THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2019-000529

ABDIYYAH BEN ALKEBULANYAHH,
AKA TYREE ROBERTS..PETITIONER,

v.

STATE OF SOUTH CAROLINA.................................RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is an indigent, death-sentenced inmate who has spent nearly a decade diligently attempting to obtain a new PCR hearing on the (uncontestable) basis that his initial post-conviction relief ("PCR") counsel failed to meet the statutory qualification requirements of S.C. Code § 17-27-160(B). On December 14, 2016, this Court held in *Robertson v. State* that a capital PCR applicant's allegation that "prior PCR counsel were not qualified under section 17-27-160(B) . . . constitutes a 'sufficient reason' to permit a successive PCR application." 418 S.C. 505, 516, 795 S.E.2d 29, 35 (2016). Prior to this Court's decision in *Robertson*, Petitioner challenged counsel's qualifications in this Court and in the Circuit Court via four different procedural mechanisms, including a request for remand for additional PCR proceedings and a second-in-time PCR application. Each attempt was denied despite Petitioner's diligence and several other capital PCR applicants receiving hearings on the qualifications of their initial PCR counsel using the exact same procedural mechanisms. Specifically, at issue here is the lower court's decision to summarily dismiss Petitioner's second-in-time PCR application as untimely despite the fact that it was filed prior to this Court's decision in *Robertson*.

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) he 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 & RELEVANT FACTS

I. Trial Proceedings.

Petitioner, Abdiyyah Ben Alkebulanyahh,[1] was charged with two counts of capital murder in Beaufort County, South Carolina and was temporarily represented by attorneys Gerald Kelly and Sean Thornton. Prior to trial, Petitioner moved to represent himself and, after considering expert testimony that Petitioner was psychotic and lacked a rational understanding of the proceedings, Judge Daniel F. Pieper found that Petitioner was competent and allowed him to proceed *pro se.* App. 246. During the jury's deliberations at the guilt-or-innocence phase of the proceedings, Petitioner announced that – if convicted – he did not wish to be present for sentencing and he would be verbally disruptive if required to remain in the courtroom. App. 246. During the sentencing proceedings, Petitioner was verbally disruptive and Judge Pieper ordered Petitioner be shackled and placed in a glass-enclosed room at the back of the courtroom while Kelly and Thornton remained at counsel table (though they presented no evidence or argument) during the sentencing phase of the trial. App. 247-48. The jury deliberated approximately forty-five minutes before sentencing Petitioner to death. On direct appeal, appellate counsel raised a single issue – whether it was error for the trial judge to require Petitioner to be present at the penalty phase of the proceedings. *State v. Roberts*, 632 S.E.2d 871, 583 (S.C. 2007). This Court affirmed on July 24, 2006. *Id.* at 585.

II. Initial Post-Conviction Relief Action & Appeal

Petitioner then filed a *pro se* application for post-conviction relief ("PCR"). Attorneys Glenn Walters and Carl Grant were appointed by Judge Roger Young to serve as PCR counsel. *See* App. 249. PCR counsel conducted no investigation and filed an amended application raising

[1] Petitioner, formerly known as Tyree Roberts, legally changed his name in 1998 after "inventing" his own religion (a form of Black Judaism) and creating his own church.

a single claim for relief.[2] App. 249-50. The PCR hearing, conducted before Judge Young on October 13-14, 2008, consisted primarily of counsel calling Petitioner to the stand to state his grievances with his trial counsel. App. 249. On September 17, 2009, Judge Carmen Mullen signed without modification a state-drafted order denying post-conviction relief.[3] App. 250.

On March 5, 2010, this Court appointed attorney John H. Blume to represent Petitioner in connection with the post-conviction appeal. App. 250. Given the unusual procedural history of Petitioner's case to that point, Blume conducted some limited investigation revealing initial PCR counsel were not qualified to represent Petitioner under S.C. Code § 17-27-160(B). App. 249. Less than five months after his appointment, on July 21, 2010, Blume filed in this court a Motion to Remand for Additional Post-Conviction Proceedings ("Motion to Remand"), requesting additional PCR proceedings with qualified counsel. App. 245-59. The motion specifically alleged: "Petitioner's PCR counsel were not qualified to represent Petitioner in a capital post-conviction proceeding pursuant to the requirements of S.C. Code § 17-27-160(B)." App. 255-57. The State argued in its response to the Motion to Remand that even if PCR counsel were not qualified under the statute and were ineffective, "there is no basis for giving Petitioner a second bite at the [PCR] apple." App. 278-79. This Court summarily denied the motion on October 20, 2010. App. 312.

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[2] The issue asserted in the amended application was that the "trial judge failed to make the proper findings to determine if the applicant knowingly and intelligently understood the implications of proceeding *pro se*." App. 249. This claim, as pled by Walters and Grant, is not cognizable in a PCR proceeding. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (holding issues that could have been raised at trial or on direct appeal cannot be asserted in post-conviction absent a claim of ineffective assistance of counsel).

[3] For reasons that are not clear from the record, this Court reassigned the case to Judge Mullen on December 17, 2008, after the PCR hearing.

Petitioner continued his efforts to challenge PCR counsel's lack of qualification by filing a Petition for Writ of Certiorari, asking this Court to review his newly developed PCR claims, on February 17, 2011. App. 486-524. One of the issues presented in the petition was "Whether Petitioner was denied due process and equal protection of the law and is thus entitled to a new post-conviction proceeding where: (a) petitioner's PCR counsel were not qualified under S.C. Code § 17-27-160(B); [and] (b) PCR counsel were ineffective . . ." App. 492. Petitioner specifically asserted:

> It is uncontested that neither of petitioner's post-conviction relief (PCR) attorneys had either (1) previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings; or, (2) twelve hours of continuing legal education or professional training in capital appellate and/or post-conviction defense within two years of their appointment to represent petitioner in this case. The statutory language is clear and unambiguous. Therefore, because petitioner's court-appointed counsel did not meet the clear standard for appointment contained in S.C. Code § 17-27-160(B), petitioner's case should be remanded to the circuit court for the appointment of qualified counsel and additional post-conviction proceedings. There is no other remedy that would not effectively render the statutory qualifications a nullity.

App. 518. In its return to the petition for certiorari, the State asserted that Applicant was not entitled to a second PCR action despite his claim that PCR counsel were not qualified under the statute. App. 558-562. This Court summarily denied the petition for writ of certiorari on March 12, 2013. App. 585.

On February 18, 2011, Petitioner once again raised his PCR counsel's lack of qualifications in a Petition for Writ of Habeas Corpus filed in this Court's original jurisdiction. App. 314-406. In the habeas petition, Petitioner asserted "undersigned counsel [Blume] subsequently contacted both [initial PCR] attorneys and confirmed that they, in fact, did not have the experience set forth by the statute. Respondent does not contest that [PCR counsel] do not satisfy the criteria set forth in § 17-27-160(B)." App. 319. Petitioner's Petition for Writ of Habeas Corpus was summarily denied on March 12, 2013. App. 484.

III. Second-in-Time Post-Conviction Relief Proceedings

On September 24, 2014, this Court granted certiorari in *Robertson v. State* to determine whether, and under what circumstances, a death-sentenced inmate could file a successive PCR application. While *Robertson* was pending, Petitioner filed a second-in-time PCR application in the circuit court on November 24, 2014.[4] App. 1-6. The PCR application raised several claims for relief and stated those "grounds for relief were not included in the initial PCR application due to Applicant's initial PCR counsel's inexperience and lack of qualifications under the state PCR statute, S.C. Code § 17-27-160(B)." App. 5. On December 14, 2016, this Court decided *Robertson*, holding that a capital PCR applicant's allegations that "prior PCR counsel were not qualified under section 17-27-160(B) . . . constitutes a 'sufficient reason' to permit a successive PCR application." *Robertson*, 418 S.C. at 516, 795 S.E.2d at 35. After *Robertson*, the State filed a supplement to its earlier motion to dismiss Petitioner's PCR application asserting that Petitioner's PCR application should be dismissed because it was untimely despite being filed while *Robertson* was still pending. App. 122-30. Overlooking Petitioner's multiple attempts to remedy his initial PCR counsel's lack of qualifications, the State argued he should have filed a second-in-time PCR application before *Robertson* and "at least by July 21, 2011, 365 days after he was aware of the underlying facts for his claim that PCR counsel was not qualified." App. 127.

Judge Maite Murphy held a hearing on the State's motion to dismiss, App. 223-44, and dismissed Petitioner's application as untimely. App. 207-13. Petitioner filed a motion to alter or amend judgment, App. 214-17, which Judge Murphy also denied. App. 219-21. This appeal follows.

[4] Petitioner's federal proceedings have been stayed while the state courts resolve the issues raised in the second-in-time PCR application.

ARGUMENT

I. Petitioner is Entitled to a Hearing on the Statutory Qualifications of His Initial PCR Counsel Pursuant to *Robertson v. State.*

Pursuant to *Robertson*, where a capital PCR applicant alleges and raises a genuine issue of fact (as Petitioner did here) that "prior PCR counsel were not qualified under section 17-27-160(B)," the applicant "should be afforded a hearing on this limited issue [of qualifications]."[5] 318 S.C. at 516, 522, 795 S.E.2d at 35, 38. This Court has addressed the limited circumstances under which it is appropriate to dismiss a PCR application without a hearing on the merits and Petitioner's case does not fall within those circumstances.

> 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. When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. . . . 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, 795 S.E.2d at 36 (internal citations and quotations omitted).

Petitioner's second-in-time PCR application specifically alleged initial PCR counsel failed to meet the statutory qualification requirements of S.C. Code § 17-27-160(B). The State concedes "it is unclear from the record whether PCR counsel was properly qualified," creating a genuine issue of fact that entitles Petitioner to a hearing if the application is deemed timely. App. 128-29. For the reasons discussed below, 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

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[5] At least two other capital PCR applicants (James Robertson and Stephen Stanko) have been afforded a hearing to determine the qualifications of prior PCR counsel using this mechanism.

were not refuted by the record. Therefore, Petitioner was entitled to a hearing on the qualifications of his initial PCR counsel and the PCR court erred in dismissing his application.

II. Petitioner's Second-in-Time Application for PCR was Timely Filed and was the Proper Procedure for Raising Initial PCR Counsel's Failure to Meet the Statutory Qualification Requirements Under *Robertson*.

The PCR court erroneously dismissed Petitioner's second-in-time application as untimely, ignoring Petitioner's repeated and diligent attempts to raise the issue of his initial PCR counsel's qualifications before a remedy was first created in *Robertson* – including Petitioner filing the instant application *before* the decision in *Robertson. See* S.C. Code § 17-27-45(B) (requiring that claims filed based on a newly recognized right be "filed not later than one year after the date on which the standard or right was determined to exist"). The PCR court's ruling effectively penalizes Petitioner for being "right too soon."

This Court's decisions make clear that *Robertson* created a remedy that did not previously exist for capital petitioners alleging their initial PCR counsel were not qualified pursuant to the statute.[6] Three times in 2010, Petitioner alleged that his PCR counsel were not qualified and requested further proceedings with qualified PCR counsel. In response to each request, the State argued, and this Court agreed, that there was no PCR (or other) remedy for the lack of

[6] *Robertson* does more than simply create a remedy for an individual who had unqualified counsel. The decision also clarified the standard by which counsel's qualifications must be measured. In 2003, prior to initial PCR counsel's appointment, former Chief Justice Jean H. Toal sent a letter to all circuit court judges stating that anyone qualified to represent a defendant at a capital trial would also be qualified to represent a capital inmate in PCR. *Robertson* makes clear that qualification must actually be determined pursuant to S.C. Code § 17-27-160(B), not former Chief Justice Toal's letter. Though Petitioner consistently challenged his counsel's qualifications under the statute (not the letter), the State has argued counsel were qualified under the letter and this change in the law would have further excused any failure to previously challenge PCR counsel's qualifications. *See* App. 277, 559.

qualifications.[7] *See, e.g.*, App. 278-79 (asserting PCR counsel's failure to meet the statutory qualification requirement was "no basis for giving Petitioner a second bite at the [PCR] apple."). There is no reason to believe filing a second-in-time PCR application in 2010 would have led to a different result, especially when a motion to remand for further PCR proceedings was denied by this Court.

More than six years later, *Robertson* created the remedy Petitioner sought in 2010. Since *Robertson*, this Court has recognized two procedural mechanisms for challenging prior counsel's qualification: (1) a second-in-time PCR application in *Robertson*, and (2) a motion to remand for additional PCR proceedings in the case of Stephen Stanko.[8] Petitioner had tried to use this second method less than five months after discovery that his initial PCR counsel were not qualified by filing a (pre-*Robertson*) Motion to Remand. App. 245-75. If *Robertson* were not new, the Court would have granted Petitioner's Motion to Remand like it granted the petition to remand in *Stanko* under identical circumstances. Thus, this Court's denial of Petitioner's Motion to Remand demonstrates, contrary to the lower court's order, that *Robertson* created a new remedy allowing a PCR applicant to file a new PCR application alleging unqualified PCR counsel within one year of the *Robertson* decision. *See* S.C. Code 17-27-45(B).

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[7] The State continued to make the same argument before this Court until *Robertson* was decided. Thus, the State should be equitably estopped from now arguing Petitioner should have previously filed a second PCR application and raising the statute of limitations as a defense. *See Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 210, 417 S.E.2d 579, 582 (1992).

[8] In *Stanko v. State*, No. 2017-000211 (S.C. Dec. 14, 2017), this Court remanded a PCR appellate proceeding to the circuit court, ordering a hearing on the qualifications of counsel based on the appellant's Motion to Remand to Determine Qualification of Counsel Pursuant to S.C. Code § 17-27-160(b). In *Stanko*, PCR appellate counsel discovered evidence that initial PCR counsel were not qualified and filed a motion to remand. Stanko did not file a successive PCR application, but was granted a hearing on the qualifications of counsel based on his motion to remand the PCR proceedings filed in this Court.

Even if *Robertson* did not create a new remedy allowing for a PCR application to be filed within a year of the decision, Petitioner's claim in the second-in-time application would not be untimely. In cases allowing successive PCR applications to go forward, the Court has found the statute of limitations does not apply. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756-57 (1999) (holding the statute of limitations does not apply when a successive PCR application is permitted simply to allow an applicant one "fair 'bite' at the apple"). This Court's policy of permitting successive PCR applications in certain exceptional circumstances would be frustrated if the one-year statute of limitations applied to bar an otherwise permissible successive PCR application. Thus, the Court has never applied the one-year statute of limitations to a permissible successive PCR application.[9] *See, e.g., Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996); *Woods v. State*, Op. No. 2019-MO-044 (S.C. S. Ct. filed Dec. 18, 2018) (finding a claim of intellectual disability in a death penalty case is a permissible reason to allow for a successive PCR application and remanding for a hearing despite a finding by the lower court that the claim was time-barred).

In light of the new remedy created in *Robertson* and Petitioner's repeated attempts to assert prior counsel's lack of qualifications, including filing a second-in-time PCR application before *Robertson*, this Court should grant certiorari, find Petitioner's application timely, and remand for a hearing on the qualifications of PCR counsel. *See Robertson*, 418 S.C. at 522, 795 S.E.2d at 38 (ordering a hearing where "there is a genuine issue of fact as to whether prior PCR counsel were statutorily qualified").

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[9] *Robertson* did not create a rule to the contrary as it did not address the issue of what would happen if the applicant had not raised a claim that his PCR counsel were not qualified within one year of making such a discovery. The *Robertson* Court simply noted that this was not an issue because Robertson did file within one year of making the discovery. 418 S.C. at 517, 795 S.E.2d at 35.

III. If Petitioner's Second-in-Time PCR Application is Deemed Untimely, He is Entitled to Equitable Tolling Given Petitioner's Multiple, Diligent Attempts to Challenge Initial PCR Counsel's Qualifications.

Although the decision below should be reversed and remanded for the straightforward reasons set forth above, at a bare minimum, Petitioner's diligent efforts to remedy his prior PCR counsel's lack of qualification beginning in 2010, less than five months after discovering the issue, should equitably toll the statute of limitations if this Court find Petitioner's second-in-time PCR application is technically untimely. Any other outcome would be Kafkaesque. It is well within this Court's equitable discretion to toll the limitations period for any appropriate duration. *See Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (equitable tolling of the PCR limitations period may be applied where "circumstances preventing a petitioner from making a timely filing were both beyond the petitioner's control and unavoidable despite due diligence").

As described in detail above, Petitioner has made four distinct attempts to receive one "fair bite at the apple" with qualified PCR counsel since 2010. One of those attempts was through a motion to remand for further PCR proceedings less than a year after discovering the lack of counsel's qualifications – the exact same procedural mechanism used by Stanko to obtain a hearing on the qualifications of his initial PCR counsel after *Robertson*. The only error Petitioner made (if any) was seeking that relief too early (before *Robertson*).[10] There is no principled or equitable basis for denying relief to Petitioner where others have received it simply because they identified their counsel's lack of qualifications at a time the Court was willing to create a remedy. *See* S.C. Const. art. I, § 3 ("[N]or shall any person be denied the equal protection of the laws."). *Cf. McNeil*

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[10] Even if counsel failed to properly challenge initial PCR counsel's lack of qualifications despite their repeated attempts to do so, Petitioner should not bear the burden of counsel's ability to foresee the particular procedural steps that needed to be taken prior to the existence of such a procedural mechanism. *See Robertson*, 418 S.C. at 517, 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.").

v. Polk, 476 F.3d 206, 212 (4th Cir. 2007) (requiring state procedural rules be "regularly" and "consistently" applied in order to create procedural bars in subsequent federal post-conviction proceedings).

CONCLUSION

For all of the reasons discussed above, Petitioner is entitled to a hearing on the qualifications of his initial PCR counsel. This Court should grant the writ of certiorari and remand for a hearing to determine whether initial PCR counsel were statutorily qualified and, if not, whether petitioner was prejudiced.

Respectfully submitted,

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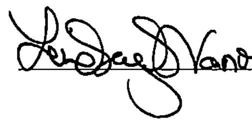

December 23, 2019.

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State of South Carolina,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petition for a Writ of Certiorari was served by first class United States mail, postage prepaid, this 23rd day of December, 2019, upon the following:

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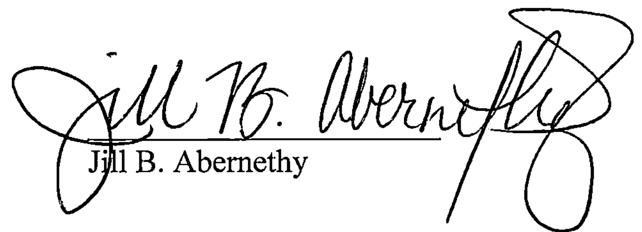

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