

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

S.C. SUPREME COURT

Appellant Case No. 2013-000935
(Case No. 2012-CP-40-07764)

The State of South Carolina Respondent,
V.
Demarco Johnson #241438 Appellant.

Proof Of Service

I certify that I have served the ~~explanation~~ on Daniel E. Shearouse Clerk of S.C. Supreme Court by depositing a copy of it in the United States mail, postage prepaid on July 19 2013.

The Supreme Court of South Carolina
Daniel E. Shearouse
Clerk of S.C. Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

s/ Demarco Johnson
Demarco Johnson #241438
B.R.C.I.
4460 Broad River Rd.
Columbia S.C. 29210

July 19 2013

on the 19th day of July, 2013
Susan W. Frye

My Commission Expires
March 5, 2018

EXPLANATION UNDER RULE 243(C), SCACR

In response to the final order of the Respondant, dated March 26, 2013. The Applicant would show this court:

I

The Applicant is proceeding under the Uniform Post-Conviction Act subsection §17-27-45(B). This is what this present P.C.R. is filed under. This subsection allows an Applicant to file a Post-Conviction Relief application no later than or (1) year after the substantive standard not previously recognized or not in existence at the time of the state court trial has come in creation and is binding upon the Supreme Court of South Carolina and/or the state of South Carolina. The ineffective assistance of counsel substantive standards created by the case Lafler V. Cooper, 132 S.ct. 1376 (2012) and Missouri V. Frye, 132 S.ct. 1399 (2012) are the Applicant's basis for this present P.C.R. application, Appellant case No. 2013-000935 (Case No. 2012-CP-40-07764). Also included Miller V. Alabama.

The court's final order is flawed in several particular conclusions of law and finding of fact which the Applicant will point out to this court clearly and concisely. First, the court rests upon the legal conclusion that the Applicant's present P.C.R. application does not comply with the filing procedures under §17-27-45-(A) and the South Carolina case law Peloquin V. State, 469 S.E.2d. 606 (1996). Therefore, the present P.C.R. application 2013-000935 (2012-CP-40-07764), should be summarily dismissed. (See conditional order of dismissal Pages 3-6) Respectfully, this court's legal conclusion is clearly erroneous and is contrary to the case law established by the Supreme Court of South Carolina.

In Talley V. State, 640 S.E.2d. 878 (S.C. 2007), the defendant Talley filed his P.C.R. application under the S.C. Ann. §17-27-45(B). This Applicant Johnson, also filed this present P.C.R. application 2013-000935 (2012-CP-40-07764), under the S.C. Code Ann. §17-27-45(B).

1.

1.

The defendant Talley filed his P.C.R. application on the assertion that the U.S. Supreme Court's ruling on the case ALABAMA V. SHELTON, 535 U.S. 654, 122 S.ct. 1764 (2002) created for Talley new substantive standards not previously recognized nor were in existence at the time of Talley's state court trial. Additionally, defendant Talley asserted that the one (1) year limitation period governing post-conviction claim that prior, uncounseled misdemeanor convictions could not be used to enhance subsequent federal charges began to run when the United States Supreme Court issued the decision in Alabama V. Shelton that defendant had constitutional right to counsel in prosecutions that could result in deprivation of liberty. In Talley V. State, the State of South Carolina moved to summarily dismiss Talley's P.C.R. application for failure to file within the statute of limitations pursuant to S.C. Code Ann. §17-27-45(A) and Peloquin V. State, 469 S.E.2d. 606 (1996) After a thoughtful legal analysis of both Talley's position and the State of South Carolina's position, Our Supreme Court of South Carolina ruled that because Alabama V. Shelton, applies retroactively on collateral review, the P.C.R. judge in Talley's case correctly determined S.C. Code Ann. §17-27-45 (B) is the applicable statute of limitations. Our Supreme Court of South Carolina ruled that Alabama V. Shelton was decided on May 20, 2002 and Talley filed his P.C.R. application on May 6, 2003. Therefore, Talley's P.C.R. application is timely filed under S.C. Code Ann. §17-27-45 (B).

The Applicant Johnson's case posture is indistinguishable from the defendant Talley's case posture in Talley V. State, 640 S.E.2d. 878 (S.C. 2007). The case Talley V. State controls in the determination of whether or not Applicant Johnson's P.C.R. application can be summarily dismissed - it can not. This P.C.R. application must be brought forward for evidentiary hearing on the merits of these issues. The case Talley V. State mandates this Honorable Court of Appeals to proceed in this manner. Secondly, Applicant Johnson present P.C.R. application should not be deemed " successive " nor rendered ingenuine. Because Applicant Johnson present constitutional claim could not have been brought forward in a prior P.C.R. application for one undeniable

reason. Prior to March 21, 2012 the constitutional standard of ineffective assistance of counsel as established by Lafler V. Cooper 132 S.ct. 1376 (2012) and Missouri V. Frye, 132 S.ct. 1399 (2012) did not exist in the United States of America nor its territory, because these constitutional standards of ineffective assistance of counsel as established by Lafler V. Cooper and Missouri V. Frye came into existence on March 21, 2012, the Applicant could not as a matter of law file a P.C.R. application in South Carolina on the constitutional claim of ineffective assistance of counsel pursuant to Lafler V. Cooper and Missouri V. Frye in none of his prior post-conviction applications nor prior opportunities to file a pleading.

This present post-conviction application case 2013-000935 (2012-CP-40-007764), is the first and only opportunity as a matter of fact and as a matter of law, that Applicant Johnson has to plead his constitutional claim of ineffective assistance of counsel pursuant to Lafler V. Cooper and Missouri V. Frye. The respondent's argument of this P.C.R. application being successive is meritless and baseless. Talley V. State, 640 S.E.2d. (S.C. 2007).

II

Thirdly, Applicant strongly claims that due to the severity of his case, facing a life sentence without the possibility of parole, the ineffectiveness of trial counsel in not establishing nor made and attempt to establish a meaningful, reasonable, and effective plea bargain negotiation, hindered Applicant from effective assistance of counsel. Lafler V. Cooper.

Date: July 19, 2013

Respectfully submitted,
s/ Demarco Johnson 241438
Demarco Johnson #241438
4460 Broad River Rd.
Columbia S.C. 29210

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Demarco Johnson, #241438,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2012-CP-40-07764

FINAL ORDER

JEANNETTE W. McBRIDE
C.C.P. & G.S.

2013 MAR 27 PM 2:00

RICHLAND COUNTY
FILED

This matter comes before this Court by way of an application for post conviction relief (PCR) filed November 21, 2012. The Respondent made its Return and Motion to Dismiss on December 19, 2012, requesting that the Application be summarily dismissed as untimely filed and impermissibly successive in nature. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, the Honorable James R. Barber, III, in his then capacity as Chief Administrative Judge for the Court of Common Pleas for the Fifth Judicial Circuit, issued a Condition Order of Dismissal on January 4, 2013, provisionally denying and dismissing this action, while giving the Applicant thirty (30) days from the date of said Order in which to show why the dismissal should not become final.

Copied below and incorporated herein is an Affidavit of Service signed by Applicant and dated January 22, 2013, confirming personal service of the Conditional Order upon Applicant at the South Carolina Department of Corrections.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCRPC, the Director of the South Carolina Department of Corrections has designated John W. Hamery (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA) AFFIDAVIT OF PERSONAL SERVICE
COUNTY OF Richland)

On this 22nd day of January, 2013, I served the signed Conditional Order of Dismissal on Inmate SCDC Inmate No. 241438, by delivering personally and leaving a copy of the same at Broadview Correctional Institution, Columbia, South Carolina. Deponent is not a party to this action.

s/ John W. Hamery

SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 22 day of January, 2013
Jacqueline Murrell (L.S.)

Notary Public for South Carolina

My Commission Expires: 3/15/16

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, Broadview Correctional Institution, Columbia, Richland County, South Carolina, this 22nd day of January, 2013.

s/ Demarco Johnson

Inmate Signature
SCDC No. 241438

List case number here

2012-CP-40-7764

Applicant responded to the Court's Conditional Order by way of one *pro se* filing dated January 30, 2013, entitled "Motion Responding to Conditional Order of Dismissal". In it,

Applicant set forth the following objections to this Court's proposed summary dismissal¹:

Applicant in the present case as indicated in his Post-conviction Relief Application (2012-CP-4007764), pursues this current (PCR) action pursuant to newly established Constitutional Substantive Standards announced by the United States Supreme Court, not previously recognized that are intended to be applied retroactively, holding, "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it, if the right is denied, prejudice can be shown, under the prejudice prong of the Strickland test for ineffective assistance of counsel, if loss of the plea opportunity led to trial resulting in a conviction on more serious charges or imposition of a more severe sentence. U.S.C.A., Const. Amend.6. Lafler v. Cooper, 132 S.Ct. 1387(2012), and further the companion case to Lafler holding, "Defense counsel has the duty to communicate formal offers from the prosecution, and to accept a plea on terms and conditions that may be favorable to the accused. Missouri v. Frye, 132 S.Ct. 1399 (2012).

Further, applicant pursues this action pursuant to Miller v. Alabama, 567 U.S.(2012). Holding, "The Eighth (8th) and Fourteenth(14th) Amendments to the United States Constitution forbids life without parole for defendants below eighteen (18) at the time of their crimes.

¹ This is not an exhaustive or all-inclusive list of the objections contained in the document submitted by Applicant. This Court had the entirety of the file before it and undertook a thorough review of the documents contained therein prior to making a final determination of the current summary dismissal.

Respondent alleges that applicant had the opportunity to litigate all allegations in his prior (PCR). Apparently, Respondent misapprehends or overlooks the fact that, applicant's recent (PCR) action:(2012-CP-4007764) is entirely a derivative of newly declared Constitutional Substantive Standards announced by the United States Supreme Court in: Lafler, Frye, and Miller.

After conducting a thorough review of the entirety of the record, all relevant documents contained therein, and the entirety of the *pro se* packet submitted by Applicant, this Court finds no sufficient reason has been set forth why the Conditional Order should not become final, dismissing the current action with prejudice.

In his response, Applicant contends the current allegation was timely filed and appropriately raised through this PCR action as it hinges on a “newly established Constitutional Substantive Standard” set forth in the United States Supreme Court cases of Lafler v. Cooper and Missouri v. Frye. This argument fails to overcome the untimely and successive nature of the current application as Applicant has failed to set forth any sufficient reason why he could not have raised such an allegation within the one year statute of limitations or in his prior PCR action, regardless of the subsequent holdings in Lafler and Frye. Applicant contends his application was timely filed as he filed it within one year of the decisions in Lafler v. Cooper and Missouri v. Frye; however, there is nothing set forth in those cases or in any other relevant materials before this Court to indicate that those cases are to apply retroactively. Regardless, Applicant has failed to establish any reason he could not have raised the claim in his prior PCR action. Accordingly, this Court finds summary dismissal of that allegation to be well founded.

Additionally, Applicant contends he is basing the second portion of his action on the holding set forth in Miller v. Alabama, 132 S.Ct. 2455 (U.S. filed June 25, 2012). After a review

of the pleadings and documents, this Court is satisfied this claim is wholly without merit and fails to set forth any genuine issue of material fact for this Court to consider. See S.C. Code § 17-27-80(b) & (c). In Miller v. Alabama, the United States Supreme Court held that mandatory life imprisonment without the possibility of parole for offenders under the age of eighteen (18) at the time the crime(s) was committed violates the Eighth Amendment prohibition on cruel and unusual punishment. Based solely upon the pleadings and documents before this Court, it appears Applicant was born September 25, 1979 (*see sentencing sheet 2000-GS-40-47718*); the indictment references the incident date as December 14, 1999, which would have made Applicant twenty (20) years old at the time of the crime that he now seeks to challenge his life sentence on (*see indictment 2000-GS-40-47718*). Accordingly Miller v. Alabama is wholly inapplicable to Applicant's case and this Court is satisfied there is no *genuine* issue of material fact for this Court to consider. Therefore, this Court finds Respondent's motion to dismiss is well founded and must be granted.

Accordingly, for all of the reasons set forth herein, as well as those in the previous Conditional Order, this Court must summarily dismiss the action with prejudice.

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
)
 JOHNSON Demarco, 241438,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

2012CP4007764

JEANETTE W. SCBRIDGE
 C.C.P. & S.S.

2014 JAN -4 PM 2:23

RICHLAND COUNTY
 FILED

CONDITIONAL ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed November 21, 2012.¹

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was true bill indicted at the July 2000 term of the Richland County Grand Jury for Burglary 2nd Degree, Armed Robbery, and two (2) counts of Kidnapping (200-GS-40-47718). He was represented by attorneys April Sampson, Esquire, and Sheilla Duke Mims, Esquire, on the charge(s). The Applicant proceeded to jury trial before The Honorable Marc H. Westbrook, and on February 7, 2001, was found guilty and sentenced to life imprisonment without parole.

A Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. By order filed May 28, 2002, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Johnson, Op. No. 3501 (S.C. Ct. App. filed May 28, 2002). Applicant's subsequent Petition for Writ of Certiorari was denied by the South Carolina Supreme Court on February 24, 2003. The remittitur was issued February 27, 2003.

¹<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2012CP4007764&CourtType=G&CaseType=Civil&CourtAgency=40002>

Applicant thereafter filed an application for PCR on December 5, 2003 (2003-CP-40-05842). He was represented by Tara Shurling, Esquire, on the action. On February 26, 2007, the matter was called for evidentiary hearing before the Honorable James R. Barber, III, at which Applicant was present and testified. By order filed March 7, 2007, Judge Barber denied and dismissed the application with prejudice. A notice of appeal was filed and a Petition for Writ of Certiorari submitted on Applicant's behalf for review of the PCR court's denial. The South Carolina Supreme Court denied the petition by order dated June 26, 2008. The remittitur was issued July 14, 2008.

In making its decision, the Court had before it the available records of the Richland County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the relevant documents from Applicant's unsuccessful direct appeal and/or the *Respondent's Return and Motion to Dismiss*.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- 1.The conviction and sentence was in violation of the Constitution of the United States and the Constitution and laws of South Carolina.
- 2.That the Defendant received ineffective assistance of counsel.
- 3.The state was in violation of the Separation of power Doctrine.

1.The conviction and sentence was in violation of the Constitution of the United States and the Constitution and laws of South Carolina.

(a) According to the recent decision in Miller V. Alabama, the Defendant was denied his constitutional right to due process and cruel and unusual punishment when the state did not consider the fact that the Defendant's first crime was committed while he was only a juvenile. According to Miller v. Alabama the culpability of a child is not the same as an adult. Therefore in sentencing me under 17-25-45 was not constitutional.

2. That the Defendant received ineffective assistance of counsel.

(a) Counsel was ineffective for failing to explore reasonable and realistic plea negotiations with the solicitor for a more just outcome as mentioned in Lafner.

3. The State was in violation of the Separation of Power Doctrine.

(a) The Defendant's right to a fair trial, fundamental fairness and due process was violated when the sentencing judge at the Defendant's trial was not allowed to mitigate the circumstances and judge appropriately as he understood the case at hand.

Findings of Fact and Conclusions of Law

Timeliness – S.C. Code §17-27-45(a)

This Court agrees with the Respondent that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160.

S.C. Code Ann. §17-27-45(a) reads as follows:

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.

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). For the purposes of this Order, the Applicant's conviction/sentence was "finalized" on the date of his conviction or the date of the Remittitur from any direct appeal, whichever was later, i.e. February 27, 2003. Adding one (1) year per S.C. Code § 17-27-45(a) and one (1) day per Rule 6(a), SCRCPC means that this PCR application had to be filed by February 28, 2004. **This Application was filed on November 21, 2012, which was well beyond the statutory time for filing.**

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court shall summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act. **SUCCESSIVE**

The application should be summarily dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. *Id.*, 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. *Id.* The Applicant bears the burden of showing that the allegations could not have been raised previously. *Land*, 274 S.C. 243, 262 S.E.2d 735 (1980).

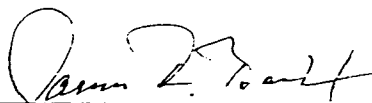
The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by either

party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for the reasons explained above.

Based upon its review of the pleadings in this matter, this Court does not see the need to appoint counsel to represent the Applicant and expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it should not dismiss the matter in its entirety. The Applicant is granted thirty (30) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Richland County Clerk of Court and shall serve opposing counsel at the following address:

Assistant Attorney General
Robert D. Corney
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 2 day of JANUARY, 2012.



The Honorable James R. Barber, III
Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina