

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS

CASEY MANNING, CIRCUIT COURT JUDGE

---

CASE NO. ( 2012- CP-40-07764 )

---

The State of South Carolina, ..... Respondent.

Demarco Johnson, #241438, ..... Applicant.

---

NOTICE OF APPEAL

---

Demarco Johnson appeals the order of the Honorable Casey Manning dated March 26, 2013. Appellant received written notice of entry of this order on April 1, 2013.

s/ Demarco Johnson 4-26-13  
Demarco Johnson #241438  
4460 Broad River Road.  
Columbia S.C. 29210

RECEIVED

MAY 01 2013

SC Court of Appeals

1  
MAY 01 2013  
S. C. JUDICIAL BRANCH

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

I.

The Applicant is proceeding under the Uniform Post-Conviction Act's subsection § 17-27-45 (B). This is what this Present PCA is filed under. This subsection allows an applicant to file a post-conviction relief application no later than one (1) year after the date a 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 Lafley v. Cooper, 132 S.Ct. 1376 (2012) and Missouri v. Frye, 132 S.Ct. 1399 (2012) are the Applicant's basis for this present PCA application. 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 Pelquin v. State, 469 S.E.2d 606 (1996). Therefore the present P.C.R. application, 2012-CP-40-07764, should be summarily dismissed. (See "conditional order of dismissal and/or final order") respectfully, this court's legal conclusion is clearly erroneous and is contrary to the caselaw 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, 2012-CP-40-07764, under the S.C. Code Ann. §17-27-45 (B). The defendant Talley filed his P.C.R. application on the assertion that the US Supreme Court's ruling on the case Alabama v. Shelton, 535 US 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 limitations period governing post-conviction claim that prior, uncounseled misdemeanor convictions could not be used to enhance subsequent federal charges, began to run when the the United States Supreme Court issued the decision in Alabama v. Shelton that defendants 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 Pelouin 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 PCR 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 PCR application on March 6, 2003. Therefore, Talley's PCR application is timely filed under S.C. Code Ann. § 17-27-45 (B).

The Applicant Johnson 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 PCR Application can be summarily dismissed—it can not. This PCR application must be brought forward for an evidentiary hearing on the merits of these issues. The case Talley v. State mandates this Honorable PCR court to proceed in this manner.

III

Secondly, Applicant Johnson present PCR application should not be deemed "Successive" nor rendered ingenuine. because Applicant Johnson present Constitutional Claim could not be 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 fact nor as a matter of law file a post-conviction 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 #2012 CP-40-07764, is the first and only opportunity, as a matter of fact and as a matter of law, the Applicant Johnson has to plead his Constitutional Claim of

ineffective assistance of counsel pursuant to Lafley v. Cooper and Missouri v. Frye. The Respondent's argument of this PCN application being successive is meritless and baseless. Talley v. State, 640 S.E.2d (S.C. 2007)

III

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 or attempt to establish a reasonable and effective plea bargaining negotiation, hindered Applicant from effective assistance of counsel.

date: April 26, 2013

Respectfully Submitted,

Demarco Johnson

Demarco Johnson #241438  
4460 Broad River Rd.  
Columbia S.C. 29210

RECEIVED  
MAY 01 2013  
SC Judicial Appeals