

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

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S.C. Supreme Court

DEMARCO JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000935

PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in dismissing Petitioner's PCR application on grounds that it was successive and untimely where he filed it within one year after the United States Supreme Court's rulings in *Missouri v. Frye* and *Lafler v. Cooper*, which expressly held for the first time that the right to effective assistance of counsel extends to plea negotiations.

STATEMENT

On July 12, 2000, the Richland County Grand Jury indicted Petitioner Demarco Johnson on two counts of kidnapping, one count of first degree burglary, and one count of attempted armed robbery. App. 13, ln. 3—App. 15, ln. 4; App. 552-557. Based on his conviction on March 21, 1997 of assault and battery with intent to kill, on January 19, 2001 the State served on Petitioner notice of its intent to seek life without parole.¹ App. 460, ll. 4-18; App. 463, ll. 5-11. On February 5, 2001, Petitioner proceeded to trial before the Honorable Marc H. Westbrook and a jury. Sheila Duke-Mims and April Woodard Sampson represented Petitioner, and Dana A. Pellizzari represented the State. App. 1. On February 7, 2001, the jury found Petitioner guilty on all counts. App. 454, ll. 3-21. For each count, the court sentenced Petitioner to life imprisonment without the possibility of parole. App. 467, ll. 10-13. Petitioner appealed, and the South Carolina Court of Appeals affirmed the conviction and sentence on May 28, 2002. App. 470-473.

On December 5, 2003, Petitioner filed an application for post-conviction relief. App. 474-482. The State filed a return and motion to dismiss in part on July 13, 2004. App. 483-486; App. 541. On February 26, 2007, Petitioner appeared at a PCR hearing before the Honorable James R. Barber. Tara D. Shurling represented Petitioner and Robert L. Brown represented the State. App. 488.

¹ See S.C. Code Ann. § 17-25-45, which includes in “most serious offenses” assault and battery with intent to kill, first degree burglary, kidnapping, and attempted armed robbery, and which provides for life sentences for persons convicted of certain crimes:

(A) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has . . . one or more prior convictions for . . . a most serious offense

Petitioner testified that trial counsel did not object when the State elicited testimony that the parties agreed would not be offered; that trial counsel in response further elicited such testimony and opened the door wider for the state's examination on the topics; that trial counsel failed to investigate and adduce certain exculpatory evidence and witnesses; that trial counsel failed to preserve an evidentiary issue for appellate review; and that trial counsel failed to challenge the allegedly insufficient indictments. App. 497, ln. 9—App. 514, ln. 12. Trial counsel also testified in support of some of Petitioner's contentions. App. 519, ln. 7—App. 527, ln. 6. On March 7, 2007, the PCR court issued an order of dismissal finding that Petitioner failed to show both deficiency and prejudice in connection with any of the errors alleged at the hearing. App. 541-551. Petitioner then filed with this Court a petition for a writ of certiorari, which the Court denied on June 26, 2008. App. 570.

On November 21, 2012, Petitioner filed a second application for post-conviction relief, alleging ineffective assistance of counsel for failure "to explore reasonable and realistic plea negotiations." App. 572-580. On December 27, 2012, the State filed a return and motion to dismiss for being successive and for failure to comply with the time limits under the Uniform Post-Conviction Relief Act ("UPCRA"), S.C. Code Ann. §§ 17-27-10 to 17-27-160. App. 581-586. On January 4, 2013, the PCR court issued a conditional order of dismissal, which provided the application would be dismissed in thirty days unless the Petitioner presented a sufficient reason for failing to raise his argument earlier. App. 587-592. Petitioner filed a response dated January 30, 2013. App. 294. Petitioner stated his current claim was based on "newly established Constitutional Substantive Standards announced by the United States Supreme Court, not previously recognized that are intended to be applied retroactively," citing *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct 1399 (2012). On March 27, 2013, the PCR court issued a final order of

dismissal, ruling that Petitioner failed to set forth sufficient reason for failing to meet the time requirements of the UPCRA or for failing to raise his argument in the prior PCR action. App. 593-598.

ARGUMENT

The lower court erred in dismissing Petitioner's PCR application when he filed it soon after the United States Supreme Court's rulings in *Missouri v. Frye* and *Lafler v. Cooper* entitled him to a new review of his ineffective assistance of counsel claim.

The lower court erred in dismissing Petitioner's PCR application when he filed it soon after the United States Supreme Court's rulings in *Missouri v. Frye* and *Lafler v. Cooper* entitled him to a new review of his ineffective assistance of counsel claim. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). Generally, a person convicted of a crime may make a PCR claim within the later of one year after either the entry of judgment or conviction or the final remittitur or decision in an appeal. S.C. Code Ann. § 17-27-45(A). However, a convicted person may also make a PCR claim within one year after the imposition of a new standard or right in criminal proceedings intended to be applied retroactively:

When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

S.C. Code Ann. § 17-247-45(B). Generally, a rule is new and meant to be applied only prospectively when it “breaks new ground or imposes a new obligation” on the government

To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing

at the time the defendant's conviction became final.” *Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). However, an exception requires retroactive application of rules that “require[] the observance of those procedures that . . . are implicit in the concept of ordered liberty . . . [i.e.,] watershed rules of criminal procedure’ which implicate the fundamental fairness and accuracy of the proceeding.” *Id.* at 543, 640 S.E. 2d at 882 (quoting *Teague* at 311). “The [United States] Supreme Court has . . . applied each extension of the constitutional right to counsel retroactively to collateral proceedings.” *Id.* at 544, 640 S.E.2d at 882.

A successive PCR application is favored when a reason exists to permit a person under sentence to litigate again. *Land v. State*, 274 S.C. 243, 246, 262 S.E.2d 735, 736 (1980); S.C. Code Ann. § 17-27-90.²

In this case, Petitioner filed his previously unsubmitted ineffective assistance of counsel claim on November 21, 2012 and explained the claim was based on new, retroactive law laid down in *Lafler v. Cooper* and *Missouri v. Frye*. These cases establish that the right to effective assistance

² Section 17-27-90 provides:

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.

of counsel extends to plea negotiations,³ thereby setting a standard for effective assistance of counsel not previously recognized. Under *Talley v. State*, this standard—an extension of the constitutional right to counsel—applies retroactively. Thus, Petitioner’s claim was timely under subsection 17-27-45(B).

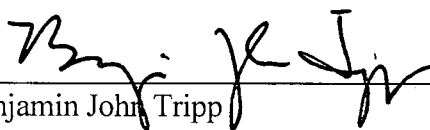
Petitioner was also justified in asserting this claim based on a previously unrecognized right in a successive action for two reasons. First, the same reasoning noted above for permitting a delayed claim based on a previously unrecognized right applies to justify allowing a successive claim based on an unrecognized right: if a defendant has not been fairly afforded an opportunity to assert a previously unarticulated right that is implicit in ordered liberty, a special procedure must be made available for him to do so, and a more reliable standard must apply to establish a knowing waiver of the right. Second, refusing to permit successive claims based on a previously unrecognized rights would lead to absurd results by practically emasculating the exception under subsection 17-27-45(B) for delayed claims. Specifically, a defendant asserting a claim based on new law beyond the default one-year time limit has almost certainly already pursued an earlier PCR action because failure to do so would constitute a permanent waiver of the separate grounds asserted in that action. Accordingly, Petitioner is entitled to a new review of his claim alleging ineffectiveness of plea counsel, and the PCR court erred in dismissing the claim without holding an evidentiary hearing on the merits to determine whether his plea counsel was ineffective in representing him during plea negotiations.

³ See *Missouri v. Frye*, 132 S.Ct. at 1408 (“This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”); *Lafler v. Cooper*, 132 S. Ct. at 1391 (“As to prejudice, respondent has shown that but for counsel’s deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Demarco Johnson's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of January, 2014.

minimum sentence 3 & half times greater than he would have received under the plea." (citations omitted)).

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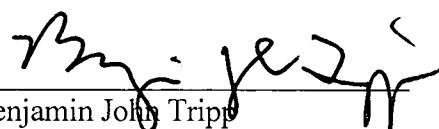
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Demarco Johnson #241438, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 13th day of January, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of January, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.