VOLUME IX OF X

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

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

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-205909

APPENDIX

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about Earl, Sr.'s treatment, he recalled that Earl was treated for a shorter period of time and later than the rest of the family. Also, much of the records from Meyer related to Terry and her problems. Apart from the matters testified to by Ms. Cascio, Mr. Hancock indicated that the defense did not discover any evidence of physical abuse by Earl.

Both attorneys testified about their other steps to develop a mental health defense, and both were clear that they provided each of their experts with the records in their possession; they never withheld any records from their experts; and none of their experts ever claimed that he or she could not reach an opinion without additional records or information. Robertson did not present any expert testimony in support of this allegation, although he did introduce additional mental health records as Applicant's Exs. 1-3.

Based upon the present record, the Court finds that Robertson has not established either deficient performance or resulting prejudice under *Strickland*. First, the Court finds that Robertson's attorneys – with the assistance of their social worker – made an objectively reasonable investigation into the mental health history of both Robertson and his family, as required by *Strickland*, 466 U.S. at 690-91. *See also Wiggins*, 539 U.S. at 521-22. The Court likewise finds that counsel made an objectively reasonable presentation of this evidence.

While trial counsel could have presented the jury with a more complete picture of the family's mental health history, the presentation made was quite extensive. Further, the Court finds that it was reasonable for them to rely upon their experts to develop and focus upon the most salient aspects of the mental health history. The principal witness that counsel chose to

develop this information through was Ms. Cascio.[53] The Court does not find any reason to believe that the decision to present no more of the family's mental health history than counsel presented was deficient performance.

The Court also finds that Robertson has failed to prove any prejudice with respect to the current allegation. The only credible evidence is that all of the records counsel had were provided to their experts, and that no expert complained that he or she lacked sufficient records upon which to reach an opinion. The Court further finds that Applicant's Exs. 1-3 do not provide it with a sufficient basis to conclude that Robertson has proved prejudice under *Strickland*.[54] Moreover, there was overwhelming evidence of Robertson's guilt for both murders and proof of the statutory aggravating circumstances.

Also, the evidence presented at the PCR hearing does not support any additional statutory or non-statutory mitigating circumstance apart from those which were submitted to the jury, as the result of the evidence presented by trial counsel. *See* § 16-3-20(c)(b) (1) – (2), (6) and (7). Therefore, the Court finds that Robertson has not established that "there is a reasonable probability that ... the sentencer ... [can] conclude[ ] that the balance of aggravating and mitigating circumstances [do] not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins*, 539 U.S. at 537.

GROUND 10(a)(12)

[53] Therefore, the Court finds that the present allegation and the ineffectiveness claims relating to Ms. Cascio are intertwined.

[54] One of the primary matters focused upon by Robertson at this hearing was that the notes for some sessions in Applicant's Exs. 1-3 did not reflect any complaints by the victims centered on Robertson or Chip. In that regard, the Court finds that this position is not only inconsistent with the recollection of trial counsel and the extensive trial testimony discussed *supra*, it is also inconsistent with Robertson's own testimony before this Court.

Robertson's remaining allegation is that trial counsel were ineffective for presenting Ms. Cascio as an expert witness. Robertson raised several issues about counsel's decision to employ Ms. Cascio at the PCR hearing. Aside from her lack of experience in testifying, his principal complaints concerned the information elicited by the State on its cross-examination of her about notes of her conversations with Robertson. It was Robertson's position that the cross-examination by the State should have been reasonably foreseeable to counsel. For the following reasons, the Court finds that each of his claims relating to counsel's decision to call Ms. Cascio are without merit.

The State began its cross-examination of Ms. Cascio by focusing upon remarks Robertson made to her during a November 30, 1998, interview about other bad acts and the family social history. Robertson contends that the prosecution was able to elicit evidence concerning prior bad acts, such as stalking (*e.g.*, Tr. pp. 3000-3003); that his parents were "clueless" about his drug abuse (Tr. p. 2962); that he had a bad work history; that he stole his father's credit cards; that he and his father were, at one point, about to have a confrontation involving the use of knives; Robertson did not like college, it was forced upon him and he rebelled against it; "he [my father] put the work ethic in me [but] wanted to take it out of me by sending me to college;" that his parents' ideal was for him to attend college from eighteen to twenty-two and marry and have children by age twenty-five; by the time his parents realized that he would not do the great things they wanted him to do, it was too late; he failed out of college to prove a point; "what hurt most was his [father's] image;" "she (his mother) always tried to look out for me;" "she used to subsidize my income straight out of her pocket;" "love was financial in

terms to [his father];" and other comments concerning the social history, such as the turbulent relationship he had with Earl, Sr. Tr. pp. 2955-70; 2979-3008.

Robertson also complains of the damage to the defense's case by the State's cross-examination regarding admissions he made to Ms. Cascio concerning the facts of the crime and his activities around the time of the murder, including admissions that:

- he had taken 250-280 mg of Ritalin over the course of the previous evening and the morning of the murders;
- Meredith Moon and Erin Savage were at the residence for approximately two hours that morning;
- he and Moon snorted 40 mgs. of Ritalin at that time;
- he continued to use Ritalin after they left;
- he talked to Chip for about two hours about coming home for Thanksgiving, and that Chip was dropping out of school;
- he later called Moon and spoke to her on two or three occasions;
- he asked Moon to give him $ 75.00 to get Chip home and, although she wouldn't give him money, she agreed to drive up and get Chip;
- Moon was infatuated with him and would have done anything he asked;
- After Moon came to his house, they began talking about the problems surrounding Chip coming home and "somehow it led to I'm going to do it;"
- he discussed which bat to use;
- he decided not to use the wooden one because it was autographed and he did not want to ruin it;
- he condensed two bottles of Tilex;
- he sat in his room and waited for his father to get in the shower before killing his mother because there would be noise;
- he took the phone off of the hook and laid a knife in the hallway in case his father came in;
- he went in the bedroom and started struggling with his mother, who began screaming for his father;
- "it was getting at me to hear her screaming;"
- he was "in a rage like a maniac;"
- he came downstairs and said "one down, one to go;"
- he laid the bat at the top of the stairs, sat and waited with the hammer "like I was standing on the other side of myself watching me;"
- it was "like someone else committing the crime and I was watching;"
- he sprayed Tilex in his father's eyes and buried the hammer in his head;
- his father "put up a fight with the hammer stuck in his head;"

- eventually, his father fell to the ground and Petitioner hit him 200 times with the hammer and bat;
- he said that "22 years of hatred came out;"
- it was "overkill" and he "went on and on and on and on;"
- he then went into the bedroom and checked on his mother;
- he hit his mother in the head with the hammer to make sure that she was dead;
- Moon thought he was going to kill her;
- he later heard a noise upstairs and it was his father breathing into the carpet;
- he wondered "how is he still breathing;"
- he "went to find the drill to end the matter;"
- he then took the bat upstairs to beat his father again and he kicked him with his toe to make sure he was dead;
- he cleaned up, took the money and car keys and packed stuff to dump;
- he said that "Meredith's testimony wasn't good enough by itself;"
- he broke the window downstairs to make it look like a robbery;
- a man pulled up across the street and he waived then got in car and left;
- he explained how he used his father's credit card, and how he stopped and bought Neosporin for his finger;
- he was going to get Chip and bring him to South Carolina, where they would discover his parents;
- no one would notice that his parents were missing;
- what he had done would not be a surprise to his brother;
- he called home and realized that someone had found the bodies and put the phone back on the hook;
- he thought he was "too smart to let this happen," meaning getting caught;
- Meredith was "running her mouth" but he never confessed; and
- he killed his mother because he couldn't live with her knowing that he killed his father.

Tr. pp. 3009-25.

Finally, the Court would note that, before the State began cross-examining Ms. Cascio about Robertson's admissions related to the murders, she was specifically asked whether she took Robertson's statements about the crime into consideration informing her evaluation of him. Ms. Cascio replied, "I was looking at early childhood history that could have led him to that point;" and she agreed that she factored Robertson's statements into her assessment. Tr. p. 3010, ll. 10-22.

Mr. Hancock testified that Ms. Drucie Glass and the Center for Capital Litigation, which specialized in providing assistance to defense lawyers trying capital cases, recommended that the defense hire Ms. Cascio as a social worker and they hired her. Counsel were well aware of her limited experience and that she had never testified as a forensic social worker. *See* Applicant's Ex. 4 (curriculum vitae for Toni A. Cascio), Tr. pp. 2852-55. However, another social worker with experience (Ms. Glass) and the Center for Capital Litigation had recommended Ms. Cascio. Also, counsel had met with Ms. Cascio a number of times over the course of a year to prepare her testimony, and Mr. Hancock did not report any problems in terms of her gathering information for the social history of Robertson. Nor were counsel able to locate a more experienced social worker.

It was Mr. Hancock's recollection that counsel objected to production of Ms. Cascio's notes, which contained a number of admissions by Robertson with which Ms. Cascio was cross-examined by the State at trial. Both attorneys, however, made the joint decision to present her as a witness even though they were aware that her notes would have to be disclosed to the prosecution because counsel felt that she was a necessary part of the defense's case in mitigation. Mr. Hancock was not happy with the State's cross-examination of Ms. Cascio and felt that she hurt the defense. However, he testified that she had provided the jury with a good deal of mitigating evidence on direct examination.[55]

[55] Mr. Pope characterized Ms. Cascio as the one defense expert who could pull together the various matters testified to by the other experts for the jury's benefit.

As discussed, Mr. Boyd mistakenly thought that Mr. Hancock had already hired the defense experts before he was appointed.[56] However, Mr. Boyd testified that he did not object to what had been done with regard to the experts. Ms. Cascio was hired to investigate Robertson's mental health history and his family history. In Mr. Boyd's estimation, it was important to develop Robertson's background and mental health problems in order to find a reason for what had happened. Mr. Boyd also testified that the defense received a copy of Ms. Cascio's report shortly before trial; and Robertson introduced Applicant's Ex. 6, which is a March 1, 1999 letter from Ms. Cascio to Mr. Hancock providing counsel with a copy of the preliminary report.

Mr. Boyd further testified that Ms. Cascio was the last defense expert who testified. He felt that all of the other defense experts were good witnesses. Although Ms. Cascio was able to provide beneficial information to the jury on direct examination, Mr. Boyd felt that this benefit was overshadowed by the damage resulting from the State's cross-examination of her.

Mr. Boyd did not recall whether he was aware, at the time of the trial, that Ms. Cascio had never testified before Robertson's trial. However, Mr. Boyd noted that sometimes it is not a good idea to hire someone with previous experience in testifying and this would not be his main reason for not using an expert witness. As with Mr. Hancock, Mr. Boyd did not recall consenting to the disclosure of Ms. Cascio's notes (Applicant's Ex. 7). Likewise, Mr. Boyd did not recall when he became aware of the notes;[57] but he testified that he would have reviewed them before disclosing them to the State. Mr. Boyd testified that he met with Ms. Cascio on

[56] Both the Order appointing Mr. Hancock and the Order appointing Mr. Boyd were filed in the York County Clerk of Court's Office on the same date. *See* Respondent's Exs. 1-2.

[57] Mr. Boyd's recollection was that he became aware of the admissions in the notes either shortly before or during the trial, and he did not recall any conversations with Ms. Cascio between December 1998 (the date of her last interview with Robertson) and March 1999, but admitted that Ms. Cascio may have told him about the notes.

more than two occasions and that co-counsel was not present on at least one occasion. Counsel corroborated that he and co-counsel decided to use her as a witness at trial, even after they learned that they would have to disclose her notes, because of the importance of her testimony to the defense.

Robertson testified that counsel had advised him to fully cooperate, and be honest with the defense experts, and he did so.

A. Cascio's lack of experience.

Robertson's first complaint is that counsel were ineffective for employing Ms. Cascio because she had never testified before his trial. The Court rejects this allegation. In *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), the Supreme Court held that under some circumstances, a state must assure an indigent defendant "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

However, Robertson did not have a constitutional right to insist on the appointment of any particular expert. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); *Walton v. Angelone*, 321 F.3d 442, 464 (4th Cir. 2003); *Wilson v. Greene*, 155 F.3d 396, 401-02 (4th Cir. 1998). Also, "[t]he Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." *Wilson*, 155 F.3d at 401; *see also Joseph v. Angelone*, 184 F.3d 320, 327 (4th Cir. 1999); *Pruett v. Thompson*, 996 F.2d 1560, 1573 n.12 (4th Cir.1993); *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992); *Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir. 1989) (per curiam), *cert. denied*, 492 U.S. 936 (1989).[58]

[58] Even if this Court were to conclude that such a right exists under the Constitution, it would be prohibited by *Teague v. Lane*, 489 U.S. 288, 311-13 (1989), from applying the rule here. *See Fisher v. Angelone*, 163 F.3d at 853. *See also Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167,

Further, even though *Ake* refers to an "appropriate" evaluation, this Court finds that it is doubtful "that the Due Process Clause prescribes a malpractice standard for a court appointed psychiatrist's performance. Rather, the decision in *Ake* reflects primarily a concern with ensuring a defendant access to a psychiatrist or psychologist, not with guaranteeing a particular substantive result." *Wilson*, 155 F.3d at 401. Yet, "[e]ven if *Ake* 's use of the term 'appropriate' suggests that an examination must satisfy some minimal level of professional competence," the Court finds that Ms. Cascio's met that standard here. *See Wilson*, 155 F.3d at 402.

The Court finds that Robertson cannot meet his burden of proving deficient performance by merely relying on the fact Ms. Cascio had not testified before her testimony in Robertson's case or was otherwise inexperienced. The Court finds that experts are not advocates. Rather, they present medical, technical, scientific or other opinions related to their field of expertise. Nor is Robertson correct in asserting that it cannot be a reasonable under *Strickland* for counsel to employ an expert who is qualified in his or her field of expertise but legally inexperienced.

The Court finds that there are both advantages and disadvantages to employing experienced expert witnesses. Some expert witnesses, who have testified in numerous death penalty cases, are open to effective cross-examination by the State about the biases and prejudices that the witnesses bring into a trial of this nature. On the other hand, an expert who does not have a "track record" may not be subject to similar impeachment.

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178 (1990) ("In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions"); *Gibson v. State*, 355 S.C. 429, 586 S.E.2d 119 (2003) (applying *Teague* to determine whether *Sandstrom v. Montana*, 442 U.S. 510 (1979), should be applied retroactively on collateral review).

Moreover, if Robertson's reasoning is followed to its logical conclusion, then counsel could not employ any social worker (or other expert), who had not previously testified in capital cases. This is an unworkable rule, and the Court finds that it is not required by the Constitution. Indeed, the United States Supreme Court rejected a similar claim in the context of the inmate's ineffective assistance of counsel claim in *Cronic*, 466 U.S. 648. The Court in *Cronic* refused to apply a presumption of prejudice to the representation by a young, inexperienced attorney whose principal practice was in real estate, and who was participating in his first jury trial. In doing so, the Court observed that "[e]very experienced criminal defense attorney once tried his first criminal case." *Cronic* 466 U.S. at 665.

Even assuming *arguendo* that Robertson had established that counsel were ineffective for hiring Ms. Cascio based solely upon her lack of experience, the Court finds that Robertson has failed to prove any prejudice because he did not present a social worker or any other evidence of mitigating information that a more experienced social worker would have found which was not discovered by Ms. Cascio. In the absence of evidence to support any additional statutory or non-statutory mitigating circumstance(s), apart from those which were submitted to the jury as the result of the evidence presented by trial counsel (*see* § 16-3-20(c)(b)(1) – (2), (6) and (7)) the Court finds that Robertson has not established that "there is a reasonable probability that ... the sentencer ... [can] conclude[ ] that the balance of aggravating and mitigating circumstances [do] not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins*, 539 U.S. at 537.

B. **Counsel's agreement to provide Ms. Cascio's notes to the State.**

Robertson contends that trial counsel were ineffective for agreeing to provide and providing Ms. Cascio's handwritten notes to the prosecution. As discussed, it was Mr.

Hancock's recollection that the defense opposed producing the notes but that the trial judge ordered the defense to produce them.

As discussed, Mr. Hancock recalled that the defense only disclosed the notes after the trial judge ruled that disclosure was required. A review of the pretrial motions hearings reflects that the defense did object to production of any reports of experts under the reciprocal discovery provisions act of Rule 5(b), S.C. R. Crim. P., until such time as the prosecution had fully complied with the defense's request for discovery under Rule 5(a) and until the defense could complete their testimony. The transcript from those proceedings further reflect that the trial judge required reciprocal discovery. *See* 7/20/98 r. pp. 4-20; 2/12/99 Tr. pp. 3-4; 8/16; Tr. pp. 74-78 (9/25/98 hearing); 79-82; 86-87 (11/2/98 hearing); 90-103; 116 (12/4/98 hearing).

Before the state began its cross-examination of Dr. Pincus in the sentencing phase of the trial, Mr. Brackett asked for Dr. Pincus' notes and underlying data. After the trial judge ordered that they be provided, the State requested a break to review those materials, in order to prepare for cross-examination; and the trial judge granted his request. Mr. Brackett then noted that, "for the sake of expediency," that the defense should produce any similar information for "any other experts that are going to testify." The defense did not object, and Mr. Boyd stated that "I thought we took a big box of all that stuff to your office the other day." Tr. pp. 2505-06.

After Dr. Pincus' testimony, the trial judge asked if the State needed "any further help in getting what they are entitled to." (Sic). Mr. Brackett, again, stated that, "if [he] could get all of the information from any expert they have who is going to testify, [he] will have a chance to review the other two over lunch and that will be plenty of time." Tr. pp. 2531. Mr. Hancock stated that the defense was doing everything it could to provide the information. The trial judge

indicated that, if judicial intervention was necessary, he would bring in the experts and Order them to determine whether they were going to testify. In response to the trial judge's inquiry, Mr. Hancock stated that "if we haven't, we will get them, your Honor." When the trial judge asked if Ms. Cascio's notes had been produced, Mr. Hancock said no, and the trial judge stated, "I think they've got a right to have it to cross-examine." Tr. pp. 2532 l. 2 – p. 2533, l. 23.

During an *in camera* break after Dr. Evans had testified, then-Solicitor Pope noted that the State had not yet received Ms. Cascio's underlying data. Mr. Boyd explained that Ms. Cascio had left her notes in Columbia and had gone to get them and bring them to court. Tr. pp. 2604-05.

Ms. Cascio testified the next day. Early in the State's cross-examination of her, Mr. Pope asked for and received a copy of her notes, without objection. Tr. pp. 2897, ll. 1-16.

Rule 705, SCRE, provides that:

> The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.[59]

Thus, the Court finds that Rule 705 "permits the cross-examination to require the expert to reveal otherwise inadmissible underlying information before the jury, subject to a Rule 403, SCRE prejudice analysis. *See United States v. A&S Council Oil Co., et al.*, 947 F.2d 1128, 1134 (4th Cir. 1991). *See also State v. Slocumb*, 336 S.C. 619, 821 SE2d 507 (Ct. App. 1999). Moreover, the Court finds that the record demonstrates that the trial judge ordered production of

[59] The notes to Rule 705 state that "The rule is identical to the federal rule. It differs from former Rule 43(m)(4), SCRCP, and former Rule 24(d), SCRCrimP, which contained the phrase 'without prior disclosure of' in place of the phrase 'without first testifying to.'"

all notes of the defense experts, for the purposes of the State's cross-examination, and that his ruling is consistent with this Court's construction of Rule 705. In other words, the underlying notes or other data must be produced if the expert witness testifies. Further, this Court would not permit any exception because the purpose of disclosure is to counteract the liberality of the Rule, see *A&S Council Oil*, 947 F.2d at 1134; *United States v. Gillis*, 773 F2d 549, 553-54 (4th Cir. 1985),[60] and Ms. Cascio clearly testified that the statements by Robertson pertaining to the murders, as reflected in her notes, was considered by her in arriving at her opinion. Tr. p. 3010, ll. 10-22. Under these circumstances, the Court finds that Robertson cannot show any deficient performance because disclosure of the notes was objectively reasonable under *Strickland*.

C. **Counsel's failure to discover Robertson's admissions about the crime in enough time to permit counsel to employ a different social worker.**

Robertson contends that counsel was ineffective for failing to discover Robertson's damaging admissions about the crime in enough time to permit counsel to employ a different social worker. The Court, however, finds that Robertson has not proved that trial counsel's performance was deficient in this regard. The only evidence before the Court is that counsel only learned about the notes shortly before trial. However, the Court finds that it was not unreasonable for counsel to fail to anticipate that Ms. Cascio's work on the case would result in her asking Robertson questions concerning the case or for otherwise failing to instruct her as to how to conduct an appropriate social history assessment. To the contrary, the reason counsel employed her as an expert witness was to take advantage of her expertise in the area of

[60] This construction of Rule 705 appears to be consistent with the changes discussed in the Notes to Rule 708, SCRE. Also, the Court would note that both *A&S Council Oil* and *Gillis* were cited with approval in *Slocumb*, 336 S.C. 619, 821 SE2d 507.

performing a social history. The Court finds that *Strickland* does not require counsel to instruct defense experts on how they should conduct their evaluations in their areas of expertise.

Nor was counsel ineffective in failing to anticipate that Ms. Cascio would seek information from Robertson about the facts of the crime in order to have enough information to formulate her opinion as to the social history, or that he would freely discuss the crime with her.[61] While an attorney can be expected to learn that the client has relayed potentially damaging information to an expert, counsel is not required to anticipate everything that can possibly go wrong in the client's interaction with an expert in the months before a trial.

Further, while Robertson has characterized Ms. Cascio's inquiry into the facts of the case as going beyond the scope of her employment, *i.e.*, to perform a social history assessment of Robertson, the only evidence is Ms. Cascio's contrary testimony that Robertson's admissions relating to the murders were considered by her in formulating her opinion that at the time of the crimes, Robertson might have felt like violence was his only alternative. *See* Tr. pp. 2886-88; 2949-52; 3010, ll. 10-22. Robertson likewise did not present testimony from any social worker that he or she would have been able to work on Robertson's case. In the absence of any testimony that this information is unnecessary or not part of a proper social history in a capital case, the Court finds that Robertson has failed to prove either deficiency or prejudice resulting from counsel's failure to learn of Robertson's admissions earlier in time to hire another social worker or find a suitable alternative to presenting Ms. Cascio as a witness. *See Glover,* 318 S.C. 496, 458 S.E.2d 538. Finally, the Court notes that two of Robertson's mental health witnesses, Dr. Pincus (Tr. p. 2472) and Dr. Evans (Tr. pp. 2545-46) relied upon the information gathered by

[61] In this regard, the Court would note that Robertson's current allegation may have simply resulted from his own decision to discuss the murder freely.

Ms. Cascio, at least in part, in reaching their conclusions about his mental status at the time of the offense. Under the circumstances, the Court finds that Robertson has not proven either deficient performance or prejudice under *Strickland*.

D. Counsel's presentation of Ms. Cascio as a witness.

Robertson contends that it was reasonably foreseeable that the State would engage in the lines of cross-examination discussed above; and, therefore, counsel were ineffective for presenting Ms. Cascio as a witness. The Court rejects this allegation because the Court finds that Robertson has failed to prove any prejudice resulting from the State's cross-examination of her. *See Strickland*, 466 U.S. at 687 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed").[62]

Here, the Court finds that, upon discovering the existence of Ms. Cascio's notes, counsel was faced with the choice of either producing the notes and calling Ms. Cascio as a witness or not presenting her as a witness.[63] Moreover, if counsel was going to accomplish the previously determined strategy of having all of the evidence in mitigation tied together for the benefit of the sentencing jury, they had to call her as a witness. Thus, counsel was forced to weigh the benefit

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[62] The Court does not find that Robertson has met his burden of proving that counsel's performance was deficient; and, in light of the facts discussed throughout this allegation, the Court specifically finds that counsel were not deficient. However, the remaining portions of this Order only discuss the lack of prejudice.

[63] For the reasons set forth in this section as well as the reasons set forth in connection with the preceding sections of this allegation, the Court rejects Robertson's contention that counsel were ineffective for failing to move *in limine* to bar production of the portion of the notes relating to Robertson's admissions to the crimes. Once the decision to call her was made, the notes had to be produced because the admissions to the murders formed part of the basis of her opinion on Robertson's social history assessment. *See* Tr. p. 3010, ll. 10-22.

to the defense from presenting her as a mitigation witness against the potential harm to the defense resulting from the State's cross-examination of her about the admissions that Robertson had made. In this regard, the Court finds that counsel's decision was much like the decision this Court must make in determining whether there is prejudice under *Strickland*.[64] After this Court's review of the record, the Court finds that there is no reasonable probability of a different result but for counsel's decision to present Ms. Cascio as a witness.

First, the Court finds that both lines of inquiry at issue in this allegation only took place after the State had already cross-examined Ms. Cascio, at length, about her findings to which she had testified on direct examination. *See* Tr. pp. 2895-2955. Second, Ms. Cascio's testimony was only part of a lengthy case in mitigation, but it served to tie all of the other evidence together. Third, the Court finds that the statements concerning his family's mental health and social history clearly were cumulative to other evidence in the record, including – but not limited to – Ms. Cascio's testimony on direct examination, the testimony concerning his involuntary admission to the William S. Hall Institute, and the testimony of Mr. Meyer.

The record is replete with evidence of the strained, tumultuous and confrontational relationship Robertson had with his parents, especially his father. Much of that history is discussed throughout this Order, and Roebrtson discussed similar evidence in his PCR testimony. Moreover, the Court finds that this was a proper line of cross-examination. The Court also finds that the State's inquiries concerning evidence of other bad acts was a proper topic for cross-

[64] In order to make such an assessment, counsel had to look at Moon's testimony, as well as Dr. Sexton's testimony and other evidence presented by the prosecution in both phases of the trial relating to proof of their client's guilt of the murders and the alleged statutory aggravating circumstances. This evidence included the manner in which Robertson committed the murders. Additionally, counsel had to consider that the State was going to be allowed to present Dr. McKee as a reply witness.

examination because it reflected upon Robertson's character. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), *rev'd. on other grounds.*, 476 U.S. 1 (1986) ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, the trial transcript clearly reflects that counsel objected when the State began cross-examining Ms. Cascio about Robertson's involvement in prior stalking incidents. However, the trial judge overruled the objection and permitted the examination. Also, Ms. Cascio took this information into account in forming her opinion. *E.g.*, Tr. pp. 3000-3003.

Moreover, Robertson cannot show any conceivable prejudice resulting from the sentencing phase jury hearing this information. This evidence of other bad acts was cumulative to evidence of bad acts discussed elsewhere in the Order. It was likewise cumulative to evidence presented by the State that Robertson had previously burglarized his neighbor's home and stole over $15,000.00 worth of valuables, including a car, blank checks and credit cards, Tr. pp. 2107-20.[65] Also, the trial judge's sentencing phase charge included a limiting instruction, in which he

[65] Based upon that crime and his subsequent activities with the credit cards, Robertson was charged with a series of offenses to which he pled guilty. The State introduced the indictments and subsequent sentencing sheets into evidence, as follows: State's Ex. 191, an indictment and sentencing sheet to burglary in the second degree; State's Ex. 192, an indictment for burglary in the first degree and guilty plea and sentencing sheet for burglary in the second degree; State's Ex. 193, an indictment and sentencing sheet for grand larceny; State's Ex. 194, an indictment and sentencing sheet for

instructed jurors that, before they considered any such evidence, they must first find that the State had proved that Robertson committed any bad acts beyond a reasonable doubt. Even if the jury found that the State had met its burden of proof, the evidence could only be considered as evidence of "his character in general." The evidence could not be considered as proof of any aggravating circumstances. Tr. pp. 3217-18. He charged that prior convictions could only be considered as character evidence as well. Tr. p. 3218.

The trial judge further instructed the jury that, in considering whether to recommend a sentence of death, it must first find the existence of one or more aggravating circumstances beyond a reasonable doubt. He also instructed jurors that they could only consider 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. Tr. pp. 3203-26. In light of the sentencing phase instructions, the Court finds that the challenged evidence was not prejudicial.

The Court further finds that Robertson was not prejudiced by the State's cross-examination concerning Robertson's admissions concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury. His

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forgery; State's Ex. 196, an indictment and sentencing sheet for financial transaction card fraud; State's Ex. 197, an indictment and sentencing sheet for financial transaction card fraud. Tr. p. 2119. Robertson gave a statement to the police in which he attributed the crimes to a drug problem. Tr. pp. 2117-19; State's Ex. 190.

co-defendant, Meredith Moon testified in the guilt phase that she met Robertson "[a]bout mid-'95," when he was dating her friend Erin. They "partied together" and "hung out at his apartment." She began to get to know him better in the fall of 1997, when they worked together at Dinkins in the food court at Winthrop. Tr. pp. 1575-76.

On the morning of Monday, November 24, 1997, Moon picked up Robertson, and they went to Charlotte, North Carolina, where they shopped. That night, she and another friend went to the Outback Steakhouse and ate. There, she saw her friend Erin, sometime between 11:30 p.m. and 12:30 a.m. on November 25. Later, Erin came by her house, picked her up and the two women went to Erin's. They "hung out" for several minutes before they went to Robertson's house. Tr. pp. 1576-78.

When she first went to visit him in the early morning of November 25,[66] his parents were upstairs and she did not see them. Neither she nor Robertson were drinking but they snorted "[a] couple of lines" of Ritalin. She and Erin eventually left and Erin drove her home after Moon retrieved her purse from Erin's apartment.[67] Tr. pp. 1578-81.

Moon could not sleep because of the effects of the Ritalin. Between 3:00 and 3:30 a.m., she received a call from Robertson, who wanted to use Moon's mother's credit card so that he could buy a bus or plane ticket for this brother, Chip, and bring Chip home for Thanksgiving.

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[66] By then, she estimated that it was between 12:30 and 1:30 a.m. Erin wanted to show Robertson a pool stick that she had bought as a gift for her boyfriend's birthday. Tr. p. 1579.

[67] The Court finds that her testimony is substantially corroborated by the guilt phase testimony of Erin Savage. Savage added that they parked off to the side of the house on the left-hand side of the road, in order not to wake anyone. She and Moon entered the house through the downstairs door leading to the basement. Robertson was "cleaning" when they arrived. Tr. pp. 1537-42.

Moon, however, told him no.[68] Moon subsequently received another call from Robertson around 5:00 a.m. He told her to come to his house and "bring some traveling clothes." She was under the impression that they were going to Philadelphia to bring Chip home. Tr. pp. 1581-82. After telling her father a lie about where she was headed, she drove to Robertson's home in her Honda Accord. Again, she entered the home through the rear door, where Robertson was waiting for her. Tr. pp. 1582-85.

She sat down on the sofa in the basement, and they talked. During their conversation, Moon saw a note on the coffee table that had a list of things to do.[69] Also, Robertson revealed his plan to kill his parents. He told her that he was going to wait until his father's alarm clock rang and his father got into the shower. Then, he was going to kill his mother. Moon unsuccessfully tried to talk him out of this plan, but he would not listen. Instead, he told her to put socks on her hands; "take two bottles of Tilex and pour them into one" bottle. Moon did as she was told, and the two snorted Ritalin. She did not know how much they snorted but agreed that it impaired her judgment. Tr. pp. 1584-97; 1623-28; 1644-46.[70]

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[68] Erin had received a call "probably around 3:30" from Robertson. He wanted to know if Moon was there, and Erin said no. He then asked if Moon's father would be home if he called her house, and Erin did not know. Tr. p. 1542.

[69] This list (State's Ex. 25) had several things listed on it, such as "trash bags" and "need to scrub out the shower for blood." Tr. pp. 1624; 1636. She further testified that, at Robertson's direction, she also later wrote a list of things to do, such as "alarm clock, wipe blood from downstairs doorknob and dispose of yard rake. She stated that these were things Robertson planned to do. Tr. pp. 1636-38; 1643.

[70] Robertson had previously told her on many occasions that he planned to kill his parents, both when he was sober and when he was drunk. Also, he explained that his motive was the insurance money, which Moon said was "a couple of million" dollars. As discussed in **Ground 10(a)(3)**, *supra*, a number of sentencing phase witnesses testified about similar conversations. Tr. pp. 2155-57; 2163-68; 2177-78; 2187-89; 2202-03; 2219; 2222; 2228. He had also often told Moon that he did not have the same type of freedom as his peers enjoyed in high school to go out, party and do things with his friends. Tr. pp. 1642-43.

Moon testified that Robertson was not always with her throughout the ensuing time, and she did know where he went when he left her.[71] She was alone and sitting on the couch in Robertson's bedroom when she heard the alarm clock ring and the shower start running. "In a couple of minutes," she heard a struggle commence. During the struggle, she heard Terry Robertson screaming for Earl, and saying, "no, Jimmy; no, Jimmy." This lasted for about a minute or so, and she could hear even though she had her hands over her ears. She went outside, smoked a cigarette and returned to Robertson's room. She testified on cross-examination that she did not leave because she was scared. Tr. pp. 1597-99; pp. 1625-27.

Shortly thereafter, she went upstairs at his direction and saw him covered with blood. She went downstairs and, unable to leave through the garage, retrieved a knife from the kitchen and gave it to him. Following his instructions, she went back to his bedroom and sat on the couch. Within minutes, the shower stopped running and she heard a loud thumping noise for about a minute.[72] Robertson then came downstairs and again was covered in blood. Because "he thought he heard something upstairs," he went back upstairs for about five minutes. Upon his return, he took off all of his clothes and showered. Tr. pp. 1599-1602; p. 1616.

Once he had showered, he put the bloody clothes in a garbage bag that was in front of the fireplace. He also placed other items in the bag, but Moon did not see what they were.[73] By now, it was between 7:30 and 8:00 a.m. Again following his instructions, Moon grabbed the bag and they went outside through the downstairs door, which he then broke with the end of a rake.

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[71] In her estimation, "he was a little more hyper, but he was acting pretty much the way he always does." Tr. 1596.

[72] She said that the noise sounded "like a hand beating on a pillow." Tr. p. 1601.

[73] She did, however, remember seeing Earl's wallet and Terry's purse on the pool table in the basement; and she saw Robertson take Earl's credit card from the wallet. Tr. pp. 1615-16; 1635.

Next, they walked up to the driveway and she put the bag in the trunk of a red Mazda.[74] They waved to a neighbor who saw them. Tr. pp. 1602-04; pp. 1615-16.[75]

After the car was loaded, they got on I-77 and headed north. They stopped at the Peach stand in Fort Mill, where they bought gasoline, as well as Neosporin and some band-aids because Robertson had "cut his finger pretty badly" when he broke the glass on the window to the back door.[76] They used Earl's credit card to pay for these items. Tr. pp. 1604-06. Also, Moon called Savage and told her that she was on her way to Philadelphia. Tr. pp. 1542-43; 1605-06.[77] Following this stop, they got back onto I-77 North and drove until they reached I-85 North. They then drove until they reached I-95 North and headed to Philadelphia.[78] Tr. pp. 1606-07.

During their ten hour trip to Philadelphia, Robertson repeatedly said that his brother was going to be proud of him, and he told Moon that he had broken off a knife blade in his mother's neck during the course killing her. He said that he was glad that it was over, and that he was going to use the insurance money to buy a house on the lake and renovate a local club. Finally, he told her the plan was to pick up Chip, return home, discover the bodies and call 911. Tr. pp. 1609-16; pp. 1632-33; pp. 1641-42.

Also, they stopped at a rest area in Virginia and at a rest area called the Chesapeake House in Maryland. While at the Chesapeake House, Robertson got the garbage bag containing

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[74] Another witness testified that the Mazda was registered to Chip. Tr. p. 1409.

[75] This neighbor was Wayne Langley, Sr., and he corroborated this portion of Moon's testimony. Tr. pp. 1423-28.

[76] Photographs taken after Robertson's arrest reflect that he his index finger had abrasions and injuries, and he had an abrasion on his elbow. Tr. pp. 1486-88;State's Ex. 138.

[77] Glenda Johnson, the cashier at the Peach Stand corroborated their stop at the store, as did a receipt for their purchases (State's Ex. 90), a surveillance videotape from the store (State's Ex. 89) and still photographs from the tape (State's Exs. 123-124). Tr. pp. 1428-35; 1438-42.

[78] They took turns driving. At some point, they stopped at a rest area, where Robertson telephoned work and told his employer that he would not be coming to work. Tr. p. 1606.

the bloody clothes and other items out of the trunk, and he threw it in a dumpster. They eventually went on to Philadelphia and were arrested outside of Chip's apartment. Tr. pp. 1607-15; 1632-33; 1641-42.

Based upon information provided by Moon, law enforcement officers from other jurisdictions located a credit card receipt for the purchase of gasoline on Earl's credit card at a Shell station in Lady Smith, Virginia (State's Ex. 91), and officers recovered the garbage bag and its contents from a dumpster at the Chesapeake House exit off I-95 in Maryland. Among the items in the bag were a beach towel; a gray t-shirt intertwined with a maroon sweatshirt; a small roll of toilet paper; a white t-shirt; a pair of yellow Union Bay pants; two prescription bottles of Ritalin with Chip Robertson's name on them; the Eaton aluminum baseball bat and the Craftsman claw hammer used by Robertson on his parents; a bottle of Zydot dry powder; a kitchen towel; a serrated, woodened handled knife; a file with a wooden handle and a scalpel with a black plastic handle; a pair of moccasins; two check receipts with the name of Robertson on them; check numbers 5219 and 5220; a check receipt and check number 6111, with the name Robertson on it; a kitchen hand towel. Tr. pp. 1442-78; 1530-31.

Subsequent to Robertson's arrest in Philadelphia, an officer from the University of Pennsylvania Police Department recovered Robertson's wallet (State's Ex. 88) from Robertson's back pocket. Tr. pp. 1468-73. Inside the wallet, the officer found a South Carolina identification card with Robertson's name on it (State's Ex. 88.1); a NationsBank Visa card in Earl Sr.'s name (State's Ex. 88.2); and a receipt from the Peach Stand (State's Ex. 88.3). Tr. pp. 1478-80.

The investigation at the crime scene revealed that the back door was open and the glass in the window had been broken, in the condition that Moon described, a yard rake with a broken

handle was found in Robertson's back yard. Subsequent testing by SLED's trace evidence department revealed that a smear on the rake handle was consistent with paint on the rear door. Tr. pp. 1347; 1657-59; 1748-51.

Inside the house, there was broken glass on the floor near the back door. Earl was found, clad only in his underwear, in a hallway at the top of the stairs. He was lying face down in a large pool of blood, and his hands were underneath his body. There was blood "all about the upper portion of the staircase" and in the hallway. Terry was found just to the right of the bed in the master bedroom. The sheets were pulled on top of her. Both "multiple wounds" and blood "all over the bed" were clearly present. A knife with a broken tip was found in the bed and the tip of the knife was found under Terry. A towel with blood on it (State's Ex. 13) was found under the couch downstairs. Tr. pp. 1354-55; 1397-1400; 1659-66; 1675-77; 1689; 1700; 1710-11; 1715-16.

On Earl's underwear, SLED Agent Bret Baker, an expert witness in latent prints and crime scene analysis, found what appeared to be an impression made by the heal of a shoe of some other object after the other had come into contact with blood. *See* State's Ex. 3.1. However, the impression was "too partial for him to render a meaningful conclusion." Tr. pp. 1679-80. An impression on a floral sheet found near Earl's body, similar to the one found on his underwear, was consistent with the fabric weave of several pairs of socks retrieved from the dumpster in Maryland. Tr. pp. 1691-95. Likewise, the top fitted sheet off of Terry's bed had impressions which were consistent with the fabric weave of three of the socks found in the dumpster in Maryland. Tr. pp. 1700-03. Earl's wallet was found at the end of the hallway, and

Terry's purse – with the "contents somewhat hanging out" was found in the bedroom. Tr. pp. 1707-09.

Downstairs, Agent Baker found a note in the kitchen, in which Robertson told his parents that he had "gone to get Chip in his car. Sorry, but he needs me right now. Love, Jim." (State's Ex. 24). His right palm print was on the note. Agent Baker found a pad with a "to do" list (State's Ex. 25) from a table in the basement. Subsequent handwriting analysis revealed that Robertson wrote State's Ex. 24.

Agent Baker gave blood spatter opinion evidence in the sentencing phase, which he supported with photographs (State's Exs. 206-37) and a videotape (State's Ex. 279).[79] He testified that the blood spatter patters he found in the hallway were indicative of a beating and he opined that Earl had been hit at least four times with a circular, long, cylindrical object. Most of the blood spatter was 18-24" from the floor, indicating that Earl was on the floor throughout most of the beating. Also, he found a piece of brain matter and skull. He likewise gave opinion evidence concerning the blood spatter found in the bedroom around Terry. He found transfer blood on the purse and a blood smear on a Tilex bottle at the top of the stairs, near Earl's body. He also testified, in both phases of the trial that he could smell the odor of Tilex in the hallway. Tr. pp. 2379-83; 2386-2415.

In a search of the red Mazda conducted pursuant to a search warrant, Tr. pp. 1485-86; 1496-98; 1653, Agent Baker colleted a number of items. Of particular relevance were a receipt from a Shell station in Ladysmith, Virginia; a Fred Pryor seminar manual with a list written on the back of it; check number 5233, on Earl and Terry Robertson's account (and a duplicate); a

[79] The jurors were not shown the victims on this video.

check on Earl and Terry's account, number 5221 (and a duplicate) which "was partially written out beginning with" Robertson's name and the date November 10, and both Moon's and Robertson's fingerprints. Tr. pp. 1726-32. Subsequent handwriting analysis revealed that Robertson wrote the note on the Fred Pryor manual. Tr. pp. 1820-24.[80]

Other testimony showed that three Caucasian head hairs recovered at autopsy from Earl's right hand were consistent with his hair, as were numerous grey and brown Caucasian head hairs recovered from the upstairs bathroom. Numerous brown Caucasian head hairs recovered from the claw hammer (State's Ex. 64) were consistent with either Terry or Earl. Moreover, a number of Caucasian head hair fragments recovered from the socks retrieved from the dumpster were similar to those of the victims, and they could not be eliminated as the source of those hairs. However, the fragments were too small to make further analysis of them. Tr. pp. 1751-56; 1758-59.

Restriction Fragment Length Polymorphism (RFLP) DNA analysis was performed on a number of items recovered in the case. Cuttings from one of the white socks and the yellow Union Bay pants retrieved from the dumpster in Maryland matched Earl's DNA. The probability of selecting an unrelated person at random having a DNA profile matching the DNA on these items is one in 35,000,000,000 blacks and "one in four point seventy billion caucasians." Blood found on the Tilex bottle and a cutting from another white sock found in the dumpster also matched Earl's DNA. The DNA found on cuttings from the sheet, a swab of the purse strap, a swab from the end of the knife blade, a cutting from the Union Bay pants, cuttings from two socks retrieved from the dumpster and a cutting from the kitchen towel found in the dumpster, all

[80] Handwriting analysis also linked Robertson to a check seized from the dumpster (State's Ex. 85). Tr. pp. 1824-25.

matched Terry's DNA profile. The probability of selecting an unrelated person at random with DNA profile matching the DNA on those items is approximately "one in one hundred and eighty-eight billion blacks and one in five point five trillion caucasians." Tr. pp. 1830-37; 1839-51; State's Ex. 189 (RFLP results work sheet); State's Ex. 187 (report of DNA expert).

DNA from stains found on the green pillowcase and a white pillow cover also matched Earl's DNA; and the probability of selecting someone at random with a matching DNA profile is approximately "one in one point nine trillion blacks and one in one hundred and ninety billion caucasians." The DNA profile from a stain on the "low end" of the claw hammer was consistent with either Earl or Robertson's DNA, which was "not uncommon in this case because the suspect ... is the sons of the victims." The DNA profile of a cutting from a beige sock retrieved from the dumpster and a stain found on the tip of the bat was consistent with being a mixture of different individuals, and neither Earl, Terry nor Robertson could be eliminated as the source of these stains. However, Moon was eliminated as a contributor. Tr. pp. 1851-57; State's Exs. 186-187.

Dr. Joel Sexton, the forensic pathologist who performed the autopsies on Terry and Earl Robertson, testified at length in both phases of the trial about his findings. His sentencing phase testimony involved opinion evidence, relevant to the statutory aggravating circumstance of physical torture, concerning whether the victims were conscious throughout the attacks, whether they may have suffered pain and whether any of the knife wounds were deliberately inflicted after the victim's were immobilized. Tr. pp. 1784-1808; 2249-2302.

His sentencing phase findings as to Terry Robertson were that she had three pairs of hammer tine marks on the left side of her head, where most of her injuries were located. Tr. p.

2277, ll. 3-8. There were also three deep lacerations on her back associated with hammer tines (Tr. p. 2278, ll. 8-16) and a tine mark on her shoulder. Tr. p. 2281, ll. 22-23. An injury to the back of her right hand was caused either by the tines or a knife. Tr. p. 2288, ll. 6-10.

Dr. Sexton also found injuries that were consistent with the lateral edge of a hammer. There were two such lacerations on the left side of Terry's head (Tr. p. 2277, ll. 9-14), one on the back of her neck (Tr. p. 2278, ll. 22-24) and another on the side of her head. Tr. p. 2278, l. 25 – p. 2279, l. 1. Additionally, he found injuries consistent with knife wounds. One was on the back of Terri's neck (Tr. p. 2279, l.25 – p. 2280, l. 6); three lacerations were found on the front of her shoulder (Tr. p. 2280, ll. 23-24); a "very shallow wound" across her wrist was found that "runs parallel to a much deeper incised wound" (Tr. p. 2284, ll. 3-5); there were four cuts on the left forearm (Tr. p. 2285, ll. 17-25); one on the back of her left wrist (Tr. p. 2286, ll. 22-24); three stab wounds in her lower right back (Tr. p. 2288, ll. 25-p. 2289, l. 12);[81] a cut across the left cheek and jaw (Tr. p. 2291, ll. 9-7); multiple cuts on her neck (Tr. p. 2291, l. 10); and a "mutilating injury" across the right side of her face. Tr. p. 2292, ll. 14-19. Dr. Sexton characterized a number of the knife wounds as "deliberate" and opined that they were inflicted after Terry was immobilized or no longer moving. Some were inflicted after her heart had stopped. Tr. p. 2284, l. 17 – p. 2285, l. 14.

The various injuries Dr. Sexton found on Terry were all detailed in diagrams which were introduced as State's Ex. 267. Dr. Sexton opined that most of the knife wounds were perimortem; and he described them as "superficial" because they did not cause her death. The fatal wounds were "the ones that are in the left temporal region where there were multiple

[81] One wound was close to "an actually impacted the spine. This wound was only 2¼." Two did not enter the abdominal cavity but only went about "four inches into the soft tissue of the back."

fractures in the skull." This included a "pair of marks" on the left ear and two more above the left ear, as well as "deeper lacerations that extend around to the back side and had [multiple fractures] underlying them." Tr. pp. 2294-96; State's Ex. 268.

Dr. Sexton gave similar testimony regarding the injuries that he found on Earl Robertson's body. He testified that he found a number of hammer tines injuries. He found one penetrating on the head (Tr. p. 2258, ll. 14-25); two pairs of injuries on the left side of the head (Tr. p. 2259, ll. 20-24); and tines marks on the temple (which actually could have been caused by "the blunt edge of the hammer turned sideways") that pinched part of the ear off (Tr. p. 2260, ll. 6-12). He found similar injuries on the right shoulder (Tr. p. 2262, ll. 11-19); the right side of Earl's neck (Tr. p. 226358, ll. 13-15); on the back of Earl's left hand (Tr. p. 2265, ll. 11-215); and on the back of Earl's right hand. Tr. p. 2265, ll. 18-23.

Dr. Sexton further testified that he found two linear abrasions consistent with the baseball bat on the top of the spine (Tr. p. 2253, ll. 22-24); one on the left side of Earl's back (Tr. p. 2254, ll. 7-10); and one on the upper right back. Tr. p. 2254, ll. 21-22. Dr. Sexton likewise found another injury consistent with the hammer on Earl's ear. Tr. p. 2260, ll. 7-11. There was a stab wound, consistent with being caused by a knife, on Earl's hand (Tr. p. 2252, l. 17); a cut from a knife or other sharp object on the right back side of Earl's neck (Tr. p. 2252, ll. 18-20); a perimortem knife injury "just above the left knee" (Tr. p. 2264, ll. 3-9); and another injury on the ride side of the neck. Tr. p. 2263, ll. 15-16.

As with the injuries to Terry, Dr. Sexton utilized several diagrams (State's Ex. 267) to illustrate Earl's various injuries. Again, he indicated that the knife wounds were superficial because they were not fatal. However, many would have been painful. Tr. pp. 2269-72; State's

Ex. 267. He further testified that the head injuries would not have caused immediate unconsciousness or immediate death. Also, the blow that "caused the most damage" and was the most likely cause of death was the one on the top of the head, which he testified was consistent with a bat. Tr. pp. 2274-76; State's Ex. 267.

After reviewing the graphic nature of Dr. Sexton's testimony, it is clear that he was ability to both identify the many different blows and show these injuries to the jury through pictures and diagrams. When this testimony is viewed in combination with Moon's testimony, the DNA evidence and other forensic evidence discussed above, the Court finds that the sentencing jury had already been presented with an overwhelmingly graphic and vivid picture of what had occurred at the time of the murders before Ms. Cascio testified. The jury was, therefore, aware of both the heinous nature, not only of the crimes, but also of the defendant who committed them.

Thus, the Court finds that, although admissions testified to by Ms. Cascio are significant, they are not so strong that this Court can conclude that there is a reasonable probability of a different result but for the presentation of her testimony. *See Strickland*, 466 U.S. at 695 (to prove that "there is a reasonable probability that ... the sentencer ... [can] conclude[ ] that the balance of aggravating and mitigating circumstances [do] not warrant death"); *see also Wiggins*, 539 U.S. at 537. The obvious lack of any discernable prejudice from cross-examination is manifestly clear when Dr. McKee's subsequent reply testimony is considered on this issue. *See* Tr. pp. 3067-72.[82] The Court finds that his testimony presented the substance of many, if not all

[82] Again, any supposed impropriety of Dr. McKee's testimony about the information he received from Robertson under *Hudgins* is not properly before this Court because the trial judge overruled trial counsel's objection, and ruled that the statements made by Robertson were admissible. Tr.

of Ms. Caselo's testimony on cross-examination; and he testified that the factual information provided to him by Robertson was virtually identical to those facts in the notes of Ms. Caselo. Tr. pp. 3066-67. For the above-stated reasons, the Court finds that this allegation is without merit.

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief in this matter is dismissed with prejudice; and

2. That Robertson is remanded to the custody of Respondent.

IT IS SO ORDERED.

John C. Few
Presiding Judge, Sixteenth Judicial Circuit

March 7, 2008

pp. 3044-57. Thus, the question of his ruling could have been raised on direct appeal and is barred in PCR. *See* § 17-27-20(b); *Drayton*, 312 S.C. at 9, 430 SE2d at 520 (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel). Moreover, the Court concludes, in the alternative, that this objection was properly overruled.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

JAMES D. ROBERTSON, #5067, Petitioner, vs. JON OZMINT, Director, South Carolina Department of Corrections, Respondent.	C/A No. 2:11-00063-SB-BHH **MOTION FOR SUMMARY JUDGMENT**

The Respondent, above-named, by and through the undersigned attorneys, would respectfully move this Court, pursuant to Rule 56(b) F.R.C.P., for summary judgment based on the pleadings.

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March 28, 2011.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

JAMES D. ROBERTSON, #5067, Petitioner, vs. JON OZMINT, Director, South Carolina Department of Corrections, Respondent.	C/A No. 2:11-00063-SB-BHH RETURN AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respondent hereby makes Return to the February 1, 2011 Rule to Show Cause filed by the Honorable Bruce Howe Hendricks, United States Magistrate Judge, and responds to the allegations in the Petition for Writ of Habeas Corpus filed with the assistance of counsel.[1] Respondent is entitled to summary judgment for the following reasons:

I. PROCEDURAL HISTORY

A. Robertson's trial and the voluntarily abandoned direct appeal.

Petitioner, James D. 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 killing his parents. The York County Grand Jury indicted him at the April 23, 1998 term of court 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.** On April 30, 1998, the State served him with a Notice of Intent

[1]Robertson is represented by John H. Blume, Esquire (as lead counsel); Keir M. Weyble, Esquire; and Emily C. Paavola, Esquire.

to seek the death penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002). The State also gave notice at that time that it would rely upon 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. *See* S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2010).

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock, Esquire, and James W. Boyd, Esquire, represented Robertson.[2] Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motion hearings on July 17 (**App. 32-48**), September 22 (**App. 49-55**) and 25, 1998 (**App. 55-79**); November 2 (**App. 79-90**) and 20, 1998;[3] December 4 (**App. 90-121**) and 18, 1998; and on February 12 and 19, 1999.

Robertson's capital jury trial was held on March 15-26, 1999. The jury convicted him of all of the indicted offenses (**App. 122-1977**); and a sentencing phase was conducted, after his exercise of the 24-hour statutory waiting period in § 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

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[2] Thad Lee Myers, Esquire, had originally been appointed to represent Robertson. However, Mr. Myers was relieved because of a conflict of interest.

[3] Robertson's collateral counsel apparently did not include this transcript in the Appendix to the Petition for Writ of Certiorari that was filed in connection with the appeal from denial of state Post-Conviction Relief. Collateral counsel also omitted the December 18, 1998 transcript and the two February 1999 transcripts. All four transcripts are attached to this Return.

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 it sentenced Robertson to death for each of the murders. Judge Hayes affirmed their decision and imposed the death sentence for the murders. **App. 1977-3242.**

Robertson did not 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).[4] At various points on direct appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III represented Robertson before the South Carolina Supreme 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. The Supreme Court entered an Order on June 25, 1999 granting direct appellate review under *White*.

Robertson wrote the Supreme Court on August 28, 2000. In this letter, 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 Supreme Court entered an Order remanding the case to Judge Hayes for the purpose of conducting a hearing on Robertson's competency to be executed.

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[4]"Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a *White v. State* review." *Davis v. State*, 288 S.C. 290, 291, n. 1, 342 S.E.2d 60, 60 n. 1] (1986)" (emphasis omitted).

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, he found that it was unnecessary to hold a competency hearing because Robertson no longer desired to appear *pro se*. Therefore, the South Carolina Supreme 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.[5] Again, Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote the South Carolina Supreme 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.

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[5] Appellate counsel Savitz' Brief presented three issues:

1. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.

2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.

3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.

4/15/02 Initial Brief of Appellant at p. 1.

However, Robertson again wrote a letter to the South Carolina Supreme Court dated June 3, 2002, in which he asked the Court to relieve Mr. Savitz and to allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme 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.[6] 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. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

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

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

[6] 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.

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.

7. The judge erred in sentencing appellant to death.

Pro Se Initial Brief of Appellant at p. 2. The State filed the Initial Brief of Respondent on December 31, 2003.

However, the direct appeal was dismissed and re-instated on several occasions because of Robertson's failure top comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the South Carolina Supreme 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.[7] 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, the Supreme Court of South Carolina 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

[7] Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

140 (1996).

Thus, Petitioner did not exhaust any claim on direct appeal because he knowingly and voluntarily abandoned the appeal and it was dismissed *at his request* without the South Carolina Supreme Court considering any issues that Petitioner raised in his *pro se* Initial Brief of Appellant.[8]

B. Intervening action prior to PCR filing.

On June 16, 2005, Robertson requested a Stay of Execution to file a Post-Conviction Relief (PCR) application. Over Respondent's opposition, the Supreme Court filed a July 7, 2005 Order granting a stay pursuant to In Re: Stays of Execution. The Court also appointed the Honorable John C. Few to preside over this case and it directed Judge Few to hold a hearing to determine whether Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), 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.[9] 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.[10] Judge Few

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[8] Petitioner acknowledges that his direct appeal was dismissed in his Petition, **Petition, p. 2 ¶¶ 9(c)-(d).** Also, he represents on **Petition, p. 14,** under the heading "**B. Exhaustion**" that "Petitioner his state court remedies on Grounds I, II and III." under subheading "**C. Direct Appeal of Grounds I, II and III,**" that "Petitioner raised these issues on direct appeal." However, although represented by three attorneys, he disingenuously omits that his appeal was dismissed because he knowingly and voluntarily abandoned his appeal, and that the state supreme court never addressed any of these three allegations.

[9] A copy of this Order is attached to this Response.

[10] The undersigned counsel has checked both its PCR files and the mail logs for counsel in the years 2005 and 2006. The transcript of the September 23, 2005 hearing is not in the files and Respondent apparently did not order this transcript because Robertson did not contest counsel's qualifications in state PCR.

later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

C. State PCR proceedings.

1. Robertson's original PCR action. (06-CP-46-532).

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 the hearing, and Messrs. Brown and Matlock, Esquires, represented him. Mr. Salter represented the State. **App. 3263-3650.**[11]

At the outset of the PCR hearing, Robertson amended his Application and proceeded on twelve specific grounds of ineffective assistance of counsel, including the following, relevant allegations:

1. Counsel failed to present Dr. Hayne McMeekin as a witness and

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Pursuant to Rule 607(I), SCACR, " a court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that period." Respondent has not previously requested the transcript of the September 23, 2005 hearing and is unaware if Robertson has done so. *See State v. Serrette*, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct.App.2007) (stating the burden is on the appellant to provide an appellate court with an adequate record for review); *State v. Williams*, 321 S.C. 455, 464 n. 4, 469 S.E.2d 49, 54 n. 4 (1996). *See also* Rule 210(h), SCACR (an appellate court need not consider any fact which does not appear in the record).

[11] 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.**

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.**

Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. **App. 3652- 57.** The Order of Dismissal addressed the claims that Robertson had raised at the PCR hearing.

Petitioner 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 Petitioner's behalf. 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. The State, through the undersigned counsel, filed a Return to Petition for Writ of Certiorari on July 15, 2009. The State re-stated the issues before the South Carolina Supreme Court as follows:

> Whether this Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State was not presented to or ruled upon by the PCR judge and he did not seek a ruling by filing a Rule 59(e), SCRCP, motion?
>
> Whether this Court should deny certiorari because probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness?

Return to Petition for Writ of Certiorari at p. ii.

The South Carolina Supreme Court filed a letter Order denying certiorari on October 6, 2010. It sent the Remittitur to the York County Clerk of Court on October 22, 2010.

2. Robertson's time-barred and successive original PCR action. (11-CP-46-532).

Although he was represented by three lawyers at the time, Robertson filed a time barred and

successive PCR Application (11-CP-46-00072) on January 7, 2011. The premise he advances for being allowed to bring the 2011 Application is that "[t]he record available to undersigned counsel contains no indication that either [collateral] attorney met the statutory criteria for appointment as qualified PCR counsel in a capital case." *See* S.C. Code Ann. § 17-27-160 (2003). He further asserts that collateral counsel were ineffective because they failed to raise the various allegations in **Grounds V-XI**. *See* **Petition for Writ of Habeas Corpus, pp. 18-25.** In the 2011 Application, he seeks to raise the following allegations that were not litigated in the 2006 action:

10(a): **Applicant was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in Section 11(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).**

11(a): Trial counsel's acts or omissions included:

(i) Counsel failed to object to the Solicitor's improper closing argument. The solicitor encouraged the jury to rely on their own emotions and passion, rather than the evidence presented, by telling the jury that they did not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty. (Trial Tr. 1916). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

10(b): **Applicant was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 11 (b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).**

11(b): Trial counsel's acts or omissions included:

(i) Counsel failed to object to presentation of Applicant's prison disciplinary

record by a single witness, who had not witnessed the presented events, in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. (Trial Tr. 2129).

(ii) Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that the victim, Terry Robertson, was a very private person and would have been deeply upset by the revelation of her counseling records. (Trial Tr. 2792). SCRE 403.

(iii) Counsel failed to develop and introduce evidence that the victims were opposed to capital punishment and would not have wanted their son to be sentenced to death.

(iv) Counsel failed to object to the State's improper statements during closing argument that Applicant's presentation of relevant mitigating evidence of his family's mental health history had been a "rape" of his mother Terry Robertson, and that this evidence had dragged Terry "through the mud." (Trial Tr. 3144, 3142). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164,166 (1998).

10 & 11(c): Applicant's Sixth and Fourteenth Amendment right to a fair jury trial was violated by the solicitor's improper and prejudicial closing argument during the guilt-or-innocence phase of the trial during which the solicitor argued that the jury should not deliberate when determining whether the state had proven Applicant's guilt beyond a reasonable doubt. (Trial Tr. 1916).

10 & 11(d): Applicant's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment were violated by the state's introduction of a list of Applicant's prison infractions during the sentencing phase of his capital trial. (Trial Tr. 2129).

10 & 11(e): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the solicitor's improper closing argument during the sentencing phase of Applicant's capital trial during which the solicitor argued that that the defense's. mitigation presentation was equivalent to raping the victim in the courtroom. ("You know, Ms. Cascio talked about Terry being sexually abused. Terry has been raped. She was raped in this courtroom when they take her through this based on his actions.") (Trial Tr. 3144).

10 & 11(f): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the trial court's error in failing to strike a panel of potential

jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire. (Trial Tr. 425 & 1283).

10(g): **Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, §§ 3 and 14 of the South Carolina constitution -when appellate counsel committed the acts or omissions set forth below in Section 11(g). Appellate counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).**

11(g): Appellate counsel's acts or omissions included:

(i) Appellate counsel failed to claim on appeal that the trial court had violated Applicant's Sixth, Eighth and Fourteenth Amendment rights by failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire.

(ii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to specifically define mitigating circumstances and to question potential jurors about specific mitigating circumstances, where several potential jurors indicated that they did not understand what mitigating circumstances were even after hearing the general legal definition. (Trial Tr. 193-96).

(iii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to limit the State's presentation of victim impact evidence to testimony from immediate family members. (Trial Tr. 1985-98). Appellate counsel' s performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

On March 24, 2011, Respondent filed a Return and Motion to dismiss in 11-CP-46-00072. Respondent has argued that his Application 11-CP-46-00072 must be summarily dismissed because (1) it is not verified by Robertson, as statutorily required by (2) it is barred by the one year statute of limitations governing PCR applications, S.C. Code Ann. § 17-27-45(A) (Supp. 2011); (2) the state supreme court will not grant relief based upon the ineffective assistance of collateral counsel, *Aice*

v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); (3) it is impermissibly successive to a previously filed application and this Court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel or PCR counsel's lack of statutory qualifications; (4) the supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge, *see 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 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);(5) laches bars relief because Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application (*see Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005)); and (6) the argument lacks merit as a matter of state law. Additionally, Respondent has argued that a number of the allegations that Robertson raises are not cognizable in state PCR because they could have been raised at trial and on direct appeal. (A copy of the Return and Motion to Dismiss is attached to this Return). *See also* Response to Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 24, 2011, **Dock. Ent. No. 22**. A Conditional Order of Dismissal was sent to the Hon. Lee S. Alford, Resident Circuit Court Judge in the Sixteenth Judicial Circuit because the Chief Administrative Circuit Judge in that Circuit is Judge Hayes, the trial judge and the state supreme court as held that the trial judge is not allowed to preside over the inmate's subsequent PCR hearing. *See Floyd v.*

State, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991) ("in all post-conviction relief hearings held after the date of this opinion, a judge shall, upon motion, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought").

D. The Petition for Writ of Habeas Corpus.

On October 27, 2010, Robertson filed a Motion for Stay of Execution and a Motion for Appointment of Counsel [**Dock. Ent. No. 1**], 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. [**Dock. Ent. No. 3**].The Honorable Sol Blatt, Jr., United States District Judge, entered an Order granting Petitioner's Motion for Stay of Execution. [**Dock Ent. No. 10**]. 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. [**Dock. Ent. Nos. 14; 17**].

Robertson filed his Petition for Writ of Habeas Corpus on January 7, 2011. [**Dock. Ent. No. 20**]. He also filed a Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 7th. [**Dock. Ent. No. 21**]. Respondent filed a Response to Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 24, 2011. [**Dock.Ent. No. 22**].

Respondent attaches the following documents to this Return and incorporate these documents by reference:

1. Appendix - Vols. 1 through 8;
2. Transcript of Record 11-20-98;

3. Transcript of Record 12-18-98;

4. Transcript of Record 2-12-99;

5. Transcript of Record 2-19-99;

6. Petition for Writ of Certiorari dated June 25, 1999;

7. Order denying Certiorari dated June 25, 1999;

8. Letter to Robertson to Court dated August 28, 2000;

9. Return to Motion dated September 11, 2000;

10. Order dated October 6, 2000 regarding competency;

11. Order dated February 2, 2001 by Judge Hayes appointing Wellborn, Esq.;

12. Order dated Feburary 15, 2001 regarding evaluation;

13. Letter and Affidavit of Robertson dated March 15, 2001;

14. Report dated October 12, 2001;

15. Order dated November 15, 2001 relieving Robert Dudek, Esq.;

16. Initial Brief of Appellant April 15, 2002;

17. Letter dated April 18, 2002 relieving Joseph Savitz;

18. Order denying Savitz being relieved dated May 16, 2002;

19. Letter to South Carolina Supreme Court dated June 3, 2002 indicating Robertson want to proceed pro se;

20. Order dated June 26, 2002;

21. Report dated October 28, 2002;

22. Pro se Initial Brief of Appellant dated July 25, 2003;

23. Initial Brief of Respondent dated December 31, 2003;

24. Order dated November 22, 2004;

25. Memorandum re: Petitioner's right to waive direct appeal dated February 14, 2005;

26. Report dated February 23, 2005;

27. Order dated June 3, 2005;

28. Order granting stay dated July 7, 2005;

29. Order appointing attorney dated September 9, 2005;

30. Petition for Writ of Certiorari;

31. Return to Petition for Writ of Certiorari;

32. Order dated October 6, 2010; and

33. Remittitur dated October 22, 2010.

II. STATEMENT OF FACTS

The direct and circumstantial evidence presented in the guilt phase of Robertson's trial, viewed in the light most favorable to the State, reasonably tended to prove that Robertson stabbed and cut his mother with a knife (**State's Exhibits 23 and 27**) and beat her in the head with the tines of a claw hammer (**State's Exhibit 64**). He killed his father in a similar fashion but also beat his father with an aluminum baseball bat and stabbed his father twice in the neck. His motive was as old as humankind itself: greed.

The primary evidence implicating him in this regard came from his co-defendant, Meredith Moon (**App. pp. 1575-1646**), evidence which officers located in Lady Smith, Virginia, Philadelphia, Pennsylvania, and in a dumpster at the Chesapeake House exit off I-95 in Maryland as a result of Moon's statement and subsequent cooperation (**App. pp. 1442-98**); the testimony of Dr. Sexton,

who performed the autopsy (**App. pp. 1784-1808**); and DNA testing of the items recovered from the dumpster in Maryland. *See* **App. pp. 1830-1873; 1876-84**. There was, however, additional evidence that reasonably tended to prove his guilt, such as his unauthorized use of his father's credit card at the Peach Stand to buy gasoline and the other items he discarded after he fled the jurisdiction, and his act of fleeing South Carolina.

Earl Robertson, Sr. and Terry Robertson lived at 2506 Westminister Drive. Robertson was staying there at the time of the crime. Meredith Moon testified in the guilt phase that she met Robertson "[a]bout mid-'95," when he was dating her friend Erin. They "partied together" and "hung out at his apartment." She began to get to know him better in the fall of 1997, when they worked together at Dinkins in the food court at Winthrop. **App. pp. 1575-76.**

On the morning of Monday, November 24, 1997, Moon picked Robertson up and they went to Charlotte, North Carolina, where they shopped. That night, she and another friend went to the Outback Steakhouse and ate. There, she saw her friend Erin, sometime between 11:30 p.m. and 12:30 a.m. on November 25. Later, Erin came by her house, picked her up and the two women went to Erin's. They "hung out" for several minutes before they went to Robertson's house. **App. pp. 1576-78.**

When she first went to visit Robertson in the early morning of November 25,[12] his parents were upstairs and she did not see them. Neither she nor Robertson were drinking but they snorted "[a] couple of lines" of Ritalin. She and Erin eventually left and Erin drove her home, after Moon

[12] By then, she estimated that it was between 12:30 and 1:30 a.m. Erin wanted to show Robertson a pool stick that she had bought as a gift for her boyfriend's birthday. **App. p. 1579.**

retrieved her purse from Erin's apartment. **App. pp. 1578-81.**[13]

Moon could not sleep because of the effects of the Ritalin. Between 3:00 and 3:30 a.m., she received a call from Robertson, who wanted to use her mother's credit card so he could buy a bus or plane ticket for this brother, Chip, and bring Chip home for Thanksgiving. Moon, however, told him no. Moon subsequently received another call from Robertson around 5:00 a.m. He told her to come to his house and "bring some traveling clothes." She was under the impression that they were going to Philadelphia to bring Chip home. **App. pp. 1581-82.**

After telling her father a lie about where she was headed, she drove to Robertson's home in her Honda Accord. Again, she entered the home through the rear door, where Robertson was waiting for her. **App. pp. 1582-85.**

She sat down on the sofa in the basement and they talked. During their conversation, Moon saw a note on the coffee table that had a list of things to do.[14] Also, Robertson revealed his plan to kill his parents. He told her that he was going to wait until his father's alarm clock rang and his father got into the shower. Then, he was going to kill his mother. Moon unsuccessfully tried to talk

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[13] Her testimony is substantially corroborated by the guilt phase testimony of Erin Savage. Savage added that they parked off to the side of the house on the left-hand side of the road, in order not to wake anyone. She and Moon entered the house through the downstairs door leading to the basement. Robertson was "cleaning" when they arrived. **App. pp. 1537-42.**

Erin had received a call from Robertson "probably around 3:30." He wanted to know if Moon was there and Erin said no. He then asked if Moon's father would be home if he called her house and Erin said that she did not know. **App. p. 1542.**

[14]This list (**State's Ex. 25**) had several things listed on it, such as "trash bags" and "need to scrub out the shower for blood." **App. pp. 1624; 1636.** At Robertson's direction, Moon also later wrote a list of things to do, such as "alarm clock, wipe blood from downstairs doorknob and dispose of yard rake. She testified that these were things that Robertson planned to do. **App. pp. 1636-38; 1643.**

him out of this but he would not listen.[15] Instead, he told her to put socks on her hands, "take two bottles of Tilex and pour them into one" bottle. Moon did as she was told and the two snorted Ritalin. She did not know how much they snorted but agreed that it impaired her judgment. **App. pp. 1584-97; 1623-28; 1644-46.**

Moon testified that Robertson was not always with her throughout the ensuing time and she did know where he went when he left her.[16] She was alone and sitting on the couch in Robertson's bedroom when she heard the alarm clock ring and the shower start running. "In a couple of minutes," she heard a struggle commence. During the struggle, she heard Terry Robertson screaming for Earl, and saying, "no, Jimmy; no, Jimmy." This lasted for about a minute or so, and she could hear even though she had her hands over her ears. She went outside, smoked a cigarette and returned to Robertson's room. She did not leave because she was scared. **App. pp. 1597-99; 1625-27.**

Shortly thereafter, she went upstairs at Robertson's direction and saw him covered with blood. She then went downstairs. Unable to leave through the garage, she retrieved a knife from the kitchen and gave it to him. Following his instructions, she went back to his bedroom and sat on the couch. Within minutes, the shower stopped running and she heard a loud thumping noise for about a minute.[17] Robertson thereafter came downstairs and again was covered in blood. Because "he

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[15] Robertson had previously told her on many occasions that he planned to kill his parents, both when he was sober and when he was drunk. Also, he explained that his motive was the insurance money, which Moon said was "a couple of million" dollars. A number of sentencing phase witnesses testified about similar conversations. **App. pp. 2155-57; 2163-68; 2177-78; 2187-89; 2202-03; 2219; 2222; 2228.** Robertson had also often told Moon that he did not have the same type of freedom as his peers enjoyed in high school to go out, party and do things with his friends. **App. pp. 1642-43.**

[16] At this point, "he was a little more hyper, but he was acting pretty much the way he always does." **App. 1596.**

[17] This noise sounded "like a hand beating on a pillow." **App. p. 1601.**

thought he heard something upstairs," Robertson went back upstairs for about five minutes. Upon his return, he took off all of his clothes and showered. **App. pp. 1599-1602; p. 1616.**

Once he had showered, he put the bloody clothes in a garbage bag that was in front of the fireplace. He also placed other items in the bag, but Moon did not see what they were.[18] By now, it was between 7:30 and 8:00 a.m. Again following his instructions, Moon grabbed the bag and they went outside through the downstairs door, which he then broke with the end of a rake. Next, they walked up to the driveway and she put the bag in the trunk of a red Mazda.[19] They waved to a neighbor who saw them.[20] **App. pp. 1602-04; 1615-16.**

After the car was loaded, they got on I-77 and headed north. They stopped at the Peach stand in Fort Mill, where they bought gasoline, as well as Neosporin and some band-aids because Robertson had "cut his finger pretty badly" when he broke the glass on the window to the back door. They used Earl's credit card to pay for these items. **App. pp. 1604-06.**[21] Also, Moon called Erin Savage and told her that she was on her way to Philadelphia. **App. pp. 1542-43; 1605-06.** Following this stop, they got back onto I-77 North and drove until they reached I-85 North. They

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[18] However, she remembered seeing Earl's wallet and Terry's purse on the pool table in the basement; and she saw Robertson take Earl's credit card from the wallet. **App. pp. 1615-16; 1635.**

[19] Another witness testified that the Mazda was registered to Chip. **App. p. 1409.**

[20] The neighbor, Wayne Langley, Sr., corroborated this portion of Moon's testimony. **App. pp. 1423-28.**

[21] Glenda Johnson, the cashier at the Peach Stand corroborated their stop at the store, as did a receipt for their purchases (**State's Ex. 90**), a surveillance videotape from the store (**State's Ex. 89**) and still photographs from the tape (**State's Exs. 123-124**). **App. pp. 1428-35; 1438-42.** Also, photographs taken of Robertson after his arrest reflect that he his index finger had abrasions and injuries, and he had an abrasion on his elbow. **App. pp. 1486-88; State's Ex. 138.**

then drove until they reached I-95 North and headed to Philadelphia.[22] **App. pp. 1606-07.**

During their ten hour trip to Philadelphia, Robertson repeatedly said that his brother was going to be proud of him. He also told Moon that he had broken off a knife blade in his mother's neck, during the course killing her; that he was glad that it was over; and that he was going to use the insurance money to buy a house on the lake and renovate a local club. Finally, he told her the plan was to pick up Chip, return home, discover the bodies and call 911. **App. pp. 1609-16; 1632-33; 1641-42.**

Also, they stopped at a rest area in Virginia and at a rest area called the Chesapeake House in Maryland. While at the Chesapeake House, Robertson got the garbage bag containing the bloody clothes and other items out of the trunk, and he threw it in a dumpster. They eventually went on to Philadelphia and were arrested outside of Chip's apartment. **App. pp. 1607-15; 1632-33; 1641-42.**

Based upon information provided by Moon, law enforcement officers from other jurisdictions located a credit card receipt, on Earl's credit card, for the purchase of gasoline at a Shell station in Lady Smith, Virginia (**State's Ex. 91**); and officers recovered the garbage bag and its contents from a dumpster at the Chesapeake House exit off I-95 in Maryland. Among the items in the bag were a beach towel; a gray t-shirt intertwined with a maroon sweatshirt; a small roll of toilet paper; a white t-shirt; a pair of yellow Union Bay pants; two prescription bottles of Ritalin with Chip Robertson's name on them; the Eaton aluminum baseball bat and the Craftsman claw hammer that Robertson used on his parents; a bottle of Zydot dry powder; a kitchen towel; a serrated, wooden handled knife; a file with a wooden handle and a scalpel with a black plastic handle; a pair of moccasins; two check

[22] They took turns driving. At some point, they stopped at a rest area, where Robertson telephoned work and told his employer that he would not be coming to work. **App. p. 1606.**

receipts with the name of Robertson on them; check numbers 5219 and 5220; a check receipt and check number 6111, with the name Robertson on it; a kitchen hand towel. **App. pp. 1442-78; 1530-31.**

Subsequent to Robertson's arrest in Philadelphia, an officer from the University of Pennsylvania Police Department recovered Robertson's wallet **(State's Ex. 88)** from his back pocket. **App. pp. 1468-73.** Inside the wallet, the officer found a South Carolina identification card with Robertson's name on it **(State's Ex. 88.1)**; a NationsBank Visa card in Earl Sr.'s name **(State's Ex. 88.2)**; and a receipt from the Peach Stand **(State's Ex. 88.3). App. pp. 1478-80.**

The investigation at the crime scene revealed that the back door was open and the glass in the window had been broken, in the condition that Moon described, a yard rake with a broken handle was found in Robertson's back yard. Subsequent testing by SLED's trace evidence department revealed that a smear on the rake handle was consistent with paint on the rear door. **App. pp. 1347; 1657-59; 1748-51.**

Inside the house, there was broken glass on the floor near the back door. Earl was found, clad only in his underwear, in a hallway at the top of the stairs. He was lying face down in a large pool of blood and his hands were underneath his body. There was blood "all about the upper portion of the staircase" and in the hallway. Terry was found just to the right of the bed in the master bedroom. The sheets were pulled on top of her. Both "multiple wounds" and blood "all over the bed" were clearly present. A knife with a broken tip was found in the bed and the tip of the knife was found under Terry. A towel with blood on it **(State's Ex. 13)** was found under the couch downstairs. **App. pp. 1354-55; 1397-1400; 1659-66; 1675-77; 1689; 1700; 1710-11; 1715-16.**

On Earl's underwear, SLED Agent Bret Baker, an expert witness in latent prints and crime

scene analysis, found what appeared to be an impression made by the heal of a shoe of some other object after the other had come into contact with blood. *See* **State's Ex. 3.1**. However, the impression was "too partial for him to render a meaningful conclusion." **App. pp. 1679-80**. An impression on a floral sheet found near Earl's body, similar to the one found on his underwear, was consistent with the fabric weave of several pairs of socks retrieved from the dumpster in Maryland. **App. pp. 1691-95**. Likewise, the top fitted sheet off of Terry's bed had impressions that were consistent with the fabric weave of three of the socks found in the dumpster in Maryland. **App. pp. 1700-03**. Earl's wallet was found at the end of the hallway; and Terry's purse was found in the bedroom with the "contents somewhat hanging out." **App. pp. 1707-09**.

Downstairs, Agent Baker found a note in the kitchen, in which Robertson told his parents that he had "gone to get Chip in his car. Sorry, but he needs me right now. Love, Jim." **(State's Ex. 24)**. His right palm print was on the note. Agent Baker found a pad with a "to do" list **(State's Ex. 25)** on a table in the basement. Subsequent handwriting analysis revealed that Robertson wrote **State's Ex. 24**.

Agent Baker gave blood spatter opinion evidence in the sentencing phase, which he supported with photographs **(State's Exs. 206-37)** and a videotape **(State's Ex. 279)**.[23] He testified that the blood spatter patters he found in the hallway were indicative of a beating and he opined that Earl had been hit at least four time with a circular, long, cylindrical object. Most of the blood spatter was 18-24" from the floor, indicating that Earl was on the floor throughout most of the beating. Also, Agent Baker found a piece of brain matter and skull. He likewise gave opinion evidence

[23] The jurors were not shown the victims on this video.

concerning the blood spatter found in the bedroom around Terry. He found transfer blood on the purse and a blood smear on a Tilex bottle at the top of the stairs, near Earl's body. He also testified, in both phases of the trial that he could smell the odor of Tilex in the hallway. **App. pp. 2379-83; 2386-2415.**

In a search of the Red Mazda conducted pursuant to a search warrant, **App. pp. 1485-86; 1496-98; 1653**, Agent Baker colleted a number of items. Of particular relevance were a receipt from a Shell station in Ladysmith, Virginia; a Fred Pryor seminar manual with a list written on the back of it; check number 5233, on Earl and Terry Robertson's account (and a duplicate); a check on Earl and Terry's account, number 5221 (and a duplicate) which "was partially written out beginning with" 's name and the date November 10, and both Moon's and 's fingerprints. **App. pp. 1726-32.** Subsequent handwriting analysis revealed that wrote the note on the Fred Pryor manual and linked him to a check seized from the dumpster (**State's Ex. 85**). **App. pp. 1820-25.**

Other testimony showed that three Caucasian head hairs recovered at autopsy from Earl's right hand were consistent with his hair, as were numerous grey and brown Caucasian head hairs recovered from the upstairs bathroom. Numerous brown Caucasian head hairs recovered from the claw hammer (**State's Ex. 64**) were consistent with either Terry or Earl. Moreover, a number Caucasian head hair fragments recovered from the socks retrieved from the dumpster were similar to those of the victims, and they could not be eliminated as the source of those hairs. However, the fragments were too small to make further analysis of them. **App. pp. 1751-56; 1758-59.**

Restriction Fragment Length Polymorphism (RFLP) DNA analysis was performed on a number of items recovered in the case. Cuttings from one of the white socks and the yellow Union Bay pants retrieved from the dumpster in Maryland matched Earl's DNA. The probability of

selecting an unrelated person at random having a DNA profile matching the DNA on these items is one in 35,000,000,000 blacks and "one in four point seventy billion Caucasians." Blood found on the Tilex bottle and a cutting from another white sock found in the dumpster also matched Earl's DNA. The DNA found on cuttings from the sheet, a swab of the purse strap, a swab from the end of the knife blade, a cutting from the Union Bay pants, cuttings from two socks retrieved from the dumpster and a cutting from the kitchen towel found in the dumpster, all matched Terry's DNA profile. The probability of selecting an unrelated person at random with DNA profile matching the DNA on those items is approximately "one in one hundred and eighty-eight billion blacks and one in five point five trillion Caucasians." **App. pp. 1830-37; 1839-51; State's Ex. 189** (RFLP results work sheet); **State's Ex. 187** (report of DNA expert).

DNA from stains found on the green pillowcase and a white pillow cover also matched Earl's DNA; and the probability of selecting someone at random with a matching DNA profile is approximately "one in one point nine trillion blacks and one in one hundred and ninety billion Caucasians." The DNA profile from a stain on the "low end" of the claw hammer was consistent with either Earl or Robertson's DNA, which was "not uncommon in this case because the suspect ... is the son of the victims." The DNA profile of a cutting from a beige sock retrieved from the dumpster and a stain found on the tip of the bat was consistent with being a mixture of different individuals, and neither Earl, Terry nor Robertson could be eliminated as the source of these stains. However, Moon was eliminated as a contributor. **App. pp. 1851-57; State's Exs. 186-187.**

Dr. Joel Sexton, the forensic pathologist who performed the autopsies on Terry and Earl Robertson, testified at length in both phases of the trial about his findings. His sentencing phase testimony involved opinion evidence, relevant to the statutory aggravating circumstance of physical

torture, concerning whether the victims were conscious throughout the attacks, whether they may have suffered pain and whether any of the knife wounds were deliberately inflicted after the victim's were immobilized. **App. pp. 1784-1808; 2249-2302.**

His sentencing phase findings as to Terry Robertson were that she had three pairs of hammer tine marks on the left side of her head, where most of her injuries were located. **App. p. 2277, ll. 3-8.** There were also three deep lacerations on her back associated with hammer tines **(App. p. 2278, ll. 8-16)** and a tine mark on her shoulder. **App. p. 2281, ll. 22-23.** An injury to the back of her right hand was caused either by the tines or a knife. **App. p. 2288, ll. 6-10.**

Dr. Sexton also found injuries that were consistent with the lateral edge of a hammer. There were two such lacerations on the left side of Terry's head **(App. p. 2277, ll. 9-14)**, one on the back of her neck **(App. p. 2278, ll. 22-24)** and another on the side of her head. **App. p. 2278, l. 25 - p. 2279, l. 1.** Additionally, he found injuries consistent with knife wounds. One was on the back of Terri's neck **(App. p. 2279, l.25 - p. 2280, l. 6)**; three lacerations were found on the front of her shoulder **(App. p. 2280, ll. 23-24)**; a "very shallow wound" across her wrist was found that "runs parallel to a much deeper incised wound" **(App. p. 2284, ll. 3-5)**; there were four cuts on the left forearm **(App. p. 2285, ll. 17-25)**; one on the back of her left wrist **(App. p. 2286, ll. 22-24)**; three stab wounds in her lower right back **(App. p. 2288, ll. 25-p. 2289, l. 12)**;[24] a cut across the left cheek and jaw **(App. p. 2291, ll. 9-7)**; multiple cuts on her neck **(App. p. 2291, l. 10)**; and a "mutilating injury" across the right side of her face. **App. p. 2292, ll. 14-19.** Dr. Sexton characterized a number of the knife wounds as "deliberate" and opined that they were inflicted after Terry was immobilized

[24] One wound was close to "an actually impacted the spine. This wound was only 2¼." Two did not enter the abdominal cavity but only went about "four inches into the soft tissue of the back."

or no longer moving. Some were inflicted after her heart had stopped. **App. p. 2284, l. 17 - p. 2285, l. 14.**

The various injuries Dr. Sexton found on Terry were all detailed in diagrams which were introduced as **State's Ex. 267**. Dr. Sexton opined that most of the knife wounds were perimortem; and he described them as "superficial" because they did not cause her death. The fatal wounds were "the ones that are in the left temporal region where there were multiple fractures in the skull." These included a "pair of marks" on the left ear and two more above the left ear, as well as "deeper lacerations that extend around to the back side and had [multiple fractures] underlying them." **App. pp. 2294-96; State's Ex. 268.**

Dr. Sexton gave similar testimony regarding the injuries that he found on Earl Robertson's body. He testified that he found a number of hammer tines injuries. He found one penetrating on the head (**App. p. 2258, ll. 14-25**); two pairs of injuries on the left side of the head (**App. p. 2259, ll. 20-24**); and tines marks on the temple (which actually could have been caused by "the blunt edge of the hammer turned sideways") that pinched part of the ear off (**App. p. 2260, ll. 6-12**). He found similar injuries on the right shoulder (**App. p. 2262, ll. 11-19**); the right side of Earl's neck (**App. p. 226358, ll. 13-15**); on the back of Earl's left hand (**App. p. 2265, ll. 11-25**); and on the back of Earl's right hand. **App. p. 2265, ll. 18-23.**

Dr. Sexton further testified that he found two linear abrasions consistent with the baseball bat on the top of the spine (**App. p. 2253, ll. 22-24**); one on the left side of Earl's back (**App. p. 2254, ll. 7-10**); and one on the upper right back. **App. p. 2254, ll. 21-22.** Dr. Sexton likewise found another injury consistent with the hammer on Earl's ear. **App. p. 2260, ll. 7-11.** There was a stab wound, consistent with being caused by a knife, on Earl's hand (**App. p. 2252, l. 17**); a cut from a

knife or other sharp object on the right back side of Earl's neck (**App. p. 2252, ll. 18-20**); a perimortem knife injury "just above the left knee" (**App. p. 2264, ll. 3-9**); and another injury on the ride side of the neck. **App. p. 2263, ll. 15-16.**

As with the injuries to Terry, Dr. Sexton utilized several diagrams (**State's Ex. 267**) to illustrate Earl's various injuries. Again, he indicated that the knife wounds were superficial because they were not fatal. However, many would have been painful. **App. pp. 2269-72; State's Ex. 267.** He further opined that the head injuries would not have caused immediate unconsciousness or immediate death. Also, the blow that "caused the most damage" and was the most likely cause of death was the one on the top of the head, which he opined was consistent with a bat. **App. pp. 2274-76; State's Ex. 267.**

Pamela Carole testified that Nations Bank was the personal representative of the estates of Earl Robertson and Terry Robertson; that she had completed all the probate filings with the probate court; and that she had filed tax returns for the estate and income tax returns for both individuals. The combined gross worth of the estates was approximately $2,200,000.00, and their children, Robertson and his brother Chip, were the beneficiaries. **App. pp. 1527-28; 1533.**

III. HABEAS ALLEGATIONS

Robertson raises the following allegations in his *pro se* Petition for Writ of Habeas Corpus:

GROUND ONE: Petitioner's Right to a Fair and Impartial Jury trial, guaranteed by the due process clause of the Fourteenth Amendment and the Sixth Amendment to the United States Constitution, was violated by the trial court's failure to select a jury from another county.

GROUND TWO: Petitioner's sentence violates the due process clause of the Fourteenth Amendment and the Fifth and Sixth Amendments to the United States Constitution because Petitioner was

forced to submit to a state-sponsored psychological evaluation fo the sole purpose of obtaining evidence to be used against him at sentencing and to waive his right to counsel for purposes of that evaluation.

GROUND THREE: Petitioner's sentence violates the due process clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution because the trial court failed to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.

Grounds Exhausted by Petitioner's First Post-Conviction Relief Proceedings

GROUND FOUR: Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution was violated by trial counsel's actions in advising Petitioner that anything he revealed to the defense expert Ms. Toni Cascio was privileged, trial counsel's failure to object to discovery of Ms. Casio's notes by the State, and trial counsel's decision to call Ms. Cascio to testify under these circumstances.

Unexhausted Ground Pending in Petitioner's Second Application for State Post-Conviction Relief.

GROUND FIVE: Petitioner's Sixth and Fourteenth Amendment right to a fair jury trial was violated by the Solicitor's improper and prejudicial closing argument during which he arged that the jury should not deliberate when determining whether the state had proven Petitioner's guilt beyond a reasonable doubt. Petitioner's trial counsel unreasonably failed to object to this argument in violation of his Sixth Amendment right to the effective assistance of counsel.

GROUND SIX: Petitioner's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment were violated by the State's introduction of a list of petitioner's prison infractions. Petitioner's trial counsel unreasonably failed to object and preserve for appellate review the federal constitutional issues related to the State's introduction of this list, in violation of petitioner's Sixth Amendment right to the effect assistance of

counsel.

GROUND SEVEN: Petitioner's right to the effective assistance of the counsel as guaranteed by the Sixth Amendment to the United States Constitution was violated by trial counsel's failure to object to the State eliciting testimony that the victim would have been mortified by the testimony introduced about her by defense witnesses and trial counsel's failure to introduce evidence that the victims were opposed to capital punishment.

GROUND EIGHT: Petitioner's Sixth, Eighth and Fourteenth Amendment rights were violated by the solicitor's improper closing argument during the penalty phase of petitioner's capital trial. Petitioner's trial counsel unreasonably failed to object to thsi argument in violation of petitioner's sixth amendment right to effective assistance of counsel.

GROUND NINE: Petitioner's Sixth, Eighth and Fourteenth Amendment rights were violated by the trial court's error in failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire. Petitioenr's appellate counsel unreasonably failed to raise this issue on direct appeal, in violation of petitioner's sixth amendment right to the effective assistance of appellate counsel.

GROUND TEN: Petitioner's right to the effective assistance of appellate counsel as guaranteed by the Sixth Amendment to the United State Constitution was violated by appellate counsel's failure to raise the issue of whether the trial court erred in denying the defense motion to specifically define mitigating circumstances and to question potential jurors about specific mitigating circumstances during voir dire.

GROUND ELEVEN: Petitioner's right to the effective assistance of appellate counsel as guaranteed by the sixth amendment to the United State Constitution was violated by Appellate Counsel's failure to raise the issue of whether the trial court erred in denying the defense motion to limit the state's presentation of victim impact evidence to testimony from immediate family members.

III. DISCUSSION

Respondent is entitled to summary judgment. The present habeas corpus petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Accordingly, the provisions of the AEDPA apply to this case. *Lindh v. Murphy*, 521 U.S. 320 (1997).

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). "The exhaustion doctrine ... is now codified at 28 U.S.C. § 2254(b)(1)." *Id.* (internal citations omitted). "The exhaustion requirement ... serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). "An exception is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." *Id. See also Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (recognizing that, although not jurisdictional, the exhaustion requirement is strictly enforced; and that failure to exhaust remedies will be excused only where exhaustion requirement is expressly waived by the state or petitioner has technically complied therewith). The exhaustion requirement is met only if the federal claim has been "fairly presented" to the state courts, *Picard v. Connor*, 404 U.S. 270, 275 (1971), or no state remedy remains available. *Matthews*, 105 F.3d at 911. To fairly present a claim, a petitioner must "include reference to a specific federal constitutional guarantee, as well as a statement of facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (citing *Picard*, 404 U.S. at 271).

Here, Robertson raises eleven separate allegations. Of these claims, he only exhausted **Ground Four**, in which he asserts that he was denied effective assistance of counsel by trial

counsel's advice to Robertson that anything he revealed to the defense social worker Toni Cascio was privileged; counsel's failure to object to discovery of Ms. Casio's notes by the State; and trial counsel's decision to call Ms. Cascio to testify after the trial judge ordered counsel to disclose her notes. Robertson did not exhaust **Grounds One-Three** because all three are direct appeal issues and Robertson knowingly and voluntarily abandoned his direct appeal.[25] He admits that **Grounds Five-Eleven** were not exhausted in PCR.

However, Petitioner does not have any state court remedies available to him because his 2011 action and any future PCR application are barred as successive under S.C. Code Ann. § 17-27-90 (1985) and *Aice, supra*, and his 2011 action and any future PCR application are untimely under the one-year statute of limitations for PCR actions, § 17-27-45(A) (Supp. 2011). Therefore, the exhaustion requirement is technically satisfied.

Petitioner's technical compliance with the exhaustion requirement, however, does not entitle him to relief.

> The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law. Judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources. Those resources are diminished and misspent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance.

Harrington v. Richter, 131 S.Ct. 770, 780 (2011). Under the AEDPA, "[f]ederal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision

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[25] As shown in the Procedural History, his **Ground One** was raised as Issue 6 in his *pro se* Initial Brief of Appellant, and his **Ground Two** was raised as Issue 6 in his *pro se* Initial Brief of Appellant. **Ground Three** had initially been raised by appellate counsel as Issue 2 in the brief submitted by counsel. However, counsel was relieved at Robertson's request and Robertson submitted his own Initial Brief of Appellant, in which he did not raise this issue. Thus, that claim had been abandoned before he abandoned his direct appeal in its entirety.

'was contrary to' federal law then clearly established in the holdings of this Court, § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); or that it 'involved an unreasonable application of' such law, § 2254(d)(1); or that it 'was based on an unreasonable determination of the facts' in light of the record before the state court, § 2254(d)(2)." *Richter*, 131 S.Ct. at 785.

"[A] state court decision is only 'contrary to' clearly established law when it 'applies a rule that contradicts the governing' Supreme Court holding or 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent.' " *Lovitt v. True*, 403 F.3d 171, 178 (4th Cir. 2005) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). If the United States Supreme Court has never addressed the claim presented to the state court, then, the state court decision cannot be said to have "unreasonabl[y] appli[ed] clearly established Federal law' [under § 2254(d)(1)." *Carey v. Musladin*, 549 U.S. 70, 74-77 (2007)

Under the "unreasonable application clause,

> [t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an unreasonable application of federal law is different from an incorrect application of federal law." *Williams*, *supra*, at 410, 120 S.Ct. 1495. A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.
>
> A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). And as this Court has explained, "[E]valuating whether a rule application

was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Ibid.* "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. ----, ----, 129 S.Ct. 1411, 1413-14, 173 L.Ed.2d 251 (2009) (internal quotation marks omitted).

Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court explicitly conducted a *de novo* review, 578 F.3d, at 952; and after finding a *Strickland* violation, it declared, without further explanation, that the "state court's decision to the contrary constituted an unreasonable application of *Strickland*." 578 F.3d, at 969. AEDPA demands more. **Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.** The opinion of the Court of Appeals all but ignored "the only question that matters under § 2254(d)(1)." *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under de novo review: Because the Court of Appeals had little doubt that Richter's *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court's result and ignores further limitations of § 2254(d), including its requirement that the state court's decision be evaluated according to the precedents of this Court. *See Renico v. Lett*, 559 U.S. ----, ----, 130 S.Ct. 1855, 1866, 176 L.Ed.2d 678 (2010). It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *See Lockyer, supra*, at 75, 123 S.Ct. 1166.

If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, **§ 2254(d)** stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It **preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal.** *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring in judgment). **As a condition for obtaining habeas corpus from a federal court, a state prisoner**

> **must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.**

Richter, 131 S.Ct. at 785-87. (Emphasis added).

The Court in *Richter* further explained that:

> The reasons for this approach are familiar. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Calderon v. Thompson*, 523 U.S. 538, 555-556, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) (internal quotation marks omitted). It "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Reed*, 489 U.S., at 282, 109 S.Ct. 1038 (KENNEDY, J., dissenting).
>
> Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions. Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. 28 U.S.C. § 2254(b). If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 82-84, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), applies. And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies. Section 2254(d) thus complements 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, see id., at 90, 97 S.Ct. 2497.

Richter, 131 S.Ct. at 787.

Finally, *Richter* makes clear that a state court need not rely upon, nor need it even cite, Supreme Court precedent in order to avoid resolving a petitioner's claims in a way that is "contrary to" or involves an "unreasonable application of" clearly established federal law. Rather, even state court orders summarily denying relief are entitled to AEDPA deference. *Id* at 784 ("determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not

require that there be an opinion from the state court explaining the state court's reasoning.... Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated"); *cf. Early v. Packer*, 537 U.S. 3, 8 (2002) ("Avoiding these pitfalls does not require citation of our cases-indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them") (emphasis in original).

GROUND ONE

Robertson first asserts that his right to a fair and impartial jury trial, "guaranteed by the due process clause of the Fourteenth Amendment and the Sixth Amendment to the United States Constitution, was violated by the trial court's failure to select a jury from another county." Respondent submits that this allegation is procedurally defaulted under *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) because, although Robertson originally raised this allegation as Issue 6 in his *pro se* Initial Brief of Appellant, the state supreme court dismissed the appeal at his request because it concluded, following an evidentiary hearing conducted by the trial judge, that he made a knowing and intelligent to abandon his direct appeal.[26]

As discussed in the "Procedural History," *supra*, Robertson wrote a second letter to the state supreme court dated June 3, 2002, in which he asked the Court to relieve Mr. Savitz and to allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The state supreme court then filed an Order on June 26, 2002, remanding the matter to the trial judge, Judge Hayes, for

[26] His **Grounds Two** and **Three** are procedurally defaulted for the same reason.

a hearing on Robertson's competency to appear *pro se*. Judge Hayes held a hearing on Robertson's competency to appear *pro* se on October 10, 2002.[27] 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. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

Robertson later filed a *pro se* Initial Brief of Appellant, dated July 25, 2003, in which he presented seven issues for appellate review. His sixth issue was stated as follows: "The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant." ***Pro Se* Initial Brief of Appellant at p. 2.**[28] However, after the direct appeal was dismissed and re-instated on several occasions because of Robertson's failure top comply with the South Carolina Appellate Court Rules (SCACR), he eventually indicated to the South Carolina Supreme Court that he wished to abandon his right to a direct appeal. *Accord State v. Motts*, Opinion No. 26947 (S.C. S.Ct., Mar. 21, 2011).

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 Court directed that on remand, Judge Hayes would be governed by the *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993) standard in making his findings, *i.e.*,

> I. Whether the convicted defendant can understand the nature of the

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[27] Robertson was present at the hearing and Bruce M. Poore, Esquire, represented him. Senior Assistant General Salter represented the State. Robertson was the only witness at the hearing. This hearing is also discussed in connection with **Ground Three**, *infra*.

[28] This issue was argued at pages 20-23 of the ***pro se* Initial Brief of Appellant**.

proceedings, what he was tried for, the reason for the punishment, or the nature of the punishment (cognitive prong); and

2. Whether the convicted defendant possesses sufficient mental capacity or ability to rationally communicate with counsel (assistance prong).

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

At the time of that hearing, Robertson testified that he understood Judge Hayes' explanation that state supreme court had asked Judge Hayes to inquire into whether or not Robertson was competent to make a decision as to whether or not to withdraw his direct appeal, and to ensure that he was "knowingly and willingly and voluntarily exercising that right." Robertson further testified that he had filed his brief and the State had filed a brief. "What has been lacking for a year and a half has been the record on appeal and designation of matter. And at this point I got bogged down with the system and said I can't provide you a record on appeal if my attorney won't provide it for me, that's where I stood and, . . . we tried to resolve it in a civil matter, you know. The courts have basically said, 'Look, provide it.' And I'm saying I can't provide it and therefore I will move on." **02/22/05 Tr. pp. 4-5.**

When Judge Hayes asked whether the expression "move on" meant that he would allow himself to be executed out of frustration, Robertson explained that he had not actively requested dismissal in his last correspondence with the state supreme court but that he would acquiesce in a dismissal. He further indicated that he was aware of and understood his right to seek Post-Conviction

Relief and federal habeas corpus. He also stated that the differences between review on direct appeal, PCR and federal habeas corpus had been explained to him. Moreover, at Judge Hayes' request, Robertson explained the issues that his former appellate counsel and he had raised on direct appeal. **02/22/05 Tr. pp. 5-8.**

Robertson testified that he understood that "some if not all of these [direct appeal] issues may not be available [and would not be available for consideration] on either collateral attack through post conviction relief or federal habeas." He acknowledged that he knew Michael Passaro, a death row inmate who had waived the right to direct appeal and had been executed. *See State v. Passaro*, 350 S.C. 499, 505, 567 S.E.2d 862, 865 (2002) (capital defendant competent to knowingly and intelligently waive right to appellate review of guilty plea). Robertson also remembered the October 2002 hearing before Judge Hayes to determine whether he was competent to knowingly and intelligently waive his right counsel on direct appeal; and he testified that he had discussed that issue with stand-by counsel at the time. **02/22/05 Tr. pp. 8-10**. *See also* **02/22/05 Tr. pp. 18-19** (Respondent's examination of Robertson). He later explained that by staand-by counsel, he was referring to Mr. Savitz. **02/22/05 Tr. p. 25.**

Robertson explained that "I should be competent to make any decision within the realm of representing myself and nobody would question my competency if I chose to appeal tomorrow, it's just because I have chosen an unpopular decision." He also noted that the State was not challenging his competency to waive his right to appeal. Judge Hayes explained that because of the nature of the punishment that Robertson faced, it was incumbent on the Courts to ensure that he was competent to make the decision of whether or not to waive the appeal, that he understood the ramifications of his decisions and that if he had counsel, he had the ability to communicate with counsel. Robertson

understood that if he followed through the direct appeal process and relief was granted, he could be entitled to a *de novo* "new trial on the murder charges and the guilt and innocence phase." **02/22/05 Tr. pp. 10-11.**

When asked whether he wanted to go forward with his appeal or have it dismissed, Robertson testified that:

> I wish to have it dismissed, whether affirmatively or whether by neglect it doesn't make a difference to me. . . . [Yes, I was frustrated, but too, I was just explaining to the Court that you don't expect some miracle record on appeal to show up on y'all's desk tomorrow morning from James Robertson, it's not going to happen. Y'all can get the remittitur ready and send it on down and we can move on with this process. They took an active step of saying he's taking an active step, I didn't mean it as an active step, but it certainly doesn't bother me. I have no desire to continue with the direct appeal.

02/22/05 Tr. pp. 11-12. Therefore, he wanted to have the appeal dismissed. **02/22/05 Tr. p. 12.**

Judge Hayes made a September 16, 2004 letter from Robertson part of the record and stated that the court recognized that Robertson stated that he was frustrated with not having all of trial counsel's file. However, Robertson testified that he understood Judge Hayes' explanation that the Record on Appeal could only include "the record . . . of the trial proceeding itself, not of the collateral matters." *See* Rule 210(c), SCACR ("The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal"). Robertson further testified that "[t]he documents I was asked to provide on the record of appeal I don't have, don't exist neither, weren't created[]," such as They were destroyed." In response, Judge Hayes asked if Robertson would change his mind if these documents were to appear. Robertson replied, "it would make life a lot easier but it would not change my decision." **02/22/05**

Tr. pp. 12-13.

Examination by Respondent established that Robertson had graduated from high school and that he had "approximately two years of college, with a major in "[i]ndustrial engineering." He also described his I.Q. as "[a]bove average," and he testified that he understood the purposes of the hearing that day. **02/22/05 Tr. pp. 14-15**. When asked to explain his understanding of a direct appeal, Robertson testified that:

> It allows for alleged errors to be corrected through a process that only looks at what happened during the trial, what is on record, what my attorney and what the State's attorney did or did not object to. The fact that you are innocent or not innocent really makes no big deal in this case, you had your chance to do that at trial. So any new issues, that kind of stuff, that's kind of way on down the line. This is strictly errors that maybe the judge made, not necessarily on purpose, just errors that the judge made in directing the jury or directing one of the attorneys or whatnot.

02/22/05 Tr. p. 15.

Additionally, Robertson, again, indicated that he understood that, in compiling a record on appeal, he "would be limited to presenting to the State Supreme Court the transcripts of any hearings before Judge Hayes or any documents that were presented in evidence. Although he remained frustrated, he testified that "I would rather move on to an arena where I can address maybe those issues." He declined Respondent's offer to assist him in finding copies of the documents that he had been unable to locate, stating that "it would have been nice to have three or four years ago in the middle of drafting a civil complaint and everything else in this world, . . . but it's not going to change my mind. It's not the overriding factor in this decision." **02/22/05 Tr. pp. 15-16.**

Robertson was aware of the state supreme court's proportionality review; that the Court "would determine whether or not the sentences [were] a result of passion, prejudice or any or arbitrary factor" as part of the proportionality review; and that the Court could conduct that review,

in spite of his waiver, as it had in *Passaro*. He also stated that "I'm undecided at this point, but I do understand I have th[e] option [to pursue PCR and federal habeas corpus]." **02/22/05 Tr. pp. 16-17.**

Robertson indicated that he had read the Initial Brief of Respondent filed by the State and was aware that Respondent had conceded error in connection with the second issue raised by him but had argued the error was harmless beyond a reasonable doubt. He was also aware that would be entitled to a new sentencing procedure "if the State Supreme Court agreed with your position instead of the State's position." However, he added that "I am most assuredly against a new sentencing proceeding . . . [because] I got the better end of the deal this time, I'm not taking my chances. The world says death is bad but it doesn't have to be better. I'm not going to give those twelve jurors a chance to do the right thing to be honest with you." **02/22/05 Tr. pp. 17-18.**

When specifically asked by Respondent why he wished to waive his right to appeal, Robertson replied,

> I'm tired, I have no desire. There is nothing to gain from it. A new trial means nothing to me. It means that at some point we are going to be standing in front of another sentencing jury. Guilt has never been an issue at this trial, never will be, never was, which, you know, just leads us back at the sentencing hearing and I don't want another sentencing hearing either. So nothing good can come from this other than just rolling the dice with twelve more jurors.

02/22/05 Tr. p. 18.

Robertson, "in general," understood that his decision to waive his right to appeal may adversely impact his ability to raise issues in federal habeas corpus; that "in order to preserve an issue for the review of federal courts the issue must be first submitted to the State Supreme Court;" and that if he did not present an issue to the state supreme court, he could not "raise it in federal court." he explained that his understanding was that this requirement was like "the same argument

that [if] it's not preserved during the trial it can't be raised on direct appeal, I understand." **02/22/05 Tr. p. 19, ll. 8-21.**

Although he stated that he frequently changed his mind as to whether he would pursue federal habeas corpus relief, he understood that he may not have the right to pursue certain issues that he might be able to otherwise pursue if he abandoned his appeal. **02/22/05 Tr. p. 19, l. 22-p. 20, l. 10.** He likewise understood that his decision to waive his appeal might result in his death sentence being carried out. However, he stated "[t]hat's not such a big deal. It's what I was sentenced to." His understanding of a death sentence was that "I will be dead. It will be over with." **02/22/05 Tr. p. 20, ll. 11-18.**

Robertson, once again, testified that he wished to waive his right to direct appeal. Moreover, he was being treated for bipolar disorder, and he was taking Prozac, Vistoril and Lithium.[29] However, when asked whether any of these medications interfered with his ability to understand what he was doing, he replied, "Absolutely not." He likewise denied that he had experienced "any problems, any manic phases" as a result of his bipolar disorder that might impact upon his decision, and he explained that "I have been taking this medicine continuously for at least three years. I did come off of it for a period before that, but this decision has been made wholly while on this medication." **02/22/05 Tr. pp. 20-21.**

He also denied being under the influence of any other drugs or alcohol that might effect his decision. He was being treated for depression but he denied being depressed. He understood that he

[29] He stated that he was taking "20 milligrams of Prozac, maybe 150 or 200 of Lithium, 100 or 125 of Vistoril, it hasn't changed much since 2002." He was being treated by a Dr. Cusack, who saw him every other week. "A nurse and a counselor" were available for him if he needed more immediate attention. The counselor was "aware of what medicine you're taking, he's aware of the general situation on death row, [and] so forth. We see a nurse who delivers medication three times a day." **02/22/05 Tr. 22.**

was tried because "I murdered two people in the course of committing another crime;" that the people he murdered were his parents, Terry Robertson and Earl Robertson; and that he received he death penalty as a result. Further, he understood that his decision to waive his right to an appeal was final and that he could not thereafter change his mind. Additionally, he denied that anyone had promised him anything, threatened him or coerced him in any manner to get him to make his decision. **02/22/05 Tr. pp. 21-23.**

While he and his former attorneys had disagreed and did not work well together, he did not have any problems understanding them and they could understand him. He did not see any problems in communicating with another attorney, if one was appointed in the future. In fact, this was something that he had discussed with his stand-by counsel, with whom he spoke approximately once a week. He had also discussed his decision to waive his direct appeal with stand-by counsel, but he, nevertheless, wanted to waive his direct appeal. **02/22/05 Tr. pp. 21-23.**

Robertson had informed his stand-by counsel, Mr. Savitz, of the hearing but Savitz was not present. Respondent also, as an exhibit, **Court's Ex. 3** from the trial. This is the letter from Dr. Geoffrey McKie, concerning his findings as to Robertson's competency. **02/22/05 Tr. pp. 23-26.**

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 the Report, Judge Hayes notes that the state supreme court held in *State v. Torrence*, 317 S.C. 45, 451 S.E.2d 883 (1994) (*Torrence II*) that a capital defendant may constitutionally waive the right of general appeal provided that he is competent and his decision is knowing and voluntary. The Court in *Torrence II* also directed the circuit court, on remand, "to conduct a full hearing allowing the introduction of testimony, exhibits, and evidence, so as to provide a full record for the Supreme Court's evaluation." Judge Hayes further noted that

"Robertson may not be determined competent unless the hearing reveals that he meets [the *Singleton*] standard." **Report to the Supreme Court of South Carolina, pp. 1-2.**

Although expert testimony on these questions was presented in both *Torrence* and *Passaro*, Judge Hayes found that it was unnecessary for Robertson to be evaluated because "(1) there is a presumption of sanity . . . ; and (2) the record and the undersign's repeated contacts with Robertson do not give rise to any reason to question his competency. Conversely there was reason to question the competency of Torrence and Passaro." **Report to the Supreme Court of South Carolina, pp. 2-3.**

Judge Hayes then made the following, detailed findings:

> Robertson has by his own testimony an above average I.Q. The record reflects he has a full scale I.Q. of 112, with a verbal score of 118 and a non-verbal score of 102 (Trial, TR pp. 2535 - 2571).
>
> Robertson does, as the court has by earlier order noted, have some mental issues and by his testimony has for the last three years and presently, dealt with such issues by monitored medication and counseling.
>
> Robertson has a high school diploma and some college experience. Robertson has now been before the undersigned on three occasions post trial and communicated recently with the undersigned by letter dated September 16, 2004, filed with the record of the February 22, 2005 hearing.
>
> Robertson not only has sufficient mental capacity and ability to rationally communicate with counsel, but has, by his testimony, communicated with prior appellate counsel and current stand by counsel. Robertson is smart and very savvy. His colloquy with the court and his answers to the State's questions clearly evince the mental capacity and ability to express ideas, analyze options, understand facts and law and intelligently convey his thoughts and ideas to others.
>
> As a result of questioning by the Court and by counsel for the State, the court finds, applying the Singleton standard, Robertson is competent to waive his right to appellate review and is exercising his right to waive such review knowingly and voluntarily.

While Robertson testified that his decision to waive his right to direct appeal is borne out of frustration with the process, it is clear his decision is being made freely, knowingly and voluntarily.

Inarguably the record is clear that Robertson understood the nature of his trial for murder, the basis for his being found guilty and, while he has some dispute with the result of the sentencing phase of his trial, he understands his sentence and the basis for same.

By reference to his personal file, Robertson articulated to the court the grounds raised on his behalf in his direct appeal while acknowledging he and appellate counsel were in disagreement as to these grounds.

Robertson testified that he did not seek a new trial on his guilt because he is guilty of killing his parents. He testified he did not want a new sentencing trial.

Robertson acknowledged that he understood his right to proceed on appeal and the consequences of waiving this right, to wit, no direct appeal of the issues raised on appeal, save the proportionality of his death sentence, and loss of the direct appeal issues relative to any collateral attack on his death sentence.

Robertson is aware of his opportunities to seek collateral relief through post conviction relief proceedings and through Federal habeas corpus.FN4

FN4/ When questioned as to whether or not Robertson intends to pursue any option, his response must be defined as cavalier and perhaps even whimsical. However, his attitude is not at issue, rather it is his competency that is here addressed.

Robertson's demeanor, ability to understand and articulately respond to questions, his grasp of the proceedings and procedure and his steadfastness and resolve as to his decisions all lead the undersigned to conclude Robertson is competent pursuant to the *Singleton* stand[ard].FN5

FN5/ The undersigned must note that Robertson's philosophy and logic on the issues extant in this matter are at best puzzling. However, while puzzling, Robertson's positions are stated lucidly, and after what appears to the court to be thoughtful consideration over a significant amount of time.

As in Robertson's earlier effort to proceed *pro se*, here the record establishes his knowledge of what will result from his choice to waive his right to appeal and such choice is being made with his eyes wide open.

CONCLUSION

> The record demonstrates that Robertson's decision to waive his appeal is a competent decision by one competent to make such a decision and he is knowingly and voluntarily exercising his right to waive his direct appeal.FN6
>
> FN6/ The Court is faced with somewhat of a contradiction as to the waiver. Robertson testified he did not affirmatively assert his right to waive his appeal, but when confronted with the option of proceeding or exercising his right to waive same he determinedly expressed his wish to exercise his right and waive further proceedings on direct appeal.
>
> Robertson, as he has previously, did not simply provide pro forma answers to pro forma questions from the court or the State. His answers at the hearing reflected the requisite understanding of the issues before the court. Robertson's decision, whether a wise one or not, is his own to make and he is competent to do so.

Report to the Supreme Court of South Carolina, pp. 3-5.

In an Order filed June 3, 2005, the Supreme Court of South Carolina 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 **Grounds One-Three** were not exhausted and he procedurally defaulted these claims on direct appeal because he knowingly and voluntarily abandoned the appeal and it was dismissed *at his request* without the South Carolina Supreme Court considering any issues that Robertson raised in his *pro se* Initial Brief of Appellant. *See Kornahrens v. Evatt*, 66 F.3d 1359, 1362 (4th Cir. 1995) (Even under *in favorem vitae* review an inmate's claim is procedurally barred unless specifically raised to the state supreme court); *Gilbert v. Moore*, 134 F.3d 642 (4th Cir. 1998)(en banc)(same).

The United States Supreme Court has held that it will not review a question of federal law

decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed. 635 (1872). "This rule applies whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729. As the Court further explained in *Coleman*,

> We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds. *See Wainwright v. Sykes*, 433 U.S. 72, 81, 87, 97 S.Ct. 2497, 2503-2504, 2506-2507, 53 L.Ed.2d 594 (1977); *Ulster County Court v. Allen*, 442 U.S. 140, 148, 99 S.Ct. 2213, 2220, 60 L.Ed.2d 777 (1979). *See generally* [*Harris v. Reed*, 489 U.S. 255, 262 (1989)].

Coleman, 501 U.S. at 729-30.

In *Bell v. Cone*, 543 U.S. 447, 451 n. 3 (2005), the Court noted that: "as a general matter, the burden is on the petitioner to raise his federal claim in the state courts at a time when state procedural law permits its consideration on the merits, even if the state court could have identified and addressed the federal question without its having been raised," *citing Baldwin v. Reese*, 541 U.S. 27, 30- 32 (2004). Much like the abuse of writ doctrine, the procedural default doctrine "refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *McCleskey v. Zant*, 499 U.S. 467, 489 (1991). "Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default." *Dretke v. Haley*, 541 U.S. 386, 388 (2004).

This is a corollary to the rule that "federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Id.* at 392.

The procedural default can only be excused if a habeas petitioner can demonstrate both cause for the procedural default and prejudice as a result of the alleged constitutional violation, or if he can demonstrate that failure to review the constitutional claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749-50. The cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that " fundamental fairness [remains] the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). A prisoner may establish a fundamental miscarriage of justice by showing that a constitutional error probably resulted in the conviction of one who is actually innocent. *See, e.g., Deitz v. Money*, 391 F.3d 804, 808 (6th Cir.2004). In order to raise a claim of actual innocence, a prisoner "must present[ ] evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). This standard applies when a prisoner presents a valid claim of constitutional error. *Id* at 316.

In the present case, Robertson cannot show cause for the default of **Grounds One-Three** since these issues could and, in the case of the present allegation and **Ground Three**, would have been addressed by the state supreme court but for Robertson's voluntary, knowing and intelligent waiver of his right to direct appeal.

To show "cause" for the default, he had to show "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). "[A] showing that the factual or legal basis for a claim was not reasonably available to

counsel, . . . or that "some interference by officials . . . made compliance impracticable, would constitute cause under this standard." *Id.* Additionally, constitutionally ineffective trial or direct appellate counsel may be cause. *Id.* Clearly, Robertson's own decision to waive his direct appeal does not constitute an objective factor as envisioned by the United States supreme Court. Also, a claim must be exhausted, *id* at 489, and contrary to the representations by Robertson and his current attorneys, Robertson's **Grounds One-Three** were not exhausted.

Furthermore, he cannot show prejudice from the default. The issue as addressed in the state trial court and as originally raised in Robertson's *pro se* Initial Brief of Appellant, was that the trial judge erroneously refused to empanel a jury from another county to try to case, pursuant to S.C. Code Ann. § 17-21-85 (Supp. 2002).[30] Respondent submits that this allegation fails to state a claim upon which federal habeas corpus relief may be granted because this argument concerns the violation of a state statute, as opposed to a rule of federal constitutional law, and federal habeas corpus relief is not available to correct errors of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.' ... 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"). (Citations omitted). *See also Wilson v. Corcoran*, 131 S.Ct. 13 (2010);[31] *Branan v. Booth*,

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[30] There is no federal constitutional requirement for such a statute, and Robertson's argument in the state trial court was limited to the failure to utilize this statute.

[31] In a *per curiam* opinion, the Court summarily vacated a decision in which the Seventh Circuit granted habeas corpus relief for an Indiana state prisoner. Jurors at Corcoran's state-court trial found that he was guilty of quadruple murder, found the statutory aggravating circumstance of multiple murders present, and recommended a death sentence. In adopting that recommendation, the trial judge made certain

861 F.2d 1507, 1508 (11th Cir.1988) (affirming the district court's dismissal of a habeas petition stating that the petition was "based exclusively on state law issues which are merely 'couched in terms of equal protection and due process'") (quoting *Willeford v. Estelle*, 538 F.2d 1194, 1198 (5th Cir.1976)).

Alternatively, Respondent submits that the trial judge did not abuse his discretion and that Robertson failed to demonstrate any actual prejudice because the trial judge's rulings were supported by the thorough *voir dire* examination of the qualified jurors and comport with precedent of both the United States Supreme Court and the state supreme court.

After the jury was sworn, the trial judge gave his preliminary remarks to the *venire*. He read the indictments against Robertson, informed the jurors that the State was seeking the death penalty

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references to the innocence of Corcoran's victims, the heinousness of the offense, and his likely future dangerousness. Based on a clarification that the trial judge provided on remand, the Indiana Supreme Court accepted that his comments were intended only to provide context, and did not reflect any reliance on aggravating factors beyond those recognized by Indiana statute. Corcoran then sought federal habeas corpus relief, alleging in part that he had been improperly sentenced based on non-statutory aggravating factors. Ultimately, the Seventh Circuit granted relief. It found that the state high court's conclusion on the sentencing issue constituted an "unreasonable determination of the facts" under 28 U.S.C. §2254(d)(2). It added that remanding the case for sentencing would "prevent noncompliance with Indiana law," which "[Corcoran] contend[ed] . . . also violates the federal Constitution." *Id* at 14-16.

The Supreme Court unanimously reversed. The Court reaffirmed that "it is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in federal courts. The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2254(a). And we have repeatedly held that federal habeas corpus relief does not lie for errors of state law." (internal quotation marks omitted). *Id* at 16.

The Court criticized the Seventh Circuit panel for providing "no hint that it thought the violation of Indiana law it had unearthed also entailed the infringement of any federal right." Nor, held that Court, did it matter that the Seventh Circuit based its holding on §2254(d)(2). That provision "does not repeal the command of §2254(a) that habeas relief may be afforded to a state prisoner 'only on the ground' that his custody violates federal law." Without expressing a view as to the merits of Corcoran's underlying claims, the Court remanded the case for further proceedings not inconsistent with its decision. *Id* at 16-17.

and explained how jurors would be questioned by the court and the parties. **App. pp. 128-30.** He later noted that the case had received some media coverage but that the *veniremen* were not to allow themselves to be exposed to any further media coverage concerning the case because those who sat on the jury must base their verdict on the law and the evidence that was developed in trial and not from any source outside of the courtroom. **App. pp. 159-60.**

The trial judge later addressed trial counsel's motion to select a jury from another county. He stated that he would take the motion "under consideration and hear what the potential jurors have to say." **App. 186.** The trial judge thereafter conducted individual *voir dire* of seventy-one *veniremen* before qualifying thirty-four jurors. **Tr. pp. 209-1271.** In the course of qualifying these jurors, forty-four indicated that they had some prior knowledge of Robertson's case, but only five jurors were excused because they had formed an inalterable opinion as to Robertson's guilt or innocence, or the punishment to be imposed, based upon their exposure to publicity. **Tr. pp. 249-53; pp. 488-500; pp. 635-36; pp. 862-64; pp. 924-35.**[32]

Twenty-nine other jurors were excused because of their views on capital punishment or for some other reason unrelated to exposure to media coverage.[33] Each of the thirty-seven qualified jurors, including the twelve who determined Robertson's guilt or innocense and the punishment to be imposed, stated either that he or she had not been exposed to media coverage or that he or she

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[32]Two jurors who were disqualified based upon their inability to impose capital punishment also had been exposed to media coverage which might effect their judgement. However, the trial judge did not make a finding as to whether they were disqualified because of exposure to publicity and only found that they were not qualified based on their views on capital punishment. *See* **App. pp. 936-56 (Shannon Nelmes); pp. 957-86 (Bessie Gordon).**

[33] For instance, at least four jurors were excused because their knowledge of potential witnesses prevented them from fairly accessing the credibility of witnesses. **App. pp. 428-53; 589-92; 630-36; 850-52; 902-16.** One of these jurors was not death penalty qualified. *See* **App. pp. 902-16.**

could set aside any information which they may have received and base a decision solely on the evidence presented at trial and the law as charged. Each qualified juror further stated that he or she could give both parties a fair and impartial trial; that he or she would be open minded as to the punishment to be imposed; that he or she could and would listen to whatever aggravating or mitigating circumstances were presented; and that he or she could return a verdict of either the death penalty or life imprisonment. Further, virtually every juror was also asked and responded affirmatively as to whether he or she could hold out for a sentence of life imprisonment if the juror felt this was the appropriate punishment, even if all other jurors thought that the death penalty was appropriate. **App. pp. 202-19** (Donna Parler); **220-33** (Dona Lowder); **277-88** (Francis Matthews); **290-303** (Pamela Witherspoon); **320-33** (Lisa Lilly); **334-49** (Fred Shelley); **350-62** (Steven Samios); **363-79** (Lester Landrum); **380-90** (Timothy McAllister); **407-27** (Michael Goeller); **475-88** (Roger Stikeleather); **504-19** (Robin Parker); **532-46** (Jerry Gwinn); **571-87** (Lorrie Sigler); **593-610** (Yancey Sanders); **613-26** (Frank Deaton); **636-53** (Barbara Wright); **654-70** (Robert Loncaric); **688-701** (Bette Christensen); **708-24** (Torrence Smith); **744-59** (Betty Zapata); **783-802** (Paul McGuirt); **817-37** (Russell Hovis); **865-88** (Charles Shaw); **987-1000** (Tino Christina); **1001-19** (Clifton Guffey); **1021-34** (Susan Cochran); **1035-53** (Alta Vandergrift); **1054-68** (Barney Melton); **pp. 1070-87** (Terry Dunlop); **pp. 1110-34** (Joseph Cook); **pp. 1135-53** (Kelly Hope); **1155-72** (Sue Moore); **1173-86** (James Goff); **1198-1214** (Michael Terlinde); **1238-52** (Charles Milbury); **pp. 1254-71** (Robert Thurman).

After the jury was qualified, the trial judge entertained Robertson's motion to select a jury from another county pursuant to § 17-21-85. Trial counsel Boyd **conceded that all of the jurors indicated that they could give Robertson a fair trial** but suggested that most had been exposed

to some media coverage and many jurors knew one or more witnesses that were going to testify. While that may not individually disqualify a particular juror, he suggested that when the panel was taken as a whole, **there was a potential for prejudice** which could be cured by drawing a jury from another county. Counsel did not reference the United States Supreme Court's decision in *Rideau v. Louisiana*, 373 U.S. 723 (1963), and he did not contend that the trial judge erred by failing to take into account public sentiment against Robertson. **App. pp. 1273-74.**

The trial judge found that he had only excused four of seventy-five jurors based upon their brief perceived ideas that they could not be fair and impartial and that he was able to get thirty-seven qualified jurors. He added that "[t]he proof in the pudding is in the eating, as they say, and we were able to get 37 jurors out of that panel. He therefore denied the motion. **App. pp. 1274-75.** There was no error.

The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. "Empaneling a jury pursuant to § 17-21-85 is similar in effect to a change of venue and is subject to the same scope of review. ... a motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abusive discretion. *State v. Manning*, 329 S.C. 1, 7, 495 S.E.2d 191, 194 (1997) (Citation omitted). When jurors have been exposed to pretrial publicity, a denial of a motion for a change of venue is not error if the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. *State v. Caldwell*, 300 S.C. 494, 502, 388 S.E.2d 816, 821 (1990); *Patterson, III, supra.* Mere exposure to pretrial publicity, therefore, does not automatically disqualify a perspective juror. "The relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt [or sentence] of the

defendant." *State v. Tucker*, 324 S.C. 155, 166, 478 S.E.2d 260, 266 (1996), quoting, *Patten v. Yount*, 467 U.S. 1025, 1035 (1984).[34] "It is sufficient if the juror can lay aside his impression or opinion and rendered a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961).[35] The moving party bears the burden of showing actual juror prejudice as a result of such publicity. *Id; Caldwell, supra.*

Applying this criteria to the present case, it is clear that the trial judge did not abuse his discretion because only five of the jurors questions were disqualified because of exposure to pretrial publicity. In support of the current argument, Robertson points out that at least several jurors from one panel of the venire discussed the case amongst themselves despite the trial judge's instructions at the beginning of voir dire not to do so. However, after this was brought to the trial judge's attention (**App. pp. 413-14; 420-22**), the trial judge and/or the parties inquired of the remaining jurors in that panel as to whether the juror had discussed the case with other veniremen and each juror denied having done so. *E.g.*, **App. pp. 437-38; 442; 468-70; 476-77.**

Because it was apparent that at least some members of one panel had potentially violated his instructions, the trial judge agreed to *voir dire* all qualified jurors concerning whether they had heard

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[34] In *Yount*, the Court noted that "[t]he constitutional standard that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law, *see Irvin*, 366 U.S., at 723, 81 S.Ct., at 1642, 1643; whether a juror can in fact do that is a determination to which habeas courts owe special deference, *see* [*Rushen v. Spain*, 464 U.S. 114, 120 (1983)]." *Yount*, 467 U.S. at 1037 n. 12. Today, that deference is codified in § 2254(d)(2). This Court may not grant relief based upon his factual findings unless they are objectively unreasonable. § 2254(d)(2). Further, his findings are entitled to a presumption of correctness, which Robertson must rebut by clear and convincing evidence. § 2254(e)(1). He cannot meet his burden based upon the current record.

[35] Fifty year ago, the Court in *Irvin* stated that "in these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Id.*

anything about the case or been exposed to it in any way after they had been instructed not to do so. **App. pp. 1280-81.** Thereafter juror Stamios indicated that he had also violated the trial judge's instructions during dinner at a local "bar and grill" on the night of his individual *voir dire*.[36] The trial judge excused him as a result of this contact. **App. pp. 1282-85.**

The trial judge thereafter explained to the *venire* that he had excused one potential juror because an inadvertent occurrence and, again, inquired as to whether any juror had been able to abide by his instructions to refrain from any information concerning the case. No juror responded to his inquiry. He further stated that it had been brought to his attention that some members of one jury panel had some discussions about the case. He stated that it was his understanding one juror had asked why Pennsylvania witnesses were listed and the response was that Pennsylvania may have something to do with the facts of the case. Also, it was his understanding the jurors were told that the victims were male and female. Finally, there were a question as to how armed robbery was involved in the case and this had also received a response. The trial judge ascertained that no other matters had been discussed and that anyone who had participated in the conversation could be fair and impartial and base his or her verdict solely on the law and the evidence. **App. pp. 1286-88.**

The State submits that neither of these matters shows an abuse of discretion in denying the motion under § 17-21-85. First, trial counsel conceded that Second, the dismissal of Stamios and the instruction given ensured that there was no prejudice to Robertson from either Stamios' conduct or the venire panel discussing the case.

In his Petition, Robertson makes the representation that "[t]he trial judge acknowledged that

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[36] An acquaintance of his, who knew Robertson's family, spoke to him about the case and told him that the case had received a lot of publicity. He stated that the conversation made him feel uneasy about serving as a juror and could possibly effect his impartiality. **App. pp. 1282-85.**

the case had been the focus of substantial media and public attention, specifically saying that the case had received a great deal of 'notoriety.'" Petition, p. 9. He made similar representations in the ***pro se* Initial Brief of Appellant, at p. 20**. In state court, he cited to ROA. p. 352, ll. 20-24 and ROA, 445, ll. 20-21, even though Robertson never filed a Record on Appeal. These citation are App. p. 159, ll.20-24 and App. p. 252, ll. 20-21.

However, his is somewhat misleading. What the trial judge actually said when addressing the jury panel on p. 159 was "Now, this case has received some media coverage." **App. p. 159.** (Emphasis added). He did later use the term "some notoriety" in his examination of potential juror David Kaylor. **App. p. 252, ll. 20-21.** Kaylor, however, was one of five jurors disqualified because of his exposure to pretrial publicity. **App. pp. 252-53.**

Further, any reliance on *Rideau* is misplaced and a presumption of prejudice, such as that relied upon by the Court in *Rideau* is not warranted in this case. The Supreme Court recently discussed *Rideau* in *Skilling v. United States*, 130 S.Ct. 2896, 2913-14 (2010). The Court summarized *Rideau* as follows:

> Wilbert Rideau robbed a bank in a small Louisiana town, kidnaped three bank employees, and killed one of them. Police interrogated Rideau in jail without counsel present and obtained his confession. Without informing Rideau, no less seeking his consent, the police filmed the interrogation. On three separate occasions shortly before the trial, a local television station broadcast the film to audiences ranging from 24,000 to 53,000 individuals. Rideau moved for a change of venue, arguing that he could not receive a fair trial in the parish where the crime occurred, which had a population of approximately 150,000 people. The trial court denied the motion, and a jury eventually convicted Rideau. The Supreme Court of Louisiana upheld the conviction.
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> We reversed. "What the people [in the community] saw on their television sets," we observed, "was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder." *Id.*, at 725, 83 S.Ct. 1417. "[T]o the tens of thousands of people who saw and heard it," we

> explained, the interrogation "in a very real sense was Rideau's trial-at which he pleaded guilty." *Id.*, at 726, 83 S.Ct. 1417. We therefore "d[id] not hesitate to hold, without pausing to examine a particularized transcript of the voir dire," that "[t]he kangaroo court proceedings" trailing the televised confession violated due process. Id., at 726-727, 83 S.Ct. 1417.

Skilling, 130 S.Ct. at 2913-14. The Court in *Skilling* noted that it had only followed this presumption of prejudice in two other cases: *Estes v. Texas*, 381 U.S. 532, 538 (1965) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). *See Skilling*, 130 S.Ct. at 2914.

The Court explained that

> In each of these cases, we overturned a "conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage"; our decisions, however, "cannot be made to stand for the proposition that juror exposure to ... news accounts of the crime ... alone presumptively deprives the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 798-799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).FN12 See also, e.g., *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984).FN13 Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) (Jurors are not required to be "totally ignorant of the facts and issues involved"; "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."); *Reynolds v. United States*, 98 U.S. 145, 155-156, 25 L.Ed. 244 (1879) ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."). **A presumption of prejudice, our decisions indicate, attends only the extreme case.**
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> FN12. Murphy involved the robbery prosecution of the notorious Jack Murphy, a convicted murderer who helped mastermind the 1964 heist of the Star of India sapphire from New York's American Museum of Natural History. Pointing to "extensive press coverage" about him, Murphy moved to transfer venue. 421 U.S., at 796, 95 S.Ct. 2031. The trial court denied the motion and a jury convicted Murphy. We affirmed. Murphy's trial, we explained, was markedly different from the proceedings at issue in *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), which "entirely lack[ed] ... the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." 421

> U.S., at 799, 95 S.Ct. 2031. Voir dire revealed no great hostility toward Murphy; "[s]ome of the jurors had a vague recollection of the robbery with which [he] was charged and each had some knowledge of [his] past crimes, but none betrayed any belief in the relevance of [his] past to the present case." *Id.*, at 800, 95 S.Ct. 2031 (footnote omitted).
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> FN13. In *Yount*, the media reported on Jon Yount's confession to a brutal murder and his prior conviction for the crime, which had been reversed due to a violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). During voir dire, 77% of prospective jurors acknowledged they would carry an opinion into the jury box, and 8 of the 14 seated jurors and alternates admitted they had formed an opinion as to Yount's guilt. 467 U.S., at 1029-1030, 104 S.Ct. 2885. Nevertheless, we rejected Yount's presumption-of-prejudice claim. The adverse publicity and community outrage, we noted, were at their height prior to Yount's first trial, four years before the second prosecution; time had helped "sooth[e] and eras[e]" community prejudice, *id.*, at 1034, 104 S.Ct. 2885.

Skilling, 130 S.Ct. at 2914-15 (emphasis added).

The present case is not an extreme one for the reasons stated. Further, any "reliance upon "*Estes* and *Sheppard* [would be] particularly misplaced; those cases involved media interference with courtroom proceedings during trial. *See supra*, at 2914. [Robertson] does not assert that news coverage reached and influenced his jury after it was empaneled." *See Skilling*, 130 S.Ct. at 2915 n. 14. Moreover, although news stories about Robertson were not kind, they did contain a videotaped confession - such as the filmed one in *Rideau*, or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight. However, "Rideau's dramatically staged admission of guilt . . . was likely imprinted indelibly in the mind of anyone who watched it." *See Skilling*, 130 S.Ct. at 2916. Additionally, almost 16 months elapsed between the time of the murders in late November 1997 and Roberson's March 1999 trial. *Cf. id.*

Thus, Robertson cannot show prejudice resulting from his default of this allegation. Finally, he cannot show that a constitutional violation has probably resulted in the conviction of one who is

actually innocent.' " *Schlup*, 513 U.S. at 327, 115 S.Ct. 851 (quoting *Murray*, 477 U.S. at 496). To meet this burden, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id. See also Wolfe v. Johnson*, 565 F.3d 140, 163-65 (4th Cir. 2009). This allegation does not involve new or additional evidence. As a result, Robertson's default on **Ground One** cannot be excused.

GROUND TWO

Robertson's second allegation is that his "sentence violates the due process clause of the Fourteenth Amendment and the Fifth and Sixth Amendments to the United States Constitution because Robertson was forced to submit to a state-sponsored psychological evaluation fo the sole purpose of obtaining evidence to be used against him at sentencing and to waive his right to counsel for purposes of that evaluation." **Ground Two** was raised as Issue 6 in his *pro se* Initial Brief of Appellant, but he made a knowing, voluntary and intelligent waiver of his direct appeal and the supreme court dismissed his appeal. For the reasons argued in connection with **Ground One**, *supra*, Respondent submits that this allegation is defaulted and that Robertson cannot show cause for his default under *Coleman* and its progeny.

His assertion that the trial judge's Order violated his Sixth Amendment right to counsel, **Petition, p. 13**, is further defaulted because it was not raised in the state trial court. While his Return to Motion Concerning Rule 5 and Mental Evaluation did mention the Sixth Amendment, his arguments at trial were that the ruling violated due process and his privilege against self-incrimination and the relevant state statutes.

In connection with his failure to show cause for the default, the State would further direct the Court's attention to his testimony at the February 22, 2005 hearing on his competency to waive his

direct appeal. Specifically, Respondent would note that Robertson testified that he had read the Initial Brief of Respondent filed by the State and that he was aware Respondent had conceded error in connection with the second issue raised by him but had argued the error was harmless beyond a reasonable doubt. He was also aware that would be entitled to a new sentencing procedure "if the State Supreme Court agreed with your position instead of the State's position." However, he added that "*I am most assuredly against a new sentencing proceeding* . . . [because] I got the better end of the deal this time, I'm not taking my chances. The world says death is bad but it doesn't have to be better. I'm not going to give those twelve jurors a chance to do the right thing to be honest with you." **02/22/05 Tr. pp. 17-18.** (Emphasis added). So, whatever desire he might have to receive a new sentencing proceeding now that he is in federal habeas corpus, it is clear that he did not want relief based upon the current allegation when he was in state court and that he expressly waived this specific claim. Thus, he cannot show cause for the default.

Moreover, Robertson cannot show prejudice from the default because his argument lacks merit. The trial judge did not violate Robertson's privilege against self-incrimination or his Sixth Amendment right to counsel by requiring him to submit to an independent evaluation because it was clear to the trial judge that Robertson intended to present expert testimony concerning his mental status in either the guilt or sentencing phase of his trial and fairness dictated that the State should be allowed to respond to this information. Also, any alleged violation of *Wainwright v. Greenfield*, 474 U.S. 284 (1986) was harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) because it did not have a "substantial and injurious effect or influence in determining the jury's verdict."

At a September 25, 1998 motions hearing, the State noted that it had not received notice within ten days of its motion as to whether or not Robertson intended to rely upon the insanity or

guilty mentally ill (GBMI) as a defense.[37] Robertson's trial counsel argued that the State's request was "somewhat premature" because the defense had not yet determined whether it was going to rely upon either defense. Counsel stated that they had just had a neuropsychologist examine Robertson on the previous day and that there was defense psychiatrist who had to review the records before they could make this determination. **App. pp. 67-72.**

The State then argued that the purpose of requiring notice of an insanity defense was to allow the State to prepare and respond to it. Because of the amount of mental health records involved in the case, the State asked the trial judge to determine if Robertson needed to be evaluated.[38] In response to the trial judge's inquiry, Robertson's counsel indicated that he could determine whether GBMI or insanity were at issue by November 1, 1998. So, the trial judge deferred ruling until then. **App. pp. 74-77.**

The issue was again raised by the State at a November 2, 1998 motions hearing, but the trial judge did not rule because he felt there must be a showing first. **App. pp. 86-87.** The State made a formal motion for an independent mental health evaluation on November 19, 1998. (A copy of this motion is attached to the Respondent's present Return).

The issue was revisited at a November 20, 1998 hearing, wherein the State argued its November 19, 1998 motion to request an independent psychiatric and/or psychological evaluation

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[37] The State had filed a motion requesting notice of insanity or GBMI on July 8, 1998. **App. p. 69.** It had previously indicated at a September 22, 1998 motions hearing that it intended to ask the trial judge to consider a court ordered competency evaluation. **App. p. 55.**

[38]The State explained that Robertson had "intermittently" seen a psychiatrist between 1993 and 1997; he had been involuntarily committed to the William S. Hall Psychiatric Institute in 1995; and, other witnesses said that Robertson had previously boasted of being able to malinger and convince psychiatrists of findings that did not exist. **App. pp. 74-76.**

for purposed of determining Robertson's mental condition. The State argued that it had not yet received reports from the examinations performed by defense experts and that it did not know what an independent evaluation would reveal. Also, under the state supreme court's decision in *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982), Robertson had a right to refuse to submit to an independent evaluation but would waive his right to present expert concerning his mental status if he did so because he could not interject a mental health issue and prevent the State from either confirming or rebutting his evidence. Further, the State asserted that it would take time to have an evaluation and for the State to adequately review it. Also, it would be impractical to allow the evaluation to take place during the course of the trial when Robertson finally introduced his mental health evidence. Finally, the State claimed that the matter was one of fairness and the State's opportunity to prepare. **11/20 Tr. pp. 4-5; 21-23.**

Robertson's counsel argued that he had not received ten days notice of the motion and counsel requested more time within which to respond to the State's request. However, he stated that competency was not yet at issue. The trial judge gave Robertson ten days within which to respond. **11/20 Tr. pp. 24-25.**

On November 30, 1998, Robertson's trial counsel filed a six page Return to Motion Concerning Rule 5 and Mental Evaluation, in which he asserted that granting the State's request. (A copy of counsel's Return is attached to the Respondent's present Return). Counsel argued that the motion should be denied under S.C. Code Ann. § 44-23-410 et seq. (Supp. 1998), "the state may request an examination of the defendant only if there is reason to believe that the defendant may lack the capacity to stand trial or if the defendant notifies the Court of his intention to pursue a defense of not guilty by reason of insanity. . . . Unless this conditional precedent is met, the state has

absolutely no right to have the defendant undergo an 'independent' examination, Given that defense has not raised the possibility that Mr, Robertson is incompetent and has also indicated that it is unlikely that it will pursue a mental status defense, there is no factual basis for the state's motion, and it should thus be denied." *See* **November 30, 1998 Return, pp. 3-4.**

Counsel further argued that the State's motion "will necessarily impinge Mr. Robertson's Fifth and Sixth Amendment rights." Specifically, he contended that "[b]ecause the prosecution's broad request contains no limits, the defendant would be in the untenable position of incriminating himself or being barred from presenting evidence of his unique characteristics that would compel a jury to sentence him to life instead of death. See Eddings v. Oklahoma, [455] U. S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Due process also prohibits the defendant from being placed "between the rock and the whirlpool." Garrity v. New Jersey, 385 U.S. 493,498 (1967); cf. Lefkowitz v. Cunningham, 431 U.S. 801, 801-808 (1977)." **November 30, 1998 Return, p. 5.**

The trial judge heard further arguments on the issue at a December 4 motions hearing. Counsel conceded that S.C. Code Ann. § 44-23-410 (Supp. 2002) allowed the trial court to order an evaluation but only upon a showing that was not met in this case, since Robertson had not asserted a mental health defense or asserted that he was incompetent to stand trial. Counsel argued that this was a fishing expedition to determine if Robertson's mental state and that if any such information came in during the penalty phase it would violate his Fifth Amendment privilege against self-incrimination. Also, he urged that a competency evaluation could be performed within ten minutes by the State's experts. **App. pp. 103-05.**

The State asserted that § 44-23-420 recognizes the inherent power of the trial court to order

a competency or insanity evaluation.[39] Further, the only way for the State to effectively cross-examine Robertson's experts on mental health issues was to require an evaluation on competency, *McNaughten* and GBMI. The State disputed Robertson's claim there had not been a showing requiring the evaluation, noting Robertson's prior involuntary commitment. Also, the State maintained that a "chain of evaluations" by his experts had taken place and that mental health issues were present. Again, the State argued that an evaluation was necessary as a matter of justice and so that the case could progress in a timely fashion, while protecting both Robertson's and the State's rights. **App. pp. 105-10.**

Trial counsel again asserted that the State's motion was premature because he had not yet received the reports from his experts. He noted that mental health issues may arise in the sentencing phase but not in the guilt phase, and asserted Fifth Amendment self-incrimination problems with a court ordered evaluation. The trial judge took the matter under advisement and said he would issue a written order. **App. pp. 110-115; 120.**[40]

The trial judge initially denied the State's request in an Order filed on December 18, 1998. However, he entertained the State's motion to reconsider his previous ruling at a hearing on February 12, 1999. The State argued that Robertson had indicated he would potentially use at least three experts who had evaluated him, including Dr. Jonathan Pincus (a neurologist), Dr. James Evans (a psychologist), and Dr. Toni Cascio (who had prepared a psycho-social history). The State stated that it had yet to receive copies of reports from any of these experts. The State again noted the previous

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[39] Again, the State recognized that Robertson could refuse the cooperate in the evaluation but under *Sloan* would be barred from presenting expert testimony in mental health issues.

[40] The trial judge observed that Robertson's responses during the evaluation could be protected.

involuntary commitment in August 1995, at which time he was diagnosed as having bipolar disorder, manic; the potential for acting out; and depression. The State requested an evaluation, so that it could either confirm or rebut what the defense may present at trial, and asserted that it was logistically impractical to keep a jury sequestered and have an evaluation during the course of a trial. The State also presented a copy of a psychiatric report which it had introduced a connection with another issue (introduced as **Court's Exhibit 1** at the hearing) and asserted that this exhibit alone warranted a court ordered evaluation. **2/12/99 Tr. pp. 8-15.**

Robertson opposed the State's motion to reconsider and asserted that an evaluation would violate his Fifth Amendment privilege against self-incrimination. The trial judge agreed to take the matter under advisement. **2/12/99 Tr. pp. 14-16.** Both parties then briefed the issue.

On February 17, 1999, the trial judge filed an Order for Evaluation as to Competency and Criminal Responsibility,[41] wherein he reconsidered the previous Order and ordered Robertson to submit to an independent psychiatric examination relating to his mental capacity by examiners designated by the State. He based his decision upon his review of records relating to Robertson's involuntary commitment to the Hall Institute in 1995, as well as Robertson's representation that he may present testimony relevant to his mental status through Dr. Pincus, Dr. Evans and Ms. Cascio, in either the guilt or penalty phase of the trial.[42]

The trial judge further found that fundamental fairness dictated that the State be allowed the opportunity to verify or rebut evidence presented by defense experts regarding Robertson's mental

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[41] A copy of this Order is attached.

[42] However, he observed that Robertson had asserted that he did not intend to present GBMI or insanity "at this time."

status; that an adequate rebuttal could not be made without independent examination; and that an independent psychiatric examination under these circumstances "is a distinct aid in the determination and the administration of justice in order to conform a claim of mental illness, discover fraudulent claims or to rebut psychiatric testimony which can only reasonably be accomplished by the presentation of expert testimony."

The trial judge ordered that any report from the evaluation be made to the State and the court within five days of the completion of the examination and should contain a diagnosis of Robertson's mental condition; as well as clinical findings bearing on the issues of (1) whether Robertson was competent to stand trial; (2) whether Robertson was criminally responsible at the time of the offense under *McNaughten*; and (3) whether or not Robertson was GBMI at the time of the offense. The trial judge further ordered that neither the results of the examinations nor any communications by Robertson during the evaluation should be admissible in any criminal proceedings against him, unless the defense first interjected Robertson's mental status as an issue in either the guilt or sentencing phases of the trial or was necessary to rebut testimony or evidence offered by Robertson. Finally, the trial judge's order noted that "[n]othing in this Order shall be construed to abridge the defendant's Fifth Amendment right to remain silent."

In the sentencing phase, Robertson presented expert testimony concerning his mental status, both generally and at the time of the crimes, from four different doctors and his social worker. In fact, the very first mitigation witness was Dr. Robert Pryor, a psychiatrist who had previously treated Robertson when he was involuntarily committed at the William S. Hall Psychiatric Institution back in August 1995. Dr. Pryor diagnosed Robertson as having bipolar disorder, manic; and severe

alcohol dependency.[43] Dr. Pryor opined that mania is characterized by elevated moods by either euphoria or irritability; impaired impulse control; a decreased need for sleep; and an increased speed of talking and thinking. It is thought to be a biological abnormality of the chemicals in the brain and does have a genetic component.[44] **App. pp. 2420-27; 2431-33.**

Dr. Jonathan Pincus, a neurologist who first examined Robertson in November 1998, testified that he obtained a history from Robertson and then performed a physical. Later he reviewed a number of records. Dr. Pincus agreed with the diagnoses that Robertson suffered from bipolar disorder and explained that if a person suffering from this illness enjoys the manic phase, they may use stimulants in an effort to recreate that same feeling. He further opined that if a manic episode was bad enough, that a person could become psychotic, have paranoid concepts and ideas, and become delusional. They can even have hallucinations and hear voice commands. At this point, it is very difficult to distinguish between a bipolar disorder from someone who is schizophrenic. Dr. Pincus' examination revealed that Robertson's frontal lobe, which provides motivation, judgment, and impulse control, was damaged. **App. pp. 2458-72; 2477-79; 2483-90.**

According to Pincus, Robertson's records reflected abuse of alcohol and Ritilan.[45] Robertson took Ritilan to self-medicate. On the night of the crimes, he snorted approximately 250 milligrams of it. **App. pp. 2493-97.**

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[43]The basis for the severe alcohol dependency finding was reports by Robertson's three arrests or convictions for DUI and legal problems in Germany as a teenager. Dr. Pryor noted that there is a genetic component to alcoholism and suggested that substance problems are more prevalent in the mentally ill. **App. pp. 2427-31.**

[44]Robertson had a history of being treated in 1994 for bipolar disorder but discontinued Lithium because it was ineffective. Both his mother and he reported symptoms consistent with a manic phase in a bipolar disorder.

[45]Robertson was never prescribed Ritilan but it was prescribed for his brother, Chip.

Dr. Pincus opined that Robertson was "probably having" a manic episode at the time of the offenses based upon information that (1) Robertson only had three hours sleep in the 24 to 36 hours before the offenses; (2) his history of gambling, drug use, and not being able to concentrate; (3) evidence that the Robertson was being treated for bipolar disorder at the time and was on the drug Depakote; (4) and evidence the Robertson was using up to 250 milligrams of Ritilan, which is roughly ten times the normal dosage. In Dr. Pincus' opinion, this had a toxic effect on Robertson. The combination of the urge he had been having to kill his parents; the fact he was under the influence of a manic episode; and his use of Ritilan, which exacerbated the manic episode's symptoms, caused Robertson to do what he did. Dr. Pincus explained that Robertson did not merely kill his parents, he obliterated them. He opined that Robertson was "gripped by some colossal emotion" at the time of the crimes. **App. pp. 2496-2501.**[46]

Dr. James Evans, a neuropsychologist who examined Robertson at the request of defense counsel, agreed that Robertson had frontal lobe damage. Specifically, Dr. Evans opined that Robertson had brain dysfunction in the right frontal area and other parts of the right hemisphere of his brain. Also, he "most likely" had dysfunction in other parts of the frontal lobe on the left side. Robertson had an overall high average IQ, with a full scale IQ of 112. Yet, Evans claimed that the sixteen point discrepancy between his verbal score (118) and his non-verbal score (102) suggested to Dr. Evans that there may be frontal lobe damage, which he confirmed on further testing. The main problems this damage would cause in his behavior were emotional control, extremes of angry and negative emotions. Dr. Evans further opined that Robertson may have extreme trouble controlling his emotions because of the right frontal lobe damage. Also, he noted that Robertson had self-

[46] His opinion was not affected by the fact there was some effort to cover up the crimes after the fact.

described periods of "derealization"and detachment from reality, which are symptoms of disassociation. He concluded that Robertson was "probably' tell the truth about these symptoms because they were consistent with his findings but he could not say that Robertson had a disassociative episode at the time of the offense because Robertson had not said that he had one. **App. pp. 2535-71.**

Alexander Morton, a psycho-pharmacologist at MUSC, had reviewed prescription records from two pharmacies for Robertson's family, Robertson's medical records, his school records, his employment records, records from his 1995 Hall Institute admission and records received after Robertson's arrest for the murders. He also met with Robertson for approximately an hour and a half. **App. pp. 2613-20.**

He concluded that the diagnoses from other doctors was accurate, and that Robertson had a substance abuse problem with alcohol and marijuana. Morton described the effects of Ritilan, which is the trade name for Methylphenidate, which is a stimulant primarily used on children ADD and hyperactivity. He stated that Ritilan can produce the same pharmacological results as amphetamines and cocaine, and it shares their same potential for abuse. He noted that when someone "snorts" Ritilan, they achieve the effects of the drug more quickly. **App. pp. 2620-47.**

Morton opined that drug-induced psychotic disturbances are more prevalent among abusers of stimulants than any other drugs. Difficulties can include "manic-like states" as well as "serious psychoses resembling schizophrenia, depressions that are almost identical to major affective disorders; and other types of anxiety disorders." The psychotic states generally tend to last only a brief period of time. **App. pp. 2636-39.**

Robertson was using approximately 240 to 300 milligrams of Ritilan at the time of the

murders, which is over four times the upper limit for proper dosage and using this much Ritilan results in symptoms that are similar to those caused by acute amphetamine intoxication. Mental disturbances, such as confusion, delirium, euphoric hallucinations and toxic psychoses may occur. People will become psychotic most of the time when such large doses are used. During intense amphetamine intoxication, paranoid ideation in auditory hallucinations in a clear "sensorium" (where the person knows where they are and what is happening) and extreme angry with threats of acting out on aggressive behavior may occur. **App. pp. 2640-41; 2643; 2647-48; 2653; 2653.**

In addition to describing his use of Ritilan and alcohol to Morton, Robertson described that he felt very energetic and was having some paranoia throughout the night. Morton said that Robertson described the offenses almost as if he was depersonalized or outside of his body watching them. Morton opined that this was consistent with someone having toxic stimulant intoxication. Finally, Morton opined that people who abuse Ritilan get psychotic and paranoid; they have "loose associations" which do not make sense, they have behavioral problems and engage in repeated touching. With continued abuse of Ritilan, paranoia will develop and progress to the point where a person may very quickly be put in a psychotic state. Also, the person will have impaired judgement and may resort to violence. Morton thought in this case that it was "a major factor" that influenced the commission of the offenses. While he was unclear as to whether Robertson was experiencing a manic state at the time of the crimes, Morton opined that Robertson clearly had Ritilan intoxication. **App. pp. 2653-56; 2665-67; 2702.**

It was against the backdrop of these witnesses, as well as the testimony of Robertson's social worker, Toni Cascio (**App. pp. 2882-3031**; *see also* **Ground Four**), that the State was allowed to present testimony from the psychologist who examined Robertson pursuant to the challenged court

ordered evaluation, Dr. Geoffrey McKee. Before his testimony, Robertson's counsel unsuccessfully renewed his objection *in camera*, and the trial judge held an *in camera* hearing to determine the admissibility of any statements Robertson made to McKee during the evaluation. **App. pp. 3044-55.** The trial judge then found that the statements made by Robertson were admissible.[47] Therefore, he found that the State could present the evidence in rebuttal. **App. pp. 3055-57.**

Dr. McKee testified that before he saw Robertson, he reviewed witness statements, incident reports, statements by people who were in or around the scene at the time of the murders, medical reports and medical records. Specifically, he reviewed Robertson's medical records from his pediatrician, a psychiatrist that he had seen, the records from the 1995 commitment to Hall Institute and records of medical and psychiatric treatment while Robertson was incarcerated for the present crimes. He then saw Robertson for clinical interview and administered a psychological test on March 5, 1999. He later saw Robertson for a four hour interview and administered three other psychological tests. **App. pp. 3059-63.**

Dr. McKee advised Robertson of his *Miranda* rights before they began the interviews and it was Dr. McKee's opinion that Robertson understood his rights. Dr. McKee opined that Robertson did suffer from bipolar disorder, manic, but without psychotic features.[48] Also, the bipolar disorder was in full remission at the times he interviewed Robertson. Robertson also suffered from alcohol

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[47] He found that because he had been advised of his rights under the Fifth and Sixth Amendments and advised as a constitutional safeguard provided by *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial judge further found that before the interview took place, Robertson had been represented by counsel for some time; and that counsel was aware of the interview and its potential use at trial. He further found that Robertson was aware of his right to remain silent as well as his other *Miranda* rights but intelligently waived those rights.

[48] Dr. McKee explained that psychoses is the presence of symptoms of delusions (fixed false beliefs); and hallucinations (false sensory experiences). **App. pp. 3065-66.**

dependence, which was also in remission. Robertson relayed a history of marijuana and amphetamine (specific Ritilan) abuse prior to his arrest for the murders and had a history of poly-substance intoxication, including cocaine, LSD, Xanax and inhalants. Robertson also had a history of ADHD. Finally, it was Dr. McKee's opinion that Robertson had features of borderline antisocial personality traits. **App. pp. 3062-64.**

Dr. McKee opined that there is no difference between a psychosis resulting from a severe mental illness, such as schizophrenia or bipolar disorder, and a drug induced psychosis. Both types of psychoses are similar in that "there's a presence of delusions and/or hallucinations." However, he opined that Robertson was not experiencing a psychotic episode at the time of the crimes on November 25, 1997. Robertson did have bipolar disorder during this time, but McKee opined that he was not experiencing the symptoms of his bipolar disorder at the he committed the offenses. Dr. McKee testified that the facts relayed to him by Robertson were virtually identical to those in the notes of Robertson's social worker, Ms. Cascio. **App. pp. 3066-67.**

Dr. McKee further opined that Robertson knew right from wrong at the time of the crimes. He based this conclusion upon evidence that Robertson put socks over his hands before the crimes in order to cover his fingerprints; he took the phone off the hook in his mother's bedroom before attacking her; he waited until his father was in the shower before attacking his mother; during the attack on his mother, he went and checked to see if his father was still in the shower on two separate occasions; he waited outside his father's bathroom door with a bottle of Tilex and with a hammer to use it when his father came out of the shower; and he sprayed his father with Tilex before hitting him with the hammer. Also, after the incident, Robertson told Moon to put the bloody clothes, socks, the bat and the knife in a bag; he showered for approximately twenty-five minutes to remove

blood from his person; he checked to see whether his neck was scraped because of his concern there might have been blood if his father scraped his neck; and he decided to use his father's credit card rather than writing checks because he was worried that he and Moon might be observed on bank cameras. Following the offense he poked a hole in the glass on the door to make the incident appear as if it were a robbery; he took the bag of clothes, bat and knife with him; he placed his bag in the trunk of the car and disposed of it in a dumpster in Maryland; and, once on the road, he called back to his house and got the answering machine. This indicated to him that someone had placed the phone back on the hook and that made him anxious. Each of these actions in Dr. McKee's estimation indicated that Robertson could distinguish right from wrong. **App. pp. 3067-70.**

Dr. McKee opined that Robertson had the capacity to conform his conduct to the requirements of the law because these same reasons showed that he could control any impulse, as did evidence he discussed his plan with Moon; he obtained two knives, a hammer, a baseball bat and Tilex before the crimes. Also, following the attack on his father but before using a baseball bat on him, Robertson had gone and checked to see if his mother was still alive; and after his assault of his father, he twice returned to assault his father after hearing his father breathing. Again, his conduct after the incidents reflected a capacity to conform his conduct. **App. pp. 3071-72.**

Finally, Dr. McKee stated "And then at arrest [he had] enough control to make a statement during his interrogation." At that point, Robertson's counsel objected and, during and *in camera* hearing moved for a mistrial. The trial judge denied the motion for a mistrial but agreed to give a curative instruction. **App. pp. 3072-75.**

When the jury returned, the trial judge charged them as follows:

THE COURT: Right before you left the room. There was testimony regarding

> incidents . . . post events from what happened in Rock Hill on that night (sic) particularly in regard to Mr. Robertson being in Philadelphia and this witness testified Mr. Robertson had enough control to make a statement during his interrogation. Disregard that. Mr. Robertson, as I have told you earlier, had an absolute[] constitutional right to remain silent and the exercise of that right cannot and must not be used against him in any fashion whatsoever. So, disregard that statement.

App. p. 3078, ll. 13-22.

A. The trial judge did not abuse violate either Robertson's Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to counsel by requiring an independent evaluation.

Under § 44-23-410, circuit court judges have the inherent duty to order a competency examination if there is reason to believe that the person charged with the criminal offense is not fit to stand trial. In *Estelle v. Smith*, 451 U.S. 454 (1981), the United States Supreme Court "considered a situation in which a psychiatrist conducted an ostensibly neutral competency examination of a capital defendant, but drew conclusions from the defendant's uncounseled statements regarding his future dangerousness, and later testified for the prosecution on that crucial issue." *Penry v. Johnson*, 532 U.S. 782, 793-94 (2001).

The Court held that the State violated the accused's Fifth Amendment rights when it used information gained from a state-ordered competency evaluation that was not initiated by or consented to by the accused and the accused did not rely on psychiatric testimony as a defense because the accused was not advised before the examination that he had a right to remain silent and that any statement he gave could be used against him. *Estelle*, 451 U.S. at 457 & n. 1, 458, 467-68. "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id* at 467-68. As the Court observed in *Penry*, the

Court had concluded in *Estelle* that "[t]he admission of the psychiatrist's testimony under those 'distinct circumstances' violated the Fifth Amendment. 532 U.S. at 794 (citing *Estelle*, 451 U.S. at 466.

The Court in *Estelle* concluded that State-elicited testimony gleaned from the evaluation may be properly used, however, if the accused requests or consents to a psychological evaluation, or if the accused intends to introduce psychological evidence. *Estelle*, 451 U.S. at 478-69.

In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the United States Supreme Court held that *Estelle* was limited to the discrete circumstances of the case, *id* at 423, and that there was no Fifth or Sixth Amendment violation in the admission of findings from a psychiatric evaluation of the accused that was proffered by the State solely to rebut other psychological evidence presented by the accused, and where the accused requested the examination and attempted to present a mental status defense at trial. *Id* at 423-24.

The Court in *Buchanan* noted that where an accused requests an evaluation or presents a mental status defense, at the least, the prosecution should be allowed to rebut this with evidence from reports of the examination the defendant requested.[49] Therefore, the Court found no error where the defendant's social worker read from the psychological reports where the prosecution's rebuttal consisted of general observations of the defendant, rather than confessions or statements in which he implicated himself in the offense. The Court found no Sixth Amendment violation in *Buchanan* because the accused's attorney requested a competency evaluation.

Critically important to the present issue, the Court in *Buchanan* stated a logical proposition which the trial judge's February 18, 1999 Order properly recognized:

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[49] The petitioner in *Buchanan* joined in the State's motion. *Id.*

> If a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested.

Buchanan, 483 U.S. at 422. (Emphasis addcd). See also *id* at 433 n. 5 ("The Commonwealth is free, of course, *to compel a separate examination specifically inquiring as to the mental condition of the defendant at the time of the alleged offense, once put on notice that the defendant will place this mental condition in issue*") (citing *Estelle*, 451 U.S. at 465). *Accord Washington v. Murray*, 952 F.2d 1472, 1480 (4th Cir. 1991) (state evaluation admissible in suppression hearing on confession, where defendant has put his mental competency in issue); *Woomer v. Aiken*, 856 F.2d 677, 681-82 (4th Cir.1988), *cert. denied*, 489 U.S. 1091 (1989).

Respondent would further note that the Fourth Circuit Court of Appeals rejected an argument premised upon *Estelle* in *Savino v. Murray*, 82 F.3d 593 (4th Cir. 1996). In *Savino*, the Court reasoned, in pertinent part, as follows:

> In [*Estelle*], the Court differentiated between a defendant who intends to introduce psychiatric evidence on his own behalf and one who "neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence." *Id.* at 468, 472, 101 S.Ct. at 1875-76, 1877-78. When a defendant asserts a mental status defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination or he may be required to submit to an evaluation conducted by the prosecution's own expert. *Buchanan v. Kentucky*, 483 U.S. 402, 422-23, 107 S.Ct. 2906, 2917-18, 97 L.Ed.2d 336 (1987); *Smith*, 451 U.S. at 465, 101 S.Ct. at 1874. That defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence. *Powell v. Texas*, 492 U.S. 680, 684-85, 109 S.Ct. 3146, 3149-50, 106 L.Ed.2d 551 (1989); *Buchanan*, 483 U.S. at 422-23, 107 S.Ct. at 2917-18. In essence, the defendant waives his right to remain silent-but not his right to notice-by indicating that he intends to introduce psychiatric testimony. *Powell*, 492 U.S. at 685, 109 S.Ct. at 3150.

Savino, 82 F.3d at 604.[50]

Moreover, the state supreme court has held that, where a defendant presents psychiatric or psychological testimony, the prosecution has an interest in introducing psychiatric testimony to rebut the defendant's defense, and the courts have found that a defendant may be required to submit to an examination "by the prosecution's psychiatrist." In *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982); the Court found that the prosecutor's comments on a defendant's refusal to talk with a psychiatrist were error but expressed the following remedy:

> We agree with the state that it is unfair to allow a defendant to assert this privilege and yet introduce his own psychiatric testimony at trial. However, we perceive the proper remedy to be exclusion of the defendant's psychiatric testimony rather than a violation of the defendant's Fifth Amendment rights.

298 S.E.2d at 94.

In *State v. Locklair*, 341 S.C. 352, 363-64, 535 S.E.2d 420, 426 (2000), the Court held that:

> Despite the mandatory language of the statute requiring a judge to order a competency examination if there is reason to believe that a person charged with a criminal offense is not fit to stand trial, ordering a competency examination is within the discretion of the trial judge and a refusal to grant an examination will not be disturbed on appeal absent a clear showing of an abuse of discretion. *State v. Singleton*, 322 S.C. 480, 472 S.E.2d 640 (Ct.App.1996). Where insanity is interposed as a defense in a criminal prosecution, compulsory examination of the accused by experts for the purpose of determining his mental condition does not violate either the constitutional protection against self-incrimination or the constitutional guaranty of due process of law. *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506 (1951).

The Court in *Locklair* also rejected the defendant's argument that, while a trial judge may order a psychiatric examination where insanity is asserted as a defense, there is no authority that

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[50] If the United States Supreme Court should overrule *Buchanan* and *Estelle v. Smith* while Robertson's habeas Petition is pending, the new rule created at that time could not be applied retroactively to him in collateral litigation because the new rule that would be established was not dictated by precedent at the time Robertson's conviction became final. *Teague v. Lane*, 489 U.S. 288 (1989).

indicates a trial judge has the authority to order an examination when a defendant provides no notice that he will plead GBMI, and GBMI is never pled. This Court held that "the mental competency of the defendant to stand trial is a baseline inquiry by the court. In order to protect the legal process and preserve the integrity of the trial, a trial judge has the authority to order a psychiatric evaluation of the defendant when his or her competency may be in question." *Id* at 364, 535 S.E.2d at 426.

The Court found that the trial judge had anticipated that the defendant's mental condition might be made an issue at trial and observed that there was evidence to support his conclusion. Then, the Court held that "[b]y stating that Locklair may offer evidence of his mental illness at trial, defense counsel opened the door to the issue of Locklair's mental health." *Id* at 365, 535 S.E.2d at 426-27. *Accord Hartless v. State*, 611 A.2d 581 (Md. 1992); *Lynd v. State*, 414 S.E.2d 5, 11 (Ga. 1992) (upholding an exclusion of defense mental health testimony where defendant refused to submit to examination by prosecution's mental health experts). As the Court stated in *Lynd*, "such an exclusion is justified by the state's overwhelming difficulty in responding to the defense's psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." 414 S.E.2d at 11. *See also* F.R.Cr.P., Rule 12.2. As the Court in *Hartless* observed, there is substantial authority supporting the proposition that the State constitutionally may be permitted to have access to evidence on an issue the defendant has introduced and that, for rebuttal purposes, the "state must be able to follow where the defendant has led." *Hartless*, 611 A.2d at 586. (Citation omitted). *Cf. State v. Stewart*, 283 S.C.104, 110, 320 S.E.2d 447, 551 (1984) ("It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial").

Applying the above criteria to the present case, it is clear that the trial judge did not violate

Robertson's Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to counsel by requiring the independent evaluation. First and unlike *Estelle v. Smith*, it was readily apparent that Robertson intended to introduce expert testimony concerning his mental status, and he presented four such experts in mitigation of punishment. Second, there was adequate notice of the State's request for an evaluation, again *contra Estelle*. Third, the State had called the psychiatrist in *Estelle* to testify as a part of its case-in chief. *Estelle*, 451 U.S. at 459. Here, the State presented McKee in rebuttal to the defense's case.

Further, although none of Robertson's experts testified that he was insane or GBMI at the time of the offense, Pincus and Morton clearly testified that, in their opinion, he had a psychotic episode a the time of the murders. **Tr. pp. 2496-2501; pp. 2653-56; pp. 2665-67; p. 2702.** Further, Evans' testimony was unclear as to whether he had a disassociative state of the time of the murders. **Tr. p. 2571.**

Moreover, while McKee's testimony was clearly relevant to rebutting Robertson's case in mitigation, Dr. McKee was limited to giving his opinion that Robertson was neither insane nor GBMI at the time of the murders; that he was not psychotic at the time; and giving the reasons for these opinions. He was not permitted to answer the State's questions concerning whether Robertson's behavior was consistent with a layman's understanding of "psychopath." **Tr. pp. 3075-78.** Also, Robertson's experts did not dispute that Robertson was GBMI. Thus, the trial judge's decision was proper under *Sloan* and *Locklair*; and, in the absence of the evaluation, Robertson would not have been allowed to present his mental status evidence. *Id.*

Nor was it improper for McKee to relay part of what Robertson told him in answering questions relating to Robertson's mental status at the time of the murders. The trial judge had

previously ruled *in camera* that such statements were admissible and his ruling is supported by the record. Also, Robertson withdrew his objection when it became clear that, while the information to which he testified was consistent with what Robertson told Cascio (*See* **App. pp. 3010-31**), the information to which McKee testified came from his own notes. **App. pp. 3073-75.** Further, McKee's testimony is merely cumulative to that of Cascio and cannot be prejudicial.

B. Violation of *Wainwright v. Greenfield.*

The State concedes that McKee's reliance upon Robertson's exercise of his right to remain silent to show that he was not GBMI was improper under *Greenfield* and *Sloan*, but would submit that any error was harmless because it did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 551 U.S. 112, 116-20 (2007) (on collateral review by federal habeas court of criminal judgment of state court, federal court assesses prejudicial impact of state court's constitutional error under *Brecht*'s more forgiving "substantial and injurious effect" standard, and not under *Chapman*'s "harmless beyond reasonable doubt" standard, regardless of whether state courts recognized the error and reviewed for harmless beyond reasonable doubt under *Chapman*); *Tuggle v. Netherland*, 79 F.3d 1386, 1388 (4th Cir.1996) (applying *Brecht* harmless-error standard to improper admission of testimony). In order for an error to have a "substantial and injurious effect or influence," it must have "affected the verdict." *O'Neal v. McAninch*, 513 U.S. 432, ---, 115 S.Ct. 992, 994 (1995). "Because juries have a limited number of responses to give in a criminal trial-guilty, innocent, or cannot decide-an error is harmless when the error did not substantially sway or substantially influence the response. *Cooper v. Taylor*, 103

F.3d 366, 370 (4th Cir.1996) (en banc) (citing *Brecht*, 507 U.S. at 637 (actual prejudice must be shown) and *Kotteakos*, 328 U.S. at 765 (jury's judgment must not have been "substantially swayed by the error")).

First, there was overwhelming proof of the statutory aggravating circumstances. *See* **Statement of Facts**, *supra*; *see also* **Ground Four**, *infra*. Also, the witness only made one brief reference to Robertson's exercise of his right to remain silent in the course of a very lengthy trial, and Robertson had already presented a great deal of evidence concerning his mental status at the time of the murders. While Mckee was the only prosecution expert to testify on the issue of his mental status, testimony from Moon, Sloan and others who dealt with him clearly reflected that he had a normal demeanor and was not insane or acting under an uncontrollable impulse. *E.g.* **App. pp. 1429-35; 1439-42; 1537-46; 1552-57; 1584-1643.**

Moreover, the trial judge gave a curative instruction before any further testimony and repeatedly charged jurors not to consider the remark because Robertson had a constitutional right to remain silent and his exercise of this right could not be held against him. **App. p. 3078.** The State did not subsequently refer to this remark in closing argument, **App. pp. 3125-73**, and the trial judge instructed the jury in his sentencing phase instructions on Robertson's exercise of his right to remain silent and the State's burden of proof. **App. pp. 3218-19.** *See Hill v. Turpin*, 135 F.3d 1411, 1417 (11th Cir.1998) (Although repeated and intentional Greenfield violations are unconstitutional, references to a defendant's silence that are "isolated" or "unintentional" or "promptly addressed by a curative instruction from the trial court" and not further "highlight[ed]" by "questioning other witnesses or during closing argument" are reviewed for harmless error).

Under these circumstances, any error was harmless under *Brecht. See Fugate v. Head*, 261

F.3d 1206, 1223 (11th Cir. 2001) (finding two technical *Greenfield* errors harmless under *Brecht*, even in absence of curative instruction where both improper references were brief, one occurred in petitioner's testimony, and the prosecutor did not repeat the references, question other witnesses regarding them, or address them during closing argument); Smith v. Uttecht, 369 Fed.Appx. 784, 785, 2010 WL 738586, 1 (9th Cir. 2010) (unpublished) (rejecting petitioner's claim that his due process rights were violated when the trial court permitted the arresting officers to testify about their observations of his post-arrest unresponsiveness, in violation of *Greenfield*, and cocluding that "[t]he record reflects that any alleged error is harmless because it did not have a "substantial and injurious effect or influence in determining the jury's verdict") (citing *Brecht*). *Cf. Vanda v. Lane*, 962 F.2d 583, 585-86 (7th Cir. 1992) (finding *Greenfield* error harmless beyond a reasonable doubt); *McFadden v. State*, 342 S.C. 637, 641, 539 S.E.2d 391, 393 (2000) (factors that should be considered in analyzing whether a violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976) was harmless include: (1) the reference to the defendant's right to remain silent was a single reference, which was not repeated or alluded to; (2) the solicitor did not tie the defendant's silence directly to his exculpatory story; (3) the exculpatory story was totally implausible; and (4) the evidence of guilt was overwhelming).

GROUND THREE

Next, Robertson asserts that violates due process "because the trial court failed to instruct the jury at sentencing that voluntary intoxication could be considered mitigating." This allegation was initially raised in the state supreme court as Issue 2 in the brief submitted by appellate counsel Savitz. However, appellate counsel was relieved as a result of Robertson's request, following a

hearing before Judge Hayes on his competency to appear *pro* se on October 10, 2002,[51] and the filing of Judge Hayes' October 28, 2002 Report in the Supreme Court of South Carolina.

Judge Hayes found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary and the state supreme court filed a November 21, 2002 Order relieving Mr. Savitz and permitting Robertson to appear *pro se.* Robertson later submitted his own *pro se* Initial Brief of Appellant, in which he did not raise this issue. Thus, that claim was procedurally defaulted because it had been abandoned before he abandoned his direct appeal in its entirety.

Moreover, even if it had not been procedurally defaulted at that point, it is procedurally defaulted and Robertson cannot show cause for the default for the reasons set forth in connection with the response to **Ground One.** A further reason he cannot show cause is his testimony at the February 22, 2005 hearing on his competency to waive his direct appeal was that "*I am most assuredly against a new sentencing proceeding* . . . [because] I got the better end of the deal this time, I'm not taking my chances. The world says death is bad but it doesn't have to be better. I'm not going to give those twelve jurors a chance to do the right thing to be honest with you." **02/22/05 Tr. pp. 17-18.** (Emphasis added). So, whatever desire he might have to receive a new sentencing proceeding now that he is in federal habeas corpus, it is clear that he did not want relief based upon the current allegation when he was in state court and that he expressly waived this specific claim. Thus, he cannot show cause for the default.

Moreover, Robertson cannot show prejudice from the default because the determination of

[51] 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.

whether the sentencing jury should be instructed that an accused's voluntary intoxication could be considered as mitigating is purely a state law issue, so long as the state court's instructions do not preclude the sentencer from meaningful consideration to mitigating evidence offered by the accused. *See Lockett*, 438 U.S. at 604. *See also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("A careful review of our jurisprudence in this area makes clear that well before our decision in *Penry I*, our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future").

Here, the trial judge charged the guilt phase jury that voluntary intoxication is not a defense **(App. 1955, l. 19-p. 1956, l. 6)**,[52] which is consistent with state law. *E.g.*, *State v. South*, 310 S.C. 504, 508, 427 S.E.2d 666, 669 (1993); *State v. Hartfield*, 300 S.C. 469, 388 S.E.2d 802 (1990) (voluntary intoxication or use of drugs does not constitute defense to crime; however, insanity caused by use of drugs or intoxication may be defense where insanity is permanent and destroys defendant's ability to know right from wrong). In the sentencing phase charge conference, lead trial counsel, Mr. Hancock, requested a specific jury instruction that Robertson's voluntary intoxication could be

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[52] Specifically, he charge the jury that:

> I charge you that voluntary intoxication is never an excuse for or defense to a crime, regardless of whether the crime is one involving a general or a specific intent.
>
> A person who voluntarily renders themselves voluntarily intoxicated is no less responsible for their acts while they are in such a condition.
>
> If one voluntarily is under the influence of drugs and becomes intoxicated to whatever degree and if while in that condition the person commits an act that would be a crime if it had been committed by a sober person, the fact of intoxication would not relieve the intoxicated person from responsibility.

considered as a mitigating circumstance. The trial judge declined to do so and stated that he was only going to instruct the statutory mitigating circumstances but he would charge the jury that it could consider non-statutory mitigating circumstances. **App. 3097.**

Because of the trial judge's guilt phase charge that voluntary intoxication is not a defense, counsel again made a request for a specific instruction on that non-statutory mitigating circumstance. The trial judge initially questioned whether voluntary intoxication was mitigating. **App. 3097-99.** Later, however, he declined to give a specific instruction on voluntary intoxication because he was instructing jurors on the statutory mitigating circumstances in § 16-3-20(C)(b)(2), (6) and (7),[53] as required by state supreme court precedent. **App. 3119-23.**

Trial counsel fully argued evidence of Robertson's voluntary intoxication to the jury, as well as all of the other expert and non-expert evidence that counsel felt was mitigating as to Robertson's punishment. **App. 3173-3203.** Robertson also briefly addressed the jury but he did not mention hi intoxication. **App. 3193-94.**

In the trial judge's subsequent penalty phase jury instructions, he instructed jurors, in pertinent part, as follows:

> If you find the existence of a statutory aggravating circumstance, the law also requires that you consider any mitigating circumstances that are supported by the evidence.

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[53] These mitigators are

> (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> (7) The age or mentality of the defendant at the time of the crime.

You must consider all mitigating circumstances because if you are to make an individualized assessment of the appropriateness of the death penalty, the law requires that you review the evidence of the defendant's background, considering also mitigating circumstances, and these are considered important considerations by you.

There are three conditions that you should consider in reaching your decision. . . .you would consider first whether the defendant has proven any evidence of the existence of a statutory mitigating circumstance.

Second, you would consider whether the defendants has proven by any evidence the existence of any other nonstatutory mitigating circumstance.

Third, whether for any reason you can think of or for no reason at all the defendant should be sentenced to life imprisonment rather than death.

A statutory mitigating circumstance is a fact, incident, detail or occurrence which our General Assembly has declared by statute which reduces the severity of the offense of murder.

In other words, it is a circumstance recognized by statute and is one which in fairness and mercy may be considered as extenuating or as reducing the degree of moral culpability for the commission of the crime of murder.

A mitigating circumstance is neither justification nor excuse for the murder, but simply lessens the degree of one's guilt; that is, makes that person less blameworthy or less culpable.

I have on the statutory instructions, paragraph 4, set forth those statutory mitigating circumstances that you can consider in this case.

* * * *

You can consider these circumstances and again they are in no- -the order they are in is of no significance.

The defendant, James Dejarnette Robertson, has no significant history of prior criminal conviction involving the use of violence against another person.

. . . Additionally, the murder was committed while the defendant, James Dejarnette Robertson, was under the influence of mental or emotional disturbance.

You may consider the age of the defendant at the time of the crime.

> You may consider the mentality of the defendant, James Dejarnette Robertson, at the time of the crime.
>
> You can consider the capacity of the defendant, James Dejarnettte Robertson, to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law, you can consider whether they were substantially imparied.
>
> You further may consider any mitigating circumstance which is supported by the evidence in the case.

App. pp. 3212-15.

The trial judge later instructed jurors on non-statutory mitigating circumstances. He further charged them that "[w]hile there must be some evidence which supports a finding by you that a statutory or non-statutory mitigating circumstance exists, you do not need to find the existence of such circumstance beyond a reasonable doubt." **App. p. 3216.** He also charged them that "[t]he third element you may consider if you should conclude that a statutory aggravating circumstance exists, is whether the defendant should be sentenced to life in prison for any reason at all or for no reason at all. This is what has been traditionally referred to as a recommendation of mercy. . . . In other words, you may choose to recommend life if you find a statutory or non-statutory mitigating circumstance or you may consider to recommend liufe imprisonment simply as an act of mercy." **App. p. 3217.**

The trial court must submit for the jury's consideration any statutory mitigating circumstances supported by the evidence. *State v. Vazquez*, 364 S.C. 293, 613 S.E.2d 359 (2005). The state supreme court has held that, where there is evidence the defendant is intoxicated at the time of the capital crime, the trial judge should submit three statutory mitigating circumstances in § 16-3-20(C)(b)(2), (6) & (7) to the jury. *See State v. Evans*, 371 S.C. 27, 30-32, 637 S.E.2d 313, 314-15 (2006); *State v. Young*, 305 S.C. 380, 409 S.E.2d 352 (1991); *State v. Stone*, 350 S.C. 442, 567

S.E.2d 244 (2002).[54] While it may be unnecessary to instruct on these statutory mitigating circumstances in § 16-3-20(C)(b)(2), (6) & (7) if the trial judge specifically instructs jurors on the defendant's voluntary intoxication, such a charge is not required if the trial judge charges these statutory mitigating circumstances. *See State v. Plemmons*, 296 S.C. 76, 78, 370 S.E.2d 871, 872 (1998).

In the present case, the sentencing phase jury instructions did not preclude juror consideration of the evidence of Robertson's intoxication.[55] Thus, the question of whether to charge voluntary intoxication does not state a claim in federal habeas corpus. *See Estelle v. McGuire*, 502 U.S. at 67-68 ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.' ... Today, we reemphasize that it is not the province of a federal habeas court to reexamine

[54] However, the failure to charge a mitigator is not preserved for review absent a request for the trial judge to charge it. *See Evans*, 371 S.C. at 32, 637 S.E.2d at 315; *State v. Stanko*, 376 S.C. 571, 658 S.E.2d 94 (2008).

[55] In *Stone, supra*, the Court found reversible error in the trial court's refusal to charge, at sentencing, all three statutory mitigating factors set forth in § 16-3-20(C)(b)(6) and (7). The Court further found that the error was exacerbated by the trial court's supplemental instructions to the jury, *at sentencing,* that "voluntary intoxication is not a defense to criminal act or actions" because the Court found that "reasonable jurors would clearly have understood this instruction as preventing them from considering evidence of Stone's intoxication in mitigation." 350 S.C. at 449-50, 567 S.E.2d at 248. However, the question under *Boyde v. California*, 494 U.S. 370 (1990) is whether there is reasonable likelihood that the trial judge's charge would be considered by jury in an unconstitutional manner. Respondent submits that the Eighth Amendment is satisfied because there is no reasonable likelihood that the penalty phase instructions precluded the consideration of relevant mitigating evidence offered by Robertson because (1) all three statutory mitigating circumstances relevant to Robertson's intoxication were submitted to the jury; (2) the earlier charge that voluntary intoxication was consistent with the sentencing phase definition that a "statutory mitigating circumstance is a fact, incident, detail or occurrence . . . which reduces the severity of the offense of murder;" that it "is one which in fairness and mercy may be considered as extenuating or as reducing the degree of moral culpability for the commission of the crime of murder;" and that while it "is neither justification nor excuse for the murder" it "lessens the degree of one's guilt; that is makes that person less blameworthy or less culpable;" (3) the trial judge instructed the jury that it could return a life sentence for any reason or no reason at all, and simply as an act of mercy; and (4) Robertson's counsel fully and vigorously argued all relevant information to the sentencing jury, including his voluntary intoxication.

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"). (Citations omitted). *See also Wilson, supra.*

GROUND FOUR

In **Ground Four,** Robertson asserts that he was denied effective assistance of counsel by trial counsel's advice to Robertson that anything he revealed to the defense social worker Toni Cascio was privileged; counsel's failure to object to discovery of Ms. Casio's notes by the State; and trial counsel's decision to call Ms. Cascio to testify after the trial judge ordered counsel to disclose her notes.[56] Respondent submits that Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State is procedurally defaulted under *Coleman* because was not raised as a specific allegation, it was not ruled upon by the PCR judge and Robertson did not seek a ruling by filing a Rule 59(e), SCRCP, motion. Relief should be denied as to the remainder of this claim because the state courts' rejection of Robertson's claim was not "contrary to" and did not involve an "unreasonable application of" clearly established United States Supreme Court precedent under § 2254(d)(1), *i.e.*, Robertson cannot "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131

[56] Dr. Cascio is currently employed at the University of Maryland's School of Social Work. See http://www.ssw.umaryland.edu/faculty_and_research/bios/cascio/. A 2006-07 biography for her published by that school states "**Toni Cascio**, associate professor; MSW, University of Maryland; PhD, University of Pennsylvania. Research/professional interests: spirituality and social work practice, teaching methods in social work, capital litigation.
http://www.umaryland.edu/bin/e/l/MSW%20Catalog_2006-07.pdf.

S.Ct. at 787.

A. Summary of Ms. Cascio's trial testimony.

1. Her testimony in mitigation.

Ms. Toni Cascio, the defense social worker, was the last expert called by the defense. She gave a detailed social history assessment of Robertson. **App. 2852-3031.**[57] Ms. Cascio testified that she "found that Jimmy came from a very chaotic home." She found evidence of "physical abuse and emotional abuse. And . . . definitely mental illness throughout the family." **App. 2858, ll. 4-8.**

She then gave a detailed history of each member of the family. She described the various problems that Terry Robertson had within her family as a child, including conflict with her mother, Terry's emotional and psychological problems, and Cascio opined that "a variety of indicators ... suggest that Terry was sexually abused as a child." Much of her testimony concerning Terry's childhood was corroborated, in her opinion by excerpts of Skip Meyer's notes. **Def.'s Exs. 21-22; 28; App. 2858-65; 2882-84.**

Ms. Cascio testified that Earl, Sr., was very bright but ambitious and "very confrontational." She also testified that, in 1989, Spring Industries decided that he "was not leadership material." Also, many people to whom she spoke described him as "pushy and kind of domineering." **App. 2865-67.**

Robertson's grandmother described him to Ms. Casio as "a very happy outgoing child although he did have some delayed development." In particular, he was "slow to talk." She

[57] To do the assessment, she "looked at medical and psychological records from all members of the family." Also, she interviewed Robertson and she "examined Earl Robertson's work documents; some of [Robertson's] incarceration documents; personal notebooks of Terry Robertson. And I also conducted about 13 interviews with people from a variety of areas in [Robertson's] life." **App. 2857.**

indicated that "there seemed to be poor attachment between Jimmy and his parents ... [a]t a very young age." Casio explained that children who are unable to form emotional attachments "have a lot of problems later on in life." Usually, they have "difficulty forming relationships because they just don't have a basis for it." Also, they "tend to be mistrustful" of others. They likewise tend to be angry and aggressive and after have self-control problems. **App. 2867-69.**

She testified that Robertson began banging his head when he was one or two years old. She explained that this was "often a sign of poor attachment; and she opined that this is usually seen in children who are raised in institutional settings and orphanages. She further opined that "there is a very strong association between maternal depression," such as that experienced by Terry, and a child's poor attachment because depressed mothers tend to be less responsive to the child's needs and more involved with their own problems. Depressed mothers also do not spend as much time with a child; they use "more negative language," are more hostile, more irritable, and are more harsh or arbitrary in their discipline. Children, however, need consistency. **App. 2869-73.**

Further, Ms. Cascio "found indications of physical abuse" with Robertson, including scars on his back and buttocks which he did not have a memory of receiving. "Both children confirmed that they were routinely beaten with a belt several times a week when they were pre-school and [in] grade school." Further, Robertson said that Earl, Sr., would often beat him with a belt to make him stop banging his head. Robertson's pediatric records from 1988 reflected that he was seen because he had been hit with a fist.[58] **App. 2873-76.**

Again, the multiple physical abuses, combined with psychological abuse, tends to create

[58] She likewise relayed other incidents in which Earl, Sr., was physically abuse to Robertson and Chip. One incident with Chip was documented in Skip Meyer's notes, which was introduced as **Def.'s Ex. 23.**

"negative outcomes for the children." Through Ms. Cascio's testimony and the extracts from Mr. Meyer's notes, the defense established that: Terry was afraid of Earl's temper and did not fell like she had done enough to protect her sons; there was a great deal of psychological abuse in the home, including degradation and name calling, Terry telling Robertson that she wished he had never been born and verbal abuse by Terry of both sons; the sons may have witnessed domestic violence by Terry attacking Earl; there was evidence that Chip hit women; Robertson had problems with his memory, which can be an indicator of trauma; and "everyone in the family had a history of mental illness." Terry was diagnosed as having severe depression, bipolar disorder and obsessive-compulsive disorder. Earl was diagnosed as having depression, panic disorder and ADD. Robertson had bipolar disorder and ADD; and Chip had ADD and possibly bipolar disorder. All of these factors "set the stage for something to go wrong in adolescence." **App. 2881-82; 2876-82; 2885, ll. 10-16. See also Def.'s Ex. 24.**

Likewise, through Cascio, counsel introduced three charts (**Def.'s Exs. 25-27**), which reflected psychiatric visits by the victims. These charts showed that Terry was seen in therapy roughly 170 times between 1995 and 1997, with a variety of problems, including hallucinations, self-mutilation, obsessive-compulsive disorder and suicide attempts. **App. 2881-86.**

In addition to Robertson's problems that she had previously discussed, Ms. Cascio testified that he "was often an outcast in school." Other students teased him and did not quickly accept him. By the ninth grade, he was suicidal. He started using illegal drugs while he was at Georgia Tech University and was "very suicidal" at that time as well. He also started engaging in behavior that

was consistent with mania, such as spending large sums of money and gambling.[59] Also, he did not have many friends. Ms. Cascio opined that "all of these factors [discussed by her], I believe, led him to start relying more heavily upon drugs which then in turn led to what happened later on." **App. 2886-88.**

Ms. Cascio further testified that Robertson and Chip had a "close relationship," and they often did things together, including criminal activity. She testified that Chip had similar problems with substance abuse, and he had experienced physical and psychological abuse. She also testified that Chip was incarcerated at the time of Robertson's trial. **App. 2888-90.** She later explained on cross-examination that, in light of the various factors she found in Robertson's life, "he might have felt [at the time of the murders] that [violence] was [his only alternative]." **App. 2949-52.** The defense also introduced several excerpts from Terry's "notebook" that were contained in Mr. Meyer's notes; and Ms. Cascio testified to the substance of these extracts. **App.2892-95; Def.'s Exs. 30-32.**

Finally, before the State began cross-examining Ms. Cascio about Robertson's admissions related to the murders, she was specifically asked whether she took his statements about the crime into consideration informing her evaluation of him. She replied, "I was looking at early childhood history that could have led him to that point;" and she agreed that she factored his statements into her assessment. **App. 3010, ll. 10-22.**

2. The State's cross-examination.

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[59] Ms. Cascio discussed Dr. Hayne McMeekin's 1994 diagnosis that he was depressed and his involuntary
commitment to William S. Hall, following the 1995 D.U.I. At that time, he was diagnosed as bipolar, alcohol dependent and "having mental illness with severe family strife.

The State began its cross-examination of Ms. Cascio by focusing upon remarks Applicant made to her during a November 30, 1998, interview about other bad acts and the family social history. Applicant contends that the prosecution was able to elicit evidence concerning prior bad acts, such as stalking (e.g., Tr. pp. 3000-3003); that his parents were "clueless" about his drug abuse (Tr. p. 2962); that he had a bad work history; that he stole his father's credit cards; that he and his father were, at one point, about to have a confrontation involving the use of knives; Applicant did not like college, it was forced upon him and he rebelled against it; "he [my father] put the work ethic in me [but] wanted to take it out of me by sending me to college;" that his parents' ideal was for him to attend college from eighteen to twenty-two and marry and have children by age twenty-five; by the time his parents realized that he would not do the great things they wanted him to do, it was too late; he failed out of college to prove a point; "what hurt most was his [father's] image;" "she (his mother) always tried to look out for me;" "she used to subsidize my income straight out of her pocket;" "love was financial in terms to [his father];" and other comments concerning the social history, such as the turbulent relationship he had with Earl, Sr. Tr. pp. 2955-70; 2979-3008.

Applicant also complains of the damage to the defense's case by the State's cross-examination regarding admissions he made to Ms. Cascio concerning the facts of the crime and his activities around the time of the murder, including admissions that:

- he had taken 250-280 mg of Ritalin over the course of the previous evening and the morning of the murders;
- Meredith Moon and Erin Savage were at the residence for approximately two hours that morning;
- he and Moon snorted 40 mgs. of Ritalin at that time;
- he continued to use Ritalin after they left;

- he talked to Chip for about two hours about coming home for Thanksgiving, and that Chip was dropping out of school;
- he later called Moon and spoke to her on two or three occasions;
- he asked Moon to give him $ 75.00 to get Chip home and, although she wouldn't give him money, she agreed to drive up and get Chip;
- Moon was infatuated with him and would have done anything he asked;
- After Moon came to his house, they began talking about the problems surrounding Chip coming home and "somehow it led to I'm going to do it;"
- he discussed which bat to use;
- he decided not to use the wooden one because it was autographed and he did not want to ruin it;
- he condensed two bottles of Tilex;
- he sat in his room and waited for his father to get in the shower before killing his mother because there would be noise;
- he took the phone off of the hook and laid a knife in the hallway in case his father came in;
- he went in the bedroom and started struggling with his mother, who began screaming for his father;
- "it was getting at me to hear her screaming;"
- he was "in a rage like a maniac;"
- he came downstairs and said "one down, one to go;"
- he laid the bat at the top of the stairs, sat and waited with the hammer "like I was standing on the other side of myself watching me;"
- it was "like someone else committing the crime and I was watching;"
- he sprayed Tilex in his father's eyes and buried the hammer in his head;
- his father "put up a fight with the hammer stuck in his head;"

- eventually, his father fell to the ground and Petitioner hit him 200 times with the hammer and bat;
- he said that "22 years of hatred came out;"
- it was "overkill" and he "went on and on and on and on;"
- he then went into the bedroom and checked on his mother;
- he hit his mother in the head with the hammer to make sure that she was dead;
- Moon thought he was going to kill her;
- he later heard a noise upstairs and it was his father breathing into the carpet;
- he wondered "how is he still breathing;"
- he "went to find the drill to end the matter;"
- he then took the bat upstairs to beat his father again and he kicked his father with his toe to make sure his father was dead;
- he cleaned up, took the money and car keys and packed stuff to dump;
- he said that "Meredith's testimony wasn't good enough by itself;"
- he broke the window downstairs to make it look like a robbery;
- a man pulled up across the street and he waived then got in car and left;
- he explained how he used his father's credit card, and how he stopped and bought Neosporin for his finger;
- he was going to get Chip and bring him to South Carolina, where they would discover his parents;
- no one would notice that his parents were missing;
- what he had done would not be a surprise to his brother;
- he called home and realized that someone had found the bodies and put the phone back on the hook;

- he thought he was "too smart to let this happen," meaning getting caught;
- Meredith was "running her mouth" but he never confessed; and
- he killed his mother because he couldn't live with her knowing that he killed his father.

App. pp. 3009-25.

B. PCR testimony.

Robertson testified at the PCR hearing that counsel had advised him to fully cooperate and be honest with the defense experts because they could not know how to prepare a defense unless they knew everything about him. He also claimed that counsel told him that what he disclosed was "not going to wind up in the wrong hands." So, he very candidly spoke about "very sensitive, intimate things" concerning his family and background, as well as some of the "criminal aspects of the trial" with the defense experts. He talked to the experts "no differently than" he did when he met with counsel. **App. 3292-95; 3314; 3581-82; 3605-06.**[60]

Mr. Hancock testified that counsel's investigation[61] led them to conclude that the prosecution had overwhelming evidence of guilt, and counsel did not find anything which led to the conclusion that either Meredith Moon or anyone else committed the murder. "[W]e had one of the worse cases I've seen." Therefore, counsel primarily focused on the sentencing phase of the trial and they attempted to secure a sentence of life imprisonment without parole (LWOP). Counsel got all of

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[60] When cross-examined about the murder and the statements he made to Cascio concerning the murder, he was permitted to invoke his Fifth Amendment privilege against self-incrimination, over objection, although he admitted to murdering his parents at one point. *See* **App. 3320-25; 3596-3063; 3606-07.**

[61] Counsel's qualifications and their investigation are discussed throughout the Order. Mr. Hancock had tried two capital cases and prepared for another. He also had tried eight non-capital murder cases, with six clients being acquitted. **App. 3414-16.** Mr. Boyd had practiced criminal law for almost thirty years. He had represented defendants in six capital trials (including Sylvester Adams twice) and he had prosecuted another capital case. **App. 3496-97.**

Robertson's school, mental health and other records that they could locate,[62] as well as the Robertson family counseling records from the Carolina Counseling Center, where he and his family were treated by Dr. McMeekin and family and marriage counselor Julius F. "Skip" Meyer, Jr. (While it was Mr. Hancock's impression that the defense obtained all of Dr. McMeekin's records through Mr. Meyer, he had previously turned over his file to Robertson and did not have his file at the time of the hearing). Mr. Meyer testified as a defense witness and counsel was able to introduce a substantial amount of evidence relating to the mental health counseling that Robertson and his family received. Counsel also introduced Mr. Meyer's notes of the various therapy sessions as **Def.'s Ex. 18**.

Additionally, counsel employed several defense experts whom they developed with the assistance of the Center for Capital Litigation, in Columbia: Dr. Jonathan Pincus (a neurologist); Dr. James Evans (a neuro-psychologist); and Toni Cascio, a social worker. Each of these experts testified at trial. *See* **App. pp. 2458-2530** (Dr. Pincus); **2535-89** (Dr. Evans); **2610-2736** (Dr. Morton); **2852-3031** (Ms. Cascio).

Mr. Hancock explained that "the parents were the cause. . . . [Also,] that the family was dysfunctional and because of that ... Jimmy had turned to some alcohol, drugs, Ritalin, and that it was basically the parents' fault for Jimmy having killed them." At the same time, counsel had to balance this defense with "showing that there was some sympathetic problems that could be associated with the family" that might cause jurors find sympathy for Robertson. **App. 3434, ll. 6-22.** Counsel thereafter introduced a number of mental health records through Ms. Casio. **App. 3329-39;**

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[62] This included local school records; school records from records from California; the records from his Youthful Offender Act conviction for burglary; his records from an involuntary commitment to the Willis S. Hall Psychiatric Institution; his South Carolina Department of Corrections (SCDC) records; records from Kanawha Insurance Company; and records from Piedmont Mental Health Associates.

3343-44; 3348-49; 3374; 3390; 3419-34; 3439-43; 3451.

Counsel were well aware of Ms. Cascio's limited experience and that she had never testified as a forensic social worker. *See* **App.'s Ex. 4** (C.V. for Toni A. Cascio), **App. 2852-55**. However, Ms. Drucie Glass (another social worker, who had experience in capital cases) and the Center for Capital Litigation (C.C.L.),[63] which specialized in providing assistance to defense lawyers trying capital cases, recommended that the defense hire Ms. Cascio as a social worker. Counsel obtained her C.V. They then interviewed her to determine whether she was qualified, and she assured them that she was qualified to help them. Nor were counsel tried but were unable to locate a more experienced social worker, and they were assured of her competence. So, they hired her. Also, counsel had met with her a number of times over the course of a year to prepare her testimony, and he did not report any problems in terms of her gathering information for the social history of Robertson. **App. 3340-43; 3380-82; 3421; 3426-28; 3436-37.**

Counsel told Robertson to be honest in discussing the case with the experts. Counsel felt that this was very important because counsel was afraid that the jury might figure out if the defense presented dishonest information. **App. 3349**. At some point prior to trial, the defense received her notes. Mr. Hancock's recollection was that counsel had objected to production of Ms. Cascio's notes, which contained a number of admissions by Robertson with which Ms. Cascio was cross-examined by the State at trial. Both attorneys made the joint decision to present her as a witness even though they were aware that her notes would have to be disclosed to the prosecution and that she would be

[63] Ms. Glass is the wife of Robertson's lead federal habeas counsel, Mr. Blume, who now attacks counsel's decision to use the witness. Also, Ms. Paavola heads the agency that was formerly known as the center for Capital Litigation. Respondent takes no position on whether these facts impact upon counsel's representation of Robertson before this Court, based upon a conflict of interest.

hurt on cross-examination because counsel felt that she was a necessary part of the defense's case in mitigation: she could "tie everything together [in mitigation]" to evoke some sympathy from at least one of the jurors. Also, the jury had already heard "many of the operative facts" through the State's "massive amount of evidence" and, without her testimony, the other experts' testimony was largely based upon speculation.[64] Mr. Hancock also agreed that the admissions that were elicited on the State's cross-examination of her were cumulative to much of the Moon's testimony and the State's circumstantial evidence presented in the guilt phase. **App. 3350; 3381-83; 3386-91; 3436-39; 3450-55.**[65]

Mr. Boyd mistakenly thought that Mr. Hancock had already hired the defense experts before he was appointed, using the C.C.L. However, he testified that they never really discussed which one was lead counsel; and he agreed with the trial strategy to which Hancock testified for many of the same reasons. Also, he did not object to what had been done with regard to the experts. Ms. Cascio was hired to investigate Robertson's mental health history and his family history. **App. 3498-3515; 3526-31; 3536-43.**

In Mr. Boyd's estimation, it was important to develop Robertson's background and mental health problems, to find a reason for what had happened. He also testified that the defense received a copy of Ms. Cascio's report shortly before trial; and Robertson introduced **App.'s Ex. 6**, which is

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[64] In hindsight, Mr. Hancock was unhappy with the State's cross-examination of Ms. Cascio and he felt that her testimony was "harmful" to the defense. However, he testified that she had provided the jury with a good deal of mitigating evidence on direct examination.

[65] Former Solicitor Pope characterized Ms. Cascio as the one defense expert who could pull together the various matters testified to by the other experts for the jury's benefit. **App. 3465-67.** He described her notes as a bonus (**App. 3481**), and he explained that many of Robertson's admissions merely confirmed or "shore[d] up" other evidence that the jury had heard as to guilt. **App. 3467.**

a March 1, 1999 letter from Ms. Cascio to Mr. Hancock providing counsel with a copy of the preliminary report. As to not objecting to production of her notes, he believed Rule 705 required production for cross-examination. **App. 3498-3515; 3526-31; 3536-43.**

Mr. Boyd further testified that Ms. Cascio was the last defense expert who testified. In hindsight, he felt that all of the other defense experts were good witnesses. Although Ms. Cascio was able to provide beneficial information to the jury on direct examination, he felt, in hindsight, that this benefit was overshadowed by the damage resulting from the State's cross-examination of her. He may have known but did not recall that Cascio had never previously testified as an expert. However, he noted that sometimes it is not a good idea to hire someone with previous experience in testifying and this would not be his main reason for not using an expert witness. As with Mr. Hancock, Mr. Boyd did not recall consenting to the disclosure of her notes (**App.'s Ex. 7**). **App. 3524-35; 3547-52; 3556-58.**

Nor did he recall when he became aware of them; but he testified that he would have reviewed them before disclosing them to the State. Mr. Boyd testified that he met with Ms. Cascio on more than two occasions and that co-counsel was not present on at least one occasion. Counsel corroborated that he and co-counsel decided to use her as a witness at trial, even after they learned that they would have to disclose her notes, because of the importance of her testimony to the defense since she could tie the mitigation case together. Also, Ms. Glass was present and never suggested not using her. **App. 3524-35; 3547-52; 3556-58.**

C. Discussion.

1. Robertson's first issue is procedurally defaulted from federal habeas review.

Respondent submits that Robertson's claim that trial counsel was ineffective for advising

Robertson that anything he revealed to Ms. Cascio was privileged against discovery by the State is procedurally defaulted under *Coleman, supra*, because it was raised for the first time in the state supreme court. However, it was not properly before the state supreme court on certiorari, since it was not was not raised as a specific allegation, it was not ruled upon by the PCR judge and Robertson did not seek a ruling by filing a Rule 59(e), SCRCP, motion.[66]

In South Carolina, an issue must have been raised to and ruled upon by the PCR judge to be preserved for appellate review. *Evans v. State*, 363 S.C. 495, 503-04, 611 S.E.2d 510, 515 (2005); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992) (issue or argument which is neither raised at PCR hearing nor ruled upon by the PCR court is procedurally barred from appellate review); *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); *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) ("This issue was not raised below and is not properly before us"). *Cf. Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).[67]

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[66] Although Respondent addressed the merits of this portion of Robertson's claim in the alternative on certiorari, it did so only by way of two sentences in a footnote and it primarily relied upon the well-settled procedural bars discussed herein as the reason for denying certiorari. *See* **Return to Petition for Writ of Certiorari at pp. 13-14 & n. 24.**

[67] Unlike the Rule 59(e) requirement discussed *infra*, the state appellate courts have steadfastly refused to consider arguments, either on direct appeal or in PCR appeals, that were not presented to the trial judge. *See Evans, Plyler, Hyman* and *Powell, supra. 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. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (same); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216

Clearly, Robertson did raise this specific allegation (*see* **App. 3658-59**); and Respondent did not question counsel about whether they advised him that anything said to the experts was privileged because Respondent was not given any notice that this was an issue before the PCR court. Thus, as a matter of state court appellate procedure, the state supreme court would not have considered this argument, and it is procedurally defaulted under *Coleman.*[68]

Even if the Court views this claim as adequately pled, there was no ruling thereon by the PCR judge. The PCR judge's failure to specifically rule on the issues precludes appellate review of the issues. To preserve an issue for review that is not specifically addressed in the PCR court's order, "[e]ither party must timely file a Rule 59(e), SCRCP, motion to preserve for review any issues not ruled upon by the court in its order." *Al-Shabazz v. State*, 338 S.C. 354, 364-65, 527 S.E.2d 742, 747 (2001) (citations omitted); *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007); *Bostick v. Stevenson,* 589 F.3d 160, 162-65 (4th Cir. 2009).[69]

In connection with his failure to specifically plead this as a claim for relief or file a Rule

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(2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court"); *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 contemporaneous objection or motion to preserve issue for appellate review); *State v. Vanderbilt*, 287 S.C. 597, 340 S.E.2d 543 (1986) ("Issues not properly preserved at trial may not be raised for the first time on appeal. To the extent that *State v. Griffin*, [129 S.C. 200, 124 S.E. 81 (1924)], may be inconsistent with this result it is overruled").

[68]The State submits that this requirement is one of basic fairness. *Cf. Stein v. New York*, 346 U.S. 156, 197 (1953) ("The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law").

[69] "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment [,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.' " *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citation omitted).

59(e), SCRCP, motion, Respondent would note that, the PCR judge reviewed and addressed the issues before him at the conclusion of the PCR hearing, in the presence of Robertson and his attorneys. **App. 3612-** He specifically asked whether PCR counsel wished to supplement their allegations and counsel said "no." **App. p. 3612, ll. 20-23.** As to counsel's decision to present Ms. Cascio as a witness, the PCR judge stated, "Now, regarding [Ms.] Cascio, you've got what I think are four basic claims. First of all, you claim that because she had never testified in a death penalty case before; in fact, [she had] never testified at all before, the decision to use her as a consultant and a witness in the first place was an unreasonable decision and I disagree with that."**App. p. 3634, ll. 14-20.**

The PCR judge summarized Robertson's remaining complaints as to counsel's decision to call Cascio as a witness as follows: "the second point is that counsel should have never agreed to provide the notes" **(App. p. 3635, ll. 24-25)**; counsel's failure to find another witness when they discovered that Cascio's notes had to be disclosed **(App. p. 3636, ll. 8-11)**; counsel's failure to sooner discover what Robertson had told Cascio **(App. p. 3638, ll. 16-20)**; and counsel's decision to present her as a witness in light of the trial judge's ruling that counsel had to disclose her notes. **App. p. 3642, ll. 3-15; p. 3642, l. 21-p. 3643, l. 3.** Counsel added that they alleged that Cascio's inexperience led her to exceed her authority and ask questions beyong the scope of her employment. **App. p. 3639, ll. 3-17; 3641, ll. 5-16.**

In *Marlar*, the order of the PCR judge failed to specifically address any of the allegations raised by the inmate, although S.C. Code Ann. § 17-27-80 (2003), required the PCR judge to "make specific findings of fact and state expressly the conclusions of law relating to each issue presented." *Id* at 408, 653 S.E.2d at 266. The state court of appeals rejected the State's argument that none of the

inmate's allegations were preserved for appellate review because the inmate failed to make a Rule 59(e), SCRCP, motion to alter or amend the judgment to include specific findings of fact and conclusions of law. The court of appeals initially indicated that the order failed to comply with § 17-27-80 and should be remanded for specific findings of fact and conclusions of law. However, the court of appeals focused on catch-all language in the order; and it reviewed state supreme court cases where the state supreme court had remanded PCR actions to the PCR judge for specific rulings although no Rule 59(e) motions had been filed, such as *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). Then, the court of appeals held that Marlar's allegations were preserved for appellate review; and it addressed the merits of Marlar's arguments. *Id* at 409, 653 S.E.2d at 266-67.

In the course of reversing the state court of appeals' decision in *Marlar*, the state supreme court first explained that:

> The cases this Court remanded for specific findings were unique cases in which the Court attempted to remind circuit court judges and parties that: (1) specific findings of fact and conclusions of law were required; and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review. Although the cases apparently have not accomplished the Court's goal, they do not change the general rule that issues which are not properly preserved will not be addressed on appeal. In fact, in Pruitt, this Court stated in a footnote, "In vacating and remanding in this case, we are not abandoning the general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review. The extraordinary action we take today is necessary only because our opinion in *McCray [v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991)] is not being followed." *Pruitt v. State*, 310 S.C. at 255, 423 S.E.2d at 128.

Marlar, 375 S.C. at 410, 653 S.E.2d at 267. The Court then held that "[b]ecause respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge."

Id at 410, 653 S.E.2d at 267.[70]

In *Bostick*, the Court of Appeals rejected the State's position, and the findings by the lower federal courts, that the failure to file a Rule 59(e), SCRCP, motion constituted an independent and adequate procedural bar to federal habeas review of Bostick's ineffectiveness claim, based upon its conclusion that, at the time of his Bostick's 2001 state PCR proceedings, the requirement was not consistently applied by the state's courts. As a result, the Court found that his failure to comply with the rule did not prevent him from pursuing his claim in habeas.

The Court in *Bostick* found that "[i]t is quite clear to us that Rule 59(e) was not consistently applied by the South Carolina courts at the time of Bostick's PCR proceedings. Indeed, in 2001 we explicitly noted that Rule 59(e) was inconsistently applied and that it was inadequate to preclude federal review. *Pearson v. Harrison*, 9 Fed.Appx. 85, 87 (4th Cir.2001)." *Bostick*, 589 F.3d at 164. The Court, therefore, "decline[d] to hold Bostick responsible for failing to comply with a rule when, at the time his case was decided, the state courts did not distinguish, in any principled way, those cases in which it would apply the rule from those in which it would not. The district court's award of summary judgment to the warden on the grounds that Bostick's federal habeas claim was procedurally defaulted is therefore reversed." *Bostick*, 589 F.3d at 165.

As the Fourth Circuit Court of Appeals' discussion of the issue in *Bostick* makes clear, however, there is no doubt that the state supreme court has expressly and consistently required compliance with the Rule 59(3) requirement since the decision in *Marlar*, which was decided on November 5, 2007. Thus, it is regularly and consistently followed rule of state appellate procedure

[70] The state supreme court also held that the requirement to file a Rule 59(e), SCRCP, motion to preserve an issue for appellate review extends to those cases where the party attacks the PCR judge's failure to make specific findings of fact and conclusions of law on an allegation. *Id* at 410, 653 S.E.2d at 267.

that - after November 5, 2007 - the state supreme court will not address issues, even in PCR, unless first presented to and ruled upon by the trial court.[71]

The Order denying relief in Robertson's case was filed on March 24, 2008. As a result, it was necessary for him to file a Rule 59(e) motion in order to preserve the allegation for review by the state supreme court. He did not file a Rule 59(e) motion. Therefore, this portion of his ineffectiveness issue was **not decided on the merits** by the state courts because of his default.

Robertson cannot 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. *Coleman*, 501 U.S. at 749-50. He cannot show cause for the default since the issue could have been raised to the state supreme court on certiorari. Also, the ineffective assistance of state habeas counsel cannot excuse procedural default given that there is no Sixth Amendment right to effective assistance of counsel in state habeas proceedings. *Coleman*, 501 U.S. at 752-53 ("There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. . . . Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must "bear the risk of attorney error that results in a procedural default") (citations omitted). *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir.1997) (en banc); *Longworth v. Ozmint*, 377 F.3d 437, 448 n. 2 (4th Cir. 2004); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26,

[71] This is consistent with state appellate court practice, generally, which is discussed, *supra*.

2002).[72] .

Also, he cannot show prejudice from the default because his allegation lacks merit under *Strickland, supra*, and this Court should deny relief for the reasons discussed with respect to his remaining arguments. At worst, he failed to establish Sixth Amendment prejudice. *See Strickland*, 466 U.S. at 687 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed"). *See also Taylor v. Bradley*, 448 F.3d 942, 950-51 (7th Cir. 2006) (the most prudent course may be to resolve ineffectiveness claims under the prejudice prong where overwhelming evidence here negates prejudice).

2. Counsel's failure to adequately object to producing Ms. Cascio's notes.

This Court must deny relief on Robertson's remaining allegations because the state courts' rejection of Robertson's claim was not "contrary to" and did not involve an "unreasonable application of" clearly established United States Supreme Court precedent under § 2254(d)(1). *See also Richter*, 131 S.Ct. at 786 ("a state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."

To establish that he received ineffective assistance of counsel, an inmate must make a

[72] In *Ivey*, the Fourth Circuit Court of Appeals rejected Ivey's claim, identical to Robertson's, that the procedural bar of § 17-27-90 did not apply because lead PCR counsel was ineffective and that lead PCR counsel was not qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011). The Court found that "[e]ven if we were to agree with Ivey that lead counsel was ineffective, however, under *Aice* that fact alone would not be sufficient to allow the filing of a successive PCR application. Accordingly, this claim is procedurally barred as a matter of South Carolina law and is thus defaulted."

twofold showing. *See Wiggins v. Smith*, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range" of reasonable professional assistance. *Id.*, at 689, 104 S.Ct. 2052. The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'' *Id.*, at 687, 104 S.Ct. 2052." *Richter*, 131 S.Ct. at 787 (quoting *Strickland*). *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

The inmate must also demonstrate that he was prejudiced by his attorneys' ineffectiveness. *Strickland*, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). In other words, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id* at 693. Rather, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Richter*, 131 S.Ct. at 787 (quoting *Strickland*, 466 U.S. at 687). In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability

that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 504 S.E.2d 822, 829-30 (S.C. 1998) (petitioner did not meet burden).

The Court in *Richter* further added that:

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.
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> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.*, at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, [*Knowles v. Mirzayance*, 556 U.S., at ----, 129 S.Ct. 1411,1420 (2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at ----, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 131 S.Ct. at 787.[73]

As discussed, Mr. Hancock recalled that the defense only disclosed the notes after the trial judge ruled that disclosure was required. A review of the pretrial motions hearings reflects that the defense did object to production of any reports of experts under the reciprocal discovery provisions act of Rule 5(b), SCRCrimP, until such time as the prosecution had fully complied with the defense's request for discovery under Rule 5(a) and until the defense could complete their testimony. The transcript from those proceedings further reflect that the trial judge required reciprocal discovery. *See* **11/20/98 Tr. pp. 4-20; 2/12/99 Tr. pp. 3-4; 8/16; App. pp. 74-78 (9/25/98 hearing); 79-82; 86-87 (11/2/98 hearing); 90-103; 116 (12/4/98 hearing).**

Before the state began its cross-examination of Dr. Pincus in the sentencing phase of the trial, Mr. Brackett asked for Dr. Pincus' notes and underlying data. After the trial judge ordered trial counsel to provide them, the State requested a break to review those materials, to prepare for cross-examination; and the trial judge granted his request. Mr. Brackett then noted that, "for the sake of expediency," the defense should produce any similar information for "any other experts that are going to testify." The defense did not object and Mr. Boyd stated that "I thought we took a big box of all that stuff to your office the other day." **App. 2505-06.**

After Dr. Pincus' testimony, the trial judge asked if the State needed "any further help in getting what they are entitled to." (Sic). Mr. Brackett, again, stated that if he could "get all of the information from any expert they have who is going to testify. I will have a change to review the

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[73] See also *Knowles*, 129 S.Ct. at 1420 ("And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard") (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations").

other two over lunch and that will be plenty of time." **App. 2531**. Mr. Hancock informed the trial judge that the defense was doing everything it could to provide the information. The trial judge stated that, if necessary, he would bring in the experts and Order then to determine whether they were going to testify. In response to the trial judge's inquiry, Mr. Hancock stated that "if we haven't, we will get them, your Honor." When the trial judge asked if Ms. Cascio's notes had been produced, Mr. Hancock said no, and the trial judge stated, "I think they've got a right to have it to cross-examine." **App. 2532 l. 2 – p. 2533, l. 23.**

During an *in camera* break after Dr. Evans had testified, then-Solicitor Pope noted that the State had not yet received Ms. Cascio's underlying data. Mr. Boyd explained that Ms. Cascio had left her notes in Columbia and had gone to get them and bring them to court. **App. 2604-05.**

Ms. Cascio testified the next day. Early in the State's cross-examination of her, Mr. Pope asked for and received a copy of her notes, without objection. **App. 2897, ll. 1-16.**

Rule 705, SCRE, provides that:

> The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The PCR judge found that:

> Rule 705 "permits the cross-examination to require the expert to reveal otherwise inadmissible underlying information before the jury, subject to a Rule 403, SCRE prejudice analysis. *See United States v. A&S Council Oil Co., et al.*, 947 F2d 1128, 1134 (4th Cir. 1991). *See also State v. Slocumb*, 336 S.C. 619, 821 SE2d 507 (Ct. App. 1999). Moreover, the Court finds that the record demonstrates that the trial judge ordered production of all notes of the defense experts, for the purposes of the State's cross-examination, and that his ruling is consistent with this Court's construction of Rule 705. In other words, the underlying notes or other data must be produced if the expert witness testifies. Further, this Court would not permit any exception because the purpose of disclosure is to counteract the liberality of the Rule,

> *see A&S Council Oil*, 947 F2d at 1134; *United States v. Gillis*, 773 F2d 549, 553-54 (4th Cir. 1985) and Ms. Cascio clearly testified that the statements by Applicant pertaining to the murders, as reflected in her notes, was considered by her in arriving at her opinion. Tr. p. 3010, ll. 10-22.

Order, App. 3738-39.

Under these circumstances, the PCR judge found that Robertson had not shown deficient performance because disclosure of the notes was objectively reasonable under *Strickland*. **App. 3739**. Particularly in light of her testimony that she considered Robertson's statements pertaining to the murders in arriving at her opinion, **App. 3010**, this ruling is supported by evidence in the record. Certainly, Robertson cannot prove any prejudice under *Wiggins* and *Strickland* because there is no reasonable probability of a different result in light of the fact that the damaging information that was presented to the jury from her notes was cumulative to Moon's testimony, the DNA evidence and Dr. Sexton's findings on autopsy. *See* "Statement of Facts," *supra*.[74]

The PCR judge's further finding that it was not unreasonable for counsel to fail to anticipate that Ms. Cascio's work on the case would result in her asking Robertson questions concerning the case or for otherwise failing to instruct her as to how to conduct an appropriate social history assessment (**App. 3739-41**), is likewise supported by the record. The reason counsel employed her as an expert witness was to take advantage of her expertise in the area of performing a social history. The PCR court correctly found that *Strickland* does not require counsel to instruct defense experts on how they should conduct their evaluations in their areas of expertise. *See Campbell v. Polk*, 447

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[74] *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir.2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *Cedillos v. State*, 250 S.W.3d 145, 154 (Tex.App. 2008) (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful); *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995) (counsel's failure to make an *in limine* motion was not ineffective because an *in limine* motion is inherently a strategic part of trial strategy).

F.3d 270, 285 (4th Cir. 2006) (refusing to read into *v. Oklahoma*, 470 U.S. 68 (1985) a malpractice standard for the assistance of appointed experts); *Wilson v. Greene*, 155 F.3d 396, 401-02 (4th Cir.1998) (holding that the Constitution does not entitle a criminal defendant to the effective assistance of an expert witness)." *Walton v. Angelone*, 321 F.3d 442, 464 (4th Cir. 2003); *Poyner v. Murray*, 964 F.2d 1404, 1418 (4th Cir. 1992) (no right to effective assistance of expert witnesses exists distinct from the right to effective assistance of counsel). *Cf. Affinito v. Hendricks*, 366 F.3d 252 (3rd Cir. 2004) (generally the selection of a particular expert is a matter of strategy and tactics where there is no showing that the expert selected is unqualified); *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (counsel had no duty to contact other experts when he thought those consulted were well qualified and counsel has no duty to ensure the trustworthiness of an expert's conclusions).

Nor was counsel ineffective in failing to anticipate that Ms. Casio would seek information from Robertson about the facts of the crime in order to have enough information to formulate her opinion as to the social history, or that he would freely discuss the crime with her.[75] While an attorney can be expected to learn that the client has relayed potentially damaging information to an expert, counsel is not required to anticipate everything that can possibly go wrong in the client's interaction with an expert in the months before a trial. *See Moody v. Polk*, 408 F.3d 141, 150 (4th Cir. 2005) (counsel had no responsibility for expert's outline, and thus did not render deficient performance in failing to stop expert from testifying while using outline that included information about which expert had doubts, even though outline itself was later used by prosecution to impeach

[75] In this regard, Respondent submits that Robertson's complaints with Cascio may have simply resulted from his own decision to discuss the murder freely.

expert's testimony).

Further, Robertson has characterized Ms. Cascio's inquiry into the facts of the case as going beyond the scope of her employment, *i.e.*, to perform a social history assessment of him, but *the only evidence* is Ms. Cascio's contrary testimony that his admissions relating to the murders were considered by her in formulating her opinion that at the time of the crimes, he might have felt like violence was his only alternative. *See* **App. pp. 2886-88; 2949-52; 3010, ll. 10-22.** Robertson likewise did not present testimony from any social worker that he or she would have been able to work on his case.

In the absence of any testimony that this information is unnecessary or not part of a proper social history in a capital case, the PCR court properly found that he had failed to prove either deficiency or prejudice resulting from counsel's failure to learn of his admissions earlier in time to hire another social worker or find a suitable alternative to presenting Ms. Cascio as a witness.[76] *See See, e.g., Beaver v. Thompson*, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony).

Finally, the Court should note that two of Robertson's mental health witnesses, Dr. Pincus (**Tr. p. 2472**) and Dr. Evans (**Tr. pp. 2545-46**) relied upon the information gathered by Cascio, *at least in part*, in reaching their conclusions about his mental status at the time of the offense. Under the circumstances, it was objectively reasonable for the PCR court to hold that he had not proven

[76] Again, counsel unsuccessfully attempted to hire a more experienced expert. **App. 3380-82.**

either deficient performance or prejudice under *Strickland, supra*.

3. Counsel's decision to present Cascio as a witness even though her notes were produced.

Finally, there is no merit to Robertson's claim that counsel were ineffective for presenting Ms. Casio as a witness after the trial judge order disclosure of her notes, since it was reasonably foreseeable that the State would engage in the lines of cross-examination of which he complains. The PCR judge rejected this allegation (**App. 3741-57**) because he found that Robertson has failed to prove any prejudice resulting from the State's cross-examination of her. *See Strickland*, 466 U.S. at 687. This Court should deny relief based on their decision to present Cascio, whom lead habeas counsel's wife recommended that trial counsel use at trial, as a witness because his decision is supported by the record and is not objectively unreasonable under § 2254(d)(1) and *Richter*.

The PCR judge expressly stated that he did not find that Robertson had proved deficient performance. **App. 3731 n. 62**. Also, the testimony of counsel (particularly Mr. Hancock's testimony) supports a finding that they made an objectively reasonable decision under *Strickland* to present her as a witness, even though they knew that the State would be able to elicit harmful evidence on its cross-examination of her, because they considered the positive aspects of her testimony more important to the defense than any potential harm, since she could tie the mitigation case together and much of the harmful information that would be elicited on cross-examination was cumulative to the State's lengthy guilt phase case that jury had already heard. **App. 3388, 3390-91, 3436-37, 3450-54** (Hancock); **3549-50** (Boyd). Also, Mr. Hancock correctly observed that they were only required to sway the decision of one juror. *See Wiggins*, 539 U.S. at 537 (had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance).

Moreover, counsel were constitutionally required to make a reasonable investigation for and presentation of mitigating evidence. *See Strickland*, 466 U.S. at 690-91; *Wiggins, supra*. However, it is unnecessary for this Court to determine whether counsel's performance was deficient because Robertson did not establish Sixth Amendment prejudice.

Initially, the PCR judge found that:

> Here, the Court finds that, upon discovering the existence of Ms. Cascio's notes, counsel was faced with the choice of either producing the notes and calling Ms. Cascio as a witness or not presenting her as a witness.Fn. 63 Moreover, if counsel was going to accomplish the previously determined strategy of having all of the evidence in mitigation tied together for the benefit of the sentencing jury, they had to call her as a witness. Thus, counsel was forced to weigh the benefit to the defense from presenting her as a mitigation witness against the potential harm to the defense resulting from the State's cross-examination of her about the admissions that [Robertson] had made. In this regard, the Court finds that counsel's decision was much like the decision this Court must make in determining whether there is prejudice under *Strickland*.Fn. 64 After this Court's review of the record, the Court finds that there is no reasonable probability of a different result but for counsel's decision to present Ms. Cascio as a witness.
>
> Fn.63/ For the reasons set forth in this section as well as the reasons set forth in connection with the preceding sections of this allegation, the Court rejects [Robertson's] contention that counsel were ineffective for failing to move *in limine* to bar production of the portion of the notes relating to [Robertson's] admissions to the crimes. Once the decision to call her was made, the notes had to be produced because the admissions to the murders formed part of the basis of her opinion on [Robertson's] social history assessment. See Tr. p. 3010, ll. 10-22.
>
> Fn. 64/ In order to make such an assessment, counsel had to look at Moon's testimony, as well as Dr. Sexton's testimony and other evidence presented by the prosecution in both phases of the trial relating to proof of their client's guilt of the murders and the alleged statutory aggravating circumstances. This evidence included the manner in which [Robertson] committed the murders. Additionally, counsel had to consider that the State was going to be allowed to present Dr. McKee as a reply witness.
>
> First, the Court finds that both lines of inquiry at issue in this allegation only took place after the State had already cross-examined Ms. Casio, at length, about her findings to which she had testified on direct examination. See Tr. pp. 2895-2955.

> Second, Ms. Cacio's testimony was only part of a lengthy case in mitigation, but it served to tie all of the other evidence together. Third, the Court finds that the statements concerning his family's mental health and social history clearly were cumulative to other evidence in the record, including – but not limited to - Ms. Casio's testimony on direct examination, the testimony concerning his involuntary admission to the William S. Hall Institute, and the testimony of Mr. Meyer.
>
> The record is replete with evidence of the strained, tumultuous and confrontational relationship [that Robertson] had with his parents, especially his father. Much of that history is discussed throughout this Order, and [Robertson] discussed similar evidence in his PCR testimony. Moreover, the Court finds that this was a proper line of cross-examination. The Court also finds that the State's inquiries concerning evidence of other bad acts was a proper topic for cross-examination because it reflected upon [Robertson's] character. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979) (same); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), rev'd. on other grds., 476 U.S. 1 (1986) ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, **the trial transcript clearly reflects that counsel objected when the State began cross-examining Ms. Casio about [Robertson's] involvement in prior stalking incidents. However, the trial judge overruled the objection and permitted the examination.** Also, Ms. Casio took this information into account in forming her opinion. *E.g.*, Tr. pp. 3000-3003.

Order, App. 3741-43 (emphasis in bold added).

The State submits that the PCR judge's findings are supported by probative evidence and a correct application of *Strickland* and its progeny. *See Richter*, *supra*. Furthermore, the PCR judge properly concluded that Robertson failed to prove show any conceivable prejudice resulting from the sentencing phase jury hearing this information where this evidence of other bad acts only was presented at sentencing; it was cumulative to evidence of bad acts discussed elsewhere in the Order; and it was cumulative to evidence presented by the State that Robertson had previously burglarized his neighbor's home and stole over $15,000.00 worth of valuables, including a car, blank checks and

credit cards. **App. 2107-20.**[77]

Also, the trial judge's sentencing phase charge included a limiting instruction, in which he instructed jurors that, before they considered any such evidence, they must first find that the State had proved that Robertson committed any bad acts beyond a reasonable doubt. Even if the jury found that the State had met its burden of proof, the evidence could only be considered as evidence of "his character in general." The evidence could not be considered as proof of any aggravating circumstances. **App. 3217-18.** He charged further that Robertson's prior convictions could only be considered as character evidence as well. **App. 3218.**

The trial judge further instructed the jury that, in considering whether to recommend a sentence of death, it must first find the existence of one or more aggravating circumstances beyond a reasonable doubt; and that jurors could only consider 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. **App. 3203-26.** In light of the sentencing

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[77] Based upon that crime and his subsequent activities with the credit cards, Robertson was charged with a series of offenses to which he pled guilty. The State introduced the indictments and subsequent sentencing sheets into evidence, as follows: **State's Ex. 191**, an indictment and sentencing sheet to burglary in the second degree; **State's Ex. 192**, an indictment for burglary in the first degree and guilty plea and sentencing sheet for burglary in the second degree; **State's Ex. 193**, an indictment and sentencing sheet for grand larceny; **State's Ex. 194**, an indictment and sentencing sheet for grand larceny; **State's Ex. 195**, an indictment and sentencing sheet for forgery; **State's Ex. 196**, an indictment and sentencing sheet for financial transaction card fraud; and **State's Ex. 197**, an indictment and sentencing sheet for financial transaction card fraud. **App. p. 2119.** Additionally, the jury heard that Robertson had given a statement to the police in which he attributed the crimes to a drug problem. **App. pp. 2117-19; State's Ex. 190.**

phase instructions, the PCR judge correctly found that the challenged evidence was not prejudicial. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."(citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Old Chief v. United States*, 519 U.S. 172, 196 (1997) ("Any incremental harm resulting from proving the name or basic nature of the prior felony can be properly mitigated by limiting jury instructions").

Likewise, the Court PCR judge correctly found that Robertson was not prejudiced by the State's cross-examination concerning his admissions concerning the murders because the substance of the various admissions, including the information concerning how he committed the murders, was cumulative to other evidence in the record and already before the sentencing phase jury, including the guilt phase testimony of his co-defendant, Meredith Moon, who was present in his parents home when he murdered them and accompanied him when he left South Carolina and drove to Philadelphia, Pennsylvania (*See, e.g.*, **App. 1575-1616; 1623-25; 1632-38; 1641-46**); the guilt and penalty phase testimony of Dr. Joel Sexton regarding his autopsy findings (*See, e.g.*, **App. 1784-1808; 2249-2302**); the evidence recovered from the scene, the car Robertson and Moon had used to flee the State and locations provided by Moon; the results of the State's fingerprint, hair, DNA and other forensic testing of evidence in the case; and the other witnesses discussed in the Order. **App. 3744-56**. Moreover, his guilt for the crimes was no longer at issue.

As the PCR judge correctly found, a review of the graphic Dr. Sexton's testimony concerning his findings clearly demonstrates that he was able to both identify the many different blows and show these injuries to the jury through pictures and diagrams. When his testimony is viewed along with Moon's testimony, the DNA evidence and other forensic evidence discussed above, the PCR judge quite reasonably found that "the sentencing jury had already been presented with an overwhelmingly

graphic and vivid picture of what had occurred at the time of the murders before Ms. Cascio testified. The jury was, therefore, aware of both the heinous nature, not only of the crimes, but also of the defendant who committed it." **App. 3756.**

As a result there is probative evidence to support the PCR judge's conclusion that, "although [the] admissions testified to by Ms. Cascio are significant, they are not so strong that this Court can conclude that there is a reasonable probability of a different result but for the presentation of her testimony." **App. 3756.** (Citing *Strickland*, 466 U.S. at 695 (defendant required to prove that "there is a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death"); *Wiggins*, 539 U.S. at 537).[78]

Respondent would further note that, in the state supreme court, Robertson relied upon *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002). However, his reliance was misplaced[79] Likewise, in

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[78] Finally, there cannot be any discernable prejudice from the State's cross-examination of Cascio if Dr. McKee's subsequent reply testimony is considered on this issue. *See* **App. 3067-72.** The PCR judge found that "his testimony presented the substance of [most], if not all of Ms. Cascio's testimony on cross-examination; and he testified that the factual information provided to him by [Robertson] was virtually identical to those facts in the notes of Ms. Cascio. Tr. pp. 3066-67." **Order, App. 3756.** Also, the PCR judge found that any challenge to the admissibility of McKee's testimony about the information he received from Robertson, under *Hudgins v. Moore*, 337 S.C. 333, 524 S.E.2d 105 (1999), was not properly raised in PCR because the trial judge had overruled trial counsel's objection, and ruled that Robertson's statements were admissible. *See* **App. 3044-57.** "Thus, the question of his ruling could have been raised on direct appeal and is barred in PCR. *See* §17-27-20(b); *Drayton*, 312 SC at 9, 430 SE2d at 520 (issue that could have been raised at trial and on direct appeal cannot be asserted in PCR application, absent a claim of ineffective assistance of counsel). Alternatively, the Court finds that there was no violation of *Hudgins*" and that this objection was properly overruled. **Order, App. 3717 n. 45.** *See also* **App. 3756 n. 82.**

[79] First, *Ingle* is a non-capital case; and the present allegation involves the reasonableness of counsel's decision to present the testimony of a forensic social worker, who could testify to matters that neither the other defense experts nor lay witnesses could testify. *Cf. Wiggins, supra.* Second, the Court held in *Ingle* that counsel was ineffective because he called a witness (Afifty) as a defense witness without interviewing her first to ascertain whether she would support petitioner's theory of the defense, and, instead, relying solely on petitioner's representation that she "would admit to having intercourse with petitioner on the morning of the alleged assault" and presuming that her testimony would be favorable to petitioner when she was not called as a witness by the State. *Id* at 471, 560 S.E.2d 403.

arguing that he was prejudiced by counsel's alleged errors, he mistakenly relied upon the state supreme court's decisions in *State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000), and *State v. Price*, 368 S.C. 494, 629 S.E.2d 363 (2006) (another non-capital case). The PCR judge relied upon the proper standard set forth in *Strickland*. *See* 466 U.S. at 695 (defendant required to prove that "there is a reasonable probability that ... the sentencer ... [can] conclude [] that the balance of aggravating and mitigating circumstances [do] not warrant death"). *See also Wiggins*, 539 U.S. at 537; *Jones v. State, supra*. Additionally and unlike *Gardner v. Ozmint*, 511 F.3d 420 (4th Cir., 2007) (defense counsel performed deficiently by allowing admission of co-defendant's pretrial statements that related racial motivation for crime) because (1) Cascio testified at sentencing; (2) her testimony was utilized to Robertson's benefit; and (3) she relied upon the damaging information at issue in making her findings.

Finally, given that the United States Supreme Court's decision in *Wiggins* stresses the need to present a capital defendant's background and family history in many cases, as well as the

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The Court found that petitioner was prejudiced by trial counsel's deficient performance for several reasons. First, she was the first witness called in petitioner's defense, but her testimony and the State was able to "elicit additional damaging testimony on cross-examination. The effect of Afify's testimony, which totally contradicted petitioner's defense, was heightened by the fact that Afify was called as petitioner's first witness." Also, this Court reasoned that reasonable doubt could have been established without her "denial that they had sexual intercourse on the morning in question" because "petitioner's theory that his semen was transferred to the victim's shorts via the bedsheets was not implausible;" and "other evidence called into question the credibility of the victim's allegations." *Id* at 471-72, 560 S.E.2d 403-04.

Here, however, Cascio was the last witness called; and she was a key witness in the case in mitigation, as opposed to the witness in *Ingle*. Further and contrary to *Ingle*, counsel in the sentencing phase was seeking one juror to vote for life. *See Wiggins*, 539 U.S. at 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance"). Also, counsel had interviewed her extensively before presenting her; and they had both her report and her notes. They were thus aware of the beneficial evidence to which she could testify and the potential for damaging cross-examination by the State, and they weighed these counterbalancing factors before calling her to testify.

importance of utilizing a social worker when that is the only way to present this evidence, and the state supreme court's decision in *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (finding that trial counsel were ineffective for not presenting an adequate sentencing phase case in mitigation),[80] it cannot be said that Robertson was prejudiced by his attorney's decision to present Ms. Cascio's testimony.

GROUNDS FIVE-ELEVEN

In **Grounds Five-Eleven**, Robertson presents a variety of claims that he concedes he failed to exhaust in state PCR. He has moved this Court to stay the current proceedings and hold them in abeyance, so that he can return to state PCR court and litigate his remaining allegations. His motion to stay is based upon the ineffective assistance of his original PCR counsel and his argument that the state PCR record does not establish that lead PCR counsel was qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011). Respondent submits that these allegations are procedurally defaulted under *Coleman* because they were never presented in state court, and that Robertson cannot show cause for and prejudice as a result of the alleged constitutional violation, or that failure to review the

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[80] Counsel in *Council* did not present any medical evidence or other testimony describing his mental health issues or that several of his immediate family members suffered from mental illness. Counsel also failed to present evidence that: Council's father was an extremely violent alcoholic, who was divorced by his mother on the ground of physical cruelty; he and his siblings resided in bad neighborhoods, lived in poverty, and often lived in homes without running water or indoor plumbing; he "and his siblings were neglected by their parents and, as a result, on one occasion [he] suffered severe burns while trying to cook without supervision;" Council had a significant drop in his I.Q. between the ages of seven and ten which may have been the result of a head injury or the onset of mental illness; that he began getting into trouble at the age of ten years most likely as the result of his violent family environment and negative influence of his siblings; his immediate family members had been diagnosed with mental illnesses such as schizophrenia, schizoid, bipolar disorder, depression, and borderline personality disorder; he had learning disabilities; DJJ caseworkers recognized hiss emotional and mental problems; he began using drugs and alcohol at sixteen years old; he attempted suicide in his twenties; he had a borderline I.Q. and frontal lobe brain dysfunction; and the onset of his current diagnosis of schizophrenia may have begun in early adolescence or childhood. Id at 177, 670 S.E.2d at 365.

constitutional claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749-50.

He cannot show cause for the default since the issue could have been raised to the state supreme court on certiorari. Also, the ineffective assistance of state habeas counsel cannot excuse procedural default given that there is no Sixth Amendment right to effective assistance of counsel in state habeas proceedings. *Coleman*, 501 U.S. at 752-53 ("There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. . . . Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must "bear the risk of attorney error that results in a procedural default") (citations omitted). *Mackall*, 131 F.3d at 449; *Longworth*, 377 F.3d at 448 n. 2 (4th Cir. 2004).

As discussed, in *Ivey v. Catoe*, the Fourth Circuit Court of Appeals rejected Ivey's claim, identical to Robertson's, that the procedural bar of § 17-27-90 did not apply because lead PCR counsel was ineffective and that lead PCR counsel was not qualified under§ 17-27-160(B). The Court found that "[e]ven if we were to agree with Ivey that lead counsel was ineffective, however, under *Aice* that fact alone would not be sufficient to allow the filing of a successive PCR application. Accordingly, this claim is procedurally barred as a matter of South Carolina law and is thus defaulted." *Ivey*, 36 Fed.Appx. at 730-31, 2002 WL 459004. Also, he cannot show prejudice from the default because he has not presented any evidence to support his various claims.

Nor should the current proceedings be stayed and held in abeyance, so that he can return to state PCR court and litigate his remaining allegations. The United States Supreme Court's decision in *Rhines v. Weber*, 544 U.S. 269 (2005) laid out the discretionary framework for this Court to apply

in addressing his motion. First, the Court directed that "stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court." *Id.*[81] Second, the Court stated that district courts may not stay a habeas case where the unexhausted claims are "plainly meritless." *Id.* Moreover, "[e]ven where stay and abeyance is appropriate, ... [a] mixed petition should not be stayed indefinitely." *Id.* Finally, the Court held that "if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." *Id.*

Under *Rhines*, the initial issue to be resolved is whether there was good cause for Robertson's failure to previously exhaust this claim in state court. His argument that he can show cause is predicated solely upon original PCR counsel's ineffective assistance and that lead PCR counsel was not qualified under§ 17-27-160(B). Respondent submits that, as in *Ivey*, there was not a showing of good cause. See also § 2254(i).

Also, the various claims that Robertson wishes to address are "plainly meritless." As the attached Return and Motion to Dismiss the 2011 Application makes clear, Robertson's allegations **10 &11(c)-10 & 11(f)** do not state a claim upon which Post-Conviction Relief may be granted because each is alleged as a free-standing, substantive claim of trial court error. *See* S.C. Code Ann. § 17-27-20(b) (1985) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). Post-conviction

[81] To Respondent's knowledge, the only other Supreme Court decision to reference the term "good cause" in the stay and abeyance context is *Pace v. DiGuglielmo*, 125 S.Ct. 1807 (2005). In *Pace*, the Court held that a state postconviction filing rejected by the state court as untimely was not properly filed within the meaning of § 2244(d)(2). *Id.* at 1814. The Supreme Court recognized that "petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." *Id.*

relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). *See also Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (same); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885-86 (1975) (same).

Although his remaining allegations are not "plainly meritless" on their face, the entire 2011 Application is "plainly meritless" for the reasons stated in Respondent's March 24, 2011 Return and Motion to Dismiss Robertson's 2011 Application: the Application is subject to summary dismissal because (1) it is not verified by Robertson; (2) it is barred by the one year statute of limitations governing PCR applications, § 17-27-45(A); (3) it is impermissibly successive to a previously filed application and this Court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel or PCR counsel's lack of statutory qualifications; (4) the supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge;(5) laches bars relief in state court because Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application.

Further, the question of whether or an attorney is qualified under § 17-27-160(B) is one of state law, a violation that was never litigated in state PCR proceedings. As this Court is well aware, " 'federal habeas corpus relief does not lie for errors of state law.' ... [Also], . . . 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." *Estelle v. McGuire*, 502 U.S. at 67-68. Moreover, alleged defects in state post-conviction procedures are not cognizable in a federal habeas corpus action. *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) (holding that errors and irregularities in connection with state post-conviction proceedings are not cognizable on federal habeas review). *See also Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir. 1998).

The State would further note that the argument lacks merit as a matter of state law. Robertson contends that to be qualified in a capital PCR a lawyer either needs to have either previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief. However, in her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 13th, 2003, the Chief Justice of the South Carolina Supreme Court specifically rejected this interpretation, finding 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.[82] Thus, it was 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 S.C. Code Ann. § 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 specifically relied on the statute and this memorandum to conclude that PCR counsel were sufficiently qualified. His September 9, 2005 Order appointing Mr. Brown

[82] Respondent has attached a copy of this Memorandum to the current Response.

specifically states that "[t]he defendant contends that he is indigent and in need of an attorney as contemplated by law." "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990). As a result, the presumption is that Judge Few appointed in accordance with § 17-27-160(B).[83] Thus, there was no violation of the capital PCR qualification statute, and accordingly no basis for remanding this case and treating the proceedings that have taken place as a nullity.

Finally, Respondent has previously submitted pleadings from *Abdiyyah ben Alkebulanyahh, #6012 v. State*, a capital PCR appeal in which the state supreme court, on October 20, 2010, summarily denied a Motion to Remand for Additional Post-Conviction Proceedings filed on the petitioner's behalf by Robertson's lead counsel, Mr. Blume. Thus, Robertson's counsel are well aware that the present motion is without merit. As a result, the procedural default of these allegatios cannot be excused and the Court should not stay the proceedings.

IV.

Each and every allegation contained within the Petition not hereinbefore either expressly admitted, qualified or explained is hereby denied.

CONCLUSION

WHEREFORE, having made Return, Respondent requests that the Petition be denied and dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

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[83] Reliance upon the presumption would be unnecessary if Robertson had timely raised the matter in state PCR.

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March 28, 2011

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

James D. Robertson, Petitioner, v. Jon Ozmint, Commissioner South Carolina Dept. of Corrections, Respondent.	Civil Action No.2:11-63-SB-BHH **ORDER**

The petitioner, a state prisoner, seeks habeas relief pursuant to Title 28, United States Code, Section 2254. The petitioner brought this habeas action on October 27, 2010, requesting a stay of execution. On November 4, 2010, the Honorable Sol Blatt, Jr. granted it. [Doc. 10.] The petitioner filed his petition on January 7, 2011. [Doc. 20.] Simultaneous to that filing, the petitioner also filed a motion to stay, which is presently before the Court. [Doc. 21.] The respondent has already filed his motion for summary judgment. [Doc. 35.] The time for a response has not expired.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 73.02(B)(2)©, D.S.C., this magistrate judge is authorized to resolve all pretrial proceedings in posttrial petitions for relief.

PROCEDURAL HISTORY

The petitioner, James D. Robertson, is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of two York County murder convictions and death sentences for allegedly killing his parents. The York County Grand Jury indicted the petitioner at the April 23, 1998 term of court 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. at 3758-65.) The petitioner was convicted and sentenced to death in the York County, South Carolina Court

of General Sessions in March, 1999. The procedural history of his direct appeal is substantially tortured, but it appears that he ultimately was permitted to abandon it voluntarily. (Resp. Response at 4-5.)

Following the dismissal of his direct appeal, the petitioner sought post-conviction relief (PCR), pursuant to S.C. Code § 17-27-160, which requires appointment of qualified counsel to assist indigent death row prisoners in the identification, development and litigation of challenges to their convictions and sentences. In September 2005, the York County Court of Common Pleas appointed Michael L. Brown and Thomas Matlock, to represent the petitioner. Counsel filed a PCR application on petitioner's behalf alleging, "Ineffective assistance of counsel – specifics to be amended later." (App. at 3246.)

The petitioner contends that his PCR counsel failed to independently investigate his case and, therefore, overlooked seven different grounds for relief, which are now a part of the habeas petition in federal court. This alleged oversight of PCR counsel, while not a bases for habeas relief itself, is the leverage by which the petitioner hopes to make a successive and potentially out-of-time PCR application in the state court and to stay the case here. The petitioner's successive PCR application, based on these unexhausted grounds, is currently pending in state court. (Pet. Mot. Stay at 2-3.)

The precise grounds for federal habeas relief need not be recited here. They allege various constitutional errors committed at the trial of the petitioner and upon his direct appeal. (See generally Pet.)

DISCUSSION

The petitioner asks the court to stay this habeas action pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), until the state court rules on his pending second PCR application. In *Rhines*, the Supreme Court addressed how "mixed" petitions containing both exhausted and unexhausted claims should be handled by district courts. The Court in *Rhines* noted the

interplay between the one-year statute of limitations of the AEDPA, 28 U.S.C. § 2244(d) (1), and the requirement of *Rose v. Lundy*, 455 U.S. 509 (1982), that courts are to dismiss the entire mixed habeas petition without prejudice in order to effectuate the requirement of "total exhaustion." *Rhines,* 544 U.S. at 274-75. In such cases, petitioners who come to federal court with a mixed petition "run the risk of forever losing their opportunity for any federal review [of their claims]" if the district court dismisses the case without prejudice close to or after the limitations period has expired." *Id.* In *Rhines,* the Court noted that some district courts have adopted a stay and abeyance procedure to deal with this problem: the court stays the petition and holds it in abeyance while the petitioner returns to state court with his unexhausted claims. *Id.* at 275-76.

The Court cautioned, however, that the practice of staying a federal habeas case, while a petitioner returns to state court to exhaust his claims, should be used sparingly.

> Stay and abeyance, if employed too frequently, has the potential to undermine these twin purposes. Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition. . . .
>
> For these reasons, stay and abeyance should be available only in limited circumstances. Because grating a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

Id. at 277. Accordingly, a stay should be granted only where (1) "there was good cause for the petitioner's failure to exhaust his claims" in a prior state court proceeding; (2) the unexhausted claims are not "plainly meritless"; and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 276. The petitioner has

addressed each consideration; the respondent has acknowledged none, failing to even recognize *Rhines* at all. The Court will address the petitioner's showing and then consider the respondent's arguments, as far as they go.

The petitioner contends that there is good cause for his failure to exhaust certain claims because his PCR attorneys did not perform the required independent investigation to determine the existence of claims for relief based on evidence not contained within the record generated at trial. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1 and Commentary, reported in 31 HOFSTRA L. REV. 913, 1085-86 (2003) ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."); *Nash v. Ryan*, 581 F.3d 1048, 1054 n.9 (9th Cir. 2009) (recognizing Guideline and duty); *Moeller v. Weber*, 2010 WL 1170451, at *1 (D.S.D. 2010) (recognizing Guideline and duty). Specifically, the petitioner contends that PCR counsel overlooked at least seven (7) colorable challenges to his convictions and sentences that were apparent from the trial record. *See* Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. at 1086 ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues."). Those claims include Grounds 5 through 11. The respondent does not reject either that PCR counsel failed to independently investigate or raise the grounds for relief, as alleged.

The petitioner also offers that while some, or all, may eventually prove ineffective, none of the grounds can reasonably be considered "plainly meritless." The respondent has not attempted, in his brief, to contest the viability of any grounds alleged, either those exhausted or unexhausted. The Court, therefore, construes the silence as acquiescence.

Finally, there exists not even the specter of any dilatory tactics on account of the petitioner or his counsel. The respondent has certainly raised none.

The Court would address briefly the objections of the respondent, many of which seem somewhat dissociated from the merits of the stay analysis. The undersigned may misapprehend them. But, as far as can be understood, they do not seem to raise any pause in the decision to stay.

First, the respondent claims that the petitioner's's "complaint is one of a state law violation that was never litigated in state PCR proceedings." (Resp. Response at 10.) The respondent continues, "Further, alleged defects in state post-conviction procedures are not cognizable in a federal habeas corpus action." *Id.* at 11. The arguments are confusing. Grounds 5 through 11 of the habeas petition are all framed as violations of various Amendments of the United States Constitution, rather than state law, and none of them purport to challenge post-conviction procedures; they are all challenges to incidents of trial or the direct appeal. [Doc. 20 at 18-24.] If the respondent means to say that the petitioner's appeal to PCR counsel's failure to investigate is somehow a part of the habeas corpus challenge, the point is not effective. The petitioner's objection to PCR counsel's conduct was exclusively an attempt to show good cause for the stay, as part of the *Rhines* paradigm. It is not, itself, some ground for habeas relief.

Reframing the point, the respondent again contends that the petitioner's basis for a successive PCR Application "lacks merit because neither the state court nor this Court will grant relief based upon the ineffective assistance of collateral counsel." (Resp. Response at 11 (citations omitted).) The Court cannot say it more plainly: petitioner does not seek habeas corpus relief for any ineffective assistance of collateral counsel.

The respondent also emphasizes that the petitioner is challenging the qualifications of his collateral counsel to handle a death penalty case. The respondent argues that any "supposed lack of qualification was an issue that could have been raised, if at all, at the time of the appointment and later pursued on appeal." (Resp. Response at 12.) The petitioner

unequivocally mentions collateral counsel's purported lack of qualification. (Pet. Mot. Stay at 1-2.) That observation, however, formed essentially no part of his good cause proffer for stay. *Id.* at 4-5. Instead, the petitioner relies almost exclusively on the PCR counsel's alleged failure to investigate. *Id.* As discussed, the showing has been unrejoined. But, even to the extent the petitioner has made a mixed appeal to the Court that good cause exists – for both a want of qualification and investigation, the allegations related to the failure to investigate have not been challenged by the respondent and would constitute good cause, alone, even if concerns over PCR counsel's qualifications were deemed somehow improvident.

Lastly the respondent contends for various procedural reasons, including the one-year statute of limitations governing state PCR applications, S.C. Code § 17-27-45(A), that the petitioner's pending and successive application will not be successful. Such may be the case. The Court agrees with the petitioner, however, that it is unnecessary to guess about it. To the extent there are any questions about the petitioner's ability to proceed in state court, those questions are better resolved there. There is no reason to prematurely foreclose the opportunity, when there exists some chance that the state court, whose determination and province it is, might view the matter differently. In light of *Rhines*, it seems that where a state court is willing to consider a prisoner's claims, there is no legitimate federal interest in impairing access to that consideration by refusing a stay. *See, e.g.*, *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief."); *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (citing Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-491 (1973)) ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and

prevent disruption of state judicial proceedings."). That is not to say that the procedural inadequacies of the petitioner's PCR application are at all times irrelevant. In fact, the Court can imagine circumstances where the procedural condition of the claims might inform the "plainly meritless" inquiry. But, here, all other considerations being favorable to the petitioner, and unchallenged by the respondent, the Court would not aggressively speculate about what the state court may or may not do regarding the time bar.[1]

Accordingly, the Court would grant the stay.

CONCLUSION

Wherefore, it is ORDERED that the petitioner's Motion to Stay is GRANTED. [Doc. 21.] The petitioner shall notify the Court within five (5) days of resolution of his state court PCR application. *See Rhines*, 544 U.S. at 278. Thereafter, the respondent will have thirty (30) days to amend his motion for summary judgment, as necessary. The remainder of the briefing schedule shall follow in accordance with applicable rules.

IT IS SO ORDERED.

s/Bruce Howe Hendricks
United States Magistrate Judge

April 8, 2011
Charleston, South Carolina

[1] Of course, any ruling of the District Court that the claims raised in this habeas petition are without merit would not preclude the state PCR court from reaching a contrary conclusion and granting relief. *See Ivey v. Catoe*, 36 Fed. Appx. 718 (4th Cir. 2002).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

JAMES D. ROBERTSON, #5067, Petitioner, vs. JON OZMINT, Director, South Carolina Department of Corrections, Respondent.	C/A No. 2:11-00063-SB-BHH MOTION TO RECONSIDER ORDER GRANTING STAY PROCEEDINGS PENDING EXHAUSTION OF STATE REMEDIES **[DOC. ENT. No. 44]**

Petitioner, James D. Robertson, is a South Carolina death row inmate who received death sentences for murdering his parents. Robertson, through appointed counsel, filed a Petition for Writ of habeas Corpus on January 7, 2011. **[Doc. Ent. 20]**. On that same date, he also filed a motion to stay. **[Doc. Ent. 20]**.On January 24, 2011, Respondent made a Response to Motion To Stay Proceedings Pending Exhaustion Of State Remedies. **[Doc. Ent. No. 22]**.[1] This Court filed an Order on April 8, 2011 **[Dock. Ent. No. 44]**, in which it granted Robertson's stay request, so that he can exhaust state court remedies as to Grounds **Five-Eleven**. hereby makes a Motion to Reconsider the April 8, 2011 Order for the following reasons:

Initially, Respondent would incorporate by Reference the Procedural History from the original Response opposing Robertson's Motion, **Dock. Ent. No. 22, pp. 1-9**, as supplemented by the Procedural History as set forth in the March 28, 2011 Return and Memorandum of Law in Support of Motion for Summary Judgment, **Dock Ent No. 36, pp. 1-15**. In particular, Respondent

[1] On March 28, 2011, Respondent filed its Return **[Doc. Ent. No. 36]**, in which it responded to Robertson's various claims, and Respondent filed a motion for summary judgment. **[Doc. Ent. No. 35]**.

would note that Robertson filed a time barred and successive Post-Conviction Relief Application (11-CP-46-00072) on January 7, 2011. The premise he advances for being allowed to bring the 2011 Application in state court is that "[t]he record available to undersigned counsel contains no indication that either [collateral] attorney met the statutory criteria for appointment as qualified PCR counsel in a capital case." *See* S.C. Code Ann.§ 17-27-160 (2003). He further asserts that collateral counsel were ineffective because they failed to raise the various allegations in **Grounds V-XI.** *See* **Petition for Writ of Habeas Corpus, pp. 18-25.**

In the 2011 Application, he seeks to raise the following allegations that were not litigated in the 2006 action:

10(a): **Applicant was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in Section 11(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).**

11(a): Trial counsel's acts or omissions included:

(I) Counsel failed to object to the Solicitor's improper closing argument. The solicitor encouraged the jury to rely on their own emotions and passion, rather than the evidence presented, by telling the jury that they did not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty. (Trial Tr. 1916). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

10(b): **Applicant was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 11 (b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).**

11(b): Trial counsel's acts or omissions included:

(I) Counsel failed to object to presentation of Applicant's prison disciplinary record by a single witness, who had not witnessed the presented events, in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. (Trial Tr. 2129).

(ii) Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that the victim, Terry Robertson, was a very private person and would have been deeply upset by the revelation of her counseling records. (Trial Tr. 2792). SCRE 403.

(iii) Counsel failed to develop and introduce evidence that the victims were opposed to capital punishment and would not have wanted their son to be sentenced to death.

(iv) Counsel failed to object to the State's improper statements during closing argument that Applicant's presentation of relevant mitigating evidence of his family's mental health history had been a "rape" of his mother Terry Robertson, and that this evidence had dragged Terry "through the mud." (Trial Tr. 3144, 3142). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164,166 (1998).

10 & 11(c): **Applicant's Sixth and Fourteenth Amendment right to a fair jury trial was violated by the solicitor's improper and prejudicial closing argument during the guilt-or-innocence phase of the trial during which the solicitor argued that the jury should not deliberate when determining whether the state had proven Applicant's guilt beyond a reasonable doubt. (Trial Tr. 1916).**

10 & 11(d): **Applicant's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment were violated by the state's introduction of a list of Applicant's prison infractions during the sentencing phase of his capital trial. (Trial Tr. 2129).**

10 & 11(e): **Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the solicitor's improper closing argument during the sentencing phase of Applicant's capital trial during which the solicitor argued that the defense's. mitigation presentation was equivalent to raping the victim in the courtroom. ("You know, Ms. Cascio talked about Terry being sexually abused. Terry has been raped. She was raped in this courtroom when they take her through this based on his actions.") (Trial Tr. 3144).**

10 & 11(f): **Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the trial court's error in failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire. (Trial Tr. 425 & 1283).**

10(g): **Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, §§ 3 and 14 of the South Carolina constitution -when appellate counsel committed the acts or omissions set forth below in Section 11(g). Appellate counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).**

11(g): Appellate counsel's acts or omissions included:

(I) Appellate counsel failed to claim on appeal that the trial court had violated Applicant's Sixth, Eighth and Fourteenth Amendment rights by failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire.

(ii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to specifically define mitigating circumstances and to question potential jurors about specific mitigating circumstances, where several potential jurors indicated that they did not understand what mitigating circumstances were even after hearing the general legal definition. (Trial Tr. 193-96).

(iii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to limit the State's presentation of victim impact evidence to testimony from immediate family members. (Trial Tr. 1985-98). Appellate counsel' s performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Respondent submits that this Court's Order may have overlooked that on March 24, 2011, Respondent filed a Return and Motion to dismiss in 11-CP-46-00072. **[Doc. Ent. 38-1]**. Respondent has argued in this pleading that his Application 11-CP-46-00072 must be summarily dismissed because (1) it is not verified by Robertson, as statutorily required by the express language of S.C.

Code Ann. §17-27-40 (2003); (2) it is barred by the one year statute of limitations governing PCR applications, S.C. Code Ann. § 17-27-45(A) (Supp. 2011); (2) the state supreme court will not grant relief based upon the ineffective assistance of collateral counsel, *Aice v. State,* 305 S.C. 448, 409 S.E.2d 392 (1991); (3) it is impermissibly successive to a previously filed application and the PCR court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel or PCR counsel's lack of statutory qualifications; (4) the supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge, *see 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 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); (5) laches bars relief because Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application (*see Bray v. State,* 366 S.C. 137, 620 S.E.2d 743 (2005)); and (6) the argument lacks merit as a matter of state law.

Additionally, Respondent has argued that Robertson's allegations 10& 11(c)-(f) that Robertson raises are not cognizable in state PCR because they could have been raised at trial and on direct appeal. A Conditional Order of Dismissal was sent to the Hon. Lee S. Alford, Resident Circuit Court Judge in the Sixteenth Judicial Circuit because the Chief Administrative Circuit Judge in that Circuit is Judge Hayes, the trial judge and the state supreme court as held that the trial judge is not

allowed to preside over the inmate's subsequent PCR hearing. *See Floyd v. State*, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991) ("in all post-conviction relief hearings held after the date of this opinion, a judge shall, upon motion, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought"). Copies of the Conditional Order and the Return and Motion to Dismiss have been filed in this Court as additional attachments 34 and 35, respectively, to the Return and Memorandum of Law. *See* **Dock. Ent. No. 38.**[2]

This Court's Order granting Robertson a stay states, "The petitioner has addressed each consideration [set forth in *Rhines v. Weber*, 544 U.S. 269 (2005)]; the respondent has acknowledged none, failing to even recognize *Rhines* at all." **Order, pp. 3-4.** The Court further finds that "[t]he respondent has not attempted, in his brief, to contest the viability of any grounds alleged, either those exhausted or unexhausted. The Court, therefore, construes the silence as acquiescence." **Order, p. 4.** However, Respondent did not acquiesce in the request for a stay but twice argued against its issuance.

Although Respondent admittedly did not cite to *Rhines* in its January 24, 2011 Response to Motion To Stay Proceedings Pending Exhaustion Of State Remedies **[Doc. Ent. No. 22]**, Respondent did argue in its subsequent Return, filed on March 28, 2011, that Robertson had not and could not make the requisite showing for a stay under *Rhines*. **[Doc. Ent. 36, pp. 125-130]**. While

[2] Subsequently, counsel for Robertson, Ms. Paavola, sent Judge Alford a letter asserting that the state supreme court needed to assign a judge to preside over the case, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996) and S.C. Code Ann. § 17-27-160 (Supp. 2010). Respondent wrote the Clerk of that Court on April 1, 2011, asking it for guidance as to whether Judge Alford could hear the matter or whether the supreme court had to appoint a judge as argued by Robertson.

Respondent apologizes for not more fully discussing these points in its initial filing or filing a separate document as a supplemental response to the stay request, Respondent has argued the stay issue at further length than found in the Court's Order.

This Court correctly recognized that the United States Supreme Court's decision in *Rhines* laid out the discretionary framework for this Court to apply in addressing his motion. First, the Court in *Rhines* directed that "stay and abeyance is *only* appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court." *Id.*[3] Second, the Court stated that district courts may not stay a habeas case where the unexhausted claims are "plainly meritless." *Id.* Moreover, "[e]ven where stay and abeyance is appropriate, ... [a] mixed petition should not be stayed indefinitely." *Id.* Finally, the Court held that "if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." *Id.*

Robertson premises his stay motion on the assertion that "[t]he record available to undersigned counsel contains no indication that either [collateral] attorney met the statutory criteria for appointment as qualified PCR counsel in a capital case." *See* S.C. Code Ann.§ 17-27-160 (2003) He further asserts that collateral counsel were ineffective because they failed to raise the various allegations in **Grounds V-XI. *See* Petition for Writ of Habeas Corpus, pp. 18-25.**

Under *Rhines*, the initial issue to be resolved is whether there was good cause for Robertson's

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[3] To Respondent's knowledge, the only other Supreme Court decision to reference the term "good cause" in the stay and abeyance context is *Pace v. DiGuglielmo*, 125 S.Ct. 1807 (2005). In *Pace*, the Court held that a state post-conviction filing rejected by the state court as untimely was not properly filed within the meaning of § 2244(d)(2). *Id.* at 1814. The Supreme Court recognized that "petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." *Id.*

failure to previously exhaust this claim in state court. This Court found that many of Respondent's arguments "seem somewhat dissociated from the merits of the stay analysis." Although the arguments to which the Court refers did not address the merits of his various allegations, they squarely demonstrate Robertson's inability to show cause.

His argument that he can show cause is predicated **solely** upon original PCR counsel's ineffective assistance and that lead PCR counsel was not qualified under§ 17-27-160(B). Respondent submits that, as in *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002), he did not make a showing of good cause. In *Ivey*, the Fourth Circuit Court of Appeals rejected Ivey's claim, identical to Robertson's, that the procedural bar of § 17-27-90 did not apply because lead PCR counsel was ineffective and that lead PCR counsel was not qualified under § 17-27-160(B).

The Court of Appeals found that "[e]ven if we were to agree with Ivey that lead counsel was ineffective, however, under *Aice* that fact alone would not be sufficient to allow the filing of a successive PCR application. Accordingly, this claim is procedurally barred as a matter of South Carolina law and is thus defaulted." *Ivey*, 36 Fed.Appx. at 730-31, 2002 WL 459004. Thus the stay granted to Robertson is inconsistent with *Ivey*. *See also* § 2254(I); *Martinez v. Johnson*, 255 F.3d 229, 245 (5th Cir.2001) (in light of § 2254(I), the Court was "unpersuaded" by petitioner's argument "that the State of Texas violated the Fourteenth Amendment by arbitrarily depriving him of his statutorily-created liberty interest in a competent post-conviction counsel"); *Shackelford v. Armontrout*, 950 F.2d 521, 522 (8th Cir.1991) (rejecting petitioner's argument that a Missouri Supreme Court rule "mandating appointment of counsel in post-conviction proceedings, created a state liberty interest in effective assistance of counsel"); *cf. Bonin v. Calderon*, 59 F .3d 815, 842 (9th

Cir.1995) ("Bonin's contention that he was deprived of a state-created liberty interest in having two attorneys make closing arguments must therefore fail.... [T]here is certainly no federal constitutional right to have two attorneys make closing arguments even in death penalty cases." (citation omitted)); *Livingston v. Kansas*, 2010 WL 4318817 (10th Cir., Nov. 2, 2010) (unpublished); *Espinoza v. Estep*, 276 F. App'x 781, 786 (10th Cir.2008) ("[w]e are not at liberty to consider" an argument that "a limited state right to effective assistance of post-conviction counsel ... creates an interest that cannot be denied without violating the Due Process Clause of the Fourteenth Amendment" because it is precluded by 28 U.S.C. § 2254(I), which was not alleged to be unconstitutional).

Also, the various claims that Robertson wishes to address are "plainly meritless." As the Return and Motion to Dismiss the 2011 Application makes clear, Robertson's allegations **10 &11(c)-10 & 11(f)** do not state a claim upon which Post-Conviction Relief may be granted because each is alleged as a free-standing, substantive claim of trial court error and no such claim is cognizable in state PCR. *See* S.C. Code Ann. § 17-27-20(b) (1985) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). Post-conviction relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). *See also Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (same); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885-86 (1975) (same).

Although his remaining allegations are not "plainly meritless" on their face, the entire 2011 Application is "plainly meritless" for the reasons stated in Respondent's March 24, 2011 Return and Motion to Dismiss Robertson's 2011 Application: the Application is subject to summary dismissal because (1) it is not verified by Robertson; (2) it is barred by the one year statute of limitations

governing PCR applications, § 17-27-45(A); (3) it is impermissibly successive to a previously filed application and this Court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel or PCR counsel's lack of statutory qualifications; (4) the supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge;(5) laches bars relief in state court because Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application.

Further, the question of whether or an attorney is qualified under § 17-27-160(B) *is* one of state law, and it is a violation that was never litigated in state PCR proceedings. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (holding that a defendant's claim of ineffective assistance of counsel as cause for procedural default in a § 2254 petition is a constitutional claim that is also subject to being procedurally defaulted if it was not timely raised before the state court). As this Court is well aware, " 'federal habeas corpus relief does not lie for errors of state law.' ... [Also], . . . 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." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). *See also Wilson v. Corcoran*, 131 S.Ct. 13 (2010); *Swarthout v. Cooke*, 131 S.Ct. 859 (2111) (*per curiam*).

Moreover, alleged defects in state post-conviction procedures are not cognizable in a federal habeas corpus action. *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) (holding that errors and

irregularities in connection with state post-conviction proceedings are not cognizable on federal habeas review). *See also Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir. 1998)(rejecting claim as outside the scope of federal habeas corpus relief, because " '[a] federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a)," and petitioner was "not currently detained as a result of a decision of the Virginia Supreme Court in the state habeas action"). However, Robertson chose not to pursue this allegation in state PCR.

The State would further note that the argument upon which he attempts to show cause lacks merit as a matter of state law. Robertson contends that to be qualified in a capital PCR a lawyer either needs to have either previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief. However, in her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 13th, 2003, the Chief Justice of the South Carolina Supreme Court specifically rejected this interpretation, finding 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, it was 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 S.C. Code Ann. § 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 specifically relied on the statute and this memorandum to conclude that PCR counsel were sufficiently qualified. His 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." "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990). As a result, the presumption is that Judge Few appointed in accordance with § 17-27-160(B).[4] Thus, there was no violation of the capital PCR qualification statute, and accordingly no basis for remanding this case and treating the proceedings that have taken place as a nullity.

Finally, Respondent has previously submitted pleadings from *Abdiyyah ben Alkebulanyahh, #6012 v. State*, a capital PCR appeal in which the state supreme court, on October 20, 2010, summarily denied a Motion to Remand for Additional Post-Conviction Proceedings filed on the petitioner's behalf by Robertson's lead counsel, Mr. Blume. Thus, Robertson's counsel are well aware that the present motion is without merit.

Thus, Robertson's threshold showing of cause fails miserably and his arguments are meritless.

Moreover, in granting the stay, this Court found that:

> the respondent contends for various procedural reasons, including the one-year statute of limitations governing state PCR applications, S.C. Code § 17-27-45(A), that the petitioner's pending and successive application will not be successful. Such may be the case. The Court agrees with the petitioner, however, that it is unnecessary to guess about it. To the extent there are any questions about the petitioner's ability to proceed in state court, those questions are better resolved there. There is no reason to

[4] Reliance upon the presumption would be unnecessary if Robertson had timely raised the matter in state PCR.

> prematurely foreclose the opportunity, when there exists some chance that the state court, whose determination and province it is, might view the matter differently.

Order, p. 6. Also, the Court refers to his Petition as a "mixed" Petition, containing both exhausted and unexhausted claims.

The Court's findings in this regard ignore that exhaustion has been technically satisfied because there is no state court remedy available to him, since he exhausted his state PCR remedy and he voluntarily abandoned his direct appeal. Also, with the exception of having three court-appointed attorneys represent him, there is no meaningful distinction from the procedural posture in Robertson's case and that of hundreds of *pro se* inmates who routinely file petitions that contain both claims that were presented to the state supreme court and those that were not presented - in other words, both exhausted and unexhausted claims. Obviously, this would result in a revolving door, and send meritless cases back to state court even though the cases are barred by § 17-27-45(A) and as successive.

Indeed, implicit in this Court's ruling is that ineffectiveness of collateral counsel creates a remedy allowing a successive or time-barred PCR application in all South Carolina PCR cases. Applying the Court's reasoning in granting a stay would open the floodgates to motions to stay federal habeas proceedings so that the inmate can return to litigate his unexhausted/procedurally defaulted claims in state court. This result is inconsistent with this Court's recognition that the Supreme Court in *Rhines* "cautioned . . . that the practice of staying a federal habeas case, while a petitioner returns to state court to exhaust his claims, should be used sparingly," **Order, p. 3**, and current practice in federal habeas corpus cases. *E.g.*, *Muldrow v. Warden of Manning Correctional Inst.*, 2008 WL 533803, 6 (D.S.C. 2008) (Report and Recommendation of the Magistrate Judge)

("Petitioner does not have any state court remedies available to him because any future PCR application would be barred as successive under S.C.Code Ann. § 17-27-90 (1985); *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (S.C.1991), and any future PCR application would be untimely under the one-year statute of limitations which governs the filing of PCR actions. S.C.Code Ann. § 17-27-45(A) (Supp.2006). Therefore, the exhaustion requirement is technically satisfied"); *Barker v. Bollinger*, 2006 WL 2564385, 6 (D.S.C. 2006) (Report of Magistrate Judge) ("The petitioner did not obtain a ruling on either grounds in the state PCR court and neither issue was presented to the state supreme court, (R. 111-12). *See Matthews*, 105 F.3d at 912. Thus, neither allegation was exhausted in state court. The petitioner, however, cannot cure these deficiencies because any future PCR application would be barred as successive under S.C.Code Ann. § 17-27-90 (1985); *Aice v. State*, 409 S.E.2d 392 (S.C.1991), and untimely under the one-year statute of limitations which governs the filing of PCR actions, S.C.Code Ann. § 17-27-45(A)"). *See also Gibbs v. Rushton*, 2008 WL 2891067, 5 (D.S.C. 2008) (Report and Recommendation of Magistrate Judge) (same); *Lynch v. Bazzle*, 2007 WL 134130, 6 (D.S.C. 2007) (Report and Recommendation) (same).

Finally, the Court concludes that "there exists not even the specter of any dilatory tactics on account of the petitioner or his counsel. The respondent has certainly raised none." **Order, p. 4.** While Respondent has refrained from name calling, it is clear from the Return that the stay request - much like Robertson's decision to litigate three issues that he knows are procedurally defaulted but which he asserts were exhausted (his **Grounds One-Three**) - could not serve any meaningful purpose, other than to needlessly delay these proceedings. As the Return makes abundantly clear,

Robertson's Petition only has one exhausted allegation: his **Ground Four.**[5] Also, a number of the allegations that he intends to pursue in state PCR are beyond the statutory jurisdiction of the PCR court to entertain. While an inmate proceeding pr se might be ignorant of this fact

CONCLUSION

WHEREFORE, Respondent respectfully asks the Court to reconsider its earlier Order granting a stay for Robertson to litigate the "unexhausted" ineffective assistance of counsel claims in his Petition and for the Court.

Respectfully submitted,

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[5]As shown in the Procedural History of the Return, his **Ground One** was raised as Issue 6 in his *pro se* Initial Brief of Appellant, and his **Ground Two** was raised as Issue 6 in his *pro se* Initial Brief of Appellant. **Ground Three** had initially been raised by appellate counsel as Issue 2 in the brief submitted by counsel. However, counsel was relieved at Robertson's request and Robertson submitted his own Initial Brief of Appellant, in which he did not raise this issue. Thus, that claim had been abandoned before he abandoned his direct appeal in its entirety. Petitioner acknowledges that his direct appeal was dismissed in his Petition, **Petition, p. 2 ¶¶ 9(c)-(d).** However, although represented by three attorneys, he disingenuously omits that his appeal was dismissed because he knowingly and voluntarily abandoned his appeal, and that the state supreme court never addressed any of these three allegations. Thus, these other allegations were not exhausted. Also, he represents on **Petition, p. 14**, under the heading "**B. Exhaustion**" that "Petitioner exhausted his state court remedies on Grounds I, II and III," and [u]nder subheading "**C. Direct Appeal of Grounds I, II and III,**" he represents that "Petitioner raised these issues on direct appeal." Contrary to his representations, however, he did not exhaust these allegations. Yet, Respondent takes the position that the exhaustion requirement is technically satisfied because there is no further direct appeal remedy, just like there is no currently available state PCR remedy.

ID No. 3710

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April 15, 2011.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP4600072

James D Roberston *vs.* State Of South Carolina

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

ORDER

Dated at York, South Carolina, this 5th day of July, 2011.

Court Reporter:

S/Lee S. Alford

PRESIDING JUDGE - Lee S. Alford

This judgment was entered on the 6th day of July, 2011, and a copy mailed first class this 6th day of July, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Emily C Paavola
Death Penalty Resource & Defense Center
P O Box 11311
Columbia, SC 29211
Keir M. Weyble
Blume Weyble & Lominack, LLC
P.O. Box 11744
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

Wm. Edgar Salter III
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24/FORM 4

David Hamilton - Clerk of Court

CPFORM4M

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 16TH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	
James D. Robertson, #5067,	)	
	)	
Applicant,	)	
	)	
v.	)	C.A. No. 2011-CP-46-0072
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

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2011 JUL -5 PM 4:26
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

This matter is before the Court regarding the appointment of counsel for the Applicant in this Death Penalty Post Conviction Relief Action. In addition, the Respondent moves to dismiss the application on the basis that it was not verified by Applicant.

A hearing was conducted on July 5, 2011 at the Moss Justice Center in York, S. C. Present were Applicant, James D. Robertson, Attorney Keir M. Weyble and Emily C. Paavola, asked to appear by the Court, and William E. Salter, III, Senior Assistant Attorney General, appearing on behalf of Respondent.

Applicant expressed his desire to have Emily C. Paavola and Keir M. Weyble appointed to represent him in this matter. The Court finds that these two attorneys are qualified to handle a Death Penalty Post Conviction Relief Action and herewith appoints them to represent James D. Robertson in this action.

Counsel for Applicant then moved to allow them to file an amended application and to allow the applicant to verify the application or to allow them to do so on his behalf.

The Court finds that there would be no prejudice to the State if an amended application was allowed or by dismissing the application and requiring that it be refiled.

The Court therefore denies the Respondent's motion to dismiss and grants Applicant's motion to allow an amended application, which must be verified by Applicant in order for him to proceed in this action.

Applicant is given twenty (20) days from July 5, 2011 to file an amended, verified application.

ALL OF WHICH IS DULY ORDERED.

Lee S. Alford
Resident Judge
of the Sixteenth Judicial Circuit Court

July 5, 2011
York, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
JAMES D. ROBERTSON APPLICANT, -vs- STATE OF SOUTH CAROLINA, DEFENDANT.	)	TRANSCRIPT OF RECORD 2011-CP-46-00072 JULY 5, 2011 YORK, SOUTH CAROLINA

B E F O R E:

THE HONORABLE LEE S. ALFORD, JUDGE.

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

KEIR WEYBLE, ESQUIRE
EMILY PAAVOLA, ESQUIRE
ATTORNEYS FOR THE APPLICANT

ED SALTER, ASSISTANT ATTORNEY GENEAL
ATTORNEY FOR THE RESPONDENT

MICHAEL R. WATTS
CIRCUIT COURT REPORTER

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WITNESSES	PAGE
(NO WITNESSES CALLED)	

EXHIBITS

NO.	DESCRIPTION	ID.	EV.
(NO EXHIBITS MARKED)			

(PROCEEDINGS, JULY 5, 2011)

THE COURT: Good morning.

This is a hearing in the matter of James D. Robertson versus South Carolina, civil action number 2011-CP-46-72.

Mr. Robertson is present.

Also -- who else is present? Counsel, give me your names for the record.

MR. WEYBLE: Your Honor, I'm Keir Weyble.

THE COURT: Okay.

MS. PAAVOLA: I'm Emily Paavola.

THE COURT: Yes.

MR. SALTER: And I'm Ed Salter. I'm with the Attorney General's Office.

THE COURT: All right, the purpose of this hearing, as I understand it, is to determine if Mr. Robertson is to be represented by defense counsel in his PCR matter.

Mr. Robertson, how are you doing this morning?

THE APPLICANT: Just fine, Your Honor.

THE COURT: All right. Mr. Robertson, the purpose of this hearing is to determine, of course, on your post-conviction relief action whether you would be represented.

And, counsel, would that be Mr. Weyble and also

Ms. Paavola, is that right?

MR. WEYBLE: That's right, Your Honor. We are willing -- we are willing to accept the appointment.

THE COURT: I understand you all are willing to do it.

Mr. Robertson, do you wish to have these attorneys represent you in your post-conviction relief matter?

THE APPLICANT: I do.

THE COURT: Okay. Counsel, do you wish to be heard?

MR. SALTER: Just briefly, Your Honor.

I would like to point out that we have previously filed a motion -- a return motion to dismiss. And part of the motion to dismiss is predicated upon the fact that the application was not verified by Mr. Robertson.

Section 17-27-40 and Section 17-27-50 both require that the PCR application be verified. There is no verified application, so, therefore, the Clerk of Court was in error in accepting it to file.

THE COURT: All right. Let me hear from counsel.

MR. WEYBLE: Your Honor, it's my understanding that an application in this situation can also be verified by counsel on behalf of the applicant, and so we would submit that that's -- that is -- that is sufficient verification for these purposes, at least to initiate the

proceedings.

If the court wants further any amendment in the future, it could be individually personally verified by Mr. Robertson, we can do that, but I think for these purposes there is no question. I'm sure Mr. Robertson would be willing to verify the contents of the application right here on the record, if necessary, as well.

THE COURT: Well, I'm not going to require him to re-file. I think I will allow him to verify it. That's just something that hasn't been filed yet.

Or course, I agree with the technicality is he hasn't verified it, but I think he can verify it after the fact. We can continue with the proceedings and allow him to go forward.

Of course, the State has filed a conditional order of dismissal in this case, and I haven't really looked at it that much, because we had to deal with the attorney issue first, but I'm assuming that it's filed on the basis that it's successive and that it exceeds the Statute of Limitations, is that correct?

MR. SALTER: Principally, Your Honor, but there are other reasons as well, but --

THE COURT: Sure.

MR. SALTER: Basically that's it.

THE COURT: All right. Well, let's do this. We

will give counsel then twenty days to respond to the State's conditional order before the court makes a decision.

MR. WEYBLE: Thank you, Your Honor.

THE COURT: Okay. Anything else we need to do today?

Anything from the State?

MR. SALTER: Nothing towards this verification, Your Honor, of the application.

THE COURT: Right, and the court would require that to be done. I think that would be done, and I would allow that to be done nunc pro tunc. We will do that.

All right, if there is nothing further then -- anything else from counsel?

MR. WEYBLE: Just on the timing of our verification, should we just submit that with the response to the motion to dismiss? Would that be timely?

THE COURT: Yes.

MR. WEYBLE: Thank you.

THE COURT: All right. Anything else we need to do today?

MR. WEYBLE: Just a moment, Your Honor.

THE COURT: Yes.

(Off the record)

(Back on the record)

MR. WEYBLE: Your Honor, Mr. Salter actually, we

made him aware of this out in the hallway, but I would just go ahead and bring it to your attention for whatever it might do to inform your planning here. We came this morning prepared to file an amended application adding a claim under Martinez v. Ryan, which is the case that the Supreme Court of the United States recently agreed to hear concerning Constitutional Right to post-conviction counsel, effective post-conviction counsel. We were not unfortunately able to actually clock it in this morning because we didn't realize that the civil clerk's office was in a separate building from the criminal one, but, nevertheless, we have given Mr. Salter a copy. We do intend to go ahead and make that official through filing it. I don't know, Mr. Salter, whether it would be more efficient if Mr. Salter wants to respond to that before we do our response to his submission or not. We can do that.

THE COURT: What's the intent of it? I'm not familiar with the case that you are talking about filed in the United States Supreme Court. Are you saying --

My understanding is he has previously filed a post-conviction relief, that is, Mr. Robertson, and he represented himself, I believe at that. Did it have to do with that?

MR. WEYBLE: No, he actually had counsel at his first post-conviction relief proceeding.

There are questions that we have raised about whether counsel was qualified for appointment under the statute and with counsel's effectiveness and how they actually performed in connection with that first post-conviction relief action.

What Martinez is about is whether the Sixth Amendment guarantees effective post-conviction counsel at a first post-conviction relief action, at least to the extent that a prisoner attempts to challenge the effectiveness of trial counsel in that first post-conviction proceeding. That's the question in front of the court in Martinez, which is obviously I think going to have pretty substantial bearing on how the issues in this case are eventually going to play out.

MR. SALTER: I would briefly like the opportunity to respond after he files his amendment and his response to my motion to dismiss, the respondent and the responding position.

Martinez' claim is what essentially underlies why we are back here in state court. It's their dissatisfaction with the Chief Justice's interpretation of the statute for the appointment of counsel in collateral proceedings, because Mr. Brown, as I understand it, would be qualified to represent a capital inmate at trial, but may not have had what they perceive to be the requirements of the statute for

appointment in a collateral proceeding where the Chief Justice has issued a memorandum, that I'm going to fully discuss in my motion, and I don't want to get into it too much, Your Honor, but I think that's where we are headed. So if I could just have an opportunity to respond to that.

THE COURT: Well, counsel, just file your verification. You can file an amended PCR application based on the issue, and then I'll allow the State to respond to that, that motion, and we could schedule a hearing a little later on that, if necessary.

MR. WEYBLE: Okay, Your Honor, I just want to make sure I'm clear. So we will file the verified amended application within twenty days, and our reply to the State's return to the original application also within that same twenty day mark. They will respond to that and then we will figure out where to go from there?

THE COURT: Exactly.

Understood?

MR. SALTER: That's fine, Your Honor. Thank very much.

(Off the record)

(Back on the record)

THE COURT: All right. Do you have further discussion on that?

You have both been qualified, or qualified, I

believe, under the requirements for post-conviction relief in a capital case, is that correct?

MR. WEYBLE: Yes, that is correct, Your Honor.

THE COURT: Ms. Paavola?

MS. PAAVOLA: Yes, that's correct.

THE COURT: That's my understanding. That's the reason the court was willing to appoint you in representing him, if he wants representation.

All right, if there is nothing further then, we will be adjourned.

(END OF REQUESTED TRANSCRIPT OF RECORD)

CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for YORK County, South Carolina, on the 5TH day of July, 2011.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

January 20, 2012

Michael R. Watts
Circuit Court Reporter

4201

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	Case No.: 2011-CP-46-00072
	)	
JAMES D. ROBERSTON, # 5067	)	**AMENDED APPLICATION FOR**
Applicant,	)	**POST- CONVICTION RELIEF**
vs.	)	
State of South Carolina,	)	
Respondent.	)	
	)	

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YORK COUNTY, SC

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.

2. Name and location of Court which imposed sentence: York County Court of General Sessions.

3. Name(s) of co-defendant(s) (if any): Not applicable

4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 98-GS-46-1020

5. The date upon which sentence was imposed and the terms of the sentence: March 26, 1999 (Death Sentence)

6. A finding of guilty was made after a plea of not guilty.

7. The applicant did appeal from judgment of conviction and sentence.

8.
   (a) The Court to which applicant appealed: The South Carolina Supreme Court.

   (b) The result in each Court to which applicant appealed: Appeal dismissed

   (c) The date of such result: June 3, 2005

   (d) Not applicable

9. Not applicable.

GROUNDS FOR RELIEF WITH SUPPORTING FACTS

10(a): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in Section 11(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

11(a): Trial counsel's acts or omissions included:

(i) Counsel failed to object to the Solicitor's improper closing argument. The solicitor encouraged the jury to rely on their own emotions and passion, rather than the evidence presented, by telling the jury that they did not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty. (Trial Tr. 1916). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

10(b): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 11(b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

11(b): Trial counsel's acts or omissions included:

(i) Counsel failed to object to presentation of Applicant's prison disciplinary record by a single witness, who had not witnessed the presented events, in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. (Trial Tr. 2129).

(ii) Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that the victim, Terry Robertson, was a very private person and would have been deeply upset by the revelation of her counseling records. (Trial Tr. 2792). SCRE 403.

(iii) Counsel failed to develop and introduce evidence that the victims were opposed to capital punishment and would not have wanted their son to be sentenced to death.

(iv) Counsel failed to object to the State's improper statements during closing argument that Applicant's presentation of relevant mitigating evidence of his family's mental health history had been a "rape" of his mother Terry Robertson,

and that this evidence had dragged Terry "through the mud." (Trial Tr. 3144, 3142). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

10 & 11(c): Applicant's Sixth and Fourteenth Amendment right to a fair jury trial was violated by the solicitor's improper and prejudicial closing argument during the guilt-or-innocence phase of the trial during which the solicitor argued that the jury should not deliberate when determining whether the state had proven Applicant's guilt beyond a reasonable doubt. (Trial Tr. 1916).

10 & 11(d): Applicant's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment were violated by the state's introduction of a list of Applicant's prison infractions during the sentencing phase of his capital trial. (Trial Tr. 2129).

10 & 11(e): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the solicitor's improper closing argument during the sentencing phase of Applicant's capital trial during which the solicitor argued that that the defense's mitigation presentation was equivalent to raping the victim in the courtroom. ("You know, Ms. Cascio talked about Terry being sexually abused. Terry has been raped. She was raped in this courtroom when they take her through this based on his actions.") (Trial Tr. 3144).

10 & 11(f): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the trial court's error in failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire. (Trial Tr. 425 & 1283).

10 (g): Applicant was denied the right to effective assistance of appellate counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution –when appellate counsel committed the acts or omissions set forth below in Section 11(g). Appellate counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

11(g): Appellate counsel's acts or omissions included:

(i) Appellate counsel failed to claim on appeal that the trial court had violated Applicant's Sixth, Eighth and Fourteenth Amendment rights by failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire.

(ii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to specifically define mitigating circumstances and to question potential jurors about specific mitigating circumstances, where several

potential jurors indicated that they did not understand what mitigating circumstances were even after hearing the general legal definition. (Trial Tr. 193-96).

(iii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to limit the State's presentation of victim impact evidence to testimony from immediate family members. (Trial Tr. 1985-98). Appellate counsel's performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10&11(h): Applicant was denied effective representation of post-conviction counsel, in violation of the Sixth, and Fourteenth Amendments of the United States Constitution where PCR counsel were inexperienced and unqualified under state statute, where Applicant was prohibited from raising any claim that his trial counsel were ineffective on direct appeal, and where PCR counsel failed to adequately investigate and present applicant's claims for post-conviction relief. *See, e.g., Martinez v. Ryan*, 2011 WL 380903 (U.S.), *Halbert v. Michigan*, 545 U.S. 605 (2005); *Douglas v. California*, 372 U.S. 353 (1963).

10&11(i): Applicant was denied effective representation of post-conviction counsel, in violation of the South Carolina Constitution, Article I, Sections 3, 14 and 15 where PCR counsel were inexperienced and unqualified under S.C. Code § 17-27-160(B), and where PCR counsel failed to adequately investigate and present applicant's claims for post-conviction relief. *See, e.g., Washington v. State*, 478 S.E. 2d 833, 835 (S.C. 1996) (allowing second post-conviction application to proceed due to "many procedural irregularities" in the first post-conviction proceedings).

12. (a) Yes, applicant has filed a mandatory appeal to the State Supreme Court, an application for post-conviction relief to the York County Court of General Sessions, and a petition for writ of certorari from denial of his application for post-conviction relief to the State Supreme Court.

(b) Yes, applicant has previously filed an application for post-conviction relief in State court. Applicant is currently filing a petition for habeas corpus in Federal court.

(c) No, no other petitions have been filed in the United States Supreme Court.

(d) No, no other petitions, motions or applications in this or any other court.

13. (a) Specific nature of other petitions:
(i) Application for post-conviction relief

(ii) Petition for writ of certiorari from denial of application for post-conviction relief

(b) Name and location of the Court in which each was filed:
(i) York County Court of General Sessions
(ii) South Carolina Supreme Court

(c) Disposition thereof:
(i) Application denied
(ii) Cert denied

(d) Date of such disposition:
(i) March 24, 2008
(ii) October 6, 2010

(e) Citations of any written opinion or orders entered pursuant to such results: Not applicable.

14. Have the grounds set forth in Sections 10 and 11 been previously presented to this or any other Court, State or Federal? No

15. (a) Which grounds have been presented: Not applicable

(b) The proceedings in which each ground was raised: Not applicable

16. Reason why grounds set forth in (10) have not previously been presented to any Court:

(a) Applicant's post-conviction relief counsel were not qualified for appointment under the terms of the capital PCR statute.

(b) Applicant's PCR counsel conducted an inadequate investigation.

(c) Applicant's PCR counsel failed to provide competent, reasonable representation.

16. Applicant was previously represented by counsel.

17. Applicant was represented at trial by James W. Hancock, P.O. Box 2581, Rock Hill, South Carolina, 29732 and James W. Boyd, 1544 Ebeneezer Road, Rock Hill, SC 29732.

On direct appeal, Applicant was initially represented by Robert Dudek and Joseph Savitz, of the Office of Appellate Defense, P.O. Box 11589, Columbia, SC 29211, but ultimately proceeded *pro se*.

In his initial application for post-conviction relief, Applicant was represented by Michael L. Brown, Jr., P.O. Box 1025, Rock Hill, SC, 29731 and Joseph D. Matlock, P.O. Box 11101, Rock Hill, SC 29731.

In his petition for writ of certiorari from denial of his application for post conviction relief, Applicant was represented by Joseph L. Savitz III, 1330 Lady Street, Suite 401, Columbia, SC 29201.

18. Applicant seeks relief from his conviction and sentence.

19. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

EMILY C. PAAVOLA
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KEIR WEYBLE
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(607) 255-3805

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

July 25, 2011

4207

STATE OF SOUTH CAROLINA)
) **VERIFICATION (*NUNC PRO TUNC*)**
COUNTY OF YORK)

I, James D. Robertson, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application, as well as the original application filed in this matter on January 6, 2011; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

James D. Robertson

Sworn to and subscribed before me this
20th day of July, 2011.

Notary Public.

My Commission Expires: 6-19-16

FILED - RECEIVED
2011 JUL 26 PM 2:16
BARRETT HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK)	Case No.: 2011-CP-46-00072
)	
JAMES D. ROBERSTON, # 5067)	**RESPONSE IN OPPOSITION**
Applicant,)	**TO MOTION TO DISMISS**
vs.)	
State of South Carolina,)	
Respondent.)	
)	

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2011 JUL 26 PM 2:15
YORK COUNTY, SC

Applicant, James D. Robertson, through undersigned counsel, submits this response in opposition to Respondent's Return and Motion to Dismiss (hereafter, "Motion to Dismiss"). Respondent argues that the Application for Post-Conviction Relief should be summarily dismissed for various reasons. Respondent's arguments are without merit. For the reasons discussed below, this Court should either: (a) deny respondent's Motion to Dismiss and allow this case to proceed to an evidentiary hearing and final adjudication because it is a permissible successive petition under state law; or, (b) deny respondent's Motion to Dismiss and hold this case in abeyance until the United States Supreme Court has resolved *Maples v. Maples*, 2011 WL 940889, and *Martinez v. Ryan*, 2011 WL 380903, which could dictate that this case be allowed to go forward as a matter of federal constitutional law, regardless of South Carolina's state law rules regarding successive petitions.

What this Court should not do, however, is dismiss the application since there is no basis to support such a result. In considering respondent's Motion to Dismiss, this Court must assume facts presented by Robertson are true and view those facts in the light most favorable him. *Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000). This Court must deny the Motion to Dismiss "if facts alleged and inferences reasonably deducible therefrom would entitle

[Robertson] to any relief on any theory of the case." *Id.* Summary dismissal without a hearing is appropriate only when: (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts; and, (2) the applicant is not entitled to relief. *Id.* Robertson has alleged facts which, if true, entitle him to relief on this application. To the extent that there is any question about those facts, the appropriate step is for this Court to set an evidentiary hearing at which those facts may be fully developed.

I. PROCEDURAL HISTORY

Robertson was convicted and sentenced to death in the York County, South Carolina Court of General Sessions in March, 1999. Following the dismissal of his direct appeal, Robertson sought post-conviction relief (PCR) pursuant to S.C. Code § 17-27-160, which requires appointment of qualified PCR counsel to assist indigent death row prisoners in the identification, development and litigation of challenges to their convictions and sentences. In September 2005, the York County Court of Common Pleas appointed Michael L. Brown and Thomas Matlock, both of the local bar, to represent Robertson. The record available to undersigned counsel contains no indication that either attorney met the statutory criteria for appointment as qualified PCR counsel in a capital case.

In March 2006, approximately six months after their appointment, counsel filed a PCR application on Robertson's behalf. The sum total of the allegations contained in the application was "Ineffective assistance of counsel – specifics to be amended later." By the time of the January 29-31, 2007, evidentiary hearing, no amended application had been filed. In response to questioning by the PCR judge about the claims they intended to pursue at the hearing, counsel identified approximately a dozen theories under which trial counsel assertedly had been ineffective. At the evidentiary hearing, counsel called three witnesses: Robertson, trial attorney

James Hancock, and trial attorney James Boyd. Consistent with the limited presentation before the PCR court, the records reviewed by undersigned counsel indicate that Robertson's PCR attorneys did not perform an independent investigation to determine the existence of claims for relief based on evidence not contained within the record generated at trial.[1] Judge John C. Few denied post-conviction relief in a written order dated March 7, 2008. On October 6, 2010, the South Carolina Supreme Court denied Robertson's petition for a writ of certiorari. Undersigned counsel were appointed by the United States District Court for the District of South Carolina to represent Robertson in his federal habeas corpus proceedings on November 8, 2010.

On January 7, 2011, undersigned counsel filed a PCR application containing a number of viable issues which could – and should – have been raised by prior counsel as grounds for post-conviction relief. These claims are merely those that are evident from a review of the record. Undersigned counsel have not yet had an opportunity to conduct an adequate and independent investigation – one which prior counsel should have performed. Such an investigation will most certainly uncover other claims for post-conviction relief. Due to their lack of experience in death penalty litigation in general, and capital post-conviction litigation in particular, Robertson's initial PCR counsel essentially failed to raise *any claim at all* (since "ineffective assistance of counsel – specifics to be amended later," is not a viable claim).

[1] *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1 and Commentary, reported in 31 HOFSTRA L. REV. 913, 1085-86 (2003) ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."); *see also*, Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. at 1086 ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues.").

II. ARGUMENT

A. ROBERTSON IS ENTITLED TO PURSUE THE PRESENT PCR APPLICATION AS A MATTER OF STATE LAW.

Relying primarily on *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), respondent argues that the PCR Application should be dismissed as impermissibly successive. *See Motion to Dismiss at pp. 16-17.* In *Aice*, the South Carolina Supreme Court observed that successive PCR applications generally should not be entertained "'unless the court finds a ground for relief asserted which for *sufficient reason* was not asserted or was inadequately raised in the original, supplemental or amended application.'" *Id.* at 450, 409 S.E.2d at 394 (emphasis in original) (quoting S.C. Code Ann. § 17-27-90). The Court held, however, that there are exceptions to the general rule, including "when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." *Id.* at 451, 509 S.E.2d at 394.

In *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996), the Court invoked this exception and permitted a successive PCR application to go forward because of the ineffective assistance of initial PCR counsel and various other procedural irregularities. *Id.* at 235-36, 478 S.E.2d at 834-35. The Court has also applied similar exceptions in other cases. For example, in *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982), the Court held that a "unique" combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR proceeding. The Court later noted that under these circumstances it was "highly doubtful" that Case would have been able to raise the appropriate arguments in his initial PCR. *Aice*, 305 S.C. at 451, n.1, 409 S.E.2d at 394, n.1; *see also*, *Carter v. State*, 293 S.C. 528,

362 S.E.2d 20 (1987) (allowing a successive PCR where initial PCR counsel was the same as trial counsel).

The Circuit Courts in at least two prior capital PCR cases have also permitted successive PCR applications in the same or similar circumstances. The Honorable Marc H. Westbrook permitted Luke Williams to pursue a second PCR proceeding, over the State's objection, on the basis that Williams' initial PCR counsel were not qualified. *See Williams v. Ozmint*, 494 F.3d 474, 484 (4th Cir. 2007) ("Williams filed two applications for state post-conviction relief, the second of which was granted by the circuit court (PCR court)."). While the South Carolina Supreme Court ultimately reversed the circuit court's grant of relief in that case, it did so on the merits, not on the ground that Williams' second application was procedurally barred. *See Williams v. State*, 363 S.C. 341, 611 S.E.2d 232 (2005). Another capital PCR applicant, Edward Elmore, was also permitted to proceed on a successive PCR application over the State's objection, and the Honorable Mark J. Hayes granted Elmore penalty-phase relief from his death sentence on February 1, 2010. The State did not appeal this order.

This case is directly on par with *Williams* and *Elmore*. Robertson's initial PCR counsel were not qualified to represent him in a capital post-conviction case under the plain language of S.C. Code § 17-27-160(B). Moreover, initial PCR counsel failed to competently represent Robertson in his first post-conviction proceeding. All death-sentenced inmates are entitled to one full and fair opportunity at post-conviction relief with the assistance of qualified and competent counsel. The general rule against successive PCR applications is intended to enforce that limit. But the courts have adopted exceptions to ensure that all PCR applicants actually receive their one fair chance at meaningful post-conviction review. As in *Williams* and *Elmore*, Robertson is simply asking for his one fair chance. There is no principled distinction between

the procedural circumstances in *Williams* and *Elmore* and the circumstances here. It would be fundamentally unfair for this Court to arbitrarily deny Robertson the opportunity that Williams and Elmore rightfully received. This Court should permit Robertson's PCR application to go forward so that he may have the one opportunity to which he is entitled under state law.

1. Robertson's Initial PCR Counsel Were Not Qualified To Represent Him in a Capital Post-Conviction Proceeding Pursuant to the Requirements of S.C. Code §17-27-160(B).

To ensure that death-sentenced inmates receive a full and fair chance at post-conviction review, the South Carolina legislature has determined that all capital PCR applicants are entitled to the appointment of two attorneys. Moreover, the legislature has established standards for the appointment of counsel in capital post-conviction cases. The standards are codified in S.C. Code §17-27-160(B) and require that at least one of the two attorneys appointed must:

> (1) Have previously represented a death sentenced inmate in state or federal post-conviction relief proceedings; OR
>
> (2) meet the minimum qualifications set forth in S.C. Code §16-3-26(B)[2] & §16-2-26(F)[3] AND have successfully completed within the previous two years not less than twelve hours of approved CLE training involving advocacy in the field of capital appellate and/or post-conviction defense.

S.C. Code Ann. § 17-27-160.

Neither of Robertson's court appointed counsel appear to have satisfied the statutory requirements for appointment in a capital post-conviction case. The statutory language is clear

[2] Section 16-3-26(B) requires that counsel have been admitted to the bar for at least five years and have three years felony trial experience.

[3] Section 16-3-26(F) requires that counsel meet any other guidelines for the appointment of counsel promulgated by the South Carolina Supreme Court.

and unambiguous. It is also makes perfect sense. There are several reasons why the legislature would enact a different, and more stringent standard for appointment of counsel in capital post-conviction cases than for appointment at the trial level. First, post-conviction litigation is an unusual combination of trial and appellate practice. Thus, persons competent to represent a death sentenced inmate at trial due to their extensive trial experience as reflected in §16-3-26(B), do not necessarily have the requisite skills to represent an individual in a capital post-conviction proceeding.[4] Second, at trial, the defendant has a Sixth Amendment right to counsel, and thus a Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). Thus, if trial counsel performs incompetently and the incompetence contributes to the conviction or death verdict, the defendant has a remedy. *See, e.g., Rosemond v. Catoe*, 680 S.E. 2d 6 (S.C. 2009) (finding counsel to have rendered ineffective assistance of counsel in a capital case for several different deficiences). However, in post-conviction proceedings, there is no currently recognized federal constitutional right to counsel, *see, e.g., Murray v. Giarratano*, 492 U.S. 1 (1989), and thus there is no clear remedy for substandard representation.[5] Therefore, because Robertson's initial PCR counsel did not meet the clear standard for appointment of counsel contained in S.C. Code§17-27-160(B), he should be allowed to pursue the present PCR

[4] *See* AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN CAPITAL CASES (2003) Guideline 1.1 (commentary) ("Post-conviction proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. . . . . For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers.").

[5] But see *Maples v. Maples*, 2011 WL 940889, and *Martinez v. Ryan*, 2011 WL 380903. These two cases, currently pending before the United States Supreme Court, could change the current landscape regarding the federal constitutional basis for the right to post-conviction counsel. These cases are discussed in more detail in section B(2), below.

application, which represents one fair opportunity at post-conviction review with the assistance of qualified counsel.

Respondent argues that Robertson's initial PCR counsel were qualified according to an August 15, 2003 letter from the Chief Justice of the South Carolina Supreme Court to All Circuit Court Judges stating that the qualifications for capital post-conviction representation under § 17-27-160(B) are identical to those for capital trial representation under § 16-3-26(B). *Motion to Dismiss at pp. 18-19.* Respondent's reliance on this letter is misplaced, since the Chief Justice herself has recently stated 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. *See Order Denying Motion to Recuse in Alkebulanyahh v. State, dated August 30, 2010, Attached as Exhibit A.*[6]

2. Applicant's Initial PCR Counsel Did Not Perform Competently.

Undersigned counsel's review of the record indicates that Robertson's initial PCR counsel conducted no investigation, and neither sought nor secured any assistance from investigators or expert witnesses. Counsel waited six months after their appointment before filing a PCR application, and even then only alleged "Ineffective assistance of counsel – specifics to be amended later." Counsel failed to file any amended application, and the bulk of

[6] Respondent notes that the South Carolina Supreme Court denied a Motion to Remand for Additional Post-Conviction Proceedings in *Alkebulanyahh v. State*, a case in which initial PCR counsel were also not qualified and failed to competently represent the applicant. *Motion to Dismiss at p. 19.* Mr. Alkebulanyahh, however, did not attempt to file a second application for post-conviction relief. Instead, he filed a petition for writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court. Respondent argued that the petition should be dismissed, and suggested that Mr. Alkebulanyahh should be required to file a second PCR application – i.e., the very action respondent now asserts to be off limits in this case. *See Return to Petition For Writ of Habeas Corpus in Alkebulanyahh v. State, filed on March 21, 2011, at pp. 12-13, attached as Exhibit B.*

the post-conviction relief hearing consisted of Robertson's testimony expressing his dissatisfaction with trial counsel. As explained above, there were a number of other potentially viable claims evident from the record which could and should have been raised. An adequate investigation – which prior counsel should have performed but did not – will almost certainly uncover other viable claims for post-conviction relief.

The American Bar Association Guidelines, which are referenced above and are applicable to trial, appellate and post-conviction counsel, have been cited with approval by the Supreme Court of the United States, *see, e.g., Rompilla v. Beard*, 545 U.S. 374, (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003), and by the South Carolina Supreme Court, *see Council v. State*, 670 S.E. 2d 356, 363 (S.C. 2008); *Ard v. Catoe*, 642 S.E.2d 590, 597 (S.C. 2007). Guidelines 10.15.1 (C) and (E) explicitly state:

> C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.
>
> E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:
>
> 1. maintain close contact with the client regarding litigation developments;
>
> 2. continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;
>
> 3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and,

4. continue an aggressive investigation of all aspects of the case.[7]

Based on all available information, Robertson's prior counsel did not fulfill these obligations. Thus, their appointment not only ignored the criteria established by the General Assembly, it also worked to Robertson's clear detriment. For this additional reason, this Court should permit the current PCR application to go forward.

B. ROBERTSON IS ENTITLED TO PURSUE THE PRESENT PCR APPLICATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. The Federal Constitution requires that a state-created right to the assistance of post-conviction counsel must be meaningful and fundamentally fair.

The United States Supreme Court has determined that indigent defendants have a constitutional right to counsel under the Sixth and Fourteenth Amendments at both the trial, *see Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963), and the initial appellate phases of a criminal prosecution. *See Douglas v. California*, 372 U.S. 353, 357-58 (1963); *Halbert v. Michigan*, 545 U.S. 605 (2005). Failure to provide counsel at these stages reduces the proceedings to "a meaningless ritual" in violation of the Due Process Clause and the Equal Protection Clause. *Id.* at 357 ("where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor"). There is no currently recognized constitutional right to counsel in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("[w]e have never held that prisoners have a constitutional right to counsel when mounting collateral attacks

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

upon their convictions. . . . [T]he right to appointed counsel extends to the first appeal of right and no further").[8]

States are free, however, to enact legislation granting their citizens more rights than the federal Constitution provides. South Carolina has done so by granting death-sentenced inmates a statutory right to two appointed PCR attorneys, at least one of whom must be qualified through specialized training or experience. S.C. Code Ann. § 17-27-160(B). Once a state chooses to act in this regard, it must do so in a way that comports with the Due Process Clause and Equal Protection Clause guarantees of fundamental fairness and meaningful access to the courts. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (noting that although the Constitution does not require States to grant appeals as of right to criminal defendants, nonetheless if a State has created a criminal appellate process, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protections Clauses of the Constitution").

In *Evitts*, the Court held that a State could not penalize a criminal defendant by dismissing his direct appeal because his appointed counsel failed to follow mandatory appellate procedures. *Id.* at 397. In so ruling, the Court rejected the State's argument that since it need not provide an appeal in the first place, it could cut off a defendant's appeal without running afoul of the Due Process Clause. Noting that "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms," the Court reasoned that "when a State opts to act in a field where its action has significant discretionary

[8] But note that in South Carolina, PCR is the first place where a criminal defendant may raise a number of specific claims, such as ineffective assistance of trial counsel, since "off the record" claims are generally barred on direct review. Thus, PCR is the first "adequate opportunity to present [these] claims fairly in the context of the State's appellate process." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). As the Supreme Court intimated in *Coleman v. Thompson*, 501 U.S. 722 (1991), in these particular circumstances, inadequate PCR representation may constitute an "independent constitutional violation." *Id.* at 755.

elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Id.* at 400-401. The Court explained that its decision in *Evitts* was supported by the Equal Protection Clause as well as the Due Process Clause and that "each Clause triggers a distinct inquiry":

> Due Process emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. Equal Protection, on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

Id. at 405.

Evitts is consistent with a long line of precedent establishing that once the State creates a right designed to protect or enhance the reliability of a criminal trial or the individual liberty of criminal defendants, the voluntarily-created state right must be *meaningful*; it must be more than a "futile gesture." *Id.* at 397; *see, e.g., Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that even though a state is not constitutionally required to provide direct review, once a state chooses to do so, it must provide indigent defendants with a free copy of the trial transcript in order to give them a fair opportunity to obtain an adjudication on the merits of the appeal); *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that a procedure whereby indigent defendants must demonstrate the merit of their case before obtaining counsel on appeal "does not comport with fair procedure"); *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977) (asserting that it is "beyond doubt that prisoners have a constitutional right of access to the courts" which must be "adequate, effective, and meaningful").[9]

[9] *See also, Steele v. Kehoe*, 724 So.2d 1192, 1194 n.4 (Fla. App. 1998) ("Even if a defendant is not necessarily entitled to appointed counsel [in post-conviction proceedings], still if one is appointed for him or if he is able to obtain his own, he should be able to rely on such counsel's at

Here, Robertson was denied the basic protections of the Due Process Clause because neither of his initial PCR counsel was qualified under the state statutory requirements and both rendered wholly inadequate and ineffective assistance during his PCR proceedings, thereby failing to do anything to protect Robertson's basic rights to a fundamentally fair PCR proceeding. Thus, Robertson's first PCR proceeding was nothing more than a "futile gesture." *Evitts*, 469 U.S. at 397. Moreover, Robertson was deprived of a meaningful opportunity for PCR because of his indigent status, since non-indigent applicants could retain counsel who are both qualified and competent. As such, Robertson's rights under the Equal Protection Clause were also violated.

2. *Maples* and *Martinez* may provide additional grounds under which the federal Constitution would require that Robertson's PCR application go forward.

Some of the federal constitutional issues raised here stand to be resolved in the near future by the United States Supreme Court. On March 21, 2011, the Court granted a petition for a writ of certiorari in *Maples v. Maples*, 2011 WL 940889 (U.S.) to decide whether the Eleventh Circuit properly held that there was no "cause" to excuse a procedural default where Maples' state post-conviction counsel unreasonably failed to file an appeal. *See Petition for Writ of Certiorari in Maples v. Maples, attached as Exhibit C.* In light of *Maples*, the Supreme Court

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least filing within the time period. . . . It is the defendant's right to have meaningful access to the judicial process that we urge is a due process right. If the defendant is denied the right to attack a presumptively valid criminal judgment because of counsel error . . . he has been denied due process"). Other courts have extended this principle to conclude that when a state statute grants a *mandatory* right to the assistance of capital post-conviction counsel, the Due Process Clause requires the full protections of the Sixth Amendment right to effective assistance from that counsel. *McKague v. Warden*, 912 P.2d 255, 258 n.5 (Nev. 1996) ("where a state law *entitles* one to the appointment of counsel to assist with an initial collateral attack after judgment and sentence, it is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel") (citation omitted).

further granted a stay of execution to Daniel Wayne Cook pending disposition of his petition for a writ of certiorari, which raises the more general question of whether Cook is entitled under the Sixth and Fourteenth Amendments to have effective state post conviction counsel. *See Miscellaneous Order in Cook v. Arizona, 10-9742 (April 4, 2011)*. On the following day, the Court also granted a stay of execution to Cleve Foster, allowing him to file a petition for rehearing raising essentially the same issue as in *Maples*. *See Miscellaneous Order in Foster v. Texas, 10-8317 (April 5, 2011)*. Most recently, on June 6, 2011, the Court granted an additional petition for writ of certiorari in *Martinez v. Ryan*, 2011 WL 380903 (U.S.), which raises the question:

> Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

Petition for Writ of Certiorari in Martinez v. Ryan, attached as Exhibit D. One or both of these pending cases could announce an additional rule requiring effective performance by state post-conviction counsel. Were such a rule announced, it would dictate that this case be allowed to go forward regardless of South Carolina state rules regarding successive PCR applications.

Although this Court should allow Robertson's PCR application to go forward solely on the basis of state law, the questions presented in *Martinez* and *Maples* are directly relevant to this case and could be resolved in such a way as to require this Court to allow the PCR application to go forward as a matter of federal constitutional law, regardless of the state law issues. Thus, this Court should permit Robertson's PCR application to go forward now, or, in the alternative, hold

this case in abeyance pending the United States Supreme Court's decision in *Maples* and *Martinez*.

B. The PCR Application is Timely.

Respondent argues that the PCR Application is barred by the statute of limitations set forth in S.C. Code Ann. § 17-27-45(A). *See Motion to Dismiss at p.15.* The one-year statute of limitations does not apply to successive PCR applications permitted under the exceptions discussed above. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999) (holding statute of limitations does not apply when a successive PCR application is permitted simply to allow an applicant one "fair 'bite' at the apple."). The South Carolina Supreme Court's policy of permitting successive PCR applications in certain exceptional circumstances would be frustrated if the one-year statute of limitations applied to bar an otherwise permissible successive PCR application. The Court has never applied the one-year statute of limitations to a permissible successive PCR application. *See Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996).

Even if the one-year statute of limitations did apply to this case, at the very least it should be implicitly tolled for the period during which the initial PCR Application was pending, until undersigned counsel were appointed to handle Robertson's federal habeas corpus proceedings. Robertson had one year from the sending of the remittitur to the lower court from an appeal, which was approximately June 20, 2005.[10] Initial PCR counsel did not file an application until

[10] Respondent incorrectly argues that the one-year time period should run from June 3, 2005 – the date on which the South Carolina Supreme Court entered an order dismissing the direct appeal. *See Motion to Dismiss at p.15.* However, that order indicates that a remittitur will be sent to the lower court. *See Order dated June 3, 2005, attached as Exhibit E.* The statute specifically provides that the one year period begins "within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45. The remittitur may not be sent to the lower

over eight months later, on March 1, 2006, thereby consuming 253 days and leaving 112 days remaining. Undersigned counsel were appointed by the federal district court on November 8, 2010, and filed the current PCR Application 60 days later, with 52 days remaining on the one-year statute of limitations. Thus, even if the statute of limitations applies to permissible successive PCR applications, Robertson filed well within that limitations period when the tolling period is included in the calculation.

Additionally, it is well within this Court's equitable discretion to toll the limitations period for any appropriate duration. *See Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (equitable tolling of the PCR limitations period may be applied where "circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence"). Robertson had no control over his initial PCR counsel's selection, lack of qualification or failure to perform competently. Since the appointment of qualified and competent counsel, Robertson has diligently pursued these claims. *See April 8, 2011 Order Granting Stay of Federal Habeas Corpus Proceedings at p.4, attached as Exhibit F* ("there exists not even the spector of any dilatory tactics on account of [Robertson] or his counsel").

Respondent argues that initial PCR counsel's lack of qualification and poor performance "could have been raised, if at all, at the time of the appointment." *Motion to Dismiss at p.17.* Respondent also advances a laches argument and blames Robertson himself for not ordering a transcript of the PCR appointment hearing. *Motion to Dismiss at pp. 17-18.* Apparently, respondent believes that somehow initial PCR counsel should have objected to their own

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court until at least fifteen (15) days have elapsed (the day of filing being excluded) after the decree of the court finally disposing of the appeal. Rule 221, SCACR.

appointment on the basis that they were inexperienced and unqualified. Because PCR counsel raised no such objection, respondent argues that Robertson's claims are now barred. Respondent's position is senseless.[11] Robertson has raised his claims at the earliest available opportunity. Moreover, undersigned counsel did attempt to order a transcript from the appointment hearing, but the court reporter has indicated that these records no longer exist. *See April 11, 2011 letter from Ms. Teresa Johnson, attached as Exhibit G.* However, undersigned counsel have also been informed that Robertson was transported for an appointment hearing on or about September 23, 2005, but that no hearing actually took place because initial PCR counsel failed to attend. Thus, this is just one issue of many that must be examined through an appropriate post-conviction investigation.

C. Applicant Verified the PCR Application.

Finally, respondent argues that the PCR Application should be dismissed because it is not verified by Robertson. The initial PCR Application, filed on January 7, 2011, was verified by Robertson's counsel on his behalf, and thus, fully complied with S.C. Code Ann. § 17-27-40 (2003). In any event, respondent's argument is now moot. On July 5, 2011, this Court held an appointment hearing at which all parties, including Robertson himself, were present. This Court granted Robertson permission to file an Amended PCR Application with a verification *nunc pro tunc* verifying both the initial and the amended application. Robertson has complied with this Court's instructions and is filing an Amended PCR Application, which is personally verified as to both the initial and the amended application, simultaneously with this Response.

[11] If respondent were correct, prisoners would be required to personally object to trial counsel's mistakes as they happen at trial and to raise ineffective assistance of counsel claims on direct appeal. That, however, is not how the process has ever worked in South Carolina.

IV. CONCLUSION

For all of the reasons stated above, this Court should deny Respondent's Motion to Dismiss, and allow this case to proceed in the ordinary course established by South Carolina law and practice.

Respectfully submitted,

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July 25, 2011

EXHIBIT

A

The Supreme Court of South Carolina

Tyree Roberts a/k/a Abdiyyah Alkebulanyahh, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

Petitioner was convicted of two counts of murder and was sentenced to death. His convictions and sentence were affirmed on direct appeal. State v. Roberts, 369 S.C. 580, 632 S.E.2d 871 (2006). The case is currently before the South Carolina Supreme Court by way of a notice of appeal, filed in October 2009, from an order denying petitioner's application for post-conviction relief (PCR). Petitioner has filed a Motion to Remand for Additional Post-Conviction Proceedings, which is partially based on the assertion that the attorneys appointed to represent petitioner in his PCR action were not qualified under S.C. Code Ann. § 17-27-160(B)(2003). Consideration of that motion has been held in abeyance pending a decision

on petitioner's request that I recuse myself from participation in consideration of the motion.

Petitioner's Motion for Recusal is based on a memorandum I sent to circuit court judges in August 2003, in my administrative capacity as administrative head of the unified judicial system. S.C. Const. art. V, § 4. That memorandum addressed confusion that had arisen in the circuit courts regarding appointment of counsel in capital PCR cases pursuant to section 17-27-160(B).

"State supreme courts have a range of powers and responsibilities in governing the judicial branch of government and adjudicating controversies." In re Vermont Supreme Court Administrative Directive No. 17, 576 A.2d 127 (Vt. 1990). See S.C. Const. art. V, § 4 ("The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts."). In addition, the Chief Justice of the South Carolina Supreme Court, like Chief Justices in other jurisdictions, is assigned both adjudicative and administrative duties. S.C. Const. art. V, § 4 ("The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. He shall appoint an

administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the State."). See State ex rel. Hash v. McGraw, 376 S.E.2d 634 (W. Va. 1988).

The South Carolina Supreme Court has never addressed whether actions taken by its Chief Justice in an administrative capacity warrant disqualification in a subsequent matter resulting from the administrative action. However, courts in other jurisdictions that have considered the issue have found "the dual responsibilities of diligent administration and impartial adjudication do not create a conflict requiring disqualification." McGraw, supra. Cf. Ky. Utils. Co. v. South East Coal Co., 836 S.W.2d 407 (Ky. 1992); Lorenz v. N.H. Admin. Office of Courts, 858 A.2d 546 (N.H. 2004); N.Y. State Assn. of Criminal Defense Lawyers v. Kaye, 95 N.Y.2d 556, 744 N.E.2d 123 (2000); Vermont Supreme Court Administrative Directive No. 17 v. Vermont Supreme Court, 576 A.2d 127 (Vt. 1990). Those courts have found the situation no different from the rehearing of a case in which the judge has rendered an opinion. Id. The courts have also noted the promulgation of an administrative order or directive does not include a determination that it is valid because that would constitute an advisory opinion. Lorenz, supra; Kaye, supra; Directive No. 17, supra. Instead, such a

determination must be adjudicated by way of a separate action. Id. Finally, the courts have recognized that in states where an appellate court has primary responsibility for administration of the judicial branch of government, including rule-making powers, the disqualification of those judges each time their administrative actions are challenged would "'render the rule-making process self-defeating and nugatory.'" Kaye, supra (quoting Berberian v. Kane, 425 A.2d 527 (R.I. 1981)).

Moreover, many of these courts have also determined disqualification in such situations is not required by Canon 3(E) of the Code of Judicial Conduct. Lorenz, supra; Directive No. 17, supra; McGraw, supra. Specifically, the courts have determined the fact that administrative action was taken by a judge does not constitute a reasonable ground for questioning the judge's impartiality in a subsequent case challenging the action, as the administrative action does not represent a personal bias or interest nor the type of prior knowledge that would prevent the judge from acting impartially. Id.

Appointment of counsel is an issue that affects the operation of the judicial system and is often dealt with in an administrative capacity by me, as Chief Justice, or the Court as a whole by way of an administrative

order or even in a rule-making capacity. As noted by the Supreme Court of Appeals of West Virginia, "[o]ur court system is replete with cases and controversies that are of a hybrid nature, possessing administrative as well as judicial characteristics." McGraw, supra. I find the fact that I have advised circuit court judges on the application of section 17-27-160(B) in my administrative capacity does not disqualify me from adjudication of petitioner's Motion for Remand, which is based on a different interpretation of the statute. My 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. Moreover, it is my opinion my issuance of the administrative memorandum does not reflect a bias or personal interest or a degree of prior knowledge that requires my disqualification pursuant to Canon 3(E) of the Code of Judicial Conduct, Rule 501, SCACR.

I have no doubt that I can decide the Motion to Remand in this case in a fair and impartial manner. Indeed, such is required by my oath of

office. I therefore deny petitioner's request that I recuse myself from acting on his Motion to Remand.[1]

CHIEF JUSTICE JEAN HOEFER TOAL

Columbia, South Carolina

August 30, 2010

cc: John H. Blume, III, Esquire
Assistant Attorney General Alphonso Simon, Jr.

[1] I find that where a motion is made to disqualify or recuse an individual justice of this Court, the motion is to be decided in the first instance by the challenged justice and not by other members of the Court. McGraw, supra; Richard E. Flam, Judicial Disqualifications § 29.2 (2nd ed. 2007).

EXHIBIT

B

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

TYREE ROBERTS AKA,
ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

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PETITIONER'S ISSUES PRESENTED

1. Petitioner was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitutional and South Carolina law because a) the trial judge failed to inquire into Petitioner's competency; b) Petitioner was incompetent in fact; c) the trial judge failed to secure a knowing and intelligent waiver of Petitioner's right to present mitigating evidence and d) the trial judge failed to terminate Petitioner's *pro* se status.

2. Petitioner's death sentence violates the Fifth, Eighth, and Fourteenth Amendments because he was visibly shackled without justification and without individualized determination by the trial judge.

3. Petitioner was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel during the penalty phase of the proceedings.

4. The prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Petitioner's rights guaranteed by the Sixth and Fourteenth Amendments.

5. Petitioner was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.

STATEMENT OF THE CASE

In March 2002, the Beaufort County Grand Jury indicted Petitioner for two charges of murder for the shooting deaths of two Beaufort County Sheriff's Deputies (02-GS-07-0369 & 0370). (App. 4534-35). The state gave notice of intent to seek the death penalty, and served its notice of evidence in aggravation.

Petitioner represented himself at his jury trial, but Attorneys Gerald Kelly and Sean Thornton remained throughout the trial to assist. Voir dire in the case began before the Honorable Daniel F. Pieper on October 6, 2003. Trial began on October 10, 2003. (App. 1316). On October 21, 2003, Petitioner's jury convicted him of both charges. (App. 3472-73).

The sentencing phase of his trial began on October 22, 2003. Judge Pieper submitted the following aggravating factors to the jury:

> The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.
>
> Two or more persons were murdered by the defendant by one act or pursuant to on scheme or course of conduct.

(App. 3847; 4529). The following mitigating factors were submitted to the jury:

> Whether the existence of any non-statutory mitigating circumstance was supported by the evidence.

(App. 3851, 4529).

On October 22, 2003, Petitioner's jury found the existence of the aggravating factors and recommended a sentence of death on the murder counts. That same day, Judge Pieper sentenced Petitioner to death. (App. 3861-68; 3873; 4533).

A timely Notice of Appeal was filed with the South Carolina Supreme Court. Petitioner was represented on direct appeal by Joseph L. Savitz, III, and Robert M. Dudek, of the South Carolina Office of Appellate Defense, after the South Carolina Supreme Court denied Petitioner's motion to proceed on direct appeal *pro se*. State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (2005) (App. 4973-81). On March 7, 2006, Petitioner submitted a Final Brief of Appellant to the state supreme court, in which he raised the following issue:

> The judge erred by refusing to allow appellant to waive his right to be present at the sentencing phase, instead confining him to a holding cell attached to the courtroom in which he was visible to the jury, particularly since appellant's absence during sentencing was his pro se trial strategy and the State advanced no countervailing reason for requiring him to be present.

The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent on February 17, 2006. Oral argument was held before the South Carolina Supreme Court on May 24, 2006. The South Carolina Supreme Court issued an opinion dated July 24, 2006, affirming the sentence. State v. Roberts, 369 S.C. 580, 632 S.E.2d 871 (2006).

Following a Petition for Stay of Execution by Petitioner and a Return by the State, the South Carolina Supreme Court issued an Order dated September 7, 2006, in which it stayed the execution so that Petitioner could file a petition for writ of certiorari with the United States Supreme Court. Petitioner filed his petition dated November 9, 2006, in which he raised the following issue:

> May a capital defendant waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reasons for requiring him to be present?

The State, through Assistant Attorney General S. Creighton Waters, filed a Return to the Petition for Writ of Certiorari dated February 5, 2007. The United States Supreme Court denied the Petition for Writ of Certiorari by Order dated March 19, 2007.

Petitioner filed a *pro se* Application for Post-Conviction Relief dated March 12, 2007. (App. 4535-44). Following a Petition for a Stay of Execution, the South Carolina Supreme Court issued an order on May 4, 2007, assigning Judge Young continuing jurisdiction over the matter. In August 2007, Judge Young signed an Order appointing Glenn Walters, Esquire, and Carl Grant, Esquire, as attorneys for Petitioner, and giving them until February 8, 2008, to file an Amended Application. On October 9, 2007, the State served its Return, Motion to Dismiss and Motion for Summary Judgment in response to Petitioner's *pro se* Application for Post-Conviction Relief. (App. 4569-98). On February 8, 2008, PCR counsel filed an Amended Application for post-conviction relief, asserting "[t]rial judge failed to make the proper findings to determine if the Applicant knowingly and intelleigently[sic] understood the implications of prooceding[sic] pro se." (App. 4562-68). The State filed its Amended Return on March 21, 2008. (App. 4545-61).

An evidentiary hearing was held in the post-conviction relief action at the Charleston County Courthouse before the Honorable Roger M. Young, Sr., Circuit Court Judge on October 13-14, 2008. (App. 4599-4920). Petitioner was present and was represented by Glenn Walters, Esquire and Carl B. Grant, Esquire. Id. Respondent was represented by Assistant Attorneys General S. Creighton Waters and Alphonso Simon, Jr. Id. Several exhibits were introduced at the hearing. Further, the

depositions of Joseph L. Savitz, III, Esquire; Robert M. Dudek, Esquire; Dr. Donna Schwartz-Watts; Gerald Kelly, Esquire; Sean Thornton, Esquire; and Solicitor I. McDuffie Stone, III were introduced into evidence as well.[1] (App. 4877-79, 5019-5133). On December 18, 2008, the post-conviction relief action was transferred to the jurisdiction of the Honorable Carmen T. Mullen, Circuit Court Judge. On September 17, 2009, the PCR Court filed an Order of Dismissal with Prejudice, denying relief upon all of the claims raised in the post-conviction relief action. (App. 5176-5229).

Petitioner timely filed a Notice of Appeal. Initially, Petitioner was represented by Glenn Walters, Esquire, one of his PCR counsel. Mr. Walters moved to be relieved from representing Petitioner. Pursuant to Petitioner's request, this Court appointed John Blume, III, Esquire to represent Petitioner in his appeal of the Order in the post-conviction relief action.

On July 21, 2010, Petitioner filed a Motion to Remand for Additional Post-Conviction Proceedings. In the Motion, Petitioner argued PCR trial counsel was not properly qualified, and some issues PCR appellate counsel believed were meritorious were not raised in the PCR. (App. 5230-60). This Court denied the Motion on October 20, 2010. (App. 5297). Petitioner subsequently filed a Petition for Writ of Certiorari and this Petition for Writ of Habeas Corpus on February 18, 2011.

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[1] Respondent would note that some of the depositions that were submitted after the evidentiary hearing are not included in the Appendix.

STATEMENT OF FACTS[2]

In January 2002, Petitioner lived in a trailer owned by Brenda Smith on Riley Road in Beaufort County. Also residing at the trailer were Smith's husband, Isaac, and Petitioner's wife Nzuri. At the time of the crime in this case, a girl named Kimberly Blake, with whom Petitioner had an infant daughter, was also staying there. On January 8, 2002, Kimberly Blake asked her friend, Strawberry Washington, to call police to come to the house to assist her in leaving because Petitioner had hit her. Beaufort County Sheriff's Deputies Dyke Coursen and Dana Tate responded. According to Kimberly Blake, when police arrived, Petitioner hid in the bedroom closet with his rifle. He gave Kimberly the okay to go out of the bedroom. She left the bedroom and Brenda Smith gave the officers permission to search the bedroom. Officers Coursen and Tate went into the bedroom. Smith and Blake heard gunshots. Blake ran outside and down the road. She was joined shortly after by Petitioner coming through the woods with a gun in his hands. Petitioner stated, "I just killed those two white bitches and I'm going to say it was self-defense." Blake left Petitioner and returned to the scene to talk to police.

When backup officers responded to the scene, they found officers Coursen and Tate dead; Coursen had suffered six gunshot wounds, Tate had seven. Petitioner was subsequently found hiding in the mud under a bridge with a shoulder and hip wound. Petitioner was arrested. At the time, he had a black fanny pack carrying ammunition

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[2] State v. Roberts, 369 S.C. 580, 581-83, 632 S.E.2d 871, 872-73 (2006)

for an M-14 assault rifle, a cell phone and a knife. Police subsequently found a rifle magazine and an SKS assault rifle in the area in which Petitioner had fled. The bullets and casings recovered from the victims and the scene of the crime were conclusively matched to the assault rifle.

Petitioner was charged with capital murder. At the guilt or innocence phase of trial, he chose to represent himself. However, two attorneys remained as stand-by counsel to assist him at trial. While the jury was deliberating, Petitioner indicated to the trial court that if the jury returned a guilty verdict, he did not intend to participate at sentencing. He also indicated he did not want his stand-by attorneys to present a defense. Petitioner indicated that if the trial court required him to be present at the sentencing hearing, he would be unruly and would have to be restrained.

The jury convicted Petitioner of two counts of murder. Petitioner advised the court he did not intend to offer any mitigating evidence and expressed his desire to absent himself from the sentencing; he indicated he would probably be unruly if required to be present. Stand-by counsel conferred with Petitioner and then advised the court as follows:

He says that he doesn't agree to any changes in his status as attorney of record, and that if the court makes any change, they'll have to do it on their own motion ... and that if the judge-if the attorneys on stand-by are to perform in any capacity, the judge will have to order that on his own motion ... He says that he doesn't want to be present in this courtroom in order to hear the evidence in the second phase. And that if the judge-but he does not intend to disrupt the proceedings ... but if the judge determines that he should be in one of the side rooms ... that's a decision

that his honor will have to make himself. He says that he is withdrawing from any further discussion with the court .... he does not intend to cooperate with stand-by counsel, to bring any witnesses....

The trial court was concerned with Petitioner' decision, but was also disturbed that to appoint counsel to represent Petitioner at sentencing might compromise his right to proceed *pro se*. Petitioner continued to maintain that he did not intend to confront any witnesses, and did not want to see the witnesses. He persisted in advising the court that if forced to remain present, he would be disruptive. As neither party could point to specific case law governing the circumstances, the court determined the best course of action was to proceed with Petitioner present in the courtroom, with the condition that if he became disruptive, the trial judge would take such action as necessary. Petitioner indicated his desire that counsel not represent him in any way, but ultimately decided counsel could remain as stand-by counsel to object to the introduction of improper evidence.

The sentencing proceeded with Petitioner seated at counsel table. As soon as the first witness was sworn, Petitioner stood and began to chant aloud, "Blessed be Yahweh, El Shaddai, Jehova, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." He was told by the court to be seated, and when he continued chanting, he was removed and a brief hearing was held in the hearing room at the back of the courtroom. Petitioner was brought back into the courtroom and once again began chanting when the witness began to testify. The jury was removed, and Petitioner was placed in a conference room at the back of the courtroom which had a glass partition to allow him to hear and see into the courtroom. He was initially

restrained, but the restraints were removed before the jury was returned to the courtroom.

Throughout sentencing, the court offered to allow Petitioner to come back into the courtroom if he could do so without being disruptive; however, Petitioner indicated he would rather remain in the back room. Petitioner ultimately returned to the courtroom to make a closing statement to the jury. After deliberations, the jury found the existence of the two aggravating circumstances and recommended a sentence of death.

I. THIS PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED BECAUSE IT IS NOT PROPER AT THIS TIME.

Habeas relief will be granted only for a constitutional claim rising to the level of "a violation, which in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Green v. Maynard, 349 S.C. 535, 564 S.E.2d 83 (2002), citing Gibson v. State, 329 S.C. 37, 39, 495 S.E.2d 426, 428 (1998) (holding that habeas relief was not available, even if precedent was overruled in petitioner's direct appeal and a new rule was created on the issue of juror qualification) and Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). See Tucker v. Catoe, 346 S.C. 483, 485, 552 S.E.2d 712, 713 (2001) (writ granted finding trial judge's instructions to deadlocked jury unconstitutionally coercive). Importantly, this Court has stated that:

> [w]e caution that not every intervening decision, nor every constitutional error at trial will justify issuance of the writ. Rather, the writ will issue only under circumstances where there has been a "violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice.

Butler, 302 S.C. at 468, 397 S.E.2d at 88. In Butler, the Court granted relief where the errors were determined to be a "grave constitutional error." See also Simmons v. State, 322 S.C. 49, 471 S.E.2d 455 (1993); Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991) (this Court will exercise its original jurisdiction where there is an extraordinary reason such as a question of significant public interest or an emergency). See also, McWee v. State, 357 S.C. 403, 407, 593 S.E.2d 456, 458 (S.C.,2004) (failure to charge the jury that petitioner was parole eligible is not shocking to the universal sense of justice).

A habeas corpus petition must support the requested relief. Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (1994). Although the allegations in the petition are to be treated as true, Tillman v. Manning, 241 S.C. 221, 127 S.E.2d 721 (1962), the petition must make out a prima facie case showing petitioner is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (1962). Petitioner must present sufficient factual allegations to support the petition. Hayes v. State, 242 S.C. 328, 130 S.E.2d 906 (1963). It must allege petitioner has exhausted all other remedies, and it must set out a constitutional claim that meets the standard delineated in Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S.Ct. 442, 112 L.Ed.2d 425 (1990). If the petition, on its face, meets these requirements, petitioner is entitled to a hearing.

Habeas corpus is available only when other remedies are inadequate or unavailable. Gibson, 329 S.C. 37, 495 S.E.2d 426 (1998). Procedurally, a petitioner seeking habeas corpus must first exhaust all available PCR remedies. Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994). Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review. "A matter may not be before this Court by a writ of certiorari and in our original jurisdiction." Binney v. State, 384 S.C. 539, 548 n.1, 683 S.E.2d 478, 483 n.1(2009). Further, petitioner must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate. Gibson, 329 S.C. at 42, 495 S.E.2d at 428. Here, Petitioner has not made the requisite showings that he has fully exhausted all other remedies and that other remedies are either unavailable or inadequate. First, Petitioner currently has a pending petition for writ of

certiorari appealing the order denying his application for post-conviction relief. That petition was filed on the same day as this habeas action. Second, Petitioner has not shown that he has exhausted any state remedies available for most of his claims now raised. Petitioner's claims in Ground Five were never raised to either the trial court or in a post-conviction relief action. Similarly, Petitioner's claims in Grounds Two and Three were not raised at all at trial or in his post-conviction relief action. While Ground Four was raised in PCR, it was not properly raised because it was a freestanding claim. Further, the argument now raised in Ground Four was not raised by Petitioner at trial. Finally, most of Petitioner's claims in Ground One were not raised in post-conviction relief. Since these claims were not properly raised in state court, and Petitioner has not shown relief is unavailable by other means for these claims, he is not entitled to habeas review at this time.

II. PETITIONER IS NOT ENTITLED TO HABEAS RELIEF UPON THE CLAIMS RAISED IN THIS PETITION.

Ground One: Petitioner was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States A) the trial judge failed to inquire into Petitioner's competency, B) Petitioner was incompetent in fact, C) the trial judge failed to secure a knowing and intelligent waiver of Petitioner's right to present mitigating evidence and D) the trial judge failed to terminate Petitioner's pro se status.

A. Trial judge failed to inquire into Petitioner's competency.

1. What occurred at trial

At a pre-trial hearing before Judge Perry M. Buckner on November 12, 2002, Petitioner complained to the judge that he had filed a motion to dismiss his attorneys because he felt they were sabotaging his case. (App. 3889). The solicitor requested

that the competency evaluation be done by a certain date, and when counsel Thornton indicated he had no objection to that, Petitioner stated he objected to it. (App. 3888-91).

At a pre-trial hearing before Judge Pieper on July 25, 2003, there was an extensive colloquy regarding Petitioner=s motion to represent himself. Petitioner noted he had finished high school and had taken some college coursework, and had also educated himself on the criminal justice system by studying the Constitution, PCR materials, trial proceedings, and statutes. He pointed out he had done PCR work for other inmates and filed numerous motions in his case. Petitioner stated he thought his lawyers were incompetent and lazy, and further complained about them withdrawing his speedy trial motions. Petitioner also complained that his lawyers hired an expert to make him look like he had a mental problem, when in fact the State expert found him competent; and he thought the State expert was far more professional and qualified. Petitioner noted his lawyers had given him a sheet on the dangers of self-representation, and the appointed defense lawyers agreed that if Petitioner was found to be competent he could in fact represent himself. The trial court discussed the fact that by waiving counsel, Petitioner was waiving it for the entire case. The trial court also noted Petitioner might find himself shocked and dazed by a guilty verdict when faced with proceeding on with the penalty phase. The court also warned Petitioner that his failure to properly raise issues at trial would preclude them on appeal and he would have no one to blame in PCR. Despite this, Petitioner continued to indicate his desire to represent himself, and the court specifically noted Petitioner was very coherent. After Petitioner reiterated his free, knowing, and intelligent decision, the

court indicated its intent to allow Petitioner to proceed *pro se*, pending a Blair hearing. (App. 3900-3945).

As the hearing progressed and various housekeeping and logistical matters were discussed, Petitioner listed for the court a relatively long list of people he wished to subpoena, including law enforcement personnel, DSS employees, and other witnesses. (App. 3951-55). After some further housekeeping matters, the court accepted as a court's exhibit the document setting forth the dangers of *pro se* representation that counsel Kelly had given to Petitioner. (App. 3955-56). The court inquired again if Petitioner understood everything that transpired, and after Petitioner indicated he did, the court gave him an additional week to think over *pro se* representation. The court also noted that Petitioner would need to be prepared at the hearing the following week to argue any motions he may have if the case was to go forward as soon as possible as Petitioner desired. (App. 3955-58). Before the hearing concluded, Petitioner and the judge discussed some expert witnesses he wished to pursue, and Petitioner explained to the judge why he wished to have a psychological expert on false statements and a firearms expert. (App. 3958-64).

The Blair hearing was held on August 1, 2003. Defense-retained psychiatrist Dr. Schwartz-Watts testified that Petitioner was not competent to represent himself, based on her assessment of his paranoia, psychosis, and reasoning for wanting to represent himself. Specifically, Dr. Schwartz-Watts stated that at their third interview Petitioner was psychotic and not in touch with reality, and had since refused to see her. She felt Petitioner did not have the capacity to assist his attorneys, because he thought they were conspiring with the solicitor. She also felt he did not have the

capacity to look at different decisions about how to defend himself, because he refused to consider any kind of mental health mitigation. She admitted, though, that she could not give an opinion as to his competency at that moment since he had refused to see her again. (App. 3975-91).

When cross examined by Petitioner, Dr. Schwartz-Watts acknowledged that Petitioner did not want to meet with her on any occasion. During the second interview, while Petitioner agreed that while he initially consented to having the interviews taped, he forgot it was recording, and was very angry that Dr. Schwartz-Watts might disclose the tape to other people. Schwartz-Watts also acknowledged that she was aware Petitioner was upset about the videotaping when she attempted to speak with Petitioner a third time. (App. 3991-97).

During cross examination by the solicitor and questioning by the judge, Dr. Schwartz-Watts stated Petitioner's intelligence was sufficient, but she was concerned not with the decisions he makes but with the reasoning behind them - given that he thought he could do better than his attorneys, and that they were Masons who were conspiring with the solicitor to deny him a fair trial based on his religious beliefs. She also thought his mental illness precluded him from considering issues in mitigation. However, she admitted she thought some of Petitioner's decisions about experts were "brilliant." Further, she conceded to the judge that if Petitioner decided to accept the opinion of another expert who thought he was competent that certainly could be a rational decision, unless he was doing so because of his illness. Ultimately, she stated Petitioner had some "good" and "strong" ideas about how to defend his case, but she questioned the reasoning by which he arrived at those ideas. She stated it would not

be unusual for him to be mistrusting since he was accused of killing two police officers, but felt he "crossed the line" with his belief that his attorneys were part of a conspiracy. Dr. Schwartz-Watts acknowledged that making an irrational decision does not render one incompetent. (App. 3997-4011).

The defense psychologist stated Petitioner refused to see him, and he had elevated scores on a portion of a test indicating defensiveness and underreporting of symptoms. On cross by Petitioner, he agreed Petitioner had average intelligence, no neuropsychological deficits, and no indications of malingering. (App. 4017-25).

The court's psychiatrist and psychologist both found Petitioner competent to stand trial, and criminally responsible. The psychiatrist, Dr. Richard Frierson, diagnosed Petitioner as having a personality disorder with narcissistic and anti-social traits. Frierson noted that was not a major mental illness. He stated he would expect Petitioner to have elevated scores on the PAI because Petitioner tries to present himself in best light. (App. 4028-32).

On cross, Dr. Frierson testified he scheduled another meeting with Petitioner after viewing Dr. Schwartz-Watts' videotape of the interview. He discussed in detail these issues with Petitioner and concluded Petitioner's thoughts about the Masons and the court system were not delusional but an ideology shared by a number of people. Dr. Frierson had found information on the internet about books written on the Masons, and Petitioner agreed he had reason some of those books. Since Petitioner's beliefs were similar to what other people believe about these organizations, Dr. Frierson found it to be a cultural belief that may be false rather than a delusion that was caused by mental illness. While Dr. Frierson certainly agreed Petitioner displayed

narcissism and might overestimate his abilities, he saw no evidence Petitioner ever had a major depressive or manic episode. (App. 4032-39).

The court's psychologist, Dr. Musick, examined Petitioner four times and also agreed he was competent to stand trial. He noted Petitioner did show elevated scores on the positive impression management scale of the Personal Assessment Inventory test, or "PAI" test. This meant Petitioner was unwilling to disclose minor shortcomings to which others might admit. However, since Petitioner was presenting himself in the best light, Dr. Musick found that not to be surprising. (App. 4041-46).

During defense counsel's cross examination, Dr. Musick agreed that when there are scores on the positive impression management scale similar to Petitioner's score, the PAI manual cautions that the other scores might underestimate any psychopathology. Dr. Musick noted they compensated for that by spending a lot of time in the interviews as to any symptoms Petitioner might have. Dr. Musick also did not think Petitioner's beliefs about the Masons was a delusion but a cultural or subcultural belief, partly because Petitioner agreed he did not know if what he had read about Masons was true, and partly because there was information on the internet and in books reflecting similar views. (App. 4046-54).

During Petitioner's cross examination, Dr. Musick stated Petitioner was not retarded. Dr. Musick agreed that while Petitioner did have some suspiciousness and distrustfulness, that did not necessarily make one abnormal. He further noted Petitioner was well aware of his rights. Dr. Musick agreed with Petitioner's questioning that simply because one tried to portray himself in a positive light or did not admit to minor annoyances, that did not necessarily mean he was hiding larger issues. Dr.

Musick agreed that one would not be delusional if he believed in the existence of the Ku Klux Klan, Free Masonry, or "enemies." (App. 4055-58).

The court found based on the court's examiners' testimony as well as its own observations and interactions with Petitioner that he was competent, stating:

> THE COURT: I have watched the defendant in court, I gave the defendant the opportunity to ask questions in these proceedings for the very purpose of evaluating the defendant's demeanor, his behavior, whether the defendant is rational, whether he has an appreciation of these proceedings. The defendant asked some questions when he was addressing the witnesses, the questions were pertinent. I think the defendant listened to the testimony, he referenced some of that testimony in his questions and there is evidence in the record from the psychiatric testimony that the defendant is competent to so proceed and the Court upon review of all of these - - with the entire record finds that defendant does have such a rational understanding of these proceedings and does have the ability to present his defense, that I find that he is competent to proceed.

(App. 4060-61). The court then held another colloquy with Petitioner on his desire to represent himself, and engaged in a detailed and lengthy discussion with Petitioner on the responsibilities, dangers, and issues with *pro se* representation, particularly in a capital case. The judge further advised Petitioner not to represent himself, and told him he may be overwhelmed by the prospect of a sentencing phase if he were convicted. Petitioner held firm to his desire to represent himself. (App. 4061-67).

The discussion then moved to standby counsel. Petitioner noted he had requested different counsel, but he understood that trial was approaching and he wanted a speedy trial. Petitioner stated that if he had to have Kelly and Thornton as standby counsel he would accept them rather than no counsel at all. The judge pointed out that there was no obligation to appoint standby counsel at all, and that even if standby counsel were appointed there would be no hybrid representation.

Petitioner specifically stated he did not expect his standby attorneys to be able to assist in the presentation of his case, and the judge agreed to allow Kelly and Thornton to remain in that capacity. After one final colloquy on Petitioner's decision to represent himself, Judge Pieper accepted Petitioner's request, finding it to be a free, voluntary, and intelligent decision. Again, the judge noted that in reviewing Petitioner's motions and discussing the case with Petitioner, the judge believed Petitioner "does seem to have the ability to proceed and handle his defense in this case." Appointed counsel Kelly and Thornton were ordered to remain as standby counsel to assist Petitioner with advice and logistical support. (App. 4067-79).

For the remainder of that pre-trial proceeding, Petitioner was able to make and logically discuss a number of motions. These motions included a motion for bond; withdrawal of motion to change venue; motion to dismiss indictments for use of his former name; motion to dismiss indictments based on 4th Amendment issue; motion for a speedy trial; motion for release from segregation; motion to dismiss based on a conspiracy between judge, prosecutor and detention officials; motion to dismiss because arrest warrant is false based on error in one of the deputy's names; motion for *voir dire*; motion to sequester jurors; motion to dismiss based on false testimony allegedly being presented to the Grand Jury; motion to dismiss because of the failure to include aggravating circumstances in the indictment; motion based on the lack of representation of minorities on the grand jury; motion to preclude the State from using any information gleaned during the competency evaluation, a motion to allow his investigators to examine the evidence, and a motion for a room wherein the defense team could meet during the trial. (App. 4080-4222). In *ex parte* proceedings,

Petitioner then cogently discussed his requests for experts, including a false memory expert, a forensic evidence expert, a jury selection expert, and a firearms expert. Some of these requests were granted. (App. 4224-4257). An additional pre-trial hearing was held on October 1, 2003, at which Petitioner raised a number of other appropriate motions, as well as conducted an evidentiary hearing on his Fourth Amendment claims. (App. 4260-4449). Petitioner handled motions to quash in opposition to his subpoenas as well as *voir dire* issues at the pretrial hearing on October 3, 2003. (App. 4451-4522).

When trial commenced on October 6, 2003, Petitioner successfully conducted the capital *voir dire* without any significant incident, asking a number of questions that were probative of the jurors as to race, involvement with law enforcement, and the death penalty. He engaged in jury selection, made a motion for a Batson hearing, and discussed parameters of opening statement with the judge. (App. 63-1230, 1318-1350).

Petitioner then gave a long opening statement. While it may not have been as focused as a traditional opening statement given by a lawyer, it was pertinent, logical, and relevant to the issues in the case. Petitioner argued prosecution's opening statement was not the truth, that some of the witnesses were going to be lying, that some witnesses were be intimidated by officers, that Kimberly Blake kept changing her story, that he was shot and fled but was not the shooter of the officers, that the officers were not following the law and proper procedure when they searched the house, that the jury should not overlook lies, discrepancies, and inconsistencies in making its decision, that the case was not about race because injustice could happen to any

citizen, and that he was being falsely characterized as some sort of "radical guy, some Jamaica guy, or some poor black, racist-type, militant type of guy," when that was not the case. Petitioner concluded by appropriately thanking the jury, and reminding them of their promise to be impartial and give him a fair trial. (App. 1385-1414). By no means could one characterize Petitioner's argument as the irrelevant ramblings of an incompetent man. In fact, the argument to the jury might be the best indication of Petitioner's competence, because it is a long unprompted exposition coming purely from Petitioner himself.

Without now recounting from this large transcript every witness and every time Petitioner did something "right" - - or even clever - - Petitioner then engaged in lengthy arguments and examinations of witnesses in an emotionally charged case. A reading of the guilt phase shows that while Petitioner may have occasionally had trouble with rules of evidence and the like, he had no trouble whatsoever during the guilt phase in maintaining proper demeanor in the courtroom and displaying proper respect for the court, opposing counsel, and the witnesses. Petitioner repeatedly expressed his appreciation and respect to the trial court throughout the entirety of the guilt phase process. See, e.g. (App. 1914; 1976-79; 1991; 3456). Thus, this was not a situation where a defendant requested to represent himself and misbehaved the whole time or repeatedly showed an inability to follow basic courtroom decorum.

The only serious issue developed after closing argument was completed in the guilt phase, while the jury was still in the deliberation. The court noted that while it had honored Petitioner's desire to represent himself, and even appointed stand-by counsel to help Petitioner, Petitioner apparently had said he did not intend to participate in

sentencing. Petitioner agreed that he did not intend to present anything in mitigation. The court highlighted the importance of a case in mitigation, but Petitioner remained firm, stating that it would make no difference to him. (App. 3448-50).

Petitioner stated he wanted to continue to represent himself, but that he would not be attending the sentencing. When the judge said that he would need to be present, Petitioner replied he "wouldn't be able to sit there and attend that proceeding," and then proclaimed that he "waive[d] all the rights to any objections to anything in the event that I'm found guilty." The judge engaged in another colloquy on Petitioner's right to give a statement to the jury, but Petitioner was adamant he did not want to present a sentencing case. (App. 3450-54).

The judge then held a meeting just with defendant and his stand-by attorneys. Petitioner stated that he did not want to participate in sentencing because:

> [I]t wouldn't have no bearing on me, because if I'm in prison for life, that's death to me. I can never accept that. You know, I don't find that [a life sentence] as a easy or something positive or good in my position. Death would be more preferable than life until I die in -- in prison.

Petitioner went on to say he did not want to be sentenced to death, but that life in prison was a form of death itself. Petitioner also told the court he did not want counsel appointed for sentencing, and this was a decision he had thought long and hard about. (App. 3454-58).

After the meeting, the court found Petitioner's decision to be voluntarily and knowingly made with regard to his sentencing phase rights. When the judge said Petitioner was going to remain present, though, Petitioner said he would probably be "unruly" and would have to be restrained. The court stated that Petitioner was not going to be unruly and that he would be restrained if need be, and lamented that

Petitioner had not caused any other problems to this point. The court pointed out that "you asked to represent yourself, and you'll need to follow that through." (App. 3460-63).

Petitioner continued to make guilt phase motions and otherwise represent himself even after a verdict the next morning. He again reaffirmed his intention not to offer anything in sentencing. (App. 3463-82). However, as the parties discussed logistics, Petitioner stated that he had no intention of sitting in the courtroom listening to the case, and while he would NOT be violent, he would be unruly. The court responded that it had honored Petitioner's request to represent himself, and that a capital case required the defendant's presence. (App. 3482-83).

Petitioner again reaffirmed his waiver of his sentencing phase rights, even reciting them himself - - but warned that he would make a statement whenever he wanted to if he was in the presence of the jury. According to Petitioner, he did not care for the jury to know anything about him, because he had already presented everything he wanted to present in the guilt phase. Petitioner declined the court's suggestion that he sit in the back room where he could observe the proceedings. (App. 3484-88).

As the conversation continued, Petitioner said that from the beginning he had instructed his stand-by attorneys and investigators that there would be no mitigation witnesses called. The court decided to break for lunch, but warned Petitioner that his presence may be required and the court would deal with any misconduct. (App. 3490-92).

Before the break, Petitioner's standby attorneys conferred with him and reported their conversations with the judge. According to them, Petitioner (1) did not want to be supplanted as attorney of record, (2) did not want to put up evidence but did not care if standby counsel objected to or examined witnesses during the state's case, (3) did not want to be present, but felt it was going to be up to the judge whether to put him in the back room. They then discussed the possibility of standby counsel representing Petitioner in a limited capacity during the sentencing phase. The court reviewed some cases, and standby counsel proposed that consistent with Petitioner's wishes they be limited in action to three things: to make objections, to give argument, and to stipulate. Petitioner expressly refused to comment. (App. 3494-3505).

After lunch, the court again took up the issue, phrasing it as attempting to balance Petitioner's right to represent himself with his right not to present evidence or testify. Petitioner then spoke up and again said he would be a disruption if forced to remain. The court told Petitioner it would deal with that if it arose. (App. 3512-14).

When the court asked Petitioner how he planned on being disruptive, Petitioner said "just verbally . . . [but] not any profanity or anything like that, or disrespectful." Petitioner said he did not want to see any of the witnesses, and again stated that he wanted to "waive any defense in reference to that proceeding," and wanted to "waive my right to not even be there if I have the right." He was "respectfully" ready to accept the jury's sentence when that time came. (App. 3516-18). Petitioner had no problem with standby counsel handling the witnesses and the objections, and freely and voluntarily waived his right to be present. (App. 3518-20).

The court then discussed with the lawyers whether they had to wait for Petitioner to be disruptive to exclude him, or whether they could just take him at his word that he would be. Standby counsel asserted that Petitioner could waive his right to be present. (App. 3521-23). The court stated that was the question at issue, but pointed out that Rule 16 of the rules of criminal procedure seemed to require a capital defendant's presence. (App. 3523-30).

Ultimately, the judge concluded that Rule 16 required Petitioner to be present. The court offered to allow Petitioner's father to sit at counsel table with Petitioner, but Petitioner declined. The court then directed that the trial proceed, and stated he was going to continue to honor Petitioner's desire to represent himself. (App. 3532-36).

The next morning, after a detailed colloquy Petitioner again stated he still wanted to continue to represent himself. Petitioner agreed that standby counsel could make objections and give a closing statement. (App. 3538-42).

After an opening charge by the judge, the State began its sentencing phase case. As soon as the solicitor asked his first question, Petitioner stood up and recited, "blessed be Yahweh, el Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." The court asked Petitioner to take a seat, which he did, and the solicitor tried to ask the question again. Petitioner stood up a second time and recited the same religious phrase. At this point the court ordered the jury to step out. (App. 3548-51; 3553).

Petitioners told the judge that he intended to continue interrupting the proceedings. The court noted that he had already warned Petitioner about misbehavior, but was going to warn him one last time, and that if he continued to

misbehave, he would be removed from the courtroom and placed in the back room. (App. 3551-53). When the jury returned, the trial court immediately gave a curative instruction. (App. 3555).

When the solicitor started questioning the witness again, Petitioner stood up and recited the same religious phrase. The court ordered jury out, and put on the record that since Petitioner repeatedly refused to behave, he would be put in the back room where there was a glass partition allowing him to see the proceedings and hear the testimony. The court noted that Petitioner had authorized his counsel to make objections and give closing statement. Petitioner requested that the sound be turned off in the back room, but the judge said he could not do that. Instead, Petitioner could cover his ears if he wanted. Again, Petitioner asked to be "exempted" from or to "waive" the proceeding, but the court denied it, stating the rules required his presence. (App. 3555-60). When the jury returned, the trial court gave another curative instruction. (App. 3566-67). The sentencing phase finally began.

After a couple of witnesses testified, the lunch recess was taken. The judge offered to let Petitioner back to counsel table, but Petitioner told the court he would rather remain in the back. Petitioner promised not to be disruptive again if his restraints were removed, and the court agreed. Petitioner said he could hear everything, but he would raise his hand if he could not. (App. 3596-97).

After a number of further witnesses, the court again invited Petitioner to return to counsel table. Petitioner again declined, saying he was "fine" in the back, that he could hear and see everything, and that he did not mind standby counsel operating on

his behalf in the limited fashion. (App. 3681). Witnesses continued for the rest of the day. (App. 3682-3735).

The next morning, the trial court asked Petitioner if he would make outbursts in placed in court, and Petitioner said he would. Petitioner said he preferred to stay in the back room, and again said that he had no problem with standby counsel representing him in the limited fashion consistent with his desire not to present a case in mitigation. (App. 3738-40).

Finally, at the close of the State's case, the court gave Petitioner one last chance to present a case in mitigation, testify or give a closing statement. Petitioner declined to present a case or testify, but agreed his counsel could argue in closing. (App. 3760-63). Upon inquiry, Petitioner again stated he would not return to the front of the courtroom without making outbursts. (App. 3765).

During the State's closing argument, Petitioner apparently decided to participate again, by twice making objections through his counsel. Despite these actions, Petitioner again declined to return to counsel table, stating that he preferred to remain in the back. (App. 3789-90; 3795-97). Petitioner ultimately decided to return to the courtroom. He gave a fairly lengthy closing statement to the jury in which he personally apologized to the victim's families. Like his other arguments, the closing argument Petitioner gave was logical, appropriate, and relevant to the issues. After finishing his argument, Petitioner returned to counsel table for the rest of the case. (App. 3829-40).

Petitioner remained calm and coherent after the sentencing phase verdict, renewed his motions, apologized to the family, and thanked the trial judge. (App. 3871-73).

2. Argument

Petitioner is not entitled to habeas relief upon this claim. He has not made the requisite showing that the trial court's handling of Petitioner's competency constituted "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. Contrary to Petitioner's assertions, Petitioner's conduct at trial did not warrant a sua sponte examination of Petitioner's competency.

The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally incompetent defendants. See Pate v. Robinson, 383 U.S. 375, 384-86, 86 S.Ct. 836 (1966). The test for mental competence is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. McLaughlin v. State, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003). At the time of Petitioner's trial, the level of competence required to waive counsel was the same as the level of competence to stand trial, as long as the waiver was knowing and voluntary. Sims v. State, 313 S.C. 420, 438 S.E.2d 253 (1993) (discussing and quoting Godinez v. Moran, 509 U.S. 389 (1993)).

> A petitioner may make a procedural competency claim by alleging that the trial court failed to hold a competency hearing after the defendant's

> mental competency was put in issue. To prevail, the petitioner must establish that the state trial court ignored facts raising a "bona fide doubt" regarding the petitioner's competency to stand trial. Pate, 383 U.S. at 384-86, 86 S.Ct. 836; see also Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir.1995). Even if a petitioner is mentally competent at the beginning of the trial, the trial court must continually be alert for changes which would suggest that he is no longer competent. See Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Although there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant." Id.

Burket v. Angelone, 208 F.3d 172, 191-92 (4th Cir. 2000).

"[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope, 420 U.S. at 172, 95 S. Ct. at 904 (citing Pate, 383 U.S. 375, 86 S.Ct. 836 (1966)). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope, 420 U.S. at 181, 95 S. Ct. at 908.

First, the trial court held a thorough Blair hearing in which he was found competent to stand trial and represent himself. Thus, Petitioner can only prevail on this claim if there was evidence to support his assertion that his demeanor at trial warranted a second competency hearing. In this case, the trial court had no basis upon which to find Petitioner was no longer competent to either stand trial or represent himself at trial. As noted above and as found by the PCR Court, Petitioner reasonably represented himself during the course of his trial. "A sane demeanor may alone obviate the need for the court to inquire into a defendant's competence. Drope, supra, 420 U.S. at 179, 95 S.Ct. 896.... And the court need not inquire if no other

circumstances signal a need for a competency examination." Jermyn v. Horn, 266 F.3d 257, 289 (3d Cir. 2001). Further, "bad trial tactics do not prove a defendant incompetent. A defendant has the right to conduct his own defense to his detriment." Wise v. Bowersox, 136 F.3d 1197, 1204 (8th Cir. 1998) (finding a second competency hearing was not required even though petitioner alleged he made "foolish decisions" during his trial)(citing Faretta, 422 U.S. at 834, 95 S.Ct. at 2540-41).

The trial court was previously made aware that Petitioner would attempt to argue that his arrest was the result of a conspiracy. Whether Petitioner's conspiracy theories indicated he was competent was very much at issue during the Blair hearing. Both Dr. Frierson and Dr. Musick indicated the beliefs did not support a finding of a serious mental illness in Petitioner's case because his thinking was not delusional; it was instead an ideology/cultural belief that was shared by a number of people regarding the Masons. (App. 4034-37, 4051-52). Further, Frierson noted he did not find sufficient evidence of a major depressive episode or a manic episode. (App. 4038). Thus, the fact that Petitioner alluded to a conspiracy theory during his examination of witnesses did not constitute new information that would given the trial court reason to believe Petitioner's competency was an issue.

Petitioner's decision against having the trial court consider whether the lesser included offense of voluntary manslaughter was also not evidence of incompetency. Petitioner clearly enunciated that he did not want to have a lesser included offense charged because he did not commit the act. (App. 3272-74). This was consistent with Petitioner's assertion that self-defense was not an issue in his case, because he contended there was no act by him. (See App. 3276).

Finally, Petitioner's actions at the beginning of the sentencing phase did not constitute evidence of incompetence. From the discussion regarding the sentencing phase that was conducted while the jury was deliberating, it is clear in the record that Petitioner did not want to be a part of the sentencing phase of trial. That was in part to Petitioner's assertion that he was ambivalent towards his sentence.

> My position - - position is - - is that I can't differentiate between life and death if it cames (sic) to a guilty verdict. And it wouldn't have no bearing on me, because if I'm in prison for life, that's death to me. I can never accept that. You know, I don't find that as a easy or something positive or good in my position. Death would be more preferable than life until I die - - in prison. . .

(App. 3455). After the jury's verdict, Petitioner again insisted the sentencing verdict was of no concern to him. (App. 3487). Petitioner was adamant that he did not want to participate in the sentencing phase. He consistently informed the court that he would be disruptive is forced to stay in the courtroom, but he would not act violently. (App. 3483, 3514, 3516-17, 3521-22). And, as was noted by Mr. Thornton, standby counsel,

> He handled himself, as far as - - his demeanor in the courtroom was fine. He treated the judge with respect; he treated opposing counsel with respect; he did not make any outbursts. Regardless of what my opinion is on how well he did as a layman, you know, in a death penalty case, the fact of the matter is he comported as he was supposed to during the trial, and even at the end when he decided he did not wish to be present during the sentencing, he did not make any large disturbance in the courtroom.

(App. 4892-93). In all, there is insufficient evidence in the record to support a finding the trial court should have conducted a second competency hearing in Petitioner's case. The trial judge, who observed Petitioner throughout the pretrial and trial proceedings, had the most occasion to discern whether Petitioner's competency was

waning. At no point during the course of the trial on the record does the court indicate Petitioner's competency was in question. Since there was not sufficient evidence to warrant a second competency hearing, Petitioner is not entitled to relief upon this claim. It should therefore be denied and dismissed.

B. Petitioner has not shown that he was incompetent-in-fact during the course of his trial.

Petitioner asserts that he was incompetent in fact during the entire course of his trial. In support of this second claim in Ground One, Petitioner attached a letter from Dr. Rikki Lynn Halavonich, who claims Petitioner has symptoms consistent with Temporal Lobe Epilepsy. Further, Dr. Halavonich wrote

> [H]owever, his competence was not reassessed at any point during the progression of his trial. His testimony at the end of the guilt phase was rambling and disjointed. His summation revealed a heightened level of paranoia and further development of the conspiracy theories he held. He was unable to give a rational reason for refusing to be present at the penalty phase of his trial. Although determined to be competent prior to the initiation of the trial, [Petitioner's] documented behaviors, particularly just prior to and during the penalty phase of the trial, indicate his mental status had then declined to an extent consistent with a lack of capacity to rationally understand the proceedings or, participate in his defense at that point in time.

(Attachment A to Petition, at pg. 4).

First, Respondent submits this letter, and the affidavit that was attached to a prior Motion to Remand for Additional PCR Proceedings cannot be relied upon in finding Petitioner was mentally incompetent at trial. See generally Drope, 420 U.S. at 181, n. 17, 95 S. Ct. at 908, n. 17; Pate v. Robinson, 383 U.S. 375, 387, 86 S. Ct. 836, 843, 15 L. Ed. 2d 815 (1966) (noting Supreme Court has emphasized the difficulty of retrospectively determining an accused's competence to stand trial.). "Retrospective determinations of whether a defendant is competent to stand trial or to plead guilty are

strongly disfavored." Weisberg v. State of Minnesota, 29 F.3d 1271, 1278 (8th Cir.1994), cert. denied, 513 U.S. 1126, 115 S.Ct. 935 (1995).

Second, Dr. Halavonich's opinion is based upon her belief that there was some agreement that Petitioner suffered from a serious mental illness. That was not the case. At the Blair hearing, Dr. Frierson testified that Petitioner suffered from "a personality disorder with narcissistic and antisocial traits." (App. 4031). He further testified that was not considered a major mental illness. (App. 4031). Dr. Musick's testimony at the hearing also did not support a finding that Petitioner was suffering from a serious mental illness. (See App. 4035-60). The only testimony at the hearing that indicated Petitioner suffered from a serious mental illness was that of Dr. Schwartz-Watts. She found Petitioner suffered from bipolar disorder. (App. 3983). However, she also noted that she could not state what Petitioner's mental state was at the hearing because he refused to talk with her. (App. 3990). Halavonich does not make a diagnosis that Petitioner suffers from or previously suffered from a serious mental illness. In fact, Halavonich does not even diagnose Petitioner with any illness. Instead, she only finds that he has symptoms consistent with TLE, which she asserts can be confirmed with further testing. Furthermore, Halavonich indicates in both the letter and her affidavit that she did not review Petitioner's trial transcript in its entirety. In light of the discrepancies between the findings made by those who examined Petitioner before trial, Halavonich's lack of a diagnosis of a serious mental illness, and the fact that post-conviction determinations of one's competence to stand trial are generally disfavored, Petitioner has failed to establish "a denial of fundamental

fairness shocking to the universal sense of justice." Green, supra. As a result, this claim in Ground One should be denied and dismissed with prejudice.

C. The trial judge did not fail to secure a knowing and intelligent waiver of Petitioner's right to present mitigating evidence.

1. What occurred at trial.

After the end of the guilt phase, Petitioner moved to withdraw his motion for a 24 hour delay. During the discussion after this motion, the trial court asked Petitioner if he was prepared to present a mitigation case. (App. 3481). Petitioner informed the court that he was not presenting a mitigation case. (App. 3481-82). He further indicated that he did not intend to present any evidence during the sentencing phase. (App. 3482). The trial court then engaged in a colloquy with Petitioner regarding his decision not to present evidence during the sentencing phase. (App. 3482-). Petitioner was informed the sentencing phase was an opportunity for Petitioner to provide the jury with information about him. (App. 3486). Petitioner responded by stating he did not want the jury to know anything about him. (App. 3486-87). He further indicated he was not concerned with their verdict on sentencing, and he had presented the jury with all of the information that he wanted to present to them. (App. 3487).

Standby counsel indicated they had not had an opportunity to discuss mitigating circumstances with Petitioner. (App. 3489). Later, Petitioner informed the court that he told his investigators that "there will be no mitigating witnesses for me in reference to anything if it came down to this point." (App. 3491). Petitioner further requested that be excluded from the sentencing phase. (App. 3492). After a conversation with Petitioner, standby counsel informed the court that Petitioner indicated to them he did

not intend to cooperate with standby counsel, bring any witnesses on his behalf, and Petitioner reaffirmed his decision to stop all mitigation preparation as of the date he was appointed to represent himself. (App. 3495). Counsel did affirm that Petitioner was advised of the purpose of the sentencing phase of trial and the importance of presenting mitigating evidence. (App. 3497-98). Mr. Kelly also indicated that he informed Petitioner that he would present witnesses for mitigation if he were appointed as attorney of record, and Petitioner wanted to remain counsel of record to prevent those witnesses from testifying. (App. 3498-99).

After the State rested its case in the sentencing phase, the trial court had another colloquy with Petitioner. During that colloquy, Petitioner acknowledged the court had explained to him that he has the opportunity to present his case and/or witnesses if he wanted to do so. (App. 3760-61). Petitioner also acknowledged that he understood his right to testify. Further, Petitioner indicated he understood that the presentation of mitigation evidence could be crucial to the jury's consideration of his sentencing. (App. 3761). The court and Petitioner further discussed whether Petitioner was going to make a closing statement. (App. 3761-62). At the end, the court asked Petitioner again if it was his strategy not to present any mitigating evidence or witnesses. Petitioner confirmed that was correct. Petitioner also confirmed that he had sufficient time to consider the issue, and despite the court's advice to the contrary, Petitioner did not want to present mitigation evidence. (App. 3762-63).

2. Discussion

Petitioner is not entitled to habeas relief upon this claim; he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. First, as acknowledged by Petitioner in the habeas petition, there is currently no requirement that a court conduct a hearing to determine whether a defendant is knowingly and intelligently waiving his right to present mitigation evidence. Schriro v. Landrigan, 550 U.S. 465, 479, 127 S. Ct. 1933, 1942, 167 L. Ed. 2d 836 (2007) ("We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence.")(generally citing to Iowa v. Tovar, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) (explaining that waiver of the right to counsel must be knowing and intelligent)). In Landrigan, the Supreme Court found the Arizona state court's findings were reasonable when the state court found trial counsel was not ineffective in not presenting mitigation evidence because the defendant waived his right to present the evidence at trial. Id. at 478-81, 127 S. Ct. 1933, 1942-44.

The "knowing, intelligent and voluntary" standard for a waiver, which is traceable to Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), applies to a defined and limited class of issues that, because of their stature as "fundamental" decisions, are waivable only by the defendant. See United States v. Teague, 953 F.2d 1525, 1531 (11th Cir.) (en banc), cert. denied, 506 U.S. 842, 113 S.Ct. 127, 121 L.Ed.2d 82 (1992). In Teague, the Eleventh Circuit noted the dichotomy between "fundamental" rights, such as the right to plead guilty, see Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the right to a jury trial, see Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942), the right to pursue an appeal, see Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9

L.Ed.2d 837 (1963), and other trial rights that "primarily involve trial strategy and tactics," including the decision as to "what evidence should be introduced." Teague, 953 F.2d at 1531. Having thus established this dichotomy, the Eleventh Circuit stated that fundamental rights are waivable only by the defendant because of the personal nature and importance of the right. Id. In contrast, however, the court expressly found that nonfundamental trial rights, including evidentiary matters, "are waivable by defense counsel on the defendant's behalf." Id.

In all, since there is no requirement under either federal law or South Carolina law that required the trial court to determine if Petitioner's waiver of the presentation of mitigation evidence was knowingly and intelligently made, this claim for habeas relief should be denied and dismissed.

Furthermore, Petitioner does not establish that his waiver of the presentation of mitigation evidence was not knowingly and intelligently made. As already noted, standby counsel discussed the matter with Petitioner. The trial court discussed the matter with Petitioner several times. Petitioner indicated on the record that he understood the purpose of presenting mitigation evidence, and he still declined to present such evidence. (App. 3449-60, 3740, 3760-63). Respondent submits that even if a knowing and intelligent waiver is required, the waiver made by Petitioner in this case was sufficient to establish his waiver was knowing and intelligent. The record clearly reflects Petitioner had an understanding of both what constitutes mitigation evidence and why mitigation evidence is important. Petitioner actively chose not to investigate and present a mitigation case during the sentencing phase. In all, Petitioner has not shown there was "a denial of fundamental fairness shocking to

the universal sense of justice." Green, supra. As a result, this claim for habeas relief should be denied and dismissed.

D. The trial judge failed to terminate Petitioner's pro se status.

Petitioner is not entitled to habeas relief upon this claim; he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. First, Petitioner's contention that the trial court both removed Petitioner from the courtroom and restricted standby counsel's ability to proceed is not supported by the record. While Petitioner was removed from the defense table, he remained in the courtroom in a back room from where he was able to both observe and hear the proceedings. (See App. 3552). Furthermore, it was Petitioner, and not the court, who placed the restrictions on what standby counsel could present. Petitioner consistently maintained that he did not want a mitigation case presented at trial. Standby counsel informed both Petitioner and the trial court that if they were made counsel of record, they would not abide by Petitioner's request not to present a mitigation case. (App. 3525-29). Thus, the only way Petitioner could maintain control over the presentation of his defense case in the sentencing phase was to maintain his status as counsel of record.

Second, a defendant who is not willing to abide by courtroom protocol does not automatically forfeit his right to self-representation. See Davis v. Grant, 532 F.3d 132, 149 (2d Cir. 2008) (finding state court's failure to instruct standby counsel to represent defendant when he was removed from courtroom was not an objectively unreasonable application of Supreme Court precedent); see Clark v. Perez, 510 F.3d 382, 395-96 (2d Cir. 2008) (finding no violation of Sixth Amendment rights when court did not

revoke pro se status of defendant who removed herself from courtroom through conduct). Altogether, it is within the trial court's discretion whether to revoke a defendant's pro se status based upon disruptive conduct. Here, the trial court did not abuse its discretion in not relieving Petitioner of his pro se status. Petitioner indicated he did not want to be relieved as counsel of record, and he did not want to present a case during the sentencing phase. Standby counsel indicated to the court that they would present a case, contrary to Petitioner's wishes, if made counsel of record. In balancing Petitioner's clear statement of his strategy for the sentencing phase, the fact his strategy would not be followed if he was relieved, and the fact the court had the alternative of having Petitioner remain in the courtroom and still maintain control of his case, the trial court clearly reasoned the best alternative would be to not terminate Petitioner's pro se status. This was not an abuse of discretion. Thus, Petitioner has not shown there was "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. As a result, this claim for habeas relief should be denied and dismissed.

Ground Two: Petitioner's death sentence does not violate the Fifth, Eighth, and Fourteenth Amendments; there is no credible evidence he was visibly shackled without justification and without an individualized determination by the trial judge.

During the discussions regarding the sentencing phase held during jury deliberations in the guilt phase, and again at the beginning of the sentencing phase, Petitioner warned the trial court that he planned on being disruptive if he was required to stay in the courtroom for the sentencing proceedings. (App. 3461-63, 3483). Petitioner followed through with his threat during the testimony of the first witness presented by the State during the sentencing phase. As the first witness started

testifying, Petitioner stood up and began to state "Blessed by Yahweh . . . El Shaddai . . . Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, and Jacob, and Jesus." (App. 3550-51). Petitioner was removed from the courtroom at that time. Outside the presence of the jury, the court asked Petitioner if he recalled the instructions that were given to him if he were to become unruly or disruptive. Petitioner indicated that he recalled those instructions. Petitioner further indicated that he intended to continue disrupting the proceedings because he did not wish to engage in them. (App. 3552). The trial court gave Petitioner one last warning, and further informed Petitioner that if he did it again, "I'm going to put you in the back room where you can hear the testimony and the proceedings as you wish. The glass panel will allow you to watch the proceedings completely." (App. 3552). Petitioner informed the court that he would be noisy back there as well. (App. 3552). The trial court told Petitioner that Petitioner would be shackled or gagged if necessary to keep Petitioner from disrupting the proceedings. (App. 3553).

After the jury returned to the courtroom, and the witness resumed testifying, Petitioner again stood up and started chanting "Blessed by Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." (App. 3556). The jury was sent out of the courtroom. (App. 3556). The trial court ordered Petitioner be placed in a room at the back of the courtroom that had a glass partition so Petitioner could see the proceedings. (App. 3556). The court also again warned Petitioner that if he had another outburst, he would be gagged. (App. 3557). While setting up the back room for Petitioner's seating, the trial court indicated it wanted Petitioner restrained. (App. 3561). The court further authorized Petitioner's

hands not be restrained. (App. 3562-63). However, Petitioner was warned that if he became disruptive again, his hands would be restrained. (App. 3563).

After the lunch recess, the trial court had a discussion with Petitioner regarding whether he would be disruptive if brought back into the main portion of the courtroom. (App. 3596). Petitioner indicated he would rather stay in the back room, and requested that he no longer be restrained. Petitioner informed the trial court that he would not be disruptive if the restraints were removed. (App. 3596). The trial court acquiesced and ordered that Petitioner's restraints be removed once he re-entered the back room. (App. 3597). There is no indication in the record that Petitioner further attempted to disrupt the court proceedings. Petitioner was asked if he wished to be seated in the main area of the courtroom multiple times, and he declined each time. (App. 3596-97, 3681, 3738).

A. Discussion

> [C]ourts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.

Deck v. Missouri, 544 U.S. 622, 633, 125 S. Ct. 2007, 2014-15 (2005).

"[W]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'"

Deck, 544 U.S. at 635, 125 S. Ct. at 2015-16 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

B. This claim is procedurally defaulted

Petitioner is not entitled to habeas relief upon this claim; he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. First, this claim is procedurally defaulted. A freestanding due process claim based upon improper shackling is a direct appeal claim. See generally Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975)(noting claims that could be raised at trial and on direct appeal cannot be raised post-conviction). Further, Petitioner could have raised this claim in his direct appeal if it was properly preserved for review. The United States Supreme Court's opinion in Deck was filed on May 23, 2005, while Petitioner's direct appeal was pending, and well before his Final Brief of Appellant was filed. That being said, Petitioner did not properly preserve this claim for direct review. At no point in time during the discussions regarding Petitioner being shackled did Petitioner object. The only complaint raised to his shackling was to Petitioner's hands being shackled. (App. 3562). After that issue was raised to the trial court, the court authorized Petitioner's hands not be shackled. (App. 3563). Since this issue was not preserved for appellate review, it could not be raised in Petitioner's direct appeal. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct.App.2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

Since Petitioner was acting pro se, and at trial he did not raise the argument now raised in this habeas action against shackling, he could not raise this claim in PCR as an ineffective assistance of counsel claim. See Faretta, 422 U.S. at 834 n.46; see, e.g., Gall v. Parker, 231 F.3d 265, 320 (6th Cir. 2000) (*pro se* defendant cannot complain about quality of defense by arguing ineffective assistance of counsel); Peoples v. U.S., 403 F.3d 844, 849 (7th Cir. 2005) (*pro se* defendant was not permitted to argue that self-representation on direct appeal deficient because he had fired his lawyers and exercised right to self-representation); U.S. v. Flewitt, 874 F.2d 669, 675 (9th Cir. 1989) (*pro se* defendant who refused standby counsel and failed to utilize discovery procedures may not claim own ineptitude as grounds for reversal).

Since this claim was available to Petitioner, but he did not properly preserve the issue for appeal and could not raise it in PCR, this claim should be denied and dismissed. . Wheeler v. State, 247 S.C. 393, 402, 147 S.E.2d 627, 631 (1966). Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965). Accord Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998)(noting in Tyler, "this Court stated that habeas corpus cannot be used as a substitute for appeal or other remedial procedure for the correction of errors for which a criminal defendant had an opportunity to avail himself.").

C. This claim is without merit

Petitioner is not entitled to relief upon this claim because it is without merit. First, contrary to Petitioner's assertions, the record clearly reflects that Petitioner was only shackled for a limited period of time during the sentencing phase. As already noted, Petitioner was first shackled when he was sent to the room at the back of the

courtroom. (App. 3561). His hands were not shackled after he complained. (App. 3562-63). This occurred shortly before 12:20 p.m. (See App. 3565). The trial court ordered the restraints be removed during the lunch recess. (App. 3597). This occurred shortly before 2:14 p.m. on the same day, and was after the testimony of four short witnesses. Also, there is no indication in the record that Petitioner's restraints were visible to the jury.

Second, the trial court did place a sufficient explanation on the record to support the shackling of Petitioner for a short period of time. Petitioner had continuously indicated that he would be disruptive if he was required to remain in the main portion of the courtroom. Petitioner also indicated that he would be similarly disruptive of the court proceedings if he was forced to observe the proceedings from the back room in the courtroom. The trial court warned Petitioner that if he planned to continually disrupt the proceedings, he would be shackled or gagged. (App. 3553). After Petitioner resumed disrupting the proceedings after his final warning, he was placed in shackles in the back room. In doing so, the trial court did state as follows:

> Let the record reflect that the defendant once again has disrupted these proceedings with his outburst contrary to the court's previous warnings. The court said it would not give him further warning.
>
> The court will place him in a room at the back of the courtroom that has a glass partition to allow him to hear all of the proceedings. He can also see the proceedings as he desires. There's a system that fees into the room that allows him to hear all of the testimony.
>
> Previously the defendant indicated he did not wish to be here. He has authorized stand-by counsel to interject objections, handles the exhibits, and make the closing statement if necessary.
>
> Because he continues to maintain that he will constantly interrupt these proceedings, the court has taken this action.

> The court has also warned the defendant that if necessary he will be gagged.
>
> We will put him back in the room and see if he - - if he has another outburst. Then at that point we will take the step of actually gagging him, which I hope we do not have to do.

(App. 3556-57). In light of the statements made by Petitioner and the disruptions that occurred prior to the court's restraining Petitioner, Respondent submits the trial court made a specific, individualized finding that warranted the action taken. Thus, the shackling of Petitioner did not violate due process.

Finally, the record reflects that the brief shackling of Petitioner did not contribute to the verdict obtained. The jury found two aggravating circumstances for each of the two murders. Each victim was a law enforcement officer killed because of the performance of his official duties. Also, two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. (App. 3861-62). Those determinations were clearly supported by the record. Further, Petitioner presented no mitigation case. The fact that Petitioner was shackled for a short period of time was not to the finding of any aggravating circumstance or mitigating circumstance. In all, Petitioner is not entitled to habeas relief upon this claim; he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra.

Ground Three: Petitioner was not deprived of his Sixth and Fourteenth Amendment Rights to Effective Assistance of Counsel during the Sentencing Phase of His Trial.

As already noted, the trial court had discussions concerning whether standby counsel should supplant Petitioner as counsel of record for the sentencing phase. Petitioner maintained that he wanted to remain counsel of record; he did not want to

participate in the sentencing phase; and he planned to present no mitigation case. During the discussions, Petitioner agreed to authorize standby counsel to make objections, motions, and closing argument in the sentencing phase. However, he maintained his status as counsel of record.

A. Discussion.

Petitioner's claims of ineffective assistance of standby counsel are without merit. A defendant may waive his constitutional right to counsel and choose to represent himself during criminal proceedings, if such waiver is effected willingly and intelligently. See Faretta v. California, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Upon such an election, standby counsel may be appointed to assist the *pro se* defendant. However, there is "no constitutional right to hybrid representation where the defendant shared the duties of conducting [his] defense with a lawyer." United States v. Morrison, 153 F.3d 34, 55 (2d Cir.1998) (internal citations, quotation marks and modification omitted); United States v. Schmidt, 105 F.3d 82, 90 (2d Cir.1997) (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984)); State v. Stuckey, 333 S.C. 56, 57-8, 508 S.E.2d 564 (1998). Accordingly, "without a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel" unless "that title [was held] in name only and, in fact, [standby counsel] acted as the defendant's lawyer throughout the proceedings." Morrison, 153 F.3d at 55; (internal citations and quotation marks omitted). Without a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective. United States v. Cochrane, 985 F.2d 1027, 1029 n. 1 (9th Cir.1993) (rejecting ineffective assistance of standby counsel argument in this context

without foreclosing argument in future); United States v. Windsor, 981 F.2d 943, 947 (7th Cir.1992) ("court knows of no constitutional right to effective assistance of standby counsel"); Morrison, supra ("without a constitutional right to standby counsel, a defendant is not entitled to relief for ineffectiveness of standby counsel") (citing Schmidt, supra).

Here, Petitioner was never relieved from his *pro se* status. As a result, Petitioner's claim in Ground Three should be dismissed because Petitioner is not entitled to effective assistance of standby counsel. Thus, he has not shown "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra.

Ground Four: The Prosecution Exercised Its Peremptory Challenges in a Racially Discriminatory Manner in Violation of Petitioner's Rights Guaranteed by the Sixth and Fourteenth Amendments.

After jury selection, Petitioner requested a Batson hearing. (App. 1339-40). At the hearing, Petitioner objected to the strikes used by the State against four jurors. First, Petitioner challenged the strike of Juror Edith Owens. The State argued she was dismissed because "in observing her during the *voir dire*, I had the impression that she was afraid of the defendant." The solicitor also noted that she was weak on the death penalty and she stated during *voir dire* that she knew nothing about the case. (App. 1340). The trial court found that to be a facially neutral reason. Petitioner contended that Kristen Lindsay was a similarly situated juror, specifically asserting "I wouldn't want to use the characteristic - - afraid of the prosecution, but in similarity as far as she would not be - - would feel intimidated by the prosecution - - authority of the prosecution." (App. 1341). The trial court found the Juror Lindsay was not similarly situated, and denied the Batson motion as to Juror Owens.

Second, Petitioner challenged the strike of Juror Matthew Young. (App. 1342). The solicitor stated he struck Juror Young because he indicated that he knew a defense witness named Jabari. (App. 1342). The solicitor also noted that Young indicated he heard about the incident on the street, and Young was weak on the death penalty. (App. 1342). The trial court found the reasons to be facially neutral. Petitioner initially indicated that Juror Jeannine Savage was similarly situated. (App. 1345-46). He then withdrew her name because she knew a law enforcement official at the time. Instead, Petitioner asserted Colene Murray was similarly situated. In further support of his argument that the strike was pretextual, Petitioner argued that Murray indicated she knew Mr. Stone, the solicitor. In response, the trial court noted that the solicitor was not a defense witness, and again asked Petitioner for something to indicate the strike was pretextual. Petitioner continued to argue Ms. Murray was similarly situated. The trial court denied the Batson motion as to Juror Young.

Third, Petitioner challenged the striking of Juror Antwoine Crosson. The solicitor stated that Crosson was from the solicitor's hometown; the solicitor knew Crosson's brother; the solicitor's wife taught at Crosson's high school for over twenty years; and the solicitor had prosecuted Crosson's brother for criminal sexual conduct. (App. 1349-50). The trial court found that to be a facially neutral reason for striking Crosson. Petitioner did not contend any other juror had a family member that had been prosecuted by the solicitor. As a result, the trial court denied the Batson motion to Juror Crosson. (App. 1351).

Fourth, Petitioner challenged the striking of Juror Kerrie Brown. (App. 1351). The solicitor stated Brown was struck because she had a pending criminal domestic

violence charge, and Petitioner's case started from a criminal domestic violence incident. (App. 1351). The trial court found that was a facially neutral reason. (App. 1351, 1352). Petitioner did not assert that any member of the jury was similarly situated to Juror Brown. (App. 1352). Thus, the trial court denied the Batson motion as to Juror Brown. (App. 1352-53).

A. This issue is not proper for habeas review because it could have been raised at trial and in Petitioner's direct appeal.

Habeas corpus is not a substitute for appeal. Wheeler v. State, 247 S.C. 393, 402, 147 S.E.2d 627, 631 (1966). Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965). Accord Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998)(noting in Tyler, "this Court stated that habeas corpus cannot be used as a substitute for appeal or other remedial procedure for the correction of errors for which a criminal defendant had an opportunity to avail himself.").

The PCR Court denied relief upon this claim because it was a freestanding claim that was improper for post-conviction relief. (App. 5216). Respondent submits the same is true for this claim now. Petitioner could have properly raised this claim at trial, and challenged the trial court's ruling in his direct appeal. He did not. As a result, this claim should be denied and dismissed.

B. The issue as raised in the habeas petition is not preserved for review.

Even if this Court finds Petitioner's allegation in Ground Four is appropriate for habeas review, Petitioner is not entitled to relief because the argument raised is not preserved for review. As already noted, Petitioner had the opportunity at trial to identify jurors who were similarly situated to the ones struck by the solicitor during jury selection. While Petitioner did raise a Batson question as to the four jurors now

challenged, Petitioner did not raise the arguments now presented in his habeas petition as part of his argument at trial. Since these arguments were not preserved for appellate review, they should be denied and dismissed. See generally State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal).

Ground Five: Petitioner Was Not Deprived of His Sixth and Fourteenth Amendment Rights to a Fair Trial Before Twelve Fair and Impartial Jurors

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); see also S.C. Const. art I, §§ 3 & 14. To safeguard these rights, "it is required that the jury render its verdict free from outside influences of whatever kind and nature." State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App.1993). In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict. State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999); State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998).

> The trial court has broad discretion in assessing allegations of juror misconduct. Relevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the

> prejudice. Generally, the determination of whether extraneous material received by a juror during the course of the trial is prejudicial is a matter for determination by the trial court. 23A C.J.S. Criminal Law § 1365 (1989).

Kelly, 331 S.C. at 141-42, 502 S.E.2d at 104.

The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence. State v. Smith, 338 S.C. 66, 525 S.E.2d 263 (Ct.App.1999). Where a defendant seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice. State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct.App.2004); see also State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) (a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial).

Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case. Smith, 338 S.C. at 71, 525 S.E.2d at 266. In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Kelly, 331 S.C. at 141, 502 S.E.2d at 104; see also State v. Salters, 273 S.C. 501, 257 S.E.2d 502 (1979) (finding a defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury and, in order to fully safeguard this basic protection, it is required that the jury render its verdict free from outside influences).

Initially, the trial judge must make a factual determination as to whether juror misconduct has occurred. See Smith, 338 S.C. at 71, 525 S.E.2d at 266; see also Aldret, 333 S.C. at 315, 509 S.E.2d at 815 (holding where affidavits supporting juror misconduct are credible, the trial court must conduct an evidentiary hearing to

determine if misconduct occurred). "Only if the trial court finds a juror is guilty of misconduct must the judge determine whether the misconduct affected the verdict, warranting a new trial." Covington, 343 S.C. at 164, 539 S.E.2d at 70.

As a general rule, juror testimony is inadmissible to impeach a jury verdict. Under Rule 606(b), SCRE, juror testimony regarding external prejudicial information or improper outside influence is allowed. Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Thus, juror testimony or affidavits are admissible to prove an allegation of extraneous information or influence. See State v. Franklin, 341 S.C. 555, 534 S.E.2d 716 (Ct.App.2000); see also Aldret, 333 S.C. at 310, 509 S.E.2d at 812 (juror testimony or affidavits are generally admissible in the case of an extraneous influence); Hunter, 320 S.C. at 88, 463 S.E.2d at 316 (juror testimony may normally be used when an extraneous influence is alleged). External influence on a jury involves situations where jurors receive information during deliberations from some outside source. Galbreath, 359 S.C. at 405, 597 S.E.2d at 848.

A. Discussion

First, Petitioner's assertion that the jury was exposed to external sources of information as a result of jurors possibly reading the Bible and/or specific Bible

passages is without merit. In Robinson v. Polk, the Fourth Circuit Court of Appeals noted

> the reading of Bible passages invites the listener to examine his or her own conscience from within. In this way, the Bible is not an "external" influence. In addition, reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence.

Polk, 438 F.3d 350, 363-64 (4th Cir.2006). (See also Fields v. Brown, 431 F.3d 1186, 1209 (9th Cir. 2005) on reh'g en banc, 503 F.3d 755 (9th Cir. 2007)(finding juror having notes with Bible passages had no substantial and injurious effect or influence in determining the jury's verdict). Thus, Respondent submits that Petitioner's claim that jurors improperly considered Bible passages is without merit and should be dismissed.

To the extent Petitioner asserts that one juror was improperly influenced by external sources because of a statement the juror may have sought guidance from a minister on how to make a decision during the sentencing phase, this claim is without merit. In addition to not identifying the juror who allegedly made the statement, the affidavit does not indicate if the juror actually received any advice from her minister, and/or what that guidance was. Since it is not established the juror received any advice, Petitioner has not shown there was any improper external influence, or that he was prejudiced as a result. Thus, this claim should be denied and dismissed.

To the extent Petitioner asserts the jury was improperly influenced by alleged statements regarding a bomb threat, Respondent submits the affidavit provided by the investigating law student does not support Petitioner's request for relief. First, the affidavit does not identify which jurors claimed they were told of a bomb threat. More importantly, there is no indication in the affidavit as to who informed the juror(s) about

an alleged bomb threat. The affidavit does not indicate that the alleged threat influenced the jury's deliberations. In all, Petitioner has not shown there was "a denial of fundamental fairness shocking to the universal sense of justice." Green, supra. As a result, Ground Five should be denied and dismissed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny this habeas petition. Respondent further requests any other relief this Court deems appropriate.

Respectfully submitted,

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March 21, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

TYREE ROBERTS AKA,
ABDIYYAH BEN ALKEBULANYAHH, #6012,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I, Alphonso Simon Jr., certify that I have served the *Return to Petition for Writ of Habeas Corpus* on Petitioner by depositing two (2) copies of same in the United States mail, postage prepaid, addressed to his attorneys of record:

John H. Blume, III
Blume, Weyble, & Norris, LLC
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This 21st day of March, 2011.

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EXHIBIT

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4291

Supreme Court, U.S.
FILED

10-63 JUL 9 - 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

RICHARD F. ALLEN,
COMMISSIONER, ALABAMA DEPARTMENT
OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

In this capital case, the divided Eleventh Circuit held that Alabama may execute a state inmate without any federal court review of the merits of serious constitutional claims because of a missed filing deadline that indisputably occurred through no fault of petitioner and after the State failed to take any action when court orders mailed to petitioner's lead attorneys of record were returned to a court clerk unopened with "Return to Sender—Left Firm" written on an envelope. The questions presented are as follows:

1. Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other circuits—that the purported state procedural default rule is "adequate" as a matter of federal law to bar federal habeas review of serious constitutional claims, where the court of appeals disregarded state case law allowing untimely appeals in analogous circumstances, reconstructed state law based on distinctions not drawn by the state courts themselves, and relied on cases decided after the asserted default.

2. Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other courts—that there was no "cause" to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.

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In the Supreme Court of the United States

No.

CORY R. MAPLES,

Petitioner,

v.

RICHARD ALLEN,
COMMISSIONER, ALABAMA DEPARTMENT
OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Cory R. Maples respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1a-32a) is reported at 586 F.3d 879 (11th Cir. 2009). The opinion and orders of the district court denying habeas relief (App.33a-218a) are not reported. The orders of the district court granting and expanding (App.219a-21a) the certificate of appealability are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2009. App.1a. A timely petition for

rehearing was denied on February 9, 2010. App.238a-39a. On April 19, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 9, 2010. App.240a-41a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix at 242a-52a.

STATEMENT OF THE CASE

This case raises exceptionally important questions concerning the gateway standards governing access to federal habeas relief for petitioners challenging a state court conviction or sentence under the Constitution. The proper understanding of these standards is especially critical in capital cases such as this where an individual's life is at stake. The divided Eleventh Circuit decision below fundamentally misconstrues—and debases—these standards in concluding that the procedural default rule at issue is "adequate" as a matter of federal law, and that petitioner could not establish "cause" to excuse any default. The court's decision directly conflicts with the decisions of this Court and other courts in several significant respects, and exacerbates the uncertainty that already exists over the standards governing procedural defaults. This Court's recent grant of certiorari in *Walker v. Martin*, No. 09-996, and decision in *Beard v. Kindler*, 130 S. Ct. 612 (2010), underscore the importance of these standards, and this case warrants certiorari to provide needed guidance in these critical areas of law.

A. Trial Court Proceedings and Direct Appeal

1. In 1997, an Alabama jury found Maples guilty of two counts of capital murder, intentional murder during a robbery and intentional murder of two or more persons. The jury recommended death by a vote of 10-2—one vote shy of the number that would have barred the jury from issuing such a recommendation under state law. Ala. Code § 13A-5-46(f). The trial court sentenced Maples to death. App.1a.

a. Because of trial counsel's gross ineffectiveness, key facts concerning the offenses and appropriateness of a death sentence were never explored. At trial, the State introduced evidence that Maples—who had a history of serious drug and alcohol dependence, but no prior record of violent crime—had been drinking heavily and using drugs on the night of the offense. For example, one of the State's witnesses testified that she saw crystal methamphetamine and crack on Maples shortly after the shootings and that Maples told her he had been "doing crystal meth and crack" that evening. R.1894.[1] Numerous other witnesses testified that Maples's behavior before the shootings was abnormal, R.1848, R.1858-59, and that he was "hyper," acting "drunk," or not making sense. R.1848, 1858, 1803.

The jury would have been entitled to conclude that Maples lacked the mental state necessary for capital murder because of voluntary intoxication. But Maples's attorneys failed to investigate evidence that Maples had been drinking and using drugs, presented no evidence at trial that Maples was intoxicated at the

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[1] "R." refers to the record for this case in the Circuit Court of Morgan County, Alabama, Case No. CC95-842, as submitted to the Court of Criminal Appeals of Alabama, Case No. CR-03-0021.

time of the shootings, and did not even request an instruction on voluntary intoxication or manslaughter. App.20-22a. Maples's attorneys instead told the jury that Maples was *not* intoxicated—even though they later told the jury during the penalty phase that "but for the alcohol and drug usage on this occasion, [the shooting] would probably not have happened." R.3086.

Worse still, Maples's attorneys told the jury during closing argument that "[w]hat we have here is ... [Maples] walking out to the car and in an instantaneous rush killing two people," R.2918, and "conceded ... there was a loss of life caused intentionally at the hand of Corey [sic] Maples," R.2914. In other words, far from providing an effective defense, Maples's state-provided attorneys essentially professed Maples's guilt to capital murder under Alabama law.

b. The penalty phase began following a lunch break on the same day that the jury handed down its verdict in the guilt phase and lasted the afternoon with closing arguments the following morning. During the hearing, Maples's attorneys—who had never previously tried the penalty phase of a capital case—admitted that, owing to their inexperience, they "may appear to be stumbling around in the dark." R.3081-82. Their affirmative case amounted to unprepared testimony from three family members and the testimony of a psychologist who had met with Maples months earlier for four hours and made no "formal diagnosis." R.3165.

Maples's attorneys failed to investigate numerous matters highly relevant to sentencing, including Maples's abusive childhood and abandonment by his mother, Maples's mental health and history of depression and suicide attempts as well as the history of mental illness in Maples's family, and his extensive

history of alcohol and substance abuse including abuse of crack cocaine, crystal methamphetamine, and LSD. Nor did Maples's attorneys investigate Maples's character, cooperation with the police, and voluntary admission to a drug treatment program.

2. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Maples's conviction and sentence. App.2a. Consistent with settled Alabama law, Maples was not permitted on appeal to challenge the effectiveness of the assistance that he received from counsel at trial. *Ex parte Ingram*, 675 So. 2d 863, 865 (Ala. 1996).

B. State Post-Conviction Proceedings

1. Under Rule 32.1 of the Alabama Rules of Criminal Procedure, a defendant convicted of a criminal offense may bring a post-conviction challenge in state court arguing that his conviction or sentence violates federal or state law. Under Alabama Rule of Appellate Procedure 4(b)(1), the time for appealing an adverse decision in "a criminal case" is generally 42 days. Rule 32.1(f), however, authorizes a request for relief when "[t]he petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part." Ala. R. Crim. P. 32.1(f) (1990). Alabama courts have excused the failure to file a timely appeal of the denial of a Rule 32.1 petition in circumstances in which the failure was without fault on petitioner's part. *See, e.g., Marshall v. State*, 884 So. 2d 898, 899 (Ala. Crim. App. 2002), *rev'd on other grounds*, 884 So. 2d 900 (Ala. 2003); *infra* at 13.

2. On August 1, 2001, Maples—represented by new out-of-state pro bono counsel—filed a petition for post-conviction relief under Alabama Rule of Criminal Procedure 32.1, raising ineffective assistance of counsel

and other claims. Maples was represented by Clara Ingen-Housz and Jaasi Munanka, attorneys at the law firm of Sullivan & Cromwell in New York, who represented Maples in their individual capacities. App.255a. John Butler, a local attorney, appeared for the sole purpose of admitting Ingen-Housz and Munanka *pro hac vice*. He had no substantive involvement in the case. App.255a-56a, 257a.

Respondent moved to dismiss the petition. The state trial court initially denied respondent's motion to dismiss in December 2001, and Maples's requests for discovery remained pending before the court. Approximately 18 months later, on May 22, 2003, while Maples was awaiting rulings on his discovery motions, the trial court issued an order denying the petition outright. App.3a. Through no fault of his own, Maples never received timely notice of the trial court's order.

The trial court clerk sent copies of the order individually addressed to Maples's pro bono attorneys of record (Ingen-Housz and Munanka) and to Butler. App.222a-23a. By this time, however, both Ingen-Housz and Munanka had left Sullivan & Cromwell—without notice to the court or substitution of counsel. App.222a. Copies of the court's order were returned to the trial court clerk unopened with "Return to Sender—Attempted Unknown" stamped on the envelope addressed to Munanka, and "Return to Sender—Attempted Not Known" stamped on the envelope addressed to Ingen-Housz and "Return to Sender—Left Firm" written on the front. App.223a. Butler received the order, but because he had "no substantive involvement" in the case, he did nothing. App.255a-56a.

After receiving the unopened and unclaimed envelopes containing the order, the trial court clerk did nothing. The clerk made no further effort to contact pro bono counsel (or anyone else at their former law firm), local counsel, or Maples. There matters stood and the 42-day period for appeal under Alabama Rule of Appellate Procedure 4(b)(1) passed. On August 13, 2003, about a month after the deadline had passed, the State's attorney sent a letter to Maples—not his attorneys—to "inform [him] of recent events" concerning the dismissal of his Rule 32 petition and to advise him that the time for filing a federal habeas corpus petition would soon expire. App.253a.

When Maples learned of the missed deadline, he immediately informed his step-mother, who contacted Sullivan & Cromwell. Other attorneys at that firm then sought leave to file an appeal notwithstanding the missed deadline, but that request was denied. App.5a.

3. The trial court deemed the notice sent to counsel sufficient (even if not received) and stated, "[i]f the petitioner is entitled to an out-of-time appeal, let the Court of Appeals so rule." App.224a. Although the Alabama Court of Criminal Appeals recognized that "[t]he circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition," it concluded that the State "was not negligent in its duty to notify the parties of the resolution of the Rule 32 petition" and that Maples had failed to show a violation of due process. App.234a, 236a. In defending that judgment, respondent told the Alabama Supreme Court that petitioner "may still present his postconviction claims to [the] court" on federal habeas. App.18a. The Alabama Supreme Court affirmed in a one-sentence order, and this Court denied certiorari.

C. Federal Habeas Proceedings

1. On August 29, 2003, Maples filed a federal habeas petition raising, *inter alia*, ineffective assistance of counsel claims. That petition was stayed pending the state court proceedings, and amended in May 2005. Notwithstanding respondent's representation to the Alabama Supreme Court that Maples "may still present his postconviction claims" on federal habeas, App.18a, respondent argued in federal court that Maples defaulted on his ineffective assistance of counsel claims due to the missed deadline.

The district court acknowledged that the Alabama courts had previously permitted an out-of-time appeal from the denial of a Rule 32 petition where the petitioner claimed that he "had not received the order dismissing his petition and that his counsel was ineffective for failing to inform him of the dismissal." App.58a (discussing *Marshall*). However, the court held that Maples "has not established that the State of Alabama's interpretation of Rule 32.1(f)'s 'no fault' provision for petitioners in Maples's posture is *not* firmly established or regularly followed." App.54a-55a (emphasis added). The court further held that Maples could not show "cause" to overcome a procedural default. App.55a. The court nevertheless authorized an appeal on these issues, recognizing that "[j]urists of reason" could "debat[e]" whether the alleged default rule was "firmly established and regularly followed" and whether Maples had established cause. App.221a.

2. A divided panel of the Eleventh Circuit affirmed. The panel declined to consider the text of Rule 32.1's "no fault" provision. Even though no decided case in Alabama has ever articulated such a framework, the panel majority held that Maples had

notice of the purported default rule because "Alabama has granted out-of-time appeals in only three limited circumstances." App.13a. The court then sought to articulate such "exceptions" based on a *post hoc*, fact-specific rendering of various Alabama cases, emphasizing distinctions that (it said) Alabama courts "appeared" to draw, though the decisions themselves did not emphasize such grounds, and relying on cases decided after the alleged default. App.13a-16a. The panel majority then held that Maples failed to show cause on the ground that attorney performance can never constitute "cause" to excuse a default. App.17a-18a.

Judge Barkett dissented. She concluded that the alleged default rule "is not 'adequate' pursuant to the Supreme Court's definition of that term." App.27a. She explained that the Alabama courts had allowed untimely appeals on "indistinguishable facts" and that the panel majority based its analysis on distinctions that the Alabama courts themselves have not applied. App.28a-31a. She also concluded that equity, if not the Constitution, required that Maples be afforded federal review of his claims given that, accepting his allegations as true, he had raised a serious ineffective assistance of counsel claim that would go unreviewed for reasons involving no fault of his own. App.30a-31a.

REASONS FOR GRANTING THE WRIT

This case raises important and recurring questions governing the gateway standards for securing federal habeas review of the constitutionality or legality of a state conviction or sentence. The divided Eleventh Circuit decision below holding that petitioner is barred from seeking federal habeas relief is seriously flawed and conflicts with decisions of this Court and other

courts of appeals in several important respects. What is more, the decision raises the shocking prospect that a man may be executed without any federal court review of serious constitutional claims due to a series of events for which all agree he was blameless and notwithstanding the State's own failings in the purported default. Certiorari is warranted to review two overriding questions raised by that ruling.

The first concerns when a state default rule is "adequate" to bar federal habeas review. This Court has held that a state rule is adequate only when it was "'firmly established and regularly followed'" at the time of the alleged default, *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citations omitted), but courts have divided in applying that standard. To hold that this standard was satisfied here, the Eleventh Circuit overlooked the text of the Alabama rule, relied on cases decided *after* the alleged procedural default, and read into the extant Alabama cases distinctions that Alabama cases do not apply. That approach conflicts with decisions of this Court and other circuits, which make clear that federal courts may not recognize a "firmly established" or "regularly followed" rule on the basis of distinguishable case law or *post hoc* reinterpretations. And the Eleventh Circuit's decision conflicts with decisions holding that the *State*—not the inmate—bears the burden of proving that a rule is adequate.

The second question concerns when a petitioner has demonstrated "cause" to excuse any default for federal purposes. This Court has held that, when the loss of a home is at stake, state officials cannot just do nothing when an important notice is returned unopened, but instead must make further efforts to provide notice. *Jones v. Flowers*, 547 U.S. 220 (2006). It follows that

the State may not "shrug [its] shoulders ... and say 'I tried'" when a man's *life* is at stake. *Id.* at 229. Yet the Eleventh Circuit did not account for the State's own involvement in the default. Moreover, the Eleventh Circuit short-circuited the inquiry into cause by concluding that *Coleman v. Thompson*, 501 U.S. 722 (1991), governed since Maples was represented by counsel. App.17a. But *Coleman* does not govern where, as here, an attorney no longer functions as an agent at the time of the alleged default. As other courts have recognized, in such circumstances, a client is not responsible for an attorney's malfeasance.

As the dissent below recognized, petitioner presented strong claims for ineffective assistance of counsel. App.30a-31a & n.3. Those claims would have been heard if the Eleventh Circuit had properly followed this Court's precedents or this case had arisen in other circuits that have addressed these threshold issues in a different fashion. The fact that a man may be executed in these circumstances without any federal review of those claims ought to be enough to merit this Court's review. But the questions presented are recurring and of immense importance to the thousands of individuals who annually seek federal habeas review. Moreover, the first question presented concerns an area of law that Justices of this Court, *e.g.*, *Beard v. Kindler*, 130 S. Ct. 612, 619-21 (2009) (Kennedy, J., joined by Thomas, J., concurring), as well as many commentators, *infra* at 12, have recognized is urgently in need of clarification by this Court.

I. THE DIVIDED ELEVENTH CIRCUIT'S DECISION THAT THE STATE'S ALLEGED DEFAULT RULE IS ADEQUATE WARRANTS THIS COURT'S REVIEW

To provide an "adequate" basis for barring federal habeas review, a state procedural rule must be "clear" at the time of the asserted default. *James v. Kentucky*, 466 U.S. 341, 346 (1984). To meet that requirement, a rule must be "'firmly established and regularly followed.'" *Lee*, 534 U.S. at 376 (citation omitted); *accord Beard*, 130 S. Ct. at 617; *James*, 466 U.S. at 348. Federal habeas review may not be denied on the basis of state law procedural impediments that did not provide the defendant with fair notice or that are novel, arbitrary, inconsistent, or unpredictable in application. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *see also NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964).

As explained below, the federal courts have divided on the proper contours of these basic requirements. The divided Eleventh Circuit decision below conflicts with the decisions of this Court and other courts in numerous respects and exacerbates the widespread confusion that already exists concerning when a state default rule is adequate. *See, e.g.*, Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 Colum. L. Rev. 243, 315 (2003) (discussing the lack of "consistent standards for adequacy review"); *see also* Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Debate*, 91 Cornell L. Rev. 541, 559 n.106 (2006) (case law on procedural defaults is "extraordinarily difficult"); Eve Brensike Primus, *A*

Structural Vision of Habeas Corpus, 98 Calif. L. Rev. 1, 1 (2010) (case law is "unworkable").

A. The Eleventh Circuit's Decision Directly Conflicts With This Court's Precedents

1. The Eleventh Circuit's conclusion in this case that there was a "firmly established and regularly followed" Alabama rule against allowing untimely appeals in petitioner's circumstances strips the adequacy requirement of all force. App.12a. The Alabama rule at issue has none of the qualities of a "firmly established and regularly followed" rule. Even as described by the Eleventh Circuit, the rule is riddled with *ad hoc* exceptions and evolving. And as a consequence, Maples lacked the requisite notice of that rule at the time it was invoked to bar his claims.

The text of Rule 32.1 itself has been a source of confusion, even to Alabama courts. In uncabined terms, the rule expressly states that a defendant may seek Rule 32 relief where "[t]he petitioner failed to appeal within the prescribed time ... and that failure was without fault on petitioner's part." Ala. R. Crim. P. 32.1(f) (1990). At the time of the alleged default, Alabama courts had recognized that, while Rule 32 did not "specifically provide for an out-of-time appeal from the denial of a Rule 32 petition" (as opposed to an order on direct review), "neither do the Rules specifically prohibit such relief." *Fountain v. State*, 842 So. 2d 719, 721 (Ala. Crim. App. 2000), *aff'd in relevant part, Ex parte Fountain*, 842 So. 2d 726 (Ala. 2001). Moreover, Alabama courts had stated that Rule 32.1(f) should be interpreted in light of Alabama Rule of Criminal Procedure 1.2, which instructs courts to construe the

rules to promote "fairness" and "protect the rights of individuals." *See id.* at 721-22.[2]

Maples could reasonably have understood Rule 32.1(f) to authorize relief from a missed Rule 32 appeal deadline through no fault of his own—and indeed many then-extant Alabama court decisions took that very position at the time of the events at issue. *See, e.g., id.* at 720 (answering in the affirmative question "whether Rule 32 ... permits an out-of-time appeal from the denial of a petition for post-trial relief"); *accord Marshall v. State*, 884 So. 2d 898, 899 (Ala. Crim. App. 2002) (*Marshall*); *Thompson v. State*, 860 So. 2d 907, 909-10 (Ala. Crim. App. 2002).

The divided Eleventh Circuit nevertheless held that the state courts have "routinely" *denied* untimely appeals from the denial of a Rule 32 petition. App.12a. But the cases the panel majority cited are readily distinguishable. *Melson v. State*, 902 So. 2d 715 (Ala. Crim. App. 2004), post-dated *Marshall v. State*, 884 So. 2d 900 (Ala. 2003) (*Marshall II*)—and Maples's alleged default—and simply followed *Marshall II*'s holding that the prisoner must use mandamus. Maples, by contrast, indisputably invoked the now-correct mandamus procedure in seeking review of the denial of his Rule 32 petition. App.5a. The other cases involved situations in which Alabama courts found that the

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[2] In September 2003—after the procedural default at issue in this case—the Alabama Supreme Court held that "[s]ubsection (f) contemplates the appeal from a conviction or sentence, but not an appeal from an adverse ruling in a collateral proceeding (such as a Rule 32 petition)." *Marshall v. State*, 884 So. 2d 900, 904 n.4 (Ala. 2003). As the dissenting justice observed, the effect of that ruling was to hold, "without citation to authority, ... that this rule does not mean what it says." *Id.* at 907 (Johnstone, J., dissenting).

inmate was at fault for missing the deadline, and thus did not satisfy the "no fault" rule. *Shephard v. State*, 598 So. 2d 39, 40 (Ala. Crim. App. 1992); *Alverson v. State*, 531 So. 2d 44, 45 (Ala. Crim. App. 1988). Here, all agree that Maples was *not* at fault for the missed deadline.

At the same time, the Eleventh Circuit refused to acknowledge that Alabama courts have consistently *allowed* untimely appeals from the denial of a Rule 32 petition in circumstances where the petitioner was not at fault for the missed deadline—and in situations where the petitioner was proceeding with counsel as well as where he was proceeding *pro se*. *See, e.g.*, *Marshall*, 884 So. 2d at 898-99; *Fountain*, 842 So. 2d at 721-24; *Thompson*, 860 So. 2d at 910; *Jenkins v. State*, 12 So. 3d 166, 166-67 (Ala. Crim. App. 2008).

The Eleventh Circuit's analysis of the *Marshall* case epitomizes the problems with its treatment of state law. As the dissent below explained, in *Marshall* the Alabama Court of Criminal Appeals—relying on prior case law, including *Fountain*—*allowed* an out-of-time appeal from the denial of a state habeas petition based on facts that are "indistinguishable" from those here. App.30a. Like Maples, Marshall was formally represented by counsel but nevertheless did not receive timely notice of the denial of his Rule 32 petition because (according to Marshall) his attorney improperly failed to notify him of the ruling. *Marshall*, 884 So. 2d at 898-99; App.28a (dissent).

The Eleventh Circuit sought to distinguish *Marshall* on the ground that the Alabama appellate court "*appeared* to find" that the court clerk "assumed a duty to serve Marshall personally in prison" based on various *pro se* motions Marshall had filed. App.14a

(emphasis added). But as the dissent below explained, that interpretation is entirely speculative; the panel majority's use of "appear[s]" recognizes that the *Marshall* court itself did not invoke such a distinction in allowing the out-of-time appeal. App.28a-30a. The *Marshall* court nowhere relied on any assumed duty on the part of the clerk or on the fact that Marshall may have made some *pro se* filings. The court instead based its holding on the fact that Marshall had shown that his failure to appeal was "through no fault of his own," since "he had never received notice of the circuit court's dismissal of his [petition]." 884 So.2d at 898-99.[3]

The Eleventh Circuit based its reading of *Marshall* on language taken out of context from a subsequent decision by the Alabama Supreme Court in that case, which was decided *after* Maples's alleged default. App.14a-15a. But the *Marshall II* court did not remotely hold, as the Eleventh Circuit would have it, that Marshall was entitled to relief only because "the state circuit court clerk assumed a duty to serve Marshall personally in prison" due to his "'numerous *pro se* filings.'" App.14a (citation omitted). *Marshall II* did not revisit the facts of Marshall's case, or whether he was substantively entitled to relief, at all. The only holding of *Marshall II* was that he should have used mandamus rather than Rule 32.1(f). The language about *pro se* filings and clerks assuming duties was not referring to Marshall's case but was simply a quote from a different case, holding that *procedural due process* was violated when a clerk

[3] Even if *Marshall* could be interpreted to turn on the presence of a duty to notify, such a duty existed here. *See infra* at 24-27; App.234a (recognizing basic "duty to notify").

assumed a duty to notify a defendant about a trial date and then failed to fulfill it. The *Marshall II* court relied on that case only to support its holding that mandamus was the proper remedy. *See Marshall II*, 884 So. 2d at 903 (quoting *Ex parte Weeks*, 611 So. 2d 259, 262 (Ala. 1992)). And in any event, *Marshall II* was issued several months *after* the events at issue, and thus could not have provided any notice to Maples at the time of the alleged default or be used to show that any rule was "firmly established" at that time.

2. The divided Eleventh Circuit's decision directly conflicts with this Court's decisions. In *Lee*, this Court refused to find a state default rule adequate where, among other things, there was no published decision applying the purported rule in the circumstances presented, and where the cases relied on by the State were "distinguishable." 534 U.S. at 382 & n.13. In stark contrast, the Eleventh Circuit below refused to account for published decisions *allowing* out-of-time appeals in analogous circumstances and grounded its adequacy finding on case law that both is readily distinguishable and post-dates the events at issue. *See supra* at 14. The extended debate among the court below over the meaning of *Marshall*—which is longer than the *Marshall* decision itself—alone underscores the absence of a discernible rule in May 2003 against allowing untimely appeals when, as here, the petitioner is not at fault. *Cf. Lee*, 534 U.S. at 378-80.

The Eleventh Circuit's *post hoc* effort to pigeonhole Alabama cases into its own newly-invented tripartite framework also conflicts with this Court's decisions. This Court has explicitly repudiated efforts to manufacture a firmly established and regularly followed default rule by reconceiving the case law "in

retrospect" as "form[ing] part of a consistent pattern." *Patterson*, 357 U.S. at 457. And the exception-riddled framework that the Eleventh Circuit conceived *post hoc* is on its own terms the antithesis of a firmly established and regularly followed rule.

The Eleventh Circuit's decision also conflicts with this Court's precedents on when a state rule is "regularly followed." *James*, 466 U.S. at 348-49. In *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964), for example, this Court held that no adequate state ground barred review of various breach-of-peace convictions because the South Carolina Supreme Court had applied the disqualifying rule at issue in a manner inconsistent with contemporaneous cases. *See also Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). In addition to *Marshall*, where relief was allowed when the failure of notice was alleged to be solely the result of attorney negligence, the Alabama courts have granted relief in multiple cases where the petitioner was not at fault and fault for the prisoner's lack of notice instead appeared to rest with the court clerk, or was shared between the court clerk and counsel. *Supra*, 14.

4. Finally, this Court has recognized that, even when the State can show a firmly established rule, "[t]here are ... exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee*, 534 U.S. at 376. This is such a case. Maples bears no fault for the missed deadline, and the State itself is a cause of the default given its failure to do anything when it learned that petitioner's *pro bono* attorneys of record never received notice of the denial of his Rule 32 petition. *See infra*, 25-26. Indeed, the

State had no difficulty notifying Maples immediately *after* the appeal period had lapsed. App.253a. Its attempt to preclude federal review in these circumstances reflects a "gotcha" mentality that this Court long ago repudiated. *See Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

B. The Eleventh Circuit's Decision Conflicts With Decisions Of Other Courts Of Appeals

The Eleventh Circuit's opinion also conflicts with the decisions of other courts of appeals in a number of important respects that go to the heart of the federal adequacy requirement and the nature of the inquiry demanded by this Court's precedents.

1. The courts below impermissibly placed on the habeas petitioner the burden of establishing that the purported state default rule is *inadequate*. App.16a. Consistent with the fact that procedural default is "a 'defense' that the State is 'obligated to raise,'" *Trest v. Cain*, 522 U.S. 87, 89 (1997), however, other circuits have held that the State bears the burden of proving that an asserted default rule was adequate. *See Jones v. Sussex I State Prison*, 591 F.3d 707, 716 (4th Cir. 2010); *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir.), *cert. denied*, 130 S. Ct. 1014 (2009); *Smith v. Mullin*, 379 F.3d 919, 927 (10th Cir. 2004); *Combs v. Coyle*, 205 F.3d 269, 276-77 (6th Cir.), *cert. denied*, 531 U.S. 1035 (2000). *But see Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995) (presuming that a "state court's reliance on a procedural bar functions as an independent and adequate ground in support of the judgment" unless

the *petitioner* can show otherwise). The proper allocation of the burden of proof in determining the adequacy of a state rule is crucial and, as underscored by the hairsplitting in which the Eleventh Circuit engaged in its analysis of Alabama case law, was almost certainly outcome determinative here.

2. The decision below further conflicts with the decisions of other circuits on when a state rule is adequate. Even accepting the Eleventh Circuit's characterization of Alabama case law, it describes a jurisprudence riddled with *ad hoc* exceptions and unpredictable case-by-case development. In other circuits, the fact that a rule is *"subject to a [growing] number of exceptions"* would have compelled the conclusion that it is *"not* an adequate state ground to bar federal habeas review." *Fields v. Calderon*, 125 F.3d 757, 763 (9th Cir.) (second emphasis added), *cert. denied*, 523 U.S. 1132 (1998). Likewise, other circuits have refused to engage in *post hoc* efforts to "harmonize[]" inconsistent decisions by raising distinctions not "emphasized (or even mentioned)" by state courts. *Gosier v. Welborn*, 175 F.3d 504, 507 (7th Cir.), *cert. denied*, 528 U.S. 1006 (1999).

3. In concluding that the alleged default rule was adequate, the Eleventh Circuit even relied on several state decisions decided *after* the alleged default. *See supra* at 14; App.12a-13a. But that approach directly conflicts with decisions of other circuits holding that "[t]he relevant inquiry is whether the rule was well-established or consistently applied 'at the time of [the] alleged default.'" *Scott*, 567 F.3d at 581 n.7; *accord Walker v. Attorney Gen. of U.S.*, 167 F.3d 1339, 1344-45 (10th Cir.), *cert. denied*, 528 U.S. 987 (1999); *see also Fautenberry v. Mitchell*, 515 F.3d 614, 641 (6th Cir.),

cert. denied, 129 S. Ct. 412 (2008). A petitioner cannot have notice of an interpretation issued after the fact.

4. The multi-dimensional conflicts created by the divided decision below exacerbate the conflict and confusion that already pervades the adequacy inquiry. *See, e.g.*, Recent Case, *Federal Courts—Habeas Corpus—Fourth Circuit Fails To Reach a Judgment on the Merits of a Constitutional Claim Based on the State Procedural Default Doctrine.—McNeill v. Polk, 476 F.3d 206 (4th Cir. 2007)*, 120 Harv. L. Rev. 2246, 2246 (2007) (noting existing "confusion as to when a state procedural default is an adequate state ground to preclude federal habeas review"); *cf. Beard*, 130 S. Ct. at 620 (Kennedy, J., joined by Thomas, J., concurring) (observing that the level of specificity or consistency that an evolving body of state law must provide in order to establish an adequate default rule "should be addressed"). This case provides an ideal vehicle to resolve these conflicts of authority and provide needed guidance in this important area.

C. The Grant Of Certiorari In *Walker v. Martin* Heightens The Need For Review Here

The Court's grant of certiorari in *Walker v. Martin*, No. 09-996, indicates that this Court already appreciates the need for guidance in this area. Granting certiorari in this case—in complement to *Walker*—would provide the Court with the best opportunity to consider the full dimensions of the problems currently vexing the lower courts in conducting the adequacy inquiry and to provide the needed guidance. The grant in *Walker* thus only bolsters the importance of plenary review in this case.

In *Walker*, the Ninth Circuit reversed the district court's determination that California's case-made

timeliness rule—which calls for inmates to file habeas claims without "substantial delay"—was adequate and thus precluded federal habeas review of claims filed in state court *five years* after a case became final on direct review. The Ninth Circuit held that the state courts had not "firmly defined" the timeliness rule and that the State had not met its burden in showing that the rule was "consistently applied." *Martin v. Walker*, 357 F. App'x 793, 794 (9th Cir. 2010), *cert. granted*, No. 09-996, 2010 WL 621406 (U.S. June 21, 2010).

In its petition for certiorari, the State—which repeatedly touted "the need to further clarify the rules relating to the 'adequacy' of state procedural bars"—sought to portray the Ninth Circuit's decision as the poster child for what is *wrong* with the adequacy doctrine. Pet. at 6, *Walker*, No. 09-996 (Feb. 17, 2010). In addition, the State argued that its rule had a discretionary component and that the Ninth Circuit had improperly nullified that rule. *Id.* at 13-14, 16. The State's amicus—which likewise observed that "[t]his Court's jurisprudence of 'adequate state grounds' has been plagued by imprecise language"—went further and argued that this Court should "consider whether to scrap the 'adequacy' inquiry in habeas altogether." Br. Amicus Curiae of the Criminal Justice Legal Foundation in Support of Pet. for Writ of Certiorari (CJLF Br.) at 9, 15, *Walker*, No. 09-996 (Mar. 24, 2010).

While they both involve application of the adequacy inquiry, there are important differences between this case and *Walker*. For example, *Walker* concerns the adequacy of a judge-made rule that is overtly discretionary. This case involves a written state procedural rule that is not discretionary in the relevant sense, and that was applied by state courts in a manner

favorable to defendants before the relevant period. (Of course there is some discretion associated with determining whether a prisoner was without fault, but the State does not deny that Maples was without fault here.) Even if States should be allowed to have rules that are clear but discretionary, this Court's precedents recognize that federal review of alleged constitutional violations should not be foreclosed on the basis of state rules—like the one at issue here—that are purportedly objective but capriciously applied.

Likewise, whereas the Ninth Circuit based its inadequacy finding largely on the state courts' failure to *define* the default rule, this case involves the adequacy of a procedural rule that on its face appears to authorize an untimely appeal when the inmate is not at fault and has been interpreted by courts to allow untimely appeals in analogous circumstances. In that respect, this case also raises the concern that even the amicus in *Walker* seemed to recognize would be an appropriate ground for refusing to enforce a state rule: when doing so would amount to a "procedural trap" for the unwary. CJLF Br. 8. And of course, whereas the inmate in *Walker* waited five years to file his state habeas petition, the inmate here sought relief as soon as he learned of the denial of his petition.

If *Walker*, to some, illustrates how federal courts can apply the adequacy inquiry in a way that unduly *intrudes* on the sovereignty of the States, then this case underscores why the doctrine is needed to ensure that inmates are not arbitrarily deprived of federal habeas review of constitutional claims. This case therefore would be an ideal companion to *Walker*. And granting review in this case, as well as *Walker*, would thus permit the Court more fully to consider the range

of issues currently surrounding the adequacy inquiry and to ensure that the Court fully accounts for the legitimate uses of the doctrine in federal habeas.

II. THE DIVIDED ELEVENTH CIRCUIT'S DECISION THAT MAPLES FAILED TO SHOW CAUSE WARRANTS REVIEW

Even when a state default rule is adequate, the federal courts may excuse a default where the prisoner had "cause" for not following the state procedural rule and suffered prejudice. *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *see also House v. Bell*, 547 U.S. 518, 536 (2006). The divided Eleventh Circuit decision's conclusion that Maples failed to establish cause independently warrants review.[4]

A. The Eleventh Circuit's Decision Conflicts With *Jones v. Flowers* And Other Precedents

As the Court has stated, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense" precipitated the default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The divided Eleventh Circuit held that Maples failed to establish cause only "because there is no right to post-conviction counsel." App.17a. In focusing solely on whether the actions of Maples's *attorneys* constituted cause, the Eleventh Circuit departed from this Court's cases by failing to consider whether there were other external factors precipitating the alleged default—

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[4] Because the Eleventh Circuit held that Maples did not establish cause, it did not consider prejudice. Given the grave consequences of any default, however, prejudice is undeniable. *See, e.g., Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000).

including the State's own failure to provide constitutionally adequate notice.[5]

In *Jones v. Flowers*, 547 U.S. 220 (2006), this Court considered the due process requirements when a State mails notice to an individual concerning a deprivation of property in connection with a tax forfeiture and the notice is returned unclaimed. The Court, in a decision by the Chief Justice, held that "[w]e do not think that a person who actually desired to inform [a recipient] would do nothing when a certified letter sent to the [recipient] is returned unclaimed." *Id.* at 229. As the Court explained, when receiving an unclaimed letter, it is not enough for the State just to "shrug [its] shoulders ... and say 'I tried.'" *Id.* Rather, given the interests at stake—in *Jones*, "such an important and irreversible prospect as the loss of a house," *id.* at 230—the State must try again through a different means. To say the least, due process requires no less when it comes to the "important and irreversible prospect," *id.*, of extinguishing a *life*.

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[5] Although respondent conceded below that this argument was raised in Maples's opening brief, respondent argued that it was somehow waived at oral argument. Resp. Mot. To Review Oral Argument Record and/or Transcript at 2. That is incorrect. Maples's counsel observed during oral argument that he was not trying to shift the blame to the State, but in a case where there is plenty of blame to go around (except to petitioner, who all agree was blameless) that hardly amounts to a renunciation of the argument that the State's own conduct must be taken into account in determining whether cause exists. Moreover, because this argument is included within petitioner's overarching position that he demonstrated cause for any default, this Court undeniably has the authority to address it. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992); *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980). And there are compelling reasons for the Court to do so.

Here, as in *Jones*, the State received copies of the unopened orders sent to both *pro bono* attorneys and the envelopes plainly indicated that they were not delivered and that an attorney had left the firm. App.34a-35a, 223a, 227a. Yet, as in *Jones*, upon receiving the unopened and unclaimed envelopes individually addressed to Maples's *pro bono* attorneys of record, the state court clerk did "nothing." *Jones*, 547 U.S. at 234. It follows *a fortiori* from *Jones* that—wholly apart from the failures of Maples's counsel—the State's failure to take further action to provide Maples with notice was constitutionally inadequate. As in *Jones*, the state clerk's "[f]ailure to follow up [was] unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." *Id.* at 229.

This due process violation was not excused by the fact that the clerk sent notice to Maples's local counsel. The State is well aware that out-of-state counsel typically serve as the primary—if not sole—counsel to Alabama's substantial death row population. The State recently advised this Court that 75% of Alabama's death row inmates are represented during post-conviction proceedings by "out-of-state law firms and/or public interest groups." Br. in Opp. at 11, *Barbour v. Allen*, No 06-10605 (May 10, 2007) (citation omitted), *cert. denied*, 551 U.S. 1134 (2007). Alabama has acknowledged that it has affirmatively chosen "to rely on the efforts of typically well-funded out-of-town volunteers" to provide post-conviction representation to the State's death row inmates. *Id.* at 23.

Furthermore, due process "require[s] the government to consider unique information about an intended recipient regardless of whether a statutory

scheme is reasonably calculated to provide notice in the ordinary case." *Jones*, 547 U.S. at 230. The Eleventh Circuit decided this case on the premise that Maples's *pro bono* counsel were "attorneys of record and had performed all of the substantive work on Maples's Rule 32 case." App.3a. When the State learned that its attempt to notify those attorneys had failed, the state court clerk was obligated to do *something*—such as attempting to contact the pro bono attorneys or their former law firm through other means, or reaching out to local counsel or even Maples himself. The State certainly had no difficulty contacting Maples directly once the appeal period ran. Its failure to do so earlier deprived petitioner of due process and establishes cause to excuse any procedural default.

B. The Eleventh Circuit's Decision Goes Well Beyond The Reach Of *Coleman v. Thompson*

Even assuming that the State's own conduct failed to establish cause under this Court's precedents, the Eleventh Circuit erred in holding that this Court's decision in *Coleman v. Thompson* categorically bars a finding of cause. App.17a. *Coleman* rests on agency principles that are inapplicable when an attorney is not functioning as his client's agent, as other courts have recognized and members of this Court recently confirmed in *Holland v. Florida*, No. 09-5327, 2010 WL 2346549, at *18 (U.S. June 14, 2010).

Coleman held that, during postconviction proceedings when the Sixth Amendment right to counsel does not attach, "[a]ttorney *ignorance* or *inadvertence* is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" 501 U.S. at 753

(emphasis added) (citation omitted). As the Court explained, this principle is rooted in "well-settled principles of agency law" attributing the negligence of an agent to his principal. *Id.* at 754; *see Holland*, 2010 WL 2346549, at *20 n.4 (Scalia, J., dissenting) ("*Coleman* ... merely applied, the already established principle that an attorney's acts are his clients.").

It is equally well-settled, however, that a client is not constructively responsible for an agent's misconduct after the agency relationship has ended, or after the supposed agent has committed a serious breach of loyalty. *See* Restatement (Second) of Agency ch. 5 scope note (1958); *id.* § 112; Restatement (Third) of Agency § 5.04 (2006). Thus, the rule of *Coleman* by its own terms does not extend to such situations.

In the context of equitable tolling in federal habeas, this Court has held that a missed deadline may be forgiven if "some extraordinary circumstance stood in [the petitioner's] way," *Holland*, 2010 WL 2346549, at *1 (citation omitted), but has explained that a client is generally responsible for garden-variety negligence by his attorney, *see id.*; *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (citing *Coleman*). As Justice Alito recently explained in *Holland*, however, those principles do not apply if the petitioner's "attorney essentially 'abandoned' him." 2010 WL 2346549, at *18 (Alito, J., concurring in part and concurring in the judgment). "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.*

Although the procedural default doctrine implicates considerations of federalism and comity not present in *Holland*, there is no basis to extend *Coleman* to

attorney malfeasance that falls outside of the agency relationship. Indeed, even the dissenters in *Holland* agreed with the principle that attorney error would not be attributable to petitioner (under *Coleman* or *Lawrence*) if the circumstances "ended the agency relationship before the relevant window." *Id.* at *22 n.9 (Scalia, J., joined by Thomas, J., in relevant part, dissenting). And in his concurring opinion, Justice Alito emphasized that attorney abandonment is fundamentally different. *Id.* at *18. At the time of the events at issue, Maples's *pro bono* attorneys of record had left Sullivan & Cromwell without providing notice to the Alabama trial court or substituting counsel, and thus were no longer functioning as his agent.[6]

Federal and state courts have recognized that a procedural default precipitated by a petitioner's "utter abandonment" by his attorneys would "constitute[] extraordinary circumstances *external* to the party's own conduct" and thus constitute cause. *Rouse v. Lee*, 339 F.3d 238, 250 n.14 (4th Cir. 2003) (en banc) (citation omitted), *cert. denied*, 541 U.S. 905 (2004); *see also Baldayaque v. United States*, 338 F.3d 145, 154 (2d Cir. 2003) (Jacobs, J., concurring) ("[W]hen an 'agent acts in a manner completely adverse to the principal's interest,' the 'principal is not charged with [the] agent's misdeeds.'") (citation omitted); *Manning v. Foster*, 224

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6 As the Eleventh Circuit stated, "arrangements had been made within the firm for other attorneys at Sullivan & Cromwell to take over representation of Maples," but "none of Maples's attorneys filed anything with the Alabama trial court reflecting this change." App.4a; *see also* App.257a-58a. And local counsel's only involvement was to admit Ingen-Housz and Munanka. App.257a. So Maples was left without counsel in his Rule 32 proceeding—despite his belief to the contrary—and thus abandoned.

F.3d 1129, 1135 (9th Cir. 2000) (attorney's errors not attributable to client when attorney "does not actually represent the client"); *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (8th Cir. 1992) (acknowledging that attorney's alleged conflict-of-interest would be "external" cause for default because attorney would have "effectively ceased to be [the client's] agent"). The Eleventh Circuit's holding that Maples failed to show cause is inconsistent with those decisions.

It is also inconsistent with the decisions of numerous state courts holding that due process entitles a habeas petitioner to an out-of-time filing when a missed deadline is due to the abandonment of counsel. *See Puckett v. State*, 834 So. 2d 676, 681 (Miss. 2002) ("[W]e do not base [equitable relief] on mere excusable neglect or ignorance by Puckett or his counsel, but upon our recognition that the actions of former counsel were such as to rise to the deprivation of fundamental due process."); *Williams v. State*, 44 S.W.3d 464, 469 (Tenn. 2001) ("If a defendant erroneously believes that counsel is continuing to represent him or her, then the defendant is essentially precluded from pursuing certain remedies independently."). Similarly, the Arkansas Supreme Court found "cause" to excuse a petitioner's procedural default after his attorney ceased representation but "had not taken any formal steps to withdraw as the attorney of record." *Porter v. State*, 2 S.W.3d 73, 74 (Ark. 1999). As the *Porter* court recognized, it is fundamentally unfair "to require an inmate on death row to abide by the stringent filing deadlines when he was under the [false] impression he was represented by counsel." *Id.* at 75.

Worse yet, the Eleventh Circuit's decision has widened an entrenched circuit split on whether the

Due Process Clause permits a litigant in a civil proceeding (in which no Sixth Amendment right to counsel attaches) to be held responsible for attorney misconduct that renders a proceeding fundamentally unfair. Several circuits have concluded that counsel's performance in a deportation proceeding may be "'so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause.'" *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 241 (2d Cir. 1992) (citation omitted); *see also Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Fadiga v. Attorney Gen. of U.S.*, 488 F.3d 142, 155 (3d Cir. 2007); *Denko v. INS*, 351 F.3d 717, 723-24 (6th Cir. 2003); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003). Two other circuits have held the opposite. *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). Although this case does not involve a deportation proceeding, the same due process principles apply to post-conviction proceedings. *See Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985).

As the dissent explained (App.31a), the Eleventh Circuit's decision also conflicts with the decisions of this Court emphasizing that "[h]abeas corpus is 'governed by equitable principles.'" *Munaf v. Geren*, 128 S. Ct. 2207, 2200 (2008) (citation omitted); *see also Holland*, 2010 WL 2346549, at *11. As the dissent stated, denying an indigent death-row prisoner access to federal courts with respect to serious ineffective assistance counsel claims because of a missed deadline that all agree was not his fault is "'fundamentally unjust'" and incompatible with the "equitable principles" on which habeas corpus is grounded, if not the Constitution itself. App.32a (citation omitted); *see*

App.31a n.4. Those principles bolster the logical conclusion that *Coleman* does not control here.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

The questions presented here are vitally important and frequently recurring. One study commissioned by the Department of Justice concluded that asserted procedural defaults were invoked to bar claims in some 42% of capital habeas cases brought by state prisoners. *See* Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 48 (2007). The significance of that statistic is underscored by the fact that "a substantial proportion of [state] prisoners succeed in having their death sentences vacated in habeas corpus proceedings." *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment). But of course, a state prisoner cannot secure any relief in federal court if his claim is barred by the procedural default doctrine.

As this Court has emphasized, important state interests are served when States enforce well-established procedural rules against petitioners who cannot show cause for their noncompliance. *See, e.g.*, *Carrier*, 477 U.S. at 494-95. But a regime in which *ad hoc* rules reconcilable only through *post hoc* ingenuity are permitted to bar access to federal court, or an individual may be put to death without any federal review of serious constitutional claims for reasons that all concede were not his fault, may call into question the legitimacy of a system of capital punishment itself and "transgress[] the constitutional commitment to decency and restraint." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008).

These risks are particularly acute here where—unique among all other states—Alabama does not provide *any* right to post-conviction counsel at the post-conviction stage. *See* Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1081 (2003). Alabama understands that its capital prisoners are routinely forced to rely on the assistance of "'out-of-state law firms and/or public interest groups.'" Br. in Opp. at 11, *Barbour*, No. 06-10605 (May 10, 2007) (citation omitted). Under the decision below, however, even those prisoners who secure counsel may be subjected to insuperable and unforeseen procedural barriers that will further diminish meaningful access to federal court. Moreover, when a prisoner runs afoul of such barriers for reasons that all agree are not his fault, he will have no recourse—even if the State itself is involved in the alleged default. The potential for these rulings to work manifest injustice is clear and warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 9, 2010

EXHIBIT

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No. 10-

IN THE

Supreme Court of the United States

LUIS MARIANO MARTINEZ,

Petitioner,

v.

DORA SCHRIRO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

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Ariz.R.Crim.P. 32.2(a) .....

Ariz.R.Crim.P. 32.3 .....

Ariz.R.Crim.P. 32.4(a) .....

Ariz.R.Crim.P. 32.4(c)(2) .....

OPINIONS BELOW

The relevant decisions and opinions of the Maricopa County Superior Court, the Arizona Court of Appeals, the Supreme Court of Arizona, United States Magistrate Judge Mark E. Aspey, the United States District Court for the District of Arizona, and the Ninth Circuit Court of Appeals and are reproduced in the Appendix to this Petition. The panel opinion of the Ninth Circuit Court of Appeals is reported as *Martinez v. Schriro*, 623 F.3d 731 (9th Cir. 2010).

JURISDICTION

The Court of Appeals denied rehearing on November 5, 2010. (App. at 84a). This petition is being filed within 90 days after entry of that judgment, pursuant to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. State Court Proceedings

A. Evidence Presented at Trial

1. Petitioner was charged in the state trial court with two counts of sexual conduct with a person under the age of fifteen. 623 F.3d at 733 (App. at 3a). The State's theory was that Petitioner had sexual intercourse with his stepdaughter, Lacey, on two occasions during the morning of July 10, 1999. (Federal Habeas Corpus Petition [hereinafter "Habeas Pet."], District Court DN 1, at 8.)

2. Lacey testified at some length at trial, but she stated that she did not remember much of what had (or had not) happened on July 10, 1999 and for the weeks that followed. (*Id.*). On cross-examination, however, Lacey testified that Petitioner did **not** try to have sex with her or "put his penis up against" her. (*Id.*).

3. Although Lacey's trial testimony did not inculpate Petitioner, the State was permitted to offer testimony that Lacey had made statements prior to trial indicating that Petitioner had rubbed her "private area" and twice had put his "private area" inside her "private area." (*Id.*). On the other hand, there was evidence that Lacey had recanted her accusations against Petitioner during later pretrial conversations with several people. (*Id.*). Lacey's recantations were consistent with Petitioner's exculpatory statements to the police. (*Id.* at 67).

4. The prosecution sought to explain Lacey's recantations primarily by arguing that they were the result of her mother's failure to believe or support Lacey's

initial accusations against Petitioner. (*Id.* at 11]). In this regard, the prosecution relied heavily on expert testimony by a social worker, Wendy Dutton, that "a range of research" indicated that recantations by children of true accusations of sexual abuse most commonly were caused by a "lack of support from the mother of the victim." (*Id.*). Defense counsel did not seek to obtain or present expert testimony to refute Ms. Dutton's opinions, even though such testimony was available. (*Id.* at 12-13).

5. The State presented evidence that a nightgown that Lacey was wearing when the police arrived at the Martinez residence on the morning of July 10, 1999 contained semen stains that matched Petitioner's DNA. (*Id.*). However, the evidence also indicated that it was not possible to determine when the semen had been deposited on the nightgown, that semen still could be found on a garment even after it had been washed, that the extremely low sperm count in the semen samples on the nightgown could have resulted from washing, and that Lacey might have taken her nightgown from a pile of dirty laundry. (*Id.*). Moreover, vaginal swabs collected during a sexual assault examination on the day of the alleged assaults did not contain semen; and the same examination also did not disclose any evidence of injury or trauma on Lacey's body, including her vaginal area. (*Id.*).[1]

6. Petitioner was convicted on both of the counts against him, and he was sentenced to consecutive terms of 35 years to life. 623 F.3d at 733 (App. at 3a).

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1. Trial counsel ineffectively failed to present additional evidence providing an exculpatory explanation for the State's DNA evidence. (*Id.* at 17-19).

B. State Appellate and Post-Conviction Proceedings

1. On direct appeal, Petitioner raised issues that are not relevant to this Petition. The Arizona Court of Appeals affirmed Petitioner's convictions, and the Arizona Supreme Court denied review. *Id.*

2. In May 2002, during the pendency of Petitioner's direct appeal but without his authorization, his court-appointed appellate counsel, Harriette Levitt, filed a Notice of Post-Conviction Relief. *Id.* at 733-34 (App. at 3a-4a). Under Arizona law, a convicted defendant commences a post-conviction relief proceeding by filing a "notice" of post-conviction relief" that does not include the defendant's claims for relief, which are to be stated in a subsequent "petition." *Id.* at 734 (App. at 3a).

3. There was no reason for Ms. Levitt to file a Notice of Post-Conviction Relief before the conclusion of Petitioner's direct appeal.[2] That Ms. Levitt in fact had no such reason became apparent in February 2003, when -- without having communicated with Petitioner's trial counsel, and without Petitioner's consent -- she filed with the state trial court a statement (a) asserting that she had "reviewed the transcripts and trial file and [could] find no colorable claims pursuant to Rule 32" and (b) requesting that the court issue an order granting Petitioner 45 days to file a pro se petition for post-conviction relief. *Id.* (App. at 4a); Habeas Pet. at 35. Ms. Levitt then failed effectively

2. Under Ariz.R.Crim.P. 32.4(a), a notice of post-conviction relief must be filed "within 30 days after the issuance of the order and mandate in the direct appeal."

to inform Petitioner that he needed to file his own petition,[3] and he did not do so. 623 F.3d at 734 (App. at 4a). On April 28, 2003, the state trial court dismissed the pending post-conviction Notice. *Id.*

4. Represented by new counsel, Petitioner filed a Notice of Post-Conviction Relief in the state trial court on October 18, 2004, and a timely Petition for Post-Conviction Relief on February 7, 2005. *Id.* The Petition alleged that Petitioner's trial counsel was ineffective, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, in several respects including failing to object to Ms. Dutton's expert testimony regarding the alleged victim's recantations, even though that testimony was inadmissible under state law; failing to research the purported basis for Ms. Dutton's testimony or to present readily available expert testimony that Ms. Dutton's testimony was inaccurate and misleading in light of the empirical literature in the field; failing to impeach an important prosecution witness with his own police report; failing to discover or present additional compelling evidence that the alleged victim's initial accusations were false and her subsequent recantations true; and failing to present exculpatory evidence relating the State's DNA evidence. *Id.* (App. at 4a); Habeas Pet. at 10-20, 22-25.[4]

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3. Ms. Levitt's letters to Petitioner were written in English -- even after Petitioner had informed her, in Spanish, that he did not read English and did not "understand anything of what is happening." (Habeas Pet. at 36).

4. Petitioner also argued in the second post-conviction relief proceeding -- in the state trial court, the Arizona Court of Appeals, and the Arizona Supreme Court -- that he had a federal constitutional right to effective assistance of first post-conviction

5. The state trial court dismissed the post-conviction relief Petition without a hearing, finding that Petitioner's claims were "precluded," under Ariz.R.Crim.P. 32.2(a), because Ms. Levitt had not raised those claims in the aborted first post-conviction relief proceeding described above. 623 F.3d at 734 (App. at 5a). The Arizona Court of Appeals granted review but denied relief, solely on the ground that Petitioner's claim was precluded because it could have been raised in the previous post-conviction proceeding. *Id.*; App. at 81a-83a. The Arizona Supreme Court denied review without opinion. 623 F.3d at 734 (App. at 5a).

II. Federal Habeas Corpus Proceedings

1. Petitioner filed a Petition for a Writ of Habeas Corpus on April 24, 2008, pursuant to 28 U.S.C. §§ 2241(a) and 2254(a). *Id.* The Petition asserted the above-referenced federal ineffective-assistance-of-counsel claim, and it argued that the claim was not subject to procedural default because Petitioner had not received the effective assistance of first post-conviction counsel, with respect to his ineffective-assistance-of-counsel claim, to which he was entitled under the United States Constitution. *Id.*; Habeas Pet. at 67-83, 87-94.

2. On December 12, 2008, the District Court issued an Order denying the Petition solely on the ground that Petitioner's claim was procedurally defaulted. 623 F.3d at 734 (App. at 5a).

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counsel with respect to his ineffective-assistance-of-trial-counsel claim, but that Ms. Levitt had performed ineffectively. (Habeas Ex. 4 at 18-19; Habeas Ex. 9 at 5; App. at 8-9; Habeas Ex. 10 at 5-8). Thus, Petitioner exhausted the issue presented in this Petition under *Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000).

3. After Petitioner filed a timely Notice of Appeal, the District Court issued a Certificate of Appealability with respect to two related issues: "1) whether Arizona's procedural bar, as applied in this case, is an adequate and independent state law ground for denying relief; [and] 2) whether Petitioner has shown cause to excuse his procedural default." *Id.*

4. On September 27, 2010, the Court of Appeals issued a panel Opinion affirming the judgment of the District Court. *Martinez v. Schriro, supra.* The Court of Appeals' ruling was based on its holding that Petitioner did not have a federal right to effective assistance of his first post-conviction relief counsel with regard to his federal ineffective-assistance-of-trial-counsel claim, and that the claim therefore was procedurally defaulted. 623 F.3d at 735-43 (App. at 6a-25a).

5. On October 11, 2010, Petitioner filed a timely Petition for Panel Rehearing and Rehearing En Banc. That Petition was denied on November 5, 2010. (App. at 84a).

III. Basis for Federal Jurisdiction in the Court of First Instance

The District Court had jurisdiction of this habeas corpus action under 28 U.S.C. §§ 2241(a), 2241(c)(3), and 2254(a).

ARGUMENT

The Court of Appeals' dispositive holding that Petitioner did not have a federal right to effective assistance of first post-conviction counsel with respect to any ineffective-assistance-of-trial-counsel claim, even though the first post-conviction proceeding provided the first opportunity for Petitioner to raise such a claim, was contrary to this Court's decisions in *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005).

I. Petitioner's Federal Ineffective-Assistance-of-Trial-Counsel Claim is Not Subject to Procedural Default for Two Related Reasons

As noted above, the state courts denied Petitioner's ineffective-assistance-of-trial-counsel claim on the procedural ground that the claim was not raised in the aborted first post-conviction "proceeding" and therefore was precluded in the second post-conviction proceeding. Petitioner of course agrees with the Court of Appeals, 623 F.3d at 735 (App. at 6a-7a), that a federal habeas corpus court may not reach the merits of a claim which the state courts have denied on a procedural ground if that ground is "adequate and independent," unless the petitioner can demonstrate "cause and prejudice to excuse his default" (or show that failure to reach the merits would "result in a fundamental miscarriage of justice"). *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). In this case, however, there are two related, but independently sufficient, reasons why Petitioner's ineffective-assistance-of-trial-counsel claim was not procedurally defaulted: (A) the procedural ground

on which the Arizona Court of Appeals denied Petitioner's claim was not "adequate"; and (B) there is cause and prejudice to excuse any "adequate" default.

A. The procedural ground on which the state court denied Petitioner's federal claims was not "adequate"

As the Court of Appeals recognized, a "state procedural rule is not adequate to bar federal review if that 'state procedural rule frustrates the exercise of a federal right.'" 623 F.3d at 742 (App. at 6a) (quoting *Hoffman v. Arave*, 236 F.3d 523, 531 (9th Cir.), *cert. denied*, 534 U.S. 944 (2001)); *see also Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); *Reece v. Georgia*, 350 U.S. 85, 88-90 (1955). As the following paragraphs will show, the state courts' procedural ruling in this case -- that Petitioner's federal claims were precluded because of the failure of his first post-conviction counsel to raise them, regardless of whether or not she performed effectively -- was not adequate to prohibit federal-court review because it frustrated the protection of two related federal rights: (a) Petitioner's right to effective assistance of first post-conviction counsel specifically with respect to any ineffective-assistance-of-trial-counsel claim, and (b) Petitioner's underlying right to effective assistance of trial counsel.

1. The "adequacy" argument stated above depends in part on the proposition that Petitioner, as an **Arizona** defendant, had a federal constitutional right to effective assistance of his **first** post-conviction counsel, specifically and only with respect to any claim of ineffective assistance of **trial** counsel. In *Coleman v. Thompson*, this Court

stated the general rule that "there is no right to counsel in state collateral proceedings." 501 U.S. at 755. But this Court then recognized that there might be an exception to that general rule when "state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* The following paragraphs will demonstrate that there is such an exception, in the specific circumstances of this case, under *Douglas v. California*, 372 U.S. 353 (1963), and *Halbert v. Michigan*, 545 U.S. 605 (2005):

a. The defendant in *Halbert*, after being convicted on a plea of nolo contendere, requested that counsel be appointed to represent him in applying for leave to appeal, but the Michigan courts denied that request. 545 U.S. at 609. This Court, however, held that the due process and equal protection guarantees of the Fourteenth Amendment required "the appointment of counsel for [Michigan] defendants, convicted on their pleas, who [sought] access to first-tier review" -- even though such review was discretionary, rather than of right. *Id.* at 610. This holding was based on this Court's conclusion that *Douglas* -- rather than *Ross v. Moffitt*, 417 U.S. 600 (1974)[5] -- provided "the controlling instruction." 545 U.S. at 616-17. That conclusion in turn was based on two factors: (i) "in determining how to dispose of an application for leave to appeal, Michigan's intermediate appellate court looks to the merits of the claims made in the application"; and (ii) "indigent defendants pursuing first-tier review [i.e., their first available opportunity for review] in the Court of Appeals are generally ill equipped to represent themselves," in part because they (unlike the defendant in *Ross*) have no prior briefing by counsel of relevant issues to present to the reviewing court. *Id.* at 617, 618-22.

5. *Ross* is discussed in Argument section II, *infra*.

b. The holdings and rationale in *Halbert* and *Douglas* clearly apply to the ineffective-assistance-of-trial-counsel claim in this case. With respect to that claim, the "first tier" of review that was available to Petitioner was a state post-conviction relief petition -- because he was not permitted to raise the claim on direct appeal under Arizona law. *State v. Spreitz*, 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002). Moreover, the two additional *Halbert* factors discussed in the preceding paragraph are fully satisfied here: (i) In deciding how to dispose of ineffective-assistance-of-trial counsel claims raised in a first post-conviction relief proceeding, an Arizona trial court "looks to the merits of the claims"; and (ii) defendants pursuing first-tier review of ineffective-assistance-of-trial-counsel claims have received no prior assistance of counsel, and otherwise are especially "ill equipped to represent themselves," with regard to such claims. Indeed, *Douglas* is even more "controlling" in this case than in *Halbert*: While the "appeal" at issue in *Halbert* was discretionary, an Arizona defendant has a **right** to obtain review of an ineffective-assistance-of-counsel claim on the merits in a timely first post-conviction relief petition. Ariz.R.Crim.P. 32.1(a), 32.4(c)(2).

c. The preceding paragraphs demonstrate that an Arizona defendant pursuing his first opportunity for review of ineffective-assistance-of-trial-counsel claims (necessarily in a Rule 32 post-conviction relief proceeding) has a constitutional right to appointed counsel under *Douglas* and *Halbert*. That means that such a defendant also is entitled to constitutionally **effective** assistance of counsel on such first-tier review. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984) ("the right to counsel is the right to the effective assistance of counsel").

3. As noted above, when an Arizona defendant is deprived of his federal right to effective assistance of trial counsel, his first and only recourse is to file a petition for post-conviction relief, which he has a right to do under Ariz.R.Crim.P. 32.1(a). Like the defendants in *Douglas* and *Halbert*, however, a defendant is ill-equipped to litigate an ineffective-assistance-of-trial-counsel claim without the assistance of post-conviction counsel -- and such assistance is of little use if it is not effective. Thus, the state courts' ruling that Petitioner's ineffective-assistance-of-trial-counsel claim was "precluded" because his first post-conviction counsel failed to raise it -- regardless of whether or not first post-conviction counsel performed effectively -- frustrated the protection of Petitioner's federal right to effective assistance of trial counsel; and it did so by denying Petitioner's federal right to effective assistance of first-tier-review counsel with respect to ineffective assistance of trial counsel under *Douglas* and *Halbert*.

B. There is cause and prejudice to excuse any procedural default of Petitioner's ineffective-assistance-of-trial-counsel claims

Even if the purely procedural ground for the Arizona Court of Appeals' decision in this case had been adequate and independent, there would be cause and prejudice to excuse the procedural default if Petitioner could show that first post-conviction counsel was **unconstitutionally** ineffective. *Coleman*, 501 U.S. at 753-54 ("Attorney error that constitutes ineffective assistance of counsel is cause"). Argument sections I(A)(1) and (2) have demonstrated that Petitioner did have a federal right to effective assistance of first post-conviction counsel, specifically with respect to his

ineffective-assistance-of-trial-counsel claims; and under *Coleman* a violation of that right constituted cause and prejudice for any procedural default of Petitioner's federal claims in the first post-conviction relief proceedings.

II. The Court of Appeals Misapplied This Court's Decisions In Holding That There Was No Right To Effective Assistance of Counsel On "First-Tier" Review Of Ineffective-Assistance-Of-Trial-Counsel Claims in Arizona

The Court of Appeals' discussion of the holdings in *Douglas*, *Ross*, and *Halbert*, 623 F.3d at 737-39 (App. at 10a-16a), is thorough and accurate, as such. However, the Court of Appeals' application of those holdings to this case, *id.* at 739-42 (App. at 16a-23a), is fundamentally flawed in several respects:

A. The Court of Appeals' analysis of whether this case is controlled by *Douglas* and *Halbert*, or by *Ross*, begins (appropriately) with a critical question: whether Petitioner's first state post-conviction proceeding amounted to "first-tier" review. *Id.* at 740 (App. at 17a). In that regard, the Court of Appeals concludes that "[t]his case is more like *Ross* than *Halbert*":

> Martinez has already received direct review of his conviction and received the assistance of counsel in connection with that appeal. . . . Even if collateral review presents the first tier of review for Martinez' ineffective assistance of [trial] counsel claim, we conclude that Martinez' action is not analogous to a direct appeal -- or

> the first opportunity for him to obtain review of his conviction -- so as to entitle him to effective counsel.

Id. (App. at 18a). With respect, this rationale is neither consistent with the holdings and reasoning in *Douglas* and *Halbert* nor supported by *Ross*:

1. As the above-quoted passage from the Court of Appeals' opinion recognizes, the fact that Petitioner was **prohibited** from raising his ineffective-assistance claim in his "direct appeal" from his conviction meant that the first post-conviction proceeding was "the first tier of review" for that claim; and with respect to that claim, Petitioner certainly had not "already received the assistance of counsel in connection with that first appeal." Thus, for Petitioner's ineffective-assistance claim the first post-conviction proceeding fully implicated the "first tier" due process and equal protection concerns that underlay *Douglas* and *Halbert*.

2. The foregoing effectively suggests how clearly *Ross* is distinguishable from this case. In *Ross*, the discretionary review proceedings in which the defendant sought appointed counsel necessarily were restricted to claims that the defendant already had litigated in the state court of appeals -- with appointed counsel. 417 U.S. at 603-604. Thus, those discretionary review proceedings provided second (or third) tier review for all of Moffitt's claims; and Moffitt -- unlike Petitioner -- really **had** "already received the assistance of counsel" for those claims.[6]

6. In *Douglas*, this Court noted that it was not concerned with the right to counsel "for the preparation of a petition for discretionary or mandatory review beyond the stage in the

3. The Court of Appeals' flawed reasoning regarding "first tier" review implies that if an Arizona defendant filed a notice and petition for post-conviction relief alleging ineffective assistance of trial counsel **before** he filed a notice of direct appeal [as he could under Ariz.R.Crim.P. 31.3 and 32.4(a)], he would be entitled to effective assistance of counsel in the post-conviction proceedings -- but not with respect to any issues that had to be raised on direct appeal. Such a result would make no sense in terms of the holdings in *Douglas* and *Halbert* (and *Ross*).

4. The Court of Appeals' position regarding "first tier" review also would mean that the State could deprive a defendant of his right to effective assistance of counsel with respect to first-tier review of any federal constitutional claim simply by (i) restricting direct appeal to state-law errors and (ii) requiring all federal errors to be raised by means of a "post-conviction" petition. Such a result would not be consistent with the holdings in *Douglas* and *Halbert*, or with *Halbert*'s explicit statement that the right to counsel on first-tier review is not dependent on whether such review is labelled an "appeal." 545 U.S. at 619.

B. With respect to Petitioner's argument that a pro se defendant is "ill equipped" to represent himself in the proceeding that provides the first opportunity to raise and litigate an ineffective-assistance-of-trial counsel claim, the Court of Appeals' reasoning is that

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appellate process at which the **claims** have once been presented by a lawyer and passed upon by an appellate court." 372 U.S. at 356 (emphasis added). And in *Ross*, this Court stated that the State had a duty "only to assure [that an] indigent defendant [had] an adequate opportunity to present his **claims** fairly in the context of the State's appellate process." 417 U.S. at 616 (emphasis added).

> Martinez faces a lesser handicap in pursuing collateral review than a defendant pursuing a first appeal, as in *Douglas* and *Halbert*. Martinez has already received the assistance of appellate counsel in a prior proceeding, like the petitioner in *Ross*.
>
> . . . . A defendant seeking second-tier review will have received the assistance of counsel in connection with direct review, and would have "at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case."

623 F.3d at 741 (App. at 19a) (quoting *Ross*, 417 U.S. at 615). The above-quoted statements of course are true when "collateral" review involves the same claims as a prior direct appeal -- but they do not apply at all to this case, in which the first post-conviction proceeding was, as a matter of state law, Petitioner's first opportunity to raise an ineffective-assistance-of-trial-counsel claim:

1. The "assistance of appellate counsel in a prior proceeding" that Petitioner received (on direct appeal) could not have had anything to do with any ineffective-assistance-of-trial-counsel claim, since such claims were prohibited on direct appeal. Similarly, neither the "brief on his behalf in the [Arizona] Court of Appeals" nor any "opinion by the Court of Appeals disposing of his case" on direct appeal could have involved any claim of ineffective assistance of trial counsel.

2. A "transcript or other record of trial proceedings" would be inadequate to evaluate the effectiveness of trial counsel, which often depends on what trial counsel did (or did not do) outside the record.

3. Given the purpose of the right to effective assistance of counsel, a defendant obviously is especially ill equipped to represent himself with respect to an ineffective-assistance claim.

C. With regard to Petitioner's argument that his case satisfies *Halbert*'s second factor regarding first-tier review because an Arizona trial court considering an ineffective-assistance claim in a first post-conviction proceeding must "look to the merits" of the claim, the Court of Appeals points out that *Douglas* and *Halbert* both involved discretionary review proceedings in which the reviewing courts looked to the merits of the defendants' claims in performing a "gatekeeping" function. 623 F.3d at 741 (App. at 20a). But that point does nothing to counter Petitioner's argument or distinguish *Douglas* and *Halbert*: In both of those decisions, this Court's point was that **even though** the reviewing courts were performing a gatekeeping function, they looked to the merits in doing so. 372 U.S. at 354-57; 545 U.S. at 612, 617-19. The fact that an Arizona trial court presented with an ineffective assistance claim in a first post-conviction proceeding has no gatekeeping function, but instead must address the merits directly, makes *Douglas* even more clearly controlling in this case than in *Halbert*.[7]

7. Moreover, it does not matter that "there is no impediment to the first tier of **appeal**," 623 F.3d at 741 (App. at 20a) (emphasis added) -- because Petitioner was prohibited from raising any ineffective-assistance claim on direct appeal.

D. The preceding paragraph effectively demonstrates why it is not relevant that

> discretionary appeal to a state Supreme Court or to the United States Supreme Court is not intended to correct error in individual cases, but rather to address questions of public importance, critical issues of law, conflicts in the decisions of relevant courts, and so forth.

623 F.3d at 741 (App. at 21a). In a first post-conviction proceeding, an Arizona trial court has no discretion whether to rule on an ineffective-assistance claims based on considerations of public importance (or anything else); and contrary to the Court of Appeals' suggestion, *id.* at 742 (App. at 21a), with respect to such claims the Arizona trial courts do perform an "error correction function" -- under *State v. Spreitz*, *supra*, and Ariz. R. Crim. P. 32.1(a) and 32.4(c)(2) -- that is precisely "analogous to an appellate court hearing a criminal defendant's direct appeal as of right."[8]

E. With regard to the Court of Appeals' "return" to *Douglas* and its due process and equal protection rationales, 623 F.3d at 742 (App. at 21a-22a), it suffices to point out that every reason that the Court of Appeals offers for not applying due process and equal protection

8. In the Arizona context, the Court of Appeals also is incorrect in asserting that post-conviction relief "is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature," 623 F.3d at 742 (App. at 21a): Rule 32.3 of the Arizona Rules of Criminal Procedure specifically provides that a post-conviction relief proceeding "is part of the original criminal action and not a separate action."

principles to this case would apply equally to *Douglas* and *Halbert* -- in both of which this Court found those principles to be applicable. 372 U.S. at 355-57; 545 U.S. at 610.[9]

F. The Court of Appeals' discussion of Petitioner's argument for a very specific "exception to the general rule that there is no right to counsel in collateral review" concludes with the proposition that "this exception would swallow the general rule." 623 F.3d at 742 (App. at 23a). While this statement is cryptic, it is supported by a citation to *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996) [*Bonin III*] -- which in turn cites to *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993) [*Bonin I*], in which the Court of Appeals offered the following rationale:

> The actual impact of such an exception would be the likelihood of an infinite continuum of litigation in many criminal cases. If a petitioner has a Sixth Amendment right to competent counsel in his or her first state postconviction proceeding because that is the first forum in which the ineffectiveness of trial counsel can be alleged, it follows that the petitioner has a Sixth Amendment right to counsel in the second state postconviction proceeding, for that is the first forum in which he or she can raise a challenge based on counsel's performance in the first state postconviction proceeding. Furthermore,

9. Petitioner respectfully disagrees with the Court of Appeals' statement that "Martinez advances no argument grounded in the rationale of equal protection," 623 F.3d at 742 (App. at 22a): In relying on *Douglas* and *Halbert*, Petitioner necessarily has been relying on their due process and equal protection rationales.

> because the petitioner's first federal habeas petition will present the first opportunity to raise the ineffective assistance of counsel in the second state post-conviction proceeding, it follows logically that the petitioner has a Sixth Amendment right to counsel in the first federal habeas proceeding as well. And so it would go. Because any Sixth Amendment violation constitutes cause, . . . federal courts would never be able to avoid reaching the merits of any ineffective-assistance claim, regardless of the nature of the proceeding in which counsel's competence is alleged to have been defective. As a result, the "exception" would swallow the rule.

Id. at 430. While the Court of Appeals' apparent concern about the likelihood of an "infinite continuum of litigation" is understandable in the abstract, it is misplaced in this case, for the following independently sufficient reasons:

1. On a theoretical level: While it would appear that a challenge (in a second post-conviction proceeding) to the effectiveness of first post-conviction counsel with respect to an ineffective-assistance-of-trial-counsel claim would constitute first-tier review, in fact that is not the case -- because any review of the effectiveness of first post-conviction counsel necessarily would require second-tier review of the effectiveness of trial counsel[10] (which would be covered by *Ross*, rather than *Douglas*

10. First post-conviction counsel could not be ineffective with regard to an ineffective-assistance-of-trial-counsel claim unless that claim was valid.

and *Halbert*). Thus, the "continuum" would end after one tier (in Arizona, the first post-conviction proceeding).[11]

2. On a practical level: It is highly unlikely that a potential habeas petitioner could work his way through several tiers of state post-conviction review without running afoul of the one-year statute of limitation for federal habeas cases, 28 U.S.C. § 2244(d)(1).

3. Even if there was a likelihood that there would be some habeas cases involving multi-level ineffective-assistance claims, that would not justify denying the constitutional right to first-tier-review counsel recognized in *Douglas* and *Halbert*. In effect, the Court of Appeals' decision says that a state criminal defendant has an abstract right to effective assistance of trial counsel -- but that if he is deprived of that right, he has no federal right to an effective remedy.

11. This does not mean that a defendant (like Petitioner) could not challenge the effectiveness of first post-conviction counsel in a second post-conviction proceeding; but it does mean that the defendant would have no federal right to counsel in the second post-conviction proceeding, or in any subsequent federal habeas proceeding.

CONCLUSION

This Petition has not addressed the merits of Petitioner's ineffective-assistance-of-trial-counsel and ineffective-assistance-of-first-post-conviction-counsel claims, because neither the Court of Appeals nor the District Court did so. Thus, this Court should grant this Petition, reverse the judgment of the Court of Appeals, and remand with direction to consider the merits of Petitioner's interdependent ineffective-assistance claims.

Respectfully submitted,

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REGULAR AND CERTIFIED MAIL
Mr. James D. Robertson
SK5067
RB 205 Lieber Correctional
P. O. Box 205
Ridgeville, SC 29472

Re: Robertson, James D. v. State

Dear Mr. Robertson:

Enclosed is the order issued in the above entitled matter.

The remittitur will be sent to the lower court as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

CLERK

RECEIVED
JUN 08 2005

DES/dmh

Enclosure

cc: Acting Chief Attorney Joseph L. Savitz, III
Senior Assistant Attorney General William Edgar Salter, III
The Honorable Thomas E. Pope

The Supreme Court of South Carolina

James D. Robertson, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

Petitioner seeks to waive his right to appellate review in this capital case. This matter was remanded to the Honorable John C. Hayes, III, for a determination of whether petitioner is competent and his decision to waive his right to appellate review is knowing and voluntary. Judge Hayes has now issued his order finding petitioner competent.

After a review of the record of the competency hearing, we agree with the finding of Judge Hayes that petitioner is competent to waive his right to appellate review. In addition, we have conducted the proportionality review required by S.C. Code Ann. § 16-3-25 (2003) and conclude that the death penalty was not the result of passion, prejudice, or other arbitrary factors, and the evidence supports the jury's finding of aggravating circumstances. The death sentence is not excessive or disproportionate to the

penalty imposed in similar cases. *See State v. Williams*, 321 S.C. 327, 468 S.E.2d 626, *cert. denied*, 519 U.S. 891 (1996); *State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997); *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116, *cert. denied*, 525 U.S. 1043 (1998).

Accordingly, we dismiss this matter and direct the Clerk of 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).

IT IS SO ORDERED.

C. J.

J.

J.

J.

J.

Columbia, South Carolina

June 3, 2005

EXHIBIT

F

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

James D. Robertson,

Petitioner,

v.

Jon Ozmint, Commissioner South Carolina Dept. of Corrections,

Respondent.

Civil Action No.2:11-63-SB-BHH

ORDER

The petitioner, a state prisoner, seeks habeas relief pursuant to Title 28, United States Code, Section 2254. The petitioner brought this habeas action on October 27, 2010, requesting a stay of execution. On November 4, 2010, the Honorable Sol Blatt, Jr. granted it. [Doc. 10.] The petitioner filed his petition on January 7, 2011. [Doc. 20.] Simultaneous to that filing, the petitioner also filed a motion to stay, which is presently before the Court. [Doc. 21.] The respondent has already filed his motion for summary judgment. [Doc. 35.] The time for a response has not expired.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 73.02(B)(2)©, D.S.C., this magistrate judge is authorized to resolve all pretrial proceedings in posttrial petitions for relief.

PROCEDURAL HISTORY

The petitioner, James D. Robertson, is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of two York County murder convictions and death sentences for allegedly killing his parents. The York County Grand Jury indicted the petitioner at the April 23, 1998 term of court 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. at 3758-65.) The petitioner was convicted and sentenced to death in the York County, South Carolina Court

of General Sessions in March, 1999. The procedural history of his direct appeal is substantially tortured, but it appears that he ultimately was permitted to abandon it voluntarily. (Resp. Response at 4-5.)

Following the dismissal of his direct appeal, the petitioner sought post-conviction relief (PCR), pursuant to S.C. Code § 17-27-160, which requires appointment of qualified counsel to assist indigent death row prisoners in the identification, development and litigation of challenges to their convictions and sentences. In September 2005, the York County Court of Common Pleas appointed Michael L. Brown and Thomas Matlock, to represent the petitioner. Counsel filed a PCR application on petitioner's behalf alleging, "Ineffective assistance of counsel – specifics to be amended later." (App. at 3246.)

The petitioner contends that his PCR counsel failed to independently investigate his case and, therefore, overlooked seven different grounds for relief, which are now a part of the habeas petition in federal court. This alleged oversight of PCR counsel, while not a bases for habeas relief itself, is the leverage by which the petitioner hopes to make a successive and potentially out-of-time PCR application in the state court and to stay the case here. The petitioner's successive PCR application, based on these unexhausted grounds, is currently pending in state court. (Pet. Mot. Stay at 2-3.)

The precise grounds for federal habeas relief need not be recited here. They allege various constitutional errors committed at the trial of the petitioner and upon his direct appeal. (See generally Pet.)

DISCUSSION

The petitioner asks the court to stay this habeas action pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), until the state court rules on his pending second PCR application. In *Rhines*, the Supreme Court addressed how "mixed" petitions containing both exhausted and unexhausted claims should be handled by district courts. The Court in *Rhines* noted the

interplay between the one-year statute of limitations of the AEDPA, 28 U.S.C. § 2244(d) (1), and the requirement of *Rose v. Lundy*, 455 U.S. 509 (1982), that courts are to dismiss the entire mixed habeas petition without prejudice in order to effectuate the requirement of "total exhaustion." *Rhines,* 544 U.S. at 274-75. In such cases, petitioners who come to federal court with a mixed petition "run the risk of forever losing their opportunity for any federal review [of their claims]" if the district court dismisses the case without prejudice close to or after the limitations period has expired." *Id.* In *Rhines,* the Court noted that some district courts have adopted a stay and abeyance procedure to deal with this problem: the court stays the petition and holds it in abeyance while the petitioner returns to state court with his unexhausted claims. *Id.* at 275-76.

The Court cautioned, however, that the practice of staying a federal habeas case, while a petitioner returns to state court to exhaust his claims, should be used sparingly.

> Stay and abeyance, if employed too frequently, has the potential to undermine these twin purposes. Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition. . . .
>
> For these reasons, stay and abeyance should be available only in limited circumstances. Because grating a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

Id. at 277. Accordingly, a stay should be granted only where (1) "there was good cause for the petitioner's failure to exhaust his claims" in a prior state court proceeding; (2) the unexhausted claims are not "plainly meritless"; and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 276. The petitioner has

addressed each consideration; the respondent has acknowledged none, failing to even recognize *Rhines* at all. The Court will address the petitioner's showing and then consider the respondent's arguments, as far as they go.

The petitioner contends that there is good cause for his failure to exhaust certain claims because his PCR attorneys did not perform the required independent investigation to determine the existence of claims for relief based on evidence not contained within the record generated at trial. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1 and Commentary, reported in 31 HOFSTRA L. REV. 913, 1085-86 (2003) ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."); *Nash v. Ryan*, 581 F.3d 1048, 1054 n.9 (9th Cir. 2009) (recognizing Guideline and duty); *Moeller v. Weber*, 2010 WL 1170451, at *1 (D.S.D. 2010) (recognizing Guideline and duty). Specifically, the petitioner contends that PCR counsel overlooked at least seven (7) colorable challenges to his convictions and sentences that were apparent from the trial record. *See* Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. at 1086 ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues."). Those claims include Grounds 5 through 11. The respondent does not reject either that PCR counsel failed to independently investigate or raise the grounds for relief, as alleged.

The petitioner also offers that while some, or all, may eventually prove ineffective, none of the grounds can reasonably be considered "plainly meritless." The respondent has not attempted, in his brief, to contest the viability of any grounds alleged, either those exhausted or unexhausted. The Court, therefore, construes the silence as acquiescence.

Finally, there exists not even the specter of any dilatory tactics on account of the petitioner or his counsel. The respondent has certainly raised none.

The Court would address briefly the objections of the respondent, many of which seem somewhat dissociated from the merits of the stay analysis. The undersigned may misapprehend them. But, as far as can be understood, they do not seem to raise any pause in the decision to stay.

First, the respondent claims that the petitioner's's "complaint is one of a state law violation that was never litigated in state PCR proceedings." (Resp. Response at 10.) The respondent continues, "Further, alleged defects in state post-conviction procedures are not cognizable in a federal habeas corpus action." *Id.* at 11. The arguments are confusing. Grounds 5 through 11 of the habeas petition are all framed as violations of various Amendments of the United States Constitution, rather than state law, and none of them purport to challenge post-conviction procedures; they are all challenges to incidents of trial or the direct appeal. [Doc. 20 at 18-24.] If the respondent means to say that the petitioner's appeal to PCR counsel's failure to investigate is somehow a part of the habeas corpus challenge, the point is not effective. The petitioner's objection to PCR counsel's conduct was exclusively an attempt to show good cause for the stay, as part of the *Rhines* paradigm. It is not, itself, some ground for habeas relief.

Reframing the point, the respondent again contends that the petitioner's basis for a successive PCR Application "lacks merit because neither the state court nor this Court will grant relief based upon the ineffective assistance of collateral counsel." (Resp. Response at 11 (citations omitted).) The Court cannot say it more plainly: petitioner does not seek habeas corpus relief for any ineffective assistance of collateral counsel.

The respondent also emphasizes that the petitioner is challenging the qualifications of his collateral counsel to handle a death penalty case. The respondent argues that any "supposed lack of qualification was an issue that could have been raised, if at all, at the time of the appointment and later pursued on appeal." (Resp. Response at 12.) The petitioner

unequivocally mentions collateral counsel's purported lack of qualification. (Pet. Mot. Stay at 1-2.) That observation, however, formed essentially no part of his good cause proffer for stay. *Id.* at 4-5. Instead, the petitioner relies almost exclusively on the PCR counsel's alleged failure to investigate. *Id.* As discussed, the showing has been unrejoined. But, even to the extent the petitioner has made a mixed appeal to the Court that good cause exists – for both a want of qualification and investigation, the allegations related to the failure to investigate have not been challenged by the respondent and would constitute good cause, alone, even if concerns over PCR counsel's qualifications were deemed somehow improvident.

Lastly the respondent contends for various procedural reasons, including the one-year statute of limitations governing state PCR applications, S.C. Code § 17-27-45(A), that the petitioner's pending and successive application will not be successful. Such may be the case. The Court agrees with the petitioner, however, that it is unnecessary to guess about it. To the extent there are any questions about the petitioner's ability to proceed in state court, those questions are better resolved there. There is no reason to prematurely foreclose the opportunity, when there exists some chance that the state court, whose determination and province it is, might view the matter differently. In light of *Rhines*, it seems that where a state court is willing to consider a prisoner's claims, there is no legitimate federal interest in impairing access to that consideration by refusing a stay. *See, e.g.*, *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief."); *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (citing Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-491 (1973)) ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and

prevent disruption of state judicial proceedings."). That is not to say that the procedural inadequacies of the petitioner's PCR application are at all times irrelevant. In fact, the Court can imagine circumstances where the procedural condition of the claims might inform the "plainly meritless" inquiry. But, here, all other considerations being favorable to the petitioner, and unchallenged by the respondent, the Court would not aggressively speculate about what the state court may or may not do regarding the time bar.[1]

Accordingly, the Court would grant the stay.

CONCLUSION

Wherefore, it is ORDERED that the petitioner's Motion to Stay is GRANTED. [Doc. 21.] The petitioner shall notify the Court within five (5) days of resolution of his state court PCR application. *See Rhines*, 544 U.S. at 278. Thereafter, the respondent will have thirty (30) days to amend his motion for summary judgment, as necessary. The remainder of the briefing schedule shall follow in accordance with applicable rules.

IT IS SO ORDERED.

s/Bruce Howe Hendricks
United States Magistrate Judge

April 8, 2011
Charleston, South Carolina

[1] Of course, any ruling of the District Court that the claims raised in this habeas petition are without merit would not preclude the state PCR court from reaching a contrary conclusion and granting relief. *See Ivey v. Catoe* , 36 Fed. Appx. 718 (4th Cir. 2002).

EXHIBIT

G

State of South Carolina
Thirteenth Judicial Circuit

Teresa B. Johnson
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April 11, 2011

Emily C. Paavola
P.O. Box 11311
Columbia, SC 29211

RE: James D. Robertson v. State
Indictment #: 06-CP-46-00532

Dear Ms. Paavola:

I have received your request dated April 7, 2011 for the above referenced transcript. Your request asks for a hearing held on September 23, 2005. Records to produce a transcript from proceedings heard before April of 2006 are no longer available.

Sincerely,

Teresa B. Johnson

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
James D. Robertson, #5067, Applicant, v. State of South Carolina, Respondent.	)	C. A. No. 11-CP-46-00072 REPLY TO APPLICANT'S RESPONSE TO RETURN AND MOTION TO DISMISS

Respondent hereby makes a Reply to Applicant's Response to the State's previously-filed Return and Motion to Dismiss. Respondent submits that this Application must be summarily dismissed for the reasons previously argued in its original motion to dismiss and the following reasons:

I.

On March 24, 2011, Respondent made its Return and Motion to Dismiss the Application for Post-Conviction Relief (PCR) filed by Applicant, James D. Robertson (Robertson) through counsel, on January 7, 2011. This Court held a status conference on July 5, 2011 at the Moss Judicial Center, in York County South Carolina. Robertson was present at the hearing, and Senior Assistant Attorney General William Edgar Salter, III, represented the State. Keir Weyble, Esquire, and Emily C. Paavola, Esquire, were also present.

At the hearing, the Court appointed Mr. Weyble and Ms. Paavola to represent Robertson. Also, the Court (1) gave Robertson twenty days within which to file a response to the Return and Motion to Dismiss, (2) gave twenty days for Respondent to reply to that response, and (3) gave Robertson twenty days, from the hearing date, to file a verification of the Application because

the Application was not verified as required by S.C. Code Ann. §§ 17-27-40 & -50 (Supp. 2011). The Court further ruled that the verification would be considered *nunc pro tunc*.

Immediately after this hearing, Robertson's counsel served Respondent with a draft of an Amended PCR Application. On June 27, 2011, Respondent received a verified Amended Application for Post-Conviction Relief and Robertson's Response in Opposition to Motion to Dismiss, both of which were dated and served July 25, 2011.

II.

Respondent has previously argued that Robertson's 2011 Application must be summarily dismissed because (1) it is not verified by Robertson; (2) it is barred by the one year statute of limitations governing PCR applications, S.C. Code Ann. § 17-27-45(A) (Supp. 2011); (3) it is impermissibly successive to a previously filed application and this Court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel or PCR counsel's lack of statutory qualifications; (4) the supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge; (5) laches bars relief because Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application; and (6) the argument that he is entitled to relief based upon the supposed lack of qualification of original PCR counsel lacks merit as a matter of state law. With the exception of the failure to verify the Application, which the Court has allowed him to remedy, Respondent would adhere to the previously-asserted reasons for summary dismissal.

III.

Robertson asserts that "this Court should either: (a) deny respondent's Motion to Dismiss and allow this case to proceed to an evidentiary hearing and final adjudication because it is a permissible successive petition under state law; or, (b) deny respondent's Motion to Dismiss and hold this case in abeyance until the United States Supreme Court has resolved *Maples v. Thomas*, 2011 WL 940889, and *Martinez v. Ryan*, 2011 WL 380903, which could dictate that this case be allowed to go forward as a matter of federal constitutional law, regardless of South Carolina's state law rules regarding successive petitions."[1] Respondent disagrees and submits that none of the reasons advanced by him justifies the filing of a successive application that was filed well outside the statute of limitations and is predicated on the ineffectiveness of original PCR counsel, which is not a cognizable claim in state PCR.[2]

He initially contends that Respondent has erroneously asserted that the Application must be dismissed as successive. However, S.C. Code Ann. § 17-27-90 (Supp. 2011) "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 v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court in *Aice* 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

[1] For the Court's information, Respondent would note that *Martinez* and *Maples* are presently scheduled for argument on October 4, 2011.

[2] Contrary to Robertson's assertion, Respondent's primary reliance is on the statute of limitations, which is discussed, *infra*. However, Respondent has replied to the arguments he has made in the sequence in which he has raised them.

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.*

While the Court in *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. Thus, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." Id. at 451, 409 S.E.2d at 394.

The Court further explained that:

> 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).

The Court in *Aice* further indicated that, apart from the scenario covered by *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), a successive PCR application is not allowed on the

ground that first complete PCR application was insufficient due to ineffective PCR counsel. *Aice*, 305 S.C. at 450-52, 409 S.E.2d at 394-95. The Court concluded as follows:

> We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the *Austin* and *Aice* cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While Austin could rely on Rule 50(6) for support of his claim, Aice's request directly conflicts with the language of Rule 50(3). Hence, *Austin* stands harmonized with the instant case.

Id at 452, 409 S.E.2d at 395.

Robertson relies upon several PCR cases involving inmates who were not under a death sentence and the capital PCR cases of Luke Williams and Edward Lee Elmore to support of his contention that he has shown "sufficient reason" under *Aice*. Respondent submits that each of these cases is distinguishable because each was based on very unique procedural circumstances that simply are not present here. For instance, 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. *Id* at 234, 478 S.E.2d at 834. He 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*.

The PCR court found that he had not waive his right to direct appeal and that he should be granted a belated appeal. On the claim related to prosecutorial misconduct, the PCR court found that the State had failed to adequately explain the State's relationship with one of its

witnesses to the jury. However, 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 the Supreme Court, but the Court denied certiorari on that issue. He then filed a second PCR application, in which he again raised the misconduct issue. *Id* at 234-35, 478 S.E.2d at 834.

He also filed 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.* On certiorari, the State argued that § 17-27-90 barred the second PCR application. The Court rejected this argument. While the Court recognized that Washington's second PCR application was successive "under a hyper-technical analysis," it reasoned that:

> such a conclusion must be rejected in this case, because so many procedural irregularities occurred during the course of Washington's judicial process that he has not received due process. 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.

324 S.C. at 236, 478 S.E.2d at 835.

The other non-capital PCR cases are likewise distinguishable. 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. Also, the Court permitted a successive application in *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the

applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Robertson's PCR 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.

Thus, as in *Aice*, the cases relied upon by Robertson do not support the conclusion that "sufficient reason" to permit a successive application. Contrary to his argument before this Court, he could have raised his current allegations in his previous PCR Application. Likewise, any supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge. As a result, he cannot raise this or any other allegation now in a successive Application. *Aice*. *See also Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 843 (1992), *cert. denied*, 507 U.S. 927 (1993); *Hunter v. State*, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of prior applications but did not raise it); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application); *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002). Therefore, this Application must be dismissed as impermissibly successive.

His 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 thereafter 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 PCR judge thereafter issued an Order finding that Elmore was mentally retarded and that the Eighth Amendment barred his execution, *id*, the State did not appeal his adverse rulings on successiveness or the statute of limitations because an appeal would be futile. *See Atkins*.

Williams is also distinguishable because lead collateral counsel in the present case, Mr. Brown, was properly qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011), unlike Williams' original PCR attorneys. Moreover, Respondent would note that the capital PCR applicant in *Ivey*, *supra*, unsuccessfully sought relief such as that now being sought by Robertson, as has death row inmate Abdiyyah ben Alkebulanyahh, #6012, whose case is discussed in the next section.

IV.

Robertson further contends that the State is erroneous in asserting that his argument as to counsel's supposed lack of qualifications lacks merit as a matter of state law. Again, Robertson contends that, to be qualified in a capital PCR, a lawyer either needs to have previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief.

However, in her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 13, 2003, the Chief Justice of the Supreme Court of

South Carolina specifically rejected this interpretation, finding 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 S.C. Code Ann. § 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.[3] However, because "[t]rial judges are presumed to know the law and to apply it in making their decisions," *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) (applying *Walton* presumption to reject claim that the district court abused its discretion in continuing the trial date because it failed to consider all relevant factors), the presumption is that Judge Few appointed in accordance with § 17-27-160(B) and the Memorandum. Respondent would further observe that the General Assembly has not subsequently amended the statute, following Chief Justice's Memorandum. Thus, there was

[3] This paragraph in the original Motion to Dismiss contained a contrary statement that was in error.

no violation of the capital PCR qualification statute, and accordingly no basis for permitting this successive Application and for treating the proceedings that have taken place as a nullity.

Robertson suggests that the State mistakenly relies upon the Chief Justice's August 13, 2003 Memorandum. He contends that 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."[4] 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. Rather, 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."

Thus, while not binding authority from the Supreme Court of South Carolina, Respondent submits it was and remains authority that supports the appointment of counsel in this case. Further and contrary to Robertson's assertion, **Response in Opposition, p. 8 n. 6**, the State did not assert that Alkebulanyahh should be required to file a second PCR application. To the

[4] This Order is attached as "Exhibit A" to Robertson's Response in Opposition to Motion.

contrary, the State argued on the cited pages that the petitioner had 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. **Response in Opposition, Exhibit B, pp. 12-13.** More importantly, Robertson ignores that, in *Alkebulanyahh*, the state supreme court summarily denied his petition on October 20, 2010. Thus, Robertson's counsel are well aware that Robertson's present arguments are without merit.

V.

Respondent further submits that there is no merit to Robertson's contention that his prior PCR counsel did not perform competently. First, he makes the assertion that "the records reviewed by undersigned counsel indicate that Robertson's PCR attorneys did not perform an independent investigation to determine the existence of claims for relief based on evidence not contained within the record generated at trial." **Response in Opposition, p. 3.** However, he fails to specify what records supposedly reflect the prior collateral counsel's lack of competency or how those records demonstrate the incompetence of Robertson's original collateral counsel.

Further, the fact counsel did not raise certain issues that Robertson and his current attorneys now suggest should have been pursued - with the benefit of hindsight and after an adverse result on the claims that were raised - only establishes that present counsel would have handled the case differently. This does not establish a lack of competency by original PCR counsel. *Cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("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"). Respondent submits that the only way for this Court 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, what

issue(s) they may have investigated but did not pursue at the evidentiary hearing, whether their investigation and their subsequent presentation of claims at the PCR hearing was objectively reasonable, and whether Robertson could meet his burden of establishing prejudice under *Strickland.*

However, this is not required by either state court precedent, statute or the Sixth Amendment. Again, to create the exception now urged by Robertson would create an exception that would swallow the rule against successive applications, since it would mandate a second PCR hearing in every case in which the applicant did not prevail in his first hearing. *Contra Aice*, 305 S.C. at 451, 409 S.E.2d at 394.[5] There 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. *Id* at 451, 409 S.E.2d at 394.

In connection with this portion of his Response in Opposition, Robertson 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, his contention is wrong. The ABA Guidelines are merely guidelines for trial and appellate counsel, *at best*, and trial counsel need not comply with them to render objectively reasonable representation. *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009). Indeed, Justice Alito wrote a separate concurring opinion in *Van Hook*, to more forcefully emphasize his "understanding that the [majority] opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have

[5] It could very well result in the filing of yet a third PCR application based upon the ineffectiveness of the second PCR counsel.

special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment." *Van Hook*, 130 S.Ct. at 20 (Alito, J., concurring). He added that "[t]he views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. *It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution*," *Id* (emphasis added).

Further, these Guidelines do not and cannot apply to collateral counsel's performance because there is no Sixth Amendment right to counsel in PCR. Indeed, Robertson repeatedly concedes that "in post-conviction proceedings, there is no currently recognized federal constitutional right to counsel . . . and thus there is no clear remedy for substandard representation." **Response in Opposition, p. 7.** *See also* **pp. 10-11.** This is correct. *See Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (observing that "the right to appointed counsel extends to the first appeal of right, and no further" and holding that prisoners have no constitutional right to counsel in mounting collateral attacks on convictions); *Murray v. Giarratano*, 492 U.S. 1, 10, 13 (1989) (applying the rule to capital cases); *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. . . . Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must "bear the risk of attorney error that results in a procedural default") (citations omitted); *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam) (there can be no deprivation of effective assistance where there is no constitutional right to counsel). *Cf.*

Turner v. Rogers, et al., 131 S.Ct. 2507, 2516 (2011) ("the Sixth Amendment does not govern civil cases").

VI.

Respondent also submits that Robertson's due process and equal protection arguments are meritless. He claims that due process was violated because he was not provided "meaningful access" to the courts. *See Bounds v. Smith*, 430 U.S. 817, 821-22 (1977). In making this assertion, he equates - as does the Petitioner in *Martinez* - "meaningful access" with effective assistance of counsel under *Strickland*.[6]

However, there is no substantive right to post-conviction relief proceedings. *Finley, supra*. To the contrary, state PCR is provided as a matter of legislative grace, as opposed to federal constitutional right. *Id* at 556-57; *Giarratano*, 492 U.S. at 10 ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."). As a result, his claim that South Carolina's PCR procedures violate due process can only be properly viewed as a claim that those procedures violate "procedural due process." *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2312, 2316-22 (2009) (because convicted prisoner did not have a substantive right to DNA testing, his claim that he was denied access to testing necessarily involved a claimed violation of procedural due process). In light of the broad discretion that the states are afforded in enacting post-conviction review legislation, a procedural due process challenge in this context faces a formidable hurdle. *See Finley*, 481 U.S. at 559 (rejecting the contention that "when a State chooses to offer help to those seeking relief from

[6] Much of Respondent's argument in this section and section VII track the arguments raised by the Respondents and the amici in *Martinez* and *Maples*.

[their] convictions, the Federal Constitution dictates the exact form such assistance must assume").[7]

Thus, a reviewing court "may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 129 S. Ct. at 2320; *see also Skinner v. Switzer*, 131 S.Ct. 1289, 1293 (2011) (stating that the Court's analysis in *Osborne* "left slim room for the prisoner to show that the governing state [PCR procedure] denies him procedural due process"). *Cf. Herrera v. Collins*, 506 U.S. 390, 399 (1993) (due process "does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person," because "[t]o conclude otherwise would all but paralyze our system for enforcement of the criminal law").

However, South Carolina's PCR procedures - particularly as relates to capital PCR applicants such as Robertson - are not "fundamentally inadequate to vindicate" a defendant's right to challenge his conviction or sentence. Counsel was appointed for him well before his hearing; appointed counsel was qualified in accordance with § 17-27-160(B) and Chief Justice Toal's Memorandum, despite his contrary assertion; he had an evidentiary hearing, at which he raised the issues that he wished to pursue, with the advice and assistance of counsel; and the PCR judge's adverse result was subject to review by the Supreme Court of South Carolina.

Again, Robertson's biggest problem is that "there is nothing in the Constitution or the precedents of [the United States Supreme] Court that requires that a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process

[7] Robertson, like the petitioner in *Martinez*, recognizes this problem and has attempted to characterize his PCR proceeding as the functional equivalent of a first direct appeal. He therefore contends that he was entitled to counsel based on the Supreme Court's decisions in *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Douglas v. California*, 372 U.S. 353 (1963). However, the Court has previously held that a state is not required to appoint counsel for a criminal defendant beyond a first appeal. *Ross v. Moffitt*, 417 U.S. 600 (1974).

itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings, *see Pennsylvania v. Finley*, . . . nor does . . . the Constitution require[] the States to follow any particular federal model in those proceedings." *Giarratano*, 492 U.S. at 13 (O'Connor, J., concurring). Simply put, by equating "meaningful access" to the courts with effective assistance of counsel under *Strickland*, he is trying to extend the protections of the Sixth Amendment through the guise of due process when the Sixth Amendment clearly does not apply. *Id. See also Turner*, 131 S.Ct. at 2516 ("the Sixth Amendment does not govern civil cases"). Moreover, Robertson has not shown an equal protection violation because he cannot show disparate treatment based upon his status as an indigent.[8]

VII.

Furthermore, Robertson's reliance upon the grant of certiorari by the United States Supreme Court in *Martinez* and *Maples* is misplaced. First, even assuming *arguendo* that the Supreme Court rules in favor of either or both petitioners, any such ruling will not require a new PCR hearing in this case because the ruling will address only whether a procedural default may be excused in federal court. Rather than requiring states to provide effective assistance of counsel in their post-conviction relief proceedings, the Court's ruling will be limited to providing inmates with the ability to raise claims in federal habeas corpus proceedings that were not pursued in state court proceedings, as the result of original PCR counsel's incompetence. This is an issue that would have to be addressed in federal court. Thus, the fact certiorari has been

[8] Moreover, the federal courts do not currently recognize the ineffective assistance of collateral counsel as a "cause" for excusing a habeas corpus petitioner's failure to properly raise an issue in state court. *See Ivey, supra. See also Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir.1997) (en banc); *Longworth v. Ozmint*, 377 F.3d 437, 448 n. 2 (4th Cir. 2004). This Court should not construe federal law in a manner differently, either through the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.

granted in *Martinez* and *Maples* does not require this Court to delay the dismissal of Robertson's current Application.[9]

Second, the Supreme Court has merely granted certiorari in these two cases. It has not ruled in the favor of either or both petitioners. Third, Respondent submits that the rulings in *Martinez* and *Maples* should be favorable to the states because the Supreme Court has consistently explained that there is no constitutional right to the assistance of counsel in state habeas. *See, e.g., Giarratano*, 492 U.S. at 10, 12–13; *Finley*, 481 U.S. at 556–57, 559. As a result, an inmate cannot have the right to the effective assistance of collateral counsel in such a proceeding. *See Coleman*, 501 U.S. at 752 (Absent a constitutional right to state habeas counsel, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."); *see also Torna*, 455 U.S. at 587-88. Instead, PCR applicants bear the costs of their attorneys' errors. *Coleman*, 501 U.S. at 754.[10]

Whatever appeal the petitioners' arguments in *Martinez* and *Maples* might otherwise have is further undermined by the fact that there is no split of authority contrary to the Courts of Appeals' rulings in those cases. *See, e.g., Mackall*, 131 F.3d at 449; *Barbour v. Haley*, 471 F.3d 1222 (11th Cir. 2006); *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996) (adding that it is also not an independent right enforceable through the due process clause); *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993) (observing that the recognition of a right to effective assistance of counsel in a first post-conviction relief proceeding, to raise claims that trial counsel was ineffective, would logically result in "an infinite continuum of litigation in many criminal

[9] However, Respondent notes that the PCR procedures in Arizona differ significantly from those in this state. In fn. 8 of his petition, the petitioner in *Martinez* states that Arizona's PCR procedures are part of the original criminal proceedings, whereas PCR is purely a civil remedy in South Carolina.

[10] Again, the Supreme Court's recent pronouncement in *Turner* that "the Sixth Amendment does not govern civil cases," 131 S.Ct. 2507, 2516 (2011), is contrary to the positions of the petitioners in *Martinez* and *Maples*.

cases"); *Caswell v. Ryan*, 953 F.2d 853 (3rd Cir. 1992); *Johnson v. Lockhart*, 944 F.2d 388, 390 (8th Cir. 1991); *Williams v. Chrans*, 945 F.2d 926, 931-32 (7th Cir. 1991). Further, the recognition of such a right would amount to a "new rule," which may not be the basis for a federal collateral attack on a state-court conviction, since it would be barred by the non-retroactivity principles announced in *Teague v. Lane*, 489 U.S. 288, 310-13 (1989). *Cf. State v. Belcher*, 385 S.C. 597, 612-13, 685 S.E.2d 802, 810-11 (2009) ("[b]ecause our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved. . . .Our ruling, however, will not apply to convictions challenged on post-conviction relief") (citing *Teague*). Again, however, the current Application should be dismissed even if the Supreme Court rules favorably to either or both petitioners in the pending cases.

VIII.

Respondent further submits that the PCR statute of limitations bars the entire Application. *See* S.C. Code Ann. § 17-27-45(A) (Supp. 2011). Section 17-27-45(A) specifically provides that:

> [a]n application for relief pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute).

The South Carolina Supreme Court filed an Order on June 3, 2005, in which it dismissed the appeal from Robertson's capital trial and sentencing proceeding because it 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), 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). It then 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.[11]

Robertson did not file the Application until January 7, 2011. *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, the application is filed when received by the Clerk of Court). This is five years, six months and sixteen days after the South Carolina Supreme Court's June 22, 2005 Order and well after the expiration of the one year time limit for filing the PCR Application. As a result, the Application is barred by § 17-27-45(A).

As noted, Robertson did not make any challenge to the qualifications of lead collateral counsel, Mr. Brown, under § 17-27-160(B) at the September 23, 2005, hearing appointing counsel. Nevertheless, he contends that he is entitled to proceed because he has filed within one year of the appointment of his current attorneys, and that neither he nor his original PCR attorney could have objected to the supposed lack of qualifications of counsel under § 17-27-160(B). Although he does not refer to the subsection in his Response, he is attempting to rely on § 17-27-45(C). That section provides as follows:

> If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

[11] Although Respondent submits that the Application is untimely for the reasons that follow, Respondent concedes that it erroneously asserted, in its original motion to dismiss, that Robertson's one year began running with issuance of the Order dismissing the appeal. His one year to file began when the Remittitur was sent. This error still does not benefit Robertson because his Application is still untimely.

Yet, his reliance is misplaced. Initially, Respondent submits that those claims in the current Application that assert claims that are otherwise cognizable in PCR, as opposed to his claims that involve issues that could have been raised on direct appeal, could have been discovered and presented in the original PCR action. The only exception are his "claims" based on the grant of certiorari in *Martinez* and *Maples*, which as of the time this pleading was filed do not have any support by supreme Court precedent. 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.

More importantly, both Robertson and his original collateral counsel were aware of any defect in counsel's qualifications at the time counsel was appointed and he could have objected to the supposed lack of counsel's qualifications at the time of the September 23, 2003 hearing held for appointment of counsel.[12] Even assuming *arguendo* that the statute of limitations did not begin running until September 23, 2005, 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.

While Robertson contends that it "is senseless," for Respondent to assert that he or collateral counsel should have objected to counsel's alleged lack of qualifications at that time, his contrary argument clearly ignores that the purpose of that hearing was (1) to determine whether Robertson wanted counsel appointed to assist him in PCR, and (2) to appoint qualified

[12] Robertson's present counsel assert that "Robertson was transported for an appointment hearing on or about September 23, 2005, but that no hearing actually took place because initial PCR counsel failed to attend." They further assert that "this is just one issue of many that must be examined through an appropriate post-conviction investigation." **Response in Opposition, p. 17.** This is yet another example of the dilatory nature of this successive Application. As indicated on page 8 of the original motion to dismiss, Judge Few held a hearing at the Greenville County Courthouse on September 23, 2005. Robertson was present at this hearing, as was Mr. Brown. Senior Assistant Attorney General Salter was also present and represented Respondent. The appointment of Mr. Brown was confirmed at that hearing. Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

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). More importantly, he ignores that § 17-27-45(C) provides that "the application must be filed under this chapter within one year after the date of *actual discovery of the facts* by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." (Emphasis added). Here, that would be one year after the September 23, 2005 hearing because that is when he would had actual discovery of counsel's qualifications, and not one year following the appointment of his present attorneys.

Likewise, his argument ignores that he was successful in having two different appellate attorneys relieved 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.

IX.

Respondent further submits that laches bars relief. Laches is an affirmative defense that must be pleaded pursuant to Rule 8(c), SCRCP. *See also Adams v. B & D, Inc.*, 297 S.C. 416, 377 S.E.2d 315 (1989). It 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, he concedes that a copy of that transcript is unavailable because the tapes of the hearing do not exist. *See* Rule 607(I), SCACR. 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.

X.

Moreover, Robertson's allegations 10 &11(c)-10 & 11(f) of the Amended Application do not state a claim upon which Post-Conviction Relief may be granted because each is alleged as a free-standing, substantive claim of trial court error. The jurisdiction of this Court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). Post-conviction relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). *See also Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (same); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885-86 (1975) (same). Also, his allegations 10 &11(h)-10 & 11(i) of the Amended Application do not state a claim upon which Post-Conviction Relief may be granted because neither is cognizable as a matter of state law and neither has been recognized as a ground for relief by the United States Supreme Court. Therefore, these allegations should be summarily dismissed for this additional reason.

XI.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, having made its Reply to Applicant's Response to Return and Motion to Dismiss, Respondent prays that the Court summarily dismiss the PCR Application.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
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(803) 734-6305

By: _____
ATTORNEYS FOR RESPONDENT

August 30, 2011.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

James D. Robertson, #5067,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C. A. No. 11-CP-46-00072

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's Revised Reply to Applicant's Response to Return and Motion to Dismiss in the foregoing action on counsel for Applicant, by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Emily C. Paavola, Esq.
Keir Weyble, Esq.
Death Penalty Resource & Defense Ctr
P.O. Box 11311
Columbia, SC 29211

This 30th day of August, 2011.

WILLIAM EDGAR SALTER, III

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP4600072

James D Roberston *vs.* South Carolina State Of

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Order

Dated at York, South Carolina, this 20th day of September, 2011.

Court Reporter:

s/Lee S. Alford

PRESIDING JUDGE - LEE S. ALFORD

This judgment was entered on the 20th day of September, 2011, and a copy mailed first class this 20th day of September, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Emily C Paavola Death Penalty Resource & Defense Center P O Box 11311 Columbia, SC 29211
Keir M. Weyble Blume Weyble & Lominack, LLC P.O. Box 11744 Columbia, SC 29211
James Robertson #5067 Lieber Correctional Inst. 136 Wilborn Avenue Ridgeville, SC 29472

ATTORNEY(S) FOR THE PLAINTIFF(S)

Wm. Edgar Salter III Assistant Attorney General P.O. Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

SCRCP APP-24/FORM 4

CPFORM4M

4411

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
	)	
JAMES D. ROBERTSON, #5067,	)	CASE NO. 2011-CP-46-00072
☐ Plaintiff	)	
	)	
v.	)	MOTION INFORMATION FORM
	)	AND COVER SHEET
STATE OF SOUTH CAROLINA	)	
X Defendant.	)	

Plaintiff's Attorney:		Defendant's Attorney:
Emily C. Paavola, Esq.	Keir Weyble, Esq.	William E. Salter, III, Bar No. 4806
Death Penalty Resource Ctr.	Blume, Weyble & Norris	Address: Post Office Box 11549
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Columbia, SC 29211	Columbia, SC 29211	phone: (803) 734-6305 fax: (803) 734-4035
		e-mail: agesalter@scag.ov

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Capital PCR
Estimated Time Needed: Court Reporter Needed: YES / X NO

SECTION II: Motion Type

Written motion attached
☐ Form Motion --
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐Plaintiff / XDefendant — Date submitted 9-15-11

SECTION III: Motion Fee

☐ PAID – AMOUNT:
X EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act X Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

FILED-RECEIVED
2011 SEP 20 AM 10: 51
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS
James D. Robertson, #5067, Applicant, v. State of South Carolina, Respondent.	C. A. No. 11-CP-46-00072 ORDER

FILED-RECEIVED
2011 SEP 20 AM 10: 54
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed by Applicant, James D. Robertson (Robertson) through counsel, on January 7, 2011. On March 24, 2011, Respondent made its Return and Motion to Dismiss.[1]

This Court held a status conference on July 5, 2011 at the Moss Judicial Center, in York County South Carolina. Robertson was present at the hearing, and Senior Assistant Attorney General William Edgar Salter, III, represented the State. Keir Weyble, Esquire, and Emily C. Paavola, Esquire, were also present. At the hearing, the Court appointed Mr. Weyble and Ms. Paavola to represent Robertson. Also, the Court (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

[1] Respondent originally moved for summary dismissal because the 2011 Application (1) was not verified by Robertson; (2) is barred by the one year statute of limitations governing PCR applications, S.C. Code Ann. § 17-27-45(A) (Supp. 2011); (3) is impermissibly successive to a previously filed application and this Court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel or PCR counsel's lack of statutory qualifications; (4) the supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge; (5) laches bars relief because Robertson's failure to timely obtain the transcript of the September 2005 hearing, during which lead counsel stated his qualifications, resulted in destruction of that transcript and, as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application; and (6) the argument that he is entitled to relief based upon the supposed lack of qualification of original PCR counsel lacks merit as a matter of state law.

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Ann. §§ 17-27-40 & -50 (Supp. 2011). The Court further ruled that the verification would be considered *nunc pro tunc*.

Immediately after this hearing, Robertson's counsel served Respondent with a draft of an Amended PCR Application. On June 27, 2011, Respondent received a verified Amended Application for Post-Conviction Relief and Robertson's Response in Opposition to Motion to Dismiss, both of which were dated and served July 25, 2011. Respondent thereafter 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. With the exception of the failure to verify the Application, which the Court has allowed Robertson to remedy, Respondent adhered to the previously-asserted reasons for summary dismissal.

After careful consideration of the pleadings, the record in this case and the arguments of the parties, the Court now grants Respondent's motion and dismisses the 2011 Application, with prejudice, for the following reasons:

I. PROCEDURAL HISTORY

A. Robertson's trial and the voluntarily abandoned direct appeal.

Robertson is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his two York County murder convictions and death sentences for brutally murdering his parents. The York County Grand Jury indicted him at the April 23, 1998 term of court 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**. On April 30, 1998, the State served him with a Notice of Intent to seek the death penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002); and it 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. 2011).[2]

The South Carolina Supreme Court assigned the case to the Honorable John C. Hayes, III, and it gave Judge Hayes exclusive jurisdiction over the case. James W. Hancock, Esquire, and James W. Boyd, Esquire, represented Robertson.[3] Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State. Judge Hayes heard motion hearings on July 17 (**App. 32-48**), September 22 (**App. 49-55**) and 25 (**App. 55-79**); November 2 (**App. 79-90**) and 20; December 4 (**App. 90-121**) and 18, 1998; and on February 12 and 19, 1999.

Robertson's capital jury trial was held on March 15-26, 1999. The jury convicted him of all of the indicted offenses (**App. 122-1977**); and a sentencing phase was conducted following his exercise of the 24-hour statutory waiting period in § 16-3-20(B). Judge Hayes instructed the jury on the five statutory aggravating circumstances relied upon by the State, as well as 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 it sentenced Robertson to

[2] These aggravating circumstances are 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.

[3] Thad Lee Myers, Esquire, had originally been appointed to represent Robertson. However, Mr. Myers was relieved because of a conflict of interest.

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). At various points on direct appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III, represented Robertson before the South Carolina Supreme 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. The Supreme Court entered an Order on June 25, 1999 granting direct appellate review under *White v. State*.

Robertson wrote the Supreme Court on August 28, 2000. In this letter, 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 Supreme Court entered an Order remanding the case to Judge Hayes for the purpose of conducting a hearing on Robertson's competency to be executed.

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

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On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Robertson's behalf.[4] Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote the South Carolina Supreme Court on April 18, 2002, and he 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.

However, Robertson again wrote a letter to the South Carolina Supreme Court dated June 3, 2002, in which he asked the Court to relieve Mr. Savitz and to allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. The South Carolina Supreme Court filed an Order on June 26, 2002, remanding the matter to Judge Hayes for a hearing on Robertson's competency to represent himself on appeal.

Judge Hayes held a hearing on his competency to appear *pro se* on October 10, 2002.[5] 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. The South Carolina Supreme Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*.

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[4] Appellate counsel Savitz' Brief presented three issues:

1. The judge erred by forcing appellant to submit to a state-sponsored psychological evaluation solely for the purpose of obtaining evidence to be used against him at sentencing, since neither competency to stand trial, guilty but mentally ill nor insanity were ever at issue in the case.

2. The judge erred by refusing to instruct the jury at sentencing that voluntary intoxication could be considered mitigating.

3. The judge erred by refusing to select an unbiased jury from another county, given the notoriety of the case and community sentiment against appellant.

4/15/02 Initial Brief of Appellant at p. 1.

[5] 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.

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

7. The judge erred in sentencing appellant to death.

***Pro Se* Initial Brief of Appellant at p. 2.** The State filed the Initial Brief of Respondent on December 31, 2003.

Thereafter, the direct appeal was dismissed and re-instated on several occasions because Robertson failed to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, Robertson indicated to the South Carolina Supreme 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

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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.[6] 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, the Supreme Court of South Carolina 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 knowingly and voluntarily abandoned the direct appeal and it was dismissed at his request without the South Carolina Supreme Court considering any issues that he raised in his *pro se* Initial Brief of Appellant.

B. Intervening action prior to PCR filing.

On June 16, 2005, Robertson requested a Stay of Execution to file a Post-Conviction Relief (PCR) Application. Over Respondent's opposition to the motion, the Supreme Court filed a July 7, 2005 Order granting a stay pursuant to *In Re: Stays of Execution.* The Court also appointed the Honorable John C. Few to preside over this case and it directed Judge Few to hold a hearing to determine whether Robertson desired to have counsel appointed.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's July 7, 2005 Order and S.C. Code Ann. § 17-27-160 (Supp. 2007), 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. Judge Few held a hearing at the Greenville County

[6] Robertson appeared *pro se* and testified at the hearing. Mr. Salter represented the State.

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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.[7] Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

C. Robertson's original PCR action. (06-CP-46-532).

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**.[8]

At the outset of the PCR hearing, Robertson amended his Application and proceeded on twelve specific grounds of ineffective assistance of counsel, including the following, relevant 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;

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[7] The parties have informed the Court that the transcript of the September 23, 2005 hearing is not in the files of the Attorney General's Office; that Respondent did not order this transcript because Robertson did not contest counsel's qualifications in state PCR; and that Robertson's current attorney's unsuccessfully attempted to obtain a copy of that transcript, but were informed by the Court Reporter that the tapes of the hearing no longer exist. *See* Rule 607(i), SCACR.

[8] 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**. Judge Few also had before him 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.**

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**.

Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. The Order of Dismissal addressed the claims that Robertson had raised at the PCR hearing. **App. 3652- 57**.

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. 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.

The State filed a Return to Petition for Writ of Certiorari on July 15, 2009. The State re-stated the issues before the South Carolina Supreme Court as follows:

> Whether this Court should deny certiorari because Robertson's claim that trial counsel was ineffective for advising Robertson that anything he revealed to Ms. Cascio, the defense social worker, was privileged against discovery by the State was not presented to or ruled upon by the PCR judge and he did not seek a ruling by filing a Rule 59(e), SCRCP, motion?
>
> Whether this Court should deny certiorari because probative evidence supports the PCR judge's ruling that trial counsel was not ineffective for failing to object to discovery of Ms. Cascio's notes by the State and for calling Ms. Cascio as a witness?

Return to Petition for Writ of Certiorari at p. ii.

The South Carolina Supreme Court filed a letter Order denying certiorari on October 6, 2010. It sent the Remittitur to the York County Clerk of Court on October 22, 2010.

D. The Petition for Writ of Habeas Corpus.

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

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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 on January 7, 2011. He also filed a Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 7th. Respondent filed a Response to Motion To Stay Proceedings Pending Exhaustion Of State Remedies on January 24, 2011. Magistrate Judge Howe entered an Order on April 8, 2011staying those proceedings, so that Robertson could attempt to exhaust the claims in his 2011 Application. *See Robertson v. Ozmint*, C.A. No.2:11-63-SB-BHH (Doc. No. 44, filed Apr. 8, 2011).

II. ALLEGATIONS

Robertson raises the following grounds for relief in the amended 2011 PCR Application:

10(a): **Applicant was denied the right to effective assistance of counsel- guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in Section 11(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).**

11(a): Trial counsel's acts or omissions included:

(i) Counsel failed to object to the Solicitor's improper closing argument. The solicitor encouraged the jury to rely on their own emotions and passion, rather than the evidence presented, by telling the jury that they did not need to spend even five minutes deliberating because they knew in their hearts that the defendant was guilty. (Trial Tr. 1916). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

10(b): **Applicant was denied the right to effective assistance of counsel- guaranteed by the Sixth and Fourteenth Amendments**

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to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 11 (b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

11(b): Trial counsel's acts or omissions included:

(i) Counsel failed to object to presentation of Applicant's prison disciplinary record by a single witness, who had not witnessed the presented events, in violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution. (Trial Tr. 2129).

(ii) Counsel failed to object to the State's improper questioning of the victims' family counselor, which suggested that the victim, Terry Robertson, was a very private person and would have been deeply upset by the revelation of her counseling records. (Trial Tr. 2792). SCRE 403.

(iii) Counsel failed to develop and introduce evidence that the victims were opposed to capital punishment and would not have wanted their son to be sentenced to death.

(iv) Counsel failed to object to the State's improper statements during closing argument that Applicant's presentation of relevant mitigating evidence of his family's mental health history had been a "rape" of his mother Terry Robertson, and that this evidence had dragged Terry "through the mud." (Trial Tr. 3144, 3142). *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164,166 (1998).

10 & 11(c): Applicant's Sixth and Fourteenth Amendment right to a fair jury trial was violated by the solicitor's improper and prejudicial closing argument during the guilt-or-innocence phase of the trial during which the solicitor argued that the jury should not deliberate when determining whether the state had proven Applicant's guilt beyond a reasonable doubt. (Trial Tr. 1916).

10 & 11(d): Applicant's rights under the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment were violated by the state's introduction of a list of Applicant's prison infractions during the sentencing phase of his capital trial. (Trial Tr. 2129).

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10 & 11(e): **Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the solicitor's improper closing argument during the sentencing phase of Applicant's capital trial during which the solicitor argued that that the defense's mitigation presentation was equivalent to raping the victim in the courtroom. ("You know, Ms. Cascio talked about Terry being sexually abused. Terry has been raped. She was raped in this courtroom when they take her through this based on his actions.") (Trial Tr. 3144).**

10 & 11(f): **Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the trial court's error in failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire. (Trial Tr. 425 & 1283).**

10(g): **Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, §§ 3 and 14 of the South Carolina constitution -when appellate counsel committed the acts or omissions set forth below in Section 11(g). Appellate counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).**

11(g): Appellate counsel's acts or omissions included:

(i) Appellate counsel failed to claim on appeal that the trial court had violated Applicant's Sixth, Eighth and Fourteenth Amendment rights by failing to strike a panel of potential jurors who violated the trial court's instructions and discussed news stories about the case while waiting to be questioned on individual voir dire.

(ii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to specifically define mitigating circumstances and to question potential jurors about specific mitigating circumstances, where several potential jurors indicated that they did not understand what mitigating circumstances were even after hearing the general legal definition. (Trial Tr. 193-96).

(iii) Appellate counsel failed to the raise the issue whether the trial court erred by denying the defense's motion to limit the State's presentation of victim impact evidence to testimony from

immediate family members. (Trial Tr. 1985-98). Appellate counsel's performance was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10&11(h): Applicant was denied effective representation of post-conviction counsel, in violation of the Sixth, and Fourteenth Amendments of the United States Constitution where PCR counsel were inexperienced and unqualified under state statute, where Applicant was prohibited from raising any claim that his trial counsel were ineffective on direct appeal, and where PCR counsel failed to adequately investigate and present applicant's claims for post-conviction relief. *See, e.g., Martinez v. Ryan*, 2011 WL 380903 (U.S.), *Halbert v. Michigan*, 545 U.S. 605 (2005); *Douglas v. California*, 372 U.S. 353 (1963).

10&11(i): Applicant was denied effective representation of post-conviction counsel, in violation of the South Carolina Constitution, Article I, Sections 3, 14 and 15 where PCR counsel were inexperienced and unqualified under S.C. Code § 17-27-160(8), and where PCR counsel failed to adequately investigate and present applicant's claims for post-conviction relief. *See, e.g., Washington v. State*, 478 S.E. 2d 833, 835 (S.C. 1996) (allowing second post-conviction application to proceed due to "many procedural irregularities" in the first post-conviction proceedings).

III. DISCUSSION

Robertson asserts that "this Court should either: (a) deny respondent's Motion to Dismiss and allow this case to proceed to an evidentiary hearing and final adjudication because it is a permissible successive petition under state law; or, (b) deny respondent's Motion to Dismiss and hold this case in abeyance until the United States Supreme Court has resolved *Maples v. Thomas*, 2011 WL 940889, and *Martinez v. Ryan*, 2011 WL 380903, which could dictate that this case be allowed to go forward as a matter of federal constitutional law, regardless of South Carolina's state law rules regarding successive petitions." However, the Court finds that none of the reasons advanced by him justifies the filing of a successive Application well outside the statute of

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limitations and predicated on the ineffectiveness of original PCR counsel, a claim which is not cognizable in state PCR.

First, the Court finds that the statute of limitations applicable to Post-Conviction Relief actions bars the entire Application. *See* S.C. Code Ann. § 17-27-45(A) (Supp. 2011). Section 17-27-45(A) specifically provides that:

> [a]n application for relief pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute).

As shown above, the South Carolina Supreme Court filed an Order on June 3, 2005, in which it dismissed the appeal from Robertson's capital trial and sentencing proceeding because it 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), 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). It then 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.

Robertson did not file the current Application until January 7, 2011. *See Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, the application is filed when received by the Clerk of Court). This is five years, six months and sixteen days after the South Carolina Supreme Court's

June 22, 2005 Order and well after the expiration of the one year time limit for filing the PCR Application. As a result, the Application is barred by § 17-27-45(A).

As noted, Robertson did not make any challenge to the qualifications of lead collateral counsel, Mr. Brown, under § 17-27-160(B) at the September 23, 2005, hearing appointing counsel. Nevertheless, he contends that he is entitled to proceed because he has filed within one year of the appointment of his current attorneys, and that neither he nor his original PCR attorney could have objected to the supposed lack of qualifications of counsel under § 17-27-160(B). Although he does not refer to this subsection in his Response, he is attempting to rely on § 17-27-45(C). That section provides as follows:

> If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

The Court finds that his reliance on § 17-27-45(C) is misplaced. To the extent that his current Application asserts claims that are otherwise cognizable in PCR, as opposed to his claims that involve issues that could have been raised on direct appeal, those allegations could have been discovered and presented in the original PCR action. The only exception are his "claims" based on the grant of certiorari in *Martinez* and *Maples*, which do not have any support by Supreme Court precedent as of the time this Order was filed. 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.[9]

Moreover, both Robertson and his original collateral counsel were aware of any supposed defect in counsel's qualifications at the time counsel was appointed and he could have

[9] His claim related to counsel's supposed lack of qualifications lacks merit for the reasons discussed, *infra*.

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objected to the supposed lack of counsel's qualifications at the time of the September 23, 2003 hearing held for appointment of counsel.[10] Also and even assuming *arguendo* that the statute of limitations did not begin running until September 23, 2005, the current Application was not filed until five years, three months and fifteen days later. Therefore, the Court finds that it is barred under § 17-27-45(C), as well.

While Robertson contends that it "is senseless" to assert that he or collateral counsel should have objected to counsel's alleged lack of qualifications at that time, the Court finds that his argument clearly ignores that 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).

More importantly, he ignores that § 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, the Court finds that would be one year after the September 23, 2005 hearing because that is when he would had actual discovery of counsel's qualifications, and not one year following the appointment of his present attorneys.

[10] Robertson's present counsel assert that "Robertson was transported for an appointment hearing on or about September 23, 2005, but that no hearing actually took place because initial PCR counsel failed to attend." They further assert that "this is just one issue of many that must be examined through an appropriate post-conviction investigation." **Response in Opposition, p. 17.** The Court finds that this is yet another example of the dilatory nature of this successive Application. As indicated on page 8 of Respondent's motion to dismiss, Judge Few held a hearing at the Greenville County Courthouse on September 23, 2005. Robertson was present at this hearing, as was Mr. Brown. Senior Assistant Attorney General Salter was also present and represented Respondent. The appointment of Mr. Brown was confirmed at that hearing. Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

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Likewise, his argument ignores that he was successful in having two different appellate attorneys relieved 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).

Second, the Court finds that the Application must be dismissed as successive. S.C. Code Ann. § 17-27-90 (Supp. 2011) "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 v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court in *Aice* 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.*

While the Court in *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. Thus, "the

contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." Id. at 451, 409 S.E.2d at 394.

The Court further explained that:

> 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).

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

> We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the *Austin* and *Aice* cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While Austin could rely on Rule 50(6) for support of his claim, Aice's request directly conflicts with the language of Rule 50(3). Hence, *Austin* stands harmonized with the instant case.

Id at 452, 409 S.E.2d at 395.

Robertson relies upon several PCR cases involving inmates who were not under a death sentence and the capital PCR cases of Luke Williams and Edward Lee Elmore to support of his contention that he has shown "sufficient reason" under *Aice*. The Court finds that each of these cases is distinguishable because each was based on very unique procedural circumstances that simply are not present here. For instance, 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. *Id* at 234, 478 S.E.2d at 834. He 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.*

The PCR court found that he had not waive his right to direct appeal and that he should be granted a belated appeal. On the claim related to prosecutorial misconduct, the PCR court found that the State had failed to adequately explain the State's relationship with one of its witnesses to the jury. However, 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 the Supreme Court, but the Court denied certiorari on that issue. He then filed a second PCR application, in which he again raised the misconduct issue. *Id* at 234-35, 478 S.E.2d at 834. He also filed 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.* On certiorari, the State argued that § 17-27-90 barred the second PCR application.

The Supreme Court rejected this argument. While the Court recognized that Washington's second PCR application was successive "under a hyper-technical analysis," it reasoned that

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> such a conclusion must be rejected in this case, because so many procedural irregularities occurred during the course of Washington's judicial process that he has not received due process. 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.

324 S.C. at 236, 478 S.E.2d at 835.

The other non-capital PCR cases are likewise distinguishable. 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 Court finds that Robertson's case does not involve such a scenario. Also, the Supreme Court permitted a successive application in *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Robertson's current PCR attorneys may say as to the quality of representation provided in the original PCR action, they must necessarily 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.

Thus, as in *Aice*, the cases relied upon by Robertson do not support the conclusion that "sufficient reason" to permit a successive application. Contrary to his argument before this Court, he could have raised his current allegations in his previous PCR Application. Likewise, any supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the appointment and later pursued on certiorari following denial of relief by the PCR judge. As a result, he cannot raise this or any other allegation now in a

successive Application. *Aice*. *See also Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 843 (1992), *cert. denied*, 507 U.S. 927 (1993); *Hunter v. State*, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of prior applications but did not raise it); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application); *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002). Therefore, this Application must be dismissed as impermissibly successive.

The Court further finds that 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 thereafter 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 PCR judge thereafter issued an Order finding that Elmore was mentally retarded and that the Eighth Amendment barred his execution, *id*, the State did not appeal his adverse rulings on successiveness or the statute of limitations because an appeal would be futile. *See Atkins*.

Williams is also distinguishable because lead collateral counsel in the present case, Mr. Brown, was properly qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011), unlike Williams' original PCR attorneys. Moreover, the Court would note that the capital PCR

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applicant in *Ivey*, *supra*, unsuccessfully sought relief such as that now being sought by Robertson,[11] as has death row inmate Abdiyyah ben Alkebulanyahh, #6012, whose case is discussed *infra*. Based upon the current record, the Court finds that

Robertson further contends that the State erroneously maintains that his argument as to counsel's supposed lack of qualifications lacks merit as a matter of state law. He effectively 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. However, he does not identify what record was available to him. Nor does he identify what qualifications counsel did or did not have. Instead, it is left up to this Court to speculate on their qualifications since there is no record or information provided to the Court. In the absence of evidence to the contrary, this Court must assume that Judge Few appointed qualified counsel to represent Robertson in his first PCR application. *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).

Further, and assuming Robertson's argument is that - to be qualified in a capital PCR - a lawyer either needs to have previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within the preceding two years twelve

[11] In *Ivey*, the Court of Appeals rejected Ivey's claim, identical to Robertson's, that the procedural bar of § 17-27-90 did not apply because lead PCR counsel was ineffective and that lead PCR counsel was not qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011). The Court found that "[e]ven if we were to agree with Ivey that lead counsel was ineffective, however, under *Aice* that fact alone would not be sufficient to allow the filing of a successive PCR application. Accordingly, this claim is procedurally barred as a matter of South Carolina law and is thus defaulted."

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hours of CLE training that primarily involves capital appeals or capital post-conviction relief, the Court rejects it.

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 S.C. Code Ann. § 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, the presumption is that Judge Few appointed in accordance with § 17-27-160(B) and the Memorandum. The Court would further observe that the General Assembly has not subsequently amended the statute, following Chief Justice's Memorandum.

Robertson suggests that Respondent mistakenly relies upon the Chief Justice's August 13, 2003 Memorandum because her August 30, 2010 Order in a capital PCR appeal, *Abdiyyah*

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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."[12] 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. Rather, 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."

Thus, while not binding authority from the Supreme Court of South Carolina, the Court finds that it was and remains authority that supports the appointment of counsel in this case. Further and contrary to Robertson's assertion, **Response in Opposition, p. 8 n. 6**, the State did not assert that Alkebulanyahh should be required to file a second PCR application. To the contrary, the State argued on the cited pages that the petitioner had 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. **Response in Opposition, Exhibit B, pp. 12-13.** Additionally, Robertson ignores that the South Carolina Supreme Court summarily denied his

[12] This Order was attached as "Exhibit A" to Robertson's Response in Opposition to Motion.

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petition in *Alkebulanyahh*, on October 20, 2010. Therefore, this Court finds that there was no violation of the capital PCR qualification statute, and accordingly no basis for permitting this successive Application and for treating the proceedings that have taken place as a nullity.

More importantly, there is no presumed prejudice from the failure to follow a technical requirement of a statute that is not a right guaranteed by the United States or State Constitutions. Robertson would therefore have to show not only that there was non-compliance with the statute, but also prejudice to him resulting from the non-compliance in order to gain relief in this action. *See Reed v. Farley*, 512 U.S. 339, (1994) (state court's failure to observe the 120-day speedy trial rule of the Interstate Agreement on Detainers (IAD) is not cognizable under the federal habeas corpus statute when the defendant registered no objection to trial date at time it was set and suffered no prejudice attributable to the delayed commencement); *United States v. Timmreck*, 441 U.S. 780 (1979) (a guilty plea conviction is not subject to collateral attack when all that can be shown is a formal violation of Rule 11 because such a violation is neither constitutional nor jurisdictional. Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure" under *Hill v. United States*, 368 U.S. 424, 428 (1962)); *cf. State v. Frey*, 362 S.C. 511, 518-20, 608 S.E.2d 874, 878-79 (Ct.App. 2005) (remanding case for trial court to determine, on the existing record, whether State's failure to comply with the Implied Consent Statute prejudiced defendant); *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.*

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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"). No prejudice has been shown in Robertson's case, other than an assertion that present counsel would have handled it differently, and this is insufficient to justify the filing of a time-barred, successive PCR Application.

The Court further finds that there is no merit to Robertson's contention that his prior PCR counsel did not perform competently. He clearly has not shown either deficient performance or resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). On page 2 of the Response in Opposition to Motion to Dismiss, Robertson states that no amended application had been filed before the evidentiary hearing in his first PCR application. However, 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.

Robertson's current attorneys further claim that they have found other grounds that could have been raised in the original PCR proceedings. However, simply stating that they would have handled the case differently does not establish that PCR counsel were deficient, nor any prejudice to Robertson. *See Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time;" *see also id* ("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 further asserts that, if given more time to investigate, other grounds *could* be found in the current action. However, Robertson's present counsel were appointed by the United States District Court for the District of South Carolina to represent Robertson in his federal habeas corpus proceeding on November 8, 2010. To this date, they can only point out that they would have handled the first PCR application differently; and, with the unerring vision of hindsight and with the knowledge that those allegations raised by Robertson's original PCR attorneys were unsuccessful, that they would have alleged additional grounds in which they contend that trial counsel rendered ineffective assistance. If the Court allowed a hearing on merits of the claims in this Application and Robertson was not successful, other counsel would undoubtedly allege that Robertson's present counsel were ineffective because they would have raised other grounds and would have handled it differently.

In connection with this portion of his Response in Opposition, Robertson 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, his contention is wrong. The ABA Guidelines are merely guidelines for trial and appellate counsel, *at best*, and trial counsel need not comply with them to render objectively reasonable representation. *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009). Indeed, Justice Alito wrote a separate concurring opinion in *Van Hook*, to more forcefully emphasize his "understanding that the [majority] opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment." *Van Hook*, 130 S.Ct. at 20 (Alito, J., concurring). He added that

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"[t]he views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. *It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution*," *Id* (emphasis added).

Further, these Guidelines do not and cannot apply to collateral counsel's performance because there is no Sixth Amendment right to counsel in PCR. Indeed, Robertson repeatedly concedes that "in post-conviction proceedings, there is no currently recognized federal constitutional right to counsel . . . and thus there is no clear remedy for substandard representation." **Response in Opposition, p. 7.** *See also* **pp. 10-11.** This is correct. *See Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (observing that "the right to appointed counsel extends to the first appeal of right, and no further" and holding that prisoners have no constitutional right to counsel in mounting collateral attacks on convictions); *Murray v. Giarratano*, 492 U.S. 1, 10, 13 (1989) (applying the rule to capital cases); *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. . . . Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must "bear the risk of attorney error that results in a procedural default") (citations omitted); *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam) (there can be no deprivation of effective assistance where there is no constitutional right to counsel). *Cf. Turner v. Rogers, et al.*, 131 S.Ct. 2507, 2516 (2011) ("the Sixth Amendment does not govern civil cases").

The Court finds 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. Only then could this Court determine whether their investigation and their subsequent presentation of claims at the PCR hearing was objectively reasonable, and whether Robertson could meet his burden of establishing prejudice under *Strickland*. However, a hearing on the competency of collateral counsel's representation is not required by state court precedent, statute or the Sixth Amendment. Again, to create the exception now urged by Robertson would create an exception that would swallow the rule against successive applications, since it would mandate a second PCR hearing in every case in which the applicant did not prevail in his first hearing. *Contra Aice*, 305 S.C. at 451, 409 S.E.2d at 394.[13]

There 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. *Id* at 451, 409 S.E.2d at 394. The Court refuses to adopt such an unreasonable standard and it rejects Robertson's position.

The Court further finds that Robertson's due process and equal protection arguments are meritless. He claims that due process was violated because he was not provided "meaningful access" to the courts. *See Bounds v. Smith*, 430 U.S. 817, 821-22 (1977). In making this assertion, he equates, as does the petitioner in *Martinez*, "meaningful access" with effective assistance of counsel under *Strickland*.

[13] It could very well result in the filing of yet a third PCR application based upon the ineffectiveness of the second PCR counsel.

However, there is no substantive right to post-conviction relief proceedings. *Finley*, *supra*. To the contrary, state PCR is provided as a matter of legislative grace, as opposed to federal constitutional right. *Id* at 556-57; *Giarratano*, 492 U.S. at 10 ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."). As a result, his claim that South Carolina's PCR procedures violate due process can only be properly viewed as a claim that those procedures violate "procedural due process." *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2312, 2316-22 (2009) (because convicted prisoner did not have a substantive right to DNA testing, his claim that he was denied access to testing necessarily involved a claimed violation of procedural due process). In light of the broad discretion that the states are afforded in enacting post-conviction review legislation, a procedural due process challenge in this context faces a formidable hurdle. *See Finley*, 481 U.S. at 559 (rejecting the contention that "when a State chooses to offer help to those seeking relief from [their] convictions, the Federal Constitution dictates the exact form such assistance must assume").[14]

Thus, a reviewing court "may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 129 S. Ct. at 2320; *see also Skinner v. Switzer*, 131 S.Ct. 1289, 1293 (2011) (stating that the Court's analysis in *Osborne* "left slim room for the prisoner to show that the governing state [PCR procedure] denies him procedural due process"). *Cf. Herrera v. Collins*, 506 U.S. 390, 399 (1993) (due process "does not require that every conceivable step be taken, at whatever cost, to

[14] Like the petitioner in *Martinez*, Robertson recognizes this problem and he has attempted to characterize his original PCR proceeding as the functional equivalent of a first direct appeal. He therefore contends that he was entitled to counsel based on the Supreme Court's decisions in *Halbert v. Michigan*, 545 U.S. 605 (2005), and *Douglas v. California*, 372 U.S. 353 (1963). However, the Supreme Court has previously held that a state is not required to appoint counsel for a criminal defendant beyond a first appeal. *Ross v. Moffitt*, 417 U.S. 600 (1974).

eliminate the possibility of convicting an innocent person," because "[t]o conclude otherwise would all but paralyze our system for enforcement of the criminal law").

This Court finds that South Carolina's PCR procedures, and particularly those procedures applicable to capital PCR applicants such as Robertson, are not "fundamentally inadequate to vindicate" a defendant's right to challenge his conviction or sentence. Counsel were appointed for him well before his hearing; appointed counsel were qualified in accordance with § 17-27-160(B) and Chief Justice Toal's Memorandum, despite his contrary assertion; he raised the issues that he wished to pursue at an evidentiary hearing, with the advice and assistance of counsel; and the PCR judge's adverse result was subject to review by the South Carolina Supreme Court.

Again, Robertson's biggest problem is that "there is nothing in the Constitution or the precedents of [the United States Supreme] Court that requires that a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings, *see Pennsylvania v. Finley*, . . . nor does . . . the Constitution require[] the States to follow any particular federal model in those proceedings." *Giarratano*, 492 U.S. at 13 (O'Connor, J., concurring).

Simply put, by equating "meaningful access" to the courts with effective assistance of counsel under *Strickland*, he is trying to extend the protections of the Sixth Amendment through the guise of due process when the Sixth Amendment clearly does not apply. *Id. See also Turner*, 131 S.Ct. at 2516 ("the Sixth Amendment does not govern civil cases"). Moreover, the Court

finds that Robertson has not shown an equal protection violation because he cannot show disparate treatment based upon his status as an indigent.[15]

Furthermore, the Court finds that the grant of certiorari by the United States Supreme Court in *Martinez* and *Maples* does not require this Court to permit the filing of his current Application. It would not be appropriate for this Court to delay a ruling in this matter because of pending cases in the United States Supreme Court. It is impossible for this Court to know whether a ruling in the cases of *Maples* and *Martinez* would affect the issues in this case or whether any ruling in those cases would be applied retroactively. If the rulings in those cases were beneficial to Robertson and provided him with a previously-unrecognized right that would be cognizable in a successive PCR hearing, he could seek relief in a subsequent action. *See* § 17-27-45(B).

However, even assuming *arguendo* that the Supreme Court rules in favor of either or both petitioners, the Court finds that it does not appear that any such ruling will require a new PCR hearing in this case because the ruling will address only whether a procedural default may be excused in federal court. Rather than requiring states to provide effective assistance of counsel in their post-conviction relief proceedings, the Court's ruling will apparently be limited to providing inmates with the ability to raise claims in federal habeas corpus proceedings that were not pursued in state court proceedings, as the result of original PCR counsel's incompetence. This is an issue that would have to be addressed in federal court.[16]

[15] Moreover, the federal courts do not currently recognize the ineffective assistance of collateral counsel as a "cause" for excusing a habeas corpus petitioner's failure to properly raise an issue in state court. *See Ivey, supra. See also Mackall v. Angelone,* 131 F.3d 442, 449 (4th Cir. 1997) (en banc); *Longworth v. Ozmint,* 377 F.3d 437, 448 n. 2 (4th Cir. 2004). This Court will not construe federal law in a contrary manner, either through the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.

[16] Moreover, the Court finds that the PCR procedures in Arizona differ significantly from those in this state. In fn. 8 of his petition, the petitioner in *Martinez* states that Arizona's PCR procedures are part of the original criminal proceedings, whereas PCR is purely a civil remedy in South Carolina.

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Second, the Supreme Court has merely granted certiorari in these two cases. It has not ruled in the favor of either or both petitioners. Third, the Court notes that the Supreme Court has consistently explained that there is no constitutional right to the assistance of counsel in state habeas. *See, e.g., Giarratano*, 492 U.S. at 10, 12–13; *Finley*, 481 U.S. at 556–57, 559. As a result, an inmate cannot have the right to the effective assistance of collateral counsel in such a proceeding. *See Coleman*, 501 U.S. at 752 (Absent a constitutional right to state habeas counsel, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings"); *see also Torna*, 455 U.S. at 587-88. Instead, PCR applicants bear the costs of their attorneys' errors. *Coleman*, 501 U.S. at 754.[17] Whatever appeal the petitioners' arguments in *Martinez* and *Maples* might otherwise have is further undermined by the fact that there is no split of authority contrary to the Courts of Appeals' rulings in those cases. *See, e.g., Mackall*, 131 F.3d at 449; *Barbour v. Haley*, 471 F.3d 1222 (11th Cir. 2006); *Bonin v. Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996); *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993) (observing that the recognition of a right to effective assistance of counsel in a first post-conviction relief proceeding, to raise claims that trial counsel was ineffective, would logically result in "an infinite continuum of litigation in many criminal cases"); *Caswell v. Ryan*, 953 F.2d 853 (3rd Cir. 1992); *Johnson v. Lockhart*, 944 F.2d 388, 390 (8th Cir. 1991); *Williams v. Chrans*, 945 F.2d 926, 931-32 (7th Cir. 1991). Thus, the fact certiorari has been granted in *Martinez* and *Maples* does not require this Court to delay the dismissal of Robertson's current Application.

Further, this Court finds that the recognition of such a right would amount to a "new rule," which may not be the basis for a federal collateral attack on a state-court conviction, since it would be barred by the non-retroactivity principles announced in *Teague v. Lane*, 489 U.S.

[17] Again, the Supreme Court's recent pronouncement in *Turner* that "the Sixth Amendment does not govern civil cases," 131 S.Ct. 2507, 2516 (2011), is contrary to the positions of the petitioners in *Martinez* and *Maples*.

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288, 310-13 (1989). *Cf. State v. Belcher*, 385 S.C. 597, 612-13, 685 S.E.2d 802, 810-11 (2009) ("[b]ecause our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved. . . .Our ruling, however, will not apply to convictions challenged on post-conviction relief") (citing *Teague*).

The Court also finds that laches bars relief. Laches is an equitable doctrine, which "arises upon the failure to assert a known right." *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971).[18] 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.

[18] Laches is an affirmative defense that must be pleaded pursuant to Rule 8(c), SCRCP. *See also Adams v. B & D, Inc.*, 297 S.C. 416, 377 S.E.2d 315 (1989).

Moreover, the Court finds that Robertson's allegations 10 &11(c)-10 & 11(f) of the Amended Application do not state a claim upon which Post-Conviction Relief may be granted because each is alleged as a free-standing, substantive claim of trial court error. The jurisdiction of this Court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). Post-conviction relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993). *See also Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (same); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885-86 (1975) (same). Finally, his allegations 10 &11(h)-10 & 11(i) of the Amended Application do not state a claim upon which Post-Conviction Relief may be granted because neither is cognizable as a matter of state law and neither has been recognized as a ground for relief by the United States Supreme Court. As a result, these allegations are summarily dismissed for this additional reason.

Therefore, the Application for PCR is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 20th day of September, 2011.

Lee S. Alford
Resident Judge
Sixteenth Judicial Circuit

Yorktown, South Carolina.

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	Case No.: 2011-CP-46-00072
JAMES D. ROBERSTON, # 5067 Applicant, vs. State of South Carolina, Respondent.	**MOTION TO ALTER OR AMEND THE JUDGMENT**

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YORK COUNTY, SC

Pursuant to Rule 59, S.C. R. Civ. P., Applicant, James D. Robertson, moves this Court to alter or amend the judgment contained in the Court's Order dated September 20, 2011 (hereafter, "the Order"). Robertson objects to the Order to the extent that it contains a number of factual and legal errors. In support of this motion, Robertson submits the following.

I. THE COURT'S DISMISSAL OF THE PCR APPLICATION VIOLATES STATE LAW.

A. ROBERTSON'S INITIAL PCR COUNSEL WERE NOT QUALIFIED UNDER S.C. CODE § 17-27-160(B).

South Carolina's Uniform Post-Conviction Procedure Act requires that all indigent capital PCR applicants who desire counsel must be afforded two attorneys, at least one of which "must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense." S.C. Code Ann. § 17-27-160(B). On September 22, 2005, Judge John C. Few filed an order appointing counsel to represent Robertson in his capital PCR proceedings. *Order p.7.* This order states, in full:

> The defendant contends that he is indigent and in need of services of an attorney as contemplated by law. THEREFORE, MICHAEL BROWN, Attorney-at-Law, is appointed as Counsel for the Defendant.

See Appointment Order, attached here as Exhibit 1.[1] This order does not address whether Mr. Brown was qualified in accordance with § 17-27-160(B). Robertson has alleged that he was not. *Response in Opposition to Motion to Dismiss at p.6.*

Respondent alleges that Judge Few subsequently held an appointment hearing at the Greenville County Courthouse on September 23, 2005, at which the appointment of Mr. Brown was "confirmed." *See Return at p.8.* Respondent does not allege, however, that the issue of Mr. Brown's statutory qualification (or lack thereof) was even discussed at this hearing, but only that his appointment was "confirmed." *Id.* Moreover, Respondent concedes that there is no record of this alleged September 23rd hearing. *See id., at p.8 n.8* ("The transcript of the September 23, 2005 hearing is not in the files and Respondent apparently did not order this transcript."). Robertson alleges that no appointment hearing actually took place because initial PCR counsel failed to attend. *Response in Opposition to Motion to Dismiss at p.17.* He further argues that this disputed material fact must be examined through an appropriate post-conviction investigation and hearing.[2] *Id.*

Although this Court has taken no evidence, nor has it authorized Robertson to begin a post-conviction investigation, it nonetheless resolves this materially disputed fact in

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[1] This order was also attached to Respondent's Return and Motion to Dismiss, filed on March 24, 2011.

[2] There is no record of Mr. Joseph David Matlock's appointment at all. The Court, and Respondent who drafted the Order, apparently concede that he was not properly qualified. The Order notes only that he was appointed to assist Mr. Brown at some unknown date. *Order at p.8.* This language is identical to Respondent's Return at p.8.

Respondent's favor, finding not only that an appointment hearing took place, but further that: (a) Robertson was present at this hearing; (b) Mr. Salter was also present; and, (c) Mr. Brown was, in fact, properly qualified.[3] *Order at pp.8, 22.* These findings are inconsistent with both state and federal law. *See, e.g., Herman v. Claudy*, 350 U.S. 116, 119 (1965) ("allegations not patently frivolous or false on a consideration of the whole record . . . should not be summarily dismissed merely because a state prosecuting officer files an answer denying some or all of the allegations"); *Coleman v. Alabama*, 377 U.S. 129 (1964) (same); *Palmer v. Ashe*, 342 U.S. 134 (1952) (same); *Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) (holding summary dismissal without a hearing is only appropriate when it is apparent on the face of the application that there is no need for a hearing to develop any facts).

The Court rejects Robertson's argument that his initial PCR counsel were unqualified, and finds instead that Mr. Brown was qualified according to Chief Justice Toal's Memorandum dated August 13, 2003.[4] *Order pp.23-24.* The Order acknowledges that Chief Justice Toal

[3] Robertson notes that his PCR application has been stalled pending the disposition of Respondent's motion to dismiss. Thus, he has not had access to resources, basic process, discovery or a hearing. Despite these significant limitations, undersigned counsel have made repeated attempts to contact Mr. Brown and Mr. Matlock. Counsel for Robertson spoke to Mr. Brown by phone yesterday. *See Affidavit of John Blume, attached here as Exhibit 2.* Mr. Matlock provided an affidavit via fax today. *Affidavit of Joseph Matlock, attached as Exhibit 3.* It is improper for this Court to imply that undersigned counsel should have been conducting a complete investigation of the state court allegations since their appointment by the federal district court in November of 2010. *See Order at p.28.* This suggestion is both incorrect and unfair. The federal district court does not fund state-court investigation, nor would it have been proper for counsel to make such a request. The only other alternative would have been for undersigned counsel to fund an investigation out of our own pocket, prior to the resolution of Respondent's motion to dismiss, and/or to attempt to reconstruct the record of an appointment hearing that may not even have occurred without access to the ordinary record reconstruction process. This alternative is equally unreasonable.

[4] This memorandum tortures the statutory language and concludes that § 17-27-160 (B) does *not* require that a capital PCR applicant must have at least one attorney who has: (a) previously

herself has recently stated that her memorandum is not an authoritative interpretation of the statute, but nonetheless concludes that "while not binding authority" her memorandum "remains authority." *Order p.25.* The Order then speculates that, although Judge Few's September 9, 2005 order appointing Mr. Brown, "did not expressly rely upon the . . . Memorandum," (nor did the order mention the memorandum at all), Judge Few "presumably" relied on it in finding Mr. Brown qualified. *Order p.24.* Thus, this Court's rejection of Robertson's arguments rests on nothing more than a series of speculative guesses, including the Court's assumptions that: (a) an appointment hearing actually took place on September 23, 2005; (b) Mr. Brown's qualifications (or lack of qualifications) under South Carolina's capital PCR statute were actually discussed and conclusively determined at this hearing; (c) at the time of the hearing, Judge Few was aware of Justice Toal's memorandum; (d) although he was not bound by her memorandum, Judge Few nonetheless viewed it as "authority" and agreed with Justice Toal's interpretation of the statute; (e) Judge Few specifically applied that interpretation to Mr. Brown; and, (f) Judge Few specifically found that Mr. Brown met that interpretation. It is inappropriate for this Court to reach a decision by such "resort to speculation and surmise." *Palmer*, 342 U.S. at 137.

The Court also condones Respondent's efforts to distance itself from its own assertions made in *Alkebulanyahh v. State*. As Robertson has explained, Alkebulanyahh's initial PCR counsel were also not qualified and failed to competently represent him. *Response in Opposition to Motion to Dismiss at p.8, n.6.* John Blume was appointed to handle Mr. Alkebulanyahh's appeal from the denial of his initial PCR application – not his federal habeas corpus proceedings

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represented a death-sentenced inmate; or (b) meets the minimum qualifications to represent a capital defendant at trial AND has completed twelve hours of capital-specific CLE training, as the clear language of the statute plainly states.

as Robertson's counsel here. Alkebulanyahh filed a petition for a writ of habeas corpus in the South Carolina Supreme Court's original jurisdiction. In response to that pleading, Respondent argued that Alkebulanyahh should not be permitted to proceed in state habeas corpus because he had not exhausted his state remedies by filing a second PCR application. Specifically, respondent argued:

> [State] Habeas corpus is available only when other remedies are inadequate or unavailable. Procedurally, a petitioner seeking habeas corpus must first exhaust all available PCR remedies. . . . Here, petitioner has not made the requisite showings that he has fully exhausted all other remedies and that other remedies are either unavailable or inadequate. . . . Since these claims were not properly raised in state court, and Petitioner has not shown that relief is unavailable by other means for these claims, he is not entitled to habeas review at this time.

See Return to Petition for Writ of Habeas Corpus in Alkebulanyahh v. State, filed on March 21, 2011, at pp.12-13, attached to Robertson's Response in Opposition to Motion to Dismiss as Exhibit B. This Court now finds that this language does not amount to an "assert[ion] that Alkebulanyahh should be required to file a second PCR Application," but only that "the petitioner had not shown that other remedies, such as PCR, were inadequate for asserting [his] claims." *Order at p.25.* This argument is implausible on its face and effectively concludes that the State argued "we insist that Alkebulanyahh may not file a successive PCR action, but he should still be faulted for not trying to do it anyway." This Court should not be complicit in Respondent's feeble attempt to take back a position it now wishes it had not taken in a different case.

B. ROBERTSON DID NOT WAIVE HIS RIGHT TO QUALIFIED PCR COUNSEL.

The Order further finds that even if initial PCR counsel was not qualified, Robertson waived his right to qualified PCR counsel by not objecting at the time of their appointment. *See Order at p.17* (finding that "the appointment hearing was **the only time** to properly complain about the defects in counsel's eligibility for appointment pursuant to § 17-27-160(B)") (emphasis in original);[5] *see also, id. at p.21.* The Order also invokes laches for the same basic reason. *Order at p.35.* This finding is erroneous in that it suggests the courts bear no independent responsibility for ensuring that counsel appointed under the capital PCR statute are actually qualified. The purpose of the statute is to ensure that competent and qualified counsel are afforded to indigent capital PCR applicants. The statute does not require that the indigent applicant *himself* be aware of the statute's requirements, personally investigate post-conviction counsel's lack of qualifications, raise objections based on that investigation, and thereby ensure that the statute's protections are actually afforded to him. Such a requirement is illogical and inconsistent with the plain language of the statute. It is also inconsistent with the basic fairness requirements of Due Process.[6]

C. NO OUTCOME-DETERMINATIVE SHOWING OF PREJUDICE IS REQUIRED BEFORE ROBERTSON'S PCR APPLICATION MAY PROCEED.

The Court finds that Robertson is required to demonstrate prejudice "from the failure to follow a technical requirement of a statute that is not a right guaranteed by the United States or

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

[6] Undersigned counsel is aware of no other context in which such a draconian waiver rule applies. For example, a criminal defendant is not require to personally object at the time of trial counsel's deficiency in order to avoid waiving his right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

State Constitutions." *Order at p.26.* This finding is inconsistent with South Carolina courts' treatment of other capital cases, including *Williams v. State*, 363 S.C. 341, 611 S.E.2d 232 (2005); *Elmore v. State*, 2005-CP-24-1205 (order filed February 1, 2010); and, most recently, *Terry v. State*, --- S.C. ---, --- S.E.2d ---, 2011 WL 3804573 (2011).

First, the Honorable Marc H. Westbrook permitted Luke Williams to pursue a second PCR application, over the State's objection, on the ground that his initial PCR counsel were not qualified under the plain language of S.C. Code Ann. § 17-27-160(B). Williams was not required to demonstrate that his second PCR application would merit relief *before* he was even allowed to proceed to a hearing. Following an evidentiary hearing, Judge Westbrook granted Williams PCR relief. Although the South Carolina Supreme Court ultimately reversed Judge Westbrook's grant of relief in *Williams*, the Court did so *on the merits*, not on the ground that Williams' second PCR application was impermissibly successive. *See Williams*, 363 S.C. 341, 611 S.E.2d 232 (2005). Similarly, Edward Elmore was also permitted to file a second PCR application over the State's objection. As in *Williams*, Elmore was not required to prove the merits of his claims *before* he was permitted to investigate and offer proof at an evidentiary hearing. Judge Mark J. Hayes granted Elmore penalty-phase relief from his death sentence on the merits of his claim, and the State did not appeal this order. Finally, capital PCR applicant, Gary Terry, raised two claims in his appeal from the denial of PCR which, at oral argument, he conceded were arguably procedurally defaulted. The South Carolina Supreme Court decided these claims *on the merits*, despite Respondent's arguments that they should be dismissed due to a procedural bar. *See Terry*, 2011 WL 3804573 (2011). During oral argument, members of the Court expressed the view that capital cases are far too serious and important to summarily dismiss on procedural grounds.

Thus, there is no threshold requirement that a capital PCR applicant must demonstrate outcome-determinative prejudice before he may proceed with a permissible second PCR application. If there were such a requirement, the Supreme Court would have reversed Williams' grant of relief on procedural grounds, and it would have taken Respondent's invitation to dismiss Terry's appeal on procedural grounds. But the Supreme Court did neither. Thus, this Court's order creates a new requirement that contradicts existing law which demands that a prisoner prove – not merely allege – entitlement to relief at the initial pleading stage, and without access to the ordinary tools of fact development contemplated (and routinely made available) in South Carolina capital post-conviction relief cases. Such a scheme is designed to preclude review regardless of merit.

The Order purports to distinguish Robertson's case from *Elmore* and *Williams*, but the Court's arguments raise only distinctions without a difference. *Order pp.18, 22-23.* First, with regard to *Elmore*, the Order states that: (a) Elmore filed a successive PCR application raising a mental retardation claim; (b) the State moved to dismiss the application on procedural grounds; (c) the PCR judge held the motion to dismiss in abeyance pending an evidentiary hearing on mental retardation; (d) the PCR court found Elmore mentally retarded; and, (e) the State did not appeal "because an appeal would be futile." *Id. at p.22.* This account of the procedural history of *Elmore* fails to explain how or why *Elmore* is distinguishable here. Like Robertson, Elmore was a death-sentenced inmate who filed a second PCR application. The fact that Elmore was allowed to proceed to a hearing on his second application, and that the PCR court rendered a decision on the merits of his claim, actually *supports* Robertson's arguments here.

Williams is even more closely analogous. Like Robertson, Williams argued that his second PCR application should be allowed to go forward because his initial PCR counsel were

not qualified and did not competently represent him during his initial PCR proceedings. Williams was allowed to proceed to a hearing and was not required to prove the merits of his claims before he was allowed that process. The Order concludes that *Williams* is distinguishable because Robertson's lead PCR counsel, Mr. Brown, "was properly qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011), unlike Williams' original PCR attorneys." *Order at p.22.* However, Mr. Brown's qualification (or lack of qualification) is a question of fact about which there is a material dispute. *See Section I.A., infra.* The Court may not simply resolve material disputed facts against Robertson without a hearing. *See, e.g., Herman*, 350 U.S. 116; *Coleman*, 377 U.S. 129; *Palmer*, 342 U.S. 134; *Al-Shabazz*, 338 S.C. at 363, 527 S.E.2d at 747.

II. THE COURT'S DISMISSAL OF THE PCR APPLICATION VIOLATES FEDERAL LAW.

This Court's Order includes a number of findings that violate well-established federal principles that state courts must follow when adjudicating federal claims such as those properly pleaded in Robertson's current PCR Application.

The Court faults Robertson for not providing particularized proof of initial PCR counsel's lack of qualifications, and thereby leaving the Court to "speculate." *Order at p.23* ("it is left up to this Court to speculate on [initial PCR counsel's] qualifications since there is no record or information provided to the Court."). The Court finds that "in the absence of evidence to the contrary, this Court must assume that Judge Few appointed qualified counsel to represent Robertson in his first PCR application." *Id.* The Court also characterizes Robertson's allegations as merely claims that current PCR counsel would have handled his proceedings "differently," and finds that this allegation "does not establish that PCR counsel were deficient, nor any prejudice to Robertson." *Order at p.27.* This is not a fair characterization of Robertson's allegations, nor is it a reasonable response to them. Robertson has plainly:

> (1) identified recognized standards by which initial PCR counsel's performance should be measured;
>
> (2) alleged facts showing that initial PCR counsel did not meet those standards and stated that there is no record establishing the contrary;
>
> (3) directed the Court's attention to obvious, fundamental deficiencies in initial PCR counsel's performance prior to and at the PCR hearing, including that they:
>
> > (a) conducted no PCR investigation;
> >
> > (b) failed to seek or secure any assistance from investigators or expert witnesses;
> >
> > (c) waited six months after appointment before filing a PCR application, and even then only alleged "[i]neffective assistance of counsel – specifics to be amended later."
> >
> > (d) failed to file any amended application;
> >
> > (e) primarily relied on Robertson's own testimony at the PCR hearing about his general dissatisfaction with trial counsel; and,
> >
> > (f) failed to raise a number of potentially meritorious claims which are plainly evident from the record.
>
> (4) alleged that, with the aid of competent counsel, Robertson could prove errors entitling him to relief; and,
>
> (5) asserted that, to the extent there is any question about counsel's qualifications, a hearing should be convened at which the evidence can be developed without resort to "speculation."

See Response in Opposition to Motion to Dismiss at pp.2-3, 5-11, 13. Without access to resources, process or a hearing, Robertson cannot reasonably be expected to have done any more than that.

Thus, Robertson agrees that the Court should not speculate, and he objects to this Court's decision to do so in lieu of affording him the basic process due to any litigant whose claim for

relief turns on the resolution of a disputed fact. *See, e.g., Palmer*, 342 U.S. at 137 (the right to counsel "is too valuable in our system to dilute it by such untrustworthy reasoning" as that conducted by "speculation and surmise"). It is error for this Court to fault Robertson for failing to prove facts outside the existing record without providing him with a hearing and the investigative tools with which to prove them. *See, e.g., Wellon v. Hall*, 130 S.Ct. 727, 730 n.3 (2010) (per curiam); *Coleman*, 377 U.S. at 133 ("Since . . . the record shows that petitioner was not permitted to offer evidence to support his claim, the judgment of affirmance must fall."); (citing *Carter v. Texas*, 177 U.S. 442, 448-449 (1990) ("where the state court found that the motion was but a mere tender of the issue, unaccompanied by any supporting testimony, this Court must reverse on the ground that the defendant offered to introduce witnesses to prove the allegations and the court declined to hear any evidence upon the subject") (internal quotations omitted)).

The Court admits "that the only way for it to determine whether prior collateral counsel's performance was incompetent is to hold an evidentiary hearing, where prior collateral counsel could testify as to their investigation and what issue(s) they may have investigated but did not pursue at the evidentiary hearing." *Order at p.30.* Robertson agrees. If this is the Court's position, then it should not purport to find, elsewhere in the Order, that initial PCR counsel were actually qualified and competent. *See Order at pp.22, 23, 26, 27.* It is contradictory for the Court to purport to hold to both of these competing conclusions.

The Order places heavy emphasis on the fact that there is currently no federal constitutional right to state post-conviction relief proceedings, calling state PCR "a matter of legislative grace." *Order at p. 31; see also, id. at pp.29-33* (citing, *inter alia*, *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (observing that "the right to appointed counsel extends to

the first appeal of right, and no further"); *Murray v. Giarratano*, 492 U.S. 1, 10, 13 (1989) (applying this rule to capital cases)). However, the Order fails to address Robertson's arguments that, in South Carolina, state post-conviction *is* the first appeal of right for many claims, such as ineffective assistance of counsel, since they cannot be raised on direct appeal. *See Response in Opposition to Motion to Dismiss at p.11 n.8.*

Nor does the Order address Robertson's arguments that a state-created right, even if only a "legislative grace," must still be provided in accordance with the basic principles of Due Process. *See id. at pp.10-13*; *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (noting that although the Constitution does not require States to grant appeals as of right to criminal defendants, nonetheless if a State has created a criminal appellate process, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protections Clauses of the Constitution"); *see also*, *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that even though a state is not constitutionally required to provide direct review, once a state chooses to do so, it must provide indigent defendants with a free copy of the trial transcript in order to give them a fair opportunity to obtain an adjudication on the merits of the appeal); *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that a procedure whereby indigent defendants must demonstrate the merit of their case before obtaining counsel on appeal "does not comport with fair procedure"); *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977) (asserting that it is "beyond doubt that prisoners have a constitutional right of access to the courts" which must be "adequate, effective, and meaningful").

The Order glosses over the fact that the United States Supreme Court has recently granted certiorari in two cases – *Maples v. Maples*, 2011 WL 940889 (U.S.) and *Martinez v. Ryan*, 2011 WL 380903 (U.S.) – that can only be seen as vehicles through which the Supreme Court will

revisit at least some of the rules established in *Finley, Giarratano* and their progeny. The Order erroneously purports to predict that *Maples* and *Martinez* will, at most, announce only a new way to overcome procedural default in federal habeas corpus proceedings. *Order at p.33* This prediction is most certainly inaccurate. The context of *Maples* may be limited to procedural default in federal habeas corpus, but *Martinez* squarely presents the question of whether the Sixth Amendment extends to the first post-conviction relief proceeding as of right.[7] Moreover, on September 20, 2011, the Supreme Court granted a stay of execution pending the disposition of the petition for a *writ of certiorari* in *Foster v. Texas*, --- S.Ct. ---, 2011 WL 4360018. Like *Martinez*, Foster's petition squarely addresses the issue of ineffective representation by state post-conviction counsel. The question presented is:

> When a state habeas corpus proceeding represents a death-sentenced state prisoner's first opportunity to raise claims of innocence or ineffective assistance of trial counsel, does the federal constitution guarantee him effective assistance of counsel in presenting those claims?

[7] The question presented in *Martinez* is:

> Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim.

See Petition for Writ of Certiorari in Martinez v. Ryan, attached to Response in Opposition to Motion to Dismiss as Exhibit D. The Court's attempt to distinguish Robertson's case from Martinez on the ground that Arizona's post-conviction procedures occur under criminal, rather than civil rules of procedure, is also quite week. *See Order at p.33 n.16.* The salient feature is that, in both schemes, ineffective assistance of counsel cannot be raised until state post-conviction. The characterize the schemes otherwise is disingenuous.

The Court also errs by anticipatorily declaring that any rule announced in either *Maples* or *Martinez* would be a "new" rule and therefore inapplicable to a case like Robertson's under *Teague v. Lane*, 489 U.S. 288 (1989). *Order at p.35.* As the Supreme Court has made clear, *Teague* is not binding on state courts. *Danforth v. Minn*esota, 552 U.S. 264 (2008). Furthermore, even if *Teague* were applicable, a "new" rule extending the right to counsel would be sufficiently fundamental that it would very likely be retroactive. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (identifying *Gideon v. Wainwright*, 372 U.S. 335 (1963), as the paradigmatic new, but retroactive rule).

III. ROBERTSON'S PCR APPLICATION IS TIMELY.

The Order finds that "[a]lthough he does not refer to this subsection in his Response," Robertson "is attempting to rely in § 17-27-45(C)," which governs claims based on newly discovered evidence. *Order at p.16.* This is not Robertson's position. He does not rely on 17-27-45(C). Rather, Robertson argued that when a second PCR application is permitted under certain exceptional circumstances, which are present here, the statute of limitations does not apply, *see Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999), or *at a minimum* should be implicitly or equitably tolled for the period during which the initial PCR application was pending. *See Response in Opposition to Motion to Dismiss at pp.15-16.* The Order incorrectly identifies Robertson's position as based on section 17-27-45(C) and fails to address any of the arguments that Robertson did raise regarding the statute of limitations.

Finally, the Order gratuitously characterizes Robertson's actions as "dilatory" and "wasteful." *Order at pp.17 n.10, 30.* These inappropriate comments should be removed. This Court has acknowledged that it has no way of knowing whether initial PCR counsel were competent without holding a hearing. *Order at p.30.* Since this Court has refused to do so on

policy grounds unconnected to this case (and inconsistent with similarly situated cases in *Elmore*, *Williams*, and *Terry*), it is improper to characterize Robertson's conduct as "dilatory" and the litigation as "wasteful."

Respectfully submitted,

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KEIR M. WEYBLE
Cornell Law School
101 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-3805

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

September 28, 2011

Exhibit 1

RECEIVED
2005 SEP 22 PM 12:09
CLERK OF COURT
YORK, S.C.

DEFENSE OF INDIGENTS ACT

FORM NO. IV

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA COUNTY OF YORK DOCKET NO. _____	
STATE OF SOUTH CAROLINA VS. JAMES D. ROBERTSON DEFENDANT	ORDER OF APPOINTMENT OF LEGAL COUNSEL OF INDIGENT DEFENDANT

The defendant contends that he is indigent and in need of services of an attorney as contemplated by law. THEREFORE, MICHAEL BROWN, Attorney-at-Law, is appointed as Counsel for the Defendant.

This 9TH day of SEPTEMBER, 2005, at 8:51 AM

[redacted]

SEE ATTACHED MEMO
FROM JUDGE FEW.

Exhibit 2

STATE OF NEW YORK)
) AFFIDAVIT
COUNTY OF TOMPKINS)

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

1. I, John H. Blume, was the Director of South Carolina Death Penalty Resource Center, which eventually became the Death Penalty Resource and Defense Center ("the Center"), from 1988 until 1996. As Director, I had the responsibility of, among other things, monitoring all capital postconviction cases in the State of South Carolina. I have represented numerous applicants in post-conviction proceedings in South Carolina.

2. Counsel for Steven Vernon Bixby have discussed the schedule in *Steven Vernon Bixby v. South Carolina*, 2011-CP-01-110 with me. Counsel have informed me that they must give notice of all "claims—particularly mental health, capacity or limitation claims or related ineffective assistance claim" by February 13, 2012, the same day that the final amended application for post-conviction relief is due. Counsel have also informed me that the evidentiary hearing is set to for hearing on April 2, 2012 and that Mr. Bixby filed his pro se Application for Post Conviction Relief on April 25, 2011.

3. During my time as Director of the Center, I am not aware of any case that went from the filing of the initial filing of an application to an evidentiary hearing in as short a time period as the schedule described by Mr. Bixby's counsel. I am also unaware of any case that had as short a time to investigate the case and file a final amended application as the time set forth in the schedule outlined by counsel. In none of the cases in which I was counsel of record contained such draconian time limits for discovery, filing a final application, and conducting an evidentiary hearing.

4. Based on my twenty-five years of post-conviction litigation in South Carolina and other jurisdictions, I do not think it is possible to provide competent representation under the court's current scheduling order.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

JOHN H. BLUME

Sworn to and subscribed before me
This 28 day of December, 2011

Notary Public for the State of New York
My commission expires: NAN A. COLVIN
Notary Public, State of New York
No. 4674392
Qualified in Tompkins County
12/31/14

Exhibit 3

STATE OF SOUTH CAROLINA)
)
COUNTY OF York)

AFFIDAVIT

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

1. I was appointed to represent James D. Robertson in his capital post-conviction relief proceedings. I served as second-chair with attorney Michael Brown.

2. At the time of my appointment, and through to the conclusion of Mr. Robertson's PCR, I had never previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings, although I had previously served as counsel on a non-capital murder trial.

3. At the time of my appointment, and through to the conclusion of Mr. Robertson's PCR, I had never attended a continuing legal education seminar or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

I affirm, under the penalty of perjury, that the above information is true and correct.

Joseph D. Matlock

Sworn to and subscribed before me
This 28th day of September, 2011.

Notary Public for the State of South Carolina

My commission expires: February 28, 2021

STATE OF SOUTH CAROLINA COUNTY OF YORK **JAMES D. ROBERTSON, SK 5067,** *Applicant,* v. **STATE OF SOUTH CAROLINA,** *Respondent.*	IN THE COURT OF COMMON PLEAS Case No.: 2011-CP-46-00072 **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Motion to Alter or Amend Judgment was served by first class United States mail, postage prepaid, this 28th day of September, 2011, upon the following:

William Edgar Salter
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

Jill A. Rider

FILED-RECEIVED
2011 OCT -4 AM 10:41
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	
)	Case No.: 2011-CP-46-00072
JAMES D. ROBERSTON, # 5067)	
Applicant,)	**MOTION TO CORRECT FILING**
vs.)	
State of South Carolina,)	
Respondent.)	

Applicant, James D. Robertson, seeks to correct his Motion to Alter or Amend the Judgment [hereafter, "Motion to Alter"], filed on September 28, 2011, by substituting the affidavit of John Blume, attached here, as Exhibit 2. *See Motion to Alter at p.3 n.3.* Apparently, due to an internal office clerical error, the wrong affidavit of John Blume was originally filed as Exhibit 2. Thus, Robertson respectfully requests that the Court substitute the correct affidavit, attached here, *nunc pro tunc.*

FILED-RECEIVED
2011 OCT 14 AM 11:30
CLERK OF COURT
YORK COUNTY, SC

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, South Carolina 29211
(803) 765-1044

KEIR M. WEYBLE
Cornell Law School
101 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-3805

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

October 13, 2011

STATE OF NEW YORK)
)
COUNTY OF TOMPKINS)

AFFIDAVIT

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

1. On September 27, 2011, I spoke with Michael Brown, who was appointed to represent James D. Robertson in his initial capital post-conviction relief proceedings.

2. Mr. Brown informed me that at the time of his appointment, he had not previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings. While he had been counsel in several capital trial level cases, he had no capital post-conviction experience.

3. Mr. Brown also informed me that at the time of his appointment, and through to the conclusion of Mr. Robertson's PCR, he had not attended a continuing legal education seminar or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

4. Mr. Brown also informed me that at the time of his appointment, he was not aware that there were different statutory provisions governing the appointment of counsel in a capital post-conviction case and a capital trial case.

5. As the former Director of the South Carolina Death Penalty Resource Center, and thus as one who monitored developments in South Carolina post-conviction cases and assisted in the recruitment of counsel in capital post-conviction cases, Mr. Brown's representations are consistent with my first hand knowledge that he had not previously been counsel in a capital post-conviction proceeding. Furthermore, I have spoken with Teresa Norris, who was the successor as Director of the Center (later known as the Center for Capital Litigation), and her recollection is consistent with both my memory and Mr. Brown's representations.

I affirm, under the penalty of perjury, that the above information is true and correct.

John H. Blume

Sworn to and subscribed before me
This 28th day of September, 2011

Notary Public for the State of South Carolina

My commission expires: 12/3/16

NAN A. COLVIN
Notary Public, State of New York
No. 4674392
Qualified in Tompkins County
Commission Expires

2011 OCT 14 AM 11:30
CLERK OF COMMON PLEAS
YORK COUNTY, SC

STATE OF SOUTH CAROLINA COUNTY OF YORK **JAMES D. ROBERTSON, SK 5067,** *Applicant,* v. **STATE OF SOUTH CAROLINA,** *Respondent.*	IN THE COURT OF COMMON PLEAS Case No.: 2011-CP-46-00072 **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Motion to Correct Filing was served by first class United States mail, postage prepaid, this 13th day of October, 2011, upon the following:

William Edgar Salter
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

Jill A. Rider

FILED-RECEIVED
2011 OCT 14 AM 11:30
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK)	Case No.: 2011-CP-46-00072
)	
JAMES D. ROBERSTON, # 5067)	**MOTION TO SUPPLEMENT**
Applicant,)	
vs.)	
State of South Carolina,)	
Respondent.)	

On September 28, 2011, Applicant James D. Robertson filed a Motion to Alter or Amend this Court's September 20th Order. That motion remains pending. Robertson has argued that he is entitled to pursue his present post-conviction relief ("PCR") application because, among other things, his initial PCR counsel, Michael L. Brown, Jr., and Joseph D. Matlock, were not qualified to represent him and failed to competently perform during his 2007 capital PCR proceeding. *See* Response in Opposition to Motion to Dismiss, filed on July 25, 2011, at pp.6-10; Motion to Alter at pp.1-4, 9-11.

Robertson now seeks to supplement his pending Motion to Alter with the recent opinion of the South Carolina Supreme Court, filed yesterday, in the matter of Michael L. Brown, Jr. *See In re Brown*, attached as Exhibit A. This opinion finds that Brown was arrested in July 2007, "following an altercation with police officers at a bar" – an incident Brown admitted "was a result of his use and abuse of alcohol." *Id.* Despite four years of substance abuse treatment, however, Brown was arrested again in July 2011 and pled guilty to resisting arrest. *Id.*

Michael L. Brown, Jr. served as lead counsel during Robertson's initial capital PCR proceeding. An evidentiary hearing took place in January 2007, and the proceeding was not concluded until Judge John C. Few signed an order of dismissal on March 7, 2008. Thus, *In re*

Brown further supports Robertson's argument that Brown did not competently represent him during his initial PCR proceeding, as he was abusing alcohol at this time and was ordered to attend both "in-patient and out-patient rehabilitation" while the PCR application was pending. Brown apparently failed to comply with these requirements, as evidenced by his most recent arrest, and the Court has now officially held that his conduct violated Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) of the Rules of Professional Conduct, Rule 407, SCACR. Moreover, the Court has disciplined Brown according to Rule 7(a)(5) (it shall be ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Accordingly, Robertson respectfully requests that this Court accept and consider this supplement to his pending Motion to Alter or Amend the judgment contained in this Court's Order dated September 20, 2011.

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, South Carolina 29211
(803) 765-1044

KEIR M. WEYBLE
Cornell Law School
101 Myron Taylor Hall
Ithaca, New York 14853
(607) 255-3805

BY: Emily C. Pasuda
ATTORNEY FOR APPLICANT

October 25, 2011

Exhibit A

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael Langford Brown, Jr.,
Respondent.

Opinion No. 27058
Submitted September 26, 2011 – Filed October 24, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of Ballard Watson & Weissenstein, of West Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of either an admonition or public reprimand with the following conditions: 1) to fully comply with the terms of his current contract with Lawyers Helping Lawyers (LHL) which was renewed in October 2010; 2) to submit an affidavit to ODC attesting to his compliance with the terms of his contract with LHL every three months for a period of one year from the date of the Court's order imposing discipline; 3) to submit to ODC statements from his medical treatment provider and his LHL monitor attesting to his compliance with his LHL contract every three months for a period of one year from the date of the Court's order imposing discipline; 4) to submit his affidavit to ODC attesting to completion of the terms of the LHL contract one year after the date of the Court's order imposing discipline; 5) to submit a letter to ODC signed by his LHL monitor and a representative of the South Carolina Bar responsible for administration of LHL confirming respondent's completion with the terms of his LHL contract one year after the date of the Court's order imposing discipline; 6) to submit a letter to ODC signed by respondent's medical treatment provider confirming respondent's compliance with his treatment program and providing his prognosis and plan for future treatment, if any, one year after the date of the Court's order imposing discipline; 7) to allow an investigative panel to review this matter one year after the date of the Court's order imposing discipline and to unilaterally extend the above six conditions for one additional year; 8) to bear all costs of compliance with the terms of the Agreement and to be personally responsible for obtaining and submitting the required documentation; and 9) to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of imposition of discipline. We accept the agreement, issue a public reprimand, and order respondent to comply with each of the conditions set forth above.

The facts, as set forth in the Agreement, are as follows.

FACTS

In July 2007, respondent was arrested following an altercation with police officers at a bar. In July 2011, respondent pled guilty to resisting arrest and was sentenced to pay a fine and complete community service. Respondent paid the fine and is in the process of completing his community service.

Respondent acknowledges the incident in July 2007 was a result of his use and abuse of alcohol. With the assistance of Lawyers Helping Lawyers, respondent has been in treatment for substance abuse since the time of his arrest in July 2007. The treatment has included in-patient and out-patient rehabilitation, active participation in Alcoholics Anonymous, peer monitoring, and random testing for alcohol use.

LAW

Respondent admits that, by his misconduct, he has violated Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), of the Rules Professional Conduct, Rule 407, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand with conditions. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Respondent shall: 1) fully comply with the terms of his current contract with LHL which was renewed in October 2010; 2) submit an affidavit to ODC attesting to his compliance with the terms of his contract with LHL every three months for a period of one year from the date of this order; 3) submit statements to ODC from his medical treatment provider and his LHL monitor attesting to his compliance with his LHL contract every three months for a period of one year from the date of this order; 4) submit his affidavit to ODC attesting to completion of the terms of the LHL contract one year after the date of this order; 5) submit to ODC a letter signed by his LHL monitor and a representative of the South Carolina Bar responsible for administration of LHL confirming respondent's completion with the terms of his LHL contract one year after the date of this order; 6) submit a letter to ODC signed by respondent's medical treatment provider confirming respondent's compliance with his treatment program and providing his prognosis and plan for future treatment, if any, one year from the date of this order; 7) allow an investigative panel to review this matter one year after the date of this order and to unilaterally extend the above six conditions for one additional year; 8) bear all costs of compliance with the terms of the Agreement and to be personally responsible for obtaining and submitting the required documentation; and 9) pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of the date of this order.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

4481

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) Case No.: 2011-CP-46-00072
)
JAMES D. ROBERTSON, SK 5067,)
Applicant,)
) **CERTIFICATE OF SERVICE**
v.)
)
STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned certifies that a copy of the foregoing Motion to Supplement was served by first class United States mail, postage prepaid, this 25th day of October, 2011, upon the following:

William Edgar Salter
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

Jill A. Rider

FILED-RECEIVED
2011 OCT 27 AM 8:31
C.C.P.&G.S.
YORK COUNTY, SC

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

James D. Robertson, Petitioner, v. Jon Ozmint, Commissioner South Carolina Dept. of Corrections, Respondent.	Civil Action No. 2:11-63-SB-BHH **ORDER**

This matter is before the Court on the status reports of the parties, submitted at the request of the Court, concerning whether or not the stay of habeas corpus proceedings, in effect in this case [Doc. 44], should now be lifted as a result of a ruling in the state Post-Conviction Relief (PCR) Court. [Docs. 54-56.] The respondent has also filed a motion to reconsider the Court's original order granting that stay. [Doc. 46.]

The petitioner, a state prisoner, seeks habeas relief pursuant to Title 28, United States Code, Section 2254. The petitioner brought this habeas action on October 27, 2010, requesting a stay of execution. On November 4, 2010, the Honorable Sol Blatt, Jr. granted it. [Doc. 10.] The petitioner filed his petition on January 7, 2011. [Doc. 20.] Simultaneous to that filing, the petitioner also filed a motion to stay the habeas proceedings, which the undersigned granted. [Doc. 44.] Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to resolve all pretrial proceedings in post-trial petitions for relief.

The parties were directed to notify the Court upon "resolution of [the petitioner's] state court PCR application. *See Rhines*, 544 U.S. at 278." [Doc. 44 at 7.] The Honorable Lee S. Alford filed an Order, on September 20, 2011, in which he dismissed the petitioner's January 7, 2011, PCR Application in *James D. Robertson, #5067 v. State*, 11-CP-46-00072. [Doc. 53, Attach 4.] In an Order written by counsel for the respondent, and adopted by

Judge Alford without modification,[1] the PCR court ostensibly concluded that (1) that the statute of lim itations applicable to Post -Conviction Relief actions barred the entire Application, *see* S.C. Code § 17-27-45(A), and that any reliance by the petitioner on S.C. Code § I7-27-45(C) was misplaced; (2) the Application must be dismissed as successive, in violation of S.C. Code § 17-27-90 and *Aice v. State*, 409 S.E.2d 392, 394 (1991); (3) a successive PCR application is not allowed on the ground that the first complete PCR application was insufficient due to ineffectivePCR counsel, apart from the scenario covered by *Austin v. State*, 409 S.E.2d 395 (1991); (4) the petitioner's contention concerning PCR counsel's supposed lack of qualifications s hould be rejected; (5) "there is no presumed prejudice from the failure to follow a technical requirement of a statute that is not a right guaranteed by the United States or State Constitutions," and that the petitioner had failed to show prejudice to him resulting from anynon-compliance with the statute; (6) there was "no merit to Robertson's contenibn that his prior PCR counsel did not perform competently," and that "simply stating that [present counsel] would have handled the case differently does not establish that PCR counsel were deficient, nor any prejudice to Robertson"; (7) "If the Court allowed a hearing on the merits of the claims in this Application and Robertson was not successful, other counsel would undoubtedly allege that Robertson's present counsel were ineffective because they would have raised other grounds and would have handled it differently"; (8) the ABA Guidelines for the Appointment and Performance of De fense Counsel in Death Penalty Cases did not es tablish the appropriate standard for counsel's investigation and representation of trial, appellate and collateral counsel in capital cases;

[1] The petitioner makes the notable pointhat, while not impermissible, the wholesale adoption of proposed orders is certainly disfavored in South Carolina capital postconviction relief cases. *See, e.g., Hall v. Catoe*, 601 S.E.2d 335, 341 (2004) (s tating that the state "strongly encourage[s] PCR judges todraft their own findings offact and conclusions of law in death penalty cases").

(9) "to create the exception now urged by Robetson would create an exception that would swallow the rule against succe ssive applications, since it would mandate a second PCR hearing in every case in whichthe applicant did not prevail inhis first hearing;" that "[t]here is no reason to tax an already overburdened judicial system with wasteful litigation that is not constitutionally mandated;" and that allowing the petitioner to proceed "would reward a dilatory filing in this case that is designed todelay the proper courseof the appeals process and it would destroy any sense of finality tditigation"; (10) the petitioner's due process and equal protection arguments were meritless; (11)"there is nothing in the Constitution or the precedents of [the United StatesSupreme] Court that requiresthat a State provide counsel in postconv iction proceedings. A postconvicti on proceeding is not part of the criminal process itself, but is instead a civil action deghed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requiresIte States to provide such proceedings"; (12) the grant of certiorari to the United States Supreme Court in *Martinez v. Ryan*, 131 S. Ct. 2960 (June 6, 2011) and *Maples v. Allen*, 131 S.Ct. 1718 (Mar. 21, 2011) did not require allowing the petitioner's successive, time barredApplication to proceed; (13) laches barred relief; (14) certain allegat ions of the pet itioner did not state a claim upon which Post-Conviction Relief could be granted because they were f ree-standing, substantive claims of trial court error which are beyond thestatutory jurisdiction of state PCR; and (15) other allegations did not state a claim uponwhich Post-Conviction Relief could be granted because they have not been recognized as grounds for relief bythe United States Supreme Court.

The petitioner, however, has filed a motion toalter or amend that Order, pursuant to S.C. R. Civ. P. 59(e), whichis apparently still pending. [Doc55-1.] Judge Alford, therefore, may as of yet still modify his ruling, which is not a final judgment. In other words, the PCR application is not yet "resolved" as this Court originally ruled, for purposes of modifying the

stay. [Doc. 44.] The plaintiff has reasonably raised issues concerning the independent judgment of it. Moreover, the Court has not changed its view of the petitioner's original motion to stay here, in light of *Rhines v. Weber*, 544 U.S. 269 (2005), notwithstanding the respondent's motion to reconsider. [Doc. 46.] The Court has revisited it all anew. Essentially for the same reasons, however, the Court would decline to lift the stay at this time.

CONCLUSION

Wherefore, it is ORDERED that the stay, already in effect in this case, shall not be lifted. Additionally, the respondent's motion to reconsider [Doc. 46] is DENIED. The petitioner shall notify the Court within five (5) days of resolution of the pending motion to alter or amend in the PCR Court. *See Rhines*, 544 U.S. at 278. Thereafter, the respondent will have five (5) days to indicate to the Court whether or not it continues to believe the stay should be lifted.

IT IS SO ORDERED.

s/Bruce Howe Hendricks
United States Magistrate Judge

November 30, 2011
Charleston South Carolina

FORM 4

STATE OF SOUTH CAROLINA
C NTY OF YORK
IN HE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP4600072

James D Roberston	South Carolina State Of
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER

ORDER INFORMATION

This order ☒ ends ☐ does not end the case. Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

LEE S. ALFORD	2113	12/8/2011
Circuit Court Judge	Judge Code	Date

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)

FILED RECEIVED
2011 DEC -8 PM 4:15
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

James D. Robertson, #5067)

Plaintiff,)

v.) C. A. No. 2011-CP-46-0072

State of South Carolina)

Defendant.)

This matter is before the Court on Motion of Applicant to Alter or Amend the Order of this Court, dated September 20, 2011, dismissing the Application for Post-Conviction Relief in this case.

The Applicant did not provide any information regarding the qualifications of counsel in his first PCR action prior to the Court's order. 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.

Applicant then filed a Motion to Supplement the Motion to Alter or Amend with a copy of the South Carolina Supreme Court's public reprimand of Michael L. Brown with regard to an altercation with police officers at a bar while he was intoxicated. Applicant

posits that because Michael Brown has a history of substance abuse, he could not have effectively represented Applicant in the first PCR proceeding. Michael Brown's law practice is located in York County. 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.

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

In this case, there is no transcript of record because of laches on the part of Applicant. This Court does, however, have the one hundred six page Order of Judge Few addressing twelve different issues raised by Applicant's first PCR application. It is obvious that there was a lot of work done by counsel in the first PCR proceeding.

Applicant's present counsel has had about a year to raise new issues, but has not done so. Simply disagreeing with the decisions of counsel in the first PCR action does not constitute ineffective assistance.

an arbitrary denial of a statutory right which amounts to a denial of due process. What concerns this Court about Petitioner's argument is that South Carolina enacted § 17-27-160 for the purpose of opting-in the Chapter 154 of the AEDPA (Antiterrorism and Effective Death Penalty Act of 1996), but because it did not follow the statute in this case, it is being held accountable by this Court's refusal to apply Chapter 154 to this case. The Court believes that its refusal to apply Chapter 54 to the Petitioner's case, which ruling Petitioner seeks, due to the State's failure to follow § 17-27-160, is of great benefit to the Petitioner, and for the Petitioner to now claim a violation of a constitutional right based upon the State's failure to follow § 17-27-160, contradicts that ruling. This Court finds that the state's failure to follow § 17-27-160 is not a violation of Petitioner's constitutional rights because the rights granted to the Petitioner under that statute, if not given, do not penalize the Petitioner. The result of the State's failing to follow § 17-27-160 in a particular case is that Chapter 154 does not apply to that case.____.

Based on the foregoing, this Court finds that an independent constitutional violation did not occur when the State failed to follow § 17-27-160, and, therefore, no cause exists to excuse the procedural defaults of claims A(1) and A(2). However, even if cause did exist, this Court agrees with the magistrate judge that the Petitioner has neither shown actual prejudice as a result of the alleged violations of federal law, nor a fundamental miscarriage of justice."

Conclusion

Applicant's Motion to Alter or Amend the Court's Order, dated September 20, 2011, is denied. There is no evidence from which the Court could infer that Michael Brown's substance abuse problem affected his effectiveness in representing the Applicant in his

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first PCR action. The failure to follow § 17-27-160 does not create an independent constitutional right. Prejudice to Applicant resulting from the failure to follow § 17-27-160 must be shown and Applicant has failed to demonstrate any prejudice.

IT IS SO ORDERED.

Lee S. Alford
Resident Judge
of the Sixteenth Judicial Circuit Court

November 28, 2011

York, South Carolina

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ZOA

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

JAMES D. ROBERTSON, #5067, Petitioner, vs. JON OZMINT, Director, South Carolina Department of Corrections, Respondent.	C/A No. 2:11-00063-SB-BHH RESPONSE TO TEXT ORDER ENTERED NOVEMBER 30, 2011 **[DOC. No. 59]** AND MOTION FOR COURT TO LIFT STAY

Respondent hereby makes a Response to the November 30, 2011 Text Order filed by the Court **[Doc. No. 59]**, wherein the Court denied Respondent's **[Doc. No. 46]** Motion for Reconsideration of the Court's previously filed **[Doc. No. 44]** Order on Motion to Stay. In addition to denying Respondent's motion for reconsideration, this Court's Order further provides that: "The petitioner shall notify the Court within five (5) days of resolution of the pending motion to alter or amend in the PCR Court. See Rhines, 544 U.S. at 278. Thereafter, the respondent will have five (5) days to indicate to the Court whether or not it continues to believe the stay should be lifted. Signed by Magistrate Judge Bruce Howe Hendricks on 11/30/11.(hhil,)."

On Monday, December 12, 2011, Respondent received the attached Order of the Honorable Lee S. Alford denying Robertson's motion to alter or amend the Court's previously entered Order and Judgment summarily dismissing Robertson's 2011 PCR Application. Judge Alford's Order was filed on December 8, 2011.

In compliance with this Court's November 30, 2011 Text Order, Respondent submits that

the stay, entered on April 8, 2011 so that Robertson could exhaust state court remedies as to **Grounds Five-Eleven [Dock. Ent. No. 44]**, should now be lifted, for the reasons argued in Respondent's previously filed pleadings.

This Court entered the stay so that Robertson could try to exhaust his unexhausted claims in state PCR. However, his 2011 Application has been summarily dismissed and his motion to alter or amend under Rule 59(e), SCACR, has been denied. Further, his right to appeal is very circumscribed by the finding that the 2011 Application is barred by § 17-27-45(A). See Rule 243(c), SCACR ("If the lower court has determined that the post-conviction relief action is barred as successive or being untimely under the statute of limitations, the petitioner must, at the time the notice of appeal is filed, provide an explanation as to why this determination was improper. **This explanation must contain sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper. If the petitioner fails to make a sufficient showing, the notice of appeal may be dismissed**") (Emphasis added).

CONCLUSION

WHEREFORE, Respondent respectfully asks the Court to reconsider its earlier Order granting a stay for Robertson to litigate the "unexhausted" ineffective assistance of counsel claims in his Petition and for the Court.

Respectfully submitted,

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December 21, 2011.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2011-CP-46-0072

James D. Robertson, #5067,

v.

State of South Carolina.

NOTICE OF APPEAL AND REQUIRED EXPLANATION

The applicant, James D. Robertson, hereby appeals from the order of the Circuit Court, Hon. Lee S. Alford, presiding judge, dismissing the Application for Post-Conviction Relief in this case on September 20, 2011. On December 8, 2011, the Circuit Court entered an order denying Robertson's Motion to Alter or Amend the Judgment. Copies of these orders are enclosed with this notice.

The lower court's order dismisses the application on six basic grounds: (1) the Application is barred by the one year statute of limitations; (2) the Application is impermissibly successive; (3) Robertson waived his right to qualified counsel at his initial PCR; (4) Robertson cannot demonstrate prejudice as a result of his initial PCR counsel's lack of qualifications; (5) no due process or equal protection violation occurred during Robertson's initial PCR; and, (6)

laches bars relief. Robertson hereby offers the following explanation as to why the lower court's determination was erroneous.

I. PROCEDURAL HISTORY

Robertson was convicted and sentenced to death in the York County, South Carolina Court of General Sessions in March, 1999. Following the dismissal of his direct appeal, Robertson sought post-conviction relief. South Carolina's Uniform Post-Conviction Procedure Act requires appointment of qualified PCR counsel to assist indigent death row prisoners in the identification, development and litigation of challenges to their convictions and sentences. S.C. Code Ann. § 17-27-160(B). At least one attorney "must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense." *Id.* On September 22, 2005, Judge John C. Few filed an order appointing counsel to represent Robertson in his capital PCR proceedings. *Order p.7.* This order states, in full:

> The defendant contends that he is indigent and in need of services of an attorney as contemplated by law. THEREFORE, MICHAEL BROWN, Attorney-at-Law, is appointed as Counsel for the Defendant.

See Appointment Order, attached as Exhibit 1. This order does not address whether Brown was qualified in accordance with § 17-27-160(B). Joseph David Matlock later appeared with Brown at Robertson's evidentiary hearing. There is no record of Matlock's appointment. The record of

Robertson's initial PCR contains no indication that either attorney met the statutory criteria for appointment as qualified PCR counsel in a capital case.

In March 2006, approximately six months after their appointment, counsel filed a PCR application on Robertson's behalf. The sum total of the allegations contained in the application was "Ineffective assistance of counsel – specifics to be amended later." By the time of the January 29-31, 2007, evidentiary hearing, no amended application had been filed. In response to questioning by the PCR judge about the claims they intended to pursue at the hearing, counsel identified approximately a dozen theories under which trial counsel assertedly had been ineffective. At the evidentiary hearing, counsel called three witnesses: Robertson, trial attorney James Hancock, and trial attorney James Boyd. Consistent with the limited presentation before the PCR court, the records reviewed by undersigned counsel indicate that Robertson's PCR attorneys did not perform an independent investigation to determine the existence of claims for relief based on evidence not contained within the record generated at trial.[1] Judge John C. Few denied post-conviction relief in a written order dated March 7, 2008.

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

[1] *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.15.1 and Commentary, reported in 31 HOFSTRA L. REV. 913, 1085-86 (2003) ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7."); *see also*, Commentary to ABA Guideline 10.15.1, 31 HOFSTRA L. REV. at 1086 ("[C]ollateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues.").

issues which could – and should – have been raised by initial PCR counsel as grounds for post-conviction relief.[2]

Respondent moved to dismiss the application. Robertson responded to the Motion to Dismiss, arguing that: (1) the application is timely; (2) Robertson is entitled to pursue the present PCR application as a matter of state law because his initial PCR counsel were not qualified and failed to competently represent him, and other PCR applicants have been permitted to go forward with similar applications under the same circumstances; (3) Robertson is entitled to pursue the application as a matter of federal constitutional law; and, (4) the United States Supreme Court is currently considering a series of cases that may provide additional grounds under which the federal constitution would require Robertson's application to go forward, *see Maples v. Maples*, 2011 WL 940889; *Martinez v. Ryan*, 2011 WL 380903; *Foster v. Texas*, 2011 WL 4360018. Robertson offered an affidavit from Joseph Matlock stating:

> (1) I was appointed to represent James D. Robertson in his capital post-conviction relief proceedings. I served as second-chair with attorney Michael Brown.
>
> (2) At the time of my appointment and through to the conclusion of Mr. Robertson's PCR, I had never previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings, although I had previously served as counsel on a non-capital murder trial.
>
> (3) At the time of my appointment and through to the conclusion of Mr. Robertson's PCR, I had never attended a continuing legal education seminar or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

[2] These claims are merely those that are evident from a review of the record. Undersigned counsel have not had an opportunity to conduct an adequate and independent investigation – one which prior counsel should have performed. Such an investigation would most certainly uncover other claims for post-conviction relief.

Affidavit of Joseph D. Matlock, attached as Exhibit 2. Moreover, Robertson offered an affidavit from John H. Blume, who stated that he spoke to Michael Brown on September 27, 2011. Brown likewise had never previously represented a death-sentenced inmate in post-conviction, nor had he attended any training primarily involving advocacy in the field of capital appellate and/or post-conviction defense at the time of his representation of Robertson. *See Affidavit of John H. Blume, attached as Exhibit 3.* Brown was not aware of the statutory provisions governing the appointment of counsel in a capital PCR case. *Id.*

Finally, Robertson presented the lower court with a copy of this Court's recent opinion in the Matter of Michael L. Brown. *See In re Brown, attached as Exhibit 4.* This opinion finds that Brown was arrested in July 2007, "following an altercation with police officers at a bar" – an incident Brown admitted "was a result of his use and abuse of alcohol." *Id.* Despite four years of substance abuse treatment, however, Brown was arrested again in July 2011 and pled guilty to resisting arrest. *Id.* Brown served as Robertson's PCR counsel from September 2005 to March 2008. Thus, *In re Brown* further supports Robertson's argument that Brown did not competently represent him during his initial PCR proceeding, as he was abusing alcohol at this time and was ordered to attend both "in-patient and out-patient rehabilitation" while the PCR application was pending. Brown apparently failed to comply with these requirements, as evidenced by his most recent arrest, and this Court held that his conduct violated Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) of the Rules of Professional Conduct, Rule 407, SCACR. Moreover, this Court disciplined Brown according to Rule 7(a)(5) (it shall be ground for discipline for a lawyer to engage in conduct tending to pollute the administration

of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Robertson requested an opportunity to investigate and fully develop the facts in support of his January 2011 PCR application. He asserted that, to the extent that there was any dispute about his initial PCR counsel's lack of qualification, the lower court should, at a minimum, hold an evidentiary hearing to determine that issue. Alternatively, Robertson argued that the lower court should hold his case in abeyance until the United States Supreme Court has resolved the *Maples*, *Martinez,* and *Foster* line of cases which could dictate that this case be allowed to go forward as a matter of federal constitutional law, regardless of South Carolina's state law rules regarding successive petitions.

The lower court rejected Robertson's arguments and dismissed his application, resolving a number of factual disputes in respondent's favor without holding an evidentiary hearing or providing Robertson with the time or opportunity to investigate. Because the lower court's determination was erroneous, Robertson must be permitted to proceed with this appeal. *See* Rule 243(c), SCACR.

II. ARGUMENT

A. ROBERTSON IS ENTITLED TO PURSUE HIS PCR APPLICATION AS A MATTER OF STATE LAW.

The lower court's September 20th Order [hereafter, "the Order] finds that Robertson's application must be dismissed as successive. *See Order at p.18*. This determination is incorrect. In *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991), this Court observed that successive PCR applications generally should not be entertained "'unless the court finds a ground for relief asserted which for *sufficient reason* was not asserted or was inadequately raised in the original, supplemental or amended application.'" *Id.* at 450, 409 S.E.2d at 394 (emphasis