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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2012-205909

JAMES ROBERTSON ..... *Petitioner*

v.

STATE OF SOUTH CAROLINA ..... *Respondent*

REPLY BRIEF OF PETITIONER

KEIR M. WEYBLE
SC Bar No. 12075
Cornell Law School
158-B Myron Taylor Hall
Ithaca, NY 14853
607 255 3805

EMILY PAAVOLA
SC Bar No. 77855
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803 765 1044

Counsel for Petitioner

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument in Reply 1

I. RESPONDENT'S BRIEF IS BUILT AROUND A COLLECTION OF MISCHARACTERIZATIONS THAT SHOULD NOT BE PERMITTED TO DISTORT THE REAL QUESTIONS BEFORE THE COURT 1

A. Robertson has never suggested that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), imposes any mandate upon this or any other state court 1

B. Respondent's concerns about finality and increasing litigation volume should be aimed at *Martinez* itself, not at Robertson 2

C. Respondent's account of South Carolina prisoners' access to federal review is misleading 4

D. Respondent's speculation over Robertson's motives in this appeal is misguided, but the underlying question deserves to be answered 6

II. ROBERTSON'S APPEAL IS PROPERLY BEFORE THE COURT 8

Conclusion 10

TABLE OF AUTHORITIES

CASES

Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) 1

Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000) (en banc) 5

Ford v. Wainwright, 477 U.S. 399 (1986) 4

Hittson v. GDCP Warden, 759 F.3d 1210 (11th Cir. 2014) 5

Juniper v. Davis, 737 F.3d 288 (4th Cir. 2013) 6

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

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

Strickland v. Washington, 466 U.S. 668 (1984) 5

STATUTES

28 U.S.C. § 2254(d) 7

28 U.S.C. §§ 2261-2266 4

OTHER

http://www.washingtonpost .com/wp-srv/aponline/20010120/aponline184839_000.htm 5

ARGUMENT IN REPLY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

While the standard Respondent so confidently articulates does appear daunting, it is not the law of the Fourth Circuit. Rather, it is derived from *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (en banc), in which a 6-5 majority of the *en banc* Eleventh Circuit – over vigorous dissent – embraced the idiosyncratic "no competent counsel" requirement Respondent now touts. What Respondent omits, however, is that the *Chandler* majority's approach – which is in obvious tension with *Strickland v. Washington*, 466 U.S. 668 (1984) – has never proliferated beyond the Eleventh Circuit, and has never been endorsed or adopted by the Fourth Circuit (or the Supreme Court[2]). There is thus no good reason to assume that Robertson or other South Carolina prisoners would be forced to satisfy the especially "demanding standard" Respondent has hand-selected from a federal court of appeals whose jurisprudence does not govern them. It is much more likely that Robertson and others from this state would simply be required to make the facially less onerous showing

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

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

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

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

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

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

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

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

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

him in federal district court.

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

KEIR M. WEYBLE
SC Bar No. 12075
Cornell Law School
158-B Myron Taylor Hall
Ithaca, NY 14853
607 255 3805

EMILY PAAVOLA
SC Bar No. 77855
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
803 765 1044

Emily C. Paavola
Counsel for Petitioner

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CERTIFICATE OF SERVICE

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

Emily C. Paavola

Emily Paavola
Attorney for Petitioner