

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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S.C. SUPREME COURT

**Appeal from Beaufort County
The Honorable Maite Murphy, Circuit Court Judge**

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

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2019-000529

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ISSUE PRESENTED

Did the Court of Appeals err by expanding the jurisdiction of appellate courts beyond the limitations specifically set by the South Carolina General Assembly in section 14-3-330 of the South Carolina Code, through its misinterpretation of this Court's precedent to allow the state to proceed with an interlocutory appeal of a circuit court's decision to grant a new sentencing proceeding?

PETITIONER'S QUESTIONS PRESENTED

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 both 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

Petitioner was indicted by the Beaufort County Grand Jury during the March 2002 Term of the Beaufort County Court of General Sessions for two counts of Murder (2002-GS-07-0369, 0370). (App., pp. 527; 207). The State then filed its Notice to Seek the Death Penalty and served its Notice of Evidence of Aggravation. (App., pp. 527; 207). Petitioner chose to represent himself during the guilt/innocence phase of trial. *State v. Roberts*, 369 S.C. 580, 582, 632 S.E.2d 871, 872 (2006).¹ Petitioner's trial began on October 10, 2003, and at the conclusion of trial the jury found Petitioner guilty for both counts of murder on October 21, 2003. (App., pp. 527; 207). On October 22, 2003, Petitioner's jury found the existence of aggravating factors and recommended a sentence of death on the murder counts. (App., pp. 528; 207-208). The Honorable Judge Daniel F. Pieper found the recommendation of the jury to be proper and sentenced Petitioner to death. (App., pp. 528; 208).

Petitioner sought a direct appeal and this Court affirmed the convictions and sentences by Opinion, dated July 24, 2006. *State v. Roberts*, 369 S.C. 580, 632 S.E.2d 871 (2006). Certiorari to the United State Supreme Court was denied by letter Order filed on March 19, 2007. (App., pp. 529; 208).

On March 12, 2007, Petitioner sought Post-Conviction Relief (2007-CP-07-715). Attorneys Carl B. Grant, Esquire and Glenn Walters, Esquire, were appointed to represent Petitioner in his PCR action. Following amendment to the PCR Application, an evidentiary hearing was held before the Honorable Roger M. Young on October 12-13, 2008. (App., pp. 529-530). By Order filed by the South Carolina Supreme Court on December 17, 2008, the Honorable Carmen T. Mullen, Circuit Court Judge, was assigned jurisdiction over the PCR

¹ The appendix in this matter is limited; however, a more complete record of prior documents is in this Court's files from the direct appeal and first PCR action.

action, and the Order assigning Judge Young was rescinded. (App., pp. 530; 208). The parties provided Judge Mullen with proposed Orders, and on September 17, 2009, the PCR Court filed its Order of Dismissal with Prejudice. (App., pp. 530; 208).²

Petitioner timely served and filed his notice of appeal on November 2, 2009. Petitioner was represented on appeal by John Blume, Esquire. *On July 21, 2010, Petitioner filed a Motion to Remand for Additional Post-Conviction Proceedings, alleging that neither PCR counsel (attorneys Grant and Walters) were properly qualified under S.C. Code of Laws 17-27-160(B) to serve as counsel in a Capital PCR matter.*³ (App., pp. 530; 208). By Order filed October 20, 2010, this Court denied the Motion to Remand. (App., pp. 530-531; 208). Petitioner then perfected his PCR appeal to the South Carolina Supreme Court with the filing of the Petition for Writ of Certiorari on February 18, 2011. Issue Three of the Petition alleged PCR Counsel's lack of qualifications under S.C. Code of laws 17-27-160(B) and again sought relief in the form of a remand to the circuit court for the appointment of qualified counsel and additional proceedings. Certiorari was denied by Order dated February 22, 2013. (App., pp. 531; 209; Petition for Writ of Certiorari, p. 27, filed February 17, 2011).^{4 5 6}

² The evidentiary hearing was completed before Judge Young prior to the appointment of Judge Mullen and further evidentiary proceedings were not conducted. The Order does not provide a basis for the rescindment.

³ Petitioner does not accurately recite Respondent's position concerning the Motion for Remand, such that it states the State argued that even if PCR counsel were not qualified, "there is no basis for giving Petitioner a second bite at the [PCR] apple." (Brief of Petitioner, at p. 3 & 11, citing App. 278-279). Respondent's argument that a "second bite of the apple" via remand was not justified falls under its argument that counsel *were* qualified. (App., p. 276-278). Respondent then argued subsequently that even if counsel were not qualified, *Petitioner was unable to demonstrate prejudice* given counsel's extensive CVs, there prior death penalty experience, and the content of the PCR hearing already afforded Petitioner. (App., p. 278-279).

⁴ Petitioner's Issue III states: "Whether Petitioner was denied due process and equal protection of the law and is thus entitled to a new post-conviction relief proceeding where: (a) petitioner's PCR counsel were not qualified under S.C. Code§ 17-27-160(B); (b) PCR counsel were ineffective; and, (c) Judge Carmen Mullen signed the state's order denying post-conviction relief,

Following the denial of certiorari for PCR Appeal, Petitioner filed a Petition for Writ of Habeas Corpus in this Court's original jurisdiction. *Petitioner did not raise the lack of qualifications of PCR counsel as a basis for state habeas relief in his Petition for Writ.*⁷ (See

which contained numerous credibility findings, even though Judge Mullen was not present during the PCR hearing and did not hear the testimony of any witness.”

⁵ In regard to the Return to the Petition for Writ of Certiorari, Petitioner's Statement of the Case again does not accurately reflect the arguments made by Respondent. (Brief of Petitioner, at p. 4, citing App. 558-62). Respondent argued that 1) the allegation was not preserved for appellate review; 2) that PCR counsel were properly qualified; 3) that even if counsel were unqualified, it would not constitute a violation of due process or equal protection rights as a constitutional right to PCR counsel does not exist; and 4) that Petitioner had failed to establish a violation of due process. (See App., p. 558-562).

⁶ Petitioner asserts that “Respondent does not contest that [PCR counsel] do not satisfy the criteria set forth in § 17-27-160(B).” (Brief of Petitioner, at p. 5, citing App. 319). In review of page 319, Petitioner's footnote 4 in his state habeas action makes the same assertion, but it provides no citation for Respondent's supposed position. In contrast, Respondent's Return to the Petition for Writ of Certiorari expressly argues that counsel were qualified. (See App., p. 558).

⁷ Petitioner raised the following grounds for relief in his state habeas Petition:

Ground I.

Petitioner was deprived of a fair and reliable determination of the appropriate sentence at the penalty phase of his capital trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitutional and South Carolina law because A) the trial judge failed to inquire into Petitioner's competency, B) Petitioner was incompetent in fact, C) the trial judge failed to secure a knowing and intelligent waiver of Petitioner's right to present mitigating evidence and D) the trial judge failed to terminate Petitioner's *pro se* status.

Ground II.

Petitioner's death sentence violates the Fifth, Eighth and Fourteenth Amendments because he was visibly shackled without justification and without an individualized determination by the trial judge.

Ground III.

Petitioner was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel during the penalty phase of the proceedings.

Ground IV.

The prosecution exercised its peremptory challenges in a racially discriminatory manner in violation of Petitioner's rights guaranteed by the Sixth and Fourteenth Amendments.

App., p. 322-392). The South Carolina Supreme Court denied the Petition for state habeas relief by Order filed February 22, 2013. (App., pp. 209).

On February 13, 2014, Petitioner next filed a Petition for Writ of Federal Habeas Corpus relief, wherein attorneys John H. Blume, III, and Emily C. Paavola were appointed to represent Petitioner in his federal habeas action. On November 5, 2014, the Honorable Kevin F. McDonald, United States Magistrate Judge, filed a Report and Recommendation finding that Respondent's Motion for Summary Judgment should be granted on the basis that all of Petitioner's claims were procedurally defaulted; the Report and Recommendation also found that all grounds, with exception to a portion of Ground Ten (alleging extraneous influence upon jurors), lacked merit and should be dismissed. The remaining portion of Ground Ten was addressed by the filing of a juror's affidavit and limited evidentiary hearing before Magistrate Judge McDonald. A Supplemental Report and Recommendation was issued finding the remaining portion of Ground Ten should be denied. *Alkebulanyahh v. Byars*, No. 6:13-CV-00918-TLW, 2014 WL 8849503 (D.S.C. Nov. 5, 2014), supplemented, No. 6:13-CV-00918-TLW, 2015 WL 2381351 (D.S.C. Mar. 3, 2015), report and recommendation adopted, No. 6:13-CV-00918-TLW, 2015 WL 2381353 (D.S.C. May 18, 2015), and report and recommendation adopted, No. 6:13-CV-00918-TLW, 2015 WL 2381353 (D.S.C. May 18, 2015)

On November 21, 2014, Petitioner filed a Motion to Stay Proceedings Pending Exhaustion of State Remedies. Petitioner then filed his second PCR Application on November 24, 2014, wherein by amendment on February 23, 2015, Petitioner asserted the lack of qualifications of his PCR counsel as a basis for successive filing. Initially the Honorable R. Knox

Ground V.

Petitioner was deprived of his Sixth and Fourteenth Amendment right to a fair trial before twelve fair and impartial jurors as a result of multiple prejudicial extraneous influences.

McMahon was assigned to this 2nd PCR action. Respondent filed its Return and Motion to Dismiss the second PCR action, arguing that the action was untimely and successive. (App., pp. 1-121).

In the interim time while this PCR matter was awaiting consideration, the Honorable Terry L. Wooten, Chief United States District Judge, accepted the Report and Supplemental Report, overruled the objections filed by Petitioner, and granted the Respondent's motion for summary judgment. In its Order the District Court also denied the pending Motion to Stay Proceedings Pending Exhaustion of State Remedies. *Alkebulanyahh v. Byars*, No. 6:13-CV-00918-TLW, 2014 WL 8849503 (D.S.C. Nov. 5, 2014), supplemented, No. 6:13-CV-00918-TLW, 2015 WL 2381351 (D.S.C. Mar. 3, 2015), report and recommendation adopted, No. 6:13-CV-00918-TLW, 2015 WL 2381353 (D.S.C. May 18, 2015), and report and recommendation adopted, No. 6:13-CV-00918-TLW, 2015 WL 2381353 (D.S.C. May 18, 2015). Petitioner then appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit requested briefing regarding the significance of the post-conviction relief action. After briefing, by Order dated March 16, 2016, the Fourth Circuit Court of Appeals placed the appeal in abeyance pending this Court's decision in *Robertson v. State*, and resolution of Petitioner's successive post-conviction relief action.

In the state action, following the 2016 ruling of *Robertson v. State*, Respondent filed a Supplemental Return arguing that the PCR application was still filed beyond the statute of limitations. (App., pp. 122-131). On July 11, 2018, in light of Judge McMahon's retirement, this 2nd PCR matter was re-assigned to the Honorable Judge Maite Murphy. (App., p. 204). A hearing was conducted before Judge Murphy on November 19, 2018, in order to address Respondent's Summary Judgment motion on the limited ground that Applicant's second PCR

Application was filed beyond the statute of limitations, in light of the *Robertson v. State* ruling. (App., p. 223-244). On January 17, 2019, Judge Murphy filed an Order of Dismissal granting Respondent's Motion to Dismiss on the grounds that the second PCR Application was indeed filed beyond the 1-year statute of limitations, pursuant to S.C. Code Laws § 17-27-45(C). (App., p. 207-213).

Pursuant to SCRCP 59(e), Petitioner filed a Motion to Alter or Amend Judgment arguing that the PCR Court erred in dismissing the action as untimely and for the lack of findings regarding Petitioner's alternative claim for equitable tolling. (App., p. 214-217). On February 22, 2019, Judge Murphy filed an Order denying Petitioner's Motion to Amend and Alter Judgment regarding the dismissal of the PCR Application for being filed beyond the statute of limitations. However, the Order did directly address Petitioner's arguments for equitable tolling, and found that Petitioner had not satisfied any of the conditions for which equitable tolling could be applied. (App., p. 219-221).

FACTS

The facts of the crime have already been established by this Court in its prior opinion, *State v. Roberts*, 369 S.C. 580, 632 S.E.2d 871 (2006). Therein, this Court summarized the facts as follows:

In January 2002, Roberts lived in a trailer owned by Brenda Smith on Riley Road in Beaufort County. Also residing at the trailer were Smith's husband, Isaac, and Roberts' wife Nzuri. At the time of the crime in this case, a girl named Kimberly Blake, with whom Roberts had an infant daughter, was also staying there. On January 8, 2002, Kimberly Blake asked her friend, Strawberry Washington, to call police to come to the house to assist her in leaving because Roberts had hit her. Beaufort County Sheriff's Deputies Dyke Coursen and Dana Tate responded. According to Kimberly Blake, when police arrived, Roberts hid in the bedroom closet with his rifle. He gave Kimberly the okay to go out of the bedroom. She left the bedroom and Brenda Smith gave the officers permission to search the bedroom. Officers Coursen and Tate went into the

bedroom. Smith and Blake heard gunshots. Blake ran outside and down the road. She was joined shortly after by Roberts coming through the woods with a gun in his hands. Roberts stated, “I just killed those two white bitches and I’m going to say it was self-defense.” Blake left Roberts and returned to the scene to talk to police.

When backup officers responded to the scene, they found officers Coursen and Tate dead; Coursen had suffered six gunshot wounds, Tate had seven. Roberts was subsequently found hiding in the mud under a bridge with a shoulder and hip wound. Roberts was arrested. At the time, he had a black fanny pack carrying ammunition for an M-14 assault rifle, a cell phone and a knife. Police subsequently found a rifle magazine and an SKS assault rifle in the area in which Roberts had fled. The bullets and casings recovered from the victims and the scene of the crime were conclusively matched to the assault rifle.

State v. Roberts, 369 S.C. 580, 581, 632 S.E.2d 871, 872 (2006).

STANDARD OF REVIEW

“When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court.” *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008). “A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 109–10, 662 S.E.2d at 41. Questions of law are reviewed *de novo*, with no deference to the trial court. *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 839 (2018). Questions of statutory interpretation are questions of law subject to *de novo* review. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

DISCUSSION

This case is solely a matter of Petitioner waiting too long to file the proper action in the proper court. The facts show conclusively that Petitioner became aware of the potential claim of unqualified counsel at least as early as July 21, 2010, yet failed to file the second PCR application until November 24, 2014. Even after the conclusion of Petitioner’s PCR appeal on

February 22, 2013, Petitioner still waited an additional year and eight months to file the present action. During that time, Petitioner instead chose to file for state habeas relief, *on grounds not including the qualification of counsel under § 17-27-160(B)*. Next, on February 13, 2014, Petitioner filed a Petition for Writ of Habeas Corpus, *which by design cannot address matters of state law*. *Alkebulanyahh v. Byars*, 2014 WL 8849503, at *6 and *21. Finally, on November 24, 2014, Petitioner filed his successive PCR application, and amended that action on February 23, 2015, to raise the matter of unqualified counsel.

In total, more than four years passed between discovery of the potential claim and the filing of the proper action *to pursue* such a claim. In those four years of time, Petitioner ultimately filed his second PCR action before *Robertson v. State* was decided, demonstrating facts contrary to Petitioner's arguments that he was somehow reliant upon that decision to create a basis for relief or that the decision removed some impediment to filing their current action. The PCR Court correctly dismissed this action based upon the lapse of statute of limitations and this Court should affirm.

ARGUMENT

- 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) he challenged counsel's qualifications prior to this Court's decision in *Robertson*?**

Petitioner's Issue I suggests that Petitioner is automatically entitled to a hearing and that summary dismissal of the application on the basis of the statute of limitations should be disregarded entirely. However, Petitioner has shown no legal basis for which an exception to the statute of limitations exists.

“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.” S.C.Code Ann. § 17-27-70(B)-(C) (2003); *Leamon v. State*, 363 S.C. 432, 611 S.E.2d 494 (2005). South Carolina Code of Laws §17-27-70(C) provides that “[t]he court may grant a motion by either party for summary disposition of the application 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 entitled to judgment as a matter of law.” S.C. Code Ann. § 17-27-70(C) (2003). While this statute is specific to PCR matters, it mirrors the fundamental standard for summary judgment in all civil actions. See e.g. *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014) (holding “[s]ummary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations.”). “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.” *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013) “To the extent that there is no conflicting evidence regarding whether a claimant should have known that a cause of action existed, however, resolution of the question is appropriate at summary judgment.” *Abrasives-S., Inc. v. Awuko Abrasives Wandmacher GmbH & Co. KG*, 225 F. Supp. 3d 568, 574 (D.S.C. 2016), *aff’d sub nom. Abrasives-S. Inc. v. Awuko Abrasives Wandmacher GMBH & Co KG*, 696 F. App’x 624 (4th Cir. 2017) (citing *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672, 681 (2000)).

The established record of this case demonstrates that Petitioner became aware of the potential claim that his PCR attorneys were not properly qualified under §17-27-160(b) at least as early as July 21, 2010. PCR Appellate counsel sought remand of an already concluded PCR

circuit court action to raise this claim. Unpreserved issues cannot be raised for the first time on appeal⁸ and the Motion to Remand was denied on October 20, 2010. Petitioner then waited more than four years to file his second PCR Application and raise this claim in state court through the proper procedure. There were no procedural impediments that prevented the filing of the second PCR application during this time frame; Petitioner simply failed to pursue the opportunity to seek relief by way of a second application under *Aice*. *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). These facts are already conclusively established within the record, and therefore Petitioner’s second PCR Application is on its face untimely, and the available record demonstrates no need for development of facts; the discovery of the claim is calculable based on prior pleadings and the existing law provides no basis for exemption from the 1-year statute of limitations. *McCoy, supra*.

“Statutes of limitations are not simply technicalities, but are fundamental to a well-ordered judicial system.” *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996) (citing C.S.J. Limitations of Actions § 2 (1989)). The PCR Court utilized sound law in dismissing this action on the basis of summary judgment.

⁸ Petitioner’s own Statement of the Case even acknowledges that via his Petition for Writ of Certiorari, he was “asking this Court to review his *newly developed* PCR claims.” (Brief of Petitioner, at p. 4) (emphasis added). See *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); *Fishburne v. State*, 427 S.C. 505, 515, 832 S.E.2d 584, 589 (2019) (noting that remand of post-conviction relief matter to circuit court requires existence of extraordinary circumstances, should only be done sparingly, and this Court in *Fishburne* did so under circumstances where a successive PCR action was not available to the applicant to protect his rights.).

Under Question I, Petitioner also appears to argue that the factual basis for his claim has already been established ⁹, and that *Robertson* provides an exception to the statute of limitations in this case. (Brief of Petitioner, p. 7, seemingly quoting an excerpt from *Robertson* that states that Petitioner “‘allege[d] facts that would establish an exception to . . . the statute of limitations’ (or to deem the statute of limitations inapplicable) and those facts were not refuted by the record.”). Neither suggestion is true.

The *full* quotation from *Robertson* states: “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 (citing *McCoy*, 401 S.C. at 369, 737 S.E.2d at 626). *Robertson* does not give an exemption to the statute of limitations when a Petitioner seeks to file a second PCR application. To the contrary, *Robertson* supports that the statute of limitations be satisfied in order for the second PCR Application to be properly filed and considered on the merits. *Robertson v. State*, 418 S.C. 505, 517, 795 S.E.2d 29, 35 (2016) (finding that Robertson’s second PCR application, filed in 2011, “was filed within the one-year statute of limitations provided by section 17-27-45 as prior PCR counsel’s alleged lack of qualification was not discovered until federal counsel was appointed in 2011.”); *Accord In re Stays of Execution in Cap. Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996) (holding that “[a] request for a stay of execution at any later time, to include a request for a stay pending the filing of a successive action for post-conviction relief or habeas corpus in the

⁹ Counsel for Petitioner asserts that during his own communications with PCR counsel they indicated they were not properly qualified. PCR counsel have not offered such testimony on the record.

circuit court or in the original jurisdiction of this Court . . . must demonstrate that there are *exceptional circumstances* warranting the issuance of the stay.”) (emphasis added).

This calculation and acknowledgment of the statute of limitations by this Court in *Robertson* is confirmation that an applicant’s statute of limitations is not negated by the underlying holding that unqualified PCR counsel satisfies the “sufficient reason” standard under *Aice*.

The PCR Court summarily dismissed Petitioner’s second PCR Application on the basis that the Application was barred by the 1-year statute of limitations because the alleged lack of qualification claim was not raised until more than four years after discovery by PCR appellate counsel. There is no basis within statute or case law that provides an exception to the statute of limitations in this matter and as such there is no right to an evidentiary hearing when the record demonstrates that the application is untimely filed.

II. Whether capital PCR applicant’s 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?

Petitioner’s Question II asserts that the timeliness of the 2nd PCR application should not be evaluated under § 17-27-45(C). Instead, he argues that the 2nd PCR application was timely under § 17-27-45(B) because he filed his 2nd PCR application within one year (and in fact before) the ruling handed down in *Robertson v. State*. However, § 17-27-45(B) is inapplicable to the circumstances of this case because there is no new substantive standard or legal right created by *Robertson*. Petitioner claimed a violation of a right guaranteed by statute under § 17-27-160(B), via the mechanism for seeking a successive PCR application for “a sufficient reason” as created by *Aice*. *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). With both the *established right* and the *established mechanism* for pursuing a denial of qualified PCR Counsel

claim in place since the 1990's, there is no basis to argue that a new right was bestowed by the Court in *Robertson*. Instead, the proper evaluation of statute of limitations in this case is under § 17-27-45(C) which requires that the applicant file his claim within *one year of discovery of the existence of the claim*. The facts of this case demonstrate that Petitioner failed to do so and failed by a substantial margin of time; he cannot now be permitted to circumvent the statute of limitations in this matter by masquerading the *Robertson* decision as an establishment of a new substantive right. This is made all the more clear by the fact that Petitioner filed his second PCR claim before *Robertson* was even decided.

South Carolina Code of Laws § 17-27-45 establishes the application of statute of limitations to PCR claims. Section 17-27-45(A) establishes the basic computation of time. It requires that application “be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.”¹⁰ Section 17-27-45(B) states

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). Last, Section 17-27-45(C) mimics the “discovery rule” commonly applied to civil law suits, requiring that the applicant file his PCR application within

¹⁰ For his *first* PCR application, Petitioner satisfied Section 17-27-45(A). However, for purposes of his *second* PCR application, that timeframe had long passed as the United State Supreme Court denied certiorari on March 19, 2007, and Petitioner's second PCR application was not filed until November 24, 2014. Moreover, certiorari for Petitioner's PCR appeal was denied on February 22, 2013, and the Remittitur was issued on March 28, 2013. Petitioner waited more than a year and a half from the conclusion of his PCR appeal to file his second PCR application.

one year of discovery of the claim, or within one year of when the claim should have been discovered by reasonable diligence.

The PCR statute also dictates when a second PCR application can be permissibly filed and avoid dismissal as successive. South Carolina Code of Laws § 17-27-90 demands that all grounds for PCR relief be raised in the “original, supplemental or amended application.” Successive applications are generally disfavored and are not permitted unless sufficient reason is given for why the successive claim was not asserted or inadequately raised in the original proceedings. S.C. Code Ann. § 17-27-90. This Court in *Aice* emphasized the “sufficient reason” language and thereby created the standard for which any subsequent PCR application must be judged to avoid dismissal as successive under § 17-27-90. *Id.*, 305 S.C. at 451, 409 S.E.2d at 394. South Carolina Code of Laws § 17-27-160(B) sets forth the necessary qualifications for an attorney to represent an applicant in a capital PCR proceeding. The “sufficient reason” argued by Petitioner is that he was denied his right to qualified Capital PCR counsel under this statute.

This Court’s opinion in *Robertson* happens to address all of these statutory provisions under the same factual circumstance, and while the case is certainly instructive on each, it does not establish a basis for Petitioner to escape summary judgment for failing to file his claim within the mandated statute of limitations. *Robertson* accomplishes four things: 1) it provides an explanation of the required qualifications for Capital PCR attorneys set forth in 17-27-160(B), 2) it concludes the applicant’s statutory right to qualified counsel was denied, 3) it concluded that the application raising that denial was timely filed, based upon the date in which the potential allegation was discovered, and 4) the applicant’s second PCR Application could proceed as having met the “sufficient reason” standard under *Aice*.

Petitioner's reliance upon § 17-27-45(B) and *Robertson* is problematic for a number of reasons. First, Petitioner fails to identify any constitutional right, federal or otherwise, that would encapsulate his allegation. PCR is a statutory remedy only. In order for this subsection 45(B) to apply, there has to be some new right or new standard created, and *Robertson* fails to create new rights. *Robertson* does nothing to create or extend the rights established by § 17-27-160(B) and it does nothing to extend the standard for which successive applications may avoid dismissal under *Aice* and § 17-27-90.¹¹ It merely interpreted and explained the statute, applied the *Aice* standard, and found that the standard was satisfied. In short, *Robertson* stands for the premise that an *existing* right had been denied, not for the *creation* of a new right.¹²

Most importantly, *Robertson* definitively answers how the statute of limitations is to be applied in seeking a subsequent PCR application under *Aice*. The Court in *Robertson* expressly articulated that the subsequent application in question was permissible because counsel had timely filed the application *within one year of the discovery of the claim*. This is a clear

¹¹ Petitioner's reliance upon *Odom* in the alternative to *Robertson* not creating a new right is misplaced. (Petition for Writ of Cert, p. 9). *Odom* granted relief to ensure the applicant received an appeal under *Austin*, a narrowly carved exception. *Odom v. State*, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999).

¹² Petitioner's argument relies in part on the premise that Petitioner needed the *Robertson* decision in order to even have a right to pursue. However, both law and fact demonstrate such an argument is meritless. First, for all of Petitioner's suggested reliance upon *Robertson*, he ultimately filed his second PCR application before the *Robertson* decision was handed down. The timing of Petitioner's filing, in addition to being substantially beyond the statute of limitations, demonstrates that there was no real reliance upon the *Robertson* as a basis for relief, nor impediment to filing removed by the *Robertson* opinion. Additionally, a party's confidence in a particular claim or the perceived futility of a claim based on prior precedent cannot serve as the basis for equitable tolling when the party fails to abide by the statute of limitations. Cf. *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611, 140 L. Ed. 2d 828 (1998)(holding that the futility of a claim cannot constitute cause for procedural default simply because that particular claim was unacceptable to that particular court during the time the claim could be pursued.); *Whiteside v. United States*, 775 F.3d 180, 185 (4th Cir. 2014) (citing *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611, 140 L. Ed. 2d 828 (1998) and holding that "futility cannot serve as cause for a procedural default in the context of collateral review.").

application of § 17-27-45(C) and there is no reference to new rights, retroactivity, or any other insinuation that § 17-27-45(B) could be applicable. Section 17-27-45(C) governs this matter.

A focused review of the record demonstrates that under § 17-27-45(C), Petitioner's second application cannot be deemed timely.

The undisputed facts demonstrate that PCR appellate counsel John Blume was aware of the alleged lack of qualifications for PCR counsel no later than July 21, 2010. Under § 17-27-45(C), the statute of limitations for raising this claim by the proper mechanism under *Aice* began at least as early as July 21, 2010. Even at the conclusion of the PCR appeal, Petitioner waited a year and eight months to file his second application. Despite this delay, Petitioner still pursued his remedy for unqualified counsel by filing a successive PCR action – a remedy that Petitioner insists he did not possess until *Robertson* was decided – *despite conceding to this Court his acknowledgment that such an action was an available remedy as early as May 18, 2011.*¹³ (App., p. 464 paragraph 1, lines 4-5). Given the procedural history, it appears Petitioner actively *avoided* filing such an action in lieu of moving on from state court and seeking federal habeas relief. Unlike *Robertson*, wherein the Court explicitly found that applicant had timely sought relief through a subsequent PCR *from the date in which the claim was discovered*, Petitioner waited for more than four years after discovery of his claim to file his second PCR application.¹⁴

The true and unflattering nature of Petitioner's argument is set forth on page 10 of the Brief of Petitioner: "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." This is irreconcilable with

¹³ Had Petitioner filed his successive PCR application at this time, it would have been timely.

¹⁴ Petitioner exceeded the statute of limitations even if calculated from the conclusion of Petitioner's initial PCR application, wherein he waited more than a year and half after the issuance of the Remittitur.

history: *this Court* ultimately found this same *preserved issue* meritorious and granted relief to Robertson via application of *Aice* (as opposed to *creating* a new remedy). Petitioner saw his chance, but simply did not want to be first in line. He cannot now avoid or toll the statute of limitations simply because he wanted to let some other applicant test the waters of this Court. Cf. *Bousley v. United States*, 523 U.S. at 623; *Whiteside v. United States*, 775 F.3d at 185 (4th Cir. 2014); *State v. Torrence*, 305 S.C. 45, 64, 406 S.E.2d 315, 326 (1991) (Toal, J. concurring) (noting that sandbagging tactics “frustrate the goals of our criminal justice system”).

In contrast to *Robertson*, the facts of this case demonstrate that Petitioner’s statute of limitations for asserting the qualifications of capital PCR counsel lapsed prior to filing. The PCR Court did not err in dismissing Petitioner’s application as untimely under § 17-27-45(C).

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 both 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?

Petitioner argues that even if his second application was untimely, as Respondent argues above, he should be entitled to equitable tolling based upon his filing of other actions in other courts. Petitioner’s argument misses the mark for a number of reasons. First, he fails to establish any of the requisite circumstances needed to apply the extreme remedy of equitable tolling. Second, diligence in the context of statute of limitations means taking efforts to file the *proper action* within the proper amount of time. *Proceeding with other actions and claims for relief does not demonstrate diligence toward filing a second PCR application based upon the discovery of a claim for relief not available during the first PCR.*¹⁵

¹⁵ Petitioner insists that he was diligent because of his alleged four attempts to raise the disputed issue. That is an exaggeration. His first two attempts were practically duplicative assertions of a *non-preserved issue*, raised for the first time on appeal. Appellate courts will not undertake an

Equitable tolling is a judicially created mechanism, established “[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.” *Hooper*, 687 S.E.2d at 32 (2009) (quoting 54 C.J.S. Limitations of Actions § 115 (2005)). However, “South Carolina has rarely applied the doctrine of equitable tolling to halt the running of the statute of limitations. Equitable tolling is reserved for extraordinary circumstances.” *Am. Legion Post 15 v. Horry Cty.*, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009); *Pelzer v. State*, 378 S.C. 516, 520–21, 662 S.E.2d 618, 620 (Ct. App. 2008); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (noting that while equitable tolling has been permitted where a litigant actively pursued his remedies but filed a defective pleading, or was induced by adversary into allowing the statute of limitations to lapse, “[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”). The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). This Court has held that the statute of limitations shall be equitably tolled where “circumstances

examination of unpreserved claims, and predictably, remand was not awarded. But this in no way prevented Petitioner from filing a successive PCR action. Petitioner alleges his third attempt was raised via the petition for state habeas relief. However, while the qualification of counsel was discussed briefly as part of the procedural history, Petitioner never raised it as a basis for relief. His five claims are clearly labeled, and none of them include relief for unqualified PCR counsel. The closest Petitioner comes is his terse mention of counsel’s lack of qualification under S.C. Code §17-27-160 in his Reply. New claims for relief cannot be raised via reply. See Rule 208(b)(1)(B), (b)(3), SCACR; *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 n.2 (2011) (citing *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 413 S.E.2d 827 (1992)) (noting by footnote that “[i]t is axiomatic that an issue cannot be raised for the first time in a reply brief.”); *State v. Wakefield*, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996); *Divine v. Robbins*, 385 S.C. 23, 44, 683 S.E.2d 286, 297 (Ct. App. 2009); see also *First State Sav. and Loan v. Phelps*, 299 S.C. 441, 385 S.E.2d 821 (1989); *Sloan Constr. Co. v. South Carolina Bd. of Health and Envtl. Control*, 285 S.C. 523, 331 S.E.2d 345 (1985).

preventing a petitioner from making a timely filing [are] both beyond the petitioner’s control and unavoidable despite due diligence.” *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (citing *Com. v. Carneal*, 274 S.W.3d 420 (Ky.2008)). In *Mose* this Court noted that the doctrine of equitable tolling be used sparingly, and that “if a PCR applicant raises the doctrine of equitable tolling as a defense to the statute of limitations, the judge should make the fact-specific determination of whether equitable tolling is justified”, and that such a drastic remedy be used sparingly.¹⁶ *Mose v. State*, 420 S.C. 500, 511, 803 S.E.2d 718, 723 (2017).

Though this Court has declined to describe in detail the circumstances from which equitable tolling can be reasonably applied, the South Carolina Court of Appeals has stated in *Pelzer* that equitable tolling is available under three circumstances:

1. “Extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.”
2. “The plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.”
and
3. “The plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.”

Pelzer v. State, 378 S.C. 516, 521, 662 S.E.2d 618, 620–21 (Ct. App. 2008).¹⁷ The Court of Appeals in *Pelzer* went on to add that “[i]t has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as

¹⁶ *Ferguson* and *Mose* are also immediately distinguishable on the basis that the applicant in question was not represented by counsel, as it concerned the disputed unavoidable and uncontrollable circumstance. In contrast, Petitioner was represented by counsel at all stages of his litigation.

¹⁷ This Court in *Mose* cited favorably to the *Pelzer v. State* opinion. *Id.* at 721-22.

fraud or misrepresentation.” *Id.* (citing 51 Am.Jur.2d Limitation of Actions § 174 (2007)); citing *Hooper*, 377 S.C. at 232, 659 S.E.2d at 221.

The facts of this case fail to demonstrate any basis for which equitable tolling could be applied. Petitioner cannot demonstrate any circumstance that “prevented” him from filing his second PCR application in a timely fashion. Petitioner failed to demonstrate that he attempted to file a second PCR application but was ultimately unsuccessful due to a defect in his pleadings or circumstances beyond his control, especially when represented by counsel. Petitioner failed to demonstrate that the State induced him to delay or induced him to allow the statute of limitations to lapse. Lastly, Petitioner failed to demonstrate how an inability to obtain vital information concerning his claim prevented his timely filing. The record is lacking any such evidence and the PCR court was correct to find that Petitioner failed to establish any of the grounds for which equitable tolling may be applied, and that such a drastic remedy was not appropriate for Petitioner’s circumstances.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits Petitioner’s second PCR action is untimely under §17-27-45(C) and that the summary dismissal of the PCR court be affirmed.

Signature block on following page

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