

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. Supreme Court

JAMES D. ROBERTSON, #5067,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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ARGUMENT

I. This Court must affirm the PCR judge’s summary dismissal of Robertson’s 2011 Application because, in a non-capital PCR case, this Court has already held that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not apply to PCR cases in this state and Robertson has not mentioned the Court’s earlier unanimous and published Order or provided sufficient reason for reaching a different result in his case; and because evidence of probative value supports the PCR judge’s findings that (1) *Martinez* does not require state courts to have merits hearings on successive applications claiming that initial PCR counsel was ineffective; (2) Robertson’s 2011 Application is barred by the successive application doctrine in S.C. Code Ann. § 17-27-90 (2003) and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); and (3) it is barred by the statute of limitations and the doctrine of laches.....11

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 3. The creation of a right to file a successive application is unnecessary because this Court already permits exceptions to

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

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

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PETITIONER'S QUESTION PRESENTED

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

COUNTERSTATEMENT OF ISSUES PRESENTED

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

STATEMENT OF THE CASE

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

Petitioner, James D. Robertson, #5067 (Robertson) is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his two York County murder convictions and death sentences for brutally and sadistically murdering his parents. The York County Grand Jury indicted him on April 23, 1998 for two counts of murder (98-GS-46-1020 & -1021), one count of armed robbery (98-GS-46-1022) and one count of financial transaction card fraud (98-GS-46-1023). **App. 3758-65**. The State timely served a Notice of Intent to Seek the Death Penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002) and gave notice that it would rely upon the statutory aggravating circumstances found in S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2015).¹

This Court assigned the case to the Honorable John C. Hayes, III, who retained exclusive jurisdiction. James W. Hancock and James W. Boyd, Esquires, represented Robertson. Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Following a series of motions hearings,² Robertson's capital jury trial was held on March 15-26, 1999. The jury convicted him of all of the indicted offenses. **App. 122-1977**. A sentencing phase was conducted following Robertson's exercise of the 24-hour statutory waiting period in §

¹ Thus, the State relied on the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; larceny with the use of a deadly weapon; and physical torture, as well as the aggravating circumstances that the offender committed the murder for himself or another for the purpose of receiving money or a thing of value and that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

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

16-3-20(B).

In addition to the five statutory aggravating circumstances relied upon by the State, Judge Hayes instructed the jury on the statutory mitigating circumstances that Robertson did not have any prior convictions involving the use of violence against another person; that the murders were committed while he was under the influence of a mental or emotional disturbance; that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and his age and mentality at the time of the crimes. § 16-3-20(C)(b)(1) (2), (6) and (7). The jury found each of the alleged statutory aggravating circumstances and sentenced him to death for each of the murders. Judge Hayes affirmed their decision and imposed the death sentences for the murders. **App. 1977-3242.**

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

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

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

On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Robertson's behalf.³ Again, however, Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote this Court on April 18, 2002 and asked for the Court to relieve Mr. Savitz because Mr. Savitz did not represent his interests. The Court denied his request in a May 16, 2002 Order.

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

³ Appellate counsel Savitz' Brief presented three issues:

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

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

Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002.⁴ On October 28, 2002, Judge Hayes signed a Report in the Supreme Court of South Carolina. He found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. This Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

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

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

⁴ Robertson was present at the hearing and Bruce M. Poore, Esquire, represented him. Senior Assistant General William Edgar Salter, III, represented the State. Robertson was the only witness at the hearing.

7. The judge erred in sentencing appellant to death.

Pro Se Initial Brief of Appellant at p. 2.

After the State filed the Initial Brief of Respondent on December 31, 2003, the direct appeal was dismissed and re-instated on several occasions because of Robertson's failure to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the Court that he wished to abandon his right to a direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing was held before Judge Hayes on February 22, 2005, at the Moss Justice Center in York, South Carolina.⁵ In a February 23, 2005 Report to the Supreme Court, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order filed June 3, 2005, this Court of agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003), it dismissed the appeal and it directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996).

Thus, Robertson's direct appeal lasted over five years and eleven months from this Court's June 25, 1999 granting direct appellate review under *White v. State*, until it was voluntarily abandoned by him.

B. Original state PCR.

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

On July 7, 2005, this Court granted Robertson's request for a stay of execution to pursue Post-Conviction Relief (PCR), pursuant to *In re Stays of Execution*. The Court also appointed the Honorable John C. Few to preside over this case. Judge Few filed an Order Appointing Counsel For Post-Conviction Relief dated September 9, 2005, in which he appointed Michael Brown, Esquire, to represent Robertson. **App. 3869**. Judge Few held a hearing at the Greenville County Courthouse on September 23, 2005. Robertson was present at this hearing, as was Mr. Salter, who represented the State. The appointment of Mr. Brown was confirmed at that hearing. **App. 3657**.⁶ Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

Robertson filed his original and only properly filed PCR Application (06-CP-46-532) on March 1, 2006. **App. 3244-51**. Respondent filed its Return on October 20, 2006. **App. 3252-62**. Judge Few held an evidentiary hearing into the matter on January 29-31, 2007, at the Moss Judicial Center in York, South Carolina. Robertson was present at this hearing, and Messrs. Brown and Matlock, Esquires, represented him. Mr. Salter represented the State. **App. 3263-3650**.⁷

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

⁶ A copy of the transcript of the September 23, 2005 hearing is not currently available. Respondent does not have a copy in the files of the Attorney General's Office and Respondent did not order this transcript because Robertson did not contest counsel's qualifications in state PCR. Robertson also has conceded that a copy of that transcript is unavailable because the tapes of the hearing do not exist. *See* Rule 607(i), SCACR.

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

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

Robertson timely served and filed a notice of appeal. Chief Deputy Appellate Defender Joseph L. Savitz, III, represented him in collateral appellate proceedings. Thereafter, Mr. Savitz filed a Petition for Writ of Certiorari on Robertson's behalf. **App. 3766-80.** The only Question Presented in the Petition was stated as follows:

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

Petition for Writ of Certiorari at p. 1, App. 3768. The State filed a Return to Petition for Writ of Certiorari on July 15, 2009. **App. 3783-3810.** This Court filed a letter Order denying certiorari on October 6, 2010. **App. 3811-12.** It sent the Remittitur to the York County Clerk of Court on October 22, 2010.

C. The Petition for Writ of Habeas Corpus.

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

⁸ He raised the following allegations: (1) counsel failed to present Dr. Hayne McMeekin as a witness and failed to develop evidence that Dr. McMeekin over-prescribed Ritalin; (2) counsel failed to present Chip Robertson as a defense witness; (3) counsel failed to pursue a verdict of guilty but mentally ill (GBMI), either by advising Applicant to enter such a plea or by requesting a verdict of GBMI at the trial; (4) counsel failed to spend an adequate amount of time with Applicant prior to trial; (5) counsel never pursued a proposed plea bargain allegedly offered by the State; (6) counsel erroneously advised Applicant not to testify in the sentencing phase of his trial; (7) counsel failed to present evidence that Applicant is adaptable to prison; (8) counsel failed to cross-examine Applicant's co-defendant, Meredith Moon about a statement in which she allegedly agreed to "keep quiet" about the murders in exchange for \$50,000.00; (9) counsel failed to request removal of a juror where the juror had made statements on voir dire; (10) counsel did not adequately advise Applicant before he was evaluated by the prosecution's psychologist, Dr. Geoffrey McKee; (11) counsel failed to adequately present evidence of the Robertson family's mental health history; and (12) counsel was ineffective for presenting social worker Toni Cascio as an expert witness because (a) of Cascio's lack of experience; (b) counsel's agreement to provide Ms. Cascio's notes to the States; (c) counsel's failure to discover Applicant's admissions about the crime in enough time to permit counsel to employ a different social worker; and (d) Counsel's presentation of Ms. Cascio as a witness. **App. 3268-73.** See also **App. 3658-59.**

Appointment of Counsel in the United States District Court for the District of South Carolina, so that he might pursue relief pursuant to a timely petition for a writ of habeas corpus under 28 U.S.C. § 2254 and 2244(d). Respondent received these motions on October 28, 2010 and made a Response thereto on November 1, 2010. The Honorable Sol Blatt, Jr., United States District Judge, entered an Order granting Petitioner's Motion for Stay of Execution. The Honorable Bruce Howe Hendricks, United States Magistrate Judge, thereafter entered Orders appointing John H. Blume, Esquire (as lead counsel); Keir M. Weyble, Esquire; and Emily C. Paavola, Esquire to represent Robertson.

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

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

C. Robertson's successive PCR.

Robertson filed his successive PCR Application (2011-CP-46-00072), through counsel, on January 7, 2011. **App. 3847-53**. In his 2011 Application, he raised six claims of ineffective assistance of trial counsel [Grounds 10 & 11(a)(i) and 10 & 11(b)(i)-(v)]; four claims of trial court error [Grounds 10 & 11(c)-(f) that are not cognizable in PCR, see S.C. Code Ann. § 17-27-20(b) (2003) (“This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction”)]; *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in a PCR application absent a claim of ineffective assistance of counsel)]; and three claims of ineffective assistance of appellate counsel [Grounds 10 & 11(g)(i)-(iii)]. **App. 3848-49**. On March 24, 2011, Respondent made its Return and Motion to Dismiss and moved for summary dismissal. **App. 3900-4030**.

The Honorable Lee S. Alford held a status conference on July 5, 2011 at the Moss Judicial Center, in York County South Carolina. Robertson was present at the hearing. Keir Weyble, and Emily C. Paavola, Esquires, were also present, and Senior Assistant Attorney General William Edgar Salter, III, represented the State. At the hearing, Judge Alford appointed Mr. Weyble and Ms. Paavola to represent Robertson. Also, he (1) gave Robertson twenty days within which to file a response to the Return and Motion to Dismiss, (2) gave twenty days for Respondent to reply to that response, and (3) gave Robertson twenty days, from the hearing date, to file a verification of the Application because the Application was not verified as required by S.C. Code Ann. §§ 17-27-40 & -50 (2003). Judge Alford ruled that the verification would be considered *nunc pro tunc*. **App. 4187-99**.⁹

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

On July 27, 2011, Respondent received a verified Amended Application for Post-Conviction Relief (**App. 4201-07**) and Robertson's Response in Opposition to Motion to Dismiss, both of which were dated and served July 25, 2011. **App. 4208-4385**. Respondent filed a Reply to Applicant's Response to the State's previously-filed Return and Motion to Dismiss dated August 15, 2011. Respondent provided the Court with a corrected copy of its Reply on August 30, 2011. **App. 4386-4409**.

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

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

ARGUMENTS

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

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

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

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

A. Standard of Review on Certiorari.

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

B. Discussion.

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

In *Martinez*, the United States Supreme Court found that “[t]o protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in [*Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991)] that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.” *Id.* at 1315. Based upon principles of equity, *id.* at 1319-20, the Court held that “Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Id.* at 1320.

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

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

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

In *Martinez*, the “precise question” addressed by the United States Supreme Court is “whether ineffective assistance in an initial review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.” *Martinez*, 132 S.Ct. at 1315. (Emphasis added). The Court held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Martinez*, 132 S.Ct. at 1320. (Emphasis added). The Court went on to set forth the requirements that must be met to overcome the procedural default in a federal habeas action. *Martinez*, 132 S.Ct. at 1318–19.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1319–20.

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷ It could also exponentially increase the number of claims that federal habeas corpus courts would have to review on the merits. As the PCR judge properly found in another section of his Order, "[t]here is no reason to tax an already overburdened judicial system with wasteful litigation that is not constitutionally mandated. Further, it would reward a dilatory filing in this case that is designed to delay the proper course of the appeals process and it would destroy any sense of finality to litigation." **App. 4441**. Any doubt that this action is not a dilatory one must ignore that currently Robertson only has the issues relating to counsel's handling of their social worker preserved for federal habeas review. However, if permitted to go forward in this action, he will be able to raise a number of additional claims on the merits. *See App. 4202-04*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Further, the relief requested by Robertson is unnecessary. Although § 17-27-90 “forbids a successive PCR application unless an applicant can point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly,” *Aice*, 305 S.C. at 450, 409 S.E.2d at 394, this Court has recognized a number of exceptions *E.g., Austin v. State*, 305 S.C. 453, 454-55, 409 S.E.2d 395, 396 (1991) (authorizing hearing on successive application asserting ineffectiveness of collateral counsel for not appealing denial of relief on first application).

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

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

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

review).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As correctly recognized by the PCR judge:

§ 17-27-90 forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." *Aice*, 305 S.C. at 450, 409 S.E.2d at 394. In *Aice*, this Court expressly declined to interpret the term 'sufficient reason' to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase 'very narrowly' by Court Rule, and it held that "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application.... We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not" *Id.* Although *Aice* recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel, as *Aice* urged, "well may swallow Rule 50(3), *It is a troubling prospect* indeed to us *that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys.* As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under *Aice*'s view.

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

As a result, a claim that "prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." *Id.* at 451, 409 S.E.2d at 394. Thus, apart from the scenario covered by *Austin*, 305 S.C. at 454-55, 409 S.E.2d at 396, a successive PCR application is generally not allowed on the ground that first PCR application was insufficient due to ineffective PCR counsel. *Aice*, 305 S.C. at 450-52, 409 S.E.2d at 394-95.

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

In *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996), the applicant’s direct appeal was dismissed because his attorney failed to file an initial brief. Washington raised a number of issues in his first PCR application, including a claim based on the State’s misconduct in connection with a plea agreement. *Id* at 234, 478 S.E.2d at 834.

The PCR court in *Washington* found that he had not waived his right to direct appeal and that he should be granted a belated appeal. On the prosecutorial misconduct claim, the PCR court found that the State had failed to adequately explain the State’s relationship with one of its witnesses to the jury, but the PCR court refused to grant a new trial because it found that this claim could have been raised on direct appeal. *Id*. Washington petitioned for certiorari and presented his misconduct claim to this Court, but the Court denied certiorari on that issue. He then filed a second PCR application, and he again raised the misconduct issue, as well as a motion to alter or amend the Order denying his original PCR application. The PCR court granted the motion to amend, and it amended its Order to grant Washington a new trial. *Id* at 234-35, 478 S.E.2d at 834.

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

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

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

Similarly, Robertson's reliance upon the capital PCR proceedings involving Edward Lee Elmore and Luke Williams is likewise misplaced. In *Elmore*, 2005-CP- 24-1205, the applicant filed a successive PCR Application on September 27, 2005, alleging that he could not be executed consistent with the Eighth and Fourteenth Amendments to the United States Constitution because he is mentally retarded. *See Atkins v. Virginia*, 536 U.S. 304 (2002). The State moved to dismiss because the action was barred by the statute of limitations and by the prohibition against successive applications. The judge assigned to hear the matter held the State's motion to dismiss in abeyance until after the evidentiary hearing on mental retardation. When the judge thereafter issued an Order finding that Elmore was mentally retarded and that the Eighth Amendment barred

²⁴ In *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), the Court permitted a successive application raising the issue of ineffective assistance of trial counsel, where trial counsel had represented the applicant in the first PCR matter. This case does not involve such a scenario. Nor is this case like *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the Court permitted a successive application because the applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Robertson's current attorneys may say as to the quality of representation provided in the original PCR action, they must concede that the allegations raised in that action were raised with the assistance of counsel and that he had a hearing on the issues raised by counsel.

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

Williams is likewise distinguishable. As in *Elmore*, the State did not appeal the PCR judge's ruling allowing Williams to proceed on a successive. Also, Respondent takes the position, for the reasons argued, *infra*, that lead collateral counsel in the present case, Mr. Brown, was properly qualified under S.C. Code Ann. § 17-27-160(B) (2003), unlike Williams' original PCR attorneys. *See Williams v. Ozmint*, 494 F.3d 474, 483 (4th Cir. 2007). Moreover, Respondent would note that the capital PCR applicant in *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31 (4th Cir., Mar. 26, 2002), unsuccessfully sought relief such as that now being sought by Robertson, as did death row inmate Abdiyyah ben Alkebulanyahh, #6012. Thus, as in *Aice*, the cases relied upon by Robertson do not support the conclusion that "sufficient reason" to permit a successive application. Contrary to his argument before this Court, he could have raised his current allegations in his previous PCR Application.

Likewise, any supposed lack of qualification of original PCR counsel in the present case was an issue that could have been raised, if at all, at the time of the September 23, 2005 hearing to confirm the appointment and later pursued on certiorari following denial of relief by the PCR judge.²⁵ As a result, he cannot raise this or any other allegation now in a successive Application.

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

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

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

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

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

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

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

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

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

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *See Butler v. State*, 397 S.E.2d 87 (S.C.1990). **We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case**, as well as other abuses of the reviewing system *Aice* urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. *See Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

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

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

²⁶ *See also Williams*, 380 S.C. at 480, 671 S.E.2d at 603 ("At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice"); *cf.*, *Webb v. Greenwood County*, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956).

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

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

B. *Martinez* does not require a hearing.

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

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

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

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

to the York County Clerk of Court on June 22, 2005. Therefore, Robertson had one year from June 22, 2005, within which to file the current Application. However, he did not file the current Application until January 7, 2011,²⁷ which is five years, six months and sixteen days after this Court's June 22, 2005 Order and well after the expiration of the one year time limit for filing the PCR Application. As a result, the Application is barred by § 17-27-45(A).

As noted, Robertson did not make any challenge to the qualifications of lead collateral counsel, Mr. Brown, under § 17-27-160(B) at the September 23, 2005 hearing appointing counsel. Nevertheless, he now contends that he is entitled to proceed because he has filed within one year of the appointment of his current attorneys, and that neither he nor his original PCR attorney could have objected to the supposed lack of qualifications of counsel under § 17-27-160(B).

To the extent that his current Application asserts claims that are otherwise cognizable in PCR, as opposed to his claims that involve issues that could have been raised on direct appeal, those allegations could have been discovered and presented in the original PCR action. ... Further, an alleged lack of qualifications of counsel under § 17-27-160(B) does not constitute "evidence of material facts . . . that requires vacation of the conviction or sentence," as required for § 17-27-45(C) to apply." **App. 4427.**²⁸

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

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

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

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

Further,

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

²⁹ As noted, section 17-27-45(C) provides that "the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." (Emphasis added). Here, that would be one year after the September 23, 2005 hearing because that is when he would have had actual knowledge of counsel's qualifications and could have discovered any defect, and not one year following the appointment of his present attorneys. See *Mitchell v. Holler*, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993) (the statute of limitations begins to run "where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist") (holding knowledge of murder conviction, coupled with complaint about trial counsel's performance, commenced running of statute). As found by the PCR judge, "the purpose of the September 23, 2005 hearing was (1) to determine whether Robertson wanted counsel appointed to assist him in PCR, and (2) to appoint qualified counsel. See *In re Stays*. Despite his protestations, the appointment hearing was the **only time** to properly complain about the defects in counsel's eligibility for appointment pursuant to § 17-27-160(B)." **App. 4428.**

Even assuming *arguendo* that the statute of limitations did not begin running until the September 23, 2005 hearing, the current Application was not filed until five years, three months and fifteen days later. Therefore, it is barred under § 17-27-45(C), as well. **App. 4428.** His statute of limitations argument ignores that he was successful in having two different appellate attorneys relieved on direct appeal, based upon his objections to representation by these attorneys. "To otherwise construe § 17-27-45 and permit him to go forward on the current Application would do nothing more than award Robertson's lack of diligence in asserting the alleged defect in counsel's statutory qualifications. As a result, the Application is barred by § 17-27-45(A)." **App. 4429.**

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

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

Equitable tolling has been deemed available where—

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

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

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

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

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

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

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

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

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

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

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

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

amend).

Robertson's argument as to counsel's supposed lack of qualifications lacks merit as a matter of state law. He asserts that Judge Few appointed unqualified counsel to represent him in his first PCR application. He also makes a blanket assertion that the record available to him does not indicate that either counsel appointed to represent him met the statutory criteria for appointment as PCR counsel in a capital case without identifying what record was available to him or identifying what qualifications counsel did or did not have, prior to the PCR judge's Order dismissing the 2011 Application. **App. 4434; 4488.**

As the PCR judge found:

Applicant provides for the first time, as a proposed amendment, a copy of an affidavit signed by Joseph D. Matlock, dated September 28, 2011, concerning his qualifications to represent an indigent applicant in a death penalty PCR action. Applicant also provided as an amendment, an affidavit of John H. Blume, in an unrelated case (Bixby) which has no relevance in this case. Thereafter, a corrective affidavit of John H. Blume was provided in which John H. Blume avers that Michael Brown told him that the PCR action in which he represented James D. Robertson was his first Capital Post-Conviction Relief proceeding.

Supp. App. 1.

In the absence of evidence to the contrary, the PCR judge correctly "assume[d] that Judge Few appointed qualified counsel to represent Robertson in his first PCR application. *Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("Trial judges are presumed to know the law and to apply it in making their decisions"); *Ray v. State*, 310 S.C. 431, 437, 427 S.E.2d 171, 175 (1993); *United States v. Robertson*, 606 F.3d 943, 960 (8th Cir. 2010)." **App. 4434.**³²

Robertson's position is that a lawyer either needs to have previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within

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

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

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

Here, Judge Few's September 9, 2005 Order appointing Mr. Brown specifically states that "[t]he defendant contends that he is indigent and in need of an attorney as contemplated by law." He confirmed counsel's appointment at a September 23, 2005 hearing, at which Mr. Brown, Robertson and counsel for Respondent were present. Judge Few's Order appointing counsel did not expressly rely upon the above Memorandum. However, because "[t]rial judges are presumed to know the law and to apply it in making their decisions," *Walton*, 497 U.S. at 653, and the law is that statutorily qualified counsel must be appointed in capital cases, the *presumption* (as opposed to speculation, as Robertson asserts) is that Judge Few appointed in accordance with §

17-27-160(B) and the Chief Justice's Memorandum.³³ Robertson suggests that the PCR judge mistakenly relied upon the Chief Justice's August 13, 2003 Memorandum because her August 30, 2010 Order in a capital PCR appeal, *Abdiyyah ben Alkebulanyahh, #6012 v. State*, "state[s] that her issuance of the letter was a mere administrative action and does not include a determination that her interpretation of the statute is valid."

In *Abdiyyah ben Alkebulanyahh*, a Motion to Remand for Additional Post-Conviction Proceedings was filed on the petitioner's behalf by Robertson's lead counsel in federal court proceedings, John H. Blume, Esquire. The petitioner also filed a motion for recusal of the Chief Justice based on her August 13, 2003 Memorandum, since he was asserting a contrary interpretation of the statute. In the course of denying the recusal motion, Chief Justice Toal did state on pp. 4-5 of the Order in *Abdiyyah ben Alkebulanyahh* that courts from other jurisdictions addressing the question have "noted the promulgation of an administrative order or directive [by an appellate court having primary responsibility for administration of the judicial branch of government] does not include a determination that it is valid because that would constitute an advisory opinion." She did not make such a determination, herself. Instead, she found that her "consideration of petitioner's Motion for Remand is no different from my consideration of petitions for rehearing filed in cases in which I have participated in a decision on the merits." Even though this is not binding authority from this Court, the PCR judge's finding that it was and remains authority that supports the appointment of counsel in this case was not clearly erroneous.³⁴

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

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

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

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

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

should be required to file a second PCR application. The State simply argued on the cited pages that the petitioner had not shown that other remedies, such as PCR, were inadequate for asserting the claims he belatedly sought to raise and it pointed out that he a pending PCR appeal.

right guaranteed by the United States or State Constitutions. As a result, it was not clear error for the PCR judge to find (**App. 4437-41**) that Robertson would have to show not only that there was non-compliance with the statute, but also prejudice to him resulting from the non-compliance in order to gain relief in this action. *See Reed v. Farley*, 512 U.S. 339, 342, 114 S.Ct. 2291, 2294 (1994) (state court's failure to observe the 120-day speedy trial rule of the Interstate Agreement on Detainers is not cognizable under the federal habeas corpus statute when the defendant registered no objection to trial date at time it was set and suffered no prejudice attributable to the delayed commencement); *United States v. Timmreck*, 441 U.S. 780, 783-85, 99 S.Ct. 2085, 2087-88 (1979) (a guilty plea conviction is not subject to collateral attack when all that can be shown is a formal violation of Rule 11 because such a violation is neither constitutional nor jurisdictional).³⁵

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

³⁵ *Accord Hutto v. State*, 387 S.C. 244, 250, 692 S.E.2d 196, 199 (2010) ("While we do not believe Agent Harris's disclosure violates the statute, assuming *arguendo* there was a violation, such violation would not warrant the exclusion of the evidence obtained from the information disclosed. Section 24-21-290 only creates a statutory privilege and does not implicate a constitutional right; therefore, the exclusionary rule does not apply"); *State v. Huntley*, 349 S.C. 1, 562 S.E.2d 472 (2002) ("Exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the defendant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures").

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

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

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

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

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

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

will not consider on the merits successive habeas corpus petitions attacking the competence of prior habeas corpus counsel which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had prior habeas corpus counsel had similar advantages); *cf. State v. Balliette*, 805 N.W.2d 334, 346-47 (Wis. 2011), *cert. denied*, 132 S. Ct. 825 (2011). *Accord Strickland*, 466 U. S. at 689, 104 S.Ct. 2052 (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way”).

He has also faulted initial PCR counsel for filing an Application raising broad and general allegations of ineffective assistance of counsel and waiting to amend at the PCR hearing. However, this is no different than many PCR cases, including capital PCR cases handled by his current counsel and Robertson’s counsel in his federal habeas corpus proceeding. *See, e.g., Binney v. State*, 384 S.C. 539, 683 S.E.2d 478 (2009); *cf. Arnold*, 309 S.C. at 173-74, 420 S.E.2d at 842-43. Also, the PCR Judge correctly found that “at the hearing, counsel identified a dozen different theories under which trial counsel had rendered ineffective assistance. Following the evidentiary hearing on these issues, Judge Few issued an Order, 106 pages in length, discussing all of these grounds and denying them.” **App. 4438**. The record likewise supports the finding that “[i]t is obvious that there was a lot of work done” by the initial PCR attorneys. **Supp. App. 2**.³⁸

³⁸ Moreover, counsel’s allegations were very similar those raised in death penalty PCR cases where the inmates have been represented by attorneys whom Robertson’s current counsel would concede are competent. *Id.* Also, Robertson erroneously suggests that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases establish the appropriate standard for counsel’s investigation and representation of trial, appellate and collateral counsel. However, the PCR judge properly found that his contention is wrong. **App. 4439-40**. The ABA Guidelines are merely guidelines for trial and appellate counsel, at best, and trial counsel need not comply with them to render objectively reasonable representation. *Bobby v. Van Hook*, 558 U.S. 4, 8-9, 130 S.Ct. 13, 17 (2009). *See also Id.* at 13-14, 130 S.Ct. at 20 (Alito, J., concurring); *Montejo v. Louisiana*, 129 S.Ct. 2079, 2087 (2009) (the Constitution does not

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

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

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

This Court has had the opportunity to observe Mr. Brown in civil and criminal cases over the last ten (10) years. The Court is aware of his substance abuse problem and treatment for that problem. The Court has not observed any instance when a substance abuse problem has interfered with his competency or diligence in representing his clients effectively. This Court has not been made aware of any instance in which Mr. Brown's representation of a client was ineffective because of substance abuse.

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

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

Supp. App. 2.

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

Robertson further contends that the PCR judge's finding that "the only way for it to determine whether prior collateral counsel's performance was incompetent is to hold an

evidentiary hearing, where prior collateral counsel could testify as to their investigation and what issue(s) they may have investigated but did not pursue at the evidentiary hearing” (App. 4441) is “irreconcilable” with findings elsewhere in the Order that original collateral counsel were both qualified and competent. (Citing App. 4433-34; 4437-38). However, the PCR judge’s findings are neither irreconcilable nor do they violate federal law. As discussed, the finding that Mr. Brown was qualified was based upon the facts that Judge Few’s September 9, 2005 Order appointing Mr. Brown specifically states that “[t]he defendant contends that he is indigent and in need of an attorney as contemplated by law;” and that counsel’s appointment was confirmed at the September 23, 2005 hearing, at which Mr. Brown, Robertson and counsel for Respondent were present.

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

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

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

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

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

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

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

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

The PCR judge found that:

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

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

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

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

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

certiorari.

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

CONCLUSION

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

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June 8, 2015.

By: 
ATTORNEYS FOR RESPONDENT

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

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

JAMES ROBERTSON,

Petitioner,

vs.

THE STATE,

Respondent.

PROOF OF SERVICE


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

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

This 8th day of June, 2015.



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