

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 28 2013

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

S.C. Supreme Court

JAMES D. ROBERTSON, #5067,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Sr. Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

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

ATTORNEYS FOR RESPONDENT.

TABLE OF CONTENTS

PETITIONERS' ISSUES PRESENTED i

COUNTERSTATEMENT OF ISSUES PRESENTED..... i

STATEMENT OF THE CASE 1

ARGUMENT

I. This Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that Robertson's 2011 Application is barred by the successive application doctrine in S.C. Code Ann. § 17-27-90 (2003) and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); it is barred by the statute of limitations and the doctrine of laches; and that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not require state courts to have merits hearings on successive applications claiming that initial PCR counsel was ineffective. 7

1. Standard of Review on Certiorari 8

2. Discussion 8

A. The 2011 Application is barred as successive. 8

B. *Martinez v. Ryan* does not require a hearing. 13

C. The 2011 Application is barred by the statute of limitations 20

D. The PCR judge's finding that original collateral counsel was qualified under § 17-27-160(B) and his alternative finding that Robertson had not proved prejudice from the failure to comply with the requirements of that section are supported by the record and are not clearly erroneous 24

E. The record supports the PCR judge's finding that Robertson did not offer proof that original collateral counsel were ineffective under *Strickland*. 30

II. The PCR judge's Order does not violate federal law 34

III. Robertson's remaining challenges to the PCR judge's Order are not meritorious 37

A.1. There was no finding that Robertson waived his right to competent counsel 38

A.2. The PCR judge’s finding that the 2011 Application is barred by laches is not clearly erroneous in light of the present record. . 38

B. The PCR judge’s alternative finding that Robertson was required to show that he was prejudiced by the failure to appoint qualified counsel was not clearly erroneous 39

C. Robertson has waived any challenge to the PCR judge’s finding that Robertson’s substantive claims for relief were barred in PCR by not challenging this on certiorari 39

CONCLUSION 40

PETITIONER'S QUESTION PRESENTED

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

COUNTERSTATEMENT OF ISSUES PRESENTED

I. Whether the rule set forth in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), even applies in South Carolina because *Martinez* only directly applies to those States that bar all direct appeals of ineffective-assistance claims, and South Carolina permits direct appeal review of Sixth Amendment claims, such as allegations that counsel labored under a conflict of interest and pro se motions to relieve counsel, where the claim was presented to and passed upon by the trial judge?

II. Whether this Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that Robertson's 2011 Application is barred by the successive application doctrine in S.C. Code Ann. § 17-27-90 (2003) and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); it is barred by the statute of limitations and the doctrine of laches; and that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not require state courts to have merits hearings on successive applications claiming that initial PCR counsel was ineffective?

STATEMENT OF THE CASE

Petitioner, James D. Robertson, #5067 (Robertson) is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his two York County murder convictions and death sentences for brutally murdering his parents. The York County Grand Jury indicted him on April 23, 1998 for two counts of murder (98-GS-46-1020 & -1021), one count of armed robbery (98-GS-46-1022) and one count of financial transaction card fraud (98-GS-46-1023). **App. 3758-65**. The State timely served a Notice of Intent to Seek the Death Penalty, pursuant to S.C. Code Ann. § 16-3-20(A)(Supp. 2002) and gave notice that it would rely upon the statutory aggravating circumstances found in S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e), and (h); (4); and (9) (Supp. 2012).

This assigned the case to the Honorable John C. Hayes, III, who had exclusive jurisdiction. James W. Hancock and James W. Boyd, Esquires, represented Robertson.¹ Judge Hayes heard motion hearings on July 17, 1998 (**App. 32-48**), September 22 (**App. 49-55**) and 25, 1998 (**App. 55-79**); November 2 (**App. 79-90**) and 20, 1998; December 4 (**App. 90-121**) and 18, 1998; and on February 12 and 19, 1999. Robertson's capital jury trial was held on March 15-26, 1999. The jury convicted him of all of the indicted offenses. **App. 122-1977**. A sentencing phase was conducted following his exercise of the 24-hour statutory waiting period in § 16-3-20(B). The jury found each of the alleged statutory aggravating circumstances and it sentenced Robertson to death for each of the murders. Judge Hayes affirmed their decision and imposed the death sentences for the murders. **App. 1977-3242**.

Robertson did not timely file a timely notice of appeal, but Judge Hayes entered a Consent

¹Sixteenth Circuit Solicitor Thomas E. Pope and Deputy Solicitor Kevin S. Brackett represented the State.

Order granting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). At various points on direct appeal, Assistant Appellate Defender Robert M. Dudek and Deputy Chief Appellate Defender Joseph L. Savitz, III represented Robertson before this Court. On May 28, 1999, Robertson, through Mr. Dudek, filed a Petition for Writ of Certiorari seeking *White v. State* appellate review, to which the State consented. This Court entered an Order on June 25, 1999 granting direct appellate review under *White v. State*. However, Robertson had each attorney relieved, and he appeared *pro se* before ultimately making a knowing, voluntary and intelligent waiver of his right to appeal. This Court filed a June 3, 2005 Order dismissing the appeal.²

² Robertson wrote this Court on August 28, 2000, and asked the Court to relieve Mr. Dudek as counsel, to allow him to drop his appeals and to permit him to be executed. Mr. Dudek made a Return to Motion on September 11, 2000. On October 6, 2000, this Court entered an Order remanding the case to Judge Hayes for the purpose of conducting a hearing on Robertson's competency to be executed. After Judge Hayes had entered Orders appointing Christopher A. Welborn, Esquire, to represent Robertson at the hearing (on February 2, 2001) and ordering a psychiatric evaluation of his competency to be executed (on February 15, 2001), Robertson signed a March 15, 2001 affidavit stating that he wished to pursue all available appellate remedies. He also asked to have Mr. Dudek relieved as counsel and to have alternative counsel appointed. Judge Hayes made a Report to the Supreme Court dated October 12, 2001. He found that it was unnecessary to hold a competency hearing because Robertson no longer desired to appear *pro se*. Therefore, this Court filed an Order on November 15, 2001 relieving Mr. Dudek as counsel and appointing Mr. Savitz as appellate counsel. On April 15, 2002, Mr. Savitz filed an Initial Brief of Appellant on Robertson's behalf, and presenting three issues for review.

Robertson expressed displeasure with the manner in which appellate counsel was handling his appeal. He wrote this Court on April 18, 2002, and he asked the Court to relieve Mr. Savitz because Mr. Savitz did not represent his interests. The Court denied his request in a May 16, 2002 Order. However, Robertson again wrote a letter to this Court dated June 3, 2002, and asked the Court to relieve Mr. Savitz and to allow him to proceed *pro se*. Both Mr. Savitz and the State responded to his request. This Court filed an Order on June 26, 2002, remanding the matter to Judge Hayes for a hearing on Robertson's competency to represent himself on appeal.

Following a hearing on his competency to appear *pro se* on October 10, 2002, Judge Hayes signed a Report in the Supreme Court of South Carolina on October 28, 2002. He found that Robertson was competent to waive appellate counsel, and that Robertson's decision to waive counsel was knowing and voluntary. This Court filed an Order on November 21, 2002, relieving Mr. Savitz and permitting Robertson to appear *pro se*. Robertson thereafter filed a *pro se* Initial Brief of Appellant, dated July 25, 2003, in which he presented seven issues for appellate review. The State filed the Initial Brief of Respondent on December 31, 2003. The direct appeal was thereafter dismissed and re-instated on several occasions because Robertson failed to comply with the South Carolina Appellate Court Rules (SCACR). Eventually, he indicated to this Court that he wished to abandon his right to a direct appeal. In an Order dated November 22, 2004, the Court remanded the case to Judge Hayes for a full hearing on his competency to waive his right to direct appeal. The State submitted a Memorandum Regarding Petitioner's Right to Waive Direct Appeal on February 14, 2005.

The hearing - at which Robertson made a knowing and intelligent waiver of his right to be represented by counsel - was

A. Original state PCR.

On July 7, 2005, this Court granted Robertson's request for a stay of execution to pursue Post-Conviction Relief (PCR), pursuant to *In re Stays of Execution*. The Court also appointed the Honorable John C. Few to preside over this case. Judge Few filed an Order Appointing Counsel For Post-Conviction Relief dated September 9, 2005, in which he appointed Michael Brown, Esquire, to represent Robertson. **App. 3869**. Judge Few held a hearing at the Greenville County Courthouse on September 23, 2005. Robertson was present at this hearing, as was Mr. Salter, who represented the State. The appointment of Mr. Brown was confirmed at that hearing. **App. 3657**.³ Judge Few later appointed Joseph David Matlock, Esquire, to assist in representing Robertson.

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

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

held before Judge Hayes on February 22, 2005, at the Moss Justice Center in York, South Carolina. In a February 23, 2005 Report to the Supreme Court, Judge Hayes found that Robertson was competent to waive his right to direct appeal. In an Order filed June 3, 2005, this Court agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. This Court also conducted the proportionality review mandated by S.C. Code Ann. § 16-3-25 (2003), it dismissed the appeal and it directed the Clerk of that Court to issue an execution notice pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). Thus, Robertson knowingly and voluntarily abandoned the direct appeal and it was dismissed at his request without the South Carolina Supreme Court considering any issues that he raised in his *pro se* Initial Brief of Appellant.

³ A copy of the transcript of the September 23, 2005 hearing is not currently available. Respondent does not have a copy in the files of the Attorney General's Office and Respondent did not order this transcript because Robertson did not contest counsel's qualifications in state PCR. Robertson also has conceded that a copy of that transcript is unavailable because the tapes of the hearing do not exist. *See* Rule 607(i), SCACR.

twelve specific grounds of ineffective assistance of counsel. **App. 3268-73.**⁴ Judge Few denied relief in an Order of Dismissal filed on March 24, 2008. **App. 3652- 3757.**

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

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

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

B. The Petition for Writ of Habeas Corpus.

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

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

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

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

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

C. Robertson's successive PCR.

Robertson filed his successive PCR Application (2011-CP-46-00072), through counsel, on January 7, 2011. **App. 3847-53**. On March 24, 2011, Respondent made its Return and Motion to Dismiss and moved for summary dismissal. **App. 3900-4030**. The Honorable Lee S. Alford held a status conference on July 5, 2011 at the Moss Judicial Center, in York County South Carolina. Robertson was present at the hearing. Keir Weyble, and Emily C. Paavola, Esquires, were also present, and Senior Assistant Attorney General William Edgar Salter, III, represented the State.

At the hearing, Judge Alford appointed Mr. Weyble and Ms. Paavola to represent Robertson. Also, he (1) gave Robertson twenty days within which to file a response to the Return and Motion to Dismiss, (2) gave twenty days for Respondent to reply to that response, and (3) gave Robertson twenty days, from the hearing date, to file a verification of the Application because the Application was not verified as required by S.C. Code Ann. §§ 17-27-40 & -50 (Supp. 2011). Judge Alford ruled that the verification would be considered *nunc pro tunc*. **App. 4187-99**.⁵

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

Judge Alford filed an Order granting Respondent's motion to dismiss and dismissing the 2011 Application with prejudice on September 20, 2011. Judge Alford found that: (1) the Application was barred by the one year statute of limitations; (2) the Application was impermissibly

⁵ Immediately after this hearing, Robertson's counsel served Respondent with a draft of an Amended PCR Application.

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

Robertson timely served his notice of appeal. He filed his Petition for Writ of Certiorari on September 14, 2012. He is currently represented by A. Mattison Bogan, Esquire, and Chief Appellate Defender Robert M. Dudek. Respondent now makes its Return to the Petition.

ARGUMENTS

I. This Court must deny certiorari because there is evidence of probative value to support the PCR judge's finding that Robertson's 2011 Application is barred by the successive application doctrine in S.C. Code Ann. § 17-27-90 (2003) and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); it is barred by the statute of limitations and the doctrine of laches; and that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not require state courts to have merits hearings on successive applications claiming that initial PCR counsel was ineffective.

Respondent submits that certiorari must be denied because there is evidence of probative value to support the PCR judge's finding that Robertson's 2011 Application is barred as successive under § 17-27-90 and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); and that the Application is also barred by the statute of limitations and the doctrine of laches. Further, neither *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), nor any prior Supreme Court decision requires state courts to entertain successive applications based upon the claims of disgruntled inmates that initial PCR counsel was ineffective in failing to litigate a different claim or claims.

1. Standard of Review on Certiorari.

This Court must deny certiorari if there is any evidence of probative value to support the PCR judge's findings, *Süber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989), and it will only reverse the PCR judge's decision when there is no probative evidence to support his findings or the decision is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). Robertson has not met this burden of proof.

2. Discussion.

A. The 2011 Application is barred as successive.

As correctly recognized by the PCR judge:

§ 17-27-90 forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly.'" *Aice*, 305 S.C. at 450, 409 S.E.2d at 394. In *Aice*, this Court expressly declined to interpret the term 'sufficient reason' to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase 'very narrowly' by Court Rule, and it held that "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application.... We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not" *Id.*

Although *Aice* recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel, as *Aice* urged, "well may swallow Rule 50(3), *It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys.* As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under *Aice*'s view.

Id at 451, 409 S.E.2d at 394 (emphasis added). As a result, a claim that "prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." *Id.* at 451, 409 S.E.2d at 394.

This Court further explained the importance of finality of litigation in cases:

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

Id at 451, 409 S.E.2d at 394. (Emphasis added). Thus, apart from the scenario covered by *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), a successive PCR application is not allowed on the ground that first PCR application was insufficient due to ineffective PCR counsel. *Aice*, 305 S.C. at 450-52, 409 S.E.2d at 394-95.

Robertson erroneously relies upon several PCR cases involving non-capital inmates as demonstrating that he has shown "sufficient reason" under *Aice*. However, each of these cases is

distinguishable because each was based on very unique procedural circumstances that simply are not present here. In *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996), the applicant's direct appeal was dismissed because his attorney failed to file an initial brief. Washington raised a number of issues in his first PCR application, including a claim based on the State's misconduct in connection with a plea agreement. *Id* at 234, 478 S.E.2d at 834.

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

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

He did not have the benefit of a direct appeal, because his attorney failed to file an appellate brief. Moreover, the first PCR court decided, in effect, that Washington was entitled to a new trial, but allowed the relief to be addressed on direct appeal; however, this Court denied certiorari as to the question. Additionally, the second PCR court granted relief, but did so through an improper procedure, specifically, by

amending the first order. Thus, Washington has never received the benefit of a direct review. Even if his application is successive, the unique combination of facts in this case entitle him to the relief granted below.

Id. There are no such procedural irregularities in this case. Rather, Robertson voluntarily waived review on direct appeal; PCR relief was denied only after a lengthy hearing at which he was represented by two attorneys; and he was represented before this Court on certiorari, where relief was again denied. The other non-capital cases upon which Robertson relies are likewise distinguishable.⁶

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

Williams is also distinguishable because lead collateral counsel in the present case, Mr.

⁶ In *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), the Court permitted a successive application raising the issue of ineffective assistance of trial counsel, where trial counsel had represented the applicant in the first PCR matter. This case does not involve such a scenario. Nor is this case like *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the Court permitted a successive application because the applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Robertson's current attorneys may say as to the quality of representation provided in the original PCR action, they must concede that the allegations raised in that action were raised with the assistance of counsel and that he had a hearing on the issues raised by counsel.

Brown, was properly qualified under S.C. Code Ann. § 17-27-160(B) (Supp. 2011), unlike Williams' original PCR attorneys. *See Williams v. Ozmint*, 494 F.3d 474, 483 (4th Cir. 2007). Moreover, Respondent would note that the capital PCR applicant in *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31 (4th Cir., Mar. 26, 2002), unsuccessfully sought relief such as that now being sought by Robertson, as did death row inmate Abdiyyah ben Alkebulanyahh, #6012. Thus, as in *Aice*, the cases relied upon by Robertson do not support the conclusion that "sufficient reason" to permit a successive application. Contrary to his argument before this Court, he could have raised his current allegations in his previous PCR Application.

Likewise, any supposed lack of qualification of original PCR counsel was an issue that could have been raised, if at all, at the time of the September 23, 2005 hearing to confirm the appointment and later pursued on certiorari following denial of relief by the PCR judge.⁷ As a result, he cannot raise this or any other allegation now in a successive Application. *Aice*; *See also Arnold v. State*, 309

⁷ Robertson was unable to obtain a copy of the transcript of the September 23, 2005 hearing because the tapes of the hearing do not exist. *See* Rule 607(i), SCACR. Also, Respondent does not have a copy in the files of the Attorney General's Office and Respondent did not order this transcript because Robertson did not contest counsel's qualifications in state PCR. In an effort to prevail in the present action, Robertson makes the misrepresentation that this hearing never occurred. His contention in this regard is false and it is contradicted by Judge Few's order of Dismissal. **App. 3557**. It is also refuted by the undesignated counsel for Respondent, who represents as an officer of this Court that it occurred and that he attended the hearing. The undersigned further represents that Robertson, Michael Brown, Esquire, and the undersigned were present before Judge Few at the hearing. The undersigned makes these representations so that Robertson's misrepresentation will not result in a fraud on the Court. Respondent's representation that Judge Few held this hearing is confirmed by a contemporaneously-generated "Attorney's Report of Trial or Hearing," which then-Attorney General McMaster required to be prepared for any court-related appearance. **App. 4575**.

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

S.C. 157, 420 S.E.2d 834, 843 (1992), *cert. denied*, 507 U.S. 927 (1993); *Hunter v. State*, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of prior applications but did not raise it); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was “inadequate” held not a “sufficient reason” warranting a successive application); *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008); *Ivey*, 36 Fed.Appx. at 730-31. Additionally, accepting Robertson’s position would literally destroy any meaningful sense of finality in virtually all PCR cases. *Contra Aice*, 305 S.C. at 451, 409 S.E.2d at 394.⁸ Therefore, this Application must be dismissed as impermissibly successive.

B. *Martinez v. Ryan* does not require a hearing.

Nor does *Martinez* require South Carolina courts to provide inmates with a hearing on successive PCR applications, merely because the inmate alleges that original PCR counsel was ineffective. Initially, Respondent submits that the rule set forth in *Martinez* may not apply to federal habeas corpus cases of South Carolina inmates. *Martinez* simply created a “**narrow exception**” to the ordinary procedural default rules applicable in federal habeas corpus proceedings by holding that where, under state law, ineffective assistance of trial counsel claims **must** be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from

⁸ See also *Teague v. Lane*, 489 U.S. 288, 309 (1989) (“[T]he principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect”); *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (“No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation”); *Williams v. Ozmint*, 380 S.C. 473, 480, 671 S.E.2d 600, 603 (2008) (“At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice”); *cf.*, *Webb v. Greenwood County*, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956).

hearing those claims if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. *Id* at 1315-20. Thus, *Martinez* only directly applies to Arizona and the five other States that also bar **all** direct appeals of ineffective-assistance claims: Maine, Missouri, Oregon, Rhode Island, and Virginia.⁹ While South Carolina does not permit free-standing ineffective assistance of counsel claims to be raised *de novo* on direct appeal, *e.g.*, *State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986); *State v. Carpenter*, 277 S.C. 309, 286 S.E.2d 384 (1982) (“Appellant's sole ground for appeal is ineffective assistance of counsel at trial. This Court usually will not consider that issue on appeal from a conviction , ... We follow that principle particularly when, as here, the issue was not argued to the trial judge.”) (citations omitted), other Sixth Amendment claims may be raised direct appeal if presented to and passed upon by the trial judge, such as *pro se* motions to relieve counsel based upon ineffectiveness and allegations that counsel labored under a conflict of interest. *E.g.*, *State v. Graddick*, 345 S.C. 383, 385, 385-86, 548 S.E.2d 210, 210-11 (2001) (while appellant’s *pro se* motion to relieve counsel based upon counsel’s ineffectiveness did not violate proscription against hybrid representation, trial judge did not abuse his discretion in refusing to grant appellant's request for new counsel mere days before the start of appellant's trial for murder where he “made only the most conclusory arguments why counsel should have been relieved”); *State v. Justus*, 392 S.C. 416, 418-20, 709 S.E.2d 668, 670 (2011) (trial court's disqualification of defendant's originally appointed second chair counsel did not constitute an abuse of discretion, even though it was debatable whether counsel's representation of a potential witness against defendant in the witness's divorce action presented an actual conflict of interest with regard

⁹**Me.:** *State v. Nichols*, 698 A.2d 521, 522 (Me. 1997); **Mo.:** Mo. S. Ct. R. 29.15; **Or.:** Or. Rev. Stat. §138.550; **R.I.:** *State v. Malstrom*, 672 A.2d 448, 450 (R.I. 1996); **Va.:** *Hall v. Com.*, 515 S.E.2d 343, 347 (Va. Ct. App. 1999).

to defendant's murder trial, given the conflicting evidence before the trial court as to whether counsel continued to represent the witness in question); *State v. Gregory*, 364 S.C. 150, 152-54, 612 S.E.2d 449, 450-51 (2005) (defense attorney had actual conflict of interest, and thus defendant was not required to demonstrate prejudice before trial court would grant motion to be relieved); *State v. Morris*, 376 S.C. 189, 206, 656 S.E.2d 359, 368 (2008). *Accord State v. Felder*, 290 S.C. 521, 522-23, 351 S.E.2d 852, 852-53 (1986) (PCR, rather than direct appeal, was proper avenue of relief for appellant claiming that he was denied effective assistance of counsel due to court's failure to inquire whether conflict of interest existed, where he did not raise that issue before trial court).¹⁰

Further and even assuming *arguendo* that *Martinez* does apply to federal habeas corpus cases challenging South Carolina convictions, *Martinez* neither applies to state PCR litigation nor creates a freestanding claim for relief. The Court in *Martinez* observed that “[w]here, as here, the initial-review collateral proceeding 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 1317. Later, the Court reasoned

¹⁰Respondent would note that the Supreme Court has granted certiorari in *Trevino v. Thaler*, 133 S.Ct. 524 (2012), to answer the following question:

In *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), this Court held that ineffective assistance of counsel in an “initial-review collateral proceeding” - that is, a collateral proceeding that “provide[s] the first occasion to raise a claim of ineffective assistance at trial” - may provide cause to excuse a procedural default when a claim of ineffective assistance of trial counsel is raised in a federal habeas proceeding. Petitioner Carlos Trevino, a condemned Texas prisoner seeking to excuse the procedural default of a claim of ineffective assistance of trial counsel, filed a petition for a writ of certiorari presenting the following question:

Whether the Court should grant certiorari, vacate the Court of Appeals' opinion, and remand to the Court of Appeals for consideration of Mr. Trevino's argument under *Martinez v. Ryan*.

Thus, the question of whether *Martinez*'s “narrow exception” applies to States that do not require all such claims to be brought in collateral proceedings, such as South Carolina, is now before the United States Supreme Court.

that:

Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) 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. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Cf. Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue).

Martinez, 132 S.Ct. at 1318-19.

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

initial-review collateral proceeding and the petitioner demonstrates that the claim has some merit. *Id* at 1319-20 (emphasis added). *See also id* at 1315 (Court stated that it was recognizing “a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause [in a federal habeas corpus proceeding to excuse] a prisoner's procedural default of a claim of ineffective assistance at trial”). It does not require states to entertain a successive PCR application.

As the Florida Supreme Court recognized in *Gore v. State*, 91 So.3d 769, 777-78 (Fla. 2012):

Gore next contends that during the initial collateral review proceedings, his postconviction counsel was ineffective for failure to locate penalty phase co-counsel Nickerson and present his testimony. Gore asserts that the recent decision of the United States Supreme Court in *Martinez* ... creates a new and independent cause of action for ineffective assistance of collateral counsel in our state courts system. While the decision in *Martinez* does contain expansive language, a proper analysis reveals that the Supreme Court specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists:

While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

Id. at 1313. Even Justice Scalia in his dissent acknowledged that the majority chose to evade this issue. *See id.* at 1326 (Scalia, J., dissenting) (noting that the reframing of the issue “avoid[ed] the Court's need to confront the established rule that there is no right to counsel in collateral proceedings”). **It appears that *Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context.**

Here, **Gore previously received full consideration of his ineffective assistance of penalty phase counsel claims in the postconviction court and a comprehensive review of those claims during his appeal before this Court.** Gore has received a full collateral review to which he is entitled in the Florida state courts system. We hold that under the facts and circumstances of this case, ***Martinez* provides Gore with no basis for relief in this Court.**

(Emphasis added). *See also State v. Pryor*, 2012 WL 4859158, 2 (Ariz.App., Oct. 12, 2012); *Martin*

v. *State*, ___ S.W.3d ___, 2012 WL 5861729, at *6 (Mo. Ct. App. Nov. 20, 2012) (“*Martinez* speaks only to federal habeas corpus procedure and does not establish a constitutional right to the effective assistance of postconviction counsel. In fact, the *Martinez* court specifically states that it is not resolving the question of whether a prisoner has a constitutional right to post-conviction counsel”); *Yarberry v. State*, 372 S.W.3d 568, 575 (Mo.App. 2012); *Ex parte Hernandez*, 2012 WL 1060079, 2 (Tex.Crim.App. Mar. 21, 2012) (Price, J., concurring) (unpublished); *State v. Johnson*, 2012 WL 5364693, 5 (Del.Super., Oct. 31, 2012).

Although Robertson correctly asserts that “the federal courts will take responsibility for the development and resolution of [his] claims” if this Court chooses not to allow successive applications raising claims that were not previously asserted because of the alleged ineffective assistance of original PCR counsel, this Court still should not allow such successive filings. The rule set forth in *Martinez* applies to both capital and non-capital cases, alike. As a result, adopting Robertson’s position would potentially open the floodgates to litigation by hundreds upon hundreds of disgruntled PCR applicants, almost all of whom most assuredly will allege the ineffectiveness of original PCR counsel.¹¹ Respondent opposes such an unnecessary strain on both financial and judicial resources that is not constitutionally required by *Martinez* or state law and which is contrary to the recognized need for finality of litigation. *See Aice* and *Williams, supra*.

Also, if this Court adopts a rule permitting hearings on successive applications asserting the

¹¹ It could also exponentially increase the number of claims that federal habeas corpus courts would have to review on the merits. As the PCR judge properly found in another section of his Order, “[t]here is no reason to tax an already overburdened judicial system with wasteful litigation that is not constitutionally mandated. Further, it would reward a dilatory filing in this case that is designed to delay the proper course of the appeals process and it would destroy any sense of finality to litigation.” **App. 4441**. Any doubt that this action is not a dilatory one must ignore that currently Robertson only has the issues relating to counsel’s handling of their social worker preserved for federal habeas review. However, if permitted to go forward in this action, he will be able to raise eight additional claims on the merits. *See App. 4202-04*.

claims presented therein were not raised in the original PCR hearing because of the ineffectiveness of collateral counsel, the claims would be litigated in federal court through the deferential merits review of 28 U.S.C. § 2254(d). However, if this Court adheres to *Aice* and its progeny, then the claims will only be litigated in federal court through the framework of procedural default analysis. *See Martinez; Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)¹² In other words, the federal courts will not review the merits of his procedurally defaulted claims unless he can demonstrate **both cause for the procedural default and prejudice as a result** of the alleged constitutional violation, or that failure to review the constitutional claim will result in a fundamental miscarriage of justice. *Id.* The Supreme Court's decision in *Martinez* merely provides him with the "narrow exception" to show cause, and does not change the requirement that he show prejudice,¹³ and review of

¹² In this regard, he would be like the scores of other inmates who raise claims in federal court that have not been previously litigated in state court proceedings because *Martinez* is not limited to capital cases. Moreover, the rule barring successive applications alleging ineffective assistance of prior PCR counsel is not the only context in which this Court gives federal courts the first opportunity to have first review of constitutional issues. Federal courts already have the first chance to review the pretrial denials of double jeopardy motions when the defendant has not been sentenced, in light of *State v. Miller*, 289 S.C. 426, 426-27, 346 S.E.2d 705, 706 (1986), where this Court held that "an order denying a double jeopardy claim is not immediately appealable" because "a criminal defendant may not appeal until sentence has been imposed." *See Livingston v. Murdaugh*, 183 F.3d 300, 301-02 (4th Cir. 1999). Further, Robertson's contention that the Court in *Martinez* indicated "a clear preference for the state courts to act as the primary forum" to develop and resolve ineffectiveness claims proves nothing new because the Supreme Court has long stated that its "procedural default doctrine and its attendant 'cause and prejudice' standard are grounded in comity and federalism concerns." *Edwards v. Carpenter*, 529 U.S. 446, 446-47 (2000) (citing *Coleman*, 501 U.S. at 730); *see also Coleman*, 501 U.S. at 726 ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) ("[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments"); *Murray v. Carrier*, 477 U.S. 478, 518 (1986) ("Despite the existence of federal power to entertain a habeas petition in the face of a procedural default, the Court in [*Fay v. Noia*, 372 U.S. 391 (1963)] acknowledged "a limited discretion" in the federal court to refuse to exercise its jurisdiction on behalf of "an applicant who has deliberately by-passed the orderly procedure of the state courts and in doing so has forfeited his state court remedies." ... This exception was recognized "[a]s a matter of comity ... in order to accord state courts and state procedures the respect due them in a federal system") (citation omitted and emphasis in original).

¹³ Whether a claim was "substantial" under the reasoning in *Martinez* is a different question from whether PCR counsel was ineffective for failing to assert it. *Martinez* explained that a "substantial" claim is a "claim that has some merit," 132 S. Ct. at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability (COA) to issue). This standard necessarily differs from "a meritorious claim," *i.e.*, one on which the inmate prevails after

procedurally defaulted claims by federal courts is still narrower than merits review, even after *Martinez*.

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

Further, the PCR judge properly found that the one-year statute of limitations applicable to PCR actions bars the entire Application. See S.C. Code Ann. § 17-27-45(A) (Supp. 2012). See also **App. 4426-28**. This Court filed an Order on June 3, 2005, dismissing Robertson's direct appeal because it agreed with Judge Hayes' finding that he was competent to waive his right to appellate review. The Court sent the Remittitur to the York County Clerk of Court on June 22, 2005. Therefore, Robertson had one year from June 22, 2005, within which to file the current Application.

However, he did not file the current Application until January 7, 2011,¹⁴ which is five years, six months and sixteen days after this Court's June 22, 2005 Order and well after the expiration of the one year time limit for filing the PCR Application. As a result, the Application is barred by § 17-27-45(A). As noted, Robertson did not make any challenge to the qualifications of lead collateral counsel, Mr. Brown, under § 17-27-160(B) at the September 23, 2005 hearing appointing counsel. Nevertheless, he contends that he is entitled to proceed because he has filed within one year of the appointment of his current attorneys, and that neither he nor his original PCR attorney could have objected to the supposed lack of qualifications of counsel under § 17-27-160(B). He further claims that the PCR court has misunderstood his statute of limitations argument and that he is not relying

full review. As *Miller-El* explained, a court deciding whether to issue a COA makes a "threshold inquiry." It does not decide the "merits of an appeal," and a court should issue a COA when "a claim [is] debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. PCR counsel may well have sound tactical reasons not to assert an ineffective assistance claim that he concludes is debatable but will ultimately fail on the merits, and a "substantial claim" may nevertheless be non-prejudicial under *Strickland* in light of the record as a whole.

¹⁴ See *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (PCR application is filed when received by the Clerk of Court).

on § 17-27-45(C), which applies when an inmate's application is based upon after-discovered evidence.

Although he did argue below that he was entitled to equitable tolling, he also argued that his 2011 Application was timely filed because filed within a year after the Remittitur was issued following this Court's denial of certiorari in PCR. *See Response in Opposition to Motion to Dismiss, App. 4222-24.* However, the PCR judge correctly found that "his reliance on § 17-27-45(C) is misplaced. To the extent that his current Application asserts claims that are otherwise cognizable in PCR, as opposed to his claims that involve issues that could have been raised on direct appeal, those allegations could have been discovered and presented in the original PCR action. ... Further, an alleged lack of qualifications of counsel under § 17-27-160(B) does not constitute "evidence of material facts . . . that requires vacation of the conviction or sentence," as required for § 17-27-45(C) to apply." *App. 4427.*¹⁵

Additionally, the PCR judge properly found that both Robertson and his original PCR counsel were aware of any supposed defect in counsel's qualifications at the time Mr. Brown was appointed and that he could have objected to the supposed lack of counsel's qualifications at the time of the September 23, 2003 hearing held for appointment of counsel.¹⁶ Moreover, the PCR court

¹⁵ The only exception are his "claims" based on *Martinez* and *Maples*, which had not been decided when the Order was filed and which do not require relief for the reasons argued.

¹⁶ Section 17-27-45(C) provides that "the *application must be filed* under this chapter *within one year* after the date of actual discovery of the facts by the applicant or *after the date when the facts could have been ascertained by the exercise of reasonable diligence.*" (Emphasis added). Here, that would be one year after the September 23, 2005 hearing because that is when he would had actual knowledge of counsel's qualifications and could have discovered any defect, and not one year following the appointment of his present attorneys. *See Mitchell v. Holler*, 311 S.C. 406, 409, 429 S.E.2d 793, 795 (1993) (the statute of limitations begins to run "where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist") (holding knowledge of murder conviction, coupled with complaint about trial counsel's performance, commenced running of statute). As found by the PCR judge, "the purpose of the September 23, 2005 hearing was (1) to determine whether Robertson wanted counsel appointed to assist him in PCR, and (2) to appoint

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

Further,

Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations. *Hooper v. Ebenezer Senior Svcs. and Rehabilitation Ctr.*, 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct.App.2008). "Equitable tolling is reserved for extraordinary circumstances." *Id.*; see, e.g., *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass, "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *Hopkins v. Floyd's Wholesale*, 299 S.C. 127, 382 S.E.2d 907 (1989) (holding statute of limitations equitably tolled for workers' compensation claim during reliance period in which employer represented to employee that claim compensable and would be taken care of without employee filing claim). The doctrine of equitable tolling can be summarized:

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

qualified counsel. *See In re Stays*. Despite his protestations, the appointment hearing was the **only time** to properly complain about the defects in counsel's eligibility for appointment pursuant to § 17-27-160(B)." **App. 4428**. Even assuming *arguendo* that the statute of limitations did not begin running until the September 23, 2005 hearing, the current Application was not filed until five years, three months and fifteen days later. Therefore, it is barred under § 17-27-45(C), as well. **App. 4428**. His statute of limitations argument ignores that he was successful in having two different appellate attorneys relieved on direct appeal, based upon his objections to representation by these attorneys. "To otherwise construe § 17-27-45 and permit him to go forward on the current Application would do nothing more than award Robertson's lack of diligence in asserting the alleged defect in counsel's statutory qualifications. As a result, the Application is barred by § 17-27-45(A)." **App. 4429**.

application of the doctrine.

Equitable tolling has been deemed available where—

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

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

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

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

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

Pelzer v. State, 378 S.C. 516, 520-521, 662 S.E.2d 618, 620-21 (Ct.App. 2008).¹⁷ Also, this Court explained in *Hooper* that the party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify tolling. *Hooper*, 377 S.C. 115, 687 S.E.2d at 32. Here, Robertson has not and cannot meet the above requirements for equitable tolling of the limitations period because he was not “actively misled” by Respondent into accepting Mr. Brown as qualified counsel; to the extent Mr. Brown was not statutorily-qualified to act as lead counsel in this case, he did not exercise “due diligence” to discover any supposed defect in Mr. Brown’s qualifications; and he was not prevented “in some extraordinary way from asserting his or her

¹⁷ See also *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (“To be entitled to equitable tolling [in federal habeas], [a petitioner] must show ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing”)

rights.” Instead, he rested on his “rights” until after an unfavorable judgment had been entered. This he may not do. *Accord State v. Mayfield*, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959) (“One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered”).¹⁸

D. The PCR judge’s finding that original collateral counsel was qualified under § 17-27-160(B) and his alternative finding that Robertson had not proved prejudice from the failure to comply with the requirements of that section are supported by the record and are not clearly erroneous.

Respondent further submits that the PCR judge’s findings that original collateral counsel was qualified under § 17-27-160(B), as well as his alternative finding that Robertson had not proved prejudice from the failure to comply with the requirements of that section, are supported by the record and are not clearly erroneous. *See App. 4434-38; Supp. App. 2-5* (Order denying motion to alter or amend).¹⁹

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

¹⁸ Again, the PCR judge found at least twice that Robertson was being dilatory. **App. 4428 n. 10; App. 4441**. His findings are supported by the record. These findings are likewise consistent with the behavior he has exhibited throughout the appellate process, including before this Court on direct appeal.

¹⁹ The Appendix filed by Robertson does not contain an entire copy of the Order denying the motion to alter or amend. So, Respondent has included the entire order in a Supplemental Appendix.

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

Supp. App. 1. In the absence of evidence to the contrary, the PCR judge correctly “assume[d] that Judge Few appointed qualified counsel to represent Robertson in his first PCR application. *Walton v. Arizona*, 497 U.S. 639, 653 (1990) (“Trial judges are presumed to know the law and to apply it in making their decisions”); *Ray v. State*, 310 S.C. 431, 437, 427 S.E.2d 171, 175 (1993); *United States v. Robertson*, 606 F.3d 943, 960 (8th Cir. 2010).” **App. 4434.**²⁰

²⁰ Robertson asserts that somehow it violates state and federal law for the PCR judge to rely upon the undersigned’s representation, as an officer of the Court, that the September 23, 2005 hearing was held and that the statutory appointment was confirmed at that time. His argument ignores Judge Few’s finding that this hearing occurred. **App. 3657.** However, it does not violate state or federal law for a tribunal to rely upon these representations of counsel, made as an officer of the Court. *See, e.g.*, Rules of Professional Conduct, Rule 407, SCACR: Rules 3.3(a)(1) and (3) (a lawyer shall not knowingly “[m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer” or “[o]ffer evidence that the lawyer knows to be false”); *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978) (attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath); *State v. Webb*, 680 A.2d 147 (Conn. 1996)(“[a]ttorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath”); *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592, 601 (Nev. 2010)(“Since the district court considered all affidavits and exhibits, and permitted the attorneys for Bahena and Goodyear to make factual representations to the court, we conclude that the district court conducted a sufficient hearing. Based upon the factual representations made by the attorneys, as officers of the court, and the balance of the record, the district court crafted its own findings of fact and conclusions of law emanating from this hearing. The nature of the hearing complied with the requirements of [*Young v. Johnny Ribeiro Bldg, Inc.*, 106 88, 787 P.2d 777 (Nev. 1990)]. Therefore, the district court did not abuse its discretion by the way it structured the hearing since the record was sufficient for the court to make its findings of willfulness”) (footnotes omitted); *People v. Paris*, 692 N.E.2d 848, 852 (Ill.App. 1998)(trial court did not abuse its discretion in quashing defendant’s subpoenas, and not requiring prosecutor, and attorneys for witnesses who had testified against defendant, to be sworn and testify regarding defendant’s post-trial contention that prosecutor had failed to disclose that witnesses had made deals with prosecution in exchange for their testimony against defendant, where court held hearing and asked attorneys if, as officers of court, any deal had been reached, and attorneys responded in the negative); *People v. Mosley*, 2005 WL 602568 (Cal.App., Mar. 16, 2005)(unreported)(trial court did not abuse discretion by relying upon unsworn representations by trial counsel to deny defendant’s motion to substitute allegedly ineffective appointed counsel, finding that “[c]ounsel was at all times an officer of the court, that there is no reason to believe, on this record, that his responses concerning actions taken by him were false”). Also, the record supports the PCR judge’s finding that “[t]here is no transcript of record because of laches on the part of Applicant.” **Supp. App. 2.**

Robertson asserts that a lawyer either needs to have previously represented a capital inmate in PCR, or be qualified to represent a death penalty inmate at trial AND also have within the preceding two years twelve hours of CLE training that primarily involves capital appeals or capital post-conviction relief, to be qualified in a capital PCR. Respondent submits that the PCR judge's rejection of his argument was supported by the record and was not clearly erroneous. In her Memorandum regarding Appointment of Counsel in Capital Post-conviction Relief Matters, dated August 13, 2003, the Chief Justice of the South Carolina Supreme Court specifically rejected this interpretation because she found that it would lead to the absurd result that an attorney qualified to represent a capital inmate at trial would not be qualified to represent him in PCR. Thus, she concluded that the "not less than twelve hours of CLE education" clause and the "or professional training primarily involving advocacy in capital appellate or PCR defense" clause of § 17-27-160(B) were independent means through which an otherwise death penalty-qualified attorney could qualify to represent a death row inmate in PCR. Accordingly, an otherwise death-qualified attorney's twelve hours of CLE within the previous two years did not necessarily have to be in the field of capital appellate or PCR defense.

Here, Judge Few's September 9, 2005 Order appointing Mr. Brown specifically states that "[t]he defendant contends that he is indigent and in need of an attorney as contemplated by law." He confirmed counsel's appointment at a September 23, 2005 hearing, at which Mr. Brown, Robertson and counsel for Respondent were present. Judge Few's Order appointing counsel did not expressly

Moreover, although the undersigned's representations are disputed by Robertson, the undersigned made them in order to prevent Robertson from perpetrating a fraud on the Court and the undersigned stands by those representations. Robertson further attempts to bolster his misrepresentation about the hearing by reference to Mr. Brown's letter to Robertson indicating that he did not become aware of the appointment Order until the first week in October 2005. **Petition, p. 14 n. 6.** His reliance on this letter does not undermine the correctness of the PCR judge's Order.

rely upon the above Memorandum. However, because "[t]rial judges are presumed to know the law and to apply it in making their decisions," *Walton*, 497 U.S. at 653, and the law is that statutorily qualified counsel must be appointed in capital cases, the *presumption* (as opposed to speculation, as Robertson asserts) is that Judge Few appointed in accordance with § 17-27-160(B) and the Chief Justice's Memorandum.²¹ Robertson suggests that the PCR judge mistakenly relied upon the Chief Justice's August 13, 2003 Memorandum because her August 30, 2010 Order in a capital PCR appeal, *Abdiyyah ben Alkebulanyahh*, #6012 v. *State*, "state[s] that her issuance of the letter was a mere administrative action and does not include a determination that her interpretation of the statute is valid."

In *Abdiyyah ben Alkebulanyahh*, a Motion to Remand for Additional Post-Conviction Proceedings was filed on the petitioner's behalf by Robertson's lead counsel in federal court proceedings, John H. Blume, Esquire. The petitioner also filed a motion for recusal of the Chief Justice based on her August 13, 2003 Memorandum, since he was asserting a contrary interpretation of the statute. In the course of denying the recusal motion, Chief Justice Toal did state on pp. 4-5 of the Order in *Abdiyyah ben Alkebulanyahh* that courts from other jurisdictions addressing the question have "noted the promulgation of an administrative order or directive [by an appellate court having primary responsibility for administration of the judicial branch of government] does not include a determination that it is valid because that would constitute an advisory opinion." She did not make such a determination, herself. Instead, she found that her "consideration of petitioner's Motion for

²¹ The General Assembly has not subsequently amended the statute following the Chief Justice's Memorandum, of which it was presumptively aware. See *McLeod v. Starnes*, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012). Also, its failure to amend § 17-27-160 for over nine years after the Memo was issued is evidence that it agrees with this interpretation. *Cf. id.*

Remand is no different from my consideration of petitions for rehearing filed in cases in which I have participated in a decision on the merits.” Even though this is not binding authority from this Court, the PCR judge’s finding that it was and remains authority that supports the appointment of counsel in this case was not clearly erroneous.²² Therefore, “there was no violation of the capital PCR qualification statute, and thus, no basis for permitting this successive Application and for treating the proceedings that have taken place as a nullity.”

Nor do the affidavits offered by Robertson in connection with his Rule 59(e), SCRCP motion show error by the PCR judge. First, although not addressed in the Order denying the Rule 59(e) motion, the affidavits were not timely and should not be considered. They could have been obtained much earlier, through the exercise of due diligence and attached to the 2011 Application. “The purpose of Rule 59(e), SCRCP, to alter or amend the judgment [,] is to request the trial judge to ‘reconsider matters properly encompassed in a decision on the merits.’ ” *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citation omitted). Thus, a party may not present arguments or offer evidence that was not presented before judgment was entered. *Spreeuw v. Barker*, 385 S.C. 45, 69, 682 S.E.2d 843, 855 (Ct.App. 2009) (“Father's Form 2106–EZ appears only as an attachment to his Rule 59(e) motion. Accordingly, it cannot be considered on appeal”); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not”); *Natural Resources Defense Council v. U.S. E.P.A.*, 705 F.Supp. 698, 701 (D.D.C.1989), *vacated on other grds.*, 707

²² Additionally, Robertson ignores that this Court summarily denied the petition in *Alkebulanyahh*, on October 20, 2010. Further and contrary to Robertson's assertion, the State did not assert that Alkebulanyahh should be required to file a second PCR application. The State simply argued on the cited pages that the petitioner had not shown that other remedies, such as PCR, were inadequate for asserting the claims he belatedly sought to raise and it pointed out that he a pending PCR appeal.

F.Supp. 3 (D.D.C.1989) (“Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier”). Further, neither the untimely affidavits nor anything in the record contradicts the PCR judge’s findings in denying the 59(e) motion that “Michael Brown has death penalty trial experience. Only one of the two attorneys appointed in a death penalty case has to be qualified in death penalty trials.” **Supp. App. 3.**

Also, it must be remembered that his complaint is that a statutory right was violated. There is no presumed prejudice from the failure to follow a technical requirement of a statute that is not a right guaranteed by the United States or State Constitutions. As a result, it was not clear error for the PCR judge to find (**App. 4437-41**) that Robertson would have to show not only that there was non-compliance with the statute, but also prejudice to him resulting from the non-compliance in order to gain relief in this action. *See Reed v. Farley*, 512 U.S. 339, (1994) (state court's failure to observe the 120-day speedy trial rule of the Interstate Agreement on Detainers is not cognizable under the federal habeas corpus statute when the defendant registered no objection to trial date at time it was set and suffered no prejudice attributable to the delayed commencement); *United States v. Timmreck*, 441 U.S. 780 (1979) (a guilty plea conviction is not subject to collateral attack when all that can be shown is a formal violation of Rule 11 because such a violation is neither constitutional nor jurisdictional).²³

Further, the PCR judge’s finding that there was no prejudice to Robertson even assuming

²³ *Accord Hutto v. State*, 387 S.C. 244, 250, 692 S.E.2d 196, 199 (2010) (“While we do not believe Agent Harris's disclosure violates the statute, assuming *arguendo* there was a violation, such violation would not warrant the exclusion of the evidence obtained from the information disclosed. Section 24-21-290 only creates a statutory privilege and does not implicate a constitutional right; therefore, the exclusionary rule does not apply”); *State v. Huntley*, 349 S.C. 1, 562 S.E.2d 472 (2002) (“Exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the defendant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures”).

arguendo that Mr. Brown was not properly qualified to represent Robertson under § 17-27-160 is supported by the record. **App. 4437-41; Supp. App. 2-5**. As discussed in the next section, he did not offer any proof of counsel's ineffectiveness, apart from his self-serving assertion thereof. Rather, he merely asserts that new counsel would have handled the matter differently, which does not meet his burden. Also, § 17-27-160 was enacted "for the purpose of opting-in the Chapter 154 of the AEDPA (Antiterrorism and Effective Death Penalty Act of 1996)." *Tucker v. Moore*, 56 F. Supp. 2d 611, 612 (1999), *aff'd*, *Tucker v. Catoe*, 221 F.3d 600 (4th Cir. 2000), *cert. den.*, 531 U.S. 1054 (2000).²⁴ South Carolina has not yet been determined to have satisfied the opt-in requirements, so as to benefit from the capital case specific provisions of AEDPA. However, the failure to appoint counsel who is qualified under § 17-27-160 prevents it from doing so in this case. This is a benefit to Robertson. *See Tucker*, 56 F. Supp. 2d at 612. As a result, the PCR judge correctly found, in the alternative, that Robertson had to prove prejudice from any defect in Mr. Brown's qualifications under § 17-27-160 and that he failed to do so.

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

Additionally, the record supports PCR judge's finding that Robertson did not offer proof that original collateral counsel were ineffective under *Strickland*. Specifically, Respondent would note that Robertson has never presented any *evidence* to support his claim that "initial PCR counsel conducted no investigation, and neither sought nor secured any assistance from investigators or expert witnesses." **Petition, p. 15**. His only proof is his current PCR counsel's assertion that - in hindsight and with the knowledge that those allegations raised by Robertson's original PCR attorneys

²⁴ While this Court granted state habeas relief to Tucker, it did so on other grounds. *See Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001).

were unsuccessful - they would have handled the case differently, which is insufficient to justify the filing of a time-barred, successive PCR Application. **App. 4438.** See *In re Reno*, 283 P.3d 1181, 1211 (Cal. 2012) (Court will not consider on the merits successive habeas corpus petitions attacking the competence of prior habeas corpus counsel which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had prior habeas corpus counsel had similar advantages); cf. *State v. Balliette*, 805 N.W.2d 334, 346-47 (Wis. 2011), cert. denied, 132 S. Ct. 825 (2011). Accord *Strickland*, 466 U. S. at 689 (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way”). See also *id* (“Judicial scrutiny of counsel’s performance must be highly deferential;” and a reviewing “court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance”).

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

by the initial PCR attorneys. **Supp. App. 2.**²⁵

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

Robertson's reliance is misplaced. First, he apparently misreads *In re Brown* as referring to two separate criminal acts, when it appears that the 2011 plea was to the July 2007 incident. *Id.* Second, although counsel represented Robertson from September 2005 until the March 24, 2008 Order of Dismissal was filed, the evidentiary hearing at which counsel represented Robertson was

²⁵ Moreover, counsel's allegations were very similar those raised in death penalty PCR cases where the inmates have been represented by attorneys whom Robertson's current counsel would concede are competent. *Id.* Also, Robertson erroneously suggests that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases establish the appropriate standard for counsel's investigation and representation of trial, appellate and collateral counsel. However, the PCR judge properly found that his contention is wrong. **App. 4439-40**. The ABA Guidelines are merely guidelines for trial and appellate counsel, at best, and trial counsel need not comply with them to render objectively reasonable representation. *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009). Indeed, Justice Alito wrote a separate concurring opinion in *Bobby*, to more forcefully emphasize his "understanding that the [majority] opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment." *Id.* at 20 (Alito, J., concurring). Further, "[t]he views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. *It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution.*" *Id.* (emphasis added). These Guidelines do not apply to collateral counsel's performance because there is no Sixth Amendment right to counsel in PCR, as Robertson concedes.

held on January 29-31, 2007. **App. 3263-3650**. Thus, counsel's investigation and representation at the hearing concluded well before the July 2007 resisting arrest.

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

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

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

Supp. App. 2.

This analysis was correct because courts have not found *per se* prejudice where trial counsel was allegedly suffering from health or substance abuse problems. *E.g.*, *Bellamy v. Cogdell*, 974 F.2d 302 (2nd Cir. 1992) (given the varying effects health problems can have on an individual's ability to function, claims of ineffective assistance based on attorney illness are best suited to the fact-specific prejudice inquiry mandated by Strickland); *McDougall v. Dixon*, 921 F.2d 518, 535 (4th Cir. 1990) (no showing legal prescription drugs taken by attorney prejudiced defendant; defendant must show medication precluded effective representation); *Smith v. Ylst*, 826 F.2d 872 (9th Cir. 1987) (better to view attorney's actual conduct at trial rather than identify presumptive mental health issues); *People v. Garrison*, 765 P.2d 419 (Cal. 1989) (en banc) (in addressing expert testimony that chronic

alcoholics cannot think through problems or make judgment calls, rejecting *per se* ineffectiveness in favor of analysis of the attorney's performance in court). *Accord Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (Court focused not only upon alcohol and substance abuse, but counsel's performance at trial). Further, the record supports the factual findings because it reflects that counsel actively and competently participated throughout the original PCR by amending the Application, examining and cross-examining witnesses, and making appropriate objections and arguments. **App. 3263-3650.**

II. The PCR judge's Order does not violate federal law.

In section II of the Petition, Robertson contends that the PCR judge's Order contains several findings that violate federal law. His complaints are not meritorious. He maintains that the PCR judge erroneously faulted him "for failing to prove facts outside the existing record without providing him with a hearing and the investigative tools with which to prove them."²⁶ Contrary to his representations, the PCR judge addressed his due process lack of meaningful access argument in this regard (**App. 4441-45**) and this Court must reject it for several reasons.

He concedes, as he must, that "there is no Sixth Amendment right to PCR proceedings, and that state PCR is provided as a matter of legislative grace rather than of federal constitutional right. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). Thus, his claim that South Carolina's PCR procedures violate due process can only be properly viewed as a claim that those procedures violate procedural due process. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2312, 2316-22 (2009) (inmate's claim that he was denied access to testing necessarily involved

²⁶ The assertions that he was not given an adequate opportunity to prove these matters is based solely upon his current attorneys' representations as officers of the court. His position is curious, to say the least, in light of his challenge to the PCR judge's reliance upon the representations of Respondent's counsel as an officer of the court.

a claimed violation of procedural due process since he did not have a substantive right to DNA testing). In light of the broad discretion that the states are afforded in enacting post-conviction review legislation, a procedural due process challenge in this context faces a formidable hurdle. *See Finley*, 481 U.S. at 559 (rejecting the contention that "when a State chooses to offer help to those seeking relief from [their] convictions, the Federal Constitution dictates the exact form such assistance must assume"). A State's PCR procedures may be upset by reviewing courts "only if they are *fundamentally inadequate* to vindicate the substantive rights provided." *Osborne*, 129 S. Ct. at 2320 (emphasis added); *Skinner v. Switzer*, 131 S.Ct. 1289, 1293 (2011) (the Court's analysis in *Osborne* "left slim room for the prisoner to show that the governing state [PCR procedure] denies him procedural due process"). Respondent submits that the PCR judge correctly found that "South Carolina's PCR procedures, and particularly those procedures applicable to capital PCR applicants such as Robertson, are not 'fundamentally inadequate to vindicate' a defendant's right to challenge his conviction or sentence." **App. 4443.**²⁷ Another problem with this portion of Robertson's due process argument is that it is overly broad, since, if accepted, merits hearings will be required on every successive PCR Application asserting that initial PCR counsel was ineffective in failing to pursue a newly-raised claim(s) and there would be extremely little - if any - incentive for every unsuccessful applicant not to file a successive application because it could be filed with impunity. *Hiott v. State*, 381 S.C. 622, 628-29, 674 S.E.2d 491, 494-95 (2009) (holding that Rule 11, SCRCR, sanctions do not apply to PCR in light of the rule against successive applications in *Aice* and the

²⁷ Likewise, the record supports the findings that "[c]ounsel were appointed for him well before his hearing; appointed counsel were qualified in accordance with § 17-27-160(B) and Chief Justice Toal's Memorandum ...; he raised the issues that he wished to pursue at an evidentiary hearing, with the advice and assistance of counsel; and the PCR judge's adverse result was subject to review by the South Carolina Supreme Court." **App. 4443.**

PCR statute of limitations which prevent abusive filings).²⁸

Robertson further contends that the PCR judge's finding that "the only way for it to determine whether prior collateral counsel's performance was incompetent is to hold an evidentiary hearing, where prior collateral counsel could testify as to their investigation and what issue(s) they may have investigated but did not pursue at the evidentiary hearing" (App. 4441) is "irreconcilable" with findings elsewhere in the Order that original collateral counsel were both qualified and competent. **Petition, pp. 19-20** (citing App. 4433-34; 4437-38). These findings are neither irreconcilable nor do they violate federal law. As discussed, the finding that Mr. Brown was qualified was based upon the facts that Judge Few's September 9, 2005 Order appointing Mr. Brown specifically states that "[t]he defendant contends that he is indigent and in need of an attorney as contemplated by law;" and that counsel's appointment was confirmed at the September 23, 2005 hearing, at which Mr. Brown, Robertson and counsel for Respondent were present.

Thus, although Judge Few's Order appointing counsel did not expressly rely upon the Chief Justice's Memorandum, the *presumption* (as opposed to speculation, as Robertson asserts) is that Judge Few appointed in accordance with § 17-27-160(B) and the Chief Justice's Memorandum because "[t]rial judges are presumed to know the law and to apply it in making their decisions," *Walton*, 497 U.S. at 653, and the law is that statutorily qualified counsel must be appointed in capital cases. This presumption is analogous to the presumption of regularity of criminal convictions and is consistent with state and federal law. *See Parke v. Raley*, 506 U.S. 20, 30, 32 (1992) (noting that the "presumption of regularity" accompanying prior convictions offered for purposes of sentence

²⁸ These safeguards would be emasculated, if not completely eliminated by adopting the position suggested by Robertson. As a result, Respondent would ask the Court to overrule *Hiott* and permit Rule 11 sanctions, if it decides to allow successive applications claiming ineffectiveness of initial PCR counsel.

enhancement prevents a defendant from merely pointing to a missing or silent trial transcript to prove the invalidity of the prior conviction on collateral review and explaining that this presumption makes it appropriate to assign burden of proof to defendant where he collaterally challenges constitutionality of prior plea); *Young v. Brabham*, 105 S.C. 62, 89 S.E. 472 (1916) (presumption of regularity applies to court of common pleas and “irregularities must be shown”); *Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995) (regularity of proceedings in general sessions court is presumed); *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 26-27, 542 S.E.2d 723, 726 (2001) (finding admission of incompetent evidence harmless and reversing court of appeals’ finding that presumption of regularity did not apply to bench trial “[b]ased on the lack of competent evidence of motive and the lack of reference to the incompetent evidence in the trial judge’s order). Likewise, the finding of competence of collateral counsel’s performance is based upon the judicial deference due to an attorney’s performance and Robertson’s failure to present evidence rebutting *Strickland*’s “‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Strickland*, 466 U. S. at 689. Current PCR counsel has merely asserted that certain claims were overlooked, which is insufficient to warrant a hearing under *Aice*. See also *In re Reno*, 283 P.3d at 1211. Also, the only way for these presumptions to be overcome - in light of the present record - would be for the PCR judge to hold a hearing to determine if initial collateral counsel’s performance was ineffective under *Strickland*. **App. 4441.**

III. Robertson’s remaining challenges to the PCR judge’s Order are not meritorious.

In section III of the Petition, Robertson claims that the PCR judge erred in finding that he had waived his right to qualified counsel; that the PCR judge erroneously found, in the alternative, that he had to prove actual prejudice from the appointment of counsel who were not statutorily qualified;

and that the PCR judge erroneously found that laches barred relief. His claims lack merit.

A.1. There was no finding that Robertson waived his right to competent counsel.

The first of these arguments, as well as the finding that the Application was barred by §§ 17-27-45(A) and (C), are addressed in section I.2.C., *supra*, and Respondent submits that it lacks merit for the previously-stated reasons and for the reasons stated in the Order.²⁹

2. The PCR judge's finding that the 2011 Application is barred by laches is not clearly erroneous in light of the present record.

Further, the finding that laches barred the 2011 Application is not clearly erroneous given the present record. **App. 4446-47.** The PCR judge found that:

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

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

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

²⁹ Contrary to Robertson's misunderstanding of the PCR judge's Order, the PCR judge did not find that Robertson had waived his right to competent counsel. Rather, the PCR judge correctly found (**App. 4426-28**) that the statute of limitations barred his right to bring the 2011 Application because he could and should have objected to counsel's alleged lack of qualifications at the time of the September 23, 2005 hearing, since he learned counsel's qualifications at that time, "and not one year following the appointment of his present attorneys attack" (as Robertson argues). **App. 4428.** His claim ignores the distinction between a waiver of his right to statutorily-qualified counsel and the statute of limitations bar of his right to challenge counsel's qualifications years after the proper time for doing so had passed.

as a result, the supposed deficiency in counsel's qualifications may not be asserted as a basis for a successive PCR Application and is barred by laches.

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

B. The PCR judge's alternative finding that Robertson was required to show that he was prejudiced by the failure to appoint qualified counsel was not clearly erroneous.

As discussed, in the absence of proof by Robertson that Mr. Brown was not statutorily-qualified under § 17-27-160(B), the PCR judge found that initial PCR counsel was qualified under that section. Alternatively, he found that Robertson was required to prove that he was prejudiced by the failure to comply with the requirements of that section. Respondent has addressed this argument in section I.2.D., *supra*, and Respondent submits that Robertson's challenge to the alternative finding lacks merit for the previously-stated reasons for the reasons stated in the Order and the Order denying the Rule 59(e) motion. **App. 4434-41; Supp. App. 2-5**

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

Finally, Respondent submits that Robertson has waived any challenge to the PCR judge's finding that Robertson's substantive claims for relief (allegations 10 & 11(c)-10 & 11(f)) were barred in PCR by not challenging the judge's ruling on certiorari. *E.g.*, *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000). Alternatively, Respondent submits that the PCR judge's ruling was correct. *See* S.C. Code Ann. § 17-27-20(b) (1985); *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520

(1993); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983).

CONCLUSION

Respondent submits that the Court should deny the Petition for Writ of Certiorari for the above-stated reasons.

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, South Carolina 29211
(803) 734-6305

January 25, 2013.

By: 
ATTORNEYS FOR RESPONDENT