THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Beaufort County
Court of Common Pleas
Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2019-000529

ABDIYYAH BEN ALKEBULANYAHH,
AKA TYREE ROBERTS, #6012 ..... *Petitioner*,

v.

STATE OF SOUTH CAROLINA ..... *Respondent.*

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Petitioner is an indigent, death-sentenced inmate who has spent more than a decade diligently attempting to obtain a new PCR hearing on the (uncontested) basis that his initial post-conviction relief ("PCR") counsel failed to meet the statutory qualification requirements of S.C. Code § 17-27-160(B). On December 14, 2016, this Court held in *Robertson v. State* that when a capital PCR applicant alleges his "prior PCR counsel were not qualified under section 17-27-160(B)," this "constitutes a 'sufficient reason' to permit a successive PCR application." 418 S.C. 505, 516, 795 S.E.2d 29, 35 (2016). Prior to this Court's decision in *Robertson*, Petitioner challenged counsel's qualifications in this Court and in the Circuit Court via four different procedural mechanisms, including a request for remand for additional PCR proceedings and a second-in-time PCR application. Each of Petitioner's pre-*Robertson* attempts was denied. However, *after* this Court's decision in *Robertson*, two other capital PCR applicants received hearings on the qualifications of their initial PCR counsel using the exact same procedural mechanisms. Specifically, at issue here is the lower court's decision to summarily dismiss Petitioner's second-in-time PCR application as untimely despite the fact that it was filed prior to this Court's decision in *Robertson*.

QUESTION I.

Whether Petitioner is entitled to a hearing on his initial PCR counsel's failure to meet the statutory qualification requirements pursuant to *Robertson* where: a) initial PCR counsel admitted they did not meet the statutory qualification requirements; and b) Petitioner challenged counsel's qualifications prior to this Court's decision in *Robertson*?

QUESTION II.

Whether capital PCR applicants whose initial PCR counsel did not meet the statutory qualification requirements had one (1) year from the decision in *Robertson* in which to file a second-in-time PCR application pursuant to S.C. Code § 17-27-45(B) raising the qualification issue?

QUESTION III.

Whether, if Petitioner's second-in-time PCR application is technically untimely, Petitioner is entitled to equitable tolling of the statute of limitations in light of his diligent efforts to litigate the issue of counsel's qualifications before and after this Court's decision in *Robertson* and where at least two other similarly situated capital defendants have received a hearing on initial PCR counsel's qualifications?

STATEMENT OF THE CASE

I. Trial Proceedings

Petitioner, Abdiyyah ben Alkebulanyahh,[1] was charged with two counts of capital murder in Beaufort County, South Carolina and was temporarily represented by attorneys Gerald Kelly and Sean Thornton. Prior to trial, Petitioner moved to represent himself and, after considering expert testimony that Petitioner was psychotic and lacked a rational understanding of the proceedings, Judge Daniel F. Pieper nevertheless found that Petitioner was competent and allowed him to proceed *pro se*. App. 246. During the jury's deliberations at the guilt-or-innocence phase of the proceedings, Petitioner announced that, if convicted, he did not wish to be present for sentencing and he would be verbally disruptive if required to remain in the courtroom. App. 246. During the sentencing proceedings, Petitioner was verbally disruptive, and Judge Pieper ordered that Petitioner be shackled and placed in a glass-enclosed room at the back of the courtroom while Kelly and Thornton remained at the counsel table (though they presented no evidence or argument) during the sentencing phase of the trial. App. 247–48. The jury deliberated approximately forty-five minutes before sentencing Petitioner to death. On direct appeal, appellate counsel raised a single issue—whether it was error for the trial judge to require Petitioner to be present at the penalty phase of the proceedings. *State v. Roberts*, 369 S.C. 580, 583, 632 S.E.2d 871, 873 (S.C. 2007). This Court affirmed on July 24, 2006. *Id.* at 585.

II. Initial Post-Conviction Relief Action and Appeal

After the denial of his direct appeal, Petitioner filed a *pro se* application for post-conviction relief ("PCR"). Attorneys Glenn Walters and Carl Grant were appointed by Judge Roger Young

[1] Petitioner, formerly known as Tyree Roberts, legally changed his name in 1998 after "inventing" his own religion (a form of Black Judaism) and creating his own church.

to serve as PCR counsel. *See* App. 249. Walters and Grant conducted no investigation, obtained no investigative or expert assistance, and filed an amended application raising a single non-cognizable claim for relief.[2] App. 249–50. The PCR hearing, conducted before Judge Young on October 13–14, 2008, consisted primarily of counsel calling Petitioner to the stand to state his grievances with his trial counsel. App. 249. On September 17, 2009, Judge Carmen Mullen signed without modification a state-drafted order denying post-conviction relief.[3] App. 250.

On March 5, 2010, this Court appointed attorney John H. Blume, without consultation, to represent Petitioner in connection with the post-conviction appeal. App. 250. Given the unusual procedural history of Petitioner's case to that point, Blume conducted some limited investigation revealing initial PCR counsel were not qualified to represent Petitioner under S.C. Code § 17-27-160(B). App. 249. Less than five months after his appointment, on July 21, 2010, Blume filed in this Court a Motion to Remand for Additional Post-Conviction Proceedings ("Motion to Remand"), requesting additional PCR proceedings with qualified counsel. App. 245–59. The motion specifically alleged: "Petitioner's PCR counsel were not qualified to represent Petitioner in a capital post-conviction proceeding pursuant to the requirements of S.C. Code § 17-27-160(B)." App. 255–57. The State argued in its response to the Motion to Remand that even if PCR counsel were not qualified under the statute and were ineffective, "there is no basis for giving Petitioner a second bite at the [PCR] apple." App. 278–79. The State attached an unpublished order

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[2] The issue asserted in the amended application was that the "trial judge failed to make the proper findings to determine if the applicant knowingly and intelligently understood the implications of proceeding *pro se*." App. 249. This claim, as pled by Walters and Grant, is not cognizable in a PCR proceeding. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (holding issues that could have been raised at trial or on direct appeal cannot be asserted in post-conviction absent a claim of ineffective assistance of counsel).

[3] For reasons unclear from the record, this Court reassigned the case to Judge Mullen on December 17, 2008, after the PCR hearing.

from this Court in *Young v. State*, in which this Court explained, "Section 17-27-160(B) does not provide a remedy for its violation nor has this Court ever addressed the issue." App. 293 (Order, *Young v. State*, Nov. 1, 2000). The State also contended that Petitioner's initial PCR counsel were in fact qualified under the interpretation of § 17-27-160(B) set forth in a memorandum written by former Chief Justice Toal on August 13, 2003 ("Toal Letter").[4] This Court summarily denied the Motion to Remand on October 20, 2010. App. 312.

Petitioner continued his efforts to challenge PCR counsel's lack of qualification by filing a Petition for Writ of Certiorari, asking this Court to review his newly developed PCR claims. App. 486–524. One of the issues presented in the petition was "Whether Petitioner was denied due process and equal protection of the law and is thus entitled to a new post-conviction proceeding where: (a) petitioner's PCR counsel were not qualified under S.C. Code § 17-27-160(B); [and] (b) PCR counsel were ineffective." App. 492. Petitioner specifically asserted:

> It is uncontested that neither of petitioner's post-conviction relief (PCR) attorneys had either (1) previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings; or, (2) twelve hours of continuing legal education or professional training in capital appellate and/or post-conviction defense within two years of their appointment to represent petitioner in this case. The statutory language is clear and unambiguous. Therefore, because petitioner's court-appointed counsel did not meet the clear standard for appointment contained in S.C. Code § 17-27-160(B), petitioner's case should be remanded to the circuit court for the appointment of qualified counsel and additional post-conviction proceedings. There is no other remedy that would not effectively render the statutory qualifications a nullity.

App. 518. In its return to the petition for certiorari, the State asserted that Petitioner was not entitled to a second PCR action despite his claim that PCR counsel were not qualified under the statute. App. 558–62. This Court summarily denied the petition for writ of certiorari on March 12, 2013.

[4] As will be further discussed below, the Toal Letter's interpretation of § 17-27-160 was rejected by *Robertson*. 418 S.C. 505, 795 S.E.2d 29 (2016).

App. 585.

On February 18, 2011, eleven months after Blume's appointment to Petitioner's case, Petitioner called this Court's attention to his PCR counsel's lack of qualifications for a third time in a Petition for Writ of Habeas Corpus ("habeas petition") filed in this Court's original jurisdiction. App. 314–406. In the habeas petition, Petitioner asserted "undersigned counsel [Blume] subsequently contacted both [initial PCR] attorneys and confirmed that they, in fact, did not have the experience set forth by the statute. Respondent does not contest that [PCR counsel] do not satisfy the criteria set forth in § 17-27-160(B)." App. 319. The State opposed Petitioner's request for review and asserted, among other things, that the habeas petition was procedurally improper because "a petitioner seeking habeas corpus must first exhaust all available PCR remedies," and "Petitioner has not made the requisite showings that he has fully exhausted all other remedies and that other remedies are either unavailable or inadequate." App. 418. In reply, Petitioner noted that the State appeared to be suggesting he file a second-in-time PCR application and requested further guidance from this Court as to that open question, stating:

> Respondent initially asserts that the petition for writ of habeas corpus should be denied because it is not proper at this time. Respondent appears to suggest that petitioner should instead file a second application for post-conviction relief. Certainly petitioner can do so, if this Court so advises or if it otherwise becomes clear that a second PCR application is the appropriate vehicle. However given that petitioner previously filed a motion to remand the case to the circuit court for additional post-conviction proceedings, which this Court denied on October 20, 2010, petitioner elected to file a petition for writ of habeas corpus in this Court's original jurisdiction.

App. 464. This Court summarily denied Petitioner's habeas petition on March 12, 2013. App. 484.

III. Second-in-Time Post-Conviction Relief Proceedings

On September 24, 2014, this Court granted certiorari in *Robertson v. State* to determine whether, and under what circumstances, a death-sentenced inmate could file a successive PCR

application. 418 S.C. 505, 795 S.E.2d 29 (2016). While *Robertson* was pending, Petitioner filed a second-in-time PCR application in the circuit court on November 24, 2014.[5] App. 1–6. The PCR application raised several claims for relief and stated those "grounds for relief were not included in the initial PCR application due to Applicant's initial PCR counsel's inexperience and lack of qualifications under the state PCR statute, S.C. Code § 17-27-160(B)." App. 5. On December 14, 2016, this Court decided *Robertson*, holding for the first time that a capital PCR applicant's allegation that "prior PCR counsel were not qualified under section 17-27-160(B) . . . constitutes a 'sufficient reason' to permit a successive PCR application." *Robertson*, 418 S.C. at 516, 795 S.E.2d at 35. After *Robertson* was decided, the State filed a supplement to its earlier motion to dismiss Petitioner's PCR application asserting that Petitioner's PCR application should be dismissed because it was untimely, even though it was filed while *Robertson* was still pending. App. 122–30. The State argued Petitioner should have filed a second-in-time PCR application before *Robertson* and "at least by July 21, 2011, 365 days after he was aware of the underlying facts for his claim that PCR counsel was not qualified," App. 127, ignoring Petitioner's multiple attempts to raise the issue of his initial PCR counsel's lack of qualifications in July 2010 and February 2011.

Judge Maite Murphy held a hearing on the State's motion to dismiss, App. 223–44, and dismissed Petitioner's application as untimely. App. 207–13. Petitioner filed a motion to alter or amend judgment, App. 214–17, which Judge Murphy also denied. App. 219–21. In the interim, as discussed further below, state courts granted hearings to two other capital PCR applicants whose initial PCR counsel were unqualified under *Robertson*, leaving Petitioner singled out as the only

[5] Petitioner's federal proceedings have been stayed while the state courts resolve the issues raised in the second-in-time PCR application.

capital PCR applicant with unqualified PCR counsel to be denied a hearing. This appeal follows.

ARGUMENT

I. Under *Robertson*, Petitioner is entitled to a hearing to determine whether PCR counsel was qualified and, if not, whether Petitioner was prejudiced.

Pursuant to *Robertson*, where a capital PCR applicant alleges and raises a genuine issue of fact (as Petitioner did here) that "prior PCR counsel were not qualified under section 17-27-160(B)," the applicant "should be afforded a hearing on this limited issue [of qualifications]" and summary dismissal is improper. 318 S.C. at 516, 519, 522, 795 S.E.2d at 35, 36, 38. This Court has articulated two limited circumstances under which it is appropriate to dismiss a PCR application without a hearing on the merits, and Petitioner's case falls under neither of those circumstances:

> Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts, and (2) the applicant is not entitled to relief. When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. . . . Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.

Id. at 519, 795 S.E.2d at 36 (internal citations and quotations omitted).

Summary dismissal of Petitioner's allegation that initial PCR counsel failed to meet the statutory qualification requirements was improper. The State concedes "it is unclear from the record whether PCR counsel was properly qualified," creating a genuine issue of fact that entitles Petitioner to a hearing if the application is deemed timely. App. 128–29. Petitioner "allege[d] facts that would establish an exception to . . . the statute of limitations" (or would deem the statute of limitations inapplicable) and those facts were not refuted by the record. Thus, Petitioner was at

minimum entitled to a hearing on the qualifications of his initial PCR counsel and the PCR court erred in dismissing his application.

II. Petitioner timely raised the issue of his initial PCR counsel's lack of qualifications.

Petitioner filed his PCR application prior to *Robertson*—before a remedy for his claim even existed. Prior to this Court's decision in *Robertson*, S.C. Code Ann. § 17-27-160 was interpreted according to a memorandum written by former Chief Justice Toal on August 13, 2003 ("Toal Letter"). The Toal Letter stated that "anyone who is qualified to represent a capital defendant at trial, and has completed their CLE requirements should be deemed qualified to represent a petitioner in a capital PCR proceeding under § 17-27-160." Toal Letter. In other words, the Toal Letter concluded that § 17-27-160(B) placed no additional requirements on capital post-conviction relief counsel (compared to trial counsel), contrary to the plain language of the statute. Appointments of capital PCR attorneys operated in this murky legal landscape, with no clearly delineated and uncontradicted requirements outlining their necessary qualifications, until *Robertson* was decided. In *Robertson*, this Court rejected the Toal Letter's interpretation of the statute and clarified for the first time that under § 17-27-160(B), "capital PCR counsel must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education." *Robertson v. State*, 418 S.C. 505, 518, 795 S.E.2d 29, 36 (2016).

Robertson is new law, creating a new, previously nonexistent remedy. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). As this Court noted in *Robertson*, the question of whether PCR counsel's qualifications constituted a

sufficient reason to permit a successive PCR petition was "a separate and distinct ground not addressed by" this Court's prior precedent. *Robertson*, 418 S.C. at 516, 795 S.E.2d at 35; *see also Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991) (finding second post-conviction petition barred as successive and expressly holding that "the contention that prior PCR counsel was ineffective is not per se a 'sufficient reason' allowing for a successive PCR application under § 17-27-90"). No remedy existed for a violation of section 17-27-160(B) prior to this Court's decision in *Robertson*, even in other states with similar statutes, which this Court acknowledged. 418 S.C. at 520, 795 S.E.2d at 37 ("Although we have researched other states that have qualification statutes or rules similar to section 17-27-160(B), we have been unable to find a case that sets forth a test for non-compliance."). Further, the fact that one post-*Robertson* applicant, Stephen Stanko, successfully obtained a *Robertson* hearing through the same procedural mechanism that failed Petitioner—a motion to remand—demonstrates that *Robertson* is new law. If *Robertson* were simply a rehashing of old law rather than an articulation of a new remedy, Petitioner's 2010 Motion to Remand would have been granted, as Stanko's was.

When a new right or remedy is created, the interest of justice requires that the statute of limitations to assert that right begins to run *when the right or remedy is created*, regardless of when the defect is discovered:

> 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.

S.C. Code. Ann. § 17-27-45(B). Requiring otherwise would be tantamount to denying relief to any petitioner insufficiently clairvoyant to request in advance remedies not yet articulated. This Court

has established this time limit in other post-conviction situations. *E.g.*, *Aiken v. Byars*, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014) (determining, in the context of life-without-parole sentences for juveniles, that the principles of *Miller v. Alabama*, 567 U.S. 460 (2012), apply retroactively and setting a time limit of one year from the date of *Aiken* for affected inmates to request relief); *Peloquin v. State*, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (providing a one-year limitations period from the effective date of § 17-27-45(A) for all individuals seeking PCR relief, regardless of their date of conviction). On the rare occasion when a petitioner calls a court's attention to a constitutional violation for which a remedy has not yet been established, as here, dismissing the petition as untimely effectively punishes the petitioner for being right too soon.

Petitioner filed his second-in-time PCR application on November 24, 2014, less than two months after this Court granted certiorari in *Robertson* and two full years before *Robertson* was decided. Because there was no remedy for a claim that counsel was unqualified before *Robertson*, there was therefore no reason for Petitioner to file a successive PCR raising such a claim before the creation of an established remedy was on the horizon. Even if Petitioner had raised his claim via a successive PCR application within a year of discovering his counsel's lack of qualification (in 2011 at the latest, five years before *Robertson*), no court would have recognized a remedy. Therefore, maintaining now, as the State argues, that Petitioner was required to file a successive PCR petition within a year of discovery—a petition that, before *Robertson*, would have been denied under *Aice*—is tantamount to arguing that Petitioner should have been required to file frivolous litigation.

The lack of an existent remedy is demonstrated by the fact that each time he had attempted to raise this issue pre-*Robertson*, the courts foreclosed any possible review on the issue, and pre-*Robertson*, the State itself consistently argued (and the courts agreed) that no remedy for

unqualified counsel existed.[6] *See, e.g.*, App. 278–79 (asserting that PCR counsel's failure to meet that statutory qualification requirement was "no basis for giving Petitioner a second bite at the [PCR] apple"). This Court rejected those same arguments from the State in *Robertson* itself. In Robertson's case, the State contended that the prescribed statutory qualifications were a mere "technical requirement" of the statute. Resp't Return to Petition for Writ of Certiorari, *Robertson v. State*, No. 2012-205909 at 29 (Jan. 25, 2013). Further, the State fervently argued against any remedy for a violation of Sec. 17-27-160, noting that this Court had never established such a remedy: "There is no reason to grant this type of relief, which is not required by the United States Constitution, the South Carolina Constitution, a state statute or this Court's prior precedent." Brief of Resp't, *Robertson v. State*, No. 2012-205909 at 11–12 (S.C. Jun. 8, 2015). Now that this Court has determined that a claim that PCR counsel was statutorily unqualified does in fact have merit, the State wants to block Petitioner from receiving a new PCR hearing on procedural grounds. The State is attempting to sidestep this Court's determination that capital PCR applicants with statutorily unqualified initial counsel are entitled to a hearing, and thus is arguing with unclean hands.

Moreover, filing a third PCR petition after *Robertson* was unnecessary (and would have

[6] In fact, throughout the litigation on the issue of Petitioner's post-conviction counsel qualification, the State has changed its argument against Petitioner numerous times, including claiming that post-conviction counsel was qualified (pursuant to the Toal Letter) and that there was no remedy at all for the lack of post-conviction counsel qualification. The State first raised its timeliness defense in responding to Petitioner's second-in-time PCR application, in the wake of certiorari being granted in *Robertson*. App. 9–33. This untimeliness claim is not only flatly contradicted by the record but also appears to be made in bad faith—the State now seeks to block Petitioner's attempts to have his counsel qualification claim heard on the basis of untimeliness after years of actively litigating against it for different, merits-based reasons. Equity requires that the State not be permitted to argue with unclean hands and it therefore should be equitably estopped from now arguing that Petitioner's attempts to have his claim heard are untimely and asserting the statute of limitations as a defense. *See Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 210, 417 S.E.2d 579, 582 (1992).

been a waste of time) because Petitioner had already raised the same argument. Petitioner's claim itself is unchanged pre- and post-*Robertson*—the only thing *Robertson* changes is the guidelines for how this Court should treat Petitioner's claim. Thus, the one-year statute of limitations for Petitioner to raise a *Robertson* claim began to run on December 14, 2016—the date *Robertson* was decided—and Petitioner's second-in-time PCR application was filed well before that date.

III. If Petitioner's second PCR application is deemed untimely, Petitioner is entitled to equitable tolling.

Even if this Court deems Petitioner's second PCR application untimely, he is entitled to equitable tolling of the statutory limitations period as applied to his claims about post-conviction counsel's qualification. Petitioner diligently sought review of those claims within five months of discovering the issue, and therefore should not be penalized for pursuing his relief simply because he filed his requests for relief too soon. Equitable tolling is a judicially created remedy designed to "to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 368 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting 54 C.J.S. *Limitations of Actions* § 115 (2005)). Given Petitioner's numerous attempts to have courts, including this Court, determine the qualifications (or lack thereof) of original PCR counsel, this Court's later recognition of a remedy for this issue, and the uniqueness of Petitioner's position as the only individual still denied relief on this issue, a finding that his petition was technically untimely would fail to serve justice in the way this Court demands.

This Court has recognized three articulated situations where equitable tolling is proper:

> (1) where the plaintiff has actively pursued his or her judicial remedies by filing a timely but defective pleading; (2) where extraordinary circumstances outside the plaintiff's control make it impossible for the plaintiff to timely assert his or her claim; or (3) where the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim.

Hooper, 368 S.C. at 116, 687 S.E.2d at 33 (2009) (quoting *Abbott v. State*, 979 P.2d 994, 998 (Alaska 1999)). However, this Court has also recognized that this list is non-exhaustive and involves a "catch-all" principle: Equitable tolling is meant "to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." 368 S.C. at 116–17, 687 S.E.2d at 33 (quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App. 2006)). Here, Petitioner diligently pursued judicial remedies in the face of extraordinary circumstances, and the circumstances surrounding Petitioner's counsel qualification claim therefore weigh heavily in favor of allowing equitable tolling.

a. Petitioner actively pursued judicial remedies as soon as he discovered the defects with initial PCR counsel's qualifications.

Petitioner diligently pursued his judicial remedies through various pleadings, with his first attempt filed within five months of current counsel discovering his prior counsel's qualification defects and six years before *Robertson* was decided. As discussed above, Petitioner made four distinct attempts to raise his post-conviction counsel qualification claims before this Court even recognized the existence of a remedy for PCR counsel qualification issues. This Court's decision six years later to recognize and articulate the remedy for PCR counsel lack of qualification was an extraordinary circumstance outside of Petitioner's control that, if equitable tolling was denied, would prohibit him from otherwise timely asserting the claim in the proper vehicle within a year of discovering the issue.

Petitioner made four distinct and diligent attempts to raise his claims related to his post-conviction counsel's qualification. He raised the claims in a motion to remand, a petition for writ of certiorari, and a petition for writ of habeas corpus within a calendar year of discovering the defects with his prior counsel's qualifications. App. 245–59, 312, 314–406, 486–524. Once those

efforts had all been denied, Petitioner filed the current PCR application, his fourth attempt to raise the claims, in 2014, within two months of this Court granting certiorari in *Robertson*. App. 484, 585.

Assuming *arguendo* that these vehicles for raising the claim were all defective[7] and that Petitioner had to specifically raise the claim within one year of discovering the claim,[8] he filed three timely but defective pleadings asserting the claim. This is sufficient to establish that equitable tolling is warranted. Further, Petitioner not only raised the issue as soon as he discovered it, but also took every reasonable action that he knew was available to him under the law at the time he discovered the defect to try to have the claim actually considered by a court.

b. Extraordinary circumstances outside Petitioner's control made it impossible for Petitioner to take any more effective action to raise his claim.

Moreover, if this Court determines that Petitioner had to file a successive PCR application alleging claims about PCR counsel qualification issues within a year of discovering the issue, equitable tolling would still be proper in Petitioner's case. Nothing suggests that the proper vehicle for raising this claim at the time Petitioner discovered it would have been to file a successive PCR

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[7] Petitioner does not concede that his motion to remand, petition for writ of certiorari, or petition for habeas corpus were defective mechanisms through which to raise this issue in his previous post-conviction proceedings. Post-*Robertson*, this Court recognized a motion to remand as a valid way to raise the qualification issue, granting Stephen Stanko's Motion to Remand and ordering further proceedings on the question of initial PCR counsel's qualifications. Order, *Stanko v. State*, No. 2017-000211 (S.C. Dec. 14, 2017). If a motion to remand is an appropriate way to raise the qualification issue after *Robertson*, it was also a valid way to do so before *Robertson*.

[8] Petitioner raises this point merely in *arguendo*, as the State argues that there is a time limit to file such an action. This Court, in other cases permitting successive PCR applications, has found that the statute of limitations does not apply. *E.g.*, *Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756–57 (holding that the statute of limitations does not apply when a successive PCR application is permitted simply to provide an application one "fair 'bite' at the apple"). Petitioner does not concede or suggest that a one-year statute of limitations applies to successive PCR applications.

application. There was no legal remedy available at the time Petitioner discovered his claim, as this Court made clear in *Robertson* that it was recognizing a new legal remedy where statutory qualification concerns could be properly raised in a successive PCR application. *Robertson*, 418 S.C. at 521–22, 795 S.E.2d at 37 (recognizing that an allegation that PCR counsel is unqualified is a "sufficient reason to avoid the prohibition of section 17-27-90 against successive PCR applications"). A second PCR application filed when he discovered the issue would have been immediately dismissed as improper and successive, as the legal remedy was not defined until 2016, and if Petitioner had then filed another PCR application after *Robertson*, the State inevitably would have argued that it should be barred as *res judicata* and/or successive.

The absence of an articulated remedy at the time Petitioner first raised this claim was an extraordinary circumstance out of Petitioner's control, which prevented him from timely filing a successive PCR application at the time he discovered the issue. This Court's judicial policies favoring fairness and one full and fair opportunity at post-conviction proceedings would be severely frustrated if this Court denied Petitioner his right to raise a claim he would otherwise be legally entitled to pursue simply because he attempted to pursue relief too soon.

c. The "catch-all" principle of the doctrine of equitable tolling and public policy require relief in Petitioner's case.

Finally, when considering all the circumstances surrounding Petitioner's claim, fairness considerations and policies weigh in favor of granting Petitioner a hearing on prior counsel's qualifications. This is not a case in which Petitioner discovered a statutory right violation and simply failed to seek relief. Rather, Petitioner tried diligently to have a court hear the merits of this claim, despite the fact that there was no legal remedy available at the time the claim was discovered. The State, after years of arguing that Petitioner's PCR counsel was qualified under the Toal Letter, changed its argument to contend that Petitioner's attempts to raise the claim was

untimely. This Court has never imposed a time limit on the filing of a successive PCR; in fact, public policy and the state's and public's interest in a legitimate and just penal system requires that appropriate second-in-time PCR petitions not be subject to time limits. *See, e.g.*, *Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756–57 (1999) (holding that the statute of limitations does not apply when a successive PCR application is permitted simply to provide an applicant one "fair 'bite' at the apple").

Petitioner is the only individual who has been singled out for denial of the right to qualified PCR counsel under *Robertson*. South Carolina courts have permitted at least two similarly situated individuals—every death row inmate who raised a *Robertson* claim except for Petitioner—to proceed with second-in-time PCR applications to vindicate the right guaranteed by *Robertson*: Stephen Stanko and James Robertson himself. Therefore, allowing equitable tolling in Petitioner's case would not open the floodgates, but would rather allow the sole individual with a remaining PCR counsel qualification claim to proceed to a hearing on the merits and vindicate his right to the effective assistance of (qualified) counsel. This is necessary both to avoid frustrating judicial policies of fairness and to ensure that Petitioner is not denied his one fair opportunity to pursue post-conviction relief, a right that is well established in this Court's jurisprudence.

CONCLUSION

For all of the reasons discussed above, Petitioner is entitled to a hearing on the qualifications of his initial PCR counsel. This Court should remand this case for a hearing to determine whether initial PCR counsel were statutorily qualified and, if not, whether Petitioner was prejudiced.

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Respectfully submitted,

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