

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Abbeville County

S.C. Supreme Court

R. Lawton McIntosh, Circuit Court Judge

SHONDRAY LAMONT MARTIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2012-213701

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PETITION FOR WRIT OF CERTIORARI  
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CARMEN V. GANJEHSANI  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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The PCR court erred in dismissing Petitioner’s PCR application with prejudice for failure to comply with the one-year statute of limitations where (1) Petitioner mailed his PCR application to the Abbeville County Clerk of Court within the statute of limitations period and this application was found in the Clerk’s file; or (2) the statute of limitations should be equitably tolled when Petitioner sent his PCR application to the Clerk within the statute of limitations period but this application was defective and he subsequently filed a corrected application outside of the limitations period.

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**ISSUE PRESENTED**

Whether the PCR court erred in dismissing Petitioner's PCR application with prejudice for failure to comply with the one-year statute of limitations where (1) Petitioner mailed his PCR application to the Abbeville County Clerk of Court within the statute of limitations period and this application was found in the Clerk's file; or (2) the statute of limitations should be equitably tolled when Petitioner sent his PCR application to the Clerk within the statute of limitations period but this application was defective and he subsequently filed a corrected application outside of the limitations period?

## STATEMENT

### **Indictments**

On April 29, 2002, Petitioner Shondray Lamont Martin was indicted by the Abbeville County Grand Jury for (1) criminal conspiracy; (2) attempted armed robbery; (3) murder; and (4) possession of a firearm or knife during the commission of a violent crime. App. 1467-1469.

### **Trial**

On March 14, 2004, Petitioner appeared before the Honorable Wyatt T. Saunders, Jr. and a jury. App. 1. Petitioner was represented by W. Benjamin McClain, and the State was represented by W. Townes Jones, IV and Timothy W. Woolston. Id.

At the conclusion of the State's case, the Trial Court granted defense counsel's motion for a directed verdict on the charge of attempted armed robbery. App. 971, ll. 2-4. On March 20, 2004, Petitioner was found guilty on the charges of (1) conspiracy; (2) murder; and (3) possession of a firearm or knife during the commission of a violent crime. App. 1258, ll. 4-10.

Judge Saunders sentenced Petitioner to life imprisonment for murder consecutive to a federal sentence he was already serving, thirty years for conspiracy, and five years for the possession charge. The sentences were to run consecutive to each other and to a sentence Petitioner was already serving for unrelated charges. App. 1266, l. 21 – 1267, l. 13; 1473-1474.

### **Direct Appeal**

Petitioner filed a timely notice of appeal to the South Carolina Court of Appeals. Chief Appellate Defender Robert M. Dudek filed a brief pursuant to Anders v. California,

386 U.S. 738 (1967). In addition, Petitioner filed a *pro se* brief. The Court of Appeals dismissed the appeal. App. 1270-1271. Petitioner's petition for rehearing was denied by the Court of Appeals on June 28, 2007. App. 1272. The remittitur was issued on August 3, 2007. App. 1287.

### **PCR Application and Hearing on Statute of Limitations**

Petitioner averred that on June 23, 2008, he mailed his Post-Conviction Relief ("PCR") Application to the Clerk of Court of Abbeville County and to Solicitor William T. Jones. App. 1429-1450;1453. In this PCR application, Petitioner alleged, among other things, that his trial counsel: (1) failed to request a lesser included offense to murder; (2) failed to request the removal of a juror who had knowledge of Petitioner's previous criminal history; and (3) failed to object to the solicitor's closing statement. App. 1429-1450.

On May 30, 2009, Petitioner wrote a letter to the Abbeville County Clerk of Court inquiring about the status of his PCR case. App. 1456. On June 12, 2009, the Clerk responded that she was unable to find a PCR case filed on his behalf. App. 1461.

On July 13, 2009, Petitioner again wrote to the Abbeville County Clerk of Court requesting that his PCR application be filed. He enclosed an Affidavit attesting to the fact that he mailed his PCR application to the Abbeville County Clerk of Court on June 23, 2008. App. 1452-1453. On July 16, 2009, the Clerk of Court responded that it received his July 13, 2009 letter with his affidavit, but could not file his PCR application as submitted. The Clerk enclosed the required documents to be completed and stated it was returning the paperwork Petitioner had submitted. App. 1451.

On August 10, 2009, the Clerk of Court notified Petitioner that it had received his PCR application but that it was being returned for proper execution. The Clerk requested

that Petitioner sign the verification in the presence of a notary public, as well as the application itself in the presence of a notary public. App. 1428.

On August 26, 2009, Petitioner responded to the Clerk's letter, informing the Clerk that the Florida federal penitentiary where he was serving his federal sentence did not have a notary public and that he would have to request a notary public to come to the institution to notarize his application. Petitioner informed the Clerk that this process could take anywhere from seven to ten working days and requested time to complete the process. App. 1425.

Petitioner then resubmitted his PCR application with the required signatures of a notary public, and the Clerk filed this application on September 28, 2009. App. 1273-1285.

The State filed a Return and Motion to Dismiss over two years later on December 19, 2011. App. 1286-1292. The State contended that Petitioner's PCR application should be summarily dismissed for failure to comply with the one-year statute of limitations set forth in S.C. CODE ANN. § 17-27-45(A). The State asserted that because the Remittitur was issued on August 3, 2007, Petitioner was required to file his application by August 4, 2008. The State argued that Petitioner did not file his PCR application until September 28, 2009, more than a year after the statutory filing period had expired. App. 1289-1290.

The PCR court issued a Conditional Order of Dismissal on January 4, 2012 notifying Petitioner that it intended to dismiss the application with prejudice unless Petitioner provided specific reasons why the application should not be dismissed in its entirety. App. 1293-1298. On January 10, 2012, Petitioner filed a Reply and Objections to the Conditional Order of Dismissal. App. 1299-1301.

A hearing on whether Petitioner filed his PCR application within the statute of limitations was held on November 27, 2012 before the Honorable R. Lawton McIntosh. App. 1302 – 1328. Petitioner was represented by Kristy Grafton Goldberg, and the State was represented by Assistant Attorney General J. Rutledge Johnson. App. 1302. Petitioner testified at the hearing. App. 1306-1322.

Petitioner testified that he drafted his PCR application himself and dated it June 23, 2008. App. 1308, l. 17 – 1309, l. 5. Petitioner signed the document but had no knowledge that he was required to have it notarized as well. App. 1309, ll. 6 – 13. Petitioner believed he mailed this application on June 23, 2008. App. 1309, ll. 20-25; 1310, ll. 19-21.

Petitioner testified that on May 30, 2009, he wrote to the Clerk of Court for Abbeville County requesting an appearance on the docket and checking on the status of the case. App. 1312, l. 16 – 1313, l. 19. He was then informed by the Clerk on June 12, 2009 that there was no pending post-conviction relief case. App. 1313; l. 22 – 1314, l. 5.

Petitioner wrote back to the Clerk on July 13, 2009, enclosing an affidavit averring that he mailed his PCR application to the court on July 23, 2008. Petitioner also believed he may have enclosed the application for a second time. App. 1314, l. 9 – 1315, l. 15. Petitioner said the Clerk responded to this letter stating that the application could not be filed as submitted. Petitioner again responded to the Clerk on August 26, 2009 explaining why his application was not notarized. App. 1315, l. 16 – 1316, l. 10. Petitioner then filed a notarized PCR application on September 28, 2009, attaching his affidavit averring that he originally mailed his PCR application on June 23, 2008. App. 1316, l. 14 – 1317, l. 4.

Petitioner further testified that when he mailed his original PCR application on June 23, 2008, he was housed at that time at a federal institution in the State of Florida. The

staff there was no longer able to notarize document so someone would have to visit the institution to notarize documents. App. 1318, l. 14 – 1319, l. 13. It was difficult to have documents notarized at this institution. App. 1319, ll. 12-13.

At the hearing, the State made as an exhibit the entire contents of the Clerk of Court's file from Abbeville County. App. 1305, l. 20 – 1306, l. 5; 1324, l. 7-17; 1374-1461. That file contained Petitioner's original PCR application dated June 23, 2008. App. 1429-1450. The Clerk of Court for Abbeville County did not make a notation on the document of when it was received. In addition, the Clerk did not attach or staple Petitioner's postmarked envelope sending the application to the application as it did for every almost other piece of correspondence sent by the Petitioner to the Clerk. App. 1325, ll. 10-16; 1382 -1385; 1405-1407; 1408-1409; 1425-1426; 1456-1457.

#### **Order of Dismissal**

Judge McIntosh dismissed Petitioner's PCR application in an order filed December 26, 2012. App. 1462-1466. Judge McIntosh found that where the Remittitur from Petitioner's appeal was issued on August 3, 2007, the statute of limitations set forth in S.C. CODE ANN. § 17-27-45(A) expired on August 4, 2008. Judge McIntosh found that even though a copy of Petitioner's PCR application dated June 23, 2008 was found in the Abbeville County Clerk of Court's file, Petitioner had no proof that he sent this application to the Clerk on June 23, 2008. Therefore, Judge McIntosh ruled that Petitioner's PCR application was not actually filed until September 28, 2009 after the statute of limitations had expired. Judge McIntosh accordingly dismissed Petitioner's PCR application with prejudice. Id.

This petition for a writ of certiorari follows.

## ARGUMENT

**The PCR court erred in dismissing Petitioner's PCR application with prejudice for failure to comply with the one-year statute of limitations where (1) Petitioner mailed his PCR application to the Abbeville County Clerk of Court within the statute of limitations period and this application was found in the Clerk's file; or (2) the statute of limitations should be equitably tolled when Petitioner sent his PCR application to the Clerk within the statute of limitations period but this application was defective and he subsequently filed a corrected application outside of the limitations period.**

Under Section 17-27-45(A) of the South Carolina Code, "[a]pplication for [post-conviction] relief . . . must be filed within one year after 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."

In this case, the Remittitur was issued on August 3, 2007 and thus there is no dispute that Petitioner's PCR application was required to be filed by August 4, 2008. App. 1287; 1463.

The question is whether Petitioner did file his PCR application by August 4, 2008 or whether he should be entitled to equitable tolling of the one-year statute of limitations on PCR applications.

The only evidence presented at the hearing was Petitioner's testimony that he did mail to the Abbeville County Clerk of Court his first PCR application on June 23, 2008 which therefore would have been received by the Clerk before the expiration of the statute of limitations. App. 1309, ll. 20-25; 1310, ll. 19-21. Petitioner had also submitted an affidavit to the Clerk averring that he mailed this application on June 23, 2008. App. 1453.

Petitioner's PCR application dated June 23, 2008 was found in the contents of the Abbeville County Clerk of Court's entire file for Petitioner's case. App. 1429-1450. The Clerk neither made a notation on this document of when it was received, nor did the Clerk

save Petitioner's postmarked envelope mailing the application. The Clerk did not attach or staple Petitioner's postmarked envelope mailing the PCR application to the application as the Clerk did with almost every other piece of correspondence sent to the Clerk's office by Petitioner. App. 1325, ll. 10-16; 1382 -1385; 1405-1407; 1408-1409; 1425-1426; 1456-1457.

The only evidence is that Petitioner mailed his application on June 23, 2008 to the Abbeville County Clerk of Court and this application was found in the Clerk of Court's file. A document is filed "when delivered to and received by the proper officer." Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001). As such, Petitioner did file his PCR application with the Abbeville County Clerk of Court before the statute of limitations expired on August 4, 2008. The PCR court erred in dismissing Petitioner's PCR application with prejudice where Petitioner did file his application prior to the expiration of the statute of limitations.

Alternatively, the statute of limitations should be equitably tolled where Petitioner mailed his application to the Abbeville County Clerk of Court on June 23, 2008 before the statute of limitations expired but his application was defective because it was not notarized.

The doctrine of equitable tolling has been summarized as follows:

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

Equitable tolling has been deemed available where—

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

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

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

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

Pelzer v. State, 378 S.C. 516, 521, 662 S.E.2d 618, 620-21 (Ct. App. 2008) (emphasis added).

Again, the only evidence is that Petitioner mailed a copy of his PCR application dated June 23, 2008 to the Abbeville County Clerk of Court on June 23, 2008. This application was found in the Clerk's file with no notation on the document of when it was received. The Clerk also apparently did not save the Petitioner's postmarked envelope sending this application.

The Clerk subsequently informed Petitioner in a letter dated August 10, 2009 that his PCR application was not properly executed because it was not notarized. App. 1428. Petitioner thereafter filed a properly executed PCR application with the Abbeville County Clerk of Court on September 28, 2009. App. 1273-1285.

Where Petitioner sent his PCR application to the Abbeville County Clerk of Court within the statute of limitations period but this application was defective and he filed a corrected application outside of the limitations period, the doctrine of equitable tolling should apply.

Moreover, Petitioner actively pursued his judicial remedies and did not sit on his rights. After he mailed his PCR application on June 23, 2008, Petitioner followed up with the Abbeville County Clerk of Court on May 30, 2009 inquiring about the status of his PCR application since he had not heard anything from the court. App. 1456. When Petitioner was advised by the Clerk on June 12, 2009 that it did not have a PCR case filed on his behalf, Petitioner then filed an affidavit with the court on July 13, 2009 averring that he had originally mailed his application on June 23, 2008 and asked that his application be filed by the Clerk. App. 1452-1454.

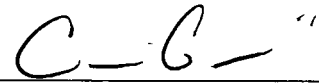
When Petitioner was then later notified by the Clerk on August 10, 2009 that his application was not properly notarized, he immediately took steps to have his application properly notarized and filed. App. 1411-1428.

Petitioner exercised due diligence in preserving his legal rights and it is therefore appropriate in this case to equitably toll the statute of limitations. For the foregoing reasons, the PCR court's dismissal with prejudice of Petitioner's PCR application for failure to comply with the statute of limitations should be reversed.

**CONCLUSION**

Based upon the foregoing reasons, Petitioner Shondray Lamont Martin requests that his Petition for Writ of Certiorari be granted with the ultimate relief of a reversal of the PCR court's dismissal of his PCR application for failure to comply with the statute of limitations. The case should then be remanded for a full evidentiary hearing on whether Petitioner is entitled to post-conviction relief.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of November, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Abbeville County  
R. Lawton McIntosh, Circuit Court Judge

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SHONDRA Y LAMONT MARTIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

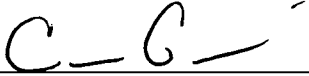
RESPONDENT.

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CERTIFICATE OF SERVICE


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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Shondray Lamont Martin, #222785 McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 25th day of November, 2013.

  
Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day  
of November, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.