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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Common Pleas

CAPITAL PCR ACTION

APPEAL FROM YORK COUNTY
Honorable R. Keith Kelly, Circuit Court Judge

JAMES ROBERTSON ..... PETITIONER

V.

STATE OF SOUTH CAROLINA. ..... RESPONDENT.

Appellate Case No. 2023-000505

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR PETITIONER

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PETITIONER'S QUESTIONS PRESENTED

1. Did prejudice result when the PCR Court appointed counsel who did not meet the qualifications set forth in S.C. Code Ann. 17-27-160(B) (1976); did not have capital post-conviction training or experience; and failed to perform in keeping with prevailing norms?

2. Did prejudice result when PCR counsel failed to plead or offer evidence of multiple serious occasions of trial counsel deficient performance because PCR counsel were unaware of those deficiencies?

3. Did prejudice result when PCR counsel did not investigate, develop, and present evidence establishing trial counsel's deficient performance, which were many and prejudicial to the Petitioner's case?

4. Did prejudice result when PCR counsel offered evidence that was false and misleading, and which was relied upon by the PCR Court in denying relief?

5. Did prejudice result when PCR counsel did not investigate, develop, and present any mitigation evidence?

6. Did prejudice result when PCR counsel did not challenge trial counsel's failure to object to the trial court's orders that a forensic psychologist perform a confidential sanity and competency evaluation for the court and, at the same time, to serve as the State's expert witness in reply to the Petitioner's mitigation case?

7. Did prejudice result when PCR counsel did not challenge appellate counsel's abandonment of the client during his direct appeal when the issue arose concerning whether the Petitioner was competent to waive the appeal?

8. Did prejudice result when the Remand Court abandoned its duty to make specific findings of fact and conclusions of law and cast that function upon the State without first making those determinations?

9. Did prejudice result when the Remand Court refused to intervene concerning shackling the Petitioner during the merits hearing when those shackles were so tight that they cut through the skin of his wri[st] resulting in pain that prohibited him from remaining in the courtroom and participating in his case?

RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

I.

Did Judge Kelly abuse his discretion in finding Petitioner failed to show prejudice from initial PCR counsel's representation as this Court required him to do in *Robertson v. State,* 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016), before Petitioner would be entitled to a new PCR proceeding? [Petitioner's Questions 1-7].

II.

Did Judge Kelly err in requesting a proposed order from the State, and ultimately adopting the proposed language, when both parties had submitted briefing with their arguments and position; the request was only made after his decision to deny relief; and, when the proposed order process was open and fair with the court allowing Petitioner the opportunity to submit his own alternate proposed order in addition to Petitioner also receiving a copy of the State's proposed order, and also when Petitioner retained the right to file a Rule 59 motion to point out any issues with the order not previously pointed out after review of the proposed language, which Petitioner did in this action? [Petitioner's Question 8]

III.

Did Judge Kelly commit any error of law by accepting Robertson's waiver of his presence at the hearing in the civil action? [Petitioner's Question 9]

STATEMENT OF THE CASE

Petitioner is a death-sentenced inmate presently held in the Security Facility at Broad River Road Correctional Institution in the South Carolina Department of Corrections. In March 1999, a York County jury found Petitioner guilty of two counts of murder, one count of armed robbery, and one count of financial transaction card fraud. After lengthy capital sentencing proceedings, the jury assessed death as the appropriate sentence for the savage killings, which including the brutal murder of his parents for financial gain.[1] (App. 3243).

The essential facts of the crime may be summarized as follows: Petitioner decided to kill his parents to inherit their substantial estate. He discussed various ways he might do so, but ultimately waited until his parents were in separate areas in the family home, his mother in a bedroom, his father in the shower getting ready for work. Robertson then attacked his mother with a hammer, inflicting crushing blows, and also stabbed and cut her repeatedly. As his father

[1] The jury found the State proved these statutory aggravating circumstances beyond a reasonable doubt: that the murder was committed while in the commission of robbery while armed with a deadly weapon; committed while in commission of larceny with the use of a deadly weapon; committed while in the commission of physical torture; committed for himself or another for the purpose of receiving money or a thing of monetary value; and, that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. (App. 3242).

returned from the shower, Robertson attempted to incapacitate him by spraying tilex on him then beat him severely about the head with a hammer, later returning to beat him again, this time with the bat, cutting him as well. Meredith Moon was with him in the house and testified concerning the attacks. He and Meredith fled to join his brother out of state. A bag that Petitioner dumped in Maryland was recovered. His parents' blood was on the clothes, including the t-shirt he wore, one with a picture of himself on the front. The bloody socks recovered showed pattern stitching consistent with the pattern left at the scene. (*See* App. 1597-1611; 1660-1661; 1671; 1692-1694; 1789-1798; 1881-1882). This is merely an overview. (See also App. 3749-3761, 2006 PCR Action Order of Dismissal summary). The evidence of guilt was overwhelming. Even Petitioner agreed with trial counsel (at the time) that guilt was "a foregone conclusion" and that the focus on mitigation was sound. (App. 5174-5175).

On direct appeal, though initially represented by counsel, Petitioner ultimately represented himself,[2] and, after filing a brief, decided to withdraw his appeal. At his request, this Court dismissed the direct appeal, but only conducting the required proportionality review. He then sought post-conviction relief.

The Honorable John C. Few, then a circuit court judge, was appointed for the subsequent PCR proceedings, who, in turn, appointed Michael Langford Brown, Esq., and Joseph D. Matlock, Esq., as counsel for Petitioner. *Robertson v. State*, 418 S.C. 505, 509, 795 S.E.2d 29, 30–31 (2016). After lengthy proceedings in the first PCR, including a three-day evidentiary hearing, Judge Few denied relief in a comprehensive, one hundred and six (106) page order

[2] This Court remanded for a hearing on competency prior to granting the request. The Honorable John C. Hayes, III, made his report to this Court on February 23, 2005, resolving that Petitioner was competent and his decision to waive counsel was knowing and voluntary. Moreover, this Court reviewed and agreed with the competency finding in the June 3, 2005, Order dismissing the appeal. (See Appellate Case No. 1999-0111188). Petitioner indicates he was abandoned by his direct appeal counsel. (Pet. at 5-6). To the contrary, Petitioner abandoned direct appeal counsel.

issued on March 7, 2008. This Court denied the petition to review the denial of post-conviction relief on October 6, 2010. (See C/A 2008-088786). Petitioner subsequently filed a federal habeas corpus action, C/A No. 2:11-cv-00063-TMC-MGB. The District Court stayed the federal action to allow for the filing of a successive PCR action. (App. 4439). It continues to be stayed.

On January 7, 2011, Petitioner filed this second PCR action and raised, among other claims, that his PCR counsel were not qualified under S.C. Code Ann § 17-27-160 (B) to represent him in the capital PCR proceedings. Initially, the action was summarily dismissed as improperly successive and untimely, (App. 4459-4460); however, on appeal, while affirming dismissal on all other grounds, this Court found that the PCR counsel qualification issue was not subject to summary dismissal as it was not improperly successive, and it was timely raised upon discovery. *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016). (See also App. 4669-4688). The Court also resolved "that non-compliance with section 17-27-160(B) constitutes deficient performance per se" under state law to effect "the Legislature's intent" as expressed in the statute. *Robertson*, 418 S.C. at 521, 795 S.E.2d at 37. However, a new hearing was not automatically warranted, rather, "a PCR applicant would still maintain the significant burden of proving that he was prejudiced by counsel's lack of qualification." *Id.*

On remand, the Honorable R. Keith Kelly initially granted summary judgment on the question of deficiency by Order dated November 21, 2017, finding that the evidence shows counsel were not qualified under the provisions of § 17-27-160 (B). (*See* App. 5212 and 6403-6405). A hearing on the question of prejudice was held on August 9-11, 2021. Respondent submitted its post-hearing brief on August 31, 2021. Petitioner submitted his post-hearing brief on September 7, 2021, and submitted an amended post-hearing brief on December 17, 2021.

Judge Kelly advised the parties by email of July 12, 2022, of his decision to (1) dismiss the claims alleging specific instances of deficient performance as beyond the scope of remand, and (2) to deny relief on the arguments for prejudice based upon the evidence of record and that submitted at the prejudice hearing, having resolved that "Petitioner failed to show that a reasonable probability exists that but for PCR counsels' error, the result of the proceeding would be different." (*See* App. 5262 and 6378). He requested the State provide a proposed order. (App. 5262). As shown in July 12th and July 19th, 2022, emails from chambers, though Judge Kelly denied Petitioner's motion to prohibit the submission by the State, he invited Petitioner's counsel to also submit a proposed order, but that was declined. (App. 5263, 5277, 6378, and 6381). On August 26, 2022, Judge Kelly issued his written order finding Petitioner had failed in his burden of proof. (App. 5210-5264). Petitioner filed a Rule 59, SCRCP, motion on September 15, 2022, (App. 5265-5275), which Judge Kelly denied on March 2, 2023, (App. 5291-5292). Petitioner timely appealed and filed a petition on November 15, 2023. This return follows.

STANDARD OF REVIEW

This Court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). A reviewing court will "afford great deference to a PCR court's credibility findings. *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433 (2018). On review of the critical fact-findings, only "[i]f no probative evidence exists to support the PCR court's findings, [will] this Court will reverse." *Lowry v. State*, 376 S.C. 499, 504, 657 S.E.2d 760, 763 (2008) (citing *Pierce v. State,* 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000)). However, this Court "review[s] questions of law de novo, with no deference to trial courts." *Smalls,* at 180-181, 819 S.E.2d at 839.

Even though a *Robertson* prejudice analysis does not flow from Sixth Amendment jurisprudence, this Court had instructed that where "prior PCR counsel are deemed unqualified and, as a result, deficient, the PCR judge must make a determination whether under *Strickland*, Petitioner was prejudiced." 418 S.C. at 522, 795 S.E.2d at 38. Thus, the general test to determine prejudice is whether an applicant has shown that because of counsel error, there is a "reasonable probability that … the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *Simpson v. Moore,* 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* at 694.

ARGUMENT

I.

Judge Kelly did not abuse his discretion in finding Petitioner failed to show prejudice from initial PCR counsel's representation as this Court required him to do in *Robertson v. State,* 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016), before Petitioner he would be entitled to a new PCR proceeding? [Petitioner's Questions 1-7].

Because there is not only probative evidence, but ample evidence in the record supporting Judge Kellys' findings of facts, and his conclusions of law following controlling precedent, this Court should deny the petition. *Smalls, supra.*

As set out above, the matter of whether prior PCR counsel were qualified under S.C. Code Ann. § 17-27-160 was settled by summary judgment in Petitioner's favor– initial PCR counsel were not so qualified. (*See* App. 6403-6405). Judge Kelly determined:

> … summary judgment on the issue of initial PCR counsel's lack of qualifications is appropriate because "there is no genuine issue of material fact and ... the moving party is entitled to judgment as a matter of law." Rule 56(c), S.C.R.C.P. No evidentiary hearing is necessary to address this issue because all of the available evidence demonstrates that neither Brown nor Matlock was qualified under the requirements of§ 17-27-160(B). This Court finds that neither Brown nor Matlock met the mandatory criteria. In accordance with

> *Robertson v. State,* 418 S.C. 505, 795 S.E.2d 29 (2016), their performance was therefore deficient. *Id.* at 521, 795 S.E.2d at 37.

(App. 6405).

Consequently, Judge Kelly correctly focused the evidentiary hearing on the only contest matter: whether there was prejudice from PCR counsel's deficiency.[3] Both parties submitted filings before the hearing discussing the proper scope focus of the proceeding after the grant of partial summary judgment. Petitioner submitted his pre-evidentiary hearing memorandum on July 30, 2021, and a memorandum on the remand order that same day, while the State submitted its memorandum on August 5, 2021.[4]

Petitioner does not contest Judge Kelly's ruling on the deficiency prong; rather, he argues that Judge Kelly should not have restricted him from presenting evidence on other perceived deficiencies in initial PCR counsel's representation.[5] However, this was correct according to the 2016 *Robertson* opinion.

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[3] Petitioner also sought to undermine reliance on the fact-finding in the prior PCR hearing. That, too, was rejected similarly because of the particular review at issue. Simply, this Court did not order a new PCR hearing and set aside the prior proceeding. (*See* App. 5260-5261).

[4] Based on consultation with opposing counsel, these will be added in amended Vol. 14.

[5] Petitioner suggests that initial PCR counsel either did not know the standards or the rules of ethics in accepting appointment. (Pet. 8 at n. 2). Petitioner cites to Rule 6.2 of the Rules of Professional Conduct. (Pet. 8 n. 2). That rule encourages a lawyer not to *avoid* appointment, which counsel did not do. Rather, counsel accepted the appointment made by Judge Few. *Robertson,* at 509, 795 S.E.2d at 30–31. (*See* App. 5991 and 6377). Notably, though, this Court has previously acknowledged that there was a 2003 memorandum sent out to the circuit court by then Chief Justice Toal regarding interpretation of the statute. *Id.,* at 511 n. 10, 795 S.E.2d at 32. Respondent submits that memorandum would appear to support either Judge Few's understanding or counsel's understanding that could be considered qualified under the statute, though the full court later disagreed. At any rate, the cited ethical rule is of no moment in determining error or prejudice. *See generally* Rule 407, SCACR, Scope, para. 7 ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."). *Accord Langford v. State*, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993) ("the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction" rather are intended "to regulate and guide the legal profession by defining proper ethical conduct"). The argument below was summarily dispatched on that basis. (App. 5260 n. 17). Petitioner's offered "expert" testimony on accepted practices for collateral counsel with an eye toward

1. Judge Kelly correctly required Petitioner to show prejudice to be entitled to a new post-conviction relief hearing.

Petitioner submits "[t]here is disagreement" on whether PCR counsel's performance or trial counsel's performance was at issue on the remand. (Pet. 8). He suggests that this Court's holding in its 2016 *Robertson* opinion is likely incorrect, and the Court should instead follow the dissent[6] that favored the granting of a new PCR hearing without a showing of prejudice. (Pet. 8). Of course, the argument that prejudice need not be shown was rejected by the majority.[7] Further, the limitation is reasonable considering the "structural error" concept is applied for absence of counsel in a trial setting, not deficiency, and not in collateral actions. *See State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) (explaining "structural error" refers to "structural defects in the constitution of the trial mechanism"). In fact, the qualification at issue derives from the capital provisions of the PCR statute, not the Sixth Amendment. *Robertson*, at 516-518, 795 S.E.2d at 35-36. *See, e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("since a defendant

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federal habeas corpus action was similarly rejected for that point, and also under *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002) (rejecting expert legal opinion on counsel's actions and "an acceptable legal standard of competence"). Indeed, all testimony offered outside qualification on the point of deficient performance was rejected pursuant to this Court's 2016 *Robertson* opinion. (App. 5256-5260).

[6] The dissent disagreed completely, but Petitioner is referring to the opinion of then Chief Justice Pleicones who concurred in part and dissented in part. Acting Justice Toal authored the full dissent. *Robertson*, at 522-526, 795 S.E.2d at 38-40. In his memorandum concerning the order on remand, Petitioner asserted there was likely to be new members of the Court at the time of his appeal who would review the prior decision. (Memo, at 1, Amend. Vol. 14). He conceded, though, as he must, that the majority opinion in *Robertson* controls, but asserted there was "ambiguity in the opinion" and that he intended to litigate "specific incidents of deficient performance occurred." (Pre-Hearing Memo, at 5, Amend, Vol. 14). Notably, the concurring and dissenting opinion by then Chief Justice Pleicones reflects *agreement with the majority* that the only circumstance for deficiency that could be considered was qualification under the statute. *Robertson*, at 522, 795 S.E.2d at 38. Agreement on this point is not as fractured as Petitioner argues.

[7] Though of no precedential value in disposition, a recent unpublished opinion shows this Court continues to apply the prejudice requirement, but that has only been necessary in three cases. *See Alkebulanyahh v. State*, No. 2019-000529, 2023 WL 4930072, at *1 (S.C. Aug. 2, 2023). Respondent is aware those case would be this one, along with *Alkebulanyahh*, and *Stanko v. State.* The *Stanko* case is presently pending in this Court as of this writing. (*See* Appellate Case No. 2017-000211).

has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori,* he has no such right when attacking a conviction" collaterally). There could be no structural error in a collateral proceeding when counsel is not constitutionally required.

Petitioner also misapprehends the purpose of the capital counsel statutory PCR qualification provision and argues contrary to the findings that this Court previously made on the matter. Petitioner asserts that the qualification statute is a product of the need to ensure our capital statute can withstand constitutional scrutiny and relies upon *Furman v. Georgia*, 408 U.S. 238 (1972). (Pet. 9). This is wrong. As this Court has already explained, the capital counsel statutory PCR qualification provision in S.C. Code § 17-27-160 (B) was enacted in response to expedited provisions and restricted review offered in the federal 1996 Antiterrorism and Effective Death Penalty Act of 1996. *See Robertson,* at 518-519, 795 S.E.2d at 35. Petitioner's further argument regarding how this qualification should be defined is also wrong. Again, this Court has already explained that the specific provisions for proficiency outlined in the statutory provision constitute the Legislature's intent for counsel. *Id.* Any redefining or refining of parameters of his provision is for the Legislature and is of no impact here.[8]

In sum, Judge Kelly correctly followed this Court's precedent and required Petitioner to bear the burden of showing prejudice, *i.e.,* that there was a reasonable probability of a different result.[9] Further, Judge Kelly reasonably rejected Petitioner's specific argument on prejudice.

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[8] This including any guidelines or opinions offered, even including the ABA guidelines. As Judge Kelly correctly found, in any context – even in reviewing trial counsel's performance – those guidelines remain guidelines, not mandates. (App. 5259 n. 16; *see also Bobby v. Van Hook*, 558 U.S. 4, 8, (2009) (*per curiam*) (finding error in treating guidelines "as inexorable commands").

[9] It is somewhat counter-intuitive for Petitioner to argue he should be allowed to show individual deficiencies as the broad one regarding qualification will do to meet the deficiency prong required to move him into the prejudice analysis. *Robertson, supra*. Moreover, such position runs afoul of the

2. Judge Kelly correctly found Petitioner's allegation that initial PCR counsel were deficient in representation by not presenting Petitioner's PCR issues in the standard court form was found not be cognizable as it was offered in support of deficiency different than the narrow qualification issue allows.

Respondent incorporates by reference the above response and relies on this Court's ruling *Robertson, supra*, that limits the successive litigation as to prejudice on the issue of qualification under the statute. Further, Judge Kelly correctly found the allegation regarding failure to file the amendments on a standard form, (Pet. 11), if it could be reached, would not afford relief based on the record. Petitioner literally attempts to elevate "form" over substance. Judge Kelly appropriately rejected that argument.

Relying on the established record, Judge Kelly found that Petitioner did not show prejudice because the record demonstrated that not only did initial PCR counsel raise multiple claims of ineffective assistance, but also the initial PCR judge, Judge Few, considered those claims on the merits. (*See* App. 3275-3280; 3663-3664). Prejudice, if any could be found, would negatively affect the State, not the applicant, for lack of sufficient notice had there actually not been sufficient notice. Notably, the State continued, and the hearing was held on those issues. Moreover, this is consistent with this Court's precedent that instructs the lower courts that leeway on amendment is preferrable where possible. *See generally Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) ("[T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural

prohibition for litigation of ineffective assistance of PCR counsel claims generally, In short, this Court determined only one circumstance for deficient performance could be litigated – whether counsel was qualified under § 17-27-160(B), and declined to recognize any other claim for his successive action. *Id.*

default on substantial claims."); *see also* Rule 15(a), SCRCP (providing "leave [to amend a pleading] shall be freely given when justice so requires").[10]

The one exception that can be noted is that the State maintained that the specific argument raised in the subsequent appeal alleging trial counsel incorrectly advised Robertson that facts of the crime revealed to the defense social worker, Cascio, were privileged, was not properly raised and ruled upon. (App. 3786). Yet, that is also addressed in the testimony. Trial counsel testified that counsel advised Applicant to be honest with the defense experts. (App. 3349, Mr. Hancock at PCR: "I talked to him to deal with them with the truth. I mean, we couldn't try a case if he's lying to them, then we're gonna lie to the jury, and they gonna figure that out somewhere along the line, so, you know, we told him to be honest." *See also* App. 6016, Petitioner Robertson confirming same). There is nothing to suggest an assurance of privilege as indicated. Moreover, in the prior PCR and in the remand litigation, trial counsel, Mr. Boyd, testified that he advised Robertson to rely on the Fifth Amendment and not talk to the State expert about the facts of the crime. Additionally, Mr. Boyd confirmed (and the fact was supported by contemporaneous-to-trial written motion, that trial defense counsel attempted to block the independent court witness requested by the State to prevent the details of the crime being shared, though Petitioner did not heed the advice. (App. 5099-5100; 2021 Remand Hearing, State's Exhibit 2,).

[10] In somewhat blending his arguments in sections (1) and (2), Petitioner argues that the rules required initial counsel to raise a claim trial counsel was ineffective for failing to raise "parricide" and "battered person syndrome." (Pet. 11). That particular assertion is addressed in the response to Petitioner's separate argument section (5) below. Judge Kelly found Petitioner could not show prejudice, but to the extent that Petitioner here alleges a prejudice by failure to follow a command under the guidelines to raise this particular defense, this Court has previous rejected that theory. In *Stone v. State*, 419 S.C. 370, 397, 798 S.E.2d 561, 575–76 (2017), this Court, consistent with Supreme Court of the United States precedent, rejected the ABA guidelines as mandates for particular tests or defenses.

Further, Petitioner's suggests that initial PCR counsel merely "read the transcript" and was unprepared. (Pet. 10). In that same vein, he submits counsel's "billing records" do not show investigation of the case or consult experts. (Pet. at 13). That is plainly inconsistent with the extent of the allegations and the preparation of witness necessary for the extended hearing. (*See generally* App. 3275-3280; 3663-3664 and 2007 PCR Hearing at 3270). Even so, that is the type of broad speculation appropriately considered insufficient to carry the *Strickland* burden of proof. *See generally* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.").

But again, the claim presented and ruled upon has to do with perceived deficiency in form pleading by initial PCR counsel. (*See* App. 4720). That was properly rejected as a specific deficiency other than qualification under the statute was a claim that exceeded the scope of remand. Judge Kelly properly denied the claims for that reason. (App. 5256-5260 and n. 17).

3. Judge Kelly correctly found that Petitioner's allegation that initial PCR counsel prejudiced him in failing to demonstrate trial court error and prejudice when trial counsel failed to read their social work expert, Cascio's notes or prevent Robertson from responding truthfully to questions concerning the crime.

The precise issue raised was that trial counsel "fail[ed] to manage and supervise their expert witnesses and fail[ed] to be present during … interviews" which resulted in denial of counsel at a critical stage in violation of the Sixth Amendment. (App. 4716, para. 11(g)). Judge Kelly found Petitioner was not entitled to rely on the presumption of prejudice under *Cronic, supra.* (App. 5252). He resolved Petitioner's claim was "fundamentally flawed because it ignores that interviews of a criminal defendant by retained experts and, for that matter, the defendant's participation in a court ordered psychiatric examination do not constitute a critical stage in the proceedings against a defendant." (App. 5253). The judge relied on *State v. Hardy*:

> Psychiatric evaluations are not adversarial proceedings and defendants are not asked to plead to charges or to make statements to be used at trial. The presence of counsel is not only unnecessary from a constitutional standpoint, it is also undesirable from a clinical perspective, for it would undoubtedly hinder the psychiatrist from effectively examining the defendant.

283 S.C. 590, 592, 325 S.E.2d 320, 322 (1985) (internal citations omitted). That existing precedent squarely supports his reasoning.

Moreover, Judge Kelly referenced the resolution of the separate grounds, 11(b) (iii, iv, and v). (App. 5253). There, Judge Kelly found Petitioner, on remand, had failed to present evidence that there was a duty to attend interviews by counsel's own witness. (App. 5229). He still has not. There is no constitutional error here. In the petition for rehearing, Petitioner maintained that Petitioner's Fifth Amendment rights were violated.[11] (App. 5267). However, here, he now cites to the ABA (non-mandatory) guidelines. (Pet. 14). That does not help him to establish *Cronic* error. Nor does it allow him to avoid *Hardy.* Instead, Petitioner cites to Judge Few's observation in the initial PCR addressing this "overly-talkative defendant" and counsel should have ensure he didn't go against counsel's advice. (Pet. at 14). Yet, Petitioner neglects to inform the Court that the statement was made in reference to the McKee interview, not defense experts. (App. 3637). This does not aid in his argument on the Cascio notes and discussions, and, contrary to Petitioner's assertion, it does not show any fact or finding that Judge Kelly overlooked in ruling on the Cascio issue.

Further, Judge Kelly also addressed a related ground, 11(b)(ii), where counsel asserted that counsel failed to attend the interview or "discover" the notes. (App. 5227).[12] This allegation

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[11] Of note is Judge Few's finding that counsel did attempt to be in the meeting but were not allowed to be in the meeting. As Judge Few correctly noted, under the jurisdictional limitations of S.C. Code § 17-27-20 (b), that issue would not be cognizable in PCR as it was, if anything, a matter for direct appeal argument. (App. 3637).

[12] Again, while Petitioner cites to Judge Few's discussion on whether the defense should have "done everything they could" to prevent disclosure of the noted, he neglects to address the remainder of the finding that undercuts his current reliance on that passage, that is that Judge Few resolved the only way to prevent the notes from

was expressly addressed by Judge Few in the initial PCR. (App. 3739-3757). Critically, Judge Few considered the wealth of forensic evidence and witness testimony and determined "the sentencing jury had already been presented with an overwhelmingly graphic and vivid picture of what had occurred at the time of the murders *before* Ms. Cascio testified," and further, the information from those notes was also admitted in Dr. McKee's reply testimony. (App. 3761) (emphasis added) (*See also*, Detailed discussion of evidence, at 3749-3761). As such he concluded Petitioner failed to show *Strickland* prejudice. (App. 3761, "The obvious lack of any discernable prejudice from cross-examination is manifestly clear when Dr. McKee's subsequent reply testimony is considered on this issue. (App. 3761-3762).[13]

Further still, Petitioner has not offered any point of fact or law that could allow him to avoid the fact that Judge Few found that Petitioner was advised not to talk to Dr. McKee about the facts of the crime but did so anyway. (*See* App. 3723).[14] As Petitioner's argument infers, he

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being turned over was not to call her, so once they made the decision to call her, the notes were going to be turned over. (App. 3647-3648). Defense counsel simply cannot, under the rules do both. Similarly, Petitioner asserts Mr. Hancock was mistaken as to having the notes in sufficient time to review. That is speculation based on a healthy dose of his own assessment of credibility and interpretation of his witness's perspective only. At bottom, the State already had the notes before Casio went to look for her notes for purposes of testimony. (*See* App. 5349). (*See also* App. 5195-5196, former Solicitor Pope testifying at the remand hearing). But apart from all of that, Judge Few's prejudice analysis has not been challenged here. *Strickland,* at 670 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.").

[13] To be sure, these were not just facts of interest unrelated to the interview purpose. Judge Kelly pointed out, "as Judge Few correctly found, 'before the State began cross-examining Ms. Cascio about Robertson's admissions related to the murder, she was specifically asked whether she took Robertson's statements about the crime into consideration informing her evaluation of him" and she "agreed that she factored Robertson's statements into her assessment." (App. 3736).

[14] Judge Few finding, in relevant part "that counsel met with Robertson and explained that the State had the right to have him evaluated if the defense wished to present evidence of his mental health in mitigation," Petitioner consented, and "Robertson was well aware of his right to remain silent," that Dr. McKee had specifically advised of those rights, and "Robertson, nevertheless voluntarily discussed the facts of the crimes with Dr. McKee." (App. 3723). Further, Judge Few found those statements by Petitioner "were consist with Ms. Cascio's notes of her conversations with Robertson." (App. 3723). He concluded Petitioner failed to show either *Strickland* deficient performance or prejudice. (App. 3723). Notably, Judge Kelly recognized that even in the remand hearing, during Petitioner's own testimony, Petitioner confirmed that he was in fact warned by Dr. McKee and admitted that he had to participate for the defense to be available to him. (*See* App. 5250; *see also* App. 5176 (Petitioner's Testimony) and 5102-5103 (Trial Counsel Mr. Boyd confirming the dilemma when putting on a mental status defense)). However, Judge Kelly was addressing that point in the alternative. Petitioner raised the claim as a trial court error claim that was not available to be raised in PCR, Drayton, supra, therefore, Petitioner could show not prejudice here.

had no new fact or point to address the treatment of his issue in the original PCR that would in any way undermine either Judge Kelly's ruling, and by extension show cause to revisit Judge Few's findings of facts relevant to this issue of prejudice. Therefore, Judge Kelly's decision is amply supported by the facts of record, and his conclusion sound in established precedent.

4. Judge Kelly correctly found Petitioner had not established prejudice by showing that trial counsel's paralegal's notes had been "commingled" with the Casio notes.

Petitioner asserts the noted became "commingled" and initial PCR counsel did not separate the notes in making the arguments before Judge Few. (Pet. at 19). Petitioner asserts that Judge Kelly did not address the "commingling" as part of the "PCR counsel abandonment" argument. (App. 526). Judge Kelly did not specifically address the "commingling." However, there could be no prejudice based on Petitioner's own admission of his view of the evidence. Its Petitioner's view that additional confidential details were presented at the first PCR hearing. (Pet. 19). This indicates that Judge Few, when comparing the information, found no prejudice on even greater evidence. Logically, if counsel had offered less, there is an even more remote possibility of prejudice. Even so, this does not address Dr. McKee's testimony and the other extensive evidence of the details of the crime as outlined in the proceeding section. Again, Petitioner is not entitled to any relief.

5. Judge Kelly correctly found Petitioner had not established prejudice by showing neither trial counsel or PCR counsel had investigate a potential presentation as a "parricide" case.

Petitioner initially begins with his offered evidence that PCR counsel was deficient for failing to independently investigate a new defense theory based on parricide. Initially, Respondent incorporates by reference its above position that Judge Kelly appropriately limited the hearing to prejudice as the qualification issue was the only issue that could be litigated for

(App. 5249-5250). A trial court error claim, independent of a claim of ineffective assistance of counsel is barred from review here, as well.

deficiency, and summary judgment was granted on that matter. Even so, Petitioner merely developed a new view on old evidence, but Petitioner did not show missed evidence or even likely admissible evidence. This does not support the type of prejudice that would secure relief.

Judge Kelly considered Petitioner's new presentation and resolved that the new theory actually relied on a discrete set of facts, and they were the facts that the defense had investigated. (App. 5220). His remand hearing expert, Dr. Ewing, testified that he agreed with a bipolar disorder diagnosis – a diagnosis throughout the record. His presentation included an opinion that Petitioner was "battered as a child." (App. 5220). Judge Kelly resolved that there was an absence of prejudice primarily because all the base facts supporting Dr. Ewing's opinion were investigated and known. In fact, the social worker Cascio had consulted two publications one intra-family violence, one of which was Dr. Ewing's work. (App. 522). Further, Dr. Ewing consistently agreed that with the Cascio conclusions and other opinions offered at trial. (App. 5221-522).[15] However, the judge, carefully considering credibility, noted that "Dr. Ewing was terribly imprecise" regarding known "instances of abused" – estimating initially a 1000 or more, then reducing to hundreds, which conflicted with the "few instances" that could be actually and readily identified and verified. (App. 5222). Additionally Judge Kelly found that *State v. Lopez*, 306 S.C. 362, 367, 412 S.E.2d 390, 393 (1991), as offered by Petitioner as support for admissibility, actually did not support that this jurisdiction recognized "battered child syndrome" as a "behavior based syndrome." (App. 5222). Judge Kelly is correct.

This Court in *Lopez* squarely distinguished inadmissible behavior evidence from admissible physical findings: " … behavior syndromes were not devised to determine the truth of events leading up to their manifestations but merely to identify emotional problems… [they]

[15] Judge Kelly observed that Dr. Ewing, like Cascio, had interviewed Petitioner and had he testified, like the notes from Ms. Cascio, his notes about Petitioner's statements regarding the murders and his thoughts about murder would be likewise a subject for cross-examination. (*See* App. 5226).

are not sufficiently reliable as scientific evidence to justify their use to prove a crime occurred" but may be used in description of "physical findings which are inconsistent with the history of the injuries given by the parents or caretakers." 306 S.C. at 367, 412 S.E.2d at 393 (internal citations omitted).

Judge Kelly also addressed Petitioner's reliance on the media articles related to the Menedez brothers case from California. The claims regarding abuse and defense were more based in media than evidence allowed in the defense. A published court case reveals limitations on the admissibility as to mental state. (App. 5223 n. 6, citing *Menendez v. Terhune*, 422 F.3d 1012, 1033 (9th Cir. 2005)). Judge Kelly reasoned Petitioner could not show *Strickland* prejudice for not pursing at best a new theory, especially where there was little support on admissibility, a case in this jurisdiction directly rejecting admissibility as a behavioral theory. (App. 5224). Notably, in declining to find prejudice, Judge Kelly observed that trial counsel actually presented much of the background information, citing testimony from "Skip" Myer and Cascio. (App. 5221). However, the defense was also acutely concerned to stay away from "trashing" the victims as that had a significant danger of "alienating" the jurors. (App. 5224-5225). Considering all of these concerns, the record and case law support Judge Kelly's findings and conclusions. As the judge noted, there are multiple ways to provide effective assistance. *See, e.g., Stone,* at 384, 798 S.E.2d at 568 ("[t]here 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.") (quoting *Strickland*, at 689). It is certainly reasonable to find Petitioner failed in his burden of proof.

6. Judge Kelly correctly found Petitioner had not established prejudice by showing that trial counsel did not obtain Dr. McKee notes or challenge the order for court evaluation that became an evaluation for the State.

Judge Kelly, considering the evidence, including contemporaneous-to-trial records resolved this factual dispute by determining that Petitioner was wrong. Dr. McKee was retained by the prosecution, not tasked with conducting an evaluation for the court. (App. 5230). Moreover, Judge Kelly under our precedent, and in complement with federal rights and not in violation of the Fifth Amendment, a defendant may be ordered to undergo an evaluation independent even if an insanity defense is not asserted. *State v. Sloan*, 278 S.C. 435, 440, 298 S.E.2d 92, 94 (1982) ("We agree with the State that it is unfair to allow a defendant to assert this privilege and yet introduce his own psychiatric testimony at trial. However, we perceive the proper remedy to be exclusion of the defendant's psychiatric testimony, rather than violation of the defendant's Fifth Amendment rights."). *See also State v. Bixby*, 388 S.C. 528, 558, 698 S.E.2d 572, 588 (2010) ("where a trial court is under the impression that a criminal defendant's mental condition will be an issue at trial, it has the inherent authority to order an independent mental evaluation of that defendant"); *State v. Locklair*, 341 S.C. 352, 365, 535 S.E.2d 420, 427 (2000) ("By stating that Locklair may offer evidence of his mental illness at trial, defense counsel opened the door to the issue of Locklair's mental health."). Again, Petitioner has failed to show an error in Judge Kelly's findings of fact or conclusions of law.

7. Judge Kelly did not err in finding that whether Petitioner made a knowing and intelligent waiver of his right to appellate counsel was decided by this Court in the direct appeal proceedings and could not be reviewed.

Judge Kelly sustained Respondent's objection to the amendment, at the hearing, to include additional claims of ineffective assistance of appellate counsel (Robertson's Grounds 11(l)(i)-(ix) and his claim that Robertson did not knowingly and intelligently waive his right to appeal his convictions and sentence) because these are matters were conclusively decided by the Supreme Court of South Carolina on direct appeal, Petitioner made a voluntary and knowing waiver of counsel, and no claims of ineffective assistance would be heard regarding the appeal

and/or waiver of the appeal. (App. 5070-5072; *see also* App. 4930, the State distinguishing a claim from a late amendment from one that could not result in relief because it was previously addressed in the Supreme Court of South Carolina). This matter is not available for review.[16] *Greenwood County v. Watkins*, 196 S.C. 51, 12 S.E.2d 545, 550 (1940) ("It is well settled in this State that the rulings in a case, even though admittedly they be wrong, become the law of the case, and are res judicata between the parties.") *Warren v. Raymond*, 17 S.C. 163 (1882) ("All points decided by this court on appeal, or necessarily involved in what was decided, are res judicata, and cannot be again considered in the cause."); *Hilton Head Center of S.C., Inc. v. Public Service Commission of S.C.,* 294 S.C. 9, 362 S.E.2d 176 (1987) ("Res judicata applies where there is identity of parties, identity of subject matter, and an adjudication of the issue in the former suit" and "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."). *See also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996), *cert. denied*, 519 U.S. 1045 (1996) (party cannot complain of error which his own conduct has induced).

Petitioner has failed to show an error in Judge Kelly's findings of fact or conclusions of law.

II.

Did Judge Kelly err in requesting a proposed order from the State, and ultimately adopting the proposed language, when both parties had submitted briefing with their arguments and position; the request was only made after his decision to deny relief; and, when the proposed order process was open and fair with the court allowing Petitioner the opportunity to submit his own alternate proposed order in addition to Petitioner also receiving a copy of the State's proposed order, and also when Petitioner retained the right

[16] Further, Petitioner's evidence that had originally been pre-marked could only be proffered as this issue was barred from litigation. (*See* App. 5072-5074).

to file a Rule 59 motion to point out any issues with the order not previously pointed out after review of the proposed language, which Petitioner did in this action? [Petitioner's Question 8]

Petitioner submits Judge Kelly's email announcing his ruling and his subsequent Order begins in a confusing manner because Judge Kelly ruled that deficiency was not at issue. (Pet. 34-35). This evidences a misunderstanding on Petitioner's part, not error or confusion on Judge Kelly's part. As set out above, this Court *rejected* the issue of ineffective assistance of PCR counsel apart from the one claim based on the qualification statute. *Robertson, supra.* Consequently, Judge Kelly did not, indeed could not, make a legal conclusion on deficiency of initial PCR counsel on any other specific allegation. Judge Kelly did, however, look at factually what the attorneys did in order to have factual context for assessing prejudice. That simply follows from the nature of the proceeding.

In his speculation, Petitioner strains to show subtle clues of what Judge Kelly might have done, (*see* Pet. 36-37), but he need not do so. Judge Kelly asserted that the order is his, and that, in denying the Rule 59 motion, also asserted "[t]he Court affirms once again that it finds Applicant has failed to show that a reasonable probability exists that but for PCR counsels' error, the result of the proceeding would be different." (App. 5292). There is no error in his adopting the proposed language as his own.[17]

In *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992), this Court did not ban proposed orders. To the contrary, the Court set out the preferred process directing care be taken in review both by counsel and the PCR court. *Pruitt* was not a capital case. However, a challenge to the adoption of a proposed order in a capital case was presented in *Hall v. Catoe*, 360 S.C. 353, 365,

[17] Notably, this issue is currently pending in an unrelated capital PCR appeal, *Lindsey v. State*, Appellate Case No. 2019-001271.

601 S.E.2d 335, 341 (2004). Again, this Court did not prevent the practice of submitting a proposed order:

> Although we ***strongly encourage*** PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, ***it is common practice*** for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. at 365, 601 S.E.2d at 341 (emphasis added).

Not only did this Court not ban the proposed ordered process, but it did also not even find the *Hall* order resulting from the process to be deficient. Rather, the Court ultimately concluded the process produced an acceptable order finding "the evidence sufficiently indicates the PCR judge spent an adequate amount of time reviewing the order before adopting it." *Id.*

More recent than either *Pruitt* or *Hall*, though, is the discussion of proposed orders in *Fishburne v. State,* 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019). In *Fishburne*, this Court again directed the parties and the PCR court to "carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised." 427 S.C. at 516, 832 S.E.2d at 589–90. Simply, the process of submitting proposed orders is built into our rules, (see Rule 5(b)(3), SCRCP), and custom, *Hall,* 360 S.C. at 365, 601 S.E.2d at 341.[18] With the Court having fairly recently spoken on the safeguards to ensure fairness in the procedure, *see Fishburne, supra,* it is unnecessary to scrap the precedent in favor of less structure – essentially placing all requesting of additional findings or reconsideration in the Rule 59 stage (a later submission with the same presentation). At bottom, a litigant will always be allowed to ask for

[18] *See also Jefferson v. Upton*, 560 U.S. 284, 293-94 (2010) ("verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court though recognizing it had "also criticized that practice.") (citing *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)). *See also Burr v. Jackson*, 19 F.4th 395, 406-407 (4th 2021) (applying deference when review of adopted order shows transparent process and state court adjudication though noting proposed order practice has been ' " strongly criticized' "); *Shaw v. Martin,* 733 F.2d 304, 309 n. 7 (4th Cir.1984) (citing examples); *Bryant v. Stirling*, No. 9:16-cv-1423-DCN-MHC, 2022 WL 10686835 *12 n. 6 (D.S.C. April 19, 2022) (though complete adoption criticized, still, "the disposition of a petitioner's constitutional claims in such a manner is unquestionably and 'adjudication' by the state court.")

certain findings of facts and urge certain conclusions of law. In fact, the capital post-conviction relief statute allows for the presentation of post-trial briefing, which is, necessarily, presented in a litigant's preferred phrasing. See S.C. Code Ann. § 17-27-160 (D) (the PCR judge may request post-trial briefs). Whether taken from a document titled "post-trial brief" or a document submitted as a proposed order, if the PCR judge, after careful consideration, adopts the language offered, that language becomes the Court's order. *Hall,* at 341, 601 S.E.2d at 365; *see also Anderson,* 470 U.S. at 572.

Judge Kelly in this case received pre-trial submissions on the issue, received evidence at the hearing, heard arguments at the hearing on various points, and received and considered post-trial briefing. Like *Hall*, there is evidence of adequate time spent in review, but critically, Judge Kelly told the parties that he had reviewed the order to make sure the facts and conclusions were as he determined them to be. Petitioner has failed to show an error.

III.

Did Judge Kelly commit any error of law by accepting Robertson's waiver of his presence at the hearing in the civil action? [Petitioner's Question 9]

Robertson complains that he was shackled during the remand hearing. He argues that Judge Kelly's failure to order the South Carolina Department of Correction security team to remove his hand shackles "resulted in pain that prohibited him from remaining in the courtroom and participating in his case." (Pet. at Robertson's argument fails both in law and fact.

By filing dated July 20, 2021, Robertson moved prior to trial to "prohibit the use of restraints while the Applicant is present during his post-conviction relief hearing." (App. 6415). Citing *Deck v. Missouri*, 544 U.S. 622 (2005), he argued there was no showing he was "a flight risk, a danger to the public, or to the Court personnel," and the use of restraints would violate the Fifth Amendment right to due process, his Sixth Amendment right to counsel and chill his right to participate in his own defense." (App. 6414-6415). The State made a written response on

August 5, 2021.[19] The State opposed the motion and noted that the South Carolina Department of Corrections – the agency vested with the responsibility to safely and securely maintain custody – opposed the request. The State pointed out the brutal crime and the fact that Applicant had expressed a desire to "be allowed to enter another inmate's cell so that he can kill him." The State also noted that this was a civil action, collateral action as opposed to a trial. The visible restraints prejudice did not appear to attach at all. At the hearing the State reminded the Court that at a prior hearing, "Mr. Robertson chose to get up from his seat and leave the table and walk away," not only a safety concern, but offensive to the decorum that should be maintained. (App. 4734). Judge Kelly recalled that event, specifically that Petitioner had "exploded in th[e] courtroom right next door … slapped his hands on the table, … and" and been escorted out the "side door in a huff because I would not remove them." (App. 4735). Being close to his counsel, who was of slight build, the judge feared the possibility of "a hostage situation." (App. 4735). General Counsel for Corrections also appeared at the hearing in support of maintaining the restraints. (App. 4737). Even so, Further, accommodations were made at the hearing, but ultimately Petitioner deemed them insufficient for his comfort in the courtroom. (App. 4731-4742).

After hearing a portion of the testimony from the first witness called, Petitioner addressed the Court and said he could not write, and felt pain from the restraints, could not "effectively assist [his] attorneys" with the restraints, and he would prefer not to remain in court under the conditions. (App. 4796-4797). Petitioner advised Judge Kelly he had no intention of coming back if the conditions remained, and Judge Kelly advised that he foresaw no change in the conditions. (App. 4797). The State moved to dismiss the case if the application did not intend to go forward with the case he filed, and noted the State intended to call him if he did not take the

[19] Based on consultation with opposing counsel, these documents will be added in Amend. Vol. 14.

stand in his case. (App. 4798). Judge Kelly stated the State would be able to do so, even if it was done by video. (App. 4798). Petitioner's counsel asserted Petitioner was not "waiving his case" by requesting to return to Death Row. (App. 4798).

Petitioner asserts that Judge Kelly erred in not exercising his discretion; however, the record shows that he did, and he did in context of knowing how Petitioner had reacted at another hearing. However, *Deck* expressly applies at the trial level, which was not the case here. Further, the South Carolina Department of Corrections has a restraints protocol in place expressly for security purposes and requires heightened security for death-sentenced inmates. There was no error, given the seriousness and brutality of the crime, the history of aggression and temperament issues, in deferring to the security policy. Moreover, Petitioner did participate and gave testimony by video. (*See* App. 5170-5182).

Notably, in this civil matter, generally a case can go forward even if a defendant is unable to participate. *See Council v. Catoe*, 359 S.C. 120, 130, 597 S.E.2d 782, 787 (2004) ("the default rule is that PCR hearings must proceed even though a petitioner is incompetent" but allowing that if the claim requires assistance for "a fact-based challenge" a continuance may be granted); S.C. Code Ann. § 17-27-80 (discretionary whether the PCR court "may order the applicant brought before it for hearing"). Petitioner's reliance on the right to confrontation and *Crawford v. Washington*, 541 U.S. 36 (2004), (Pet. 38 and 42), is misplaced for two reasons. First, Judge Kelly did not rule on a "right to confrontation," and there is no request to do so in Rule 59 motion. It is not procedurally available for review. *See, e.g., Pruitt*, at 255 n. 2, 423 S.E.2d at 128 n. 2 (explaining that a ruling by the PCR judge is required to preserve an issue for appeal). Second, it fails as a matter of law. The PCR hearing was part of his civil action, not his criminal trial. *See, e.g., State v. Henson*, 407 S.C. 154, 161, 754 S.E.2d 508, 512 (2014) ("The

Confrontation Clause … guarantees a defendant in a criminal trial the right to cross-examine the witnesses against him.") (internal citations omitted).

Here, Petitioner can show no reversible error in the decision; the case with counsel continued, he was accommodated, and there was not request for a continuance on some fact-based question that would somehow require consultation that could not be accomplished other than him by Petitioner being present akin to *Council*. To the contrary, counsel advised Petitioner at the close of Petitioner's testimony via video, that counsel "have been here and participated in this proceeding on your behalf." (App. 5182). Petitioner is not entitled to any relief.

CONCLUSION

Based on the foregoing, and for all the reasons described and announced in Judge Kelly's order, the State asks this Court to deny the petition.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

s/Melody J. Brown
By: _____
MELODY J. BROWN
S.C. Bar No. 14244

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ATTORNEYS FOR RESPONDENT