

Nov 13 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County
Capital Action
Honorable R. Keith Kelly, Circuit Court Judge

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000505

**APPENDIX
VOLUME 10 OF 14
(PAGES 4358-4857)**

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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.

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 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. Giaratano*, 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

DEFENSE OF INDIGENTS ACT
FORM NO. IV
IN THE COURT OF GENERAL SESSIONS

RECEIVED
2005 SEP 22 PM 12:09

MILTON
& G.S.
COUNTY, SC

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 5:51 AM

803-329-4200
SEE ATTACHED MEMO
FROM JUDGE FEW.

Exhibit 2

Sep 29 11 03:00a

Matlock Law Firm, P.A.

803-985-3992

p.2

STATE OF SOUTH CAROLINA)

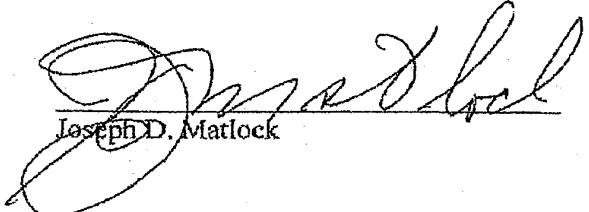
COUNTY OF York)

AFFIDAVIT

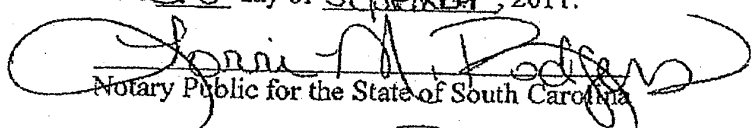
Joseph D. Matlock, Esq., who appeared personally before me, affirms and states the following:

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, 2012

Exhibit 3

STATE OF NEW YORK)

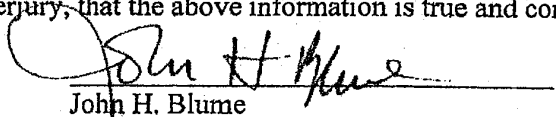
COUNTY OF TOMPKINS)

AFFIDAVIT

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

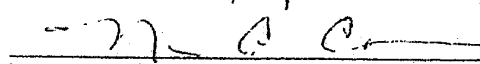
1. On September 27, 2011, I spoke with Michael Brown, who was appointed to represent James D. Robertson in his initial capital post-conviction relief proceedings.
2. Mr. Brown informed me that at the time of his appointment, he had not previously represented a death-sentenced inmate in state or federal 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. 4574392

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

ROBERT BARTELS

Counsel of Record

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Attorney for Petitioner

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COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

*i***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

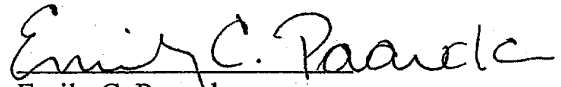
James D. Robertson, #5067,
v.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 23 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.

**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.").

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: Emily C. Paavola
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
Ridgelyville, 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 Row.

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

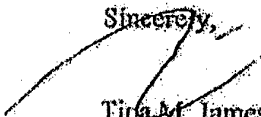
Honorable John C. Few
318 Courthouse
304 E. North Street
Greenville, South Carolina 29601

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.

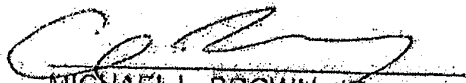
Counsel for the State has no objection and consents to this extension of time. The Defendant requests a four (4) month extension of time.

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.

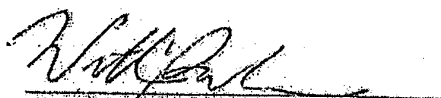
Counsel for the Defendant has until March 1, 2006, to file said Post Conviction Relief.

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,

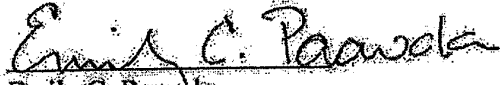
v.

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

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

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

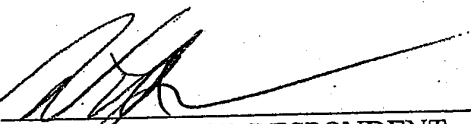
JOHN W. McINTOSH

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.

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

James D. Robertson, #5067,

Petitioner,

vs.

State of South Carolina,

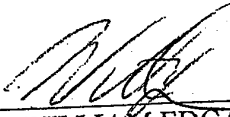
Respondent.

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.



WILLIAM EDGAR SALTER, III

Ed Salter - Activity in Case 2:11-cv-00063-SB -BHH Robertson v. Ozmint Order on Motion for Reconsideration

From: <SCDEfilingstat@scd.uscourts.gov>
To: <scd_ecf_nef@scd.uscourts.gov>
Date: 2/15/2012 12:25 PM
Subject: Activity in Case 2:11-cv-00063-SB -BHH Robertson v. Ozmint Order on Motion for Reconsideration

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 2/15/2012 at 12:23 PM EST and filed on 2/15/2012

Case Name: Robertson v. Ozmint
Case Number: 2:11-cv-00063-SB -BHH
Filer:
Document Number: 64(No document attached)

Docket Text:

TEXT ORDER denying [60] Motion for Reconsideration re [44] Order on Motion to Stay ; granting [63] Motion for Leave to File State Court Status Update. Signed by Magistrate Judge Bruce Howe Hendricks on 2/15/12. (hhil,)

2:11-cv-00063-SB -BHH Notice has been electronically mailed to:

file://C:\Documents and Settings\Esalter\Local Settings\Temp\XPgrpwise\4... 2/15/2012

John H Blume john@blumelaw.com

William Edgar Salter, III agesalter@ag.state.sc.us

Donald John Zelenka agdzelenka@scag.gov, aglbrawley@ag.state.sc.us

Keir M Weyble keir@blumelaw.com

Emily Paavola emily@deathpenaltyresource.org

2:11-cv-00063-SB -BHH Notice will not be electronically mailed to:

--- Scanned by M+ Guardian Messaging Firewall ---

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable Lee S. Alford, Circuit Court Judge

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.

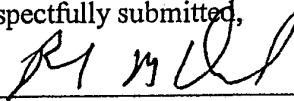
2) Petitioner would also note that the Federal District Court has stayed petitioner's federal habeas case, and issued a stay of execution so the present action could be resolved before this Court. The state's attempts to lift that stay in Federal Court were denied by orders dated November 30, 2011 and 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

JAMES ROBERTSON,

PETITIONER,

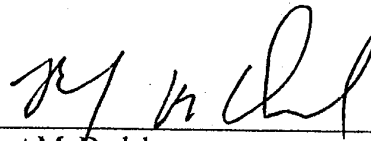
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

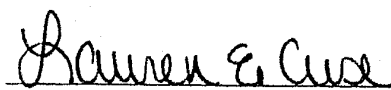
The undersigned attorney hereby certifies that a true copy of the return to motion to dismiss in the above-referenced case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of February, 2012.



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**
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V.

Respondent

Jon Ozmint
*Commissioner, South Carolina
Department of Corrections*

represented by **William Edgar Salter, III**
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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	<u>54</u>	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	<u>58</u>	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			
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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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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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,

RECEIVED

MAR 28 2012

V.

SC OFFICE OF
APPELLATE DEFENSE

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

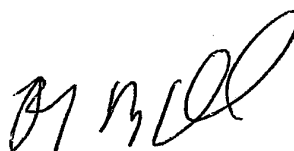
that his initial post-conviction counsel provided ineffective assistance of counsel during the post-conviction relief proceedings. The PCR judge, however, summarily dismissed the application for post-conviction relief on the basis that ineffective assistance of PCR counsel did not provide a triggering 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,

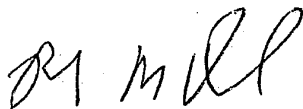
V.

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.

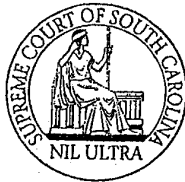


Robert M. Dudek

Chief Appellate Defender

ATTORNEY FOR PETITIONER.

March 28, 2012



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
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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.

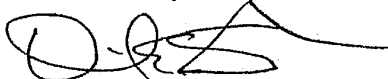
"Motion to dismiss is denied.

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

RECEIVED

APR 5 2012

SC OFFICE OF
APPELLATE DEFENSE

Robertson, James v. State
Page Two
April 5, 2012

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

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Lee S. Alford, Circuit Court Judge

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2012-205909

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of Martinez v. Ryan, ____ U.S. ____, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and the past treatment of similarly situated South Carolina prisoners, Robertson should be permitted to proceed with a second-in-time application for post-conviction relief asserting colorable claims of ineffective assistance of trial counsel that prior PCR counsel ineffectively failed to investigate or present?

STATEMENT OF THE CASE

Introduction

Petitioner, James D. Robertson, was represented in his initial capital post-conviction relief proceedings (hereafter, “initial PCR”) by attorneys Michael L. Brown and James D. Matlock, neither of whom were qualified to handle a capital PCR case under the plain language of S.C. Code § 17-27-160(B). Attorneys Brown and Matlock (collectively, “initial PCR counsel”) conducted no investigation, sought no assistance from any investigators or expert witnesses, and consequently overlooked a number of colorable claims for relief that were apparent from the record. The skeletal and undeveloped claims they did assert were rejected, and Petitioner’s initial PCR proceedings ended when this Court denied certiorari.

With the assistance of new counsel, Petitioner filed a second PCR application containing claims which could – and should – have been raised by initial PCR counsel, and requested a reasonable opportunity to develop and present evidence demonstrating his entitlement to relief.¹ In support of his request, Petitioner informed the circuit court of the facts establishing that initial PCR counsel were unqualified, explained that similarly situated South Carolina death row prisoners have been permitted to go forward with second PCR applications, and alerted the court to the pendency of two cases – Maples v. Thomas, 131 S.Ct. 718 (2011), and Martinez v. Ryan, 131 S.Ct. 2960 (2011) – likely to affect its analysis. The circuit court summarily dismissed, adopting the State’s contentions, *inter alia*, that Petitioner had received the legal assistance to which he had been entitled, and that his application was impermissibly successive.

¹The attorneys who assisted Petitioner in identifying the claims set forth in his second PCR application had been appointed to represent him in federal habeas corpus proceedings, which were (and remain) stayed pending the resolution of these state court proceedings. Due to the limited scope of their federal appointment, counsel prepared the second PCR application *pro bono*, and without access to funds for expert or investigative services.

On March 20, 2012, the Supreme Court of the United States announced its decision in Martinez v. Ryan, 132 S.Ct. 1309 (2012). Consistent with the position Petitioner advanced before the circuit court in this case, Martinez recognized that incarcerated prisoners require the assistance of effective post-conviction counsel when attempting to identify, develop and litigate challenges to the effectiveness of their trial counsel. See Martinez, 132 S.Ct. at 1317. While the Court stopped short of announcing a constitutional mandate that states furnish prisoners with effective post-conviction counsel, it did make clear that, as an equitable matter, a procedural default by a prisoner who lacked such counsel will no longer bar substantive, merits review of the prisoner's claims in federal habeas corpus proceedings. Id. at 1318.

As the Supreme Court observed, the rule announced in Martinez “permits a State to elect between appointing [effective] counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings.” Id. at 1320. As discussed more fully below, the circumstances presented by Petitioner's case require that the election envisioned in Martinez be made. To maintain the established role of South Carolina PCR courts as the primary forum for consideration and resolution of ineffective assistance of trial counsel claims, this case must be remanded for further PCR proceedings conducted with the aid of competent, qualified counsel. In the absence of such a remand, the development and resolution of the merits of Petitioner's claims for relief will take place exclusively in the federal courts. Given the importance of this choice – to Petitioner individually, and more broadly to South Carolina prisoners and courts – this Court should grant certiorari.

Procedural History and Relevant Background

Petitioner 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,² Petitioner 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 Petitioner in his capital PCR proceedings. 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.

App. 4517; Attached as Exhibit 1 to Notice of Appeal. This order does not address whether Brown was qualified in accordance with § 17-27-160(B). Joseph David Matlock later appeared with Brown at Petitioner's evidentiary hearing. There is no record of Matlock's appointment.

²Petitioner's direct appeal was dismissed after a determination that he was competent to waive appellate review. That determination, however, was made without benefit of any expert testimony or report, and occurred at a hearing at which Petitioner was not even represented by counsel.

The record of Petitioner'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, initial PCR counsel filed a PCR application on Petitioner's behalf. App. 3244-3251. The sum total of the allegations contained in the application was "Ineffective assistance of counsel – specifics to be amended later." App. 3246. 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 *only* three witnesses: Petitioner, his trial attorney James Hancock, and his trial attorney James Boyd. App. 3276-3329 (Petitioner); App. 3329-3455 (Hancock); App. 3494-3559 (Boyd). As stated, the records reviewed by undersigned counsel substantially demonstrate the Petitioner's initial PCR counsel did not perform *any* independent investigation whatsoever to determine the existence of claims for relief based on evidence not contained within the record generated at trial.³ Judge John C. Few denied post-conviction relief in a written order dated March 7, 2008.

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

³ 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.").

containing a number of viable issues which could – and should – have been raised by initial PCR counsel as grounds for post-conviction relief.⁴

Respondent moved to dismiss the application. Petitioner responded to the Motion to Dismiss, arguing that: (1) the application is timely; (2) Petitioner is entitled to pursue the present, second 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) Petitioner is entitled to pursue the second application as a matter of federal constitutional law; and, (4) the Supreme Court of the United States was then considering a series of cases that could affect the court's decision here. See Maples v. Thomas, 2011 WL 940889; Martinez v. Ryan, 2011 WL 380903; Foster v. Texas, 2011 WL 4360018. Petitioner submitted 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.

⁴ 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 and the review and investigation should take place upon remand of this matter by new, qualified PCR counsel.

App. 4519; Affidavit of Joseph D. Matlock, Attached as Exhibit 2 to Notice of Appeal. Moreover, Petitioner also submitted 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. App. 4521; Affidavit of John H. Blume, attached as Exhibit 3 to Notice of Appeal. Brown was not aware of the statutory provisions governing the appointment of counsel in a capital PCR case. Id.

Finally, Petitioner presented the lower court with a copy of this Court's recent opinion In the Matter of Michael L. Brown. App. 4523-4525; In re Brown, attached as Exhibit 4 to the Notice of Appeal. 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 Petitioner's PCR counsel from September 2005 to March 2008. Thus, In re Brown further supports Petitioner'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).

Petitioner 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, Petitioner argued that the lower court should hold his case in abeyance until the Supreme Court had resolved Martinez.

The lower court rejected Petitioner's arguments and dismissed his application, resolving a number of factual disputes in respondent's favor without holding an evidentiary hearing or providing Petitioner with the time or opportunity to investigate. The lower court's order dismissed 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) Petitioner waived his right to qualified counsel at his initial PCR; (4) Petitioner 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 Petitioner's initial PCR; and, (6) laches bars relief. Because the lower court's determination was erroneous, and because Martinez now dictates that Petitioner is entitled to merits review of his claims in federal court if this Court does not remand for further state court proceedings, this Court should grant certiorari.

ARGUMENT

I. PETITIONER IS ENTITLED TO PURSUE HIS PCR APPLICATION AS A MATTER OF EXISTING STATE LAW.

A. South Carolina courts have permitted similarly situated prisoners to proceed with a second PCR application.

The lower court's September 20th Order (hereafter, "the Order") finds that Petitioner's application must be dismissed as successive. App. 4429; Order at p.18. This determination is incorrect. In Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991), years before Martinez, 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, 409 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. Carter was later granted a new trial based on the Ineffective Assistance of Trial Counsel.). See Carter v. State, 301 S.C. 396, 392 S.E.2d 184 (1990).

South Carolina 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 on par with Williams and Elmore. Petitioner'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 Petitioner 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 minimal 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 (and now

recognized by the United States Supreme Court in Martinez), Petitioner is simply asking for his one fair chance. There is no distinction between the procedural circumstances in Williams and Elmore and the circumstances here. It would be fundamentally unfair for Petitioner to be arbitrarily denied the opportunity that Williams and Elmore rightfully received.

B. *Martinez* provides additional incentive for this Court to refrain from dispensing with the previously established state court practice.

Martinez reinforces the need for this Court to adhere to the precedent established by Williams and Elmore. In Martinez, the Court expressed a clear preference for the state courts to act as the primary forum for the development and resolution of claims of ineffective assistance of trial counsel. 132 S.Ct. at 1318. Moreover, the Court acknowledged that the assistance of competent collateral counsel is crucial if state prisoners are to obtain meaningful review of such claims. Id. at 1317. This is because “claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy,” and “[w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.” Id. “To present a claim of ineffective assistance at trial in accordance with the State’s procedures, then, a prisoner likely needs an effective attorney.” Id. If a state court fails to provide a sufficient process, including competent collateral counsel, to ensure meaningful review, then further federal development and merits review will not be precluded. Id. at 1320.

Thus, although Martinez does not require that this Court remand Petitioner’s second PCR application for further PCR proceedings with the aid of competent, qualified counsel, it does establish that if this Court chooses not to do so, the federal courts will take responsibility for the development and resolution of Petitioner’s claims instead. In order to preserve the role of South Carolina PCR courts as the primary arbitrators of ineffective assistance of trial counsel claims, this Court should grant certiorari and remand for further PCR proceedings.

C. Petitioner'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.” App. 4419; 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 the September 23rd hearing. See Id. at n.8 (“The transcript of the September 23, 2005 hearing is not in the files and Respondent apparently did not order this transcript.”).

Petitioner, 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. App. 4224; 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.⁵ App. 4224; Response in Opposition to Motion to Dismiss at p.17.

Although the lower court took no evidence and refused to authorize Petitioner 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—of which no record exists—but further that: (a) Petitioner was present at this hearing; (b) Assistant Attorney

⁵ As explained above, there is no record of Mr. Matlock’s appointment at all. The PCR Court, and Respondent who drafted the Order, apparently concedes that he was not properly qualified. The Order notes only that he was appointed to assist Mr. Brown at some unknown date. App. 4419; Order at p.8. This language is identical to Respondent’s Motion to Dismiss.

General, Mr. Edgar Salter, was also present; and, (c) Brown was, in fact, properly qualified.⁶ App. 4419; App. 4433; 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).

The lower court further found that Brown was specifically qualified according to Chief Justice Toal’s Memorandum dated August 13, 2003.⁷ App. 4434-4435; Order p. 23-24. The

⁶ Moreover, after the notice of appeal was filed, Petitioner located a letter in his personal files from Mr. Brown, 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 to Petitioner’s Supplement to Notice of Appeal and Required Explanation 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.

⁷ The memorandum conflicts 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.

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.” App. 4436; Order at 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. (App. 4435, Order p.24) (emphasis added). Thus, the lower court’s rejection of Petitioner’s arguments rests on nothing more than speculation, 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.

D. Petitioner’s Initial PCR Counsel Did Not Perform Competently.

As shown above, a review of the Record here demonstrates that Petitioner’s initial PCR counsel conducted no investigation, and neither sought nor secured any assistance from investigators or expert witnesses. Petitioner’s initial PCR 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 Petitioner’s testimony expressing his

dissatisfaction with trial counsel. As explained herein, 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.

Pursuant to Martinez, appointed post-conviction counsel provide “[i]nadequate assistance” when they fail to satisfy the threshold prescribed in Strickland v. Washington, 466 U.S. 668 (1984), and in so doing omit an ineffective assistance of trial counsel claim possessing “some merit.” Martinez, 132 S.Ct. at 1318; *see also, e.g., Strickland*, 466 US at 691 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”). 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.⁸

Based on all available information, Petitioner's prior counsel did not fulfill these obligations. Thus, not only did their appointment ignore the criteria established by the General Assembly, their performance also fell far short of the adequate post-conviction assistance baseline contemplated by Martinez.

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

Not only does the lower court's Order contravene existing state law, it also 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 Petitioner's PCR Application.

The Order faults Petitioner for not providing particularized proof of initial PCR counsel's lack of qualifications, and thereby leaving the Court to "speculate." App. 4434; 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 Petitioner'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

⁸ The commentary to the guideline states that "collateral counsel cannot rely on the previously compiled record but must conduct a thorough independent investigation. . . ."

prejudice to Robertson.” App. 4438; Order at p. 27. This is not an accurate depiction of Petitioner’s PCR allegations, nor is it a reasonable ruling with respect to them. The PCR application at issue in this Petition 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.”

App. 4209-4220; Response in Opposition to Motion to Dismiss at pp.2-13. Without access to resources, process, or a hearing, Petitioner cannot reasonably be expected to have done any more than that.

Thus, Petitioner 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 was also error for the lower court to fault Petitioner 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., Wellons 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)).

Additionally, after remarking 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,” App. 4441; Order at p.30 the lower court purported to find, elsewhere in the Order, that initial PCR counsel actually were qualified and competent, App. 4433, 4434, 4437, 4438; Order at pp. 22, 23, 26, 27. These statements are irreconcilable; the question of prior counsel’s adequacy cannot be *both* unanswerable *and* answerable on the existing record – yet that is precisely what the lower court purported to find. Moreover, while it may often be true that assessment of the adequacy of post-conviction

counsel's representation will require specific fact development, the undisputed information before the lower court in this case was more than sufficient to establish that initial PCR counsel were both unqualified and ineffective.

The lower court's order also 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." App. 4442; Order at p. 31; See also App. 4440-4444 ; Order 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 Petitioner'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. App. 4218; Response in Opposition to Motion to Dismiss at p.11 n.8; see also, Martinez, 132 S.Ct. at 1315 (noting, as in Coleman v. Thompson, 501 U.S. 722 (1991), that "the initial-review collateral proceeding [is] a prisoner's 'one and only appeal' as to an ineffective-assistance claim.") (quoting Coleman, 501 U.S. at 755).

Nor does the Order address Petitioner'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”).

III. THE LOWER COURT’S ADDITIONAL REASONS FOR DISMISSING THE PCR APPLICATION ARE WITHOUT MERIT.

Finally, in addition to the arguments already addressed herein, the order prepared by respondent and adopted by the court included a variety of other legal theories purporting to justify dismissal. In the interest of completeness, these remaining arguments are addressed below.

A. Petitioner 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, Petitioner waived his right to qualified PCR counsel by not objecting at the time of their appointment. App. 4428; 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 App.4432; Order at p. 21.⁹ The Order also invokes laches for the same basic reason. App. 4446; 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 judges appoint

competent and qualified counsel for indigent capital PCR applicants. The statute does not require that the indigent applicant *himself* be aware of the statute's requirements, personally investigate post-conviction counsel's lack of qualifications, raise objections pro se 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 as no other such harsh rule exists in other contexts. 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).

B. No outcome-determinative showing of prejudice is required before Petitioner's PCR application may proceed.

The lower court erroneously found that, before he may proceed, Petitioner 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." App. 4437; 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, 394 S.C. 62, 714 S.E.2d 326 (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

⁹ This finding is particularly curious with regard to Mr. Matlock, since no party has even alleged that he was present at an appointment hearing.

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 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 v. State, 394 S.C. 62, 714 S.E.2d 326 (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 Petitioner's case from Elmore and Williams, but the Court's Order provides no real distinctions. App. 4429; App. 4433-4434; 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.” App. 4433; Order at p.22. This account of the procedural history of Elmore fails to explain how or why Elmore is distinguishable here. Like Petitioner, 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* Petitioner’s arguments here.

Williams is even more closely analogous. Like Petitioner, 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 Petitioner’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.” App. 4433; 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 Petitioner 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 Petitioner’s federal habeas counsel for not conducting a complete investigation of the state court allegations since their appointment by the federal district court in November of 2010. App. 4439; 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 App. 4488; 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 habeas counsel to make such a request. The only other alternative would have been for habeas counsel to personally fund an investigation, prior to the resolution of respondent’s motion to dismiss, and without access to resources, basic process, discovery or a hearing. This alternative is equally unreasonable.

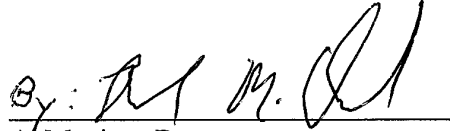
C. The PCR Application is timely.

The lower court found that “[a]lthough he does not refer to this subsection in his Response,” Petitioner “is attempting to rely in § 17-27-45(C),” which governs claims based on newly discovered evidence. App. 4427; Order at p.16. The court then determined that Petitioner’s application is untimely because “his reliance on § 17-27-45(C) is misplaced.” Id. This is not Petitioner’s position. He did not rely on § 17-27-45(C). Rather, Petitioner 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. App. 4422-4423; Response in Opposition to Motion to Dismiss at pp.15-16. The Order incorrectly identifies Petitioner’s position as based on section 17-27-45(C) and fails to address any of the arguments that Petitioner did raise regarding the statute of limitations.

CONCLUSION

For all of the reasons stated above, this Court should grant Petitioner's petition for writ of certiorari. Upon doing so and considering the arguments on the merits, this Court should then remand for a proper PCR proceeding with qualified and effective counsel.

Respectfully submitted,

By: 

A. Mattison Bogan
Attorney at Law

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 14th day of September, 2012.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Lee S. Alford, Circuit Court Judge

JAMES ROBERTSON,

PETITIONER,

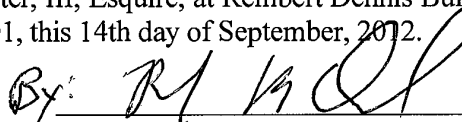
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of September, 2012.

By: 
A. Mattison Bogan
Attorney at Law

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of September, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From York County
The Honorable Lee S. Alford, Circuit Court Judge
Appellate case No. 2012-205909**

JAMES D. ROBERTSON, #5067,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney General**

**JOHN W. McINTOSH
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PETITIONER'S QUESTION PRESENTED

Whether, in light of Martinez v. Ryan, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and the past treatment of similarly situated South Carolina prisoners, Robertson should be permitted to proceed with a second-in-time application for post-conviction relief asserting colorable claims of ineffective assistance of trial counsel that prior PCR counsel ineffectively failed to investigate or present?

COUNTERSTATEMENT OF ISSUES PRESENTED

- I. Whether the rule set forth in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), even applies in South Carolina because *Martinez* only directly applies to those States that bar all direct appeals of ineffective-assistance claims, and South Carolina permits direct appeal review of Sixth Amendment claims, such as allegations that counsel labored under a conflict of interest and pro se motions to relieve counsel, where the claim was presented to and passed upon by the trial judge?
- II. Whether this Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that Robertson's 2011 Application is barred by the successive application doctrine in S.C. Code Ann. § 17-27-90 (2003) and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); it is barred by the statute of limitations and the doctrine of laches; and that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not require state courts to have merits hearings on successive applications claiming that initial PCR counsel was ineffective?

STATEMENT OF THE CASE

Petitioner, James D. Robertson, #5067 (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 on April 23, 1998 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**. The State timely served a Notice of Intent to Seek the Death Penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002) and 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. 2012).

This assigned the case to the Honorable John C. Hayes, III, who had exclusive jurisdiction. James W. Hancock and James W. Boyd, Esquires, represented Robertson.¹ Judge Hayes heard motion hearings on July 17, 1998 (**App. 32-48**), September 22 (**App. 49-55**) and 25, 1998 (**App. 55-79**); November 2 (**App. 79-90**) and 20, 1998; 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**. A sentencing phase was conducted following his exercise of the 24-hour statutory waiting period in § 16-3-20(B). The jury found each of the alleged statutory aggravating circumstances and it sentenced Robertson to 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

¹Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State.

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 this 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. This Court entered an Order on June 25, 1999 granting direct appellate review under *White v. State*. However, Robertson had each attorney relieved, and he appeared *pro se* before ultimately making a knowing, voluntary and intelligent waiver of his right to appeal. This Court filed a June 3, 2005 Order dismissing the appeal.²

² Robertson wrote this Court on August 28, 2000, and 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, this 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, this 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, and presenting three issues for review.

Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote this Court on April 18, 2002, and he asked 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 this Court dated June 3, 2002, and 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. This 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.

Following a hearing on his competency to appear *pro se* on October 10, 2002, Judge Hayes signed a Report in the Supreme Court of South Carolina on October 28, 2002. He found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. This Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*. Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003, in which he presented seven issues for appellate review. The State filed the Initial Brief of Respondent on December 31, 2003. The direct appeal was thereafter dismissed and re-instated on several occasions because Robertson failed to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, he indicated to this 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 - at which Robertson made a knowing and intelligent waiver of his right to be represented by counsel - was

A. Original state PCR.

On July 7, 2005, this Court granted Robertson's request for a stay of execution to pursue Post-Conviction Relief (PCR), pursuant to *In re Stays of Execution*. The Court also appointed the Honorable John C. Few to preside over this case. 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. **App. 3869**. Judge Few held a hearing at the Greenville County 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. **App. 3657**.³ Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

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**.

At the outset of the PCR hearing, Robertson amended his Application and proceeded on

held before Judge Hayes on February 22, 2005, at the Moss Justice Center in York, South Carolina. 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, this Court agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. This 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.

³ A copy of the transcript of the September 23, 2005 hearing is not currently available. Respondent does not have a copy 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. Robertson also has conceded that a copy of that transcript is unavailable because the tapes of the hearing do not exist. See Rule 607(i), SCACR.

twelve specific grounds of ineffective assistance of counsel. **App. 3268-73.**⁴ Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. **App. 3652- 3757.**

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. **App. 3766-80.** 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, App. 3768. The State filed a Return to Petition for Writ of Certiorari on July 15, 2009. **App. 3783-3810.** This Court filed a letter Order denying certiorari on October 6, 2010. **App. 3811-12.** It sent the Remittitur to the York County Clerk of Court on October 22, 2010.

B. The Petition for Writ of Habeas Corpus.

On October 27, 2010, Robertson filed a Motion for Stay of Execution and a Motion for

⁴ He raised the following 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; (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.**

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 in the United States District Court for on January 7, 2011. **App. 3820-46**. Although he only exhausted his claim related to counsel's use of Ms. Casio in state PCR, his Petition included a number of allegations that he asserted should have been raised by his original collateral counsel. He also filed a Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 7th. **App. 3813-19**.

Respondent filed a Response to Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 24, 2011. **App. 3854-68**. Robertson filed a Reply to Respondent's Response on February 1, 2011. **App. 3890-97**. On March 28, 2011, Respondent filed a Motion for Summary Judgment (**App. 4031**) and a Return and Memorandum of Law in Support of Motion for Summary Judgment. **App. 4032-4162**. Magistrate Judge Bruce Howe Hendrix entered an Order on April 8, 2011 staying those proceedings. *See Robertson v. Ozmint*, C.A. No.2:11-63-SB-BHH (ECF #44, filed Apr. 8, 2011). **App. 4163-69**. Judge Hendrix denied Respondent's April 15, 2011 Motion to Reconsider her Order (**App. 4170-85**) on November 30, 2011. Respondent's subsequent efforts to vacate the stay have likewise been unsuccessful. **App. 4491-93**.

C. Robertson's successive PCR.

Robertson filed his successive PCR Application (2011-CP-46-00072), through counsel, on January 7, 2011. **App. 3847-53**. On March 24, 2011, Respondent made its Return and Motion to Dismiss and moved for summary dismissal. **App. 3900-4030**. The Honorable Lee S. Alford held a status conference on July 5, 2011 at the Moss Judicial Center, in York County South Carolina. Robertson was present at the hearing. Keir Weyble, and Emily C. Paavola, Esquires, were also present, and Senior Assistant Attorney General William Edgar Salter, III, represented the State.

At the hearing, Judge Alford appointed Mr. Weyble and Ms. Paavola to represent Robertson. Also, he (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 Ann. §§ 17-27-40 & -50 (Supp. 2011). Judge Alford ruled that the verification would be considered *nunc pro tunc*. **App. 4187-99**.⁵

On June 27, 2011, Respondent received a verified Amended Application for Post-Conviction Relief (**App. 4201-07**) and Robertson's Response in Opposition to Motion to Dismiss, both of which were dated and served July 25, 2011. **App. 4208-4385**. Respondent 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. **App. 4386-4409**.

Judge Alford filed an Order granting Respondent's motion to dismiss and dismissing the 2011 Application with prejudice on September 20, 2011. Judge Alford found that: (1) the Application was barred by the one year statute of limitations; (2) the Application was impermissibly

⁵ Immediately after this hearing, Robertson's counsel served Respondent with a draft of an Amended PCR Application.

successive; (3) Robertson waived his right to challenge whether his original PCR counsel was statutorily qualified by not challenging lead counsel's qualifications during his initial PCR; (4) Robertson had not proven that collateral counsel were not qualified to represent him and he had erroneously construed the statutory requirements for appointment of PCR counsel in a capital case; (5) Robertson had not proven that his original PCR counsel had not performed competently under *Strickland v. Washington*, 466 U.S. 668 (1984), and Robertson had not demonstrated either deficient performance or resulting prejudice merely because new counsel raised different grounds that were not raised in the original action; (6) no due process or equal protection violation occurred during the initial PCR; (7) the United States Supreme Court's granting of certiorari in *Maples v. Thomas*, 132 S.Ct. 912, 914 (2012) and *Martinez v. Ryan*, 131 S.Ct. 2960 (2012), did not require the relief sought; and (8) laches barred relief. **App. 4412-47.** Robertson filed a Motion to Alter or Amend the Judgment in October 14, 2011. **App. 4448-73.** He then filed an October 27th Motion to Supplement. **App. 4474-86.** Judge Alford denied the motion to alter or amend in a November 28, 2011 Order. **App. 4487-90.**

Robertson timely served his notice of appeal. He filed his Petition for Writ of Certiorari on September 14, 2012. He is currently represented by A. Mattison Bogan, Esquire, and Chief Appellate Defender Robert M. Dudek. Respondent now makes its Return to the Petition.

ARGUMENTS

I. This Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that Robertson's 2011 Application is barred by the successive application doctrine in S.C. Code Ann. § 17-27-90 (2003) and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); it is barred by the statute of limitations and the doctrine of laches; and that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not require state courts to have merits hearings on successive applications claiming that initial PCR counsel was ineffective.

Respondent submits that certiorari must be denied because there is evidence of probative value to support the PCR judge's finding that Robertson's 2011 Application is barred as successive under § 17-27-90 and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); and that the Application is also barred by the statute of limitations and the doctrine of laches. Further, neither *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), nor any prior Supreme Court decision requires state courts to entertain successive applications based upon the claims of disgruntled inmates that initial PCR counsel was ineffective in failing to litigate a different claim or claims.

1. Standard of Review on Certiorari.

This Court must deny certiorari if there is any evidence of probative value to support the PCR judge's findings, *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989), and it will only reverse the PCR judge's decision when there is no probative evidence to support his findings or the decision is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). Robertson has not met this burden of proof.

2. Discussion.

A. The 2011 Application is barred as successive.

As correctly recognized by the PCR judge:

§ 17-27-90 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*, 305 S.C. at 450, 409 S.E.2d at 394. In *Aice*, this Court 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.*

Although *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 (emphasis added). As a result, a claim 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.

This Court further explained the importance of finality of litigation in cases:

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

Robertson erroneously relies upon several PCR cases involving non-capital inmates as demonstrating that he has shown "sufficient reason" under *Aice*. However, each of these cases is

distinguishable because each was based on very unique procedural circumstances that simply are not present here. 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. Washington 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* at 234, 478 S.E.2d at 834.

The PCR court in *Washington* found that he had not waived his right to direct appeal and that he should be granted a belated appeal. On the prosecutorial misconduct claim, the PCR court found that the State had failed to adequately explain the State's relationship with one of its witnesses to the jury, but 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 this Court, but the Court denied certiorari on that issue. He then filed a second PCR application, and he again raised the misconduct issue, as well as 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* at 234-35, 478 S.E.2d at 834.

On certiorari, this Court rejected the State's argument that § 17-27-90 barred the second PCR application. Although recognizing that Washington's second PCR application was successive "under a hyper-technical analysis," the Court rejected the State's position "because so many procedural irregularities occurred during the course of Washington's judicial process that he has not received due process." *Washington*, 324 S.C. at 236, 478 S.E.2d at 835. The Court added that:

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.

Id. There are no such procedural irregularities in this case. Rather, Robertson voluntarily waived review on direct appeal; PCR relief was denied only after a lengthy hearing at which he was represented by two attorneys; and he was represented before this Court on certiorari, where relief was again denied. The other non-capital cases upon which Robertson relies are likewise distinguishable.⁶

Similarly, 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 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 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 in light of *Atkins*.

Williams is also distinguishable because lead collateral counsel in the present case, Mr.

⁶ 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 case does not involve such a scenario. Nor is this case like *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the Court permitted a successive application because the applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Robertson's current attorneys may say as to the quality of representation provided in the original PCR action, they must 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.

Brown, was properly qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011), unlike Williams' original PCR attorneys. *See Williams v. Ozmint*, 494 F.3d 474, 483 (4th Cir. 2007). Moreover, Respondent would note that the capital PCR applicant in *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31 (4th Cir., Mar. 26, 2002), unsuccessfully sought relief such as that now being sought by Robertson, as did death row inmate Abdiyyah ben Alkebulanyahh, #6012. 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 September 23, 2005 hearing to confirm the appointment and later pursued on certiorari following denial of relief by the PCR judge.⁷ As a result, he cannot raise this or any other allegation now in a successive Application. *Aice*; *See also Arnold v. State*, 309

⁷ Robertson was unable to obtain a copy of the transcript of the September 23, 2005 hearing because the tapes of the hearing do not exist. *See* Rule 607(i), SCACR. Also, Respondent does not have a copy 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. In an effort to prevail in the present action, Robertson makes the misrepresentation that this hearing never occurred. His contention in this regard is false and it is contradicted by Judge Few's order of Dismissal. **App. 3557**. It is also refuted by the undersigned counsel for Respondent, who represents as an officer of this Court that it occurred and that he attended the hearing. The undersigned further represents that Robertson, Michael Brown, Esquire, and the undersigned were present before Judge Few at the hearing. The undersigned makes these representations so that Robertson's misrepresentation will not result in a fraud on the Court. Respondent's representation that Judge Few held this hearing is confirmed by a contemporaneously-generated "Attorney's Report of Trial or Hearing," which then-Attorney General McMaster required to be prepared for any court-related appearance. **App. 4575**.

The suggestion that there was no hearing is likewise contradicted by at least one contemporaneously-written article that Respondent has found, which obtained the information in its story from the *Rock Hill Herald*. *See* <http://lists.washlaw.edu/pipermail/deathpenalty/2005-September/003498.html>. The undersigned further represents, as an officer of the Court, that his recollection is that Judge Few addressed both Robertson's desire for appointment of counsel and Mr. Brown's statutory qualifications at the hearing. The PCR judge found that "this is yet another example of the dilatory nature of this successive Application." **App. 4428 n. 10**. *See also App. 4441*. His finding is not clearly erroneous and is consistent with the behavior Robertson exhibited throughout direct appeal. *Accord Martinez*, 132 S.Ct. at 1324 (Scalia, J., dissenting) ("I *guarantee* that an assertion of ineffective assistance of trial counsel will be made in *all* capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system") (emphasis in original). *See also id* at 1327.

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*, 36 Fed.Appx. at 730-31. Additionally, accepting Robertson’s position would literally destroy any meaningful sense of finality in virtually all PCR cases. *Contra Aice*, 305 S.C. at 451, 409 S.E.2d at 394.⁸ Therefore, this Application must be dismissed as impermissibly successive.

B. *Martinez v. Ryan* does not require a hearing.

Nor does *Martinez* require South Carolina courts to provide inmates with a hearing on successive PCR applications, merely because the inmate alleges that original PCR counsel was ineffective. Initially, Respondent submits that the rule set forth in *Martinez* may not apply to federal habeas corpus cases of South Carolina inmates. *Martinez* simply created a “**narrow exception**” to the ordinary procedural default rules applicable in federal habeas corpus proceedings by holding that where, under state law, ineffective assistance of trial counsel claims **must** be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from

⁸ See also *Teague v. Lane*, 489 U.S. 288, 309 (1989) (“[T]he principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect”); *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (“No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation”); *Williams v. Ozmint*, 380 S.C. 473, 480, 671 S.E.2d 600, 603 (2008) (“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”); cf., *Webb v. Greenwood County*, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956).

hearing those claims if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. *Id* at 1315-20. Thus, *Martinez* only directly applies to Arizona and the five other States that also bar **all** direct appeals of ineffective-assistance claims: Maine, Missouri, Oregon, Rhode Island, and Virginia.⁹ While South Carolina does not permit free-standing ineffective assistance of counsel claims to be raised *de novo* on direct appeal, *e.g.*, *State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986); *State v. Carpenter*, 277 S.C. 309, 286 S.E.2d 384 (1982) (“Appellant’s sole ground for appeal is ineffective assistance of counsel at trial. This Court usually will not consider that issue on appeal from a conviction , ... We follow that principle particularly when, as here, the issue was not argued to the trial judge.”) (citations omitted), other Sixth Amendment claims may be raised direct appeal if presented to and passed upon by the trial judge, such as *pro se* motions to relieve counsel based upon ineffectiveness and allegations that counsel labored under a conflict of interest. *E.g.*, *State v. Graddick*, 345 S.C. 383, 385, 385-86, 548 S.E.2d 210, 210-11 (2001) (while appellant’s *pro se* motion to relieve counsel based upon counsel’s ineffectiveness did not violate proscription against hybrid representation, trial judge did not abuse his discretion in refusing to grant appellant’s request for new counsel mere days before the start of appellant’s trial for murder where he “made only the most conclusory arguments why counsel should have been relieved”); *State v. Justus*, 392 S.C. 416, 418-20, 709 S.E.2d 668, 670 (2011) (trial court’s disqualification of defendant’s originally appointed second chair counsel did not constitute an abuse of discretion, even though it was debatable whether counsel’s representation of a potential witness against defendant in the witness’s divorce action presented an actual conflict of interest with regard

⁹**Me.:** *State v. Nichols*, 698 A.2d 521, 522 (Me. 1997); **Mo.:** Mo. S. Ct. R. 29.15; **Or.:** Or. Rev. Stat. §138.550; **R.I.:** *State v. Malstrom*, 672 A.2d 448, 450 (R.I. 1996); **Va.:** *Hall v. Com.*, 515 S.E.2d 343, 347 (Va. Ct. App. 1999).

to defendant's murder trial, given the conflicting evidence before the trial court as to whether counsel continued to represent the witness in question); *State v. Gregory*, 364 S.C. 150, 152-54, 612 S.E.2d 449, 450-51 (2005) (defense attorney had actual conflict of interest, and thus defendant was not required to demonstrate prejudice before trial court would grant motion to be relieved); *State v. Morris*, 376 S.C. 189, 206, 656 S.E.2d 359, 368 (2008). *Accord State v. Felder*, 290 S.C. 521, 522-23, 351 S.E.2d 852, 852-53 (1986) (PCR, rather than direct appeal, was proper avenue of relief for appellant claiming that he was denied effective assistance of counsel due to court's failure to inquire whether conflict of interest existed, where he did not raise that issue before trial court).¹⁰

Further and even assuming *arguendo* that *Martinez* does apply to federal habeas corpus cases challenging South Carolina convictions, *Martinez* neither applies to state PCR litigation nor creates a freestanding claim for relief. The Court in *Martinez* observed that “[w]here, as here, the initial-review collateral proceeding 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 1317. Later, the Court reasoned

¹⁰ Respondent would note that the Supreme Court has granted certiorari in *Trevino v. Thaler*, 133 S.Ct. 524 (2012), to answer the following question:

In *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), this Court held that ineffective assistance of counsel in an “initial-review collateral proceeding” - that is, a collateral proceeding that “provide[s] the first occasion to raise a claim of ineffective assistance at trial” - may provide cause to excuse a procedural default when a claim of ineffective assistance of trial counsel is raised in a federal habeas proceeding. Petitioner Carlos Trevino, a condemned Texas prisoner seeking to excuse the procedural default of a claim of ineffective assistance of trial counsel, filed a petition for a writ of certiorari presenting the following question:

Whether the Court should grant certiorari, vacate the Court of Appeals' opinion, and remand to the Court of Appeals for consideration of Mr. Trevino's argument under *Martinez v. Ryan*.

Thus, the question of whether *Martinez*'s “narrow exception” applies to States that do not require all such claims to be brought in collateral proceedings, such as South Carolina, is now before the United States Supreme Court.

that:

Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) 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. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Cf. Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue).

Martinez, 132 S.Ct. at 1318-19.

Moreover, the Court did not hold that an inmate is entitled to the effective assistance of collateral counsel in state PCR; it did not recognize a right to have counsel appointed in a state collateral proceeding; and it did not otherwise impose any requirements on state court PCR proceedings. Rather, it determined that defendants had an “equitable” right to the effective assistance of initial post-conviction counsel. *Id.* at 1319–20. *See also id.* at 1326 (Scalia, J., dissenting) (noting that the reframing of the issue presented “avoid[ed] the Court's need to confront the established rule that there is no right to counsel in collateral proceedings”). Thus, *Martinez* simply created a very “**narrow exception**” to the ordinary procedural default rules applicable in federal habeas corpus proceedings, by holding that a federal habeas court may address a claim of ineffective assistance of trial counsel when collateral counsel’s ineffectiveness caused a procedural default in an

initial-review collateral proceeding and the petitioner demonstrates that the claim has some merit. *Id.* at 1319-20 (emphasis added). *See also id.* at 1315 (Court stated that it was recognizing “a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause [in a federal habeas corpus proceeding to excuse] a prisoner's procedural default of a claim of ineffective assistance at trial”). It does not require states to entertain a successive PCR application.

As the Florida Supreme Court recognized in *Gore v. State*, 91 So.3d 769, 777-78 (Fla. 2012):

Gore next contends that during the initial collateral review proceedings, his postconviction counsel was ineffective for failure to locate penalty phase co-counsel Nickerson and present his testimony. Gore asserts that the recent decision of the United States Supreme Court in *Martinez* ... creates a new and independent cause of action for ineffective assistance of collateral counsel in our state courts system. While the decision in *Martinez* does contain expansive language, a proper analysis reveals that the Supreme Court specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists:

While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

Id. at 1313. Even Justice Scalia in his dissent acknowledged that the majority chose to evade this issue. *See id.* at 1326 (Scalia, J., dissenting) (noting that the reframing of the issue “avoid[ed] the Court's need to confront the established rule that there is no right to counsel in collateral proceedings”). **It appears that *Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context.**

Here, **Gore previously received full consideration of his ineffective assistance of penalty phase counsel claims in the postconviction court and a comprehensive review of those claims during his appeal before this Court.** Gore has received a full collateral review to which he is entitled in the Florida state courts system. We hold that under the facts and circumstances of this case, ***Martinez* provides Gore with no basis for relief in this Court.**

(Emphasis added). *See also State v. Pryor*, 2012 WL 4859158, 2 (Ariz.App., Oct. 12, 2012); *Martin*

v. State, ___ S.W.3d ___, 2012 WL 5861729, at *6 (Mo. Ct. App. Nov. 20, 2012) (“*Martinez* speaks only to federal habeas corpus procedure and does not establish a constitutional right to the effective assistance of postconviction counsel. In fact, the *Martinez* court specifically states that it is not resolving the question of whether a prisoner has a constitutional right to post-conviction counsel”); *Yarberry v. State*, 372 S.W.3d 568, 575 (Mo.App. 2012); *Ex parte Hernandez*, 2012 WL 1060079, 2 (Tex.Crim.App. Mar. 21, 2012) (Price, J., concurring) (unpublished); *State v. Johnson*, 2012 WL 5364693, 5 (Del.Super., Oct. 31, 2012).

Although Robertson correctly asserts that “the federal courts will take responsibility for the development and resolution of [his] claims” if this Court chooses not to allow successive applications raising claims that were not previously asserted because of the alleged ineffective assistance of original PCR counsel, this Court still should not allow such successive filings. The rule set forth in *Martinez* applies to both capital and non-capital cases, alike. As a result, adopting Robertson’s position would potentially open the floodgates to litigation by hundreds upon hundreds of disgruntled PCR applicants, almost all of whom most assuredly will allege the ineffectiveness of original PCR counsel.¹¹ Respondent opposes such an unnecessary strain on both financial and judicial resources that is not constitutionally required by *Martinez* or state law and which is contrary to the recognized need for finality of litigation. See *Aice* and *Williams*, *supra*.

Also, if this Court adopts a rule permitting hearings on successive applications asserting the

¹¹ It could also exponentially increase the number of claims that federal habeas corpus courts would have to review on the merits. As the PCR judge properly found in another section of his Order, “[t]here 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.” **App. 4441**. Any doubt that this action is not a dilatory one must ignore that currently Robertson only has the issues relating to counsel’s handling of their social worker preserved for federal habeas review. However, if permitted to go forward in this action, he will be able to raise eight additional claims on the merits. See **App. 4202-04**.

claims presented therein were not raised in the original PCR hearing because of the ineffectiveness of collateral counsel, the claims would be litigated in federal court through the deferential merits review of 28 U.S.C. § 2254(d). However, if this Court adheres to *Aice* and its progeny, then the claims will only be litigated in federal court through the framework of procedural default analysis. *See Martinez; Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)¹² In other words, the federal courts will not review the merits of his procedurally defaulted claims unless he can demonstrate **both cause for the procedural default and prejudice as a result** of the alleged constitutional violation, or that failure to review the constitutional claim will result in a fundamental miscarriage of justice. *Id.* The Supreme Court's decision in *Martinez* merely provides him with the "narrow exception" to show cause, and does not change the requirement that he show prejudice,¹³ and review of

¹² In this regard, he would be like the scores of other inmates who raise claims in federal court that have not been previously litigated in state court proceedings because *Martinez* is not limited to capital cases. Moreover, the rule barring successive applications alleging ineffective assistance of prior PCR counsel is not the only context in which this Court gives federal courts the first opportunity to have first review of constitutional issues. Federal courts already have the first chance to review the pretrial denials of double jeopardy motions when the defendant has not been sentenced, in light of *State v. Miller*, 289 S.C. 426, 426-27, 346 S.E.2d 705, 706 (1986), where this Court held that "an order denying a double jeopardy claim is not immediately appealable" because "a criminal defendant may not appeal until sentence has been imposed." *See Livingston v. Murdaugh*, 183 F.3d 300, 301-02 (4th Cir. 1999). Further, Robertson's contention that the Court in *Martinez* indicated "a clear preference for the state courts to act as the primary forum" to develop and resolve ineffectiveness claims proves nothing new because the Supreme Court has long stated that its "procedural default doctrine and its attendant 'cause and prejudice' standard are grounded in comity and federalism concerns." *Edwards v. Carpenter*, 529 U.S. 446, 446-47 (2000) (citing *Coleman*, 501 U.S. at 730); *see also Coleman*, 501 U.S. at 726 ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) ("[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments"); *Murray v. Carrier*, 477 U.S. 478, 518 (1986) ("Despite the existence of federal power to entertain a habeas petition in the face of a procedural default, the Court in [*Fay v. Noia*, 372 U.S. 391 (1963)] acknowledged "a limited discretion" in the federal court to refuse to exercise its jurisdiction on behalf of "an applicant who has deliberately by-passed the orderly procedure of the state courts and in doing so has forfeited his state court remedies." ... This exception was recognized "[a]s a matter of comity ... in order to accord state courts and state procedures the respect due them in a federal system") (citation omitted and emphasis in original).

¹³ Whether a claim was "substantial" under the reasoning in *Martinez* is a different question from whether PCR counsel was ineffective for failing to assert it. *Martinez* explained that a "substantial" claim is a "claim that has some merit," 132 S. Ct. at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability (COA) to issue). This standard necessarily differs from "a meritorious claim," *i.e.*, one on which the inmate prevails after

procedurally defaulted claims by federal courts is still narrower than merits review, even after *Martinez*.

C. The 2011 Application is barred by the statute of limitations.

Further, the PCR judge properly found that the one-year statute of limitations applicable to PCR actions bars the entire Application. See S.C. Code Ann. § 17-27-45(A) (Supp. 2012). See also **App. 4426-28**. This Court filed an Order on June 3, 2005, dismissing Robertson's direct appeal because it agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court 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.

However, he did not file the current Application until January 7, 2011,¹⁴ which is five years, six months and sixteen days after this 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). He further claims that the PCR court has misunderstood his statute of limitations argument and that he is not relying

full review. As *Miller-El* explained, a court deciding whether to issue a COA makes a "threshold inquiry." It does not decide the "merits of an appeal," and a court should issue a COA when "a claim [is] debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. PCR counsel may well have sound tactical reasons not to assert an ineffective assistance claim that he concludes is debatable but will ultimately fail on the merits, and a "substantial claim" may nevertheless be non-prejudicial under *Strickland* in light of the record as a whole.

¹⁴ See *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (PCR application is filed when received by the Clerk of Court).

on § 17-27-45(C), which applies when an inmate's application is based upon after-discovered evidence.

Although he did argue below that he was entitled to equitable tolling, he also argued that his 2011 Application was timely filed because filed within a year after the Remittitur was issued following this Court's denial of certiorari in PCR. *See Response in Opposition to Motion to Dismiss*, App. 4222-24. However, the PCR judge correctly found 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. ... 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." App. 4427.¹⁵

Additionally, the PCR judge properly found that both Robertson and his original PCR counsel were aware of any supposed defect in counsel's qualifications at the time Mr. Brown was appointed and that he could have objected to the supposed lack of counsel's qualifications at the time of the September 23, 2003 hearing held for appointment of counsel.¹⁶ Moreover, the PCR court

¹⁵ The only exception are his "claims" based on *Martinez* and *Maples*, which had not been decided when the Order was filed and which do not require relief for the reasons argued.

¹⁶ Section 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, that would be one year after the September 23, 2005 hearing because that is when he would had actual knowledge of counsel's qualifications and could have discovered any defect, and not one year following the appointment of his present attorneys. *See Mitchell v. Holler*, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993) (the statute of limitations begins to run "where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist") (holding knowledge of murder conviction, coupled with complaint about trial counsel's performance, commenced running of statute). As found by the PCR judge, "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

addressed his argument that the limitations period should be equitably tolled because of counsel's ineffectiveness and lack of statutory qualifications, in the context of the court's discussion that this was not after-discovered evidence; that the appointment hearing was the only time to properly complain about the defects in counsel's eligibility for appointment pursuant to S.C. Code Ann. § 17-27-160(B) (Supp. 2012); and that the Application was impermissibly successive.

Further,

Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations. *Hooper v. Ebenezer Senior Svcs. and Rehabilitation Ctr.*, 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct.App.2008). "Equitable tolling is reserved for extraordinary circumstances." *Id.*; see, e.g., *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass, "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *Hopkins v. Floyd's Wholesale*, 299 S.C. 127, 382 S.E.2d 907 (1989) (holding statute of limitations equitably tolled for workers' compensation claim during reliance period in which employer represented to employee that claim compensable and would be taken care of without employee filing claim). The doctrine of equitable tolling can be summarized:

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant

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)." **App. 4428**. Even assuming *arguendo* that the statute of limitations did not begin running until the September 23, 2005 hearing, the current Application was not filed until five years, three months and fifteen days later. Therefore, it is barred under § 17-27-45(C), as well. **App. 4428**. His statute of limitations argument ignores that he was successful in having two different appellate attorneys relieved on direct appeal, 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)." **App. 4429**.

application of the doctrine.

Equitable tolling has been deemed available where—

—extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.

—the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.

—the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.

It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

51 *Am.Jur. 2d Limitation of Actions* § 174 (2007); *see also Hooper*, 377 S.C. at 232, 659 S.E.2d at 221.

Pelzer v. State, 378 S.C. 516, 520-521, 662 S.E.2d 618, 620-21 (Ct.App. 2008).¹⁷ Also, this Court explained in *Hooper* that the party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify tolling. *Hooper*, 377 S.C. 115, 687 S.E.2d at 32. Here, Robertson has not and cannot meet the above requirements for equitable tolling of the limitations period because he was not “actively misled” by Respondent into accepting Mr. Brown as qualified counsel; to the extent Mr. Brown was not statutorily-qualified to act as lead counsel in this case, he did not exercise “due diligence” to discover any supposed defect in Mr. Brown’s qualifications; and he was not prevented “in some extraordinary way from asserting his or her

¹⁷ *See also Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (“To be entitled to equitable tolling [in federal habeas], [a petitioner] must show ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing”)

rights.” Instead, he rested on his “rights” until after an unfavorable judgment had been entered. This he may not do. *Accord State v. Mayfield*, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959) (“One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered”).¹⁸

D. The PCR judge’s finding that original collateral counsel was qualified under § 17-27-160(B) and his alternative finding that Robertson had not proved prejudice from the failure to comply with the requirements of that section are supported by the record and are not clearly erroneous.

Respondent further submits that the PCR judge’s findings that original collateral counsel was qualified under § 17-27-160(B), as well as his alternative finding that Robertson had not proved prejudice from the failure to comply with the requirements of that section, are supported by the record and are not clearly erroneous. *See App. 4434-38; Supp. App. 2-5* (Order denying motion to alter or amend).¹⁹

Robertson’s argument as to counsel’s supposed lack of qualifications lacks merit as a matter of state law. He 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 without identifying what record was available to him or identifying what qualifications counsel did or did not have, prior to the PCR judge’s Order dismissing the 2011 Application. **App. 4434; 4488**. As the PCR judge found:

¹⁸ Again, the PCR judge found at least twice that Robertson was being dilatory. **App. 4428 n. 10; App. 4441**. His findings are supported by the record. These findings are likewise consistent with the behavior he has exhibited throughout the appellate process, including before this Court on direct appeal.

¹⁹ The Appendix filed by Robertson does not contain an entire copy of the Order denying the motion to alter or amend. So, Respondent has included the entire order in a Supplemental Appendix.

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.

Supp. App. 1. In the absence of evidence to the contrary, the PCR judge correctly “assume[d] 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).” **App. 4434.**²⁰

²⁰ Robertson asserts that somehow it violates state and federal law for the PCR judge to rely upon the undersigned’s representation, as an officer of the Court, that the September 23, 2005 hearing was held and that the statutory appointment was confirmed at that time. His argument ignores Judge Few’s finding that this hearing occurred. **App. 3657.** However, it does not violate state or federal law for a tribunal to rely upon these representations of counsel, made as an officer of the Court. *See, e.g.*, Rules of Professional Conduct, Rule 407, SCACR: Rules 3.3(a)(1) and (3) (a lawyer shall not knowingly “[m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer” or “[o]ffer evidence that the lawyer knows to be false”); *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978) (attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath); *State v. Webb*, 680 A.2d 147 (Conn. 1996) (“[a]ttorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath”); *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 601 (Nev. 2010) (“Since the district court considered all affidavits and exhibits, and permitted the attorneys for Bahena and Goodyear to make factual representations to the court, we conclude that the district court conducted a sufficient hearing. Based upon the factual representations made by the attorneys, as officers of the court, and the balance of the record, the district court crafted its own findings of fact and conclusions of law emanating from this hearing. The nature of the hearing complied with the requirements of [*Young v. Johnny Ribeiro Bldg, Inc.*, 106 88, 787 P.2d 777 (Nev. 1990)]. Therefore, the district court did not abuse its discretion by the way it structured the hearing since the record was sufficient for the court to make its findings of willfulness”) (footnotes omitted); *People v. Paris*, 692 N.E.2d 848, 852 (Ill.App. 1998)(trial court did not abuse its discretion in quashing defendant’s subpoenas, and not requiring prosecutor, and attorneys for witnesses who had testified against defendant, to be sworn and testify regarding defendant’s post-trial contention that prosecutor had failed to disclose that witnesses had made deals with prosecution in exchange for their testimony against defendant, where court held hearing and asked attorneys if, as officers of court, any deal had been reached, and attorneys responded in the negative); *People v. Mosley*, 2005 WL 602568 (Cal.App., Mar. 16, 2005)(unreported)(trial court did not abuse discretion by relying upon unsworn representations by trial counsel to deny defendant’s motion to substitute allegedly ineffective appointed counsel, finding that “[c]ounsel was at all times an officer of the court, that there is no reason to believe, on this record, that his responses concerning actions taken by him were false”). Also, the record supports the PCR judge’s finding that “[t]here is no transcript of record because of laches on the part of Applicant.” **Supp. App. 2.**

Robertson asserts that 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 hours of CLE training that primarily involves capital appeals or capital post-conviction relief, to be qualified in a capital PCR. Respondent submits that the PCR judge's rejection of his argument was supported by the record and was not clearly erroneous. 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 § 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

Moreover, although the undersigned's representations are disputed by Robertson, the undersigned made them in order to prevent Robertson from perpetrating a fraud on the Court and the undersigned stands by those representations. Robertson further attempts to bolster his misrepresentation about the hearing by reference to Mr. Brown's letter to Robertson indicating that he did not become aware of the appointment Order until the first week in October 2005. **Petition, p. 14 n. 6.** His reliance on this letter does not undermine the correctness of the PCR judge's Order.

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, and the law is that statutorily qualified counsel must be appointed in capital cases, the *presumption* (as opposed to speculation, as Robertson asserts) is that Judge Few appointed in accordance with § 17-27-160(B) and the Chief Justice's Memorandum.²¹ Robertson suggests that the PCR judge mistakenly relied 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."

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. Instead, she found that her "consideration of petitioner's Motion for

²¹ The General Assembly has not subsequently amended the statute following the Chief Justice's Memorandum, of which it was presumptively aware. See *McLeod v. Starnes*, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012). Also, its failure to amend § 17-27-160 for over nine years after the Memo was issued is evidence that it agrees with this interpretation. Cf. *id.*

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.” Even though this is not binding authority from this Court, the PCR judge’s finding that it was and remains authority that supports the appointment of counsel in this case was not clearly erroneous.²² Therefore, “there was no violation of the capital PCR qualification statute, and thus, no basis for permitting this successive Application and for treating the proceedings that have taken place as a nullity.”

Nor do the affidavits offered by Robertson in connection with his Rule 59(e), SCRCP motion show error by the PCR judge. First, although not addressed in the Order denying the Rule 59(e) motion, the affidavits were not timely and should not be considered. They could have been obtained much earlier, through the exercise of due diligence and attached to the 2011 Application. “The purpose of Rule 59(e), SCRCP, to alter or amend the judgment [,] is to request the trial judge to ‘reconsider matters properly encompassed in a decision on the merits.’ ” *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citation omitted). Thus, a party may not present arguments or offer evidence that was not presented before judgment was entered. *Spreeuw v. Barker*, 385 S.C. 45, 69, 682 S.E.2d 843, 855 (Ct.App. 2009) (“Father’s Form 2106–EZ appears only as an attachment to his Rule 59(e) motion. Accordingly, it cannot be considered on appeal”); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not”); *Natural Resources Defense Council v. U.S. E.P.A.*, 705 F.Supp. 698, 701 (D.D.C.1989), *vacated on other grds.*, 707

²² Additionally, Robertson ignores that this Court summarily denied the petition in *Alkebulanyahh*, on October 20, 2010. Further and contrary to Robertson’s assertion, the State did not assert that Alkebulanyahh should be required to file a second PCR application. The State simply argued on the cited pages that the petitioner 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.

F.Supp. 3 (D.D.C.1989) (“Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier”). Further, neither the untimely affidavits nor anything in the record contradicts the PCR judge’s findings in denying the 59(e) motion that “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.” **Supp. App. 3.**

Also, it must be remembered that his complaint is that a statutory right was violated. 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. As a result, it was not clear error for the PCR judge to find (**App. 4437-41**) that Robertson would 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 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).²³

Further, the PCR judge’s finding that there was no prejudice to Robertson even assuming

²³ *Accord 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”).

arguendo that Mr. Brown was not properly qualified to represent Robertson under § 17-27-160 is supported by the record. **App. 4437-41; Supp. App. 2-5.** As discussed in the next section, he did not offer any proof of counsel's ineffectiveness, apart from his self-serving assertion thereof. Rather, he merely asserts that new counsel would have handled the matter differently, which does not meet his burden. Also, § 17-27-160 was enacted "for the purpose of opting-in the Chapter 154 of the AEDPA (Antiterrorism and Effective Death Penalty Act of 1996)." *Tucker v. Moore*, 56 F. Supp. 2d 611, 612 (1999), *aff'd*, *Tucker v. Catoe*, 221 F.3d 600 (4th Cir. 2000), *cert. den.*, 531 U.S. 1054 (2000).²⁴ South Carolina has not yet been determined to have satisfied the opt-in requirements, so as to benefit from the capital case specific provisions of AEDPA. However, the failure to appoint counsel who is qualified under § 17-27-160 prevents it from doing so in this case. This is a benefit to Robertson. *See Tucker*, 56 F. Supp. 2d at 612. As a result, the PCR judge correctly found, in the alternative, that Robertson had to prove prejudice from any defect in Mr. Brown's qualifications under § 17-27-160 and that he failed to do so.

E. The record supports PCR judge's finding that Robertson did not offer proof that original collateral counsel were ineffective under *Strickland*.

Additionally, the record supports PCR judge's finding that Robertson did not offer proof that original collateral counsel were ineffective under *Strickland*. Specifically, Respondent would note that Robertson has never presented any *evidence* to support his claim that "initial PCR counsel conducted no investigation, and neither sought nor secured any assistance from investigators or expert witnesses." **Petition, p. 15.** His only proof is his current PCR counsel's assertion that - in hindsight and with the knowledge that those allegations raised by Robertson's original PCR attorneys

²⁴ While this Court granted state habeas relief to Tucker, it did so on other grounds. *See Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001).

were unsuccessful - they would have handled the case differently, which is insufficient to justify the filing of a time-barred, successive PCR Application. **App. 4438.** *See In re Reno*, 283 P.3d 1181, 1211 (Cal. 2012) (Court will not consider on the merits successive habeas corpus petitions attacking the competence of prior habeas corpus counsel which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had prior habeas corpus counsel had similar advantages); *cf. State v. Balliette*, 805 N.W.2d 334, 346-47 (Wis. 2011), *cert. denied*, 132 S. Ct. 825 (2011). *Accord Strickland*, 466 U. S. at 689 (“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”). *See also id* (“Judicial scrutiny of counsel’s performance must be highly deferential;” and a reviewing “court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance”).

He faults initial PCR counsel for filing an Application raising broad and general allegations of ineffective assistance of counsel and waiting to amend at the PCR hearing. However, this is no different than many PCR cases, including capital PCR cases handled by counsel below and Robertson’s counsel in his federal habeas corpus proceeding. *See, e.g., Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009); *cf. Arnold*, 309 S.C. at 173-74, 420 S.E.2d at 842-43. Also, the PCR Judge correctly found that “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.” **App. 4438.** The record likewise supports the finding that “[i]t is obvious that there was a lot of work done”

by the initial PCR attorneys. **Supp. App. 2.**²⁵

Finally, Robertson refers, on p. 8 of the Petition, to the Court's public reprimand of lead collateral counsel, as the result of his arrest and 2011 guilty plea to the charge of resisting arrest, following a July 2007 altercation with police that was the result of counsel's admitted use and abuse of alcohol. *In re Michael Langford Brown, Jr.*, 396 S.C. 251, 721 S.E.2d 783 (2011), **App. 4523-24**. Robertson construes the 2011 plea as a separate matter from the 2007 altercation, and he contends that *In re Brown* further supports his argument that Mr. "Brown did not competently represent him during his initial PCR proceeding" because Brown was supposedly "abusing alcohol at this time" and violated Court-ordered rehabilitation requirements during the time Robertson's PCR Application was pending. **Petition, p. 8**.

Robertson's reliance is misplaced. First, he apparently misreads *In re Brown* as referring to two separate criminal acts, when it appears that the 2011 plea was to the July 2007 incident. *Id.* Second, although counsel represented Robertson from September 2005 until the March 24, 2008 Order of Dismissal was filed, the evidentiary hearing at which counsel represented Robertson was

²⁵ Moreover, counsel's allegations were very similar those raised in death penalty PCR cases where the inmates have been represented by attorneys whom Robertson's current counsel would concede are competent. *Id.* Also, Robertson erroneously 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, the PCR judge properly found that his contention is wrong. **App. 4439-40**. 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 *Bobby*, 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." *Id.* at 20 (Alito, J., concurring). Further, "[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). These Guidelines do not apply to collateral counsel's performance because there is no Sixth Amendment right to counsel in PCR, as Robertson concedes.

held on January 29-31, 2007. **App. 3263-3650**. Thus, counsel's investigation and representation at the hearing concluded well before the July 2007 resisting arrest.

Third, the PCR judge, in denying the motion to alter or amend, made the following uncontroverted findings:

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.

[Robertson] has not provided any evidence, from which it could be inferred, that substance abuse by Mr. Brown affected his representation of [Robertson], 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.

Supp. App. 2.

This analysis was correct because courts have not found *per se* prejudice where trial counsel was allegedly suffering from health or substance abuse problems. *E.g.*, *Bellamy v. Cogdell*, 974 F.2d 302 (2nd Cir. 1992) (given the varying effects health problems can have on an individual's ability to function, claims of ineffective assistance based on attorney illness are best suited to the fact-specific prejudice inquiry mandated by Strickland); *McDougall v. Dixon*, 921 F.2d 518, 535 (4th Cir. 1990) (no showing legal prescription drugs taken by attorney prejudiced defendant; defendant must show medication precluded effective representation); *Smith v. Ylst*, 826 F.2d 872 (9th Cir. 1987) (better to view attorney's actual conduct at trial rather than identify presumptive mental health issues); *People v. Garrison*, 765 P.2d 419 (Cal. 1989) (en banc) (in addressing expert testimony that chronic

alcoholics cannot think through problems or make judgment calls, rejecting *per se* ineffectiveness in favor of analysis of the attorney's performance in court). *Accord Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (Court focused not only upon alcohol and substance abuse, but counsel's performance at trial). Further, the record supports the factual findings because it reflects that counsel actively and competently participated throughout the original PCR by amending the Application, examining and cross-examining witnesses, and making appropriate objections and arguments. **App. 3263-3650.**

II. The PCR judge's Order does not violate federal law.

In section II of the Petition, Robertson contends that the PCR judge's Order contains several findings that violate federal law. His complaints are not meritorious. He maintains that the PCR judge erroneously faulted him "for failing to prove facts outside the existing record without providing him with a hearing and the investigative tools with which to prove them."²⁶ Contrary to his representations, the PCR judge addressed his due process lack of meaningful access argument in this regard (**App. 4441-45**) and this Court must reject it for several reasons.

He concedes, as he must, that "there is no Sixth Amendment right to PCR proceedings, and that state PCR is provided as a matter of legislative grace rather than of federal constitutional right. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). Thus, 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) (inmate's claim that he was denied access to testing necessarily involved

²⁶ The assertions that he was not given an adequate opportunity to prove these matters is based solely upon his current attorneys' representations as officers of the court. His position is curious, to say the least, in light of his challenge to the PCR judge's reliance upon the representations of Respondent's counsel as an officer of the court.

a claimed violation of procedural due process since he did not have a substantive right to DNA testing). 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"). A State's PCR procedures may be upset by reviewing courts "only if they are *fundamentally inadequate* to vindicate the substantive rights provided." *Osborne*, 129 S. Ct. at 2320 (emphasis added); *Skinner v. Switzer*, 131 S.Ct. 1289, 1293 (2011) (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"). Respondent submits that the PCR judge correctly found 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." **App. 4443.**²⁷ Another problem with this portion of Robertson's due process argument is that it is overly broad, since, if accepted, merits hearings will be required on every successive PCR Application asserting that initial PCR counsel was ineffective in failing to pursue a newly-raised claim(s) and there would be extremely little - if any - incentive for every unsuccessful applicant not to file a successive application because it could be filed with impunity. *Hiott v. State*, 381 S.C. 622, 628-29, 674 S.E.2d 491, 494-95 (2009) (holding that Rule 11, SCRCP, sanctions do not apply to PCR in light of the rule against successive applications in *Aice* and the

²⁷ Likewise, the record supports the findings that "[c]ounsel 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 ...; 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." **App. 4443.**

PCR statute of limitations which prevent abusive filings).²⁸

Robertson further contends that the PCR judge's finding 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" (App. 4441) is "irreconcilable" with findings elsewhere in the Order that original collateral counsel were both qualified and competent. **Petition, pp. 19-20** (citing App. 4433-34; 4437-38). These findings are neither irreconcilable nor do they violate federal law. As discussed, the finding that Mr. Brown was qualified was based upon the facts that 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;" and that counsel's appointment was confirmed at the September 23, 2005 hearing, at which Mr. Brown, Robertson and counsel for Respondent were present.

Thus, although Judge Few's Order appointing counsel did not expressly rely upon the Chief Justice's Memorandum, the *presumption* (as opposed to speculation, as Robertson asserts) is that Judge Few appointed in accordance with § 17-27-160(B) and the Chief Justice's Memorandum because "[t]rial judges are presumed to know the law and to apply it in making their decisions," *Walton*, 497 U.S. at 653, and the law is that statutorily qualified counsel must be appointed in capital cases. This presumption is analogous to the presumption of regularity of criminal convictions and is consistent with state and federal law. *See Parke v. Raley*, 506 U.S. 20, 30, 32 (1992) (noting that the "presumption of regularity" accompanying prior convictions offered for purposes of sentence

²⁸ These safeguards would be emasculated, if not completely eliminated by adopting the position suggested by Robertson. As a result, Respondent would ask the Court to overrule *Hiott* and permit Rule 11 sanctions, if it decides to allow successive applications claiming ineffectiveness of initial PCR counsel.

enhancement prevents a defendant from merely pointing to a missing or silent trial transcript to prove the invalidity of the prior conviction on collateral review and explaining that this presumption makes it appropriate to assign burden of proof to defendant where he collaterally challenges constitutionality of prior plea); *Young v. Brabham*, 105 S.C. 62, 89 S.E. 472 (1916) (presumption of regularity applies to court of common pleas and “irregularities must be shown”); *Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995) (regularity of proceedings in general sessions court is presumed); *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 26-27, 542 S.E.2d 723, 726 (2001) (finding admission of incompetent evidence harmless and reversing court of appeals’ finding that presumption of regularity did not apply to bench trial “[b]ased on the lack of competent evidence of motive and the lack of reference to the incompetent evidence in the trial judge’s order). Likewise, the finding of competence of collateral counsel’s performance is based upon the judicial deference due to an attorney’s performance and Robertson’s failure to present evidence rebutting *Strickland*’s “‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Strickland*, 466 U. S. at 689. Current PCR counsel has merely asserted that certain claims were overlooked, which is insufficient to warrant a hearing under *Aice*. See also *In re Reno*, 283 P.3d at 1211. Also, the only way for these presumptions to be overcome - in light of the present record - would be for the PCR judge to hold a hearing to determine if initial collateral counsel’s performance was ineffective under *Strickland*. **App. 4441.**

III. Robertson’s remaining challenges to the PCR judge’s Order are not meritorious.

In section III of the Petition, Robertson claims that the PCR judge erred in finding that he had waived his right to qualified counsel; that the PCR judge erroneously found, in the alternative, that he had to prove actual prejudice from the appointment of counsel who were not statutorily qualified;

and that the PCR judge erroneously found that laches barred relief. His claims lack merit.

A.1. There was no finding that Robertson waived his right to competent counsel.

The first of these arguments, as well as the finding that the Application was barred by §§ 17-27-45(A) and (C), are addressed in section I.2.C., *supra*, and Respondent submits that it lacks merit for the previously-stated reasons and for the reasons stated in the Order.²⁹

2. The PCR judge's finding that the 2011 Application is barred by laches is not clearly erroneous in light of the present record.

Further, the finding that laches barred the 2011 Application is not clearly erroneous given the present record. **App. 4446-47.** The PCR judge found that:

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). 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,

²⁹ Contrary to Robertson's misunderstanding of the PCR judge's Order, the PCR judge did not find that Robertson had waived his right to competent counsel. Rather, the PCR judge correctly found (**App. 4426-28**) that the statute of limitations barred his right to bring the 2011 Application because he could and should have objected to counsel's alleged lack of qualifications at the time of the September 23, 2005 hearing, since he learned counsel's qualifications at that time, "and not one year following the appointment of his present attorneys attack" (as Robertson argues). **App. 4428.** His claim ignores the distinction between a waiver of his right to statutorily-qualified counsel and the statute of limitations bar of his right to challenge counsel's qualifications years after the proper time for doing so had passed.

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.

App. 4446-47 (footnote omitted). Despite Robertson's contrary assertions, the PCR judge's factual findings are supported by probative evidence of record, *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626, and, based upon those findings, his conclusion that laches bars the 2011 Application is not clearly erroneous because Robertson slept on his rights. *Pierce*, 338 S.C. at 145, 526 S.E.2d at 225. Accord *Bray*, 366 S.C. at 140-41, 620 S.E.2d at 745.

B. The PCR judge's alternative finding that Robertson was required to show that he was prejudiced by the failure to appoint qualified counsel was not clearly erroneous.

As discussed, in the absence of proof by Robertson that Mr. Brown was not statutorily-qualified under § 17-27-160(B), the PCR judge found that initial PCR counsel was qualified under that section. Alternatively, he found that Robertson was required to prove that he was prejudiced by the failure to comply with the requirements of that section. Respondent has addressed this argument in section I.2.D., *supra*, and Respondent submits that Robertson's challenge to the alternative finding lacks merit for the previously-stated reasons for the reasons stated in the Order and the Order denying the Rule 59(e) motion. **App. 4434-41; Supp. App. 2-5**

C. Robertson has waived any challenge to the PCR judge's finding that Robertson's substantive claims for relief were barred in PCR by not challenging this on certiorari.

Finally, Respondent submits that Robertson has waived any challenge to the PCR judge's finding that Robertson's substantive claims for relief (allegations 10 & 11(c)-10 & 11(f)) were barred in PCR by not challenging the judge's ruling on certiorari. *E.g., Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000). Alternatively, Respondent submits that the PCR judge's ruling was correct. *See* S.C. Code Ann. § 17-27-20(b) (1985); *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520

(1993); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983).

CONCLUSION

Respondent submits that the Court should deny the Petition for Writ of Certiorari for the above-stated reasons.

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January 25, 2013.

By: 

ATTORNEYS FOR RESPONDENT



COPY

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
Lee S. Alford, Circuit Court Judge

RECEIVED

FEB 19 2013

S.C. Supreme Court

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2012-205909

REPLY TO THE RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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FEB 19 2013

APPELLATE DEFENSE

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ARGUMENT IN REPLY

Rather than making a persuasive case against a grant of certiorari, the content of Respondent's Return both highlights the reversible errors in the PCR court's decision to dismiss Robertson's second-in-time application, and underscores the need for this Court's guidance in response to the pressing issues raised by *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). Respondent's Return is a thinly guised effort to shield the PCR court's legal errors behind inapplicable standards of review, and to distort the relevant statute of limitations inquiry. The issues that this Court should address by granting the petition for writ of certiorari are discussed below.

I. Respondent is not entitled to the favorable standards of review from which it seeks to benefit.

At various points in its Return, respondent seeks to take advantage of favorable standards of review to which the determinations in the PCR court's order are not entitled. For example, respondent insists that a number of purely legal rulings in the PCR order should not be disturbed because, in respondent's view, they are not "clearly erroneous."¹ That, however, is not the standard by which legal error must be assessed. Rather, this Court has repeatedly indicated that it "will reverse the decision of the PCR judge when it is controlled by an error of law." *Bailey v. State*, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011) (citing *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007)). That formulation appears synonymous with the *de novo* review that appellate courts routinely apply to questions of law, and does not comport with the

¹See, e.g., Return 26 (invoking "clearly erroneous" standard for review of PCR court's construction of S.C. Code § 17-27-160(B)); Return 28 (defending PCR order's reliance on Chief Justice Toal's August 13, 2003 Memorandum as "authority" for assessing appointed counsel's qualifications because it "was not clearly erroneous"); Return 29 (arguing that PCR court's application of "prejudice" requirement "was not clear error"); Return 38-39 (arguing that PCR court's application of laches was "not clearly erroneous"); Return 39 (arguing that PCR court's determination that Robertson was required to show prejudice "was not clearly erroneous").

deferential standard improperly invoked by respondent. Respondent also incorrectly attempts to shield the PCR order's determinations factual and mixed questions by invoking the "any evidence" standard contained in *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).² While that is the standard ordinarily applied to a PCR court's findings of fact, its applicability ordinarily presumes such findings have been made in accordance with basic principles of due process. *See, e.g., Goins v. State*, 397 S.C. 568, 572-73, 726 S.E.2d 1, 2-3 (2012) (applying the "any evidence" standard where PCR court had held a hearing addressing a claim of ineffective assistance of counsel); *Smith v. State*, 375 S.C. 507, 514-15, 654 S.E.2d 523, 527-28 (2007) (assessing PCR court's findings given that PCR court held a hearing); *Tilley v. State*, 334 S.C. 24, 25, 28, 511 S.E.2d 689, 690-91 (1999) (indicating that PCR court held a hearing after respondent filed PCR application). As discussed below the PCR court did not abide by these in this case, and the findings relied upon in the order of dismissal are therefore unsustainable as a matter of law.

II. The dismissal of Robertson's PCR application on the basis of factual determinations made without minimally adequate process must be reversed.

Respondent insists that the PCR court was correct to dismiss Robertson's application because prior PCR counsel were, in fact, qualified, and the first PCR court selected and appointed them in accordance with state law. *See* Return 24, 27-28. Those factual propositions, however,

²*See, e.g.,* Return 24 ("Respondent further submits that the PCR judge's findings that original collateral counsel was qualified under § 17-27-160(B), as well as his alternative finding that Robertson had not proved prejudice from the failure to comply with the requirements of that section, are supported by the record and are not clearly erroneous."); Return 25 ("In the absence of evidence to the contrary, the PCR judge correctly 'assume[d] [sic] that Judge Few appointed qualified counsel to represent Robertson in his first PCR application."); Return 30 (asserting that PCR court's finding that Robertson's representation by unqualified counsel was not prejudicial was "supported by the record").

were disputed below, and were resolved against Robertson without a hearing. As set forth in the Petition, that lack of process was inconsistent with federal and state law.

Moreover, since the Petition and Return were filed, the seriousness of the PCR court's deviation from acceptable practice has been reinforced by this Court's recent decision in *McCoy v. State*, Op.No. 27214 (S.C. Sup. Ct. filed Feb. 6, 2013) (Shearouse Adv. Sh. No. 6 at p. 14) 2013 W.L 441549 (Feb. 6, 2013). *McCoy*, as here, the Circuit Court summarily dismissed a PCR application without a hearing based only on the respondent's disputed allegations that it was successive and untimely. This Court unanimously reversed, and made clear that summary dismissal under such circumstances is impermissible:

“The [PCR] court may grant a motion by either party for summary disposition of the [PCR] application when ... there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” S.C.Code Ann. § 17-27-70(c). When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (citing S.C.Code Ann. § 17-27-80). Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing. *Cf. Delaney v. State*, 269 S.C. 555, 556, 238 S.E.2d 679, 679 (1977).

McCoy, ___ S.E.2d ___, 2013 WL 441549, at *2. The PCR court's treatment of this case is materially indistinguishable from what occurred in *McCoy*, and it follows that this case, too, must be remanded for a fair and informed resolution of disputed issues.³

³*McCoy* also disposes of respondent's assertion that “the affidavits offered by Robertson in connection with his Rule 59(e), SCRPC, motion ... were not timely and should not be considered,” Return 28, and its criticism of Robertson for not presenting “any evidence” of counsel's ineffectiveness, Return 30. *See McCoy*, 2013 WL 441549, at *2 (describing PCR judge's finding “that, because Petitioner failed to ‘offer any detail as to how this information

Respondent makes no real effort to defend the PCR court's reliance on factual findings made without a hearing. Instead, it advances the extraordinary proposition that the PCR court was permitted to simply accept its counsel's word, "as an officer of the Court, that the September 23, 2005, [appointment] hearing was held and that the statutory appointment was confirmed as that time." Return 25, n.20.⁴ That is not how due process works. To be sure, respondent's counsel was entitled to *assert* his own version of the facts before the PCR judge. But where such assertions are contested – as they were here – respondent enjoys no automatic right to prevail simply because its counsel is "an officer of the court." If that were the law, the State could defeat every PCR application merely by showing up and denying the allegations.⁵

would have affected his trial had it been known at that time, or how and when it was discovered,' Petitioner failed to establish 'sufficient reason' why the current allegations could not have been raised in his previous PCR application"). As in *McCoy*, the PCR court in this case held no hearing on disputed issues, and provided Robertson with no opportunity to investigate, develop and present the evidence supporting his positions. Had the PCR court afforded Robertson the process to which he was entitled, he could have presented his evidence in the ordinary course, i.e., after appropriate investigation, and at a hearing. That he was unable to do so is a consequence only of the PCR court's erroneous premature dismissal.

⁴To avoid the possibility of confusion generated by respondent's arguments, Robertson acknowledges the possibility that there was an attempt to conduct an appointment hearing on September 23, 2005, as suggested by the text of the web page cited by respondent. See Return 12, n.7. However, neither that text nor anything else in the record provides any corroboration for respondent's claims that the proceeding went forward as expected, or contradicts Robertson's allegations that Attorney Brown was not present in court that day, and that his qualifications to serve as PCR counsel were not addressed.

⁵Respondent's assertion that the original PCR judge must have determined that Mr. Brown was qualified under Chief Justice Toal's August 13, 2003 Memorandum "because '[t]rial judges are presumed to know the law and to apply it in making their decisions,'" is also extraordinary. Return 27 (quoting *Walton v. Arizona*, 4979 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002)). If that presumption were capable of bearing the weight respondent seeks to place upon it, there would be no need to record trial court proceedings, or to subject them to appellate review. Once again, that is not the law.

Finally, respondent claims to have made its unsupported assertions about the September 23, 2005 hearing “in order to prevent Robertson from perpetrating a fraud on the Court” Return 26, n.20. That accusation is as inappropriate as it is unfounded. There is no record of the September 23, 2005 hearing, and the available circumstantial evidence is, at the very least, more consistent with Robertson’s allegations than with those of respondent’s counsel. *See, e.g.*, Petition at 14, n.6 (describing evidence concerning the appointment of initial PCR counsel, including counsel’s letter to Robertson indicating counsel’s ignorance of his appointment until October, 2005). That respondent has seen fit to attempt to shore up its claims through an allegation of attempted “fraud” only underscores the need for a real -- and fair -- process in which actual evidence can be presented, and informed, reliable findings can be made. As *McCoy* demonstrates, the only way to facilitate such a process is to reverse the PCR court’s order of dismissal and remand for further proceedings.

III. South Carolina’s response to *Martinez* remains to be determined.

As discussed in the Petition, *Martinez* raises pressing questions about whether South Carolina PCR courts will retain their historical position as the primary arbiters of ineffective assistance of trial counsel claims, or will instead cede that role to the federal courts. In its Return, respondent seeks to avoid resolution of those questions by suggesting *Martinez* is either inapplicable in South Carolina now, or is likely to become so in the near future. Both of those suggestions are wrong.

Respondent first asserts that although South Carolina law -- like the scheme reviewed in *Martinez* -- requires that ineffective assistance of trial counsel claims be reserved for post-conviction proceedings, the equitable right to effective post-conviction counsel established in *Martinez* is nevertheless inapplicable here because “other Sixth Amendment claims may be raised on direct appeal” Return 14. As can be easily inferred from its failure to suggest any logical

connection between the *Martinez* rule and the cognizability on direct appeal of claims *other than* ineffective assistance of trial counsel, respondent's argument is completely irrelevant. The simple truth is that if state procedure mandates that ineffective assistance of trial counsel claims be reserved for post-conviction proceedings – as South Carolina's undisputedly does – then *Martinez* applies. *Martinez*, 132 S.Ct. at 1320 (“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.”).

Respondent further suggests that *Trevino v. Thaler*, 133 S.Ct. 524, 525 (2012) (order granting certiorari), which is presently before the Supreme Court of the United States, may lead to South Carolina (and presumably other states) being exempted from the *Martinez* rule. *See* Return 15, n.10 (“Thus, the question of whether *Martinez*'s ‘narrow exception’ applies to States that do not require all such claims to be brought in collateral proceedings, such as South Carolina, is now before the United States Supreme Court.”). The State has not accurately depicted the issue presented in *Trevino*. The question in *Trevino* is whether Texas is exempt from the *Martinez* rule because its prisoners have, on rare occasions, been permitted to assert ineffective assistance of trial counsel claims on direct appeal. *See* Brief of Petitioner, *Trevino v. Thaler*, No. 11-10189, at (i) (Dec. 2012) (describing reformulation of Question Presented in light of *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012)). As respondent has already conceded in this case, *see* Return 14, South Carolina law ***makes no such exception*** to the requirement that ineffective assistance of trial counsel claims be held for PCR proceedings. *Trevino* is unlikely to provide any support for respondent's suggestion that South Carolina might somehow manage to evade the *Martinez* rule.

Finally, on the substance of how South Carolina should react to *Martinez*, respondent expresses opposition to any change in state procedure for the purpose of accommodating cases in which initial PCR counsel provided inadequate assistance in connection with a prisoner's ineffective assistance of trial counsel claims. *See* Return 18-20. The important question now, however, is not what respondent desires, but how *this Court* will choose to go forward within the landscape as *Martinez* has changed it. As Robertson acknowledged in his Petition, *Martinez* does afford state courts the option of refusing to ensure that post-conviction relief applicants receive adequate representation. Contrary to respondent's suggestion, however, choosing that option comes with costs that this Court may regard as significant, *e.g.*, complete relinquishment of the opportunity to enter judgment on ineffective assistance of trial counsel claims in the first instance, and sacrifice of the state-friendly rules otherwise applicable to such judgments in federal habeas corpus proceedings, *see, e.g.*, 28 U.S.C. §§ 2254(d) & (e). It is up to this Court to weigh the various and competing considerations, and to make the necessary election. Robertson's case is an ideal vehicle in which to do so.

IV. Robertson's second PCR application is not barred by the statute of limitations.

Respondent also continues to assert that Robertson's second PCR application should not be permitted to proceed because it was untimely. That is not correct. As explained in the Petition and the pleadings submitted to the PCR court – but never addressed by respondent -- the limitations period is inapplicable under exceptional circumstances like those presented here.

Moreover, even if it were appropriate to apply the statute of limitations, Robertson would be entitled to equitable tolling for the period during which his first PCR application remained pending, since that period was squandered by inadequate and unqualified counsel. After remaining silent on the issue during the proceedings below, respondent now appears to acknowledge the availability of

equitable tolling in theory, but insists that Robertson is not eligible. This is so, according to respondent, “because [Robertson] was not ‘actively misled’ by Respondent into accepting Mr. Brown as qualified counsel,” and because, “to the extent Mr. Brown was not statutorily-qualified to act as lead counsel in this case, [Robertson] did not exercise ‘due diligence’ to discover any supposed defect in Mr. Brown’s qualifications[.]” Return 23-24.

Respondent’s arguments contradict basic principles of equity. *Pliler v. Ford*, 542 U.S. 225, 234 (2004) (remanding to determine equitable tolling given concerns that prisoner may have been affirmatively misled by the magistrate judge); *id.* at 235 (O’Connor, J., concurring) (“if the petitioner is affirmatively misled, either by the court or by the State, equitable tolling might well be appropriate”); *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (“[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.”); *Pelzer v. State*, 378 S.C. 516, 522, 662 S.E.2d 618, 621 (2008) (agreeing with the Fourth Circuit that resort to equity is appropriate for instances involving “circumstances external to the party’s own conduct”).

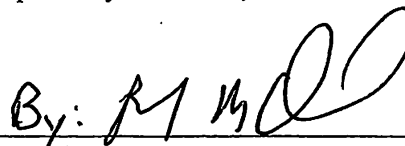
When Robertson announced his intention to seek post-conviction relief, South Carolina law obligated the presiding judge -- not Robertson himself -- to select and appoint qualified and adequate counsel. Given that mandate from the General Assembly, Robertson can hardly be faulted for relying on the PCR court to do as the law instructed by furnishing him with competent lawyers. That Robertson did rely upon the PCR court to discharge its obligation, and was materially disadvantaged by having done so, is a compelling basis for equitable relief. *See, e.g., Spottsville v. Terry*, 476 F.3d 1241, 1245 (11th Cir. 2007) (granting equitable tolling of federal habeas limitations

period based on determination that “[t]he instructions of the state habeas court for filing Spottsville’s appeal were misleading”); *Keenan v. Bagley*, 400 F.3d 417, 421-22 (6th Cir. 2005) (observing that prisoner’s “argument for equitable tolling” due to detrimental reliance upon state court’s order “might be very strong,” and remanding for further fact development); *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002) (per curiam) (upholding grant of equitable tolling of federal habeas limitations period where district judge might have “unwittingly hindered” prisoner’s opportunity for timely review).

CONCLUSION

For these additional reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

By: 

A. Mattison Bogan
Attorney at Law

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 19th day of February, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
Lee S. Alford, Circuit Court Judge

JAMES ROBERTSON,

PETITIONER,

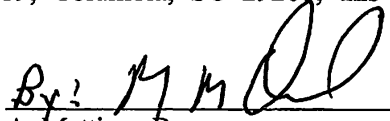
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

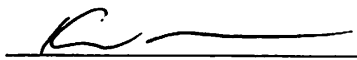
I certify that a true copy of the reply to the return to the petition for writ of certiorari and a copy of the appendix in this case have been served on William Edgar Salter, III, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of February, 2013.


A. Mattison Bogan
Attorney at Law

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of February, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

The Supreme Court of South Carolina

James D. Robertson, Petitioner,

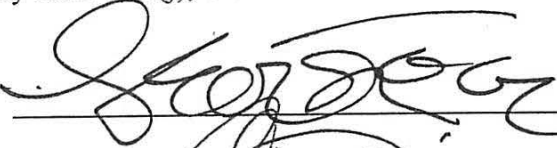
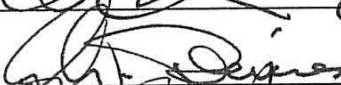
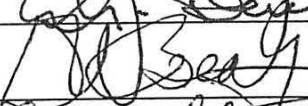
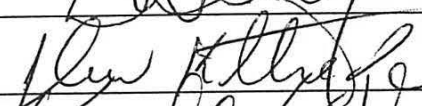
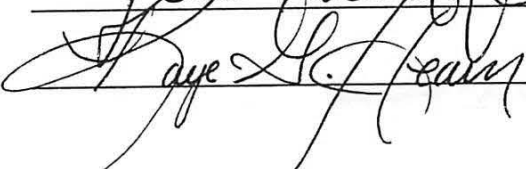
v.

State of South Carolina, Respondent.

Appellate Case No. 2012-205909

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

 C.J.
 J.
 J.
 J.
 J.

Columbia, South Carolina
September 24, 2014

cc:

Robert Michael Dudek, Esquire
W. Edgar Salter, III, Esquire
Allen Mattison Bogan, Esquire

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SEP 24 2014

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APPELLATE DEFENSE

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S.C. Supreme CourtSTATE OF SOUTH CAROLINA
In the Supreme CourtAPPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2012-205909

JAMES ROBERTSON *Petitioner*

v.

STATE OF SOUTH CAROLINA *Respondent*

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON APPEAL

WHETHER, IN LIGHT OF *MARTINEZ V. RYAN*, 132 S.Ct. 1309 (2012), AND THE PAST TREATMENT OF SIMILARLY SITUATED SOUTH CAROLINA PRISONERS, ROBERTSON SHOULD BE PERMITTED TO PROCEED WITH A SECOND-IN-TIME APPLICATION FOR POST-CONVICTION RELIEF ASSERTING COLORABLE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL THAT PRIOR PCR COUNSEL INEFFECTIVELY FAILED TO INVESTIGATE OR PRESENT?

STATEMENT OF THE CASE

This case concerns the role of the South Carolina state courts in collateral review of challenges to criminal judgments asserting violations of the Sixth Amendment right to effective assistance of trial counsel. Historically, South Carolina state post-conviction relief proceedings have served as the “main event” for such claims, whether or not counsel appointed to assist the prisoner in those proceedings performed adequately. Where post-conviction counsel’s performance was inadequate – *e.g.*, by failing to discover or properly assert colorable ineffective assistance of trial counsel claims – the resulting mistakes or omissions were charged to the prisoners themselves, and led to procedural bars that ordinarily prevented merits review, either in a second state PCR proceeding, or in federal habeas proceedings.

Martinez v. Ryan, 132 S.Ct. 1309 (2012), changed that arrangement, by recognizing the indispensability of adequate representation in state collateral review, and by providing that prisoners who did not receive such representation in state post-conviction proceedings may nevertheless establish a right to *de novo* merits review in federal court. Importantly, however, *Martinez* also acknowledged that this new approach could intrude upon state interests (*e.g.*, by causing forfeiture of state court control over fact-development mechanisms, and by rendering inapplicable the highly deferential rules for federal review of state court merits adjudications), and left the door open for state

courts to avoid such intrusions by providing their own remedy for inadequate assistance of post-conviction counsel. The question in this case is whether South Carolina courts will offer such a remedy, and in so doing maintain their primacy in the litigation of ineffective assistance of trial counsel claims, or decline *Martinez*'s invitation, and cede control over that litigation to the federal courts.

In the sections that follow, petitioner, Jimmy Robertson, will begin by describing the relevant history of his own post-conviction litigation, which well illustrates the problem addressed in *Martinez*. He will then discuss the origin and operation of the *Martinez* rule, and the implications of that rule for both state and federal collateral review. Finally, Robertson will explain why South Carolina should respond to *Martinez* by permitting subsequent state post-conviction proceedings where prior counsel's performance was inadequate, and why the inadequacy of his own prior post-conviction counsel requires that this case be remanded for development and consideration of his previously undeveloped ineffective assistance of trial counsel claims.

* * *

Robertson was convicted and sentenced to death in the York County Court of General Sessions in March, 1999. Following the dismissal of his direct appeal, he sought post-conviction relief. Pursuant to the Uniform Post-Conviction Procedure Act, Robertson was entitled to appointment of qualified counsel to assist in the identification, development and litigation of PCR challenges to his convictions and sentences. S.C. Code Ann. § 17-27-160(B). The Act requires that 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. That order stated, 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.

App. 4517. The order did not address whether Brown was qualified under § 17-27-160(B). A second attorney, Joseph David Matlock, later appeared with Brown at Robertson’s PCR hearing. There is no record of Matlock’s appointment, nor does the record made in connection with Robertson’s initial PCR proceedings contain any indication that either Brown or Matlock actually met the statutory criteria for appointment in a capital PCR case.

In March 2006, approximately six months after appointment, counsel filed a PCR application on Robertson’s behalf. App. 3244-3251. The sum total of the allegations contained in the application was, “Ineffective assistance of counsel – specifics to be amended later.” App. 3246. By the time of the evidentiary hearing in January, 2007, no amended application had been filed and no “specifics” had been alleged. In response to questioning by the PCR judge about the claims they intended to pursue at the hearing, counsel mentioned approximately a dozen theories under which Robertson’s trial lawyers may have been ineffective. *See* App. 3268-69. At the evidentiary hearing, counsel called three witnesses: Robertson; trial attorney James Hancock, and trial attorney James Boyd. App. 3276-3329 (Robertson); App. 3329-3455 (Hancock); App. 3494-3559 (Boyd). Nothing in the PCR record or other available documentation suggests that Robertson’s initial PCR counsel performed any

independent investigation to determine the existence of grounds for relief based on evidence outside the trial record. Judge Few denied post-conviction relief in a written order dated March 7, 2008. This Court denied certiorari on October 6, 2010.

On November 9, 2010, the United States District Court for the District of South Carolina appointed new counsel – including undersigned attorneys Weyble and Paavola – to represent Robertson in federal habeas corpus proceedings pursuant to 18 U.S.C. § 3599. Based on a review of the available case materials, counsel identified a significant number of viable claims for relief which had not been developed or asserted by Robertson’s state post-conviction counsel,¹ and were therefore not yet ripe – because they had not been “exhausted” in state court, *see* 28 U.S.C. § 2254(b) – for consideration by the federal district court. To preserve Robertson’s ability to develop and eventually secure review of those grounds, counsel prepared and filed two submissions: a federal habeas corpus petition raising both Robertson’s previously litigated (and therefore exhausted) claims, and the newly identified (and therefore unexhausted) claims, *see* App. 3820; and a second-in-time state PCR application raising the newly identified claims, *see* App. 3847.² The federal district court subsequently stayed the federal habeas case pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005); that stay remains in effect as of the filing of this brief.

The second-in-time PCR application was assigned to Circuit Judge Alford, who appointed

¹The claims identified at that stage were merely those evident from a review of the existing record. Because, as described below, Robertson has never been afforded the essential combination of qualified post-conviction counsel *and* access to fact-development mechanisms, additional grounds for relief remain to be discovered, either on remand to a state PCR court, or in a federal habeas corpus proceeding.

²Due to the limited scope of their federal appointment, counsel prepared and filed the second-in-time PCR application *pro bono*, and without the aid of investigative or expert services.

undersigned counsel to represent Robertson at a brief hearing in July, 2011, and directed that he file a response to respondent's motion to dismiss and an amended application within three weeks. App. 4198. Robertson complied, submitting both an amended set of allegations and a separate pleading contending, *inter alia*, that the application should either be permitted to proceed, as had similar cases in recent years, along the ordinary course through fact development, evidentiary hearing, and merits adjudication, or be held in abeyance pending the forthcoming decisions in *Maples v. Thomas*, 131 S.Ct. 1718 (Mar. 21, 2011) (order granting certiorari), and *Martinez v. Ryan*, 131 S.Ct. 2960 (June 6, 2011) (order granting certiorari). See App. 4208-24.

Less than two months later, the PCR court signed respondent's proposed order summarily dismissing the case on a variety of grounds including: that the application was impermissibly successive; that, as matters of fact, prior PCR counsel performed competently and one of them was qualified; that Robertson waived his right to competent PCR counsel by failing to contemporaneously object; that the application was untimely; and that Robertson's failure to personally order the now-unavailable transcript of an earlier court proceeding implicated the laches doctrine. See App. 4412-47. The order also maintained that the *Maples* and *Martinez* decisions were unlikely to affect the issues in this case, see App. 4444-46, and implied that Robertson's newly appointed counsel – who had been afforded no access to fact development resources while the court considered whether to allow the case to proceed – had somehow been dilatory in failing to fund an investigation on their own, see App. 4439.

Robertson timely moved to alter or amend the judgment. Among other arguments, he objected to the court's resolution of highly material and hotly disputed factual issues concerning the qualifications and performance of initial PCR counsel without a hearing. See App. 4448-51. To that

end, Robertson explained that the obvious conflict in the parties' positions on those issues required a hearing under settled rules of state and federal law, and attached sworn affidavits confirming that neither of his initial PCR counsel met the statutory criteria for qualification to handle a capital case. *See* App. 4448-51; 4456-58; 4468; 4472.³ He also reiterated that the summary dismissal of his application was inconsistent with the treatment of other, similarly situated capital cases, *see* App. 4453-56, and objected both to the court's mischaracterization of the timeliness question as governed by S.C. Code § 17-27-45(C) rather than the principles articulated in *Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999), *see* App. 4461, and to its suggestion that current counsel should have been funding a PCR investigation from their own pockets, *see* App. 4450. On November 28, 2011, the court entered an order denying the motion to alter or amend the prior judgment without addressing most of the issues raised. *See* Supp. App. 3-7.

Approximately four months after the Circuit Court's final order, the Supreme Court decided *Martinez*.⁴ As discussed more fully *infra*, *Martinez* acknowledged the indispensability of adequate post-conviction representation in connection with ineffective assistance of trial counsel claims, and made clear that if state courts do not provide that representation, federal habeas courts will no longer punish prisoners – like Robertson – for poorly counseled mistakes committed during state collateral proceedings. Relying on *Martinez*, as well as pre-existing South Carolina precedent, Robertson petitioned for certiorari. This Court granted the petition on September 24, 2014.

³Robertson later supplemented the record with a copy of this Court's October 24, 2011, Public Reprimand of Michael Brown for professional misconduct related to substance abuse that coincided with his service as lead counsel in the initial PCR proceedings in this case. App. 4474-80.

⁴At the time *Martinez* was decided, Robertson's time for pursuing discretionary review in this Court was being held in abeyance due to the pendency of the State's Motion to Dismiss his Notice of Appeal.

ARGUMENT

I. *MARTINEZ* CHANGED THE RULES FOR THE LITIGATION OF SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS, AND THOSE CHANGES WILL IMPACT THE TREATMENT OF SOUTH CAROLINA CASES IN FEDERAL COURT, STATE COURT, OR BOTH.

A. Law and practice prior to *Martinez*.

Collateral review of state criminal judgments involves two distinct but closely connected phases: state post-conviction review conducted by state courts pursuant to state-created procedures; and federal habeas review conducted by federal courts under rules made by Congress and the Supreme Court of the United States. *See, e.g.,* S.C. Code § 17-27-20 *et. seq.*; 28 U.S.C. §§ 2241; 2254. Because both phases of review require examination of the same underlying claims of error – *e.g.,* ineffective assistance of trial counsel in violation of the Sixth Amendment – it is inevitable that state post-conviction courts’ rulings adverse to prisoners are scrutinized, and sometimes overturned, in the federal habeas proceedings that follow. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 80 (1977) (quoting *Brown v. Allen*, 344 U.S. 443, 458 (1953)) (explaining that a state court judgment “‘is not *res judicata*’” in a federal habeas proceeding). This arrangement presents obvious federalism concerns, as the federal courts’ imperative to remedy constitutional error in habeas often collides with the states’ interests in exercising their sovereign power to convict and punish, and in securing the finality of their own hard-won judgments. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 747-48 (1991); *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982).

Striking the appropriate balance between maintaining respect for state court judgments on one hand, and safeguarding the right of individual prisoners to federal habeas review on the other, has received detailed attention from the Supreme Court throughout the history of modern collateral

review. After a relatively brief period during which state interests were subjugated, *see, e.g., Brown v. Allen, supra; Fay v. Noia*, 372 U.S. 391 (1963), the Court began a systematic, decades-long campaign to restore the relevance of state court judgments, and to make state courts the “primary forum for the adjudication of claims of even federal error in state criminal proceedings.”⁵ *McKaskle v. Vela*, 464 U.S. 1053, 1056 (1984) (O’Connor, J., dissenting from denial of certiorari).⁶ Over time this federalism- and comity-driven effort produced a framework of rules governing federal habeas review that is calibrated to require respectful – and, at times, deferential – treatment of state court judgments in direct proportion to the fullness, fairness, and reliability of the processes afforded to prisoners by the state courts themselves.⁷

Historically, South Carolina’s post-conviction review scheme has produced judgments that qualify for the procedural advantages available under federal habeas law. For example, because the state system typically offers prisoners reasonable opportunities to develop and present evidence to

⁵Congress joined the effort with passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which featured a nearly comprehensive set of revisions and additions to the already well-developed body of decisional law governing federal habeas review of state court judgments. *See* 28 U.S.C. §§ 2244; 2253; 2254; 2261-66.

⁶*See also, e.g., Sykes*, 433 U.S. at 90 (predicting that adoption of procedural default rule would “have the salutary effect of making the state trial on the merits the ‘main event,’ so to speak, rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing”); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*).

⁷*See, e.g., Sykes, supra* (requiring federal enforcement of state procedural bars so long as they rest on adequate and independent state law grounds); 28 U.S.C. § 2254(d) (forbidding grant of federal habeas relief on claim previously adjudicated on the merits by a state court, unless the state court decision is judged defective in one or more ways enumerated in subdivisions (d)(1) and (d)(2)); (*Michael*) *Williams v. Taylor*, 529 U.S. 420 (2000) (construing 28 U.S.C. § 2254(e)(2) to forbid a federal evidentiary hearing if the prisoner failed to take advantage of an available opportunity for fact development in state court).

support their claims for relief, the federal courts have had no occasion – or authority, *see* 28 U.S.C. § 2254(e)(2) – to hold their own evidentiary hearings in South Carolina cases. As a result, South Carolina judges, not federal judges, have controlled the power to make factual findings, and those findings have been subject to a statutory presumption of correctness in subsequent federal habeas proceedings.⁸ *See* 28 U.S.C. § 2254(e)(1). Similarly, because South Carolina post-conviction relief courts regularly reach and adjudicate the merits of prisoners’ claims for relief, and do so in written orders eligible for discretionary appellate review by this Court, the federal courts ordinarily have no authority to grant habeas relief based on mere disagreement with the result reached in state court. *See* 28 U.S.C. § 2254(d); (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Instead, § 2254(d) “erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court,” and “requires ‘a state prisoner [to] show that the state court’s ruling on the claim ... was so lacking in justification that there was an error ... beyond any possibility for fairminded disagreement.’” *Burt v. Titlow*, 134 S.Ct. 10, 16 (2013) (quoting *Harrington v. Richter*, 562 U.S. ___, 131 S.Ct. 770, 786-87 (2011)); *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (characterizing 28 U.S.C. § 2254(d) as a “highly deferential standard for evaluating state-court

⁸This power is substantial and often dispositive in federal habeas proceedings, as the statutory presumption of correctness applicable to state court factual findings prevents federal courts from drawing or acting upon their own conclusions about the evidence. *See, e.g., Ivey v. Ozmint*, 304 Fed. App’x 144, 148 (4th Cir. 2008) (stating “the question of Young’s impartiality is a question of fact and the state court’s determination of that issue is entitled to the § 2254(e)(1) statutory presumption of correctness,” and affirming district court’s denial of habeas relief); *Wilson v. Moore*, 178 F.3d 266, 280 (4th Cir. 1999) (observing that South Carolina state court’s factual finding that applicant was informed of dangers of counsel representing co-defendants was “presumptively correct” and upholding district court’s denial of habeas relief). Indeed, the consequences of that presumption have been a driving force behind South Carolina prisoners’ objections to the practice of permitting counsel for the State to draft orders denying post-conviction relief. *See Hall v. Catoe*, 360 S.C. 353, 364-65, 601 S.E.2d 335, 341 (2004).

rulings, which demands that state-court decisions be given the benefit of the doubt”).

South Carolina practice has also been consistent with federal law with respect to claims *not* presented to and adjudicated by the state courts in a prisoner’s first application for post-conviction relief. *See* S.C. Code § 17-27-90. At least since *Wainwright v. Sykes*, *supra*, federal courts have been obligated to respect a state court’s refusal to consider a prisoner’s attempt to pursue a second round of state post-conviction review. And at least since *Coleman v. Thompson*, *supra*, that obligation held even where the prisoner’s failure to assert a claim (either properly or at all) in state court was plainly attributable to post-conviction counsel’s own mistake. *See Coleman*, 501 U.S. at 752; *see also Murray v. Giarratano*, 492 U.S. 1 (1989) (declining to recognize right to appointment of post-conviction counsel in capital cases); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (declining to recognize right to appointment of post-conviction counsel in non-capital cases). Thus, although South Carolina has not always uniformly forbidden second or subsequent applications for post-conviction relief, it has generally had the option of doing so safe in the knowledge that, absent truly unusual circumstances, a federal court would respect and enforce that decision as a valid procedural bar to merits review in a habeas proceeding.⁹

B. Changes made by *Martinez*.

As framed by the Supreme Court itself, *Martinez* presented the question “whether a federal

⁹*See, e.g., Ivey v. Catoe*, 36 Fed. App’x 718, 730 (4th Cir. 2002) (holding a claim of ineffective assistance of trial counsel was procedurally defaulted because it was not raised in the petitioner’s initial state PCR proceeding); *Pickney v. McCall*, No. 1:11-cv-03466-DCN, 2013 WL 1207089, at *5-6 (D.S.C. Mar. 25, 2013) (finding claims of ineffective assistance of trial counsel procedurally barred because the petitioner did not present “the operative facts and controlling legal issues” to the PCR court); *McDowell v. South Carolina*, No. 4:08-752-CMC-TER, 2008 WL 5083104, at *11 (D.S.C. Nov. 24, 2008) (finding two claims of ineffective assistance of trial counsel procedurally barred because they were not raised in petitioner’s PCR application or in his petition for writ of certiorari to the South Carolina Supreme Court).

habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." *Martinez*, 132 S.Ct. at 1313. As noted above, conventional wisdom had held that the answer to that question was a categorical "no" at least since *Coleman* was decided in 1991. *See, e.g., Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (en banc). In *Martinez*, however, the Court identified several factors that combined to call for a "narrow exception" to *Coleman*'s general rule. *Martinez*, 132 S.Ct. at 1315.

First, the Court recognized that where state post-conviction review "is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial" – as it was in *Martinez*'s home state of Arizona, and is in South Carolina, *see State v. Torrence*, 305 S.C. 45, 66, 406 S.E.2d 315, 326-27 (1991) (Toal, J., concurring) – that "proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective assistance of counsel claim." *Martinez*, 132 S.Ct. at 1317.¹⁰ Building on the analogy, the Court observed that just as a prisoner whose direct appeal counsel is ineffective is "denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims," a prisoner lacking the assistance of an "adequate attorney" in post-conviction proceedings "will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim." *Id.* This is so, the Court explained, because "[c]laims of ineffective assistance at trial often require investigative work and an

¹⁰In *Trevino v. Thaler*, 133 S.Ct. 1911, 1921 (2013), the Court clarified the reach of *Martinez* by holding that its rule applies "where ... state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal" As reflected in *Torrence*, *supra*, both the design and operation of South Carolina's scheme for reviewing criminal judgments make it "highly unlikely" that an ineffective assistance of trial counsel claim could be adequately litigated on direct appeal.

understanding of trial strategy,” such that a prisoner seeking to present such claims “in accordance with the State’s procedures ... likely needs an effective attorney.” *Id.*; *see also id.* (“While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.”); *id.* (noting that a prisoner’s inability to present an ineffective assistance of trial counsel claim is “of particular concern” because “[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system”).

Having framed the problem as a consequence of enforcing the federal habeas procedural default doctrine against a prisoner who lacked the assistance of counsel necessary to comply with the rules for securing a state court judgment on the merits, the Court crafted a solution fit for the context. After noting that it had long since made the “equitable judgment” that prisoners who are “impeded or obstructed in complying with the State’s established procedures” are “excuse[d] ... from the usual sanction of default,” the Court endorsed the same approach for defaults occasioned by inadequate post-conviction counsel:

Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney’s errors (or the absence of an attorney) 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.

Martinez, 132 S.Ct. at 1318.

The Court went on to specify that a prisoner may benefit from this new category of “cause” to overcome a default, and thereby qualify for merits review in federal habeas, by making a two-part showing. First, the prisoner must demonstrate that “appointed counsel in the initial-review collateral proceeding, where the [ineffective assistance of trial counsel] claim should have been raised, was

ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).” *Martinez*, 132 S.Ct. at 1318. Second, the prisoner must establish that “the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003), as “describing standards for certificates of appealability to issue”);¹¹ *see also Martinez*, 132 S.Ct. at 1315 (noting need “to protect prisoners with a *potentially legitimate* claim of ineffective assistance of trial counsel”) (emphasis added).

Finally, the Court acknowledged that although the “equitable ruling of this case” would not require states to appoint effective post-conviction counsel (as would a constitutional ruling), *Martinez*, 132 S.Ct. at 1319, it would require them “to elect between appointing [effective] counsel in initial-review collateral proceedings or not asserting a procedural default ... in federal habeas proceedings,” *id.* at 1320. *See also id.* at 1319 (noting that a state may also attempt to refute a prisoner’s assertion of “cause” by contending that the underlying ineffective assistance of trial counsel claim “is insubstantial, ... or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards”).

¹¹While the Court did not otherwise expound upon what it means for a claim to be “a substantial one,” the citation to *Miller-El* – and only that decision – is significant. In *Miller-El*, the Court made a point of emphasizing that the standard governing issuance of a certificate of appealability (COA) – a jurisdictional prerequisite for appellate review of the denial of federal habeas relief, *see* 28 U.S.C. § 2253(c) – is, and must remain, a *low* one. *See Miller-El*, 537 U.S. at 336-37 (“The COA determination ... requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court’s [decision] ... and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims.”); *id.* at 338 (“We do not require petitioner to prove . . . that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.”).

C. The impact of *Martinez* on state and federal practice.

While the “elect[ion]” *Martinez* requires can be stated simply enough, the consequences flowing from it have profound implications for federalism and the interests of state courts. As discussed *supra*, all of the benefits federal habeas law makes available to states depend upon the existence of a state post-conviction court ruling either resolving a claim on the merits or refusing to do so on the basis of a federally enforceable procedural bar; absent one or the other, federal law entitles a prisoner to fully *de novo* habeas review on the merits, which significantly increases the prospects for a grant of relief. The rule announced in *Martinez* affects both scenarios.

Prior to *Martinez*, a federal habeas court presented with an ineffective assistance of trial counsel claim not previously adjudicated on the merits by a state court – either because it was never presented to the state court at all, or because it was not presented correctly or completely – ordinarily followed a straight path to dismissal with prejudice. Absent a currently available state court remedy through which the prisoner might yet secure a merits ruling (more on that alternative below), the federal court’s task was simply to confirm that the state court rule barring merits adjudication was both adequate and independent, dispose of any excuses the prisoner might offer to avoid the default (ineffective post-conviction counsel was not among them), and declare the claim barred from federal review.¹²

¹²*See, e.g., Ivey v. Catoe*, 36 Fed. App’x 718, 730 (4th Cir. 2002) (finding petitioner’s claim procedurally defaulted, and that petitioner could not overcome default by claiming PCR counsel was ineffective); *Thomas v. Eagleton*, 693 F. Supp. 2d 522, 528-29 (D.S.C. 2010) (finding petitioner’s claim procedurally defaulted, and that petitioner could not demonstrate cause or prejudice to overcome default); *Broach v. Stevenson*, No. 0:08-1627-HMH-PJG, 2009 WL 1586907 (D.S.C. June 4, 2009) (finding petitioner’s claims procedurally defaulted, and that petitioner failed to show cause and prejudice or a miscarriage of justice to overcome default); *McClure v. Ozmint*, No. 2:06-1076-HMH-RSC, 2007 WL 1656227, at *18 (D.S.C. June 5, 2007) (finding petitioner’s claims procedurally defaulted, and that ineffective assistance of PCR appellate counsel did not suffice as

After *Martinez*, the federal habeas prospects for a defaulted ineffective assistance of trial counsel claim are considerably brighter in several respects. Using the equitable rule established in *Martinez*, a prisoner presenting such a claim may argue that although it was not raised correctly, completely, or at all in the state courts, the resulting default should be excused because state post-conviction counsel performed inadequately. Unless the State concedes the existence of this form of “cause” for the default, the federal court will be required to evaluate state court counsel’s performance based on the existing record, and, where necessary, additional evidence developed through federal discovery and an evidentiary hearing.¹³ If that inquiry results in a determination that post-conviction counsel was inadequate for failing to raise a substantial ineffective assistance of trial counsel claim – *i.e.*, a claim based on allegations that, taken as true, *Walker v. True*, 399 F.3d 315, 319 (4th Cir. 2005), is “potentially legitimate,” *Martinez*, 132 S.Ct. at 1315, or “debatable amongst jurists of reason,” *Miller-El*, 537 U.S. at 337 – then the prisoner will have established an entitlement to merits review. And because that review will occur in the absence of a prior state court adjudication on the merits, it will be entirely *de novo*, and unrestrained by the “highly deferential standard for evaluating state-court rulings,” *Woodford, supra*, that would otherwise apply. In comparison to the tightly circumscribed review afforded to most claims for federal habeas relief, the consideration available for a claim that has passed successfully through *Martinez* will be highly desirable to the average habeas petitioner.

“cause” to overcome default).

¹³Because an evidentiary hearing on these issues goes to the availability of merits review rather than the actual merits of the underlying claim for habeas relief, 28 U.S.C. § 2254(e)(2)’s strict limitation on a federal court’s power to take evidence not presented to the state courts is inapplicable. *See, e.g., Dickens v. Ryan*, 740 F.3d 1302, 1321-22 (9th Cir. 2014) (en banc); *Cristin v. Brennan*, 281 F.3d 404, 415-419 (3rd Cir. 2002), *cert. denied sub nom. Cristin v. Wolfe*, 537 U.S. 897 (2002).

For the reasons that many habeas petitioners regard *Martinez* proceedings as a promising opportunity, states may well regard them as a threat to their interests in finality and the relevance of their own collateral review proceedings. To the extent a state perceives such a threat, it may take steps to neutralize it. For cases in which state post-conviction review is not yet complete, a state need only follow *Martinez*'s suggestion to ensure the provision of adequate counsel to assist prisoners. See *Martinez*, 132 S.Ct. at 1319-20. Although doing so would not guarantee that no prisoner would ever raise a *Martinez*-based argument in federal court, it would significantly reduce the likelihood that such an argument, if raised, would succeed.

For cases in which state post-conviction review has already been completed, a state may avoid the consequences of *Martinez* – and maintain control over the litigation of otherwise defaulted ineffective assistance of trial counsel claims in the first instance – by offering prisoners a mechanism through which to pursue a state court adjudication of the merits of their claims. As a practical matter, such a mechanism would take the form of a limited exception to state rules (if any) barring second or subsequent applications for post-conviction relief,¹⁴ and would authorize consideration of such an

¹⁴While many states – including South Carolina, see S.C. Code § 17-27-90 (barring grounds for relief raised in a “subsequent application” absent “sufficient reason”) – have such rules, many others already permit second or subsequent state post-conviction proceedings. See, e.g., *Grinols v. State*, 74 P.3d 889, 895 (Alaska 2003) (“Given that a right to counsel would be meaningless if that counsel were not effective, we hold that the due process clause of the Alaska Constitution requires that a defendant be given a chance to challenge the effectiveness of counsel in a second petition for post-conviction relief.”); *Stovall v. State*, 800 A.2d 31, 34 (Md. Ct. App. 2002) (holding that a post-conviction petitioner is entitled to the effective assistance of post-conviction counsel and has a right to reopen a post-conviction proceeding by asserting facts that, if proven, establish that post-conviction relief would have been granted but for the ineffective assistance of post-conviction counsel); *Jackson v. Weber*, 637 N.W.2d 19, 22 (S.D. 2001) (recognizing that, under South Dakota law, a person is entitled to effective assistance of counsel on one occasion to determine whether he received effective assistance of counsel in his initial habeas proceeding and, therefore, ineffective assistance of habeas counsel overcomes the state procedural bar of S.D. Criminal Law 21-27-16.1); *State v. McCaughtry*, 556 N.W.2d 136, 139 (Wis. 1996) (“[A] claim of ineffective assistance of

application upon a showing equivalent to that sufficient to trigger a *Martinez* proceeding in a federal court.

As a matter of federal habeas law, the existence and availability of such a state court remedy would render an otherwise *Martinez*-eligible claim “unexhausted,” and compel the federal court to refrain from addressing until it has first been presented to and denied by the state courts. *See* 28 U.S.C. § 2254(b)(1)(a); 28 U.S.C. § 2254(c); *Rose v. Lundy*, *supra*. In that instance, the federal court may administratively stay the habeas petition pursuant to *Rhines v. Weber*, *supra*, while the state court proceedings run their course. In the event those proceedings result in a merits adjudication denying relief, the prisoner may return to federal court and reactivate the previously stayed federal petition. Importantly, however, any federal review that follows will, by virtue of the existence of the new state court merits decision, be circumscribed by the full range of deferential rules that habeas law makes available to any other state court merits adjudication, *e.g.*, § 2254(e)(1)’s presumption of correctness, § 2254(e)(2)’s restriction on evidentiary hearings, § 2254(d)’s limitation on authority to grant relief. In short, by providing a remedy for otherwise defaulted ineffective assistance of trial counsel claims, a state may effectively renew its own ability to produce a judgment eligible for deferential treatment

postconviction counsel should be raised in the trial court either by a petition for habeas corpus or a motion under § 974.06, STATS.”); *Dunbar v. State*, 515 N.W.2d 12 (Iowa 1994)(“The right to counsel under section 663A.5 ‘necessarily implies that counsel be effective.’ Moreover, the ineffectiveness of postconviction relief counsel constitutes ‘sufficient cause’ under section 663A.8 to excuse an applicant’s failure to adequately raise an issue in prior proceedings.”) (citations omitted); *In re Clark*, 855 P.2d 729, 748 (Cal. 1993)(“If, therefore, counsel failed to afford adequate representation in a prior habeas corpus application, that failure may be offered in explanation and justification of the need to file another petition.”); *Lozada v. Warden*, 613 A.2d 818, 823-24 (Conn. 1992)(recognizing a successive habeas petition is the appropriate remedy for ineffective assistance of appointed initial habeas counsel); *Losh v. McKenzie*, 277 S.E.2d 606, 611 (W. Va. 1981)(“[A]n omnibus habeas corpus hearing will render a final decision and ... subsequent habeas corpus petitions will be summarily denied unless they address one of the narrow exceptions. These exceptions include: ineffective assistance of counsel at the omnibus habeas corpus hearing”).

in federal court.

II. TO MAINTAIN SOUTH CAROLINA'S LONGSTANDING PRACTICE OF PRODUCING STATE COURT JUDGMENTS THAT COMMAND RESPECT IN FEDERAL HABEAS PROCEEDINGS, THIS COURT SHOULD CONSTRUE S.C. CODE § 17-27-90 TO PERMIT A *MARTINEZ* REMEDY.

South Carolina has a consistent history of generating post-conviction relief judgments that qualify for favorable treatment under federal habeas law. That history is reflected in the extreme rarity of federal evidentiary hearings in South Carolina cases,¹⁵ and in the equally small rate at which South Carolina federal habeas petitioners obtain relief on the merits.¹⁶ The reason is simple: the vast majority of claims presented in habeas cases from South Carolina enter federal court accompanied by a state court ruling either denying relief on the merits or refusing merits review on the basis of an enforceable procedural bar. When combined with federal law designed to insulate such state court outcomes, the result has been that evidentiary records and findings of fact made in the state courts have remained intact and received deferential treatment, and defaults committed in the state courts have ordinarily been insurmountable. Going forward, however, it is unlikely that this status quo will hold unless South Carolina's post-conviction relief scheme is adapted to accommodate the concerns articulated in *Martinez* by providing a remedy for cases – like this one – in which post-conviction counsel's inadequate performance has resulted in the default of a colorable ineffective assistance of trial counsel claim.

A. The construction of § 17-27-90 adopted in *Aice v. State*, 305 S.C.

¹⁵To undersigned counsel's knowledge, only one such hearing has been held since at least 1996, when the Antiterrorism and Effective Death Penalty Act took effect.

¹⁶Apart from *Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011), no South Carolina capital prisoner has secured and maintained a final order granting federal habeas relief since *Hyman v. Aiken*, 824 F.2d 1405 (4th Cir. 1987).

448, 409 S.E.2d 392 (1991), should be re-evaluated in light of contemporary conditions.

As described in the preceding section, the federal habeas effects of *Martinez* can be neutralized by affording a prisoner a state court mechanism for obtaining a merits judgment on a previously defaulted ineffective assistance of trial counsel claim. As a statutory matter, the availability of such a mechanism in South Carolina depends upon the construction of S.C. Code § 17-27-90, which bars a “subsequent application” for post-conviction relief “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.” (emphasis added). In *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), this Court construed § 17-27-90 to strongly disfavor successive PCR applications, and expressed deep concerns that a broad reading of the statute’s “sufficient reason” clause could well result in serial, abusive filings, and afford prisoners more than “one bite at the apple.” *Aice*, 305 S.C. at 452, 409 S.E.2d at 395. While those concerns were not unfounded then and are not unfounded now, the emergence of the *Martinez* rule warrants further consideration of the policy laid down in *Aice*.

Since *Aice* was decided in 1991, circumstances have changed in at least two ways material to an evaluation of whether the strict no-successor rule put in place then is worth maintaining for the future. First, *Martinez* has now established unequivocally that prisoners who qualify for its benefit *will* have their otherwise defaulted claims heard *somewhere*, with the only question being whether those claims will be resolved in the first instance by a state court or a federal court. And second, in all of the ways described *supra*, state court judgments on the merits of a prisoner’s claim are entitled

to far more respect in federal habeas proceedings than they were more than two decades ago.¹⁷ Consequently, there is real value for state interests in providing a mechanism through which to produce those judgments, and a real cost to state interests when such a judgment is not present in a given case. Thus, the question now before the Court is whether South Carolina's interests are better served by adapting to *Martinez* or not.

Resolving that question requires careful consideration of the concerns articulated in *Aice*, and the implications of modifying state practice. Importantly, *Martinez* is engineered to limit both the scope of the opportunity it presents to prisoners, and the corresponding burden on states that choose to adapt to it. First, it applies exclusively to defaulted ineffective assistance of trial counsel claims. Although that category can be broad in its own right, it does not encompass nearly as much as would a more generalized exception applicable to *any* claim defaulted due to poor post-conviction counsel performance (e.g., prosecutorial misconduct, juror misconduct, competency, ineffective assistance of appellate counsel, etc.). Second, it limits prisoners' access to the remedy by demanding a multi-part showing that the performance of prior post-conviction counsel (if any) was both "inadequate" according to *Strickland v. Washington*, *supra*, and responsible for the default of a "substantial" claim for relief.¹⁸ While some prisoners will be capable of making that showing, many will not. Those that

¹⁷As of 1991, state court decisions on questions of law and mixed questions of law and fact – including decisions on *Strickland* ineffective assistance of trial counsel claims – were subject to plenary, non-deferential review in federal habeas proceedings. See, e.g., *Wright v. West*, 505 U.S. 277 (1992); *Miller v. Fenton*, 474 U.S. 104 (1985). That is no longer true today. See, e.g., *Cullen v. Pinholster*, 131 S.Ct. at 1403 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)) (federal habeas review of state court decision on ineffective assistance of trial counsel claim is "doubly deferential," requiring "a 'highly deferential' look at counsel's performance, *Strickland*, 466 U.S. at 689, through the 'deferential lens of § 2254(d)'").

¹⁸It is important to recognize that the *Martinez* inquiry does not turn on whether post-conviction counsel did or did not satisfy any statutory qualification criteria at the time of

do gain only a chance to “ensure that proper consideration [i]s given to a substantial claim,” *Martinez*, 132 S.Ct. at 1318, which, as a practical matter, operates as a first *real* “bite at the apple”; those incapable of making the requisite showing receive nothing of real value.

Modification of the *Aice* rule to reach the limited exception recognized in *Martinez* would be unlikely to have a significant impact on day-to-day post-conviction relief practice in South Carolina. In non-capital cases, lack of access to appointed federal habeas counsel would leave most prisoners unable to make even the threshold showing demanded by *Martinez*, and would therefore result in little, if any, change to current conditions.¹⁹ Prisoners in capital cases do have access to appointed federal habeas counsel, *see* 18 U.S.C. § 3599, and therefore have greater capacity to identify and assert potentially *Martinez*-eligible claims, but affording them a state court mechanism through which to do so would not be entirely inconsistent with current policy. Since 1996, S.C. Code § 17-27-160(B) has provided death-sentenced prisoners in South Carolina with a statutory right to the appointment of qualified PCR counsel. In doing so, state law has implicitly acknowledged what *Martinez* recently made explicit: “Without the help of an adequate attorney, a prisoner will have ...

appointment. Rather, just as in the *Strickland* context from which it borrowed, *Martinez* is concerned with counsel’s actual performance in the identification, development, and litigation of the prisoner’s ineffective assistance of trial counsel claims. Thus, while counsel’s lack of formal qualification under a statute is relevant to the *Martinez* inquiry, it is not dispositive. The real question is whether counsel’s acts and omissions during the representation conformed to prevailing professional norms.

¹⁹*See Duncan v. Walker*, 533 U.S. 167, 191 (2001) (Breyer, J., dissenting) (“[T]he vast majority of federal habeas corpus petitions are brought without legal representation. *See* Federal Habeas Corpus Review 14 (finding that 93% of habeas petitioners in study were *pro se*).”); 18 U.S.C. § 3006A (providing for appointment of counsel under limited circumstances); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir.1984) (noting district court’s discretion to appoint counsel under “exceptional circumstances”), *disapproved on other grounds by Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa*, 490 U.S. 296, 300 (1989).

difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim.” *Martinez*, 132 S.Ct. at 1317. Construing § 17-27-90 to permit a remedy for the limited subset of cases in which the promise of adequate PCR counsel is proven to have gone unfulfilled would both strengthen that promise, and align South Carolina with the trajectory set by the Supreme Court in *Martinez*.

Furthermore, permitting a *Martinez*-style remedy would also be consistent with the approach taken in at least two prior capital cases in which the initial PCR proceedings proved insufficient. In 2002, Luke Williams was permitted, over the State’s objection, to pursue post-conviction relief a second time on the basis that the attorneys originally appointed to represent him were unqualified for the assignment. *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 barred by *Aice*’s construction of § 17-27-90. *See Williams v. State*, 363 S.C. 341, 611 S.E.2d 232 (2005). Later, in 2010, Edward Lee Elmore also won relief from his death sentence after he was permitted, again over the State’s objection, to proceed with a second application of post-conviction relief. That judgment was not appealed. Although neither *Williams* nor *Elmore* precisely followed the path *Martinez* would mark years later, each was driven by the same equitable principle: where a first application for post-conviction relief fails to afford a prisoner one meaningful “bite at the apple,” it is appropriate to permit a second application to proceed. *See Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (“All applicants are entitled to a full and fair opportunity to present claims in one PCR application.”).

Finally, to the extent the prospect of establishing a *Martinez*-style remedy in South Carolina

raises concerns about the possibility of opening a “floodgate” of litigation, those concerns could be addressed in the procedures to be utilized by courts assigned to hear the cases. For example, the availability of the remedy could, as a threshold matter, be conditioned upon satisfaction of a heightened pleading standard, under which a prisoner seeking a second round of review would be required to allege specific inadequacies in prior counsel’s performance, and link those inadequacies to the prior default of the ineffective assistance of trial counsel claims the prisoner proposes to develop or present. Such inadequacies could include (but would not necessarily be limited to) a showing that prior counsel conducted little or no independent investigation of the case or the available grounds for relief, thereby failing to discharge the most basic obligation of the post-conviction lawyer. A prisoner capable of making such a threshold showing could be confidently classified as having been afforded something less than one full and fair “bite at the apple,” such that he or she should, in fairness, be permitted to proceed with a second PCR application. Conversely, a prisoner unable to plead a demonstrable deficiency in prior counsel’s performance, or to link any such deficiency with a colorable but defaulted ineffective assistance of trial counsel claim, could rightly be subject to summary dismissal by the PCR court.

In sum, federal habeas law has evolved past *Aice*’s construction of § 17-27-90, such that retention and strict enforcement of the no-successor rule put in place more than twenty years ago would impair, rather than promote, important state interests. The better course – and one readily available as a matter of statutory interpretation – is to adapt South Carolina’s post-conviction review procedure to the landscape as *Martinez* has changed it by permitting second-in time applications where prior post-conviction counsel’s “inadequate” representation led to the default of a “substantial” (*i.e.*, “debatable”) claim of ineffective assistance of trial counsel.

B. Robertson's case should be remanded for further proceedings consistent with the limited exception established in *Martinez*.

Martinez had not yet been decided at the time the Circuit Court signed respondent's proposed order dismissing Robertson's second-in-time PCR application as impermissibly successive. As a result, that order does not speak to the standard *Martinez* established. Just as importantly, the findings the order does contain do not reliably answer the *Martinez* inquiry; some are marginally relevant at best, and others were made in flat disregard of the basic rules of fair process.

Consistent with the South Carolina precedents that existed at the time, the Circuit Court proceedings were largely focused on initial PCR counsel's failure to satisfy the statutory qualification criteria set forth in § 17-27-160(B). While Robertson maintains that counsel were not qualified within the meaning of the statute – and that the order's purported finding to the contrary cannot be reconciled with the record evidence – that fact has only limited relevance under *Martinez*, which is concerned, not with counsel's resume at the time of appointment, but with their conduct during the representation itself.

On the question at the center of the *Martinez* inquiry – whether PCR counsel's performance was “inadequate” within the meaning of *Strickland* and prevailing professional norms – the order adopted below contains no coherent determinations on which Robertson's eligibility to proceed may be reliably determined. On the contrary, within a span of four pages the order declares *both* that “there is no merit to Robertson's contention that his prior PCR counsel did not perform competently,” App. 4438, and that “the only way for [the court] to determine whether prior collateral counsel's performance was incompetent is to hold an evidentiary hearing, where ... counsel could testify as to their investigation and what issue(s) they may have investigated but did not pursue at the evidentiary

hearing,” App. 4441.²⁰ While Robertson had requested just such a hearing, and had submitted ample allegations indicating that prior counsel’s performance fell well short of prevailing norms,²¹ the court declared the allegations irrelevant in light of *Aice* and the absence of a Sixth Amendment right to effective post-conviction counsel, and dismissed the notion of a hearing at which to make informed factual findings as “wasteful litigation.” *Id.*

Similarly, the order below does not speak, directly or indirectly, to whether Robertson’s new ineffective assistance of trial counsel claims are “substantial” for *Martinez* purposes. Although Robertson had pled five such claims, *see* App. 4202-03, none were acknowledged or analyzed. Instead, the order mischaracterizes Robertson’s allegations as “simply stating that [new counsel]

²⁰*See also id.* (continuing: “Only then could this Court determine whether [initial PCR counsel’s] 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*.”).

²¹*See* App. 4204 (Amended Application for Post-Conviction Relief) (alleging PCR counsel were ineffective, inexperienced, and unqualified under S.C. Code § 17-27-160(B)); *see also* App. 4449-50 (Motion to Alter or Amend [PCR] Judgment) (arguing the circuit court improperly denied Robertson’s claim that PCR counsel were unqualified without taking evidence). It has long been settled that a state court cannot dismiss a well-pleaded federal claim without giving the applicant an opportunity for fact development in support of the claim. *See Coleman v. Alabama*, 377 U.S. 129 (1964); *McNeal v. Culver*, 365 U.S. 109 (1961); *Herman v. Claudy*, 350 U.S. 116 (1956); *Palmer v. Ashe*, 342 U.S. 134 (1952). Instead, disputed material facts must be resolved through a hearing. *See McNeal*, 365 U.S. at 117 (reversing summary dismissal where record was inadequate to resolve disputed issues and “the allegations themselves made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are”); *Herman*, 350 U.S. at 120-21 (finding “the allegations in the petition and the answer reveal[] a sharp dispute as to the facts material to determining the constitutional questions involved ... the very kind of dispute which should be decided only after a hearing”); *Smith v. O’Grady*, 312 U.S. 329, 334 (1941) (remanding for hearing where “[t]he state court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand.”); *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).

would have handled the case differently,” then declares that position insufficient to “establish that PCR counsel were deficient, nor any prejudice to Robertson.” App. 4438. *Martinez* requires more, as does this Court’s own decision in *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013), which was announced while the petition for certiorari was pending in this case.²²

Because the order adopted by the PCR court does not address the considerations enumerated in *Martinez*, and was adopted in the absence of anything resembling a fair fact development process, it is of no meaningful use in determining whether Robertson has made the showing *Martinez* contemplates. As described *supra*, and in the pleadings submitted below, the facts and circumstances surrounding Robertson’s initial PCR proceeding – *e.g.*, counsel’s failure to conduct any independent investigation, articulate coherent and plausible claims for relief, or offer facially adequate proof to support the vague assertions they did make – easily reach the “inadequate” performance threshold set by *Martinez*. Likewise, the new grounds for relief identified by Robertson’s federal habeas counsel are “substantial” for *Martinez* purposes,²³ and more such grounds likely await discovery through a competent post-conviction investigation. For all of these reasons, the order entered by the Circuit Court should be vacated, and this case should be remanded for further proceedings consistent with *Martinez*.

²²Although *McCoy* was not available at the time the PCR order was signed, the principles articulated there are consistent with a series of Supreme Court decisions mandating fair and reliable process in the adjudication of federal constitutional issues, all of which were cited to the PCR court. See App. 4450 (Motion to Alter or Amend [PCR] Judgment).

²³While the Circuit Court never engaged with those claims, the federal district court’s decision to stay the habeas proceedings indicates that, at the very least, that court did not regard them as “plainly meritless.” *Rhines*, 544 U.S. at 277; see also App. 4166 (noting respondent’s “acquiescence” to the “viability of” the “grounds alleged” by Robertson).

**III. ROBERTSON’S SECOND-IN-TIME PCR APPLICATION IS NOT SUBJECT TO
DISMISSAL AS UNTIMELY UNDER S.C. CODE § 17-27-45.**

The PCR order also contains a determination that Robertson’s second-in-time application is barred by S.C. Code § 17-27-45, because it was filed more than one year after the judgment against him became final on direct review, and because the grounds for relief set forth in the application could have been discovered by competent counsel in time to have been included in his first application. *See* App. 4426-29. That determination is inconsistent with the principles articulated and applied in *Odom v. State*, *supra*. There, this Court reversed a PCR court’s summary dismissal of a second PCR application as untimely, explaining that it would be inappropriate to apply the limitations period to bar review given that procedural defects in the prisoner’s earlier PCR proceeding had thus far “prevent[ed]” him from having “his fair ‘bite’ at the apple.” *Odom*, 337 S.C. at 263, 523 S.E.2d at 757.

The same is true here. Because his appointed counsel performed inadequately by failing to investigate, develop, or present substantial claims for relief, Robertson’s initial PCR proceeding bore no resemblance to the “full and fair opportunity” for collateral review that South Carolina law requires. *Odom*, 337 S.C. at 261, 523 S.E.2d at 755. The deficiencies in Robertson’s first PCR proceeding were not of his making;²⁴ instead, they were a direct consequence of the appointment of unqualified counsel who failed to discharge the basic obligations of post-conviction representation.

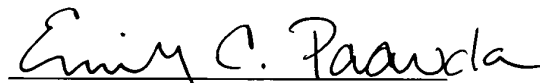
²⁴The PCR order purported to find otherwise, faulting Robertson for failing to raise a *pro se* objection to the appointment of unqualified counsel, and treating that asserted failure as a waiver of his right to seek redress. *See* App. 4427-28. That cannot be correct. When Robertson announced his intention to seek post-conviction relief, South Carolina law obligated the presiding judge – not Robertson himself – to select and appoint qualified counsel. *See* S.C. Code § 17-27-160(B). Given that mandate from the General Assembly, Robertson can hardly be faulted for relying on the PCR court to do as the law instructed by furnishing him with competent lawyers.

Under such circumstances, there is no principled basis for insisting upon rigid enforcement of the limitations period. *See Odom*, 337 S.C. at 263-64, 523 S.E.2d at 757.

CONCLUSION

Wherefore, for all of the foregoing reasons, this Court should construe S.C. Code § 17-27-90 to permit a remedy consistent with the rule established in *Martinez*, vacate the Circuit Court's order dismissing Robertson's second-in-time PCR application, and remand this case to afford Robertson an opportunity to develop, present, and secure adjudications of his previously defaulted ineffective assistance of trial counsel claims.

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February 5, 2015

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2012-205909

JAMES ROBERTSON *Petitioner*

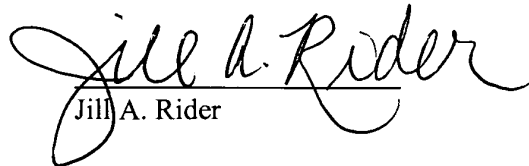
v.

STATE OF SOUTH CAROLINA *Respondent*

CERTIFICATE OF SERVICE

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 11 2015

Appeal From York County
The Honorable Lee S. Alford, Circuit Court Judge
Appellate case No. 2012-205909

S.C. Supreme Court

JAMES D. ROBERTSON, #5067,

Petitioner,

vs.

THE STATE,

Respondent.

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4. Also, provided that they can present a claim that satisfies the demanding prerequisites for relief, South Carolina inmates potentially have the ability to pursue the remedy of state habeas corpus in this court’s original jurisdiction, a procedure over which this Court is the gatekeeper.

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PETITIONER'S QUESTION PRESENTED

Whether, in light of Martinez v. Ryan, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and the past treatment of similarly situated South Carolina prisoners, Robertson should be permitted to proceed with a second-in-time application for post-conviction relief asserting colorable claims of ineffective assistance of trial counsel that prior PCR counsel ineffectively failed to investigate or present?

COUNTERSTATEMENT OF ISSUES PRESENTED

I. Whether this Court must affirm the PCR judge's Order and judgment summarily dismissing Robertson's 2011 Application because, in a non-capital PCR case, this Court has already held that *Martinez v. Ryan*, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), does not apply to PCR cases in this state and Robertson has not mentioned the Court's earlier unanimous and published Order, or provided sufficient reason for reaching a different result in his case; and because evidence of probative value supports the PCR judge's findings that (1) *Martinez* does not require state courts to have merits hearings on successive applications claiming that initial PCR counsel was ineffective; (2) Robertson's 2011 Application is barred by the successive application doctrine in S.C. Code Ann. § 17-27-90 (2003) and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); and (3) it is barred by the statute of limitations and the doctrine of laches?

STATEMENT OF THE CASE

A. The trial and the protracted, but ultimately abandoned, direct appeal.

Petitioner, James D. Robertson, #5067 (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 and sadistically murdering his parents. The York County Grand Jury indicted him on April 23, 1998 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**. The State timely served a Notice of Intent to Seek the Death Penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002) and 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. 2015).¹

This Court assigned the case to the Honorable John C. Hayes, III, who retained exclusive jurisdiction. James W. Hancock and James W. Boyd, Esquires, represented Robertson. Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Following a series of motions hearings,² 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**. A sentencing phase was conducted following Robertson's exercise of the 24-hour statutory waiting period in §

¹ Thus, the State relied on the statutory aggravating circumstances 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.

² Judge Hayes heard motion hearings on July 17, 1998 (**App. 32-48**), September 22 (**App. 49-55**) and 25, 1998 (**App. 55-79**); November 2 (**App. 79-90**) and 20, 1998; December 4 (**App. 90-121**) and 18, 1998; and on February 12 and 19, 1999.

16-3-20(B).

In addition to the five statutory aggravating circumstances relied upon by the State, Judge Hayes instructed the jury on 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 sentenced him to 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). The proceedings on appeal were protracted and lengthy because of Robertson's machinations. At various points on direct appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III, represented Robertson before this 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. This Court entered an Order on June 25, 1999 granting direct appellate review under *White v. State*.

Robertson wrote this Court on August 28, 2000. 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 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. In his Report, Judge Hayes found that it was unnecessary to hold a competency hearing because Robertson no longer desired to appear *pro se*. Therefore, this 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.³ Again, however, Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote this Court on April 18, 2002 and 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.

Robertson again wrote a letter to this Court dated June 3, 2002, in which he asked the Court

³ 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.

to relieve Mr. Savitz and to allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. This Court then filed an Order on June 26, 2002, remanding the matter to Judge Hayes for a hearing on Robertson's competency to appear *pro se*.

Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002.⁴ 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. This Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003. 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.

⁴ 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.

7. The judge erred in sentencing appellant to death.

Pro Se Initial Brief of Appellant at p. 2.

After the State filed the Initial Brief of Respondent on December 31, 2003, the direct appeal was dismissed and re-instated on several occasions because of Robertson's failure to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the 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.⁵ 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, this Court of 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's direct appeal lasted over five years and eleven months from this Court's June 25, 1999 granting direct appellate review under *White v. State*, until it was voluntarily abandoned by him.

B. Original state PCR.

⁵ Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

On July 7, 2005, this Court granted Robertson's request for a stay of execution to pursue Post-Conviction Relief (PCR), pursuant to *In re Stays of Execution*. The Court also appointed the Honorable John C. Few to preside over this case. 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. **App. 3869**. Judge Few held a hearing at the Greenville County 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. **App. 3657**.⁶ Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

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**.⁷

At the outset of the PCR hearing, Robertson amended his Application and proceeded on

⁶ A copy of the transcript of the September 23, 2005 hearing is not currently available. Respondent does not have a copy 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. Robertson also has conceded that a copy of that transcript is unavailable because the tapes of the hearing do not exist. *See* Rule 607(i), SCACR.

⁷ 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**. The Court also had before it 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**.

twelve specific grounds of ineffective assistance of counsel. **App. 3268-73.**⁸ Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. **App. 3652- 3757.**

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. **App. 3766-80.** 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, App. 3768. The State filed a Return to Petition for Writ of Certiorari on July 15, 2009. **App. 3783-3810.** This Court filed a letter Order denying certiorari on October 6, 2010. **App. 3811-12.** It sent the Remittitur to the York County Clerk of Court on October 22, 2010.

C. The Petition for Writ of Habeas Corpus.

On October 27, 2010, Robertson filed a Motion for Stay of Execution and a Motion for

⁸ He raised the following 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; (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.**

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 in the United States District Court on January 7, 2011. **App. 3820-46**. Although he had only exhausted his claim related to counsel's use of Ms. Casio in state PCR, his Petition included a number of allegations that he asserted should have been raised by his original collateral counsel. He also filed a Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 7th. **App. 3813-19**.

Respondent filed a Response to Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 24, 2011. **App. 3854-68**. Robertson filed a Reply to Respondent's Response on February 1, 2011. **App. 3890-97**. On March 28, 2011, Respondent filed a Motion for Summary Judgment (**App. 4031**) and a Return and Memorandum of Law in Support of Motion for Summary Judgment. **App. 4032-4162**. Magistrate Judge Bruce H. Hendrix entered an Order on April 8, 2011 staying those proceedings. *See Robertson v. Ozmint*, C.A. No.2:11-63-SB-BHH (ECF #44, filed Apr. 8, 2011). **App. 4163-69**. Judge Hendrix denied Respondent's April 15, 2011 Motion to Reconsider her Order (**App. 4170-85**) on November 30, 2011. Respondent's subsequent efforts to vacate the stay have likewise been unsuccessful. **App. 4491-93**.

C. Robertson's successive PCR.

Robertson filed his successive PCR Application (2011-CP-46-00072), through counsel, on January 7, 2011. **App. 3847-53.** In his 2011 Application, he raised six claims of ineffective assistance of trial counsel [Grounds 10 & 11(a)(i) and 10 & 11(b)(i)-(v)]; four claims of trial court error [Grounds 10 & 11(c)-(f) that are not cognizable in PCR, see S.C. Code Ann. § 17-27-20(b) (2003) (“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”); *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in a PCR application absent a claim of ineffective assistance of counsel)]; and three claims of ineffective assistance of appellate counsel [Grounds 10 & 11(g)(i)-(iii)]. **App. 3848-49.** On March 24, 2011, Respondent made its Return and Motion to Dismiss and moved for summary dismissal. **App. 3900-4030.**

The Honorable Lee S. Alford held a status conference on July 5, 2011 at the Moss Judicial Center, in York County South Carolina. Robertson was present at the hearing. Keir Weyble, and Emily C. Paavola, Esquires, were also present, and Senior Assistant Attorney General William Edgar Salter, III, represented the State. At the hearing, Judge Alford appointed Mr. Weyble and Ms. Paavola to represent Robertson. Also, he (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 Ann. §§ 17-27-40 & -50 (2003). Judge Alford ruled that the verification would be considered *nunc pro tunc*. **App. 4187-99.**⁹

⁹ Robertson’s counsel served a draft of an Amended PCR Application on Respondent immediately after this hearing.

On July 27, 2011, Respondent received a verified Amended Application for Post-Conviction Relief (**App. 4201-07**) and Robertson's Response in Opposition to Motion to Dismiss, both of which were dated and served July 25, 2011. **App. 4208-4385**. Respondent 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. **App. 4386-4409**.

Judge Alford filed an Order granting Respondent's motion to dismiss and dismissing the 2011 Application with prejudice on September 20, 2011. Judge Alford found that: (1) the Application was barred by the one year statute of limitations; (2) the Application was impermissibly successive; (3) Robertson waived his right to challenge whether his original PCR counsel was statutorily qualified by not challenging lead counsel's qualifications during his initial PCR; (4) Robertson had not proven that collateral counsel were not qualified to represent him and he had erroneously construed the statutory requirements for appointment of PCR counsel in a capital case; (5) Robertson had not proven that his original PCR counsel had not performed competently under *Strickland v. Washington*, 466 U.S. 668 (1984), and Robertson had not demonstrated either deficient performance or resulting prejudice merely because new counsel raised different grounds that were not raised in the original action; (6) no due process or equal protection violation occurred during the initial PCR; (7) the United States Supreme Court's granting of certiorari in *Maples v. Thomas*, 132 S.Ct. 912, 914 (2012) and *Martinez v. Ryan*, 131 S.Ct. 2960 (2012), did not require the relief sought; and (8) laches barred relief. **App. 4412-47**. Robertson filed a Motion to Alter or Amend the Judgment in October 14, 2011. **App. 4448-73**. He then filed an October 27th Motion to Supplement. **App. 4474-86**. Judge Alford denied the motion to alter or amend in a November 28, 2011 Order. **App. 4487-90**.

Robertson timely served his notice of appeal. He filed his Petition for Writ of Certiorari on September 14, 2012. A. Mattison Bogan, Esquire, and Chief Appellate Defender Robert M. Dudek filed the Petition on his behalf. Respondent made its Return to the Petition. This Court granted certiorari on September 24, 2014. After the Court had granted the Petition, Mr. Weyble and Ms. Paavola were substituted as counsel. Robertson filed a Brief of Petitioner on February 5, 2015.

ARGUMENTS

I. This Court must affirm the PCR judge's summary dismissal of Robertson's 2011 Application because, in a non-capital PCR case, this Court has already held that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not apply to PCR cases in this state and Robertson has not mentioned the Court's earlier unanimous and published Order or provided sufficient reason for reaching a different result in his case; and because evidence of probative value supports the PCR judge's findings that (1) *Martinez* does not require state courts to have merits hearings on successive applications claiming that initial PCR counsel was ineffective; (2) Robertson's 2011 Application is barred by the successive application doctrine in S.C. Code Ann. § 17-27-90 (2003) and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); and (3) it is barred by the statute of limitations and the doctrine of laches.

Contrary to Robertson's argument, the present case is not about whether the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), requires state PCR courts to entertain successive applications because it does not, a fact that this Court has previously and correctly recognized. Nor is this case about whether it is wise, as a matter of policy to allow the filing of successive applications in light of *Martinez*. Rather, Robertson is asking the Court to carve out an exception in state Post-Conviction Relief remedies to benefit those inmates under a sentence of death - the smallest group of PCR applicants who already are afforded the most protections in our judicial system - and to guarantee them the safety net of a second Post-Conviction Relief hearing that will not be afforded to the vast majority of PCR applicants, who do not have the same protections already in place. There is no reason to grant this type of relief, which is not required by the United States Constitution, the South Carolina Constitution, a

state statute or this Court's prior precedent. Rather, granting the requested relief would grant Robertson "a windfall to which the law does not entitle him," *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838 (1993) and would thereby erode public confidence in the criminal justice system by defeating any semblance of finality to the appeals process for death sentenced inmates.

Instead of granting relief, Respondent submits that the Court must affirm the PCR judge's judgment and Order because this Court has already held that *Martinez* does not require state PCR courts to entertain successive applications based upon the claims of disgruntled inmates that initial PCR counsel was ineffective in failing to litigate a different claim or claims, see *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013). Also, the Court's unanimous, published Order in *Kelly* is consistent with other state appellate courts to consider the issue, and Robertson has not even bothered to address *Kelly*, much less offer any sound reason for departing from the Court's earlier decision. Also, evidence of probative value supports the PCR judge's findings that Robertson's 2011 Application is barred as successive under § 17-27-90 and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); and that the Application is also barred by the statute of limitations and the doctrine of laches.

A. Standard of Review on Certiorari.

This Court will only reverse the PCR judge's decision when there is no probative evidence to support his findings or the decision is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). Robertson has not met this burden of proof.

B. Discussion.

1. **This Court has previously held that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions, and Robertson has not offered any sound reason for now adopting a different standard.**

In *Martinez*, the United States Supreme Court found that “[t]o protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in [*Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991)] that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.” *Id.* at 1315. Based upon principles of equity, *id.* at 1319-20, the Court held 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 1320.

The Court did not hold that the Sixth Amendment required the effective assistance of collateral counsel in state PCR; it did not recognize a right to have counsel appointed in a state collateral proceeding; and it did not otherwise impose any requirements on state court PCR proceedings. Rather, it determined that defendants had an “equitable” right to the effective assistance of initial post-conviction counsel. *Id.* at 1319–20. *See also id.* at 1326 (Scalia, J., dissenting) (noting that the reframing of the issue presented “avoid[ed] the Court’s need to confront the established rule that there is no right to counsel in collateral proceedings”). Thus, *Martinez* simply created a very “narrow exception” to the ordinary procedural default rules applicable in federal habeas corpus proceedings, by holding that a federal habeas court may address a claim of ineffective assistance of trial counsel when collateral counsel’s ineffectiveness caused a procedural default in an initial-review collateral proceeding and the petitioner demonstrates that the claim has some merit. *Id.* at 1319-20 (emphasis added). *See also id.* at 1315.

This Court has previously decided that the Supreme Court’s decision in *Martinez* does not apply to Post-Conviction Relief in this State, in the non-capital case of *Kelly v. State*, *supra*. In

Kelly, the applicant relied upon *Martinez* to avoid the state successiveness bar. However, this Court filed a unanimous Order rejecting the argument and noting a great agreement among the States that *Martinez* did not require this result. Specifically, the Court ruled that:

In *Martinez*, the “precise question” addressed by the United States Supreme Court is “whether ineffective assistance in an initial review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.” *Martinez*, 132 S.Ct. at 1315. (Emphasis added). The Court held that “[w]here, 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.” *Martinez*, 132 S.Ct. at 1320. (Emphasis added). The Court went on to set forth the requirements that must be met to overcome the procedural default in a federal habeas action. *Martinez*, 132 S.Ct. at 1318–19.

Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions. See *State v. Travis*, 2013 WL 1196332 (Del.Super.Ct.2013) (finding the holding in *Martinez* is “limited only to that narrow procedural situation under federal law concerning habeas corpus.”); *Gore v. State*, 91 So.3d 769 (Fla.2012) (“It appears that *Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context.... *Martinez* provides Gore with no basis for relief in this Court.”); *People v. Blackmon*, 2013 IL App (1st) 111908–U, 2013 WL 2145922 (2013) (finding Blackmon’s reliance on *Martinez* in attempting to file a successive state PCR application misplaced because *Martinez* applies to federal habeas review); *Logan v. State*, 377 S.W.3d 623 (Mo.Ct.App.2012) (“The limited holding of *Martinez*, while having the potential to aid Logan should he file a future federal habeas action, does not afford Logan a second chance at obtaining relief through a [state post-conviction relief] proceeding.”); *Rowell v. State*, 2013 WL 1501618 (Nev.2013) (“[A]ppellant’s reliance upon *Martinez* was misplaced as *Martinez* relates to federal procedural bars and not state procedural bars. Thus, the holding in *Martinez* would not provide good cause because it is inapplicable in state court.”); *Commonwealth v. Saunders*, 60 A.3d 162 (Pa.Super.Ct.2013). As such, petitioner’s contention that, based on *Martinez*, the circuit court erred in dismissing petitioner’s third application for post-conviction relief as successive is without merit.

Kelly v. State, 404 S.C. at 365-66, 745 S.E.2d at 378 (emphasis added).

As the Court recognized in *Kelly*, the vast majority of appellate courts to have consider the

issue have ruled that *Martinez* does not have any application on state procedural bars to successive PCR or state habeas actions, even cases involving death sentenced inmates.¹⁰ In addition to the cases cited in *Kelly*, Respondent would point to *State v. Escareno–Meraz*, 232 Ariz. 586, 307 P.3d 1013, 1014 (App.2013) (concluding that “*Martinez* does not alter established Arizona law” that a defendant is not entitled to effective assistance of counsel in post-conviction proceedings); *Martin v. State*, 386 S.W.3d 179, 185-86 (Mo. Ct. App. Nov. 20, 2012) (“*Martinez* speaks only to federal habeas corpus procedure and does not establish a constitutional right to the effective assistance of postconviction counsel. In fact, the *Martinez* court specifically states that it is not resolving the question of whether a prisoner has a constitutional right to post-conviction counsel”); *Yarberry v. State*, 372 S.W.3d 568, 575 (Mo.App. 2012); *Ex parte Hernandez*, 2012 WL 1060079, 2 (Tex.Crim.App. Mar. 21, 2012) (Price, J., concurring) (unpublished); *State v. Johnson*, 2012 WL 5364693, 5 (Del.Super., Oct. 31, 2012); *People v. Miller*, 2013 IL App (1st) 111147, 370 Ill. Dec. 695, 988 N.E.2d 1051 (App. Ct. 1st Dist. 2013), *appeal denied*, 374 Ill. Dec. 573, 996 N.E.2d 20 (Ill. 2013) (“We decline defendant's invitation to apply *Martinez*. ... *Martinez* applies to federal courts considering habeas petitions”); *Howell v. State*, 109 So. 3d 763, 774 (Fla. 2013) (“We have already rejected the claim that *Martinez* can be used in state proceedings”); *Jimenez v. State*, 153 So.3d 906, 2014 WL 5487756, *1 (Fla. 2014) (affirming death-sentenced petitioner’s appeal of summary denial of a successive PCR motion, finding that “[n]either *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), nor *Martinez* ... grants Florida criminal defendants the right to challenge the

¹⁰ Indeed, because the ruling in *Martinez* was not based upon a constitutional right to counsel in collateral proceedings, the Supreme Court could not mandate a change in how states conduct those proceedings. *E.g.*, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“Today, we reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States”); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) (“there is no Sixth Amendment right to PCR proceedings, and that state PCR is provided as a matter of legislative grace rather than of federal constitutional right). *Cf. Martinez*, 132 S.Ct. at 1319-20.

effectiveness of trial counsel or present *Brady v. Maryland*, 373 U.S. 83 (1963), challenges in successive state postconviction proceedings based upon a claim of ineffective assistance of initial collateral counsel”); *Atwater v. State*, 118 So.3d 219, 2013 WL 3198744,*1 (Fla. 2013) (affirming postconviction court's summarily denial of death sentenced inmate's third successive motion for postconviction relief, citing *Gore v. State*); *State v. Hessler*, 288 Neb. 670, 680, 850 N.W.2d 777, 786 (Neb. 2014) (“*Martinez* did not recognize a constitutional right to effective assistance of postconviction counsel. Based upon principles of equity, it expanded only the types of cause permitting a federal habeas court to excuse a procedural default in a federal habeas proceeding. Nothing in *Martinez* prevents state courts from enforcing procedural defaults in accordance with state law”) (footnote omitted); *Ex Parte Thurmond*, 2012 WL 752543 (Tex.Crim.App., Feb. 29, 2012) (denying both subsequent application for writ of habeas corpus and a motion for stay of execution where defendant did not meet statutory requirements for filing successive applications); *Brown v. McDaniel*, 331 P.3d 867, 871-72 (Nev. 2014) (affirming summary dismissal in non-capital case of untimely and successive post-conviction petition, and finding that *Martinez* did not “mandate a change in our case law holding that noncapital petitioners have no right to the effective assistance of counsel in post-conviction proceedings and that the ineffectiveness of counsel representing a noncapital petitioner does not constitute good cause to excuse a state procedural bar”).

Respondent submits that *Kelly* disposes of the issue on which the Court granted certiorari in this case. However, Robertson does not even mention the existence of *Kelly* in his brief, much less try to distinguish it in some meaningful fashion.¹¹ Therefore, this Court may wish to dismiss

¹¹ Respondent would note that at least one capital inmate seeking a hearing on his successive Application has taken the odd and offensive position that the unanimous and published Order in *Kelly* is not binding precedent because it is an Order and not an Opinion. See *Brad Sigmon v. State*, 2014-CP-23-04632,

certiorari as improvidently granted or, alternatively, affirm the PCR judge's ruling because his failure to do so should bar him from obtaining relief.

Further, Respondent submits that Robertson's argument is contrary to the intent of the majority opinion in *Martinez*. The majority of the Court in *Martinez* repeatedly emphasized that its holding was "narrow" and "limited." *Id.* at 1313 (rephrasing question before it in "a more narrow, but still dispositive, formulation"); *id.* at 1315 ("This opinion qualifies *Coleman* by recognizing a narrow exception"); *id.* at 1319 (referring to "[t]his limited qualification to *Coleman*"); *id.* at 1320 (referring to the "limited circumstances" and the "limited nature" of the Court's holding). In *Trevino*, the Court extended the holding in *Martinez* to states where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S.Ct. at 1921.¹² However, the majority in *Trevino*, again,

Petitioner's Motion and Memorandum of Law at p. 7, dated February 6, 2015. If the position asserted in *Sigmon* is correct, then the parties are likewise not bound by the Court's other prior Orders, such as *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), and *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (1990). This would lead to a ludicrous result, since both courts and litigants routinely rely upon such orders.

However, Robertson has not even made that argument. As a result, any attempt to address *Kelly* in a Reply Brief would not be properly before this Court. See *Glasscock, Inc. v. United States Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief"); *Hunter v. Staples*, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999) (where the Department argued in the initial brief that the evidence was inadmissible under Rule 608 and 613 and did not argue error under Rule 609(a)(2) in its initial brief, it was precluded from asserting this argument for the first time in its reply brief); Toal et al., *Appellate Practice in South Carolina* 75-76 (2d. ed. 2002); 4 C.J.S. Appeal & Error Sec. 619 (2005) ("A point raised for the first time in the reply brief will not be considered by the appellate court").

¹² In describing its holding in *Martinez*, the Court stated that:

[w]e ... read *Coleman* as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review

emphasized that the holding of *Martinez* was “limited.” *See, e.g., id.* at 1917 (“We ultimately held that a “narrow exception” should “modify the unqualified statement in *Coleman*”); *id.* at 1921 (referring to “a narrow exception”).

The majority in *Martinez* also stated that “[t]he holding here ought not to put a significant strain on state resources. When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.” *Martinez*, 132 S.Ct. at 1319. The Court then added that:

This is but one of the differences between a constitutional ruling and the equitable ruling of this case. A constitutional ruling would provide defendants a freestanding constitutional claim to raise; it would require the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from state courts if the States' system of appointing counsel did not conform to the constitutional rule. An equitable ruling, by contrast, permits States a variety of systems for appointing counsel in initial-review collateral proceedings. And it permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings. In addition, state collateral cases on direct review from state courts are unaffected by the ruling in this case.

Id. at 1319–20.

Thus, Robertson’s suggestion that the Court should permit South Carolina inmates to file

proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law requires that an “ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding.”

Trevino, 133 S.Ct. at 1918 (citing *Martinez*, 132 S.Ct. at 1318–19, 1320–21); *see also Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012) (summarizing the *Martinez* test to require the following: “a reviewing court must determine whether the petitioner’s attorney in the first collateral proceeding was ineffective under *Strickland*, whether the petitioner’s claim of ineffective assistance of trial counsel is substantial, and whether there is prejudice”).

successive PCR applications, *contra Kelly*, 404 S.C. at 365-66, 745 S.E.2d at 378, is inconsistent with the *Martinez* Court's intention in creating only a "limited" exception to the general rule of *Coleman*.¹³ Further, the Court created rule providing for appointment of counsel in all PCR cases when "the [initial] application presents questions of law or fact which will require a hearing," 71.1(d), SCRCP, seems to satisfy the concerns of the majority in *Martinez*. Even it does not satisfy those concerns, certainly the statutory requirements for the appointment of counsel in capital PCR cases in S.C. Code Ann. § 17-27-160(B) does, or at least should.

The notion that Robertson's request for this Court to grant a hearing on Robertson's successive Application is supported by *Martinez* is belied by the claims that Robertson has raised in the 2011 Application. **The rule created in *Martinez* does not have any bearing on seven of the thirteen claims that he has raised in his successive Application** (those raising claims of trial court error and ineffective assistance of appellate counsel), *see Martinez*, 132 S.Ct. at 1320 ("The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts"), **and four of those allegations are beyond the statutory authority of a court to address in PCR. App. 3848-49.** Further, permitting him to litigate the substantive claims of error in his Application that are not based upon alleged ineffectiveness of counsel – claims that could have been raised at trial and by Robertson on direct

¹³ Ironically, although the majority of the *Martinez* Court views the exception it created as "limited," that "limited exception" has not stopped ever single death sentenced inmate in South Carolina from attempting to obtain relief based upon claims of ineffective assistance of trial counsel that were never presented in state PCR, and using original PCR counsel's ineffective and the *Martinez* decision as the basis for their "right" to do so. While it is understandable that *pro se* litigants do not understand how limited the *Martinez* exception is, Robertson is represented by attorneys specializing in handling capital cases in the appellate process.

appeal¹⁴ - the Court will contravene the General Assembly's statutory limitation of the PCR court's authority in § 17-27-20(b) and abolish the procedural bar previously recognized in *Drayton*, 312 S.C. at 8-9, 430 S.E.2d at 520 (issues that could have been raised at trial or in direct appeal cannot be asserted in a PCR application absent a claim of ineffective assistance of counsel). See also *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (same); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (petitioner failed to preserve for review on appeal claim that trial counsel was ineffective for failure to object that sentences constituted cruel and unusual punishment where point was not raised in PCR application or at hearing). He has not provided this Court with any reason to permit such a result.

Also, implicit in Robertson's failure to mention *Kelly* in his Brief of Petitioner is that the Court should reach a different result based upon the fact he is under a death sentence.¹⁵ However, there is no valid reason for creating an exception and permitting capital PCR applicants to file successive applications in light of *Martinez*. To the contrary, the Court in *Martinez* did not limit its holding to federal habeas petitioners who had been sentenced to death. Rather, the Court holding applies to all state court petitioners who seek habeas corpus relief, and hundreds of non-capital federal habeas corpus petitioners in South Carolina, alone, have attempted to avail themselves of *Martinez*'s "narrow" exception.¹⁶ Adopting Robertson's position would open the floodgates to litigation by hundreds upon hundreds of disgruntled PCR applicants, almost all of whom most

¹⁴ It must be remembered that he knowingly and voluntarily abandoned his direct appeal.

¹⁵ Again, however, he does not bother to mention *Kelly*.

¹⁶ Carving out an exception for applicants in capital PCR cases would be inherently unfair to non-capital applicants who may have cases where the same purported error(s) occur.

assuredly will allege the ineffectiveness of original PCR counsel.¹⁷ Respondent opposes such an unnecessary strain on both financial and judicial resources that is not constitutionally required by *Martinez* or state law and which is contrary to the recognized need for finality of litigation.

Also, Robertson's argument suggests that the collateral counsel in every PCR case is ineffective. While Respondent submits that this is not true of the vast majority of non-capital PCR cases, *see Martinez*, 132 S.Ct. at 1319 ("It is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, where that is so, the States may enforce a procedural default in federal habeas proceedings"), clearly there is little or no reason to suppose that this is true in capital PCR cases. Attorneys who represent capital PCR applicants in South Carolina are required to meet the statutory requirements of S.C. Code Ann. § 17-27-160(B) (Supp. 2015). These statutory requirements were enacted to and, Respondent submits, do ensure that qualified, competent counsel represented capital PCR applicants.¹⁸ Additionally, collateral counsel for capital applicants are provided with unknown and potentially unlimited funding. Further, "[a] party in a capital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure," S.C. Code Ann. § 17-27-150(B), whereas non-capital applicants are only entitled to discovery "if, and to the extent that, the judge in the exercise of his discretion and for

¹⁷ It could also exponentially increase the number of claims that federal habeas corpus courts would have to review on the merits. As the PCR judge properly found in another section of his Order, "[t]here 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." **App. 4441**. Any doubt that this action is not a dilatory one must ignore that currently Robertson only has the issues relating to counsel's handling of their social worker preserved for federal habeas review. However, if permitted to go forward in this action, he will be able to raise a number of additional claims on the merits. *See App. 4202-04*.

¹⁸ For the reasons argued, *infra*, Respondent submits counsel met those requirements here, notwithstanding Robertson's argument to the contrary.

good cause shown grants leave to do so, but not otherwise.” § 17-27-150(B).

Likewise his argument makes it clear beyond cavil that *Martinez*-related claims will be pursued in every case where the applicant is under a death sentence. He thereby proves the accuracy of Justice Scalia’s predictions in his dissent in *Martinez* that “even the *appointment* of state-collateral-review counsel will not guarantee that the State’s criminal proceeding can be concluded without years-long federal retrial,” *see* 132 S.Ct. at 1322-23 (Scalia, J., dissenting), and that “I *guarantee* that an assertion of ineffective assistance of trial counsel will be made in *all* capital cases from this date on, causing (because of today’s holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system.” *Id.* at 1324 (Scalia, J., dissenting).

Again, the bottom line is that Robertson is asking this Court to carve out an exception for the smallest group of PCR applicants - who already are afforded the most protections in our judicial system - and to guarantee them the safety net of a second Post-Conviction Relief hearing that will not be afforded to the vast majority of PCR applicants, who do not have the same protections already in place. There is no reason to grant this type of relief.

2. The existence of the deferential review provisions of 28 U.S.C. § 2254(d)(1)-(2) do not support granting applicants a hearing on a successive application alleging ineffective assistance of collateral counsel in the original PCR proceedings.

Throughout much of Robertson’s brief, he suggests that the Court should require hearings on successive applications that allege ineffective assistance of collateral counsel in the original PCR proceedings in order to receive the benefits of the deferential review for decisions on the

merits found in § 2254(d)(1)-(2).¹⁹ However, his disingenuous argument must be rejected for several reasons.

First, this Court's primary concern in a case is not with the deference that federal courts may or may not give to the Court's decisions. Rather, the Court's primary concern is attempting to reach the correct and fair result under both the law and the facts in the cases before it, whether the case is civil or criminal. If the Court's concern was with the deference that its Opinions and Orders are given in federal habeas proceedings, the Court would not have adopted the certiorari procedure that is currently in place for PCR cases because summary denial of certiorari is not entitled to deference. Rather, when certiorari is summarily denied, the decision addressed in federal habeas corpus is the PCR judge's Order.

Moreover, Robertson's contention that § 2254(d) is preferable fails to mention that § 2254(d) was intended to "complement[] the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Harrington v. Richter*, 562 U.S. 86, 103-104, 131 S.Ct. 770, 787 (2011). Also, his contention that the Court in *Martinez* indicated "a clear preference for the state courts to act as the primary forum" to develop and resolve ineffectiveness claims proves nothing

¹⁹ Robertson asserts that "[t]o the undersigned counsel's knowledge, only one [federal habeas evidentiary] hearing has been held since at least 1996" However, this is in error. *See, e.g., Alkebulanyahh v. Byars*, /A No. 6:13-cv-00918-TLW, 2015 WL 2381353, *1 (D.S.C., May 18, 2015). While not discussed in the Order, an evidentiary hearing was likewise held in *Credell v. Bodison*, 818 F.Supp.2d 928 (D.S.C. 2011) and, though rare, evidentiary hearings have been held in other cases. Robertson also mistakenly asserts that "the vast majority of claims presented in habeas cases from South Carolina enter federal court accompanied by a state court ruling either denying relief on the merits or refusing merits review on the basis of an enforceable procedural bar. That is no longer necessarily true after *Martinez*. Now, many petitioners raise claims that were not presented in state PCR and they assert that the claim is not defaulted because collateral counsel was ineffective.

He also cites Ninth Circuit Court of Appeals decision for the proposition that "28 U.S.C. § 2254(e)(2)'s strict limitation on a federal court's power to take evidence not presented to the state courts is inapplicable" when a federal court addresses a defaulted claim pursuant to *Martinez*. *Brief of Petitioner*, p.15 n. 13. Respondent disagrees with his position but submits that this point is irrelevant to the issue before this Court.

new because state courts remain the primary forum for the litigation of ineffective assistance claims when a claim is procedurally defaulted, either under the “independent and adequate state law” doctrine, see *Coleman*, 501 U.S. at 729-30, 111 S.Ct. 2546, or – as with the claims in Robertson’s 2011 Application – by the inmates failure to fairly present the claim to the state courts, so that they have the first opportunity to decide the issue.

The Supreme Court has long stated that its “procedural default doctrine and its attendant ‘cause and prejudice’ standard are grounded in comity and federalism concerns.” *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 1591 (2000) (citing *Coleman*, 501 U.S. at 730, 111 S.Ct. 2546); see also *Coleman*, 501 U.S. at 726, 111 S.Ct. 2546 (“This is a case about federalism. It concerns the respect that federal courts owe the States and the States’ procedural rules when reviewing the claims of state prisoners in federal habeas corpus”); *McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454 (1991) (“[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State’s interest in the finality of its criminal judgments”); *Murray v. Carrier*, 477 U.S. 478, 518, 106 S.Ct. 2678 (1986) (“Despite the existence of federal power to entertain a habeas petition in the face of a procedural default, the Court in [*Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963)] acknowledged “a limited discretion” in the federal court to refuse to exercise its jurisdiction on behalf of “an applicant who has deliberately by-passed the orderly procedure of the state courts and in doing so has forfeited his state court remedies.” ... This exception was recognized “[a]s a matter of comity ... in order to accord state courts and state procedures the respect due them in a federal system”) (citation omitted and emphasis in original).

If this Court adopts a rule permitting hearings on successive applications asserting the

claims presented therein were not raised in the original PCR hearing because of the ineffectiveness of collateral counsel, the claims would be litigated in federal court through the deferential merits review of § 2254(d). However, if this Court adheres to *Aice* and its progeny, then the claims will only be litigated in federal court through the framework of procedural default analysis. See *Martinez; Coleman*, 501 U.S. at 749-50.²⁰

In other words, before the federal courts can review the merits of his procedurally defaulted ineffective assistance of trial counsel claims, he must first meet the standard set forth in *Martinez*,²¹ which is hardly a given in this or any other case. In particular, to establish that PCR Counsel provided ineffective assistance of counsel, Robertson must prove that: (1) his counsel's performance "fell below an objective standard of reasonableness," and (2) he was prejudiced by his counsel's deficient performance. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. To establish prejudice, Robertson must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052.

²⁰ In this regard, he would be like the scores of other inmates who raise claims in federal court that have not been previously litigated in state court proceedings because *Martinez* is not limited to capital cases. Moreover, the rule barring successive applications alleging ineffective assistance of prior PCR counsel is not the only context in which this Court gives federal courts the first opportunity to have first review of constitutional issues. Federal courts already have the first chance to review the pretrial denials of double jeopardy motions when the defendant has not been sentenced, in light of *State v. Miller*, 289 S.C. 426, 426-27, 346 S.E.2d 705, 706 (1986), where this Court held that "an order denying a double jeopardy claim is not immediately appealable" because "a criminal defendant may not appeal until sentence has been imposed." See *Livingston v. Murdaugh*, 183 F.3d 300, 301-02 (4th Cir. 1999).

²¹ The federal habeas courts cannot address the four claims of trial court error [Grounds 10 & 11(c)-(f)] and three claims of ineffective assistance of appellate counsel [Grounds 10 & 11(g)(i)-(iii)] (**App. 3848-49**) that he has procedurally defaulted, unless he can demonstrate both cause for the procedural default and prejudice as a result of the alleged constitutional violation, or that failure to review the constitutional claim will result in a fundamental miscarriage of justice. See *Coleman*, 501 U.S. at 749-50, 104 S.Ct. 2052. Again, the "narrow" or "limited exception" recognized in *Martinez* has no application on these claims.

Thus, “the Court must conclude that the ineffective-assistance-of-trial-counsel claim would have won Petitioner a new trial at the state court level.” *Martinez v. Schriro*, No. CV 08–785–PHX–JAT, 2012 WL 5936566, at *2 (D.Ariz. Nov.27, 2012); *see also Preyor v. Stephens*, 537 Fed. App’x 412, 421 (5th Cir. 2013) (“To establish ineffective assistance of his initial state habeas counsel, [Petitioner] must show both that habeas counsel’s performance ... was deficient and that he was prejudiced by the deficient performance—that is, there is a reasonable probability that he would have been granted state habeas relief had the claims been presented in the first state habeas application.”); *Foley v. White*, No. 6:00–CV–552–DCR–REW, 2012 WL 6965070, at *9 (E.D.Ky. Nov.15, 2012) (quoting *Leavitt v. Arave*, No. 1:93–cv–0024–BLW, 2012 WL 1995091, at *10 (D.Idaho June 1, 2012)) (“In the context of *Martinez*, a demonstration of prejudice would require [Petitioner] to show that, but for post-conviction counsel’s errors, there is a reasonable probability he ‘would have received relief on a claim of ineffective assistance of trial counsel in state court.’ ”), *Horonzy v. Smith*, No. 1:11–cv–00235–EJL, 2012 WL 4017927, at *6 (D.Idaho Sept.12, 2012) (“The application of the *Strickland* test in this instance means that Petitioner is required to show that counsel’s representation during the post-conviction proceeding was objectively unreasonable, and that, but for his errors, there is a reasonable probability that Petitioner would have received relief on a claim of ineffective assistance of trial counsel in the state post-conviction matter. This standard is a high one.”).

This requires Robertson to show more than the mere fact collateral counsel failed to raise potentially meritorious claims. He must show that no competent counsel, in the exercise of reasonable professional judgment, would have omitted those claims. *Hittson v. GDCP Warden*, 759 F.3d 1210 (11th Cir. 2014). As the Eleventh Circuit Court of Appeals explained in *Hittson*:

To establish cause under *Martinez*, Hittson must demonstrate that state habeas

counsel were themselves ineffective for failing to raise the four claims in his second amended § 2254 petition. This is a somewhat familiar inquiry, as petitioners have long been able to claim ineffective assistance of trial or appellate counsel to establish cause to excuse a procedural default caused by their trial or appellate counsel. See *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). As the Supreme Court has explained in that context, “[n]ot just any deficiency in counsel’s performance will do ... the assistance must have been so ineffective as to violate the Federal Constitution.” *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 1591, 146 L.Ed.2d 518 (2000) (citation omitted). While *Martinez* did not establish a constitutional right to counsel in state post-conviction proceedings, it did adopt the constitutional standard from *Strickland* as the standard governing petitioners’ claims that their post-conviction counsel’s conduct should excuse a procedural default. See *Martinez*, — U.S. at —, 132 S.Ct. at 1318.

Accordingly, Hittson must establish that his habeas counsel’s conduct “fell below an objective standard of reasonableness,” and that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694, 104 S.Ct. at 2064, 2068. Obviously the merits of the underlying ineffective-assistance claims have some bearing on both *Strickland* prongs; collateral counsel would clearly not fall below *Strickland*’s minimum competency requirements by deciding not to raise a meritless claim, and a petitioner would also not be prejudiced by his counsel’s failure to do so.

But the merits of the underlying claim is only a part of the *Strickland* analysis. With unlimited time and the benefit of hindsight, a petitioner can come up with any number of potentially meritorious ineffective-assistance claims that he now wishes his collateral counsel had raised. However, a petitioner does not establish constitutionally defective performance simply by showing that (a) potentially meritorious claims existed and (b) his collateral counsel failed to raise those claims. *Murray*, 477 U.S. at 486, 106 S.Ct. at 2644 (“[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.”). “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.” FN60 *Jones v. Barnes*, 463 U.S. 745, 751–52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983). “[A] *per se* rule that ... the professional advocate, [is not] allowed to decide what issues are to be pressed ... seriously undermines the ability of counsel to present the client’s case in accord with counsel’s professional evaluation.” *Id.* at 751, 103 S.Ct. at 3313.

FN60. “Even in a court that imposes no time or page limits ... [a] brief that raises every colorable issue runs the risk of burying good arguments ... in a verbal mound made up of strong and weak contentions.” *Barnes*, 463 U.S. at 753, 103 S.Ct. at 3313.

As we have explained, *Strickland* instructs courts to “indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance”—that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” 466 U.S. at 689–90, 104 S.Ct. at 2065–66. To overcome this presumption, a petitioner must “establish that no competent counsel would have taken the action that his counsel did take.” *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir.2000) (en banc).

Thus, to show that his habeas counsel failed to provide the level of representation required by *Strickland*, Hittson must show more than the mere fact they failed to raise potentially meritorious claims; he must show that no competent counsel, in the exercise of reasonable professional judgment, would have omitted those claims. Even assuming that the underlying ineffective-assistance claims are meritorious (which, as we explain in the following section, they are not), Hittson has not established that his state habeas counsel were incompetent for failing to raise them.

Hittson, 759 F.3d at 1262-63. (Emphasis added).

Unless Robertson can meet this demanding standard, the federal habeas courts will not address the claim *de novo*, but will find that the procedural default cannot be excused. Of course, the merits of procedurally defaulted claims were addressed, even prior to *Martinez*, in those cases where the inmate showed both cause for and prejudice from the procedural default, or if he could show that the failure to address “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Murray*, 477 U.S. 478, 496, 106 S.Ct. 2678. So *de novo* review of defaulted claims is nothing new, only the manner for excusing the procedural default. *Cf. Barnes v. Thompson*, 58 F.3d 971, 983 (4th Cir. 1995) (“The majority finds that Barnes has procedurally defaulted his [*United States v. Bagley*, 473 U.S. 667 (1985)] claim in state court, and that he has shown neither cause nor prejudice for the default. Although the majority is mistaken as to those default issues, I concur in the result reached by the majority because I find that Barnes has failed to prove the materiality prong of his Bagley claim”) (Murnaghan, J., concurring in judgment).

Another misleading point in Robertson's argument is that, although factual findings

relevant to procedurally defaulted claims are generally not governed by § 2254(d)(2) unless those facts also relate to a claim adjudicated on the merits by the state court, they are nevertheless entitled to a presumption of correctness and the petitioner must overcome that presumption by clear and convincing evidence because AEDPA requires such deference to state court factual findings. § 2254(e)(1). *See, e.g., Walker v. Kelly*, 589 F.3d 127, 131-32 (4th Cir. 2009); *Sivak v. Hardison*, 658 F.3d 898, 907 (9th Cir. 2011) (“The Idaho Supreme Court’s application of § 19–2719(5) is premised on an erroneous factual determination, and Sivak has met his AEDPA burden of introducing clear and convincing evidence to rebut the presumption that the state court’s determination is correct. *See* 28 U.S.C. § 2254(e)(1) (2006)”); *Crowe v. Hall*, 490 F.3d 840, 844-46 (11th Cir. 2007). *Peace v. Klem*, 335 Fed.Appx. 197, 198-99, 2009 WL 1833871, *1 (3rd Cir. 2009); *Love v. Roberts*, 259 Fed.Appx. 58, 63, 2007 WL 4293389, *5 (10th Cir. 2007).

Robertson seems to suggest that this Court can eliminate or at least limit the impact that *Martinez* has on the litigation of ineffective assistance of trial counsel claims in federal court. Obviously, it cannot because as the Opinion in *Martinez* makes clear, and this Court’s Order in *Kelly* correctly recognized, that it is merely an equitable exception to the general rule of *Coleman*. On the other hand, the creation of a right to file a successive PCR Application to litigate ineffective assistance of trial counsel claims that were not raised in the original PCR proceedings, as the result of ineffective assistance of the original collateral attorney, would not guarantee that a federal habeas corpus petitioner will not attempt to assert even different claims in federal habeas corpus from those raised in the successive application that were, in the petitioner’s estimation, overlooked in the original PCR because of PCR counsel’s ineffectiveness. While the State would assert that those claims are procedural defaulted, there is no incentive for inmates, particularly those under lengthy sentences, not to at least attempt to raise such claims and assert that *Martinez* permits them

to do so. In capital habeas corpus proceedings, death sentenced inmates are provided new counsel to represent them, as was done for Robertson. *See e.g., Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013). Most assuredly, death sentenced petitioners will attempt to raise such claims. *Cf. Martinez*, 132 S.Ct. at 1323-24 (Scalia, J., dissenting).

Additionally, if Robertson is truly correct in asserting that deferential merits review under 2254(d) is preferable because it will provide more deference to and thereby better insulate this Court's decisions in federal habeas corpus proceedings, that brings up the altogether obvious question: why would his current attorneys advocate that position? The answer is that they would not because they would be ineffective under *Strickland*.²² Instead, this is an attempt to further delay proceedings in this case.

3. **The creation of a right to file a successive application is unnecessary because this Court already permits exceptions to the bar generally proscribing successive applications in § 17-27-90 and *Aice v. State*, to ensure that all PCR applicants receive “one full bite of the apple;” the exceptions to § 17-27-90 and *Aice* recognized by this Court, although narrow, are sufficient to ensure fairness to all PCR applicants; and Robertson's argument that the Court should rethink *Aice* is both procedurally barred and fails to recognize that the bar on successive applications is statutory. Nor has Robertson presented any argument that § 17-27-90 is unconstitutional.**

Further, the relief requested by Robertson is unnecessary. Although § 17-27-90 “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*, 305 S.C. at 450, 409 S.E.2d at 394, this Court has recognized a number of exceptions *E.g., Austin v. State*, 305 S.C. 453, 454-55, 409 S.E.2d 395, 396 (1991) (authorizing hearing on successive application asserting ineffectiveness of collateral counsel for not appealing denial of relief on first application).

²² An inmate would not file a Petition for Writ of Habeas Corpus, unless he or she had already lost in state PCR, as has Robertson.

Respondent discusses this Court's other cases recognizing exceptions to § 17-27-90 and *Aice* in connection with the PCR judge's ruling. Those exceptions are premised upon the Court's recognition that every PCR applicant is entitled to "one full bite at the apple." *See Aice*, 305 S.C. at 452, 409 S.E.2d at 395, and the exceptions that this Court has recognized, although narrow, ensure fairness to those who seek Post-Conviction Relief.

Robertson's argument that the Court should rethink *Aice* is procedurally barred. He did not argue in the PCR court that *Aice* needed to be modified "to reach the limited exception recognized in *Martinez*." **Brief of Petitioner, p. 21**. Instead, he argued that his 2011 Application fell within an exception to the general rule of *Aice*. *See App. pp. 4211-17* (Response in Opposition to Motion to Dismiss); **App. pp. 4453-58** (Motion to Alter or Amend the Judgment). Thus, the issue is procedurally barred because not presented to and passed upon by the PCR judge. E.g., *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992) (an issue must have been raised to and ruled upon by the PCR judge to be preserved for appellate review); *Hyman*, 278 S.C. at 502, 299 S.E.2d at 331; *Evans v. State*, 363 S.C. 495, 503-04, 611 S.E.2d 510, 515 (2005). *See also State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one theory at trial and a different theory on appeal); *State v. Mayfield*, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959) ("One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered"); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (court should not address an issue which was not explicitly ruled on by the trial court or brought to the trial court's attention in a motion to alter or amend); *State v. Torrence*, 305 S.C. 45, 60-71, 406 S.E.2d 315, 324-29 (1991) (Toal, J., concurring in result and joining Justice Chandler's concurrence in result) (abolishing the doctrine of *in favorem vitae* review in capital cases and requiring a contemporaneous objection or motion to preserve issue for appellate

review).

Nor has he previously raised this argument on certiorari. In his “Notice of Appeal and Required Explanation,” Robertson argued that the PCR judge’s application of *Aice* was incorrect and that his 2011 Application fell within an exception to the general rule. **App. pp. 4499-4501.** He likewise did not make such an argument in the Petition for Writ of Certiorari. Instead, he again asserted that the 2011 Application fell within an exception to the general rule of *Aice*. **Petition for Writ of Certiorari, pp. 10-12.** *See Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281, 282 n. 3 (2003) (issue must also be argued fully in the initial brief of appellant to be preserved for the Court’s consideration); *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal).

Also, this argument is not fairly encompassed in the Question Presented by him, *see* Rule 208(b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal”) or in the Order granting certiorari. Therefore, his argument is procedurally barred. Worse, Robertson’s argument fails to recognize that this Court’s discussion of the bar on successive applications is based upon § 17-27-90, which is part of the statutory framework establishing the PCR remedy. In 1995, the General Assembly passed a statute of limitations for PCR cases, S.C. Code Ann. § 17-27-45 (2003). Subsections (B) and (C) allow for inmates to avail themselves of changes in the law that are applied retroactively and after-discovered evidence.²³ These subsections provide further legislatively created exceptions to

²³ § 17-27-45(B) provides that “[w]hen a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application ... may be filed not later than one year after the date on which the standard or right was determined to exist.” Similarly, § 17-27-45(C) permits an Application asserting after-discovered evidence to be filed “within one year after the date of actual discovery of the facts

the strict rule of § 17-27-90. Moreover, Robertson's argument must be rejected because he has not presented any argument that § 17-27-90 is unconstitutional.

Additionally, his proposed rule would open the floodgates to vexatious and endless litigation that would defeat any sense of finality to litigation, and finality is both necessary and desirable as the discussion of the PCR judge's ruling, *infra*, makes clear.

4. **Also, provided that they can present a claim that satisfies the demanding prerequisites for relief, South Carolina inmates potentially have the ability to pursue the remedy of state habeas corpus in this court's original jurisdiction, a procedure over which this Court is the gatekeeper.**

In addition to the exceptions to § 17 27 90 and *Aice* recognized by this Court, South Carolina inmates potentially have the ability to pursue the remedy of state habeas corpus in this court's original jurisdiction, provided that they can present a claim that satisfies the demanding prerequisites for relief.

Habeas corpus is available only when other remedies, such as PCR, are inadequate or unavailable. *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998); *see also Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008) ("a writ of habeas corpus is reserved for the very gravest of constitutional violations which, in the setting, constitute[] a denial of fundamental fairness shocking to the universal sense of justice"). Also, "not every intervening decision, nor every constitutional error at trial will justify issuance of the writ." *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). However, as this Court explained in *Williams*:

Notwithstanding the exhaustion of appellate review, including all direct appeals and PCR, habeas corpus relief remains available to prisoners in South Carolina. See S.C. Const. art. I, § 18. Habeas relief is seldom used and acts as an ultimate insurer of fundamental constitutional rights. For these reasons, a defendant bears a much

by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

higher burden in a habeas proceeding. A writ of habeas corpus is reserved for the very gravest of constitutional violations “which, in the setting, constitute[] a denial of fundamental fairness shocking to the universal sense of justice.” *Green v. Maynard*, 349 S.C. 535, 538, 564 S.E.2d 83, 84. It is clear that “not every intervening decision, nor every constitutional error at trial will justify the writ.” *McWee v. State*, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004) (quoting *Green v. Maynard*, 349 S.C. at 538, 564 S.E.2d at 84). A defendant who seeks a writ of habeas corpus based on an error recognized as a constitutional violation after his conviction must show that, in the setting, the violation denied him fundamental fairness. [*Butler*, 302 S.C. at 468, 397 S.E.2d at 88].

Williams, 380 S.C. at 477-78, 671 S.E.2d at 602. See also *Torrence*, 305 S.C. at 69, 406 S.E.2d at 328 (Toal, J., concurring in result and joining Justice Chandler’s concurrence in result) (“... we do not relinquish entirely our ability to provide relief to those who have, for whatever reason, been utterly failed by our criminal justice system. While we abolish *in favorem vitae* review as an outdated doctrine too easily abused, an imprisoned individual may obtain a writ of habeas corpus from this Court after exhausting all other sources of relief, ‘where there has been a ‘violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice.’ ”) (quoting *Butler*).

The state habeas corpus remedy has resulted in relief to a number of inmates, including death sentenced inmates on several occasions. *E.g.*, *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001) (finding that coercive *Allen* charge given at penalty phase violated defendant’s right to due process); *Butler*, 302 S.C. at 467-68, 397 S.E.2d at 87-88 (the trial judge violated the mentally retarded defendant’s fifth amendment rights by coercing him to take the witness stand in his defense). See also *Johnson v. Catoe*, 336 S.C. 354, 520 S.E.2d 617 (1999) (after federal habeas court had found inmate’s guilt phase claims procedurally defaulted under *Coleman* by concession of guilt at sentencing, Court granted writ and held that that capital defendant who admits his guilt at sentencing is not thereby precluded from challenging guilt phase errors on collateral attack).

Further, state habeas corpus is a procedure over which this Court is the gatekeeper and through which the Court can ensure that an inmate is not deprived of fundamental constitutional rights. In light of the existence of this remedy and the exceptions to *Aice* previously recognized by this Court, Robertson's position must be rejected.

II. The PCR judge's denial of relief is supported by the record.

A. The PCR judge correctly found that the 2011 Application is barred as successive.

As correctly recognized by the PCR judge:

§ 17-27-90 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*, 305 S.C. at 450, 409 S.E.2d at 394. In *Aice*, this Court 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.* Although *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 (emphasis added).

As a result, a claim 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. Thus, apart from the scenario covered by *Austin*, 305 S.C. at 454-55, 409 S.E.2d at 396, a successive PCR application is generally not allowed on the ground that first PCR application was insufficient due to ineffective PCR counsel. *Aice*, 305 S.C. at 450-52, 409 S.E.2d at 394-95.

Robertson erroneously relies upon several PCR cases involving non-capital inmates as demonstrating that he has shown “sufficient reason” under *Aice*. However, each of these cases is distinguishable because each was based on very unique procedural circumstances that simply are not present here.

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. Washington 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* at 234, 478 S.E.2d at 834.

The PCR court in *Washington* found that he had not waived his right to direct appeal and that he should be granted a belated appeal. On the prosecutorial misconduct claim, the PCR court found that the State had failed to adequately explain the State’s relationship with one of its witnesses to the jury, but 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 this Court, but the Court denied certiorari on that issue. He then filed a second PCR application, and he again raised the misconduct issue, as well as 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* at 234-35, 478 S.E.2d at 834.

On certiorari, this Court rejected the State’s argument that § 17-27-90 barred the second PCR application. Although recognizing that Washington’s second PCR application was successive “under a hyper-technical analysis,” the Court rejected the State’s position “because so many procedural irregularities occurred during the course of Washington’s judicial process that he has not received due process.” *Washington*, 324 S.C. at 236, 478 S.E.2d at 835. The Court added that:

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.

Id. There are no such procedural irregularities in this case. Rather, Robertson voluntarily waived review on direct appeal; PCR relief was denied only after a lengthy hearing at which he was represented by two attorneys; and he was represented before this Court on certiorari, where relief was again denied. The other non-capital cases upon which Robertson relies are likewise distinguishable.²⁴

Similarly, 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 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 judge thereafter issued an Order finding that Elmore was mentally retarded and that the Eighth Amendment barred

²⁴ 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 case does not involve such a scenario. Nor is this case like *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the Court permitted a successive application because the applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Robertson's current attorneys may say as to the quality of representation provided in the original PCR action, they must 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.

his execution, *id*, the State did not appeal his adverse rulings on successiveness or the statute of limitations because an appeal would be futile in light of *Atkins*. Thus, the question of whether or not the PCR judge erred in permitting Elmore to proceed on a successive application was never presented to this Court on appeal.

Williams is likewise distinguishable. As in *Elmore*, the State did not appeal the PCR judge's ruling allowing Williams to proceed on a successive. Also, Respondent takes the position, for the reasons argued, *infra*, that lead collateral counsel in the present case, Mr. Brown, was properly qualified under S.C. Code Ann. § 17-27-160(B) (2003), unlike Williams' original PCR attorneys. *See Williams v. Ozmint*, 494 F.3d 474, 483 (4th Cir. 2007). Moreover, Respondent would note that the capital PCR applicant in *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31 (4th Cir., Mar. 26, 2002), unsuccessfully sought relief such as that now being sought by Robertson, as did death row inmate Abdiyyah ben Alkebulanyahh, #6012. 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 in the present case was an issue that could have been raised, if at all, at the time of the September 23, 2005 hearing to confirm the appointment and later pursued on certiorari following denial of relief by the PCR judge.²⁵ As a result, he cannot raise this or any other allegation now in a successive Application.

²⁵ Robertson was unable to obtain a copy of the transcript of the September 23, 2005 hearing because the tapes of the hearing do not exist (*see* Rule 607(i), SCACR), and Respondent did not order this transcript because Robertson did not contest counsel's qualifications in state PCR. By failing to argue it in his Brief of Petitioner, he has apparently abandoned his false contention that this hearing was not held. It is contradicted by Judge Few's Order of Dismissal. **App. 3557**. It is also refuted by the undersigned counsel for Respondent, who represents as an officer of this Court that it occurred and that he attended the hearing. The undersigned further represents that Robertson, Michael Brown, Esquire, and the undersigned were present

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*, 36 Fed.Appx. at 730-31.

Also of great importance is that both the United States Supreme Court and this Court have emphasized the necessity for finality of litigation in criminal cases. For instance, the United States Supreme Court has explained that "the principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060 (1989). In his concurring and dissenting Opinion in *Mackey v. United States*, 401 U.S. 667, 691, 91 S.Ct. 1160 (1971), Justice Harlan wrote that:

Finality in the criminal law is an end which must always be kept in plain view. . . .

before Judge Few at the hearing Respondent's representation that Judge Few held this hearing is confirmed by a contemporaneously-generated "Attorney's Report of Trial or Hearing," which then-Attorney General McMaster required to be prepared for any court-related appearance. App. 4575.

The suggestion that there was no hearing is likewise contradicted by at least one contemporaneously-written article that Respondent has found, which obtained the information in its story from the Rock Hill Herald. See <http://lists.washlaw.edu/pipermail/deathpenalty/2005September/003498.html>. The undersigned further represents, as an officer of the Court, that his recollection is that Judge Few addressed both Robertson's desire for appointment of counsel and Mr. Brown's statutory qualifications at the hearing. The PCR judge found that "this is yet another example of the dilatory nature of this successive Application." App. 4428 n. 10. See also App. 4441. His finding is not clearly erroneous and is consistent with the behavior Robertson exhibited throughout direct appeal. *Accord Martinez*, 132 S.Ct. at 1324 (Scalia, J., dissenting) ("I guarantee that an assertion of ineffective assistance of trial counsel will be made in all capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system") (emphasis in original). See also *id.* at 1327.

At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

Mackey, 401 U.S. at 691, 91 S.Ct. 1160 (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after *Mackey*, this Court quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441, 248 S.E.2d 120, 123 (1978).

This Court in *Aice* also gave the following explanation of the importance of finality of litigation in criminal cases:

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).

Accepting Robertson's position would literally destroy any meaningful sense of finality, *Contra Aice*, 305 S.C. at 451, 409 S.E.2d at 394,²⁶ and this was another reason the PCR judge

²⁶ *See also Williams*, 380 S.C. at 480, 671 S.E.2d at 603 ("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"); *cf.*, *Webb v. Greenwood County*, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956).

properly denied relief. **App. pp. 4430-31.** As a result, Robertson's position must be rejected because it would erode public confidence in the criminal justice system by defeating any semblance of finality to the appeals process for death sentenced inmates. This is particularly true since the same attorneys who are now advocating this procedure, which would add both further delay and expense, tell the public that the death penalty should be abolished because it takes too long to enforce. *See, e.g., WIS Investigates: Is the death penalty on hold in South Carolina?* <http://raycomgroup.worldnow.com/story/28119053/wis-investigates-is-the-death-penalty-on-hold-in-south-carolina> (" 'It should not take 30 years before you have some sort of closure in a criminal case, and I think that is the product of a system, which is broken,' she explained. 'And I think it's broken beyond repair. We cannot fix it in a way that will address those needs of quick closure and also provide for the kind of reliability that is necessary when we take another person's life' ") (quoting Emily Paavola, Esquire, one of Robertson's attorneys) (Posted: Feb 16, 2015 11:33 AM EST, Updated: Mar 12, 2015 4:52 PM EDT).

Moreover, the delay in the present case is prejudicial because lead trial counsel, Mr. Hancock, is now deceased, and he had turned his file over to Robertson before the PCR hearing. **App. p. 3932 n. 9.** Further, the need for finality in this case is heightened because the federal habeas courts have granted stays in five other capital federal habeas cases, in light of this Court's grant of certiorari in this case, and those inmates currently have successive applications pending in circuit court. *See John Richard Wood, #6005 v. State*, 2013-CP-23-5190; *Gary Dubose Terry v. State*, , 2012-CP-26-2718; *Brad Sigmon v. State*, 2014-CP-23-4632; *James N. Bryant v. State*, 2013-CP-26-6631; and *Abdiyyah Ben Alkebulanyahh v. State*, 2014-CP-07-2994. Each of these other cases is impacted by this case.

B. *Martinez* does not require a hearing.

For the previously-argued reasons, Respondent submits that the PCR judge correctly ruled that *Martinez* does not require South Carolina courts to provide inmates with a hearing on successive PCR applications, merely because the inmate alleges that original PCR counsel was ineffective. See *Kelly*, 404 S.C. at 365-66, 745 S.E.2d at 377-78. Because *Martinez* does not apply, the PCR judge's rulings that the 2011 Application was barred as successive and barred by the statute of limitations are correct.

Moreover, there is no merit to Robertson's complaint that "the order below does not speak, directly or indirectly, to whether Robertson's new ineffective assistance of trial counsel claims are 'substantial' for *Martinez* purposes." **Brief of Petitioner, p. 25.** His position ignores the patently obvious fact that there was no reason for the PCR judge to perform such an analysis because the "narrow" and "limited exception" to *Coleman* that the Court created in *Martinez* only applies to a federal habeas corpus court's review of the procedurally defaulted claims. It does not purport to tell state courts how to address or even whether to address such claims. The issue before the PCR judge on Respondent's motion to dismiss were the separate and discrete inquiries of whether Robertson could overcome the limitation on successive applications in *Aice* and § 17-27-90, the statute of limitations bar in § 17-27-45, as well as the other affirmative defenses raised by Respondent.

C. The 2011 Application is barred by the statute of limitations.

Further, the PCR judge properly found that the one-year statute of limitations applicable to PCR actions bars the entire Application. See § 17-27-45(A); **App. 4426-28.** This Court filed an Order on June 3, 2005, dismissing Robertson's direct appeal because it agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court 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. However, he did not file the current Application until January 7, 2011,²⁷ which is five years, six months and sixteen days after this 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 now 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).

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. ... 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.” **App. 4427.**²⁸

Additionally, the PCR judge properly found that both Robertson and his original PCR counsel were aware of any supposed defect in counsel's qualifications at the time Mr. Brown was appointed and that he could have objected to the supposed lack of counsel's qualifications at the

²⁷ See *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (PCR application is filed when received by the Clerk of Court).

²⁸ The only exception are his “claims” based on *Martinez*, which had not been decided when the Order was filed and which do not require relief for the reasons argued.

time of the September 23, 2003 hearing held for appointment of counsel.²⁹ Moreover, the PCR court properly addressed his argument that the limitations period should be equitably tolled because of counsel's ineffectiveness and lack of statutory qualifications, in the context of the court's discussion that this was not after-discovered evidence; that the appointment hearing was the only time to properly complain about the defects in counsel's eligibility for appointment pursuant to S.C. Code Ann. § 17-27-160(B) (Supp. 2012); and that the Application was impermissibly successive.

Further,

Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations. *Hooper v. Ebenezer Senior Svcs. and Rehabilitation Ctr.*, 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct.App.2008). "Equitable tolling is reserved for extraordinary circumstances." *Id.*; see, e.g., *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass,

²⁹ As noted, section 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, that would be one year after the September 23, 2005 hearing because that is when he would have had actual knowledge of counsel's qualifications and could have discovered any defect, and not one year following the appointment of his present attorneys. See *Mitchell v. Holler*, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993) (the statute of limitations begins to run "where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist") (holding knowledge of murder conviction, coupled with complaint about trial counsel's performance, commenced running of statute). As found by the PCR judge, "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)." **App. 4428.**

Even assuming *arguendo* that the statute of limitations did not begin running until the September 23, 2005 hearing, the current Application was not filed until five years, three months and fifteen days later. Therefore, it is barred under § 17-27-45(C), as well. **App. 4428.** His statute of limitations argument ignores that he was successful in having two different appellate attorneys relieved on direct appeal, 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)." **App. 4429.**

“[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”); *Hopkins v. Floyd’s Wholesale*, 299 S.C. 127, 382 S.E.2d 907 (1989) (holding statute of limitations equitably tolled for workers’ compensation claim during reliance period in which employer represented to employee that claim compensable and would be taken care of without employee filing claim). The doctrine of equitable tolling can be summarized:

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.

Equitable tolling has been deemed available where—

—extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.

—the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant’s misconduct into allowing the filing deadline to pass.

—the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.

It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

51 *Am.Jur.2d Limitation of Actions* § 174 (2007); see also *Hooper*, 377 S.C. at 232, 659 S.E.2d at 221.

Pelzer v. State, 378 S.C. 516, 520-521, 662 S.E.2d 618, 620-21 (Ct.App. 2008).³⁰ Also, this Court

³⁰ See also *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (“To be entitled to equitable tolling [in federal habeas], [a petitioner] must show ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing”); *Holland v. Florida*, 560 U.S. 631, 651-52, 130 S.Ct. 2549, 2564 (2010) (a “serious instance[] of attorney misconduct” may rise to the

explained in *Hooper* that the party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify tolling. *Hooper*, 377 S.C. 115, 687 S.E.2d at 32. Here, Robertson has not and cannot meet the above requirements for equitable tolling of the limitations period because he was not “actively misled” by Respondent into accepting Mr. Brown as qualified counsel; to the extent Mr. Brown was not statutorily-qualified to act as lead counsel in this case, he did not exercise “due diligence” to discover any supposed defect in Mr. Brown’s qualifications; and he was not prevented “in some extraordinary way from asserting his or her rights.” Instead, he rested on his “rights” until after an unfavorable judgment had been entered. This he may not do. *Accord Mayfield*, 235 S.C. at 23-24, 109 S.E.2d at 724 (“One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered”). As a result, his reliance upon *Odom* is misplaced.³¹

D. Although Robertson now concedes that whether counsel was statutorily qualified to represent him in PCR “has only limited relevance under *Martinez*,” the PCR judge’s finding that original collateral counsel was qualified under § 17-27-160(B) and his alternative finding that Robertson had not proved prejudice from the failure to comply with the requirements of that section are supported by the record and are not clearly erroneous.

Although Robertson now concedes that whether counsel was statutorily qualified to represent him in PCR “has only limited relevance under *Martinez*,” **Brief of Petitioner, p. 24**, Respondent submits that the PCR judge’s findings that original collateral counsel was qualified under § 17-27-160(B), as well as his alternative finding that Robertson had not proved prejudice from the failure to comply with the requirements of that section, are supported by the record and are not clearly erroneous. *See App. 4434-38; Supp. App. 2-5* (Order denying motion to alter or

level of an extraordinary circumstance necessary to justify equitable tolling but not “garden variety” negligence).

³¹ Again, the PCR judge found at least twice that Robertson was being dilatory. **App. 4428 n. 10; App. 4441**. His findings are supported by the record, and these findings are consistent with the behavior he has exhibited throughout the appellate process, including before this Court on direct appeal.

amend).

Robertson's argument as to counsel's supposed lack of qualifications lacks merit as a matter of state law. He 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 without identifying what record was available to him or identifying what qualifications counsel did or did not have, prior to the PCR judge's Order dismissing the 2011 Application. **App. 4434; 4488.**

As the PCR judge found:

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.

Supp. App. 1.

In the absence of evidence to the contrary, the PCR judge correctly "assume[d] 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)." **App. 4434.**³²

Robertson's position is that 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

³² The record supports the PCR judge's finding that "[t]here is no transcript of record because of laches on the part of Applicant." **Supp. App. 2.**

the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief, to be qualified in a capital PCR. Respondent submits that the PCR judge's rejection of his argument was supported by the record and was not clearly erroneous.

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 § 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, and the law is that statutorily qualified counsel must be appointed in capital cases, the *presumption* (as opposed to speculation, as Robertson asserts) is that Judge Few appointed in accordance with §

17-27-160(B) and the Chief Justice's Memorandum.³³ Robertson suggests that the PCR judge mistakenly relied 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."

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. Instead, 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." Even though this is not binding authority from this Court, the PCR judge's finding that it was and remains authority that supports the appointment of counsel in this case was not clearly erroneous.³⁴

³³ The General Assembly has not subsequently amended the statute following the Chief Justice's Memorandum, of which it was presumptively aware. See *McLeod v. Starnes*, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012). Also, its failure to amend § 17-27-160 for over nine years after the Memo was issued is evidence that it agrees with this interpretation. Cf. *id.*

³⁴ Additionally, Robertson ignores that this Court summarily denied the petition in *Alkebulanyahh*, on October 20, 2010. Further and contrary to Robertson's assertion, the State did not assert that *Alkebulanyahh*

Therefore, “there was no violation of the capital PCR qualification statute, and thus, no basis for permitting this successive Application and for treating the proceedings that have taken place as a nullity.”

Nor do the affidavits offered by Robertson in connection with his Rule 59(e), SCRCP motion show error by the PCR judge. First, although not addressed in the Order denying the Rule 59(e) motion, the affidavits were not timely and should not be considered. They could have been obtained much earlier, through the exercise of due diligence and attached to the 2011 Application. “The purpose of Rule 59(e), SCRCP, to alter or amend the judgment [,] is to request the trial judge to ‘reconsider matters properly encompassed in a decision on the merits.’ “ *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citation omitted). Thus, a party may not present arguments or offer evidence that was not presented before judgment was entered. *Spreeuw v. Barker*, 385 S.C. 45, 69, 682 S.E.2d 843, 855 (Ct.App. 2009)); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990); *Natural Resources Defense Council v. U.S. E.P.A.*, 705 F.Supp. 698, 701 (D.D.C.1989), *vacated on other grds.*, 707 F.Supp. 3 (D.D.C.1989) (“Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier”). Moreover, neither the untimely affidavits nor anything in the record contradicts the PCR judge’s findings in denying the 59(e) motion that “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.” **Supp. App. 3.**

Also, it must be remembered that his complaint is that a statutory right was violated. There is no presumed prejudice from the failure to follow a technical requirement of a statute that is not a

should be required to file a second PCR application. The State simply argued on the cited pages that the petitioner 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.

right guaranteed by the United States or State Constitutions. As a result, it was not clear error for the PCR judge to find (**App. 4437-41**) that Robertson would 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, 342, 114 S.Ct. 2291, 2294 (1994) (state court's failure to observe the 120-day speedy trial rule of the Interstate Agreement on Detainers 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, 783-85, 99 S.Ct. 2085, 20877-88 (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).³⁵

Further, the PCR judge's finding that there was no prejudice to Robertson even assuming *arguendo* that Mr. Brown was not properly qualified to represent Robertson under § 17-27-160 is supported by the record. **App. 4437-41; Supp. App. 2-5**. Robertson did not offer any proof of counsel's ineffectiveness, apart from his self-serving assertion thereof. Rather, he merely asserts that new counsel would have handled the matter differently, which does not meet his burden. Also, § 17-27-160 was enacted "for the purpose of opting-in the Chapter 154 of the AEDPA (Antiterrorism and Effective Death Penalty Act of 1996)." *Tucker v. Moore*, 56 F. Supp. 2d 611, 612 (1999), *aff'd*, *Tucker v. Catoe*, 221 F.3d 600 (4th Cir. 2000), *cert. den.*, 531 U.S. 1054 (2000).³⁶

³⁵ *Accord 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").

³⁶ While this Court granted state habeas relief to Tucker, it did so on other grounds. *See Tucker v. Catoe*,

South Carolina has not yet been determined to have satisfied the opt-in requirements, so as to benefit from the capital case specific provisions of AEDPA. However, the failure to appoint counsel who is qualified under § 17-27-160 prevents it from doing so in this case. This is a benefit to Robertson. *See Tucker*, 56 F. Supp. 2d at 612. As a result, the PCR judge correctly found, in the alternative, that Robertson had to prove prejudice from any defect in Mr. Brown's qualifications under § 17-27-160 and that he failed to do so.

E. The record supports PCR judge's finding that Robertson did not offer proof that original PCR counsel were ineffective under *Strickland*.

Additionally, Robertson concedes that to establish the prejudice, it was incumbent upon him to show ineffectiveness under *Strickland*. Respondent submits that the record supports the PCR judge's finding that Robertson did not offer proof that original collateral counsel were ineffective under *Strickland*. Specifically, he has never presented any *evidence* to support his claim that "[n]othing in the PCR record or other available documentation suggests that Robertson's initial PCR counsel performed any independent investigation to determine the existence of grounds for relief based on evidence outside the trial record." **Brief of Petitioner, pp. 3-4.**³⁷ His only proof is his current PCR counsel's assertion that - in hindsight and with the knowledge that those allegations raised by Robertson's original PCR attorneys were unsuccessful - they would have handled the case differently, which is insufficient to justify the filing of a time-barred, successive PCR Application. **App. 4438.** *See In re Reno*, 283 P.3d 1181, 1211 (Cal. 2012) (Court

346 S.C. 483, 552 S.E.2d 712 (2001).

³⁷ Of course why would the record reflect PCR counsel's investigation? After all, the adequacy of their investigation was not at issue. Rather, the issue before the original PCR judge was whether Robertson's trial attorneys were ineffective under *Strickland*. Nor do the allegations raised reflect ineffectiveness. In fact, Respondent would note that in all of the allegations in *Johnny Olandis Bennett v. State* were record based. The problem with his point in this regard is that it ignores *Strickland*'s "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

will not consider on the merits successive habeas corpus petitions attacking the competence of prior habeas corpus counsel which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had prior habeas corpus counsel had similar advantages); *cf. State v. Balliette*, 805 N.W.2d 334, 346-47 (Wis. 2011), *cert. denied*, 132 S. Ct. 825 (2011). *Accord Strickland*, 466 U. S. at 689, 104 S.Ct. 2052 (“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 has also faulted initial PCR counsel for filing an Application raising broad and general allegations of ineffective assistance of counsel and waiting to amend at the PCR hearing. However, this is no different than many PCR cases, including capital PCR cases handled by his current counsel and Robertson’s counsel in his federal habeas corpus proceeding. *See, e.g., Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009); *cf. Arnold*, 309 S.C. at 173-74, 420 S.E.2d at 842-43. Also, the PCR Judge correctly found that “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.” **App. 4438**. The record likewise supports the finding that “[i]t is obvious that there was a lot of work done” by the initial PCR attorneys. **Supp. App. 2.**³⁸

³⁸ Moreover, counsel’s allegations were very similar those raised in death penalty PCR cases where the inmates have been represented by attorneys whom Robertson’s current counsel would concede are competent. *Id.* Also, Robertson erroneously 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, the PCR judge properly found that his contention is wrong. **App. 4439-40**. 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*, 558 U.S. 4, 8-9, 130 S.Ct. 13, 17 (2009). *See also Id.* at 13-14, 130 S.Ct. at 20 (Alito, J., concurring); *Montejo v. Louisiana*, 129 S.Ct. 2079, 2087 (2009) (the Constitution does not

Robertson refers, on p. 6 n. 3 of his Brief, to the Court's public reprimand of lead collateral counsel, as the result of his arrest and 2011 guilty plea to the charge of resisting arrest, following a July 2007 altercation with police that was the result of counsel's admitted use and abuse of alcohol. *In re Michael Langford Brown, Jr.*, 396 S.C. 251, 721 S.E.2d 783 (2011), **App. 4523-24**. Robertson has previously construed the 2011 plea as a separate matter from the 2007 altercation, and he contends that *In re Brown* further supports his argument that Mr. "Brown did not competently represent him during his initial PCR proceeding" because Brown was supposedly "abusing alcohol at this time" and violated Court-ordered rehabilitation requirements during the time Robertson's PCR Application was pending. **Petition, p. 8**. Robertson's reliance is misplaced.

First, he apparently misreads *In re Brown* in his Petition as referring to two separate criminal acts, when it appears that the 2011 plea was to the July 2007 incident. *Id.* Second, although Mr. Brown represented Robertson from September 2005 until the March 24, 2008 Order of Dismissal was filed, the evidentiary hearing at which counsel represented Robertson was held on January 29-31, 2007. **App. 3263-3650**. Thus, counsel's investigation and representation at the hearing concluded well before the July 2007 resisting arrest.

Third, the PCR judge, in denying the motion to alter or amend, made the following un-controverted findings:

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.

codify ABA Model Rules); *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (ABA standards do not necessarily establish what the Constitution commands in a given context). These Guidelines do not apply to collateral counsel's performance because there is no Sixth Amendment right to counsel in PCR.

[Robertson] has not provided any evidence, from which it could be inferred, that substance abuse by Mr. Brown affected his representation of [Robertson], 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.

Supp. App. 2.

This analysis was correct because courts have not found *per se* prejudice where trial counsel was allegedly suffering from health or substance abuse problems. *E.g.*, *Bellamy v. Cogdell*, 974 F.2d 302 (2nd Cir. 1992) (given the varying effects health problems can have on an individual's ability to function, claims of ineffective assistance based on attorney illness are best suited to the fact-specific prejudice inquiry mandated by Strickland); *McDougall v. Dixon*, 921 F.2d 518, 535 (4th Cir. 1990) (no showing legal prescription drugs taken by attorney prejudiced defendant; defendant must show medication precluded effective representation); *Smith v. Ylst*, 826 F.2d 872 (9th Cir. 1987) (better to view attorney's actual conduct at trial rather than identify presumptive mental health issues); *People v. Garrison*, 765 P.2d 419 (Cal. 1989) (en banc) (in addressing expert testimony that chronic alcoholics cannot think through problems or make judgment calls, rejecting *per se* ineffectiveness in favor of analysis of the attorney's performance in court). *Accord Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (Court focused not only upon alcohol and substance abuse, but counsel's performance at trial). Further, the record supports the factual findings because it reflects that counsel actively and competently participated throughout the original PCR by amending the Application, examining and cross-examining witnesses, and making appropriate objections and arguments. **App. 3263-3650.**

Robertson further contends that the PCR judge's finding 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” (App. 4441) is “irreconcilable” with findings elsewhere in the Order that original collateral counsel were both qualified and competent. (Citing App. 4433-34; 4437-38). However, the PCR judge’s findings are neither irreconcilable nor do they violate federal law. As discussed, the finding that Mr. Brown was qualified was based upon the facts that 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;” and that counsel’s appointment was confirmed at the September 23, 2005 hearing, at which Mr. Brown, Robertson and counsel for Respondent were present.

Thus, although Judge Few’s Order appointing counsel did not expressly rely upon the Chief Justice’s Memorandum, the *presumption* (as opposed to speculation, as Robertson asserts) is that Judge Few appointed in accordance with § 17-27-160(B) and the Chief Justice’s Memorandum because “[t]rial judges are presumed to know the law and to apply it in making their decisions,” *Walton*, 497 U.S. at 653, and the law is that statutorily qualified counsel must be appointed in capital cases.³⁹ Likewise, the finding of competence of collateral counsel’s performance is based upon the judicial deference due to an attorney’s performance and

³⁹ This presumption is analogous to the presumption of regularity of criminal convictions and is consistent with state and federal law. *See Parke v. Raley*, 506 U.S. 20, 30, 32 (1992) (noting that the “presumption of regularity” accompanying prior convictions offered for purposes of sentence enhancement prevents a defendant from merely pointing to a missing or silent trial transcript to prove the invalidity of the prior conviction on collateral review and explaining that this presumption makes it appropriate to assign burden of proof to defendant where he collaterally challenges constitutionality of prior plea); *Young v. Brabham*, 105 S.C. 62, 89 S.E. 472 (1916) (presumption of regularity applies to court of common pleas and “irregularities must be shown”); *Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995) (regularity of proceedings in general sessions court is presumed); *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 26-27, 542 S.E.2d 723, 726 (2001) (finding admission of incompetent evidence harmless and reversing court of appeals’ finding that presumption of regularity did not apply to bench trial “[b]ased on the lack of competent evidence of motive and the lack of reference to the incompetent evidence in the trial judge’s order).

Robertson's failure to present evidence rebutting *Strickland*'s "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Strickland*, 466 U. S. at 689. Current PCR counsel has merely asserted that certain claims were overlooked, which is insufficient to warrant a hearing under *Aice*. See also *In re Reno*, 283 P.3d at 1211. Also, the only way for these presumptions to be overcome - in light of the present record - would be for the PCR judge to hold a hearing to determine if initial collateral counsel's performance was ineffective under *Strickland*. **App. 4441.**

F. There was no finding that Robertson waived his right to competent counsel.

On p. 5 of the Brief of Petitioner, Robertson asserts that the PCR judge erred in finding that he had waived his right to qualified counsel; that the PCR judge erroneously found, in the alternative, that he had to prove actual prejudice from the appointment of counsel who were not statutorily qualified; and that the PCR judge erroneously found that laches barred relief. His claims lack merit. Respondent submits that this argument lacks merit. Contrary to Robertson's misunderstanding of the PCR judge's Order, the PCR judge did not find that Robertson had waived his right to competent counsel. Rather, the PCR judge correctly found (**App. 4426-28**) that the statute of limitations barred his right to bring the 2011 Application because he could and should have objected to counsel's alleged lack of qualifications at the time of the September 23, 2005 hearing, since he learned counsel's qualifications at that time, "and not one year following the appointment of his present attorneys attack" (as Robertson argues). **App. 4428.** His claim ignores the distinction between a waiver of his right to statutorily-qualified counsel and the statute of limitations bar of his right to challenge counsel's qualifications years after the proper time for doing so had passed.

G. Robertson has apparently abandoned his challenge to the PCR judge's finding that

the 2011 Application is barred by laches, which also is not clearly erroneous in light of the present record.

Robertson has apparently abandoned his challenge to the PCR judge's finding that the 2011 Application is barred by laches. Further, the finding that laches barred the 2011 Application is not clearly erroneous given the present record. **App. 4446-47.**

The PCR judge found that:

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). 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.

App. 4446-47 (footnote omitted). Despite Robertson's contrary assertions, the PCR judge's factual findings are supported by probative evidence of record, *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626, and, based upon those findings, his conclusion that laches bars the 2011 Application is not clearly erroneous because Robertson slept on his rights. *Pierce*, 338 S.C. at 145, 526 S.E.2d at 225. Accord *Bray*, 366 S.C. at 140-41, 620 S.E.2d at 745.

H. Robertson has waived any challenge to the PCR judge's finding that Robertson's substantive claims for relief were barred in PCR by not challenging this on

certiorari.

Finally, Respondent submits that Robertson has waived any challenge to the PCR judge's finding that Robertson's substantive claims for relief (allegations 10 & 11(c)-10 & 11(f)) were barred in PCR by not challenging the judge's ruling on certiorari. *E.g., Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000). Alternatively, Respondent submits that the PCR judge's ruling was correct. *See* § 17-27-20(b); *Drayton*, 312 S.C. at 8-9, 430 S.E.2d at 520.

CONCLUSION

Respondent submits that the Court should affirm the PCR judge's Order and judgment for the above-stated reasons.

ALAN WILSON
Attorney General

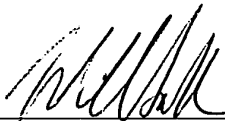
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June 8, 2015.

By: 
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**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**APPEAL FROM YORK COUNTY
The Honorable Lee S. Alford, Circuit Court Judge
Appellate Case No. 2012-205909**

JAMES ROBERTSON,

Petitioner,

vs.

THE STATE,

Respondent.

PROOF OF SERVICE

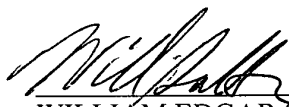
I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Brief of Respondent, by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to the attorney of record:

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I further certify that all parties required by Rule to be served have been served.

This 8th day of June, 2015.



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JUL 13 2015

STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2012-205909

JAMES ROBERTSON *Petitioner*

v.

STATE OF SOUTH CAROLINA *Respondent*

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ARGUMENT IN REPLY

Petitioner, James Robertson, submits this Reply to the Brief of Respondent. While most of the arguments set forth in that document either were anticipated and addressed in Robertson’s main brief or are irrelevant to the issues before the Court, a handful of items do warrant a brief response. They are identified and discussed below.

I. RESPONDENT’S BRIEF IS BUILT AROUND A COLLECTION OF MISCHARACTERIZATIONS THAT SHOULD NOT BE PERMITTED TO DISTORT THE REAL QUESTIONS BEFORE THE COURT.

Throughout its brief, Respondent directs its attack toward issues it wishes to confront rather than addressing the facts and circumstances actually presented by this case. The result is a set of arguments that variously misstate Robertson’s positions, overlook conditions that cannot be changed regardless of the outcome of this appeal, and rely upon a skewed account of the relevant legal landscape. These contentions only muddle, rather than clarify, the important issues to be resolved by the Court.

A. Robertson has never suggested that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), imposes any mandate upon this or any other state court.

In the very first sentence of its Arguments, Respondent characterizes Robertson’s claim as resting on the proposition that *Martinez* “requires state PCR courts to entertain successive applications[.]” Resp. Br. 11. As even a cursory reading of Robertson’s brief demonstrates, that is obviously false. As explained in detail there, *Martinez* does not “require[.]” a state court to do anything. It does, however, alter the federal habeas consequences of state law rules – *e.g.*, the rule of *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) – forbidding second or subsequent requests for post-conviction relief where the prisoner’s counsel in a prior post-conviction proceeding

performed inadequately. And, as Robertson has further explained, that alteration of consequences in federal court raises important questions about whether state law should either be modified to preserve the historical influence of state court judgments in the new landscape, or simply maintained at the expense of that influence. That is the question at the center of this appeal.

Respondent's misunderstanding on this point also accounts for its indignation over Robertson's asserted failure to "mention" or "distinguish" *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013). Resp. Br. 16; *see also id.* at 12. If Robertson had come before this Court contending, as the would-be petitioner in *Kelly* appears to have done, that *Martinez forbids* the dismissal of a successive PCR application, then Respondent would have a point. As Robertson has made clear, however, that is simply not his position. Nor is there any inconsistency between Robertson's arguments and this Court's recognition in *Kelly* that "*Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." *Kelly*, 404 S.C. at 365, 745 S.E.2d at 377. Robertson need not – and does not – challenge this Court's conclusion in *Kelly* in order to raise the separate question – which *Kelly* did not address – whether *Martinez's* impact on federal law and practice calls for a change to the rules governing anterior proceedings in state court.

B. Respondent's concerns about finality and increasing litigation volume should be aimed at *Martinez* itself, not at Robertson.

Respondent warns that, "Adopting Robertson's position would open the floodgates to litigation by hundreds upon hundreds of disgruntled PCR applicants, almost all of whom most assuredly will allege the ineffectiveness of original PCR counsel." Resp. Br. 20-21; *see also id.* at 22 (asserting that "*Martinez*-related claims will be pursued in every case where the applicant is under a death sentence"). While Respondent likely overestimates the scale of the response, Robertson does

not deny that many prisoners are attracted to the opportunity to obtain merits review of claims previously defaulted due to the inadequacy of prior post-conviction counsel. What Respondent overlooks, however, is that such an opportunity *already* exists in federal court; the Supreme Court of the United States created it in *Martinez*, and in so doing accepted the associated costs to finality and efficiency.

Thus, the question in this case is not *whether* prisoners harboring the particular grievance to which *Martinez* is addressed should have *any* chance to be heard – they already do and will – but is instead whether South Carolina’s interests are better served by a rule that permits at least some of those prisoners to obtain merits review in state court rather than federal court. To be sure, offering such review would not be without costs. As explained in Robertson’s main brief, however, the flow of cases and the relative burdens they could be expected to place upon South Carolina courts could be effectively limited both by non-capital prisoners’ lack of access to the tools necessary to effectively develop and present *Martinez*-style arguments, and by implementation of threshold requirements reserving access to successive PCR proceedings only for prisoners who demonstrate that they previously received something less than a full and fair “bite at the apple.” See Pet. Br. 21-23. In combination, these controls would go a long way toward mitigating the exaggerated parade of horrors envisioned by Respondent.¹

¹Respondent also appears to suggest that this Court’s existing original habeas jurisdiction constitutes a remedy sufficient to answer the concerns that animated *Martinez*. See Resp. Br. 33-35. That cannot be correct for the obvious reason that prisoners have no established right to counsel in such proceedings. Absent assistance from counsel, many prisoners never pursue original habeas review, and those who do so unsuccessfully will be well-positioned to demonstrate “cause” for their defaults in federal court. See *Martinez*, 132 S.Ct. at 1318 (“[A] prisoner may establish cause for a default ... where the state courts did not appoint counsel in the initial-review collateral proceedings for a claim of ineffective assistance at trial.”).

Respondent further accuses Robertson of “asking this Court to carve out an exception for” capital cases, and insists that such special treatment would be unfair since prisoners sentenced to death “already are afforded the most protections in our judicial system.” Resp. Br. 22. In truth, Robertson has made no such request. He does acknowledge, however, that were the Court so inclined, a decision to limit South Carolina’s response to *Martinez* to capital cases would be within its prerogative, and would be neither unprincipled nor unprecedented. *Cf., e.g., Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (observing that aspiration toward “a heightened standard of reliability” in capital cases “is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different”); 28 U.S.C. §§ 2261-2266 (legislating special rules for federal habeas corpus litigation in capital cases, including a truncated period of limitations and strict deadlines for entry of final judgments).

C. Respondent’s account of South Carolina prisoners’ access to federal review is misleading.

As part of its effort to persuade this Court that there is nothing to be gained by modifying the rule of *Aice*, Respondent appears to suggest that most (if not all) prisoners who seek to proceed under *Martinez* in federal court will simply fall short. While it is undoubtedly true that some will meet that fate – as Respondent observes, satisfaction of *Martinez* “is hardly a given in this or any other case,” Resp. Br. 25 – Respondent’s account of the difficulty South Carolina prisoners can expect to confront when attempting to secure federal merits review is misleading.

According to Respondent, if Robertson (or, presumably, any other South Carolina prisoner) were to invoke *Martinez* to overcome a procedural default in federal court, he would be “require[d] ... to show more than the mere fact collateral counsel failed to raise potentially meritorious claims.

He must show that no competent counsel, in the exercise of reasonable professional judgment, would have omitted those claims.” Resp. Br. 26. In support of these assertions Respondent cites, and goes on to quote at length from, *Hittson v. GDCP Warden*, 759 F.3d 1210 (11th Cir. 2014), before concluding with the declaration that, “Unless Robertson can meet this demanding standard, the federal habeas courts will not address the claim *de novo*, but will find that the procedural default cannot be excused.” Resp. Br. 26-28.

While the standard Respondent so confidently articulates does appear daunting, it is not the law of the Fourth Circuit. Rather, it is derived from *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (en banc), in which a 6-5 majority of the *en banc* Eleventh Circuit – over vigorous dissent – embraced the idiosyncratic “no competent counsel” requirement Respondent now touts. What Respondent omits, however, is that the *Chandler* majority’s approach – which is in obvious tension with *Strickland v. Washington*, 466 U.S. 668 (1984) – has never proliferated beyond the Eleventh Circuit, and has never been endorsed or adopted by the Fourth Circuit (or the Supreme Court²). There is thus no good reason to assume that Robertson or other South Carolina prisoners would be forced to satisfy the especially “demanding standard” Respondent has hand-selected from a federal court of appeals whose jurisprudence does not govern them. It is much more likely that Robertson and others from this state would simply be required to make the facially less onerous showing

²The prisoner in *Chandler* was an inmate on the federal government’s death row. His death sentence was commuted by President Clinton on January 20, 2001, *see* http://www.washingtonpost.com/wp-srv/aponline/20010120/aponline184839_000.htm (last visited July 3, 2015), and his petition for certiorari was denied by the Supreme Court more than a month later. *Chandler v. United States*, 531 U.S. 1204 (2001).

Martinez itself prescribes.³ See Pet. Br. 13 (describing *Martinez* standard).

D. Respondent’s speculation over Robertson’s motives in this appeal is misguided, but the underlying question deserves to be answered.

Respondent perceives a paradox in Robertson’s position – *i.e.*, that he appears to advocate for a rule that would “provide more deference to and thereby better insulate this Court’s decisions in federal habeas corpus proceedings” – and answers it by speculating that Robertson is merely engaged in a ruse designed “to further delay proceedings in this case.” Resp. Br. 30. The paradox is authentic, but the speculation is wrong. While any course of litigation will necessarily engender “delay” in the sense that it will take time to complete, the second PCR proceeding initiated by Robertson has a legitimate basis in fact and law: his prior PCR counsel were unqualified, they performed no discernable investigation, they failed to plead or prove readily available claims for relief, and the result was a proceeding that did not afford him anything close to the measure of review contemplated by South Carolina law.⁴ Under such circumstances, Robertson’s effort to

³To date, the Fourth Circuit has not added its own gloss to the requirements spelled out in *Martinez*. It has, however, demonstrated that it takes the exception *Martinez* recognized seriously by establishing a rule requiring appointment of independent counsel to evaluate the availability of *Martinez*-eligible claims overlooked by prior counsel. See *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013) (“[I]f a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under *Martinez* in a state where the petitioner may only raise ineffective assistance claims in an ‘initial-review collateral proceeding,’ qualified and independent counsel is *ethically required*. A district court must grant the motion for appointment of counsel without regard to whether the underlying motion identifies a ‘substantial’ ineffective assistance claim under *Martinez*.”) (emphasis by the court).

⁴Respondent reports that, “At the outset of the PCR hearing, Robertson amended his Application and proceeded on twelve specific grounds of ineffective assistance of counsel.” Resp. Br. 6-7; see also *id.* at 7 n.8 (enumerating “allegations”). As the record demonstrates, however, the PCR application was never actually amended beyond the original allegation of “Ineffective assistance of counsel -- specifics to be amended later.” App. 3246. What Respondent charitably calls

secure now what should have been available to him then reflects only his desire for full and fair process (through which he believes he can prevail).

That still leaves the apparent paradox in Robertson's position: If a prisoner's chances for success in federal habeas are stronger without a merits judgment from a state court (because the associated default can be overcome through *Martinez*) than with such a judgment (because the judgment would trigger the application of 28 U.S.C. § 2254(d)), why would a prisoner like Robertson continue to pursue state court review? There are two answers. First, while it is true that federal review unencumbered by § 2254(d) is more desirable than the alternative from a prisoner's perspective, seeking that form of review comes with both a risk and a price. The risk is that the prisoner's effort to satisfy *Martinez* will somehow come up short, such that he will end up with no review at all, state or federal. And the price is that, in order to simply press ahead under *Martinez* in federal court, a prisoner in Robertson's position would be required to forego an available (or, as of now, potentially available) opportunity for a remedy in state court. While pursuing the remedy on the state court side may diminish his chances in a later federal proceeding, it also affords him a more immediate chance to prevail on the merits, which would obviate the need to go to federal court at all. Reasonable minds might differ on how best to weigh these considerations, but Robertson has concluded that, on balance, the opportunity for review in the state courts of South Carolina is worthy of pursuit even though it poses a risk of affecting the review that would otherwise be available to

an amendment was actually PCR counsel's vague and disjointed verbal response to the court's request for a summary of the "issues" counsel proposed to address. App. 3268. The list of "allegations" contained in footnote 8 of Respondent's brief were never actually articulated by PCR counsel, and appear instead to have been formulated by Respondent itself using inferences from counsel's remarks to the PCR court. Furthermore, while Respondent credits PCR counsel for alleging that trial counsel were ineffective for failing to call certain witnesses, it omits the fact that PCR counsel themselves also failed to call those witnesses to prove their allegations.

him in federal district court.

The second answer is that, regardless of how individual prisoners may resolve the balancing analysis in their own cases, *Martinez* has created a need for clarification of South Carolina law. While the course this Court ultimately selects will dictate the terms of litigation going forward, the current uncertainty over whether South Carolina prisoners whose PCR counsel performed inadequately may seek further review in state court should be resolved for the benefit of all concerned – prisoners, the State, state courts, and federal courts. As it happens, Robertson’s case has become the vehicle through which the needed clarification can be achieved.

II. ROBERTSON’S APPEAL IS PROPERLY BEFORE THE COURT.

Respondent asserts that “Robertson’s argument that the Court should rethink *Aice* is procedurally barred” because “[h]e did not argue in the PCR court that *Aice* needed to be modified ‘to reach the limited exception recognized in *Martinez*,’” Resp. Br. 31 (quoting Pet. Br. 21), and he did not raise “this argument” in his “‘Notice of Appeal and Required Explanation,’” *id.* at 32. What respondent fails to mention, however, is that each of those documents was prepared and filed before *Martinez* was decided by the Supreme Court. Robertson is unaware of any South Carolina rule of procedure that demands clairvoyance on pain of default.

Respondent further contends that Robertson’s “argument” was not set forth in the Petition for Writ of Certiorari and “is not fairly encompassed in the Question Presented by him.” Resp. Br. 32. That is simply incorrect. Both the petition and the question it presents plainly refer to and rely upon *Martinez* as the central basis for Robertson’s request that his case be remanded and that he “be permitted to proceed with a second-in-time application for post-conviction relief asserting colorable claims of ineffective assistance of trial counsel that prior PCR counsel ineffectively failed to

investigate or present[.]” Cert. Pet. 2. Furthermore, the body of the petition includes express references to the election made necessary by *Martinez*, and the importance of providing a state court remedy “[i]n order to preserve the role of South Carolina PCR courts as the primary arbitrators of ineffective assistance of trial counsel claims[.]” Cert. Pet. 12. In short, under any reasonable reading, the arguments set forth in Robertson’s briefing are fairly encompassed within the question presented and supported in the petition itself. Respondent’s argument to the contrary is unworthy of serious consideration.

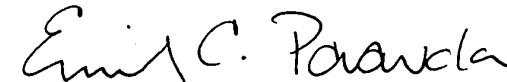
CONCLUSION

Wherefore, for these additional reasons, this Court should construe S.C. Code § 17-27-90 to permit a remedy consistent with the rule established in *Martinez*, vacate the Circuit Court's order dismissing Robertson's second-in-time PCR application, and remand this case to afford Robertson an opportunity to develop, present, and secure adjudications of his previously defaulted ineffective assistance of trial counsel claims.

Respectfully submitted,

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Counsel for Petitioner

July 9, 2015

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2012-205909

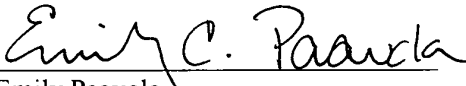
JAMES ROBERTSON *Petitioner*

v.

STATE OF SOUTH CAROLINA *Respondent*

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Reply Brief of Petitioner in the above-captioned case has been served upon William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 9th day of July, 2015.


Emily Paavola
Attorney for Petitioner

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

James D. Robertson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-205909

ON WRIT OF CERTIORARI

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 27691
Heard October 8, 2015 – Filed December 14, 2016

REVERSED AND REMANDED

Keir M. Weyble, of Cornell Law School, of Ithaca, New York, and Emily C. Paavola, of Justice 360, of Columbia, both for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia, for Respondent.

JUSTICE BEATTY: In this capital Post-Conviction Relief ("PCR") case, James D. Robertson ("Petitioner") filed a second PCR application alleging, among other things, that his prior PCR counsel were not qualified under section 17-27-160(B) of the South Carolina Code¹ and failed to competently represent him. Without a hearing, the PCR judge dismissed the application on the grounds that it was successive and barred by the one-year statute of limitations and laches. This Court granted certiorari to review the circuit court's dismissal of Petitioner's application. Petitioner contends his second PCR application should not have been summarily dismissed as successive because his case presents unique circumstances warranting review of prior PCR counsel's assistance under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).² We reverse and remand.

I. Factual / Procedural History

On March 26, 1999, Petitioner was convicted and sentenced to death for the 1997 murder of his parents, armed robbery, and financial transaction card fraud. Over the course of the next four years, Petitioner filed a direct appeal through appointed counsel, moved to relieve appointed appellate counsel, and filed a pro se appeal to this Court on July 25, 2003. Ultimately, following a judicial determination of competency, Petitioner waived his right to direct appeal. On June 3, 2005, this Court dismissed Petitioner's direct appeal after conducting the proportionality review mandated by section 16-3-25³ of the South Carolina Code.

On July 7, 2005, this Court granted Petitioner's request for a stay of execution to pursue PCR. This Court also appointed then Circuit Court Judge John

¹ S.C. Code Ann. § 17-27-160(B) (2014) (identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant).

² See *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that a state procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective).

³ S.C. Code Ann. § 16-3-25 (2003) (identifying procedure Supreme Court must use in reviewing cases involving a sentence of death).

Few to preside over the PCR proceedings. Judge Few appointed Michael Langford Brown, Jr., and Joseph D. Matlock, both of Rock Hill, to represent Petitioner.⁴

On March 1, 2006, Petitioner filed a PCR application (the "2006 Application") generally alleging ineffectiveness of trial counsel. At the beginning of the PCR hearing, Petitioner's counsel verbally amended the application to include twelve grounds of ineffectiveness of trial counsel. Following a three-day hearing, Judge Few denied relief and issued an Order of Dismissal on March 24, 2008. In a letter dated October 6, 2010, this Court denied Petitioner's request for a writ of certiorari.

On January 7, 2011, Petitioner, with the assistance of federally appointed counsel,⁵ simultaneously filed a second PCR application in state court and a Petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina. By order dated April 8, 2011, a federal magistrate stayed the federal proceedings pending the exhaustion of Petitioner's state court remedies.

In his second PCR application (the "2011 Application"), Petitioner sought to have his convictions and sentences reversed based on trial court error as well as ineffective assistance of trial counsel, appellate counsel, and prior PCR counsel. With respect to PCR counsel, Petitioner alleged that his prior PCR counsel were not qualified under section 17-27-160(B)⁶ and failed to competently represent

⁴ The State maintains that Judge Few appointed Brown by order dated September 9, 2005 and confirmed the appointment during a hearing held on September 23, 2005. Petitioner disputes that such a hearing took place. The parties agree, however, that any tape of the hearing no longer exists.

⁵ The federally appointed attorneys are also representing Petitioner before this Court.

⁶ Section 17-27-160(B) provides in relevant part:

If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in this action. At least one of the attorneys appointed to represent the applicant 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

him.⁷ The State filed a Return and a Motion to Dismiss alleging, among other things, that the 2011 Application was barred by the one-year statute of limitations,⁸ impermissibly successive to the 2006 Application, barred by laches, and lacked merit. In Reply, Petitioner urged the PCR judge to deny the motion to dismiss and (1) allow the case to proceed to an evidentiary hearing and final adjudication, or (2) hold the case in abeyance until *Martinez* and *Maples*⁹ were resolved by the United States Supreme Court.

By order dated September 20, 2011, Circuit Court Judge Lee S. Alford summarily dismissed the 2011 Application. In so ruling, the PCR judge found Petitioner's allegation of ineffectiveness of original PCR counsel was not a cognizable state claim that justified filing an untimely, successive PCR application.

Specifically, the judge held: (1) the 2011 Application was barred by the one-year statute of limitations as it was filed more than five years after Petitioner's direct appeal was dismissed on June 22, 2005 and the appointment of original PCR counsel on September 23, 2005; (2) the 2011 Application was impermissibly successive because an allegation that original PCR counsel were ineffective is not a sufficient reason to allow a successive PCR application; (3) Petitioner waived his right to challenge whether his original PCR counsel were statutorily qualified by failing to object to lead counsel's qualifications during the 2006 PCR hearing; (4) Petitioner failed to prove that original PCR counsel were not statutorily qualified to represent him given there was no evidence to the contrary and Petitioner

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*.

S.C. Code Ann. § 17-27-160(B) (2014) (emphasis added).

⁷ In support of this contention, Petitioner cited *Martinez* which, at that time, was pending before the United States Supreme Court.

⁸ S.C. Code Ann. § 17-27-45(A) (2014).

⁹ *Maples v. Thomas*, 132 S. Ct. 912 (2012) (concluding, in capital case, that applicant who was abandoned by his attorney in state PCR proceedings established the requisite cause to excuse procedural default in federal habeas action).

erroneously construed the statutory requirements for appointment of PCR counsel in a capital case;¹⁰ (5) Petitioner failed to prove that his original PCR counsel had not performed competently under *Strickland v. Washington*, 466 U.S. 668 (1984) because the mere allegation that new PCR counsel would have raised different grounds in the 2006 PCR action did not establish deficient performance or prejudice; (6) no due process violation occurred during the 2006 PCR action because Petitioner was provided counsel and meaningful access to the courts; (7) no equal protection violation occurred during the 2006 PCR action because Petitioner could not show disparate treatment based upon his status as an indigent defendant; (8) the decision of the United States Supreme Court to grant certiorari in *Martinez* and *Maples* did not mandate the relief sought by Petitioner given a favorable decision in those cases would only address whether a procedural default may be excused in federal court not state court; (9) laches barred relief; (10) Petitioner's allegations of trial court error are not cognizable PCR claims; and (11) Petitioner's allegations of ineffective assistance of original PCR counsel are not cognizable PCR claims.

Petitioner filed a motion to reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Petitioner objected to, among other things, the PCR judge's dismissal without a hearing, particularly where there was a

¹⁰ In reaching this conclusion, the PCR judge referenced a memorandum issued by then Chief Justice Toal on August 13, 2003 that was sent to all circuit court judges. <http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=165>. In the memorandum, Chief Justice Toal opined that counsel is qualified to represent a capital PCR applicant under section 17-27-160(B) if counsel is qualified to represent a capital defendant at trial under section 16-3-26(B). To be qualified to represent a defendant in a capital trial, at least one attorney must have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases. S.C. Code Ann. § 16-3-26(B) (2003); Rule 421(b), SCACR. Chief Justice Toal construed section 17-27-160(B) to permit qualification of counsel who has twelve South Carolina Bar approved CLE hours *or* has professional training in capital appellate or PCR defense rather than requiring twelve hours of education or training in capital appellate or PCR defense. Chief Justice Toal believed that this construction avoids the absurd result that an attorney qualified to represent a defendant in the trial of a capital case would not necessarily be qualified to represent a capital PCR applicant. Accordingly, Chief Justice Toal concluded that "anyone who is qualified to represent a capital defendant at trial, and has completed their CLE requirements should be deemed qualified to represent a petitioner in a capital PCR proceeding under § 17-27-160."

disagreement between the parties regarding whether original PCR counsel met the statutory qualifications to be appointed in a capital PCR case. In support of this assertion, Petitioner supplemented the motion with: (1) affidavits confirming that neither Brown nor Matlock were qualified; and (2) a published opinion wherein Brown was publicly reprimanded for professional misconduct, which stemmed from substance abuse that occurred in July 2007.

The judge denied the motion, finding Brown had death penalty experience and there was no evidence that Brown's substance abuse problems affected his effectiveness in representing Petitioner in the 2006 PCR action. Additionally, the judge found that any failure to comply with section 17-27-160 did not violate Petitioner's constitutional rights because the statute does not create an independent, constitutional right. Finally, even assuming the State did not comply with section 17-27-160, the judge concluded that Petitioner failed to demonstrate prejudice. This Court granted Petitioner's request for a writ of certiorari to review the PCR judge's order.

II. Discussion

A. Arguments

Petitioner seeks for this Court to vacate the PCR judge's order summarily dismissing his 2011 Application and remand for a hearing. As the basis for this relief, Petitioner asserts that this Court, in response to *Martinez*, should amend existing state court PCR proceedings to permit Petitioner to file a second PCR application. While acknowledging the existing prohibition against successive PCR applications under section 17-27-90 and cases interpreting the statute, Petitioner maintains that this law should be re-evaluated based on *Martinez*. Additionally, because Petitioner claims that prior PCR counsel were not qualified under section 17-27-160(B) and were ineffective, he contends that these reasons were sufficient to allow him to file a timely, successive PCR application and require a hearing on the merits. Due to the alleged deficiencies in prior PCR counsel's representation, Petitioner avers that he was denied a full and fair opportunity to present his claims.

B. Procedural Default in PCR Proceedings

The South Carolina Legislature enacted the Uniform Post-Conviction Procedure Act to govern all aspects of PCR, including strict time deadlines and the appointment of counsel in capital PCR proceedings. S.C. Code Ann. §§ 17-27-10 to -160 (2014). A PCR application must be filed within one year after the entry of

a judgment of conviction, or if there is an appeal, 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. *Id.* § 17-27-45(A). However, "[i]f 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." *Id.* § 17-27-45(C).

"All applicants are entitled to a full and fair opportunity to present claims in one PCR application." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). "Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were.'" *Id.*

Section 17-27-90 of the South Carolina Code generally prohibits the filing of successive PCR applications, stating:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, *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.*

S.C. Code Ann. § 17-27-90 (2014) (emphasis added). In *Aice v. State*, this Court interpreted section 17-27-90 to forbid "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* acknowledged that there may be "unique" circumstances,¹¹ where a PCR counsel's assistance could be challenged in

¹¹ See, e.g., *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996) (permitting successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, prohibited applicant the benefit of due process); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (authorizing a successive PCR

a successive application. *Id.* at 451, 409 S.E.2d at 394. However, the Court expressly held "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.*

Despite the express holding in *Aice*, Petitioner argues that *Martinez* excuses the procedural bar of section 17-27-90. In *Martinez*, the "precise question" addressed by the United States Supreme Court ("USSC") was "whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding." *Martinez*, 132 S. Ct. at 1315. The USSC answered this question by holding that:

[w]here, 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 1320. In reaching this conclusion, the USSC recognized that federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are governed by rules designed to ensure that state-court judgments are accorded finality and respect necessary to preserve the integrity of legal proceedings within the system of federalism, including the doctrine of procedural default. *Id.* at 1316.

The USSC explained:

Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) 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. From this it follows

application where the applicant did not have PCR counsel that differed from his trial counsel); *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982) (allowing a successive PCR application where applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing).

that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed. 2d 931 (2003) (describing standards for certificates of appealability to issue).

Id. at 1318-19.

One year after *Martinez* was decided, this Court explicitly stated that "the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013).

Appellate courts have continued to adhere to this Court's holding in *Kelly*. See, e.g., *Salter v. State*, 184 So. 3d 944 (Miss. Ct. App. 2015) (discussing *Kelly* and holding that *Martinez* does not apply to Mississippi PCR proceedings), *cert. denied*, 185 So. 3d 385 (Miss. 2016); *Brown v. McDaniel*, 331 P.3d 867, 871-72 (Nev. 2014) (citing *Kelly* and declining to alter Nevada PCR procedures based on *Martinez*). Significantly, courts from other jurisdictions have also extended the holding in *Kelly* to encompass capital PCR proceedings. See *State v. Hessler*, 850 N.W.2d 777, 786 (Neb. 2014) (citing *Kelly* and concluding in a capital PCR case that "[n]othing in *Martinez* prevents state courts from enforcing procedural defaults in accordance with state law").

We find that Petitioner has offered no legitimate legal or policy reason to depart from our holding in *Kelly*. Notably, Petitioner has never moved to argue against precedent. Moreover, because the PCR Act is a legislatively created scheme, any post-*Martinez* change to PCR proceedings must be instituted by the Legislature. See *Brown*, 331 P.3d at 875 ("Whether or how a rule similar to that adopted in *Martinez* should be adopted in state post-conviction proceedings is a

matter of policy and lies in the hands of the Legislature."); *Hessler*, 850 N.W.2d at 787 (declining to extend *Martinez* to state court PCR proceedings and noting that it was for the Legislature to determine the consequences of *Martinez*). Accordingly, we hold that *Martinez* does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.

However, Petitioner's 2011 Application also alleged, as a separate and distinct ground not addressed by *Aice*,¹² that prior PCR counsel were not qualified under section 17-27-160(B). We conclude Petitioner's allegation that he was denied a state-created right to qualified counsel constitutes a "sufficient reason" to permit a successive PCR application under section 17-27-90.¹³ Furthermore, we find that Petitioner's 2011 Application was filed within the one-year statute of limitations provided by section 17-27-45 as prior PCR counsel's alleged lack of qualification was not discovered until federal counsel was appointed in 2011. Contrary to the State's position, we find Petitioner did not waive his challenge to counsel's lack of qualification by failing to raise this issue during the 2006 PCR proceeding. We believe it is unreasonable to think that an indigent PCR applicant,

¹² The dissent cites *Aice* to support its position that Petitioner's application is impermissibly successive. The dissent's reliance on *Aice* is misplaced as this case was decided by this Court in 1991 before the Legislature identified the qualifications for capital PCR counsel in 1996.

¹³ The dissent disagrees that Petitioner's allegation he was denied a state-created right to qualified counsel constitutes a "sufficient reason" to permit a successive PCR application under section 17-27-90. Instead, the dissent characterizes Petitioner's challenge to his capital PCR counsel's qualifications as "merely" a "routine ineffectiveness argument." We question how Petitioner's challenge could be "routine" as his allegation is based on a distinct statute that is only applicable to capital PCR applicants. Further, the dissent cites no authority for its position but, rather, acknowledges cases where this Court permitted a successive application. Finally, the dissent claims a petition brought pursuant to *Butler v. State*, 302 S.C. 466, 397 S.E.2d 87 (1990) is adequate to address Petitioner's challenge. While the dissent may believe a *Butler* petition is the "ultimate safety net," it seems nonsensical to require a capital PCR applicant to exhaust all state and federal relief with the assistance of counsel who may ultimately be found unqualified. In the interest of judicial economy and fundamental fairness, we believe an allegation that capital PCR counsel is unqualified should be resolved at the earliest point in the proceedings and not after an applicant has exhausted all permitted relief.

who relies on the State to appoint qualified counsel, would have the knowledge to question counsel's qualifications at the onset of the proceeding.

Having determined that Petitioner's 2011 Application was procedurally proper, we must next construe section 17-27-160(B) and identify the requisite qualifications for capital PCR counsel.

C. Statutorily Mandated Qualifications for Capital PCR Counsel

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* Pub. L. No. 104-132 (1996). In the AEDPA, "Congress provided streamlined federal habeas procedures to those states that maintain mechanisms for the mandatory appointment and compensation of competent counsel during state postconviction proceedings." Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31, 35 (2003) (footnote omitted). "By this act, Congress chose to restrict federal *habeas corpus* review in exchange for the states[] appointing competent counsel for indigent capital defendants for purposes of state postconviction review." *Lee v. State*, 238 S.W.3d 52, 56 (Ark. 2006) (citing Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. Crim. L. & Criminology 467, 469 (2000)).

In response, the majority of death-penalty states addressed issues relating to capital PCR counsel. McConville, *supra*, at 35. South Carolina, one of ten states, "amended their rules to provide a mandatory right to counsel for capital defendants at the state postconviction stage." *Id.* In 1996, the South Carolina Legislature enacted the "South Carolina Effective Death Penalty Act of 1996." Act No. 448, 1996 S.C. Acts 2709, 2712-14. As a provision in this Act, the Legislature included section 17-27-160 to provide, in part, for "the appointment and compensation of counsel" in capital PCR proceedings. *Id.*

Taking into account the express purpose of section 17-27-160, we find the Legislature intended for an indigent capital defendant to be appointed counsel who: (1) has previous experience representing a capital defendant in state or federal PCR proceedings, or (2) was qualified to try a capital case and successfully completed at least twelve hours of South Carolina Bar approved (a) CLE specifically involving *capital* appellate or *capital* PCR proceedings or (b) professional training specifically involving *capital* appellate or *capital* PCR proceedings. *See* fn.6,

supra. Simply stated, at least one attorney appointed pursuant to section 17-27-160(B) must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education.

Furthermore, given the inclusion of section 17-27-160 in the South Carolina Effective Death Penalty Act of 1996 and specific designation as providing procedures for capital PCR, we find this construction comports with the intent of the Legislature for appointed counsel to be proficient in capital PCR proceedings and not just capital trial proceedings. *See Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (stating that "the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect").

D. Application to the Instant Case

Based on our construction of section 17-27-160(B), we find the PCR judge erred in ruling that compliance with section 17-27-160(B) only required capital PCR counsel to have capital *trial* experience. Moreover, we agree with Petitioner that the PCR judge erred in summarily dismissing the 2011 Application because there was a genuine issue of fact as to whether prior PCR counsel met the qualifications of section 17-27-160(B).

Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts, and (2) the applicant is not entitled to relief. S.C. Code Ann. § 17-27-70(b), (c) (2014). "When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant." *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013). "Similarly, when reviewing the propriety of a dismissal, this Court must view the facts in the same fashion." *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005).

"Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a

question of fact is raised which can only be resolved by a hearing." *McCoy*, 401 S.C. at 369, 737 S.E.2d at 626.

Here, Petitioner offered affidavits confirming that neither Brown nor Matlock were qualified as capital PCR counsel. Petitioner also notes that Judge Few's summary order of September 9, 2005, appointing Brown as counsel, contained no reference to section 17-27-160 or a finding that counsel was qualified. In contrast, the State maintains that Judge Few conducted a hearing on September 23, 2005 during which he confirmed the appointment of Brown. Both parties agree that there is no tape or transcript of the September 23, 2005 hearing.

Because the parties offered conflicting evidence as to whether Petitioner's prior PCR counsel met the requisite qualifications, the PCR judge erred in dismissing the 2011 Application without a hearing. Consequently, we remand for a determination of whether prior PCR counsel were statutorily qualified. *See Lee v. State*, 238 S.W.3d 52 (Ark. 2006) (remanding for circuit court to conduct further proceedings where capital PCR counsel, who admitted to being impaired by alcohol during capital PCR proceeding, may not have met the specific qualifications set forth in state rule providing for the appointment of counsel).

In the event that prior PCR counsel are deemed unqualified under section 17-27-160(B), the judge must decide the appropriate remedy. Because we have yet to enunciate how this remedy is to be determined, we take this opportunity to do so.

E. Remedy for Lack of Qualified Counsel

Although we have researched other states that have qualification statutes or rules similar to section 17-27-160(B), we have been unable to find a case that sets forth a test for non-compliance. However, based on our reading of *Martinez*, we find the *Strickland*¹⁴ test is appropriate and should be applied to evaluate this type of case. *See Martinez*, 132 S. Ct. at 1318 (recognizing that effectiveness of

¹⁴ In *Strickland*, the USSC enunciated a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

counsel, who represented defendant in an initial-review collateral proceeding, should be evaluated under the standards of *Strickland*).¹⁵

Applying the *Strickland* test, we conclude that non-compliance with section 17-27-160(B) constitutes deficient performance per se. To rule otherwise, we believe would render meaningless the Legislature's intent to have *qualified* counsel appointed to capital PCR applicants. See *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000) (evaluating the State's failure to comply with section 17-27-160 and stating, "We accordingly conclude that a state must not only enact a 'mechanism' and standards for post-conviction review counsel, *but those mechanisms and standards must in fact be complied with* before the state may invoke the time limitations of U.S.C. § 2263" (emphasis added)).¹⁶ Nevertheless, a PCR applicant would still maintain the significant burden of proving that he was prejudiced by counsel's lack of qualification.

¹⁵ See also *Tucker v. Moore*, 56 F. Supp. 2d 611 (D.S.C. 1999) (holding that State's failure to follow section 17-27-160 is not a violation of an applicant's constitutional rights because the rights granted under that statute, if not given, do not penalize the applicant), *aff'd*, 221 F.3d 600 (4th Cir. 2000), *cert. denied*, 531 U.S. 1054 (2000); *Aeschliman v. State*, 973 P.2d 749 (Idaho Ct. App. 1999) (recognizing that trial counsel's lack of qualifications under the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Case did not constitute ineffective assistance of counsel per se; concluding that applicant must allege specific instances where trial counsel fell short of an objective standard of reasonableness); *State v. Misch*, 656 N.E.2d 381 (Ohio Ct. App. 1995) (finding that lack of certification of defense counsel as experienced in capital cases under court rules does not automatically create a presumption that trial counsel has not provided effective assistance of counsel; recognizing that the effectiveness of counsel not qualified under court rule must be judged under the *Strickland* standard); *State v. Maletta*, 781 P.2d 350, 354 (Or. Ct. App. 1989) (concluding that no legitimate policy is served by dismissal of a charge where trial counsel in a capital case was not qualified under a state statute if the defendant was not prejudiced; noting that "adequacy of counsel is measured by performance, not credentials").

¹⁶ Also, by analogy, a violation of a statute in a civil proceeding constitutes negligence per se. See *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012) (recognizing that the violation of an applicable statute constitutes negligence per se).

III. Conclusion

Despite this Court's express ruling in *Kelly*, Petitioner seeks to have the Court create a state remedy that is the equivalent of the federal remedy established by *Martinez*. We decline to do so. Instead, we reaffirm *Kelly* and extend its holding to encompass capital PCR cases. However, we conclude that Petitioner's allegation that prior PCR counsel were unqualified is not foreclosed by *Aice* or its progeny and constitutes a "sufficient reason" to avoid the prohibition of section 17-27-90 against successive PCR applications. Furthermore, we find that Petitioner's 2011 Application was filed within the one-year statute of limitations provided by section 17-27-45 as prior PCR counsel's alleged lack of qualification was not discovered until federal counsel was appointed in 2011. Additionally, we hold that the PCR judge erroneously construed section 17-27-160(B) as we conclude that at least one attorney appointed pursuant to this code section must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education.

Because there is a genuine issue of fact as to whether prior PCR counsel were statutorily qualified, Petitioner should be afforded a hearing on this limited issue. *Cf. McCoy*, 401 S.C. at 370, 737 S.E.2d at 627 ("Although Petitioner's PCR claim may ultimately prove to be untimely, successive, or perhaps unsuccessful on the merits, the PCR judge erred in granting the State's motion for summary dismissal because genuine issues of material fact exist as to whether Petitioner's PCR claim is successive or untimely."). If prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced. Accordingly, we reverse the PCR judge's order and remand the matter for a hearing.

REVERSED AND REMANDED.

KITTREDGE and HEARN, JJ., concur. PLEICONES, C.J., concurring in part and dissenting in part in a separate opinion. Acting Justice Jean H. Toal, dissenting in a separate opinion.

CHIEF JUSTICE PLEICONES: I concur in part and dissent in part. I agree with the majority's analysis of the *Martinez* issue and concur in its analysis¹⁷ of S.C. Code Ann. § 17-27-160(B) (2014).

I disagree, however, that a capital PCR applicant must demonstrate *Strickland*¹⁸ prejudice in order to be entitled to relief for a statutory violation of § 17-27-160(B). In 1991, a majority of the Court abolished the doctrine of *in favorem vitae* which required the Court to search the record in a capital appeal for legal error. *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). The abolition of this common law doctrine was justified in large part because of the protections afforded by the Uniform Post-Conviction Procedure Act. That PCR is a poor substitute for *in favorem* review, however, was made explicit in *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001). In *Franklin*, the capital PCR applicant contended trial counsel were ineffective in failing to inform him of his statutory right to argue to the jury in the guilt phase of his trial. The *Franklin* majority acknowledged that the applicant had been denied this statutory right, and that prior to the abolition of *in favorem*, this error would have warranted a new trial. The majority held, however, that with PCR "replacing" *in favorem* review, a capital PCR applicant now bore the burden of proving not only error, but also constitutional prejudice. I dissented, and wrote:

In my opinion, we must honor the General Assembly's prerogative to establish the procedural safeguards which it deems necessary to the fair administration of the death penalty. Where the legislature has prescribed a departure from the procedures observed in "ordinary" criminal trials, those deviations should be scrupulously honored. I would thus not engage in a prejudice analysis where the undisputed facts do not demonstrate a conscious waiver or strategic decision to forego one of the special protections mandated by the capital statutes.

Franklin v. Catoe, supra, Pleicones, J., *dissenting*.

¹⁷ I would simply add that where the attorney seeks to be qualified by virtue of training or CLE, that education must have been accomplished within the two years preceding the appointment.

¹⁸ *Strickland v. Washington*, 466 U.S. 668 (1984).

Based upon my view of the Court's obligation to enforce statutes governing special procedures in capital proceedings, including those mandating the qualifications of attorneys, and based upon the assurances made in *Torrence* that "[O]ther mechanisms of protection and of relief have now been created for the [capital] defendant which safeguard [him] and render the protections afforded by *in favorem vitae* surplusage,"¹⁹ I would hold that a capital PCR applicant must be appointed counsel who meet the qualifications set forth in § 17-27-160(B). If upon remand it is determined that Petitioner was not represented by statutorily qualified counsel, then in my view the appropriate remedy is a new PCR proceeding in which he is represented by such counsel.

For the reasons given above, I concur in part and dissent in part.

¹⁹ *State v. Torrence*, 305 S.C. 45, 61, 406 S.E.2d 315, 324 (1991).

ACTING JUSTICE TOAL: I respectfully dissent. I would affirm the post-conviction relief (PCR) court's dismissal of Petitioner's second PCR application because Petitioner's allegation of ineffectiveness does not justify the filing of an untimely, successive PCR application. Further, I disagree with the majority's interpretation of section 17-27-160(B) of the South Carolina Code²⁰ and would find that an attorney who is qualified to represent a capital defendant at trial is likewise qualified to represent a capital defendant in PCR proceedings.

A. Successive Application

First, I would find that Petitioner has not set forth sufficient reasons in his application to overcome the prohibition against successive PCR applications. *See* S.C. Code Ann. § 17-27-90 (2014) ("Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, 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."); *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991) (interpreting section 17-27-90 to prohibit "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").

While I agree with the majority that Petitioner should not be afforded review pursuant to *Martinez*,²¹ and that *Kelly*²² should be extended to capital PCR cases, I disagree with the majority's holding that applications containing allegations

²⁰ Section 17-27-160(B) requires the appointment of two attorneys in a PCR capital case, of which 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 [s]ection 16-3-26(B) and [s]ection 16-3-26(F) and (2) have successively 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."

²¹ *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

²² *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013).

regarding compliance with section 17-27-160(B) warrant automatic review of an otherwise successive application. *See Aice*, 305 S.C. at 451, 409 S.E.2d at 394 ([T]he contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90."). Even though Petitioner is challenging his PCR counsel's qualifications, he is merely asserting a routine ineffectiveness argument, which does not constitute a "sufficient reason" why the new grounds for relief he asserts were not raised, or were not raised properly. *But see Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996) (permitting a successive application where multiple procedural irregularities prohibited the applicant from receiving a direct appeal); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (permitting a successive application where trial counsel also served as PCR counsel); *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982) (permitting a successive application where a pro se PCR application was dismissed without a hearing).²³ I am hesitant to create another tier of review in an already thorough process when procedures exist to deal with successive (but meritorious) claims that may have slipped through the cracks of the normal review process.

B. Interpretation of Section 17-27-160(B)

Moreover, I disagree with the majority's interpretation of section 17-27-160(B). Since 2003, counsel has been held to be qualified to represent a capital PCR applicant if counsel is qualified to represent a capital defendant *at trial*²⁴ and has completed the continuing legal education requirements. *See Re Appointment of Counsel in Capital Post-Conviction Relief Matters*, dated August 15, 2003, found at <http://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=165>. I see no reason to depart from this interpretation now. In my opinion, the sound

²³ Moreover, there is still the ultimate safety net provided by *Butler* petitions in cases in which a PCR applicant has exhausted all permitted relief but "where there has been a violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (internal quotation marks omitted) (citation omitted); *McWee v. State*, 357 S.C. 403, 414, 593 S.E.2d 456, 461 (2004) (Pleicones, J., dissenting) (explaining a *Butler* petition provides the Court with "a final opportunity to review the fundamental fairness of a criminal proceeding").

²⁴ An attorney is qualified to represent a capital defendant at trial if he or she has at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases. *See* S.C. Code Ann. § 16-3-26(B) (2015); Rule 421(b), SCACR.

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reasoning underlying that interpretation still holds true, and the adoption of the majority's interpretation of the statute would lead to the illogical result that an attorney meeting the qualifications to defend a capital defendant at trial may not be qualified to defend him in PCR proceedings. *Id.*

C. Conclusion

For these reasons, I would affirm the decision of the PCR court.

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF YORK) IN THE COMMON PLEAS COURT
3 James D. Robertson,)
4 Applicant,) TRANSCRIPT OF RECORD
5) 2011-CP-46-0072
6 -vs-)
7 The State.) July 14, 2020
Gaffney, South Carolina

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9
10 B E F O R E :

11 HONORABLE R. KEITH KELLY, JUDGE
12
13

14 A P P E A R A N C E S :

15 WILLIAM HARRY EHLIES, II, ESQUIRE
16 JOSEPH BRADLEY BENNETT, ESQUIRE
Attorneys for the Applicant

17 W. EDGAR SALTER, III, ESQUIRE
18 MELODY JANE BROWN, ESQUIRE
Attorneys for the State
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22 Linda D. Moffitt
23 Circuit Court Reporter
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25

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Status conference -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 (The following was heard using WebEx with counsel
2 wearing masks.)

3 THE COURT: Okay. Everyone, we're having a little bit
4 of hearing issues because we're having to use speakers.
5 And my court reporter, Linda, is doing her very, very best,
6 but everybody's going to have to speak up, please.

7 Okay. Mr. Ehliès or Mr. Bennett, which one of you --
8 this is a status conference that you wanted on the record,
9 is that right?

10 MR. BENNETT: Yes, sir.

11 THE COURT: All right. Somebody tell me what the
12 issues are. And I'm going to mute myself while everybody
13 else is talking. That'll keep the background noise.

14 MR. EHLIES: Yes, sir. This is Hank Ehliès.

15 And please let me know that you can hear me, court
16 reporter.

17 Okay. And, Mr. Salter, can hear me?

18 MR. SALTER: Yes. I can.

19 MR. EHLIES: All right, sir. This is, Judge, a motion
20 for a status conference that was actually a junk [sic]
21 motion. We had bonds in Columbia and met with
22 representatives of the state, and we agreed that it would
23 be helpful to have a status conference pertaining to,
24 primarily to, the scope of the presentation when we get to
25 the merits hearing.

1 In particular concern for me was reading the Supreme
2 Court decision and order of remand.

3 It became difficult to understand what it was they
4 wanted you to do, and I was particularly caught by the
5 prejudice remarks within the context of the order, because
6 by the time they resolved the Martinez issue, which was
7 five to nothing in favor of the ruling that there was no
8 probability of an application of a Martinez exception
9 within the law as it pertains to capital P.C.R. litigation
10 in South Carolina.

11 It went from there to part two, which was the
12 statutory requirements for serving as counsel in a capital
13 P.C.R. case, and, more specifically, as it was -- be in the
14 Carr [sic] decision in the favor review, and it was very
15 difficult and ambiguous remarks about what your function
16 would be.

17 I did not want to make the decision for you, and it
18 was basically one of two turns.

19 It was either a sentencing after the determination was
20 made as to where the trial -- P.C.R. -- initial P.C.R.
21 counsel met the statutory obligations. It was a statement
22 in the majority opinion of three, and at that point
23 Torrence [sic] was a dissenter on this. It became a
24 three-two dissent.

25 They said that after making determination of the facts

1 concerning whether the initial P.C.R. counsel qualified,
2 statute, if they were not, then a deficiency and prejudice
3 analysis could be -- could be made.

4 And it became kind of unclear to me as to whether the
5 prejudice they're talking about is prejudice associated
6 with not being qualified, which is very easy to establish,
7 because they weren't qualified. They failed to meet the
8 due process requirement. The client did not get what was
9 guaranteed in the evidence [sic] with regards to due
10 process in the fault cases for counsel.

11 But then they made this reference in the majority
12 opinion to Strickland, and it was specific that the
13 prejudice assessment should be an actuary [sic] of the
14 Strickland decision as regards prejudice.

15 And what really is interesting there is that we know
16 that Strickland vs. Washington was never, has never, is
17 never, and today is not applicable to assessing of P.C.R.
18 counsel performance.

19 Everyone knows the standard for trial counsel only,
20 and in South Carolina there was never any analysis or
21 prejudice to a client that had a remedy if P.C.R. counsel
22 were ineffective. And that's what Martinez was all about,
23 in to make sure that it didn't squeeze its way into the law
24 of this state.

25 But then they turned right around and asked you, the

1 commanding [sic], the presiding judge, to accept the
2 consequences of not having qualified counsel according to
3 the Strickland analysis, and that's what takes me to trial
4 counsel and whether they were deficient and, if so, did
5 that prejudice according to this definition of prejudice in
6 Strickland vs. Washington. And of course that critiques
7 where we have to go the full gamut of investigation,
8 development and presentation.

9 Those are the Wiggins [sic] standards for performance
10 that are [inaudible] to [inaudible] for capital litigation,
11 which you have to investigate, you have to develop and if
12 it's strategy and decisions of trial counsel in their
13 strategic decisions and forced to decisions present those
14 issues.

15 So I've been going down that track ever since I've
16 been involved in this case, and we've made a lot of
17 progress. And we have identified a number of issues that
18 have never been addressed either at the jury trial or at
19 the initial P.C.R. that will need to be raised in this
20 successive P.C.R.

21 And so we -- we are not sitting on our hands during
22 all of this. We're moving on the more global
23 interpretation of the remand order, which is that we should
24 look at trial counsel's performance and prejudice as
25 defined in Strickland vs. Washington.

1 So I came to you with the idea that you may say I
2 don't want to do any of that, I would just rather say
3 they're deficient and it was prejudicial to [inaudible]
4 guarantee [inaudible] statute. That was to impress this
5 violation there and prejudice. And there are other things
6 that at a merits hearing we could bring forth on that very
7 easy burden, if you will, compared to an analysis of trial
8 counsel and prejudice under Strickland.

9 So that's why I come to you, and it's really just
10 to -- to see how you feel about that issue, because I
11 didn't want to arrive in court prepared for the full plan B
12 of presentation only to have you say I don't want to hear
13 anything of it, I just want -- I just want to limit it to
14 the fact that they were not death-penalty qualified, so how
15 did that hurt if they weren't death-penalty qualified.
16 Well, it hurts because they didn't do the presentation, the
17 interpretation, they should have in addition to being a due
18 process, due process violation.

19 So I hope you -- you heard me and the court reporter
20 equally hear me. I tried not to speak too quickly, because
21 I tend to do that anyway. And that's kind of where I am in
22 this request. And as long as you don't object to us
23 proceeding with the full [inaudible] as we have been with
24 the full plan of B of presentation and investigation
25 developed of these issues, then we're good to go. And I

1 appreciate your time.

2 Do you have any questions for me?

3 THE COURT: No, no, and I don't not at this -- this
4 point.

5 I'll hear from Mr. Salter, but-and then I've got some
6 comments.

7 Go ahead, Mr. Salter or Ms. Brown. Someone.

8 MR. SALTER: Yes, sir, just quickly.

9 In my return I pointed out that we've been --
10 Mr. Robertson was represented by Mr. Weyble and Ms. Paavola
11 we had a status conference. [inaudible]

12 THE COURT: Linda's having trouble.

13 Can you move your mask down just a little bit and
14 maybe let's see if that helps Linda, Mr. Salter.

15 (Pause.)

16 THE COURT: I'm sorry. Mr. Salter, can you lower your
17 mask maybe just a little bit? Let's see if that helps
18 Linda.

19 MR. SALTER: I apologize, Your Honor.

20 THE COURT: That's fine. We're just doing the best we
21 can.

22 Go ahead, Mr. Salter.

23 MR. SALTER: All right. What I was saying is back
24 when Mr. Robertson was represented by Mr. Weyble and Ms.
25 Paavola Your Honor had a status conference here in the

1 attorney general's office with Ms. Paavola present and
2 Mr. Weyble on the phone.

3 We kinda went through some of the same matters that
4 Mr. Ehlied has discussed, and I believe my recollection is
5 that Your Honor determined that we would have to go forward
6 with what Mr. Ehlied has referred to as a full plan B under
7 Strickland.

8 THE COURT: Okay. This -- this is what my
9 understanding is, and, please, somebody jump in if you
10 think I'm wrong on this.

11 I think what the Supreme Court is asking me to do is
12 to determine, in the simplest form determine, whether or
13 not because neither of the P.C.R. lawyers had that
14 particular certification, whether or not the defendant was
15 prejudiced by that. That's what I think the Supreme Court
16 is asking me to do.

17 In fact, it is stipulated by the state that they did
18 not -- the lawyers, one of whom is deceased and the other
19 one is not -- but they both agree -- they both, I think,
20 signed affidavits that they never satisfied the statute.

21 Nonetheless, there was an order in place from the
22 Chief Justice, as I recall, that said if you were
23 death-penalty certified to try a case you were certified to
24 do a death-penalty P.C.R.

25 I think, and I'm speaking from memory here, that when

1 Chief Justice Beatty took over they rescinded that order,
2 and so that's where this question has now arisen.

3 And so I think the question is because -- is, again,
4 whether or not that piece of paper, that certification,
5 those classes would have made a difference, was the
6 defendant prejudiced because his P.C.R. counsel did not
7 have that certification. And I think that is the only
8 question that is being asked of me.

9 I think that if -- in the event that the Court finds
10 that he was prejudiced, then he's entitled to a second full
11 blown P.C.R.

12 If the Court finds he is not prejudiced, then it will
13 be up to the Supreme Court to decide whether or not they
14 give him a second P.C.R. or not. But I think that's the
15 question before me.

16 Now, somebody jump in and tell me I'm wrong.

17 Mr. Salter.

18 MR. SALTER: No, sir, Your Honor.

19 I think you're correct, but I think Mr. Ehli's
20 question -- Mr. Ehli's question is how does he go about
21 establishing that. And our position would be that he would
22 have to satisfy the prejudice prong of Strickland, which is
23 specifically referenced in the Robertson opinion.

24 THE COURT: Well, that's what the Court's told me to
25 use.

1 MR. SALTER: Yes, sir.

2 THE COURT: Mr. Ehliès, I mean, I'm happy to hear from
3 you, sir, but that's what the Court has told me to use, is
4 the Strickland standard, and we are at prong two.

5 MR. EHLIES: Yes, sir. Can you hear me?

6 THE COURT: Yes, sir.

7 MR. EHLIES: Okay. Establishing the Strickland
8 prejudice standard, the definition cannot be done when you
9 look at the deficiencies of P.C.R. counsel without showing
10 what happened at the trial level with prejudice.

11 And it may not be necessary to show deficient
12 performance of trial counsel, but in the end to establish
13 that P.C.R., initial P.C.R., counsel were deficient and
14 that prejudiced my client using the definition of
15 Strickland, that it may have altered the outcome, then
16 you've got to do the full Strickland prejudice analysis of
17 the fact that they existed or were and were presented or
18 not presented at the trial. And so that's what's taken us
19 down this path of having to look at all of the prejudice
20 making the prejudice assessment.

21 That's at the trial level, because that's what the
22 initial P.C.R. did not do and should have done. And that's
23 how the client became prejudiced and [inaudible] that in
24 your order in compliance as you understand the remand to
25 be.

1 They were deficient and in the interest of further of
2 what would have happened had they been qualified to develop
3 this evidence in post conviction.

4 So that takes us right back to where we were in the
5 beginning, we've got to do the Strickland analysis after it
6 presented itself at the trial level because that's where
7 qualified P.C.R. would have gone or should have gone and
8 did not go. Thank you. That's all.

9 THE COURT: well, and I understand. I'm following
10 that in some ways that -- but then I think someone has to
11 testify at the -- at this hearing, not the P.C.R. hearing.
12 This is not a P.C.R. hearing today -- but have to testify
13 at this hearing that that's where they should have gone
14 and-but for them not being certified that they -- that
15 things would have been different in that P.C.R., they would
16 have raised issues in that P.C.R. that they did not raise
17 because they did not know to do that.

18 Am I right, half right, there?

19 MR. EHLIES: Yes, yes, sir. That's one. They did not
20 know to go there because they didn't have adequate
21 training. And had they gone there, Strickland prejudice,
22 this is what would have been developed which would have
23 materially impacted and changed the result of the verdict.

24 THE COURT: Okay. So --

25 MR. EHLIES: That's all.

1 THE COURT: Okay. So you're going to have somebody
2 testify to that and Mr. Salter is going to have somebody
3 say otherwise, I guess.

4 MR. EHLIES: Yes, sir. We have people to testify.
5 Your Honor, I'm going up today, as a matter of fact, we
6 hope. We've got to do the interviews.

7 He'll testify as to what these education standards and
8 experience and training do for an individual who
9 specializes in this area and how that impacts their
10 investigation, development and perpetration of issues as
11 it's outlined in wiggins. So that's what we're going to
12 have, and then we'll be able to cover all of the bases by
13 doing that.

14 Thank you. That's all.

15 THE COURT: Thank you.

16 Mr. Salter.

17 MR. SALTER: Just briefly, Your Honor.

18 We also have an issue -- I neglected to mention
19 this -- the issue of whether or not P.C.R. counsel may have
20 had a strategic reason for not developing certain issues.

21 THE COURT: Oh, yeah, certainly, certainly. I
22 understand. Yeah. It could have been trial; it could have
23 been strategy. Oh, yeah, I agree. But that's -- we're
24 headed in the same direction, but that's the only question
25 I'm being asked to do, whether or not -- whether or not

1 this defendant gets a -- this gentleman gets another P.C.R.
2 is not up to this Court. I'm not being asked to do that as
3 I understand it.

4 Now, having said that, I would love to get this thing
5 moved, and I have become a huge fan of this WebEx, and so I
6 don't -- we could probably do all of this because we don't
7 have a jury. I think this could easily be done on the
8 WebEx, especially where you've got out-of-state witnesses,
9 Mr. Ehliès and Mr. Salter.

10 MR. SALTER: [inaudible] As long as we have our
11 problems with communications --

12 THE COURT: Yeah. We've got a little bit of things to
13 work on as far as being able to hear and some things like
14 that. I understand that, and we do.

15 And it changes. In my case it changes in whatever
16 courtroom or whatever courthouse I'm in. It's a little
17 different, and I'm in Gaffney this week. But it changes a
18 little bit.

19 But we can -- I think we can overcome that and
20 everybody be able to hear and use earbuds, because some
21 places I can use earbuds and it's really clear using
22 earbuds.

23 How far out are we, Mr. Ehliès and Mr. Bennett?

24 MR. EHLIES: Your Honor, Judge, I don't want to pass
25 over lightly your suggestion that WebEx is going to do it,

1 but actually there are constitutional issues involved in
2 the webEx and remote type and all the rest of that.

3 I know that transporting -- we can't get in to most of
4 the jails, and transporting people is very difficult for
5 S.C.D.C.

6 So that aside, just to alert you that, I'm not so
7 quick to get in to constitutional issues that are presented
8 by [inaudible] litigating cases and seeing witnesses and
9 being with the client [inaudible] manifestations of facial
10 gestures and all of the other components that go with
11 communication. That aside we -- we have been deep into
12 this case and have not been lax. Totally it's a major
13 inhibitor.

14 I've got three expert witnesses who will not allow me
15 to meet with them and will not meet, and one of them is the
16 testifying expert under subpoena in this case, Mr. Elan
17 Gopy [sic] who does not and will not leave his house. He
18 is immune compromised. He's 71 years old. He is carrying
19 a large part of the case that I inherited, and he's been
20 unavailable to us other than by telephone.

21 we've got another witness who won't do the initial
22 interview until COVID is over because they don't want to
23 get subpoenaed to come to a court in a live presentation.
24 And I haven't suggested that it wouldn't be live because I
25 was hoping that it would be live.

1 So COVID doctors have real restrictions of moving
2 forward with the case. And that's about all I can tell you
3 on that score other than to assure you that we have been
4 and are and still pressing forward.

5 We have three states to visit in the next month --
6 Maryland, Tennessee and Florida -- and those are witnesses,
7 most of them experts, potential experts. We have not
8 settled on them. We're dealing with the vetting process
9 now. So I don't see us being ready in -- in 2020 and I
10 don't see COVID changing.

11 Frankly, we just got an order from federal court
12 extending all juries and other courthouse-related things
13 into September. And none of us could have anticipated this
14 back when this thing got started, but the COVID
15 restrictions are real and significant as far as our work to
16 get this case ready to go. So I would say it's going to be
17 a 2021 case.

18 THE COURT: Okay. Now, is there -- is there any
19 chance that -- that some of your experts can -- can do some
20 work with the defendant by WebEx? I mean, I'm managing to
21 take some pleas and do some other things in the prison. I
22 could help with that. I don't know if that helps you or
23 not.

24 MR. EHLIES: Yeah. We can -- we can reach -- I can
25 reach my client by phone, of course, and I do that every

1 week. I meet with him every week, every Wednesday at
2 10:00 a.m.

3 They have to move him, and you have to be mindful that
4 really that's a major effort even to get him to a video
5 conference setting. And they cannot leave him there. So
6 they have to dedicate people.

7 If I have somebody interviewing him from Maryland,
8 they have to dedicate people to stay with him and supervise
9 that rather than putting him in a conference room on the
10 rug.

11 And the witness would be administering tests that are
12 on written documents. And he scored -- he commits the
13 answers in the text and then the experts score all the
14 answers.

15 So it is very problematic to boil it all down to
16 video, although video is helpful in the initial stages and
17 we are using it. In this case we're using it. But it's
18 not a substitute [inaudible] for custom to COVID. Yeah.
19 Mr. Bennett is pointing out to me that getting -- getting a
20 conference, we never let a witness have access to a client
21 without us being physically present.

22 So it takes -- it takes a system that will accompany
23 multiple, like this WebEx that will accompany multiple
24 venues that you're getting it done. And it runs me \$20 for
25 30 minutes. So, and we have these things going eight hours

1 on interviews, that sort of thing. So it's problematic.
2 we're going to get this job done.

3 I did not anticipate when you called me originally
4 that this COVID thing would happen, and I myself am 71
5 years old, you know. But I've not slowed down a bit. I
6 work seven days a week. I'm in every prison in the Upstate
7 just about. Going to one right after this one.

8 So we're -- we're on the target, but it's a major
9 undertaking to make application, it's not major
10 application. But it's a life balance and you got to treat
11 it seriously.

12 Thank you very much. That's all I have to say.

13 THE COURT: I know that you're on it. I know both of
14 you are on it, and I appreciate you very much.

15 Mr. Salter, anything? I think he -- I think he's
16 muted. Okay. Mr. Salter, anything?

17 MR. SALTER: No, sir, Your Honor.

18 THE COURT: well, okay. Everybody is working hard,
19 and the COVID-19 is with us, and I'm afraid that it's not
20 going to get any better any time soon but I don't have
21 any -- I don't have any advanced information on that. I
22 just know what I read in the paper like everyone else, but
23 it just doesn't seem good. Seems like South Carolina just
24 got a major outbreak at this point.

25 So, anyway, well, we'll stay in touch with everyone

1 and keep up. And thank everyone for your hard work. And
2 if I can do anything to help resolve this, I sure would,
3 but I don't know what I can do to help. So, but if you
4 come up with something, let me know.

5 MR. EHLIES: Yes, sir. We'll stay in touch with you,
6 and I appreciate your time as well. We have broken up. We
7 got about half of what you said there, and that's an
8 illustration these things can't be if you're doing an open
9 trial.

10 THE COURT: Yes, sir. I was just saying this COVID-19
11 is with us for a little while to stay. None of us knows
12 that it's going to get any better any time soon. I don't
13 have any knowledge of that.

14 So, but thank you so much, and we'll stay in touch
15 with each other.

16 MR. EHLIES: Thank you, Your Honor.

17 THE COURT: Thank you.

18 Thank you, Mr. Salter. Thank you, Ms. Brown.

19 MR. SALTER: Thank you.

20 MR. BROWN: Absolutely.

21 END OF REQUESTED TRANSCRIPT OF RECORD
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for York County, South Carolina, on the 14th day of July 2020.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 27, 2020

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

Case No.: 2011-CP-46-0072

James D. Robertson, # 5067

Applicant,

vs.

State of South Carolina,

Respondent.

**FIFTH AMENDED APPLICATION
FOR POST- CONVICTION RELIEF**

FILED-RECEIVED

-
1. Place of Detention: Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210.
 2. Name and location of Court which imposed sentence: York County Court of General Sessions.
 3. Name(s) of co-defendant(s) (if any): Not applicable
 4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 98-GS-46-1020, 98-GS-46-1021
 5. The date upon which sentence was imposed and the terms of the sentence: March 26, 1999 (Death Sentence)
 6. A finding of guilty was made after a plea of not guilty.
 7. The applicant did appeal from judgment of conviction and sentence.
The Court to which applicant appealed: The South Carolina Supreme Court;
 - (a) The result in each Court to which applicant appealed: Appeal dismissed
 - (b) The date of such result: June 3, 2005
 - (c) Not applicable
 9. Not applicable.

GROUNDNS FOR RELIEF WITH SUPPORTING FACTS

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 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. *See Strickland v. Washington*, 466 U.S. 668 (1984). Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See S.C. Code Ann. 17-27-160; see also Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

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).
- (ii) Counsel failed to challenge the State's theory of the case that the killings were motivated by a desire for financial gain.
- (iii) Trial Counsel failed to investigate, develop and present guilt phase defenses involving battered child syndrome (*see State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (S.C. 1991)). Counsel failed to consult with an expert in parricide who was familiar with the psychological theory of internal family systems. Specifically, that children who kill their parents after a prolonged period of abuse may result in a self-defense claim to murder and, alternatively, may be guilty only of voluntary manslaughter. *See also Simpson v. Moore*, 367 S.C. 24; 511 S.E.2d 689 (S.C. 2006). *See Ard v. Catoe*, 372 S.C. 318; 642 S.E.2d 590 (SC; 2007) embracing the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Guideline 5.1(B)(2)(f). Guideline 8.1(B)(3)(5)(10). Guideline 10.7(A)(2). Guideline 10.11(A); (F)(2); (K).
- (iv) Trial Counsel failed to challenge the State's case concerning the lack of positive identification of the two bodies found at the scene.

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 penalty phases of his capital trial

when trial counsel committed the acts or omissions set forth below in section II(b). Trial counsel's performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Original PCR counsel would have investigated, developed and presented evidence of deficient performance resulting in prejudice to the client and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See* S.C. Code Ann. 17-27-160; *Robertson*, 418 S.C. 505, 795 S.E.2d 29.

II(b). Trial Counsel's deficient and prejudicial acts and omissions included:

- (i) Trial Counsel incorrectly advised Applicant that any information he gave to testifying experts would be kept confidential and would NOT be admissible at trial. Applicant relied on this erroneous advice and told testifying experts extremely prejudicial, self-incriminating information that was later admitted into evidence at trial.
- (ii) Because Trial Counsel failed to attend the interviews between testifying experts and the client, Counsel did not discover that Dr. Toni Cascio, their novice testifying expert, had questioned the defendant about the circumstances of the crime and that the defendant had answered those questions. Counsel also failed to discover that she memorialized those details in her notes. Counsel failed to read the notes of Dr. Cascio before surrendering them to the prosecutor. Dr. Toni Cascio's interview notes with the client included detailed and confidential, extremely damaging and prejudicial, self-incriminating statements. Trial Counsel did not make an informed strategic decision whether to surrender the notes to the State as a prerequisite to calling Dr. Cascio as a witness because Counsel did not know that the notes memorialized prejudicial, self-incriminating statements made by the defendant. As a result, the confidential and extremely damaging self-incriminating statements contained within the notes were entered into evidence for the jury's consideration through the testimony of Dr. Cascio on cross-examination. *Ingle v State*, 348 S.C. 467, 560 S.E.2d 401 (2002).
- (iii) Trial Counsel abandoned the client. Counsel did not provide legal assistance during the client's critical interviews with testifying expert witnesses because they did not attend those interviews. (See Hancock November 23, 1998 letter).¹ As a result, experts

¹ "Counsel must discuss with the client in advance any evaluation that is to take place and attend the examination in order to protect the client's rights (Subsections J(2)-(3))." *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 2003, § 10.11 Commentary (Guidelines) 2003 referencing 1989 edition; emphasis added. *See Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 1989, § 11.8.6 The defense

obtained damning confidential information about the details of the crime otherwise protected by the client's assertion of his Fifth Amendment right not to be a witness against himself. Trial Counsel's failure to be present resulted in testifying experts (Dr. Cascio being only one) asking questions that should not have been asked or answered. The horrendous and damning details, which the State would otherwise have never known, were then published to the jury.

- (iv) Trial Counsel failed to instruct, supervise, and manage, testifying expert witnesses. In particular Dr. Toni Cascio, who had never served as a testifying expert witness, to ensure that she, and all others, complied with the client's constitutional right and decision to remain silent concerning the details of the crime. Because Trial Counsel made an informed strategic decision to hire an inexperienced expert, Counsel incurred a heightened duty to instruct, supervise and manage her work.
- (v) Trial Counsel failed to supervise and manage Applicant's interviews with all the testifying defense experts to ensure that Applicant's Fifth Amendment rights against self-incrimination were protected from disclosure to the jury.
- (vi) Trial Judge Hayes ordered Applicant to submit to a psychological evaluation to determine whether he was competent to assist with his defense and was sane at the time of the crime. Those were issues that were never raised by the defense at any time. Doing an evaluation of the Applicant on those issues required the Court's examiner to ask Applicant about the circumstances of the crime. The examiner was the Court's witness and was performing a function for the benefit of the Court. Trial Counsel failed to insist that the examiner's report be retained by the Judge alone thereby protecting the Applicant's right not to be a witness against himself, and protecting the contents within the report being kept from the prosecution unless and until issues of competency or sanity were raised by the defense. As a result of Trial Counsel's failure, Applicant's statements in violation of his Fifth Amendment rights came into evidence when the prosecution called the Court's examiner, Dr. McKee, as its rebuttal witness.
- (vii) Trial Counsel failed to object to allowing the State to utilize the Court's examiner as its rebuttal witness to the client's case in mitigation. The separate functions of serving the Court to determine competency and sanity became commingled within one

case at the sentencing phase Commentary Paragraph two footnoted 4.

witness. Trial Counsel's failure to object resulted in the Court's witness, armed with Constitutionally protected information, to also serve as the State's rebuttal witness and, in that role, to testify about the circumstances of the crime in violation of the client's Fifth Amendment rights to remain silent.

- (viii) Trial Counsel failed to insist that the State produce the notes of Dr. McKee in advance of his testimony. Because Trial Counsel did not have Dr. McKee's notes, they were unable to effectively cross-examine him and demonstrate that McKee's notes did not include all of the details of the crime to which Dr. McKee testified. Specifically, some of Dr. McKee's testimony came only from the contents within Dr. Cascio's notes. Therefore, McKee was not testifying from his own personal knowledge about all of the details of the crime, as represented to the jury, but also from some of Dr. Cascio's notes about the details of the crime which he had just been provided by Respondent and read moments before taking the witness stand. (App. Trans. pps.3046-3083; 3067).
- (ix) Trial Counsel failed to develop and present all available mitigation evidence from Applicant's life and background. Counsel did not retain a social historian that was familiar with internal family systems which was necessary to build an effective mitigation case for the defendant. This includes evidence regarding Applicant's long-standing, severe, improperly treated mental health issues; his family members' mental health issues; and the Robertson's internal family system dynamics.

Trial counsel's failures left the State's aggravating portrayal of Applicant un rebutted and prevented the jury from understanding and giving mitigating effect to the long history of severe dysfunction that pervaded the family. The mitigation history as presented at trial failed to incorporate this social history, and other relevant mitigating evidence.

- (x) Trial Counsel failed to investigate, develop and present penalty phase defenses involving battered child syndrome (*see State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (S.C. 1991)) and parricide. Counsel failed to consult with an expert in parricide who was familiar with the psychological theory of internal family systems. Specifically, that children who kill their parents after a prolonged period of abuse have substantial mitigating circumstances that when presented properly reduce culpability for murder. See also *Simpson v. Moore*, 367 S.C. 24; 511 S.E.2d 689 (S.C. 2006). See *Ard v. Catoe*, 372 S.C. 318; 642 S.E.2d 590 (SC; 2007) embracing the ABA Guidelines for the Appointment and

Performance of Defense Counsel in Death Penalty Cases. Guideline 5.1(B)(2)(f). Guideline 8.1(B)(3)(5)(10). Guideline 10.7(A)(2). Guideline 10.11(A); (F)(2); (K).

- (xi) Trial 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).
- (xii) Trial Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that 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.
- (xiii) Trial 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).
- (xiv) Trial Counsel failed to investigate, develop and present evidence to challenge the prosecution's theory of the case. The State's theory was that the murders were financially motivated when the evidence of severe rage as documented in Dr. Sexton's autopsy reports demonstrated otherwise.
- (xv) Trial Counsel failed to investigate, develop and present evidence supporting a defense based upon battered child syndrome (State v Lopez, 306 S.C. 362, 412 S. E.2d 390 (1991)).
- (xvi) Trial Counsel failed to challenge the State's case concerning the lack of positive identification of the two bodies found at the scene.

10 & 11(c). Applicant's Fifth Amendment right not to testify against himself and his Sixth Amendment right to have effective assistance of counsel at every stage of the proceedings were violated when trial counsel willfully abandoned Applicant during his interviews with testifying experts. Counsel chose not to attend ANY interviews of Applicant by any of the defense experts in the case. This abandonment resulted in improper questions being asked and of and answered by the Applicant. As a result, highly prejudicial and self-incriminating statements were memorialized in the notes of defense experts and were eventually revealed to the jury at trial. This information would not have been

presented to the jury but for the notes of the defense experts. Original PCR counsel should have pursued and likely would have prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See* S.C. Code Ann. 17-27-160; Robertson, 418 S.C. 505, 795 S.E.2d 29.

10 & 11(d). Applicant's Fifth Amendment right not to testify against himself was violated when Dr. Geoffrey McKee was allowed to reveal self-incriminating statements to the jury that Applicant allegedly made to Dr. McKee during a court-ordered competency evaluation. The competency evaluation was ordered by the Judge to satisfy himself that the Applicant was competent to stand trial and was sane at the time of the crime. Trial Counsel were deficient to the prejudice of the Applicant by not objecting to the Court disclosing the report and Dr. McKee's notes to the prosecution, especially because the report and notes contained detailed, self-incriminating statements concerning the circumstances of the crime.

Dr. McKee was improperly allowed to testify before the jury to irrelevant statements by the Applicant which were only necessary to determine competency and sanity when neither of these issues were ever raised by the defense. Applicant's Fifth and Sixth Amendment rights to have counsel present during the competency evaluation, and to have any self-incriminating statements contained in Dr. McKee's report redacted was violated. *See* State v. Bixby, 388 S.C. 528, 558, 698 S.E.2d 572, 588-89 (2010). Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See* S.C. Code Ann. 17-27-160; Robertson, 418 S.C. 505, 795 S.E.2d 29.

10 & 11(e). Applicant's Fifth and Fourteenth Amendment right to due process were violated when the State failed to provide the defense with Dr. McKee's interview notes, in violation of the trial Court's rulings, Rule 705, SCRE, Rule 5, SCRCrimP, and Brady v. Maryland, 373 U.S. 83 (1963). Because the defense was not given Dr. McKee's notes, they were unable to effectively cross-examine Dr. McKee. Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See* S.C. Code Ann. 17-27-160; Robertson, 418 S.C. 505, 795 S.E.2d 29.

On May 29, 2020 Applicant's attorneys served a discovery subpoena upon the current Circuit Solicitor requiring him to make his file available to be copied. Neither the entire file, as requested, nor a redacted file including a privilege log has been provided at this time. The Applicant reserves the right to supplement this Application concerning matters of prosecution errors until after the file in its entirety or as redacted with a privilege log are disclosed with enough time for Applicant's counsel to review, research and investigate the untimely provided material.

10 & 11(f). Applicant's Sixth Amendment right to control his own defense was violated when trial counsel failed to inform Applicant that guilt phase defenses

existed. This is a structural error and prejudice is presumed. *See McCoy v. Louisiana*, 138 S. Ct. 1500 (2018); *United States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020). Alternatively, this error meets the *Strickland* standard for relief. Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See S.C. Code Ann.* 17-27-160; *Robertson*, 418 S.C. 505, 795 S.E.2d 29.

10 & 11(g). Trial Counsel's failure to manage and supervise their expert witnesses and failure to be present during all of the Applicant's experts' interviews resulted in the Applicant being without counsel at a critical stage of his case, thereby denying Applicant his Sixth Amendment right to effective assistance of counsel. *See United States v. Cronin*, 466 U.S. 648, 659 (1984). Counsel's systemic errors and omissions also caused a breakdown in the adversarial process that was violative of Applicant's Sixth Amendment right to effective assistance of counsel. *See id.* Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See S.C. Code Ann.* § 17-27-160; *Robertson*, 418 S.C. 505, 795 S.E.2d 29.

10 & 11(h). Applicant's Sixth and Fourteenth Amendment rights to a fair jury trial were violated by the solicitor's improper and prejudicial closing argument during the guilt 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). Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See S.C. Code Ann.* 17-27-160; *Robertson*, 418 S.C. 505, 795 S.E.2d 29.

10 & 11(i). 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). Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See S.C. Code Ann.* § 17-27-160; *Robertson*, 418 S.C. 505, 795 S.E.2d 29.

10 & 11(j). 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). Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. *See S.C. Code Ann.* 17-27-160; *Robertson*, 418 S.C. 505, 795 S.E.2d 29.

10 & 11(k). 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). Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. See S.C. Code Ann. 17-27-160; Robertson, 418 S.C. 505, 795 S.E.2d 29.

10 (l). 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 I, §§ 3 and 1 4 of the South Carolina Constitution when appellate counsel committed the acts or omissions set forth in Section 11(g). Appellate counsel's performance was both unreasonable and prejudicial. See *Strickland*, 466 U.S. 668. Original PCR counsel would have pursued and prevailed on this claim but for original PCR counsel's lack of statutorily required education and experience. See S.C. Code Ann. 17-27-160; Robertson, 418 S.C. 505, 795 S.E.2d 29.

11(l). Appellate counsel's acts or omissions included:

- (i) Appellate counsel failed to argue 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 argue that 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 argue that 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).
- (iv) Appellate counsel failed to argue that Dr. McKee's testimony was incorrectly admitted at trial since the Defense never raised issues of Applicant's competency to stand trial or Applicant's sanity at the time of the crime under the M'Naghten standard. (M'Naghten's Case, 8 Eng. Rep. 718 (1843)).

- (v) Appellate Counsel failed to advise Applicant of possible meritorious issues available for review. This failure prevented the Applicant from making an informed decision about proceeding *pro se*.
- (vi) Prior to being relieved as Appellate Counsel, a hearing was held to determine if the Applicant should be allowed to proceed *pro se*. Appellate Counsel chose **not** to attend this important hearing. Appellate Counsel abandoned the Applicant at this critical stage of his case. Thus, Applicant was left unprepared and unrepresented by learned counsel at that hearing. Maples v. Thomas, 565 U.S. 266 (2012).
- (vii) Appellate Counsel failed to advise Applicant about the dangers of self-representation and the likelihood of Applicant being executed as a result of proceeding *pro se* with his appeal. (See June 12, 2002, letter from Joseph Savitz, III to The Honorable Daniel Shearhouse, Clerk, South Carolina Supreme Court)
- (viii) Appellate Counsel failed to attend either of the competency hearings held before Judge John Hayes. The purpose of those hearings was to determine whether the Applicant was competent to make knowing and intelligent decisions to waive the right to counsel on appeal and to proceed *pro se*, so that he might ultimately – and did – abandon his appeal. Neither the Federal nor State Constitutions provide a right for an appellant to represent himself. State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (SC 2005)) (death sentenced appellant denied permission to proceed *pro se*). Indiana v. Edwards, 554 U.S. 164 (2008). The prejudice that resulted from Appellate counsel's abandonment of the Applicant was that Judge Hayes decided the Applicant was competent to make these decisions without first considering his long-standing unremitted mental illnesses and their mercurial, rapid cycling transitions in mood; the cognitive impairments resulting from the Applicant's years on death row; and failing to obtain a neuropsychological evaluation by a qualified expert. An appeal from a sentence of death cannot be waived. The mandated appeal process is not just a personal right of the defendant but is also a right of the people secured by Legislative enactment so that the public may have confidence in the integrity of the process that results in the execution of a human being. That Legislative purpose was not considered when deciding that the Applicant had the right to proceed *pro se*. S.C. Code Ann. 16-3-25 (1976).

Had Appellate Counsel been present at Applicant's competency hearing he would have moved Judge Hayes for a psychological evaluation of Applicant to determine whether the Applicant was competent to proceed *pro se*. Maples v. Thomas, 565 U.S. 266 (2012).

Judge Hayes found Applicant competent to make a knowing and intelligent waiver of his right to counsel and allowed Applicant to proceed *pro se* in his appeal of his capital murder guilty verdict and death sentence.

After approximately three years as a *pro se* litigant Applicant failed to advance his appeal in any meaningful way. The efforts he did make demonstrated his limited understanding of going forward *pro se*.

- (ix) Appellate Counsel failed to attend a competency hearing held by Judge John C. Hayes, III on February 22, 2005, to determine if Applicant was competent to waive his right to appellate review.

Had Appellate Counsel been present at Applicant's competency hearing he could have moved before Judge Hayes for a psychological evaluation of Applicant to whether the Applicant had the mental capacity to make a knowing and intelligent decision to waive his right to appellate review. Maples v. Thomas, 565 U.S. 266 (2012).

Additionally, had Appellate Counsel been present at the hearing, he could have provided clarity to the court about the issue of Applicant having or not having representation via "Stand By Counsel". (See Hearing Transcript pp. 24 -27).

Had Appellate Counsel been present, he also would have provided the court with insight as to Applicant's reasons for wanting to proceed *pro se*, which would have indicated to the Court that his waiver was not unequivocal, knowing and intelligent. See Reed v. Ozmint, 374 S.C. 19, 647 S.E.2d 209 (2007).

- (x) Applicant did not knowingly and intelligently waive his right to appeal. Applicant's appeal was dismissed because Applicant failed to adequately comport with the South Carolina Appellate Court Rules. Applicant did not timely file the documents the Rules required him to file because he believed that he had never been given his entire file and did

not want to proceed with his appeal with an incomplete file. Out of frustration with the process, and believing that he would never be given his complete file, Applicant eventually acquiesced and agreed to waive his direct appeal. However, like Reed in Reed v. Ozmint, 374 S.C. 19, 647 S.E.2d 209, Applicant wanted to have the substantive claims adjudicated while simultaneously seeking to waive his right to appeal. Like in *Reed*, therefore, Applicant did not unequivocally, knowingly and intelligently waive his right to appeal. *See Id.*

- (xi) It was inappropriate for Robertson to have been allowed to proceed *pro se* in his direct appeal. Like Roberts in State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (2005), Applicant's request to proceed *pro se* was not timely, Applicant was sentenced to death, and Applicant was represented by Mr. Joseph Savitz – a “very experienced capital appeals litigator.” 365 S.C. at 589, 614 S.E.2d at 629. Despite being extremely similarly situated, Roberts was not allowed to proceed *pro se* in his capital appeal but Applicant was.

10(m). Original Post-Conviction Relief Counsel were deficient to the prejudice of the Applicant by accepting Court Appointment when they failed to meet the criteria set forth in S.C. Code Ann., § 17-27-160(B). Without the statutorily required experience and training original PCR counsel were deficient to the prejudice of the Applicant in the particulars set forth in 11(m).

11(m). Original Post-Conviction Relief Counsel were deficient to the prejudice of the Applicant in all the matters heretofore enumerated and in the following particulars:

- (i) by being ignorant of the laws governing procedures in capital post-conviction cases (S.C. Code Ann. 17-27-160, Capital Case Post Conviction Relief Procedures Act) and, as a consequence, failing to promptly advise the Court that neither PCR counsel met the requirements to serve as lead counsel.² See Rule 1.1 Competence; Rule 6.2 comment (2) Refusing appointment when the attorney is not qualified, and Rule 3.3 Candor Towards the Tribunal RPC, Rule 407, SCACR. Prevailing professional norms may never fall below Rules of Professional Conduct.
- (ii) by failing to state any ground for relief in the Application as required by S.C. Code Ann., 17-27-90 (1976): “All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or

² “An attorney’s ignorance of a point of law that is fundamental to his case combined with this failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.” Hinton v. Alabama, 571 U.S. 263, 274 (2014). Prejudiced flowed from the deficiency in that trial counsel were not challenged on the performance issues raised in 11(b).

amended application.” SC Code Ann., 17-27-90 (1976). Further, that deficiency resulted in prejudice as the meritorious grounds for relief became defaulted.

- (iii) by offering Applicant’s #5, which combined Dr. Cascio’s handwritten client interview notes with her typed report, and representing to the Court that the report and notes were sent to trial counsel together on March 1, 1999 (See Dr. Cascio’s cover letter marked as Applicant’s #6). In reliance on this clearly erroneous representation, the Court issued an order denying relief, in part, on the basis that trial counsel had sufficient time with the Cascio handwritten notes to make a strategic decision whether to call her as a witness.³ See Rule 1.1 Competence; Rule 6.2 comment (2) Refusing appointment when the attorney is not qualified, and Rule 3.3 Candor Towards the Tribunal RPC, Rule 407, SCACR. Prevailing professional norms may never fall below Rules of Professional Conduct.
- (iv) by marking defense trial counsel’s paralegal, Catherine Smith Hendrix’s notes as Applicant’s #7 and handing them up to the Court with the clearly erroneous representation that the notes were those of defense testifying expert, Dr. Cascio, when in reality, the notes were those of Catherine Smith Hendrix. PCR counsel knew or should have known that the notes were attorney work product of trial counsel’s paralegal and not those of Dr. Cascio. Applicant’s #7 contained additional detailed, confidential and devastating facts included and relied upon by the Court in rendering its decision denying relief. See Rule 1.1; Rule 6.2 comment (2), and Rule 3.3 RPC, Rule 407, SCACR. Prevailing professional norms never fall below mandatory rules of professional conduct.
- (v) by failing to interview Dr. Cascio and Catherine Smith Hendrix which would have revealed that the Cascio notes only became available to trial counsel the night before she testified. Trial counsel surrendered the notes to the prosecution, unread, immediately after obtaining them. By doing so trial counsel essentially surrendered control over whether to call Dr. Cascio as a witness since the State, having read the notes containing details about the actual killings, would have called her as an adverse witness pursuant to Rule 611(c) SCRE.
- (vi) by failing to challenge trial counsel for not attending expert witness conferences with the client to make sure improper questions were not asked and were not answered. Trial counsel were deficient to the prejudice of the Applicant by failing to manage and direct the activities

³ See PCR Transcript pps. 189-192. As will be shown at the successive hearing, trial counsel did not obtain Dr. Cascio’s notes until the night before her testimony (March 24, 1999) and only had possession of the notes for mere moments before surrendering them to the prosecution. (See Appendix page 2749).

of all the expert witnesses hired by trial counsel to make a mitigation case.

- (vii) by failing to challenge trial counsel for not insisting that the State surrender State expert witness Dr. McKee's interview notes to prepare for cross-examination of that witness as more particularly set forth in 10 & 11(e).
- (viii) by falsely representing to the Court that Dr. McKee did not testify before the jury concerning the details of the crime. (App pps. 3618, 3631) when he did testify concerning details of the crime. (App pps. 3067-3073); and by falsely representing to the Court that Dr. Cascio met with the defendant on July 17 and July 22, 1998 (App. Page 3492) when her billing records, confirmed in part by notes of lead counsel Hancock, establish that she did not meet with the client on those dates.⁴

These errors caused the trier of fact to draw erroneous conclusions concerning the length of time Trial Counsel had within which to learn that Dr. Cascio was interviewing the defendant about inappropriate and confidential matters. Subsequently, the trier of fact erroneously concluded trial counsel had a far greater amount of time to intercept Dr. Cascio's damaging notes and make a strategic decision regarding whether to call her as a witness or dismiss her in favor of a new social historian. The misrepresentations concerning Dr. McKee's extensive testimony about the details of the crime (App. Pps. 3067-3073) caused a deflection of the factfinder's parsing of the evidence and a loss of opportunity to present evidence that the McKee testimony before the jury concerning the details of the crime were facts McKee actually gleaned primarily from Dr. Cascio's notes, which he read just before taking the witness stand, and not solely from statements the client made during the McKee interviews. (App. Page 3067).

- (ix) by failing to challenge trial counsel for not objecting to the trial Court's disclosure of the psychological evaluation report to the parties when it was the Court that ordered the evaluation and when neither competence or sanity were in issue. Further, in failing to challenge trial counsel for not objecting to the Court's order which allowed the same expert who performed the competency/sanity examination – the Court's expert - to become the State's expert witness to rebut the defendant's mental health presentation. The State should have hired its own rebuttal witness and

⁴ State's Exhibit 8, offered during the original PCR, is the visitation log for the York County Detention Center where the Applicant was held during the month of July 1998. There is no record of Dr. Cascio visiting with the Applicant during that month or at any time the Applicant was detained at that facility. The Applicant was moved from the York Detention Center to Lee Correction Institution in the latter half of 1998 and before his jury trial in March of 1999.

the Court should have prohibited the State's witness from asking questions in violation of the client's right to remain silent. Such a ruling would have placed the rebuttal witness on the same footing as the defense experts which was that they were not to inquire about the details of the crime in violation of the defendant's Fifth Amendment right to remain silent.

- (x) by failing to investigate, develop and present evidence pertaining to the guilt phase of the case by which the Applicant could then have challenged trial counsel's performance in failing to present battered child syndrome to bolster a self-defense and/or a voluntary manslaughter theory of the case.
- (xi) by failing to investigate, develop and present detailed mitigation testimony by means of an internal family systems expert to provide the trier of fact with evidence from which it may be determined that Trial Counsel were deficient and as a result the Applicant was prejudiced. (See Judge Few's remarks faulting PCR counsel on this basis App. P. 3633).
- (xii) by failing to investigate, develop and present a witness to demonstrate the deficient performance and prejudice resulting from using a social worker who had never testified or developed a social history for the purpose of testifying prior to being retained by Trial Counsel in this case. (See Judge Few's remarks faulting PCR counsel on this basis App. P. 3635).
- (xiii) by failing to question Trial Counsel for not challenging the State's case concerning the lack of positive identification of the two bodies found at the scene.

10(n). As a result of the errors set forth in 11(m) Judge Few's order granting summary judgment to the State and denying relief to the Applicant was based upon clearly erroneous presentations by PCR counsel pertaining to critical facts upon which Judge Few relied. The result is that the final order denying relief lacks indicia of reliability and constitutes a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the post-conviction proceeding and his order undermines confidence in the outcome.

- 12. (a) Yes, Applicant has filed a mandatory appeal to the State Supreme Court, an application for post-conviction relief to the York County Court of General Sessions, and a petition for writ of certiorari from denial of his application for post-conviction relief to the State Supreme Court.
- (b) Yes, applicant has previously filed an application for post-conviction relief in State court. Applicant has filed a petition for habeas corpus in federal court.

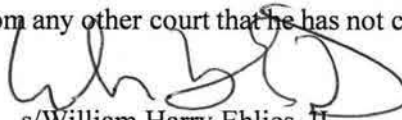
- (c) No, no other petitions have been filed in the United States Supreme Court.
 - (d) No, no other petitions, motions or applications in this or any other court.
13. (a) Specific nature of other petitions:
- (i) Application for post-conviction relief
 - (ii) Petition for writ of certiorari from denial of application for post-conviction relief.
- (b) Name and location of the Court in which each was filed:
- (i) York County Court of General Sessions
 - (ii) South Carolina Supreme Court
- (c) Disposition thereof:
- (i) Application denied
 - (ii) Cert denied
- (d) Date of such disposition:
- (i) March 24, 2008
 - (ii) October 6, 2010
- (e) Citations of any written opinion or orders entered pursuant to such results: Not applicable.
14. Have the grounds set forth in Sections 10 and 11 been previously presented to this or any other Court, State or Federal? No
15. (a) Which grounds have been presented: Not applicable
- (b) The proceedings in which each ground was raised: Not applicable
16. Reason why grounds set forth in (10) have not previously been presented to any Court:
- (a) Applicant's post-conviction relief counsel were not qualified for appointment under the terms of the capital PCR statute.
 - (b) Applicant's PCR counsel conducted an inadequate investigation.
 - (c) Applicant's PCR counsel failed to provide competent, reasonable representation.
16. Applicant was previously represented by counsel.
17. Applicant was represented at trial by James W. Hancock, P.O. Box 2581, Rock Hill, South Carolina, 29732 and James W. Boyd, 144 Ebenezer Road, Rock Hill, SC 29732.

On direct appeal, Applicant was initially represented by Robert Dudek and Joseph Savitz, of the Office of Appellate Defense, P.O. Box 11589, Columbia, SC 29211, but ultimately proceeded *pro se*.

In his initial application for post-conviction relief, Applicant was represented by Michael L. Brown, Jr., P.O. Box 1025, Rock Hill, SC, 29731 and Joseph D. Matlock, P.O. Box 11101, Rock Hill, SC 29731.

In his petition for writ of certiorari from denial of his application for post-conviction relief, Applicant was represented by Joseph L. Savitz III, 1330 Lady Street, Suite 401, Columbia, SC 29201.

18. Applicant seeks relief from his conviction and sentence.
19. Applicant is not under sentence from any other court that he has not challenged.



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July 20, 2021.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 JAMES D. ROBERTSON, # 5067,)
 Applicant,)
 vs.)
)
 STATE OF SOUTH CAROLINA,)
 Respondent.)

IN THE COURT OF COMMON PLEAS

Case No: 2011-CP-46-0072

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Applicant's Third Amended Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 20th day of July, 2021, upon the following:

William Edgar Salter, III
 Senior Deputy Assistant
 Attorney General
 Post Office Box 11549
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 s/ William Harry Ehlires, II

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 Attorney for Applicant

2021 JUL 20 PM 12:28
 DAVID HAMILTON
 C.P. & GS
 YORK COUNTY, SC

FILED-RECEIVED

1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF YORK
4 2011-CP-46-00072

5 James DeJarnette Robertson

6 Vs.

7 State of South Carolina

8

9 York, South Carolina

10 August 9-11, 2021

11 Before the Honorable Keith Kelly

12 APPEARANCES

13 For the State: Ed Salters, Melody Brown, Tommy Evans

14 For the Applicant: William Henry Ehlied, III, Joseph Bradley

15 Bennett

16 Reported by: Michael C. Watkins

17 Official Court Reporter

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1

2 THE COURT: Okay. Good morning, everyone. We are here
3 on the matter of James D. Robertson versus State of South
4 Carolina. Good morning, everyone.

5 MR. EHLIES: Good morning, Judge.

6 THE COURT: All right. We've got some preliminary
7 matters, I think?

8 MR. EHLIES: Yes, sir. As a housekeeping matter,
9 Judge, there is a booklet on your -- it looks like this.

10 THE COURT: Okay.

11 MR. EHLIES: It has got every exhibit and every
12 document in it by number and marked as an exhibit number,
13 and they are all tabbed, so as we go through this trial and
14 we make reference to a particular exhibit -- for instance,
15 the first witness who's behind me is number 34, and so you
16 can turn to tab 34 and all of the documents pertaining to
17 that witness are in that tab. And then what I'll do, if it
18 suits the Court, is the court reporter has the originals in
19 that expansion folder right in front of her, and I will give
20 the witness the original exhibit, they're not bound,
21 punched, that's the way they want them and not stapled,
22 because we had to be careful to get pages. So I will hand
23 the witness the original document and then that's how we can
24 proceed. Are there any questions or objections, Judge?

25 THE COURT: None from me. Is the State good?

1 MS. BROWN: No objections, Your Honor.

2 MR. EHLIES: Okay. All right. So then after that I
3 think the first issue up is a motion that I filed in July
4 about the restraints issue. And I am citing to Deck,
5 D-e-c-k, versus Missouri in the Supreme Court of the United
6 States, 2005. And basically it is our position that the
7 applicant, Mr. Robertson, is so severely bound, and he can
8 describe that and we'll probably need to if we don't get
9 any -- of that on the record. What we're asking for,
10 though, is simply that he be comfortable and allowed to
11 communicate with us with his hands only, so we have no
12 objection to traditional shackling in the ankles, things of
13 that nature. The law of the case is, of course, if it was a
14 jury trial that he wouldn't have any of these things other
15 than the shackles at the ankles not visible to the jury.
16 Not being a jury trial it changes a little bit. Deck deals
17 with sentencing after the conviction for murder as well, so
18 the same rules apply to capital sentencing. And we believe
19 that the second prong of the Deck analysis is that if it
20 inhibits his ability to communicate with his lawyers that
21 the restraints would be improper unless there is a factual
22 showing of a risk or danger to the people in this courtroom
23 or flight risk. Those are the two elements regarding the
24 restraint devices. So I leave that with you. It's our
25 request that the restraints -- he has what they call a black

1 box on him at his waist that is very tight and he'll
2 describe that, if necessary. And I leave it -- I think the
3 government has somebody else they want to argue that case,
4 or argue this motion.

5 THE COURT: Yes, ma'am.

6 MS. BROWN: Thank you, Your Honor. We filed a
7 response. We served it actually on August the 5th, I don't
8 know whether you have a copy, sir, but if you do not I have
9 a couple of copies that I could hand up.

10 THE COURT: I would like to have one.

11 MS. BROWN: If I may approach, Your Honor.

12 (Break in proceedings.)

13 THE COURT: I briefly saw that this morning. I was
14 away at the end of the week last week at the trials lawyers,
15 but anyway, I have briefly seen this. But yes, ma'am.

16 MS. BROWN: Yes, sir, I can make a little short
17 presentation, it covers just about every point that's in
18 there. Basically we have opposed it. We don't think that
19 Deck applies in this particular proceeding. But we've also
20 reached out to the South Carolina Department of Corrections,
21 and we've attached an affidavit to our response. I would
22 like to bring your attention to paragraph four of that
23 affidavit, and that notes that in either applying or
24 removing restraints that represents two of the most
25 dangerous interactions that corrections officers have with

1 inmates. So even the act of getting close enough to loosen
2 restraints is a recognized danger. Now, I won't go into the
3 affidavit too much, but I do want to also bring to your
4 attention that general counsel, Barton Vincent, is present
5 from the South Carolina Department of Corrections, and I
6 think that he could probably explain some of the assertions
7 in that affidavit should you have any questions about that.
8 But here is our basic response: Deck does not apply. But
9 if it did what you're looking at is this individual, and
10 this individual brutally killed two people; his parents.
11 The jury found beyond a reasonable doubt the aggravating
12 circumstance of torture, so I want to underscore brutality.
13 I also want to underscore that he fled the jurisdiction
14 after the murder. He was arrested out of state. He admits
15 to receiving funds from family while he's been in SCDC. At
16 the time of the first PCR hearing he admitted to getting
17 over 45 or \$50,000 from families, so means right there.
18 There's no jury, there's no prejudice from been seen in the
19 restraints. Commensurate with the security level that he's
20 earned. It's because of who he is and what he's done that
21 he's on death row and that he is shackled in the way that he
22 is. Now, he has also expressed some anger issues while he's
23 in SCDC, and we've gone over that. There are two medical
24 records that reflect that he has anger issues and that he
25 also asked to be let out of his cell so he could kill

1 another inmate. Now, he can speak with his attorneys, he's
2 right here in the courtroom. Certainly the court reporter
3 is making a good record. There's no need to write to see
4 what's going on here. And we can take breaks as needed if
5 he needs more time to speak with his counsel. So there are
6 ways that we can accommodate communication without
7 undermining South Carolina Department of Corrections
8 security protocols. And, of course, lastly, Your Honor, I
9 don't think that any of us can forget or overlook that in
10 our conflict hearing Mr. Robertson chose to get up from his
11 seat and leave the table and walk away. Deck, if it
12 applied, talks about decorum, and I would submit to you that
13 Mr. Robertson has not shown the decorum so far that he
14 needed to in these very proceedings. So based on that and
15 everything in the affidavit, Your Honor, we would ask the
16 Court to follow SCDC protocols.

17 THE COURT: Anything?

18 MR. EHLIES: Very briefly, Judge. All we're asking for
19 is the hands component so that he can communicate with his
20 lawyers, the rest of the things I think we can accommodate.
21 The crime is 1997, November the 25th of 1997, so all of that
22 is ancient history in substance. It was a very narrow
23 target victim of family members, it doesn't have that with
24 citizen interaction. And in SCDC he doesn't have any
25 significant record of violence against other inmates or

1 corrections officers. He's traveled frequently with them,
2 unfortunately, up and down and there's not been any problems
3 with that. So the fix is very simple and it pertains to his
4 wrists. Okay? Thank you.

5 THE COURT: Okay. Thank you. Anything further from
6 the State?

7 MS. BROWN: Nothing further, Your Honor.

8 THE COURT: Okay. The request to remove the restraints
9 is denied for the same reason it was denied in the
10 previous -- in the conflict case. I've said this and I'll
11 say it again, we're on the record, that I am not in charge
12 of security. These law enforcement officers are in charge
13 of security and I don't tell them how to secure anyone,
14 that's their business and that's what they do. Now, he can
15 communicate because he can write a note or he can do
16 whatever he does. And I understand that he's restrained.
17 And he exploded in that courtroom right next door when I was
18 here before, slapped his hands on the table, went -- Tim
19 Hager carried him right out that side door in a huff because
20 I would not remove them. When I told the lawyer, I think
21 her name was Emily Pavalock (phonetically) who is a very
22 small person, you know, very petite person, and I thought we
23 were going to have a hostage situation. So again, I don't
24 control security, law enforcement controls security. I
25 don't tell them how to do their job, they don't tell me how

1 to do mine.

2 MR. EHLIES: All right. Judge, I would need to make a
3 proffer --

4 THE COURT: Yes, sir.

5 MR. EHLIES: -- under the circumstances. I'm going to
6 call on the witness to stand up -- I mean, the applicant,
7 I'm sorry, to stand up so the Judge can see you and I want
8 to describe -- I want you to describe for the record -- I
9 want you to stand where you can be seen and describe your
10 circumstances of restraints.

11 THE APPLICANT: In particular it's the first set of
12 restraints, you can see it's further up my arm toward my
13 elbow and it is attached to a belly chain, what we call a
14 belly chain. And then there's a standard set of leg irons
15 attached to the ankles to be found in any jail or any prison
16 anywhere. But recently, and I don't know how recently, but
17 some time in the last seven or eight years SCDC has adopted
18 this black box, which requires a second set of handcuffs,
19 which you can see here at an angle. And the first set of
20 handcuffs are designed to keep your hands to your side and
21 walk freely, hands by your side and walk freely. Once you
22 put on the second set of handcuffs it pulls everything you
23 own, all of your arms forward, and then when they put the
24 hobble on, which is just the chain wrapped around the bottom
25 of the leg, chain up through the black box and attached in

1 the back, not only are you pulling your hands and your arms
2 from the natural position of being to your side forward, now
3 you're pulling them down. At I guess what we're calling the
4 conflict hearing, when I got back to the jail I had been in
5 the restraints for six years and it required medical
6 attention for six days for my hands to go back to normal.
7 As you can see, my hands are turning blue. There's no
8 opportunity to write. I can barely pick up the envelope
9 that I brought with me. I have no ability to flip through
10 paperwork, flip through a motion, flip through a document.
11 I have no ability to write at all as you can see. I have no
12 ability to shake hands.

13 MR. EHLIES: Okay. All right, sir. The Judge has
14 ruled that there's -- and I assume SCDC is not compromising
15 their position. Could we get that on the record? I don't
16 mean to step out of my bounds here.

17 THE COURT: You're not. Yes, sir. Tell me your name
18 for my court reporter, please.

19 MR. VINCENT: It's Barton Vincent, I'm general counsel
20 for the Department of Corrections. And we concur with your
21 ruling. Thank you.

22 THE COURT: Thank you, sir.

23 MR. EHLIES: So in light of that, and in respect to
24 your ruling, I'm going to ask the -- Mr. Robertson, are you
25 asking then to be excused from this hearing? The

1 circumstances are not going to change as far as your
2 restraints are concerned.

3 THE APPLICANT: I would need to discuss that with my
4 attorneys.

5 MR. EHLIES: All right, sir. As soon as possible then
6 when it suits you we'll have that discussion on the side of
7 the door there, and then I can relay to you and put him on
8 the record about that.

9 THE COURT: Okay. Well, we can do that right now.
10 I'll let him talk with you anytime he wants to talk with his
11 lawyers. I tell you one thing I do want, though, Madam
12 Clerk, I want one of those jail pens. I want that kind of
13 pen, I don't want that other thing.

14 (A recess was taken.)

15 THE COURT: Sir, did you have your discussion with your
16 lawyer?

17 THE APPLICANT: I did.

18 THE COURT: Okay. Very good.

19 MR. EHLIES: Judge, there is a secondary issue here
20 that was going to come up behind this and it had to do with
21 an email that we received from SCDC staff attorney, Ms.
22 Bigalow (phonetically), and I forwarded it to your chambers.
23 It was recent, and it concerned an order directing that he
24 be left here at York County for trial so that they didn't
25 have to transport him up and down everyday. We don't know

1 what resolution that the York County Detention Center has
2 made on that request and if that's a possibility. The
3 security arrangements may be different in which he could
4 stay and tolerate in their judgment what is necessary. So
5 is there anybody here from the detention facility?

6 THE COURT: I don't know what their position is.

7 MS. BROWN: Your Honor, I understood from the email
8 that Mr. Ehliès shared with me that they would just need an
9 order to keep him here, and I think the request would have
10 to be made. I would suggest there's a little bit more to be
11 done outside of the courtroom to see if something can be
12 lined up or if there is an opposition to that. We'll be
13 happy to do what we can from our side to see if we can get
14 you an answer on it.

15 THE COURT: Okay. We'll see by the end of the day or
16 by this morning maybe some time what we can do.

17 MR. EHLIES: All right.

18 MS. BROWN: And, Your Honor, if you wouldn't mind me
19 taking just a few more moments. This goes back to the
20 restraints issue. And I know Mr. Robertson addressed you
21 about the box, and we don't have anything on the record from
22 SCDC. So I wondered if you would allow us a few minutes for
23 Mr. Vincent to address the idea, first of all, about the
24 black box and if it can be loosened and not seeing anything.
25 I think Mr. Robertson indicated that in his perception his

1 hands were blue and we kind of wanted to put on what SCDC
2 observes at this point. And also we would like to ask
3 Mr. Vincent to address the video capabilities so if Mr.
4 Robertson does not wish to stay he can still participate by
5 video and have some communication with counsel. And I'll
6 defer to general counsel.

7 THE COURT: I'm happy to hear from you. Yes, sir.

8 MR. EHLIES: Can I hold back on the video before we get
9 to that?

10 THE COURT: Okay.

11 MR. EHLIES: And could I ask him to take a look closely
12 at what is happening to these hands? If you would step
13 right around here and take a look at what we've got here.

14 THE APPLICANT: They have been on for three hours, you
15 can see it's blue, kind of cutting off circulation.

16 MR. EHLIES: Thank you. You can have a seat.

17 MR. VINCENT: Thank you, Your Honor. Bart Vincent,
18 General Counsel for the Department of Corrections. First
19 off I would offer to have the officers here look at his
20 hands and adjust those cuffs in any way to make him more
21 comfortable. I think there is a way for us to look at that
22 and see if that's necessary. As to the black box, it's not
23 our policy to remove that, that keeps him more secure and
24 still allows him to participate in these proceedings, but
25 it's not our policy to remove that black box. So I would

1 offer that, to have the officers look at the cuffs and
2 loosen those if necessary.

3 THE COURT: Thank you.

4 MR. VINCENT: As to the video, to be honest, I don't
5 know at this point whether that's an option or not. I've
6 made inquiries and continue to follow through on that.
7 Thank you.

8 MR. EHLIES: In response to your loosening the cuffs,
9 that doesn't allow him to go through these exhibits, do I
10 understand that correctly?

11 MR. VINCENT: Well, I don't know if that --

12 MR. EHLIES: He will still be restrained or --

13 MR. VINCENT: I don't know if that's true or not. I'll
14 have to see if they can loosen them and see how that affects
15 his movement.

16 CORRECTIONS OFFICER: Your Honor, if I may? We've
17 already comprised Mr. Robertson as far as how his hands are.
18 The proper way to restrain him is like this (indicating)
19 which would be extremely more uncomfortable and it will
20 affect his mobility even more. So if you would like for us
21 to restrain him properly like this (indicating) we can,
22 we'll meet your needs.

23 THE COURT: I want him to be able to communicate in
24 writing at least with his lawyer, and I think that he can
25 with his hands there, but if they are too tight then I'm

1 going to leave that up to law enforcement. If they need to
2 be loosened a little bit, that's up to law enforcement, but
3 I'm not in charge of security.

4 MS. BROWN: Your Honor, may we have a moment for SCDC
5 to come forward and check and make sure that that's
6 comfortable, that nobody is turning blue or having the
7 circulation cut off?

8 MR. EHLIES: Can we get the officer's name who made the
9 remarks for the record?

10 THE COURT: Yes, sir. Officer, will you tell us your
11 name for the record?

12 CORRECTIONS OFFICER: Lieutenant Waddell.

13 MR. EHLIES: Thank you, Judge.

14 (Break in proceedings.)

15 MS. BROWN: And, Your Honor, for the record, I believe
16 for the gesture from the officer for the hands were back to
17 back instead of palm to palm, and he's palm to palm at the
18 moment; is that correct?

19 CORRECTIONS OFFICER: Yes, ma'am.

20 (Break in proceedings.)

21 THE COURT: My court reporter couldn't hear what you
22 said. He has mobility?

23 CORRECTIONS OFFICER: We feel that he has the amount of
24 mobility and security standard.

25 THE COURT: Anything further?

1 MR. EHLIES: We would just await word from local York
2 County officials on the detention center.

3 THE COURT: Okay. Well, let's move along and we'll
4 decide that before the end of the day.

5 MS. BROWN: Thank you, Your Honor.

6 THE COURT: I think that's the gentleman you need to
7 talk with right there if you want to speak with him.

8 (Break in proceedings.)

9 CHIEF HICKS: My name is Chief John Hicks.

10 (Break in proceedings.)

11 MR. EHLIES: The question for Chief Hicks is whether or
12 not they can accommodate housing for the applicant for the
13 period of time that this hearing will take. And your answer
14 is what?

15 CHIEF HICKS: No, sir. We're not equipped or prepared
16 for that.

17 MR. EHLIES: So then staying here is not an option, is
18 that a fair --

19 CHIEF HICKS: Yes, sir.

20 MR. EHLIES: -- interpretation of what you're saying?

21 CHIEF HICKS: Yes, sir.

22 THE COURT: Thank you, Chief.

23 CHIEF HICKS: Yes, sir.

24 MR. EHLIES: The record will reflect that I think when
25 he was here in 2007 he stayed in the detention facility. I

1 don't know what's changed but I understand they're not
2 willing to do that, and you're not willing to write the
3 order -- I'm still going to ask you, would you be willing to
4 write the order?

5 THE COURT: Well, again, I'm going to hear from the
6 State, but the Chief has said he is not equipped personnel
7 wise or facility wise, and I don't know what that requires
8 but he is saying he can't do it, so --

9 MR. EHLIES: Okay. Thank you, Judge.

10 THE COURT: Thank you.

11 MS. BROWN: Your Honor, we have one more pretrial
12 filing that is still out there. Both parties have submitted
13 a memorandum concerning the order of remand. And this is
14 new territory to be sure, but we do have a few guideposts, a
15 little bit vague but they are out there, and that comes from
16 the Robertson opinion itself. And one thing we know is that
17 the first order of business is to determine deficiency, and
18 deficiency is limited in this remand. There are very
19 concise parameters to the remand and the deficiency can only
20 be a statutory qualification issue, and Your Honor has
21 already ruled on that. If you'll recall, you ruled
22 November 21st of 2017, and you reference that in your
23 scheduling order filed September 17th, 2018, that summary
24 judgment was entered in favor of Mr. Robertson that prior
25 counsel did not meet the statutory qualifications. Well,

1 Your Honor, there's nothing more to litigate on deficiency.
2 In fact, the Robertson opinion is very clear, it's only that
3 one area that can be litigated for deficiency, and if you
4 show a lack of qualification it's per se deficiency, the
5 analysis is over. So I say all of that because I agree in
6 portion with what they're saying in their memorandum, that
7 what we're here for is prejudice, but the problem we have,
8 and there are still allegations pending that go only to
9 deficiency, and that it's, for the reasons I just stated,
10 totally irrelevant at this time. So we're asking this Court
11 to go ahead and dismiss the allegations in 10 and 11M, as in
12 Mary, because there's nothing that can be received on
13 deficiency at this time. And in the same vain there's an
14 allegation in the application in 10N, as in Nancy,
15 challenging Judge Few's order, and again, we have guidance
16 from the Robertson opinion. Our Supreme Court rejected the
17 idea that new proceedings are to be held after deficiency is
18 shown, I mean, they rejected that. It's very clear in the
19 concurrence that that was considered and rejected. So Judge
20 Few's order is fine. Nothing has vacated Judge Few's order
21 at this time. Now, that doesn't mean that we're not here
22 and we're going to receive some evidence and we're going to
23 receive arguments on prejudice, we certainly are, but I
24 think that's the only thing we're here for. And if Your
25 Honor would go ahead and dismiss those two groups of

1 allegations that is going to streamline this particular
2 hearing, and that's why I'm bringing it to you before we
3 start.

4 THE COURT: Thank you. Yes, sir?

5 MR. EHLIES: Judge, you know, you have my memoranda.
6 This thing -- this order is very complex in reality and it
7 can be read all different kinds of ways. One of the things
8 you cannot do, regardless of which interpretation of the
9 five offerings you have, is weigh prejudice when you don't
10 know a specific event from which derives prejudice. There
11 has to be a specific event on deficiency to measure
12 prejudice. You can't just say, "Okay. It's prejudice per
13 se," and now finding anywhere some sort of -- I mean,
14 deficiency per se, find somewhere prejudice. So you to have
15 a specific departure and a deficiency from which you can
16 then measure an impacting result. Now, if you want to say
17 that the deficiency is that he didn't get a full and fair
18 opportunity to present these claims against trial counsel in
19 the first PCR and therefore he's entitled to a whole new
20 PCR, you can issue an order right now and do that and we can
21 go home. That's what Pleicones said but unfortunately he
22 wound up being in descent and not the majority, and then the
23 majority types that, no, really we do need more than just
24 not qualifying. You have to be deficient, you have to not
25 have the education and as a result be deficient, and the

1 deficient result in prejudice. That's a classic analysis of
2 Strickland, deficiency and prejudice, and that's what you
3 have to do. And in the end you have to even go against
4 trial counsel in deficient and prejudice, because if the
5 best team in the world in PCR happened not to be qualified
6 under the statute and could not prove deficiency to the
7 prejudice of the client at trial, it's all for not. I mean,
8 it doesn't mean anything. So our position is this is a full
9 blown hearing for you to decide if there are particularized
10 deficiencies resulting from not having the education and the
11 experience that's in 17-27-160B, and what those deficiencies
12 are that they also resulted in particularized prejudice as a
13 consequence. We think that's set forth in our memoranda as
14 best as we can make clear, and we have the lineup for the
15 witnesses to talk to you about the education and what that
16 statute means and why it's relevant as far as performance is
17 concerned so we can identify those particularized prejudices
18 based upon a specific finding of a specific act. And that's
19 our position.

20 THE COURT: Yes, ma'am. Anything?

21 THE APPLICANT: Well, I think part of that I agree
22 with, part of it I disagree with, I'm sure it doesn't
23 surprise you at all, but there are two levels of ineffective
24 assistance that we're looking at. We don't need to litigate
25 deficiency for PCR counsel because Robertson has told us --

1 the Supreme Court told us that's not the State's position
2 and that's what the Supreme Court has told us to do and we
3 are here to determine prejudice. So that will go back to
4 deficiency, but not PCR counsel, it goes back to trial
5 counsel deficiency. And as far as not having to address
6 deficiency at all, well, Your Honor, we can look right at
7 Strickland. Strickland has a passage that has been relied
8 upon since I think it's 1984 when it came out, is that if
9 it's lack of prejudice you don't even need to address
10 deficiency. So I think the structure is there, Your Honor,
11 that doesn't give us any heartburn to skip this step and
12 just go directly to prejudice. Now, will there be some
13 testimony that trial counsel should have done A, B, C and D?
14 Sure. But that's because it sets up the prejudice, not
15 because there has to be a particular finding that PCR
16 counsel, because of some lack of a CLE, actually didn't see
17 the problem that trial counsel failed to do something that
18 we don't need to do, and that was the streamline that the
19 Supreme Court took in Robertson. We don't care why, we
20 don't care how badly you don't qualify, but if you don't
21 qualify we're going to let you try to prove prejudice here
22 on anything that perhaps was not raised or was not raised
23 correctly in PCR. It's still a lot of area here for us to
24 go over, but deficiency is not one of them, and that's where
25 we're asking for that dismissal only on the allegations

1 against PCR counsel, which, Your Honor, if you review some
2 of the issues they're even bringing up rules of professional
3 conduct, which is not something to be litigated in
4 deficiency. So none of this going toward deficiency needs
5 to be there at all, and we would ask for Your Honor to
6 dismiss those claims, and dismiss the claim about Judge
7 Few's order and streamline this process so we can have a
8 full and fair hearing on prejudice as the Supreme Court
9 ordered.

10 MR. EHLIES: One very briefly. Your Honor, we -- as
11 you know, capital litigation lives and goes all of the way
12 to the Supreme Court of the United States, that's just
13 routine. We just finished, Ms. Brown and I, the Charles
14 Christopher Williams case all of way to the Supreme Court.
15 So I have to make a record, even if it's in proffer, that's
16 elaborate and extensive to show deficient performance and
17 prejudice at the PCR level directly relating to not being
18 qualified, and that had they had qualified counsel then they
19 could have challenged trial counsel in all of those
20 particulars. So we have to have the full record
21 establishing trial counsel's deficient components and
22 prejudice. And I thank you for your tolerance and patience.

23 THE COURT: I'm going to deny the State's motion to
24 limit them, because in thinking about this, and I spent a
25 lot of time thinking about this matter, I think he is going

1 to have to go into some specifics. And I understand,
2 because I remember when we agreed, that everybody agreed
3 that they did not have the continuing ed. certificate,
4 everybody agrees with that from the outset. And I believe
5 it was Chief Justice Pleicones who said it's deficient per
6 se, let him have a new PCR. But our court didn't do that.
7 They sent it to me to determine whether or not he was
8 prejudiced, and I think they meant something other than
9 if -- they had to mean something other than it's statutorily
10 deficient and therefore he gets a second one, they didn't
11 say that. So I'm going to let him go a little broad. I'm
12 going to let him go a little broad on it and make the
13 record.

14 MS. BROWN: And, Your Honor, would it be okay if we
15 objected to the relevance to all of the witnesses?

16 THE COURT: Absolutely.

17 MS. BROWN: Thank you, Your Honor.

18 THE COURT: I'll tell both sides, you object and you
19 put anything on the record you want to, that's what lawyers
20 are supposed to do.

21 MS. BROWN: Thank you, sir.

22 THE COURT: Are we getting close to calling a witness?

23 MR. EHLIES: Judge, I'm going to have to come close to
24 the bench to get the original documents and things like
25 that, is that all right?

1 THE COURT: Yes, sir.

2 (Break in proceedings.)

3 MR. EHLIES: Mr. Robert Burke.

4 The witness, ROBERT BURKE, was first duly sworn and
5 Testified as follows:

6 DIRECT EXAMINATION

7 BY MR. EHLIES:

8 Q And, Mr. Burke, I'm going to hand you from the Clerk of
9 Court's record what has been premarked as Exhibit 34, all
10 right, sir, and ask you whether or not you can identify that
11 document?

12 A Yes, it's my CV.

13 Q Okay. All right, sir. Is that CV accurate and
14 complete?

15 A Yes.

16 Q And to the best of your knowledge, does it contain
17 anything that is misleading or otherwise should be altered
18 or changed at this point?

19 A I don't think so. Hold on one second, I just want to
20 check one thing. Yeah. The one thing that should be
21 changed is my bar memberships. I have listed there the
22 Florida Bar and the District of Columbia Bar. Recently I
23 suspended my membership in the District of Columbia Bar
24 subject to being reinstated whenever I request it be
25 reinstated. That's the only thing that's not accurate.

1 Q All right, sir. And why did you do that?

2 A Well, I was a member of both bars. I wasn't practicing
3 in either place but I was continuing to pay dues and I
4 didn't see the point of that, so I just suspended one of
5 them and maintained the other.

6 Q All right, sir. What is your current circumstance
7 vocationally?

8 A I am semiretired and I live in Beach Mountain, North
9 Carolina.

10 Q So the actual license is not something you need at the
11 moment?

12 A It's not.

13 Q And was that a voluntary act on your part or was that
14 under any kind of compulsion?

15 A No, it was voluntary on my part. There was no
16 disciplinary action or anything of that nature.

17 Q And are you still actively licensed anywhere else?

18 A I'm actively licensed in Florida.

19 Q Okay. And you told us that you reside in Beach
20 Mountain, and you -- is that a full-time permanent residence
21 there?

22 A It is now, yes, for the last six months or so.

23 Q Okay. Well, we're glad to have you and that's about
24 all of the introduction I think we're going to go into.

25 A All right.

1 Q I want to back up, then, and tell us about your
2 academic career, where you went to school.

3 A I went to law school at the University of Miami in
4 Florida.

5 Q All right.

6 A I graduated in 1984.

7 Q Okay. And tell me where you went after the University
8 of Miami Law School.

9 A I clerked for two years for an intermediate appellate
10 court judge in Miami for a district court of appeal.

11 Q All right. And just give us a summary, if you will, of
12 the rest of your early professional career, your vocational
13 career.

14 A I worked for two years, or maybe a little more, in
15 private civil practice. I wasn't really fond of that work,
16 so I left and I went to the Appellate Division of the Public
17 Defender's Office in Miami, Florida, and I was there for
18 four or five years.

19 Q All right, sir. And what were your functions at the
20 appellate division in Miami, Florida?

21 A Well, I handled criminal appeals, juvenile and federal
22 criminal appeals and extraordinary writs. I did some
23 resentencings.

24 Q All right. And where did life take you after that?

25 A For personal reasons I moved to Washington, D.C., and I

1 worked for between six and seven years at a nonprofit called
2 the National Legal Aide and Defender Association, which is
3 referred to NLADA.

4 Q And what was your role at the NLADA?

5 A I had several responsibilities there. The primary ones
6 were -- it was an organization committed to training and
7 providing technical assistance to public defenders and
8 assigned counsel around the country, so I designed and
9 managed about between four and eight training events a year.
10 One of them annually was the Life in a Balance Training
11 event, which is NLADA's death penalty training program. I
12 was the editor of three different news letters, one of them
13 was called Capital Report, which was for the capital defense
14 community, so I edited and wrote articles on the capital
15 defense issues. We also had what was in effect a hotline
16 where lawyers could call and ask questions about criminal
17 defense, and I did that. I was -- I managed a group of
18 defender training folks, and we worked on writing NLADA's
19 defender training and education standards, which were
20 published in early 1997.

21 Q All right. And tell us how you went about rating the
22 programs.

23 A Went about what?

24 Q Rating the programs.

25 A Rating?

1 Q Rating, r-a-t-i-n-g. How did you get the information
2 you needed to identify significant and needed training
3 issues?

4 A Oh, right. Okay. Well, there were a variety of ways
5 that we did that. We sometimes did a more formal process
6 where we surveyed people or did focus groups. But the
7 things that we did consistently over time were we followed
8 case law and statutory developments, particularly the U.S.
9 Supreme Court, but other courts as well depending upon the
10 court and nature of the issue. So, for example, important
11 Supreme Court decisions like in the capital area, like Payne
12 v. Tennessee, Wiggins Mitigation Investigation, Payne victim
13 impact, decisions on forensic science like Daubert,
14 Strickland, those cases would always create training needs.
15 We would look at the cases, analyze them and talk with
16 people in the field who had expertise to figure out what
17 training needs they created.

18 Q Was it also -- I'm sorry.

19 A The same was true with statutory developments. Like,
20 for instance, the Antiterrorism Death Penalty Act, referred
21 to as ADPA, that was a statute on which the NALDA did
22 education of members of Congress when they were discussing
23 whether they would pass that legislation, and once it was
24 passed that created a huge training need and particularly
25 related to what became known as their opt-in provision.

1 Q You're a little ahead of me but we'll get there.

2 A All right.

3 Q As far as identifying training needs back at --

4 A NALDA.

5 Q -- yeah. Were you also concerned with monitoring the
6 cert petitions to the Supreme Court that were granted and
7 denied as a source of information about technical issues and
8 problems that were percolating through the capital defender
9 organizations?

10 A Yeah, that was common to monitor those as well.

11 Q I'm trying to get some depth from you about the sources
12 of information to identify training needs.

13 A Right.

14 Q And you've mentioned several of those.

15 A There are others.

16 Q All right, sir. Okay. Have you exhausted your --

17 A No, there are others. Publications often created
18 training needs. Like, for example, the ADA Guidelines Death
19 Penalty Representation, those created a lot of training
20 needs, and it was common to do training on those guidelines
21 often both after they were initially published in 1989 and
22 then when they were amended and revised in 2003. Other
23 publications, just as examples, in -- I forget what year it
24 was, in the 90's the National Academy of Sciences published
25 a report on forensic science, and that created a big

1 training need in particular. Because their conclusion was
2 that most forensic sciences really didn't meet scientific
3 standards with the exception of perhaps DNA, so that created
4 a training need.

5 Q But didn't that publication also identify and endorse
6 DNA as a valid biological point of intrigue, but that
7 training was needed to understand and to cross examine
8 experts in that field?

9 A Well, yeah. I mean, when DNA first -- when they first
10 developed the use of DNA back in I think it was the late
11 80's, that created a huge need, and has continued to create
12 a need, because the technology has developed and become more
13 sophisticated over time.

14 Q And so are the straining needs then fluid as time
15 passes?

16 A Absolutely. That's why you have to continuously
17 monitor these court decisions, legislative changes, reports
18 that come out. Another big one in the death penalty area in
19 particular is the DSM, which, you know, new versions of it
20 come out every so often and they change criteria for
21 diagnosis of mentality illnesses and so on, and that creates
22 training needs.

23 Q So you're referring to the Diagnostic and Statistical
24 Manual for Psychiatric Disorders.

25 A Exactly.

1 Q So then does that open also an additional area of
2 training on things like trauma as well as the embedded
3 umbrella syndromes of trauma including Battered People
4 Episode, things that have nature?

5 A Well, yeah, absolutely, I mean, all kinds of mental
6 illnesses, but trauma was a huge one. And over the course
7 of the time that I was involved in capital training, which
8 was, I don't know, 25 years, there was an abundance of
9 training on trauma and PTSD, and Battered Persons Syndrome
10 is considered a subcategory or type of PTSD.

11 Q Okay. Now, that -- have we pretty well covered the
12 sources of information for identifying training needs in
13 your work as --

14 A One other one that I could think of is that we both
15 talked to people in the field at training events and
16 otherwise, at both NALDA and then my later job at the
17 Administrative Office of the U.S. Courts, we had hotlines,
18 so we got calls from people regularly on different issues.
19 So when we saw particular issues that we got questions about
20 frequently, then that clued us in that that may be a
21 potential training need.

22 Q Did you, within your unit and your involvement and
23 direction in that unit, let it be known to practitioners
24 that you were available by hotline and that you were
25 responsive to their needs for specific information about how

1 to develop issues?

2 A Well, yeah, we did at NALDA. That was before every
3 organization had a website. But we made that known all the
4 time through email communications and at all of our training
5 events. The Administrative Office of U.S. Courts and
6 Offender Services we had a website. We also told people at
7 our training events and otherwise that we had a website that
8 listed the hotline as being available.

9 Q All right. Let's move to one other segment then.
10 After you've identified these particularized needs that are
11 very fluid as I understand your testimony, is that a fair
12 characterization?

13 A That's right, they change over time.

14 Q Everything that the laws the court gives us to science
15 that is revealed in DSM and the rest of that; is that
16 correct?

17 A Exactly.

18 Q How do you determine as another category where and in
19 what venue these training programs should be offered?

20 A Well, I mean, another responsibility that I had in both
21 my job at NALDA at the Administrative Office of the U.S.
22 Courts, I was a liaison to other groups, and death penalty
23 defense groups met regularly to discuss a variety of issues
24 and training was one of them. And the general consensus
25 among of national organizations that were doing training is

1 that an effort should be made to place the national programs
2 in those places where there were a lot of death penalty
3 cases and large death rows. That tended to be the south,
4 Pennsylvania, Missouri and California, and so many of them
5 were placed in those locations.

6 Q All right. And then once you've identified a venue for
7 presenting these education programs, did you provide
8 resources for folks that were handling those cases to get to
9 those venues and promote their folk's knowledge that the
10 program is coming up and available?

11 A Well, let's see. At NALDA we didn't because it was a
12 nonprofit and it did not have a lot of funding, but some
13 other organizations did. The ADA Death Penalty Post
14 Conviction Project provided funding to people for financial
15 assistance for them to attend programs. When I worked at
16 Defender Services, you know, we had funds that were
17 available, too, and people could apply for financial
18 assistance to cover some or most of their costs to attend
19 training programs.

20 Q Okay. And let me step back one step and clarify. The
21 testimony you're giving is your personal knowledge and your
22 employment and your function for designing and administering
23 education programs, but were you the only agencies doing
24 those kinds of training programs in the country?

25 A No. I mean, a number of other agencies did it. And,

1 in fact, in both of my positions I attended training
2 programs of other death penalty programs of other
3 organizations both to stay abreast of, you know, what other
4 people were training on, which was another way we identified
5 training needs, but also to observe faculty that we might
6 want to use. So the NAACP Legal Defense Fund did an annual
7 training in Airlie, Virginia, that I went to every year when
8 I was at NALDA. The California Attorneys for Criminal
9 Justice and the California Public Defender Association did a
10 training annually that I went to several times. I went to
11 programs in Kentucky that were put on by the Department of
12 Public Advocacy there. In Missouri I went to NACBL's Making
13 the Case for Life programs, which were the annual death
14 penalty programs that they put on.

15 Q All right. And so that was one of the collateral
16 benefits of doing that was to identify presenters of
17 quality?

18 A Exactly.

19 Q Okay. And was it common in that arena of presenters to
20 be cooperative to be presenters in your programs?

21 MS. BROWN: Your Honor, I object. I think we're
22 getting far afield and I haven't heard anything about South
23 Carolina. I just don't see the relevance, Your Honor.

24 Q Mr. Burke, counsel raises the regional concerns that
25 these laws don't apply in training in South Carolina. Tell

1 us about that.

2 THE COURT: Let me hear from -- yeah, go ahead. See if
3 he can make it relevant. Go ahead.

4 A Well, at both organizations that I worked at, NALDA and
5 Defender Services, we had participants from all over the
6 country. So it was very common in both places that we would
7 have lawyers or mitigation specialists or others who were
8 from South Carolina who attended this training.

9 Q John Blume one?

10 A Well, if you're talking about faculty, yeah, John
11 Blume. Keeter Wible (both phonetically), who also used to
12 be in South Carolina, he was off and on the faculty. David
13 Bruck.

14 Q Okay. All right. So the programs that you
15 administered, designed and promoted were nationally designed
16 but South Carolina were frequent participants in
17 registration and attendees; is that correct?

18 A That's correct.

19 Q And they were available to those practitioners by means
20 of internet publications that the training was coming up and
21 that sort of thing; is that correct?

22 A That's correct. We published it -- at the
23 Administrative Office of the U.S. Courts they were always
24 published on our website, but we also sent out emails to
25 past registrants and other people who we had email addresses

1 for who we knew was to be targeted -- a part of the target
2 audience.

3 Q All right, sir. And we'll get to it but since the
4 objection has been raised, wasn't one of the criterias you
5 mentioned was where death row was a substantial, and cases
6 seeking death were in the south -- southern regions
7 including South Carolina; is that correct?

8 A That's right. So it was very common to have programs
9 in, for example, North Carolina, New Orleans, Texas, the
10 D.C., occasionally Virginia.

11 Q Raleigh?

12 A Raleigh, yeah --

13 Q Durham?

14 A -- several times. I'm sorry?

15 Q Was Durham one?

16 A I think we did have at least one in -- I recall at
17 least one in Durham, but Raleigh, I think, was more common.

18 Q Atlanta?

19 A Atlanta.

20 Q Okay. We'll get into that in a minute. But those
21 programs are available in South Carolina participant
22 licensed capital defenders; is that right?

23 A That's right.

24 Q Okay. Let's take you up, now -- one other question on
25 your presenters. Were you able to get that highest caliber

1 presenter across the country to participate in these
2 programs?

3 A Yeah, they participated in different ways. Another way
4 actually that we identify training needs was for almost
5 every program that we put on we had planning advisory
6 groups, which included top lawyers and mitigation people,
7 occasionally mental health experts who we had conference
8 calls with to help us identify what the training needs were
9 for the community. Many of them volunteered their time to
10 be on those planning groups, but they were also very helpful
11 and cooperative in serving as faculty.

12 Q And how did that transition in to attendees? Were they
13 available to the folks who were attending as capital
14 defenders for answering questions and developing issues in
15 their cases?

16 A Well, yeah. So I guess I need to talk a little bit
17 about the time I spent at the Administrative Office --

18 Q Okay. Let's go there.

19 A Okay. So I was there for 17 years, most of that time I
20 was in the training division. First --

21 Q Excuse me, I'm sorry. Let's identify the AO, which is
22 the Administrative Office of United States Courts; is that
23 correct?

24 A That's correct.

25 Q Is that in the Thurgood Marshall Building in Washington

1 D.C.?

2 A It is.

3 Q Who else is in that building? Who are the agencies
4 there that you can recall?

5 A The only other agency that's in that building is the --
6 well, Sentencing Commission -- the U.S. Sentencing
7 Commission is in the building, and retired supreme court
8 justices have offices in that building.

9 Q So it serves the U.S. Courts; is that correct?

10 A That's right.

11 Q And it serves the probation office; is that correct?

12 A Right.

13 Q In the Thurgood Marshall building?

14 A Right. They're part of the administrative office.

15 Q Yeah. So it's a large organization in that building;
16 is that correct?

17 A Yeah, it's 1100 or 1200 employees.

18 Q Okay. And one of the divisions is Defender Services.

19 A That's right.

20 Q And within Defender Services is a division for
21 training.

22 A That's right.

23 Q And is that where you parked?

24 A That's where I was first as an attorney, and then as
25 the assistant chief, and then as the chief.

1 Q All right. And what as chief were your
2 responsibilities when you reached that level?

3 A Well, I mean, I managed the staff of 17 people, and we
4 were responsible for a number of things. One was designing
5 and implementing training events, and we did between 40 and
6 50 a year, both capital and noncapital. On the capital side
7 I was also responsible for managing two set of contracts.
8 We had contracts with death penalty experts, who formed a
9 group -- two groups, one was called the Federal Death
10 Penalty Resource Counsel Project, and they were available to
11 design and implement training on federal death penalty trial
12 work. The other one was a Habeas Assistance and Training
13 Counsel, and they were available to do training and provide
14 consultation on state death penalty cases that were in
15 federal habeas. So both of those groups were available to
16 be contacted by email or phone to consult with our cases.
17 But it was common in training both on trial cases and post
18 conviction cases. In some programs they would have breakout
19 sessions which they call bring your own case, and people
20 would have the opportunity to go to that smaller group
21 session and they would typically be two or three experienced
22 death penalty practitioners, lawyers, mitigation specialists
23 and often mental health experts who would be available for
24 them to ask questions about their particular cases.

25 Q All right, sir. And, in fact, under the Habeas

1 Assistance Training Group, did you -- did A.O. have a
2 contract for them to field specifics questions by phone or
3 email at anytime from practitioners in any region, including
4 South Carolina, who had questions about --

5 A Yeah. The contract called for them to do a number of
6 things, but the two primary things were to develop, along
7 with my group, we worked with them on developing the death
8 penalty training programs. And then the second major
9 function was consultation either by phone, email, or at the
10 sessions at the training events.

11 Q All right, sir. And your tenure lasted for 17 years in
12 that same function; is that correct?

13 A Well, the first two years I was in a different
14 division, a legal policy division, although I did also
15 design and manage a couple of training events there. But
16 then subsequent to that I went over to the training
17 division, and most of my time was spent in the training
18 division.

19 MR. EHLIES: Judge, we offer Mr. Burke as an expert in
20 designing, implementing and promoting capital defender and
21 general defender training programs.

22 THE COURT: Anything from the State?

23 MS. BROWN: May I have a few voir dire questions?

24 THE COURT: Yes, ma'am.

25 VOIR DIRE EXAMINATION

- 1 BY MS. BROWN:
- 2 Q Good morning, sir.
- 3 A Good morning.
- 4 Q You are being offered, as I understand it, for federal
- 5 training, correct?
- 6 A I was being what?
- 7 Q You're being offered as an expert in federal training?
- 8 A Well, criminal defense training in general, and capital
- 9 training in particular.
- 10 Q Okay. And you don't practice today?
- 11 A I don't practice, no.
- 12 Q And have you ever practiced in North Carolina?
- 13 A No, not in North Carolina.
- 14 Q But you did practice in Florida.
- 15 A In Florida, and I did some appellate work in D.C.
- 16 Q So you've never practiced in South Carolina.
- 17 A No.
- 18 Q And you put together seminars as I understand that.
- 19 A That's right.
- 20 Q And have you put together seminars specifically in
- 21 South Carolina?
- 22 A I don't think we had any death penalty programs in
- 23 South Carolina, but we had a number of noncapital programs
- 24 that took place in South Carolina.
- 25 Q Sir, have you published any articles about training

1 aspects in federal habeas or post conviction relief?

2 A Not specifically on post conviction relief. But I've
3 written articles on training, training needs assessment.
4 I've written papers that have been used to train public
5 defenders in training divisions about principles of adult
6 learning, designing training programs consistent with
7 principles of adult learning, assessing training needs and
8 evaluating programs.

9 Q Have you ever testified as an expert?

10 A I have.

11 Q Today, sir, if I were to ask you what fact would you
12 like for the judge to understand by way of your testimony,
13 what fact would that be?

14 A One particular fact? I think ultimately that there
15 were training programs available to the counsel -- various
16 counsel in this case that they could have attended and would
17 have enhanced their competence.

18 Q And you know what was available to them if they turned
19 something down, or if they tried to attend anything about
20 their actual acts?

21 A I don't know -- I know it was available to them during
22 the time periods in question, whether they had -- you know,
23 they would have had the opportunity to attend them if they
24 had researched it, and, you know, in many cases they would
25 have had the opportunity to have financial assistance to

1 attend them if they needed it.

2 MS. BROWN: Thank you, sir. Argument, Your Honor?

3 THE COURT: Yes, ma'am.

4 MS. BROWN: I object to qualification. I understand
5 that he's worked in the area but there's nothing of any
6 particular importance for South Carolina post conviction
7 relief, where we are right now. So I object to training
8 because I don't think it's relevant, and I don't think that
9 there's a basis there that would help you understand a fact.
10 So quite frankly under Rule 702 I don't see anything that
11 will assist the trier of fact to understand the evidence or
12 to determine a fact at issue. And if he is qualified, Your
13 Honor, it would be irrelevant, because under Green versus
14 State, and McKnight versus State, there's nothing factual
15 about the testimony that goes to this case, therefore it's
16 irrelevant, it shouldn't be received and it's nothing that
17 can help the Court. So those are my objections and
18 argument.

19 MR. EHLIES: I may not have read the order of remand
20 closely, but it seemed to me it was all about training and
21 the absence of training, and understanding training is
22 essential to understanding what the Court was after and in
23 deficiencies and in prejudice. Second, the guidelines that
24 are universal, international even, but certainly national
25 direct our attention to the quality of legal services across

1 the country because it is controlled by the United States
2 Constitution. Strickland itself is a Sixth Amendment claim,
3 and all of that federal jurisprudence is embedded within
4 what we do here in South Carolina in assessing a Strickland
5 analysis, making it a Strickland analysis. So what we have
6 here is the groundwork for how the training comes about, and
7 then I have a witness following this who will tell us how to
8 use that. So this is an expert on how we developed the
9 training programs, what can be expected from them, and the
10 outreach to the community, the capital defendant community.
11 And I do have a follow-up question in the qualification
12 issue if I could back up in light of their objection.

13 THE COURT: Okay. You want to ask a question before I
14 rule?

15 MR. EHLIES: I think so.

16 VOIR DIRE EXAMINATION

17 BY MR. EHLIES:

18 Q Mr. Burke, this is the second time we've heard this
19 regional approach to this thing. Okay. Two parts. Number
20 one, is the training limited to trial or does it embrace
21 trial, appeal, post conviction, state and federal habeas to
22 the Supreme Court?

23 A Well, if you look at the breadth of the training and
24 the different groups that are putting it on, yes, it covers
25 every aspect of capital litigation.

1 Q All right, sir. And does it, in fact, cover
2 circumstances, laws and conditions in South Carolina?

3 A Well, it covers the interplay between state law and
4 federal law certainly, but particularly when it comes to the
5 appellate and post conviction litigation. But I think maybe
6 more importantly standards related to training are national
7 standards. The NALDA guidelines call for anybody who is a
8 member of a capital defense team to receive comprehensive
9 training in capital litigation, they list 11 broad areas in
10 which people should be trained. The NALDA Defender
11 Education Standards say that anybody on a capital team
12 should receive all training necessary to provide high
13 quality services to the client. And those apply nationally,
14 it's not to a particular jurisdiction.

15 Q Are you familiar with 17-27-160B, the South Carolina
16 statute?

17 A I am.

18 Q Does it limit training opportunities to South Carolina
19 jurisdiction only, or does it --

20 A It just says they have to have a minimum of 12 hours --
21 I mean, at least 12 hours of training in the two years
22 preceding their appointment, and it doesn't say it has to be
23 training in South Carolina.

24 Q All right, sir.

25 MR. EHLIES: That's it, Judge.

1 THE COURT: Okay. Thank you. Anything further from
2 the State?

3 MS. BROWN: Your Honor, we would rely on Robertson
4 versus State. In the event that the prior PCR counsel are
5 deemed unqualified under 17-27-160B, the Judge must decide
6 the appropriate remedy, and that's all you need to do is
7 decide whether they went by the statute or not. As I
8 understand it there's no claim that the statute is somehow
9 wrong, incorrect or needs to be modified, it's not a
10 statutory claim at all. So we rely on Robertson.

11 THE COURT: Okay. The State's objection is overruled.
12 I'm going to allow this. And I myself have attended Life
13 in the Balance, I'm familiar with it as a matter of fact.
14 I'm going to qualify him as an expert.

15 THE WITNESS: When was that, Judge?

16 THE COURT: I'm sorry?

17 THE WITNESS: When was that?

18 THE COURT: I can't tell you the year but I'm pretty
19 sure I flew to Boston to go.

20 THE WITNESS: Okay.

21 MR. EHLIES: Thank you, Judge.

22 THE COURT: He's qualified as an expert.

23 MR. EHLIES: As an expert in training.

24 THE COURT: Yeah, for whatever it's worth.

25 MR. EHLIES: Okay, sir.

1 FURTHER DIRECT EXAMINATION

2 BY MR. EHLIES:

3 Q I want to talk to you -- you've already addressed it a
4 little bit -- but about the standards for performance,
5 individual performance, and I think you've identified those
6 not only in the rules of conduct to be competent in what you
7 assumed even if it's by way of appointment. Are you
8 familiar with that in the Rules of Professional Conduct?

9 A Well, generally the model rules contain a duty of
10 competence. The South Carolina rule is similar to the model
11 rule, and it mentions in the comments that competence can be
12 obtained through study or education, and that makes sense.
13 I mean, the competence -- the duty of competence is one of
14 the foundations for states requiring continuing and legal
15 education.

16 Q Okay. And do those rules, model rules and our rules in
17 particular address accepting or rejecting appointments to
18 cases in which you are not competent?

19 A Yeah. There's a separate rule, I think it is 6.2,
20 which says you should not accept an appointment in a case
21 where your representation would result in a violation of the
22 Rule of Professional Conduct or another law.

23 Q And is it a training initiative to make sure that every
24 lawyer performs at a minimum at the required Rules of
25 Professional Conduct and not below?

1 A Yeah, at a minimum. Most training organizations think
2 it should be higher than that, but at a minimum, yeah.

3 Q So no performance that falls below a professional rule
4 of conduct is going to be acceptable.

5 A That's right.

6 Q Okay. Let's talk a little bit then about the ABA
7 Guidelines and how they came to be relevant in your training
8 for the lawyers in this country, not only capital -- I keep
9 saying that, I'm sorry, this is a capital case, of course,
10 but capital and criminal defenders both at trial, appellate,
11 post conviction and even in habeas. Okay?

12 A Okay. Well -- okay. I mean, I need to talk about them
13 separately. I mean, the ABA has standards for criminal
14 defense representation that are not capital specific, and so
15 does the National Lawyer Defender Association. They publish
16 a document for performance guidelines for criminal defense
17 representation. Those apply in the noncapital context. In
18 the capital context the ABA published in 1989 their
19 guidelines for death penalty representation, they updated
20 them in 2003, and then in 2018 they published supplemental
21 guidelines that were related specifically to mitigation
22 investigation and presentation of mitigation evidence.

23 Q All right, sir. And did you train then from '84 or '85
24 on the guidelines all of the way through their existence?

25 A Well, my career in training began in '90 or '91, so

1 yeah. But from that time on we trained on -- it depended
2 upon the program. I mean, in the context of noncapital
3 programs we often trained on NALDA's performance guidelines.
4 In the capital context we trained on the ABA death penalty
5 guidelines often.

6 Q And --

7 A Because they establish what would be considered the
8 standard of practice in death penalty litigation, and many
9 courts have recognized them as establishing that standard of
10 practice.

11 Q And, in fact, are you familiar with -- I don't know if
12 I sent you Ard versus Catoe in South Carolina recognizing
13 and referring to the ABA standards?

14 A Yeah. They say that the ABA standards approve them I
15 would say.

16 Q Okay. So the programs on the ABA, I'm going to read
17 through a few and I want you to acknowledge whether you
18 recognize that as part of the training initiatives that went
19 on in ABA. Relevant state law. Was that included in the
20 training initiatives?

21 A Yeah, definitely.

22 Q Pleading and motion practice, and pleading your case.

23 A Absolutely.

24 Q Okay. Pretrial investigation, preparation, theory
25 development regarding guilt phases in capital litigation?

1 A That's right.

2 Q And that would be -- there are specific guidelines for
3 even PCR counsel doing the same thing, are there not?

4 A There are. And I think -- it sounds like you're
5 referring to the guideline on training in the ABA
6 guidelines, and it later says they have to be familiar with
7 post conviction litigation as well.

8 Q All right, sir. Jury selection?

9 A Jury selection, yes.

10 Q These are issues that are in this case. Have you had
11 the fourth and five amended application?

12 A Yes.

13 Q The application -- the pleadings in this case?

14 A Yes. The fourth and fifth amended, yes, I've read
15 them.

16 Q All right. So I'm referring to issues that are set
17 forth in that pleading.

18 A Right.

19 Q Jury selection is one of the training issues raised in
20 the ABA standards; is that correct?

21 A Right. And that was -- the Life in the Balance Program
22 was largely, especially when I first started working on it,
23 a trial program. But over time they added appellate post
24 conviction sessions. But certainly they cover jury
25 selection, and the Federal Death Penalty Resource Counsel

1 often trained on jury selection.

2 Q All right. And trial preparation and presentation
3 including the use of experts.

4 A A huge topic in both trial and post conviction
5 litigation, how to identify your experts, how to vet them,
6 how to manage them.

7 Q All right, sir.

8 A Cross examining them.

9 Q But managing expert witnesses is one of the training
10 issues and stated as an issue with guidance in the ABA
11 guidelines for performance.

12 A That's correct.

13 Q Ethical considerations. Do you include ethics sections
14 within the training protocols?

15 A Well, almost always both because it's incredibly
16 important, but also almost every state requires continuing
17 legal education credits and evidence.

18 Q All right, sir. Preservation of the record for the
19 purposes of appeal?

20 A Absolutely, especially in any trial focused program.

21 Q Counsel's relationship with the client and his family?

22 A A huge factor in any criminal defense training, but
23 particularly in the capital context.

24 Q And in this case in particular, training and focus on
25 the science and psychiatry and trauma in particular and

1 Battered Person Syndrome?

2 A That might be the subject that was trained on most in
3 the capital context. So many death row inmates that have
4 mental health issues, trauma -- and have experienced trauma
5 that it was trained on in abundance.

6 Q You have, I think, some experience in death penalty
7 defense and other complex specialized practice areas and
8 recite to Standard 7.1, the death penalty defense, I think
9 those supplemental standards in mitigation?

10 A That's the NALDA Defender Training and Education
11 Standards 7.1, which says that in death penalty and complex
12 areas of litigation people should receive all of the
13 training necessary to provide high quality services to the
14 client.

15 Q Is that not anticipated in Strickland v. Washington?

16 A Well, it's a way of creating or facilitating the kind
17 of competence that would hopefully avoid an IAC claim if
18 that's what you mean.

19 Q That is the objective to --

20 A That's the objective always of training.

21 Q -- effective assistance of counsel, is it not?

22 A The objective of all the training is to enhance the
23 quality of representation for the clients, absolutely.

24 Q Okay, sir. All right. You've mentioned already the
25 forensic evidence reports on the various forensic issues;

1 fingerprint, DNA, blood splattering and all of those things.

2 You concluded that as well in your training protocols and --

3 A That's right, yeah. In fact, the Habeas assistance and
4 Training Counsel together with the Federal Death Penalty
5 Resource Counsel did a number of programs in the early to
6 mid 2000's that were -- the title of the program was
7 Forensic Science and Criminal Law, they did four or five of
8 them.

9 Q All right, sir. Tell us -- you mentioned Tennessee,
10 Payne versus Tennessee on the victim impact testimony, and
11 you have mentioned Daubert and the sciences have just
12 referred to. Does Wiggins really -- Wiggins versus Smith
13 setting forth the duty to investigate, develop and present,
14 and without that you can make no strategic decision, did
15 that law in the Wiggins decision itself wind up pretty high
16 on your list of training people about its existence and your
17 responsibilities?

18 A Very high. I mean, the opinion among capital
19 practitioners before Wiggins was that that's what the law
20 should have been, and when the Supreme Court adopted that
21 then it became -- there was already training going on in
22 that area, but that training expanded after Wiggins and
23 Roppilla.

24 Q Roppilla was, I think, in 2005, two years earlier,
25 Roppilla vs. Beard?

1 A Yeah. It's another case along the lines of Wiggins.

2 Q Okay. You've mentioned DSM. And did you get
3 presenters that were non-lawyer but experts in the
4 psychology, psychiatry, and familiar with the DSM and how to
5 use that?

6 A We did. They trained on trauma, but there often were
7 sessions on the DSM itself. Particularly when new editions
8 came out people would do sessions on the changes that had
9 taken place in the criteria for diagnosis of different
10 illnesses.

11 Q All right, sir. You've mentioned, and I'm just going
12 to go through briefly on these, that the objectives
13 including managing expert witnesses, is that correct, and in
14 doing mitigation investigation into evolving standards of
15 mental health; is that correct?

16 A Those are at least two of the common areas, but two of
17 the most common I would say.

18 MR. EHLIES: Judge, I'm going turn to -- I move into
19 evidence his CV.

20 MS. BROWN: No objection, Your Honor.

21 THE COURT: Without objection.

22 (The CV was received as Applicant's 34.)

23 MR. EHLIES: Let me have that CV back before we get out
24 of order. Judge, I am handing the witness what has been
25 marked for identification purposes Applicant's Exhibit

1 Number 13. The stickers actually say petitioner but I use
2 that interchangeably.

3 Q And I'm going to hand this, along with Tab A, 13A and
4 13B. 13B is identified with the yellow tab. I'm going to
5 ask you to take a look at these. Let me know when you're
6 ready to proceed.

7 (Break in proceedings.)

8 A Okay.

9 Q When I first contacted you about this case I mentioned
10 to you that there were certain particularized issues
11 embedded within the case, one of the issues was managing
12 your expert witnesses and what is expected of counsel at any
13 level --

14 A Right.

15 Q -- as regards to managing an expert witness. And you
16 obtained, with the assistance of Ms. McLaughlin
17 (phonetically), who has given us the business records
18 affidavit, these spreadsheets. And I want you to explain
19 what they are, what they mean to the Judge and identify
20 their locations as they relate to the region of the south.

21 A Okay.

22 MS. BROWN: And, Your Honor, excuse me, but I don't
23 believe it has been moved into evidence yet. We're talking
24 about it.

25 THE COURT: Are you moving 13 -- are you moving --

1 MR. EHLIES: I will and I intend to. I was going to
2 have him review it and then move it into evidence but I will
3 move it now.

4 MS. BROWN: And I object to relevance. I would also
5 object to confusion, because there's a good deal of
6 information, at least in the copies that I have, and it
7 doesn't seem to go to the case. So relevance and 403.

8 MR. EHLIES: The relevance obviously is for the
9 regions, the subject matter, managing expert witnesses, and
10 it's authenticated with the affidavit. And it certainly
11 fleshes out what's available to local counsel as far as
12 these particular raised issues are concerned.

13 THE COURT: Okay. I'm going to overrule, I'm going to
14 let it in. Are you moving it in?

15 MR. EHLIES: Yes, sir, I'm moving it in.

16 THE COURT: Any objection to it coming in? There is
17 objections. Over your objection. All right.

18 (The business record were received as Applicant's 13.)

19 MR. EHLIES: And Judge, on that point since we're
20 getting in a hot spot here, it is our position that Chambers
21 versus Mississippi from the Supreme Court of the United
22 States prohibits the use of Rules of Evidence to exclude
23 what is relevant and has indicia of reliability. That
24 principle that was set out in 1973 was adopted by our
25 legislature when they passed 17-27-80, which says that this

1 Court can accept proof in any PCR, capital or otherwise, by
2 means of affidavits, depositions, sworn testimony, letters
3 or other evidence. So you are not bound by any formal rule
4 of evidence, that's our position on these objections about
5 whether they're admissible. Okay.

6 MS. BROWN: Your Honor, just for clarity, that was
7 just -- that's for relevance, not for the affidavit.
8 Just -- thank you, Your Honor.

9 THE COURT: Yes. Thank you.

10 Q All right. Mr. Burke, we're back to looking at this
11 exhibit, if you would. And tell us under Exhibit 13 why we
12 should pay particular attention to this? What is the issues
13 it is embracing to start with?

14 A Well, it's identifying training on a variety of topics
15 that was available between the years of 1996 or '97 to 2007.

16 Q Do you know the date of this crime? I told you it was
17 1997, November the 25th.

18 A Yeah, right.

19 Q Do these records embrace that time period?

20 A Right. They embrace the time period from the trial to
21 post conviction is my understanding.

22 Q That's very good. Tell us about what they reveal.

23 A All right. So I referred earlier to the Federal Death
24 Penalty Resource Counsel Project. That project has not only
25 trial lawyers in it, but over time they added a mitigation

1 specialist to it and that position was called the National
2 Mitigation Coordinator. The person that held that position
3 for many years was Russ Stetler (phonetically), and he was
4 considered a mitigation expert, one of the best mitigation
5 specialists in the country. He trained all over the country
6 for a variety of organizations, and over the years of doing
7 that he collected training materials from the programs that
8 he either was on a faculty for or otherwise attended. That
9 information was then entered into a database, and Russ still
10 does some of this work, but there's a new mitigation
11 coordinator now. And they did some searches in the database
12 on particular topics to produce these spreadsheets, which
13 show training on those topics in the time period that we
14 talked about, '96 through 2007.

15 Q All right, sir. And that's the first group that's
16 marked Exhibit 13, I think; is that correct?

17 A Well, I mean, the exhibit number is on the affidavit,
18 but then what follows that are a number of different
19 spreadsheets that reflect training on different topics over
20 that period of time.

21 Q All right, sir. And I'm not being really clear, I
22 guess. My point is that the Exhibit 13 pertains to managing
23 your expert witnesses.

24 A That, yeah, in addition to other topics. But, yeah,
25 one of them is related to managing expert witnesses, one of

1 the spreadsheets.

2 Q All right, sir. And then there's another spreadsheet
3 that is 13A, and I think that is in response to your in
4 inquiry about a different issue, mitigation, as regards
5 trauma?

6 A Right. That one, I think, covers both mitigation, the
7 ABA Guidelines, trauma and DNA.

8 Q All right, sir. And for our help it has the date that
9 the program was present; is that correct?

10 A That right.

11 Q And the provider that's hosting the program; is that
12 correct?

13 A That's correct.

14 Q And then the conference center, and you turn the page
15 and some of these you get even more information like who the
16 presenters are in these programs?

17 A Right. It had the year and the sponsor, the title of
18 the session, and then it had the presenters is the last
19 field.

20 Q All right, sir. And so is this region fairly embraced
21 within these outlines of training opportunities?

22 A Well, yeah. If you look through you'll see -- this
23 represents a number of the national organizations that did
24 training and some of the state organizations. So you will
25 see some training by state organizations in Georgia,

1 California, I think Texas. But this isn't comprehensive in
2 terms of all of the capital training that went on around the
3 country, there would be much, much more of it put on by
4 other organizations. But if you look through it you'll see
5 that there are many programs that were located in the south,
6 because as I said, this coalition of national organizations
7 had a consensus that the program should be placed where
8 there was a lot of death penalty litigation. So there are
9 programs in Atlanta, Georgia; in Raleigh, North Carolina; in
10 San Antonio and Austin, Texas; in Nashville, Tennessee; and
11 New Orleans; Washington D.C.; Baltimore, Maryland.

12 Q Let's turn, if you would, to the first page just as an
13 illustration on the first Exhibit 13. In 1997 -- and I'm
14 dropping down to the fourth line -- 1997, North Carolina
15 Central University School of Law mental retardation, mental
16 illness and death penalty --

17 A Right.

18 Q -- and in '97 that would have been before Daryl's case
19 on mental retardation, I think. But that was hosted in
20 Durham, North Carolina.

21 A That's right.

22 Q Daryl Atkins' cases, I'm getting a block on the date of
23 that. But that issue, the mental -- to be trained mental
24 and aware of mental health issues and intellectual abilities
25 was taught in Durham in 1997; is that correct?

1 A That's correct.

2 Q And then if you go down you have one in Washington D.C.
3 again on mental health.

4 A Right. That's habeas assistance and training counsel,
5 right.

6 Q So in using that document --

7 A Just to stand on that a little bit. This conference
8 title, mental health and criminal law, the habeas assistance
9 and training counsel did a number of programs over several
10 years that had that title, and it covered specifically
11 mental health mitigation. Well, not just mitigation, in
12 some cases it was related to guilt issues on competency or
13 insanity.

14 Q All right, sir. And then if you turned two pages down
15 from that same example, I'm just using that same example,
16 the North Carolina example in Durham, North Carolina, if you
17 turn to the third page after that you get a page that has
18 identifiers of who the presenters were --

19 A Right.

20 Q -- is that correct?

21 A That's right.

22 Q And if you follow along the stream, because Excel
23 prints out long-wise so we have to cut them in page; is that
24 correct?

25 A That's right.

1 Q So is that how you would read this particular
2 spreadsheet is in multiples pages?

3 A Right. You have to flip through the pages to see the
4 entire field.

5 Q Okay. So is it fair to say, then, that because of the
6 prevalence of the State prosecutors to seek death in the
7 south that many of the programs are, in fact, offered and
8 housed in the southern regions of the United States?

9 A That's correct.

10 Q Atlanta, Georgia; Dallas, Texas; Durham, North
11 Carolina, Raleigh.

12 A Raleigh, Nashville.

13 Q Memphis, Tennessee.

14 A Nashville, Knoxville, San Antonio, Austin. That was a
15 strategy that the national organizations had for reaching as
16 many people who were doing the work as possible.

17 Q And if you would very briefly tell the Judge, basically
18 I think there were three particular issues that you saw
19 verification for the training programs. One was managing
20 expert witness; is that correct?

21 A Yeah. There were more than three, but that was one of
22 them, yeah.

23 Q And then another spreadsheet on what issue?

24 A Mitigation investigation and presentation of mitigation
25 evidence.

1 Q And then there was a third?

2 A Trauma. Well, there were several, but trauma was one
3 of them, and the ABA Guidelines was another one. DNA was
4 one. Case management was one. And then waivers of appeals
5 counsel and basically what we call volunteers who are giving
6 up on their death penalty litigation, basically volunteering
7 to be executed.

8 Q And are you aware that all of those issues are in the
9 fifth amended application?

10 A Yes.

11 Q And that this particular individual volunteered, they
12 had a competency evaluation to see if he could waive counsel
13 and that sort of thing. You were aware of that.

14 A Yes. That's why we asked for searches to be done on
15 those topics.

16 Q Okay. And that's what's reflected in these 13A and
17 13B?

18 A That's correct.

19 MR. EHLIES: And I understand, now, Judge, that those
20 are all in evidence.

21 THE COURT: They are.

22 Q And let me retrieve those from you. Okay, sir. I want
23 to go back and touch on one issue that we sort of talked
24 about before you were qualified as an expert. When you are
25 a participant or an employee at the A.O., Administrative

1 Office of the United States Court Training Division of
2 Offender Services, were you there at or about the time that
3 ADPA, Antiterrorism Death Penalty Act, was being discussed
4 by Congress and ultimately became law?

5 A Well, that -- I was -- that happened -- when that
6 happened that overlapped my two jobs. The discussion of
7 passage of that legislation began a number of years before
8 it was actually passed in '96, I'm pretty sure it was, and
9 so I was involved in education -- both legislative education
10 with members of Congress, but also education for the lawyers
11 and others before its passage. But then after it passed in
12 '96 we continued to do writing on and education about it. I
13 left NALDA in '97 and went to the A.O. at that point, and
14 then in that capacity let training continue to be done on
15 ADPA by the A.O. training division and the contractors that
16 we had available to do training.

17 Q Now, you have read the opinion, I believe, in this case
18 from the Supreme Court, it's Robertson versus South Carolina
19 on a remand?

20 A I have.

21 Q All right, sir. And there's some reference to an
22 opt-in provision within the ADPA plan for states, and that
23 that informed -- in the opinion it references informing the
24 initiative to plug in by statute 17-27-16-160B. Can you
25 tell us then what you understood at that time the initiative

1 by Congress and the Attorney General as far as the opt-in
2 plan was concerned?

3 A Well, so ADPA was going to set a one year statute of
4 limitations for the filing of federal habeas claims, and
5 then there were some states that wanted a shorter statute of
6 limitations. And the sort of bargain that was reached in
7 the ultimate passage of the legislation was what became
8 known as the opt-in provision, which would allow states --

9 Q Excuse me. You were there in part of this; is that
10 correct?

11 A Yeah. When it was passed I was still at NALDA, that's
12 right.

13 Q Okay.

14 A And the opt-in provision basically would have allowed
15 states to have the advantage of a six month statute of
16 limitations and some other advantages, which, you know, I
17 don't think you need all of the details, but some other
18 advantages, provided that they met certain criteria, which
19 included having a comprehensive system for providing
20 qualified counsel to people in death penalty cases. So that
21 included both experiential time doing capital litigation as
22 well as training on capital litigation.

23 Q All right, sir. And so if the State then could have a
24 program guaranteeing quality post conviction, in this case
25 services, what would be their benefit?

1 A Well, they would get a six month statute of limitations
2 and some other benefits related to, you know, waiver of
3 issues and some other things. But --

4 Q What would a state that amended their program to
5 guarantee quality lawyers in those phases do to get
6 certified or take advantage of that opt-in opportunity?

7 A Well, they would have to set up a system for providing
8 counsel where counsel were fairly compensated both for their
9 time and expenses, where they were qualified by experience
10 and training, and where the law on governing representation
11 was implemented in a consistent manner.

12 Q All right. And then after they made that program a
13 guarantee by statute, what would they do as far as getting
14 actual certifications?

15 A Well, originally they had to apply to I think it was
16 the Cert's Federal Circuit Court Appeal, but they changed
17 that some time ago and they apply now to the U.S. Department
18 of Justice, and the U.S. Department of Justice makes a
19 determination about whether they are certified to opt in,
20 and that decision is appealable to the circuit court of
21 appeal in that circuit.

22 Q So can you describe that process a little bit for us,
23 not in a big deal, but just a thumbnail sketch?

24 A They have to file an application with the Department of
25 Justice, which would require them to lay out how their

1 system meets the criteria that's in ADPA, and then there's a
2 comment period that's allowed of people -- other parties
3 that are interested can comment on the application, and then
4 DOJ would make a decision about whether they would certify
5 them as meeting the requirements and allow them to get the
6 benefits of the six month statute of limitations.

7 Q Do you know whether South Carolina ever qualified for
8 that?

9 A My understanding is that they applied and are not
10 certified.

11 Q In fact, you kept up with states that were certified;
12 is that correct?

13 A Well, only one state in the country has been certified.

14 Q All right. And what state was that?

15 A It was just last fall, it was Arizona, but the
16 certification has been challenged. And so an appeal was
17 filed in the District of Columbia Court of Appeals, and
18 recently the Department of Justice requested that the court
19 remand the certification back to DOJ so that they can
20 further consider it because they want more information from
21 the State of Arizona.

22 Q So the program submitted by South Carolina did not
23 qualify?

24 A That's -- well, I know they weren't certified, so that
25 meant DOJ determined it didn't qualify.

1 Q That should have been my question, I'm sorry. South
2 Carolina was never certified in order to opt in for the
3 benefits including this 180 day statute of limitations
4 instead of 365 days.

5 A That's right.

6 Q Okay. Okay, sir.

7 MR. EHLIES: Judge, can I have a minute or two so I can
8 talk to my client?

9 THE COURT: Yes, sir. I was getting ready to stop you
10 at 11:30 anyway, so we'll stop now for about 15 minutes and
11 we'll reconvene then if you're ready.

12 MR. EHLIES: Do you need to step down, Mr. Burke?

13 THE WITNESS: If we're taking 15 minutes I'll step down
14 and get some water.

15 THE COURT: Yes, sir, you may step down. You can't
16 talk to anyone about what you've testified to, but get some
17 water and refresh yourselves. Let's be back in about 15 or
18 18 minutes, something like that. For planning purposes
19 we're going to run until about 12:30 and break for lunch.

20 MR. EHLIES: Okay, sir. I think we can handle that.
21 The next witness is a little longer than this one and he is
22 present and in the courtroom.

23 THE COURT: Okay. Thank you. We're in recess.

24 (Break was taken.)

25 MR. EHLIES: Judge, while they're bringing him in

1 here --

2 THE COURT: Yes, sir.

3 MR. EHLIES: -- chambers versus Mississippi on limited
4 state rules of evidence is at 410US284. I understand last
5 week there was another decision on that issue, I'll try to
6 have it tomorrow.

7 (Break in proceedings.)

8 MR. EHLIES: Judge, I think everyone is here. The
9 applicant, Mr. Robertson, is unable to continue and he's
10 going to say why and ask to be excused for the balance of
11 the hearing.

12 THE COURT: Okay. Well, let's do this, before we do
13 that, Madam Clerk, how about swearing him. You can swear
14 him from right there.

15 (The applicant was sworn.)

16 THE COURT: Yes, sir, I'm happy to hear from you.

17 THE APPLICANT: It's two-fold. The pain might be worth
18 sitting through if I could effectively help my attorneys but
19 I can't because I can't write. I can't turn my wrists to
20 write. I can't even lift up the envelope that I brought,
21 the legal pad that I brought. If I can't effectively assist
22 my attorneys then there's no point in being here, not in
23 this pain. I mean, I don't mind being here in no pain, I
24 don't mind being here in discomfort as long as I can write.
25 Not that you'll allow it, but I could show a demonstration

1 of them taking this black box off and still leaving this one
2 set of handcuffs on and you'll be able to see how I am still
3 fully restrained. I would be able to write, I would be able
4 to effectively communicate with my attorneys. I can't even
5 tap on my attorney's shoulder. I can't move my hands. You
6 cannot not rotate your wrists, you can't write. I
7 couldn't -- for a billion dollars I couldn't put my name on
8 a piece of paper right now. That's the choice that I have.

9 THE COURT: Okay. Well, I've already told you that I'm
10 not going to order law enforcement to undo those restraints.
11 And I think you can write if you want to, and if you don't
12 or can't write you certainly can talk with your lawyers.
13 But if you desire to be absent from here you may do that, so
14 you decide.

15 THE APPLICANT: That's my decision.

16 THE COURT: All right, sir, you'll be allowed to leave.
17 Let me ask this before you go out of the courtroom, are you
18 being asked to be -- you're not coming back at all or you're
19 just going to be gone today?

20 THE APPLICANT: I have no intention of coming back at
21 all.

22 THE COURT: Okay. Very good, then.

23 THE APPLICANT: Provided that this situation remains
24 the same.

25 THE COURT: It does.

1 THE APPLICANT: Should something change overnight or
2 change tomorrow morning then --

3 THE COURT: No, sir, it won't.

4 MR. SALTER: In that case we're going to move to
5 dismiss the entire case. He is the plaintiff in a civil
6 suit, if he doesn't wish to go forward, I mean -- I
7 obtained -- if he did not testify on his own behalf I was
8 going to call him as a witness, and I have a right to do
9 that.

10 THE COURT: You still can.

11 THE APPLICANT: I won't be here.

12 MR. EHLIES: Well, he can do that by video.

13 THE COURT: Yes, sir. If he calls you as a witness
14 you'll be here. You wish to call him as a witness later
15 this week?

16 MR. SALTER: Yes, sir.

17 THE COURT: Okay. Very good. Well, he is excused
18 until such time -- he desires not to be here at this point
19 in time in his case in chief so I'm going to allow him to
20 leave.

21 MR. EHLIES: And, Judge, it's to be absent -- he's not
22 waiving his case, he's just asked --

23 THE COURT: I understand. Yes, sir. I think later
24 this week, Lieutenant, they'll ask for a subpoena for him to
25 be here. Thank you for your help.

1 MR. SALTER: Your Honor, just to be clear, we have
2 not -- obviously had not subpoenaed him because he's --

3 MR. EHLIES: I don't think he's going anywhere.

4 THE COURT: If you want him you can have him.

5 MR. SALTER: Thank you. We'll just have to figure out
6 logistically when the Court will wish to have that heard.

7 THE COURT: Whenever you want to call him we'll work it
8 out. You can work it out with him.

9 (The applicant left the courtroom.)

10 MR. EHLIES: I only have a few things more. Are we
11 ready to --

12 THE COURT: Yes, sir, we're ready.

13 BY MR. EHLIES:

14 Q Mr. Burke, I don't know if you'll need any background
15 to orient you in the course of your testimony because these
16 couple of questions are going to take you back pretty far,
17 and one of them is the reason why you selected out some of
18 the spreadsheets on these issues, and one of them was
19 managing your expert witnesses and making sure they don't
20 stray from the project itself or the referring question, as
21 we say, those sorts of things. What was your understanding
22 of what we're after as far as managing your expert witness?
23 And did those selected programs address that kind of issue?

24 A Yeah. I mean, my understanding was not just on that
25 issue but on the others that were included within the

1 application was that those issues existed in this case, and
2 in particular with regard to managing expert witnesses that
3 there was basically a failure to do that, and that the
4 training that was available would have covered issues like
5 selecting experts, making determinations about whether they
6 should or shouldn't testify, if they were going to testify
7 making sure that they were aware of issues of privilege,
8 confidence, work product, 5th Amendment rights, making sure
9 they knew what to write down or not write down, and advising
10 them and attending interviews with them.

11 Q And that was a particular training issue, to make sure
12 you attended the interviews with them.

13 A Right. All of those aspects of managing experts were
14 commonly trained on during this period.

15 Q And those records and spreadsheets covered from 1997
16 courses, in '96, I think, in one of them, all of the way up
17 through the PCR case. So that window of time covered the
18 essence of this case, again the crime being September 25th
19 of -- I mean, November 25th of 1997, and then the PCR's in
20 2006 and 7 --

21 A That's correct.

22 Q -- is that your understanding?

23 A That's right. I mean, I could go through those
24 spreadsheets and testify with specificity about how many
25 times each topic was presented, and in what years and at

1 what locations but you probably don't want me to spend the
2 time doing that. So the general summary of it is all of
3 those issues that are on the spreadsheets were addressed
4 during the time period in question, '97 to 2007, some more
5 than others. Managing experts, mitigation, investigation
6 and presentation, trauma were -- I mean, you will just have
7 to look at the spreadsheets, they were covered over and over
8 and over again. A little bit less so but still quite
9 frequently the ABA Death Penalty Guidelines were covered a
10 lot.

11 Q Okay. And that's something that we can obtain by a
12 close inspection of the spreadsheets that are in evidence.

13 A Right.

14 MR. EHLIES: Thank you, Judge I think -- Judge, that's
15 all for the applicant.

16 THE COURT: Okay. Thank you. Yes, ma'am?

17 MS. BROWN: Thank you, Your Honor.

18 CROSS EXAMINATION

19 BY MS. BROWN:

20 Q Mr. Burke, I just want to ask you a few questions about
21 some of the comments that you made.

22 A Okay.

23 Q I think you've told us that you looked at 17-27-160,
24 right, our statute, and that part of the qualification is to
25 have successfully completed within the previous two years

1 not less than 12 hours of South Carolina Bar approved
2 continuing legal education, or professional training
3 primarily involved in the field of capital appellate work,
4 and I've kind of paraphrased that last part just so I
5 wouldn't keep reading. Are you aware that this Judge has
6 already found that PCR counsel did not meet that
7 qualification?

8 A I am, yes.

9 Q And you've told us that there are different ways you
10 could not meet that qualification, correct? But if he's
11 already been held deficient, help me understand, what does
12 your testimony do in interpreting that part of the statute?

13 A Well, it doesn't necessarily do anything in terms of
14 interpreting that part of the statute. What it does is
15 demonstrates that training on these various topics were
16 available both to trial counsel and also to post conviction
17 counsel, and that that training could have allowed them to
18 recognize these issues and appropriately investigate them
19 and litigate them.

20 Q Okay. And I think you also shared with us there are
21 several organizations that have training, the organizations
22 you mentioned, but there's also the National Association of
23 Criminal Defense Lawyers, right?

24 A That's correct.

25 Q And they have a capital litigation section, correct?

1 A They do an annual training, yeah, called Making the
2 Case For Life.

3 Q Federal Capital Habeas Project, that's another one?
4 Federal Capital Trial Project?

5 A That's right. Those are the contractors that I worked
6 with at the Administrative Office.

7 Q And the, of course, ABA, American Bar Association.

8 A That's right.

9 Q And part of the ABA encourages people with experience,
10 trial experience, to be on cases, correct?

11 A That's right.

12 Q So it is a benefit to have actual trial experience in
13 felony cases as part of your background, correct? That's a
14 benefit.

15 A Well -- to be a capital defense lawyer?

16 Q For any lawyer representing anybody in collateral
17 proceedings or anywhere else experience matters, correct?

18 A Well, sure. But it depends upon what kind of case
19 you're in and what kind of experience you have. Just being
20 a criminal defense lawyer who has done felony cases, in my
21 opinion, doesn't qualify you to represent people in capital
22 cases.

23 Q Okay. Fair enough. And you think that when you
24 associate or you reach out to some of these projects or
25 research units that that's a benefit to a capital defense

1 presentation.

2 A If you reached out to like the ABA Death Penalty Post
3 Conviction Project you mean?

4 Q Yeah.

5 A Sure.

6 Q And that's a benefit. And you would advocate that, in
7 fact, right?

8 A Yes. Well, yes. But sometimes -- often that project
9 would, because of the outreach that they did, get large law
10 firms who had a lot of resources to come into the cases, and
11 often those lawyers did not have the kind of experience that
12 they need for death penalty cases. So they usually were
13 assisted by consultants either from these death penalty
14 projects or death penalty lawyers within the state to help
15 them on the cases.

16 Q And you also mentioned just not the big umbrella of
17 projects from ABA, but also there are local projects, and
18 there used to be a capital center in this state and John
19 Blume headed it up for a time. Do you remember?

20 A That's right.

21 Q Okay. And you recognized Mr. Blume earlier in your
22 testimony as who is someone you would consider an expert.

23 A That's correct.

24 Q A teacher in this field.

25 A That's correct.

1 Q Okay. So if someone went to John Blume and the
2 resource center in preparation for a trial, in your opinion
3 that's positive step, isn't it?

4 A Right. I would consider it to be, yes.

5 Q Okay. I want to go back and talk a little bit
6 about ADPA. I think you mentioned from your understanding
7 one of the goals for ADPA passing is to secure better
8 representation.

9 A Well, particularly if states want to take advantage of
10 the opt-in provision to get a shorter statute of
11 limitations, that's right.

12 Q Okay. What is the major goal of ADPA? If you read a
13 Supreme Court opinion that talked about the major goal of
14 ADPA that would actually be to reduce delays in capital
15 cases, wouldn't it?

16 A That was the theory among many of the people who
17 proposed the legislation, yes.

18 Q And the Court -- the Supreme Court has said in Michael
19 Williams and several cases since then, correct?

20 A I don't remember the specific names of cases, but it
21 wouldn't surprise me if they said that.

22 Q Well, can you point us to a Supreme Court case, any
23 Supreme Court authority that sets out ADPA as having a goal
24 of raising a certain level of qualification or training?

25 A Not necessary ADPA, but there are Supreme Court cases

1 that find ineffective assistance of counsel and approvingly
2 say the ABA Guidelines for death penalty representation. So
3 there's an interest in quality of representation of capital
4 cases.

5 Q I agree that ABA Guidelines have been consulted and
6 referenced, but what does the Supreme Court say about the
7 guidelines?

8 A Well, they in at least some cases, and I'm not going to
9 be able to give you the exact names, they've cited them
10 approvingly as establishing the standard of care in capital
11 practice.

12 Q Would you agree with me they say that they remain
13 guidelines, they are not mandates?

14 A They have -- I seem to recall there is at least one
15 opinion that I remember where they said that they are not
16 mandates.

17 Q It says in Strickland the ABA Guidelines are not
18 mandates, right?

19 A Yeah. Well, those would be -- those wouldn't be the
20 death penalty guidelines, but yes.

21 Q What about Wong versus Belmontes?

22 A I don't know, I'm not familiar with that.

23 Q Fair enough. Let's talk a little bit about ADPA. That
24 became effective back in April of 1996, right.

25 A I don't remember the month, but yeah, '96.

1 Q Okay. And you said you've read our 17-27-160 and the
2 Robertson opinion, so you know that we responded to ADPA by
3 putting additional qualifications in.

4 A Right.

5 Q Part of those qualifications as the training that we
6 just discussed earlier.

7 A Uh-huh.

8 Q And you mentioned, as I understood it, that you didn't
9 think South Carolina qualified.

10 A No. I said that they made an application and then they
11 weren't certified.

12 Q When did they make that application, sir?

13 A I'm not aware of that.

14 Q Have you seen an application from the State of South
15 Carolina?

16 A I haven't.

17 Q Okay. Have you seen any letters written by the Office
18 of the Attorney General to the Fourth Circuit Court of
19 Appeals saying that our opt-in provision applies? Have you
20 seen anything like that?

21 A No, I haven't.

22 Q Are you aware of any South Carolina case that's gone
23 into South Carolina District Court and the opt-in provision
24 has been applied?

25 A No. I mean, they haven't been certified so it wouldn't

1 apply.

2 Q And you mentioned certification. There were only two
3 who asked for certification.

4 A No. I'm not -- I don't know the total number who have
5 applied for certification. I know that certainly Arizona
6 has and they were certified. Texas did and their
7 application was never ruled on. Years ago California did
8 and they were not certified.

9 Q Well, let's talk about that because I think it's kind
10 of an important point. When we talk about certification,
11 what you're talking about is the restrictive timeframe that
12 a different portion of ADPA, then the regular 2254 would
13 apply, a different portion that has expedited proceedings --

14 A That's right.

15 Q -- when you opt in --

16 A That's right.

17 Q -- and somebody says that our statute complies. And by
18 the way, what does ADPA set out for the qualifications that
19 are necessary?

20 A I can't give them to you in detail, but they have to
21 have a comprehensive system for making available qualified
22 and fairly compensated counsel.

23 Q But there's nothing specific in there, is there, sir?

24 A There's not a specific amount of experience, number of
25 training hours or so on, no.

1 Q Okay.

2 A Those standards have established those because it's
3 really difficult to specify a particular numbers of hours
4 that might be required.

5 Q Okay. Well, the benefits of opt-in, correct me if I'm
6 wrong, but if I understand it's expedited proceedings.

7 A That's right.

8 Q A standard non-capital federal habeas case has a one
9 year statute of limitations, right?

10 A That's right.

11 Q If you opt in you get six months for your statute of
12 limitations.

13 A That's right.

14 Q Okay. Well, let me ask you, the standard of review is
15 under 2254D if you opt in, correct?

16 A The standard of review?

17 Q Uh-huh. So a federal court will be looking at the
18 reasonable application of federal law or a reasonable
19 determination of fact.

20 A Right.

21 Q So that would be the standard that they're going to use
22 to review an opt-in case.

23 A Yeah. I guess that's correct, I'm not actually sure.
24 That's not really an area of my expertise, but --

25 Q Oh, okay. Well, you would agree with me there's no

1 different standard of review in the opt-in provisions,
2 correct?

3 A That's right. I think -- I'm pretty sure that's
4 correct, yes.

5 Q Okay. So no matter whether it's opt in or not
6 qualified or even not certified, it's the same review in
7 federal habeas, if an issue has been preserved that issue
8 will be considered for a reasonable determination of fact
9 and a reasonable application of federal law, correct?

10 A That's correct.

11 MR. EHLIES: Your Honor, I object to the line of
12 questioning as involving detailed expertise in administering
13 and litigating ADPA. He is in a training scenario as a
14 qualified expert to consider those things, but not to be an
15 expert in how you administered them, and I don't know that
16 South Carolina has ever advanced the proposition that they
17 are qualified and certified in and get 180 -- if she has a
18 case that says they qualified for it I would like to see it.

19 THE COURT: She's on cross, I'm going to give her a
20 little latitude. Go ahead.

21 MS. BROWN: Thank you, sir.

22 Q So the point is, going back to opt-in procedures, which
23 is what we're talking about, that review is the same no
24 matter what.

25 A You get the shorter statute of limitations. There are

1 some other benefits that you get, I don't recall
2 specifically what they are.

3 Q Okay. Well, I'm going to stick with the statute that
4 just deals with opt-in right now. But 2261, that same
5 statute that provides the opt-in procedures that you've been
6 talking about also has paragraph E, and it says
7 ineffectiveness or incompetence shall not be a ground for
8 relief in 2254 when you're talking about collateral counsel,
9 correct?

10 A I don't know. And I'm not an expert on ADPA and its
11 administration or litigation under it.

12 Q Okay. Well, walk with me through this hypothetical,
13 please, sir. If an attorney goes to your training and has
14 more than 14 hours or more than 20 hours of training and he
15 is qualified under the state statute, 17-27-160, but he
16 fails to raise an ineffective assistance of counsel claim
17 that he claims is substantial, that's still going to be
18 defaulted, it's still ineffective assistance, correct?

19 A As I said I'm not an expert on litigating IAC claims.
20 I think you're going to have an expert here on that but
21 that's not me.

22 Q Well, let's focus in on the point that I would like to
23 explore with you, and that is whether you have the training
24 or whether you do not, the review will be for trial counsel
25 whether you meet the 6th Amendment qualification, not ABA,

1 not federal habeas, capital defense or anything like that.

2 You're looking at it from the 6th Amendment.

3 A Well, I'm not sure -- I'm not exactly sure on what the
4 question is. But if you're saying can people who have been
5 trained still commit ineffective assistant of counsel, yes,
6 but that doesn't mean you shouldn't provide training to the
7 people to try to enhance their ability to represent people
8 in a quality way.

9 Q Absolutely. And just because they have training
10 doesn't mean they'll be fantastic, because they have an
11 absence of training doesn't mean they're horrible.

12 A Okay.

13 Q Would you agree?

14 A It's possible that somebody without training could do a
15 good job, but it's less likely certainly. And when they get
16 the training they're going to be more aware of issue
17 identification and how to appropriately litigate a case.

18 Q I like that you said issue identification, sir, because
19 at the end of the day what we're talking about is a specific
20 claim, correct? If you have a claim that is meritorious and
21 you can prove a 6th Amendment counsel violation then you get
22 relief.

23 A Sure.

24 Q But you've got to have that claim, correct?

25 A Yeah, you have to have claims. In any post conviction

1 proceeding you have to make claims.

2 Q Okay. And I believe you told us that you practice in
3 or practiced in Florida, correct?

4 A That's right.

5 Q Do you practice there any longer at all?

6 A No.

7 Q Okay. When you were practicing in Florida, what was
8 the prevailing thought about having someone come in and talk
9 about standards or training in collateral actions?

10 A I'm not sure I can tell you that, I don't really
11 remember. I mean, I stopped practicing in Florida in 1990,
12 it was a long time ago.

13 Q In 1990 you said?

14 A Yeah. I guess it was in early '91, I think it was.

15 Q Well, sir, if you had someone come in and create a
16 seminar and they gave advice that a strategy for a
17 particular subject should be A, B, C, and line out that
18 advice, and you have an attorney from a different state that
19 has listened to that advice and he says, "I don't think that
20 my county will agree with that, I don't think that that's
21 something they're going to like," and he goes in a different
22 direction, is he deficient?

23 A I can't answer that question without -- I wouldn't be
24 able to answer that question without specifics, and I
25 probably then wouldn't answer it anyway. Because, like I

1 said, I'm not here as an expert on ineffective assistance,
2 I'm here as an expert on training issues. And the specifics
3 would be necessary, because it would depend on whether the
4 local practice prohibited some action or he just thought
5 they might and he didn't want to take the advice of the
6 experts and engage in a practice that he wasn't accustomed
7 to.

8 Q And you're familiar with Strickland versus Washington,
9 right?

10 A Right.

11 Q And that is the case for ineffective assistance of
12 counsel.

13 A That's right.

14 Q Is that a good characterization? You agree with that?

15 A Well, sure. There have been many since then that have
16 amplified on it, but yeah, that's the -- case.

17 Q And Strickland teaches us that no two attorneys are
18 going to try a case the same way, correct?

19 A That's right.

20 Q And cases and -- well, courts, excuse me, still cite to
21 that portion of the case because it is correct, would you
22 agree with me?

23 A People may within the context of a certain standard of
24 care implement that care in a different way, yes.

25 MS. BROWN: Court's indulgence.

1 (Break in proceedings.)

2 MS. BROWN: Mr. Burke, thank you for your time. No
3 further questions, Your Honor.

4 THE COURT: Anything at all as to that little bit?

5 MR. EHLIES: Yes, sir, one issue.

6 CROSS EXAMINATION

7 BY MR. EHLIES:

8 Q Mr. Burke, the suggestion is that there's no difference
9 in PCR litigation in capital to trial counsel's work in the
10 jury trial. And isn't that asking you to assume Strickland
11 doesn't exist and all of the jurisprudence after Strickland
12 that is different and requires different training and
13 understanding in order to be able to challenge what trial
14 counsel did; is that correct?

15 A I'm sorry, I'm not following the question.

16 Q The practitioners in post conviction have to know about
17 Strickland and progeny in order to challenge trial counsel's
18 work.

19 A Oh, absolutely. I mean, one of the most common claims
20 in post conviction, probably the most common claim in post
21 conviction is IAC. So they have to know about what the
22 standards for trial lawyers are and be able to assess
23 whether or not they met them.

24 Q And so that's a different body of knowledge and
25 experience from that body that controls the trial counsel.

1 A That's one of them, there are others as well. They
2 have to know the interplay between state and federal law,
3 it's complex area, the interplay between state post
4 conviction and federal habeas.

5 MR. EHLIES: Thank you very much, Judge.

6 THE COURT: Anything at all as to that?

7 MS. BROWN: No, Your Honor. Thank you.

8 THE COURT: Thank you. Sir, you may step down, please
9 be careful. All right. I indicated we will leave for lunch
10 about 12:30 and we are right on top of it, so let's break,
11 everybody be back by 2:00.

12 MR. EHLIES: Can Mr. Burke be released?

13 THE COURT: Any objection to the witness being released
14 from his subpoena?

15 MS. BROWN: No objection, Your Honor.

16 THE COURT: Okay. Sir, you may stay or go, whichever
17 you choose.

18 THE WITNESS: Thank you.

19 (A lunch break was taken.)

20 THE COURT: Yes, sir.

21 MR. EHLIES: John Mitchell Bailey.

22 The witness, JOHN MITCHELL BAILEY, was first duly
23 Sworn and testified as follows:

24 THE COURT: Sir, if you will tell us who you are for
25 the record and spell your last name, please.

1 THE WITNESS: John Bailey. B as in boy, a-i-l-e-y.

2 THE COURT: Thank you. Yes, sir?

3 DIRECT EXAMINATION

4 BY MR. EHLIES:

5 Q And, Mr. Bailey, where do you reside, sir?

6 A Nashville, Tennessee.

7 Q And what is your vocation?

8 A I'm an attorney.

9 Q And how long have you been practicing law?

10 A Since 1983.

11 Q All right, sir. And I'm going to hand you what has
12 been previously been marked for identification as
13 Petitioner's Number 35, and ask you if you recognize that
14 document?

15 A I do.

16 Q And I think that's in two parts actually so thumb
17 through it a little bit. I don't know that the pages are
18 numbered. I think the first segment is three pages and then
19 there's an affidavit attached. Do you have that also?

20 A Yes.

21 Q Okay. And would you tell us what Exhibit 35 is?

22 A The first three pages is my resume', and then after the
23 next approximately 64 or 65 pages is an affidavit that I
24 prepared for a case where I was appointed an expert -- to be
25 an expert in Arizona.

1 Q All right, sir. And was that a federal case?

2 A No, sir, it's still in state court.

3 Q All right, sir. So is the CV, the curriculum vitae
4 resume', accurate?

5 A There have been some updates, which I gave you, to the
6 affidavit. I believe the resume' is up to date.

7 Q Okay. And I think now that you say that on the very
8 back page of the affidavit there's a memoranda to me from
9 you. Is that on your -- you have the original exhibit in
10 your possession by the way. Is that on there?

11 A Yes, it is.

12 Q Okay. And tell us the significance of that.

13 A You asked me if there were any updates to the affidavit
14 that I prepared in Mr. Prince's case, and after looking
15 through it I said there have been some updates to my work
16 experience, and so I gave you those in the memo that is the
17 last page.

18 Q All right, sir. Okay. So what we have from prepared
19 documents from you are the three pages of the resume' and
20 then the specific affidavit with points of reference in your
21 practice experience; is that correct?

22 A Yes, sir.

23 Q Okay. Well, we're going to spend some time here
24 getting you qualified within the particular area of interest
25 to us. Having heard from Mr. Burke, were you present and

1 heard from Mr. Burke during his testimony?

2 A Yes, I did.

3 Q Okay. And you understand that Mr. Burke was testifying
4 to training protocols, developing, identifying issues, and
5 the risk, the materials as it relates to offering training
6 protocols for criminal defense practitioners and also the
7 capital defender community; is that correct?

8 A Yes, sir.

9 Q And I understand that you do the same in large part,
10 but you transition from training into the application of the
11 training principles to the practitioners under your
12 supervision and direction, and in your -- also in your
13 practice; is that correct?

14 A I have done that, yes, sir.

15 Q Okay. So let's start then with the current statement
16 of your current practice that's in paragraph one of your
17 resume'. If you would review that and speak to us about the
18 itemized particulars in that paragraph.

19 A I have been in private practice since 1996, and during
20 that time period my practice has consisted almost
21 exclusively of capital defense work. It was exclusively
22 capital defense work from 1996 until 2013. But since 2013 I
23 have taken on maybe four or five noncapital cases, RICO drug
24 conspiracies in federal court, several of those.

25 Q All right, sir. And then turn the page, if you will,

1 and let's go back in time from '92 to '96 when you were in
2 the -- the Director of the Western District Capital Unit
3 Missouri Public Defender, and give us a little thumbnail
4 sketch there about your responsibilities, particularly as it
5 relates to assuring that the other members of the public
6 defender's office were securing and obtaining training that
7 was relevant to their practice.

8 A There were three capital defense units in the Missouri
9 Public Defender; one in St. Louis, one in Columbia, and one
10 in Kansas City, I was the director of the office in Kansas
11 City. We -- it was an eight person office; four attorneys,
12 two administrative assistants and two investigators. My job
13 description included directly representing clients in the
14 western half of Missouri that the State of Missouri was
15 seeking the death penalty against. Another part of my
16 duties were to supervise the other attorneys in the office.
17 And as you alluded to in your questioning, part of that duty
18 was to make sure that those other attorneys and myself
19 attended seminars so we could stay up to date and abreast of
20 all important developments in capital defense work and how
21 to implement them.

22 Q All right, sir. And so was that your first experience
23 in directing the inviting practitioners into the training
24 segment of life, CLE if you will?

25 A No. I was very briefly the Deputy Director of the New

1 Hampshire State Public Defender. But even in that brief
2 period of time I was given the responsibility of training
3 the staff attorneys for the New Hampshire Public Defender,
4 and as part of that I put together two public seminars, and,
5 in fact, lectured at both of those seminars on two different
6 topics, but of those were not capital defense topics. There
7 was a death penalty in place in New Hampshire during the
8 time that I was there in 1991, however it was a pre Furman
9 versus Georgia death penalty statute, and the attorney
10 general had recognized that it was not constitutional under
11 Furman so they did not seek any death penalty prosecutions
12 under that statute.

13 Q The training we've talked about with Mr. Burke really
14 applies to all of the phases of a capital case and many of
15 the phases even in sentencing of a traditional criminal
16 case, a noncapital eligible murder; is that right?

17 A Absolutely. There are many elements of criminal
18 defense work generally that are applicable to capital
19 defense work in addition to the specific topics that are
20 only involved in capital defense work. But, yes, general
21 criminal defense work is very much applicable.

22 Q All right, sir. So let's drop down to Arizona. And if
23 you would take a look at your -- you have similar duties in
24 Arizona, but I think this may involve the capital aspects as
25 well in Arizona.

1 A Yes.

2 Q And what we call CHU's, Capital Habeas Units, although
3 maybe you weren't a member of one, you designed and
4 implemented training programs there and how that we would
5 relate to the practitioner; is that correct?

6 A Absolutely.

7 Q All right. Well, tell us about that and how you would
8 accomplish those objectives.

9 A In addition to directly representing clients at the
10 state post conviction and federal habeas corpus levels, the
11 death penalty resource centers, and that's what the Arizona
12 Capital Representation Project was, it was a death penalty
13 resource center, there was reference in Mr. Burke's
14 testimony to the one in South Carolina, they all started at
15 the same time in 1989. I was in the office in Arizona. And
16 you and Mr. Burke and the assistant attorney general talked
17 about some of the people that were in the South Carolina
18 resource center. One of the specific responsibilities that
19 the resource centers were set up for was to consult with and
20 train defense attorneys who were representing capital
21 defendants at the trial, direct appeal, state post
22 conviction and federal habeas corpus levels, and I did that.
23 I consulted with the attorneys, and I also set up seminars,
24 brought in speakers, spoke myself at seminars aimed at
25 training capital defense attorneys in Arizona.

1 Q And would you be available then in that role to field
2 questions from specific practitioners on the phone or
3 otherwise, not necessarily in the context of a seminar but
4 available for consult?

5 A I was available and did so.

6 Q And were the other resource centers tagged to do
7 that -- tasked to do that as well?

8 A Yes, they were.

9 Q That was part of their function; is that correct?

10 A Yes.

11 Q Okay. So in that role you would not be making
12 decisions necessarily for the practitioner, but
13 recommendations and facilitating contacts with other experts
14 that they may need, would that be correct?

15 A Yes, sir.

16 Q Okay. Now, in that role there at the Arizona Capital
17 Representation Project I see that you were also the author
18 of several documents including bimonthly newsletter and a
19 capital training manual somewhere in here?

20 A Yes, sir.

21 Q Okay. Tell us about that.

22 A One of my responsibilities was putting together a
23 bimonthly news letter for capital defense attorneys in
24 Arizona. In that I included case updates that were relevant
25 to capital defense work, articles that were relevant to

1 capital defense work, and also training opportunities,
2 seminars that were available to capital defense attorneys,
3 and I put all of those things in the bimonthly newsletter.
4 One of the things that my office did was at that time we put
5 together a voluminous, I believe it was three volumes, it
6 might have been four volumes, capital defense manual, and I
7 was involved in writing a couple of the chapters for that,
8 editing some chapters. And then one of the volumes was
9 sample pleadings that might be relevant in capital cases,
10 and I went through a number of pleadings and chose what I
11 thought were the best examples to put in that section of the
12 capital trial manual.

13 Q And was that document manual received nationally?

14 A I believe the answer to that is yes but in a very
15 limited way. It was designed, as I said, primarily for
16 Arizona capital defense attorneys. Capital Defense Resource
17 Centers, Capital Habeas Units as you mentioned, Capital
18 Defense Units like the one that I was in in Kansas City
19 often times keep a library of good materials from out of
20 state or from national organizations to reference in being a
21 capital defense practitioner. So yes, our defense manual --
22 or capital case manual in Arizona did go to places outside
23 of Arizona, capital defense organizations.

24 Q And I think you also taught students, is that correct,
25 law students?

1 A Our office was at the Arizona State University Law
2 School, and as part of our agreement for getting office
3 space from Arizona State we did teach a course at the law
4 school. There were three attorneys in the Capital
5 Representation Project, and we each taught on different
6 subjects in the seminar on capital cases at Arizona State
7 University, and part of my duty was to teach those classes.

8 Q All right, sir. And I think then that that brings us
9 down to the Rhode Island experiences?

10 A I was a staff attorney in the Rhode Island Public
11 Defender's Office. There is no death penalty in Rhode
12 Island as you well know. I handled a number of murder cases
13 there but no capital cases. I also did put together a
14 training seminar for Rhode Island State Public Defenders,
15 and I brought in speakers and actually spoke at that seminar
16 myself. That was an in-house seminar.

17 Q All right, sir. Then finally I think you've got some
18 time as the staff attorney in Louisville, Kentucky Public
19 Defender's Office. Tell us about that, please.

20 A I was a staff attorney with the Louisville Jefferson
21 County Public Defender's Office. I handled a full case load
22 there, meaning I handled misdemeanor theft cases up to
23 capital murder cases and everything in between. And I did
24 have capital murder cases in Louisville and, in fact, went
25 to trial on one of those cases in 1985. That was my first

1 capital trial.

2 Q All right, sir. After that we have a listing of the
3 bar memberships but we can skip over to the affidavit. And
4 tell us then as the second part of Exhibit 35, what is the
5 meaning of the affidavit, why was it prepared, for what
6 purpose?

7 A Mr. Prince is on death row in Arizona. His attorneys
8 who are affiliated with the Arizona Capital Representation
9 Project, which still exists, not in the same form as it was
10 when I was there but it still exists as an organization,
11 they contacted me and asked me if I would be willing if the
12 Court would appoint me to be an expert on the standard of
13 care for capital defense attorneys in that case and I said
14 that, yes, I would. So they filed a motion with the Court
15 asking for me appointment, the -- I guess the slang term for
16 it is a Strickland expert, and that's how the Court refers
17 to me and that's how the attorney and the attorney -- the
18 assistant attorney generals who deposed me in that case
19 referred to me as the Strickland expert in that case. So I
20 was appointed, and as a result of that I reviewed -- Mr.
21 Prince had had three capital defense trials that led to his
22 death sentence. I reviewed all three of those transcripts,
23 I reviewed the record in the case, that is to say the
24 pleadings, orders, everything that was involved in the
25 record of the case, and then also I read a number of

1 affidavits and declarations from people that Mr. Prince's
2 current attorneys and investigators had located and
3 interviewed and taken statements from. And after doing all
4 of those things I prepared the affidavit that is the second
5 part of Exhibit 35.

6 Q All right, sir. And does it pretty substantially
7 detail your findings in serving that role for the Court?

8 A I believe it does. I hope it does.

9 Q And did we establish as a fact that you were indeed
10 appointed for that purpose?

11 A I was, yes, sir.

12 Q Okay. And I think there's another category of service
13 at least in the federal system that's referred to as learned
14 counsel in capital cases for the federal judiciary and the
15 prosecution, et cetera. Can you explain that? I think it's
16 18USC3053599 also, section 3599, which sets forth the
17 criteria for being appointed as learned counsel. Talked to
18 us a little bit about that.

19 A Yes, sir. In federal capital cases the federal death
20 penalty statute requires the appointment of two attorneys,
21 at least two attorneys, to represent any defendant that is
22 potentially facing a death sentence in federal court, and
23 the federal statute requires that at least one of those two
24 attorneys be qualified as learned counsel, that's the phrase
25 in the statute, learned counsel. And the statute defines

1 that as someone who has distinguished prior experience in
2 capital defense work in either federal or state court.

3 Q All right, sir. And did you, in fact, qualify under
4 those definitions as and for appointment as learned counsel?

5 A Seven times.

6 Q Seven times. All right, sir. And are you serving in
7 that capacity presently?

8 A No, sir. The cases that I was appointed as learned
9 counsel on -- I'm sorry, I guess the answer to that is yes.
10 I have a case in the Southern District of Mississippi that I
11 was appointed as learned counsel for. We went to the
12 Department of Justice, made our mitigation presentation, and
13 as a result of that the Department of Justice did not
14 authorize the local U.S. Attorney's office to seek the death
15 penalty. I am still representing that client, and I suppose
16 I am still technically learned counsel in that case. My
17 original answer no was because that client is no longer
18 facing the death penalty, but I think I am still considered
19 learned counsel in that case.

20 Q Okay, sir. All right. You then have particularized
21 experience in not only providing training sessions and
22 speaking and selecting speakers and presenters, but in also
23 managing other folks who need to attend them; is that
24 correct?

25 A Yes, sir.

1 Q And then to survey the application of the lessons
2 learned to their actual practice; is that correct?

3 A Yes, sir.

4 Q And you have the experience also as a practitioner
5 having received that kind of training and recognition under
6 the learned counsel's standards of the federal court system.

7 A Yes, sir.

8 MR. EHLIES: We would offer Mr. Bailey as an expert in
9 the application of training sessions to the practice of the
10 criminal defense bar, and in particular also the capital
11 defender community.

12 THE COURT: State?

13 MS. BROWN: Your Honor, we're going to object basically
14 for the same reason that we previously put on with the last
15 expert, and we rely on Rule 702, there's no fact at issue
16 where an expert could be qualified that would help the trier
17 of fact, Your Honor. We also object under McKnight v. State
18 and Green v. State, relevancy and Rule 403. It is
19 cumulative to what we've heard before, it is about training
20 and Your Honor has already ruled on deficiency.

21 THE COURT: Mr. Ehliies?

22 MR. EHLIES: Well, Your Honor, this is an additional
23 component to Mr. Burke and that is the application of what
24 is to be learned to the practice, and that's transitioned
25 from Mr. Burke to Mr. Bailey who is in a position of doing

1 that.

2 THE COURT: Why does he need to be qualified as an
3 expert to do that?

4 MR. EHLIES: Because he has the particularized training
5 to be alert to the issues that the student needs to take
6 away and apply in the actual defense cases, which he was
7 supervising in a number of positions, and he is going to
8 opine information, factual information, about specific
9 issues in this case.

10 THE COURT: Okay. I'm going to qualify him as an
11 expert over the objection of the State.

12 MR. EHLIES: We would move that Exhibit 35 into
13 evidence.

14 THE COURT: Any objection to the exhibit?
15

16 MS. BROWN: No, sir.

17 (The CV was received as Applicant's 35.)

18 MS. BROWN: And may I take the opportunity to just put
19 on a general objection for relevance so we will not
20 interrupt the flow of testimony?

21 THE COURT: Yes, ma'am. I'm going to allow it, though.
22 Relevance is a low standard in this state as we both know so
23 we'll see where it goes.

24 MS. BROWN: Thank you, sir.
25

1 BY MR. EHLIES:

2 Q Mr. Bailey, have you had an opportunity to see the
3 spreadsheets that were produced by Mr. Burke as far as
4 training opportunities between '97 and 2000 -- 1997 and 2006
5 or so?

6 A Yes, sir, I have.

7 Q And you saw the ones that pertain to the managing of an
8 expert witness; is that correct?

9 A Yes, sir.

10 Q And are you familiar with those kinds of training
11 programs?

12 A Yes, sir.

13 Q And are you also familiar with the tasks of actually
14 managing expert witnesses?

15 A Yes, sir.

16 Q And I think I have provided to you a copy of the
17 amended application, fourth amended application and the
18 fifth amended application; is that correct?

19 A Yes, sir.

20 Q And you're familiar then with the various
21 specifications of errors and deficiencies and prejudice?

22 A I am.

23 Q Let's start with then Number 20. If I can retrieve
24 that from you we will go to Exhibit Number 20. I will
25 represent to you that this is a document that's in the

1 record in this case, and it is the initial application for
2 post conviction relief. Then I will also represent to you
3 that this particular document was the only application
4 submitted and that it was never amended in writing in
5 advance of hearing, it will constitute the final statement
6 of issues. Those statements made to you, I would ask that
7 you turn to paragraph 10A and 11A and read those to self, I
8 think. And then I want you to scan the document and see if
9 you find any other particularized statements associated with
10 a statement of prejudice and the specific allegations of
11 facts in support of that.

12 A I have reviewed it and I do not see any other
13 allegations.

14 Q All right. Now, you mentioned earlier that one of the
15 training protocols focused on pleading your case; is that
16 correct?

17 A Yes, sir. That is certainly a big part of training,
18 yes, sir.

19 Q Okay. Tell us the significance of that training and
20 what is the takeaway from someone who has training in post
21 conviction capital defense work.

22 A In post capital defense work, post-trial capital
23 training would teach the capital defense practitioner a
24 number of things; one, how to spot issues; two, how to
25 research those issues; three, how to do factual

1 investigation of those issues; four, how to retain necessary
2 experts to assist in presenting and factually documenting
3 those issues, and how to plead those issues before a post
4 conviction court to effectively represent the client in the
5 presentation of those issues.

6 Q All right, sir. And is that an outgrowth in large part
7 from Wiggins versus Smith, a duty to investigate, develop
8 and present issues that are in the record itself?

9 A Wiggins and other cases I would say, yes, sir.

10 Q Okay. And how is the practice for doing just that,
11 articulating and expressing in the written statement
12 pleading your case as we call it? What are the guidelines
13 that govern and control how best to do that?

14 A Well, to start with you need a factual investigation,
15 because presenting an issue without facts to support that
16 issue is extremely unlikely to generate any benefit to the
17 client whatsoever. So investigating the factual basis for
18 the claims. And then determining whether those facts need
19 to be supplemented with expert opinions with other lay
20 witnesses that were not part of the record at the trial.
21 And also, of course, researching the law relevant to that
22 specific issue and presenting all of that in a persuasive
23 factual and legal presentation to the post conviction Court.
24 Q All right. And is the springboard for doing the actual
25 courtroom work a consequence of articulating the claim in

1 the pleading itself?

2 A Absolutely.

3 Q And I specifically call your attention to the wording
4 in paragraph 11, and I would read it for the record, it
5 says, "State concisely and in the same order the facts which
6 support each of the grounds." Is it your opinion that the
7 answer that's given here in paragraph A, "Ineffective
8 assistance of counsel which resulted in an unjust
9 conviction," is that what you would expect as an
10 appropriately plead or pleading of the case?

11 A No. It's actually ignoring the very thing that the
12 pleading asks you to provide: Facts. There are no facts.

13 Q All right. And if you are not articulating the facts
14 it is then suspect as to whether you know what the issues
15 are?

16 A Yes.

17 Q Let's look up at ten and make sure I get this from you
18 before I forget. That has the same thing, it says, "I want
19 you to state concisely the grounds on which you base your
20 allegation that you are being held in custody unlawfully."
21 The answer is, "Ineffective assistance of counsel, specifics
22 to be amended later." Is that an adequate pleading of the
23 case before the Court?

24 A No, it is not.

25 Q Okay. And aren't the training sessions also -- do they

1 not also embrace the idea of front-loading your issues for
2 the Court, who reads the pleadings in advance in a favorable
3 way for your client?

4 A Yes, sir.

5 Q Could you tell us a little bit about that and what the
6 advantages are to an adequately stated and pled case?

7 A Well, it provides the Court with information about the
8 facts that support the legal arguments that you're making in
9 that pleading. A general claim of ineffective assistance of
10 counsel is virtually meaningless. There are, I won't say
11 enumerable, but certainly a lot of ways that counsel may be
12 ineffective, and those ways that counsel may be ineffective
13 need to be factually supported and they need to have the
14 law. And there's a lot of law on ineffective assistance of
15 counsel out there in a wide variety of factual scenarios.
16 So you have to have the facts and then you have to look at
17 the law that looks at those facts and determines whether or
18 not in the circumstances of the individual case it is
19 ineffective assistance of counsel or not.

20 Q And in a general tone if one fails to do that, would
21 that enhance the possibility that legitimate claims become
22 defaulted?

23 MS. BROWN: Objection, calls for speculation.

24 THE COURT: Yes. I sustain.

25 Q Is there any other aspect of pleading your case that I

1 have not asked you about?

2 A I would just say that when I said investigation I meant
3 both investigating the facts of the crime and the facts
4 surrounding the crime, and also the mitigation available in
5 the case. I don't know that we've talked about mitigation
6 investigation specifically. But when I said investigation I
7 meant both factual and mitigation investigation.

8 Q All right, sir. I then asked you, I believe, to focus
9 some attention on one of the larger issues in this case,
10 which was retaining Tony Casio, Ph.D, social worker, and the
11 circumstances that surrounded that, along with supervising
12 and managing her performance as retained, testifying expert
13 witness. And I want to stress for the record, this is not a
14 consulting witness, this would be someone retained for
15 purposes of testifying to the jury. Would you address that
16 for us?

17 A Yes. I have reviewed the record in this case regarding
18 Dr. Casio both at the time of trial and also since the time
19 of trial. And there are a number of factual issues
20 surrounding trial counsel's retaining Dr. Casio in Mr.
21 Robertson's case, the first one being that she had no
22 experience as a testifying expert and extraordinarily
23 limited experience, I believe, one completely non-similar
24 case in doing a social history for a capital defendant. And
25 that factual scenario leads directly to the next factual

1 scenario, which means if you're going to retain someone who
 2 is that inexperienced it is incumbent on counsel to take a
 3 very strong role in guiding that inexperience mitigation
 4 investigator in their work since they haven't had that
 5 experience before. And that responsibility would certainly
 6 include going over with the mitigation investigator the
 7 subject matter that she was to look at in the case and what
 8 subject matter was not an appropriate subject for her to
 9 investigate. And it would also necessarily include, because
 10 she had no experience doing so, attending any meeting
 11 between the expert and the client. That is standard
 12 procedure with even the most experienced expert, but it's
 13 absolutely essential with someone who has little experience,
 14 virtually no experience like Dr. Casio. And then the next
 15 part of that, because the factual basis that I just
 16 articulated because it was ignored, it was incumbent on
 17 trial counsel to review what Dr. Casio had done, whether
 18 Dr. Casio had taken any notes, what those notes might have
 19 said, what subject matters were discussed with the client,
 20 and determined whether Dr. Casio had conducted an
 21 appropriate interview with a capital client.

22 Q Let me take a pause there, if you can hold that
 23 thought. Do you have the fifth amended application? You
 24 probably don't. Let me hand you what has been filed as the
 25 fifth amended application, and I would ask you to look at

1 the bottom of page three to the footnote there and see if
2 you recognize that.

3 A Yes, I do recognize that.

4 Q Okay. What is it?

5 A It is the ABA Guidelines on an attorney's
6 responsibility in managing an expert witness, which includes
7 meeting with the client with that expert witness.

8 Q And that would include any testifying expert witness;
9 is that correct?

10 A Yes, sir.

11 Q And that provision in footnote three is also embedded
12 within the earlier version, the first version of the ABA
13 Guidelines, and I think it's a side note to there, is that
14 your understanding?

15 A It is.

16 Q Okay. So you were articulating how this thing went
17 through this pathway of errors, and I want you then to take
18 a look -- that's number eight and 8A. Let me take this one
19 back. I'm handing you what's been marked as exhibit for
20 identification Plaintiff's 8 and A. I want you to take a
21 minute and take a look at that document. The first part A
22 was an affidavit from the paralegal from Mr. Hancock at the
23 time of this trial and her name was Catherine Smith, and she
24 offers in the affidavit that she was in that role and on
25 paragraph two recognizes this particular letter that is

1 dated November the 23rd, 1998. The trial in this case was
2 in March of 1999. And will you talk to the Court a little
3 about the duty to be present and how that plays out in the
4 context of what happened in this particular case under the
5 lead counsel's representation to Gail Whisenhunt
6 (phonetically) at the York County Detention Center?

7 A Yes. Exhibit 8A is a letter from Mr. Hancock to I
8 would suppose a superintendent or some person of authority
9 at the York County Detention Center indicating that Tonie
10 Cascio will be visiting his client, Mr. Robertson, at that
11 detention facility. And it appears that Mr. Hancock did
12 that in lieu of actually going to Dr. Cascio's interview
13 with Mr. Robertson, because he was not present for that
14 interview, nor was any counsel for Mr. Robertson.

15 Q All right. And is that a function of counsel to be
16 physically present with the client to supervise testifying
17 expert's interviews?

18 A Yes, sir. With any testifying expert, no matter how
19 experienced, but it's critically important -- I don't mean
20 to repeat myself, but with someone who was an absolute
21 novice identification as Dr. Cascio was.

22 Q All right. Is it even a function that can be delegated
23 to other office personnel, non-lawyer office personnel to
24 attend the meeting?

25 A No, sir.

1 Q All right, sir. And is that more than one part? Does
2 it apply -- being present apply to supervising and managing
3 the expert as well as applying to the client and what the
4 client might answer?

5 A Absolutely. As you suggested the duty is two-fold;
6 one, to evaluate any question by the expert to see if it is
7 an appropriate question, and if it is not an appropriate
8 question to prevent the client from answering it. Or
9 alternatively, if the question by the expert is an
10 appropriate question on its face but the client begins to
11 give an answer that is inappropriate, you stop the client
12 and cut off the answer so as to avoid any inappropriate
13 information going to that testifying expert.

14 Q Okay. And is it your understanding that Dr. Cascio was
15 a social worker, Ph.D social worker?

16 A Yes, sir.

17 Q And is your understanding that she was preparing a
18 social history for the family and the defendant?

19 A Yes, sir.

20 Q And is that a -- facing task in time that is?

21 A Yes, sir.

22 Q And so it would not embrace the actual crime itself or
23 details of how the murders were committed.

24 A Absolutely not.

25 Q Okay. That would be an example of over the line.

1 A That is a question that would be cut off by any
2 competent capital defense attorney attending the meeting
3 between the expert and the client.

4 Q But the lawyer would have to be present to know that
5 and do that; is that correct?

6 A Yes, sir.

7 Q If this was a pattern for all of the testifying experts
8 to allow access for interview purposes to the client without
9 any client representation, without the lawyer being there,
10 would that be as serious an issue as it is with Tonie
11 Cascio?

12 A Yes, sir.

13 Q Is it -- in other words, is it a non-delegable duty for
14 the counsel for the client to be present during these
15 interviews about -- by testifying expert witnesses?

16 A There is absolutely nobody that counsel could delegate
17 that duty to.

18 Q Okay.

19 MR. EHLIES: We would move 8 and 8A into evidence.

20 THE COURT: Any objection from the State?

21 MS. BROWN: May I have a moment, Your Honor?

22 THE COURT: Yes, ma'am.

23 (Break in proceedings.)

24 MS. BROWN: No objection, Your Honor.

25 THE COURT: Without objection it's in.

1 (The affidavit was received as Applicant's 8 and 8A)

2 MR. EHLIES: Thank you, sir. This is the package of
3 the affidavits, this whole folder, that I previously sent
4 and they have been very kind about it, nobody expressed any
5 problem.

6 Q Okay. So let's take that down a little bit further.
7 Okay. Is the training of trial counsel who has retained a
8 testifying expert witness to obtain knowledge in way of a
9 report, or maybe not a report but at least to check in with
10 them about what they've learned, what their impressions are
11 and the factual basis for those impressions?

12 A Yes. Specifically counsel would, after meeting with
13 the expert and the client, talk with the expert about the
14 information that the two of them received from the client at
15 the interview. And counsel would make a determination about
16 whether their -- it would be appropriate to have a written
17 report, or whether that information needs to be fleshed out
18 for lack of a better term, better before any report is
19 written.

20 Q All right, sir. I'm going to now hand you Exhibit 3 in
21 the attachments. This is an affidavit of Tonie Cascio,
22 supplemental affidavit actually, it's marked for
23 identification Petitioner's Number 3. Can I have that other
24 one back? You gave me the other one back already? Thank
25 you. And the second parts of that affidavit have to do with

1 a transcript of the proceedings in this case. If you would
2 take a look at that. And really for the purposes of this
3 part of the questions, just the first page 2749 of the
4 transcript -- this is actually the jury trial transcript,
5 2749.

6 A You just want me to read page 2749, not the additional
7 two pages?

8 Q All right, sir. Take a look at paragraph three of the
9 affidavit itself. And if I tell you that March 24th was the
10 day before the case ended, would that be a sufficient amount
11 of time for counsel that had retained that witness to review
12 the notes during the trial?

13 A No, sir.

14 Q Okay. And look at the transcript as far as when
15 counsel actually got physical possession of the notes
16 pertaining to the details of the crime.

17 MR. EHLIES: Judge, for shorthand purposes we refer to
18 those notes as Night of Crime, it's on the top of the page
19 and says Night of Crime.

20 Q Starting at line 12.

21 A Yes, sir.

22 Q And you understand Mr. Boyd's reaction to the
23 solicitor's suggestion is what on line 16?

24 A Yes, sir.

25 Q What does that say?

1 A "We've got a copy of that to give you right now."

2 Q All right. Does that comport with what you read in the
3 affidavit in paragraph 3 of Cascio?

4 A Yes.

5 Q Okay.

6 MR. EHLIES: Judge, I'm going to flip over to number
7 10. I move that into evidence by the way.

8 THE COURT: Any objection?

9 MS. BROWN: No objection, Your Honor.

10 THE COURT: Without objection it's in.

11 (The affidavit was received as Applicant's 3.)

12 Q All right, sir.

13 MR. EHLIES: We're going to go over Number 10, Judge.

14 Q All right, sir. I'm showing you a document that is
15 five pages, and it's attached to an affidavit of Mr. James
16 Boyd, and it's Petitioner's Number 10. And I'll represent
17 to you, sir, that Mr. James Boyd was the second chair to the
18 jury trial case, Mr. Hancock was lead counsel. If you will
19 look down at paragraph eight of page one of the affidavit.

20 A Yes, sir.

21 Q And then take a look -- you've already read the
22 transcript of record about March the 24th end of court is
23 when Mr. Boyd answered by saying, "I'm going to give it you
24 to you right now," he leaves the courthouse. And take a
25 look at number eight.

1 A Yes, sir.

2 Q Would you publish that for us, please?

3 A Paragraph eight?

4 Q Yes, sir.

5 MS. BROWN: Your Honor, if I may interject an
6 objection. We've looked at the affidavit, which I think
7 part of it will be published at this time or referenced, and
8 we're going to object to this one simply because it's
9 inconsistent with the PCR testimony. I recognize, Your
10 Honor, that affidavits can come in in post conviction relief
11 actions, I am suggesting that the Court reject this
12 particular one in favor of having the former attorney
13 actually come in and testify since there is a very plain
14 inconsistency with the settled PCR record from the last
15 proceeding.

16 THE COURT: Counsel?

17 MR. EHLIES: Yes, sir. The PCR record is replete with
18 references, "Well, I don't really remember, but my best
19 recollection," and that would be good cross examination
20 material for Mr. Boyd who will be here to testify, but it
21 doesn't impact the admissibility of this affidavit that
22 they've had for a couple of months.

23 MS. BROWN: If he's going to testify, Your Honor, I
24 would say that that actually lessens the need for the
25 affidavit. And the record page would be the -- let me

1 see -- appendix page 3532, which is, again, directly
2 contrary.

3 THE COURT: Okay. I'm going to let it in over the
4 objection simply because it may well be impeachment
5 evidence, we'll see what happens with that.

6 MR. EHLIES: And also, Judge, the witness will be gone,
7 my expert will be gone, so whenever Boyd comes up he
8 wouldn't be able to reply.

9 Q Okay. Take a look then at the testimony itself,
10 particularly on page 2749. You've read that before where
11 Mr. Boyd leaves the courtroom. And this is the evening that
12 the Court adjourns, "see you at 9:30 in the morning," and
13 that's when court starts up on the 25th. My question for
14 you, sir, if that is, in fact, the substance that is the
15 most accurate about when counsel obtained Night of Crime
16 notes that were taken by the interview of Tonie Cascio of
17 the client the evening before she actually testifies, the
18 evening of the 24th, she's called on the 25th, is that
19 adequate opportunity to review the substance of the notes
20 and make a strategic decision about whether or not they
21 should be revealed to the prosecutor?

22 A It is not. And it's not consistent with any reasonable
23 interpretation of the standard of care a capital defense
24 attorney is to exercise in a capital case.

25 Q And, in fact, it isn't a question about making a

1 strategic decision in this case as you've read the
2 transcript of whether to call her, because once they've
3 handed those notes to the prosecutor then the prosecutor has
4 the option to call her as an adverse witness under Rule 601.
5 So isn't that, in fact, the critical issue is when those
6 notes were surrendered to the prosecution?

7 A Yes. After the notes were surrendered there could be
8 no strategic decision.

9 Q And if the notes were surrendered immediately, I'm
10 walking out of the library room having first obtained them
11 from the prosecutor, what opportunity is there for a
12 strategic conference?

13 A None.

14 Q All right, sir. So let me back up a little bit on that
15 point in training. The idea of a strategic -- what is the
16 idea of having two lawyers on a capital case?

17 A Well, amongst other things, I mean, one thing would be
18 division of labor. But more to your point, the idea is that
19 two people looking at an issue and discussing that issue,
20 talking about the pros and cons of each side of a decision
21 to be made is more likely to render a well thought out and
22 appropriate decision. That would certainly be one of the
23 reasons for two counsel on a capital case.

24 Q Okay. And so if someone just unilaterally turns over
25 to the prosecutor the 5th Amendment protected details of the

1 crime, there's virtually no opportunity and no strategic
2 decision made; is that correct?

3 A Under those circumstances, no.

4 Q Would that be a departure from the standard of care?

5 A Yes, sir, it would.

6 Q All right, sir. Let's shift a little bit to -- let me
7 put that back. We're going to go to -- did you see the
8 issue about the neuropsych evaluation that the Court ordered
9 and that was performed by Dr. McKee?

10 A I have looked at some materials about that, yes, sir.

11 Q Okay. Do you have any experience with dealing with
12 courts that order psychiatric evals?

13 A Yes, sir, I have.

14 Q When a court orders a psychiatric eval. and it is
15 limited to determining whether the client has the capacity
16 to aid and assist his lawyers competence, and whether or not
17 at the time of the crime he was sane, McNaughten, and that's
18 the limit of the inquiry, is it necessary that the examining
19 officer inquires the details of the crimes in order to
20 determine whether he was sane at the time he was committing
21 it?

22 A I think it would depend on a case by case analysis, but
23 most of the time it would not.

24 Q Okay. And if it did happen, that the examiner was
25 asking questions that are 5th Amendment protected and

1 obtaining answers concerning whether or not he was sane at
2 the time of the crime, that is in the literal act of murder,
3 if it's a Court ordered examination, is it standard
4 procedure that the Court maintains control of the report,
5 and it is the Court's witness, and that report is in custody
6 of the Judge?

7 A Yes. There are some standard procedures before that
8 that could help alleviate the problems that you've
9 identified and the procedures for the Court ordered
10 evaluation, but under the circumstances of this case and
11 what transpired, once it happened factually the way that it
12 did, yes, the Court would retain the doctor's report and any
13 other memorandum that the doctor prepared.

14 Q His notes.

15 A Yes, sir.

16 Q Okay. And that would be, number one, because the
17 record demonstrates in this case that neither competency nor
18 sanity were ever pled. In this state, by the way, we have a
19 rule that says we have to make the disclosures in advance if
20 they're going to rely on it. There is never any issue that
21 was in the record, and yet the Judge ordered the psych eval.
22 Given that that may have been appropriate for him to do, is
23 it not also appropriate for the defense counsel to make
24 certain that the Judge asserted control over the reports
25 that might contain 5th Amendment protected information?

1 A Amongst other things, as I was referring to, yes. That
2 would certainly be a part of the appropriate standard of
3 care for defense counsel under those circumstances.

4 Q And if the order said for the examiner to send that
5 report to the prosecution and not to the defense, would that
6 be something that defense counsel should object to?

7 A Defense counsel should object to that, and if that
8 objection was overruled I would think that it would be
9 appropriate to file a writ with the Court of Appeals in
10 those circumstances.

11 MR. EHLIES: Judge, the orders on psych eval. are in
12 this record under tab 15, they're filed. We would move that
13 into evidence, too, by the way, we're talking about. These
14 are filed with the Clerk of Court, there are actually two of
15 them.

16 THE COURT: Any objection?

17 MS. BROWN: I apologize, Your Honor, we're trying to
18 get to that right now, if I may have just a moment.

19 THE COURT: Yes, ma'am.

20 (Break in proceedings.)

21 MS. BROWN: No objection, Your Honor.

22 THE COURT: Without objection.

23 (The psychological evaluations were received as
24 Applicant's 15.)

25 MR. EHLIES: So, Judge, there are two of them. The

1 cover letter sending them, then the order under 15A, and
2 then a supplemental, a second order under 15B is what you
3 should have, and our request is going to all of the
4 documents and in category 15.

5 THE COURT: I think -- I don't think there's an
6 objection to that.

7 MR. EHLIES: All right, sir.

8 Q I'm handing you what's now in evidence as 15A. And I
9 would ask you to take a look at the bottom of page two
10 number two that carries over into the top of the next page.
11 Have you read that?

12 A Yes, sir.

13 Q All right. Now, if you're the defense lawyer properly
14 trained and acts as an advocate for your client and you
15 receive this as the order, is there any grounds for
16 objecting to this paragraph number two that starts on page
17 two and carries over to the top of page three?

18 A Yes, sir.

19 Q And what would be the basis and reasoning for
20 controlling that information when it's not an issue?

21 A Well, at a basic level if this is a court expert rather
22 than a defense expert or a State expert, then that expert's
23 report should only go to the Court, and the Court would then
24 determine whether either side, both sides or neither side
25 received a copy of that report.

1 Q Or it would be redacted for a 5th Amendment protected
2 information, which the Judge actually articulates in the
3 order, but once it went to the State, and once again I guess
4 the cat is out of the bag on that. So is that appropriate
5 then to object to that kind of wording in the order?

6 A Yes, sir.

7 Q If you're defense counsel?

8 A Absolutely.

9 Q Okay. Now, what happened next is also in the record,
10 and that is that McKee, Dr. McKee, a forensic psychologist,
11 makes the report and does notes. He questions the defendant
12 in absence of counsel in detail of the circumstances of the
13 crime, that is how many blows to the mother and all of those
14 circumstances that are also mimicked and recorded in the
15 notes night of the crime by Dr. Cascio. The testimony is
16 from Dr. McKee, very similar to those of Cascio, and they
17 report to the jury and those similarly situated common
18 details of the crime. My question to you is at that point
19 not only is the order surrendered to the State without any
20 involvement to the Judge so they have possession of that
21 information, but the State is then allowed to adopt the
22 Court's witness with 5th Amendment protected information as
23 their own testifying expert and has on the witness stand the
24 notes and details of the crime. Is that any grounds for
25 objection as a criminal defense attorney as a capital

1 defender?

2 A Yes, sir.

3 Q Okay. Can you tell us about that and --

4 A Well, I understand that the order says that counsel is
 5 not allowed to be present, and I'm not aware of whether
 6 trial counsel litigated that issue or not, but even in the
 7 absence of counsel there are other alternatives that could
 8 help protect the defendant's 5th Amendment rights. First,
 9 the examination by the doctor could be recorded. Second,
 10 there could be a defense expert present for the examination
 11 by the Court's expert as an observer not doing his own --
 12 his or her own evaluation, but as an observer of the Court
 13 expert. And with both of those, both the recording and with
 14 a defense expert present, the issues involved could be --
 15 about the defendant's statement could be stopped before the
 16 Court expert had reduced them to a report or to writing, and
 17 that would at least give the opportunity to protect the
 18 client's 5th Amendment privilege. Again, as I said before,
 19 it would be appropriate, if necessary, I'm not sure what the
 20 procedure is in South Carolina, I've done it in several
 21 different states and there have been several different names
 22 for it in those various states, but a petition for a writ of
 23 mandamus or prohibition to an appellate court would be
 24 absolutely appropriate under the circumstances of this case.
 25 Q All right, sir. And that would be to arrest and

1 control distribution, dissemination of confidential
2 protected information, 5th Amendment protected information;
3 is that correct?

4 A Yes, sir.

5 Q At least to the extent that it doesn't get to the jury;
6 is that correct?

7 A Yes, sir.

8 Q Okay. So is there in the training scenarios a protocol
9 for protecting 5th Amendment information and what lawyers
10 should do when a Court orders the psych eval. on its own
11 initiative?

12 A There absolutely are and I've presented on it.

13 Q Okay. And I've understood you having alternative
14 recordings, those sort of things and somebody in attendance,
15 but is it proper to allow the State in this case to adopt as
16 its reply witness the same witness that belonged to the
17 Court and did a psych eval. for McNaughten purposes at the
18 direction of the Court?

19 MS. BROWN: Objection, outside the scope of expertise.

20 MR. EHLIES: I think that's right within the practice
21 area.

22 THE COURT: Rephrase --

23 MS. BROWN: He was asking specifically for South
24 Carolina.

25 THE COURT: Rephrase your question, please.

1 Q Okay. In the training scenario, are these kinds of
2 problems dealt with, court ordered psych eval.?

3 A Yes, sir.

4 Q And I'm talking about one where the defendant has not
5 raised any of those issues, competency or sanity, so that's
6 a separate sort of a scenario. Is that the kind of scenario
7 the trainers would really seize upon and say, "This can grow
8 into a nightmare?"

9 A Absolutely.

10 Q Okay. And you've spoken on those issues as a
11 presenter.

12 A I have.

13 Q And in that context, do you see any defects or
14 departures from a standard of care and deficiencies on the
15 part of trial counsel in the manner in which Dr. McKee, who
16 is the Court witness and became the State's reply witness
17 when armed with the same information?

18 A Yes. Counsel's inaction most definitely deviates from
19 the standard of care for a capital defense attorney in a
20 capital case.

21 Q Now, there was in the record a suggestion that one of
22 the defense witnesses, Dr. Pincus (phonetically), had in his
23 report a statement that was actually made by the client that
24 he might not have known right from wrong, and Dr. Pincus did
25 not adopt that or make it a part of his report, and that is

1 coming up in the records, his actual report, but it is part
2 of the history from the client to be obtained. Again, no
3 one was with Dr. Pincus, no lawyer was present when Dr.
4 Pincus asked those questions and the client answered them.
5 Is that also an illustration of deficient performances that
6 prejudiced the client?

7 A Yes, sir, it is.

8 Q Okay. All right. On page three there's an allegation
9 that trial counsel told the client that he should answer all
10 of the questions that were asked by the testifying expert
11 witnesses and he did so. Is that any kind of departure from
12 the standard of care in the efficient performance in the
13 light of the training in your expertise and practice?

14 A Absolutely. It goes hand in hand about what we've
15 talked about earlier, that the standard of care is for
16 counsel to go with the expert for the client in review. So
17 it naturally follows that it would be completely
18 inappropriate, and more accurately it would violate the
19 standard of care, or the standard of practice in capital
20 defense work to just tell the defendant "Answer whatever
21 questions the expert asks you."

22 Q All right, sir. Are you familiar with the case of
23 Maples versus Thomas?

24 A I certainly am.

25 Q All right. And will you tell the Court a little bit --

1 let me get you the citation for that. Tell the Judge, if
2 you will, while I'm hunting for the citation -- Maples
3 versus Thomas, which is a United States Court decision, and
4 tell the Judge your understanding of that as it pertains to
5 the duty of care for counsel.

6 A In that case the Supreme Court addressed the issue of
7 abandonment by counsel of a client. In that case my
8 recollection, it was while the case was on appeal, but it
9 dealt generally with issues of counsel -- what constitute
10 counsel's abandonment of a client.

11 Q And in the context that we've been talking about not
12 going to these conferences, would that be qualifying in your
13 mind as an abandonment issue?

14 A Not going to the meetings with the expert?

15 Q Correct.

16 A Yes, sir.

17 MR. EHLIES: Judge, I'll have that citation for you
18 pretty soon.

19 Q And that is different, is it not, in analysis from
20 deficient performances not being there to perform at all?
21 Abandonment is not a free standing claim but it's not
22 exactly a Strickland claim either, is it?

23 A No. My recollection is the Court did not analyze that
24 issue under a Strickland analysis, but as you suggest it's a
25 separate issue, abandonment versus ineffective assistance of