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South Carolina Post-Conviction Relief: Practical Considerations and Procedures from a Prisoner's Perspective

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SOUTH CAROLINA POST-CONVICTION RELIEF: PRACTICAL CONSIDERATIONS AND PROCEDURES FROM A PRISONER'S PERSPECTIVE

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I. INTRODUCTION

In order to understand post-conviction relief (PCR), it is first necessary to understand where it came from. Thus, this discussion must begin with the law of habeas corpus and how PCR came to "branch off" from this area of the law.[1]

Habeas corpus, also known as the "Great Writ,"[2] is a mode of procedure for obtaining a judicial determination of the validity of an individual's incarceration.[3] While the writ of habeas corpus predates the founding of this Nation,[4] it was not forgotten by the Founding Fathers and was given explicit recognition when the United States Constitution was written.[5] It was incorporated in the Judiciary Act of 1789[6] and has had many patriotic descriptions both before and since becoming a staple of American jurisprudence.[7] In the eighteenth century, Sir William Blackstone called habeas corpus "the most celebrated writ in the English law,"[8] and this sentiment has been echoed for all of its history in American jurisprudence.[9] The appeal of habeas corpus to prisoners is that it is designed to alleviate restraints contrary to

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1. For an excellent discussion of the history of habeas corpus, see generally *Fay v. Noia*, 372 U.S. 391, 399–414 (1963), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977) (citations omitted).

2. *See* Scott R. Grubman, *What a Relief? The Availability of Habeas Relief Under the Savings Clause of Section 2255 of the AEDPA*, 64 S.C. L. REV. 369, 369 (2012) (citing Jennifer Ponder, *The Attorney General's Power of Certification Regarding State Mechanisms to Opt-in to Streamlined Habeas Corpus Procedure*, 6 CRIM. L. BRIEF, Fall 2010, at 38, 39); *see also* BLACK'S LAW DICTIONARY 778 (9th ed. 2009) (defining habeas corpus as "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal").

3. *See Fay*, 372 U.S. at 401–02.

4. *See generally* Grubman, *supra* note 2, at 371–78 (citations omitted) (providing a brief history of habeas corpus).

5. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

6. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

7. *See, e.g.*, *Fay*, 372 U.S. at 399–400 (citations omitted) (providing examples of expressions used to describe the writ).

8. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (photo. reprint 1978) (1783).

9. *See generally* Ezra Spilke, Note, *Adjudicated on the Merits?: Why the AEDPA Requires State Courts to Exhibit Their Reasoning*, 39 J. MARSHALL L. REV. 995, 998–1000 (2006) (providing a brief history of habeas corpus in American law).

fundamental law—such as the United States Constitution—and inquire into the legality of an individual's detention.[10] "[I]f the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."[11]

Originally, the writ of habeas corpus was available only to federal prisoners.[12] This limitation changed after the Civil War when Congress amended the Habeas Corpus Act to allow state prisoners to pursue habeas relief.[13] This amendment was passed partly out of fear that southern states would target freed slaves, who would need adequate redress.[14] Several changes occurred, albeit slowly, over the next eighty years from the amendment in 1867 to the middle of the twentieth century regarding the claims cognizable on habeas review and the jurisdiction of the courts to entertain them.[15] Most relevant here is the United States Supreme Court's increasing concern in the middle of the twentieth century regarding the lack of a sufficient avenue for state prisoners to address alleged violations of fundamental law.[16] These concerns of exhaustion and comity came to somewhat of a head (or quasi-resolution) in the case of *Case v. Nebraska*.[17]

In *Case*, the petitioner alleged that he was "unconstitutionally denied the assistance of counsel" when he entered a guilty plea to a burglary charge.[18] The Nebraska Supreme Court recognized that, if true, the petitioner's claim would establish a violation of the United States Constitution but held that, in Nebraska, habeas relief was not available if the court imposing the sentence had jurisdiction to do so and the sentence was within the power of the court.[19] The United States Supreme Court "granted certiorari to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees."[20] Because Nebraska enacted a statute providing a post-conviction procedure before the Court could answer this question, the case was remanded in light of the supervening statute and the question was never addressed.[21] In a concurring opinion, however, Justice Clark noted the "great variations in the scope and availability of such remedies" among the states and "a tremendous

10. *See Fay*, 372 U.S. at 409.
11. *Id.* at 402.
12. *See id.* at 409 (citing *Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845)).
13. Spilke, *supra* note 9, at 999 (citing Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385–86 (codified as amended at 28 U.S.C. §§ 2241–2255 (2006))).
14. *Id.*
15. *See id.* at 999–1000 (citing 28 U.S.C. § 2254(d) (1995)).
16. *See* Simpson v. State, 329 S.C. 43, 45, 495 S.E.2d 429, 430 (1998).
17. 381 U.S. 336 (1965).
18. *Id.* at 336.
19. *Id.* at 336–37 (quoting Case v. State, 129 N.W.2d 107, 112 (Neb. 1964), *judgment vacated by Case*, 381 U.S. 336).
20. *Id.* at 337.
21. *Id.* (citing H. 836, 1965 Leg., 75th Sess. (Neb. 1965)).

increase in habeas corpus applications in federal courts" as a result thereof.[22] He applauded Nebraska for enacting a PCR statute that allowed prisoners to "air out" their claims and encouraged other states to follow this lead.[23] As a result, "the Commissioners on Uniform State Law promulgated the Uniform Post-Conviction Procedure Act."[24]

South Carolina adopted a version of the Uniform Post-Conviction Procedure Act with the enactment of what would eventually become sections 17-27-10 to -160 of the South Carolina Code (PCR Act).[25] The General Assembly intended the PCR Act to take the place of "'all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence' and 'shall be used exclusively in place of them.'"[26] PCR is "not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."[27] The PCR process was specifically designed to allow for the inquiry into relevant facts surrounding a prisoner's allegations and, where needed, to provide a hearing for factual development and claim clarification.[28] As the South Carolina Supreme Court noted in *Al-Shabazz v. State*,[29] "The courts, the state Office of the Attorney General, the state Office of Appellate Defense, private attorneys, prison officials, and many inmates have grown familiar with a well-defined process developed under the PCR Act during the past thirty years."[30]

II. DIRECT APPEAL IN RELATION TO PCR

Direct appeal is an important step to consider prior to pursuing PCR. In contrast to PCR, claims raised on direct appeal usually revolve around the

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22. *Id.* at 338 (Clark, J., concurring).

23. *Id.* at 340 (Brennan, J., concurring) (internal quotation marks omitted).

24. Simpson v. State, 329 S.C. 43, 45, 495 S.E.2d 429, 430 (1998); *see also* UNIF. POST-CONVICTION PROCEDURE ACT, 11 U.L.A. 666–871 (2003) (providing the 1966 Act).

25. *See Simpson*, 329 S.C. at 46, 495 S.E.2d at 430–31 (citing S.C. CODE ANN. §§ 17-27-10 to -160 (2003) (original version at S.C. CODE ANN. §§ 17-601 to -612 (Supp. 1970))).

26. Pennington v. State, 312 S.C. 436, 438, 441 S.E.2d 315, 315–16 (1994) (quoting S.C. CODE ANN. § 17-27-20 (1976)), *abrogated by Simpson*, 329 S.C. 43, 495 S.E.2d 429.

27. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (citing Peeler v. State, 277 S.C. 70, 71, 283 S.E.2d 826, 826 (1981) (per curiam); *see also* Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (expressing that this sentiment is "universally held").

28. *See* Delaney v. State, 269 S.C. 555, 556, 238 S.E.2d 679, 679 (1977) (per curiam) (citing Coardes v. State, 262 S.C. 493, 498, 206 S.E.2d 264, 266 (1974); Chambers v. State, 262 S.C. 202, 205–06, 203 S.E.2d 426, 428 (1974); Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973)); *see also Simpson*, 329 S.C. at 45, 495 S.E.2d at 430 (stating that the Uniform Post-Conviction Procedure Act was written, in part, "to bring together and consolidate into one simple statute all the remedies, beyond those that are incident to the usual procedures of trial and [appellate] review, which are at present available for challenging the validity of a sentence of imprisonment" (quoting UNIF. POST-CONVICTION PROCEDURE ACT § 1 cmt., 11 U.L.A. 667 (2003) (enacted 1966) (alteration in original) (internal quotation marks omitted)).

29. 338 S.C. 354, 527 S.E.2d 742 (2000).

30. *Id.* at 363, 527 S.E.2d at 746–47.

assertion that the trial court erred in ruling upon a prior motion or objection.[31] For example, issues often raised in a direct appeal are allegations that the trial judge erred in refusing to grant a motion for a mistrial or claims that a defendant's motion to suppress evidence was erroneously decided.[32] In PCR, the prisoner "attempts to show that his or her attorney erred in a manner that a reasonably proficient attorney would not, and that the error prejudiced his case."[33] Therefore, PCR claims are generally framed to allege a violation of one's Sixth Amendment right to the effective assistance of counsel.[34] While direct appeals focus primarily on claims that the presiding judge in a case failed to make a correct ruling on an issue,[35] direct appeals may also include claims of ineffective assistance of counsel if they are evident from the record alone.[36] An action for PCR cannot be initiated while a direct appeal is pending.[37] Additionally, the one-year statute of limitations for filing a PCR action is tolled during the time a direct appeal is in progress.[38] Prisoners often find this "breathing room" provided by their time on appeal allows them time to better understand the PCR process should the reviewing court deny their appeal.

Historically, the distinction between an appeal and a PCR action is "based on the fact that an appeal [is] a continuation of the original criminal proceeding, whereas [PCR is] a separate civil action attacking the result in the criminal case."[39] Also, "appeal courts are bound by the factual record developed by the trial court," but PCR courts "may undertake independent fact finding and expand the record beyond what was generated in the trial court."[40]

Deciding whether to pursue a direct appeal is not always an easy decision for a prisoner to make, and ideally, the decision should be made in consultation with the prisoner's plea or trial counsel prior to, or immediately after, a conviction. A prisoner, however, does not have all the time in the world to meet with counsel once he is within the South Carolina Department of Corrections (SCDC). The several days following a prisoner's date of conviction are vital to any prisoner wishing to appeal a recently received sentence.

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31. *See id.* at 363, 527 S.E.2d at 747.

32. *See, e.g.*, State v. Spears, 393 S.C. 466, 472–73, 713 S.E.2d 324, 327 (Ct. App. 2011) (noting that defendant claimed the trial court erred in denying motions to suppress evidence and a motion for a mistrial).

33. *Al-Shabazz*, 338 S.C. at 364, 527 S.E.2d at 747.

34. *See id.* at 363, 527 S.E.2d at 747 (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993); Richardson v. State, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993); Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (per curiam)).

35. *See id.*

36. *See* United States v. Gigley, 213 F.3d 509, 515 n.2 (10th Cir. 2000) (citing United States v. Carter, 130 F.3d 1432, 1442 (10th Cir. 1997)).

37. *Al-Shabazz*, 338 S.C. at 363, 527 S.E.2d at 747 (citing S.C. R. CIV. P. 71.1(b)).

38. *See* S.C. CODE ANN. § 17-27-45(A) (2003).

39. MARK E. CAMMACK & NORMAN M. GARLAND, ADVANCED CRIMINAL PROCEDURE IN A NUTSHELL 467 (2d ed. 2006).

40. *Id.*

South Carolina requires that a notice of appeal be filed "within ten (10) days after the sentence is imposed,"[41] so an individual wishing to do so—if his counsel has not—may already be on dangerous grounds. Reception and evaluation at Kirkland Correctional Institution is intended to be completed within fourteen days,[42] but the process frequently lasts upwards of two months. During this time period, prisoners typically do not leave their assigned cells except to undergo a variety of tests and evaluations, with time set aside for meals and showers.[43] Therefore, prisoners who wish to inquire into the appropriateness of an appeal often have a hard time doing so because attempts to obtain leave to use the institutional law library are often met with skepticism. Guards typically assume prisoners are simply attempting to liberate themselves from their restrictive living conditions and deny or ignore legitimate requests and inquiries. Failure of a prisoner to timely file a notice of appeal may require a prisoner to demonstrate that he attempted to do so in a later PCR hearing as opposed to automatically having a right to appeal at that time.[44] The procedure for pursuing a belated appeal is more thoroughly discussed later in this text.[45]

As important as a direct appeal may be to prisoners seeking relief after a criminal conviction, it is often difficult for a prisoner to pursue one on his own within ten days of being convicted and subsequently transferred to the SCDC. While SCDC policy provides that prisoners who can prove upcoming court deadlines should be provided with access to the law library to conduct research,[46] this access is rarely afforded at Kirkland Reception and Evaluation for two primary reasons. First, prisoners at this stage of incarceration are generally unaware of what steps need to be taken in order to ensure an appeal has been filed on their behalf or to file one themselves. Many come to prison with little more than the clothes they are wearing and a sentencing sheet. Thus, prisoners are not generally able to show that they have a court deadline in order to gain access to the law library.[47] Additionally, many guards are under the impression that a prisoner needs to present a letter from the court or its officers stating a deadline in order to be given access to the law library under this policy provision.[48] No consideration is given to the rules of court expressly stating time

41. S.C. APP. CT. R. 203(b)(2).

42. S.C. DEP'T OF CORR., No. OP-21.04, OPERATIONS MANUAL: INMATE CLASSIFICATION PLAN § 4 (Jan. 1, 2011) [hereinafter INMATE CLASSIFICATION PLAN].

43. *See id.* §§ 4–5.7.

44. *See* S.C. APP. CT. R. 243(i).

45. *See infra* Part XI.B.

46. S.C. DEP'T OF CORR., No. GA-1.03, GENERAL ADMINISTRATION MANUAL: INMATE ACCESS TO THE COURTS § 7.3 (June 1, 2004) [hereinafter GEN. ADMIN. MANUAL].

47. *But see* Magee v. Waters, 810 F.2d 451, 452 (4th Cir. 1987) (quoting Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975)) (citing Cookish v. Cunningham, 787 F.2d 1, 5 (1st Cir. 1986)) (stating that limited access to library in a short-term facility is not a denial of access to courts).

48. *See* GEN. ADMIN. MANUAL, *supra* note 46, § 7.6 ("Intake Inmates Access to the Law Library: Since inmates in intake status (IN) at a Reception and Evaluation Center are considered high custody, those inmates who have paperwork that shows a pending court deadline will be

frames for filing documents, pleadings, actions, and motions, such as the ten days a prisoner has to file a notice of appeal.[49]

Secondly, if a prisoner is able to show a deadline, it is doubtful that such a prisoner would know SCDC policy allows them access to the law library because all SCDC policies are kept in the institutional law library for prisoners to review.[50] Therefore, a prisoner would have to know that such a policy exists before being able to view it because the qualifications for receiving law library access are not commonly advertised. In short, if a prisoner's plea or trial counsel has not filed a notice of appeal and a prisoner wishes to evaluate the rules and procedures that apply to him in an attempt to determine whether he should do so, he is not likely to file a notice of appeal in the required time. Of course, if plea or trial counsel has already filed a desired notice of appeal, then such a prisoner will have no cause to worry. This, however, is not always the case.

All criminal defendants have a right to pursue a direct appeal,[51] and attorneys who proceed to trial are required to consult with their clients about their right to appeal.[52] However, absent exceptional circumstances, a defendant who pleads guilty is not required to be informed of his right to a direct appeal.[53] In addition to tolling the one-year statute of limitations for the filing of a PCR action[54]—time that applicants wisely use to prepare for a possible PCR—upon the filing of a direct appeal, the South Carolina Office of Indigent Defense will appoint counsel to represent an indigent prisoner,[55] and counsel will provide the applicant with a transcript, or transcribed copy, of the proceedings below.[56] Prisoners do not have a right to transcripts on collateral review like PCR.[57] Furthermore, although an appellant does not have a federal or state constitutional

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afforded use of the law library. If an intake inmate does not have such paperwork, institutional personnel should contact the Office of General Counsel for guidance.").

49. *See generally* S.C. APP. CT. R. 203(b)(2) (stating that a notice of appeal shall be filed within ten days after the sentence is imposed).

50. *See* GEN. ADMIN. MANUAL, *supra* note 46, § 2.1.

51. *See, e.g.*, Dennison v. State, 371 S.C. 221, 223, 639 S.E.2d 35, 35 (2006) ("Unlike review of a conviction, which is by direct appeal and is a constitutional right, review of a decision in a PCR matter is discretionary by way of a writ of certiorari.").

52. *See* Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000); *see also* Frazer v. South Carolina, 430 F.3d 696, 705 (4th Cir. 2005) (noting that Supreme Court precedent clearly establishes "[t]he necessity of counsel's consultation with the defendant regarding the fundamental decision of whether to appeal").

53. Jones v. State, 382 S.C. 589, 596, 677 S.E.2d 20, 23 (2009) (citing Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)).

54. *See* S.C. CODE ANN. § 17-27-45(A) (2003).

55. *See* S.C. CODE ANN. § 17-3-360(C) (Supp. 2012).

56. *See* Britt v. North Carolina, 404 U.S. 226, 227 (1971) (citations omitted) ("[T]here can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.").

57. Gunter v. State, 267 S.C. 486, 488, 229 S.E.2d 723, 724 (1976).

right to proceed pro se in an appeal from his criminal conviction,[58] the court may, in its discretion, allow an appellant to do so.[59]

If a prisoner's direct appeal is denied, he must then decide whether to pursue this denial to the next stage—namely, the South Carolina Supreme Court—by way of a petition for writ of certiorari.[60] Once an appeal is denied, a prisoner must file a petition for rehearing no later than fifteen days after an order is filed.[61] Filing a petition for rehearing is a prerequisite to filing a petition for writ of certiorari.[62] If such a prisoner wishes to pursue a petition for writ of certiorari where a petition for rehearing has been denied, a prisoner will have thirty days from the date of that denial to file a petition for writ of certiorari with both the clerk of the South Carolina Court of Appeals and the clerk of the South Carolina Supreme Court.[63] Review by writ of certiorari is discretionary and will only be exercised in exceptional circumstances where there are "special and important reasons" to do so.[64] As a result, only a handful of prisoners who pursue a petition for writ of certiorari actually have their cases reviewed.

If a prisoner elects not to pursue certiorari review, the remittitur[65] will be sent to both the lower court and the prisoner to notify them that the order of the court of appeals is final.[66] Generally, a prisoner must pursue all available state remedies in order to have his claim deemed exhausted for possible later federal habeas review.[67] In South Carolina, however, a prisoner need not pursue certiorari after direct appeal or after the denial of PCR in order for his claims to be deemed exhausted.[68]

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58. *See* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 163 (2000).

59. State v. Roberts, 364 S.C. 583, 588, 614 S.E.2d 626, 629 (2005).

60. *See generally* S.C. APP. CT. R. 242 (governing certiorari to the South Carolina Court of Appeals).

61. S.C. APP. CT. R. 221(a).

62. *See* S.C. APP. CT. R. 242(d)(1).

63. S.C. APP. CT. R. 242(c).

64. S.C. APP. CT. R. 242(b). The court is likely to grant certiorari

> [w]here there are novel questions of law; where there is a dissent in the decision of the [South Carolina] Court of Appeals; where the decision of the [South Carolina] Court of Appeals is in conflict with a prior decision of the [South Carolina] Supreme Court; where substantial constitutional issues are directly involved; and/or where a federal question is included and the decision of the [South Carolina] Court of Appeals conflicts with a decision of the United States Supreme Court.

Haggins v. State, 377 S.C. 135, 137 n.2, 659 S.E.2d 170, 170 n.2 (2008).

65. A "remittitur of record" is defined as "the action of sending the transcript of a case back from an appellate court to a trial court; the notice for doing so." BLACK'S LAW DICTIONARY 1409 (9th ed. 2009).

66. *See* S.C. APP. CT. R. 221(b).

67. *See* 28 U.S.C. § 2254(b)(1)(A) (2006); *see also* Rose v. Lundy, 455 U.S. 509, 522 (1982) (holding that a district court may only hear a habeas petition containing exhausted claims).

68. *In re* Exhaustion of State Remedies in Criminal & Post-Conviction Relief Cases, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990).

III. INCARCERATION

A. Classification

By definition, the vast majority of individuals who pursue PCR have been convicted and are incarcerated.[69] A prisoner's classification in the SCDC determines the restrictiveness of the prisoner's custody as well as the privileges and programs he will be afforded.[70] This Commentary is intended to examine all of the hardships, to the extent possible, of pro se litigants pursuing relief at PCR. As such, an examination of a prisoner's living condition and prison life in general is properly encompassed within the scope of this Commentary. The SCDC classification policy classifies a prisoner based on many subjective factors that are coupled with an abundance of discretion.[71] Consequently, a detailed analysis of the policy cannot be sufficiently accomplished without quoting the policy itself verbatim. However, this Section is merely intended to provide the reader with a brief overview of some of the more important aspects of the policy with which prisoners generally concern themselves. Upon reception into the SCDC, male prisoners are taken to and housed at Kirkland Correctional Reception and Evaluation Center—commonly referred to as Kirkland R&E[72]—and female prisoners are taken to the Camille Graham Reception and Evaluation Center.[73] Both facilities are in Columbia.[74] A prisoner's custody and classification levels are initially determined at these facilities.[75]

1. Custody Levels

The principal security-level designations in the SCDC are, from lowest to highest, Level 1A, Level 1B, Level 2, and Level 3.[76] A prisoner's security level is based on his behavioral and criminal history and is principally designed to be "behavior driven."[77] Factors used to determine a prisoner's security level include, but are not limited to: "[s]everity of current offense; [i]ncarcerative

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69. However, an applicant who is not incarcerated may also bring a PCR action. *See* Jackson v. State, 331 S.C. 486, 489, 489 S.E.2d 915, 916 (1997) ("[A]n applicant, regardless of whether he served jail time, may bring a PCR action if he demonstrates he is prejudiced by persistent results of his conviction." (citing Jones v. State, 322 S.C. 101, 102, 470 S.E.2d 110, 110 (1996); McDuffie v. State, 276 S.C. 229, 231, 277 S.E.2d 595, 596 (1981))).

70. *See* INMATE CLASSIFICATION PLAN, *supra* note 42, § 1.3.

71. *See id.* §§ 2.5, 2.6, 2.8, 2.9.

72. *See Kirkland Correctional Institution*, S.C. DEP'T CORRECTIONS, http://www.doc.sc.gov/institutions/kirkland.jsp (last visited May 4, 2013).

73. *See Graham (Camille Griffin) Correctional Institution*, S.C. DEP'T CORRECTIONS, http://www.doc.sc.gov/institutions/camille.jsp (last visited May 4, 2013).

74. *Id.*; *Kirkland Correctional Institution*, *supra* note 72.

75. *See* INMATE CLASSIFICATION PLAN, *supra* note 42, § 2.1; *see also id.* § 8 (providing security criteria); *id.* § 44 (providing custody criteria).

76. *See id.* § 3.1.

77. *Id.* §§ 2.6, 2.9 (internal quotation marks omitted).

sentence based on time to max out; [p]rior commitments over [ninety] days; [a]ssaultive disciplinary convictions; [e]scape history; . . . [d]etainers," and special considerations such as mental health and separation requirements.[78] The initial assessment to determine the impact or applicability of these factors, as well as other medical and educational considerations, takes place at Kirkland R&E upon a male prisoner's entry into the SCDC.[79] Although a prisoner has "no right to any particular custody level,"[80] a prisoner who does not feel that he has been assigned the proper custody level may appeal a classification decision through the agency's grievance system.[81]

2. Level 1A and Level 1B

There are a total of over 2,600 prisoners at eight Level 1 institutions within the SCDC.[82] Level 1 prisoners are those with the least security concerns, with Level 1A being the lowest security level possible.[83] Level 1 institutions provide prisoners with the most freedom and are enclosed with either a single fence around the perimeter or no fence at all.[84] A prisoner is eligible to receive a Level 1B status if he has eight years or less to max out and a Level 1A if he has five years or less to max out.[85] This eligibility, however, does not depend on time alone, and a prisoner must meet several other requirements in order to obtain this status.[86] The primary difference between Level 1A and Level 1B prisoners is that Level 1A prisoners are allowed to work at off-institutional-property work programs and Level 1B prisoners are not.[87]

Level 1 institutions do not resemble the "concrete fortress" surrounded by razor wire that most members of the public envision. Most Level 1 prisons, especially the pre-release centers, would take hard scrutiny to recognize their penitentiary status and could easily be mistaken for a retirement home or similar structure. One of the main incentives that prisoners target Level 1 institutions

78. *Id.* § 2.5. The term "max out" is commonly used to describe the amount of time a prisoner has to serve without the benefit of good-time credits or parole.

79. *See id.* §§ 4–6.

80. *Id.* § 2.8.

81. *Id.* §§ 1.5, 33.

82. *Population Counts and Capacities*, S.C. DEP'T CORRECTIONS (May 4, 2013, 3:07 PM), https://sword.doc.state.sc.us/population/summary.do. This number does not include female prisoners. *See id.*

83. *See Institutions*, S.C. DEP'T CORRECTIONS, http://www.doc.sc.gov/institutions/institutions.jsp (last visited May 4, 2013).

84. *See id.*

85. INMATE CLASSIFICATION PLAN, *supra* note 42, § 8.

86. For example, prisoners advancing to Level 1A cannot have more than two major disciplinary convictions in the last twelve months, no drug disciplinary convictions in the last thirty-six months, and no prior sex convictions or arrests in order to do so. *Id.*

87. *See id.* § 43; *see also id.* § 50 (providing additional information on work programs).

for is the institutions' overall relaxed visitation procedures.[88] It is not uncommon for prisoners and their families to enjoy visitation outside in a park setting at a Level 1 institution as opposed to a maximum security setting at Level 3 institutions. While most Level 1 institutions do not contain law libraries, the overall consensus of prisoners is that it is much better to be imprisoned at a Level 1 prison than any other level prison. However, some prisoners do attempt to avoid placement at Level 1 facilities in the legitimate belief that rules are more strictly enforced at Level 1 facilities than Level 2 or 3 facilities. Level 1 institutions include: Campbell Pre-Release Center (PRC), Catawba PRC, Livesay Correctional Institution, Lower Savannah PRC, Manning Correctional Institution (CI), Palmer PRC, Walden CI, and Coastal PRC.[89]

3. Level 2

A total of over 7,900 prisoners reside at nine Level 2 institutions within the SCDC.[90] Level 2 prisons are the most populated security class[91] and can house all prisoners—except those prisoners serving life without parole—who have served ten years in the SCDC or who have ten years or less to max out.[92] As with all primary security level designations, a prisoner must meet certain disciplinary and other requirements to obtain this status.[93] By design, there is less tolerance for a prisoner's criminal and behavioral history at each of the lower security levels. For example, a prisoner may have up to two category 4 or category 5 prior offenses on his record and obtain a Level 2 status,[94] while a prisoner seeking Level 1B status may only have one prior category 4 offense and no category 5 offenses to obtain such a status.[95] To be eligible for security status Level 1A, a prisoner may not have any prior violent or category 4 or 5 convictions or commitments on his record.[96]

Level 2 prisons typically enclose a prisoner from the public by a fence.[97] These institutions are prisons in every sense of the word, and a lot of prisoners serve most of their time at Level 2 prisons because they do not meet the

88. *See generally* S.C. DEP'T OF CORR., No. OP-22.09, OPERATIONS MANUAL: INMATE VISITATION § 2 (Aug. 1, 2006) (providing the visitation procedures for Level 1 institutions).

89. *Institutions*, *supra* note 83. Goodman CI, which is technically classified as a Level 4 prison, is the only minimum-security female institution in the SCDC. *See Population Counts and Capacities*, *supra* note 82.

90. *Population Counts and Capacities*, *supra* note 82. This number does not include female prisoners. *See id.*

91. *See id.*

92. INMATE CLASSIFICATION PLAN, *supra* note 42, § 8.

93. To advance to Level 2, a prisoner must not have had more than two sexual disciplinary convictions or more than four major "disciplinaries" in the last twelve months. If a prisoner has had a major disciplinary conviction in the past six months, review is on a case-by-case basis. *Id.*

94. *Id.*

95. *See id.*

96. *Id.*

97. *See Institutions*, *supra* note 83.

eligibility requirements to advance to a Level 1 status.[98] Level 2 institutions include: Allendale CI, Evans CI, Kershaw CI, MacDougall CI, Ridgeland CI, Trenton CI, Turbeville CI, Tyger River CI, and Wateree CI.[99] Most prisoners either start their prison term at a Level 2 prison or are placed at one shortly thereafter. While most Level 2 prisons are the same in terms of programs offered that prisoners may participate in,[100] some institutions—such as Kershaw CI and Tyger River CI—offer prison-industry programs that allow prisoners to make minimum wage and generate income during their incarceration.[101]

4. Level 3

Over 4,700 prisoners are housed at six Level 3 institutions within the SCDC.[102] Level 3 prisons are the most restrictive and the most dangerous prisons of all the prisons in the SCDC.[103] These prisons can house all prisoners, regardless of crime or sentence,[104] and are generally where Level 1 and Level 2 prisoners are sent when they gather numerous disciplinary infractions at a lower custody prison.[105] Upon entry into the SCDC, prisoners who have ten years or more to serve in prison before their max out date are assigned to Level 3 prisons.[106] These prisons usually have dorms designated for "problem prisoners" that are more restrictive than the other housing units on the compound.[107] As the amount of time a prisoner has to serve in prison is not the only factor in Level 3 placement, prisoners with exceptionally bad disciplinary records are usually

98. For example, a lot of prisoners of Hispanic descent are not allowed to receive Level 1 status due to their inability to show in-state residence.

99. *Id.*

100. *Prison Industries*, S.C. DEP'T CORRECTIONS, http://www.doc.sc.gov/programs/pi.jsp (last visited May 4, 2013).

101. *See Tyger River Correctional Institution*, S.C. DEP'T CORRECTIONS, http://www.doc.sc.gov/institutions /tygerriver.jsp (last visited May 4, 2013); *Kershaw Correctional Institution*, S.C. DEP'T CORRECTIONS, http://www.doc.sc.gov/institutions/kershaw.jsp (last visited May 4, 2013).

102. *Population Counts and Capacities*, *supra* note 82. This number does not include female prisoners. *See id.* Camille Graham and Leath CI are the only maximum security prisons for females in the SCDC. They house a combined total of just over 500 female prisoners. *Id.*

103. *See Institutions*, *supra* note 83.

104. *See* INMATE CLASSIFICATION PLAN, *supra* note 42, § 8.

105. *See id.* Level 1 prisoners are not typically housed at Level 3 prisons. *See id.* § 47.1. Prisoners who are designated as "out of custody" must be assigned a cell only with other prisoners of the same custody level. *See id.* § 47.2.

106. *See id.* § 8.

107. *See generally* S.C. DEP'T OF CORR., No. OP-22.12, OPERATIONS MANUAL: SPECIAL MANAGEMENT UNIT (Sept. 1, 2012) [hereinafter SPECIAL MGMT. UNIT] (providing the policies and procedures for housing "inmates requiring more intense levels of supervision and monitoring" separate from the general prison population).

classified as a Level 3 status regardless of sentence.[108] Level 3 prisons include: Broad River CI, Kirkland R&E, Lee CI, Lieber CI, McCormick CI, and Perry CI.[109]

Being at a Level 3 prison itself does not signify that a prisoner is a "problem prisoner."[110] In most instances, it is simply the fact that a prisoner has a significant amount of time to complete that requires placement at a Level 3.[111] Something such as a prior escape, however, can restrict a prisoner to a Level 3 facility.[112] These prisons do not differ only in location; prisons such as Kirkland and Broad River CI have a positive reputation among prisoners for being a less oppressive prison in which to serve a sentence, while Lee CI is notorious for lockdowns, stabbings, and riots and is thus one prison that the majority of prisoners attempt to avoid. While prison is an undesirable place to be by nature, prisoners often closely watch their classification progress in order to depart Level 3 prisons as soon as possible.[113]

5. Other Security Levels

It should be noted that just because a prisoner is designated Level 2, this designation does not mean that he will not or cannot be housed at a Level 3 prison.[114] In such a case, a Level 2 prisoner would be allowed to be at a Level 3 prison provided plans to transfer him to a Level 2 are in place and he is housed in a cell with another Level 2 prisoner.[115] Level 1 prisoners, however, are not allowed placement at a Level 3 prison absent special circumstances or a custody

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108. *See* INMATE CLASSIFICATION PLAN, *supra* note 42, §§ 2.5–2.6; *see also id.* § 8 (noting that a Level 3 security conditions result where "[f]ive or more "Major" disciplinary convictions [occur] within 12 months").

109. *Institutions*, *supra* note 83. These institutions do not include those for women. *See id.*

110. *See generally* INMATE CLASSIFICATION PLAN, *supra* note 42 (providing the criteria and procedures for determining prisoners' classifications).

111. *See generally id.* (providing the criteria and procedures for determining prisoners' classifications).

112. *See generally id.* § 68 (outlining the impact of an escape or attempted escape on a prisoner's classification).

113. According to a report by the SCDC, in 2008 there were 339 assault charges for inmate-on-inmate assaults, 516 charges for inmate-on-staff assaults, and 23 charges for inmate assaults on other people. S.C. DEP'T OF CORR., INMATE ASSAULTS FY 2008–2012, http://www.doc.sc.gov/research/SystemOverview/InmateAssaultsFY2008-2012.pdf.

114. The SCDC's INMATE CLASSIFICATION PLAN provides that "[t]he meeting of custody criteria does not guarantee placement at any particular level. An inmate's custody classification involves the exercise of discretion in regard to security needs and overrides may be used." INMATE CLASSIFICATION PLAN, *supra* note 42, § 42. Section 2.8 additionally states that "[i]nmate custody classification is based on different factors and embodies correctional discretion. An inmate has no right to any particular custody level." *Id.* § 2.8.

115. *See id.* § 47.2.

change.[116] While guidelines are set, classification and placement are assigned with wide discretion.[117] Because the exceptions and considerations are too numerous to name, the reader is again referred to the SCDC's classification policy for more specific information.[118]

As stated above, Level 1A, Level 1B, Level 2, and Level 3 are not the only security levels assigned to prisoners within the SCDC but are simply the primary ones.[119] The primary levels do not account for the over 1,800 prisoners in institutional Security Maximum Units (SMUs) or inmates who are assigned to special classification status such as protective custody[120] and safekeeping.[121]

B. Hardship Transfers

When a prisoner leaves intake status at Kirkland R&E for placement at a more permanent institution, no consideration is given to a prisoner's place of residency when assignments are made.[122] Accordingly, prisoners routinely find themselves housed at prisons several hundred miles away from where they live. Therefore, the SCDC allows prisoners who meet certain criteria or qualifications to be transferred to a facility closer to their place of residency as an incentive for prisoners to exhibit good behavior.[123] These transfers are known as "hardship transfers,"[124] and prisoners generally rely heavily on them.

Each prisoner receives a classification review annually, which provides the prisoner with the opportunity to sit down with his caseworker and review his classification status; requests for hardship transfers must be made at this time.[125] Hardship transfers are usually based on a family hardship a prisoner is encountering, such as having elderly family members who are unable to travel long distances or a family member that requires special medical attention.[126] A

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116. *See, e.g.*, *id.* § 48 ("[Level] 1B inmates housed in labor crew dorms and specialized work units at Level 2/3 institutions will be exempt from the cell assignment process (designated dorms must house labor crew inmates only).").

117. *See id.* § 2.8.

118. *See generally id.* (providing the criteria and procedures for determining prisoners' classifications).

119. *See id.* § 3.1 ("The principal security level designations are: 1A, 1B, 2, and 3").

120. For more information on protective concerns and other special status categories, see *id.* §§ 39, 42.

121. A "county safekeeper" prisoner is "an individual awaiting trial who has been deemed to be in a high profile/high risk status and who cannot be housed in a county facility." S.C. DEP'T OF CORR., No. OP-21.09, OPERATIONS MANUAL: INMATE RECORDS PLAN § 5 (Nov. 1, 2007) [hereinafter INMATE RECORDS PLAN]. A "death row safekeeper" prisoner is "an inmate who is sentenced to death and housed in the SCDC for the committing county until his/her execution." *Id.*; *see also* S.C. DEP'T OF CORR., No. SK-22.02, OPERATIONS MANUAL: SAFEKEEPERS (July 1, 2006) (providing the procedures for safekeepers).

122. *See* INMATE CLASSIFICATION PLAN, *supra* note 42, §§ 2.5–2.6.

123. *See id.* § 69.

124. *Id.*

125. *See id.* § 69.2.

126. *See id.* § 69.

prisoner is basically requesting to be moved on the ground that transfer would make visitation for these family members less burdensome.[127] The SCDC, however, does not allow a prisoner to be transferred by way of a hardship transfer on bare allegations alone and generally will require a prisoner to show the following:

> (1) That the family member he is requesting to be moved for is an immediate family member and on his visitation list or relative screen;
> (2) That, at the time of his annual review, the prisoner provided a doctor's statement (on official stationery) verifying family illness;
> (3) That, at the time of his annual review, the prisoner provided documents from a community representative or official (such as a pastor or congressman) requesting transfer; or
> (4) That, at the time of his annual review, the prisoner provided a copy of an elderly family member's driver's license or birth certificate showing that he or she is 65 years of age or older.[128]

In order to be eligible for a hardship transfer, a prisoner must have no major disciplinary convictions and not more than one minor disciplinary conviction within the last twelve months; have satisfactory job performance over the past twelve months; have been in the SCDC for at least twelve months; have no separations or cautions at the requesting institution; and be requesting to go to an institution that is the appropriate security level and meets a prisoner's programmatic needs, such as addiction treatment, counseling, and mental health needs.[129] If a prisoner's request is accepted and he is transferred to the desired institution, he will be subject to removal from that location if he receives any major disciplinary convictions.[130] If removal occurs, the prisoner will not be eligible for another hardship transfer for three years from the date of the disciplinary infraction.[131]

As a final note, prisoners should ensure that they have all the necessary documentation to request a hardship transfer prior to their annual review dates. If a prisoner knows his annual review will be held in June, he should have the documentation he wishes to submit ready by May. A prisoner will sometimes be told that he will be having his annual review late in a month and be unprepared when a caseworker decides to hold his review at the beginning of the month. When this change occurs, prisoners who are not prepared are often told that they must wait another year to submit their documentation and request for a hardship transfer.

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127. *See id.*
128. *See id.*
129. *Id.* § 69.1.
130. *See id.* § 69.3.
131. *Id.*

IV. APPOINTMENT OF COUNSEL

In *Pennsylvania v. Finley*,[132] the United States Supreme Court held that there is no federal constitutional right to counsel for indigent prisoners seeking state post-conviction relief.[133] The Court distinguished the requirement of appointment of counsel on direct appeal as a constitutional mandate and placed PCR actions in the context of discretionary reviews not supported by an underlying constitutional right to counsel.[134] The Court noted that "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."[135] The Court held that "States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well."[136]

While federal law provides no support for state prisoners to be appointed counsel in PCR actions, and thus renders ineffective assistance of counsel claims on PCR counsel virtually impossible to raise,[137] South Carolina state law gives indigent applicants who have been granted a hearing in PCR actions the right to court-appointed counsel.[138] This appointment of counsel, however, is not automatic upon the filing of a PCR action by a prisoner.[139] In an Administrative Order issued by Chief Justice Jean Toal on October 6, 2008, the Chief Justice directed the post-conviction relief section of the South Carolina Attorney General's Office to either recommend counsel be appointed to prisoners seeking relief or recommend counsel not be appointed when they file their return.[140] If a recommendation by the attorney general's office is made against the appointment of counsel because the attorney general asserts that the application is successive or untimely, counsel will be appointed only by written order of the

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132. 481 U.S. 551 (1987).

133. *See id.* at 555, 556–57.

134. *See id.* at 556–57; *cf.* Douglas v. California, 372 U.S. 353, 357–58 (1963) (concluding denial of counsel to indigents on first appeal as of right amounted to unconstitutional discrimination against the poor). *But cf.* Ross v. Moffitt, 417 U.S. 600, 610 (1974) (holding no constitutional right to counsel when seeking a discretionary appeal on direct review of conviction); Douglas v. State, 369 S.C. 213, 215 n.1, 631 S.E.2d 542, 543 n.1 (2006) (noting no Sixth Amendment right to counsel in pursuing discretionary appeal (citing Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (per curiam))).

135. *Finley*, 481 U.S. at 556–57.

136. *Id.* at 557 (citation omitted).

137. *See, e.g.*, *Torna*, 455 U.S. at 587–88 ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel . . . .").

138. *See* S.C. CODE ANN. § 17-27-60 (2003); S.C. R. CIV. P. 71.1(d); *see also* Whitehead v. State, 310 S.C. 532, 535, 426 S.E.2d 315, 316 (1992) ("[W]hen a PCR application is not dismissed *before* a hearing is held, the PCR judge must appoint counsel or obtain a knowing and intelligent waiver . . . .").

139. *See* S.C. Sup. Ct. Admin. Order No. 2008-10-06-01 (Oct. 6, 2008), *available at* http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2008-10-06-01.

140. *See id.*

chief administrative judge in that circuit and only when the facts of the case fall within one of the exceptions allowing successive or untimely petitions.[141] If the attorney general cites any other reason for not recommending the appointment of counsel, only the written order of a circuit court judge will overrule such a recommendation using the standard contained in Rule 71.1 of the South Carolina Rules of Civil Procedure.[142] This directive by Chief Justice Toal is an apparent effort to further judicial economy and to relieve "an unnecessary burden on the appointed counsel."[143] This Administrative Order, however, has been criticized for allowing the applicant's opponent in a PCR action to decide whether or not to appoint counsel to indigent applicants and for creating such a broad sweeping rule without the input or approval of the legal community.[144] The criteria used by the attorney general's office to determine whether counsel should be appointed is not mentioned in Chief Justice Toal's Administrative Order, but the jurisprudence in this area has always been that, to receive a hearing—and implicitly, the attorney general's recommendation—the applicant must allege that an issue of material fact is in dispute (as opposed to a purely legal issue that can be resolved without the need for a hearing).[145]

Once counsel has been appointed—usually about sixty to ninety days after an applicant has filed his application with the clerk of court—the applicant will be notified of his appointed attorney (usually by an introductory letter sent by the attorney) and the attorney–client relationship will commence.[146] Appointed counsel handle an overwhelming majority of PCR cases in South Carolina.[147] While most appointed counsel are competent and experienced enough to handle the majority of claims a prisoner may ultimately present at his PCR hearing, appointed counsel usually work under a strenuous workload that makes it unlikely that they will conduct more than a cursory review of a prisoner's claims prior to an evidentiary hearing.[148] Indeed, there is somewhat of an unspoken understanding that prisoners will research and locate issues they believe to have merit and appointed counsel will in turn review and pass judgment on these issues sometime prior to the actual hearing. Appointed counsel typically confer face to face with their clients rarely more than once or twice before a prisoner's

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141. *See id.*

142. *See id.*

143. *Id.*

144. *See* John H. Blume & Emily C. Paavola, *A Reintroduction: Survival Skills for Post-Conviction Practice in South Carolina*, 4 CHARLESTON L. REV. 223, 250–51 (2010).

145. *See* Pelzer v. State, 378 S.C. 516, 519, 662 S.E.2d 618, 619 (Ct. App. 2008) (citing S.C. CODE ANN. § 17-27-70(b)–(c) (2003); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005)).

146. *See generally* ASHLEY A. MCMAHAN, SOUTH CAROLINA POST-CONVICTION RELIEF MANUAL 2–3 (2d ed. 2008) (describing steps an appointed attorney should take in relation to the applicant).

147. *See* John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. REV. 235, 236 (1994).

148. *See id.* at 236–37 & n.4.

scheduled PCR hearing.[149] Many times the sole meeting an applicant has with his appointed counsel occurs a day or two before the evidentiary hearing takes place or else on the day of the hearing itself.[150] The amount of claim development that goes into a PCR application usually depends on the amount of time and effort a prisoner has dedicated to the application himself.[151] It is not outlandish to say that if a prisoner depends on his appointed counsel to locate, research, and brief issues for him, it is unlikely that the prisoner will have any claims or issues to present at his PCR hearing.

In addition, the economic recession of the past several years has virtually eliminated the funds available to pay for the appointment of counsel in PCR cases.[152] In a letter from the Executive Director of the South Carolina Commission on Indigent Defense, members of the South Carolina Bar were informed that the General Assembly "did not provide any funds for 2010–2011 to compensate attorneys for work performed" in civil appointment cases such as PCR.[153] The letter also mentioned a plan submitted to Chief Justice Toal that would reduce the maximum number of appointments an attorney could receive from ten to seven, and the letter requested appointed attorneys submit vouchers, payable when funds become available, for work performed.[154] This letter essentially indicated that appointed PCR counsel would not receive any compensation for representing indigent prisoners during the economic downturn. This lack of compensation is likely to affect not only the quality of representation a prisoner receives but also a prisoner's potential to receive funds for needed investigative and expert services. While this information does not paint a pretty picture, prisoners must ensure that any hindrance in presenting a claim encountered because of the lack of funding is fully detailed at the applicant's upcoming evidentiary hearing. Prisoners should detail concerns because when state courts fail to allow a prisoner to fairly present or develop a constitutional claim, federal courts are more receptive to allowing discovery in a federal forum and are more lenient in applying its prohibition against factual development in federal courts.[155] For this reason, and many others, indigent

149. *See id.* at 237 n.4.

150. *See id.*

151. *See id.* at 236–37 & n.4.

152. *See* Letter from T. Patton Adams, Exec. Dir., S.C. Comm'n on Indigent Def., to S.C. Bar Members (June 30, 2010), *available at* http://www.sccid.sc.gov/Civil-Appt-Letter.doc; *see also* Press Release, S.C. Comm'n on Indigent Def., S.C. Comm'n on Indigent Def. Voucher Payments Suspended Until Approximately July 1, 2012 (May 1, 2012), *available at* http://www.sccid.sc.gov/indigent-defense-press-releases-detail.cfm?id=148 (announcing suspension of voucher payments for civil appointment cases).

153. Letter from T. Patton Adams to S.C. Bar Members, *supra* note 152.

154. *See id.*

155. *See, e.g.*, Conaway v. Polk, 453 F.3d 567, 589, 590–91 (4th Cir. 2006) (stating that petitioner was not barred from obtaining hearing where he reasonably attempted to investigate and pursue claim in state court). In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the United States Supreme Court modified its procedural rules for obtaining habeas consideration by permitting

prisoners need to work from a mindset that they are proceeding pro se (even with appointed counsel on their case) and must prepare themselves and their claims to the best of their abilities.

Another major concern many prisoners encounter in pursuing PCR is the lack of communication between them and appointed counsel. From the date of filing, a PCR application will usually take at least ten months to materialize into an actual hearing. Prisoners almost invariably attempt to correspond with their appointed counsel during this time to address various concerns that they may have and to ensure that any additional issues that they may wish to raise are included in their application. While some appointed counsel are exceptions, most simply fail to respond to an inquiring prisoner's correspondence.[156] This lack of communication could occur because the appointed counsel feels that he will have a better opportunity to review the applicant's position and allegations when he visits the prisoner in person, or because he may simply have more pressing matters at the time, both situations occurring with no desire to intentionally neglect corresponding with the applicant.[157] Or, this could be due to the fact that appointed counsel in PCR proceedings are generally more nonchalant in their duties since later allegations of ineffective assistance of counsel are unlikely.[158] This lack of communication also could be due to the fact that they are given only a nominal wage for representing indigent prisoners—many are "paid" with vouchers to be redeemed when funds become available[159]—and they sometimes fail to understand the gravity and importance of the situation from an incarcerated person's viewpoint. In any event, and as a result of these issues, prisoners frequently request that their counsel be dismissed and that substitute counsel be appointed so that a more involved attorney may be appointed to represent them.[160] Such a practice is disfavored and has been addressed and condemned by the South Carolina Supreme Court.[161]

In *Richardson v. State*,[162] the South Carolina Supreme Court took the opportunity to address the recurring problem of PCR applicants repeatedly seeking to have their appointed counsel relieved and substituted without

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litigants to raise ineffective assistance constitutional claims at the PCR level where the claim is based on the attorney's possible procedural defaults. *See id.* at 1318.

156. *See* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 97 (2009), http://www.constitutionproject.org/pdf/139.pdf (discussing the lack of communication between client and appointed counsel) (citation omitted).

157. *See id.* at 95–96.

158. *See supra* note 137 and accompanying text.

159. *See* S.C. CODE ANN. § 17-3-50 (2003) (providing that a reasonable fee will be determined on the basis of "forty dollars an hour for time spent out of court" and "sixty dollars an hour for time spent in court"); *see also* Press Release, S.C. Comm'n on Indigent Def., *supra* note 152 (advising attorneys of a temporary suspension of voucher payments).

160. *See* Richardson v. State, 377 S.C. 103, 105, 659 S.E.2d 493, 494 (2008).

161. *See id.*

162. 377 S.C. 103, 659 S.E.2d 493.

sufficient cause.[163] In *Richardson*, the applicant's counsel requested removal from the applicant's case, based on motions the applicant filed, and counsel's request was denied by the PCR judge.[164] In reviewing the matter, the supreme court emphasized that PCR applicants are not entitled to appointed counsel of their choice and that a "mere disagreement between an applicant and his counsel as to how to proceed with the PCR application, including the allegations to be raised, is not sufficient cause, in itself, to require the PCR judge to replace or to offer to replace court appointed counsel with another attorney."[165] The court went on to recognize that a PCR applicant will commonly file a complaint against his appointed counsel with the Office of Disciplinary Counsel and then assert the complaint as a basis for a motion to relieve the appointed counsel in his case.[166] The court cautioned the bench against this tactic and against the repeated filing of a motion to relieve counsel by applicants.[167] The court stated that such maneuvers constituted "an abuse of the judicial process" and "should not be tolerated."[168] Although the court did state that the basis of a complaint should be explored and that discretion should be used in accepting a motion to relieve counsel,[169] the overall message to attorneys and PCR applicants seems to be to "work it out," with the strong presumption that counsel is properly exercising his duties.

Many applicants feel, and correctly so, that an appointed PCR counsel's failure to research, amend or supplement an application, subpoena witnesses, and communicate more generally, is unacceptable and that every effort should be made to correct these shortcomings prior to the evidentiary hearing. Counsel's perceived lack of interest is taken by many applicants as a sign of indifference to the success of their PCR action. Understandably, applicants wish to maximize their chances of prevailing at PCR by developing facts and presenting evidence to the best of their ability. While it may not be intended, appointed counsel often project a lack of belief or interest in these objectives and undermine an effective attorney–client relationship in the process.

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163. *Id.* at 105, 659 S.E.2d at 494.

164. *See id.*

165. *Id.* at 106, 659 S.E.2d at 495 (citing State v. Jones, 270 S.C. 587, 588, 243 S.E.2d 461, 462 (1978)). Although typically individuals have a right to counsel of their choice, indigents with court-appointed counsel do not have the same constitutional right. *Compare* United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) (holding that there is a constitutional right to the choice of an attorney), *with* United States v. Basham, 561 F.3d 302, 324 (4th Cir. 2009) ("[A]n indigent criminal defendant has no constitutional right to have a particular lawyer represent him." (quoting Miller v. Smith, 115 F.3d 1136, 1143 (4th Cir. 1997) (internal quotation marks omitted)).

166. *Richardson*, 377 S.C. at 107, 659 S.E.2d at 495.

167. *See id.*

168. *Id.* at 105, 659 S.E.2d at 494.

169. *Id.* at 107, 659 S.E.2d at 495.

V. FILING DEADLINES

A. Statute of Limitations

In 1995, the South Carolina General Assembly enacted a one-year statute of limitations for the filing of PCR actions.[170] In order to meet this time requirement, a prisoner must file a PCR action within one year after the entry of a judgment of conviction, within one year after the sending of the remittitur to the lower court from an appeal, or within one year of the filing of the final decision upon appeal, whichever is later.[171] If a prisoner does not seek an appeal after a judgment of conviction, his one year will begin to run after the available time to appeal has expired.[172] If a prisoner does seek direct review, the one-year statute of limitations will be tolled during his direct appeal, during the time he petitions the court for rehearing, and during the pendency of a petition for writ of certiorari to the South Carolina Supreme Court.[173] If a prisoner's petition for writ of certiorari is denied, the court of appeals will send out the remittitur upon notification and a prisoner's statute of limitations will begin to run on that date.[174] If a prisoner's petition for writ of certiorari is granted, the date the supreme court issues an opinion on his claims will constitute a "filing of the final decision upon an appeal" for statute of limitation purposes.[175] If no rehearing or supreme court review is pursued, the remittitur will be sent fifteen days after the judgment of the court is entered and a prisoner's one year will begin on that day.[176]

Prisoners should be very mindful of the statutory time restrictions and conscious of the available time remaining for filing. Too often prisoners procrastinate until the "eleventh hour," and do not realize the burden they will face at a later time. For example, if a prisoner has not pursued a direct appeal and has spent several months in the SCDC's reception and evaluation center without filing a PCR application, then the one-year time period that he has to file will be lessened by those several months. Prisoners sometimes delay filing a PCR application, awaiting peripheral matters—such as factual development of claims, retainer of legal counsel, or the possession of additional discovery documents—when, in fact, these matters can be pursued just as effectively after a PCR application has been filed. It is very important for a prisoner to file his

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170. 1995 S.C. Acts 7; H. 4323, 110th Gen. Assemb., 2d Reg. Sess. (S.C. 1994); *see also* Peloquin v. State, 321 S.C. 468, 469–70, 469 S.E.2d 606, 607 (1996) (per curiam) (quoting S.C. CODE ANN. § 17-27-45(A) (Supp. 1995)) (interpreting the recently enacted statute of limitations).

171. S.C. CODE ANN. § 17-27-45(A) (2003).

172. *See* S.C. R. CIV. P. 71.1(b). Rule 203(b)(2) of the South Carolina Appellate Court Rules mandates a ten-day time period for the filing of a notice of appeal from the South Carolina Court of General Sessions. S.C. APP. CT. R. 203(b)(2).

173. *See* § 17-27-45(A).

174. *See id.*; *see also* S.C. APP. CT. R. 221(b) (describing remittiturs).

175. § 17-27-45(A).

176. *See* S.C. APP. CT. R. 221(b).

PCR application at the earliest possible date, even if this means he will have to amend or supplement his application at a later date.[177] South Carolina has rejected arguments advanced by prisoners who have run afoul of the one-year time limitation on grounds that they did so because of ineffective assistance of counsel,[178] mental incompetence,[179] and even where a prisoner failed to do so because he was incarcerated in another state.[180] From any perspective, a prisoner should never step outside the available time period.

Subsections (B) and (C) of South Carolina Code section 17-27-45 provide the only two exceptions to the one-year statute of limitations. Subsection (B) provides the following:

> When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.[181]

In *Teague v. Lane*,[182] the United States Supreme Court announced that a state prisoner may not rely on a new constitutional rule to attack his conviction on collateral review if his conviction has become final.[183] A new constitutional rule is one that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or "was not dictated by precedent existing at the time the defendant's conviction became final."[184] In order for a new constitutional rule to be applied retroactively on collateral review (such as PCR), it must fall within one of the two listed exceptions: (1) that the rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" or (2) if it requires the observance of procedures

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177. *See generally* S.C. CODE ANN. § 17-27-70(a) (2003) (stating that the court may issue an order for an application to be amended, for filing further pleadings or motions, or for extending the time for filing any pleading at any time prior to entry of judgment); S.C. CODE ANN. § 17-27-150(A) (2003) (stating that discovery is available to applicants pursuing PCR upon leave of court).

178. *See* Jones v. State, 382 S.C. 589, 592, 596, 677 S.E.2d 20, 21, 24 (2009) (citing § 17-27-45).

179. Norris v. State, 335 S.C. 30, 33, 515 S.E.2d 523, 525 (1999).

180. Leamon v. State, 363 S.C. 432, 436, 611 S.E.2d 494, 496 (2005).

181. S.C. CODE ANN. § 17-27-45(B) (2003); *see also* Talley v. State, 371 S.C. 535, 541–44, 640 S.E.2d 878, 880–82 (2007) (citations omitted) (discussing when new procedural rules and United States Supreme Court decisions should be applied retroactively on collateral review and applying § 17-27-45(B) as the applicable statute of limitations).

182. 489 U.S. 288 (1989).

183. *See id.* at 316.

184. *Id.* at 301.

that are "implicit in the concept of ordered liberty."[185] Such claims will undoubtedly be rare because, as the Court noted, "[w]e operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge."[186] Nonetheless, if a prisoner meets these criteria he will have one year from the date of the decision to file for a PCR.[187]

Subsection (C) of section 17-27-45, the second statutory exception to the one-year time limitation for the filing of a PCR, provides that "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence," then the prisoner may file within one year of the actual discovery of the facts or within one year "after the date when the facts could have been ascertained by the exercise of reasonable diligence."[188] The South Carolina Court of Appeals has stated:

> To prevail on a motion for a new trial based on after-discovered evidence, it is necessary to show that the evidence: "(1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching."[189]

An often underestimated aspect of a claim being successful based on after-discovered evidence is not being precluded by the phrases "could have been ascertained by the exercise of due diligence" and "could not have been discovered before trial." For example, a common after-discovered evidence

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185. *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692–93 (1971) (Harlan, J., concurring in part and dissenting in part)) (internal quotation marks omitted); *see also Talley*, 371 S.C. at 541, 544, 640 S.E.2d at 881, 882 (finding that the new rule announced in *Alabama v. Shelton*, 535 U.S. 654 (2002), that the constitutional right to counsel tends to a defendant who receives a "suspended sentence that may 'end up in the actual deprivation of a person's liberty,'" is a "watershed rule" of criminal procedure applicable to collateral review because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding) (quoting *Shelton*, 535 U.S. at 658).

186. *Teague*, 489 U.S. at 313.

187. *See* S.C. CODE ANN. § 17-25-45(B) (2003).

188. § 17-27-45(C).

189. State v. Hill, 359 S.C. 301, 316, 597 S.E.2d 822, 830–31 (Ct. App. 2004) (quoting State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668–69 (1993)), *rev'd on other grounds*, 368 S.C. 649, 630 S.E.2d 274 (2006); *see also* Dearybury v. State, 367 S.C. 34, 40, 625 S.E.2d 212, 215–16 (2006) (quoting § 17-27-45) (noting that petitioner argued § 17-27-45(C) applied). In *Dearybury*, the petitioner alleged that he was under the belief that his divorce attorney represented him on a criminal charge and that section 17-27-45(C) governed his PCR application because, although he filed his PCR outside of the allowable one-year time frame, he filed within a month of learning the newly discovered fact that his divorce attorney did not represent him. *See id.* at 37, 40, 625 S.E.2d at 214, 215–16 (quoting § 17-27-45). The court ultimately remanded the case to determine whether petitioner knowingly and intelligently waived his right to trial counsel in this instance. *Id.* at 41, 625 S.E.2d at 216.

claim is one based on the affidavit of a newly discovered alibi witness.[190] These types of claims, however, hardly ever survive scrutiny if the affiant could have previously been discovered by counsel's reasonable investigation.[191]

B. Equitable Measures

Three situations provide for a nonstatutory equitable measure allowing a prisoner to file a PCR action outside of the one-year statutory time limitation. These situations arise when a prisoner claims he did not waive his right to appellate review of a prior PCR order,[192] when an applicant is denied legal counsel,[193] and when a prisoner claims that he did not knowingly and intelligently waive his right to a direct appeal from his criminal conviction.[194]

In *Austin v. State*,[195] the South Carolina Supreme Court held that a prisoner may pursue a successive PCR application if he alleges ineffective assistance of PCR counsel for failure to seek appellate review of his PCR order.[196] Recognizing the right of prisoners to seek appellate review of the denial of PCR,[197] and the right to appellate counsel's assistance in doing so,[198] the court in *Austin* proceeded to craft a procedure to remedy such a claim.[199] This procedure, which is thoroughly discussed in the appellate Part of this Commentary,[200] has come to be known as an *Austin* appeal.[201] The court has ruled that the one-year statute of limitations time requirement does not apply to *Austin* appeals.[202]

In *Odom v. State*,[203] the South Carolina Supreme Court reversed a PCR judge's order of dismissal, finding that the petitioner never received the entitled full "bite at the apple" because both of his PCR applications were dismissed before he was appointed legal counsel.[204] The court emphasized that because Odom's *Austin* appeal attacked the "PCR procedure used in his case, not the

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190. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 393 (1993) (explaining that petitioner wanted to use affidavits as newly discovered evidence in a habeas proceeding).

191. *See, e.g.*, *Herrera*, 506 U.S. at 423 (O'Connor, J., concurring) ("Affidavits like these are not uncommon . . . [and] are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism.").

192. *See* Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991).

193. *See* Odom v. State, 337 S.C. 256, 263, 523 S.E.2d 753, 756–57 (1999).

194. *See* Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582–83 (2002).

195. 305 S.C. 453, 409 S.E.2d 395.

196. *See id.* at 454, 409 S.E.2d at 396.

197. *Id.* (citing S.C. CODE ANN. § 17-27-100 (1976); S.C. SUP. CT. R. 50(9) (Supp. 1986) (now available at S.C. APP. CT. R. 243)).

198. *Id.*

199. *See id.*

200. *See infra* Part XI.

201. *See, e.g.*, Odom v. State, 337 S.C. 256, 263, 523 S.E.2d 753, 756–57 (1999) (citing S.C. CODE ANN. § 17-27-45(A) (Supp. 1998)) (describing an *Austin* appeal).

202. *See id.* at 263, 523 S.E.2d at 757 (citing § 17-27-45(A)).

203. 337 S.C. 256, 523 S.E.2d 753.

204. *Id.* at 262, 523 S.E.2d at 756 (internal quotation marks omitted).

merits of his sentence," the one-year statute of limitations did not apply.[205] The court stated that "*Austin*['s] policy would be frustrated if the one-year statute of limitations applied to procedural errors made by the PCR courts."[206] This holding does not mean that a prisoner must receive the appointment of counsel simply because he has filed a PCR application, only that that appointment must take place once it is determined that an evidentiary hearing is warranted.[207]

In *Wilson v. State*,[208] the South Carolina Supreme Court extended the rule of *Odom* and *Austin* and held that the one-year time limitation period in which a prisoner has to file an application for post-conviction relief does not apply where a defendant was denied a direct appeal due to ineffective assistance of counsel.[209] In *Wilson*, the defendant alleged that, after a jury convicted him, he instructed his attorney to appeal his conviction, but his attorney never did so.[210] When the state moved to dismiss Wilson's application as being time-barred, Wilson argued that the one-year statute of limitations should not apply to defendants who did not voluntarily waive their right to a direct appeal from a criminal conviction.[211] The supreme court agreed with Wilson and held that a defendant has a right to file one direct appeal as well as the right to file one PCR.[212] In other words, a defendant has the procedural right to "one fair bite at the apple."[213] However, while a prisoner has a right to seek a belated direct appeal, prisoners are not entitled to seek a belated writ of certiorari to review the court of appeals decision on direct appeal regardless of whether they are within the applicable one-year statute of limitations.[214]

Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of a statute of limitations and is reserved for only the most extraordinary of circumstances.[215] Generally, a prisoner seeking equitable tolling bears the burden of establishing "(1) that he has been pursuing his rights diligently, and (2)

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205. *Id.* at 263, 523 S.E.2d at 757 (citing § 17-27-45(A)).

206. *Id.*

207. *See* S.C. Sup. Ct. Admin. Order No. 2008-10-06-01 (Oct. 6, 2008), *available at* http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2008-10-06-01. For an enlightening discussion of *Austin* and *Odom*, see *Pettinato v. Eagleton*, 466 F. Supp. 2d 641, 650–51 (D.S.C. 2006) (citations omitted).

208. 348 S.C. 215, 559 S.E.2d 581 (2002).

209. *See id.* at 218, 559 S.E.2d at 582–83.

210. *See id.* at 217, 559 S.E.2d at 582.

211. *See id.*

212. *See id.* at 218, 559 S.E.2d at 582–83.

213. *Id.* at 218, 559, S.E.2d at 582.

214. *See* Douglas v. State, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (2006). The South Carolina Supreme Court declined to impose a duty on appellate counsel to pursue rehearing and/or certiorari following the decision of the court of appeals in a criminal direct appeal. *Id.* Accordingly, no claim of ineffective assistance of counsel can be brought against an attorney pursing certiorari after a direct appeal. *Id.* at 215 n.1, 631 S.E.2d at 543 n.1.

215. Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008) (quoting Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct. App. 2008), *rev'd*, 386 S.C. 108, 687 S.E.2d 29 (2009)).

that some extraordinary circumstances stood in his way."[216] Equitable tolling is available only in "those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result."[217] The special and unique circumstances necessary to trigger equitable tolling are virtually unobtainable in most cases.[218] An applicant may believe many reasons (and excuses) entitle him to equitable tolling that simply do not. If an applicant is attempting to gain PCR review using this avenue, he should be prepared to show some measure of prudence, activities, or assiduity in diligently pursuing his rights; and he should know that his chances of prevailing on uncharted grounds are slim.[219] Obviously, conscious adherence to the PCR Act's statute of limitations can assure avoidance of most of the circumstances that lead applicants to seek review under the equitable tolling doctrine.

C. Federal Habeas Considerations

Conscious adherence to the one-year statute of limitations the PCR Act imposes also requires prisoners to consider the detrimental effect late filing will have on the pursuit of federal habeas relief. Prisoners in custody pursuant to the judgment of a state court are given a one-year time limitation to apply for a federal writ of habeas corpus.[220] This limitation period begins to run from the latest of one of the following dates: (1) "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"; (2) "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action"; (3) "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"; or (4) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."[221] However, the time during which a prisoner has properly filed a direct appeal, PCR application, or any other collateral review with respect to the pertinent judgment or claim, is not counted towards a prisoner's one-year limitation period.[222]

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216. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

217. Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)).

218. *See Harris*, 209 F.3d at 330.

219. *See Rouse*, 339 F.3d at 246 (citing Spencer v. Sutton, 239 F.3d 626, 630 (4th Cir. 2001)).

220. *See* 28 U.S.C. § 2244(d)(1) (2006). *See generally* 28 U.S.C. § 2254 (2006) (explaining the situations in which applications for writs of habeas corpus should be granted).

221. § 2244(d)(1)(A)–(D).

222. § 2244(d)(2); *see also* Pace v. DiGuglielmo, 544 U.S. 408, 411 (2005) (holding that because petitioner's PCR application was rejected as untimely, it was not "properly filed," so he was not entitled to tolling under § 2244(d)(2)).

With regard to prisoners filing PCR actions, there are two areas of confusion that warrant clarification. First, prisoners should know that the one-year statute of limitations for habeas review and the one-year statute of limitations for PCR review run simultaneously with each other.[223] Accordingly, prisoners who delay filing PCR actions, when no other action—typically a direct appeal—is pending, gradually reduce the time they have for filing for federal habeas review as well.[224] For example, if a prisoner was convicted on January 1, 2011, and did not pursue a direct appeal, that prisoner would have until January 1, 2012, to file a PCR action. If this prisoner did not file his PCR application until nine months later on October 1, 2011, then he would have three months remaining to file for federal habeas review if his complete PCR—that is, his PCR and subsequent appeal—prove unsuccessful, because after the nine-month delay, there are only three months remaining in the year. The clock for habeas review is not tolled after the date of conviction or judgment unless a prisoner files for direct appeal or other "[s]tate post-conviction or other collateral review."[225] Tolling merely pauses the clock; it does not restart anew the limitations period.[226] The tolling period is also not limited to only the court of appeals on direct appeal or the PCR court, but extends itself to the review of these courts by any subsequent petition for writ of certiorari.[227] The tolling period does not extend itself, however, when a prisoner seeks review of an adverse decision by the South Carolina Supreme Court by way of petition for writ of certiorari in the United States Supreme Court.[228] A potentially important distinction to make between the one-year statute of limitations for filing a PCR and the one-year statute of limitations for filing a federal habeas petition is that the PCR's clock begins to run on the date a prisoner is convicted,[229] while the federal habeas clock actually begins to run on

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223. *See, e.g.*, *Harris*, 209 F.3d at 328 (holding that petitioner's habeas petition was time barred because both his PCR and habeas one-year period had expired).

224. *See, e.g.*, *id.* (explaining that after the court denied petitioner's PCR application, the clock began running again, so that his federal habeas petition, which was filed six months after his one-year period had expired, was time-barred).

225. § 2244(d)(1)(A), (d)(2).

226. Trapp v. Spencer, 479 F.3d 53, 58 (1st Cir. 2007) (quoting § 2244(d)(2)) (internal quotation marks omitted).

227. *See, e.g.*, Carey v. Saffold, 536 U.S. 214, 219–20 (2002) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1669 (1993) (An action is pending for the purpose of § 2244(d)(2) as long as the action is "'in continuance,'" that is, "'until the completion of' that process. In other words, until the application has achieved final resolution through the [s]tate's post-conviction procedures, by definition it remains 'pending'").

228. *See* Crawley v. Catoe, 257 F.3d 395, 401 (4th Cir. 2001) (holding that "the time that [a] petition for certiorari, which sought review of [an] adverse decision in the state habeas proceeding, was pending in the United States Supreme Court did not toll the one-year limitations of § 2244(d)(1)").

229. S.C. CODE ANN. § 17-27-45(A) (2006); *see also* Green v. State, 353 S.C. 29, 30–31, 576 S.E.2d 182, 183 (2003) (per curiam) (dismissing petitioner's PCR application and stating that section 17-27-45(A) does not "provide any exception for tolling the statute of limitations where an applicant seeks federal habeas relief prior to exhausting his state remedies"); Peloquin v. State, 321

the day the time for seeking direct review expires.[230] In South Carolina, a prisoner has ten days to seek an appeal from his conviction.[231] Thus, using the example above, the prisoner who was convicted on January 1, 2011, would actually begin his one-year time limitation for habeas review on January 11, 2011. Of course, if a direct appeal is taken then neither PCR nor habeas time limitations begin to run until it has ended.[232] Prisoners should take caution and realize that it is usually the "gap" period between the conclusion of a direct appeal and the filing of a PCR action that does the most damage to a prisoner's limitation period for the filing of a federal habeas action.[233]

Secondly, prisoners should be clear on what it means to have a pleading "properly filed" in state courts. A PCR application is properly filed within the meaning of the statute when its delivery and acceptance are in compliance with the laws and rules governing filing, which usually prescribe "the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee."[234] For example, if a prisoner filed his PCR application before his direct appeal ended[235] or filed his PCR application in a court other than the proper one, then his application would not be properly filed for purposes of tolling the federal habeas time limitation until the application was filed correctly.[236] Additionally, the limitation period is not tolled during the time an applicant has filed a second or successive petition if it is determined that the petition does not meet the limited circumstances to which the statute of limitations would not apply.[237] State law governs whether a

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S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (holding that the legislature failed to provide time for applications which would otherwise be barred by the one-year statute of limitations).

230. *See* § 2244(d)(1)(A); *see also* Hill v. Braxton, 277 F.3d. 701, 704 (4th Cir. 2002) (stating the "one-year limitation period begins running when direct review of the state conviction is completed or when time for seeking direct reviews has expired").

231. S.C. APP. CT. R. 203(b)(2).

232. *See* 28 U.S.C. § 2244(d)(2).

233. *See, e.g.*, Harris v. Hutchinson, 209 F.3d 325, 327 (4th Cir. 2000) (explaining that the time between the conclusion of direct review and the filing of a PCR is not tolled because no state court application is pending).

234. Artuz v. Bennett, 531 U.S. 4, 8 (2000).

235. *See* S.C. R. CIV. P. 71.1(b) ("An application for post-conviction relief cannot be made while an appeal from the conviction or sentence is pending or during the time in which an appeal may be perfected.").

236. *See* S.C. CODE ANN. § 17-27-40 (2003) ("A proceeding is commenced by filing an application verified by the applicant with the clerk of court in which the conviction took place."); *see also Artuz*, 531 U.S. at 9 (providing that limitations are not tolled where application filed in the wrong state court).

237. *See, e.g.*, Pettinato v. Eagleton, 466 F. Supp. 2d 641, 655 (D.S.C. 2006) (finding that "extraordinary circumstances" did exist to justify tolling petitioner's second PCR).

pleading is properly filed[238] and a review of the applicable law governing a filing can be found in the Uniform Post-Conviction Procedure Act.[239]

VI. LAW LIBRARY

A. Access

In *Bounds v. Smith*,[240] the United States Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[241] The *Bounds* Court sufficiently recognized the need for prisoners to conduct adequate claim research in order to rebut a state's argument in opposition to submitted pleadings or to file an initial pleading in general.[242] The Court left open the method a state may employ (libraries, inmate paralegals, clinical programs including law students or professionals, legal assistance organizations, etc.) in ensuring compliance with this mandate and deemed the course of action taken as a purely administrative matter.[243] In response, South Carolina has opted to provide its prisoners with law libraries staffed with inmate law clerks.[244] The decision in *Bounds*, however, was later trimmed in respect to how far a state must go to meet these requirements.

In *Lewis v. Casey*,[245] the United States Supreme Court retracted from the statements in *Bounds* suggesting that prison authorities must enable a prisoner to discover grievances or effectively litigate in court.[246] The Court stated that prisoners need only be given the "tools . . . to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement."[247] Justice Scalia, writing rather sarcastically for the Court in *Lewis*, noted that "*Bounds* does not guarantee inmates the wherewithal to transform themselves

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238. *See id.* at 649 (alteration in original) (quoting Merritt v. Blaine, 326 F.3d 157, 167 (3d Cir. 2003) ("[W]e must look to state law to determine whether the state petition is 'properly filed.'" (alteration in original)).

239. *See* S.C. CODE ANN. §§ 17-27-40, -45, -50 (2003).

240. 430 U.S. 817 (1977).

241. *Id.* at 828.

242. *See id.* at 825 (stating that although some petitions only require a petitioner to set forth facts and not law, "it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.").

243. *See id.* at 830.

244. *See* GEN. ADMIN. MANUAL, *supra* note 46, §§ 1, 4.1.

245. 518 U.S. 343 (1996).

246. *See id.* at 354.

247. *Id.* at 355.

into litigating engines capable of filing everything from shareholder derivative actions to slip–and–fall claims."[248] While the majority of prisoners pursuing PCR are not attempting to "transform" themselves into anything other than a free citizen, it is doubtful the limited access to and deficiency of the SCDC's law libraries (combined with the other roadblocks discussed below) would suffice to pass constitutional muster under *Bounds*. Indeed, however one looks at the situation, the deficiencies meant to be alleviated in *Bounds v. Smith* and *Lewis v. Casey* remain a common problem for prisoners to overcome.

When a prisoner comes to the law library attempting to gain insight into his situation, he often finds this task to be a formidable one. In general, institutional law libraries are required to be open a total of 37.5 hours per week.[249] This includes two nights per week totaling at least six hours.[250] As all prisons have several dorms on each compound, each dorm is usually assigned a specific day of the week to utilize the law library. This assignment breaks down to allow a prisoner a total of around six to seven available hours to utilize the law library each week. On weekends, law libraries typically operate for two to three hours and rotate so that each dorm on the compound is given one weekend a month to visit the library. Often, attendance in the law library is limited for various reasons. For example, a fog around the facility is considered a security hazard and will cause the law library to be closed or its opening to be delayed. If it is raining or exceptionally cold, prisoners will likely be told that the weather is not acceptable and the law library will not open. These examples illustrate that the hours of operation for institutional law libraries are simply the projected hours a prisoner may receive and not, in most cases, the actual time a library is available to be used.

Moreover, because all prisoners are required to work, the time provided for prisoners in the law library is further significantly reduced.[251] Prisoners are generally not allowed to leave their work assignment without facing disciplinary action.[252] Additionally, most job assignments usually run concurrent with the hours of operation for the law library (usual business hours). This limitation usually leaves only the evening hours of operation, typically an hour or two, available to many prisoners wishing to use the law library, and then only on the day their dorm is assigned to use the law library. Work supervisors are about even both ways on the issue of allowing a prisoner to leave work to use the law library. Some will let a prisoner go if he is not actually needed or if the prisoner

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248. *Id.*

249. GEN. ADMIN. MANUAL, *supra* note 46, § 3.

250. *Id.*

251. *See* S.C. DEP'T OF CORR., No. OP-22.08, OPERATIONS MANUAL: CONTROLLED INMATE MOVEMENT § 1.4 (July 1, 2008) [hereinafter CONTROLLED INMATE MOVEMENT] (stating that all inmates will participate in a productive duty assignment).

252. *See* S.C. DEP'T OF CORR., No. OP-22.14, OPERATIONS MANUAL: INMATE DISCIPLINARY SYSTEM app. A (July 1, 2012) [hereinafter INMATE DISCIPLINARY SYS.] (listing various disciplinary offenses, including offenses 826 for "Refusing to Work" and 828 for being "Out of Place").

has finished his assignment early. Others will strictly forbid the absence of a prisoner until scheduled work hours are over, regardless of why the absence is needed. It really boils down to the luck of the draw.

If a prisoner does manage to obtain a pass to the law library, it is still no guarantee that the law library will be open. Not infrequently, a prisoner will attempt to gain access to the law library only to find that it has been closed for one of a number of reasons. The most common reason given is that there is a shortage of staff and no security available to supervise the educational building where institutional libraries are located.[253] When this occurs, it is usually another week before a prisoner can attempt to gain access again. While SCDC policy requires that prisoners be allowed to attend the law library for at least two hours daily,[254] this policy is simply not the reality of the situation. Among other things, the law library is frequently closed when contraband searches are being conducted, when test drills are being exercised, and when the institution is on lockdown. Even greater limitations occur when a prisoner is placed in a prison's "lock-up" unit.[255]

Prisoners in an institution's SMU, commonly referred to as "lock-up," are prisoners who have been separated from the general population due to disciplinary infractions.[256] While a rules violation may seem like an unnecessary and self-imposed hardship, it is not an uncommon occurrence. During its 2009 fiscal year, the SCDC recorded a total of 22,716 disciplinary convictions.[257] As of March 27, 2013, there were a total of over 2,000 prisoners in SMUs in South Carolina.[258] Considering the fact that a prisoner may spend anywhere from several days to several years in an institution's SMU, obtaining legal material from the law library during this time is arguably even more vital, yet more limited, than that of prisoners in general population.[259] In order to obtain legal material from the law library while in SMU, policy requires prisoners to submit an SCDC Form 9-2, titled "Law Book Request," to an SMU supervisor.[260] Within three business days, the prisoner is supposed to receive up to three requested books or policies.[261] What actually occurs, however, is that inmate law clerks circulate SMU on one day to pick up request forms and legal material,

253. Contrary to the language in SCDC policy, it is usually a correctional officer, not a trained librarian, who operates and oversees the libraries at most institutions. *See, e.g.*, GEN. ADMIN. MANUAL, *supra* note 46, §§ 2, 2.4 (discussing duties of "Institutional Librarians").

254. CONTROLLED INMATE MOVEMENT, *supra* note 250, §§ 2.3.2, 2.4.2.

255. *See generally* GEN. ADMIN. MANUAL, *supra* note 46, § 9 (describing the access afforded to inmates in other units).

256. For information on the operation and procedures of SMUs, see generally SPECIAL MGMT. UNIT, *supra* note 107.

257. S.C. DEP'T OF CORR., AGENCY ACCOUNTABILITY REPORT 38 (2012), http://www.doc.sc.gov/pubweb/research/AccountabilityReportFY2012.pdf.

258. *Population Counts and Capacities*, *supra* note 82.

259. For a review of the amount of time a prisoner can spend in an SMU, see INMATE DISCIPLINARY SYS., *supra* note 251, § 17.1.

260. GEN. ADMIN. MANUAL, *supra* note 46, § 9.2.

261. *Id.*

then circulate SMU on another day to deposit the requested material and books. Therefore, an SMU prisoner might receive books on Thursday and be required to turn in those books the following Tuesday (along with a request for more books to be delivered again Thursday). The prisoner would again receive books on the following Thursday, and the cycle would continue. This is the typical routine employed at most institutions. The handicap in this routine is that prisoners may only review three cases a week, and sometimes the cycle is delayed if an inmate law clerk cannot make his scheduled rounds. Special procedures are rarely, if ever, employed for prisoners with court deadlines or any other type of special concern.[262] The most effective way prisoners combat this reduction in access to legal publications is to have other prisoners in close vicinity to them in SMU place a law book request for them so that they may have the benefit of reviewing more than three cases in a one- or two-week period.

As a final consideration regarding prisoners housed in SMU: Prisoners and lawyers alike should be aware that a prisoner and his property will be separated during his time in SMU. While prisoners are allowed to keep their legal box and legal materials in SMU, legal material that does not fit into a prisoner's 15″ x 12″ x 10″ legal box is placed in a property box and cannot be accessed by the prisoner.[263] A common problem occurs when a prisoner needs to remove material from his property box but is forbidden from doing so. Prisoners will often need to ensure, to the extent possible, that their most important documents are within the legal box if they are faced with the possibility of placement in SMU. Attorneys should also take seriously a prisoner's claim that he is unable to access necessary paperwork and advocate retrieval on a prisoner's behalf, since prison administrators sometimes respond only to outside influence.

Of course, these restrictions and roadblocks only occur when an institution has a law library to attend. Several institutions have no law library at all, and prisoners wishing to attend one must be transported to another institution to do so.[264] Generally, institutions that do not have law libraries are lower-security facilities, and the prisoners there have generally received a lesser term of imprisonment than prisoners at other higher-security institutions or have graduated to a reduced custody level.[265] However, prisoners at these lower-security facilities may still have received significant sentences they wish to

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262. *But see* Green v. McKaskle, 788 F.2d 1116, 1126 (5th Cir. 1986) (noting that right of access violated when prisoners in administrative segregation allowed only two to three law books per day, without justification for that limitation).

263. SPECIAL MGMT. UNIT, *supra* note 107, § 17.

264. *See* GEN. ADMIN. MANUAL, *supra* note 46, § 7.1 (stating that prisoners at facilities without a law library must submit a request to be transported to the law library of another institution and must be so transported within a "reasonable amount of time").

265. *See generally* INMATE CLASSIFICATION PLAN, *supra* note 42, § 8 (stating that inmates who are within eight years of being released may be placed at Level 1B institutions). Therefore, a prisoner with a twelve-year nonviolent sentence may automatically meet the time requirement for placement at such a facility. *See generally* S.C. CODE ANN. § 24-13-230 (Supp. 2012) (describing generally the credits given for good behavior).

challenge through a PCR action or other post-conviction avenue. Since the decision to pursue post-conviction relief is a subjective evaluation of the facts and law in any given case and is not limited by a prisoner's sentence alone, prisoners who are housed at a facility without a law library often request, unsuccessfully, equal access to needed legal materials. Unfortunately, such prisoners are only given a mere two hours per week to conduct their studies,[266] if they are given the opportunity to do so at all. Since two hours per week is wholly inadequate, prisoners in these situations generally attempt to simply make the most out of a challenging situation, as the only alternative is to be reassigned to a more restrictive facility with a law library.

Once a prisoner has gained access to the institutional educational building and has been given a valid pass, it is still not guaranteed that he will actually make it to the law library itself. Guards assigned to the educational building are generally unpredictable in their antics and mannerisms towards prisoners. While policy provides that all prisoners will be provided with access to the law library,[267] there are usually differences between practice and policy. On the one hand, a prisoner may be able to show the guard a pass and move directly to the law library. On the other, the guard may determine that a prisoner's shirt is not properly tucked in or that he is not properly groomed, and thus order that he exit the law library.[268] This practice has the effect of forcing prisoners to return to their dormitories and waive their library privileges for that day, which, in turn, means that a prisoner must wait another week before being able to return. Once again, it all boils down to the luck of the draw on the type of guard a prisoner will encounter.

Lastly, institutional mailrooms can prove to be an almost impossible hurdle to overcome for prisoners attempting to gain "access to the courts."[269] Although the SCDC has an established policy outlining the guidelines for outgoing and incoming mail,[270] this policy, like many, is often conservatively construed to the effect of placing additional hardships on a great number of indigent and pro se litigants. For example, although indigent prisoners are supposed to be able to mail necessary paperwork to the courts without limitation,[271] to do so they are often required to demonstrate that they are initiating or have a pending action in the courts. While it could possibly be argued that this practice serves a logical penological interest—preventing prisoners from frivolously abusing the privilege—the frustration lies with mailroom personnel who are not trained to

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266. *See* GEN. ADMIN. MANUAL, *supra* note 46, § 1.

267. *See id.*

268. For more information on the grooming standards of prisoners, see generally S.C. DEP'T OF CORR., No. OP-22.13, OPERATIONS MANUAL: INMATE GROOMING STANDARDS (Nov. 1, 2006).

269. Bounds v. Smith, 430 U.S. 817, 821 (1977).

270. *See generally* S.C. DEP'T OF CORR., No. PS-10.08, PROGRAM SERVICES MANUAL: INMATE CORRESPONDENCE PRIVILEGES (May 1, 2008) [hereinafter INMATE CORRESPONDENCE PRIVILEGES] (providing the guidelines).

271. *See id.* § 11.1 (stating that inmates are allowed to send legal mail as needed, regardless of indigent status).

recognize legitimate court documents and often deny prisoners postage out of ignorance. Mailroom personnel typically demand to review a prisoner's personal legal correspondence from a court officer in order to determine whether a prisoner has a pending court action,[272] and then they often deny postage simply because they do not sufficiently understand what it is they have read. One of the most common demands that mailroom personnel make on indigent prisoners seeking postage with which to access the courts is requiring that the prisoner produce a recent letter from his lawyer or the court demonstrating the pendency of an action. Doing so is not always an easy task. As previously discussed, appointed counsel often go long periods without responding to a prisoner's inquiries and sometimes do not respond at all, thereby preventing a prisoner from making this requested showing. For this reason, this practice serves as a major hindrance to a significant number of prisoners attempting to communicate with the court and its officers.

B. Capacity

Another common roadblock prisoners encounter is the limited capacity of the law library itself. SCDC policy limits the total number of prisoners allowed in the law library.[273] Most institutions within the SCDC are designed to hold a total population of between 1,100 and 1,800 prisoners.[274] This statistic means that if even one percent of an institution's population (eleven to eighteen prisoners) decided to utilize the law library on any given day, it is not likely that the prisoner who is not quick on his feet will be admitted.

Some prisoners spend only a fraction of the time available to them in the law library when they are granted access. Others will often come simply to browse and kick around ideas. Therefore, a logical solution to capacity space might be to allow prisoners awaiting access to actually wait in the vicinity until a chair becomes available. This is a reasonable proposition because some prisoners come to the law library only to secure an address or to quickly check a fact and then leave shortly thereafter. Another reasonable proposition might be to allow prisoners to check out legal material and conduct their research in another area of the educational building. Both of these options are feasible because the adjoining library, which is attached to the law library, can seat a minimum of eighteen prisoners and is rarely at full capacity. Unfortunately, neither of these advancements seem likely to be implemented anytime soon. As no legal books are allowed to be checked out of the educational building,[275] prisoners often

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272. *See id.* § 7.2 (providing that legal mail will be opened and inspected in front of prisoner).

273. *See* GEN. ADMIN. MANUAL, *supra* note 46, § 7.2 (limiting inmate access to law libraries to existing seating capacity). However, there are exceptions. Broad River CI, for example, seats at least sixteen prisoners in its law library. This is the only prison known to the author with a capacity this high.

274. *See Population Counts and Capacities*, *supra* note 82.

275. GEN. ADMIN. MANUAL, *supra* note 46, § 7.5.

must return to their living units and attempt to gain access yet again at a later time or date. The most effective countermeasure against being denied access to the law library because of capacity is simply to ensure that one is familiar with the available time frames for access and is the first to sign up to attend.

C. Inmate Law Clerks

Once in the law library, a prisoner's obstacles really begin to unfold. Prisoners generally have no idea what it is that they need to research or where to begin doing so. While many have asked enough questions to have a very general understanding of what PCR is about, prisoners are basically left to examine the merits of their claims through independent research. Prisoners usually find this to be an extremely daunting task for several reasons.

To begin, prisoners typically want a quick prognosis for their situation when one is not available. Many also wish to assess their situation through diligent research, but they are not in possession of all—if any—of their discovery-related documents and transcripts to enable them to do so.[276] Others come to the law library without even pen and paper. Thus, it is usually to the prisoner law clerks that inquiring minds first turn.

Inmate law clerks fall into one of two categories: those who are knowledgeable and skilled in legal research and those who are not. Those law clerks in the former category are mostly self-trained through determination and diligence. Many have taken paralegal courses and stay abreast of changes in the law by personally purchasing recent opinions, periodicals, and other legal publications. The majority of these inmate law clerks do not give "curbside" advice and do not have a problem telling an inquiring prisoner that they do not know the answer to a question, if that is indeed the case.[277] These law clerks not only inform and guide other prisoners with the knowledge within their possession on any given topic but also teach others how to research effectively so that an answer is always available to a prisoner, no matter what question he may have. These law clerks are truly few and far between, and prisoners seeking guidance in the law library have really found a "diamond in the rough" should they cross paths with one.

The second category of inmate law clerks mentioned is definitely the most dominant. Their existence is due to the fact that no qualifications or prerequisites exist for becoming a law clerk within the SCDC.[278] A prisoner need not take any courses in legal education, meet any standard in legal training, or know the difference between the *Georgetown Law Journal* and *The Bluebook*

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276. Criminal discovery in the prosecution of a crime is regulated by Rule 5 of the South Carolina Rules of Criminal Procedure. *See* S.C. R. CRIM. P. 5. For the rule governing discovery in PCR actions, see S.C. CODE ANN. § 17-27-150 (2003).

277. SCDC policy bars inmates from giving other inmates any form of legal assistance. *See* GEN. ADMIN. MANUAL, *supra* note 46, § 4.3. However, prisoners do so on a regular basis.

278. *See generally id.* § 4 (describing inmate law clerks).

in order to become a law clerk in the SCDC. The only quasi-requirement mentioned in SCDC policy is that potential law clerks read, voluntarily, a pamphlet on how to conduct legal research.[279] It is very true that a prisoner can have absolutely no understanding of the law yet become an institutional law clerk simply because an educational guard has a position that needs to be filled. These prisoner law clerks are the origin of horrendous pleadings and bad advice. Nonetheless, many inquiring prisoners seek the advice and assistance of these types of law clerks for the simple reason that they are more likely to tell an inquiring prisoner what it is they desire to hear, regardless of its validity. To speak of such concepts as dictum, plurality opinions, and stare decisis to these law clerks is to speak in a foreign tongue. In this most common of situations, it is truly the blind leading the blind.

It should be additionally noted that it is not unheard of for prisoners seeking enlightenment as to their legal concerns to fall victim to those prisoners who can only be described as scam artists. These are individuals who prey on a prisoner's fear and ignorance to portray themselves as legal scholars for pecuniary gain. It is usually the victims of these scam artists who end up coming to the institutional law library at a later date seeking to "fix" what they had originally believed to be an adequate pleading or motion. Whether in or out of the law library, bad advice and insufficient pleadings can have a devastating effect upon a prisoner's chances of success by PCR. A signature trait of the conversations that occur in institutional law libraries is prisoners taking a rumor or error of law and portraying it as a fact. Very often, prisoners are led away from a correct understanding of the law and how it may apply because they take the words of other prisoners as fact and do not bother to ascertain the truth for themselves. Legal research can get very complex, and what may seem like a common sense answer may not turn out to be the correct one upon reviewing the relevant case law. Good arguments are often lost or diluted because prisoners take as true the fictional beliefs of others. Law libraries tend to be breeding grounds for prisoners who desire to exert themselves as legal geniuses but who often only accomplish misguiding others due to their own unseen and unacknowledged misunderstanding of the law. Prisoners should ensure that they do the research necessary for their case themselves.

Another warning about this practice is that the preparation of legal documents or the giving of legal advice by anyone who is not a member of the Bar of this state is against the law.[280] Thus, prisoners are often faced with

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279. Although SCDC policy states that "law clerks will be trained in law library research by the institutional librarian using the reference packet prepared by the Office of General Counsel titled 'How to Use the Law Library,'" *id.* § 4.2, this statement is misleading. As stated before, most libraries are operated by whatever correctional officer that happens to be working and not by an actual trained librarian. These correctional officers have no legal training whatsoever and can provide law clerks with no more, if not less, assistance than that which they can provide themselves.

280. S.C. CODE ANN. § 40-5-310 (2011); *see also* State v. Despain, 319 S.C. 317, 319–20, 460 S.E.2d 576, 577–78 (1995) (discussing what constitutes the unauthorized practice of law).

deciding among one of the following three avenues when preparing a PCR application: (1) research and draft the claims in their PCR application themselves, (2) seek out the assistance of another prisoner to do so, or (3) turn in their PCR application with only vague claims and rely on the attorney subsequently assigned to them to remedy the deficient pleadings. Most prisoners trust neither themselves nor any subsequently appointed counsel to adequately plead or advance their claims and frequently feel the best option is to seek out the assistance of other prisoners to do so. It is understandable, and quite natural, for prisoners with lengthy prison sentences to seek out the assistance of more knowledgeable prisoners for advice on legal matters but blindly following advice without checking and rechecking a position taken is both careless and destructive. Slick words and fast talk that promise a prisoner an easy and sure way to relief should always be viewed with skepticism and should never be taken as an invitation to relax the need to conduct the relevant research. Prisoners should always be wary of the advice of others and should attempt to better understand the law surrounding their case themselves before seeking guidance somewhere else. Additionally, prisoners helping other prisoners in preparing PCR applications should know that serious consequences can ensue.[281]

In *State v. McLauren*,[282] the defendant was charged with the unauthorized practice of law for preparing and filing a PCR application on behalf of another prisoner.[283] McLauren, a self-proclaimed "jailhouse lawyer," was found guilty of the charge and later appealed.[284] Before the South Carolina Court of Appeals, McLauren argued several points revolving around two South Carolina statutes that he asserted gave him the right to advocate the cause of another person despite not being a member of the Bar.[285] In rejecting his argument, the court of

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281. SCDC policy states that prisoners who do help other prisoners with legal matters may be charged with a disciplinary infraction. GEN. ADMIN. MANUAL, *supra* note 46, § 4.3.

282. 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002).

283. McLauren helped another prisoner by filling out his PCR application, and signed the application as "Brent C. McLauren, Esq. . . . Of Legal Counsel to Petitioner." *Id.* at 491, 563 S.E.2d at 347. McLauren was not a licensed attorney in South Carolina. *Id.*

284. *See id.* at 490–91, 563 S.E.2d at 347.

285. *See id.* at 498, 563 S.E.2d at 351. Specifically, McLauren attempted to construe section 40-5-310 to exclude his conduct because he was not "in a court of this state." *Id.* at 497, 563 S.E.2d at 350 (internal quotation marks omitted). Section 40-5-310 previously provided the following:

> No person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney. A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

S.C. CODE ANN. § 40-5-310 (2001) (amended 2009). The court rejected McLauren's argument by defining the word "practice" to include his conduct. *See McLauren*, 349 S.C. at 498, 563 S.E.2d at 351. McLauren also attempted to construe section 40-5-310, in conjunction with section 40-5-80, for the proposition that his conduct was permitted as long as he did not take "fees or gratuities." *Id.* Section 40-5-80 previously provided as follows:

> This chapter shall not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires, or the cause of another, with leave of the court

appeals ruled that "South Carolina does not allow 'jailhouse lawyers' to practice law under the guise of an inmate giving advice or preparing legal documents for another inmate."[286] McLauren was sentenced to three years' imprisonment for practicing law, consecutive to the time he was already serving, for preparing another prisoner's PCR application.[287]

D. Materials and Holdings

The road to the law library itself, sadly, does not lead to a pot of gold. When a prisoner does manage to make it into the law library and find useful directions from a knowledgeable law clerk, the reality of the law library's limitations becomes readily apparent to the researcher. The available material in the law library is governed by policy and is strictly enforced.[288] This enforcement means that any material not listed in the law library's holdings, dictated by policy, are strictly forbidden. For example, the *South Eastern Reporter*, second edition (S.E.2d), goes up to volume 576 in all institutional law libraries.[289] Volume 576 was published in early 2003.[290] Therefore, any post-2003 cases that cannot be found in the *South Eastern Reporter*, second edition, cannot be found in any SCDC law library and are effectively barred from placement in any prisoner's legal argument.[291]

The exclusive holdings of the SCDC's law libraries, presently, are comprised of the following: *South Eastern Reporter*, second edition, volumes 374–576; *Federal Supplement* (F. Supp.), volumes 302–999; *Federal Supplement*, second edition (F. Supp. 2d), volumes 1–244; *Federal Reporter*, second edition (F.2d), volumes 859–999; *Federal Reporter*, third edition (F.3d), volumes 1–320; *Corpus Juris Secundum*, volumes 14A, 22, 22A, 23, 23A, 24, and 28A; *Modern Criminal Law*, one volume; *South Carolina Digest*, second edition, complete set; *Supreme Court Reporter*, volumes 80 to present; South Carolina Code of Laws (1976, as amended), complete set; Shepard's for United States, Federal, and South Carolina citations; *Criminal Law Reporter* (BNA); South Carolina Rules of Court, state and federal; United States Code Annotated,

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> first had and obtained; provided, that he declare on oath, if required, that he neither has accepted nor will accept or take any fee, gratuity or reward on account of such prosecution or defense or for any other matter relating to the cause.

S.C. CODE ANN. § 40-5-80 (2001) (amended 2002). The court rejected this argument on the ground that leave had not been first obtained by McLauren. *McLauren*, 349 S.C. at 498, 563 S.E.2d at 351. The concluding language in this case also indicated that leave of the court in this manner should rarely and cautiously be granted. *Id.* at 499, 563 S.E.2d at 351.

286. *Id.*

287. *Id.* at 490–91, 563 S.E.2d at 347.

288. *See* GEN. ADMIN. MANUAL, *supra* note 46, §§ 2.1–.4.

289. *See id.* § 2.1.

290. 576 SOUTH EASTERN REPORTER (2d ed. 2003).

291. Some of the more significant and sought-after cases may still be found in some institutional law libraries due to the thoughtfulness of prisoners who have purchased these recent opinions and donated them for the general population of prisoners to view.

Title 28, Sections 2201 to end and Title 42, Sections 1771 to 2010; *West's Federal Practice Digest*, fourth edition, complete set; *Black's Law Dictionary*; *South Carolina Bar Lawyers Desk Book*; the United States and South Carolina Constitutions; a list of addresses for state and federal courts in South Carolina; a "How to Use the Law Library" reference packet; and *SCDC Operations Manuals*.[292] Most of the material available, however, is dangerously outdated.

To start, the only reporter that is up to date in institutional law libraries is the *Supreme Court Reporter*.[293] All other reporters stopped being distributed to institutional law libraries somewhere around the early part of 2003.[294] *Corpus Juris Secundum* is updated only through 1996, the United States Code is updated through 1987 (with supplements going until possibly 2001), Shepard's Citations are through 2001, *Modern Criminal Law* is only as modern as its publishing date in 1976, and the *Lawyers Desk Book* is dated 2002.[295] Institutional libraries are provided with current supplements for both the South Carolina Code of Laws and the *South Carolina Digest*, second edition, but finding a recent opinion in either means only that a prisoner has found a case that he will need to order if he is interested in reading it.[296] For the prisoners attempting to gain an understanding of the merits of the claims they wish to pursue during PCR and in the face of the attorney general's office citing recent authority in responsive and opposition motions against applicants, this practice can be exceptionally discouraging.[297]

While it is true that much of the material in the law library is dated, prisoners can still benefit a great deal by using this material to research. Many prisoners are under the mistaken belief that unless more recent material becomes available, the law library is of no use to them. While the lack of recent state and federal opinions is indeed a major hindrance, most of the legal principles that form the law today have been around for decades, and prisoners can gain invaluable insight into their legal concerns simply by reading the state and federal opinions that are available on a topic, in conjunction with any recent Supreme Court opinions available on point. Although complete research cannot

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292. GEN. ADMIN. MANUAL *supra* note 46, § 2.1.

293. *See id.*

294. *See id.* (showing volumes of reporters available in institutional law libraries).

295. *See generally id.* (showing volumes of legal sources available in institutional law libraries).

296. *See generally id.* (describing the sources and updated volumes thereof available to prisoners).

297. Recently, the SCDC has attempted to correct the antique nature of its law libraries by installing at certain institutions computers with LexisNexis-like software that provide prisoners with select up-to-date legal sources. Prisoners are hopeful that the SCDC will continue this effort and place similar computers at all institutions.

be accomplished using the SCDC law libraries by themselves, taking a proactive position is better than taking an inactive one.[298]

Another major barrier prisoners encounter is the lack of explanatory texts available in the law library. Law libraries contain only graduated material, or "hard law," and prisoners pursuing a PCR action generally only have statutes and case law to review when doing so.[299] Most prisoners would rather dispense with even attempting to understand such clinical material, and many simply give up doing so. There is no doubt that more easily understandable publications and periodicals, such as law reviews,[300] encyclopedias,[301] and other publications,[302] that explain, rather than define, the PCR process would more immediately benefit pro se litigants and indigent applicants attempting to understand their position. The SCDC, however, has taken the stance that no such publications are to be made available to prisoners regardless of whether prisoners, private citizens, or organizations decide to donate them. For this reason, relying on institutional law libraries alone to attack the validity of a prisoner's conviction and sentence is simply not possible.

E. Legal Community

To combat the inadequacies of institutional law libraries, prisoners often seek out the members of the legal community in their prison to aid and assist them in their research. What is meant by "legal community" is simply the group of those prisoners who have taken an interest in post-conviction and appellate remedies and have obtained publications and other relevant material to increase their understanding of the legal avenues they are attempting to travel. If a prisoner desires to better understand PCR, for example, it is likely that one or more copies of the *South Carolina Post-Conviction Relief Manual* (or a similar text) can be found within the possession of another prisoner.[303] Books on brief writing, evidence law, criminal procedure, federal habeas, and individual forms

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298. Prisoners should take this advice with a dose of caution and ensure that they are not relying on "bad law" (overturned opinions, abrogated statutes, etc.) when researching and preparing documents to be submitted to a court.

299. *See generally* GEN. ADMIN. MANUAL, *supra* note 46, § 2.1 (providing an inventory of legal sources available to inmates).

300. *See, e.g.*, Blume, *supra* note 147 *passim* (discussing the various aspects of post-conviction remedies available to inmates in South Carolina); Blume & Paavola, *supra* note 144 *passim* (providing an updated discussion of post-conviction practice and procedure in South Carolina and explaining statutory amendments to South Carolina's PCR Act that have occurred since 1994).

301. *See, e.g.*, 17 S.C. JUR. *Post-Conviction Relief* (1993) (legal encyclopedia explaining post-conviction relief).

302. *See, e.g.*, DAVID A. SPENCER, SOUTH CAROLINA POST-CONVICTION RELIEF MANUAL (2000) (addressing the procedure and substantive law of post-conviction relief in the state courts of South Carolina).

303. The SOUTH CAROLINA POST-CONVICTION RELIEF MANUAL is published by the South Carolina Bar's Continuing Legal Education Division, P.O. Box 608, Columbia, SC 29201. *See id.*

and comments can usually be found if a prisoner knows the right person to ask. Most prisoners who frequent the law library are well-acquainted with each other and understand the bartering system in place enough to allow their material to be borrowed in return for the same privilege from someone else. This lending system between prisoners cuts down on the cost that prisoners have to spend to purchase the same material and creates a much more up-to-date "library" from which prisoners can benefit. Since the law library does not contain the most recent published opinions, it is likely that someone on the compound will have a subscription to the Shearouse Advance Sheets to rectify this.[304] Even more prisoners likely will order an untold number of cases from either the South Carolina Supreme Court Library[305] or the University of South Carolina Coleman Karesh Law Library.[306] Both libraries have an established procedure for selling copies of legal materials to prisoners that is efficient, vital, and appreciated.[307] Admittedly, few prisoners opt to utilize their available resources to purchase necessary legal materials in the face of more instantly gratifying options (such as canteen, magazines, and hobby craft items). However, there are usually enough prisoners on any given compound who do purchase a substantial amount of legal materials to constitute an adequate community. When a prisoner needs to know if an older case he is reviewing is still good law or review material on an issue other than case law and statutes, this community can be invaluable.

Donations made by the legal community outside of prison can play a significant part in a prisoner's research and preparation abilities as well. Since most of the materials available in the SCDC law libraries are only as current as 2003, several sympathetic attorneys have donated more current legal materials on a regular basis (especially when the attorneys receive newer editions of the material).[308] Attorneys who wish to do so must submit a request to an institution's associate warden for program services or mail the donated material

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304. The Advance Sheets contain the most recent opinions of the South Carolina Court of Appeals and the South Carolina Supreme Court. For more information on how to obtain this publication, a prisoner may write to: South Carolina Supreme Court, Attn. Advance Sheets, P.O. Box 11330, Columbia, SC 29211.

305. South Carolina Supreme Court, Attn. Law Library/Photocopy Services, P.O. Box 11330, Columbia, SC 29211. Copies are currently twenty cents per page plus postage.

306. University of South Carolina Coleman Karesh Law Library, Attn. Photocopy Services, 701 South Main Street, Columbia, SC 29208. Copies are currently fifty cents per page plus a handling fee.

307. Both the South Carolina Supreme Court Law Library and the University of South Carolina's Coleman Karesh Law Library require prisoners to forward to them a list of the materials they want copied. Once this is done, a return letter will be sent to the prisoner stating a price for the requested material. After a prisoner forwards payment, copies will be made and mailed out. This whole procedure usually takes anywhere from ten to fourteen days.

308. Mr. John H. Blume, Professor of Law, Cornell Law School and Director, Cornell Death Penalty Project, Ithaca, NY, and Mr. Patrick Flynn, Associate Professor of Law, University of South Carolina School of Law and Member, University of South Carolina Department of Clinical Legal Education, Columbia, SC, are worth mentioning here. Both of these individuals have taken measures and utilized resources for the benefit of prisoners.

directly to an individual prisoner. Unfortunately, most of these donations do not get accepted by prison administrators on the grounds that the material being donated is not listed in the designated law library holdings.[309] In addition to attorneys, a prisoner's family is often a great help in the research process as well. An important note to make here is that family members usually send prisoners requested material they have looked up on the Internet, and they should know that the SCDC policy only allows a prisoner to receive five Internet pages in each envelope.[310] When the prisoner is receiving something this way, it may help to mark larger packages of legal materials with the words "legal materials" or "legal mail."

F. Statistics and Comprehension

The SCDC possesses a total of thirty-one facilities and houses 21,924 prisoners committed to its care.[311] Prisoners are usually committed to the SCDC by commitment orders of the county in which they were convicted of a crime exceeding three months' imprisonment.[312] In 2012, approximately 10,170 prisoners entered the SCDC.[313] Out of that number, 7,966 of those were new admissions from court and 1,959 of the new admissions were parole or probation revocations.[314] While the full picture normally encompasses more than just bold statistics, these statistics are intended to give the reader an appreciation of the prisoner population within the SCDC and a relevant profile of the prisoners incarcerated.

The SCDC's population consists of 20,592 male prisoners—94% of its total population—whereas its 1,332 female prisoners make up the remaining 6% of the population.[315] The average length of sentence in the SCDC is thirteen years and seven months,[316] with an average of five years and nine months of time remaining prior to release.[317] Over 52% of the population, or 11,506 prisoners,

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309. GEN. ADMIN. MANUAL, *supra* note 46, § 2.1 (June 1, 2004).

310. INMATE CORRESPONDENCE PRIVILEGES, *supra* note 269, § 5.5.1 ("*However, if the inmate can demonstrate that the excessive material is supportive documentation as it relates to accessing the courts, an inmate may have it for the purpose of his/her legal defense/claim, provided* that the contents do not depict questionable material.").

311. *Population Counts and Capacities*, *supra* note 82.

312. S.C. CODE ANN. § 24-3-20(A) (Supp. 2012).

313. *Admission to SCDC Base Population*, S.C. DEP'T OF CORR. (Aug. 8, 2012), http://www.doc.sc.gov/research/Admissions/ADM_FromBASEPOP_FY12.pdf.

314. *Id.*

315. *Id.*

316. *Sentence Length Distribution of SCDC Total Inmate Population as of June 30, 2012*, S.C. DEP'T OF CORR. (Aug. 8, 2012), http://www.doc.sc.gov/research/InmatePopulationStats/ASOF_SentenceLengthDistrib_063012.pdf.

317. *Remaining Time to Serve Before Expiration of Sentence of SCDC Total Inmate Population as of June 30, Fiscal Years 2008–2012*, S.C. DEP'T OF CORR. (Aug. 8, 2012), http://www.doc.sc.gov/research/InmatePopulationStatsTrend/ASOFTrendRemainingTimeToServeFY08-12.pdf.

are not eligible to receive parole, and 14% of the population, or 3,206 prisoners (excluding those with life sentences), have been sentenced to twenty years of imprisonment or more.[318] Considering the average prisoner's lengthy sentence and time served, and given the significant amount of time a number of prisoners have in general, one would think that a majority of prisoners would be primarily focused on obtaining post-conviction remedies. Unfortunately, the reality is that few prisoners put forth any real effort to pursue their options. The plus side to this, however, is that the few prisoners who do put forth a respectable effort to research, develop, and present their claims are an anomaly to PCR courts and greatly increase their chance of success.

As true as this is, it may not always be a prisoner's lack of determination that prevents him from fully presenting and litigating a claim, but instead an overall mental inability to do so. This factor in the equation is often overlooked when evaluating the "access to courts" prisoners are entitled to. The practical side of prison demonstrates that incarcerated individuals are generally an under-classed and under-educated community. With the right resources, however, most prisoners can do a fairly decent job of researching and presenting their claims to the courts. The potential or ability to learn what steps need to and should be taken in order to maximize a prisoner's chance of success on PCR is not a problem for most prisoners; some simply do not attempt to utilize their potential to do so and are procrastinators at best or lazy or indifferent at worst. A significant number of prisoners, however, simply will never understand or comprehend the gravity of the situation they are in and the due process that needs to be taken in order to correct any constitutional violations that may have occurred because they do not have the ability to do so.

To begin with, the overall education level of prisoners within the SCDC is a mere 10.5.[319] This number represents an educational level of someone in the tenth grade.[320] The overall reading level of prisoners averages out at 8.8, with 48% of the total population reading below a ninth-grade level.[321] With these statistics in mind, it is understandable that the majority of prisoners usually have a hard time comprehending the material they read in the law library. Those reading this text who have a background in legal research only have to recall the cases they needed to read two or three times in order to comprehend its meaning to understand the average prisoner's dilemma. Indeed, one of the questions that prisoner law clerks are asked most frequently is: "What is this case talking about?" There is no simple solution to this problem. Not everyone can, nor is everyone meant, to understand the law the same way the next person does. Some people just understand the law better than others. As a result, it is a major

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318. *Profile of Inmates in Institutional Count (Including Inmates on Authorized Absence)*, S.C. DEP'T OF CORR. (Aug. 8, 2012), http://www.doc.sc.gov/research/InmatePopulationStats/ASOF_InstitutionalCountProfile_FY12.pdf.

319. *Id.*

320. *See id.*

321. *Id.*

roadblock to many prisoners that the SCDC forbids the discussion of legal matters amongst prisoners.[322] Receiving another person's point of view on an issue, like reading a dissenting opinion, can vastly increase a person's understanding of the issue. While prisoners should be wary of the legal advice given to them from anybody but a member of the Bar who has been trained in legal matters, not allowing a prisoner to explain to another prisoner what a term or legal principle means does not fit well with the reality of prison life. This is because when attorneys fail to answer letters from prisoners, refuse to accept telephone calls, and neglect to visit or otherwise communicate with their prisoner clients, the result is that prisoners will either allow their claims to perish or else seek help from other prisoners.

A further extension of this topic involves those prisoners with a diagnosed mental illness. Understanding and discovering potential claims a prisoner may ultimately present at PCR can be a tough task for some but an impossible task for others. Approximately 13% of the SCDC's prison population, or over 2,800 prisoners, are classified as mentally ill.[323] The percentage of mentally ill prisoners almost undoubtedly corresponds with the nearly 10% of prisoners who are treated with psychotropic medication in state prisons.[324] These prisoners suffer a handicap in pursuing PCR that is not addressed by SCDC policy in any way. Other prison systems have at least attempted to take measures to assist prisoners who lack the mental competency necessary to pursue direct or collateral relief, but the SCDC has remained silent on the topic.[325] Additionally, by way of restrictions imposed by policy, the SCDC effectively works against this class of prisoners by forbidding other prisoners from assisting them.[326] Fortunately, South Carolina jurisprudence provides some measure of protection for such prisoners wishing to pursue PCR.

In *Council v. Catoe*,[327] the South Carolina Supreme Court addressed the question of whether PCR proceedings of a mentally incompetent applicant should be stayed until the applicant regains competency.[328] The applicant here

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322. GEN. ADMIN. MANUAL, *supra* note 46, § 4.3 (stating that inmate law clerks will not type forms or letters for other inmates or provide any other form of legal assistance).

323. *Profile of Inmates in Institutional Count (Including Inmates on Authorized Absence)*, *supra* note 317.

324. ALLEN J. BECK & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH TREATMENT IN STATE PRISONS, 2000, at 4 (2001), *available at* http://www.ojp.gov/jbs/pub/pdf/mhtsp00.pdf.

325. *See* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.–C.L. L. REV. 299, 312 (2006) ("Inmates who are illiterate or have disabilities that hinder their ability to research the law and prepare legal documents and legal mail, and need research assistance, shall be provided *access* to the law library and to inmate law clerks. . . . Upon receipt of [a] . . . request . . . the law library supervisor shall schedule the inmate for a *visit* to the law library or a *visit* with an inmate law clerk." (quoting FLA ADMIN. CODE ANN. r. 33-501.301(3)(e) (2005))).

326. *See supra* note 322 and accompanying text.

327. 359 S.C. 120, 597 S.E.2d 782 (2004).

328. *Id.* at 124, 597 S.E.2d at 784.

had attempted to waive his PCR rights.[329] The court, after hearing testimony that clearly indicated that the applicant was unstable, ordered a competency evaluation that ultimately determined that the applicant suffered from schizophrenia.[330] In holding that the applicant's PCR should not be delayed due to the applicant's mental incompetency, the court noted that the issues raised were not "extraordinarily fact intensive" and did not require the applicant's assistance.[331] The court went on to carve out an exception to the bar on successive PCR applications by holding that "[i]f, at a future date, the petitioner regains his competency and discovers that at his original PCR hearing, his incompetency prevented his ability to assist his counsel on a fact-based claim of ineffective assistance of counsel, he may then raise that claim in a subsequent proceeding."[332]

In *Ferguson v. State*,[333] the court examined the opinion in *Council v. Catoe* to determine whether the one-year statute of limitations set forth in section 17-27-45(A) of the South Carolina Code was tolled by an applicant's incapacity.[334] The court asserted that difference between the two cases was that Council had already filed his PCR application and was seeking to stay his hearing until he regained competency.[335] Ferguson, on the other hand, had never filed his PCR application and was asking the court to allow him to file out of time because he was mentally incompetent and unable to file on his own during the one-year limitation period.[336] In remanding the matter to the PCR court for a hearing to determine whether Ferguson's mental incapacity prevented his filing an application in the year following his guilty plea, the court held that to deny a prisoner the right to file a PCR application because of his mental incapacity would not allow such a prisoner "one full bite at the apple."[337] In such situations, the court held, a hearing shall be held to determine the dates the prisoner suffered from mental incompetency and to calculate his one year for filing a PCR application.[338] If the applicant is within one year from the time he regained competency, then he will not be barred from pursuing post-conviction relief.[339]

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329. *Id.* at 123, 597 S.E.2d at 783.

330. *Id.* at 123, 597 S.E.2d at 784.

331. *Id.* at 127, 597 S.E.2d at 785–86.

332. *Id.* at 129, 597 S.E.2d at 787.

333. 382 S.C. 615, 677 S.E.2d 600 (2009).

334. Ferguson v. State, 382 S.C. 615, 617–18, 677 S.E.2d 600, 601 (2009) (citing S.C. CODE ANN. § 17-27-45(A) (2003); *Council*, 359 S.C. at 129, 597 S.E.2d at 787).

335. *Id.* at 618, 677 S.E.2d at 601.

336. *Id.* at 616, 618, 677 S.E.2d at 601.

337. *Id.* at 619–20, 677 S.E.2d at 602.

338. *Id.* at 620, 677 S.E.2d at 602.

339. *See id.* For more information on mental incompetency, see generally 7 WEST'S S.C. DIGEST 2D *Criminal Law*, Key No. 385 (2008 & Supp. 2012).

VII. INITIAL FILING

A. Standing, Filing, and Return

Under the PCR Act, an individual who has been convicted of or sentenced for a crime has standing to pursue post-conviction relief.[340] For purposes of the PCR Act, the word "convict" simply means to prove a person guilty of a crime and the word "sentence" means "the judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted."[341] A sentence is not limited to a term of imprisonment but instead may either be a term of imprisonment or a fine or both.[342] Accordingly, an applicant has standing to petition for post-conviction relief if he is in custody or the results of his prior conviction still persist.[343] This is true regardless of whether a person has served jail time or not.[344]

An action for PCR is initiated when a person properly files a standard application to the clerk of court in the county in which he was convicted.[345] Simply mailing a form off, however, does not constitute filing; "[w]hen a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer."[346] Forms are supplied by the Office of Court Administration to circuit court clerks for distribution upon request.[347] Although

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340. S.C. CODE ANN. § 17-27-20(a) (1976); Jackson v. State, 331 S.C. 486, 489, 489 S.E.2d 915, 916 (1997) (citing Jones v. State, 322 S.C. 101, 102, 470 S.E.2d 110, 110 (1996)); Sutton v. State, 361 S.C. 644, 647, 606 S.E.2d 779, 780 (2004) (citing S.C. CODE ANN. §§ 17-27-10 to -160), *abrogated on other grounds by* Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005).

341. *Jackson*, 331 S.C. at 489, 489 S.E.2d at 916 (quoting WEBSTER'S NEW WORLD DICTIONARY 97 (Compact School & Office ed. 1967); BLACK'S LAW DICTIONARY 1222 (5th ed. 1979)) (internal quotation marks omitted).

342. *Id.*

343. *Id.* at 487, 489 S.E.2d at 916 ("The [PCR] Act does not contain an express "in custody" requirement."); *see also* McDuffie v. State, 276 S.C. 229, 231, 277 S.E.2d 595, 596 (1981) ("We hold where an applicant for [PCR] alleges in his application that the results of his prior conviction still persist, even though the sentence has been fully served, he is entitled to an evidentiary hearing to determine whether or not he has been prejudiced.").

344. Pierce v. State, 338 S.C. 139, 142 n.1, 526 S.E.2d 222, 223 n.1 (2000) ("Although respondent did not receive a prison sentence, he has standing to bring a PCR action because he alleged the conviction has affected his ability to get a job in law enforcement.").

345. Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) ("The applicant submits his claims on a standard PCR application, initiating a civil action governed by the South Carolina Rules of Civil Procedure in the Court of Common Pleas in the county where he was convicted." (citing §§ 17-27-40, -50, -80; S.C. R. CIV. P. 71.1, Form 5)).

346. Pelzer v. State, 378 S.C. 516, 520, 622 S.E.2d 618, 620 (Ct. App. 2008) (citing Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001)); *see also* Artuz v. Bennett, 531 U.S. 4, 9 (2000) (noting that if an application is erroneously sent to the wrong location, it may be considered pending, but not properly filed). In *Pelzer*, the applicant incorrectly sent his PCR application to the South Carolina Office of Appellate Defense one day prior to his deadline for filing. *Pelzer*, 378 S.C. at 518–19, 662 S.E.2d at 619. Although the appropriate clerk of court received his application only a few days later, the PCR court refused to hear his application and deemed it untimely. *Id.*

347. S.C. R. CIV. P. 71.1(b).

the SCDC law libraries do not provide forms for inmates, prisoner law clerks will usually have one available for viewing upon request. A sample application for PCR can also be found in the forms/appendix section of the South Carolina Rules of Civil Procedure,[348] available to prisoners in the law library. Prisoners are not required to pay a filing fee for submitting PCR applications.[349]

An application for PCR is a civil action filed in the South Carolina Court of Common Pleas and, as such, the South Carolina Rules of Civil Procedure apply to the extent that they are not inconsistent with the statutory language of the Uniform Post-Conviction Procedure Act.[350] All PCR applications should be filled out using a prisoner's full name and prison number.[351] Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct.[352] This may be accomplished by a prisoner submitting a sworn (notarized) affidavit attesting to the authenticity of the submitted material.[353] Furthermore, the PCR Act provides:

> The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in [section] 17-27-40. Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence.

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348. S.C. R. CIV. P., Form 5.

349. §§ 17-27-20(a)(6), -60; *see also* Thompson v. State, 325 S.C. 58, 59, 479 S.E.2d 808, 808 (1997) (stating that a PCR action "may be instituted without the payment of a filing fee, regardless of a person's financial status"). However, "[a] litigant proceeding *in forma pauperis* is only entitled to filing fees, not court reporter's costs or copying costs." Lakes v. State, 333 S.C. 382, 385, 510 S.E.2d 228, 230 (Ct. App. 1998) (citing Quillian v. Evatt, 308 S.C. 555, 555, 419 S.E.2d 783, 783 (1992)).

350. S.C. R. CIV. P. 71.1(a); *see also* Sutton v. State, 361 S.C. 644, 647–48, 606 S.E.2d 779, 780 (2004) ("A PCR action is . . . generally subject to rules and statutes that apply in civil proceedings." (citing Wade v. State, 348 S.C. 255, 263, 559 S.E.2d 843, 846–47 (2002); § 17-27-80)), *abrogated on other grounds by* Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005); Hiott v. State, 375 S.C. 354, 357, 652 S.E.2d 436, 437 (Ct. App. 2007) (citing Council v. Catoe, 359 S.C. 120, 125, 597 S.E.2d 782, 784 (2004)) (stating that because PCR actions are civil actions, all rules that apply in a civil case apply to PCR actions), *rev'd*, 381 S.C. 622, 674 S.E.2d 491 (2009).

351. S.C. R. CIV. P. 71.1(c).

352. S.C. CODE ANN. § 17-27-40 (1976).

353. The standard PCR application requires a signed and notarized statement verifying the accuracy of the information presented before a PCR application will be accepted by the court. S.C. R. CIV. P., Form 5.

> Arguments, citations and discussion of authorities are unnecessary. The application shall be made on such form as prescribed by the [South Carolina] Supreme Court.[354]

Once a prisoner's application is received by the clerk's office, it is clock-stamped and given a docket number.[355] Prisoners frequently request that a copy of their clock-stamped PCR application be returned to them and should be aware that it is not uncommon for a clerk's office to request that a copying fee be paid in advance for doing so. Additionally, thoughtful prisoners sometimes submit any memoranda in support of their claims and motions for expert expenses at the same time they turn in their application to avoid hybrid representation challenges.[356] The attorney general's office will often refuse to acknowledge documents submitted by a prisoner who is represented by counsel, and so prisoners can avoid this problem by submitting documents at the time of filing because no attorney has been appointed to them yet, and there is no chance of a violation of hybrid representation occurring. By the same token, submitting documents at this stage also avoids any complications that may arise from trying to do so at a later time through counsel who is less than active in a prisoner's case. Lastly, prisoners should be mindful that clerks of court often ask prisoners to file additional motions and pleadings in duplicate if a prisoner desires to have a clock-stamped copy returned to him.

Once received by the clerk's office, the application is forwarded to the attorney general's office, and this office is then given thirty days to respond to the application by way of an answer or motion.[357] If a prisoner's application contains claims alleging disputed material facts, then an answer will be returned requesting an evidentiary hearing to be held to fully develop these facts and sufficiently explore a prisoner's claim.[358] A standard answer from the attorney general's office will usually deny all of a prisoner's claims as meritless and without cause for relief, but it will nonetheless request that a hearing be held to allow the claims to be explained and explored. If the state moves for summary disposition, it will be granted only "when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is

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354. S.C. CODE ANN. § 17-27-50 (1976).

355. § 17-27-40.

356. Foster v. State, 298 S.C. 306, 306–07, 379 S.E.2d 907, 907 (1989) (holding there is no right to "hybrid representation"—which is representation that is partially pro se and partially by counsel—where petitioner attempted to file substantive document in her PCR case, thereby precluding petitioner from filing the document despite seemingly contrary language of S.C. CONST. art. I, § 14).

357. S.C. CODE ANN. § 17-27-70(a) (1976); *see also* Guinyard v. State, 260 S.C. 220, 225, 195 S.E.2d 392, 394 (1973) ("Compliance with the thirty day time limit prescribed by [this section] is, therefore, not mandatory . . . but discretionary with the trial court.").

358. § 17-27-70(a).

entitled to judgment as a matter of law."[359] When considering the state's motion for summary dismissal, a judge must assume that facts presented by an applicant are true and view those facts in a light most favorable to the applicant.[360] Either side may request summary disposition, and the party against whom this action is taken must be given an opportunity to reply to the proposed dismissal.[361] Summary dismissal is not appropriate if there exists a material issue of fact.[362] Prisoners commonly submit an application alleging only that counsel was ineffective in failing to consult with the prisoners regarding important decisions in their cases and in failing to properly research the prisoners' defenses in hopes of avoiding summary dismissal.[363] With supporting facts, this *may* be sufficient to avoid summary dismissal, but it will also have drastic consequences if not properly remedied.

If, after the state has filed its return, the application presents questions of law or fact that will require a hearing, the court will, upon the recommendation of the attorney general's office, appoint counsel to assist and represent the applicant.[364]

B. Habeas Considerations

An unforeseen consequence of inadequate pleading, whether it is due to lack of involvement by appointed counsel or lack of understanding or self-determination by the prisoner, may occur if the applicant is unsuccessful in state courts and opts to have his claims reviewed under a writ of habeas corpus in the federal courts.[365] On April 24, 1996, President Clinton signed into law the

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359. § 17-27-70(c); *see also* Coardes v. State, 262 S.C. 493, 497–98, 206 S.E.2d 264, 265–66 (1974) (holding that an application for post-conviction relief was properly dismissed where applicant's only material allegation of fact—that he suffered lack of effective assistance of counsel—was conclusively refuted by the record).

360. Sutton v. State, 361 S.C. 644, 647, 606 S.E.2d 779, 780 (2004) ("When considering the State's motion for dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant."), *abrogated on other grounds by* Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005).

361. § 17-27-70(b).

362. *Id.*

363. The applicant also has the authority to amend or supplement an application. S.C. CODE ANN. § 17-27-90 (1976); *see also* S.C. R. CIV. P. 71.1(d) ("Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.").

364. S.C. R. CIV. P. 71.1(d); *see also* S.C. Sup. Ct. Admin. Order No. 2008-10-06-01 (Oct. 6, 2008), *available at* http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2008-10-06-01 ("In its return, the Attorney General's Office shall clearly state in the caption heading whether it requests that counsel be appointed for the applicant.").

365. 28 U.S.C. §§ 2241, 2254 (2006). Both of these statutes provide jurisdiction for state prisoners challenging the lawfulness of their imprisonment. Specifically, § 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Antiterrorism and Effective Death Penalty Act (AEDPA).[366] This Act created a number of new procedural defenses applicable to state prisoners and expanded already existing procedural hurdles to federal habeas consideration and relief.[367] For instance, the AEDPA imposed stricter standards that make it almost impossible to secure evidentiary hearings in federal courts to develop facts that could have been developed in such forums as PCR hearings[368] or through diligence by an applicant.[369] Statute of limitations, procedural adherence, exhaustion, sufficient factual pleadings, specific pleadings, and the preciseness of legal advancements will all play a part in whether a federal habeas court will hear a prisoner's claims or grant the requested relief.

Many prisoners are under the assumption that specific fact or legal pleading is unnecessary when applying for post-conviction relief. The main reasoning used by these prisoners is that the Uniform Post-Conviction Procedure Act states that "[a]rgument, citations and discussion of authorities are unnecessary."[370] Relying on this, prisoners sometimes file a vague PCR application in which they make broad and general claims of constitutional violations and sprinkle their application with selected facts.[371] While doing so *may* allow their application to survive summary disposition, it is certainly not a wise course of action for the prisoner who, after exhausting his state remedies without success, may elect to pursue federal relief through a writ of habeas corpus. The adequate presentation of a federal claim (and federal claims encompass virtually all claims of ineffective assistance of counsel and other constitutional violations) to the state courts is a requirement before a prisoner may pursue federal habeas.[372]

The exhaustion of state remedies requires that prisoners adequately present federal claims to the state courts to allow such courts the "opportunity to pass

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366. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

367. Williams v. Taylor, 529 U.S. 362, 399 (2000) (explaining that AEDPA "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners"); *see also* Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (stating that federal habeas is difficult to obtain and that "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so" (citing Knowles v. Mirzayance, 556 U.S. 111, 123 (2009); Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997); Strickland v. Washington, 466 U.S. 668, 689 (1984))); Jimenez v. Walker, 458 F.3d 130, 135 n.2 (2d Cir. 2006) (stating that 28 U.S.C. § 2254(d) can "more accurately be called a 'limitation on relief'").

368. *See* § 2254(e)(2).

369. Conaway v. Polk, 453 F.3d 567, 589–91 (4th Cir. 2006) (stating that petitioner was not barred from obtaining hearing where he reasonably attempted to investigate and pursue claim in state court).

370. S.C. CODE ANN. § 17-27-50 (1976).

371. This so-called "notice pleading" may not sufficiently present a claim, and applicants are expected to state facts that show a real possibility of constitutional error. *See id.*

372. 28 U.S.C. § 2254(b) (2006); *see also* Rose v. Lundy, 455 U.S. 509, 515–22 (1982) (providing an excellent discussion on the exhaustion requirement); Picard v. Connor, 404 U.S. 270, 276 (1971) ("A state prisoner [must] present the state courts with the same claim he urges upon the federal courts.").

upon and correct alleged violations of its prisoners' federal rights."[373] The "exhaustion requirement 'reduces friction between the state and federal court systems by avoiding the unseem[liness] of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.'"[374] To meet this exhaustion requirement, a prisoner must have cited a specific federal constitutional or statutory provision in filings submitted to the highest state court.[375] This requires that a prisoner provide the state courts with both a thorough description of the operative facts and controlling legal principles that drive his claim.[376] A prisoner filling out a PCR application would do well to keep this in mind and ensure the claim he is presenting has a foundation under the United States Constitution or federal law if he later wishes to submit such a claim for federal review.[377] Prisoners should not assume that simply citing a federal case, without more, or vaguely touching upon some constitutional theory or principle will suffice. Exhaustion for federal review demands more than "drive-by" citation and general appeals to broad constitutional principles such as due process and the right to a fair trial.[378] All claims must be presented "face-up and squarely," and mystic prose that a constitutional theory or principle "may be lurking in the woodwork will not" turn the trick.[379]

To safeguard against this, a prisoner should adequately encompass both the state and federal source of law his claim relies upon, as well as properly title his claim.[380] Prisoners typically only look to state case law when researching their claims and do themselves a great injustice in this regard. All PCR applications should be drafted in preparation of possible federal habeas review. Knowing what the United States Supreme Court and lower federal courts—particularly the

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373. *Picard*, 404 U.S. at 275 (quoting Wilwording v. Swenson, 404 U.S. 249, 250 (1971)) (internal quotation marks omitted).

374. Longworth v. Ozmint, 377 F.3d 437, 448 (4th Cir. 2004) (alteration in original) (quoting O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)).

375. *See* Baldwin v. Reese, 541 U.S. 27, 29 (2004) (citing Duncan v. Henry, 513 U.S. 364, 365–66 (1995); *O'Sullivan*, 526 U.S. at 845).

376. *See* Gray v. Netherland, 518 U.S. 152, 162–63 (1996) (citing *Picard*, 404 U.S. 270); *see also Longworth*, 377 F.3d at 448 (finding that exhaustion was not met because operative facts were not presented to state supreme court); Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) (noting that "both the operative facts and controlling legal principles must be presented to the state court" (quoting Verdin v. O'Leary, 972 F.2d 1467, 1474 (7th Cir. 1992)) (internal quotation marks omitted)).

377. *See* Casey v. Moore, 386 F.3d 896, 913 (9th Cir. 2004) (finding that petitioner's "vague appeal" to "constitutional error" and the "deprivation of a fair trial" was insufficient to fairly present federal constitutional issues when "bolstered only by state law cases that focused on state procedural or state constitutional error").

378. *Gray*, 518 U.S. at 163.

379. *See Matthews*, 105 F.3d at 911 (quoting Mallory v. Smith, 27 F.3d 991, 995 (4th Cir. 1994)).

380. *See Baldwin*, 541 U.S. at 33 (denying petitioner's habeas claim based on the exhaustion doctrine, noting that "[t]he petition provides no citation of any case that might have alerted the court to the alleged federal nature of the claim").

United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of South Carolina—have said with regard to any given claim is a necessity in doing this.[381] A prisoner should not "veil" his claim in such a manner that a habeas court has to search to find the grounds upon which the prisoner relies.[382] Obviously, a claim devoid of "[a]rgument, citations and discussion of authorities"[383] is counter-productive to this end.

To illustrate further, assume a prisoner wishes to raise a PCR claim alleging that he invoked his right to counsel upon arrest, and that a violation occurred when officers questioned him about the same incident at a later date. Further assume that the prisoner later discovered documentary evidence showing that he invoked his right to counsel prior to his questioning, and that he also wishes to raise a claim of ineffective assistance of his counsel at trial for failing to present favorable evidence. When these claims are put forth in the prisoner's PCR application, he will need to entitle his claims in such a manner that a reviewer will immediately know what violations are alleged and the source of law upon which those allegations rely.[384] In this example, the prisoner may simply title his claim as: "Trial counsel provided deficient performance in failing to present evidence that the applicant invoked his right to counsel." While such a title may adequately state the prisoner's claim, the broad and general terms "deficient performance" and "right to counsel" in the above title are not enough to alert the reader that a federal violation has occurred and are insufficient to establish exhaustion for federal review.[385] Likewise, stating a claim as "unconstitutional" is insufficient to apprise the reader of the federal nature of the claim because a claim under the PCR Act can be in violation of the "Constitution of the United States or the Constitution . . . of this State."[386] Indigent prisoners often mistakenly assume that an appointed counsel will remedy any deficiencies or defects in a prisoner's application at a later date, which may or may not be an accurate assumption. It is, however, always the better practice to eradicate ambiguity and squarely identify the law relied upon.[387] In this hypothetical, the prisoner would do much better to title his claim as two distinct claims. An

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381. South Carolina is part of the Fourth Judicial Circuit. *See* 28 U.S.C. § 41 (2006).

382. BRIAN R. MEANS, FEDERAL HABEAS MANUAL: A GUIDE TO FEDERAL HABEAS CORPUS LITIGATION 491 (2012) ("Notice pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." (citing Advisory Committee Notes to Rule 4 of Rules Governing § 2254 Cases in United States District Courts (internal quotation marks omitted))).

383. S.C. CODE ANN. § 17-27-50 (1976).

384. *See* Dye v. Hofbauer, 546 U.S. 1, 3–4 (2005) (discussing, in part, the adequacy of petitioner's argument heading).

385. *See* Gray v. Netherland, 518 U.S. 152, 163 (1996) ("[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court.").

386. § 17-27-20(a)(1).

387. *See* Martens v. Shannon, 836 F.2d 715, 717 (1st Cir. 1998) ("The exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record.").

adequate way to phrase the alleged violations that the prisoner wishes to assert could be as follows:

> 1. Applicant's right to counsel, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and state law, was violated when officers held a custodial interrogation of the applicant despite the fact that the applicant had previously invoked his right to have counsel present.
>
> 2. Applicant's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and state law, was violated when the applicant's trial counsel failed to present evidence that the applicant had invoked his right to have counsel present prior to questioning.[388]

Both headings sufficiently put the reader on notice of the constitutional principle relied upon (right to counsel and right to effective assistance of counsel), the federal provision (Fifth, Sixth, and Fourteenth Amendments to the United States Constitution) in conjunction with state law, and the violation the prisoner is asserting.

Additionally, the prisoner in this example would benefit by incorporating federal law into the brief or memorandum he ultimately presents to the court.[389] This can be accomplished in either the prisoner's original, supplemental, or amended filings.[390] During research of the prisoner's first claim here (invocation of right to counsel during questioning), he will likely come across various state court cases such as *State v. Owens*[391] and *State v. Binney*[392] that deal with this claim. In both of these cases, the federal source of law for this claim—*Miranda v. Arizona*[393] and *Edwards v. Arizona*[394]—can be found and should be cited in conjunction with the state cases the prisoner ultimately decides to use. Doing so will help ensure the exhaustion requirement is met by identifying the exact principles of law on which the applicant is relying.

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388. *See* Council v. Catoe, 359 S.C. 120, 127 n.4, 597 S.E.2d 782, 785 n.4 (2004) (providing a good example of the proper way to frame claims).

389. *See* Baldwin v. Reese, 541 U.S. 27, 32 (2004) (holding that "a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material . . . that does so"). To exhaust a federal claim in state courts, a prisoner must present it "within the four corners" of his brief. Castillo v. McFadden, 399 F.3d 993, 1000 (9th Cir. 2005).

390. S.C. CODE ANN. § 17-27-90 (1976) (providing authority for amending and supplementing PCR applications).

391. 346 S.C. 637, 659, 552 S.E.2d 745, 756 (2001), *overruled by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

392. 362 S.C. 353, 358, 608 S.E.2d 418, 421 (2005).

393. 384 U.S. 436, 444–45 (1966).

394. 451 U.S. 477, 482–87 (1981).

Lastly, a prisoner must raise his claim in the state's highest court in order for that claim to be considered exhausted, even if that review is discretionary.[395] A prisoner's PCR claim need not be considered or even discussed by the state's highest court designated to review PCR matters because exhaustion only requires that a claim be properly presented.[396] This is because the exhaustion requirement is a matter of comity, not of jurisdiction, and a "full and fair" opportunity for state courts to resolve a federal claim means that a prisoner must exhaust all available avenues before seeking review.[397] In South Carolina, however, PCR appeals are transferred to the South Carolina Court of Appeals for review from the South Carolina Supreme Court in order to ease the supreme court's workload.[398] When this occurs, "a litigant is not required to petition for rehearing and certiorari following an adverse decision of the [South Carolina] Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error."[399] Exhaustion in state courts is a mandatory prerequisite to federal habeas review because habeas review is not otherwise available.[400]

C. Cognizable Claims

The Uniform Post-Conviction Procedure Act sets forth six statutory grounds pursuant to which a prisoner may seek relief.[401] They are:

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395. *See* Longworth v. Ozmint, 377 F.3d 437, 447 (4th Cir. 2004) ("While we would find no merit in any of these contentions, we conclude that they are procedurally defaulted as a result of Longworth's failure to raise them in his petition for certiorari to the South Carolina Supreme Court for review of the State PCR Court's decision."); *see also* O'Sullivan v. Boerckel, 526 U.S. 838, 845, 847 (1999) (stating that prisoners must run their claim through "one complete round of the State's established appellate review process," to include "petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State"); Castille v. Peoples, 489 U.S. 346, 350–51 (1989) (stating that a state appellate court cannot choose to ignore a federal constitutional claim squarely raised in a petitioner's brief and render such a claim unexhausted by the state court's inaction (quoting Smith v. Digmon, 434 U.S. 332, 333 (1978); Picard v. Connor, 404 U.S. 270, 275 (1971))); MEANS, *supra* note 381, § 9C:29, at 957 ("If the federal claim was *properly presented* to the state's highest court, the court's failure to address the claim does not render it unexhausted." (citing *Castille*, 489 U.S. at 350–51)).

396. *See supra* note 372.

397. *See Ex parte* Royall, 117 U.S. 241, 251–52 (1886); *see also O'Sullivan*, 526 U.S. at 845 (noting that "the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts").

398. Dunlap v. State, 371 S.C. 585, 585, 641 S.E.2d 431, 431 (2007).

399. *Id.* at 585, 641 S.E.2d at 431 (citing *In re* Exhaustion of State Remedies in Criminal & Post-Conviction Relief Cases, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990)).

400. Frierson v. State, 314 F. Supp. 444, 446 (D.S.C. 1970) (noting that "the failure of the petitioner to exhaust State remedies [under the PCR Act] would justify dismissal" of his petition for federal habeas corpus relief).

401. S.C. CODE ANN. § 17-27-20(a)(1)–(6) (1976).

> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State; (2) That the court was without jurisdiction to impose sentence; (3) That the sentence exceeds the maximum authorized by law; (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy . . . .[402]

PCR is a proper avenue for prisoners seeking relief "*only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence*" as authorized by section 17-27-20(a).[403] The only two non-collateral exceptions are specifically listed in the PCR Act. They are: (1) the claim that an applicant's sentence has expired, and (2) the claim that an applicant's probation, parole or conditional release has been unlawfully revoked.[404] A prisoner may not seek post-conviction relief on the ground that the evidence presented against him was insufficient to support a conviction.[405] Furthermore, an issue "that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel."[406]

In *Al-Shabazz v. State*,[407] the South Carolina Supreme Court significantly clarified the grounds upon which a PCR action may stand. Al-Shabazz brought a PCR action alleging that the SCDC's Adjustment Committee improperly took away good-time credits, unlawfully found him guilty of violating institutional rules, and illegally placed him in solitary confinement.[408] Al-Shabazz alleged that his constitutional rights to due process and equal protection were violated when he was not provided adequate representation at his disciplinary hearing or allowed to call witnesses.[409] While a prior decision by the South Carolina

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402. *Id.*

403. Williams v. State, 378 S.C. 511, 515, 662 S.E.2d 615, 617 (Ct. App. 2008) (quoting Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000)).

404. § 17-27-20(a)(5).

405. § 17-27-20(a)(6); *see also* LoPiano v. State, 270 S.C. 563, 569, 243 S.E.2d 448, 451 (1978) (holding that because the prisoner's "plea was entered voluntarily and understandingly, he does not now have the right, in post-conviction proceedings, to attack the plea upon the ground that the facts were insufficient to establish the offense to which he pled." (citing § 17-27-20(a)(6); Ramey v. State, 257 S.C. 127, 130, 184 S.E.2d 544, 546 (1971))).

406. *Al-Shabazz*, 338 S.C. at 363–64, 527 S.E.2d at 747 (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)).

407. 338 S.C. 354, 527 S.E.2d 742.

408. *Id.* at 361, 527 S.E.2d at 746.

409. *Id.* at 361–62, 527 S.E.2d at 746.

Supreme Court seemingly deprived a PCR court of the authority to hear such claims by prisoners,[410] the *Al-Shabazz* court noted that it had previously allowed similar claims to be heard primarily because such claims lacked an adequate judicial review process, and because PCR provided "an established and uniform process, as well as the availability of appointed counsel."[411] The court undertook the task of squarely defining reviewable (collateral) and non-reviewable (non-collateral or administrative) claims and held that issues of solitary confinement, downgrading of custody status, credit-related issues, and other conditions of imprisonment are administrative matters and a prisoner's proper course of review in these matters is through the SCDC's internal grievance system and the South Carolina Administrative Law Court.[412]

The PCR Act otherwise allows a prisoner to raise virtually any claim imaginable, absent one regarding the sufficiency of the evidence.[413] The Act also prohibits a prisoner from bringing a claim that could have been raised on direct appeal, unless the prisoner frames a direct appeal issue in language that converts the claim into one of ineffective assistance of counsel.[414] What claims a prisoner can and should raise on his behalf is a decision that should only be

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410. *See* Tutt v. State, 277 S.C. 525, 526, 290 S.E.2d 414, 415 (1982) (per curiam) (stating that PCR does not give a court the authority to consider an allegation that a prisoner's downgrade in custody and transfer to another facility violated his constitutional rights (citing Crowe v. Leeke, 273 S.C. 763, 763–64, 259 S.E.2d 614, 614–15 (1979))).

411. *Al-Shabazz*, 338 S.C. at 366, 527 S.E.2d at 748.

412. *See id.* at 383–84, 527 S.E.2d at 757–58. *But see* Delahoussaye v. State, 369 S.C. 522, 526, 633 S.E.2d 158, 160 (2006) (noting that defendant's case encompassed a claim that his state sentence had expired while he served time in federal custody and that the claim for credit for time served in federal custody could be brought under the PCR Act and was not required to be filed under the Administrative Procedures Act (APA)). The court in *Al-Shabazz* went on to detail both the procedures an inmate must undertake to pursue such claims in both the SCDC and under the APA. 338 S.C. at 371–76, 527 S.E.2d at 751–53. While neither will be discussed here, the author would like to expound on one aspect relative to credit-related issues that often plague prisoners.

Many times, prisoners spend a significant amount of time in the county jail prior to coming to the SCDC. A prisoner is entitled to have this time—the time between his arrest and conviction—credited against his sentence. *See* Blakeney v. State, 339 S.C. 86, 89, 529 S.E.2d 9, 11 (2000). It is not uncommon for prisoners to later discover that no credit was received. Prisoners typically respond to this revelation by writing their sentencing judge and trial counsel requesting them to "fix" their sentence. However, the correct approach to this situation can be found in the SCDC policy, titled "Inmate Records Plan." INMATE RECORDS PLAN, *supra* note 121, § 12.3. Section 12 of this policy states that prisoners who feel that they have not been credited for served jail time should contact their classification caseworker and fill out an SCDC Form 18-11, "Request for Jail Time." *Id.* § 12.3.1. Once this form is completed, it will be sent to the records analyst responsible for jail-time credits who will either forward it to the appropriate county jail or respond to the designated caseworker and explain why jail-time credit is not applicable. *Id.* § 12.3.2–4. If jail-time credit is awarded to the inmate, the appropriate modifications to a prisoner's record will be made and the designated caseworker will be notified. *Id.* § 12.3.5.

413. *See* S.C. CODE ANN. § 17-27-20(a)(6) (1976).

414. *Al-Shabazz*, 338 S.C. at 363–64, 527 S.E.2d at 747 (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993); Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (per curiam)).

made after counseled guidance and thorough research.[415] This often conflicts with a prisoner's position, as most times an indigent prisoner will only have the assistance of law clerks and other prisoners. Prisoners typically base their claims on the constitutional principles and rights provided for in the Fourth (unreasonable search and seizure and probable cause), Fifth (Due Process and Fair Trial Clauses), and especially Sixth (right to counsel and right to impartial jury) Amendments to the United States Constitution and corresponding state law.[416] The state constitution may sometimes provide greater protection than the federal Constitution and the jurisprudence surrounding both should be thoroughly examined regarding any claim a prisoner intends to advance.[417] As a majority of claims raised in a PCR application revolve around the allegation of ineffective assistance of counsel, a broad overview of several different types of ineffective assistance of counsel claims and the standards of review that govern them is important.

1. Ineffective Assistance of Trial Counsel

In *Strickland v. Washington*,[418] the United States Supreme Court set forth a two-pronged test for determining whether counsel rendered a criminal defendant effective assistance.[419] First, a prisoner "must show that counsel's performance was deficient."[420] Under this prong, a defendant must show "that counsel made

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415. Such a decision rests upon the particular facts relating to each applicant and is therefore not within the scope of this Commentary.

416. The constitutional principles in parentheses here are not exhaustive, merely demonstrative. Additionally, the Model Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction. Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008) (quoting Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993)).

417. In *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001), the defendant was approached by an officer suspicious of her activity and agreed to let the officer search her luggage. *Id.* at 640, 541 S.E.2d at 839. When the officer requested to search her purse, the defendant held the purse open for viewing and the officer took the purse, tore out the bottom, and discovered crack cocaine. *Id.* at 640–41, 541 S.E.2d at 839. The defendant was convicted and appealed on the grounds that the South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable search and seizure, provides a higher level of protection from government searches than the United States Constitution, requiring the exclusion of the discovered evidence. *Id.* at 641, 541 S.E.2d at 839. The South Carolina Supreme Court agreed and stated:

> The relationship between the two constitutions is significant because "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights. This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling.

Id. at 643, 541 S.E.2d at 840 (alteration in original) (citations omitted) (quoting State v. Easler, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 622 n.13 (1997)).

418. 466 U.S. 668 (1984).

419. *Id.* at 687.

420. *Id.*; *see also* Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (discussing the *Strickland* test).

errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[421] In determining this, courts measure an attorney's performance by examining whether his action or inaction was reasonable under current prevailing professional norms.[422]

Prisoners must identify "the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment"[423] and overcome a strong presumption that counsel's conduct was reasonable or might be considered sound trial strategy.[424] The presumption that counsel acted in a reasonable manner is applicable to all of counsel's plausible strategic judgments.[425]

The second prong of the *Strickland* test requires a showing that counsel's deficient performance actually prejudiced the defendant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[426] "A reasonable probability is a probability sufficient to undermine confidence in the outcome of [the proceeding]."[427] In making this determination, courts must consider the totality of the evidence before the judge or jury, differentiate between errors that had a pervasive effect and those with only a trivial one, and take into account the fact that errors will have a more significant impact upon a conviction only weakly supported by the record than those with overwhelming record support.[428] Prisoners should be wary that courts are instructed to dispose of an ineffective assistance of counsel claim without making an inquiry into counsel's conduct if it is easier to do so on the grounds that a claim lacks any possible showing of prejudice.[429] The overriding theme of *Strickland*'s two-pronged test is one of fundamental fairness of the proceedings and whether the adversarial process was adequately engaged in and not undermined by counsel's conduct.[430]

The language in *Strickland* usually strikes a familiar chord with prisoners attempting to understand ineffective assistance of counsel claims in preparation of filling out a PCR application. Emphasizing counsel's "duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution"[431] is usually an

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421. *Strickland*, 466 U.S. at 687.

422. *Id.* at 688.

423. *Id.* at 690.

424. Von Dohlen v. State, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004) (citing *Strickland*, 466 U.S. at 690; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625).

425. *See Strickland*, 466 U.S. at 690.

426. *Id.* at 667, 694.

427. *Id.* at 694.

428. *Id.* at 695–96; *see also* Slate v. Locklair, 341 S.C. 352, 365, 535 S.E.2d 420, 427 (2000) ("Error without prejudice does not warrant reversal." (quoting State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996)) (internal quotation marks omitted)).

429. *See Strickland*, 466 U.S. at 697.

430. *Id.* at 696.

431. *Id.* at 688.

excellent stepping stone for prisoners to begin their research. Another mandate from the Court that may be applicable and helpful to a prisoner's research is the requirement that counsel "make reasonable investigations or . . . make a reasonable decision that makes particular investigations unnecessary."[432] Typical PCR claims include prosecutorial misconduct,[433] counsel's failure to research and investigate,[434] counsel's failure to request a jury instruction,[435] and counsel's failure to call potential witnesses.[436]

2. *Ineffective Assistance of Guilty-Plea Counsel*

In *Hill v. Lockhart*,[437] the United States Supreme Court adopted the two-pronged test for analyzing claims of ineffective assistance of counsel with respect to guilty pleas.[438] A variance on the prejudice prong for guilty pleas requires a prisoner to show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[439] A defendant who pleads guilty on the advice of counsel may only "attack the voluntary and intelligent character" of the plea by showing that the "advice he received from counsel was not within the range of competence

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432. *Id.* at 691.

433. *See, e.g.*, Riddle v. Ozmint, 369 S.C. 39, 48, 631 S.E.2d 70, 75 (2006) (requiring reversal because solicitor failed to correct testimony he knew to be false).

434. *See, e.g.*, Nance v. Ozmint, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006) (reversing PCR decision because counsel failed to adequately investigate and plan defense and the court presumed prejudice where numerous errors "helped to bolster the case *against* his client"); *cf.* Rollison v. State, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." (quoting Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998))).

435. *See, e.g.*, Riddle v. State, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992) (finding trial counsel ineffective for failing to request alibi instruction).

436. *See, e.g.*, Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) ("In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence."). For particular claims of ineffective assistance of counsel, prisoners may wish to comb through the criminal law section of the *South Carolina Digest*, key number 1519, and the accompanying supplements. *See* 8A WEST'S S.C. DIGEST 2D *Criminal Law*, Key No. 1519 (2008 & Supp. 2012).

437. 474 U.S. 52 (1985).

438. *Id.* at 58; *see also* Alexander v. State, 303 S.C. 539, 542–43, 402 S.E.2d 484, 485–86 (1991) (granting new trial in case where the defendant pleaded guilty and "[t]rial counsel's sentencing advice was obviously defective").

439. *Lockhart*, 474 U.S. at 59; *see also* Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 224–25 (2000) ("Where there has been a guilty plea, the applicant must prove counsel's representation fell below the standard of reasonableness and, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial." (citing *Lockhart*, 474 U.S. at 59; *Alexander*, 303 S.C. at 541–42, 402 S.E.2d at 485)).

demanded of attorneys in criminal cases."[440] Claims challenging guilty pleas typically couple the "voluntary and intelligent" requirement within a claim of ineffective assistance of counsel. For example, a properly constructed claim might read as follows:

> 1. Applicant's guilty plea was not knowingly, voluntarily, or intelligently entered due to counsel's ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution and state law, when counsel erroneously advised the applicant that the maximum allowable sentence for the charged offense of murder is ten (10) years' imprisonment.

The "terms 'knowingly' and 'intelligently' are often used interchangeably."[441] That a plea must be knowingly and voluntarily made is essentially saying that a plea must be entered into with a full understanding of the consequences it entails.[442] A very common claim raised at PCR is that counsel failed to advise a prisoner of a later-discovered consequence of a plea such as sex offender registry or subsequent parole conditions.

Recently, in the two companion cases of *Missouri v. Frye*[443] and *Lafler v. Cooper*,[444] the United States Supreme Court clarified the role of defense attorneys in two important aspects of the plea-bargaining process. In *Frye*, the Court held "that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[445] This case arose from the fact that defense counsel did not inform his client of a favorable plea deal and allowed the time for accepting the plea deal to expire, which led the defendant to accept a harsher plea deal at a later time.[446] The Court recognized that plea bargaining comprises approximately ninety-five percent of all criminal convictions and that counsel has a duty to be effective at this critical stage in the criminal process.[447] In order to show prejudice from this type of claim, the Court held that defendants must: (1) "demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel"; (2) "demonstrate a reasonable probability the plea would have been entered without

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440. Griffin v. State, 361 S.C. 173, 177, 604 S.E.2d 394, 396 (2004) (citing Carter v. State, 329 S.C. 355, 359–60, 495 S.E.2d 773, 775 (1998)).

441. 37 GEO. L.J. ANN. REV. CRIM. PROC. 403 n.1291 (2008).

442. Boykin v. Alabama, 395 U.S. 238, 243–44 (1969); *see also* Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991) ("To ensure that the defendant understands [the charges against him], the trial judge usually questions the defendant about the facts surrounding the crime and the punishment which could be imposed.").

443. 132 S. Ct. 1399 (2012).

444. 132 S. Ct. 1376 (2012).

445. *Frye*, 132 S. Ct. at 1408.

446. *Id.* at 1401.

447. *Id.* at 1407.

the prosecution canceling [or withdrawing the offer]"; and (3) demonstrate a reasonable probability the trial court would have approved the plea agreement.[448] Since prosecutors and judges have wide discretion in sticking to and accepting plea deals, the Court undoubtedly leaves open many questions as to how exactly this prejudice showing will be applied.[449] Nonetheless, prisoners should invariably benefit from this expansion of plea-bargaining law if they are raising a similar claim at PCR because it sketches a possible remedy or redress for prisoners who have suffered from their counsel's neglect in this fashion.

In *Lafler*, the criminal defendant was charged with, among other charges, assault with intent to murder.[450] After his attorney erroneously informed him that he could not be convicted of assault with intent to murder because the victim had been shot below the waist, the defendant rejected a favorable plea deal and proceeded to trial, where he was convicted and sentenced to an amount of time that was three times more severe than the amount offered in the plea deal.[451] Because all parties agreed that counsel's performance was deficient, the primary question before the Court was the appropriate remedy to craft once it had determined that rejection of a plea offer on the advice of counsel is subject to a *Strickland* analysis.[452] The Court outlined two forms of appropriate remedies: (1) that an evidentiary hearing be held to "determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea" and then allow the defendant to be sentenced for anywhere between the initial plea offer and the time he actually received after trial if such a showing is made; or (2) require the prosecution to reoffer the plea proposal so "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed."[453] This case is especially noteworthy because the defendant had a constitutionally valid trial that led to his conviction and yet the Court still erred on the side of fairness for prisoners and rejected the state's contention that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining."[454] Both *Frye* and *Lafler* are admittedly vague in the precise remedy to employ and considerations to evaluate when determining prejudice, thereby leaving further clarification and procedural refining to the state and lower federal court judges.

Further, when a prisoner pleads guilty, he waives most nonjurisdictional constitutional rights such as the right to a jury trial, the right to confront one's accuser, and the privilege against self-incrimination.[455] This generally means

448. *Id.* at 1409.
449. *See id.*
450. Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012).
451. *Id.*
452. *Id.* at 1384, 1388, 1391.
453. *Id.* at 1389.
454. *Id.* at 1388.
455. Boykin v. Alabama, 395 U.S. 238, 243 (1969) (citing Duncan v. Louisiana, 391 U.S. 145, 150 (1968); Pointer v. Texas, 380 U.S. 400, 403 (1965); Malloy v. Hogan 378 U.S. 1, 3 (1964)); *see also* Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly

that a prisoner who has pleaded guilty will have significantly reduced the number of constitutional claims he may raise at PCR. By pleading guilty, a prisoner also waives certain nonjurisdictional violations committed by the government such as allegations that a confession was coerced[456] or that an illegal search and seizure took place.[457] Claims typically raised by prisoners attacking their guilty pleas at PCR include claims that counsel failed to investigate possible defenses prior to a prisoner entering a plea,[458] failure of counsel to withdraw a plea on deviation from an agreed upon plea bargain,[459] giving bad advice,[460] failing to convey a plea offer,[461] failure of counsel to interview potential witnesses,[462] and failure of counsel to discover or discuss potentially favorable evidence with an accused.[463] "Unless counsel gives *erroneous* parole advice . . . parole information is not a ground [to] collateral[ly] attack . . . a

admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the guilty plea.").

456. McMann v. Richardson, 397 U.S. 759, 768 (1970); *see also* United States v. Scruggs, 356 F.3d 539, 546–47 (4th Cir. 2004) (quoting United States v. Wiggins, 905 F.2d 51, 52 (4th Cir. 1990)) (holding that a guilty plea waives a defendant's privilege against self-incrimination; therefore, *Miranda* warnings are not required).

457. United States v. Dahlman, 13 F.3d 1391, 1394 n.2 (10th Cir. 1993) (stating that a guilty plea waives the right to challenge a suppression ruling); *see also* 37 GEO. L.J. ANN. REV. CRIM. PROC. 419–20 (2008) (listing nonjurisdictional defects that courts often hold are waived when the defendant enters a guilty plea).

458. *See* Cobbs v. State, 305 S.C. 299, 301, 408 S.E.2d 223, 225 (1991); *see also* Stevens v. State, 365 S.C. 309, 313, 617 S.E.2d 366, 368 (2005) (holding that guilty-plea counsel was ineffective for failing to properly investigate and research charged offenses where such efforts would have significantly reduced the number of offenses with which defendant was charged).

459. Thompson v. State, 340 S.C. 112, 115–16, 531 S.E.2d 294, 296 (2000) (finding plea counsel ineffective for failing to object to a recommendation by the solicitor of thirty years' imprisonment where state agreed not to make any recommendation).

460. Alexander v. State, 303 S.C. 539, 542–43, 402 S.E.2d 484, 485–86 (1991) (finding plea counsel ineffective and reversing case because plea counsel told defendant he would face a life sentence if he proceeded to trial where he would have actually faced a seven to twenty-five year sentence on one charge and a twenty-five year sentence on a second charge).

461. In *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009), the South Carolina Supreme Court held that counsel's failure to convey a plea offer constituted deficient performance and remanded for a new sentencing hearing with the limitation that the sentence not exceed the original sentence imposed. *Id.* at 617, 675 S.E.2d at 424. This method of remedy was deemed appropriate because the court noted "that we cannot compel the State to reinstate or the circuit court judge to accept the original . . . plea offer." *Id.* at 616, 675 S.E.2d at 424.

462. Grier v. State, 299 S.C. 321, 323–24, 384 S.E.2d 722, 724 (1989) (upholding a PCR judge's ruling that "counsel's failure to call these witnesses constituted deficient performance"), *overruled by* Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).

463. Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470–71 (1998) (finding trial counsel ineffective in criminal sexual conduct case where victim claimed penetration by the defendant but told nurse, who made notes, that no penetration occurred, and counsel failed to call nurse or use the notes to discredit the victim).

guilty plea" on grounds of ineffective assistance of counsel.[464] The potential claims listed above are neither all-inclusive nor exhaustive, and prisoners should know that allegations that a guilty plea was based on the inaccurate advice of counsel will be viewed in light of the plea colloquy between the judge and the defendant to determine if any possible error by counsel was cured by the information conveyed therein.[465]

3. *Harmless and Structural Errors*

Structural errors are defects that affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself," and are so basic to a fair trial that the error can never be viewed as harmless and prejudice is presumed.[466] In *Chapman v. California*,[467] the United States Supreme Court held that constitutional violations, with the exception of structural errors, are subject to a harmless-error analysis in which "unimportant and insignificant" errors will not require reversal if a reviewing court finds them to be "harmless beyond a reasonable doubt."[468] In other words, structural errors are so basic to a fair trial that once a violation of such a right has been established, the courts simply apply a presumption of prejudice and dispense with a harmless-error analysis.[469] Examples of structural errors include a trial by a partial judge,[470] denial of counsel,[471] denial of self-representation at trial,[472] and the denial of a

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464. Knox v. State, 340 S.C. 81, 85–86, 530 S.E.2d 887, 889 (2000) (citing Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997)), *overruled by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

465. Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 416–17 (1998) (citing Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997)). For a review of potential claims revolving around attacks on guilty pleas at PCR, prisoners may wish to review the criminal law section of the *South Carolina Digest*, key numbers 267–303. *See* 7 WEST'S S.C. DIGEST 2D *Criminal Law*, Key Nos. 267–303 (2008 & Supp. 2012).

466. Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (Rehnquist, C.J., dissenting) (quoting Rose v. Clark, 478 U.S. 570, 577–78 (1986)).

467. 386 U.S. 18 (1967).

468. *Id.* at 22, 24; *see also* S.C. R. CIV. P. 61 (adopting the "harmless error" rule from the Federal Rules of Civil Procedure—stating that the court must disregard any error or defect that does not affect the substantial rights of the parties).

469. *See Fulminante*, 499 U.S. at 289–90 (White, J., dissenting) (quoting *Chapman*, 386 U.S. at 23).

470. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, [the defendant] had the right to have an impartial judge.").

471. *See* United States v. Cronic, 466 U.S. 648, 653–54 (1984) (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)); *see also* McKnight v. State, 320 S.C. 356, 359–60, 465 S.E.2d 352, 354 (1995) (holding the *Strickland* standard to be inappropriate and presuming prejudice when defense counsel not in courtroom during testimony of key witness).

472. *See* Faretta v. California, 422 U.S. 806, 818, 834 (1975) (stating that an accused has a right to represent himself out of "respect for the individual which is the lifeblood of the law," and that such a right is rooted in the "structure of the Sixth Amendment" (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970)) (Brennan, J., concurring) (internal quotation marks omitted)).

public trial.[473] These are structural errors because they "are structural defects in the constitution of the trial mechanism" that affect the "entire conduct of the trial from beginning to end."[474] In determining whether an error is structural, courts typically look to see if the error has undermined the integrity and adversarial nature of the proceeding and whether the error is the type that "transcends the criminal process."[475] Also, denial, or constructive denial, of counsel claims are commonly referred to as "*Cronic* claims" in reference to the United States Supreme Court decision that held that prejudice is presumed where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."[476]

For claims of structural errors involving ineffective assistance of counsel, *Strickland v. Washington*[477] laid out the three categories of cases in which prejudice will be presumed: (1) denial of counsel, (2) where "counsel is burdened by an actual conflict of interest," and (3) "various kinds of state interference."[478] Since only a select few rights are classified as structural, the majority of claims prisoners present at PCR will fall under "trial error" and therefore will be subject to a showing of prejudice.[479]

4. *Ineffective Assistance of Appellate Counsel*

In *Evitts v. Lucey*,[480] the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal.[481] The Court recognized that the right to counsel on appeal "would be a futile gesture unless it comprehended the right to the effective assistance of counsel."[482] In *Evitts*, the defendant's appellate attorney failed to file a statement of appeal required by Kentucky's procedural rules when he filed the defendant's brief on appeal.[483]

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473. *See, e.g.*, Waller v. Georgia, 467 U.S. 39, 49 (1984) (noting that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee").

474. *See Fulminante*, 499 U.S. at 309–10 (Rehnquist, C.J., dissenting).

475. *Id.* at 311.

476. *Cronic*, 466 U.S. at 659.

477. 466 U.S. 668 (1984).

478. *Id.* at 692 (citing Cuyler v. Sullivan, 446 U.S. 335, 345–50 (1980)).

479. *Fulminante*, 499 U.S. at 307–08 (Rehnquist, C.J., dissenting) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)); *see also Strickland*, 466 U.S. at 692 (citing *Cuyler*, 446 U.S. at 345–50). For more on structural errors, see the criminal law section of the *South Carolina Digest*, key numbers 1751, 1770, 1773, 1774(2), 1871, and 1881–83. *See* 8A WEST'S S.C. DIGEST 2D *Criminal Law*, Key No. 1169.12 (2008 & Supp. 2012); 8B WEST'S S.C. DIGEST 2D *Criminal Law*, Key Nos. 1751, 1770, 1773, 1774(2), 1871, 1881–83 (2008 & Supp. 2012). Also looking under the habeas corpus section, key number 409, may prove helpful. *See* 13 WEST'S S.C. DIGEST 2D *Habeas Corpus*, Key No. 409 (2002 & Supp. 2012).

480. 469 U.S. 387 (1985).

481. *See id.* at 388–89, 396 (citing Douglas v. California, 372 U.S. 353 (1963)).

482. *Id.* at 397.

483. *Id.* at 389.

Because of this error, the defendant's appeal was dismissed and the state courts refused to consider the defendant's claims.[484] The defendant then sought relief in the federal courts by challenging the constitutionality of the state's dismissal of his claims, alleging that his attorney had violated his right to effective assistance of counsel on appeal.[485] Both the district court and the court of appeals agreed and the United States Supreme Court held that a first appeal as of right would not be in accordance with due process "if the appellant does not have the effective assistance of an attorney."[486] Prisoners commonly rely on *Evitts* and the progeny of cases that have stemmed from it to support claims of ineffective assistance of appellate counsel for any procedural errors that an appellate counsel may have made on appeal and for appellate counsel's failure to raise what a prisoner believes to be meritorious claims. In the case of a prisoner raising a claim on PCR that appellate counsel failed to raise a "winning" claim on appeal, prisoners should know that an appellate attorney is not required to raise every meritorious claim that can be found in the record.[487]

In *Jones v. Barnes*,[488] the defendant was appointed counsel on appeal and wrote to his appellate counsel regarding several claims that he wished to have included in his appellate brief.[489] The defendant's appellate attorney chose not to include all of the claims selected by the defendant on appeal and presented only a few for consideration.[490] The appeal was ultimately denied and the defendant's conviction affirmed.[491] Seeking federal relief, the defendant alleged that his appellate counsel was ineffective for failing to raise his non-frivolous issues on appeal.[492] The Court reviewed these allegations and held that an attorney assigned to prosecute an appeal has no duty to raise every non-frivolous issue on appeal.[493] The Court noted that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.'"[494] The Court in *Barnes* went on to cite several authorities that stand for the proposition that presenting more than three or four issues on

484. *See id.* at 390.

485. *See id.*

486. *Id.* at 390–91, 396 (citing Lucey v. Kavanaugh, 724 F.2d 560 (6th Cir. 1984); Lucey v. Seabold, 645 F.2d 547 (6th Cir. 1981)).

487. Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)).

488. 463 U.S. 745 (1983).

489. *Id.* at 747.

490. *Id.* at 747–48.

491. *Id.* at 748 (citing New York v. Barnes, 381 N.E.2d 179 (N.Y. 1978) (unpublished table decision); New York v. Barnes, 405 N.Y.S.2d 621 (App. Div. 1978) (unpublished table decision)).

492. *See id.* at 749–50 (quoting Barnes v. Jones, 665 F.2d 427, 434 (2d Cir. 1981), *rev'd*, 463 U.S. 745 (1983)).

493. *See id.* at 746, 754.

494. *Id.* at 751–52.

appeal will do more harm than good.[495] It is often hard for prisoners to understand why an attorney has not chosen to include every issue that can be included in an appeal, and the opinion in *Barnes* is a good starting place for understanding the rationale employed by such attorneys. The holding in *Barnes*, however, does not preclude a claim of ineffective assistance of appellate counsel if the appellant can show that the decision not to include a claim was unreasonable and not part of a strategic or competent decision.[496]

The standard for ineffective assistance of appellate counsel claims is somewhat similar to the standards for ineffective assistance of counsel claims for guilty-plea defendants.[497] For guilty pleas, a defendant must show that but for counsel's error, the defendant would not have pleaded guilty and would have insisted on going to trial.[498] For ineffective assistance of appellate counsel claims, a defendant "must show that failure to raise issue[s] was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed."[499] To be "objectively unreasonable," a defendant would have to show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[500] Thus, the fact that a meritorious claim was not raised on an appeal is not the only thing a prisoner should focus on when raising this type of claim.[501] A prisoner will also need to focus on whether the decision not to raise the claim can be seen as a reasonable decision in light of what was raised.[502]

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495. *Id.* at 752–53 (quoting ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 7.18, at 266 (1981); John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 897 (1940); Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMP. L.Q. 115, 119 (1951)). The authorities cited here can help prisoners better understand the mindset appellate attorneys have when they approach claim selection. Knowing this information may help prisoners communicate with their attorneys regarding which claims to present on appeal.

496. *See Barnes*, 463 U.S. at 746, 754. A list of successful PCR cases (both ineffective assistance of counsel cases and cases dealing with other types of claims) are regularly analyzed and compiled by Teresa L. Norris, Esq. Ms. Norris is an attorney with Blume, Norris & Franklin-Best, LLC, a Columbia, South Carolina law firm, and she serves on the board of directors of the Death Penalty Resource & Defense Center. *See Board Members*, DEATH PENALTY RES. & DEF. CENTER, http://deathpenaltyresource.org/board.aspx (last visited May 6, 2013). A recent compilation of PCR cases can also be found in the appendices to Blume & Paavola, *supra* note 144, at 280–329.

497. *See* Southerland v. State, 337 S.C. 610, 616 & n.6, 524 S.E.2d 833, 836 & n.6 (1999) (citing Strickland v. Washington, 466 U.S. 668 (1984); Evitts v. Lucey, 469 U.S. 387 (1985); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991); Smith v. State, 309 S.C. 413, 415, 424 S.E.2d 480, 481 (1992)).

498. Hill v. Lockhart, 474 U.S. 52, 59 (1985); *see also* Part VII.C.2 (discussing ineffective assistance of counsel claims in the context of guilty pleas).

499. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836 (citing People v. Griffin, 687 N.E.2d 820 (Ill. 1997)).

500. *Strickland*, 466 U.S. at 687.

501. *See, e.g.*, Jones v. Barnes, 463 U.S. 745, 754 (1983) (holding that appellate attorneys need not "raise every 'colorable' claim suggested by a client").

502. *See, e.g.*, *Strickland*, 466 U.S. at 687–88 ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness."). For more information on ineffective assistance of

D. Successive Applications

Generally, successive post-conviction relief applications are disfavored and the prisoner has the burden of establishing that "any new ground raised in a subsequent application could not have been raised by him in a previous application."[503] "A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings."[504] Often, prisoners attempting to file a successive PCR application are met with summary dismissal motions filed by the attorney general's office alleging a procedural bar on this ground.[505] Specifically, section 17-27-90 of the South Carolina Code states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.[506]

If a motion for summary dismissal has been served upon a prisoner filing what the attorney general is terming a successive application, the prisoner will be given the opportunity to reply to the proposed dismissal and show "sufficient reason" why his application is not successive.[507] Courts interpret the phrase "sufficient reason" very narrowly. In *Aice v. State*,[508] the South Carolina Supreme Court interpreted this phrase to mean 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."[509] This phrase alone excludes the vast majority of potential claims from being pursued in successive applications. The court

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appellate counsel, flipping through the pages of the criminal law section of the *South Carolina Digest*, key numbers 1966–71, may prove helpful. *See* 8B WEST'S S.C. DIGEST 2D *Criminal Law*, Key Nos. 1966–71 (2008 & Supp. 2012).

503. Tilley v. State, 334 S.C. 24, 28, 511 S.E.2d 689, 691 (1999) (citing Arnold v. State, 309 S.C. 157, 173, 420 S.E.2d 834, 843 (1991), *cert. denied*, 507 U.S. 927 (1993); Aice v. State, 305 S.C. 448, 450–51, 409 S.E.2d 392, 394 (1991); Foxworth v. State, 275 S.C. 615, 617, 274 S.E.2d 415, 416 (1981)).

504. Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (citing Carter v. State, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987)).

505. S.C. CODE ANN. § 17-27-70(b)–(c) (1976).

506. S.C. CODE ANN. § 17-27-90 (1976).

507. *See id.*

508. 305 S.C. 448, 409 S.E.2d 392.

509. *Id.*

further explained that it "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."[510] Thus, the courts are generally reluctant to consider successive applications because they allow an applicant to receive more than "one bite at the apple as it were."[511] Prisoners attempting to proceed on a successive PCR application must therefore fall within an exception to this general rule or face the certainty of the attorney general's office being "entitled to judgment as a matter of law."[512]

This broad rule disfavoring successive PCR applications, however, does allow certain exceptions.[513] Courts have allowed prisoners to file successive applications in situations where a prisoner did not have PCR counsel that differed from his trial counsel,[514] where a prisoner's first PCR application was dismissed without the assistance of legal counsel and without a hearing,[515] where a "gross miscarriage of justice" occurred,[516] where unique facts required review in the interest of justice,[517] and where a prisoner alleged his PCR counsel failed to file a timely appeal of the denial of his PCR application.[518] The contention that prior PCR counsel provided ineffective assistance is not, per se, a "sufficient reason" to allow a successive application.[519] PCR authorities additionally believe that "circumstances satisfying the PCR Act's exception to the statute of limitations (i.e., a new retroactive rule of law and newly discovered evidence as defined by S.C. Code Ann. [section] 17-27-45 (2003)) should *invariably* qualify as a 'sufficient reason' permitting a successive petition."[520] If a prisoner's claim does not fall within one of the exceptions to the rule barring successive PCR applications, a prisoner will undoubtedly have a hard time proceeding. Also, if a successive petition does not fall within the category of circumstances or exceptions that would allow a successive petition to proceed, it will not be considered "properly filed," and thus will not toll the time period (one year) for filing a federal habeas petition that the applicant may later wish to pursue.[521] In short, unless otherwise unavoidable, a prisoner would do well to remember that all grounds he wishes to present "must be raised in his original, supplemental or amended application."[522]

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510. *Id.*

511. Matthews v. Evatt, 105 F.3d 907, 916 (4th Cir. 1997) (quoting Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)) (internal quotation marks omitted), *abrogated on other grounds by* United States v. Barnette, 644 F.3d 192 (4th Cir. 2011).

512. § 17-27-70(c).

513. *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

514. Carter v. State, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987).

515. Case v. State, 277 S.C. 474, 474–75, 289 S.E.2d 413, 413–14 (1982) (per curiam).

516. *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

517. *See Case*, 277 S.C. at 475, 289 S.E.2d at 413–14.

518. Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991).

519. *See id.*

520. Blume & Paavola, *supra* note 144, at 274 n.295.

521. *See* Pettinato v. Eagleton, 466 F. Supp. 2d 641, 651 (D.S.C. 2006) (citations omitted).

522. S.C. CODE ANN. § 17-27-90 (1976).

VIII. DISCOVERY

A. In General

Prisoners commonly encounter a variety of roadblocks in the pursuit of relief through PCR. In the course of research, for example, a prisoner may recognize the need for investigative or expert services to fully develop the factual basis of a claim he wishes to present. Additionally, a prisoner may realize the need to subpoena witnesses or may simply find it efficient to utilize certain discovery tools prior to his evidentiary hearing. Interrogatories, requests for production, requests for admissions, and subpoenas can be valuable tools for a prisoner attempting to fully present his claims before a PCR court. Utilizing these discovery tools, however, is not a right, and a prisoner wishing to invoke this process must move the court for leave to do so.[523] Once leave has been granted by a judge, "in the exercise of his discretion and for good cause shown," a prisoner is entitled to pursue discovery in accordance with the South Carolina Rules of Civil Procedure.[524] Thus, discovery in PCR proceedings is authorized by section 17-27-150.[525]

In an article published about PCR and its procedure, Professor John Blume and Ms. Emily Paavola expound on the discovery aspect of PCR and offer several helpful tips on the topic.[526] For example, a prisoner is not assigned a judge in his PCR case until the attorney general schedules a hearing in his case.[527] Therefore, in order for a prisoner to conduct discovery prior to the attorney general scheduling his case, Professor Blume and Ms. Paavola suggest that a prisoner should:

> (1) file the motion for leave to obtain discovery before the chief administrative common pleas judge in the circuit in which the conviction occurred and request a hearing on the motion from that judge; or (2) file the motion in the appropriate circuit and then request that the motion be scheduled for hearing at the next upcoming PCR term—by either contacting the attorney general assigned to that term, or

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523. S.C. CODE ANN. § 17-27-150(A) (1976); *see also* Hiott v. State, 375 S.C. 354, 357, 652 S.E.2d 436, 437 (Ct. App. 2007) ("Section 17-27-150 indicates the legislature's express intent to afford PCR applicants limited use of the discovery process as stated in the South Carolina Rules of Civil Procedure."), *rev'd on other grounds*, 381 S.C. 622, 674 S.E.2d 491 (2009). The court also specifically quoted the statute: "A party in a noncapital [PCR] proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge . . . grants leave to do so . . . ." *Id.* (quoting § 17-27-150(A)) (internal quotation marks omitted).

524. *See* § 17-27-150(A).

525. *Id.*

526. *See* Blume & Paavola, *supra* note 144, at 251–52 (explaining the process PCR applicants can utilize in trying to convince a judge to grant discovery).

527. *Id.* at 251.

> if necessary, by making the request to the judge assigned to the next PCR term.[528]

This will give a prisoner an ample amount of time to conduct discovery prior to his hearing.[529] The unique function of each discovery tool allows prisoners to clearly present their claims in a PCR court and avoid uncertainties in testimony and documents that may lead to delays.

Below is an overview of some of the discovery tools available to prisoners pursing a PCR action. The following summaries do not contain every exception, mandate, or requirement applicable to each tool and should be read in conjunction with the authorities that have been cited in this Commentary.

B. Interrogatories

"Interrogatories"—governed by Rule 33 of the South Carolina Rules of Civil Procedure—are essentially used to provide the requesting party with a list of documents, parties, witnesses, photographs, addresses, and other prepared documents and information regarding witnesses and material intended to be used at an upcoming hearing.[530] It is basically a "tell me what you got" questionnaire sent to the opposing party, although it is rare for the attorney general to utilize more than an applicant's prior plea or trial counsel as a witness in addition to the record provided[531] (after all, the burden is on the applicant to prove his allegations in a PCR action.)[532] An interrogatory is formally defined as a "written request ([usually] in a set of questions) submitted to an opposing party in a lawsuit as part of discovery."[533] A particularly useful function of interrogatories lies in the ability to request a summary of "facts known to or observed by" witnesses or a party involved in a case.[534] Additionally, once submitted, interrogatories are "deemed to continue from the time of service," so that information that surfaces after interrogatories have been submitted shall be required to be continuously forwarded to the other party.[535] Although a prisoner will not find an example form of interrogatories[536] in any SCDC law library, individuals who have engaged in civil litigation on any given compound will

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528. *Id.* at 251–52.

529. *See id.* at 251.

530. S.C. R. CIV. P. 33(b).

531. *See* Blume & Paavola, *supra* note 144, at 261 (citing S.C. CODE ANN. § 17-27-130 (2003)).

532. S.C. R. CIV. P. 71.1(e).

533. BLACK'S LAW DICTIONARY 896 (9th ed. 2009).

534. S.C. R. CIV. P. 33(b)(7).

535. S.C. R. CIV. P. 33(b).

536. *See* 2 KEVIN A. DUNLAP & KELLEY M. HALL, SOUTH CAROLINA LITIGATION FORMS AND ANALYSIS § 25.01 (1997).

likely have one. If not, one can be ordered as discussed in this Commentary's discussion of access to the courts.[537]

C. *Requests for Production of Documents and Things*

A "request for the production"—governed by Rule 34 of the South Carolina Rules of Civil Procedure—is basically a request to inspect and copy any designated document or to inspect and copy, test, or sample any tangible thing within the possession, custody, or control of the party upon whom the request is served.[538] This discovery tool is somewhat similar to the discovery rule in criminal cases,[539] but it is not likely to produce much more than what is already in the prisoner's possession. This is because, as stated above, the attorney general, to whom such a request would be made, is not likely to be in possession of much more than the transcripts of the proceedings below, an outline of the prisoner's history within the SCDC, and current filings in regard to the present PCR application.[540] Generally, a request for the production of documents in PCR proceedings is used to secure an attorney's case file pertaining to the charge an applicant is incarcerated for that a prisoner was not otherwise able to obtain.

D. *Requests for Admission*

"Requests for admission"—governed by Rule 36 of the South Carolina Rules of Civil Procedure—are used to request that a party admit or deny the truth of any matter set forth in the request that relates to statements or opinions of fact or of the application of law, including the genuineness of any documents described in the request.[541] Once a matter is admitted by a party, that matter will be treated by the court as having been conclusively established and need not be proved at trial.[542] Requests for admission are helpful in getting straightforward answers from individuals and in preventing an applicant's prior trial or plea counsel from "dancing" around with evasive answers at an applicant's PCR hearing. For example, a prisoner may wish to know beforehand the exact dates that counsel alleges to have consulted with him prior to a trial or guilty plea, whether counsel admits making specific statements to him, or whether counsel admits to having overlooked certain facts or misinterpreted applicable law. A party may not request more than twenty admissions without leave of court.[543] A party who does not respond in the required time frame runs the risk of default

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537. *See supra* Part VI.A.

538. S.C. R. CIV. P. 34(a).

539. S.C. R. CRIM. P. 5.

540. *See* Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (1999) (citing S.C. CODE ANN. § 17-27-70(a) (1985)).

541. S.C. R. CIV. P. 36(a).

542. S.C. R. CIV. P. 36(b).

543. S.C. R. CIV. P. 36(c).

judgment being entered against him and the matter being deemed admitted as a result.[544]

E. Subpoenas

Rule 45 of the South Carolina Rules of Civil Procedure governs the use of subpoenas. A "subpoena" is a command to an individual to appear at a certain time and place—usually a courthouse—to give testimony or to produce evidence relating to a certain matter.[545] Prisoners usually have one or more witnesses they wish to call at their upcoming PCR hearing; therefore, issuing a subpoena to compel their attendance is recommended regardless of whether the witness has volunteered to attend.[546] Also relevant, a "subpoena *duces tecum*" requires a person served to bring forth certain specific documents and other items or materials relevant to the facts that a prisoner is developing.[547] For instance, a prisoner might use a subpoena *duces tecum* to compel the attendance of a 911 dispatch operator and require the operator to bring the records and logs of a certain dispatch relevant to a prisoner's claim.[548] Any licensed attorney may sign and issue a subpoena on behalf of a court, and prisoners appearing pro se may have a subpoena issued for them by requesting the court to do so.[549] Subpoena forms can usually be acquired from the clerk of court in the county in which the PCR action is pending.[550]

F. Freedom of Information Act

South Carolina's Freedom of Information Act (FOIA) is set forth in Title 30, Chapter 4 of the South Carolina Code.[551] FOIA provides that information held by public agencies must be made available to the public unless the information comes within one of the specific categories exempt from public disclosure.[552]

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544. *See* S.C. R. CIV. P. 36(a); *see also* DUNLAP & HALL, *supra* note 540, § 25.33 (discussing requests for admission in general); *id.* § 25.34 (providing a standard form for requests for admission).

545. *See* BLACK'S LAW DICTIONARY 1563 (9th ed. 2009).

546. *See* S.C. R. CIV. P. 45.

547. *See* BLACK'S LAW DICTIONARY 1563; *see also* S.C. R. CIV. P. 45(a)(1)(C) (commanding a person to "produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person").

548. *Cf.* Love v. Johnson, 57 F.3d 1305, 1313–14 (4th Cir. 1995) (finding that the prisoner adequately supported his subpoena *duces tecum* for material from three state agencies by arguing that the state records "might contain material evidence favorable to [his] defense").

549. S.C. R. CIV. P. 45(a)(3).

550. *See id.*; *see also* S.C. CODE ANN. § 17-27-40 (2003) (determining with which clerk of court a prisoner may file his PCR application).

551. *See* S.C. CODE ANN. § 30-4-10 (2007) ("This chapter shall be known and cited as the 'Freedom of Information Act.'"). *See generally* S.C. CODE ANN. §§ 30-4-10 to -165 (encompassing FOIA).

552. *See id.* §§ 30-4-30 to -40 (2007 & Supp. 2012).

The exemptions denying public disclosure generally concern the release of information that may endanger the life of an individual or hamper a law enforcement investigation.[553] FOIA is an excellent avenue for prisoners to obtain photographs, tapes, recordings, or other documents a prisoner may need, regardless of whether a prisoner is allowed to pursue discovery in PCR.[554] A prisoner may forward a FOIA request to any state agency, commission, department, or political subdivision, as well as any "organization, corporation, or agency" that receives support, in whole or in part, from public funds.[555] Therefore, prisoners can obtain desirable information from local police and sheriffs' departments, public defenders and solicitors' offices, the South Carolina Law Enforcement Division (SLED), and the Department of Probation, Parole and Pardon Services (DPPPS), to name a few.[556] Public organizations that receive public funds, such as county hospitals and the University of South Carolina, are also within FOIA's reach.[557]

To obtain information under FOIA, a prisoner can simply write a letter requesting documents or information and title the letter: "FOIA" Request.[558] Most public agencies and departments designate individuals as FOIA coordinators to handle such requests and to provide the requesting party with the requested material at little or no charge.[559] FOIA for federal agencies is governed by 5 U.S.C. § 552.[560]

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553. *See id.* § 30-4-40.

554. *See id.* § 30-4-20(c) (2007).

555. *Id.* § 30-4-20(a).

556. *See, e.g.*, Newberry Publ'g Co. v. Newberry Cnty. Comm'n on Alcohol & Drug Abuse, 308 S.C. 352, 353–54 & n.3, 355, 417 S.E.2d 870, 871 & n.3, 872 (1992) (citing S.C. CODE ANN. §§ 30-4-30 to -40 (2007 & Supp. 2012)) (concluding that because SLED is a public body, criminal investigative reports are public records appropriately released under FOIA); Burton v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 348–49, 594 S.E.2d 888, 893 (Ct. App. 2004) (citing S.C. CODE ANN. §§ 30-4-20(a), -30(a), -40) (finding that county sheriff's department was a "public body" as defined under FOIA).

557. *See, e.g.*, Campbell v. Marion Cnty. Hosp. Dist., 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003) (citing S.C. CODE ANN. § 30-4-20(a) (2007)) (noting that county hospitals are public bodies as defined under FOIA); Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991) (rejecting respondent's argument and holding that the foundation that had received funds from, and operated exclusively for the benefit of, the University of South Carolina—a public body—was also subject to FOIA as a public body regardless of whether the foundation was considered a "public" or "private" entity under common law principles).

558. *See* S.C. CODE ANN. § 30-4-30(c).

559. *See, e.g.*, *Research*, S.C. DEP'T CORRECTIONS, http://www.doc.sc.gov/research/research.jsp (last visited Apr. 20, 2013) (explaining that FIOA requests must be sent to the SCDC's FIOA coordinator).

560. *See* 5 U.S.C. § 552 (2006 & Supp. V 2012).

G. Motion for Funds for Expert Expenses

In *Thames v. State*,[561] a PCR applicant sought funds from the court so that a psychiatrist could examine her and support her claim of mental incompetency at the time of her guilty plea.[562] Currently, *Thames* is the only South Carolina opinion on the topic of providing funds for expert services in a PCR proceeding. In a footnote that has received some criticism,[563] the *Thames* court noted that the statute authorizing funds for a defendant who requests expert services is inapplicable to PCR proceedings and that the PCR judge in the underlying case properly conducted a hearing on Thames's motion for the payment of expert witness fees.[564] The court upheld the denial of Thames's request on the grounds that she had previously been examined by two psychiatrists prior to pleading guilty and that "the mere possibility that petitioner could find an expert somewhere to support her claim of incompetency at the time of her plea is insufficient to warrant the authorization of funds to pay an expert."[565] Therefore, while section 17-3-50 of the South Carolina Code does not apply in a PCR setting according to the *Thames* footnote, a prisoner moving the court for funds to pay an expert should still be prepared to show the request for funds is both "necessary" and "reasonable"—that the request is necessary to fully develop the prisoner's claim, that the facts or evidence intended to be shown by the use of such expert are not merely cumulative or immaterial, and that no other avenue is available to the prisoner to develop the prisoner's claims.[566] Prisoners generally find it useful to file a motion for funds for expert services at the same time they file their PCR application to avoid potential problems in getting their attorneys to submit one at a later date. Additionally, a denial of ex parte proceedings for a prisoner's request for these types of funds may trigger a violation of a prisoner's due process and equal protection rights.[567] In the face of recent budget cuts that have impacted the availability of funds for expert services for PCR applicants, prisoners should still submit requests for these funds and thoroughly detail the necessity of these funds to the full development of their claims. In the likely event that no funds are made available to an applicant, prisoners should

561. 325 S.C. 9, 478 S.E.2d 682 (1996).

562. *See id.* at 10–11, 478 S.E.2d at 682.

563. *See, e.g.*, Blume & Paavola, *supra* note 144, at 255–57 (listing grounds on which the application of *Thames* in a noncapital PCR case could be challenged).

564. *See Thames*, 325 S.C. at 11 n.1, 478 S.E.2d at 682 n.1 (citing S.C. CODE ANN. §§ 16-3-26, 17-3-50 (2003)).

565. *Id.* at 11, 478 S.E.2d at 682–83.

566. *See id.* at 11 n.1, 478 S.E.2d at 682 n.1; *cf.* S.C. CODE ANN. § 17-3-50 (1976) (providing "reasonable" and "necessary" standard for defendant's request for expert services for a criminal trial); State v. Taylor, 333 S.C. 159, 176, 508 S.E.2d 870, 879 (1998) (citing Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993); State v. Caskey, 273 S.C. 325, 329, 256 S.E.2d 737, 738–39 (1979)) (stating that when obtaining a new trial based on after-discovered evidence is "material to the issue of guilt or innocence" and "is not merely cumulative or impeaching").

567. *See* Blume & Paavola, *supra* note 144 at 256–57.

sufficiently state on the record at their evidentiary hearing how the denial of these funds adversely affected the presentation of their claims so that they can prepare their claims for possible federal review.[568]

For prisoners who allege counsel was ineffective for failing to call an expert witness or for prisoners who have claims that require expert evaluation to substantiate them, this motion will be especially important. It is important because an applicant's "[m]ere speculation of what a[n expert] witness'[s] testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."[569] Applicants will need to produce testimony to support their position regarding claims that call for an expert's opinion to prevail on such a claim.[570] Prisoners sometimes put forth only a minimal effort in attempting to obtain funds for expert expenses and end up not being heard on the matter at all. It is hard to imagine claims calling for expert opinion that are more routinely dismissed than those made without expert testimony as support. Diligence, persistence, and a clear record of the prisoner's efforts are highly recommended.

IX. EVIDENTIARY HEARING

A. In General

An application for PCR is generally heard by "a court of competent jurisdiction in the county in which the conviction took place."[571] It is not unheard of, however, for an evidentiary hearing to take place in a county other than that in which the conviction took place.[572] Additionally, the judge who presides "at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought" "shall, *upon motion*, recuse himself" from presiding over the same prisoner's PCR evidentiary hearing.[573] Evidentiary hearings are the climax of the entire PCR proceeding, and most courts usually conduct at least two PCR terms per year.[574] In preparing for and attending a hearing, a prisoner should take several considerations into account to maximize the possibility of prevailing on the claims raised.

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568. *See* Conaway v. Polk, 453 F.3d 567, 589–91 (4th Cir. 2006) (stating that petitioner was not barred from obtaining a hearing where he reasonably attempted to investigate and pursue his claim in state court).

569. Dalton v. State, 376 S.C. 130, 143, 654 S.E.2d 870, 877 (Ct. App. 2007) (citing Porter v. State, 368 S.C. 378, 386–87, 629 S.E.2d 353, 358 (2006)).

570. *See* Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 776–77 (2008) (denying prisoner's PCR petition and holding that "it is merely speculative that these allegedly favorable expert witnesses would have aided in [Lorenzen's] defense").

571. S.C. CODE ANN. § 17-27-80 (2003).

572. Buchanan v. State, 276 S.C. 127, 129, 276 S.E.2d 302, 303–04 (1981) (citing § 17-27-80) (holding that the PCR statutes do not require that a PCR application be heard in the county in which the applicant was convicted, but only that the application is heard before a judge who has jurisdiction to pass upon the matter arising within such county).

573. Floyd v. State, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991) (per curiam).

574. *See* Blume, *supra* note 147, at 254.

To begin with, a prisoner has the burden of proving the allegations in his application and must establish his "entitlement to relief by a preponderance of the evidence."[575] A preponderance of the evidence is evidence that has greater weight than the evidence opposing it or is evidence that "has the most convincing force" and has "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."[576] It is not enough to simply include claims alleging violations in a PCR application. A PCR applicant must pursue his claims at the PCR hearing or they will be considered abandoned and procedurally barred.[577] Prisoners should not take lightly that the PCR statutes provide that "proof by affidavits, depositions, oral testimony or other evidence" may be received by a court from a prisoner.[578] Indeed, such evidence must be provided by a prisoner who aims to be successful in obtaining relief. Prisoners sometimes believe that it is a sound strategy to withhold facts or evidence until their actual evidentiary hearing takes place. This belief is usually based on the assumption that their claims will have a better chance of success if the attorney general's office cannot prepare for what they do not know. Prisoners who do so run the risk that their claim will likely not be heard based upon the objection that the material was not included in an applicant's "original, supplemental, or amended application."[579] An objection can also be raised on the ground that such "sandbagging" has prejudicial effect on the attorney general's office's preparation of its defense.[580] For these reasons, withholding information or evidence is never a wise course of action.

Additionally, some prisoners neglect to fully substantiate their claims, believing that a point they are attempting to establish in an argument is conclusive and needs no further verification. This line of reasoning is also often bolstered by the assumption that a PCR court is already in possession of the

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575. S.C. R. CIV. P. 71(e); *see also* Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) ("In a PCR proceeding, the burden is on the applicant to prove the allegations in his application."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 621–22, 300 S.E.2d 482, 483 (1983)) (stating that the burden of proof is on the applicant).

576. BLACK'S LAW DICTIONARY 1301 (9th ed. 2009).

577. *See* § 17-27-80; *see also* Primus v. Padula, 555 F. Supp. 2d 596, 611 (D.S.C. 2008) (citing § 17-27-80; Hughes v. South Carolina, 444 F. Supp. 2d 594 (D.S.C. 2006); Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992)) (finding that applicant, who could have raised his claims earlier and failed to do so, was procedurally barred from doing so later); *Plyler*, 309 S.C. at 409, 424 S.E.2d at 478 (citing Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983)) (finding that an issue that was neither raised at the PCR hearing nor ruled upon by the PCR court was procedurally barred).

578. § 17-27-80.

579. S.C. CODE ANN. § 17-27-90 (2003).

580. *See* S.C. R. CIV. P. 15(b) (stating generally that evidence objected to at trial on the grounds that evidence was not in the pleadings may be excluded if the opposing party proves that its defense has been prejudiced); Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006) (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)) (stating that amendments to PCR applications must conform to evidence presented at trial and must not raise new claims).

material needed to prove a fact or point a prisoner is attempting to establish. This assumption is a fatal gamble that prisoners frequently lose.[581]

Probably the most common error prisoners make in attempting to prove a claim at evidentiary hearings is the failure to produce favorable witnesses. To establish that prejudice resulted from a witness's failure to testify at trial, a prisoner must produce the testimony of the witness or otherwise offer the testimony in accordance with the applicable evidentiary rules at the PCR hearing.[582] "Mere speculation of what a witness'[s] testimony may be is insufficient . . . ."[583] Likewise, prisoners attempting to show that promises or specific statements were made by prior counsel in the presence of, or to, others will need to produce those "others" (usually family members an attorney has consulted with) to substantiate their claim.[584] Applicants are not entitled to a new trial for the sole purpose of presenting a "fancier" case and competent evidence in support of a prisoner's claim needs to be presented.[585]

As the moving party in a civil proceeding, the prisoner presents evidence first at the evidentiary hearing.[586] While prisoners typically remain restrained through the course of the hearing, most judges will allow a prisoner's dominant hand to be freed so the prisoner can sift through documents upon request. The gravity and imposing nature of evidentiary hearings in general is not lost on prisoners, and many find it helpful to prepare outlines of the testimony they wish to present in advance. A pretrial brief outlining the facts and law surrounding each of a prisoner's claims might sound too technical to accomplish to most prisoners, but a simple, well-formatted claim summary, or "coversheet," is an excellent tool to keep everyone on the same page and to avoid having to sift through paperwork to find a document.[587] A PCR evidentiary hearing is usually a prisoner's last chance to present claims for relief, so prisoners should be mindful that the failure to pursue claims at that hearing will constitute

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581. In other words, prisoners are often denied relief because they fail to properly assess the depth of their duty to prove the allegations in their application. A common example of this is when prisoners attempt to substantiate a claim based, in whole or in part, on something that occurred in a prior proceeding but lose on that claim because they wrongly assumed the PCR court had possession of the prior proceeding's transcripts. This practice is often fatal.

582. Bassette v. Thompson, 915 F.2d 932, 940–41 (4th Cir. 1990); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)); Underwood v. State, 309 S.C. 560, 562, 564, 425 S.E.2d 20, 22–23 (1992) (citing Cherry v. State, 300 S.C. 115, 118–19, 386 S.E.2d 624, 625–26 (1989)).

583. Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) (citing Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998)).

584. *See generally* Wolfe v. State, 326 S.C. 158, 164–66, 485 S.E.2d 367, 370–71 (1997) (discussing counsel's "promises" regarding a potential reduced sentence); *Underwood*, 309 S.C. at 562, 425 S.E.2d at 22 (noting that although prisoner alleged that three witnesses could have testified, none of them did so).

585. *See* Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998).

586. *See* S.C. CODE ANN. § 17-27-80 (2003); S.C. R. CIV. P. 71.1(c), (e).

587. *See, e.g.*, 2 DUNLAP & HALL, *supra* note 540, § 31:03 (pretrial brief sample forms); *see also* S.C. R. CIV. P. 16(c) (pretrial brief requirements).

abandonment of those claims, which will thereafter be procedurally barred.[588] It is not enough to simply include potential claims in an application and hope for relief; a prisoner must affirmatively raise claims at his evidentiary hearing.[589] Prisoners often hopefully look to their evidentiary hearings as their opportunity to "tell their side of the story," yet many fumble at this chance due to a preventable lack of preparation. Judges frequently deny claims for lack of credibility—when the truthfulness of a matter may have been easily established by the presentation of available evidence. For example, if the weather on a specific date is material to a prisoner's claim, the prisoner should submit documents such as weather reports to substantiate his allegation.[590] There is simply no such thing as "over-substantiating" a claim,[591] and evidentiary hearings are generally a prisoner's last chance to develop both the factual basis of a claim and the record of the proceedings for review.[592]

When speaking at evidentiary hearings and explaining claims to the court, prisoners should be mindful that the objective is to crystallize their position for the record. A prisoner's testimony is usually the very last chance to expand, explain, or clarify what has been submitted in his application. The specific objective is to persuade the court towards a desired conclusion by attempting to harmonize the applicant's position with the position the court ultimately adopts. Rehearsing arguments prior to attending a hearing can be a helpful method at this stage. Prisoners should aim to be candid, clear, respectful and, at times, passionate when presenting their claims. As one author put it:

> [T]he appellant does not come to the court seeking abstract justice, but he complains that he is the victim of injustice, in the form of a specific violation of his substantial rights. One can only right an injustice by doing something about it. This sense of injustice starts a swelling motion when it is properly conveyed.[593]

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588. Smith v. Padula, 444 F. Supp. 2d 531, 534 (D.S.C. 2006).

589. *See* Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) (citing Hyman v. State, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983).

590. *See, e.g.*, Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) ("Since the contents of these documents were never revealed at the PCR hearing, [d]efendant has failed to present any evidence of probative value demonstrating how the failure to obtain the unproduced statements or acquire the other documents in a more timely fashion prejudiced the defense." (citing Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998))).

591. *See* Simpson v. Moore, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) (finding that allowing a petitioner to submit over forty depositions and twenty-two affidavits at his PCR hearing was within the discretion of the trial judge).

592. S.C. CODE ANN. § 17-27-80 (2003) provides, in part, that "[a] record of the proceedings shall be made and preserved."

593. EDWARD D. RE & JOSEPH R. RE, BRIEF WRITING AND ORAL ARGUMENT 152 (8th ed. 1999) (quoting Harris B. Steinberg, *The Criminal Appeal*, *in* COUNSEL ON APPEAL 3, 14 (Arthur A. Charpentier ed., 1968)).

While tears are not necessary, it is only natural for some passion to seep into an applicant's speech. Also, it almost goes without saying that prisoners should at all times speak loud enough to be heard. A good way to alleviate the anxiety that is often the cause of inaudible responses can be to request counsel to ask some preliminary or "warm-up" questions until a comfortable level in the prisoner's speech has been achieved. A prisoner should not expect a judge to strain to hear what is being said.

The attitude of the court is something the applicant should be prepared for as well. Some judges will seem inattentive and bored while others will be actively engaged in the hearing and will ask questions. If the court does ask a prisoner a question directly, the prisoner should welcome this opportunity to address the court and should also think carefully before responding. If the court displays a hostile attitude towards the prisoner and acts with disbelief towards the claims presented, a prisoner should not behave in kind or answer questions with any less respect than what he would show a friendlier judge. Such action should not be taken even if the prisoner is sure that the judge will not rule in his favor. Some judges will, perhaps naturally, focus on the weakest part of a prisoner's claim. Prisoners should be prepared to respond to this questioning and should not be disheartened that the judge has bypassed the generalities and directly reached the pros and cons of the argument. Lastly, to preserve his claims and protect any appellate rights, a prisoner may wish to express his desire to have counsel file appropriate post-hearing motions and appeals in the event of an adverse decision.

Once evidence and allegations are presented by an applicant, the state is next given the opportunity to respond.[594] Because most claims at PCR hearings involve the allegation of ineffective assistance of counsel, prior counsel are usually called as witnesses to defend themselves and explain their decisions relevant to the particular applicant.[595] By nature, ineffective assistance of counsel claims essentially allege that prior counsel was deficient and incompetent in representing the applicant, and applicants should expect prior counsel to refute such allegations vehemently.[596] While the testimony of the witness cannot be foretold, many applicants find it useful to prepare a list of questions to ask during cross-examination of the prior counsel. Applicants will be given an opportunity to provide testimony in rebuttal and should pay close attention to what is being testified to. Once this stage has concluded, both sides

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594. PCR hearings are generally conducted similar to civil bench trials. S.C. R. CIV. P. 71.1(a).

595. *See, e.g.*, Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (testimony of trial counsel); *see also* Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) ("Where . . . counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (quoting *Stokes*, 308 S.C. at 548, 419 S.E.2d at 779) (internal quotation marks omitted)).

596. *See* Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (1999) (stating that in PCR proceedings, "[t]he applicant attempts to show that his or her attorney erred in a manner that a reasonably proficient attorney would not").

will be given an opportunity to make a closing statement, and an applicant's evidentiary hearing will thereafter conclude.

At the conclusion of the evidentiary hearing, a judge will either "dismiss," "grant," "continue," or "take under consideration" a prisoner's application. Frequently, proposed orders are requested prior to the court issuing an order on an applicant's claim. Prisoners sometimes believe it wise to ensure that a proposed order is prepared in advance to anticipate the court requesting one. This position fails to account for favorable testimony presented at an evidentiary hearing that a prisoner may wish to include in such an order. For example, if counsel testifies at an evidentiary hearing that a particular omission was due to his intoxication during trial, this admission is testimony that a prisoner likely would want included in a proposed order. Obviously, proposed orders or briefs prepared in advance deprive a prisoner of this opportunity. In considering an application, most judges reach an answer within ninety days of an evidentiary hearing. However, no substantial method to compel a judge to reach a conclusion exists and waiting two years after an evidentiary hearing to receive an answer is not unheard of.[597] The PCR statutes require PCR courts to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."[598] The order ultimately issued is considered the final judgment.[599]

B. Relief

Historically, there have been four outcomes for a PCR action: (1) vacate the conviction and remand to the trial court for a new trial; (2) vacate the conviction; (3) vacate the sentence and remand to the trial court for resentencing; and (4) dismiss the application.[600] It is an incorrect belief that a PCR court can reduce a prisoner's sentence or that a prisoner can in some way receive a "time-cut" as a form of relief. Many applicants pursue PCR under this misconceived belief and then withdraw their application at a later date when they discover that no such

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597. Motions asserting inordinate delay and writs of mandamus are sometimes used to try to compel a judge to act and issue a ruling in some circumstances, but the success rate of these measures is not high and they often go unaddressed. *See, e.g.*, City of Rock Hill v. Thompson, 349 S.C. 197, 200, 563 S.E.2d 101, 102 (2002) ("[T]he [c]ourt could direct a judge to rule on a pending motion because the act of ruling is ministerial in nature."); *see also* 18 WEST'S S.C. DIGEST 2D *Mandamus*, Key No. 3(3) (2008 & Supp. 2012) (acts and proceedings of courts, judges, and judicial officers).

598. S.C. CODE ANN. § 17-27-80 (2003).

599. *Id.*

600. *See* S.C. CODE ANN. § 17-27-70(b) (1976); *see also* Singleton v. State, 313 S.C. 75, 85, 437 S.E.2d 53, 59 (1993) (quoting S.C. CODE ANN. § 17-27-20(b) (1976)) (discussing the appropriate relief in PCR cases); Gilstrap v. State, 252 S.C. 625, 628, 168 S.E.2d 88, 89 (1969) (stating that even under the assumption that all the allegations were true, the relief to be granted in this PCR case was remand for a new trial). The general basis for these remedies was codified in former South Carolina Supreme Court Rule 50(1), which was repealed by adoption of the South Carolina Appellate Court Rules.

remedy is available. Even more prisoners voluntarily withdraw their application when they discover that a PCR applicant can receive an even greater prison sentence upon retrial than the one the applicant is currently serving. A good example of this situation can be found in the following hypothetical:

> If an [a]pplicant is successful in having his conviction set aside, he will be facing the original charges all over again. If he received concurrent sentences, he may receive consecutive sentences the next time around. If charges were dismissed in exchange for a plea, the applicant will be facing the dismissed charges again.
>
> For instance, an [a]pplicant may have pled guilty and received a sentence of ten years imprisonment for armed robbery. Armed robbery carries a sentence of ten to thirty years imprisonment. If successful in PCR, [a]pplicant will be facing trial for the same charge, and be facing the possibility of a thirty-year sentence again. If a second charge was to run concurrent to that sentence or dismissed in exchange for the plea, the [a]pplicant may face additional exposure from that charge. For example, kidnapping carries up to thirty years imprisonment. So if the [a]pplicant received a concurrent sentence or the charge was dismissed in exchange for the plea to armed robbery, his exposure would increase to sixty years.[601]

Despite such warnings, a widespread myth still remains amongst prisoners that additional time cannot be imposed upon an applicant who prevails in obtaining post-conviction relief. This misconception is mostly due to prisoners failing to properly understand the United States Supreme Court decision in *North Carolina v. Pearce*.[602] In *Pearce*, the Court held that the Due Process Clause of the Fourteenth Amendment prevented a trial court from penalizing a defendant for exercising his right to appeal.[603] The defendant in *Pearce* successfully attacked his conviction on appeal and received a harsher sentence on retrial.[604] In stating that vindictiveness must play no part in the sentence a defendant receives after a new trial, the Court ruled that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear . . . so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."[605] If no reasons for an increased sentence are given, due process is presumed to have been violated.[606] This rule has become known as the *Pearce* presumption.

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601. MCMAHAN, *supra* note 146, at 4 (citations omitted).
602. 395 U.S. 711 (1969).
603. *Id.* at 725.
604. *Id.* at 713.
605. *Id.* at 725–26.
606. *See id.* at 726. In *Wasman v. United States*, 468 U.S. 559 (1984), the defendant received a greater sentence, from the same judge, at a retrial following a successful appeal. *See id.* at 562.

In *State v. Higgenbottom*,[607] the South Carolina Supreme Court took efforts to analyze *Pearce* and its progeny.[608] In *Higgenbottom*, the defendant received an increase in his probationary sentence following a motion for reconsideration of his original sentence.[609] The defendant appealed and claimed that a due process violation had occurred because the judge increased his sentence without any explanation or new evidence.[610] Although the court recognized that several subsequent cases seemed to have weakened *Pearce*, and thus weakened the defendant's position that a *Pearce* violation had occurred, the court refused to view *Pearce* as having been "emasculated."[611] The court reversed the defendant's increased probationary sentence "[b]ecause the trial court failed to put on the record objective reasons for the harsher sentence" and left no way for the *Pearce* presumption to be rebutted.[612] Therefore, as long as a judge on retrial gives objective reasons for increasing a sentence after an applicant has successfully pursued any sort of appellate or collateral relief, it is not likely that grounds will exist to pursue a due process violation so long as the grounds given by the judge are stated on the record and are not vindictive in nature.

If an applicant is successful in obtaining relief, the attorney general's office will most certainly appeal the PCR court's order granting relief. If appellate review is denied or if the PCR court's decision is upheld, the relief granted to the applicant will then materialize.

A valid question a prisoner might ask himself is: "Why would I pursue post-conviction relief if I can receive more time than what I am already serving?" There is no universal answer to this question, but there are plenty of good ones. For example, a prisoner may have received an extraordinary amount of time to serve after being found guilty at trial and may believe that he is actually or

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Although these circumstances alone were enough to apply the *Pearce* presumption, the Court found no violation because the trial judge stated objective reasons on the record for the increase. *See id.* at 569; *see also* State v. Higgenbottom, 344 S.C. 11, 15, 542 S.E.2d 718, 720 (2001) (citing Colten v. Kentucky, 407 U.S. 104, 116–17 (1972); *Pearce*, 395 U.S. at 726).

607. 344 S.C. 11, 542 S.E.2d 718 (2001).

608. *See id.* at 14, 542 S.E.2d at 720 (citations omitted).

609. *Id.* at 14, 542 S.E.2d at 719.

610. *Id.* at 13–14, 542 S.E.2d at 719.

611. *Id.* at 15–16, 542 S.E.2d at 720; *see also* Alabama v. Smith, 490 U.S. 794, 801 (1989) (holding that the presumption does not apply when a defendant is sentenced to a harsher sentence upon retrial after successfully appealing from a guilty plea); Texas v. McCullough, 475 U.S. 134, 138 (1986) (holding that the presumption does not apply when the jury imposed the first sentence and a judge imposed the second, harsher sentence); Chaffin v. Stynchcombe, 412 U.S. 17, 28 (1973) (holding that the presumption does not apply when a subsequent jury on a retrial imposes a harsher sentence than the original jury).

Additionally, the South Carolina Supreme Court has held that when the second sentencing judge is someone other than the original trial judge, the *Pearce* presumption does not apply. *See Higgenbottom*, 344 S.C. at 15–16, 542 S.E.2d at 720 (citing State v. Hilton, 291 S.C. 276, 279, 353 S.E.2d 282, 284 (1987)). Indeed, in light of these four exceptions to the *Pearce* presumption alone, it is not likely a prisoner will be able to make out a viable showing that a *Pearce* violation occurred in most cases.

612. *Higgenbottom*, 344 S.C. at 17, 542 S.E.2d at 721.

factually innocent of the charged offense. A prisoner may have pleaded guilty to a crime, but he may not think that his attorney, or the court, was straightforward with him regarding the amount of time he would receive at his guilty-plea hearing. Likewise, a prisoner simply may not be content with the sentence he is serving, regardless of guilt, and may truly believe that he may obtain relief through a procedural error or a constitutional violation that may have occurred in the course of the prosecution. After all, no one wants to be incarcerated. Many prisoners do not see PCR as a gamble where they can receive more time but rather as a chance, if successful, to be back in a position to negotiate a lower term of incarceration with the solicitor. This expectation is reasonable because of factors such as: witnesses may no longer reside in the area or remember all the details of an event if retrial were to occur; evidence may no longer be available; the PCR court may have found certain evidence to be inadmissible against the defendant that would make a second conviction less likely; judicial economy may weigh against retrying an old crime where a defendant has already served a significant amount of time; and increasingly overloaded court dockets can play a part in negotiations upon retrial, assuming that retrial was the granted relief.[613] The decision of whether to pursue relief is a subjective evaluation a prisoner will have to make in light of the prisoner's own particular circumstances. A ten-year prison sentence may be an injustice to one person and a blessing to another depending on the facts and events that occurred in any given case. Guilt or innocence frequently do not play a major role in a prisoner's determination of whether to pursue relief at the PCR stage, because most constitutional violations tend to revolve around procedural errors and ineffective assistance of counsel claims, which can be successful regardless of the guilt of the applicant.[614]

X. POST-HEARING MOTIONS

A. In General

Post-hearing motions are required to be made promptly after an order has been entered by the court and not later than ten days after receipt of written notice of entry of judgment.[615] The timely filing of such a motion automatically

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613. *See* Herrera v. Collins, 506 U.S. 390, 403–04 (1993) (noting that the "'erosion of memory and dispersion of witnesses that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication" (quoting McCleskey v. Zant, 499 U.S. 467, 491 (1991))).

614. "The constitutional rights of criminal defendants . . . are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (quoting Kimmelman v. Morrison, 477 U.S. 365, 380 (1986)) (internal quotation marks omitted).

615. S.C. R. CIV. P. 52(b), 59(b); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004). *Elam* arose from a tort action under the South Carolina Tort Claims Act, S.C. CODE ANN. §§ 15-78-10 to -200 (2005 & Supp. 2012), but nonetheless provides a thorough analysis

stays the time for appeal in PCR cases until a prisoner receives written notice of entry of the order either granting or denying such motion.[616] A prisoner will then have thirty days from the date he receives a ruling on his post-hearing motion to file and serve a notice of appeal.[617] The most commonly filed post-hearing motions in PCR actions are motions pursuant to Rules 52(b), 59(e), and 60(a) and (b) of the South Carolina Rules of Civil Procedure. Each of these motions serves a unique function and is briefly discussed below. Rule 60 is mostly used to correct clerical mistakes, and Rule 52 is generally used to request the court to amend its findings or make additional findings. Both of these rules are pretty straightforward, and reviewing the appropriate section in the South Carolina Rules of Civil Procedure should sufficiently apprise a reader of all of the appropriate functions of these rules. Because Rule 59(e) is more frequently employed and more widely known to prisoners in PCR actions, it is discussed more thoroughly below.

B. South Carolina Rule of Civil Procedure 59(e)

Rule 59(e) of the South Carolina Rules of Civil Procedure is titled a "motion to alter or amend a judgment,"[618] but it is more commonly referred to as a motion for reconsideration.[619] This motion has been described as "a vehicle to request the trial court [to] 'alter or amend the judgment'" as well as "a vehicle to seek 'reconsideration' of issues and arguments."[620] By employing this motion, a party is allowed to rehash, and request the court to review, all or part of a previously presented argument and request that the court reconsider its decision.[621] In asking the court to reconsider its decision, this motion is frequently used and inherently designed to call attention to material facts and principles of law a party believes a court either overlooked or disregarded in its final judgment.[622] Unfortunately, many prisoners are forced to use this motion to address the failure of a PCR court to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."[623]

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of Rule 59(e) of the South Carolina Rules of Civil Procedure. *Elam*, 361 S.C. at 15, 602 S.E.2d at 775.

616. *See* S.C. APP. CT. R. 203(b)(1).

617. *Id.*

618. S.C. R. CIV. P. 59(e).

619. *Elam*, 361 S.C. at 21, 602 S.E.2d at 778; *see also* Arnold v. State, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992) ("The purpose of [a motion] to alter or amend the judgment is to request the trial court to 'reconsider matters properly encompassed in a decision on the merits.'" (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1988))).

620. *Elam*, 361 S.C. at 21, 602 S.E.2d at 778–79.

621. *Id.*

622. *See id.*

623. S.C. CODE ANN. § 17-27-80 (2003); *see also* McCray v. State, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991) (quoting § 17-27-80) (concluding that remand was required because PCR court did not make required findings of fact).

In *Pruitt v. State*,[624] the South Carolina Supreme Court addressed the matter of the increasing number of orders being issued by PCR courts that improperly fail to address the allegations raised in prisoners' applications and at prisoners' evidentiary hearings.[625] The *Pruitt* court stressed concern over this burdensome practice and admonished counsel to be meticulous in preparing proposed orders, for opposing counsel to be attentive and to call any omissions to the attention of the PCR judge prior to the issuance of the order, and for a PCR judge to carefully review the order before signing it.[626] The court further placed an obligation on counsel to file a Rule 59(e) motion when an order fails to set forth findings regarding issues raised and the reasons for those findings.[627] The South Carolina Supreme Court has expounded on this, stating:

> A party *may* wish to file [a Rule 59(e)] motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.[628]

In *Marlar v. State*,[629] the South Carolina Supreme Court held that issues raised but not ruled upon by a PCR court were not preserved for appellate review where respondent did not submit a Rule 59(e) motion to correct the insufficiency.[630] In *Marlar*, the court of appeals apparently read the following language from the PCR judge's order to constitute an adequate ruling on Marlar's claims:

> As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.[631]

This "postcard" denial does nothing to set forth findings of facts and conclusions of law. The South Carolina Supreme Court stated that such language should not

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624. 310 S.C. 254, 423 S.E.2d 127 (1992).

625. *See id.* at 255, 423 S.E.2d at 128.

626. *Id.* at 256, 423 S.E.2d at 128.

627. *Id.*; *see also* Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001) (stating that an argument not raised and ruled upon by a PCR judge is not preserved for review).

628. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

629. 375 S.C. 407, 653 S.E.2d 266 (2007).

630. *Id.* at 410, 653 S.E.2d at 267.

631. *Id.* at 409, 653 S.E.2d at 266.

be included in an order unless absolutely no evidence on the referenced claims was presented.[632]

If a prisoner receives a PCR order that contains similar language, he will likely need to file a timely Rule 59(e) motion in order for his issues to be properly preserved for appellate review.[633] Additionally, it is important to remember that when filing this motion, the judge presiding over the case must be provided with a copy within ten days after the filing of the motion.[634] Once a Rule 59(e) motion has been submitted and ruled upon, a second Rule 59(e) motion may be filed only if it challenges something that was altered from the original judgment as a result of the initial Rule 59(e) motion.[635] If a prisoner submits a successive Rule 59(e) motion that simply raises the same issues and arguments made in the first Rule 59(e) motion, the prisoner's time to appeal will not be tolled pending its outcome, and a prisoner will run the risk of losing his right to appeal.[636]

XI. APPEAL

A. PCR Appeal

A prisoner who wishes to appeal the decision of a PCR court has a right to do so.[637] Once a final judgment has been entered by the court, counsel is required to advise an applicant of the right to appeal the denial of PCR.[638] If the applicant is indigent, as many prisoners are, counsel is required to assist the applicant in obtaining representation by the Division of Appellate Defense of the South Carolina Office of Indigent Defense (SCOID).[639] To appeal, a notice of appeal must be served within thirty days after the order of the court has been received or within thirty days after written notice is received of an order granting or denying post-hearing motions under Rules 50, 52, or 59 of the South Carolina Rules of Civil Procedure, which had tolled the available time to appeal.[640] Prisoners do not have a state or federal constitutional right to proceed pro se in an appeal from a criminal conviction, but they may do so if the court, in its discretion, allows a prisoner to represent himself.[641]

An avoidable problem prisoners sometimes encounter during the period immediately after an order has been issued lies in the uncertainty of whether PCR counsel has filed appropriate post-trial motions, if necessary, and an appeal.

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632. *Id.* at 409, 653 S.E.2d at 266–67.
633. *See* S.C. R. CIV. P. 59(e).
634. *See* S.C. R. CIV. P. 59(g).
635. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004).
636. *Id.* at 16, 602 S.E.2d at 776.
637. *See* S.C. CODE ANN. § 17-27-100 (2003); S.C. R. CIV. P. 71.1(g).
638. Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005).
639. S.C. R. CIV. P. 71.1(g).
640. S.C. APP. CT. R. 203(b)(1).
641. State v. Roberts, 364 S.C. 583, 588–89, 614 S.E.2d 626, 629 (2005).

If counsel does not contact a prisoner directly after an order has been issued and a prisoner is unable to contact his counsel, a prisoner may wish to file appropriate post-hearing motions himself if he recognizes the need to do so and is capable of accomplishing the task. Whether on the grounds of allowing a prisoner to "fully and fairly" litigate his claims or simple indifference, a PCR court will sometimes accept such motions despite the obvious hybrid representation violation.[642] Additionally, in this situation, a prisoner will want to consider writing letters to both the clerk of court and the presiding judge explaining the difficulty he is encountering in protecting his claims and expressing a desire to pursue an appeal and counsel's inaction in doing so. It is unfortunate that prisoners must sometimes take measures like these to create a record that expresses their desire to appeal instead of PCR counsel simply consulting or corresponding with them. However, such is often the situation and doing nothing in the face of such serious consequences would be nothing short of reckless. Likewise, a prisoner should submit a pro se notice of appeal within thirty days if he is not sure if counsel has done so regardless of whether he has submitted a pro se post-hearing motion.[643] The philosophy is: A prisoner loses nothing by exercising caution and diligence.

The procedures for review of PCR applications are governed by Rule 243 of the South Carolina Appellate Court Rules. A final decision of a PCR court is reviewed by the South Carolina Supreme Court upon petition by either party for a writ of certiorari.[644] A writ of certiorari is a discretionary writ pursuant to which an appellate court has discretion over whether to hear an appeal from a lower court.[645] As such, review on writ of certiorari is not a matter of right and will only be granted in limited situations where there are special and important reasons to do so.[646] To lighten its workload, the South Carolina Supreme Court will sometimes transfer PCR cases to the court of appeals for review.[647] When this occurs, applicants will not then, again, need to seek review in the same

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642. *See* State v. Stuckey, 333 S.C. 56, 58, 508 S.E.2d 564, 564 (1998) ("Since there is no right to hybrid representation, substantive documents filed pro se by a person represented by counsel are not accepted unless submitted by counsel." (italics omitted) (citing Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989))).

643. *See, e.g.*, S.C. APP. CT. R. app. C, Form 4 (providing example notice of appeal).

644. S.C. CODE ANN. § 17-27-100 (2003); S.C. APP. CT. R. 243(a).

645. BLACK'S LAW DICTIONARY 258 (9th ed. 2009).

646. *See* Haggins v. State, 377 S.C. 135, 137 n.2, 659 S.E.2d 170, 170 n.2 (2008) (stating that certiorari review will only be granted "[w]here there are novel questions of law; where there is a dissent in the decision of the [South Carolina] Court of Appeals; where the decision of the [South Carolina] Court of Appeals is in conflict with a prior decision of the [South Carolina] Supreme Court; where substantial constitutional issues are directly involved; and/or where a federal question is included and the decision of the [South Carolina] Court of Appeals conflicts with a decision of the United States Supreme Court" (quoting S.C. APP. CT. R. 242(b))).

647. *See, e.g.*, Dunlap v. State, 371 S.C. 585, 585, 641 S.E.2d 431, 431 (2007) (stating that the South Carolina Supreme Court has "only recently been transferring PCR actions to the [South Carolina] Court of Appeals").

manner to the South Carolina Supreme Court.[648] When an applicant is denied review by the court of appeals in a PCR matter and receives a "letter of denial," such denial will not constitute a "special reason" justifying additional South Carolina Supreme Court review.[649] If the PCR court determines that the action is barred as successive or untimely under the statute of limitations, an appellant must submit an explanation as to why this determination was improper at the time of his filing a notice of appeal.[650] "If the petitioner fails to make a sufficient showing, the notice of appeal may be dismissed."[651]

Within ten days of the filing of the notice of appeal, counsel shall order a transcript of the lower court proceedings from the court reporter.[652] Applicants represented by SCOID usually receive a copy of these transcripts within the first few months of SCOID's representation. Moreover, within thirty days of receipt of the transcript, the petitioner is required to serve on opposing counsel a copy of the appendix and a copy of the petition for writ of certiorari.[653] The petitioner must also file an original plus six copies of the petition, two copies of the appendix, and proof of service on opposing counsel with the clerk of the South Carolina Supreme Court.[654] The petition must contain: "(1) [t]he questions presented for review. . . . (2) [a] concise statement of the case . . . . [and (3) a] direct and concise argument in support of the petition."[655] The appendix must contain the entire lower court record, a copy of the PCR court's final order, and an index setting forth the principal matters contained in the appendix.[656] Then, the respondent must draft his return, not to exceed twenty-five pages, and must serve it on opposing counsel within thirty days after service of the petition and appendix.[657] The respondent must file an original, plus six copies, with the clerk of court along with proof that the return has been served on opposing counsel.[658] Thereafter, the petitioner will then have ten days from the date of service of the return to file a reply, which must not exceed fifteen pages in length.[659] The petitioner is required to file an original of the reply, six copies, and proof of

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648. *See id.*

649. *Haggins*, 377 S.C. at 136 n.1, 659 S.E.2d at 170 n.1 (explaining that a "letter of denial" is what parties receive when "[they] are informed that their petitions for writs of certiorari have been denied by letter from the appellate court clerk's office").

650. S.C. APP. CT. R. 243(c) (formerly S.C. APP. CT. R. 227). This rule was renumbered from 227 to 243, effective April 29, 2009.

651. *Id.*

652. *See* S.C. APP. CT. R. 243(b); *see also* S.C. APP. CT. R. 203, 207 (providing the applicable time limitations).

653. S.C. APP. CT. R. 243(d).

654. *Id.*

655. S.C. APP. CT. R. 243(e)(1)–(3).

656. S.C. APP. CT. R. 243(f)(1)–(3).

657. S.C. APP. CT. R. 243(g).

658. *Id.*

659. S.C. APP. CT. R. 243(h).

service on opposing counsel with the clerk of the South Carolina Supreme Court within the same ten days.[660]

On appeal, the supreme court gives great deference to a judge's findings of fact and conclusions of law, especially when matters of credibility are involved because the supreme court lacks the opportunity to directly observe witnesses.[661] Additionally, a PCR judge's findings will be upheld only where there is probative evidence to support it.[662] The term "probative evidence" simply means "[e]vidence that tends to prove or disprove a point in issue."[663] This definition is important to understand when seeking appellate review from a PCR denial because prisoners often focus on the evidence presented in support of their claim and not the evidence, or lack thereof, in opposition to their claim. Even when it seems that the evidence in support of a claim outweighs the evidence against it, a reviewing court may still uphold a PCR court's decision on the ground that "any" evidence was found to support the ruling.[664] A PCR judge's decision will be reversed, however, when it is controlled by an error of law.[665]

B. Belated Appeal

In *White v. State*,[666] the South Carolina Supreme Court carved out an exception to the prohibition against appellate courts considering appeals in the absence of a notice of appeal.[667] This exception "permits consideration of the full trial record on this issue in conjunction with appellate review of the PCR proceeding."[668] The special procedures for applicants who seek a belated appeal are detailed in Rule 243(i) of the South Carolina Appellate Court Rules and provide as follows:

> (1) When the [PCR] judge has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the petition

660. *Id.*

661. Huggler v. State, 360 S.C. 627, 632, 602 S.E.2d 753, 756 (2004) (citing Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)); Soloman v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)), *overruled on other grounds by* State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013).

662. Brown v. State, 340 S.C. 590, 593–94, 533 S.E.2d 308, 310 (2000) (citing Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)).

663. BLACK'S LAW DICTIONARY 639 (9th ed. 2009).

664. *Brown*, 340 S.C. at 593–94, 533 S.E.2d at 310 (citing *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626).

665. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

666. 263 S.C. 110, 208 S.E.2d 35 (1974).

667. *See id.* at 119, 208 S.E.2d at 39–40 (citing S.C. CODE ANN. § 7-405 (1962) (current version at S.C. APP. CT. R. 203); State v. Wright, 228 S.C. 432, 436, 90 S.E.2d 492, 494 (1955); 3 WEST'S S.C. DIGEST *Appeal and Error*, Key Nos. 425–30 (2008 & Supp. 2012)).

668. Wicker v. State, 310 S.C. 8, 9, 425 S.E.2d 25, 25 (1992); Whitehead v. State, 308 S.C. 119, 121, 417 S.E.2d 529, 530 (1992).

> shall contain a question raising this issue along with all other [PCR] issues petitioner seeks to have reviewed. At the same time the petition is served, petitioner shall serve and file a brief addressing the direct appeal issues. This brief shall, to the extent possible, comply with the requirements of Rule 208(b). Respondent's return to the petition shall address the [PCR] issues, including whether the direct appeal was knowingly and intelligently waived. At the same time the return is due, respondent shall also serve and file a brief addressing the direct appeal issues. Within ten (10) days after service of respondent's brief, petitioner may file a reply brief on the direct appeal issues.
>
> (2) When the [PCR] judge has found that the applicant is *not* entitled to a *White v. State* review, the petition shall raise the question of wavier of the right to a direct appeal along with all other [PCR] issues petitioner seeks to have reviewed. The petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a *White v. State* review is granted; this statement of issues shall comply with the requirements of Rule 208(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue.[669]

Additionally, the South Carolina Supreme Court has held that the one-year statute of limitations for the filing of a PCR action does not apply where defendants are denied a direct appeal due to ineffective assistance of counsel.[670]

C. Johnson *Petition*

Indigent applicants who wish to appeal the denial of a PCR order may be represented by SCOID.[671] As similar offices in different states all handle a great number of prisoner appeals, the United States Supreme Court long ago set out a procedure to ensure indigent prisoners do not have their appeal dismissed without proper consideration. In *Anders v. California*,[672] the Supreme Court held that when appointed counsel determines that an appeal is frivolous and requests to withdraw, such counsel must brief "anything in the record that might arguably support [an] appeal" and must furnish a copy of the brief to both the appellant and the court.[673] The indigent is then given time to "raise any points that he chooses."[674] The court then reviews the proceedings to determine

669. S.C. APP. CT. R. 243(i) (italics added).

670. Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582–83 (2002) ("A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal and one PCR application.").

671. *See* S.C. R. CIV. P. 71.1(g); S.C. APP. CT. R. 602(e)(3).

672. 386 U.S. 738 (1967).

673. *Id.* at 744.

674. *Id.*

whether the appeal is, indeed, "wholly frivolous."[675] If the court decides that it is frivolous, counsel's request to withdraw may be granted.[676] If the court decides that arguable issues do exist, the court will "afford the indigent the assistance of counsel to argue the appeal."[677] The Court stated that "[t]his procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel."[678]

In *Johnson v. State*,[679] the South Carolina Supreme Court "approved the withdrawal of counsel in meritless post-conviction appeals, provided the procedures outlined in [*Anders* are] followed."[680] Thus, in South Carolina, when counsel requests to withdraw from a PCR appeal pursuant to *Anders*, counsel's brief containing an arguable issue is called a "*Johnson* petition."[681] If such a brief is submitted by counsel, the appellant will be notified by the clerk of court and will be given forty-five days from the date of notification to submit a pro se brief addressing any issues the appellant believes the court should consider on appeal.[682] Upon receipt of an appellant's pro se brief, or the expiration of forty-five days, the court will then review the record.[683] If a *Johnson* petition is filed on an appellant's behalf and the appellant is debating whether to file a pro se brief, the appellant should be mindful that, should his writ of certiorari be denied, only issues presented to the South Carolina Supreme Court for consideration will be considered on federal habeas review.[684]

XII. STATE HABEAS CORPUS

The remedial avenue of state habeas corpus is provided for by sections 17-17-10 to -200 of the South Carolina Code.[685] The purpose of a state habeas petition "is to test the legality of [a] prisoner's present detention"; the only

675. *Id.*
676. *Id.*
677. *Id.*
678. *Id.* at 745.
679. 294 S.C. 310, 364 S.E.2d 201 (1988) (per curiam).
680. *Id.* at 310, 364 S.E.2d at 201 (citing *Anders*, 386 U.S. at 744–45).
681. *See, e.g.*, Edmond v. State, 341 S.C. 340, 343 & n.2, 534 S.E.2d 682, 684 & n.2 (2000) ("Counsel for petitioner filed a *Johnson* petition for a writ of certiorari.").
682. State v. Williams, 305 S.C. 116, 117, 406 S.E.2d 357, 357–58 (1991).
683. *Id.* at 117, 406 S.E.2d at 358.
684. *See* Castille v. Peoples, 489 U.S. 346, 351 (1989) (noting that it is "well settled that 'once [a] federal claim has been *fairly presented* to the state courts, the exhaustion requirement is satisfied'" (alteration in original) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971))); *see also* O'Sullivan v. Boerckel, 526 U.S. 838, 845–47 (1999) (citations omitted) (noting that the fact that a petitioner has a right to raise a claim through a discretionary review process in the state supreme court is sufficient to *require* presentation to the state court in order to exhaust state remedies prior to federal habeas review).
685. *See* S.C. CODE ANN. §§ 17-17-10 to -200 (2003).

remedy to be granted is release from custody.[686] While the option of pursuing state habeas relief is still available to prisoners, its availability has been severely limited by the enactment of the PCR Act.[687] This limitation is due to the fact that the PCR Act "takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them."[688] Although the PCR Act supersedes and encompasses the state habeas corpus procedure provided for by statute, it does not supplant the constitutional right to seek habeas corpus nor does it unconstitutionally suspend that right.[689]

A petition for state habeas corpus is usually a last resort to challenge the validity of a prisoner's conviction or sentence, initiated after an unsuccessful direct appeal, PCR, and federal review.[690] State habeas is only available where "other remedies, such as PCR, are unavailable or inadequate."[691] The South Carolina Supreme Court retains jurisdiction over state habeas petitions, and a claim "cognizable under the [PCR] Act may not be raised by a petition for a writ of habeas corpus before the circuit [court] or other lower courts."[692] Additionally, like PCR, a state habeas petitioner is entitled to proceed *in forma pauperis*—without payment of filing fees.[693]

When filing a petition for state habeas corpus, a prisoner should ensure that the document they are submitting contains a proper case caption designating the document as a state habeas corpus petition, has a proper county designation, and is signed by the submitting party to assure the clerk of court's acceptance.[694] A

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686. Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) (citing McCall v. State, 247 S.C. 15, 18, 145 S.E.2d 419, 419 (1965)).

687. *See id.* at 40, 495 S.E.2d at 428; *see also* Al-Shabazz v. State, 338 S.C. 354, 365, 527 S.E.2d 742, 748 (2000) ("[W]e clearly have indicated that we wish to limit habeas petitions and funnel issues raised by inmates challenging their conviction or sentence into the PCR process.").

688. *Gibson*, 329 S.C. at 41, 495 S.E.2d at 428 (quoting S.C. CODE ANN. § 17-27-20(b) (1976)) (internal quotation marks omitted).

689. *Id.* ("[H]abeas corpus continues to be available as a constitutional remedy provided a petitioner qualifies for this extraordinary relief and clears the procedural hurdles.").

690. *See, e.g.*, Williams v. Ozmint, 380 S.C. 473, 479–80, 671 S.E.2d 600, 603 (2008) (citing Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991)) (recognizing that the petitioner had run through the avenues of state and federal review and that the writ of common law habeas corpus can only issue in the "very rarest of exceptions" in light of the review that the claims have already received).

691. *Gibson*, 329 S.C. at 42, 495 S.E.2d at 428.

692. Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998).

693. Lakes v. State, 333 S.C. 382, 385, 510 S.E.2d 228, 230 (Ct. App. 1998) (quoting Thompson v. State, 325 S.C. 58, 59, 479 S.E.2d 808, 808 (1997) (citing *Gibson*, 329 S.C. at 41, 495 S.E.2d at 428). A proceeding *in forma pauperis* generally relieves the applicant of both filing fees and court costs; however, a litigant filing a PCR application *in forma pauperis* is only entitled to filing fees and is not entitled to court costs. *Id.* (citing Quillian v. Evatt, 308 S.C. 555, 555, 419 S.E.2d 783, 783 (1992)).

694. Miller v. State, 377 S.C. 99, 101–02, 659 S.E.2d 492, 493 (2008) (citing S.C. JUDICIAL DEP'T, CLERK OF COURT MANUAL § 6.2.4, *available at* http://www.judicial.state.sc.us/clerkOfCourtManual/displaychapter.cfm?chapter=6#6.2.4). *Miller* clarified the clerk of court's duties upon

petition may be viewed by the court as a PCR application if the petitioner does not satisfy the procedural requirements or fails to allege sufficient facts to justify a habeas corpus hearing.[695] Although the allegations in a state habeas petition are to be treated as true, "the petition must make out a prima facie case showing [that the] petitioner is entitled to relief."[696]

To prevail in a state habeas action, the petitioner must raise a constitutional claim that meets the standards set out in *Butler v. State*.[697] In *Butler*, the South Carolina Supreme Court ruled that a state habeas corpus petition "will issue only under circumstances where there has been a 'violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice.'"[698] This intentionally high showing leaves all but the rarest constitutional claims to a PCR court and sufficiently corresponds to the court's overall reluctance to issue a writ of habeas corpus.[699] The court in *Butler* emphasized that the state habeas writ was being issued "under the unique and compelling circumstances of th[e] case," with the obvious implication that most cases will not be as "unique and compelling."[700] State habeas is available to correct an injustice, not to relitigate an applicant's claims simply because they have been denied elsewhere.[701] While it is not impossible to obtain state habeas relief, prisoners are seldom successful, as the PCR Act seemingly leaves very little function for state habeas.

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receipt of a state habeas petition and can be an insightful read for prisoners when a clerk of court fails to recognize their state habeas action as such. *See id.* at 102, 659 S.E.2d at 493.

695. *See Gibson*, 329 S.C. at 41, 495 S.E.2d at 428 (citing Hunter v. State, 316 S.C. 105, 108, 447 S.E.2d 203, 205 (1994), *abrogated by Simpson*, 329 S.C. 43, 495 S.E.2d 429). If a prisoner's state habeas petition is construed as a PCR application, it will most likely be deemed successive, and the prisoner will be required to show why he did not raise the present claims in the previous PCR application. *See Aice*, 305 S.C. at 450, 409 S.E.2d at 394.

696. *Gibson*, 329 S.C. at 40, 495 S.E.2d at 427 (citing Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965); Crosby v. State, 241 S.C. 40, 43, 126 S.E.2d 843, 844 (1962); Tillman v. Manning, 241 S.C. 221, 224, 127 S.E.2d 721, 722 (1962)).

697. 302 S.C. 466, 397 S.E.2d 87 (1990).

698. *Id.* at 468, 397 S.E.2d at 88 (quoting State v. Miller, 84 A.2d 459, 463 (N.J. Super. Ct. App. Div. 1951)).

699. *See id.*; *Gibson*, 329 S.C. at 41, 495 S.E.2d at 428.

700. *Butler*, 302 S.C. at 468, 397 S.E.2d at 88; *see also* Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008) ("Habeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights. For these reasons, a defendant bears a much higher burden in a habeas proceeding. A writ of habeas corpus is reserved for the very gravest of constitutional violations 'which, in the setting, constitute[] a denial of fundamental fairness shocking to the universal sense of justice.'" (alteration in original) (quoting Green v. Maynard, 349 S.C. 535, 538, 564 S.E.2d 83, 84 (2002))).

701. *See Gibson*, 329 S.C. at 41, 495 S.E.2d at 428.

XIII. UNDERSTANDING CASE LAW

Case law is law created by the courts, as opposed to statutory law created by the legislative branch, and may be cited as precedent.[702] In the appellate courts—including the state courts of appeals and state supreme courts and the federal circuit courts of appeals and United States Supreme Court—a majority of judges are required to agree in order to create law. For example, a majority of the United States Supreme Court is generally five Justices; therefore, a Supreme Court judicial opinion will generally require five votes to make new law.[703] However, the more votes a judicial opinion receives, the more persuasive it is. As a result, briefs and opinions often emphasize that a cited opinion was a "unanimous decision" so as to show the strength of the decision.

A. Opinions of the Court

The opinion of a case is simply the reasoning of the court on any issue before it. The formal definition of the word "opinion" is "[a] court's written statement explaining its decision in a given case, usu[ally] including the statement of facts, points of law, rationale, and dicta."[704] The court's determination of a matter of law that is pivotal to its decision in the case is referred to as the "holding."[705] The holding of a case, and the rationale necessary for reaching it, carries the precedential value that is relied upon for the disposition of similar issues.[706]

Not every opinion of a court carries the same weight because it is not uncommon for a judge or justice to disagree with the reasoning or holding of the court. Appellate courts are not required to be unanimous in resolving a question before them and frequently are not. A "majority opinion" of the court is the reasoning agreed to by more than half of the judges deciding an issue.[707] Appellate judges who are not in agreement with the majority's reasoning or holding will sometimes write a "dissenting opinion," also known as a "dissent,"

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702. *See* BLACK'S LAW DICTIONARY 244 (9th ed. 2009) (defining "caselaw" or "case law" as "[t]he law to be found in the collection of reported cases that form all or part of the body of law within a given jurisdiction").

703. *See* 28 U.S.C. § 1 (2006) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight [A]ssociate [J]ustices, any six of whom shall constitute a quorum."). If less than the full nine Justices participate, a majority may be made up of less than five votes. By contrast, the South Carolina Supreme Court is made up of one chief justice and only four associate justices. S.C. CONST. art. V, § 2.

704. BLACK'S LAW DICTIONARY 1201. "Dicta" (plural of "dictum") is "[a] statement of opinion or belief considered authoritative because of the dignity of the person making it." *Id.* at 519.

705. *Id.* at 800 ("A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision.").

706. *See* Williams v. Taylor, 529 U.S. 362, 382 (2000) (discussing the relationship between "bright-line rules" and dicta).

707. BLACK'S LAW DICTIONARY 1201.

to explain why.[708] A "concurring opinion," also known as a "concurrence," is one that agrees with the outcome of the majority opinion, but is written to express a different view of the issues or to expound upon a principle that the particular judge holds in high esteem.[709] Concurring opinions are not part of the majority opinion and do not maintain the same precedential value.[710] Plurality, dissenting, and other disjointed opinions are explained more thoroughly below.

1. Dissenting Opinions

It is a common mistake for applicants researching an issue to overlook a dissenting opinion when reading a case. Dissenting opinions generally provide the reader with a point of view or analysis that the majority opinion does not reveal. Too often applicants skip over reading the dissent simply because it has no precedential value,[711] and applicants believe that there is no reason to read it. While it is true that a dissenting opinion has no precedential value, a dissent should always be read to obtain a "full picture" from both sides of an issue. Also, dissenting opinions may be cited as "persuasive" authority for an argument that a previous court decision was incorrect or should be limited in scope. Such an argument can sometimes result in a new majority opinion being written on the same principle as a previous dissent. A good example of this situation can be found in *Murray v. Carrier*.[712]

In *Murray*, the United States Supreme Court decided the question of "whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons."[713] In analyzing the law, the Court held that cause and prejudice must be shown in order to overcome a procedural default, regardless of whether it was deliberate or inadvertent.[714] Justice Stevens wrote a concurring opinion examining several prior decisions of the Court.[715] In relying on a dissenting opinion, Justice Stevens noted that "because the [first case's] holding was repudiated in [a later case], Justice Black's penetrating dissent commands greater

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708. *See id.* (defining "dissenting opinion" as "[a]n opinion by one or more judges who disagree with the decision reached by the majority").

709. *Id.* at 331 (defining "concurrence" as "[a] vote cast by a judge in favor of the judgment reached, often on grounds differing from those expressed in the opinion or opinions explaining the judgment" or "[a] separate written opinion explaining such a vote").

710. *See, e.g.*, Bailey v. U.S. Fid. Guar. Co., 185 S.C. 169, 174, 193 S.E. 638, 640 (1937) (explaining that a concurring opinion "while deserving of great respect, not being a holding of the court, is, of course, without binding force or effect").

711. Purcell v. BankAtlantic Fin. Corp., 85 F.3d 1508, 1513 (11th Cir. 1996) (stating that "a dissenting Supreme Court opinion is not binding precedent").

712. 477 U.S. 478 (1986).

713. *Id.* at 481–82.

714. *Id.* at 491, 496–97.

715. *Id.* at 497.

respect than Justice Reed's ambiguous opinion for the Court."[716] This example is not to say that a dissenting opinion will always be useful to an applicant or that it is equally persuasive as controlling law, but it does show that courts may look to prior dissenting opinions when overruling or modifying a prior decision. If an applicant's claim is going against precedent in a particular area, dissenting opinions may be the only support available for such an uphill battle.

The obvious flaw in relying on dissenting opinions to support an argument is that the reasoning encompassed in a dissent has already been rejected by the majority of the court. A better course of action might be to alter an argument and word it in such a fashion so that the dispositive issues in a claim do not find their complete basis in a dissenting opinion. Whether or not an applicant uses a dissenting opinion in his argument, such opinions are truly vital to a full understanding of an issue and too informative to disregard. Furthermore, dissents and concurrences sometimes contain stinging comments when discussing a majority opinion, which makes reading case law slightly more entertaining than clinical.[717]

2. *Plurality Opinions*

A plurality opinion is an opinion—or reasoning of the court—that is agreed to by less than a majority of the court but that "receiv[es] more votes than any other opinion."[718] When there is no majority supporting the rationale but there is a majority supporting the result, the United States Supreme Court has stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[719] Therefore, when there is no majority opinion, the holding of the Court may be found in either a plurality opinion or a concurring opinion, whichever resolves the question on the narrowest grounds. However, in some cases, there may be more than one plurality opinion written.[720] Again, in

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716. *Id.* at 508.

717. For example, see the colorful words of Justice Scalia in *Herrera v. Collins*, 506 U.S. 390, 428 (1993) (Scalia, J., concurring) ("If the system that has been in place for 200 years (and remains widely approved) 'shock[s]' the dissenters' consciences, . . . perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of 'conscience shocking' as a legal test." (alteration in original) (quoting *id.* at 430 (Blackmun, J., dissenting)).

718. BLACK'S LAW DICTIONARY 1201 (9th ed. 2009). For an example of a plurality opinion, see *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

719. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

720. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (two, three-Justice opinions); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (two, four-Justice opinions); State v. Hollman, 232 S.C. 489, 102 S.E.2d 873 (1958) (two-justice main opinion, one-justice concurrence in result, and two-justice dissent), *overruled by* Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999).

these instances, the holding of the Court is determined by the narrowest rationale for the decision in which a majority of the Justices agree.[721]

3. Other Disjointed Opinions

Courts may also issue other disjointed opinions in which there are multiple writings, parts of each which gain a majority. These can be as difficult as plurality opinions to determine what the important parts are. The key to finding the holding and the precedent set by these confusing opinions is to look for those portions that garner the approval of the majority of the court. A good study example of this can be found in *Arizona v. Fulminante*.[722]

In *Fulminante*, the United States Supreme Court decided the question of whether the admission at trial of a coerced confession is subject to a harmless-error analysis.[723] The three major components relevant to the resolution of this question were: (1) whether the confession was inadmissible because of coercion; (2) whether harmless-error analysis was appropriate; and, if so, (3) whether any error was harmless.[724] Overall, the Court found that the confession was coerced, was subject to harmless-error analysis, and was prejudicial to the defendant; however, these findings were close ones.[725] Three Justices—Chief Justice Rehnquist, Justice White, and Justice Kennedy—authored opinions in this case.[726] Justice Kennedy authored a concurrence, while both Chief Justice Rehnquist and Justice White authored opinions with parts that represented majority opinions for the Court and parts that were dissents.[727] The difficulty in reading an opinion such as this, and the confusion that can result, is easily illustrated. Justice White's full opinion appears first in the decision and contains four parts—three of which represent the opinion of the Court and one of which constitutes a dissent.[728] Chief Justice Rehnquist's opinion appears second and contains three parts—one part that represents the opinion of the Court and two parts that constitute dissents.[729] Justice Kennedy's concurrence appears last.[730] As this order demonstrates, the opinion of the Court on the issues does not necessarily appear first, followed by each dissent. Recognizing this phenomenon is key to avoiding confusion over what segment of the decision represents a majority or minority opinion on a particular issue before the Court. For a better visual of the Court's decision in *Fulminante*, examine the following table:

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721. *See supra* note 724 and accompanying text.

722. 499 U.S. 279 (1991).

723. *Id.* at 285.

724. *See id.* at 284, 288, 295–96.

725. *Id.* at 287, 295, 297.

726. *See id.* at 282 (White, J.); *id.* at 302–03 (Rehnquist, C.J.); *id.* at 313 (Kennedy, J., concurring).

727. *See id.*

728. *Id.* at 282.

729. *Id.* at 302–03.

730. *Id.* at 313.

Justice White's Opinion			
Part	**Members of the Court**	**Pages**	**Opinion**
I	White, Kennedy, Marshall, Blackmun, Stevens, Scalia	282–85	Majority
II	White, Marshall, Blackmun, Stevens, Scalia	285–88	Majority
III	White, Marshall, Blackmun, Stevens	288–95	Dissent
IV	White, Kennedy, Marshall, Blackmun, Stevens	295–302	Majority
Chief Justice Rehnquist's Opinion			
Part	**Members of the Court**	**Pages**	**Opinion**
I	Rehnquist, O'Connor, Kennedy, Souter,	303–06	Dissent
II	Rehnquist, O'Connor, Kennedy, Souter, Scalia	306–12	Majority
III	Rehnquist, O'Connor, Scalia	312	Dissent
Justice Kennedy's Concurrence			
Part	**Members of the Court**	**Pages**	**Opinion**
I	Kennedy	313–14	Concurrence

As shown above, Justice White's opinion served as the majority for all parts of the Court's opinion except Part III.[731] Part III of Justice White's opinion reflects the belief that the harmless-error rule should be "inapplicable to erroneously admitted coerced confessions."[732] However, because a majority of the Court rejected that position (which is, in turn, Part II of Chief Justice Rehnquist's opinion), Part III of Justice White's opinion is necessarily a dissent.

B. Supremacy Clause

Article VI, Clause 2 of the United States Constitution, also known as the Supremacy Clause, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,

731. *Id.* at 282.
732. *Id.* at 288.

> any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[733]

Reading the above, it is not hard to wonder why the Supremacy Clause often presents a myriad of questions for prisoners attempting to understand the difference between federal and state law and the interplay between the two. Most of these questions revolve around which law to follow and whether to cite state or federal law in a brief. The first thing applicants should recognize in preparing PCR documents is that, while the Supremacy Clause demands that state law yield to federal law, a state court is only bound by the interpretation of federal law as decided by the United States Supreme Court—not the federal district courts or circuit courts of appeals.[734]

In *State v. Al-Amin*,[735] the South Carolina Court of Appeals dealt with the issue of whether armed robbery constituted a crime of dishonesty for the purpose of admitting a prior conviction into evidence under Rule 609(a)(2) of the South Carolina Rules of Evidence.[736] Because the question was a novel one in South Carolina, the court looked to both federal and other states' jurisprudence for guidance.[737] While the majority of federal courts of appeals that had decided the question had found armed robbery not to be a crime of dishonesty, the South Carolina Court of Appeals stated that "[t]he precedent set by the federal circuit courts is not binding on this [c]ourt" and that "[w]e decline to follow the federal courts' restrictive interpretation of the phrase 'dishonesty or false statement' in Rule 609(a)(2)."[738] In other words, if a state court follows a lower federal court's interpretation of federal law, "it does so only because it chooses to and not because it must."[739] If, on the other hand, the United States Supreme Court or the South Carolina Supreme Court had already ruled on the issue, the South Carolina Court of Appeals would have been bound to follow their interpretation.[740]

Just as state courts are not required to follow the lower federal courts' interpretations of federal law, federal courts are not bound by a state court's interpretation of federal law.[741] Not being bound to follow each other, however, does not mean that state and federal courts work against each other or do not respect each other's opinions. To the contrary, state courts often look to federal

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733. U.S. CONST. art. VI, cl. 2.

734. Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring).

735. 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003).

736. *See id.* at 415, 578 S.E.2d at 37.

737. *See id.*

738. *Id.* at 416, 578 S.E.2d at 38.

739. *Lockhart*, 506 U.S. at 376.

740. *See id.*; *see also* S.C. CONST. art. V, § 9 ("The [South Carolina] Court of Appeals shall have such jurisdiction as the General Assembly shall prescribe by general law. The decisions of the [South Carolina] Supreme Court shall bind the [South Carolina] Court of Appeals as precedents.").

741. MEANS, *supra* note 381, at 1021. Federal courts, however, are bound to follow a state's highest court's interpretation of that state's law. *See* Johnson v. Fankell, 520 U.S. 911, 916 (1997).

courts for guidance—as the South Carolina Court of Appeals did in *Al-Amin*[742]—and federal courts respect state court decisions in the habeas context.[743] The distinctions between the two may seem confusing at times, but knowing how both state and federal courts have applied and interpreted an issue will greatly benefit applicants drafting PCR claims. This way, a prisoner can draft a claim to fit into South Carolina's interpretation of an issue and still arrange his argument to meet the federal court's interpretation in case he is not successful on PCR and must pursue federal habeas relief. Accordingly, citing the controlling federal opinion on an issue along with the relevant state opinion is often a wise course to follow.[744]

All PCR applications should be prepared in anticipation of being denied and the applicant having to pursue federal relief. Citing the federal source of law on a claim is often a good way to alert the state courts that an applicant is invoking his rights to federal review, because although state case law may be enough for PCR-claim-drafting purposes, it will not likely be enough to alert a state court that a federal violation is being alleged.[745] Additionally, if a federal court's interpretation of federal law differs in any way from the state court's interpretation, being able to draft a claim to encompass both, or recognizing the need to "split" the claim (that is, drafting two claims from a single issue), will invariably aid in the pursuit of relief—whether that relief be state or federal.

Lastly, while federal district courts are no less competent than other courts, their published opinions are not binding on any other court or even on any other judge in the same district.[746] Prisoners should be mindful of this fact when they

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742. *See supra* notes 740–43 and accompanying text.

743. *See, e.g.*, Swain v. Pressley, 430 U.S. 372, 383 (1977) (stating that state judges are "fully competent to decide federal constitutional issues, and that their decisions must be respected by federal district judges in processing habeas corpus applications pursuant to 28 U.S.C. § 2254").

744. *See* Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) (citing Picard v. Connor, 404 U.S. 270, 275–78 (1971)); *see also* Verdin v. O'Leary, 972 F.2d 1467, 1474 (7th Cir. 1992) (stating that for a claim to be exhausted in state court, the petitioner must present to the state court the substance of their federal claim that includes "both the operative facts and the 'controlling legal principles'" (quoting *Picard*, 404 U.S. at 277)); Baldwin v. Reese, 541 U.S. 27, 32 (2004) ("A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court [PCR] petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'").

745. *See, e.g.*, MEANS, *supra* note 381, at 973 ("For a federal issue to be 'fairly presented' by the citation of a state decision dealing with both state and federal issues relevant to the claim, the citation must be accompanied by some clear indication that the case involves federal issues. Where the citation to the state case has no signal in the text of the brief that the petitioner is raising federal claims of relies on state law cases that resolve federal issues, the federal claim is not fairly presented." (citing Casey v. Moore, 386 F.3d 896, 911–12 n.12 (9th Cir. 2004))). Furthermore, the "four corners" rule states that a federal claim is not adequately presented to a state court if the court must look outside of the "four corners" of a petition or brief to locate it. *Baldwin*, 541 U.S. at 32.

746. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 430 n.10 (1996); *see also* 6A WEST'S S.C. DIGEST 2D *Courts*, Key No. 96(4) (2008 & Supp. 2012) (outlining the "[c]onclusiveness of decisions of [the c]ourt of [a]ppeals within its circuit").

are reading case law from the United States District Court for the District of South Carolina. In light of this reality, applicants may wish to rely on opinions from the Fourth Circuit Court of Appeals when drafting claims, as that court's decisions are binding on the district courts within the Fourth Circuit—the same district court to which many applicants later submit federal habeas applications.[747] And, of course, decisions from the United States Supreme Court are the "supreme law of the land" to be followed by all.[748]

C. Dictum

Judicial dictum is formally defined as "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision."[749] Dictum is basically the language or statements in an opinion that can be deleted without impairing the analysis necessary to reaching the holding, because by "being peripheral, [it] may not have received the full and careful consideration of the court that uttered it."[750] One of the clearest ways of describing dictum in an opinion is:

> [D]ictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner. If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that

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747. *See* Doe v. Chao, 511 F.3d 461, 465 (4th Cir. 2007). In *Chao*, the Fourth Circuit Court of Appeals dealt with the issue of whether a district court violated a previously issued mandate from their court. *See id.* at 464. In examining the question and finding a violation, the court stated that "[i]t is axiomatic that in our judicial hierarchy, the decisions of the circuit courts of appeals bind the district courts just as decisions of the Supreme Court bind circuit courts." *Id.* The court proceeded to state that "[t]his is not to say appellate courts are somehow superior or always correct, but only that our system has been served well by the availability of review and the need for appropriate review to be final." *Id.*

As a side note, applicants often question whether to include decisions from other federal circuit court of appeals in their arguments when drafting claims. While decisions from other circuit courts and state courts can be persuasive and should be respected, applicants in South Carolina should see whether the Fourth Circuit or South Carolina has resolved an issue first before going elsewhere. *See, e.g.*, Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228, 1240 n.15 (11th Cir. 2002) (stating that a circuit court's decision is only binding on the federal district courts within its own circuit); Bajkowski v. United States, 787 F. Supp. 539, 541 n.2 (E.D.N.C. 1991) ("[W]hen there is mandatory authority governing a dispute, persuasive authority from other jurisdictions is irrelevant."); Jones v. Equicredit Corp., 347 S.C. 535, 542, 556 S.E.2d 713, 717 (Ct. App. 2001) ("When there is no South Carolina case directly on point, [the appellate] court may look to other jurisdictions for persuasive authority.").

748. *See supra* note 731 and accompanying text. For cases on the United States Supreme Court's influence in South Carolina state courts, see 6A WEST'S S.C. DIGEST 2D *Courts*, Key No. 97(1).

749. BLACK'S LAW DICTIONARY 519 (9th ed. 2009).

750. Sarnoff v. Am. Home Prods. Corp., 798 F.2d 1075, 1084 (7th Cir. 1986).

> proposition plays no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum.[751]

Drawing the line on what is dictum and what is not is not always simple, but it is an important distinction to make. The importance of the distinction lies in the fact that dictum in a decision is considered separate from the material holding of the opinion and is not given precedential value. In other words, a prisoner must know what is considered dicta and what is the holding because not all the language in the majority opinion of a case is given the same precedential value. Dicta may be disregarded by a court when cited in a brief. An examination of several cases may help to illustrate this point.

In *Smith v. Robbins*,[752] the United States Supreme Court addressed the question of whether the procedure set out in *Anders v. California*,[753] requiring appellate counsel to brief an arguable issue before requesting to be relieved on an indigent defendant's appeal, was obligatory upon the states to follow.[754] Prior to *Robbins*, California adopted new procedures that departed from the procedures set forth in *Anders*, but that still adequately safeguarded the defendant's right to appeal and ensured counsel's performance met constitutional muster.[755] In deciding that the procedures laid out in *Anders* were not obligatory upon the states and that California was free to craft its own procedures, the Court held that the statements in *Anders*, and any subsequent cases that indicated that the *Anders* procedure was mandatory, were no more than dicta.[756] The Court stated that "it is true that in [a case subsequent to *Anders*] we used some language suggesting that *Anders* is mandatory upon the States, but that language was not necessary to the decision we reached."[757] The language from which the Court retreated would take much determination to identify as dictum; however, this case is a good example of the way in which the term dictum can be used and applied.

In *Carey v. Musladin*,[758] the Supreme Court addressed the question of whether spectators at a defendant's murder trial violated his right to a fair trial by wearing buttons with the picture of the victim displayed to the jury.[759] Without addressing this "spectator-conduct" claim, the Court declined to answer the question on a procedural technicality.[760] Because the defendant could only receive federal habeas relief if the state court's decision denying him relief

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751. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006).

752. 528 U.S. 259 (2000).

753. 386 U.S. 738 (1967).

754. *Robbins*, 528 U.S. at 264–65.

755. *Id.* at 264, 278–79.

756. *Id.* at 273, 276.

757. *Id.* at 273 (internal citation omitted). The text referenced regarding *Anders* being mandatory can be found in *Penson v. Ohio*, 488 U.S. 75, 80–82 (1988).

758. 549 U.S. 70 (2006).

759. *Id.* at 72.

760. *See id.* at 77.

"resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[761] the Court held that the defendant was not entitled to relief due to the fact that the United States Supreme Court had never squarely decided the "potentially prejudicial effect of spectators' courtroom conduct" like the conduct that occurred in *Musladin*.[762] In reaching this holding, the Court recognized that "clearly established Federal law" referred only to the holdings of the Supreme Court and not to its dicta.[763] Justice Stevens, concurring in judgment only, took issue with the Court so easily disregarding prior statements of the Court as dicta and pointed out that the reasoning in *Strickland v. Washington*, "including [its] carefully considered dicta," had set forth the standard for evaluating ineffective assistance of counsel claims for over twenty years.[764] Justice Stevens went on to write:

> Virtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases. It is quite wrong to invite state-court judges to discount the importance of such guidance on the ground that it may not have been strictly necessary as an explanation of the Court's specific holding in the case.[765]

The "guidance" Justice Stevens refers to is frequently the language a prisoner cites in support of his claims. One of the best ways for a prisoner to determine what is dictum within a case is to take the time to understand and identify the holding of the opinion. Then, the prisoner can determine what reasoning was necessary to that holding as he reads through the case. Too many prisoners read first and attempt to pinpoint the holding later, if at all. Other prisoners simply read opinions to find favorable language without understanding that not all of the language in an opinion is considered to have precedential value.

If a prisoner has read all of the above and still does not understand the concept of dictum, he should know that a better understanding will come in time now that he is at least familiar with the term. Additionally dissenting opinions sometimes point out the dicta in majority opinions, if for no other reason than to attack it.[766] Likewise, majority opinions sometimes do the same, but they tend to

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761. *Id.* at 74 (quoting 28 U.S.C. § 2254 (2006)).

762. *Id.* at 77.

763. *Id.* at 74 (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)).

764. *Id.* at 78 (Stevens, J., concurring in judgment) (citing Strickland v. Washington, 466 U.S. 668, 700–01 (1984)).

765. *Id.* at 79 (internal citations omitted).

766. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 430 (1993) (Blackmun, J., dissenting) ("I therefore must disagree with the long and general discussion that precedes the Court's disposition of this case. That discussion, of course, is dictum because the Court assumes, 'for the sake of argument in deciding this case . . . .'").

point out dicta when deviating from what may have been previously interpreted as being mandatory instructions or settled law.[767] In both of these instances, identifying dicta is made easier with the Court's aid.

Lastly, prisoners must realize that dicta should not be brushed aside. Some circuits, including the Fourth Circuit (which encompasses South Carolina), have held that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."[768] Supreme Court dicta is very persuasive; however, if it conflicts with a holding of a circuit court of appeals, that federal appellate court will be bound to follow its own precedent, rather than Supreme Court dicta.[769]

XIV. CLAIM CONSTRUCTION

A. In General

The purpose of this Part is to provide pro se litigants with an outline of a sufficiently constructed claim and to explore some of the writing techniques that are widely held to be effective when addressing the courts. There are many instructional works that provide an in-depth analysis of brief writing from varying perspectives.[770] This Part is not intended to take the place of those works as much as it is intended to be a distillation of the complexities encompassed elsewhere into terms and examples more readily understandable. This "primer" approach is more commonsensical when one considers the practical reality that PCR applicants are merely filling out applications as opposed to writing briefs. However, because most applicants wisely find it necessary to attach a memorandum of law to their PCR application or later amend one by drafting a motion to this effect, this Part attempts to provide a clear and abbreviated format for doing so.

With regard to writing techniques, most of the principles expounded upon in the numerous reviews and texts on the topic apply generally to the various forms of legal writing.[771] In other words, most of what one learns about writing a memorandum of law will also apply to drafting an amendment or supplement to one's PCR application, or to any other appellate brief.[772] This Part is also intended to help applicants avoid common mistakes when drafting a claim and to

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767. *See supra* notes 760–62 and accompanying text.

768. Wynne v. Town of Great Falls, 376 F.3d 292, 298 n.3 (4th Cir. 2004) (citations omitted).

769. Martinez v. City of Oxnard, 270 F.3d 852, 857 n.3 (9th Cir. 2001), *rev'd on other grounds sub nom.* Chavez v. Martinez, 538 U.S. 760 (2003). For additional information on dicta, see 6A WEST'S S.C. DIGEST 2D *Courts*, Key No. 92 (2008 & Supp. 2012).

770. Excellent works include: THOMAS R. HAGGARD & ELIZABETH SCOTT MOÏSE, THE SCRIVENER: A PRIMER ON LEGAL WRITING (3d ed. 2009); RE & RE, *supra* note 597; and JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA (1999).

771. *See* RE & RE, *supra* note 597, at 2.

772. *See, e.g.*, RE & RE, *supra* note 597, at 5 (emphasizing the importance of clear writing in all types of legal documents).

provide helpful tips, propositions, suggestions, and insights. So many excellent works have been generated on effective brief writing that it would simply not be possible to incorporate all of the "gems" of the topic in this Part. Fortunately, we are not trying to master this area, but instead are only trying to present claims to the court in a comprehensive and effective manner. It is still advised, however, that applicants take the time and read as much material on this topic as they can obtain.

1. ABCs of Legal Writing

Adequately conveying thoughts on a particular claim can be a formidable task even to those who are accustomed to legal writing. For the rest of us, the task can seem insurmountable. In beginning the process, however, it is helpful to remember and adhere to what has been termed the "ABCs" of legal writing: accuracy, brevity, and clarity.[773]

a. Accuracy

Accuracy is essential to effective legal writing. The emphasis on being accurate is generally placed upon honesty and credibility. If an applicant is not prepared to concede what he honestly must, the brief's integrity, and more importantly that of the drafter, will be called into question and viewed with skepticism.[774] If the applicant is faced with unfavorable case law that seemingly works against his position, it is best to acknowledge its existence and attempt to distinguish one's case.[775] In doing so, it is probably better to attempt to distinguish the case on the facts as opposed to the law, as it is generally more difficult to succeed in telling a court that a reasoned opinion is incorrect than it is in telling a court that a prior case is factually different than the one being presented.[776] There is simply no sense in withholding unfavorable facts or law from the attention of the court.[777] Of course, this candor requirement does not mean an applicant must play the role of the attorney general and fight against his own position—only that the applicant should be fair in his presentation. Accuracy, by definition, also requires an applicant to be specific when referring

773. For a more thorough look at the ABCs, see *id.* at 2–7. However, at least one commentator has suggested that the ABCs should also include an "E," for "Eloquence." *See* HAGGARD & MOÏSE, *supra* note 775, at 1–2. These sources are heavily relied upon in this segment.

774. RE & RE, *supra* note 597, at 3 (citing John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 816–17 (1976)).

775. *See generally* TOAL ET AL., *supra* note 775, at 228–34 (discussing general principles of brief writing and highlighting that attorneys should distinguish unfavorable cases cited by the opposing side).

776. *See, e.g.*, *id.* at 234 (noting the fact that direct overruling of cases does not often occur).

777. In fact, the Rules of Professional Conduct require a lawyer to disclose directly conflicting authority in the controlling jurisdiction to the tribunal. *Id.* at 228 (citing S.C. APP. CT. R. 407, R. 3.3(a)).

to the record, authorities cited, and other material or evidence used to advance his position.[778]

b. Brevity

Brevity simply means that a brief or argument should be no longer than it has to be.[779] Including everything important in an argument and still achieving the desired objective of conciseness takes a thorough understanding of the facts and law with a keen eye towards removing the unnecessary.[780] Briefs should exclude irrelevant and immaterial matter and avoid wordiness at all cost. It takes real determination to be short, concrete, and to the point. A good analogy for brevity can be to "[t]hink of words as passengers on a train. If one word has not paid its fare by contributing something unique to the transportation of the idea, then kick it out. No room exists, in trains or sentences, for free riders."[781]

c. Clarity

In expressing yourself to the courts through briefs and arguments, it is absolutely vital to a winning position that an applicant be clear, concise, specific, and concrete.[782] This means giving content to abstract principles and avoiding vague abstractions.[783] The key to being clear is utilizing an extensive vocabulary that eradicates muddled and confused verbiage.[784] Finding the right word is not always easy, and the value of a dictionary or a thesaurus cannot be overstated.[785] The reader should not be left confused and in doubt about what an applicant is attempting to say.[786] Finding the right words, however, does not mean finding words that are not commonly used or words that may force the reader to pick up a dictionary of his own. Instead, finding the right word means choosing the most fitting word from several available options.[787]

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778. *See* RE & RE, *supra* note 597, at 3.

779. *See* HAGGARD & MOÏSE, *supra* note 775, at 1.

780. *See, e.g.*, RE & RE, *supra* note 597, at 4 (citing John Munkman, *Some Thoughts on Drafting*, 114 L.J. 420, 420 (1964)) (describing the importance of mastering the facts and law and eliminating the unnecessary).

781. HAGGARD & MOÏSE, *supra* note 775, at 1.

782. *See* TOAL ET AL., *supra* note 775, at 229.

783. *See, e.g.*, Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988) ("[A] litigant has an obligation 'to spell out its arguments squarely and distinctly.'" (quoting Paterson-Leitch Co. v. Mass. Mun. Wholesale Electric Co., 840 F.2d 985, 990 (1st Cir. 1988))).

784. *See* RE & RE, *supra* note 597, at 6.

785. *See id.*

786. *See id.* at 5.

787. *Id.* at 6.

2. Direction

Direction means that you must know where you are going before you can persuade someone else to go there with you.[788] The best way to do this is to focus on the conclusion, or end result, you are attempting to achieve when drafting a claim. Focusing on the end result will help an applicant determine what facts to include and what amount of weight or emphasis to place upon them.[789] Also, knowing what legal test an applicant will need to overcome (such as *Strickland*'s "deficient performance–prejudice" test) will allow an applicant to "direct" his interpretation of the facts towards this end.[790] Sidetracking a reader with irrelevant matter does nothing to further this goal, and applicants should plan on leading with strength to avoid part of this confusion by opening and closing arguments with impressive, strong points.

The direction a writer is intending to chart may also include the tone and style of an argument. The overall composition may sometimes be read more as a forceful demand rather than as the desired persuasive petition. A court cannot be intimidated into ruling a particular way, and applicants should seek to draft respectful, informative, and persuasive arguments.[791] A good way to check the tone of an argument is to read it out loud to determine whether it is smooth and persuasive or harsh and demanding.[792]

Focusing on the end result—usually a showing that the applicant received ineffective assistance of counsel and was prejudiced by it—will also allow an applicant to use different reasoning to reach the end result if necessary. In other words, to reach the end result, the applicant might be able to tell the court: "In addition to the reasons stated above, the applicant is further entitled to relief because . . . ," and then go on to explain the alternate reasons for granting relief. Thus, knowing the end result allows an applicant to avoid immaterial matter and move all the facts in one direction—that an injustice has occurred. This way, a court has several routes from which to choose to grant relief. After all, whether for one reason or another, all that matters is that the argument is won.

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788. *See generally* TOAL ET AL., *supra* note 775, at 230, 236 (discussing a "clear overall framework" and analogizing organization to the act of giving a traveler directions).

789. *See generally id.* at 231 (indicating that persuasive arguments are formed by first identifying one's position before applying the facts); HAGGARD & MOÏSE, *supra* note 775, at 190 (explaining how to emphasize favorable facts and how to neutralize unfavorable facts).

790. *See* HAGGARD & MOÏSE, *supra* note 775, at 190. For a review of the *Strickland* test, see *supra* text accompanying notes 418–25.

791. *See generally* TOAL ET AL., *supra* note 775, at 238 (discussing the tone attorneys should adopt in their briefs).

792. *See* Diana Roberto Donahoe, *Analyzing the Writer's Analysis: Will It Be Clear to the Reader?*, N.Y. ST. B.A. J., Mar.–Apr. 2000, at 49.

3. Case Selection

When researching a claim, applicants will undoubtedly come across several cases on a particular topic that they may wish to discuss or cite in an argument. This choice of precedent often includes "on-point" cases or cases that are in a similar legal realm and involve a somewhat similar set of facts to the claim an applicant is presenting. When deciding on what authority to cite in an argument, applicants usually attach themselves to a favorable passage or particular language in a case and often overlook other important considerations. For example, applicants sometimes cite a case because of the favorable language it contains even though the actual outcome of the case may work against them.[793] A case may be favorable to the applicant's position on one point and disastrous on another. Researchers should train themselves to look not only for favorable language, but also for favorable outcomes. It is probably not the best course of action to cite authority that works for your position on one point and for the attorney general on another more damaging point.

The procedural posture of the case is also a relevant consideration that is sometimes overlooked by researchers. Citing a case that has arisen out of a civil tort action when attempting to overturn a criminal conviction is probably not prudent, unless otherwise unavoidable, because cases that go through different procedural avenues may be reviewed by different standards.[794]

Citing a case solely on the summary of a case or a quick review of a headnote can be another critical error applicants will want to avoid. Headnotes and summaries can be misleading, and they deprive the researcher of the opportunity to uncover additional facts and holdings that may be favorable or unfavorable to a particular position. Research is research and necessarily involves a thorough analysis of all the cases on a particular subject, even if most of the cases ultimately prove useless.[795] As much as all of us wish otherwise, there is simply no substitute or shortcut available for fully researching and reading the relevant law.

Lastly, ensuring a case still represents the current law is a must.[796] While the deficiencies of the SCDC's law libraries make researching the subsequent

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793. *See, e.g.*, McNeill v. Polk, 476 F.3d 206, 213 (4th Cir. 2007) (noting that the case cited by petitioner "actually cuts against [petitioner's] position").

794. *See, e.g.*, O'Neal v. McAninch, 513 U.S. 432, 440 (1995) ("Unlike the civil cases cited by the State, the errors being considered by a habeas court occurred in a *criminal* proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake."); Williams v. Ozmint, 380 S.C. 473, 478–79, 671 S.E.2d 600, 602 (2008) (emphasizing the fact that challenging a conviction by way of a writ of habeas corpus involves a different burden than a direct appeal).

795. *See generally* STEVE BARBER & MARK A. MCCORMICK, LEGAL RESEARCH 293 (1996) (noting that thorough research is imperative, despite the fact that it can be tedious).

796. *See, e.g.*, Geter v. State, No. 05-95-00775-CR, 1996 WL 459767, at *3 n.2 (Tex. App. July 31,1996) (demonstrating disapproval with counsel for citing a reversed case and "caution[ing] counsel to choose authorities more carefully in the future").

history of a case a difficult task, the difficulties in no way alleviate an applicant's duty to do so. Citing a case that has been overruled or reversed is "claim suicide." Under no circumstances should an applicant bypass this aspect of research in the claim-selection process.[797] An applicant must ensure the case still represents current law and may have to order the necessary material himself or employ some other method to verify the case's status. There is simply no point in arguing a position on grounds that do not exist.[798]

4. Page Citations

When applicants quote favorable language from a case they have researched, it is always better to include the actual cite from which the quotation was extracted as opposed to the case citation in general.[799] As an example, look at the following quotation from *Jackson v. State*[800]:

> "A sentence is not limited to a term of imprisonment; instead, it may be either a term in prison or a fine or both." *Jackson v. State*, 331 S.C. 486, 489, 489 S.E.2d 915, 916 (1997).

Citing the specific page numbers—489 in the *South Carolina Reporter* and 916 in the *South Eastern Reporter*, second edition—demonstrates that you have actually read the case you are citing and are not simply citing a summary. Additionally, it hones in on the accuracy and credibility of your work.[801] As many opinions seem to go on for seemingly forever, specific page citations give a reviewer of your work the benefit of avoiding scanning opinions to find the specific language you have cited. In a world of overcrowded court dockets, no one has time to read entire case opinions simply to find a single sentence you have cited.[802]

5. String Citations

During research, an applicant is likely to find many cases that stand for a proposition of law that he may wish to advance. Citing case after case however—the so-called "string citation"—is not in and of itself particularly persuasive.[803] A citation is meant to point a reader to a case or work "without

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797. *See generally* TOAL ET AL., *supra* note 775, at 226 ("One of the most vital, but grossly underestimated, steps in effective brief writing is performing extensive research of the law.").

798. *See* BARBER & MCCORMICK, *supra* note 800, at 239 (explaining that overruled cases are no longer valid authority).

799. *See* TOAL ET AL., *supra* note 775, at 231.

800. 331 S.C. 486, 489 S.E.2d 915 (1997).

801. *See* TOAL ET AL., *supra* note 775, at 231.

802. *See* RE & RE, *supra* note 597, at 4.

803. *See id.* at 124 (citing MARIO PITTONI, SUGGESTIONS ON BRIEF WRITING AND ARGUMENTATION 39 (1951)).

the necessity of seeking aid or information elsewhere."[804] It is often better to analyze a few key cases on a topic than to tattoo an argument with a string of unexplained citations.[805] Breaking down the single most relevant case can carry more weight with a court than multiple citations that are less relevant to an applicant's position.

The total number of citations in a work should be no more than what is needed and no less than what is necessary.[806] When a proposition of law is encompassed in a great deal of case law, an applicant may want to cite the "landmark" case first, if available.[807] Because many legal principles find their origins in the United States Constitution, a controlling or "landmark" case from the United States Supreme Court can often be found on the topic being referenced. When this occurs, the Supreme Court case should be cited first followed by the parallel state case controlling on the topic. For example:

> Due process requires the prosecution to disclose evidence favorable to an accused upon request when such evidence is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Proctor*, 358 S.C. 417, 421 n.4, 595 S.E.2d 476, 478 n.4 (2004) (quoting *Brady*, 373 U.S. at 87).

Citing the federal case in conjunction with the state case not only brings the court's attention to relevant authority but also is a good way to establish the federal nature of your claim for exhaustion purposes. Once a controlling case has been selected and the legal test to overcome has been established, most of the following cases used in an argument will likely involve state cases that have interpreted exactly what this proposition does and does not mean.

Another reason to "double-stack" citations (using a federal–state or a state–state format) is when a cited case is particularly old, and you want to show the court that the proposition cited has been recently recognized as still valid. For example:

> Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e) motion to alter or amend if the order fails to set forth the findings as required by section 17-27-80 of the South Carolina Code and Rule 52(a) of the South Carolina Rules of Civil Procedure. *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007); *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992).

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804. *Id.*

805. *See id.* at 124–25.

806. *See generally id.* at 124 (discussing the balance between marshaling the available authority and citing too many cases).

807. *See id.*

The number of citations to use in a particular argument is a matter of judgment to be exercised with caution. Recognizing that you cannot, and should not, incorporate everything found during research into an argument is, however, a good starting point. Get to the point. Start another argument if something peripheral forces you to, but do not cloud an argument with points that do not need to be there.

6. Words to Avoid

One of the most common mistakes applicants make when drafting a claim is believing that they must abandon plain English and speak in "legalese." In furtherance of this belief, words such as "hereto," "wherefore," "hereinafter," and "inasmuch" are commonly placed into arguments for no better reason than to make an argument sound more professional. This practice is widely disfavored. Words should only be used upon the consideration of whether they are appropriate and never because they seem to make a brief sound more "lawyer-like." An applicant will never write effectively otherwise.

Words that elude, confuse, or offend a reader should be avoided as well.[808] Moreover, a confusing phrase such as "and/or" has no place in an applicant's argument. Being specific and following the ABCs of legal writing demands that it is either "and" or "or." Another word that should rarely find a home in an argument is the word "must." Telling a court that it *must* do something is borderline offensive and definitely not sensible. A court simply does not *have* to do anything that an applicant asks of it.

B. Constructing a Claim

Picking up a pen to begin drafting a claim is the part of filling out a PCR application or proceeding pro se over which applicants most often get nervous. Instead of believing that the task can be accomplished with a little determination, applicants sometimes sacrifice excellent arguments to a false sense of hopelessness. The formula outlined in this Section is an effective and straightforward way to adequately present a claim before a PCR court, regardless of whether the applicant is a skilled writer. While the focus here is on drafting a memorandum of law in support of a PCR application, the insight provided can also apply to creating amendments and supplements as well.

1. Mastering the Facts and the Law

There are two important things to know before jumping into the brief-writing formula below. First, the applicant must master the facts of the case

808. For a good discussion on words to avoid, see HAGGARD & MOÏSE, *supra* note 775, at 9–11, 21–33.

before beginning. It is easy when studying PCR procedures and the relevant authority that surrounds a claim to forget the importance of the facts involved in a particular case. A thorough and detailed understanding of the facts is required before one can begin to delve into the law applicable to a particular case. Facts drive the law and are generally what a PCR court looks for first in an applicant's argument (a judge, presumably, already knows the law). Judges cannot be expected to properly rule on an issue before the court if they have not been given all of the relevant facts involved. Facts are facts: they cannot be changed, and they cannot be forced to fit into preconceived slots if they do not fit. The applicant will need to master the facts of his case if he plans on winning because the success of a case often depends on it.

Secondly, and equally important, an applicant will need to have a thorough understanding of the law to prevail on a claim. Thus, the applicant must thoroughly analyze the main proposition of law on which the applicant is relying to advance his claims. To begin, an applicant must know the legal foundation on which he is standing. Is an argument relying on statutory law or case law, or a combination of both? Can support be found in the United States Constitution, the state constitution, both, or neither? If your argument is relying on case law, the procedural posture of the case you are citing will also be relevant. Different fora provide different procedures and rules. For example, an analysis of an application of law that has arisen out of a family court proceeding will not be entirely persuasive to a PCR judge reviewing the validity of a criminal conviction. It is also not good enough to simply cite the main case on a topic and move on. You must explain the case enough so that your reasoning for relying on the case is easily understood. There is no substitute for an in-depth examination of the facts and law on any given claim, and there is no way to draft a winning argument without such an in-depth examination.

2. The Three-Paragraph Approach

As stated before, this Section is intended to help applicants present their claims in a manner that is both clear and effective. While pro se prisoners are given the benefit of a liberal construction when creating a pro se motion such as a memorandum in support of a PCR application, this benefit does not mean that anything prisoners present to the courts will be accepted or interpreted in their favor. "Notice pleading" is not sufficient when drafting a substantial document such as a memorandum in support of a PCR application, and prisoners are required to show, with specificity, the facts and law that support their claim. Courts are not required to "add meat" to a skeletal argument simply because a prisoner is appearing before them pro se. Neither the court—which must draw inferences from inadequate pleadings, whether right or wrong—nor the applicant—who runs the risk of having his application summarily dismissed—benefit from inadequate or insufficient pleadings. Avoiding this unnecessary complication is the aim of this Section.

This Section does not cover all (or even most) aspects of legal writing. Pro se applicants are not, after all, skilled in writing technical briefs. Most prisoners simply want to do a good job writing their arguments to the courts without making the art of writing a profession. To look at this situation as a means to an end, however, does require that an applicant follow some sort of format so that the end product is comprehensive and effective. To do this, the outline below provides simple and easy instructions to complete this task. As with most professional shortcuts, however, this Section gives an applicant only the bare essentials to put a respectful argument before the courts and dispenses with several aspects of brief writing. The preliminary statement, questions presented, point heading, and other aspects of brief writing are not covered in this Section. The statement of the facts, however, is too vital to do without and will be discussed in the following Section. The approach taken in this Section is a pro se litigant's approach, because every indigent prisoner is required to fill out a PCR application on his own before they are appointed an attorney.

The following three-paragraph format for presenting a claim to a PCR court is suggested for pro se litigants attempting to tackle this endeavor:

Paragraph One:	Present the relevant facts of your argument.
Paragraph Two:	Present the relevant legal principles and authorities.
Paragraph Three:	Apply the relevant facts to the controlling law and demonstrate how you were prejudiced or harmed.

Utilizing this simple and easy three-step approach can be a valuable aid to any applicant attempting to present a claim before a PCR court. To put this format into practice, consider the following ineffective assistance of counsel claim:

(a) Heading

An applicant's right to the effective assistance of counsel, as guaranteed by the Sixth Amendment of the United States Constitution and state law, was violated when counsel failed to employ an independent forensic expert to examine the crime scene and failed to adequately cross-examine the State's crime-scene expert, thereby failing to advance the applicant's self-defense claim.

(b) Paragraph 1

At trial, the applicant admitted to discharging a firearm in the general direction of the victim during the altercation that resulted in his conviction. Tr. P. 274, Lines 14–20. The applicant testified that he fired in the victim's direction only after the victim had fired at him first and that his only intention in

discharging his firearm was to protect himself from being injured or killed by the victim. Tr. P. 281, Line 21–P. 283, Line 8. The applicant maintained that he never meant to strike the victim; rather, he meant only to escape a life-threatening situation. Tr. P. 291, Lines 6–8. Prior to trial, the applicant asserted that he inquired about possible forensic evidence of return fire from the victim to prove that the victim had fired shots at the applicant and to support his self-defense theory. The applicant maintains that trial counsel ignored his numerous requests for investigative forensic reports and stated simply that he would look into it. Despite a report from the sheriff's forensic-analysis team stating that "projectiles and shell casings consistent with return fire" have been located and marked (see Appendix, Ex. 14, Investigative Report of Detective Robert Whitaker), trial counsel neglected to inform the applicant of this evidence prior to trial. Trial counsel also failed to use this evidence during trial to support the theory of self-defense. The applicant contends that this was in error.

(c) Paragraph 2

The legal principles applicable to claims of ineffective assistance of counsel are set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* established a two-part test for assessing whether counsel rendered a defendant ineffective assistance. First, a defendant must prove that his counsel's efforts were objectively unreasonable when measured against prevailing professional norms. *Id.* at 687–88; *Brown v. State*, 375 S.C. 464, 468–69, 652 S.E.2d 765, 767 (Ct. App. 2007) (citing *Strickland*, 466 U.S. at 668). Second, the defendant must demonstrate that counsel's performance, if deficient, was also prejudicial. *Strickland*, 466 U.S. at 687; *Miller v. State*, 379 S.C. 108, 114, 665 S.E.2d 596, 598–99 (2008). Prejudice is defined as a reasonable probability that, had trial counsel not provided deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Specifically, in discussing counsel's duties to a criminal defendant, *Strickland* held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. The cornerstone of any ineffective assistance of counsel claim is whether counsel has adequately subjected the prosecution's case to the crucibles of the adversarial testing process. *See id.* at 686.

(d) Paragraph 3

In the present case, counsel failed to make a reasonable investigation to support the applicant's testimony at trial that the victim had been in possession of a weapon and had discharged a pistol in his direction. Tr. P. 281, Lines 2–21. This omission is especially flagrant in the face of applicant's repeated requests that a thorough examination of the crime scene take place and that counsel focus his attention on the forensic aspect of the applicant's defense. Counsel's failure to employ an expert to examine this matter or to uncover favorable evidence

already in his possession that would have dramatically bolstered the version of events advanced by the applicant was both unreasonable and prejudicial to the applicant. The only direct evidence against the applicant was the testimony of the victim, who had changed his story three times before testifying at trial. Tr. P. 172 Line 3–P. 175, Line 19; *see also Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). Moreover, the applicant relied on a theory of self-defense at trial. In order to prove self-defense, the evidence must show that

> (1) [the defendant] was without fault in bringing on the difficulty; (2) *[the defendant] actually believed he was in imminent danger of losing his life or sustaining serious bodily injury*; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) [the defendant] had no other probable means of avoiding the danger.

State v. Chatman, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999) (emphasis added) (citing *State v. Bruno*, 322 S.C. 534, 536, 473 S.E.2d 450, 451 (1996)). The applicant meets all the enumerated criteria, and it is reasonable to assume that had counsel employed an investigator to conclusively establish that return fire had taken place, presented the material and favorable evidence at trial, and properly cross-examined the State's forensic expert about the existence of evidence to support the applicant's version of events, the result of the proceedings would have been different. Counsel's failure to do so was both unreasonable and prejudicial to the applicant.

* * *

The above approach provides a workable outline for applicants attempting to present a claim. It is not intended to be a rigid format in any regard. If an extra paragraph is needed to explore a collateral point or alternate reason to support a finding in the applicant's favor, there should not be any hesitation in creating one. It is impossible to determine how many paragraphs or how long any one argument should be, and the format provided is simply what the applicant should provide at a minimum. Also, many PCR applications contain more than one ineffective assistance of counsel claim. If an applicant is raising more than one claim, stating a legal test more than once will not normally be required. To use the example argument above, the legal test of *Strickland v. Washington* will not have to be repeatedly stated in every subsequent ineffective assistance of counsel claim that is raised in a particular memorandum or amendment. It will suffice to simply reference the controlling authority on any subsequent claims in conjunction with any of the other "on-point" cases or authority that the applicant desires to use.

3. Statement of the Facts

While most of the elements of brief writing can be avoided when creating a pro se memorandum of law in support of a PCR application, a sufficient statement of the facts cannot. The best part about this section is that a good statement of the facts is not difficult to compose. The "statement of the facts" describes the procedural posture of the case (or its litigated history, which an applicant is quizzed on in the actual PCR application) and basically gives a brief overview of the material facts that gave rise to the applicant's claims. This section is usually the part of a brief that begins by saying something like, "On December 21, 2007, the applicant and several of his friends were attending a party at a privately rented club in Columbia," and goes on to explain the relevant facts that an applicant intends to use to support his claim. This section is usually the first thing that a court reads to get a picture of what is going on in a case and what is to come. A statement of facts section presents the facts in chronological order and takes a reader step-by-step through the relevant facts being used to give a fair presentation from both perspectives. A fair, credible statement of facts should be displayed for the reader, and specific citations to the record should always be used. Some people find it more helpful to draft a statement of facts section after they have completed an argument to ensure that all of the material facts that they have used in support of their claims are included. Most memoranda and briefs set out a detailed statement of facts as the first thing presented before an argument. If the applicant pursued a direct appeal, an example of a statement of facts section can be found in his appellate brief.

4. Conclusion

The conclusion is usually only a sentence or two in length and summarizes the applicant's overall position while clearly setting out the requested relief. The conclusion is often called a "prayer for relief" section as well. An example may read something like this:

> For the above-stated violations of the applicant's constitutional rights, as guaranteed by the United States Constitution and state law, the applicant prays that this court vacate his conviction and sentence and remand the case to the Richland County Court of General Sessions for a new trial.

5. Editing

When a document is completed, an applicant cannot forget to check and recheck the completed work for spelling and grammatical errors. In legal writing, editing includes double-checking citations as well. It is a tedious task, but it is a task that is nonetheless mandatory. Another prudent idea might be to allow another person to proofread the completed work. Having a second set of eyes review the work often helps locate and correct errors that an applicant may

have overlooked. Regardless of how an applicant decides to spell-check his work and ensure that his argument flows smoothly and reads professionally, documents must be edited as many times as necessary to ensure that work submitted to the court is error free.

6. Amendments and Supplements

Amendments in PCR proceedings are authorized by both statute and court rules.[809] Amendments and supplements are used to amend or supplement a previously submitted claim or to add a new claim to an application prior to an evidentiary hearing.[810] Unlike a memorandum, amendments and supplements are usually submitted during the time an applicant is represented by counsel and must generally be submitted through appointed counsel to be accepted by the court.[811] Frequently, applicants desire to amend or supplement a previously submitted claim with additional facts, points of law, affidavits, documents, and exhibits to further support their position. New claims are frequently added to PCR applications through this method as continuing research often uncovers issues that were previously missed.

In *Arnold v. State*,[812] the PCR court denied the petitioner's motion to amend his application due to its untimeliness because the request to amend had been made after the judge had issued an order denying petitioner relief.[813] In upholding this decision, the South Carolina Supreme Court noted that amendments after a final judgment are governed by Rule 15(b) of the South Carolina Rules of Civil Procedure, which does not allow for new claims to be asserted but is intended to help conform the pleadings to the evidence presented at a hearing.[814] The court likened an untimely motion to a successive PCR application and additionally upheld the lower court's decision because the petitioner "failed to present to the circuit court facts and circumstances to show why the new grounds were not and could not have been presented in the prior petitions."[815] With regard to Arnold's attempt to submit a motion to alter or amend the judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil

809. *See* S.C. CODE ANN. § 17-27-90 (2003) ("All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application."); S.C. R. CIV. P. 71.1(d) ("Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.").

810. *See* § 17-27-90; Arnold v. State, 309 S.C. 157, 173, 420 S.E.2d 834, 842–43 (1992) (citing § 17-27-90).

811. An applicant has no right to hybrid representation. Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989).

812. 309 S.C. 157, 420 S.E.2d 834 (1992).

813. *See id.* at 172, 420 S.E.2d at 842.

814. *Id.*; S.C. R. CIV. P. 15(b) ("Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment . . . .").

815. *Arnold*, 309 S.C. at 173–74, 420 S.E.2d at 843.

Procedure to add additional grounds for relief after the order was issued, the court held that a Rule 59(e) motion is not a vehicle to add new grounds but rather is a request to the trial judge to "reconsider matters properly encompassed in a decision on the merits."[816] Therefore, applicants wishing to submit amendments to their PCR application should do so before an evidentiary hearing takes place.

816. *Id.* at 172, 420 S.E.2d at 842 (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1988)).

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