

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Apr 25 2022

ON WRIT OF CERTIORARI TO HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Benjamin H. Culbertson, Plea Judge
The Honorable William H. Seals, Post-Conviction Relief Judge

ROBERT LEE MYERS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2021-000919

RESPONDENT'S MOTION FOR REMAND
FOR APPOINTMENT OF COUNSEL AND
A NEW EVIDENTIARY HEARING

This matter is before the Court on appeal from the denial of Petitioner's application for post-conviction relief. On June 25, 2021, a motion to dismiss hearing was held before the Honorable William H. Seals, circuit court judge, at the Horry County Courthouse. Petitioner was represented by Carla F. Grabert-Lowenstein. On July 31, 2021, the Court issued an order of dismissal, granting the State's partial motion to dismiss for untimeliness concerning all claims except for Petitioner's claim pursuant to *White v. State*, 263 S.C.110, 108 S.E.2d 35 (1974).

On January 4, 2022, Petitioner filed the appendix and petition for writ of certiorari, raising the following issues:

- I. Whether the PCR Court erred where it dismissed Petitioner's ineffective assistance of counsel claims based on failure to comply with the one-year limitations period for PCR actions, where the application was sent to and received by the Clerk of Court within the one-year time period but the clerk's office erroneously returned the application

- a. Since the application was filed the first time it was delivered to and received by the Clerk of Court?
- b. Since, alternatively, equitably tolling of the limitations period was warranted under these circumstances?

II. Whether the PCR court erred where it found counsel provided effective representation despite her failure to file a notice to appeal immediately after the plea hearing, and where counsel could not recall whether she met with Petitioner after the plea hearing, since counsel was obligated to initiate an appeal when one was requested?

In *Barnes v. State*¹, the Supreme Court of South Carolina found the petitioner was entitled to file a successive application because the clerk of court improperly returned the application back to petitioner, unfiled, based upon a perceived procedural defect. 433 S.C. 399, 401, 85 S.E.2d 260, 261 (2021). The Court found that a clerk of court cannot reject a pleading for lack of conformity with the procedural requirements of form, but that this determination falls within the PCR Court's jurisdiction. *Id.* at 403-04, 85 S.E.2d at 262. Timeliness of a PCR application is based upon receipt of the application by the clerk of court; not based upon the clerk's personal determination of whether or not the application is worthy of clocking. *Id.*

In light of the South Carolina Supreme Court's recent decisions in *Barnes*, Respondent would now consent to a remand of this case and the appointment of PCR counsel. Respondent has reviewed the record in its entirety. In the present case, Respondent agrees that Petitioner's PCR application is timely because the clerk of court returned a timely received, unstamped copy of the PCR application back to Petitioner, causing Petitioner to miss the filing deadline.

Therefore, Respondent moves that this case be remanded to the Court of Common Pleas of Horry County for the appointment of new PCR counsel and a new evidentiary hearing where Petitioner can raise his legal issues of ineffective assistance of counsel and any other legal issues

¹ *Barnes* was not yet decided when the clerk of court returned Petitioner's unfiled application for post-conviction relief back to him.

that are proper in a post-conviction relief hearing. The parties also agree to dismiss the present appeal without prejudice. Respondent has contacted Petitioner, who consents to this motion.

CONCLUSION

WHEREFORE, Respondent prays that this Court remand this matter to the Court of Common Pleas for a new evidentiary hearing and the appointment of counsel for Petitioner.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General
S.C. Bar. No. 104191

/s Chelsey F. Marto
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

April 25, 2022