

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No.: 2015-001355

MICHAEL T. BARNES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

P.O. Box 11549
Columbia, SC 29211
(803) 734-4124

ATTORNEYS FOR RESPONDENT

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SC SUPREME COURT

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QUESTION PRESENTED

Did the PCR correctly deny Petitioner a hearing and appointment of counsel where Petitioner failed to timely file his application with the Charleston County Clerk of Court's Office within the statute of limitations as prescribed by S.C. Code Ann. § 17-27-45(A)?

STATEMENT OF THE CASE

Petitioner (Michael T. Barnes) was indicted at the April 2006 term of the Charleston County Grand Jury for murder (2006-GS-10-2169) and Attempted Armed Robbery (2006-GS-10-2170). Martha K. Runey, Esquire and Beattie Butler, Esquire represented Petitioner. On November 1-3, 2006, Petitioner proceeded to trial and was found guilty as indicted. The Honorable R. Markley Dennis, Jr. sentenced him to confinement for thirty (30) years for murder and fifteen (15), consecutive, for Attempted Armed Robbery.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed his convictions and sentences. State v. Barnes, Op. No. 2009-UP-516 (Filed November 12, 2009). The Remittitur was issued on December 1, 2009.

Petitioner subsequently filed an application for post-conviction relief on January 7, 2011. Respondent filed a Return and Motion to Dismiss on March 24, 2011, stating that Petitioner filed his application thirty-seven (37) days after the one-year statute of limitations had expired pursuant to S.C Code § 17-27-10 -160. On March 31, 2011, the Honorable Kristi L. Harrington issued a Conditional Order of Dismissal, giving Petitioner 20 days from the date of proof of service to show why the Order should not become final. Petitioner issued a letter, construed as a response to the Conditional Order of Dismissal, on April 11, 2011. On May 20, 2015, the Honorable R. Markley Dennis, Jr. issued a Final Order of Dismissal. On October 7, 2015, Petitioner filed a Petition for Writ of Certiorari to this Court. This Return follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. The PCR court correctly denied Petitioner a hearing and appointment of counsel where Petitioner failed to timely file his application with the Charleston County Clerk of Court's Office within the statute of limitations as prescribed by S.C. Code Ann. § 17-27-40 and -45(A).

Petitioner asserts the PCR court erred in not granting Petitioner a hearing and appointment of counsel because Petitioner claims he presented issues beyond his control concerning whether equitable tolling applied to the statute of limitations to render his application timely filed. This argument is without merit.

S.C. Code Ann. § 17-25-40 states, “[a] proceeding is commenced **by filing an application** verified by the applicant with the **clerk of the court** in which the conviction took place.” (emphases added). S.C. Code Ann. § 17-27-45(A) states, “[a]n application for relief filed pursuant to this chapter **must 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.” (emphases added).

Additionally, under South Carolina law, mailing does not constitute filing. Mailing of a petition for post-conviction relief does not constitute filing, for statute of limitations purposes. Gary v. State, 347 S.C. 627, 557 S.E.2d 662 (2001). “When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer.” Gary at 629, 557 at 663. Moreover, “statutes of limitations are not simply technicalities, but are fundamental to a well-ordered judicial system.” Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008).

Further, “[e]quitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations. “Equitable tolling is reserved for extraordinary circumstances.”” Id. (quoting Hooper v. Ebenezer Senior Svcs. and Rehabilitation Ctr., 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct.App.2008)).

Nevertheless, “[e]quitable 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.”

Pelzer at 521, 662 at 620-21.

In this case, Petitioner asserts the statute of limitations should be equitably tolled because the circumstances in Petitioner’s case prevented him from timely filing. This argument is in error. Petitioner had from December 1, 2009, the date on which the Remittitur was issued, to file a timely PCR application. Petitioner claims, in his response to the Conditional Order of Dismissal, that he attempted to file his PCR application on November 10, 2010, very close to the 1-year deadline. He also claims this envelope was sent back to him because it weighed more than the prison mailroom standards. Likewise, Petitioner asserts he was under “lockdown” until November 18, when he took his envelope back to the mailroom. Further, Petitioner claims his application was returned from the clerk of court on November 29, 2010 because it was the wrong application form. While Petitioner lastly claims he completed the correct form and mailed it within a few days, this application was not filed with the Charleston County Clerk of Court’s Office until January 7, 2011, over a month after he claims he mailed his completed application.

Respondent submits Petitioner is not entitled to equitable tolling, as he waited over 11 months from the issuance of the Remittitur to even begin the PCR process. Additionally, Petitioner waited over one month after receiving the correct form from the Charleston County Clerk of Court's Office to properly file the PCR application. Most importantly, Petitioner has failed to provide any credible proof that he diligently pursued his judicial remedies in this case. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application). Petitioner has simply failed to meet his burden of proof in this case.

Further, this is not a case in which extraordinary circumstances prevented Petitioner from filing despite his diligence. This is a case where Petitioner neither actively pursued judicial remedy by filing a defective pleading, as he never filed a pleading under Gary, nor was tricked or induced by Respondent into allowing the filing deadline to pass. Lastly, this is not a case where Petitioner was unable to obtain vital information bearing on the existence of his claims. Simply put, this case does not warrant equitable tolling of the statute of limitations.

CONCLUSION

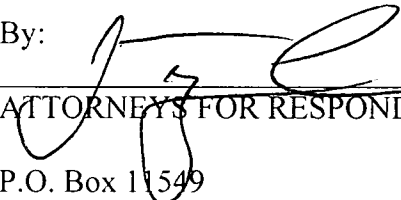
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General
SC Bar # 78871

By:



ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

February 2, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

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SC SUPREME COURT

MICHAEL T. BARNES,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 2nd day of February, 2016.



ELIZABETH McCLELLAN
LEGAL ASSISTANT



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SC SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

February 2, 2016

The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

Re: Michael T. Barnes v. State of South Carolina
Appellate Case No. 2015-001355
Lower Court Case No. 2011-CP-10-0146

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Rutledge Johnson
Assistant Deputy Attorney General
SC Bar No. 78871

JRJ/em
Enclosures

cc: Robert M. Pachak, Esquire
Trisha Allen, Victim Services