

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAY 11 2017

COUNTY OF GREENVILLE
Capital-PCR Case, Court of Common Pleas

S.C. SUPREME COURT

Circuit Court Case No. 2014-CP-23-04632

C/A No. _____

BRAD K. SIGMON Appellant-Petitioner.

vs.

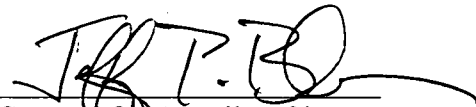
STATE OF SOUTH CAROLINA Respondent-Defendant.

NOTICE OF APPEAL

Appellant-Petitioner Brad K. Sigmon, hereby files this Notice of Appeal, appealing from the Order of the Hon. J.C. Nicholson, Jr. dismissing Appellant's Post-Conviction Relief (PCR) application without a hearing in this case.

The lower court denied and dismissed the Application for PCR in a written Order (copy attached) dated February 10, 2017, and received by Appellant's counsel on March 6, 2017. On March 15, 2017, Appellant timely filed a Motion to Reconsider, Alter, or Amend the Judgment under Rule 59(e), SCRPC. In a written Order dated April 17, 2017 (copy attached), which was received by Appellant's counsel on May 5, 2017, the lower court denied the Rule 59(e) Motion. This Notice of Appeal follows. A Statement of Explanation, as is required by Rule 243(c), SCACR, is also attached.

Respectfully submitted,



Counsel for Appellant Sigmon

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Dated: May 11, 2017

M. Celia Robinson
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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
BRAD K. SIGMON, #6008)
Appellant-Petitioner)
)
VS:)
)
STATE OF SOUTH CAROLINA,)
RESPONDENT)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT
Case No. 2014-CP-23-04632

CERTIFICATE OF SERVICE

I do hereby certify that I have served the following documents, as set forth below and herein, upon the attorney for the Respondent, by sending them via electronic mail to the address specified, and by depositing a copy of same in the United States Mail, first class, postage prepaid, on May 11, 2017, and filed via U.S. Mail on the same date with the Greenville County Clerk of Court, and addressed as follows to the attorney for Respondent:

Document(s): [1] Notice of Appeal
[2] Statement of Explanation per Rule 243(c), SCACR

Served Upon:

Melody J. Brown
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211
e-mail: mbrown@scag.gov

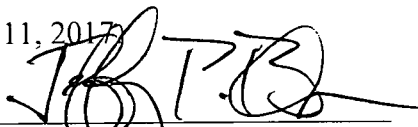
Paul B. Wickensimer
Greenville County Clerk of Court
ATTN: Common Pleas (PCR)
Greenville County Courthouse
305 E. North Street
Greenville, S.C. 29601

RECEIVED

MAY 11 2017

S.C. SUPREME COURT

This day of May 11, 2017



Jeffrey P. Bloom
Counsel for Appellant-Petitioner

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2014CP2304632

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 MAR 3 AM 10 02

Brad Sigmon vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

- ACTION DISMISSED (CHECK REASON):**
SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
 Rule 12(b), SCRPC; Rule 41(a),

- ACTION STRICKEN (CHECK REASON):**
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
 Rule 40(j) SCRPC; Bankruptcy;

- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - J C Nicholson, Jr

This judgment was entered on the . and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Jeffrey P. Bloom P.O.Box 5885 Columbia, SC
29250-5885

Melody Jane Brown PO Box 11549 Columbia, SC
29211-1549

Mary Cecelia Robinson 300 White Falls Drive
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

BRAD K. SIGMON, #6008,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

C/A No. 2014-CP-23-04632

CAPITAL PCR

ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT
AND DISMISSING ACTION AS
SUCCESSIVE AND BARRED BY THE
STATUTE OF LIMITATIONS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL S. MICHELSIMER
2017 FEB 28 10 02

Presently pending before this Court is Respondent's motion for summary judgment. This Court resolves that the above captioned action is barred under the successive application prohibition and time limitations of the South Carolina Post-Conviction Relief ("PCR") Statute, and that Applicant has failed to show any viable exception to the procedural bars. Therefore, pursuant to S.C. Code § 17-27-70 (c), this Court grants the motion for summary judgment.

Relevant General Procedural History

A full procedural history of the matter is included in Respondent's Return and Motion to Dismiss filed September 26, 2014, and is not repeated in full here. For purposes of this Order, the undersigned will summarize the prior proceedings. In July 2002, a Greenville County jury convicted Applicant of two counts of murder and burglary first degree. For the murders, Applicant was sentenced to death. His convictions and sentence were affirmed on direct appeal. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005), *reh'g denied* January 13, 2006, *cert. denied*, 548 U.S. 909 (2006). In October 2006, Applicant filed his first PCR action. The undersigned was assigned jurisdiction over the matter and subsequently appointed William H. Ehliès, Esq., and Teresa L. Norris, Esq., as PCR counsel for Applicant. PCR counsel amended the application and moved for summary judgment. An evidentiary hearing was convened on

August 4, 2008, after Applicant's motion for summary judgment was denied. Applicant immediately rested on the depositions and the arguments presented in the summary judgment motion, and did not present any witnesses or other evidence. Respondent moved for a directed verdict which was denied. Respondent thereafter called Frank L. Eppes, Esq., former trial counsel for Applicant. The undersigned issued a written Order of Dismissal on July 14, 2009, filed July 20, 2009. Applicant's appeal from the order resulted in a published opinion affirming the denial of relief. *Sigmon v. State*, 403 S.C. 120, 742 S.E.2d 394 (2013), *cert. denied*, 134 S.Ct. 646 (2013).

On August 21, 2013, Applicant filed a federal habeas corpus action pursuant to 28 U.S.C. § 2254. C/A No. 8:13-cv-01399-RBH-JDA (Federal District Court, District of South Carolina). On August 21, 2014, while the federal action was pending, Applicant filed the above captioned PCR action.¹ The federal action was stayed pending resolution of the instant action.

The Instant Action

By Order dated September 25, 2014, the Supreme Court of South Carolina appointed the undersigned to hear the action. By motion filed September 26, 2014, Respondent moved to dismiss as successive and untimely. Applicant opposed and moved to stay the action pending resolution of *Robertson (James D.) v. South Carolina*, Appellate Case No. 2012-205909 (S.C.Sup.Ct.). The undersigned heard arguments on the motions on February 12, 2015. By Order dated April 13, 2015, filed April 24, 2015, this Court denied Applicant's motion to stay the proceedings, and denied Respondent's motion to dismiss as *per se* successive and untimely. However, this Court allowed Respondent the opportunity to seek summary judgment.

¹ Applicant was aided by counsel, Jeffrey P. Bloom, Esq., in filing this PCR action. Mr. Bloom, along with M. Celia Robinson, Esq., was subsequently formally appointed on October 6, 2014.

Respondent filed its motion for summary judgment July 2, 2015, and Applicant responded. This Court heard arguments on Respondent's motion on August 12, 2015. The matter was thereafter informally held in abeyance in anticipation of a ruling in *Robertson*.

The Supreme Court of South Carolina decided *Robertson* on December 14, 2016. By letter dated that same day, Respondent advised this Court of the issuance of the opinion. Respondent also advised *Robertson* did not create a new exception for capital cases in regard to the procedural bars relied upon in this action, and that it relied on the arguments previously presented in the motion for summary judgment. On January 13, 2017, Applicant submitted a supplemental memorandum in support of an evidentiary hearing to address the *Robertson* decision. Applicant agreed no new exceptions were authorized. However, Applicant submitted *Robertson* allows him to avoid the successive application and time bars on a claim *trial counsel* was not statutorily qualified. Respondent replied *Robertson* has no such application as the narrow exception in *Robertson* speaks to statutory qualifications of *PCR counsel*. On January 20, 2017, this Court held a hearing on Applicant's assertion of *Robertson*'s applicability to his case. The matter is now ripe for determination.

Ruling on Respondent's Motion for Summary Judgment

Respondent argues this action may be dismissed without an evidentiary hearing as the record before the Court conclusively shows the actions should be dismissed as successive and untimely. (Motion for Summary Judgment, p. 2). This Court agrees.

"An individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal." *Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002). See also S.C. Code §§ 17-27-45 and 90. "In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application

could not have been raised in the previous application.” *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008). “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.” *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29, 36 (2016) (quoting *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013)).

None of the present five claims fit this narrow exception. Most of the claims are squarely record based (referencing events at trial) and none were somehow unavailable such that they could not have been raised during Applicant’s first PCR action.² Applicant concedes as much, but argues ineffective assistance of PCR counsel as cause to excuse the procedural bar prohibiting a successive application: “These same grounds were previously not raised by state-post conviction counsel due to ineffective assistance of counsel, per *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d. 272 (2012).” (2014 Application, p. 11). Applicant argued in his motion for stay and response in opposition to summary judgment “hopefully Robertson will address” whether he could rely upon same. (August 12, 2015 Transcript, p. 31). This Court finds Petitioner has failed to show sufficient cause to avoid the procedural bars.

It has long been a settled principle in our state jurisprudence that ineffective assistance of PCR counsel alone does not demonstrate “sufficient reason” as to why available claims were not asserted to overcome the strong successiveness bar. *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). The Supreme Court of South Carolina further found, in *Kelly v. State*, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013), that *Martinez*, which applies to federal habeas actions, did

² In fact, two the allegations in Applicant’s first claim raised (the Dr. Martin allegation and the video allegation), and one (the video allegation) was actually decided in the prior PCR action. (See Respondent’s Motion for Summary Judgment, pp. 12-14, with supporting attachments).

not provide a basis for another “bite at the apple” in state litigation: “... [w]e hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not application to state post-conviction relief actions.” In *Robertson*, the Court set out: “Despite the express holding in *Aice*, Petitioner argues that *Martinez* excuses the procedural bar of section 17-27-90.” *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29, 33 (2016). The Court rejected the argument and reaffirmed both *Aice* and *Kelly*. *Id.*, 795 S.E.2d at 33-34 and 37 (“We find that Petitioner has offered no legitimate legal or policy reason to depart from our holding in *Kelly*,” extended *Kelly* to capital cases specifically, and resolving “*Martinez* does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.”).

Applicant agrees with Respondent that *Robertson* affirmed that *Martinez* does not alter or affect the procedural bars set out in the PCR statute. (January 13, 2017 Supplemental Memorandum, p. 3). See also *Robertson*, 795 S.E.2d at 34 (“because the PCR Act is a legislatively created scheme, any post-*Martinez* change to PCR proceedings must be instituted by the Legislature”). Applicant contends, however, that the *Robertson* decision supports his request for a successive application on the narrow issue of whether *trial counsel* were qualified under the state statute for capital trial counsel. (January 13, 2017 Supplemental Memorandum, pp. 6-8).³ He relies upon that fact that *Robertson* allowed a successive action on the sole issue of the qualification of *PCR counsel* and prejudice therefrom. *Id.*

³ In his supplemental memorandum, Applicant references an amendment that would raise a challenge to the state statutory qualification of both trial attorneys. Respondent opposes the amendment. This Court need not rule on the amendment as Applicant has not moved to amend or offered an amendment. Further, Applicant stated at the January 20, 2017 hearing that a decision whether to amend had not been made. (January 20, 2017 Transcript, p. 26). The Court need not address an issue not raise, but would note, in this instance, the amendment would not affect the analysis as such an allegation against either or both trial counsel would have been available to prior PCR counsel. The result would be the same. The allegation would be barred as successive and untimely.

Respondent submits Applicant's reliance is misplaced for four distinct reasons, but first and foremost, because the *Robertson* exception is recognized only because a second action was the first opportunity for the applicant to challenge former PCR counsel's qualifications. This Court agrees.

The logic in *Robertson* cannot be extended to allegations of trial counsel qualifications. To do so would omit the critical consideration of whether the trial counsel issue could have been raised in the previous PCR action. In fact, it was the inability to raise the PCR counsel qualification issue that the Court found dispositive in *Robertson*. 795 S.E.2d at 35 ("We believe it is unreasonable to think that an indigent PCR applicant, who relies on the State to appoint qualified counsel, would have the knowledge to question counsel's qualifications at the onset of the proceeding."). Moreover, the Court noted that the qualification challenge went only to establishing deficient performance, not prejudice. *Robertson*, 795 S.E.2d at 37 ("non-compliance with section 17-27-160(B) constitutes deficient performance per se" however, even if shown, "a PCR applicant would still maintain the significant burden of proving that he was prejudiced by counsel's lack of qualification"). A claim against trial counsel's qualification under a state statute is in a decidedly different posture.

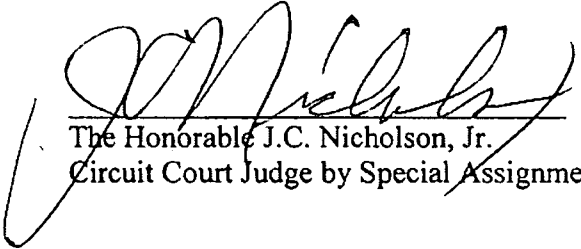
Challenges to trial counsel's deficient performance, and resulting prejudice, are made in an applicant's one PCR action as a matter of right. See generally *Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) ("In PCR, the focus usually is upon alleged errors made by trial or plea counsel. Therefore, when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel."). See also *Strickland v. Washington*, 466 U.S. 668 (1984) (to demonstrate ineffective assistance of counsel, a petitioner must show that (1)

counsel's errors were so serious that her performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment to the United States Constitution and (2) petitioner was prejudiced as a result). If one should attempt to apply the logic of *Robertson's* narrow exception to claims regarding trial counsel qualification, it becomes clear that the applicant could not prove prejudice as that was the purpose of the first PCR hearing. This Court finds that Applicant has not shown the narrow exception of *Robertson* is applicable.⁴

THEREFORE, based on the foregoing, this Court grants Respondent's motion for summary judgment and dismisses the action as successive and barred by the statute of limitations.

IT IS SO ORDERED.

February 10, 2017.
Charleston, South Carolina.



The Honorable J.C. Nicholson, Jr.
Circuit Court Judge by Special Assignment

⁴ This Court notes that Respondent attached portions of a deposition in the Reply to the Supplemental Memorandum that support that prior PCR counsel questioned Mr. Abdalla about his prior felony experience before the capital trial in July 2002. Not only do these pages indicate that PCR counsel did investigate, the responses tend to support qualification under the statute. In his direct testimony, Mr. Abdalla stated he was qualified with five (5) years of experience in "serious felony charges," referencing his six (6) years with the solicitor's office before going to the public defender's office in Spartanburg, which was before going to the Greenville County public defender's office prior to being assigned this case. (Reply Attachment, Abdalla Deposition, pp. 5-8). In cross-examination, Mr. Abdalla revealed he had a case in 1999 or 2000 in Spartanburg that was "going to be a capital case" but plead out. (Attachment, Abdalla Deposition pp. 45-46). Moreover, again as Respondent points out in their Reply, both well-qualified PCR counsel were aware of the state statutory requirement for trial counsel from their work in other cases. See, for example, *Thomas Treshawn IVEY, Petitioner - Appellant, v. William D. CATOE, Commissioner, South Carolina Department of Corrections; Charles M. Condon, Attorney General, State of South Carolina, Respondents - Appellees.*, 2001 WL 34379133 (4th Cir. Nov. 14, 2001), Brief of Appellant, at 55-56. There is nothing in this record to indicate the issue or issues on qualification of trial counsel could not have been raised in the prior proceeding.

Brad K. Sigmon, #6008

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 12(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

FILED - CLERK OF COURT
 PAUL WICKENS
 GREENVILLE CO. SC
 2017 MAY -3 PM 12:37

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Applicant's Motion to Reconsider the Court's Order entered on February 10, 2017 is respectfully denied without a rehearing.

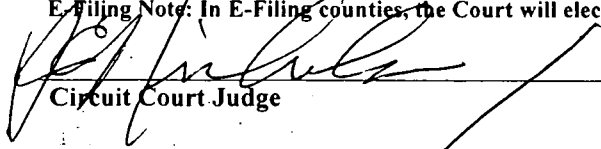
ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount to be Enrolled (List amount(s) below)
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

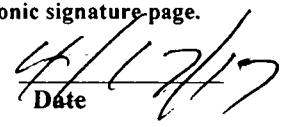
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.



Circuit Court Judge

2117

Judge Code



Date