

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

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JUN 23 2016

SC SUPREME COURT

DYZSHON R. BOYKINS,

PETITIONER/RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2015-002513

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

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### QUESTION PRESENTED

Whether the PCR court properly denied the State's motion to dismiss Respondent's<sup>1</sup> application for post-conviction relief where the PCR court recognized the doctrine of equitable tolling to excuse Respondent's filing of his application for post-conviction relief beyond the statute of limitations where Respondent did not have access to the application and was unable to timely file the application due to being on continuous lockdown in the South Carolina Department of Corrections for reasons beyond Respondent's control?

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<sup>1</sup> Respondent is officially designated "Petitioner-Respondent" in this appeal. For ease of reference, he is referred to throughout this Return as "Respondent."

## STATEMENT OF THE CASE

On the afternoon of December 28, 2010, the South Carolina Credit Union in Orangeburg County, South Carolina was robbed. App. 7, ll. 5 – 7. An individual came into the bank, presented a firearm, and took money. App. 7, ll. 8 – 9. The police printed photographs from the video footage from the bank cameras, which showed the individual's face. App. 7, ll. 9 – 12.

In February of 2011, Travis Green spoke with police. App. 7, ll. 16 – 19. Green gave a statement saying that he knew Respondent and had “some conversations with him shortly afterward where he had admitted to the bank robbery.” App. 7, ll. 16 – 19. Green told police that he had seen the still photographs of the bank robbery published in the local newspaper and had recognized Respondent. App. 7, ll. 19 – 21. Green also “provided information that [Respondent] was down in Georgia” at the time Green gave the statement to police. App. 7, ll. 21 – 22.

Based on Green's information, the police developed a photographic line-up with Respondent's photograph. App. 7, ll. 22 – 24. One of the bank tellers identified Respondent as the individual who came in and robbed the bank on December 28, 2010. App. 7, ll. 22 – 24. In August of 2011, Respondent was arrested in Georgia and brought back to Orangeburg to be served with a warrant for armed robbery. App. 8, ll. 1 – 3.

On November 7, 2011, the Orangeburg County Grand Jury indicted Respondent for armed robbery and possession of a weapon during commission of a violent crime. App. 71. On February 11, 2013, Respondent waived presentment to the Orangeburg County Grand Jury and pled guilty to entering a bank with the intent to steal. App. 4, ll. 16 – 19. Mark Wise represented Respondent. App. 1. Don Sorenson represented the State. App. 1.

Judge Griffith sentenced Respondent to seven years' imprisonment. App. 16, ll. 11 – 16. Respondent did not appeal his conviction and sentence.

On June 30, 2014, Respondent filed a PCR application alleging counsel failed to assist in preparing a defense for trial and misrepresented the total incarceration time Respondent would serve by pleading guilty. App. 19. On February 20, 2015, the State filed its return and partial motion to dismiss. App. 28. The State argued that Respondent's PCR application "should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act," specifically, for filing his application "after the statutory filing period had expired." App. 29; S.C. Code Ann. § 17-27-45(a) (2003).

An evidentiary hearing was held before the Honorable Maité Murphy on May 22, 2015. App. 33. Jonathan D. Waller represented Respondent. J. Clayton Mitchell represented the State. App. 33.

At the start of the hearing, the State made a partial motion to dismiss Respondent's application. App. 35, ll. 14 – 17. The State asserted that Respondent filed his PCR application "outside the one-year statute of limitations." App. 35, ll. 14 – 17. Respondent pled guilty in February of 2013 and filed his application for post-conviction relief in June of 2014. App. 35, ll. 14 – 18. The State was prepared to go forward on the allegation that defense counsel was ineffective for failing to file an appeal. App. 35, ll. 18 – 22. However, the State requested that the remaining allegations of ineffective assistance of counsel be dismissed. App. 35, ll. 18 – 22.

Respondent explained to the court that he did not have access to an application for post-conviction relief due to "various lock-downs" while he was incarcerated in the Department of Corrections. App. 36, ll. 4 – 6. Respondent stated that after pleading guilty, he was immediately transported to Kirkland where he remained for about forty days. App. 36, ll. 19 – 23. Respondent asserted that Kirkland was on "lock down" for twenty-three hours per day and the inmates did not

have access to the law library. App. 37, ll. 1 – 4. Further, Respondent did not have access to an application for post-conviction relief. App. 37, ll. 8 – 10.

Respondent was then transported to the Ridgeland facility in Jasper County, South Carolina. App. 37, ll. 13 – 16. Respondent explained that Ridgeland is a “level two” facility where inmates are restricted in a fenced area and cannot go outside of that area. App. 37, ll. 21 – 15. When Respondent arrived, the inmates had already been on “lock down” due to a riot that occurred prior to Respondent’s arrival. App. 38, ll. 1 – 3. The “lock down” lasted about “three months.” App. 38, ll. 9 – 11. Because the inmates could not leave their rooms, Respondent did not have access to the law library or an application for post-conviction relief. App. 38, ll. 1 – 8.

The next facility “lock down” began on May 13, 2013, and lasted for fifty days. App. 38, ll. 16 – 19. Respondent explained that the kitchen inside the facility was under reconstruction, and inmates were required to stay “in the dorm.” App. 38, ll. 16 – 19. Respondent did not have access to the law library or an application for post-conviction relief during this period. App. 38, ll. 20 – 24.

Respondent further contended:

“Well, the first time that I wasn’t on lockdown was three months after I was [in] Ridgeland . . .”

App. 39, ll. 9 – 12. Respondent asserted that there was another “lock down” from January through February of 2014 because “a gun was discovered on the yard.” App. 39, ll. 19 – 21. The deadline for filing an application for post-conviction relief was February 11, 2014 – during the lockdown from January through February of 2014. App. 39, l. 24 – App. 40, l. 1.

At the end of Respondent's testimony explaining the fact that he had no access to an application for post-conviction relief, PCR counsel for Respondent concluded:

“Your Honor, just briefly with respect to the motion to dismiss, while I understand the State's position that Mr. Boykins was competent throughout the entire time, **he was physically precluded from – prohibited from being able to file anything. He was on lockdown not – without access to the actual application itself.** It is – I don't think it's reasonable to expect someone to be able to file something that they don't physically have access to or be able to actually file it, so we would ask you to deny the motion to dismiss based on those grounds.”

App. 46, ll. 11 – 20 (emphasis added).

#### **PCR Court's Ruling on the State's Motion to Dismiss**

The PCR court denied the State's motion to dismiss Respondent's application. App. 46, ll. 21 – 25. The court ruled:

“Based upon the testimony and the record, I am going to deny the motion to dismiss. It appears that he was not advised of his right to appeal by either the Court or his attorney, so I will . . . not grant the motion to dismiss.”

App. 46, ll. 21 – 25.

The court concluded:

“Based upon his inability to have access and he wasn't properly advised, so now he can proceed on his other claims, on his ineffective assistance claim.”

App. 47, ll. 10 – 12.

## **Order of Dismissal**

On August 18, 2015, the PCR court issued an order denying the merits of Respondent's application. App. 62. However, the judge wrote that Respondent "was not barred by the statute of limitations and that the time limits should be tolled due to Applicant's circumstances of incarceration." App. 66.

The PCR judge further wrote that there "was no evidence or testimony presented that Applicant requested Counsel file an appeal on Applicant's behalf or that there was a reason for Counsel to believe that Applicant wanted to appeal the conviction or sentence." App. 66. The judge found that there was "no merit to an appeal." App. 66.

The State appealed the PCR court's ruling that Respondent was not barred by the statute of limitations and the time limit for filing the application for post-conviction relief should be tolled. On April 21, 2016, the State filed a petition for writ of certiorari. This return to the State's petition follows.

## ARGUMENT

The PCR court properly denied the State's motion to dismiss Respondent's application for post-conviction relief where the PCR court recognized the doctrine of equitable tolling to excuse Respondent's filing of his application for post-conviction relief beyond the statute of limitations where Respondent did not have access to the application and was unable to timely file the application due to being on continuous lockdown in the South Carolina Department of Corrections for reasons beyond Respondent's control.

S.C. Code Ann. § 17-27-45(a) of the Uniform Post-Conviction Procedure Act provides:

“An 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.”

However, the doctrine of equitable tolling, which stops the running of the statute of limitations, has been deemed available “where extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.” Pelzer v. State, 378 S.C. 516, 521, 662 S.E.2d 618, 620 (Ct. App. 2008).

Although tolling of the statute of limitations has only been upheld in PCR cases where the applicant's mental incompetency prevented the timely filing of the PCR application, the appellate court's “critical inquiry” was “whether the circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence.” Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (citing Com. v. Carmeal, 274 S.W.3d 420 (Ky. 2008)). Further, the appellate court considers whether “the claimant failed to exercise due

diligence in preserving his legal rights” Pelzer, 378 S.C. at 520 – 521, 662 S.E.2d at 620 (quoting Hopkins v. Floyd’s Wholesale, 299 S.C. 127, 129, 382 S.E.2d 907, 908 (1989)).

“When considering the State’s motion for summary dismissal of an application for PCR, a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.” Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000)).

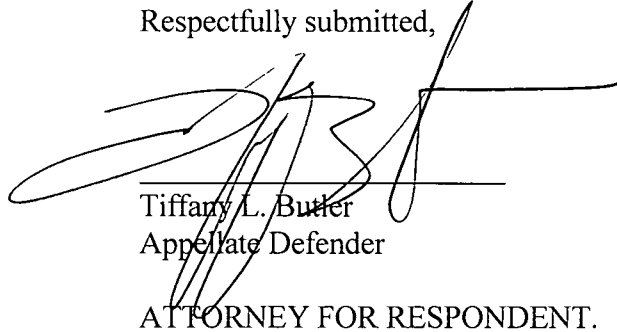
Here, the PCR court correctly ruled that Respondent “was not barred by the statute of limitations” and that the one-year time limit should be tolled due to Respondent’s circumstances of incarceration. App. 66. Being on continuous lockdown in the individual facilities of the Department of Corrections, and being on lockdown at the critical time the PCR application was **due to be filed**, was beyond Respondent’s control. There was no evidence presented that any of the instances where the inmates were restricted to only their rooms was due to Respondent’s actions. Further, the PCR judge stated that Respondent “wasn’t properly advised” by plea counsel. App. 47, ll. 10 – 12.

Because Respondent did not have access to a PCR application because he was continuously on lockdown, was not properly advised by plea counsel, and was not negligent in failing to timely file his application, the PCR court correctly tolled the one-year statute of limitations and granted Respondent’s PCR hearing.

CONCLUSION

For the reasons argued above, Respondent Dyzshon Boykins respectfully requests this Court to deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tiffany L. Butler', is written over a horizontal line. The signature is stylized and somewhat cursive.

Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 23rd day of June, 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Orangeburg County  
Maite Murphy, Circuit Court Judge

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DYZSHON R. BOYKINS,  
PETITIONER/RESPONDENT,  
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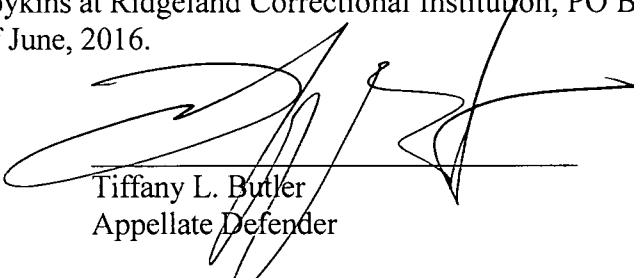
APPELLATE CASE NO. 2015-002513

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CERTIFICATE OF SERVICE

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I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Clay Mitchell, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Dyzshon R. Boykins at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 23rd day of June, 2016.



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Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 23rd day  
of June, 2016.

Christian Ford (L.S.)

Notary Public for South Carolina

My Commission Expires: March 1, 2026