

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM SALUDA COUNTY

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J. Derham Cole  
Circuit Court Judge  
Case No. 2016-CP-41-0077

James P. Robinson # 250720 .....Petitioner

V.

State of South Carolina .....Respondent

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**Petition for Writ of Certiorari**

James P. Robinson  
Kirkland Corr. Inst. B-2-22  
4344 Broad River Rd.  
Columbia, SC 29210

Office of the Attorney General  
Sherrie Butterbaugh  
PO Box 11549  
Columbia, SC 29211-1549

**RECEIVED**

OCT 29 2018

**S.C. SUPREME COURT**

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Certiorari to review Post-Conviction Relief actions, Petitioner's explanation of why the lower courts determination was improper.

Pro-se petitioner in this matter comes before this court to show that the lower court erred by issuing a Order of Dismissal with prejudice due to petitioner's applications were barred as successive in this matter. Petitioner addresses the explanation herein, of why the lower courts determination was improper.

Pro-se petitioner request that counsel be appointed to represent petitioner in the Notice of Appeal that was filed on July 16 2018. Petitioner is an indigent inmate and is incapable of paying attorney fees and cost. Petitioner filed a response to the Motion to Dismiss on petitioner's behalf in the lower court and petitioner filed the notice of intent to appeal due to the time-lines of protecting his rights.

**Statement of The Case**

Petitioner is an indigent inmate at Kirkland Correctional Institution located in Columbia, South Carolina. Petitioner was charged and sentenced with murder, pointing a firearm, and for possession of a firearm or knife during the commission of or attempt to commit a violate crime on June 16, 1998, in the Court of General Sessions. The petitioner was represent by Thomas D. Broadwater, Esquire at trial. The Honorable Edward B. Cottingham sentence petitioner to

thirty(30) years for murder and five(5) years concurrently on the other above charges. Petitioner did not appeal for failure of trial counsel to advise him of his appeal rights due to his November 9, 1998 application for PCR. On February 20, 2001, the Honorable Rodney S. Peoples dismissed applicant's PCR. Petitioner appealed the dismissal by a petition for Writ of Certiorari to the South Carolina Supreme Court. On May 30, 2002, the South Carolina Supreme Court denied petitioner's petition for Writ of Certiorari. Petitioner filed a petition for rehearing which was denied on July 10, 2002. The Remitter was issued on July 10, 2002 subsequently. Petitioner was denied his petition for Writ of Habeas Corpus in Richland County Court of Common Pleas, Columbia South Carolina Court of Appeals but filed a motion to stay appeal. Petitioner filed an amendment to his original PCR application. That was construed as a second PCR application on March 24, 2005. On April 26, 2005, the court of appeals denied petitioner's amended or second application for PCR. A remitter was issued on July 27, 2005. On January 17, 2007 a hearing on applicant's amended or second PCR application was held in Lexington, South Carolina. The Honorable R. Knox McMahon dismissed the case with prejudice on March 1, 2007. Petitioner appealed the denial to the court of appeals which denied petitioner's Notice of Appeal on April 24, 2009. The court of appeals issued a remitter on May 14, 2009. On June 30, 2009, petitioner filed a petition for Writ of Habeas Corpus in the Federal District Court on December 23, 2009 respondent filed it's return and motion for summary judgment. The Honorable Shiva V. Hodges, United States Magistrate issued a report and recommendation on July 19, 2010. On August 11, 2010, the United States District Court granted respondents motion for summary judgment. Petitioner filed an appeal and motion for certificate of appeal-ability with the United States Court of Appeals for the Fourth Circuit on September 15, 2010. Petitioner's motion for certificate of appeal-ability was denied and dismissed on March 25, 2011. Petitioner amended his PCR application that was filed in the Saluda County Court of Common Pleas, Saluda, South Carolina. Petitioner's amended PCR application was dismissed on October 28, 2014, which was received by petitioner on November 11, 2014. Attorney Mary P. Miles filed a notice of intent to appeal on November 25, 2014 with a copy of the final order from the lower court. An order was issued by the Supreme Court of South Carolina dismissing petitioner's appeal due to failure to provide the explanation required by Rule 243(c) of South Carolina court. An order was issued by the Supreme Court of South Carolina dismissing petitioner's appeal due to failure to provide the explanation required by Rule 243(c) of South Carolina Appellate Rules (SCACR) to request that petitioner's appeal not be denied. On January 20, 2015 petitioner's petition for a writ of certiorari was dismissed for failure to provide the explanation of the notice appeal required by rule 243(c). attorney Mary P. Miles for the petitioner failed to advise petitioner that he has twenty(20) days from date of the letter to file a pro-se explanation as to why the petitioner believes that the

determination by the circuit court was improper. Dennison V. State, 371 S.C. 221, 639 S.E. 2d 35 (2006) the court also advised attorney Dennison within ten(10) days of the letter that was sent to her on December 11, 2014, petitioner's case was dismissed on January 20, 2015. Attorney Mary P. Miles failed to file the explanation in a timely fashion for petitioner nor did she advise him to file one on his own behalf. Petitioners current application was dismissed on February 26, 2018, which was received by petitioner on March 6, 2018. Petitioner filed a notice of appeal on July 16, 2018, with a copy of the order from the lower court. Petitioner herein complies with Rule 243(c) of the South Carolina Appellate Court Rules (SCACR) to request that petitioner's appeal not be denied.

This is not a successive PCR application, it relates back to the original PCR application 98-CP-41-161, it's an issue concerning the jury that was inadequately raise during petitioner's first PCR hearing. Attorney Wayne Floyd brought a Baston violation issue up due to the fact that the state struck the only Black juror that was called during selecting the jury, which he failed to go into facts that I, petitioner was convicted of a juror that presumed bias. I, petitioner discovered this After Discovered Evidence on June 8, 2015, which I promptly filed a motion for a new trial on August 10, 2015, in the General Sessions Court in Saluda County, which I never got a response back to it after it was filed for seven(7) months it was filed. After no response, I immediately filed a PCR application under statute 17-27-45(c) which states if the applicant contends that there is evidence of materials facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of Actual Discovery of the facts by the applicant or after the date when the facts could have been ascertain by the exercise of reasonable diligence. Also chapter 27 uniform Post-Conviction Procedure Act; Section 17-27-90, Grounds for Relief.

It also states unless the court finds a Ground for Relief asserted which for sufficient reason was not asserted or was inadequately raised in the original supplemental or amended application.

**[Uniform Post-Conviction Procedure Act]**

SC Code 17-27-20(A), any person who has been convicted or sentenced for a crime and who claim:

- 1) That the conviction or sentence was in violation of the United States or the Constitution of Laws of this state.
- 4) That there is evidence of material facts not previously presented and heard that requires vocation of the conviction or sentence in the interest of justice.

The presence of biased juror cannot be harmless. The error requires a new trial without showing actual prejudice, United States v. Martinez Salazar 120, S.Ct. 77, 782 (January 19,2000).

Petitioner filed his declaration in support of his after Discovery Claim, learning he was convicted by a juror that should have been dismissed by being related by blood to the coroner, the state witness, an inquiry was never done on juror. After juror responded to question concerning related by blood or marriage.

There is no way to determine with any degree of certain to whether a defendant's right to a fair trial by an impartial jury was abridge see: Edwards v. State 631, S.E. 2d 244, 248 (2006).

The proper remedy in such cases is granting of a new trial, Ford 512 S.E. 2d at 504

Petitioner's trial counsel Thomas D. Broadwater violated petitioner's United States Constitutional 6<sup>th</sup> Amendment Federal protected right to an "Effective" counsel which has been recognized as an important element of criminal defendant's fundamental right to a fair trial, Powell v. Alabama, 287, U.S. 45 (1932); Gideon v. Wrainwright, 372 U.S. 335 (1963).

To prove prejudice a petitioner must show there is a reasonable probability that but for counsels deficient performance; the result of the proceeding would have been different id. At 571, 552 S.E. 2d at 723. The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E. 2d 884, 886 (2007). “This court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law.” Lomax v. State, 379 S.C. 93,101,665 S.E. 2d 164, 168 (2008). The PCR courts findings on matters of credibility are given great deference by this court. Simuel v. State, 390 S.C. 267, 270,701 S.E. 2d 738, 739 (2010).

### Argument

Petitioner was denied his bite of the apple during his first PCR hearing 1998-CP-41-161. Petitioner argues that the South Carolina Supreme Court has both appellate and original jurisdiction in his appellate capacity, the Supreme Court has exclusive jurisdiction to hear appeals from the circuit court. The Supreme Court also reviews judgments of the circuit and family court relating to post-conviction relief actions by writ of certiorari. The respondent moved to dismiss petitioner’s PCR application. The lower courts decision to dismiss with prejudice was based on five procedural claims made by respondent: First,(1) the application fails to make prima facie showing that petitioner is entitled to relief based on the information set forth and therefore petitioner is not entitled to an evidentiary hearing on the matter and (2) it was not filed within the applicable statute of limitations established by SC code ann Section 17-27-45(A), and (3) it is barred by the equitable doctrine of laches, and (4) it is successive to an application already filed, heard, and dismissed after an evidentiary hearing , and (5) it is barred by the doctrine of resjudicata.

Petitioner argues that the South Carolina rule of Civil Procedure also applies to the PCR proceedings, but only to the extent they are not inconsistent with the act Rule 71.1 SCRCP. Under the act, an petitioner must “specifically set forth grounds upon which the petitioner is based and include in his/her application those facts that are within the petitioner’s “personal knowledge” and set them out” separately from other allegations of facts S.C. code ann 17-27-50(2003). The act also requires (ALL) grounds for relief available to a petitioner... to be raised in his/her original, supplemental or amended application S.C. code ann 17-27-90(2003). Scott v. Savers Property and Gas Ins. Co., 663 N.W. 2d 715, 262 wis 2d 127(2003). A complaint will be dismissed only if it appears certain that no relief can be granted under any set of facts that the petitioner might prove in support of their allegations when standing is challenged on the basis of

the pleadings, (courts) accept as true all material allegations of the complaint, and... construe the complaint in favor of the moving party. Town of Eagle v. Christensen. 191 wis.2d 301,316,529 N.W.2d 245 (ct. App. 1995). Thus, respondent's motion to dismiss should be denied.

Petitioner argues that his amended application for PCR was not successive and was within the statute of limitations and was entitled to the Discovery Rule, Petitioner had no knowledge of juror which should have been dismissed for cause before the discovery until petitioner found out about his friends situation.

Applicant's attorney Thomas D. Broadwater, bound by rule 1.3 of professional conduct, attorney Thomas D. Broadwater failed to object, failed to do inquiry on juror.

Petitioner's attorneys during his first, second, third PCR's failed to challenge the jury issue, petitioner's United States and State Laws constitution was violated. Attorneys was bound by rule 1.3 to act with reasonable diligence and promptness in representing petitioner which they failed to do.

Juror Tavy Turner Hendrix should have been dismissed by counsel and the court. Juror is blood related to a state witness at petitioner's trial. The coroner of Saluda County, is the uncle of the above mentioned juror. The juror served and convicted the petitioner.

Pursuant to the uniform Post-Conviction Procedure Act (ACT) S.C. code ann 17-27-10 to 160 (2003) governs the procedure for PCR proceedings. Al-Shabazz v. State, 338 SC 354, 363 527 S.E. 2d 742, 746 (2000). Petitioner James P. Robinson opposed the South Carolina Motion to Dismissal of petitioner's application in the lower court. Petitioner's opposition to respondent's motion to dismiss was based on the grounds that petitioner had evidence of "Material Facts" to establish the essential elements of his causes of action against his trial attorney for ineffective assistance of counsel. There is no genuine issue of material facts in dispute for petitioner's amended PCR request to be treated as a fourth PCR application rather than an amendment to his original PCR application 17-27-90, thus the lower courts order of dismissal with prejudice should be reversed and that petitioner should be granted a hearing on his original and amended PCR request as a matter of law.

## Standard of Review

A convicted petitioner's claim that counsel's assistance was so defective as to require reversal of a conviction... has two components. Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice. To satisfy the first prong, a defendant must show counsel's performance "Fell below an objective standard of reasonableness. Franklin v. Catoe, 346 S.C. 563, 570-71, 552 S.E. 2d 718, 722 (2001).

PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by section 17-27-20(A), a typical PCR claim of ineffective assistance of counsel falls into this category because, if the applicant proves his case, his conviction or sentence will be overturned.

Finklea v. State supra, uniform laws annotated 275, comment on section 1 of uniform Post-Conviction Procedure Act (1995) act was written in part, to bring together and consolidate into one simple statute all the remedies, beyond those that are incident to the usual procedures of trial and appellate review which are at present available for challenging the validity of a sentence of imprisonment. Simpson v. State 329 S.C.43, 495 S.E. 2d 429.

Petitioner had no knowledge of the discovery until June 8, 2015, petitioner promptly filed his motion for a new trial after discovering that he was convicted by a tainted jury. He came into the knowledge of the discovery after a friend of his in the same unit was convicted by a juror that tampered with evidence at trial, after petitioner's friend, Mr. Kelvin Jones and petitioner talked, petitioner immediately went to his cell to look over his trial transcripts, which petitioner noticed the relation of juror and coroner, petitioner did research and promptly filed his after discovered evidence.

S.C. Code of Laws, Title 14 Chapter 7 Juries and Jurors in Circuit Court Section 14-7-1020, Jurors may be examined by court, if jurors are not indifferent he shall be set aside. The court on motion of either party in suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the case, has expressed or formed any opinion or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection, if it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

Petitioner filed his motion for a new trial, petitioner never received a docket number nor an attorney. It was stamped and clocked the motion.

### Conclusion

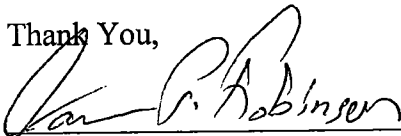
Access to a reasonably competent attorney is necessary in order for an accused who has no knowledge of the law and rules of evidence to have "Ample" opportunity to defend himself.

Adams v. United States, McCann 317 U.S. 269, 275 (1942)

It is through competent counsel that the accused secures all his other Constitutional Rights. Kimmelman v. Morrison, 477 U.S. 365, 377 (1986). The right to counsel embodies much more than an attorneys physical presence. The right to counsel, is the right to effective assistance of counsel McCann v. Richardson 397 U.S. 759.

Petitioner believes in the interest of fairness and justice that this Honorable Court grant petitioner a hearing, appoint counsel to represent petitioner, state motion for summary dismissal be denied.

Thank You,



James P. Robinson

Kirkland Corr. Inst. B-2-22

4344 Broad River Rd.

Columbia, SC 29210

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM SALUDA COUNTY  
COURT OF COMMON PLEAS

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HONORABLE J. DERHAM COLE  
CIRCUIT COURT JUDGE

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Case No. 2016-CP-41-0077

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Petition for Writ of Certiorari

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James P. Robinson .....Petitioner

v.

State of South Carolina.....Respondent

**PROOF OF SERVICE**

I certify that the following was served on Sherrie Butterbaugh, Office of The Attorney General,  
P.O. Box 1159, Columbia, South Carolina 29211 by placing same in U.S. Mail Postage pre-paid  
this 25 day of Oct, 2018 as provide by rule 267(d)

Respectfully Submitted

*James P. Robinson*  
s/ James P. Robinson  
James P. Robinson

Sworn before me this 25 day  
Of October 2018

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*Melissa Spig*  
Notary Public of South Carolina  
My commission expires  
Dec. 1, 2025

**RECEIVED**

October 25, 2018

OCT 29 2018

Daniel E. Shearouse

Clerk of Court, In the

Supreme Court of South Carolina

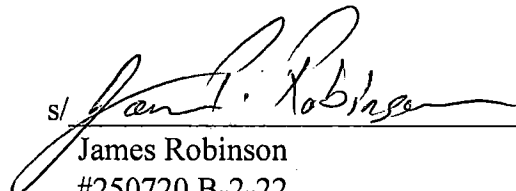
P.O. Box 11330

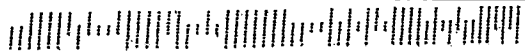
Columbia, SC 29211

**S.C. SUPREME COURT**

Re: Petition and appendix for writ of certiorari: case no: 2016-CP-41-0077 from Saluda County Court of Common Pleas.

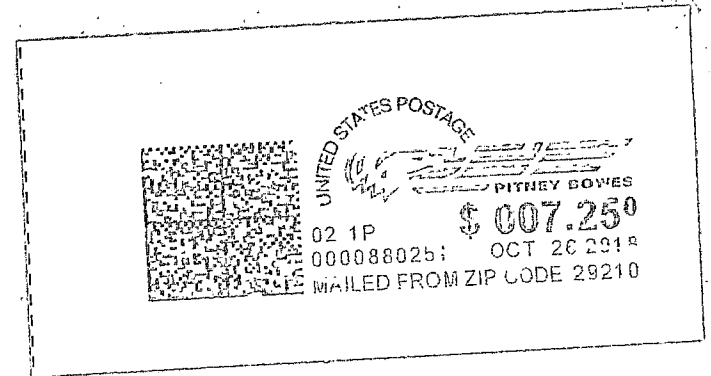
Dear Clerk, Please find the original petition and appendix for writ of certiorari that has been served on **Sherrie Butterbaugh, Office of The Attorney General, P.O. Box 1159, Columbia, South Carolina 29211**. A copy of six(6) copies of the petition and two(2) copies of appendix

  
James Robinson  
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land, Correctional, Inst. B-222  
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