

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas  
Thomas A. Russo, Post-Conviction Relief Judge  
John C. Hayes, III, Trial Judge

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Appellate Case No. 2019-000578

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ERIC ADAMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**MAR 17 2020**

**S.C. SUPREME COURT**

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**ISSUES PRESENTD ON CERTIORARI**

**PETITIONER'S ISSUE PRESENTED ON CERTIORARI**

Whether the PCR court erred by finding petitioner did not provide any evidence that he attempted to file his PCR application in a timely manner where the uncontested testimony was that petitioner had a timely delivered his PCR application into the prison mail system, and where petitioner immediately retained counsel when he learned the application had not been filed because of circumstances totally beyond his control?

**RESPONDENT'S ISSUE PRESENTED ON CERTIORARI**

Did the post-conviction relief court properly dismiss Petitioner's application for post-conviction relief as it was filed six months after the statutory one-year filing period and Petitioner failed to provide any credible evidence to the post-conviction relief court showing the one-year statutory filing period should be equitably tolled due to extraordinary circumstances outside of his control?

## STATEMENT OF THE CASE

Eric Adams (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. During its September 2015 term, the York County Grand Jury indicted Petitioner for possession with intent to distribute (PWID) marijuana (2015-GS-46-2742), trafficking in cocaine (over 200 grams) (2015-GS-46-2741), and trafficking in crack cocaine (2015-GS-46-2740). Jack Swerling, Esquire, (Counsel) represented Petitioner. Assistant Solicitor Ryan Newkirk of the Sixteenth Circuit Solicitor's Office prosecuted the case. On January 28, 2016, Petitioner pled guilty before the Honorable John C. Hayes, III, as indicted to trafficking cocaine and PWID marijuana, but pled to trafficking cocaine (28-100 grams, first offense) as a lesser included offense of his original charge. Pursuant to negotiations between Petitioner and the State, Petitioner was sentenced to imprisonment for twelve years for trafficking crack cocaine, twelve years for trafficking cocaine, and five years for PWID marijuana. Petitioner did not file a notice of appeal and, therefore, any application for post-conviction relief would have been due on or before January 30, 2017.<sup>1</sup>

Petitioner filed an untimely application for post-conviction relief (PCR) on August 7, 2017, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Plea Counsel.
2. Involuntary guilty plea.

Respondent filed a return and motion to dismiss requesting Petitioner's application be summarily dismissed asserting it was filed beyond the statute of limitations. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto,

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<sup>1</sup>Petitioner's application deadline would technically be January 29, 2017, but since that was a Sunday, the due date would be the next business day, which was Monday, January 30, 2017.

the Honorable Daniel D. Hall issued a Conditional Order of Dismissal signed October 30, 2017, and filed November 13, 2017, provisionally denying and dismissing this action, while giving Petitioner twenty days from the date of service of the order to show why the dismissal should not become final.

Petitioner filed a response to the conditional order of dismissal on December 6, 2017, which included the following claims:

1. "That Plea Counsel did not adequately and properly investigate the case."
2. "That the Applicant never saw the discovery or the State's evidence against him and that Defense Counsel never went over this information with him prior to his plea."
3. "That he thought that his case was going to trial."
4. "That he was told, as an incentive to plea that the drug laws were going to change from 85% to 65% and that he would be eligible for parole. That this was the major basis for his decision to accept the plea."
5. "That plea counsel failed to file an Notice of Appeal in this case."

On May 17, 2018, Respondent filed an amended return and motion to dismiss all of Petitioner's claims except his claim that he was entitled to belated appellate review. A hearing into the matter was convened before the Honorable Thomas A. Russo on January 29, 2018, at the Moss Justice Center. Tommy A. Thomas, Esquire, (PCR Counsel) represented Petitioner and Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office represented the State. At the evidentiary hearing, Petitioner proceeded on his request for belated appellate review and Respondent renewed its motion to dismiss Petitioner's application because it was filed outside of the statutory filing period.

By order filed April 2, 2019, Judge Russo denied and dismissed Petitioner's application for post-conviction relief finding Petitioner did not meet his burden of proving he did not voluntarily and intelligently waive his right to appeal. The post-conviction relief court also granted Respondent's motion to dismiss Petitioner's untimely post-conviction relief application

finding Petitioner failed to provide any credible evidence showing he attempted to file his application in a timely manner. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari. This return to Petitioner's writ of certiorari follows.

### **STANDARD OF REVIEW**

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The post-conviction relief court properly dismissed Petitioner's application for post-conviction relief as it was filed over six months after the statutory one-year filing period and Petitioner failed to provide any credible evidence to the post-conviction relief court showing the one-year statutory filing period should be equitably tolled due to extraordinary circumstances outside of his control.**

Petitioner asserts the post-conviction relief court erred in dismissing his untimely post-conviction relief application because he allegedly filed a timely application that was never received by the York County Clerk of Court, and his second application was untimely only because he filed it after he realized his initial application had never been received. Petitioner claims the post-conviction relief court should have equitably tolled the statute of limitations despite the absence of any credible evidence Petitioner filed an initial timely application. However, the post-conviction relief court properly dismissed Petitioner's untimely application as equitable tolling is not appropriate unless a petitioner can show extraordinary circumstances that are beyond their control, which Petitioner in this case has failed to show. As such, this Court should deny certiorari.

As an initial matter, Petitioner's assertion that the post-conviction relief court summarily dismissed Petitioner's application and, therefore, the post-conviction relief court should have assumed the facts presented by Petitioner were true and view those facts in light most favorable to Petitioner is incorrect. See Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) ("When considering the State's motion for summary dismissal of an application, **where no evidentiary hearing has been held**, the circuit court must assume facts presented by an application are true and view those facts in the light most favorable to the applicant.") (emphasis added). Petitioner received a hearing on Respondent's motion to dismiss the post-conviction relief application as there was a genuine issue of material fact regarding whether Petitioner

attempted to file a timely post-conviction relief application. The post-conviction relief court heard testimony from Petitioner on this matter and made an implicit finding that Petitioner's testimony was not credible as the post-conviction relief court dismissed Petitioner's application. As such, Petitioner has incorrectly stated the standard the post-conviction relief court should have used in evaluating Respondent's motion to dismiss Petitioner's post-conviction relief application.

Petitioner further asserts he is entitled to the equitable tolling of the PCR statute of limitations due to circumstances beyond his control and unavoidable despite his due diligence. (PWC. 5.) However, Petitioner failed to set forth any credible evidence supporting his claim that he was unable to file a timely application due to circumstances beyond his control or that he exercised due diligence in attempting to file a timely application. Our courts have held that "statutes of limitations are not simply technicalities, but are fundamental to a well-ordered judicial system." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996).

Moates explained:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Id. Statutes of limitations should be followed as strict rules in order to set a hard deadline to ensure an organized legal system.

This Court has held the statute of limitations should be equitably tolled for the filing of a post-conviction relief application in limited circumstances. See Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (finding the statute of limitations should be equitably tolled when a mentally incompetent PCR applicant was prevented from timely filing by his mental

incompetency, and the applicant should proceed with his PCR action only if the application was filed within one year of the applicant regaining competency); Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017) (allowing equitable tolling where the applicant notarized and relinquished control of his application to prison authorities for mailing seventeen days prior to the filing deadline, but due to circumstances outside applicant's control, the application was not filed until three days past the deadline). Equitable tolling has also been allowed where "extraordinary circumstances prevented the plaintiff from filing despite his or her diligence" and where "the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim." Pelzer, 378 S.C. at 521, 662 S.E.2d at 621.

Although Petitioner asserts he is similarly situated to the petitioner in Mose, his circumstances are distinguishable. In Mose, Mose entered a guilty plea on March 7, 2013, and since he did not pursue a direct appeal, Mose's post-conviction relief application would have been due on March 8, 2014.<sup>2</sup> Mose claimed he placed his post-conviction relief application in the hands of prison authorities on February 18, 2014, which would have been timely; however, it was not stamped "filed" by the Williamsburg County Clerk's Office until March 10, 2014, which was two days past the statutory filing period. This Court found the post-conviction relief court erred in dismissing Mose's application because the Verification and Application to Proceed Without Payment of Costs sections of the post-conviction relief application were notarized on February 18, 2014, the same date Mose claims he relinquished control of his application to prison authorities. Mose, 420 S.C. 500, 803 S.E.2d 718 (2017) Further, Mose alleged in his

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<sup>2</sup> That statute of limitations for filing an application for PCR is one year. S.C. Code Ann. §17-27-45(A). The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

affidavit that an associate warden confirmed Mose's application was mailed prior to the expiration of the one-year statutory filing period. Id. at 513, 803 S.E.2d at 723.

Here, unlike Mose, Petitioner presented no credible evidence to the post-conviction relief court that his application was in fact timely mailed. The initial application Petitioner claims was sent in June 2016 was *never* received by the York County Clerk of Court. Although Petitioner claims another inmate assisted him, no affidavit or information from any other inmate or prison authority was provided to the post-conviction relief court substantiating Petitioner's claim that a post-conviction relief application was mailed in June 2016. Petitioner's own testimony shows he has no actual knowledge the alleged application was even mailed.

**PCR Counsel:** Now do you know if [the PCR application] actually went in the mail?

**Petitioner:** From my understanding it did. I bought him an envelope and all.

**PCR Counsel:** So you had - - so you provided the envelope?

**Petitioner:** Yeah.

**PCR Counsel:** And it went out in your SCDC mail to the best of your knowledge?

**Petitioner:** Yes, sir.

(App. 58.) In denying Petitioner's application, the post-conviction relief court made the implicit finding that the testimony above was not credible.

This Court's decision in Mose was based on the evidence Mose presented to substantiate his claim that he attempted to file a timely application. Here, Petitioner has only presented his self-serving testimony that he believes an inmate mailed a timely application on his behalf in June 2016. Further, Mose's application was two days late at the time it was received by the Williamsburg County Clerk of Court, but contained evidence therein that he mailed it timely.

Here, Petitioner's current application was filed over six months after the expiration of the statutory filing period, and the alleged timely filed application has *never been received* by the York County Clerk of Court.

Petitioner also asserts he is entitled to equitable tolling of the statute of limitations because he had "no control over his application once it was in the prison mail system and had no way to guard against it being mailed late, lost in the mail, or never being filed." (PWC. 8.) Notwithstanding the fact that Petitioner failed to produce any credible evidence that he attempted to mail a timely application, Pelzer explained the doctrine of equitable tolling should be limited to very exclusive circumstances. "[E]quitable 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." Pelzer, 378 S.C. at 521, 662 S.E.2d at 620. Pelzer cited to an opinion from the Fourth Circuit Court of Appeals in denying equitable tolling to a party as "particularly illuminating:"

[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where - due to circumstances external to the party's own conduct - it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

Pelzer, at 378 S.C. 522-23, 662 S.E.2d at 621 (citing Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) (holding habeas petitioner's missing filing deadline due to erroneous advice from counsel was not an extraordinary circumstance requiring equitable tolling)).

Here, Petitioner has failed to show this Court any such “rare and exceptional circumstances” as he is not claiming he was prevented from filing a timely post-conviction relief application, nor was he prevented from checking on the allegedly timely filed application with the York County Clerk of Court prior to the expiration of his statutory filing period. By Petitioner’s own timeline, he would have had approximately seven months from June 2016 until January 30, 2017, to discover the allegedly timely filed application had not been filed and to resubmit a timely application. Petitioner’s failure to check on his allegedly timely filed application prior to the expiration of the statutory filing period does not fit the “rare and exceptional circumstances” this Court has found warrant equitable tolling, especially since Petitioner has not alleged he was prevented from checking on his application or filing a second application for post-conviction relief prior to the expiration of the statutory filing period. There is no allegation or indication that Petitioner was prevented from exercising his rights, and as such, the post-conviction relief court properly denied and dismissed Petitioner’s untimely filed post-conviction relief application.

Petitioner has failed to show the post-conviction relief court the “rare and exceptional circumstances” required to justify equitable tolling of the statute of limitations. Petitioner has not alleged any of the circumstances outlined by the South Carolina Court of Appeals in Pelzer as justifiable reasons to toll the statute of limitations in post-conviction relief cases. As the South Carolina Court of Appeals held, equitable tolling is typically only available if the claimant was prevented in some extraordinary way from exercising his or her rights, which is not the case here: Pelzer, 378 S.C. at 521, 662 S.E.2d at 620. Petitioner was not prevented from exercising his rights, in fact, he allegedly filed a timely application, although he failed to produce any credible evidence of this application to the post-conviction relief court. The limited nature of

equitable tolling has not been extended to circumstances where a petitioner has failed to exercise his own due diligence in following up on an allegedly timely filed application. Allowing Petitioner to toll the statute of limitations in this instance is contrary to the Harris holding cited by the South Carolina Court of Appeals in Pelzer that stated, “To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation.” Pelzer, at 378 S.C. 522-23, 662 S.E.2d at 621 (citing Harris, 209 F.3d at 330 (4th Cir. 2000)).

Petitioner has failed to set forth any credible evidence that he filed a timely application for post-conviction relief. Additionally, despite having adequate time and the ability to follow-up on the allegedly pending application prior to the expiration of the statutory filing period, Petitioner has failed to do so and has not offered any credible excuse for such failure. See Pelzer, at 378 S.C. 521, 662 S.E.2d at 620 (citing Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990) (“we have generally been much less forgiving in receiving late filing where the claimant failed to exercise due diligence in preserving his legal rights.”)). Therefore, the post-conviction relief court properly dismissed Petitioner’s application for being untimely filed. This Court should deny certiorari.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By:   
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3/17/, 2020

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The Honorable Roger E. Henderson, Circuit Court Judge

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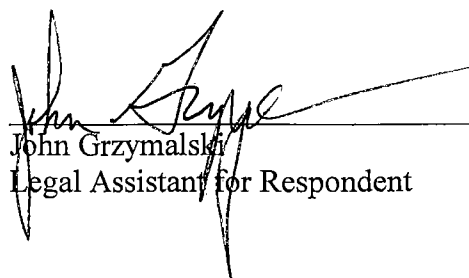
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

**Jessica M Saxon, Esquire**  
**PO Box 11589**  
**Columbia, SC 29201**

This 17<sup>th</sup> day of March, 2020.

  
\_\_\_\_\_  
John Grzymalski  
Legal Assistant for Respondent