

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County  
Court of Common Pleas  
L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2013-000935

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DEMARCO JOHNSON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**RECEIVED**

MAY 30 2014

**S.C. Supreme Court**

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**ISSUE PRESENTED**

Did the post-conviction relief court err in dismissing applicant's second post-conviction relief application as successive and untimely pursuant to S.C. Code Ann. §§ 17-27-45 & -90?

## STATEMENT OF THE CASE

Petitioner was indicted during the July 2000 term of the Richland County Grand Jury for two counts of kidnapping (2000-GS-40-47716, -47717), one count of burglary in the first degree (2000-GS-40-47718), and one count of armed robbery (2000-GS-40-47714)<sup>1</sup>. Petitioner was represented by Sheila Mims and April Sampson, Esquires. Prior to trial, the State served Petitioner with notice of its intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45 based on his prior convictions for assault and battery with intent to kill and two counts of attempted armed robbery. On February 5-7, 2011, Petitioner proceeded to a jury trial before the Honorable Marc H. Westbrook, where he was convicted as indicted on all four counts. The court sentenced Petitioner to life without parole pursuant to S.C. Code Ann. § 17-25-45.

A notice of appeal was filed and an appeal was perfected on Petitioner's behalf. Following briefing and argument, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentence on May 28, 2002. State v. DeMarco Johnson, 350 S.C. 543, 576 S.E.2d 486 (Ct. App. 2002). A subsequent Petition for Writ of Certiorari to the South Carolina Supreme Court was denied on February 24, 2003. The Remittitur was issued on February 27, 2003.

Petitioner filed an initial application for post-conviction relief on December 5, 2003, alleging that he was being held in custody unlawfully based on allegations of ineffective assistance of counsel, that his conviction and sentence were unconstitutional, that the court lacked jurisdiction, and newly discovered evidence. Respondent made its Return and Motion to Dismiss in Part on July 13, 2004, requesting an evidentiary hearing be held. An evidentiary hearing was convened on February 26, 2007, at the Richland County Courthouse before the

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<sup>1</sup> The Petition for Writ of Certiorari incorrectly lists this charge as *attempted* armed robbery. Petitioner was convicted of armed robbery. App. p. 454. This sentencing sheet and indictment were omitted from the Appendix.

Honorable James R. Barber, III. Petitioner was present and represented by Tara D. Shurling, Esquire. Respondent was represented by Assistant Attorney General Robert L. Brown of the South Carolina Attorney General's Office. Petitioner testified on his own behalf and the State presented testimony from trial counsel Sheila Mims. By Order filed March 7, 2007, Judge Barber denied and dismissed Petitioner's application for post-conviction relief. Petitioner filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on June 26, 2008. The Remittitur was issued on July 14, 2008.

Petitioner filed a second application for post-conviction relief on November 21, 2012, alleging he was being held in custody unlawfully based on claims of:

- “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* [sic].
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 as he understood the case at hand.”

Petitioner listed “vacation of sentence/time reduction” as his relief sought. The State made its Return and Motion to Dismiss on December 27, 2012, asking that the application be summarily dismissed as filed beyond the statute of limitations pursuant to S.C. Code Ann. § 17-27-45 and as

successive pursuant to S.C. Code Ann. § 17-27-90. The Honorable James R. Barber, III, acting in his capacity as Chief Administrative Judge of Common Pleas for the Fifth Judicial Circuit, signed a Conditional Order of Dismissal on January 2, 2013, provisionally dismissing the application as successive and beyond the statute of limitations but giving Petitioner thirty days from the date of service to allow Petitioner to provide specific reasons why the application should not be dismissed. Petitioner was served with the Conditional Order of Dismissal on January 22, 2013.

Petitioner responded to the Conditional Order of Dismissal by way of a five page document captioned "Motion Responding to Conditional Order of Dismissal," filed on February 12, 2013. In the document, Applicant asserted that his case should not be summarily dismissed based on the recent United States Supreme Court cases of Lafler v. Cooper, 132 S.Ct. 1387 (2012) and Missouri v. Frye, 132 S.Ct. 1399 (2012) which held that counsel has a duty to communicate all terms of a formal plea offer effectively. He further asserted that these cases create a "new constitutional standard" and, therefore, his application is timely pursuant to S.C. Code Ann. § 17-27-45(b). Applicant did not list any facts or circumstances to support his bare allegation that his trial counsel had indeed been ineffective in regards to plea negotiations.

After reviewing Petitioner's response to the Conditional Order of Dismissal, the Honorable L. Casey Manning, acting in his capacity as Chief Administrative Judge of Common Pleas for the Fifth Judicial Circuit, dismissed the application by Final Order of Dismissal filed March 27, 2013.

Petitioner filed a Notice of Appeal on May 16, 2013. His Petition for Writ of Certiorari was served on January 13, 2014. This Return Follows.

## STANDARD OF REVIEW

On certiorari in post-conviction relief cases, this Court applies an “any evidence” standard of review. Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). “This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them,” and it “will reverse the PCR judge's decision when it is controlled by an error of law.” Suber v. State, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007). “This Court gives great deference to the PCR judge's findings of fact and conclusions of law.” McHam v. State, 404 S.C. 465, 472-73, 746 S.E.2d 41, 45 (2013)(citing Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005)).

## ARGUMENT

**The post-conviction relief court properly dismissed Petitioner's second application as successive and untimely.**

Petitioner asserts that the post-conviction relief court erred in summarily dismissing his second application for post-conviction relief, arguing that the application was timely pursuant to S.C. Code Ann. § 17-27-45(B) in light of the United States Supreme Court's recent rulings in Missouri v. Frye and Lafler v. Cooper. This argument is without merit, as Missouri v. Frye and Lafler v. Cooper do not create new a new constitutional standard, but rather expounded already existing grounds of ineffective assistance of counsel. As the post-conviction relief court's decision was not based on an error of law, this Court should affirm the lower court's ruling and deny certiorari.

In South Carolina, post-conviction relief actions 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." S.C. Code Ann. § 17-27-45(a). However, the Uniform Post-Conviction Procedure Act allows an applicant to file an application beyond this one year statute of limitations in certain circumstances, such as "when a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of the United States 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." S.C. Code Ann. § 17-27-45(B). In those narrow circumstances, an application for post-conviction relief must be filed within one year of the date on which the right or standard was determined to exist.

Petitioner asserts that the rulings in Missouri v. Frye and Lafler v. Cooper amount to a “previously unrecognized right” and allow applicant to proceed forward on an application that is clearly successive and beyond the statute of limitations. However, this argument is in error, as neither Missouri v. Frye nor Lafler v. Cooper “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.” The right to competent counsel prior to and during a guilty plea proceeding is a widely recognized right, established in the seminal United States Supreme Court case of Hill v. Lockhart, 474 U.S. 52 (1985). South Carolina courts have long held that defendants are entitled to competent counsel during the plea process. See e.g., Holden v. State, 393 S.C. 565, 713 S.E.2d 611 (2011) (holding that any deficiency in counsel's representation of defendant pertaining to plea proceedings did not prejudice defendant).

Missouri v. Frye and Lafler v. Cooper do not create any new constitutional standards or establish any new grounds but rather expound on already existing standards. Several other courts have determined similarly. See Galloway v. United States, 3:12-CV-492-FDW, 2012 WL 3262437 (W.D.N.C. Aug. 9, 2012) appeal dismissed, 500 F. App'x 233 (4th Cir. 2012) (Petitioner's argument is that the holdings in Frye and Lafler created a new rule of constitutional law as it pertains to counsel's duties during the plea bargaining stage and in counseling Petitioner on his decision of whether to plead guilty or proceed to trial. This argument must fail because these decisions did not recognize or create a new rule of constitutional law, rather these decisions merely explained the expansive nature of the rights defendants have to constitutionally effective assistance of counsel which was expounded in Strickland; In re Perez, 682 F.3d 930 (11th Cir.2012) (finding that the right to effective assistance of counsel during plea negotiations

existed before Strickland, and holding that Frye and Lafler did not announce new constitutional rules: “To begin, the Supreme Court in Lafler and Frye confirm that the cases are merely an application of the Sixth Amendment right to counsel, as defined in Strickland.” *Id.* at 932); see also Hare v. United States, 2012 U.S.App. LEXIS 16257, \*1–2 (7th Cir.2012) (denying successive Section 2255 petition and finding Frye and Lafler were not announcing new rules of constitutional law, rather the cases were applying Strickland to the unique facts of each case).

Furthermore, the post-conviction relief court properly discerned that even if Missouri v. Frye and Lafler v. Cooper did create a new standard, they are not to be applied retroactively. See In re Perez, 682 F.3d 930, 932-33 (11th Cir. 2012) (“In Frye and Lafler, the Supreme Court did not directly address whether its holdings announced new rules of constitutional law or applied retroactively. We are persuaded, however, that Frye and Lafler did not announce new rules.”) In reaching its decision, the Perez court determined that the Supreme Court's language in Lafler and Frye confirm that the cases are merely an application of the Sixth Amendment right to counsel, as defined in Strickland, to a specific factual context. In re Perez, *supra* (citing Frye, 132 S.Ct. at 1409 (noting that its discussion involved an “application of Strickland to the instances of an uncommunicated, lapsed plea”) and Lafler, 132 S.Ct. at 1384 (noting that “[t]he question for this Court is how to apply Strickland's prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial”)). As discussed above, the United States Supreme Court has long recognized that Strickland's two-part standard applies to “ineffective assistance of counsel claims arising out of the plea process.” Hill v. Lockhart, *supra*; see also Frye, 132 S.Ct. at 1405 (recognizing that Hill “established” that Strickland applies to ineffectiveness claims in the plea bargaining context). Because neither

Lafler nor Frye “breaks new ground or imposes a new obligation on the State or Federal Government,” they did not announce new rules. Teague v. Lane, 489 U.S. 288, 301, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 334 (1989) (plurality opinion). “Put another way, Lafler and Frye are not new rules because they were dictated by Strickland.” In re Perez, 682 F.3d 930, 932-33 (11th Cir. 2012).

As Missouri v. Frye and Lafler v. Cooper do not create any new constitutional standards or rules, S.C. Code Ann. § 17-27-45(B) is inapplicable and does not allow Petitioner to proceed forward on an application that is clearly successive and filed beyond the statute of limitations. Additionally, Missouri v. Frye and Lafler v. Cooper were not intended to be applied retroactively. Therefore, the post-conviction relief court properly dismissed Petitioner’s application. This Court should deny certiorari.

**CONCLUSION**

For the foregoing reasons, the State submits that the Petition 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,

ALAN WILSON  
Attorney General

MEGAN E. HARRIGAN  
SC Bar No. 100108  
Assistant Attorney General

By: Megan E. Harrigan  
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May 30, 2014

STATE OF SOUTH CAROLINA

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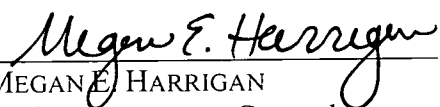
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Benjamin J. Tripp, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 30<sup>th</sup> day of May, 2014.

  
\_\_\_\_\_  
MEGAN E. HARRIGAN  
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ALAN WILSON  
ATTORNEY GENERAL

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MAY 30 2014

**S.C. Supreme Court**

May 30, 2014

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Demarco Johnson v. The State of South Carolina**  
**Appellate Case No. 2013-000935**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Megan E. Harrigan  
Assistant Attorney General  
S.C. Bar No. 100108

MEH/ko  
Enclosures

cc: Benjamin J. Tripp, Esquire, Appellate Defense  
Trisha Allen, Victim's Services