenced federal ineffective-assistance-of-counsel claim, and it argued that the claim was not subject to procedural default because Petitioner had not received the effective assistance of first post-conviction counsel, with respect to his ineffective-assistance-of-counsel claim, to which he was entitled under the United States Constitution. *Id.*; Habeas Pet. at 67-83, 87-94.

2. On December 12, 2008, the District Court issued an Order denying the Petition solely on the ground that Petitioner's claim was procedurally defaulted. 623 F.3d at 734 (App. at 5a).

counsel with respect to his ineffective-assistance-of-trial-counsel claim, but that Ms. Levitt had performed ineffectively. (Habeas Ex. 4 at 18-19; Habeas Ex. 9 at 5; App. at 8-9; Habeas Ex. 10 at 5-8). Thus, Petitioner exhausted the issue presented in this Petition under *Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000).

3. After Petitioner filed a timely Notice of Appeal, the District Court issued a Certificate of Appealability with respect to two related issues: “1) whether Arizona’s procedural bar, as applied in this case, is an adequate and independent state law ground for denying relief; [and] 2) whether Petitioner has shown cause to excuse his procedural default.” *Id.*

4. On September 27, 2010, the Court of Appeals issued a panel Opinion affirming the judgment of the District Court. *Martinez v. Schriro, supra*. The Court of Appeals’ ruling was based on its holding that Petitioner did not have a federal right to effective assistance of his first post-conviction relief counsel with regard to his federal ineffective-assistance-of-trial-counsel claim, and that the claim therefore was procedurally defaulted. 623 F.3d at 735-43 (App. at 6a-25a).

5. On October 11, 2010, Petitioner filed a timely Petition for Panel Rehearing and Rehearing En Banc. That Petition was denied on November 5, 2010. (App. at 84a).

III. Basis for Federal Jurisdiction in the Court of First Instance

The District Court had jurisdiction of this habeas corpus action under 28 U.S.C. §§ 2241(a), 2241(c)(3), and 2254(a).

ARGUMENT

The Court of Appeals' dispositive holding that Petitioner did not have a federal right to effective assistance of first post-conviction counsel with respect to any ineffective-assistance-of-trial-counsel claim, even though the first post-conviction proceeding provided the first opportunity for Petitioner to raise such a claim, was contrary to this Court's decisions in *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005).

I. Petitioner's Federal Ineffective-Assistance-of-Trial-Counsel Claim is Not Subject to Procedural Default for Two Related Reasons

As noted above, the state courts denied Petitioner's ineffective-assistance-of-trial-counsel claim on the procedural ground that the claim was not raised in the aborted first post-conviction "proceeding" and therefore was precluded in the second post-conviction proceeding. Petitioner of course agrees with the Court of Appeals, 623 F.3d at 735 (App. at 6a-7a), that a federal habeas corpus court may not reach the merits of a claim which the state courts have denied on a procedural ground if that ground is "adequate and independent," unless the petitioner can demonstrate "cause and prejudice to excuse his default" (or show that failure to reach the merits would "result in a fundamental miscarriage of justice"). *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). In this case, however, there are two related, but independently sufficient, reasons why Petitioner's ineffective-assistance-of-trial-counsel claim was not procedurally defaulted: (A) the procedural ground

on which the Arizona Court of Appeals denied Petitioner's claim was not "adequate"; and (B) there is cause and prejudice to excuse any "adequate" default.

A. The procedural ground on which the state court denied Petitioner's federal claims was not "adequate"

As the Court of Appeals recognized, a "state procedural rule is not adequate to bar federal review if that 'state procedural rule frustrates the exercise of a federal right.'" 623 F.3d at 742 (App. at 6a) (quoting *Hoffman v. Arave*, 236 F.3d 523, 531 (9th Cir.), *cert. denied*, 534 U.S. 944 (2001)); *see also* *Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); *Reece v. Georgia*, 350 U.S. 85, 88-90 (1955). As the following paragraphs will show, the state courts' procedural ruling in this case -- that Petitioner's federal claims were precluded because of the failure of his first post-conviction counsel to raise them, regardless of whether or not she performed effectively -- was not adequate to prohibit federal-court review because it frustrated the protection of two related federal rights: (a) Petitioner's right to effective assistance of first post-conviction counsel specifically with respect to any ineffective-assistance-of-trial-counsel claim, and (b) Petitioner's underlying right to effective assistance of trial counsel.

1. The "adequacy" argument stated above depends in part on the proposition that Petitioner, as an **Arizona** defendant, had a federal constitutional right to effective assistance of his **first** post-conviction counsel, specifically and only with respect to any claim of ineffective assistance of **trial** counsel. In *Coleman v. Thompson*, this Court

stated the general rule that “there is no right to counsel in state collateral proceedings.” 501 U.S. at 755. But this Court then recognized that there might be an exception to that general rule when “state collateral review is the first place a prisoner can present a challenge to his conviction.” *Id.* The following paragraphs will demonstrate that there is such an exception, in the specific circumstances of this case, under *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005):

a. The defendant in *Halbert*, after being convicted on a plea of *nolo contendere*, requested that counsel be appointed to represent him in applying for leave to appeal, but the Michigan courts denied that request. 545 U.S. at 609. This Court, however, held that the due process and equal protection guarantees of the Fourteenth Amendment required “the appointment of counsel for [Michigan] defendants, convicted on their pleas, who [sought] access to first-tier review” -- even though such review was discretionary, rather than of right. *Id.* at 610. This holding was based on this Court’s conclusion that *Douglas* -- rather than *Ross v. Moffitt*, 417 U.S. 600 (1974)⁵ -- provided “the controlling instruction.” 545 U.S. at 616-17. That conclusion in turn was based on two factors: (i) “in determining how to dispose of an application for leave to appeal, Michigan’s intermediate appellate court looks to the merits of the claims made in the application”; and (ii) “indigent defendants pursuing first-tier review [i.e., their first available opportunity for review] in the Court of Appeals are generally ill equipped to represent themselves,” in part because they (unlike the defendant in *Ross*) have no prior briefing by counsel of relevant issues to present to the reviewing court. *Id.* at 617, 618-22.

5. *Ross* is discussed in Argument section II, *infra*.

b. The holdings and rationale in *Halbert* and *Douglas* clearly apply to the ineffective-assistance-of-trial-counsel claim in this case. With respect to that claim, the “first tier” of review that was available to Petitioner was a state post-conviction relief petition -- because he was not permitted to raise the claim on direct appeal under Arizona law. *State v. Spreitz*, 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002). Moreover, the two additional *Halbert* factors discussed in the preceding paragraph are fully satisfied here: (i) In deciding how to dispose of ineffective-assistance-of-trial counsel claims raised in a first post-conviction relief proceeding, an Arizona trial court “looks to the merits of the claims”; and (ii) defendants pursuing **first-tier** review of ineffective-assistance-of-trial-counsel claims have received no prior assistance of counsel, and otherwise are especially “ill equipped to represent themselves,” with regard to such claims. Indeed, *Douglas* is even more “controlling” in this case than in *Halbert*: While the “appeal” at issue in *Halbert* was discretionary, an Arizona defendant has a **right** to obtain review of an ineffective-assistance-of-counsel claim on the merits in a timely first post-conviction relief petition. Ariz.R.Crim.P. 32.1(a), 32.4(c)(2).

c. The preceding paragraphs demonstrate that an Arizona defendant pursuing his first opportunity for review of ineffective-assistance-of-trial-counsel claims (necessarily in a Rule 32 post-conviction relief proceeding) has a constitutional right to appointed counsel under *Douglas* and *Halbert*. That means that such a defendant also is entitled to constitutionally **effective** assistance of counsel on such first-tier review. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984) (“the right to counsel is the right to the effective assistance of counsel”).

3. As noted above, when an Arizona defendant is deprived of his federal right to effective assistance of trial counsel, his first and only recourse is to file a petition for post-conviction relief, which he has a right to do under Ariz.R.Crim.P. 32.1(a). Like the defendants in *Douglas* and *Halbert*, however, a defendant is ill-equipped to litigate an ineffective-assistance-of-trial-counsel claim without the assistance of post-conviction counsel -- and such assistance is of little use if it is not effective. Thus, the state courts' ruling that Petitioner's ineffective-assistance-of-trial-counsel claim was "precluded" because his first post-conviction counsel failed to raise it -- regardless of whether or not first post-conviction counsel performed effectively -- frustrated the protection of Petitioner's federal right to effective assistance of trial counsel; and it did so by denying Petitioner's federal right to effective assistance of first-tier-review counsel with respect to ineffective assistance of trial counsel under *Douglas* and *Halbert*.

B. There is cause and prejudice to excuse any procedural default of Petitioner's ineffective-assistance-of-trial-counsel claims

Even if the purely procedural ground for the Arizona Court of Appeals' decision in this case had been adequate and independent, there would be cause and prejudice to excuse the procedural default if Petitioner could show that first post-conviction counsel was **unconstitutionally** ineffective. *Coleman*, 501 U.S. at 753-54 ("Attorney error that constitutes ineffective assistance of counsel is cause"). Argument sections I(A)(1) and (2) have demonstrated that Petitioner did have a federal right to effective assistance of first post-conviction counsel, specifically with respect to his

ineffective-assistance-of-trial-counsel claims; and under *Coleman* a violation of that right constituted cause and prejudice for any procedural default of Petitioner's federal claims in the first post-conviction relief proceedings.

II. The Court of Appeals Misapplied This Court's Decisions In Holding That There Was No Right To Effective Assistance of Counsel On "First-Tier" Review Of Ineffective-Assistance-Of-Trial-Counsel Claims in Arizona

The Court of Appeals' discussion of the holdings in *Douglas*, *Ross*, and *Halbert*, 623 F.3d at 737-39 (App. at 10a-16a), is thorough and accurate, as such. However, the Court of Appeals' application of those holdings to this case, *id.* at 739-42 (App. at 16a-23a), is fundamentally flawed in several respects:

A. The Court of Appeals' analysis of whether this case is controlled by *Douglas* and *Halbert*, or by *Ross*, begins (appropriately) with a critical question: whether Petitioner's first state post-conviction proceeding amounted to "first-tier" review. *Id.* at 740 (App. at 17a). In that regard, the Court of Appeals concludes that "[t]his case is more like *Ross* than *Halbert*":

Martinez has already received direct review of his conviction and received the assistance of counsel in connection with that appeal. . . . Even if collateral review presents the first tier of review for Martinez' ineffective assistance of [trial] counsel claim, we conclude that Martinez' action is not analogous to a direct appeal -- or

the **first** opportunity for him to obtain review of his conviction -- so as to entitle him to effective counsel.

Id. (App. at 18a). With respect, this rationale is neither consistent with the holdings and reasoning in *Douglas* and *Halbert* nor supported by *Ross*:

1. As the above-quoted passage from the Court of Appeals' opinion recognizes, the fact that Petitioner was **prohibited** from raising his ineffective-assistance claim in his "direct appeal" from his conviction meant that the first post-conviction proceeding was "the first tier of review" for that claim; and with respect to that claim, Petitioner certainly had not "already received the assistance of counsel in connection with that first appeal." Thus, for Petitioner's ineffective-assistance claim the first post-conviction proceeding fully implicated the "first tier" due process and equal protection concerns that underlay *Douglas* and *Halbert*.

2. The foregoing effectively suggests how clearly *Ross* is distinguishable from this case. In *Ross*, the discretionary review proceedings in which the defendant sought appointed counsel necessarily were restricted to claims that the defendant already had litigated in the state court of appeals -- with appointed counsel. 417 U.S. at 603-604. Thus, those discretionary review proceedings provided second (or third) tier review for all of Moffitt's claims; and Moffitt -- unlike Petitioner -- really **had** "already received the assistance of counsel" for those claims.⁶

6. In *Douglas*, this Court noted that it was not concerned with the right to counsel "for the preparation of a petition for discretionary or mandatory review beyond the stage in the

3. The Court of Appeals' flawed reasoning regarding "first tier" review implies that if an Arizona defendant filed a notice and petition for post-conviction relief alleging ineffective assistance of trial counsel **before** he filed a notice of direct appeal [as he could under Ariz.R.Crim.P. 31.3 and 32.4(a)], he would be entitled to effective assistance of counsel in the post-conviction proceedings -- but not with respect to any issues that had to be raised on direct appeal. Such a result would make no sense in terms of the holdings in *Douglas* and *Halbert* (and *Ross*).

4. The Court of Appeals' position regarding "first tier" review also would mean that the State could deprive a defendant of his right to effective assistance of counsel with respect to first-tier review of any federal constitutional claim simply by (i) restricting direct appeal to state-law errors and (ii) requiring all federal errors to be raised by means of a "post-conviction" petition. Such a result would not be consistent with the holdings in *Douglas* and *Halbert*, or with *Halbert's* explicit statement that the right to counsel on first-tier review is not dependent on whether such review is labelled an "appeal." 545 U.S. at 619.

B. With respect to Petitioner's argument that a pro se defendant is "ill equipped" to represent himself in the proceeding that provides the first opportunity to raise and litigate an ineffective-assistance-of-trial counsel claim, the Court of Appeals' reasoning is that

appellate process at which the **claims** have once been presented by a lawyer and passed upon by an appellate court." 372 U.S. at 356 (emphasis added). And in *Ross*, this Court stated that the State had a duty "only to assure [that an] indigent defendant [had] an adequate opportunity to present his **claims** fairly in the context of the State's appellate process." 417 U.S. at 616 (emphasis added).

Martinez faces a lesser handicap in pursuing collateral review than a defendant pursuing a first appeal, as in *Douglas* and *Halbert*. Martinez has already received the assistance of appellate counsel in a prior proceeding, like the petitioner in *Ross*.

. . . . A defendant seeking second-tier review will have received the assistance of counsel in connection with direct review, and would have “at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case.”

623 F.3d at 741 (App. at 19a) (quoting *Ross*, 417 U.S. at 615). The above-quoted statements of course are true when “collateral” review involves the same claims as a prior direct appeal -- but they do not apply at all to this case, in which the first post-conviction proceeding was, as a matter of state law, Petitioner’s first opportunity to raise an ineffective-assistance-of-trial-counsel claim:

1. The “assistance of appellate counsel in a prior proceeding” that Petitioner received (on direct appeal) could not have had anything to do with any ineffective-assistance-of-trial-counsel claim, since such claims were prohibited on direct appeal. Similarly, neither the “brief on his behalf in the [Arizona] Court of Appeals” nor any “opinion by the Court of Appeals disposing of his case” on direct appeal could have involved any claim of ineffective assistance of trial counsel.

2. A “transcript or other record of trial proceedings” would be inadequate to evaluate the effectiveness of trial counsel, which often depends on what trial counsel did (or did not do) outside the record.

3. Given the purpose of the right to effective assistance of counsel, a defendant obviously is especially ill equipped to represent himself with respect to an ineffective-assistance claim.

C. With regard to Petitioner’s argument that his case satisfies *Halbert*’s second factor regarding first-tier review because an Arizona trial court considering an ineffective-assistance claim in a first post-conviction proceeding must “look to the merits” of the claim, the Court of Appeals points out that *Douglas* and *Halbert* both involved discretionary review proceedings in which the reviewing courts looked to the merits of the defendants’ claims in performing a “gatekeeping” function. 623 F.3d at 741 (App. at 20a). But that point does nothing to counter Petitioner’s argument or distinguish *Douglas* and *Halbert*: In both of those decisions, this Court’s point was that **even though** the reviewing courts were performing a gatekeeping function, they looked to the merits in doing so. 372 U.S. at 354-57; 545 U.S. at 612, 617-19. The fact that an Arizona trial court presented with an ineffective assistance claim in a first post-conviction proceeding has no gatekeeping function, but instead must address the merits directly, makes *Douglas* even more clearly controlling in this case than in *Halbert*.⁷

7. Moreover, it does not matter that “there is no impediment to the first tier of **appeal**,” 623 F.3d at 741 (App. at 20a) (emphasis added) -- because Petitioner was prohibited from raising any ineffective-assistance claim on direct appeal.

D. The preceding paragraph effectively demonstrates why it is not relevant that

discretionary appeal to a state Supreme Court or to the United States Supreme Court is not intended to correct error in individual cases, but rather to address questions of public importance, critical issues of law, conflicts in the decisions of relevant courts, and so forth.

623 F.3d at 741 (App. at 21a). In a first post-conviction proceeding, an Arizona trial court has no discretion whether to rule on an ineffective-assistance claims based on considerations of public importance (or anything else); and contrary to the Court of Appeals' suggestion, *id.* at 742 (App. at 21a), with respect to such claims the Arizona trial courts do perform an "error correction function" -- under *State v. Spreitz*, *supra*, and Ariz. R. Crim. P. 32.1(a) and 32.4(c)(2) -- that is precisely "analogous to an appellate court hearing a criminal defendant's direct appeal as of right."⁸

E. With regard to the Court of Appeals' "return" to *Douglas* and its due process and equal protection rationales, 623 F.3d at 742 (App. at 21a-22a), it suffices to point out that every reason that the Court of Appeals offers for not applying due process and equal protection

8. In the Arizona context, the Court of Appeals also is incorrect in asserting that post-conviction relief "is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature," 623 F.3d at 742 (App. at 21a): Rule 32.3 of the Arizona Rules of **Criminal** Procedure specifically provides that a post-conviction relief proceeding "is part of the original criminal action and not a separate action."

principles to this case would apply equally to *Douglas* and *Halbert* -- in both of which this Court found those principles to be applicable. 372 U.S. at 355-57; 545 U.S. at 610.⁹

F. The Court of Appeals' discussion of Petitioner's argument for a very specific "exception to the general rule that there is no right to counsel in collateral review" concludes with the proposition that "this exception would swallow the general rule." 623 F.3d at 742 (App. at 23a). While this statement is cryptic, it is supported by a citation to *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996) [*Bonin III*] -- which in turn cites to *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993) [*Bonin I*], in which the Court of Appeals offered the following rationale:

The actual impact of such an exception would be the likelihood of an infinite continuum of litigation in many criminal cases. If a petitioner has a Sixth Amendment right to competent counsel in his or her first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a Sixth Amendment right to counsel in the second state postconviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state postconviction proceeding. Furthermore,

9. Petitioner respectfully disagrees with the Court of Appeals' statement that "Martinez advances no argument grounded in the rationale of equal protection," 623 F.3d at 742 (App. at 22a): In relying on *Douglas* and *Halbert*, Petitioner necessarily has been relying on their due process and equal protection rationales.

because the petitioner's first federal habeas petition will present the first opportunity to raise the ineffective assistance of counsel in the second state post-conviction proceeding, it follows logically that the petitioner has a Sixth Amendment right to counsel in the first federal habeas proceeding as well. And so it would go. Because any Sixth Amendment violation constitutes cause, . . . federal courts would never be able to avoid reaching the merits of any ineffective-assistance claim, regardless of the nature of the proceeding in which counsel's competence is alleged to have been defective. As a result, the "exception" would swallow the rule.

Id. at 430. While the Court of Appeals' apparent concern about the likelihood of an "infinite continuum of litigation" is understandable in the abstract, it is misplaced in this case, for the following independently sufficient reasons:

1. On a theoretical level: While it would appear that a challenge (in a second post-conviction proceeding) to the effectiveness of first post-conviction counsel with respect to an ineffective-assistance-of-trial-counsel claim would constitute first-tier review, in fact that is not the case -- because any review of the effectiveness of first post-conviction counsel necessarily would require **second**-tier review of the effectiveness of trial counsel¹⁰ (which would be covered by *Ross*, rather than *Douglas*

10. First post-conviction counsel could not be ineffective with regard to an ineffective-assistance-of-trial-counsel claim unless that claim was valid.

and *Halbert*). Thus, the “continuum” would end after one tier (in Arizona, the first post-conviction proceeding).¹¹

2. On a practical level: It is highly unlikely that a potential habeas petitioner could work his way through several tiers of state post-conviction review without running afoul of the one-year statute of limitation for federal habeas cases, 28 U.S.C. § 2244(d)(1).

3. Even if there was a likelihood that there would be some habeas cases involving multi-level ineffective-assistance claims, that would not justify denying the constitutional right to first-tier-review counsel recognized in *Douglas* and *Halbert*. In effect, the Court of Appeals’ decision says that a state criminal defendant has an abstract right to effective assistance of trial counsel -- but that if he is deprived of that right, he has no federal right to an effective remedy.

11. This does not mean that a defendant (like Petitioner) could not challenge the effectiveness of first post-conviction counsel in a second post-conviction proceeding; but it does mean that the defendant would have no federal right to counsel in the second post-conviction proceeding, or in any subsequent federal habeas proceeding.

CONCLUSION

This Petition has not addressed the merits of Petitioner's ineffective-assistance-of-trial-counsel and ineffective-assistance-of-first-post-conviction-counsel claims, because neither the Court of Appeals nor the District Court did so. Thus, this Court should grant this Petition, reverse the judgment of the Court of Appeals, and remand with direction to consider the merits of Petitioner's interdependent ineffective-assistance claims.

Respectfully submitted,

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR
COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu
Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 11-CP-46-0072

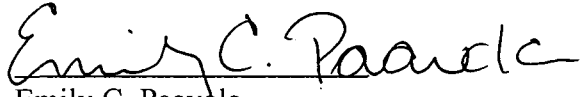
James D. Robertson, #5067,
v.

State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Notice of Appeal and Required Explanation has been served upon Respondent's counsel by first class mail, postage prepaid, this 6th day of January, 2012, upon the following:

William Edgar Salter
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Emily C. Paavola

RECEIVED

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2011CP4600072

JAN 09 2012

S.C. SUPREME COURT

James D Roberston

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

 Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order; (formal order to follow)☐ Statement of Judgment by the Court:

ORDER

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

S. LEE S. ALFORD
 Circuit Court Judge

2113
 Judge Code

12/8/2011
 Date

For Clerk of Court Office Use Only

This judgment was entered on the 8th day of December, 2011, and a copy mailed first class or placed in the appropriate attorney's box on the 8th day of December, to attorneys of record or to parties (when appearing pro se) as follows:

Emily C Paavola Death Penalty Resource & Defense Center P O Box 11311
Columbia, SC 29211
Keir M. Weyble Blume Weyble & Lominack, LLC P.O. Box 11744
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

Wm. Edgar Salter III Assistant Attorney General P.O. Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA RECEIVED IN THE COURT OF COMMON PLEAS
COUNTY OF YORK 2011 DEC -8 PM 4:15 FOR THE SIXTEENTH JUDICIAL CIRCUIT

DAVID HAMILTON
C.C.C.P. & GS
James D. Robertson, #5067 YORK COUNTY, SC

Plaintiff,

v.

State of South Carolina

Defendant.

C. A. No. 2011-CP-46-0072

This matter is before the Court on Motion of Applicant to Alter or Amend the Order of this Court, dated September 20, 2011, dismissing the Application for Post-Conviction Relief in this case.

The Applicant did not provide any information regarding the qualifications of counsel in his first PCR action prior to the Court's order. Applicant provides for the first time, as a proposed amendment, a copy of an affidavit signed by Joseph D. Matlock, dated September 28, 2011, concerning his qualifications to represent an indigent applicant in a death penalty PCR action. Applicant also provided as an amendment, an affidavit of John H. Blume, in an unrelated case (Bixby) which has no relevance in this case. Thereafter, a corrective affidavit of John H. Blume was provided in which John H. Blume avers that Michael Brown told him that the PCR action in which he represented James D. Robertson was his first Capital Post-Conviction Relief proceeding.

Applicant then filed a Motion to Supplement the Motion to Alter or Amend with a copy of the South Carolina Supreme Court's public reprimand of Michael L. Brown with regard to an altercation with police officers at a bar while he was intoxicated. Applicant

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posits that because Michael Brown has a history of substance abuse, he could not have effectively represented Applicant in the first PCR proceeding. Michael Brown's law practice is located in York County. This Court has had the opportunity to observe Mr. Brown in civil and criminal cases over the last ten (10) years. The Court is aware of his substance abuse problem and treatment for that problem. The Court has not observed any instance when a substance abuse problem has interfered with his competency or diligence in representing his clients effectively. This Court has not been made aware of any instance in which Mr. Brown's representation of a client was ineffective because of substance abuse.

Applicant has not provided any evidence, from which it could be inferred, that substance abuse by Mr. Brown affected his representation of Applicant, other than speculation, based on the public reprimand recently issued by the South Carolina Supreme Court. It is axiomatic that an attorney can have a substance abuse problem and still render effective assistance to a client. Michael Brown has practiced law for many years and has extensive experience in representing clients in serious criminal cases.

In this case, there is no transcript of record because of laches on the part of Applicant. This Court does, however, have the one hundred six page Order of Judge Few addressing twelve different issues raised by Applicant's first PCR application. It is obvious that there was a lot of work done by counsel in the first PCR proceeding.

Applicant's present counsel has had about a year to raise new issues, but has not done so. Simply disagreeing with the decisions of counsel in the first PCR action does not constitute ineffective assistance.

Applicant again raises the issue that there was non-compliance with Section 17-27-160 of the S. C. Code. In the Motion to Reconsider, however, they include an affidavit of Joseph D. Matlock, in which he avers that he had not represented an applicant in a Capital PCR action, and had not completed at least twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

Applicant also included two affidavits of John H. Blume. The first was involving another case and mistakenly sent in this case. The second affidavit avers that Michael Brown told him that he had not represented an applicant in a capital PCR application and had not attended twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

Michael Brown has death penalty trial experience. Only one of the two attorneys appointed in a death penalty case has to be qualified in death penalty trials.

In the prior Order, dated September 20, 2011, the Court ruled that Section 17-27-160 is a statutory provision that does not create a constitutional right. The Applicant would therefore have to show he was prejudiced by non-compliance with the statute.

In the case of Tucker v. Moore, 56 F. Supp. 2d 611, 612 (1999), the United States District Court, D. South Carolina, in an opinion written by Judge Sol Blatt, Jr., the Court found as follows:

"The Petitioner attempts to prove an independent constitutional violation by alleging that his federal due process rights were violated because South Carolina did not appoint PCR counsel whose qualifications satisfied S. C. Code Ann § 17-27-160, and that this was

an arbitrary denial of a statutory right which amounts to a denial of due process. What concerns this Court about Petitioner's argument is that South Carolina enacted § 17-27-160 for the purpose of opting-in the Chapter 154 of the AEDPA (Antiterrorism and Effective Death Penalty Act of 1996), but because it did not follow the statute in this case, it is being held accountable by this Court's refusal to apply Chapter 154 to this case. The Court believes that its refusal to apply Chapter 54 to the Petitioner's case, which ruling Petitioner seeks, due to the State's failure to follow § 17-27-160, is of great benefit to the Petitioner, and for the Petitioner to now claim a violation of a constitutional right based upon the State's failure to follow § 17-27-160, contradicts that ruling. This Court finds that the state's failure to follow § 17-27-160 is not a violation of Petitioner's constitutional rights because the rights granted to the Petitioner under that statute, if not given, do not penalize the Petitioner. The result of the State's failing to follow § 17-27-160 in a particular case is that Chapter 154 does not apply to that case. _ _ _ _ .

Based on the foregoing, this Court finds that an independent constitutional violation did not occur when the State failed to follow § 17-27-160, and, therefore, no cause exists to excuse the procedural defaults of claims A(1) and A(2). However, even if cause did exist, this Court agrees with the magistrate judge that the Petitioner has neither shown actual prejudice as a result of the alleged violations of federal law, nor a fundamental miscarriage of justice."

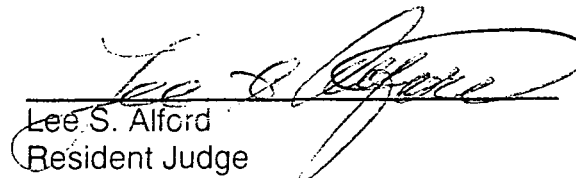
Conclusion

Applicant's Motion to Alter or Amend the Court's Order, dated September 20, 2011, is denied. There is no evidence from which the Court could infer that Michael Brown's substance abuse problem affected his effectiveness in representing the Applicant in his

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first PCR action. The failure to follow § 17-27-160 does not create an independent constitutional right. Prejudice to Applicant resulting from the failure to follow § 17-27-160 must be shown and Applicant has failed to demonstrate any prejudice.

IT IS SO ORDERED.


Lee S. Alford
Resident Judge
of the Sixteenth Judicial Circuit Court

November 28, 2011

York, South Carolina

5
2011

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP4600072

James D Roberston vs. South Carolina State Of

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a),
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Order

Dated at York, South Carolina, this 20th day of September, 2011.

Court Reporter:

s/Lee S. Alford

PRESIDING JUDGE - LEE S. ALFORD

This judgment was entered on the 20th day of September, 2011, and a copy mailed first class this 20th day of September, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Emily C Paavola Death Penalty Resource & Defense
Center P O Box 11311 Columbia, SC 29211
Keir M. Weyble Blume Weyble & Lominack, LLC
P.O. Box 11744 Columbia, SC 29211
James Robertson #5067 Lieber Correctional Inst.
136 Wilborn Avenue Ridgeville, SC 29472

Wm. Edgar Salter III Assistant Attorney General
P.O. Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

SCRCP APP-24/FORM 4

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF YORK

JAMES D. ROBERTSON, #5067,
☐ Plaintiff

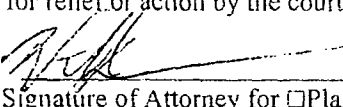
v.

STATE OF SOUTH CAROLINA
X Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2011-CP-46-00072

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney: Emily C. Paavola, Esq. Keir Weyble, Esq. Death Penalty Resource Ctr. Blume, Weyble & Norris P.O. Box 11311 P.O. Box 11744 Columbia, SC 29211 Columbia, SC 29211		Defendant's Attorney: William E. Salter, III, Bar No. 4806 Address: Post Office Box 11549 Columbia, SC 29211 phone: (803) 734-6305 fax: (803) 734-4035 e-mail: agesalter@scag.ov		
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)				
SECTION I: Hearing Information				
Nature of Motion: Capital PCR Estimated Time Needed: Court Reporter Needed: YES / X NO				
SECTION II: Motion Type				
Written motion attached ☐ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.				
 Signature of Attorney for ☐ Plaintiff / X Defendant		9-15-11 Date submitted	FILED-RECEIVED 2011 SEP 20 AM 10:56 DAVID HAMILTON C.C.P. & CS YORK COUNTY, SC	
SECTION III: Motion Fee				
☐ PAID - AMOUNT: X EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act X Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:				
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:				
		JUDGE CODE: _____ Date: _____		
CLERK'S VERIFICATION				
Collected by: _____		Date Filed: _____		
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____				

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

James D. Robertson, #5067,

C. A. No. 11-CP-46-00072

Applicant,

v.

ORDER

State of South Carolina,

Respondent.

FILED-RECEIVED
2011 SEP 20 AM 10:54
DAVID HAMILTON
S.C.C.P. & GS
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed by Applicant, James D. Robertson (Robertson) through counsel, on January 7, 2011. On March 24, 2011, Respondent made its Return and Motion to Dismiss.¹

This Court held a status conference on July 5, 2011 at the Moss Judicial Center, in York County South Carolina. Robertson was present at the hearing, and Senior Assistant Attorney General William Edgar Salter, III, represented the State. Keir Weyble, Esquire, and Emily C. Paavola, Esquire, were also present. At the hearing, the Court appointed Mr. Weyble and Ms. Paavola to represent Robertson. Also, the Court (1) gave Robertson twenty days within which to file a response to the Return and Motion to Dismiss, (2) gave twenty days for Respondent to reply to that response, and (3) gave Robertson twenty days, from the hearing date, to file a verification of the Application because the Application was not verified as required by S.C. Code

¹ Respondent originally moved for summary dismissal because the 2011 Application (1) was not verified by Robertson; (2) is barred by the one year statute of limitations governing PCR applications, S.C. Code Ann. § 17-27-45(A) (Supp. 2011); (3) is impermissibly successive to a previously filed application and this Court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel or PCR counsel's lack of statutory qualifications; (4) the supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge; (5) laches bars relief because Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application; and (6) the argument that he is entitled to relief based upon the supposed lack of qualification of original PCR counsel lacks merit as a matter of state law.

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Ann. §§ 17-27-40 & -50 (Supp. 2011). The Court further ruled that the verification would be considered *nunc pro tunc*.

Immediately after this hearing, Robertson's counsel served Respondent with a draft of an Amended PCR Application. On June 27, 2011, Respondent received a verified Amended Application for Post-Conviction Relief and Robertson's Response in Opposition to Motion to Dismiss, both of which were dated and served July 25, 2011. Respondent thereafter filed a Reply to Applicant's Response to the State's previously-filed Return and Motion to Dismiss dated August 15, 2011. Respondent provided the Court with a corrected copy of its Reply on August 30, 2011. With the exception of the failure to verify the Application, which the Court has allowed Robertson to remedy, Respondent adhered to the previously-asserted reasons for summary dismissal.

After careful consideration of the pleadings, the record in this case and the arguments of the parties, the Court now grants Respondent's motion and dismisses the 2011 Application, with prejudice, for the following reasons:

I. PROCEDURAL HISTORY

A. Robertson's trial and the voluntarily abandoned direct appeal.

Robertson is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his two York County murder convictions and death sentences for brutally murdering his parents. The York County Grand Jury indicted him at the April 23, 1998 term of court for two counts of murder (98-GS-46-1020 & -1021), one count of armed robbery (98-GS-46-1022) and one count of financial transaction card fraud (98-GS-46-1023). **App. 3758-65**. On April 30, 1998, the State served him with a Notice of Intent to seek the death penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002); and it gave notice that it

would rely upon the statutory aggravating circumstances found in S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2011).²

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and it gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock, Esquire, and James W. Boyd, Esquire, represented Robertson.³ Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motion hearings on July 17 (**App. 32-48**), September 22 (**App. 49-55**) and 25 (**App. 55-79**); November 2 (**App. 79-90**) and 20; December 4 (**App. 90-121**) and 18, 1998; and on February 12 and 19, 1999.

Robertson's capital jury trial was held on March 15-26, 1999. The jury convicted him of all of the indicted offenses (**App. 122-1977**); and a sentencing phase was conducted following ~~his exercise of the 24-hour statutory waiting period in § 16-3-20(B).~~ Judge Hayes instructed the jury on the five statutory aggravating circumstances relied upon by the State, as well as the statutory mitigating circumstances that Robertson did not have any prior convictions involving the use of violence against another person; that the murders were committed while he was under the influence of a mental or emotional disturbance; that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and his age and mentality at the time of the crimes. § 16-3-20(C)(b)(1)-(2), (6) and (7). The jury found each of the alleged statutory aggravating circumstances and it sentenced Robertson to

² These aggravating circumstances are that the murder was committed while in the commission of robbery while armed with a deadly weapon; larceny with the use of a deadly weapon; and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

³ Thad Lee Myers, Esquire, had originally been appointed to represent Robertson. However, Mr. Myers was relieved because of a conflict of interest.

death for each of the murders. Judge Hayes affirmed their decision and imposed the death sentences for the murders. **App. 1977-3242.**

Robertson did not timely file a timely Notice of Appeal; but Judge Hayes entered a Consent Order granting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). At various points on direct appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III, represented Robertson before the South Carolina Supreme Court. On May 28, 1999, Robertson, through Mr. Dudek, filed a Petition for Writ of Certiorari seeking *White v. State* appellate review, to which the State consented. The Supreme Court entered an Order on June 25, 1999 granting direct appellate review under *White v. State*.

Robertson wrote the Supreme Court on August 28, 2000. In this letter, he asked the Court to relieve Mr. Dudek as counsel; to allow him to drop his appeals; and to permit him to be executed. Mr. Dudek made a Return to Motion on September 11, 2000. On October 6, 2000, the Supreme Court entered an Order remanding the case to Judge Hayes for the purpose of conducting a hearing on Robertson's competency to be executed.

After Judge Hayes had entered Orders appointing Christopher A. Welborn, Esquire, to represent Robertson at the hearing (on February 2, 2001) and ordering a psychiatric evaluation of his competency to be executed (on February 15, 2001), Robertson signed a March 15, 2001 affidavit stating that he wished to pursue all available appellate remedies. He also asked to have Mr. Dudek relieved as counsel and to have alternative counsel appointed. Judge Hayes made a Report to the Supreme Court dated October 12, 2001. He found that it was unnecessary to hold a competency hearing because Robertson no longer desired to appear pro se. Therefore, the South Carolina Supreme Court filed an Order on November 15, 2001 relieving Mr. Dudek as counsel and appointing Mr. Savitz as appellate counsel.

On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Robertson's behalf.⁴ Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote the South Carolina Supreme Court on April 18, 2002, and he asked for the Court to relieve Mr. Savitz because Mr. Savitz did not represent his interests. The Court denied his request in a May 16, 2002 Order.

However, Robertson again wrote a letter to the South Carolina Supreme Court dated June 3, 2002, in which he asked the Court to relieve Mr. Savitz and to allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme Court filed an Order on June 26, 2002, remanding the matter to Judge Hayes for a hearing on Robertson's competency to represent himself on appeal.

Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002.⁵ On October 28, 2002, Judge Hayes signed a Report in the Supreme Court of South Carolina. He found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

⁴ Appellate counsel Savitz' Brief presented three issues:

1. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.
3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.

4/15/02 Initial Brief of Appellant at p. 1.

⁵ Robertson was present at the hearing and Bruce M. Poore, Esquire, represented him. Senior Assistant General William Edgar Salter, III, represented the State. Robertson was the only witness at the hearing.

Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003, in which he presented seven issues for appellate review:

1. The judge erred in denying 3 separate motions for a directed verdict based on insufficient evidence and State's failure to meet the burden of proof as to first element of corpus delicti of murder at the conclusion of State's case.
2. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.
3. The judge erred by denying the jury's request to take notes while being recharged as to the law during guilt phase deliberations.
4. The judge erred in revealing the location where the jurors were sequestered, thereby denying appellant his constitutional right to a fair and impartial jury.
5. The judge erred in not allowing the defense to define "life imprisonment" as it appears in the state statute to potential jurors during voir dire, thereby denying appellant a fair and impartial jury.
6. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.
7. The judge erred in sentencing appellant to death.

Pro Se Initial Brief of Appellant at p. 2. The State filed the Initial Brief of Respondent on December 31, 2003.

Thereafter, the direct appeal was dismissed and re-instated on several occasions because Robertson failed to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the South Carolina Supreme Court that he wished to abandon his right to a direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State

submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing was held before Judge Hayes on February 22, 2005, at the Moss Justice Center in York, South Carolina.⁶ In a February 23, 2005 Report to the Supreme Court, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order filed June 3, 2005, the Supreme Court of South Carolina agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003), it dismissed the appeal and it directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

Thus, Robertson knowingly and voluntarily abandoned the direct appeal and it was dismissed at his request without the South Carolina Supreme Court considering any issues that he raised in his *pro se* Initial Brief of Appellant.

B. Intervening action prior to PCR filing.

On June 16, 2005, Robertson requested a Stay of Execution to file a Post-Conviction Relief (PCR) Application. Over Respondent's opposition to the motion, the Supreme Court filed a July 7, 2005 Order granting a stay pursuant to *In Re: Stays of Execution*. The Court also appointed the Honorable John C. Few to preside over this case and it directed Judge Few to hold a hearing to determine whether Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), Judge Few filed an Order Appointing Counsel For Post-Conviction Relief dated September 9, 2005, in which he appointed Michael Brown, Esquire, to represent Robertson. Judge Few held a hearing at the Greenville County

⁶ Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

Courthouse on September 23, 2005. Robertson was present at this hearing, as was Mr. Salter, who represented the State. The appointment of Mr. Brown was confirmed at that hearing.⁷ Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

C. Robertson's original PCR action. (06-CP-46-532).

Robertson filed his original and only properly filed PCR Application (06-CP-46-532) on March 1, 2006. **App. 3244-51**. Respondent filed its Return on October 20, 2006. **App. 3252-62**. Judge Few held an evidentiary hearing into the matter on January 29-31, 2007, at the Moss Judicial Center in York, South Carolina. Robertson was present at this hearing, and Messrs. Brown and Matlock, Esquires, represented him. Mr. Salter represented the State. **App. 3263-3650**.⁸

At the outset of the PCR hearing, Robertson amended his Application and proceeded on twelve specific grounds of ineffective assistance of counsel, including the following, relevant allegations:

1. Counsel failed to present Dr. Hayne McMeekin as a witness and failed to develop evidence that Dr. McMeekin over-prescribed Ritalin;
2. Counsel failed to present Chip Robertson as a defense witness;

⁷ The parties have informed the Court that the transcript of the September 23, 2005 hearing is not in the files of the Attorney General's Office; that Respondent did not order this transcript because Robertson did not contest counsel's qualifications in state PCR; and that Robertson's current attorney's unsuccessfully attempted to obtain a copy of that transcript, but were informed by the Court Reporter that the tapes of the hearing no longer exist. *See* Rule 607(i), SCACR.

⁸ Robertson testified on his own behalf at the hearing. He also presented testimony from his trial counsel, James William Hancock, Jr., and James W. Boyd, Esquires. The State presented the current Sixteenth Circuit Solicitor, Kevin S. Brackett; the former Sixteenth Circuit Solicitor, Thomas E. Pope, Esquire; Michael Stobbe, the Branch Chief of Inmate Records at the South Carolina Department of Corrections (S.C.D.C.); and Ms. Merry Collins, an Investigator with the Sixteenth Circuit Solicitor's Office. **App. 3263-3650**. Judge Few also had before him the trial transcript (including pretrial motions hearings); the records from Robertson's direct appeal to the South Carolina Supreme Court and the waiver of his appeal; the June 16, 2005 letter request for a stay of execution; Respondent's June 21, 2005 letter opposing the request for a stay of execution; the July 7, 2005 Order of the South Carolina Supreme Court granting the stay; the Order Appointing Counsel for Post-Conviction Relief; the York County Clerk of Court's records; the Post-Conviction Relief Application and the Return. **Order, App. 3652-53**.

3. Counsel failed to pursue a verdict of guilty but mentally ill (GBMI), either by advising Applicant to enter such a plea or by requesting a verdict of GBMI at the trial;
4. Counsel failed to spend an adequate amount of time with Applicant prior to trial;
5. Counsel never pursued a proposed plea bargain allegedly offered by the State;
6. Counsel erroneously advised Applicant not to testify in the sentencing phase of his trial;
7. Counsel failed to present evidence that Applicant is adaptable to prison;
8. Counsel failed to cross-examine Applicant's co-defendant, Meredith Moon about a statement in which she allegedly agreed to "keep quiet" about the murders in exchange for \$50,000.00;
9. Counsel failed to request removal of a juror where the juror had made statements on voir dire;
10. Counsel did not adequately advise Applicant before he was evaluated by the prosecution's psychologist, Dr. Geoffrey McKee;
11. Counsel failed to adequately present evidence of the Robertson family's mental health history; and
12. Counsel was ineffective for presenting social worker Toni Cascio as an expert witness because (a) of Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; (c) counsel's failure to discover Applicant's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness.

App. 3268-73. See also App. 3658-59.

Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. The Order of Dismissal addressed the claims that Robertson had raised at the PCR hearing. **App. 3652- 57.**

Robertson timely served and filed a notice of appeal. Chief Deputy Appellate Defender Joseph L. Savitz, III, represented him in collateral appellate proceedings. Thereafter, Mr. Savitz

filed a Petition for Writ of Certiorari on Robertson's behalf. The only Question Presented in the Petition was stated as follows:

Trial counsel was ineffective at sentencing (1) for advising Robertson that anything he revealed to Ms. Cascio - including theretofore undisclosed details about the crimes - was privileged against discovery by the State or (2) for failing to object to discovery of Ms. Cascio's notes by the State and (3) for calling Ms. Cascio as a witness under these circumstances.

Petition for Writ of Certiorari at p. 1.

The State filed a Return to Petition for Writ of Certiorari on July 15, 2009. The State restated the issues before the South Carolina Supreme Court as follows:

Whether this Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State was not presented to or ruled upon by the PCR judge and he did not seek a ruling by filing a Rule 59(e), SCRCP, motion?

Whether this Court should deny certiorari because probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness?

Return to Petition for Writ of Certiorari at p. ii.

The South Carolina Supreme Court filed a letter Order denying certiorari on October 6, 2010. It sent the Remittitur to the York County Clerk of Court on October 22, 2010.

D. The Petition for Writ of Habeas Corpus.

On October 27, 2010, Robertson filed a Motion for Stay of Execution and a Motion for Appointment of Counsel in the United States District Court for the District of South Carolina, so that he might pursue relief pursuant to a timely petition for a writ of habeas corpus under 28 U.S.C. § 2254 and 2244(d). Respondent received these motions on October 28, 2010 and made a Response thereto on November 1, 2010. The Honorable Sol Blatt, Jr., United States District Judge, entered an Order granting Petitioner's Motion for Stay of Execution. The Honorable

Bruce Howe Hendricks, United States Magistrate Judge, thereafter entered Orders appointing John H. Blume, Esquire (as lead counsel); Keir M. Weyble, Esquire; and Emily C. Paavola, Esquire to represent Robertson.

Robertson filed his Petition for Writ of Habeas Corpus on January 7, 2011. He also filed a Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 7th. Respondent filed a Response to Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 24, 2011. Magistrate Judge Howe entered an Order on April 8, 2011 staying those proceedings, so that Robertson could attempt to exhaust the claims in his 2011 Application. *See Robertson v. Ozmint*, C.A. No.2:11-63-SB-BHH (Doc. No. 44, filed Apr. 8, 2011).

II. ALLEGATIONS

Robertson raises the following grounds for relief in the amended 2011 PCR Application:

10(a): **Applicant was denied the right to effective assistance of counsel- guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in Section 11(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).**

11(a): Trial counsel's acts or omissions included:

(i) Counsel failed to object to the Solicitor's improper closing argument. The solicitor encouraged the jury to rely on their own emotions and passion, rather than the evidence presented, by telling the jury that they did not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty. (Trial Tr. 1916). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

10(b): **Applicant was denied the right to effective assistance of counsel- guaranteed by the Sixth and Fourteenth Amendments**

to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 11 (b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. See *Strickland v. Washington*, 466 U.S. 668 (1984).

11(b): Trial counsel's acts or omissions included:

- (i) Counsel failed to object to presentation of Applicant's prison disciplinary record by a single witness, who had not witnessed the presented events, in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. (Trial Tr. 2129).
 - (ii) Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that the victim, Terry Robertson, was a very private person and would have been deeply upset by the revelation of her counseling records. (Trial Tr. 2792). SCRE 403.
 - (iii) Counsel failed to develop and introduce evidence that the victims were opposed to capital punishment and would not have wanted their son to be sentenced to death.
 - (iv) Counsel failed to object to the State's improper statements during closing argument that Applicant's presentation of relevant mitigating evidence of his family's mental health history had been a "rape" of his mother Terry Robertson, and that this evidence had dragged Terry "through the mud." (Trial Tr. 3144, 3142). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).
- 10 & 11(c): Applicant's Sixth and Fourteenth Amendment right to a fair jury trial was violated by the solicitor's improper and prejudicial closing argument during the guilt-or-innocence phase of the trial during which the solicitor argued that the jury should not deliberate when determining whether the state had proven Applicant's guilt beyond a reasonable doubt. (Trial Tr. 1916).
- 10 & 11(d): Applicant's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment were violated by the state's introduction of a list of Applicant's prison infractions during the sentencing phase of his capital trial. (Trial Tr. 2129).

- 10 & 11(e): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the solicitor's improper closing argument during the sentencing phase of Applicant's capital trial during which the solicitor argued that that the defense's mitigation presentation was equivalent to raping the victim in the courtroom. ("You know, Ms. Cascio talked about Terry being sexually abused. Terry has been raped. She was raped in this courtroom when they take her through this based on his actions.") (Trial Tr. 3144).
- 10 & 11(f): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the trial court's error in failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire. (Trial Tr. 425 & 1283).
- 10(g): Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, §§ 3 and 14 of the South Carolina constitution -when appellate counsel committed the acts or omissions set forth below in Section 11(g). Appellate counsel's performance was both unreasonable and prejudicial as outlined below. See *Strickland v. Washington*, 466 U.S. 668 (1984).
- 11(g): Appellate counsel's acts or omissions included:
- (i) Appellate counsel failed to claim on appeal that the trial court had violated Applicant's Sixth, Eighth and Fourteenth Amendment rights by failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire.
 - (ii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to specifically define mitigating circumstances and to question potential jurors about specific mitigating circumstances, where several potential jurors indicated that they did not understand what mitigating circumstances were even after hearing the general legal definition. (Trial Tr. 193-96).
 - (iii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to limit the State's presentation of victim impact evidence to testimony from

immediate family members. (Trial Tr. 1985-98). Appellate counsel's performance was both unreasonable and prejudicial. See *Strickland v. Washington*, 466 U.S. 668 (1984).

10&11(h): Applicant was denied effective representation of post-conviction counsel, in violation of the Sixth, and Fourteenth Amendments of the United States Constitution where PCR counsel were inexperienced and unqualified under state statute, where Applicant was prohibited from raising any claim that his trial counsel were ineffective on direct appeal, and where PCR counsel failed to adequately investigate and present applicant's claims for post-conviction relief. See, e.g., *Martinez v. Ryan*, 2011 WL 380903 (U.S.), *Halbert v. Michigan*, 545 U.S. 605 (2005); *Douglas v. California*, 372 U.S. 353 (1963).

10&11(i): Applicant was denied effective representation of post-conviction counsel, in violation of the South Carolina Constitution, Article I, Sections 3, 14 and 15 where PCR counsel were inexperienced and unqualified under S.C. Code § 17-27-160(8), and where PCR counsel failed to adequately investigate and present applicant's claims for post-conviction relief. See, e.g., *Washington v. State*, 478 S.E. 2d 833, 835 (S.C. 1996) (allowing second post-conviction application to proceed due to "many procedural irregularities" in the first post-conviction proceedings).

III. DISCUSSION

Robertson asserts that "this Court should either: (a) deny respondent's Motion to Dismiss and allow this case to proceed to an evidentiary hearing and final adjudication because it is a permissible successive petition under state law; or, (b) deny respondent's Motion to Dismiss and hold this case in abeyance until the United States Supreme Court has resolved *Maples v. Thomas*, 2011 WL 940889, and *Martinez v. Ryan*, 2011 WL 380903, which could dictate that this case be allowed to go forward as a matter of federal constitutional law, regardless of South Carolina's state law rules regarding successive petitions." However, the Court finds that none of the reasons advanced by him justifies the filing of a successive Application well outside the statute of

limitations and predicated on the ineffectiveness of original PCR counsel, a claim which is not cognizable in state PCR.

First, the Court finds that the statute of limitations applicable to Post-Conviction Relief actions bars the entire Application. *See* S.C. Code Ann. § 17-27-45(A) (Supp. 2011). Section 17-27-45(A) specifically provides that:

[a]n application for relief pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute).

As shown above, the South Carolina Supreme Court filed an Order on June 3, 2005, in which it dismissed the appeal from Robertson's capital trial and sentencing proceeding because it agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003), and it directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). It then sent the Remittitur to the York County Clerk of Court on June 22, 2005. Therefore, Robertson had one year from June 22, 2005, within which to file the current Application.

Robertson did not file the current Application until January 7, 2011. *See Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, the application is filed when received by the Clerk of Court). This is five years, six months and sixteen days after the South Carolina Supreme Court's

June 22, 2005 Order and well after the expiration of the one year time limit for filing the PCR Application. As a result, the Application is barred by § 17-27-45(A).

As noted, Robertson did not make any challenge to the qualifications of lead collateral counsel, Mr. Brown, under § 17-27-160(B) at the September 23, 2005, hearing appointing counsel. Nevertheless, he contends that he is entitled to proceed because he has filed within one year of the appointment of his current attorneys, and that neither he nor his original PCR attorney could have objected to the supposed lack of qualifications of counsel under § 17-27-160(B). Although he does not refer to this subsection in his Response, he is attempting to rely on § 17-27-45(C). That section provides as follows:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

The Court finds that his reliance on § 17-27-45(C) is misplaced. To the extent that his current Application asserts claims that are otherwise cognizable in PCR, as opposed to his claims that involve issues that could have been raised on direct appeal, those allegations could have been discovered and presented in the original PCR action. The only exception are his “claims” based on the grant of certiorari in *Martinez* and *Maples*, which do not have any support by Supreme Court precedent as of the time this Order was filed. Further, an alleged lack of qualifications of counsel under § 17-27-160(B) does not constitute “evidence of material facts . . . that requires vacation of the conviction or sentence,” as required for § 17-27-45(C) to apply.⁹

Moreover, both Robertson and his original collateral counsel were aware of any supposed defect in counsel’s qualifications at the time counsel was appointed and he could have

⁹ His claim related to counsel’s supposed lack of qualifications lacks merit for the reasons discussed, *infra*.

objected to the supposed lack of counsel's qualifications at the time of the September 23, 2003 hearing held for appointment of counsel.¹⁰ Also and even assuming *arguendo* that the statute of limitations did not begin running until September 23, 2005, the current Application was not filed until five years, three months and fifteen days later. Therefore, the Court finds that it is barred under § 17-27-45(C), as well.

While Robertson contends that it "is senseless" to assert that he or collateral counsel should have objected to counsel's alleged lack of qualifications at that time, the Court finds that his argument clearly ignores that the purpose of the September 23, 2005 hearing was (1) to determine whether Robertson wanted counsel appointed to assist him in PCR, and (2) to appoint qualified counsel. *See In re Stays*. Despite his protestations, the appointment hearing was **the only time** to properly complain about the defects in counsel's eligibility for appointment pursuant to § 17-27-160(B).

More importantly, he ignores that § 17-27-45(C) provides that "the application must be filed under this chapter within one year after the date of *actual discovery of the facts* by the applicant *or after the date when the facts could have been ascertained by the exercise of reasonable diligence*." (Emphasis added). Here, the Court finds that would be one year after the September 23, 2005 hearing because that is when he would had actual discovery of counsel's qualifications, and not one year following the appointment of his present attorneys.

¹⁰ Robertson's present counsel assert that "Robertson was transported for an appointment hearing on or about September 23, 2005, but that no hearing actually took place because initial PCR counsel failed to attend." They further assert that "this is just one issue of many that must be examined through an appropriate post-conviction investigation." **Response in Opposition**, p. 17. The Court finds that this is yet another example of the dilatory nature of this successive Application. As indicated on page 8 of Respondent's motion to dismiss, Judge Few held a hearing at the Greenville County Courthouse on September 23, 2005. Robertson was present at this hearing, as was Mr. Brown. Senior Assistant Attorney General Salter was also present and represented Respondent. The appointment of Mr. Brown was confirmed at that hearing. Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

Likewise, his argument ignores that he was successful in having two different appellate attorneys relieved based upon his objections to representation by these attorneys. To otherwise construe § 17-27-45 and permit him to go forward on the current Application would do nothing more than award Robertson's lack of diligence in asserting the alleged defect in counsel's statutory qualifications. As a result, the Application is barred by § 17-27-45(A).

Second, the Court finds that the Application must be dismissed as successive. S.C. Code Ann. § 17-27-90 (Supp. 2011) "forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court in *Aice* expressly declined to interpret the term "sufficient reason" to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase "very narrowly" by Court Rule, and it held that "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. . . . We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not" *Id.*

While the Court in *Aice* recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel, as *Aice* urged, "well may swallow Rule 50(3). It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under *Aice's* view." *Id.* at 451, 409 S.E.2d at 394. Thus, "the

contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." *Id.* at 451, 409 S.E.2d at 394.

The Court further explained that:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. 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. *See Butler v. State*, 397 S.E.2d 87 (S.C.1990). **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. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. *See Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Id. at 451, 409 S.E.2d at 394. (Emphasis added).

Additionally, the Court in *Aice* indicated that a successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel, apart from the scenario covered by *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Aice*, 305 S.C. at 450-52, 409 S.E.2d at 394-95. The Court concluded as follows:

We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the *Austin* and *Aice* cases. *Austin* never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, *Aice* seeks to have more than one procedural "bite" at the apple. *Aice* has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While *Austin* could rely on Rule 50(6) for support of his claim, *Aice's* request directly conflicts with the language of Rule 50(3). Hence, *Austin* stands harmonized with the instant case.

Id at 452, 409 S.E.2d at 395.

Robertson relies upon several PCR cases involving inmates who were not under a death sentence and the capital PCR cases of Luke Williams and Edward Lee Elmore to support of his contention that he has shown "sufficient reason" under *Aice*. The Court finds that each of these cases is distinguishable because each was based on very unique procedural circumstances that simply are not present here. For instance, in *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996), the applicant's direct appeal was dismissed because his attorney failed to file an initial brief. *Id* at 234, 478 S.E.2d at 834. He raised a number of issues in his first PCR application, including a claim based on the State's misconduct in connection with a plea agreement. *Id*.

The PCR court found that he had not waive his right to direct appeal and that he should be granted a belated appeal. On the claim related to prosecutorial misconduct, the PCR court found that the State had failed to adequately explain the State's relationship with one of its witnesses to the jury. However, the PCR court refused to grant a new trial because it found that this claim could have been raised on direct appeal. *Id*.

Washington petitioned for certiorari and presented his misconduct claim to the Supreme Court, but the Court denied certiorari on that issue. He then filed a second PCR application, in which he again raised the misconduct issue. *Id* at 234-35, 478 S.E.2d at 834. He also filed a motion to alter or amend the Order denying his original PCR application. The PCR court granted the motion to amend, and it amended its Order to grant Washington a new trial. *Id*. On certiorari, the State argued that § 17-27-90 barred the second PCR application.

The Supreme Court rejected this argument. While the Court recognized that Washington's second PCR application was successive "under a hyper-technical analysis," it reasoned that

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such a conclusion must be rejected in this case, because so many procedural irregularities occurred during the course of Washington's judicial process that he has not received due process. He did not have the benefit of a direct appeal, because his attorney failed to file an appellate brief. Moreover, the first PCR court decided, in effect, that Washington was entitled to a new trial, but allowed the relief to be addressed on direct appeal; however, this Court denied certiorari as to the question. Additionally, the second PCR court granted relief, but did so through an improper procedure, specifically, by amending the first order. Thus, Washington has never received the benefit of a direct review. Even if his application is successive, the unique combination of facts in this case entitle him to the relief granted below.

324 S.C. at 236, 478 S.E.2d at 835.

The other non-capital PCR cases are likewise distinguishable. In *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), the Court permitted a successive application raising the issue of ineffective assistance of trial counsel, where trial counsel had represented the applicant in the first PCR matter. This Court finds that Robertson's case does not involve such a scenario. Also, the Supreme Court permitted a successive application in *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Robertson's current PCR attorneys may say as to the quality of representation provided in the original PCR action, they must necessarily concede that the allegations raised in that action were raised with the assistance of counsel and that he had a hearing on the issues raised by counsel.

Thus, as in *Aice*, the cases relied upon by Robertson do not support the conclusion that "sufficient reason" to permit a successive application. Contrary to his argument before this Court, he could have raised his current allegations in his previous PCR Application. Likewise, any supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge. As a result, he cannot raise this or any other allegation now in a

successive Application. *Aice*. See also *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 843 (1992), *cert. denied*, 507 U.S. 927 (1993); *Hunter v. State*, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of prior applications but did not raise it); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application); *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002). Therefore, this Application must be dismissed as impermissibly successive.

The Court further finds that Robertson's reliance upon the capital PCR proceedings involving Edward Lee Elmore and Luke Williams is likewise misplaced. In *Elmore*, 2005-CP-24-1205, the applicant filed a successive PCR Application on September 27, 2005, alleging that he could not be executed consistent with the Eighth and Fourteenth Amendments to the United States Constitution because he is mentally retarded. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

The State thereafter moved to dismiss because the action was barred by the statute of limitations and by the prohibition against successive applications. The judge assigned to hear the matter held the State's motion to dismiss in abeyance until after the evidentiary hearing on mental retardation. When the PCR judge thereafter issued an Order finding that Elmore was mentally retarded and that the Eighth Amendment barred his execution, *id*, the State did not appeal his adverse rulings on successiveness or the statute of limitations because an appeal would be futile. See *Atkins*.

Williams is also distinguishable because lead collateral counsel in the present case, Mr. Brown, was properly qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011), unlike Williams' original PCR attorneys. Moreover, the Court would note that the capital PCR

applicant in *Ivey, supra*, unsuccessfully sought relief such as that now being sought by Robertson,¹¹ as has death row inmate Abdiyyah ben Alkebulanyahh, #6012, whose case is discussed *infra*. Based upon the current record, the Court finds that

Robertson further contends that the State erroneously maintains that his argument as to counsel's supposed lack of qualifications lacks merit as a matter of state law. He effectively asserts that Judge Few appointed unqualified counsel to represent him in his first PCR application. He also makes a blanket assertion that the record available to him does not indicate that either counsel appointed to represent him met the statutory criteria for appointment as PCR counsel in a capital case. However, he does not identify what record was available to him. Nor does he identify what qualifications counsel did or did not have. Instead, it is left up to this Court to speculate on their qualifications since there is no record or information provided to the Court. In the absence of evidence to the contrary, this Court must assume that Judge Few appointed qualified counsel to represent Robertson in his first PCR application. *Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("Trial judges are presumed to know the law and to apply it in making their decisions"); *Ray v. State*, 310 S.C. 431, 437, 427 S.E.2d 171, 175 (1993); *United States v. Robertson*, 606 F.3d 943, 960 (8th Cir. 2010).

Further, and assuming Robertson's argument is that - to be qualified in a capital PCR - a lawyer either needs to have previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within the preceding two years twelve

¹¹ In *Ivey*, the Court of Appeals rejected Ivey's claim, identical to Robertson's, that the procedural bar of § 17-27-90 did not apply because lead PCR counsel was ineffective and that lead PCR counsel was not qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011). The Court found that "[e]ven if we were to agree with Ivey that lead counsel was ineffective, however, under *Aice* that fact alone would not be sufficient to allow the filing of a successive PCR application. Accordingly, this claim is procedurally barred as a matter of South Carolina law and is thus defaulted."

hours of CLE training that primarily involves capital appeals or capital post-conviction relief, the Court rejects it.

In her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 13, 2003, the Chief Justice of the South Carolina Supreme Court specifically rejected this interpretation because she found that it would lead to the absurd result that an attorney qualified to represent a capital inmate at trial would not be qualified to represent him in PCR. Thus, she concluded that the “not less than twelve hours of CLE education” clause and the “or professional training primarily involving advocacy in capital appellate or PCR defense” clause of S.C. Code Ann. § 17-27-160(B) were independent means through which an otherwise death penalty-qualified attorney could qualify to represent a death row inmate in PCR. Accordingly, an otherwise death-qualified attorney’s twelve hours of CLE within the previous two years did not necessarily have to be in the field of capital appellate or PCR defense.

Here, Judge Few’s September 9, 2005 Order appointing Mr. Brown specifically states that “[t]he defendant contends that he is indigent and in need of an attorney as contemplated by law.” He confirmed counsel’s appointment at a September 23, 2005 hearing, at which Mr. Brown, Robertson and counsel for Respondent were present. Judge Few’s Order appointing counsel did not expressly rely upon the above Memorandum. However, because “[t]rial judges are presumed to know the law and to apply it in making their decisions,” *Walton*, 497 U.S. at 653, the presumption is that Judge Few appointed in accordance with § 17-27-160(B) and the Memorandum. The Court would further observe that the General Assembly has not subsequently amended the statute, following Chief Justice’s Memorandum.

Robertson suggests that Respondent mistakenly relies upon the Chief Justice’s August 13, 2003 Memorandum because her August 30, 2010 Order in a capital PCR appeal, *Abdiyyah*

ben Alkebulanyahh, #6012 v. *State*, “state[s] that her issuance of the letter was a mere administrative action and does not include a determination that her interpretation of the statute is valid.”¹² In *Abdiyyah ben Alkebulanyahh*, a Motion to Remand for Additional Post-Conviction Proceedings was filed on the petitioner’s behalf by Robertson’s lead counsel in federal court proceedings, John H. Blume, Esquire. The petitioner also filed a motion for recusal of the Chief Justice based on her August 13, 2003 Memorandum, since he was asserting a contrary interpretation of the statute.

In the course of denying the recusal motion, Chief Justice Toal did state on pp. 4-5 of the Order in *Abdiyyah ben Alkebulanyahh*, that courts from other jurisdictions addressing the question have “noted the promulgation of an administrative order or directive [by an appellate court having primary responsibility for administration of the judicial branch of government] does not include a determination that it is valid because that would constitute an advisory opinion.” She did not make such a determination, herself. Rather, she found that her “consideration of petitioner’s Motion for Remand is no different from my consideration of petitions for rehearing filed in cases in which I have participated in a decision on the merits.”

Thus, while not binding authority from the Supreme Court of South Carolina, the Court finds that it was and remains authority that supports the appointment of counsel in this case. Further and contrary to Robertson’s assertion, **Response in Opposition**, p. 8 n. 6, the State did not assert that Alkebulanyahh should be required to file a second PCR application. To the contrary, the State argued on the cited pages that the petitioner had had not shown that other remedies, such as PCR, were inadequate for asserting the claims he belatedly sought to raise and it pointed out that he a pending PCR appeal. **Response in Opposition, Exhibit B**, pp. 12-13. Additionally, Robertson ignores that the South Carolina Supreme Court summarily denied his

¹² This Order was attached as “Exhibit A” to Robertson’s Response in Opposition to Motion.

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petition in *Alkebulanyahh*, on October 20, 2010. Therefore, this Court finds that there was no violation of the capital PCR qualification statute, and accordingly no basis for permitting this successive Application and for treating the proceedings that have taken place as a nullity.

More importantly, there is no presumed prejudice from the failure to follow a technical requirement of a statute that is not a right guaranteed by the United States or State Constitutions. Robertson would therefore have to show not only that there was non-compliance with the statute, but also prejudice to him resulting from the non-compliance in order to gain relief in this action. *See Reed v. Farley*, 512 U.S. 339, (1994) (state court's failure to observe the 120-day speedy trial rule of the Interstate Agreement on Detainers (IAD) is not cognizable under the federal habeas corpus statute when the defendant registered no objection to trial date at time it was set and suffered no prejudice attributable to the delayed commencement); *United States v. Timmreck*, 441 U.S. 780 (1979) (a guilty plea conviction is not subject to collateral attack when all that can be shown is a formal violation of Rule 11 because such a violation is neither constitutional nor jurisdictional. Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure" under *Hill v. United States*, 368 U.S. 424, 428 (1962)); *cf. State v. Frey*, 362 S.C. 511, 518-20, 608 S.E.2d 874, 878-79 (Ct.App. 2005) (remanding case for trial court to determine, on the existing record, whether State's failure to comply with the Implied Consent Statute prejudiced defendant); *Hutto v. State*, 387 S.C. 244, 250, 692 S.E.2d 196, 199 (2010) ("While we do not believe Agent Harris's disclosure violates the statute, assuming *arguendo* there was a violation, such violation would not warrant the exclusion of the evidence obtained from the information disclosed. Section 24-21-290 only creates a statutory privilege and does not implicate a constitutional right; therefore, the exclusionary rule does not apply"); *State v.*

Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002) (“Exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the defendant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures”). No prejudice has been shown in Robertson’s case, other than an assertion that present counsel would have handled it differently, and this is insufficient to justify the filing of a time-barred, successive PCR Application.

The Court further finds that there is no merit to Robertson’s contention that his prior PCR counsel did not perform competently. He clearly has not shown either deficient performance or resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). On page 2 of the Response in Opposition to Motion to Dismiss, Robertson states that no amended application had been filed before the evidentiary hearing in his first PCR application. However, at the hearing, counsel identified a dozen different theories under which trial counsel had rendered ineffective assistance. Following the evidentiary hearing on these issues, Judge Few issued an Order, 106 pages in length, discussing all of these grounds and denying them.

Robertson’s current attorneys further claim that they have found other grounds that could have been raised in the original PCR proceedings. However, simply stating that they would have handled the case differently does not establish that PCR counsel were deficient, nor any prejudice to Robertson. *See Strickland*, 466 U.S. at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential,” and “every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel’s perspective as the time;” *see also id* (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way”).

He further asserts that, if given more time to investigate, other grounds *could* be found in the current action. However, Robertson's present counsel were appointed by the United States District Court for the District of South Carolina to represent Robertson in his federal habeas corpus proceeding on November 8, 2010. To this date, they can only point out that they would have handled the first PCR application differently; and, with the unerring vision of hindsight and with the knowledge that those allegations raised by Robertson's original PCR attorneys were unsuccessful, that they would have alleged additional grounds in which they contend that trial counsel rendered ineffective assistance. If the Court allowed a hearing on merits of the claims in this Application and Robertson was not successful, other counsel would undoubtedly allege that Robertson's present counsel were ineffective because they would have raised other grounds and would have handled it differently.

In connection with this portion of his Response in Opposition, Robertson suggests that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases establish *the appropriate standard* for counsel's investigation and representation of trial, appellate and collateral counsel. However, his contention is wrong. The ABA Guidelines are merely guidelines for trial and appellate counsel, *at best*, and trial counsel need not comply with them to render objectively reasonable representation. *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009). Indeed, Justice Alito wrote a separate concurring opinion in *Van Hook*, to more forcefully emphasize his "understanding that the [majority] opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment." *Van Hook*, 130 S.Ct. at 20 (Alito, J., concurring). He added that

“[t]he views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. *It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution,*” *Id* (emphasis added).

Further, these Guidelines do not and cannot apply to collateral counsel's performance because there is no Sixth Amendment right to counsel in PCR. Indeed, Robertson repeatedly concedes that “in post-conviction proceedings, there is no currently recognized federal constitutional right to counsel . . . and thus there is no clear remedy for substandard representation.” **Response in Opposition**, p. 7. *See also* pp. 10-11. This is correct. *See Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (observing that “the right to appointed counsel extends to the first appeal of right, and no further” and holding that prisoners have no constitutional right to counsel in mounting collateral attacks on convictions); *Murray v. Giarratano*, 492 U.S. 1, 10, 13 (1989) (applying the rule to capital cases); *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991) (“There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. . . . Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must “bear the risk of attorney error that results in a procedural default”) (citations omitted); *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam) (there can be no deprivation of effective assistance where there is no constitutional right to counsel). *Cf. Turner v. Rogers, et al.*, 131 S.Ct. 2507, 2516 (2011) (“the Sixth Amendment does not govern civil cases”).

The Court finds that the only way for it to determine whether prior collateral counsel's performance was incompetent is to hold an evidentiary hearing, where prior collateral counsel could testify as to their investigation and what issue(s) they may have investigated but did not pursue at the evidentiary hearing. Only then could this Court determine whether their investigation and their subsequent presentation of claims at the PCR hearing was objectively reasonable, and whether Robertson could meet his burden of establishing prejudice under *Strickland*. However, a hearing on the competency of collateral counsel's representation is not required by state court precedent, statute or the Sixth Amendment. Again, to create the exception now urged by Robertson would create an exception that would swallow the rule against successive applications, since it would mandate a second PCR hearing in every case in which the applicant did not prevail in his first hearing. *Contra Aice*, 305 S.C. at 451, 409 S.E.2d at 394.¹³

There is no reason to tax an already overburdened judicial system with wasteful litigation that is not constitutionally mandated. Further, it would reward a dilatory filing in this case that is designed to delay the proper course of the appeals process and it would destroy any sense of finality to litigation. *Id* at 451, 409 S.E.2d at 394. The Court refuses to adopt such an unreasonable standard and it rejects Robertson's position.

The Court further finds that Robertson's due process and equal protection arguments are meritless. He claims that due process was violated because he was not provided "meaningful access" to the courts. *See Bounds v. Smith*, 430 U.S. 817, 821-22 (1977). In making this assertion, he equates, as does the petitioner in *Martinez*, "meaningful access" with effective assistance of counsel under *Strickland*.

¹³ It could very well result in the filing of yet a third PCR application based upon the ineffectiveness of the second PCR counsel.

However, there is no substantive right to post-conviction relief proceedings. *Finley, supra*. To the contrary, state PCR is provided as a matter of legislative grace, as opposed to federal constitutional right. *Id* at 556-57; *Giarratano*, 492 U.S. at 10 (“State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal.”). As a result, his claim that South Carolina’s PCR procedures violate due process can only be properly viewed as a claim that those procedures violate “procedural due process.” *See Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2312, 2316-22 (2009) (because convicted prisoner did not have a substantive right to DNA testing, his claim that he was denied access to testing necessarily involved a claimed violation of procedural due process). In light of the broad discretion that the states are afforded in enacting post-conviction review legislation, a procedural due process challenge in this context faces a formidable hurdle. *See Finley*, 481 U.S. at 559 (rejecting the contention that “when a State chooses to offer help to those seeking relief from [their] convictions, the Federal Constitution dictates the exact form such assistance must assume”).¹⁴

Thus, a reviewing court “may upset a State’s postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.” *Osborne*, 129 S. Ct. at 2320; *see also Skinner v. Switzer*, 131 S.Ct. 1289, 1293 (2011) (stating that the Court’s analysis in *Osborne* “left slim room for the prisoner to show that the governing state [PCR procedure] denies him procedural due process”). *Cf. Herrera v. Collins*, 506 U.S. 390, 399 (1993) (due process “does not require that every conceivable step be taken, at whatever cost, to

¹⁴ Like the petitioner in *Martinez*, Robertson recognizes this problem and he has attempted to characterize his original PCR proceeding as the functional equivalent of a first direct appeal. He therefore contends that he was entitled to counsel based on the Supreme Court’s decisions in *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Douglas v. California*, 372 U.S. 353 (1963). However, the Supreme Court has previously held that a state is not required to appoint counsel for a criminal defendant beyond a first appeal. *Ross v. Moffitt*, 417 U.S. 600 (1974).

eliminate the possibility of convicting an innocent person,” because “[t]o conclude otherwise would all but paralyze our system for enforcement of the criminal law”).

This Court finds that South Carolina’s PCR procedures, and particularly those procedures applicable to capital PCR applicants such as Robertson, are not “fundamentally inadequate to vindicate” a defendant’s right to challenge his conviction or sentence. Counsel were appointed for him well before his hearing; appointed counsel were qualified in accordance with § 17-27-160(B) and Chief Justice Toal’s Memorandum, despite his contrary assertion; he raised the issues that he wished to pursue at an evidentiary hearing, with the advice and assistance of counsel; and the PCR judge’s adverse result was subject to review by the South Carolina Supreme Court.

Again, Robertson’s biggest problem is that “there is nothing in the Constitution or the precedents of [the United States Supreme] Court that requires that a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings, *see Pennsylvania v. Finley*, . . . nor does . . . the Constitution require[] the States to follow any particular federal model in those proceedings.” *Giarratano*, 492 U.S. at 13 (O’Connor, J., concurring).

Simply put, by equating “meaningful access” to the courts with effective assistance of counsel under *Strickland*, he is trying to extend the protections of the Sixth Amendment through the guise of due process when the Sixth Amendment clearly does not apply. *Id.* See also *Turner*, 131 S.Ct. at 2516 (“the Sixth Amendment does not govern civil cases”). Moreover, the Court

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ds that Robertson has not shown an equal protection violation because he cannot show separate treatment based upon his status as an indigent.¹⁵

Furthermore, the Court finds that the grant of certiorari by the United States Supreme Court in *Martinez* and *Maples* does not require this Court to permit the filing of his current Application. It would not be appropriate for this Court to delay a ruling in this matter because of pending cases in the United States Supreme Court. It is impossible for this Court to know whether a ruling in the cases of *Maples* and *Martinez* would affect the issues in this case or whether any ruling in those cases would be applied retroactively. If the rulings in those cases were beneficial to Robertson and provided him with a previously-unrecognized right that would be cognizable in a successive PCR hearing, he could seek relief in a subsequent action. See § 17-27-45(B).

However, even assuming *arguendo* that the Supreme Court rules in favor of either or both petitioners, the Court finds that it does not appear that any such ruling will require a new PCR hearing in this case because the ruling will address only whether a procedural default may be excused in federal court. Rather than requiring states to provide effective assistance of counsel in their post-conviction relief proceedings, the Court's ruling will apparently be limited to providing inmates with the ability to raise claims in federal habeas corpus proceedings that were not pursued in state court proceedings, as the result of original PCR counsel's incompetence. This is an issue that would have to be addressed in federal court.¹⁶

¹⁵ Moreover, the federal courts do not currently recognize the ineffective assistance of collateral counsel as a "cause" for excusing a habeas corpus petitioner's failure to properly raise an issue in state court. See *Ivey*, *supra*. See also *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir.1997) (en banc); *Longworth v. Ozmint*, 377 F.3d 437, 448 n. 2 (4th Cir. 2004). This Court will not construe federal law in a contrary manner, either through the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.

¹⁶ Moreover, the Court finds that the PCR procedures in Arizona differ significantly from those in this state. In fn. 8 of his petition, the petitioner in *Martinez* states that Arizona's PCR procedures are part of the original criminal proceedings, whereas PCR is purely a civil remedy in South Carolina.

288, 310-13 (1989). *Cf. State v. Belcher*, 385 S.C. 597, 612-13, 685 S.E.2d 802, 810-11 (2009) (“[b]ecause our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved. . . . Our ruling, however, will not apply to convictions challenged on post-conviction relief”) (citing *Teague*).

The Court also finds that laches bars relief. Laches is an equitable doctrine, which “arises upon the failure to assert a known right.” *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971).¹⁸ As the Court explained in *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005),

Laches is “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.” *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988).

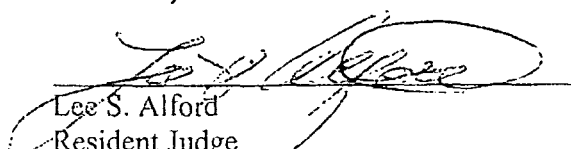
In this case, the transcript of the September 23, 2005 hearing is not in the files of the Attorney General’s Office and Respondent apparently did not order this transcript because Robertson did not contest counsel's qualifications in state PCR. Moreover, Robertson concedes that a copy of that transcript is unavailable because the tapes of the hearing do not exist. *See* Rule 607(i), SCACR. The Court finds that Robertson’s failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel’s qualifications may not be asserted as a basis for a successive PCR Application and is barred by laches.

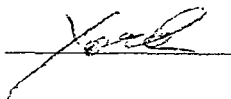
¹⁸ Laches is an affirmative defense that must be pleaded pursuant to Rule 8(c), SCRCP. *See also Adams v. B & D, Inc.*, 297 S.C. 416, 377 S.E.2d 315 (1989).

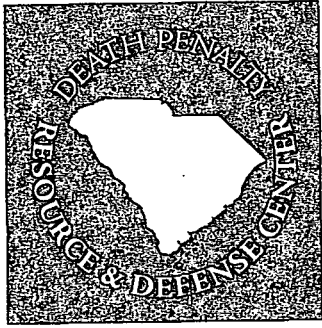
Moreover, the Court finds that Robertson's allegations 10 & 11(c)-10 & 11(f) of the Amended Application do not state a claim upon which Post-Conviction Relief may be granted because each is alleged as a free-standing, substantive claim of trial court error. The jurisdiction of this Court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). Post-conviction relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). See also *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (same); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885-86 (1975) (same). Finally, his allegations 10 & 11(h)-10 & 11(i) of the Amended Application do not state a claim upon which Post-Conviction Relief may be granted because neither is cognizable as a matter of state law and neither has been recognized as a ground for relief by the United States Supreme Court. As a result, these allegations are summarily dismissed for this additional reason.

Therefore, the Application for PCR is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 30th day of September, 2011.


Lee S. Alford
Resident Judge
Sixteenth Judicial Circuit

, South Carolina.



January 6, 2012

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: *James Robertson v. South Carolina, 2011-CP-46-00072*

Dear Mr. Shearouse:

Enclosed please find for filing, with proof of service, the original and one copy of Applicant's Notice of Appeal and Required Explanation in regards to the above referenced case. Please clock-in the extra copy and return it to me in the enclosed self addressed stamped envelope. By way of this letter, I am also filing this pleading in the lower court.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

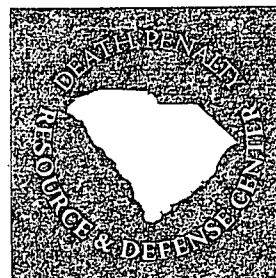

Emily C. Paavola

cc: David Hamilton, Clerk of Court
William Edgar Salter
James Robertson

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S.C. SUPREME COURT



P.O. Box 11311
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The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
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