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S.C. Supreme Court

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*

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 Roberton'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

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[1]The 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.

[2]Due 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.

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[3]Robertson 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.

[4]At 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

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[5]Congress 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

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[8]This 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

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[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

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[10]In *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").

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[11]While 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]

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[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).

[13]Because 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

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[14]While 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

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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.

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[15]To 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.

[16]Apart 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

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[17]As 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.C.t 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)'").

[18]It 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 ...

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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]

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[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*.

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[22]Although *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).

[23]While 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.

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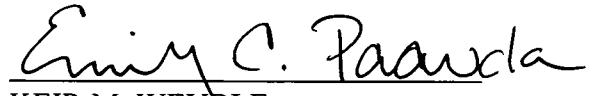
[24]The PCR order purported to find otherwise, faulting Robertson for failing to raise a *pro se* objection to the appointment of unqualified counsel, and treating that asserted failure as a waiver of his right to seek redress. *See* App. 4427-28. That cannot be correct. When Robertson announced his 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.

Respectfully submitted,



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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

The undersigned certifies that a copy of the foregoing Petitioner's Brief was served by first class United States mail, postage prepaid, this 5th day of February, 2015, upon the following:

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