VOLUME X OF X

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
SEP 14 2012
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

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

A. MATTISON BOGAN

NELSON MULLINS RILEY & SCARBOROUGH, LLP
Meridian, 17th Floor
1320 Main Street
Columbia, South Carolina 29201
(803) 255-9589

ATTORNEYS FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

VOLUME X
PAGES 4500-4600

INDEX

INDEX i

VOLUME I OF X

APPENDIX FILED APRIL 15, 2009 1

TRIAL TRANSCRIPT 1

PRE-TRIAL MOTIONS OF 7-17-98 32

PRE-TRIAL MOTIONS OF 9-22-98 48

PRE-TRIAL MOTIONS OF 9-25-98 55

PRE-TRIAL MOTIONS OF 11-2-98 79

PRE-TRIAL MOTIONS OF 12-4-98 90

JURY PANEL VOIR DIRE 122

MOTION BY SOLICITOR POPE 169

MOTIONS BY MR. BOYD 176

INDIVIDUAL JUROR VOIR DIRE 202

VOLUME II OF X

INDIVIDUAL JUROR VOIR DIRE CONTINUED 501

VOLUME III OF X

INDIVIDUAL JUROR VOIR DIRE CONTINUED 1001

MOTION BY MR. BOYD 1273

OPENING STATEMENT BY THE COURT 1300

OPENING STATEMENT BY SOLICITOR POPE 1311

OPENING STATEMENT BY MR. HANCOCK 1315

TESTIMONY

MARTHA CISSY GEORGE
Direct Examination by Solicitor Pope....1319

LINDA WEAVER
Direct Examination by Solicitor Pope....1323
Cross Examination by Mr. Hancock....1327

MARGIE JORDAN
Direct Examination by Solicitor Pope....1328
Cross Examination by Mr. Boyd....1335

GREGORY SCOTT MAGGART
Direct Examination by Solicitor Pope....1338

DEBBIE BRISSON
Direct Examination by Solicitor Pope....1360
Cross Examination by Mr. Hancock....1369

RALPH MISLE (IN CAMERA)
Direct Examination by Solicitor Pope....1373
Cross Examination by Mr. Boyd....1378

JAMES D. ROBERTSON (IN CAMERA)
Direct Examination by Mr. Boyd....1388
Cross Examination by Solicitor Pope....1389

DOUGLAS C. MCKOWN
Direct Examination by Solicitor Pope....1396

RALPH MISLE
Direct Examination by Solicitor Pope....1401

WAYNE SCOTT LANGLEY, SR.
Direct Examination by Solicitor Brackett....1423

GLENDA JOHNSON
Direct Examination by Solicitor Brackett....1428
Cross Examination by Mr. Boyd....1440

CURTIS LEE RICHARDSON
Direct Examination by Solicitor Brackett....1442

GUY R. COX
Direct Examination by Solicitor Pope....1446

THOMAS A. BEMAN
Direct Examination by Solicitor Pope....1453

JOSEPH A. BARKER, JR.
Direct Examination by Solicitor Pope....1464

MICHAEL SYLVESTER
Direct Examination by Solicitor Pope....1468
Cross Examination by Mr. Hancock....1477

JERRY GERALD ROBISON
Direct Examination by Solicitor Pope....1481

WILLIAM COOGAN
In Camera....1489
Direct Examination by Solicitor Pope....1496

ROBERT BROWN
Direct Examination by Solicitor Pope....1498

JOHN HOWE
Direct Examination by Solicitor Pope....1500

VOLUME IV OF X

JOHN HOWE CONTINUED
Direct Examination by Solicitor Pope....1501

JOHN WILLIAMS
Direct Examination by Solicitor Pope....1507

JAMES T. HAGER
Direct Examination by Solicitor Pope....1511

RENE SEALEY
Direct Examination by Solicitor Pope....1514

CLYDE J. MITCHUM, JR.
Direct Examination by Solicitor Pope....1518

NOTE FROM FOREMAN....1526

TESTIMONY CONTINUED

PAMELA CARROLL
Direct Examination by Solicitor Brackett....1527
Cross Examination by Mr. Boyd....1532

ERIN ELIZABETH SAVAGE
Direct Examination by Solicitor Brackett 1537
Cross Examination by Mr. Hancock 1545
Redirect Examination by Solicitor Brackett 1552

MARGARET W. SMITH
Direct Examination by Solicitor Brackett 1554
Cross Examination by Mr. Boyd 1556

MICHAEL SYLVESTER (IN CAMERA)
Direct Examination by Solicitor Pope 1558
Cross Examination by Mr. Boyd 1560

JERRY ROBISON (IN CAMERA)
Direct Examination by Solicitor Pope 1563
Cross Examination by Mr. Hancock 1568

MEREDITH L. MOON
Direct Examination by Solicitor Brackett 1575
Cross Examination by Mr. Hancock 1618
Redirect Examination by Solicitor Brackett 1639
Recross Examination by Mr. Hancock 1644

BRETT BAKER
Direct Examination by Solicitor Pope 1647
Cross Examination by Mr. Boyd 1739

JOHN C. BARRON
Direct Examination by Solicitor Pope 1748
Cross Examination by Mr. Hancock 1756

PATTI B. RUFF
Direct Examination by Solicitor Pope 1761

LORRI MEDLIN JOHNSON
Direct Examination by Solicitor Pope 1772
Cross Examination by Mr. Boyd 1782

DR. JOEL S. SEXTON
Direct Examination by Solicitor Pope 1784
Cross Examination by Mr. Hancock 1803

JOYCE LAUTERBACH
Direct Examination by Solicitor Brackett 1811
Cross Examination by Mr. Boyd 1827

GRAYSON AMICK
Direct Examination by Solicitor Pope....1830
Cross Examination by Mr. Hancock....1857
Redirect Examination by Solicitor Pope....1870
Recross Examination by Mr. Hancock....1873

MOTIONS BY MR. HANCOCK....1886

STATEMENT TO DEFENDANT BY COURT....1889

MOTION FOR DIRECTED VERDICT....1895

CLOSING ARGUMENT BY SOLICITOR BRACKETT....1899

CLOSING ARGUMENT BY MR. HANCOCK....1917

CLOSING ARGUMENT BY MR. BOYD....1931

CHARGE ON THE LAW....1940

JURY QUESTION....1963

VERDICT....1972

SENTENCING PHASE....1977

MOTION BY MR. BOYD....1982

TESTIMONY

JERRY HOFFMAN (IN CAMERA)
Direct Examination by Solicitor Pope....1999

VOLUME V OF X

JERRY HOFFMAN (IN CAMERA) CONTINUED
Direct Examination by Solicitor Pope....2001

KELLY J. BIGHAM (IN CAMERA)
Direct Examination by Solicitor Brackett....2007
Cross Examination by Mr. Hancock....2011

CHRISTINE M. URMSON
Direct Examination by Solicitor Brackett....2013
Cross Examination by Mr. Boyd....2021
Redirect Examination by Solicitor Brackett....2023

LESSLIE R. HERRING
Direct Examination by Solicitor Brackett 2024
Cross Examination by Mr. Hancock 2026

ANN KATHERINE KING
Direct Examination by Solicitor Brackett 2027
Cross Examination by Mr. Boyd 2030

WILLIARD ANDREW GEORGE
Direct Examination by Solicitor Brackett 2031
Cross Examination by Mr. Boyd 2034
Redirect Examination by Solicitor Brackett 2034

LOU FUNDERBURKE WYLIE
Direct Examination by Solicitor Brackett 2044
Cross Examination by Mr. Boyd 2046

DOUGLAS KEITH MANNING
Direct Examination by Solicitor Brackett 2049
Cross Examination by Mr. Boyd 2051

OPENING STATEMENT BY THE COURT 2057

OPENING STATEMENT BY SOLICITOR BRACKETT 2060

OPENING STATEMENT BY MR. HANCOCK 2063

TESTIMONY

LOU FUNDERBURKE WYLIE
Direct Examination by Solicitor Brackett 2068

WILLIAM WOOD (IN CAMERA)
Direct Examination by Solicitor Pope 2089

KEN FIELDS (IN CAMERA)
Direct Examination by Solicitor Pope 2096

RODNEY PICKEL (IN CAMERA)
Direct Examination by Solicitor Pope 2098

WILLIAM WOOD
Direct Examination by Solicitor Brackett 2107

JERRY HOFFMAN
Direct Examination by Solicitor Pope 2112
Cross Examination by Mr. Boyd 2118

AMY STURGIS
Direct Examination by Solicitor Brackett....2120

CAROLE SARN
Direct Examination by Solicitor Brackett....2125

MICHAEL JOHN STOBBE
Direct Examination by Solicitor Brackett....2127
Cross Examination by Mr. Hancock....2133

SCOTT WILLIAMS
Direct Examination by Solicitor Pope....2144
Cross Examination by Mr. Hancock....2150

ERIN ELIZABETH SAVAGE
Direct Examination by Solicitor Brackett....2153
Cross Examination by Mr. Boyd....2158
Redirect Examination by Solicitor Brackett....2167

JUSTIN CLAYTON ROBINSON
Direct Examination by Solicitor Brackett....2171
Cross Examination by Mr. Boyd....2181

DARREN W. KELLER
Direct Examination by Solicitor Brackett....2200
Cross Examination by Mr. Hancock....2206
Redirect Examination by Solicitor Brackett....2212

SCOTT EUGENE DOUGLAS
Direct Examination by Solicitor Brackett....2217
Cross Examination by Mr. Boyd....2220

STACEY AMANDA PEAKE
Direct Examination by Solicitor Brackett....2223
Cross Examination by Mr. Hancock....2229

VIEWING OF VIDEO BY THE COURT....2233

MOTION BY MR. BOYD....2234

STIPULATION....2248

TESTIMONY CONTINUED

DR. JOEL S. SEXTON
Direct Examination by Solicitor Pope....2249
Cross Examination by Mr. Hancock....2298
Redirect Examination by Solicitor Pope....2301

MARTHA CISSY GEORGE
Direct Examination by Solicitor Pope 2303
Cross Examination by Mr. Hancock 2318
Redirect Examination by Solicitor Pope 2324

MARGIE JORDAN
Direct Examination by Solicitor Brackett 2327
Cross Examination by Mr. Boyd 2338

LINDA WEAVER
Direct Examination by Solicitor Pope 2340
Cross Examination by Mr. Hancock 2372

BRETT BAKER
Direct Examination by Solicitor Pope 2379
Cross Examination by Mr. Hancock 2411

VIDEO PLAYED 2415

STATEMENT TO DEFENDANT BY THE COURT 2416

TESTIMONY CONTINUED

DR. RONALD D. PRYOR
Direct Examination by Mr. Boyd 2420
Cross Examination by Solicitor Brackett 2434
Redirect Examination by Mr. Boyd 2445

DR. JONATHAN H. PINCUS
Direct Examination by Mr. Hancock 2458

VOLUME VI OF X

DR. JONATHAN H. PINCUS CONTINUED
Direct Examination by Mr. Hancock 2501
Cross Examination by Solicitor Brackett 2505
Redirect Examination by Mr. Hancock 2526

DR. JAMES EVANS
Direct Examination by Mr. Hancock 2535
Cross Examination by Solicitor Brackett 2574
Redirect Examination by Mr. Hancock 2587
Recross Examination by Solicitor Brackett 2588

MOTIONS AND OBJECTIONS 2590

TESTIMONY CONTINUED

DR. W. ALEXANDER MORTON (IN CAMERA)
Direct Examination by Mr. Boyd 2610

DR. W. ALEXANDER MORTON
Direct Examination by Mr. Boyd 2613
Cross Examination by Solicitor Pope 2706

MICHAEL JOHN STOBBE
Direct Examination by Mr. Hancock 2740
Cross Examination by Solicitor Brackett 2745

JULIUS FREDERICK MEYER, JR.
Direct Examination by Mr. Hancock 2750
Cross Examination by Solicitor Brackett 2791
Redirect Examination by Mr. Hancock 2803

DR. GEORGE HOOK
Direct Examination by Mr. Hancock 2808
Cross Examination by Solicitor Pope 2811

LINDA HOOK
Direct Examination by Mr. Hancock 2816
Cross Examination by Solicitor Pope 2817

JULIAN M. MCLAUHLIN
Direct Examination by Mr. Hancock 2818
Cross Examination by Solicitor Pope 2822

MICHAEL FAULKNER
Direct Examination by Mr. Boyd 2828
Cross Examination by Solicitor Pope 2845
Redirect Examination by Mr. Boyd 2851

DR. TONI CASCIO
Direct Examination by Mr. Boyd 2852
Cross Examination by Solicitor Pope 2895

VOLUME VII OF X

DR. TONI CASCIO CONTINUED
Cross Examination by Solicitor Pope 3001
Redirect Examination by Mr. Boyd 3025
Recross Examination by Solicitor Pope 3029

HAROLD EVERETTE HALL, JR.
Direct Examination by Mr. Hancock 3031

WILLIAM CLARK PENDER
Direct Examination by Mr. Hancock 3034

PAIGE M. MCRIGHT
Direct Examination by Mr. Hancock 3036

STATEMENT BY THE COURT TO DEFENDANT 3040

TESTIMONY CONTINUED

DR. GEOFFREY R. MCKEE (IN CAMERA)
Direct Examination by Solicitor Brackett 3046
Cross Examination by Mr. Boyd 3053

DR. GEOFFREY R. MCKEE
Direct Examination by Solicitor Brackett 3059

MOTION FOR MISTRIAL 3073

STATEMENT BY COURT TO THE JURY 3078

DR. GEOFFREY R. MCKEE CONTINUED
Cross Examination by Mr. Boyd 3079
Redirect Examination by Solicitor Brackett 3082
Recross Examination by Mr. Boyd 3083

STATEMENT TO DEFENDANT BY THE COURT 3083

MOTION BY SOLICITOR BRACKETT 3085

CLOSING ARGUMENT BY SOLICITOR POPE 3125

CLOSING ARGUMENT BY MR. HANCOCK 3173

CLOSING ARGUMENT BY MR. ROBERTSON 3193

CLOSING ARGUMENT BY MR. BOYD 3194

CHARGE ON THE LAW 3203

EXCEPTIONS TO THE CHARGE 3226

VERDICT 3233

JURY POLLED 3236

STATEMENT BY THE COURT TO THE JURY 3239

SENTENCE 3241

APPLICATION FOR POST-CONVICTION RELIEF, 2006-CP-46-532 3244

RETURN, 2006-CP-46-532 3252

POST-CONVICTION RELIEF HEARING TRANSCRIPT, 2006-CP-46-532 3263

VOLUME VIII OF X

POST-CONVICTION RELIEF HEARING TRANSCRIPT, 2006-CP-46-532, CONTINUED 3501

ORDER OF DISMISSAL, 2006-CP-46-532 3652

INDICTMENTS 3758

CERT PETITION FILED APRIL 15, 2009 3766

RETURN TO CERT FILED JULY 15, 2009 3783

CERT DENIED ORDER FILED OCTOBER 6, 2010 3811

MOTION TO STAY FILED JANUARY 7, 2011 3813

PETITION FOR WRIT OF HABEAS CORPUS FILED JANUARY 7, 2011 3820

APPLICATION FOR POST-CONVICTION RELIEF FILED JANUARY 7, 2011 3847

RESPONSE IN OPPOSITION TO MOTION TO STAY FILED JANUARY 24, 2011 3854

REPLY TO OPPOSITION TO MOTION TO STAY FILED FEBRUARY 1, 2011 3890

RETURN AND MOTION TO DISMISS FILED MARCH 24, 2011 3898

VOLUME IV OF X

RETURN AND MOTION TO DISMISS FILED MARCH 24, 2011 CONTINUED 4001

MOTION FOR SUMMARY JUDGMENT FILED MARCH 28, 2011 4031

RETURN AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FILED MARCH 28, 2011 4032

ORDER GRANTING MOTION TO STAY FILED APRIL 8, 2011 4163

MOTION TO RECONSIDER ORDER GRANTING STAY FILED APRIL 15, 2011 4170

ORDER APPOINTING PCR COUNSEL FILED JULY 5, 2011 4186

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JULY 5, 2011 4189

AMENDED APPLICATION FOR POST-CONVICTION RELIEF FILED JULY 26, 2011 4201

RESPONSE IN OPPOSITION TO DISMISS FILED JULY 26, 2011 4208

REVISED REPLY TO APPLICANT'S RESPONSE TO RETURN
AND MOTION TO DISMISS DATED AUGUST 30, 2011 4386

ORDER OF DISMISSAL FILED SEPTEMBER 20, 2011 4410

MOTION TO ALTER OR AMEND JUDGMENT FILED OCTOBER 4, 2011 4448

MOTION TO CORRECT FILING FILED OCTOBER 14, 2011 4470

MOTION TO SUPPLEMENT FILED OCTOBER 27, 2011 4474

ORDER DENYING RESPONDENT'S MOTION TO RECONSIDER
STAY FILED NOVEMBER 30, 2011 4482

ORDER DENYING APPLICANT'S MOTION TO ALTER
OR AMEND THE COURT'S ORDER FILED DECEMBER 8, 2011 4486

MOTION FOR RECONSIDERATION OF ORDER GRANTING STAY
FILED DECEMBER 21, 2011 4491

NOTICE OF APPEAL AND REQUIRED EXPLANATION FILED JANUARY 9, 2012 4494

VOLUME X OF X

NOTICE OF APPEAL AND REQUIRED EXPLANATION
FILED JANUARY 9, 2012 CONTINUED 4501

SUPPLEMENT TO NOTICE OF APPEAL AND REQUIRED
EXPLANATION FILED JANUARY 23, 2012 4558

MOTION TO DISMISS DATED FEBRUARY 14, 2012 4567

ORDER DENYING MOTION FOR RECONSIDERATION OF
ORDER GRANTING STAY FILED FEBRUARY 15, 2012 4579

RETURN TO MOTION TO DISMISS DATED FEBRUARY 29, 2012 4581

NOTICE OF SUPPLEMENTAL AUTHORITY FILED MARCH 28, 2012 4594

ORDER DENYING MOTION TO DISMISS FILED APRIL 5, 2012 4599

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 was 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 this Court ultimately reversed the circuit court's grant of relief in that case, it did so on the merits, not on the ground that Williams' second application was 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 Robertson to be arbitrarily denied the opportunity that Williams and Elmore rightfully received.

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).

In its motion to dismiss, respondent alleged that Judge Few held an appointment hearing at the Greenville County Courthouse on September 23, 2005, at which the appointment of Mr. Brown was "confirmed." *Motion to Dismiss at p.8.* Respondent did not allege, however, that the issue of Brown's statutory qualification (or lack thereof) was even discussed at this hearing, but only that his appointment was "confirmed." Moreover, Respondent conceded 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, on the other hand, alleged that although an appointment hearing was scheduled, it did not actually take place because initial PCR counsel failed to attend. *Response in Opposition to Motion to Dismiss at p.17.* He further argued that this disputed material fact must be examined through an appropriate post-conviction investigation and hearing.[3] *Id.*

Although the lower court took no evidence and refused to authorize Robertson to begin a post-conviction investigation, it nonetheless resolved this materially disputed fact in respondent's favor, finding not only that an appointment hearing took place, but further that: (a) Robertson was present at this hearing; (b) Assistant Attorney General, Mr. Edgar Salter, was also present; and, (c) Brown was, in fact, properly qualified. *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).

---

[3] As explained above, there is no record of Mr. 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 Motion to Dismiss at p.8.

The lower court further found that Brown was specifically qualified according to Chief Justice Toal's Memorandum dated August 13, 2003.[4] *Order pp.23-24.* The Order acknowledges that Chief Justice Toal 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 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 Brown qualified. *Order p.24.* Thus, the lower 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) 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 Brown; and, (f) Judge Few specifically found that Brown met that interpretation. It is inappropriate for the lower court to reach a decision by such "resort to speculation and surmise." *Palmer*, 342 U.S. at 137.

[4] This memorandum is at odds with 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 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.

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 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 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 this 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.[5]

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.

B. ROBERTSON DID NOT WAIVE HIS RIGHT TO QUALIFIED PCR COUNSEL AND LACHES DOES NOT APPLY.

The lower court found that even if his 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); *see also, id. at p.21.*[6] 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 is afforded to indigent capital PCR applicants. The statute does not require that the indigent

---

[5] The commentary to the guideline states that "collateral counsel cannot rely on the previously compiled record but must conduct a thorough independent investigation. . . ."

[6] This finding is particularly curious with regard to Mr. Matlock, since no party has even alleged that he was present at an appointment hearing.

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.[7]

C. NO OUTCOME-DETERMINATIVE SHOWING OF PREJUDICE IS REQUIRED BEFORE ROBERTSON'S PCR APPLICATION MAY PROCEED.

The lower court found that, before he may proceed, Robertson must first demonstrate 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." *Order at p.26*. This finding is inconsistent with this and other South Carolina courts' treatment of 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. Similarly, Edward 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

---

[7] In no other context does such a draconian waiver rule apply. 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).

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. This 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).

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, this 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 this Court did neither. Thus, the lower 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 lower court's 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, Brown's qualification (or lack of qualification) is a question of fact about which there is a material dispute. It is improper for the lower court to 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.

It is likewise error for the lower court to fault Robertson for not conducting a complete investigation of the state court allegations since undersigned counsel's appointment by the federal district court in November of 2010. *See Order at p.28* ("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 proceeding on November 8, 2010. To this date, they can only point out that they would have handled the first PCR differently. . . "); *see also, December 8, 2011 Order Denying Applicant's Motion to Alter or Amend at p.2* ("Applicant's present counsel has had about a year to raise new issues, but has not done so."). This conclusion 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 personally fund an investigation, prior to the resolution of respondent's motion to dismiss, and without access to access to resources, basic process, discovery or a hearing. This alternative is equally unreasonable.

D. THE LOWER COURT'S ORDER VIOLATES FEDERAL LAW.

The lower 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 Order 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 Order 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 Order 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 lower court should not speculate, and it was improper for the lower court 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 the lower 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 lower 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. Accordingly, it is improper for the lower court to purport to find, elsewhere in the Order, that initial PCR counsel was actually qualified and competent. *See Order at pp.22, 23, 26, 27*. It is contradictory for the lower 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. 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 as Exhibit 5. The lower 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 weak. *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. To characterize the schemes otherwise is disingenuous.

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?

The lower court also erred 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).

E. The PCR Application is timely.

The lower court found 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.* The court then determined that Robertson's application is untimely because "his reliance on § 17-27-45(C) is misplaced." *Id.* This is not Robertson's position. He did 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.

CONCLUSION

For all of the reasons stated above, this Court should permit Robertson to file a petition for writ of certiorari and allow his appeal to proceed.

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
COUNSEL FOR PETITIONER

January 6, 2012

Exhibit 1

4517

RECEIVED

2005 SEP 22 PM 12:09

HILTON
& G.S.
COUNTY, SC

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) ORDER OF APPOINTMENT OF LEGAL
VS.) COUNSEL OF INDIGENT DEFENDANT
JAMES D. ROBERTSON)
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 9:51 AM

803-329-4200
SEE ATTACHED MEMO
FROM JUDGE FEW.

Exhibit 2

STATE OF SOUTH CAROLINA)
)
COUNTY OF York)

AFFIDAVIT

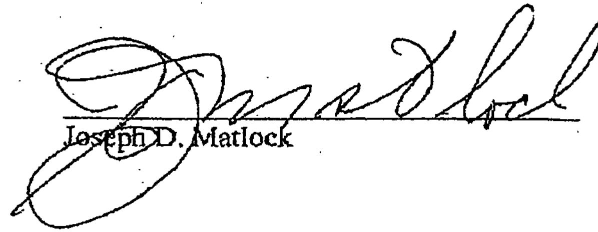
Joseph D. Matlock, Esq., who appeared personally before me, affirms and states the following:

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.

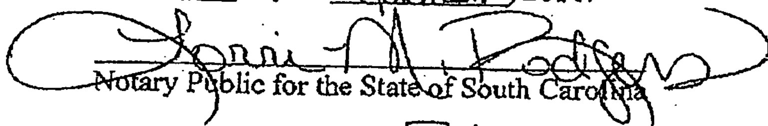
3. At the time of my appointment, and through to the conclusion of Mr. Robertson's PCR, I had never attended a continuing legal education seminar or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.

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

Exhibit 3

STATE OF NEW YORK)
) AFFIDAVIT
COUNTY OF TOMPKINS)

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.

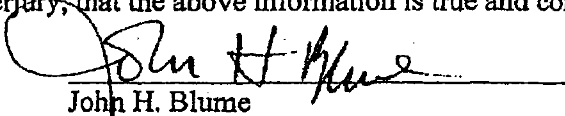
2. Mr. Brown informed me that at the time of his appointment, he had not previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings. While he had been counsel in several capital trial level cases, he had no capital post-conviction experience.

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: NAN A. COLVIN
Notary Public, State of New York
No. 4674392
Qualified in Tompkins County
Commission Expires
12/31/14

Exhibit 4

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.

Exhibit 5

4527

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

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

234520

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ....

TABLE OF CONTENTS......................

TABLE OF CITED AUTHORITIES ....

OPINIONS BELOW..........................

JURISDICTION ....

CONSTITUTIONAL PROVISIONS INVOLVED ....

STATEMENT OF THE CASE ....

I. State Court Proceedings ....

A. Evidence Presented at Trial ....

B. State Appellate and Post-Conviction Proceedings ....

II. Federal Habeas Corpus Proceedings......

III. Basis for Federal Jurisdiction in the Court of First Instance ....

Table of Contents

Page

ARGUMENT. . . . .

I. Petitioner's Federal Ineffective-Assistance-of-Trial-Counsel Claim is Not Subject to Procedural Default for Two Related Reasons . . . .

A. The procedural ground on which the state court denied Petitioner's federal claims was not "adequate" . . . .

B. There is cause and prejudice to excuse any procedural default of Petitioner's ineffective-assistance-of-trial-counsel claims . . . .

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 . . . .

CONCLUSION . . . .

4531

TABLE OF APPENDICES

Page

APPENDIX A — FOR PUBLICATION OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (SEPTEMBER 27, 2010) 1a

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT (DECEMBER 12, 2008) 26a

APPENDIX C — REPORT AND RECOMMENDATION BY UNITED STATES MAGISTRATE JUDGE (SEPTEMBER 17, 2008) 37a

APPENDIX D — ARIZONA SUPERIOR COURT RULINGS 68a

— ARIZONA SUPERIOR COURT RULING (NOVEMBER 4, 2005) 68a

— ARIZONA SUPERIOR COURT RULING (DECEMBER 1, 2005) 76a

APPENDIX E — UNREPORTED ARIZONA COURT OF APPEALS MEMORANDUM DECISION (AUGUST 31, 2006) 79a

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (NOVEMBER 5, 2010) 84a

TABLE OF CITED AUTHORITIES

Page

CASES

Bonin v. Calderon,
77 F.3d 1155 (9th Cir. 1996) . . . .

Bonin v. Vasquez,
999 F.2d 425 (9th Cir. 1993) . . . .

Coleman v. Thompson,
501 U.S. 722 (1991) . . . .

Douglas v. California,
372 U.S. 353 (1963) . . . .

Edwards v. Carpenter,
529 U.S. 446 (2000) . . . .

Halbert v. Michigan,
545 U.S. 605 (2005) . . . .

Hoffman v. Arave,
236 F.3d 523 (9th Cir.), *cert. denied*, 534 U.S. 944
(2001) . . . .

Martinez v. Schriro,
623 F.3d 731 (9th Cir. 2010) . . . .

Reece v. Georgia,
350 U.S. 85 (1955) . . . .

Page

Ross v. Moffitt,
417 U.S. 600 (1974). . . . .

State v. Spreitz,
202 Ariz. 1, 39 P.3d 525 (2002). . . . .

Staub v. City of Baxley,
355 U.S. 313 (1958) . . . .

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

Wainwright v. Sykes,
433 U.S. 72 (1977) . . . .

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. VI . . . .

U.S. Const., Amend. XIV . . . .

STATUTES

28 U.S.C. § 1254(1). . . . .

28 U.S.C. § 2241(a). . . . .

28 U.S.C. § 2241(c)(3) . . . .

28 U.S.C. § 2244(d)(1) . . . .

28 U.S.C. § 2254(a). . . . .

Page

RULES

Sup. Ct. R. 13.1 ....

Sup. Ct. R. 13.3 ....

Ariz.R.Crim.P. 31.3 ....

Ariz.R.Crim.P. 32.1(a)........................

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).....................

4535

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).

---

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]

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).

---

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

4549

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

---

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.

4555

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,

ROBERT BARTELS
Counsel of Record
SANDRA DAY O'CONNOR
COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
Tempe, AZ 85287-7906
(480) 965-7053
Robert.Bartels@asu.edu

Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

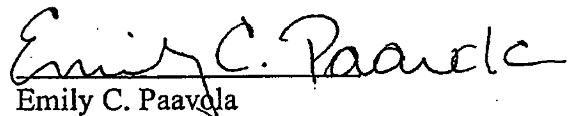
Case No. 11-CP-46-0072

James D. Robertson, #5067,
v.
State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Notice of Appeal and Required Explanation has been served upon Respondent's counsel by first class mail, postage prepaid, this 6th day of January, 2012, upon the following:

William Edgar Salter
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211



Emily C. Paavola

RECEIVED

JAN 23 2012

S.C. Supreme Court

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.

SUPPLEMENT TO NOTICE OF APPEAL AND REQUIRED EXPLANATION

Appellant, James D. Robertson, filed a notice of appeal along with a written explanation required by Rule 243(c), SCACR, on January 6, 2012. As Robertson explained in that filing, the lower court dismissed his application for post-conviction relief and, among other things, resolved disputed material facts in Respondent's favor without affording Robertson an evidentiary hearing or the basic tools of fact discovery and development. In particular, Respondent alleged that Judge John Few held an appointment hearing at the Greenville County Courthouse on September 23, 2005, at which the appointment of Mr. Michael Brown as PCR counsel was "confirmed."[1]

[1] Respondent did not allege, however, that the issue of Brown's statutory qualification (or lack thereof) was even discussed at this hearing, but only that his appointment was "confirmed." Moreover, Respondent conceded 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, on the other hand, alleged that although an appointment hearing was scheduled, it did not actually take place because Mr. Brown failed to attend. He further argued that this disputed material fact must be examined through an appropriate post-conviction investigation and hearing. The lower court refused to grant a hearing and instead resolved this materially disputed fact in Respondent's favor, finding not only that an appointment hearing took place, but further that Judge Few determined that Brown was, in fact, properly qualified during this supposed hearing.

After the notice of appeal was filed, Robertson located a letter from Mr. Brown in Robertson's personal files in which Brown stated that he did not become aware of his appointment as PCR counsel until October, 2005. Specifically, Mr. Brown and Mr. Salter (on behalf of Respondent) prepared a consent order stating:

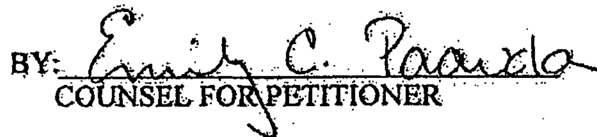
> The above-named Defendant, JAMES D. ROBERTSON, was appointed MICHAEL L. BROWN, JR., attorney at law, on September 22, 2005. Due to an error in mailing the Order from the Clerk's office, counsel for the Defendant did not receive the Notice of Appointment until the first week in October, 2005.

See Correspondence to James Robertson from Michael Brown, attached as Exhibit A. Thus, this letter is further evidence in support of Robertson's assertion that no appointment hearing took place on September 23, 2005, since Mr. Brown asserted that he did not even know of his appointment until October, 2005. Accordingly, Robertson respectfully requests that this Court consider the attached correspondence along with his previously filed Notice of Appeal and Required Explanation.

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: 
COUNSEL FOR PETITIONER

January 19, 2012

Exhibit A

The Law Offices of
MICHAEL L. BROWN, JR.
223 Main Street, Suite 550, Rock Hill, SC • PO Box 1025, Rock Hill, SC 29731
Telephone: (803)328-8822
Facsimile: (803)328-0523

November 2, 2005

James D. Robertson
SK5067R/A136 CCI
P.O. Box 205
Ridgeville, South Carolina 29472

Re: State v. James D. Robertson

Dear James:

Please be advised that we were granted an Order of Extension of time to prepare and file for your PCR. The deadline is now March 1, 2006. I have enclosed a copy of the Order as well as other correspondence forwarded to Judge Few.

Please do not hesitate to contact me should you have any questions.

Sincerely,

Tina M. James
Paralegal

/tmj

The Law Offices of
MICHAEL L. BROWN, JR.
223 Main Street, Suite 550, Rock Hill, SC • PO Box 1025, Rock Hill, SC 29731
Telephone: (803)328-8822
Facsimile: (803)328-0523

November 11, 2005

Honorable John C. Few
318 Courthouse
304 E. North Street
Greenville, South Carolina 29601

Re: State v. James D. Robertson

Dear Judge Few:

Please find the original Consent Order executed by Mr. Salter and Mr. Brown in connection with the above-referenced matter.

Sincerely,

Tina M. James
Paralegal

/tmj
Enclosure

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF GENERAL SESSIONS
SIXTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA,

vs.

JAMES D. ROBERTSON,

Defendant.

CONSENT ORDER TO EXTEND TIME TO FILE POST CONVICTION RELIEF

The above-named Defendant, JAMES D. ROBERTSON, was appointed MICHAEL L. BROWN, JR., attorney at law, on September 9, 2005; said Order of Appointment was filed September 22, 2005. Due to an error in mailing the Order from the Clerk's office, counsel for the Defendant did not receive the Notice of Appointment until the first week in October, 2005.

The Defendant was originally given sixty (60) days in which to decide whether or not to file a Post Conviction Relief in the above-referenced matter. The Defendant has decided to file the Post Conviction Relief. The attorney for the Defendant, due to the logistics involved and the amount of work involved, needs an extension of time to file the Post Conviction Relief.

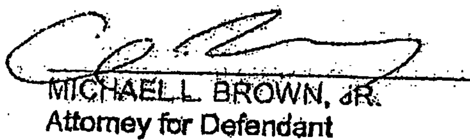
Counsel for the State has no objection and consents to this extension of time. The Defendant requests a four (4) month extension of time.

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED, that the Defendant, JAMES D. ROBERTSON, is given a four (4) months extension of time from November 1, 2005, in which to file his Post Conviction Relief in the above-referenced matter.

Counsel for the Defendant has until March 1, 2006, to file said Post Conviction Relief.

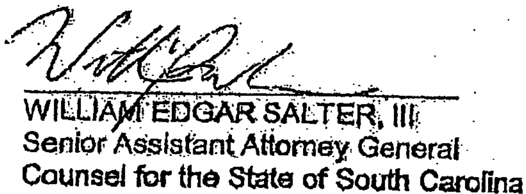
HONORABLE JOHN C. FEW

I SO MOVE:



MICHAEL L. BROWN, JR.
Attorney for Defendant

I SO CONSENT:



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Counsel for the State of South Carolina

November 7, 2005.

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. 11-CP-46-0072

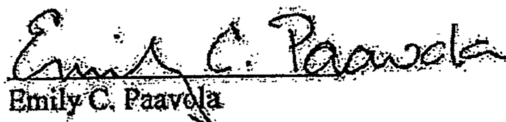
James D. Robertson, #5067,
v.

State of South Carolina.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Supplemental Notice of Appeal and Required Explanation has been served upon Respondent's counsel by first class mail, postage prepaid, this 19th day of January, 2012, upon the following:

William Edgar Salter
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211



Emily C. Paavola

STATE OF SOUTH CAROLINA
In the Supreme Court

On Rule 243 (c), SCACR Permission to File Petition for Writ of Certiorari
Capital PCR: Court of Common Pleas
York County

James D. Robertson, #5067,

Petitioner,

vs.

State of South Carolina,

Respondent.

MOTION TO DISMISS

This matter comes before the Court by way of Petitioner's notice and explanation seeking permission to appeal the denial of a successive and untimely Application for Post-Conviction Relief (PCR) filed by death-sentenced inmate, James D. Robertson (Robertson) through counsel, on January 7, 2011. See Rule 243(c), SCACR. This Court has not yet entered a formal order either dismissing or allowing the appeal.[1] Respondent would move for dismissal because Petitioner has not satisfied the requirement of Rule 243(c), SCACR. In support of this motion, Respondent would respectfully show the Court:

[1] Respondent has received a copy of e-mail correspondence between former counsel for Robertson, Emily Paavola, Esq., (who now represents Robertson in a federal habeas action), and clerk office staff indicating the appeal is pending and petition is due March 26, 2012. However, counsel for respondent has not been advised of any formal action on the notice and permission to appeal.

On March 24, 2011, Respondent made its Return and Motion to Dismiss in the circuit court.[2] At the hearing appointing counsel for Petitioner, Judge Alford heard oral argument on the state's motion. He thereafter received briefing by the parties. On September 20, 2011, Judge Alford dismissed the application as successive and untimely. On November 28, 2011, Judge Alford denied Robertson's motion to alter or amend the judgment. Respondent incorporates Judge Alford's Orders and the reasons for dismissal by reference.

On January 19, 2012, Robertson filed his notice and explanation seeking permission to appeal. In his explanation, Robertson asserts, among other reasons, that a September 23, 2005 hearing to appoint counsel was never held. He also seeks to provide reasons why his successive and time barred Application should not have been summarily dismissed. Those arguments are meritless and dilatory.

This Court has rejected the repeated successive filings of PCR applications based ineffective assistance of PCR counsel. This Court has correctly noted the nearly unexhaustable availability of new claims if the Court would allow such action:

> 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. Aice protests that only those new arguments of true merit would be advanced in successive applications and that hence our fears are unfounded. Yet, the very arguments Aice advances lack merit and demonstrate that our fears are real.

[2] 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.

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. ...

Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Plainly, "successive PCR applications are disfavored, and the applicant has the burden of proving that the grounds could not have been raised in a prior PCR application." *Bray v. State*, 366 S.C. 137, 141, 620 S.E.2d 743, 745 (2005). Here, Robertson asks for permission to re-opened his fully litigated collateral state remedy on highly speculative grounds – namely, that the United States Supreme Court may recognize an exception to the rule. However, the PCR court properly rejected his claim.

In a document titled, "Supplement to Notice of Appeal and Required Explanation," dated January 19, 2012, Robertson asserts that Mr. Brown was not appointed at a hearing taking place on September 23, 2005. The undersigned was present at the hearing held in Greenville which confirmed Mr. Brown appointment. Robertson and Mr. Brown were also present and participated in this hearing, which was held at 10:30 a.m. on September 23, 2005. The only record the undersigned can find of this hearing is the contemporaneously generated Attorney's Report of Trial or Hearing (which was mandated by Attorney General McMaster), required after appearance by all attorneys), generated September 26, 2005, and signed by the undersigned. This form is attached and incorporated by reference.

Although not a participant in the proceedings, Respondent would note that a reporter from the Rock Hill *Herald* was likewise present. The actual appointment order, captioned, "Order of Appointment of Legal Counsel of Indigent Defendant," filed September 22, 2005. This Order is also attached and incorporated by reference. Respondent would further note that he sent Mr. Brown a copy of that Order on November 2, 2005.

Further, Petitioner 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 was properly dismissed as impermissibly successive.

Also, 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).[3] 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 did not order this transcript because Robertson did not contest counsel's qualifications in state PCR. Moreover, Robertson concedes that a copy of

[3] 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).

that transcript is unavailable because the tapes of the hearing do not exist. *See* Rule 607(i), SCACR. Respondent submits 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.

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 the PCR 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 were properly subject to summary dismissal for this additional reason.

Wherefore, Respondent moves for dismissal of this case.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH

Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By:
ATTORNEYS FOR RESPONDENT

February 14, 2012.

STATE OF SOUTH CAROLINA
In the Supreme Court

On Rule 243 (c), SCACR Permission to File Petition for Writ of Certiorari
Capital PCR: Court of Common Pleas
York County

James D. Robertson, #5067,
Petitioner,

vs.

State of South Carolina,
Respondent.

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 Motion to Dismiss in the foregoing action on counsel for Petitioner, by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows: Robert M. Dudek, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina, 29201. Although his federal habeas corpus counsel no longer represent him I this appeal, Respondent has also served federal habeas corpus counsel, by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Emily C. Paavola, Esq.
Death Penalty Resource & Defense Ctr
P.O. Box 11311
Columbia, SC 29211

This 14th day of February, 2012.

WILLIAM EDGAR SALTER, III

Attorney's
Report of Trial or Hearing

To be prepared by the attorney and submitted to the Attorney General and Chief Deputy each time an attorney appears in any court.

Attorney: Ed Salter **Section:** Capital Litigation

Other AAG(s) appearing: Don Zelenka

Opposing counsel: n/a

Case name: James Robertson v. State

Day & date of appearance: 9/23/05 **Time:** 10:30

Court: Common Pleas **County:** Greenville/York (origination)

Judge: Few

Type of trial or hearing: Appointment hearing
(eg. Jury trial, bench trial, motions(s), jury selection, guilty plea, sentencing, appellate argument, roster meeting, post-conviction relief hearing.)

Description of event, issues and result

Hearing to determine Robertson present desire. Mike Brown of Rock Hill appointed to represent him on PCR.

9/26/05
Date

Attorney

Distribution
Original - Attorney General
Copies - Chief Deputy
Legal file

Confirmation Report – Memory Send

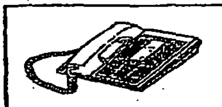
Date & Time: Nov-02-2005 10:33am
Tel line : 803-734-4035
Machine ID : SC ATTORNEY GENERAL CAPITAL LITIGATION

Job number	:	801
Date & Time	:	Nov-02 10:32am
To	:	918033280523
Number of pages	:	004
Start time	:	Nov-02 10:32am
End time	:	Nov-02 10:33am
Pages sent	:	004
Status	:	OK

Job number : 801 *** SEND SUCCESSFUL ***

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL



CAPITAL LITIGATION, HOMICIDE APPEALS
FEDERAL HABEAS CORPUS SECTION

FAX TRANSMISSION FORM

TO: Michael Brown FAX NUMBER: 803-328-0523

DATE: 11/2/05

FROM: Ed Salter OFFICE: (803) 734-6305

FAX: (803) 734-4035

MESSAGE: Per your request

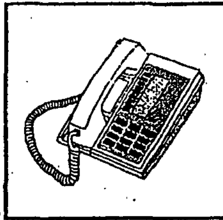
TOTAL NUMBER OF PAGES IN TRANSMISSION INCLUDING COVER:

NOTICE OF CONFIDENTIALITY: The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual(s) or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this telecopy is strictly prohibited. If you have received this telecopy in error, please notify us immediately by telephone at (803) 734-6305 and return the original message to us at the address below via the United States Postal Service. Thank you.

4577

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL



CAPITAL LITIGATION, HOMICIDE APPEALS
FEDERAL HABEAS CORPUS SECTION

FAX TRANSMISSION FORM

TO: Michael Brown

FAX NUMBER: 803-328-0523

DATE: 11/2/05

FROM: Ed Salter

OFFICE: (803) 734-6305

FAX: (803) 734-4035

MESSAGE: Per your request.

TOTAL NUMBER OF PAGES IN TRANSMISSION INCLUDING COVER: ______

NOTICE OF CONFIDENTIALITY: The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual(s) or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this telecopy is strictly prohibited. If you have received this telecopy in error, please notify us immediately by telephone at (803) 734-6305 and return the original message to us at the address below via the United States Postal Service. Thank you.

RECEIVED
2005 SEP 22 PM 12:09
HAMILTON
P & G.S.
COUNTY, SC

DEFENSE OF INDIGENTS ACT

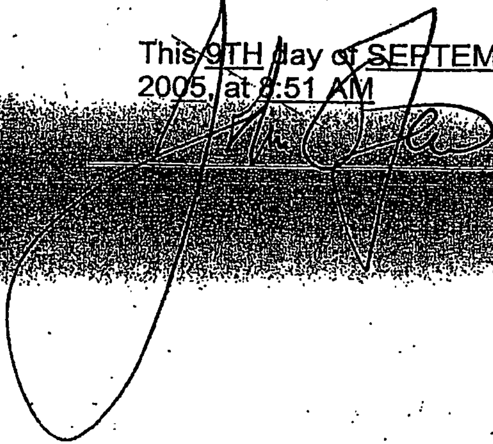
FORM NO. IV

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



PCR - DEATH PENALTY
MICHAEL BROWN
PO DRAWER 36250
ROCK HILL, SC 29732
803-329-4200
SEE ATTACHED MEMO
FROM JUDGE FEW.

4579

Ed Salter - Activity in Case 2:11-cv-00063-SB -BHH Robertson v. Ozmint Order on Motion for Reconsideration

---

From: <SCDEfilingstat@scd.uscourts.gov>
To: <scd_ecf_nef@scd.uscourts.gov>
Date: 2/15/2012 12:25 PM
Subject: Activity in Case 2:11-cv-00063-SB -BHH Robertson v. Ozmint Order on Motion for Reconsideration

---

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 2/15/2012 at 12:23 PM EST and filed on 2/15/2012

Case Name: Robertson v. Ozmint
Case Number: 2:11-cv-00063-SB -BHH
Filer:
Document Number: 64(No document attached)

Docket Text:
TEXT ORDER denying [60] Motion for Reconsideration re [44] Order on Motion to Stay ; granting [63] Motion for Leave to File State Court Status Update. Signed by Magistrate Judge Bruce Howe Hendricks on 2/15/12. (hhil,)

2:11-cv-00063-SB -BHH Notice has been electronically mailed to:

John H Blume john@blumelaw.com

William Edgar Salter, III agesalter@ag.state.sc.us

Donald John Zelenka agdzelenka@scag.gov, aglbrawley@ag.state.sc.us

Keir M Weyble keir@blumelaw.com

Emily Paavola emily@deathpenaltyresource.org

2:11-cv-00063-SB -BHH Notice will not be electronically mailed to:

--- Scanned by M+ Guardian Messaging Firewall ---

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable Lee S. Alford, Circuit Court Judge

JAMES ROBERTSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO MOTION TO DISMISS

Petitioner makes the following return to the State's motion to dismiss:

1) Petitioner's post-conviction relief counsel, Emily Paavola, properly set forth her Rule 243(c), SCACR, reasons why this case should proceed where it is was ruled successive by the lower court at the time she filed the notice of intent to appeal. Counsel set forth "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."

2) Counsel was notified on February 10, 2012 that the present case would proceed before this Court and that it was "proceeding in accordance with the South Carolina Appellate Court Rules. The petition for writ of certiorari and appendix are currently due March 26, 2012." A copy of that notification is attached as Exhibit A.

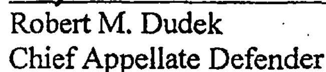
2) Petitioner would also note that the Federal District Court has stayed petitioner's federal habeas case, and issued a stay of execution so the present action could be resolved before this Court. The state's attempts to lift that stay in Federal Court were denied by orders dated November 30, 2011 and February 15, 2012. Robertson v. Ozmint, #2:11-cv-00063-SB-BHH. See Exhibit B (Docket Text).

3) Petitioner submits that the State's present motion to dismiss is an improper motion. There is no provision allowing it in Rule 243(c), SCACR, and this Court has already determined that the case will proceed on the basis of the showing made by petitioner. As stated above, counsel for petitioner properly set forth her reasons why this case should not be dismissed as successive or as barred by the statute of limitations in a separate document when she filed the notice of intent to appeal on behalf of petitioner. As evidenced by the Exhibit A, those reasons were accepted by this Court and this case was allowed to go forward.

4) Further, as Rule 243(c), SCACR, implicitly contemplates, arguments like those set forth in the State's motion to dismiss are properly raised in a return to the petition for a writ of certiorari, rather than in an unauthorized request to terminate the ordinary process of review at the notice of appeal stage.

WHEREFORE, the State's motion to dismiss should be denied.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

February 29, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

JAMES ROBERTSON,

PETITIONER,

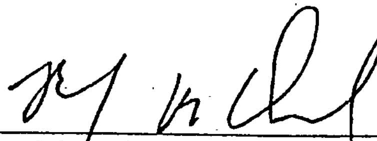
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the return to motion to dismiss in the above-referenced case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of February, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of February, 2012

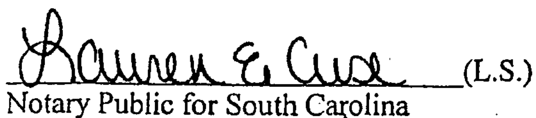

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014

EXHIBIT A

From: Hopkins, Debbie <DJHopkins@sccourts.org>

To: Emily@deathpenaltyresource.org
Cc:

Date: Friday, February 10, 2012 01:18 pm
Subject: James Robertson PCR Appeal
Attachments:

Dear Ms. Paavola,

In response to your telephone request, please be advised Mr. Robertson's appeal from the denial of his post-conviction relief action is currently pending in the South Carolina Supreme Court and is proceeding in accordance with the South Carolina Appellate Court Rules.

The Petition for a Writ of Certiorari and Appendix are currently due March 26, 2012.

Please feel free to contact this office if additional information is needed.

Sincerely,

Debbie M. Hopkins
South Carolina Supreme Court
P. O. Box 11330
Columbia, South Carolina 29211
(803) 734-1080

EXHIBIT B

DEATH, STAYED

U.S. District Court
District of South Carolina (Charleston)
CIVIL DOCKET FOR CASE #: 2:11-cv-00063-SB -BHH

Robertson v. Ozmint
Assigned to: Honorable Sol Blatt, Jr
Referred to: Magistrate Judge Bruce Howe Hendricks
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 01/07/2011
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

James D Robertson represented by **Emily Paavola**
John H Blume Law Office
PO Box 11744
Columbia, SC 29211
803-765-1044
Email: emily@deathpenaltyresource.org
PRO HAC VICE
ATTORNEY TO BE NOTICED

John H Blume
Blume Weyble and Lominack
PO Box 11744
Columbia, SC 29211
803-765-1044
Fax: 803-765-1143
Email: john@blumelaw.com
ATTORNEY TO BE NOTICED

Keir M Weyble
John H Blume Law Office
PO Box 11744
Columbia, SC 29211
803-765-1044
Email: keir@blumelaw.com
ATTORNEY TO BE NOTICED

V.

Respondent

Jon Ozmint
Commissioner, South Carolina Department of Corrections

represented by **William Edgar Salter , III**
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211
803-734-6305

Fax: 803-734-4035
Email: agesalter@ag.state.sc.us
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Donald John Zelenka
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211
803-734-6305
Fax: 803-734-4035
Email: agdzelenka@scag.gov
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/27/2010	1	MOTION for Stay of Execution, MOTION to Appoint Counsel by James D Robertson. Motions referred to Bruce Howe Hendricks.(kbos) (Entered: 11/01/2010)
11/01/2010		TRUE DIVISION FOR TRIAL: Rock Hill. (kbos) (Entered: 11/01/2010)
11/01/2010	3	RESPONSE to Motion re 1 MOTION to Stay MOTION to Appoint Counsel Response filed by Jon Ozmint.Reply to Response to Motion due by 11/12/2010 (Attachments: # 1 State Court Documents SC Sct. Order of Oct. 27, 2010 setting Date of Execution, # 2 State Court Documents Remittitur Letter, # 3 State Court Documents Robertson v. State - Order denying Certiorari October 6, 2010, # 4 Certificate of Service)(Zelenka, Donald) (Entered: 11/01/2010)
11/02/2010	5	MOTION to Appear Pro Hac Vice by Emily Paavola by James D Robertson. Response to Motion due by 11/19/2010 (Attachments: # 1 Affidavit)Proposed order is being emailed to chambers with copy to opposing counsel(Weyble, Keir) (Main Document 5 replaced on 11/3/2010) (ncha,). Modified on 11/3/2010 to replace incorrect document with corrected document as provided by filing user (ncha,). (Entered: 11/02/2010)
11/03/2010	7	MOTION for Leave to Proceed in forma pauperis (Restricted Access) by James D Robertson. Response to Motion due by 11/22/2010 (Attachments: # 1 Affidavit Form AO 240, # 2 Affidavit Certified Trust Account)Proposed order is being emailed to chambers with copy to opposing counselMotions referred to Bruce Howe Hendricks.(Weyble, Keir) (Entered: 11/03/2010)
11/04/2010	10	ORDER granting Petitioner's 1 Motion for Stay of Execution signed by Honorable Sol Blatt, Jr on November 4, 2010.(ncha,) (Main Document 10 replaced on 11/18/2010) (ncha,). Modified on 11/18/2010 to replace main document to add filing headers (ncha,). (Entered: 11/04/2010)
11/05/2010	11	ORDER granting 5 Motion for Emily C. Paavola to Appear Pro Hac Vice signed by Honorable Sol Blatt, Jr on November 4, 2010.(ncha,) (Entered: 11/05/2010)
11/08/2010	12	NOTICE of Appearance by William Edgar Salter, III on behalf of Jon Ozmint

		(Attachments: # 1 Certificate of Service)(Salter, William) (Entered: 11/08/2010)
11/08/2010	14	ORDER granting 7 Motion for Leave to Proceed in forma pauperis ; granting in part and denying in part 1 Motion to Appoint Counsel. John H. Blume, a member of this Court's Death Penalty Attorney Panel, is appointed as lead counsel for Petitioner in this capital habeas corpus case. Keir M. Weyble is appointed second chair counsel in Petitioner's capital habeas corpus case. Signed by Magistrate Judge Bruce Howe Hendricks on November 8, 2010. (ncha,) (Entered: 11/08/2010)
11/09/2010	17	SUPPLEMENTAL ORDER appointing Emily C. Paavola as third chair counsel for the Petitioner. Signed by Magistrate Judge Bruce Howe Hendricks on November 9, 2010. (ncha,) (Entered: 11/09/2010)
11/18/2010	18	***DOCUMENT FAXED: 10 Order on Motion to Stay to SCDC, ATTN: David Tatarsky, 803-896-1766. (ncha,) (Entered: 11/18/2010)
01/07/2011	20	Petition for Writ of Habeas Corpus. (Attachments: # 1 Exhibit, State Court Judgment and Order # 2 Exhibit, Supreme Court Letter)Weyble, Keir) Modified on 1/7/2011 to edit text (ncha,). (Entered: 01/07/2011)
01/07/2011	21	MOTION to Stay *Proceedings Pending Exhaustion of State Remedies* by James D Robertson. Response to Motion due by 1/24/2011 No proposed orderMotions referred to Bruce Howe Hendricks.(Weyble, Keir) (Entered: 01/07/2011)
01/07/2011	23	NOTICE OF CHANGE OF CASE NUMBER from Miscellaneous Case Number 6:10-mc-00158-SB-BHH. (ncha,) (Entered: 01/07/2011)
01/07/2011	24	MOTION to Strike 20 Petition for Writ of Habeas Corpus by Jon Ozmint. Response to Motion due by 1/24/2011 (Attachments: # 1 Certificate of Service)No proposed orderMotions referred to Bruce Howe Hendricks.(Salter, William) (Entered: 01/07/2011)
01/07/2011	25	Petition for Writ of Habeas Corpus *(Verified)*. Weyble, Keir) (Additional attachment(s) added on 1/20/2011: # 1 Exhibit, State Court Judgment and Order, # 2 Exhibit, State Court letter) (ncha,). (Entered: 01/07/2011)
01/24/2011	28	RESPONSE in Opposition re 21 MOTION to Stay *Proceedings Pending Exhaustion of State Remedies* Response filed by Jon Ozmint.Reply to Response to Motion due by 2/3/2011 (Attachments: # 1 attach no 1 - SC Sup Crt's memo 8-13-03, # 2 attach no 2 - Order of appt of legal counsel 9-9-05, # 3 attach no 3 - reply to response to mtn to remand, # 4 attach no 4 - SC Sup Crt order denying mtn, # 5 Certificate of Service)(Salter, William) (Entered: 01/24/2011)
01/27/2011	30	**TEXT ORDER finding as moot 24 Motion to Strike the 20 Petition for Writ of Habeas Corpus. The petition has now been verified by counsel. As Respondent concedes, this is sufficient. Order signed by Magistrate Judge Bruce Howe Hendricks on January 27, 2011.**(ncha,) (Entered: 01/27/2011)
02/01/2011	32	**ORDER authorizing service of process and apprising the respondent of deadline for filing dispositive motions. Return and Memorandum due by**

		3/28/2011. Signed by Magistrate Judge Bruce Howe Hendricks on 2/1/11. (Attachments: # 1 Verified Petition, # 2 State Court Documents, # 3 State Court Letter)(kmca) (Entered: 02/01/2011)
02/01/2011	33	REPLY to Response to Motion re 21 MOTION to Stay *Proceedings Pending Exhaustion of State Remedies* Response filed by James D Robertson. (Attachments: # 1 Exhibit Order in Elmore v Ozmint)(Weyble, Keir) (Entered: 02/01/2011)
02/09/2011	34	ADMINISTRATIVE NOTICE RE: Docket (sdon,) (Entered: 02/09/2011)
03/28/2011	35	MOTION for Summary Judgment by Jon Ozmint. Response to Motion due by 4/14/2011 No proposed orderMotions referred to Bruce Howe Hendricks. (Salter, William) (Entered: 03/28/2011)
03/28/2011	36	Return and Memorandum to 25 Petition for Writ of Habeas Corpus by Jon Ozmint. (Attachments: # 1 attach no 2 - TOR 11-20-98, # 2 attach no 3 - TOR 12-18-98, # 3 attach no 4 - TOR 2-12-99, # 4 attach no 5 - TOR 2-19-99-part 1, # 5 attach no 5 - TOR 2-19-99 - part 2, # 6 attach no 6 - pet for writ of cert, # 7 attach no 7 - order denying cert, # 8 attach no 9 - return to mtn dated 9-11-00, # 9 attach no 10 - order dated 10-6-00, # 10 attach no 11 - order dated 2-2-01 appting Wellborn Esq., # 11 attach no 12 - order dated 2-15-01 re evaluation, # 12 attach no 13 - ltr and affidavit of robertson dated 3-15-01, # 13 attach no 14 - report dated 10-12-01, # 14 attach no 15 - Order 11-15-01 relieving Dudek, # 15 attach no 16 - IBOA 4-15-02)(Salter, William) ADDITIONAL ATTACHEMNTS filed as entry 37 , 38 , 39 , 40 , 41 , 42 , 43 . Modified title and added link on 3/29/2011(hhil,). Modified on 3/30/2011 and 4/4/2011 to add additional links (hhil,). ADDITIONAL ATTACHMENTS filed as entry 49 . Modified on 6/3/2011 to add link (hhil,). (Entered: 03/28/2011)
03/28/2011	37	Additional Attachments to Main Document 36 Return and Memorandum. (Attachments: # 1 attach no 17 - ltr dated 4-18-02 relieving Savitz, # 2 attach no 18 - order denying Savitz 5-16-02, # 3 attach no 19 - ltr to SC Sup Crt dated 6-3-02, # 4 attach no 20 - order dated 6-26-02, # 5 attach no 21 - report dated 10-28-02, # 6 attach no 22 - pro se IBOA dated 7-25-03, # 7 attach no 23 - IBOR 12-31-03, # 8 attach no 24 - order dated 11-22-04, # 9 attach no 25 - Memo dated 2-14-05, # 10 attach no 26 - report dated 2-23-05, # 11 attach no 27 - Order dated 6-3-05, # 12 attach no 28 - Order granting stay 7-7-05, # 13 attach no 29 - Order appting atty dated 9-9-05)(Salter, William) Modified title on 3/29/2011 (hhil,). (Entered: 03/28/2011)
03/29/2011	38	Additional Attachments to Main Document 36 Return and Memorandum. (Attachments: # 1 attach no 34 - return and mtn to dismiss dated March 24, 2011, # 2 attachment to attach no 34 - Order of dismissal - part 1, # 3 attachment to attach no 34 -Order of Dismissal - part 2, # 4 attachment to attach no 34 - Order of dismissal - part 3, # 5 attach no 35 - proposed Conditional order of dismissal)(Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
03/29/2011	39	Additional Attachments to Main Document 36 Return and Memorandum. (Attachments: # 1 attach no 1 - appendix - vol 1 - part 1, # 2 attach no 1 - appendix - vol 1 - part 2, # 3 attach no 1 - appendix - vol 1 - part 3, # 4 attach

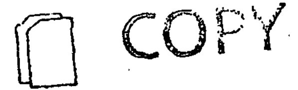
		no 1 - appendix - vol 1 - part 4, # 5 attach no 1 - appendix - vol 1 - part 5, # 6 attach no 1 - appendix - vol 1 - part 6, # 7 attach no 1 - appendix - vol 1 - part 7, # 8 attach no 1 - appendix - vol 2 - part 1, # 9 attach no 1 - appendix - vol 2 - part 2)(Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
03/29/2011	40	Additional Attachments to Main Document 36 Return and Memorandum. (Attachments: # 1 attach no 1 - appendix - vol 2-part 3, # 2 attach no 1 - appendix - vol 2 - part 4, # 3 attach no 1 - appendix - vol 2-part 5, # 4 attach no 1 - appendix - vol 2 - part 6, # 5 attach no 1 - appendix - vol 2-part 7, # 6 attach no 1 - appendix - vol 3 part 1, # 7 attach no 1 - appendix - vol 3 part 2, # 8 attach no 1 - appendix - vol 3 - part 3)(Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
03/29/2011	41	Additional Attachments to Main Document 36 Return and Memorandum. (Attachments: # 1 attach no 1 - appendix - vol 3-part 4, # 2 attach no 1 - appendix - vol 3 - part 5, # 3 attach no 1 - appendix - vol 3-part 6, # 4 attach no 1 - appendix - vol 4 part 1, # 5 attach no 1 - appendix - vol 4 - part 2, # 6 attach no 1 - appendix - vol 5 - part 1, # 7 attach no 1 - appendix - vol 5-part 2, # 8 attach no 1 - appendix - vol 6 part 1, # 9 attach no 1 - appendix - vol 6-part 2) (Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
03/29/2011	42	Additional Attachments to Main Document 36 Return and Memorandum. (Attachments: # 1 attach no 1 - appendix - vol 7 - part 1, # 2 attach no 1 - appendix - vol 7 - part 2, # 3 attach no 1 appendix - vol 7 part 3, # 4 attach no 1 -appendix - vol 7 - part 4, # 5 attach no 1 - appendix - vol 8 part 1, # 6 attach no 1 appendix vol 8 - part 2, # 7 attach no 8 - Ltr from Robertson to Crt, # 8 attach no 24 - Order 11-22-04, # 9 attach no 30 - pet for writ of cert, # 10 attach no 31 - return to pet for writ of cert, # 11 attach no 32 - Order 10-6-10, # 12 attach no 33 - remittitur 10-22-10, # 13 attach no 36 - Order 11-21-02, # 14 attach no 37 - return to mtn to relieve counsel 9-11-00)(Salter, William) Modified title on 3/30/2011 (hhil,). (Entered: 03/29/2011)
04/01/2011	43	Additional Attachments to Main Document 36 Return and Memorandum. (Attachments: # 1 attach no 38 - ltr of Paavola dated 3-29-11 and Respondent's ltr to Shearouse dated 4-1-11)(Salter, William) Modified title on 4/1/2011 (hhil,).Modified on 4/8/2011 to add docket text (hhil,). (Entered: 04/01/2011)
04/08/2011	44	**ORDER granting 21 Motion to Stay. The petitioner shall notify the Court within five (5) days of resolution of his state court PCR application. Thereafter, the respondent will have thirty(30) days to amend his motion for summary judgment, as necessary. Signed by Magistrate Judge Bruce Howe Hendricks on 4/8/11.(hhil,)** (Entered: 04/08/2011)
04/15/2011	46	MOTION for Reconsideration re 44 Order on Motion to Stay, by Jon Ozmint. Response to Motion due by 5/2/2011 (Attachments: # 1 attach no 1 - Emily Paavola Ltr dated 3-29-11, # 2 attach no 2 - Ltr to Shearouse dated 4-1-11)No proposed orderMotions referred to Bruce Howe Hendricks.(Salter, William) ADDITIONAL ATTACHMENTS FILED 9/23/11 as entry 53 . Modified on 9/26/2011 to add link(hhil,). (Entered: 04/15/2011)
04/19/2011	47	RESPONSE in Opposition re 46 MOTION for Reconsideration re 44 Order on

		Motion to Stay, MOTION for Reconsideration re 44 Order on Motion to Stay, Response filed by James D Robertson.Reply to Response to Motion due by 4/29/2011 (Attachments: # 1 Exhibit, # 2 Exhibit)(Weyble, Keir) (Entered: 04/19/2011)
06/02/2011	49	Additional Attachments to Main Document 36 Return and Memorandum. (Attachments: # 1 attachment no 39 - SC Sup Crt order dated 5-31-11)(Salter, William) Modified title on 6/3/2011 (hhil,). (Entered: 06/02/2011)
09/23/2011	53	Additional Attachments to Main Document 46 MOTION for Reconsideration re 44 Order on Motion to Stay, MOTION for Reconsideration re 44 Order on Motion to Stay,. (Attachments: # 1 attach no 1 - applicant's response in opp to mtn to dismiss, # 2 attach no 2 - respondent's reply to applicant's response to return and mtn to dismiss, # 3 attach no 3 - Ltr from Judge Alford to WES, # 4 attach no 4 - Order dated 9-20-11)(Salter, William) (Entered: 09/23/2011)
09/26/2011	54	**TEXT ORDER : It appears from the most recent filings of the Respondent that the Petitioner's state PCR application has been denied. Within 3 days of this Order or as soon as practicable, the parties should briefly indicate their belief as to whether the stay of this matter should now be lifted. Signed by Magistrate Judge Bruce Howe Hendricks on 9/26/11. (hhil,)** (Entered: 09/26/2011)
09/29/2011	55	STATUS REPORT *Petitioner's Memorandum on Maintaining the Stay of These Proceedings Pending Exhaustion of State Remedies* by James D Robertson. (Attachments: # 1 State Court Motion to Alter or Amend with Supporting Exhibits 1-3) (Weyble, Keir) Modified on 10/4/2011 to add attachment description (hhil,). (Entered: 09/29/2011)
09/29/2011	56	STATUS REPORT *Respondent's Response to Text Order [Doc. #54]* by Jon Ozmint. (Salter, William) (Entered: 09/29/2011)
10/14/2011	57	MOTION to Amend/Correct 55 Status Report, by James D Robertson. Response to Motion due by 10/31/2011 (Attachments: # 1 Exhibit)No proposed orderMotions referred to Bruce Howe Hendricks.(Weyble, Keir) (Entered: 10/14/2011)
11/08/2011	58	**TEXT ORDER granting 57 Motion to Amend/Correct. Signed by Magistrate Judge Bruce Howe Hendricks on 11/8/11.(hhil,)** (Entered: 11/08/2011)
11/30/2011	59	**ORDER denying 46 Motion for Reconsideration re 44 Order on Motion to Stay. It is ORDERED that the stay, already in effect in this case, shall not be lifted. Additionally, the respondents 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. Signed by Magistrate Judge Bruce Howe Hendricks on 11/30/11.(hhil,)** (Entered: 11/30/2011)
12/21/2011	60	MOTION FOR RECONSIDERATION ON 44 Order granting 21 Motion to Stay by Jon Ozmint with REPLY to 59 Order on Motion for Reconsideration.

		(Attachments: # 1 attach no 1 - Order of Judge Lee S. Alford filed on 12-8-11) (Salter, William) Modified on 12/22/2011 to correct event type(hhil,). (Entered: 12/21/2011)
12/22/2011	61	RESPONSE in Opposition re 60 MOTION for Reconsideration Response filed by James D Robertson.Reply to Response to Motion due by 1/3/2012 (Weyble, Keir) (Entered: 12/22/2011)
02/14/2012	63	MOTION for Leave to File *State Court Status Update* by James D Robertson. Response to Motion due by 3/2/2012 (Attachments: # 1 Supreme Court Status Email)No proposed orderMotions referred to Bruce Howe Hendricks.(Weyble, Keir) Modified on 2/16/2012 to correct attachment description (hhil,). (Entered: 02/14/2012)
02/15/2012	64	**TEXT ORDER denying 60 Motion for Reconsideration re 44 Order on Motion to Stay ; granting 63 Motion for Leave to File State Court Status Update. Signed by Magistrate Judge Bruce Howe Hendricks on 2/15/12. (hhil,)** (Entered: 02/15/2012)

PACER Service Center			
Transaction Receipt			
02/27/2012 11:03:43			
PACER Login:	bw0999	**Client Code:**	Robertson
Description:	Docket Report	**Search Criteria:**	2:11-cv-00063-SB - BHH
Billable Pages:	6	**Cost:**	0.48

4594



IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable Lee S. Alford, Circuit Court Judge

RECEIVED
MAR 28 2012
S.C. Supreme Court

JAMES ROBERTSON,

PETITIONER,

RECEIVED
MAR 28 2012
SC OFFICE OF
APPELLATE DEFENSE

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF SUPPLEMENTAL AUTHORITY

In Martinez v. Ryan, --- S.Ct. ----, 2012 WL 912950 (U.S., Mar. 20, 2012), a 7-2 majority of the Supreme Court of the United States held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* at *5. The Court did not decide whether there is a Sixth Amendment right to counsel (and thus a constitutional right to the effective assistance of counsel) in jurisdictions such as South Carolina where claims of ineffective assistance of counsel

must be raised in post-conviction proceedings. Rather, it reserved that question for another case and another day. However, it did hold that, as a matter of equity, ineffective assistance of post-conviction counsel is a gateway to consideration of a claim of ineffective assistance of trial counsel not raised in a prior post-conviction proceeding. *Id.* at *8 ("Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors . . . caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.").

In creating this new exception to consideration of claims previously barred from federal review, the Court relied upon several considerations. First, the Court recognized that because PCR is the "first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at *7. Second, the Court noted that "[w]ithout the help of an adequate attorney, a prisoner will have . . .difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim." *Id.* Thus the Court concluded that:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at *11.

Currently pending before this Court is applicant's appeal from the summary denial of his second application for post-conviction relief. In that application, petitioner alleged both that his initial trial counsel were ineffective under Strickland v. Washington, 466 U.S. 668 (1984), and

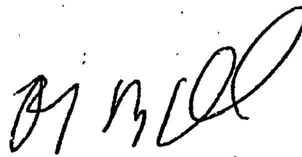
that his initial post-conviction counsel provided ineffective assistance of counsel during the post-conviction relief proceedings. The PCR judge, however, summarily dismissed the application for post-conviction relief on the basis that ineffective assistance of PCR counsel did not provide a triggering mechanism for filing a second PCR action. September 20, 2011 Order of Dismissal at p.26 ("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."); *id.* at p.29 (concluding that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases "do not and cannot apply to collateral counsel's performance because there is no Sixth Amendment right to counsel in PCR."). Counsel for the State has also moved to dismiss this appeal on the same grounds.

Martinez has changed the legal landscape of this case. While the United States Supreme Court's decision does not mandate that this Court, at least at this time, create a similar equitable exception to the generally recognized bar against second PCR applications, it certainly provides a basis for doing so. First the Court left open the question of whether there is a Sixth Amendment right to counsel in cases where a claim must be raised as an initial matter in state post-conviction proceedings. Given the Court's recognition that an initial PCR challenge raising claims that must be raised for the first time on collateral review is very similar to a direct appeal, it seems likely that the Court will eventually answer that question in the affirmative. Douglas v. California, 372 U.S. 353 (1963) (holding that an indigent defendant has the right to counsel on direct appeal); Jones v. Barnes, 463 U.S. 745 (1983) (recognizing the right to effective assistance of counsel on direct appeal). Second, the Court's recognition of the importance of a) the right to the effective assistance of counsel at trial as an essential component of the adversary system, b) collateral review in vindicating the right to effective assistance of counsel, and c) adequate post-

conviction representation to investigate and present substantial claims of ineffective assistance of trial counsel, the same equitable considerations that led the Court to recognize ineffective assistance of state post-conviction counsel as "cause" for a procedural default in federal habeas corpus proceedings, should lead this Court to adopt a similar exception to the bar against second or successive PCR applications.

Thus, this Court should deny the state's motion to dismiss the appeal and adhere to its previous determination to allow the case to proceed in the ordinary course so that the Court may resolve this important question.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

March 28, 2012

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAR 28 2012

S.C. Supreme Court

Appeal from York County

Honorable Lee S. Alford, Circuit Court Judge

JAMES ROBERTSON,

PETITIONER,

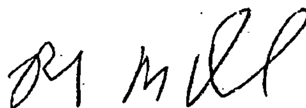
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the notice of supplemental authority in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 26th day of March, 2012.



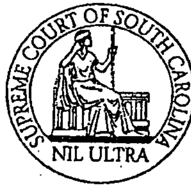
Robert M. Dudek

Chief Appellate Defender

ATTORNEY FOR PETITIONER.

March 28, 2012

4599



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 5, 2012

Senior Assistant Attorney General William Edgar Salter, III
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Robertson, James v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Dismiss in the above entitled case on appeal.

"Motion to dismiss is denied.

s/ Costa M. Pleicones J.
For the Court

April 5, 2012."

By copy of this letter we are advising opposing counsel the Petition for a Writ of Certiorari and Appendix should be served and filed within thirty (30) days of the date of this letter.

Very truly yours,

CLERK

RECEIVED

APR 5 2012

SC OFFICE OF
APPELLATE DEFENSE

cc: Chief Appellate Defender Robert M. Dudek
Emily C. Paavola, Esquire