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**MAR 23 2020**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2019-000529

ABDIYYAH BEN ALKEBULANYAHH,  
AKA TYREE ROBERTS.....PETITIONER,

v.

STATE OF SOUTH CAROLINA.....RESPONDENT.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

**LINDSEY S. VANN**  
SC Bar No. 101408  
**EMILY C. PAAVOLA**  
SC Bar No. 77855  
Justice 360  
900 Elmwood Ave., Suite 200  
Columbia, SC 29201  
(803) 765-1044  
*Counsel for Petitioner*

Petitioner, Abdiyyah ben Alkebulanyahh, submits the following reply to Respondent's Return to Petition for Writ of Certiorari. Respondent advances an interpretation of *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), that would deny Petitioner a remedy for his initial post-conviction relief ("PCR") counsel's failure to meet the statutory qualification requirements despite the fact that two other petitioners in materially indistinguishable positions were allowed to proceed. Respondent does so with "unclean hands" as, throughout this litigation, counsel for the State have opposed Petitioner's (and other similarly situated inmates') requests for a remedy for statutorily unqualified PCR counsel. In effect, Respondent asks this Court to penalize Petitioner for raising PCR counsel's undisputed lack of qualifications too soon (i.e., before this Court created the *Robertson* remedy). For these reasons, this Court should grant certiorari and remand for further proceedings.

**I. *Robertson*, for the First Time, Held that Unqualified Initial PCR Counsel can Constitute "Sufficient Reason" to Allow a Permissible Second PCR Application Contrary to Respondent's Repeated Arguments Against Providing a Remedy at All.**

Respondent's argument that *Robertson* did not create a new avenue for relief cannot withstand even minimal scrutiny; in 2016, this Court held for the first time, that an "allegation that [a petitioner] was denied a state-created right to qualified counsel constitutes a 'sufficient reason' to permit a successive PCR application under 17-27-90." *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 35 (2016). Prior to the *Robertson* decision, all indications were that a successive PCR application was not an available mechanism for Petitioner to seek relief for unqualified PCR counsel.

That was definitely Respondent's position because, until the decision in *Robertson*, counsel for the State consistently (and often indignantly) argued that a death sentenced inmate had no remedy for their initial PCR counsel's alleged failure to meet the qualification requirements, other

than (possibly) a state habeas petition.<sup>1</sup> In its brief in *Robertson*, Respondent asserted that this Court had previously deemed a successive PCR application unavailable when challenging PCR counsel's qualifications in this and Thomas Ivey's capital cases. Brief of Respondent, *Robertson v. State*, at 38 (June 8, 2015) ("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."). Similarly, in Petitioner's case, Respondent opposed Petitioner's request for remand for additional PCR proceedings with qualified PCR counsel, arguing that even if initial PCR counsel were not qualified under the statute and were ineffective, "there is no basis for giving Petitioner a second bite at the [PCR] apple." App. 278-79. In short, Respondent asserts Petitioner should have known to file a second-in-time PCR application over five years prior to this Court's decision in *Robertson*, ignoring not only the fact that Petitioner repeatedly raised the issue of initial PCR counsel's lack of qualifications,<sup>2</sup> but also that Respondent denied such a remedy existed until this Court ruled to the contrary in *Robertson*. Respondent's obstinance should not be rewarded. *Rodante v. University of South Carolina*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 ("In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct.").

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<sup>1</sup> In *Robertson*, Respondent asserted: "In addition to the exceptions to § 17 27 90 [*sic.*] and *Aice* recognized by this Court, South Carolina inmates potentially have the ability to pursue the remedy of state habeas corpus in this Court's original jurisdiction, provided that they can present a claim that satisfies the demanding prerequisites for relief." Brief of Respondent, *Robertson v. State*, at 33 (June 8, 2015).

<sup>2</sup> For a full discussion of Petitioner's three attempts to obtain a remedy during the appeal of his post-conviction proceedings (through a Motion to Remand, a Petition for Writ of Certiorari, and a Petition for Writ of Habeas Corpus), see Petitioner's Petition for Writ of Certiorari filed in this action at pages 3-4.

Respondent also ignores the best evidence that *Robertson* said something new: this Court’s grant of capital petitioner Stephen Stanko’s motion to remand for additional PCR proceedings (after *Robertson* was decided), when the Court denied the same motion (made in the same posture) when filed by Petitioner prior to *Robertson*.<sup>3</sup> See Order, *Stanko v. State*, No. 2017-000211 (S.C. Dec. 14, 2017); App. 245-75. If *Robertson* was not new, there is no justification for treating the two indistinguishable motions differently. Because Petitioner filed his second-in-time PCR application while *Robertson* remained pending, this Court should find it timely and remand for proceedings pursuant to *Robertson*.

**II. Of Three Capital Petitioners Seeking Relief Under *Robertson*, Respondent Seeks to Deny Only Petitioner a Remedy for His Initial PCR Counsel’s Lack of Qualifications.**

Adoption of Respondent’s arguments would leave Petitioner as the only South Carolina capital petitioner appointed unqualified initial PCR counsel without a remedy. Since *Robertson*, this Court has remanded two cases for additional PCR proceedings (a remedy Petitioner also previously requested) to determine if his initial PCR counsel were qualified and, if not, whether he was prejudiced. The *Robertson* and *Stanko* cases both remain pending in the lower courts to make the determinations required under *Robertson*. Petitioner is the only capital defendant who has challenged his PCR counsel’s qualification but has (thus far) been denied the ability to present any evidence on their qualifications and the resulting prejudice. This result cannot be justified when Petitioner filed his second-in-time PCR application seeking relief under *Robertson* even before the case was decided.

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<sup>3</sup> In *Stanko*, Respondent argued that remand was not appropriate because *Robertson* created a “vehicle . . . for challenging the qualification of appointed PCR counsel” by way of a second or successive PCR application. Return to Motion for Remand, *Stanko v. State*, No. 2017-000211 (Oct. 13, 2017). This Court rejected Respondent’s argument and granted remand for Stanko to seek relief based on his allegations of unqualified PCR counsel.

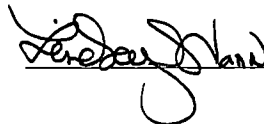
**CONCLUSION**

For the reasons stated above and in the Petition for Writ of Certiorari, this Court should grant certiorari to correct the inequity created—especially given Petitioner’s consistent attempts to seek a remedy before such a remedy even existed—by denying Petitioner access to a remedy for his initial PCR counsel’s lack of qualification. Ultimately, this Court should remand for a hearing on initial PCR counsel’s qualifications and, if necessary, resulting prejudice.

Respectfully submitted,

LINDSEY S. VANN  
Justice 360  
900 Elmwood Avenue, Suite 200  
Columbia, SC 29201  
803-765-1044

EMILY C. PAAVOLA  
Justice 360  
900 Elmwood Avenue, Suite 200  
Columbia, SC 29201  
803-765-1044



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March 20, 2020.

STATE OF SOUTH CAROLINA  
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MAR 23 2020

Appeal from Beaufort County

S.C. SUPREME COURT

Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2019-000529

Abdiyyah ben Alkebulanyahh, #6012  
a/k/a Tyree Roberts,

PETITIONER,

V.


State of South Carolina,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Reply to Response to Petition for a Writ of Certiorari was served by first class United States mail, postage prepaid, this 20<sup>th</sup> day of March, 2020, upon the following:

Melody Brown  
William Joseph Maye  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211



Lindsey S. Vann