

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable R. Kirk Griffin, Circuit Court Judge

MARQUITA SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000502

APPENDIX

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Marquita Smith - Redirect Examination by Ms. Shurling

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1 defendant? I believe his name was Mr. Grant.

2 A. No, I didn't know him. I hadn't never seen him
3 until trial.

4 Q. And you didn't -- the day that the three of them,
5 including Kerry Hollins showed up, you didn't know in
6 advance there were going to be three of them?

7 A. It was four. I didn't know in advance it was going
8 to be -- I saw -- it was four, they said at trial. Gary
9 Grant, the one you just asked me about, I didn't know him
10 at all. I had never seen him until trial. But the other
11 one I had seen.

12 Q. Okay. Now, I'm aware that a gentleman named -- it's
13 a name I couldn't remember, Odonis, or something like
14 that, Cobb, said that four -- there were four armed
15 people that came in.

16 MS. SHURLING: Your Honor, I'm looking at page
17 403 and 404 of the transcript.

18 Q. But to your knowledge at the time the people became.
19 visible out in the parking lot at Tiwana's apartment, how
20 many were there, three or four?

21 A. It was four.

22 Q. Well, two people were on trial with you, right?

23 A. Yes, ma'am.

24 Q. Mr. Hartwell and Mr. Brown?

25 A. Uh-huh (affirmative).

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1 THE COURT: Is that a yes?

2 A. Yes, ma'am.

3 Q. And Kerry testified for the State?

4 A. Yes, ma'am.

5 Q. That's three.

6 A. Uh-huh (affirmative).

7 Q. Who was the fourth person?

8 THE COURT: Is that a yes?

9 A. Yes, ma'am. I sorry. Kareem King.

10 Q. Mr. King?

11 A. Yes, ma'am.

12 Q. And what happened to him, did he have charges?

13 A. Yes, ma'am.

14 Q. What were the charges against him?

15 A. I'm not sure. His was like a year later. So I'm
16 not sure what they had charged him with.

17 Q. Okay. So he wasn't brought to trial until
18 considerably after y'all?

19 A. Yes, ma'am.

20 Q. Okay. All right. So I've raised everything you
21 wanted me to?

22 A. That's correct.

23 Q. One real important question, have I explained to you
24 to be careful what you pray for?

25 A. That's correct.

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1 Q. Have I explained to you that if Her Honor were to
2 find in her wisdom that it was appropriate to give you a
3 new trial, that at a new trial, that the Judge at a new
4 proceeding would not be bound by the sentence that was
5 given to you by the Trial Judge in your first trial?

6 A. That's correct.

7 Q. And have I explained to you that if it were to be
8 the same Judge and that Judge wanted to give you more
9 time, that he would have to put on the record -- she --
10 pardon me. If it Deadra Jefferson and Deadra Jefferson
11 wanted to give you more than thirty years, she would have
12 to explain why in her wisdom the appropriate penalty had
13 gone up since the first trial?

14 A. Correct.

15 Q. But if it was any other Circuit Court Judge and I
16 explained to you, we've got a bunch of them, any other
17 Judge would be bound only by what the law provides the
18 penalties to be for armed robbery and murder?

19 A. Correct.

20 Q. Because accessory before the fact carries the same
21 penalties as the completed offense?

22 A. Yes, ma'am.

23 Q. With the exception of the fact that there is a South
24 Carolina case that has found that an accessory before the
25 fact of murder does not face possible capital punishment,

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1 right?

2 A. Yes, ma'am.

3 Q. All right. So do you understand that if the Judge
4 grants you a new trial, what she's granting to you is the
5 chance to start over completely?

6 A. That's correct.

7 Q. And knowing that risk exist, that you could get more
8 time, you still are asking Her Honor to grant you a new
9 trial?

10 A. Yes, ma'am.

11 Q. Thank you.

12 MS. SHURLING: No further questions.

13 MR. FRIEDMAN: No other questions, Your Honor.

14 THE COURT: You may step down. Call your next
15 witness.

16 MS. SHURLING: Your Honor, I have no further
17 witnesses. I have already informed Madam Court Reporter
18 that I would request a copy of the transcript of today's
19 proceedings. I think given the complexity of the
20 testimony here today and the issues involved, that it
21 would be advisable for us to have a copy of the
22 transcript to prepare proposed orders. She's a rarity.
23 She tells me she's not very backed up on her typing,
24 which is delightful to hear. I would ask Your Honor that
25 we be given fifteen days from the date that I receive

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1 that transcript to do proposed orders.

2 THE COURT: Madam Court Reporter, how long is
3 it going to take you to do that.

4 MADAM COURT REPORTER: It shouldn't be a month.
5 I mean, I only have about three hundred, four hundred
6 pages. I mean, I can get it whenever you want me to have
7 it?

8 THE COURT: All right. Counsel, approach.

9 (WHEREUPON, Mr. Friedman and Ms. Shurling approached
10 the bar.)

11 THE COURT: All right. The Court reporter has
12 indicated that in all likelihood she would be able to
13 have this -- looking at my calendar, she would need the
14 Thanksgiving Holidays, of course, to finish it up. And
15 so you would have it by December 1st at the latest. Is
16 that correct?

17 MADAM COURT REPORTER: Yes, ma'am.

18 THE COURT: So that would give you -- with
19 that, Ms. Shurling, how long would you need for proposed
20 orders?

21 MS. SHURLING: What day of the week is December
22 15th?

23 THE COURT: December 1st.

24 MS. SHURLING: No, that's when she's going to -

25 --

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1 THE COURT: That's when she's going to give it
2 to you.

3 MR. FRIEDMAN: Thursday.

4 MS. SHURLING: Pardon?

5 THE COURT: It's a Thursday.

6 MS. SHURLING: Your Honor, my office is closed
7 on Friday so if I could have to the end of the business
8 day on Thursday the 15th to have it submitted to Your
9 Honor electronically?

10 THE COURT: I'll give you to the 14th. The end
11 of business the 14th.

12 MS. SHURLING: Whatever, Your Honor.

13 THE COURT: If you need any additional -- I'm
14 anticipating that she'll have you the transcript before
15 December 1st. So if you need additional time, just let
16 me know. But whatever happens is ---

17 MS. SHURLING: Whatever Your Honor thinks is
18 appropriate.

19 THE COURT: December 14th at five p.m.

20 MS. SHURLING: December what, Your Honor?

21 THE COURT: 14th.

22 MS. SHURLING: The 14th?

23 THE COURT: At five p.m.

24 MS. SHURLING: It'll be here.

25 THE COURT: And Madam Court Reporter, if

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1 anything happens, if you would just let me know, as well,
2 if you need additional time and state what time.

3 MADAM COURT REPORTER: All right. I'll be
4 fine.

5 THE COURT: All right. December 14th at five
6 p.m.

7 MS. SHURLING: All right, Your Honor.

8 THE COURT: And if there's anything that you
9 need between now and then, while we're waiting on
10 transcripts, if you wish to provide me additional
11 supplemental briefs or cases or whatever you think that I
12 need, I'll be more than happy to accept it.

13 MS. SHURLING: And thank you, Your Honor. I do
14 intend to try and find the letter that Ms. Blanchette
15 says she sent to Marquita Smith outlining issues that she
16 felt were probable meritorious raising issues on appeal
17 had they been preserved. I would, at this time, say that
18 I will probably file a motion to have those issues
19 considered in addition to what we've already said today
20 if there is anything other than what I've already raised.
21 There are two points that I also need to bring up. Is
22 that it was developed during the testimony of Craig Jones
23 that for some reason he had not gotten these statement --
24 the most recent statement of Kerry Hollins in discovery
25 materials and he did not, based on my reading, raise the

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1 Rule 5 violation, Brady** arguably, as a potential basis
2 for the failure to timely provide under Lyles v.
3 Whitley**. He didn't make that argument in his motion
4 for severance and his motion for continuance and I would
5 add that to what was already amended in my application.
6 Likewise, Your Honor, it came out today -- I had another
7 point. I'm sorry. It has just left my brain. I
8 apologize. Your Honor, there was one additional point
9 that was developed in the course of the testimony today
10 that was not strictly covered by the letter of the
11 amended application. When I read the transcript of the
12 proceeding today, I will articulate that issue, as well
13 as the Rule 5 issue, as grounds developed in the PCR
14 testimony and ask the Court's leave to amend and include
15 those under Simmons v. State** at the time I do my
16 proposed order.

17 THE COURT: Any objection?

18 MR. FRIEDMAN: No, Your Honor.

19 THE COURT: So granted

20 MS. SHURLING: Thank you.

21 THE COURT: You may do that as well. All
22 right. With that, anything further?

23 MS. SHURLING: Nothing.

24 THE COURT: All right. Well, I will be waiting
25 anxiously for your proposed orders on the 14th. Thank

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1 you.

2 MS. SHURLING: Thank you, Your Honor.

3 THE COURT: Thank you. And I believe that
4 concludes our matters for today. Good luck to you, Ms.
5 Smith.

6

7 END OF REQUESTED TRANSCRIPT OF RECORD

8

Marquita Smith -vs- The State of South Carolina (2010-CP-08-2985)
Certificate of Reporter

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1

CERTIFICATE OF REPORTER

2

3

I, the undersigned Danette P. Hanks, Official Court
Reporter for the Thirteenth Judicial Circuit of the State
of South Carolina, do hereby certify that the foregoing
is a true, accurate, and complete transcript of record of
all the proceedings had and evidence introduced in the
trial/hearing of the captioned case, relative to appeal,
in the Court of Common Pleas for Berkeley County, South
Carolina, on the 17th day of November, 2011.

11

This transcript may contain quoted material. Such
material is reproduced as read by the speaker.

13

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

15

November 29, 2011

16

17

18



19

Circuit Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

MARQUITA SMITH, #323834)
Applicant,)
v.)
THE STATE OF SOUTH CAROLINA)
Respondent.)

2010-CP-08-2985

**MEMORANDUM OF LAW IN
SUPPORT OF APPLICATION FOR
POST-CONVICTION RELIEF**

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on August 24, 2010 and amended on November 17, 2011. The State filed its Return on February 3, 2011. An evidentiary hearing was convened in this matter on November 17, 2011, during which the Applicant was present and represented by Tara Dawn Shurling, Esquire and the State was represented by Assistant Attorney General, Matt Friedman. At the hearing held in this case, the Applicant presented her own testimony as well as testimony from defense counsel, appellate counsel, Tricia Blanchette, and State witness, Kerry Hollins. In addition to this testimony, the Court had before it a transcript of the Applicant's August of 2007 trial, a copy of the records of the Berkeley County Clerk of Court regarding the subject convictions, and a copy of the Applicant's records with the South Carolina Department of Corrections.

**I.
PROCEDURAL HISTORY**

The Applicant is incarcerated in the South Carolina Department of Corrections pursuant to the Berkeley County Clerk of Court's orders of commitment. She was indicted by the Berkeley County Grand Jury at the August 2007 term of court for accessory before the fact of murder (2007-GS-08-1748) and accessory before the fact of armed robbery (2007-GS-08-1751). On August 27-30, 2007, the Applicant proceeded to trial by jury and was represented by V.

Craig Jones, Esquire. The Applicant was found guilty as charged and sentenced to thirty (30) years imprisonment on each charge, to be served concurrently. A timely Notice of Appeal was filed on the Applicant's behalf. Tommy A. Thomas, Esquire and Tricia A. Blanchette, Esquire, represented the Applicant on appeal. On March 24, 2010, the South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Smith, Op. No. 4662, (S.C. Ct. App. filed March 24, 2010). The Court of Appeals denied the Applicant's Petition for Rehearing and Petition for Rehearing *en banc* by Order dated June 4, 2010. The Remittitur was issued July 13, 2010.

II. ALLEGATIONS RAISED

In her Application for Post-Conviction Relief filed August 24, 2010, the Applicant alleged that she was being held in custody unlawfully for the following reasons:

1. The Applicant received ineffective assistance of counsel prior and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

2. The judgments and sentences against the Applicant were entered in violation of her rights to the due process of law and to the effective assistance of counsel.

3. The Applicant received ineffective assistance of counsel on direct appeal in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

The Amended Application for Post-Conviction Relief, filed November 17, 2011, contained the following additional specific allegations:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery.

2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery.

3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her.

4. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact.

5. Trial Counsel was ineffective for failing to fully present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges.

6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery.

7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing *and/or* the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties.

8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability

analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her co-defendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit.

9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder.

10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she *was not present* during the commission of the principal offenses.

11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants.

12. Trial counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense.

13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments.

14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story."

15. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal offenses or that the crimes were readily foreseeable

consequences of the acts she agreed to commit.

16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.

17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "*to commit a crime*," thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing *any* crime would make her mutually liable for all the acts committed by her co-defendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

At the evidentiary hearing convened in this case, the Applicant expanded one of her amended allegations, to include a claim that: defense counsel was ineffective for advising his client that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument. (added to amended allegation #13). At this hearing, the Applicant also specifically alleged that:

1. Defense counsel was ineffective for failing to effectively argue a Rule 5, SCRCrimP, violation in his motion for a continuance and severance, where the State did not disclose a statement of a co-defendant that had turned State witness.

2. Defense counsel was ineffective for failing to interview the co-defendant turned State witness prior to trial, or in the alternative, for failing to request a brief recess or continuance to do so.

III. FACTUAL BACKGROUND

The Applicant admitted, in a statement given to law enforcement, that she had offered up the name of her "cousin," the Victim in this case, when co-defendant turned State witness, Kerry Hollins, indicated that he wanted someone to rob. Trial Tr. p. 545, ll. 15-18. She told Hollins that

the Victim might have some money on his person. Trial Tr. p. 545, ll. 17-18. Two days later, on the night in question, the Applicant provided some information to Hollins regarding the Victim's whereabouts. Trial Tr. p. 546, l. 6-p. 547, l. 19. The Applicant was present with the Victim and a friend at that friend's apartment, when Hollins, the Applicant's co-defendants and Kareem King arrived with the apparent intent of robbing the Victim. Trial Tr. p. 547, l. 20-p. 548, l. 7; p. 411, ll. 9-24. The co-defendants and King overtook the Victim at the apartment and transported him to a secondary location. Trial Tr. p. 547, l. 20-p. 548, l. 7; Trial Tr. pp. 172-175. The Applicant was indisputably at or near the friend's apartment complex when the incident was initiated. Trial Tr. p. 548, ll. 8-9. The victim was physically assaulted and fatally wounded by gunfire at the secondary location. Trial Tr. p. 385, ll. 15-24; p. 391, l. 21-p. 392, l. 13. There was some testimony that a co-defendant may have taken jewelry from the Victim during the course of these events. Trial Tr. p. 416, l. 18-p. 417, l. 1.

The Thursday prior to trial, defense counsel received his first notice that Hollins, a former co-defendant of the Applicant, would be testifying against her at trial. He received this information from the public defender representing Hollins. It was that Public Defender, not the State, who sent defense counsel a copy of the previously undisclosed statement by Hollins. Based on that revelation, and his untimely notification that the case was being called for trial, defense counsel moved for a continuance. Trial Tr. pp. 11-21. Defense counsel also moved for a severance, claiming antagonistic defenses between the Applicant and her co-defendants as well as an inability to fully cross-examine Hollins. These motions were denied. Trial Tr. pp. 11-21.¹ At the trial, Hollins testified without objection that the Applicant provided the nickname of the Victim, "Kuku," as someone to set up a "lick" on. Hollins also testified that a "lick" meant robbery and that a weapon was needed to do a "lick." Trial Tr. p. 403, l. 10-p. 404, l. 23.

¹ The lower court's rulings on these issues were challenged on direct-appeal.

During the State's presentation of its case, counsel for a co-defendant introduced a photo lineup as an exhibit, causing all defendants to lose the right to a last argument. Trial Tr. p. 334, l. 25-p. 336, l. 15. Despite the fact that last arguments had been lost, defense counsel did not present any testimony or evidence in the Applicant's defense. He argued for a directed verdict of acquittal on the Applicant's charges, but the motion was collectively denied along with the other motions for directed verdicts from the co-defendants based on the Court's determination that evidence existed to support the charges. Trial Tr. pp. 559-563; 624-625. During the charge conference, defense counsel requested an additional instruction on the charge of strong arm robbery, highlighting the lack of any evidence that the Applicant knew weapons would be involved. Trial Tr. p. 597, l. 5-p. 604, l. 1.

Also at the charge conference, Defendant's counsel requested an accomplice liability charge for the Applicant. The State requested a felony-murder instruction, and the Court indicated that it would give an instruction on the felony-murder inference of malice. Trial Tr. p. 607, ll. 6-24. The State referenced the so-called felony-murder rule in its closing arguments, noting that any time a victim is killed "in the course of another felony, then his death is murder. End of story." Trial Tr. p. 693, ll. 16-20. Defense counsel, in his closing arguments, indicated that his client could not be held accountable for events that were not foreseeable results of the plans in which the Applicant was involved. Trial Tr. pp. 653-674. Defense counsel stressed the fact that his client was not present during the commission of the crimes charged to the principal actors. Trial Tr. pp. 653-674.

IV. STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294

(2000); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

Where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Defense counsel may not however explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (internal citations omitted).

The Sixth Amendment's guarantee of effective assistance of counsel includes the effective assistance of counsel in the defendant's first appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). In the context of an allegation of ineffective assistance of appellate counsel, the

operative question becomes whether but for appellate counsel's errors and omissions, the result on appeal would have been different. Smith v. Murray, 477 U.S. 527 (1986); see also Smith v. Robbins, 528 U.S. 259, 285 (2000) (holding that the proper standard for evaluating the claim that appellate counsel was ineffective was the standard enunciated in Strickland v. Washington); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). "Respondent must first show that his counsel was objectively unreasonable, see Strickland, 466 U.S., at 687-691, 104 S.Ct. 2052, in failing to find arguable issues to appeal-that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [Respondent] succeeds in such a showing, he then has the burden of demonstrating prejudice." Smith v. Robbins, 528 U.S. at 285.

V. DISCUSSION

1. Defense Counsel's Failure to Adequately Argue Applicant's Pre-Trial Motions for a Severance and Continuance and his failure to seek a recess to interview co-defendant Hollins when a Continuance was denied.

Defense counsel made a motion for a continuance at the onset of the Applicant's trial, indicating that he received notice of the scheduled start date only ten (10) days in advance. Counsel informed the judge that he had just discovered, the Thursday prior to trial, that a former co-defendant would be testifying against his client and that there was a previously undisclosed statement from that witness. Trial Tr. p. 11, l. 5-p. 13, l. 10. He additionally argued that he had not had adequate time to secure the attendance of two parties that he felt to be necessary witnesses in the Applicant's defense. Trial Tr. p. 22, l. 19-p. 24, l. 4. The Applicant's defense counsel also presented a motion for a severance, supported by the fact that he could not adequately highlight the disparity in culpability between co-defendants with extensive criminal backgrounds and his own

client's clean record, if their prosecutions were not severed. Trial Tr. p. 14, l. 2-p. 15, l. 12. Counsel additionally argued that his last-minute notice of the fact that Hollins would be a witness for the State, deprived him of the opportunity to prepare to adequately refute Hollins' anticipated testimony that his client was the mastermind behind this entire plan. Trial Tr. p. 16, l. 25-p. 17, l. 5.

What defense counsel failed to cover in his argument for a severance was the reality that jury instructions issued in a joint trial against the Applicant and her co-defendants would have to be very cumbersome and complex. The instructions necessary at a joint trial would have to adequately explain the different findings required for the jury to determine the co-defendant's guilt on their charges of armed robbery and murder charges versus those necessary for verdicts on the Applicant's charges of *accessory before the fact of* armed robbery and murder. The necessary instructions would necessarily have to thoroughly explain the theory of accomplice liability as it applied to the accessory versus the principal offenses. There existed a very real possibility that a jury would be confused by the complicated legal differentiation of the standard to be applied to the Applicant versus her co-defendants and therefore would be incapable of applying the proper legal standard to the Applicant's accessory charges versus the standard applicable to her co-defendants who were charged as principals. While defense counsel argued for a severance based on his need to highlight the disparity between his client's background and the extensive criminal records of her co-defendants, he did not argue that it would be difficult for his client to have a jury adequately and clearly instructed on the applicable law in a joint trial. The Applicant was clearly prejudiced in that this available argument would have supported the desired severance. South Carolina precedent provides that a severance should only be granted "when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt."

Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (emphasis in original). It is the Applicant's position that the confusing jury instructions ultimately issued at her trial prevented the jury from making a reliable judgment about her guilt. The complex and confusing instructions likely to result from a joint trial were readily foreseeable and should have been argued as justification for a severance.

When defense counsel realized that the Court was not going to continue this trial to another day or term, he should have, at the least, requested a brief recess in order to attempt to interview Hollins about his statement and anticipated testimony. He was clearly ineffective for failing to do so since defense counsel's own words indicate that he felt incapable of adequately cross-examining this last-minute witness. In his PCR testimony, defense counsel admitted that he did not ask the public defender representing Hollins if he could interview him prior to the beginning of the Applicant's trial. PCR Tr. p. 61, ll. 12-15. The record establishes that defense counsel spoke with Hollins' attorney the week before the Applicant's trial. That conversation addressed the fact that Hollins would be a witness for the State and therefore presented an obvious opportunity to discuss a potential interview of Hollins prior to trial. PCR Tr. p. 86, ll. 9-17.

Hollins testified at the Applicant's evidentiary hearing that he would have agreed to speak with the Applicant's defense attorney if he had been asked. PCR Tr. p. 108, l. 20-p. 109, l. 4. Furthermore, Hollins confirmed information that clearly would have been helpful to the defense, such as the Applicant being unaware of any plan to bring guns and his assurances to the Applicant that the Victim would not be hurt. When asked if he would have provided this information to defense counsel, Hollins answered in the affirmative. PCR Tr. p. 112, ll. 2-24. Defense counsel admitted that he failed to ask for even a brief recess to speak with Hollins and he acknowledged that he would have been more likely to receive that, than a continuance of the trial. PCR Tr. p. 86, l. 18-

p. 87, l. 6.

When Applicant's defense counsel presented his arguments for a continuance and severance, he also failed to mention the Rule 5² violation that occurred in the State's failure to timely disclose the more recent statement of Hollins, who was testifying against his client. Counsel thought that the statement was taken on August 4th, 2007, nearly two weeks prior to trial. Counsel did not receive the statement, or notice of its existence, until the Thursday or Friday prior to trial, and even then, received the information from the attorney representing Hollins not the State. Rule 5(a)(1)(C) provides that upon request of the defendant, the prosecution has a duty to provide documents or items in the possession, custody or control of the prosecution which are material to the preparation of a defense or are intended to be used by the prosecution as evidence in chief. Rule 5(a)(1)(C), SCRCrimP. Furthermore, the duty imposed under this rule is a continuing duty to disclose as necessary. Rule 5(c), SCRCrimP. A motion requesting discovery under Rule 5 was prepared and served upon opposing counsel by the Applicant's previous attorney, George Bishop, Jr. PCR Counsel obtained a copy of that motion from the file of trial counsel, Craig Jones. A copy of that motion and certificate of service are attached.³ See Attachment A.

The State's failure to produce Hollins' most recent statement prior to trial was a violation of South Carolina Rules of Criminal Procedure and defense counsel's failure to note this violation in support of his continuance request constituted ineffective assistance of counsel. At the evidentiary hearing, defense counsel admitted that he probably did not specifically reference this issue, and in retrospect, wished that he had used words to specifically evoke a Rule 5 violation. PCR Tr. p. 56, l.

² Rule 5, SCRCrimP.

³ A copy of this motion was not introduced during the evidentiary hearing inasmuch as PCR counsel expected the motion to be included in the Clerk of Court records in this matter. It has subsequently been determined that, although the motion was served, it was apparently not filed with the Clerk of Court. For that reason, PCR counsel is filing a motion to expand the PCR record to include a copy of the Rule 5 Motion and certificate of service. Counsel for the Respondent has consented to this request.

4-p. 57, l. 12. The Applicant was prejudiced by counsel's failure to add this to his arsenal of arguments in favor of a continuance. This Rule 5 violation so strongly supported that motion, that it could also have proven to be reversible error, if prejudice were shown to result from the violation. See State v. Landon, 370 S.C. 103, 108-109, 634 S.E.2d 660, 663 (2006). Defense counsel had, indeed, stated that his preparation of a defense was impaired by this last-minute notice that a co-defendant had turned State witness and given a recent statement.

For the above reasons, the Applicant argues that her defense counsel was ineffective in arguing his motions for a severance and continuance and in failing to seek even minimal time to interview Hollins.

2. Defense Counsel's Failure to Adequately Cross-Examine State Witness Hollins

Tied into this claim is the Applicant's claim that defense counsel was ineffective for failing to fully cross-examine Hollins. Specifically, he failed to elicit testimony that would have been favorable to the defense. As stated immediately above, Hollins testified at the evidentiary hearing that he would have confirmed that the Applicant was unaware of any plan to bring weapons, and that she was similarly unaware that the victim might be harmed.⁴ Likewise, his testimony could have been used to confirm that there was no plan to which the Applicant was privy to commit a burglary. And, as will be discussed in-depth in the next section, an unclear and improper definition of the street term "lick" elicited from Hollins in his direct testimony was relied upon the State to create the inference that the Applicant *was aware* that weapons would be involved. If Hollins had been adequately cross-examined, it is clear that Hollins' own testimony

⁴ Although the Applicant was only charged with accessory before the fact to armed robbery and murder, the fact that a burglary and kidnapping ultimately occurred, for which her co-defendants were charged could have been considered by the jury in determining whether a murder was a readily foreseeable consequence of the activities the Applicant participated in. Thus, testimony that the Applicant had no knowledge of a plan to be armed while committing this robbery, or of any plan to kidnap or commit burglary, would have significantly diminished the chances that the jury would find that the victim's murder was a readily foreseeable consequence of the acts she knowingly participated in.

on cross-examination would have substantially challenged the State's position that the Applicant was aware of plans to commit an armed robbery. Defense counsel should have had the benefit of knowledge gained from a pre-trial interview with Hollins to use to challenge the confusing or incongruent statements elicited from this witness on direct examination. As this failure to fully cross-examine Hollins is directly related to the failure to interview the witness prior to trial, and the Rule 5 violation, this issue must be evaluated in conjunction with the issues addressed in Section 1, *supra*.

3. Testimony from State Witness Hollins' that a "Lick" Conclusively Meant an Armed Robbery

The most damaging evidence against the Applicant at trial came in the form of improper and patently misleading testimony from State witness Hollins. Hollins testified that the Applicant had suggested the Victim for a "lick", and then at the urging of the State proceeded to define for the jury, what a "lick" is commonly taken to mean. While Hollins initially defined a lick as signifying a robbery, he was subsequently led by the State to state that a "lick" necessitated the use of some type of weapon. Trial Tr. p. 403, ll. 10-20. Although Counsel for a co-defendant was able to get Hollins to admit, on cross-examination, that the term did not necessarily refer to an armed robbery, Trial Tr. p. 424, l. 13-p. 425, l. 9, the Applicant submits the damage from this statement was done. The jury was all too likely to take at face value Hollins initial claim on direct-examination that you need a weapon to hit a "lick" and fail to recognize his retreat from that position on cross-examination. Furthermore, this testimony was cited by the State as evidence supporting denial of the Applicant's request for a charge on a lesser offense of strong arm robbery. Trial Tr. p. 598, l. 14-p. 599, l. 1. The prejudice arising from this testimony was exacerbated when during closing arguments the State emphasized this testimony by stating, "Defense would have you believe she [Applicant] didn't know it was going to be a robbery—she didn't know it was going to be an armed robbery." The

State wraps up that argument with, "Y'all know what a robbery is, what a lick is." Trial Tr. p. 679, ll. 13-20.

The Applicant testified at her own evidentiary hearing that the term a "lick" does not necessarily denote an armed robbery, or robbery at all. She testified that it could signify various different means of getting money, or making quick cash. PCR Tr. p. 128, l. 8-p. 129, l. 3. This interpretation is consistent with the definition of a "lick" referenced in an unrelated 2008 Court of Appeals decision. See State v. Page, 378 S.C. 476, 479, 663 S.E.2d 357, 358 (Ct. App. 2008) (witness testifies that "making a lick," is slang for "coming up on some extra money, doing something to come up with some extra money some way or somehow"). It is evident from the trial record that counsel for a co-defendant recognized, and acted upon, the need to challenge Hollins' initial characterization of a "lick" as being an armed robbery. The Applicant's counsel should have likewise recognized the impropriety of this witness giving meaning to a street term without any evidentiary foundation or basis. Defense counsel was ineffective for failing to object each and every time that the State sought to introduce testimony that a "lick" signified an armed robbery. The Applicant, being charged as an accessory before the fact, was more severely harmed by this testimony than any of the other co-defendants.

In a 1960 slander case⁵ before the Supreme Court of South Carolina, a married female plaintiff alleged that her supervisor had told her, among other things, to refrain from sexual relations with her husband when he stated the following slang term: "You go home and tell him he can't have any of that stuff tonight or any night." In reviewing the lower court's decision, the Supreme Court held that the defendant had conceded his agreement with the meaning ascribed to a slang term by the plaintiff, because the defendant had not objected to the Plaintiff's failure to offer proof as to the meaning of the term. Renew, 237 S.C. at 119, 115 S.E.2d at 666. In the instant case, trial counsel's

⁵ Renew v. Serby, 237 S.C. 116, 115 S.E.2d 664 (1960).

failure to object each and every time the slang term was defined substantially prejudiced the Applicant's defense and her case on appeal.

The prejudice to the Applicant arising when Hollins defined this term *as a robbery involving weapons* was so substantial that defense counsel was remiss for not immediately moving for a mistrial and/or requesting a curative instruction. Hollins' definition of this term was not only improperly admitted, but it was instantly prejudicial to the Applicant. There was no other evidence presented that even suggested that the Applicant was aware that weapons would be involved in this attempt to get money from the Victim. This is the testimony that the State hung its hat on, regarding the Applicant's alleged knowledge that an *armed* robbery would take place. The Applicant was greatly prejudiced by counsel's failures in this regard in that the jury could infer, solely from Hollins' definition of a "lick," that the Applicant had volunteered her cousin for an armed robbery. Knowledge that this robbery would involve the use of weapons exponentially increased the chances that jury would conclude that the victim's murder was a foreseeable consequence of the crime she knowingly was an accessory to.

4. Defense Counsel's Directed Verdict Motions

Defense counsel brought a motion for a directed verdict of acquittal on both of the charges against the Applicant simply arguing that there was no evidence to support a charge of accessory to armed robbery. He further stated that there was no evidence of a common plan to commit armed robbery or murder and that; generally, murder was not a probable and natural consequence of the Applicant's acts. Trial Tr. pp. 559-560. This argument in support of the Applicant's directed verdict motions was inadequate and ineffective considering the fact that the totality of the evidence adduced at trial had completely failed to establish that the Applicant knowingly participated in anything that put her on notice that her co-defendants would ultimately commit far more serious crimes.

There was a total lack of evidence, other than Hollins' improper definition of a street slang term a "lick", to suggest that the Applicant knew that weapons would be involved. Without any evidence to establish that the Applicant knew weapons might be involved, it is implausible for the State to argue that murder and armed robbery were foreseeable results of her assistance to the co-defendants. The Applicant was an inexperienced nineteen-year-old with no criminal history. She suggested the Victim as a potential target for some quick cash, however the State did not demonstrate that the Applicant had any knowledge from which she should have concluded that the victim's death was a probable consequence of her actions. Defense counsel's brief argument in support of directed verdicts of acquittal for his client fails to highlight the State's failure to prove in a clear and organized fashion.

Defense counsel also failed to utilize another important item in his arguments supporting the motions for a directed verdict. One of the elements required to find a person liable as an accessory before the fact is that the person is *not present* at the scene of the crime. The elements necessary to support an accessory before the fact charge are as follows: "(1) that the defendant advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) that the defendant was not present when the offense was committed; and (3) that the principal committed the crime." State v. Gentry, 363 S.C. 93, 97-98, 610 S.E.2d 494, 497 (2005) (quoting State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993)) (emphasis added).

It had already been established that the Applicant was present at her friend's apartment, where the Victim was initially attacked and grabbed by the co-defendants. The testimony of the Applicant's friend and the Applicant's own statement establishes this fact. Trial Tr. p. 547, l. 20-p. 548, l. 7; pp. 137-141. Since the evidence did not clearly establish where, if anywhere, an actual robbery occurred, it is possible that she was present during the alleged act of robbery. At the very

least, it was established that the Applicant was present during one of the phases of the crimes that led to her accessory before the fact of armed robbery and murder charges. Most importantly, defense counsel could have argued that the Applicant was present when the only crime she *knowingly* aided and abetted, a robbery, was initiated. This critical fact, which negated one of the elements necessary to convict the Applicant on her charges, should have been argued in support of directed verdicts of acquittal.⁶

At the evidentiary hearing, appellate counsel testified that the evidence demonstrated that the Applicant was present for stages of the offenses. PCR Tr. p. 30, ll. 7-18. She indicated that if defense counsel had presented this issue in his motions for a directed verdict, it would most likely have been included in the appellate brief as a meritorious issue. Unfortunately, she stated, the issue was not preserved for further review. PCR Tr. p. 31, l. 19-p. 32, l. 17. Thus, defense counsel's failure to make this well-supported argument in favor of directed verdicts of acquittal not only damaged the Applicant's chances of the trial judge directing verdicts in her favor, but also eliminated any opportunity for appellate review of this issue as preserved error.

5. Presentation of a Defense

When defense counsel realized that all co-defendants had lost their right to a final argument, he should have made this consequence clear to his client, who desired to testify on her own behalf. In the evidentiary hearing, defense counsel admitted that he probably did not mention to the Applicant that she had already lost her right to a final argument, and that this was no longer a factor in her decision whether to testify. PCR Tr. p. 89, l. 12-p. 90, l. 7. He affirmed the possibility that he told her, at a point earlier in the trial, that they could retain last arguments if they did not put up a defense. PCR Tr. p. 88, ll. 3-12. The Applicant testified that she was not aware when the right to last

⁶ While this position initially seems counter productive inasmuch as it supports her being a principal, the fact remains that she was not indicted as a principal and could not have been convicted as one.

arguments was lost, and that her reluctant decision not to testify was based on her desire to preserve final arguments despite her attorney's urging that the prosecution would "eat [her] alive" on the stand. PCR Tr. p. 125, l. 3-p. 127, l. 13.

Counsel was clearly ineffective for not explaining to his client that she no longer had a right to final argument prior to resting her case without putting up a defense. In addition to this, the Applicant maintains that defense counsel also erred in advising her that the prosecution would "eat her alive" if she testified, without any accompanying rationale. Defense counsel admitted that the Applicant was an articulate 19-year-old woman without a criminal record that could be used for impeachment. PCR Tr. p. 90, l. 8-p. 91, l. 1. The Applicant testified at her evidentiary hearing that she did not intend to challenge her statement to police, and that she was not afraid to testify in her defense. PCR Tr. p. 125, l. 3-p. 126, l. 15. Defense counsel was ineffective for failing to communicate to his client that she had already lost her right to a final argument, motivating her to give up her right to present a defense on the basis of a non-existent consideration. The Applicant could have testified at trial, as she did in her evidentiary hearing, as to her personal definition of a "lick" and her lack of knowledge that the Victim would be harmed in any way. The Applicant's poised and articulated testimony at her PCR hearing demonstrated that she could have been an effective witness in her own defense at trial.

6. Jury Charges

Defense counsel was correct in his determination that a strong arm robbery charge was more appropriate to the evidence presented at trial *regarding the plans of which the Applicant had knowledge*, than armed robbery, the offense charged to the principal actors. "Strong arm robbery is defined as the 'felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in

fear.’ ” State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996) (quoting State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987))

Where defense counsel erred was in his specific request for a jury charge on strong arm robbery. Since the charge against his client was accessory before the fact to armed robbery, Defense counsel should have requested a charge on *accessory before the fact* to strong arm robbery, not strong arm robbery. Defense counsel presented the lack of evidence that his client was aware that weapons would be involved as his basis for requesting the additional charge. While one may be able to infer from the record the actual charge needed for the Applicant, it was crucial that defense counsel specifically request a charge on *accessory before the fact* to strong arm robbery and not just request an instruction on strong arm robbery. Obviously, the lower court could not have issued a jury charge for a crime that the indictment against the Applicant would not sustain a conviction for.

Counsel needed to draw the Court’s attention to the fact that his client’s position differed greatly from that of her co-defendants, and that she was the only one charged as an accessory before the fact. He also needed to emphasize the fact that his arguments for the additional charge were tailored to the lack of any evidence that *his client* knew weapons would be involved, from her perspective as an *accessory*, rather than a principal actor. Defense counsel’s ineffectiveness in failing to specify that he was seeking *an accessory before the fact* to strong arm robbery charge prejudiced his client, in that the Court was obviously focused upon the crimes *actually* committed by her co-defendants as opposed to what the evidence demonstrated the Applicant was aware of. The Court, in denying the request, noted *that there was not any evidence that the robbery was, in fact, committed without weapons*. Trial Tr. p. 603, ll. 12-17. This statement demonstrates that the Court was not properly focused on the Applicant’s role in this robbery, as a result of defense counsel’s failure to tailor the request to his client’s charges. Absent the appropriate request to

charge, the Court was understandably focused on what crime was ultimately committed. Defense Counsel did not make it clear that his client should be entitled to a lesser-included charge regardless of whether her co-defendants were or not.

During his testimony at the evidentiary hearing, defense counsel admitted that the correct request would have been for a charge on accessory before the fact of strong arm robbery. He stated that he hoped he would have mentioned that at some point in his argument, but notes that the whole strong arm robbery request was declined by the Court very quickly. PCR Tr. p. 77, l. 15-p. 78, l. 1.

Defense counsel similarly failed in that he did not present, at the jury charge conference, any requests to charge that would have set forth the law of accomplice liability *as it specifically relates to the crime of accessory before the fact*. He neglected to request a charge that would have instructed the jury that Applicant could only be found guilty as an accessory before the fact for crimes that she *knowingly* aided and abetted the principals in the planning or committing and/or the commission of crimes that were the readily foreseeable consequence of acts mutually agreed upon. Such a charge by necessity should have instructed the jury that the Applicant's guilt as an accessory before the fact had to be determined based upon her knowledge of the case as distinguished from the knowledge of her co-defendants. The trial transcript reflects that defense counsel began discussing an accomplice liability instruction *for his client* with the Court, but once he was informed that the Court would give a standard accomplice liability instruction, he failed to press farther, and request a charge on accomplice liability specifically tailored to his client's alleged involvement in this case. Trial Tr. p. 605, l. 6-p. 606, l. 1.

In his charge requests, defense counsel was also ineffective for neglecting to request a jury instruction which required the jury to apply a separate foreseeability analysis to determine the liability of the Applicant, apart from the findings made on the liability of each of her co-defendants

who were charged as principals. This distinction was appropriate and necessary because the evidence adduced at trial demonstrated that what the Applicant knew about the plan differed from the knowledge of her co-defendants.

7. Closing Arguments

Defense counsel failed to utilize the fact that his client *was present* during some portions of the underlying offenses not only in directed verdict motions, but also in closing arguments. Had he recognized the significance of this fact to the State's case on the accessory offenses, defense counsel could have argued this as a reason for the jury to acquit his client. Not only did defense counsel fail to use this helpful fact, but he also argued against it. Defense counsel stressed the fact that his client was not present at the scene of the crime in his closing arguments. Trial Tr. pp. 653-674. In doing so, he basically conceded one of the elements in the offenses charged to his client.

As stated previously, *infra*, appellate counsel confirmed that the denial of a directed verdict on this ground would have been an appealable issue if this argument had been made in support of the directed verdict. It certainly would have given the jury a possible basis for reasonable doubt to consider the fact that the evidence directly contradicted the Applicant's status as an accessory before the fact where the State had elected not to pursue charges against her as a principal.

In way of an explanation, defense counsel stated at the PCR hearing that he believed the Applicant was not present during the crimes for which she was actually prosecuted.⁷ He supported this with his assertion that if she had been present, she would have been charged as a principal. Trial Tr. p. 69, l. 25-p. 70, l. 17. This assumption did not justify defense counsel's failure to make

⁷ As a practical matter, this position ignores the fact that in many crimes all the principals are not present throughout every stage of a crime. For example, a so-called get away driver might help plan the armed robbery of a convenience store, case the scene before the co-defendants enter the place to be robbed and then leave and drive around the block while the co-defendants complete the armed robbery. No one well versed in criminal law would argue that his driver could not be a principal because he wasn't at the scene the moment guns were brandished and the case register emptied *if* there was evidence the driver knew his cohorts were armed and planned to use those weapons to commit a robbery.

appropriate arguments once the Applicant was indicted only as an accessory before the fact and was in the middle of her trial. At that point, there was no danger of her being convicted as a principal on the indictments as true billed.

During the State's closing arguments, a statement was made referencing the felony-murder doctrine in a manner that was wholly inconsistent with South Carolina law. The Solicitor informed the jury that any time a victim is killed "*in the course of another felony, then his death is murder. End of story.*" Trial Tr. p. 693, ll. 16-20. Defense counsel did not object to this statement. This statement should have been objected to on the basis that it was inconsistent with prevailing law on the permissible inference which may arise when a killing occurs during the commission of another felony. The prejudice from this statement is obvious. Strong armed robbery or common law robbery is a felony in South Carolina. S. C. Code Ann. § 16-1-90 (D). Therefore, this erroneous statement of the law if followed by the Applicant's jury could have resulted in a conviction for *accessory before the fact* of murder even the jury believed the Applicant only knew about and participated in an *unarmed* robbery. A proper statement of the law concerning the felony murder inference would have been:

The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985) (overruled on other grounds). An inference of malice may arise, but the law does not provide that one is instantly liable for murder because a killing occurred during the commission of any felony.

Appellate counsel testified that she recognized, and marked in her notes, that the State's

comment portrayed an improper malice instruction. PCR Tr. p. 25, ll. 7-20. She likely would have presented that issue on appeal, if it had been objected to and the objection overruled. PCR Tr. p. 26, ll. 5-9. Defense counsel also submitted that this comment was not a correct statement of law. PCR Tr. p. 83, ll. 4-20. He further agreed that the statement was prejudicial to the Applicant and stated that given another chance, he would have objected to the comment. PCR Tr. p. 83, l. 21-p. 84, l. 6.

If you take this closing statement in combination with the Court's standard felony murder inference instruction, it is logical that the jury would have found that the Applicant committed *some* felony and was therefore liable for the ensuing murder. Yet, the jury should have been focused upon determining not only if the inference of malice was appropriate, but whether the murder was a foreseeable result of the crime committed. The prejudice in this regard was very serious because it enhanced the likelihood that the Applicant would be convicted on the basis of an incorrect application of the law to the facts.

8. Ineffectiveness of Appellate Counsel

Appellate counsel failed to raise three meritorious issues in the Applicant's direct appeal: 1) that the lower court erred by denying the Applicant's directed verdict motions on all charges; 2) that the lower court erred by refusing to issue a jury charge on strong arm robbery, as a lesser-included of armed robbery; and 3) that the lower court erred by charging to the jury that the State would only have to prove that the Applicant aided and abetted another person "*to commit a crime*".

At the Applicant's PCR evidentiary hearing, one of Applicant's appellate attorneys acknowledged that if the transcript demonstrated that there were no direct or circumstantial evidence substantiating that the Applicant knew that weapons would be involved, then the issue of the denial of the Applicant's directed verdict motion on the accessory before armed robbery charge

would have been a strong one. PCR Tr. p. 17, l. 23-p. 18, l. 4. Appellate counsel likewise acknowledged that if there were no evidence, direct or circumstantial, that there had been any discussion that the Victim would be harmed in any way, then the issue of the denial of the Applicant's directed verdict motion on the accessory before murder charge would also have been a strong one. PCR Tr. p. 18, ll. 11-21. Appellate counsel could not recall why the issue of the denial of the directed verdict motions was not presented, but she believed it was due to a determination that it was not one of the strongest issues. PCR Tr. p. 14, l. 12-p. 15, l. 23.

As discussed previously, *infra*, the Applicant maintains that there was no properly admissible evidence, direct or otherwise, demonstrating that the Applicant knew that weapons would be involved or that the victim would be harmed in any way. A defendant is entitled to a directed verdict where the State fails to produce evidence of the crime charged. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). The denial of the Applicant's directed verdict motions on both of the charges would have been a strong issue on appeal and appellate counsel was ineffective for not briefing that issue.⁸ The Applicant was prejudiced in that this issue was omitted from her direct appeal, lessening her probability of success on the merits.

At trial, defense counsel requested an additional jury charge on strong arm robbery, which was denied. In the evidentiary hearing, appellate counsel acknowledged that the issue of the lower court denying the Appellant's request for a strong arm robbery charge was not briefed; and she indicated that she and the other attorney did not feel that the issue was strong enough to include. PCR Tr. p. 19, l. 17-p. 20, l. 8. As has already been discussed, *infra*, the Applicant's position on the strong arm robbery charge request was sound, even though defense should have phrased the request as one for a charge "on *accessory before the fact* of strong arm robbery". Assuming *arguendo*, that

⁸ As previously argued, the Applicant believes that defense counsel should have more thoroughly argued the motion for directed verdicts of acquittal. Nevertheless, she would argue that the lower court's failure to grant the motions, as made, should have been challenged on direct appeal.

the need for a charge on the lesser included offense of accessory before the fact to strong armed robbery was adequately preserved, this issue should have been presented on direct appeal. There was no evidence, other than the improper definition by Hollins of the street term a "lick," which was abandoned on cross-examination, which suggested that the Applicant was aware that weapons would be involved. For this reason, the evidence supported a charge on lesser offense of accessory before the fact to strong arm robbery. Appellate counsel was ineffective for failing to brief the denial of this charge request as an issue, and the Applicant was prejudiced in the consideration of her direct appeal, as a result.

During trial, defense counsel objected to language in the jury instructions stating that "the State must prove beyond a reasonable doubt that the defendant, Marquita Smith, either advised, agreed, urged, counseled, hired, or in some way aided and abetted—aided or abetted another person to commit *a crime*..." Trial Tr. p. 718, ll. 5-9. Counsel challenged the language "a crime" and maintained that the instruction might be read to mean that she could be found guilty as an accessory on the basis of *any crime* that she participated in the commission of, rather than the crimes she was actually charged with; accessory before the fact, armed robbery and murder. Trial Tr. p. 733, l. 17-p. 744, l. 23. This objection was noted and overruled by the Judge, who stated that the language was "self-explanatory." Trial Tr. p. 734, l. 15-p. 735, l. 10.

Appellate counsel acknowledged that this issue was not raised on direct appeal and further admitted, in the evidentiary hearing, that there is a "valid argument" that the language of that charge combined with defense counsel's earlier admission that his client had a role in these events, might imply that the Applicant was liable for any offenses that occurred that night, based on her commission of "a crime." PCR Tr. p. 24, l. 16-p. 25, l. 6. In closing arguments, defense counsel basically conceded that his client committed a bad act and should be held accountable; that she had

done something “horrible” and “wrong” in volunteering the Victim. Of course, defense counsel followed up by maintaining that her actions did not amount to murder or armed robbery. Trial Tr. pp. 653-674.

It is very plausible that the jury might understand defense counsel’s admission that the Applicant had committed a wrongful act to be the crime that they could justifiably use to convict her as an accessory to the murder and alleged armed robbery that occurred that night. Alternatively, if the language had stated “the crime” or “the crimes,” the jury’s attention would have been focused upon the crimes actually attributed to the principal actors; armed robbery and murder. The Applicant has maintained throughout that the evidence simply did not demonstrate that she aided or assisted others in the commission of armed robbery and murder. The trial court erred in overruling the Applicant’s objection to the specific language of the charge and appellate counsel erred in not presenting this preserved issue on direct appeal.

The prejudice in this instance is apparent where these meritorious issues not presented to the Appellate Court in the Applicant’s direct appeal were at least as strong, if not stronger, than the issues presented on direct appeal and, therefore, their submission on appeal would likely have changed the outcome of the Applicant’s direct appeal.

9. Defense Counsel’s Failure to Argue in Opening that Murder was not a Foreseeable Consequence

The Applicant presented testimony at her evidentiary hearing that defense counsel failed to clearly and concisely state in opening arguments the reasons why the Applicant could not be found guilty as an accessory before the fact to murder, when the murder was not a foreseeable result of the plan in which she was involved. Defense counsel did argue that the jury would have to find that the armed robbery was a foreseeable consequence of the plans in which she was involved, but he failed to make the logical extension of that argument to the accessory before the fact of murder charge.

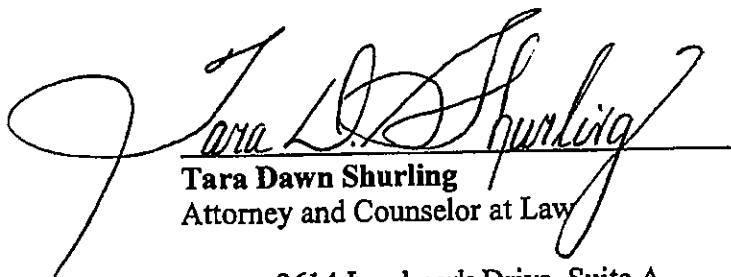
Trial Tr. pp. 125-126. In the evidentiary hearing, defense counsel noted that he did not argue that the murder was not foreseeable in his opening arguments, and stated that he was "hoping not to over-emphasize." PCR Tr. p. 63, l. 22- p. 64, l. 6. He went on to state that he believed the State's strongest case to be on the accessory before the fact of armed robbery charge, but that he hoped the murder would seem to be an even less foreseeable result. Defense counsel stated that if he had the opportunity to do it over again, he would have included some argument pertaining to the accessory before murder charge in his opening arguments. PCR Tr. p. 64, ll. 7-20.

Defense counsel's argument against the accessory before armed robbery charge and failure to challenge the State's case on the accessory murder charge, when the jury was well aware that there were two charges against the Applicant, could have been seen as a silent admission of weakness. Or, at best, it was a missed opportunity for defense counsel to expand his foreseeability argument to encompass all of the Applicant's charges. Defense counsel did not provide a strategic reason for mentioning one as opposed to both, and it can be concluded that this was not the result of a tactical decision or effective assistance of counsel.

**VI.
CONCLUSION**

For all of the above reasons, the Applicant respectfully requests that this Court vacate her convictions and sentences and remand her case to the Berkeley County Court of General Sessions for a new trial. The Applicant expressly does not waive any issues raised at her Post-Conviction Relief hearing not argued herein. The Applicant would rely on all arguments and evidence previously submitted for any issue not addressed herein.

Respectfully submitted,


Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, SC 29204
803-738-8622
803-738-1600 Fax
E-mail: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT

This 3rd day of January, 2012.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

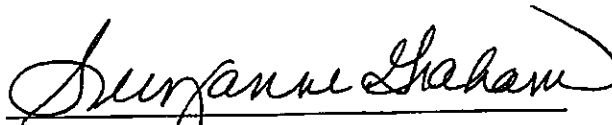
IN THE COURT OF COMMON PLEAS

MARQUITA SMITH, #323834)
Applicant,)
v.)
THE STATE OF SOUTH CAROLINA)
Respondent.)

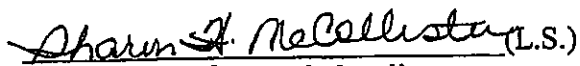
2010-CP-08-2985

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Memorandum of Law in Support of Application for Post-Conviction Relief in the above-entitled case has been served upon opposing counsel, Matt Friedman, Assistant Attorney General, by U. S. Mail with correct postage to Post Office Box 11549, Columbia, SC 29211, this the 3rd day of January, 2012.


Suzanne Graham
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 3rd day
of January, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: Jan. 16, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

MARQUITA SMITH, #323834)
Applicant,)

2010-CP-08-2985

v.)
THE STATE OF SOUTH CAROLINA)
Respondent.)

**AMENDED APPLICATION
FOR POST-CONVICTON RELIEF**

The Post-Conviction Relief Application previously filed on August 24, 2010 under docket number 2010-CP-08-2985 is hereby amended as follows:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery.
2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery.
3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her.
4. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact.
5. Trial Counsel was ineffective for failing to fully present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges.
6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery.

2012 JAN 17 AM 11:14
HARRY BROOKS
CLERK OF COURT
BERKELEY COUNTY, SC

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7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing *and/or* the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties.
8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her co-defendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit.
9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder.
10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she *was not present* during the commission of the principal offenses.
11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants.
12. Trial counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense.
13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments.
14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story."
15. Appellate Counsel was ineffective for failing to brief the issue of the lower

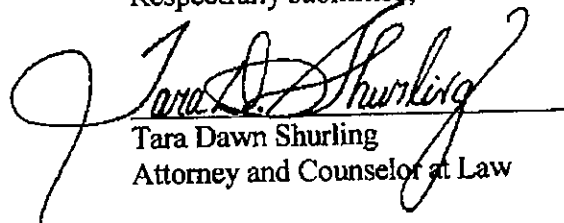
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court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit.

16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.
17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "*to commit a crime*," thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing *any* crime would make her mutually liable for all the acts committed by her co-defendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

The Applicant has no further amendments at this time. Copies of these amendments have been served on opposing counsel, Trial Counsel for the Applicant and Appellate Counsel for the Applicant. This Amended Application was inadvertently filed with the Charleston County Clerk of Court's Office on November 17, 2011. See copy attached hereto. The Post-Conviction Relief hearing in this Berkeley County case was held in Charleston County on that same date. Counsel for the Respondent, Matthew Friedman, was properly served with this Amended Application on November 15, 2011.

Respectfully submitted,


Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 9th day of January, 2012.
Columbia, SC

1044
STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

MARQUITA SMITH, 323834

☒ Applicant,

v.

The State Of South Carolina

☐ Respondent.

IN THE COURT OF COMMON PLEAS

CASE NO. 2010-CP-08-2985

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

FILED
2012 JAN 20 AM 11:48
CLERK OF COURT
BERKELEY COUNTY, SC

Plaintiff's Attorney:
Tara Dawn Shurling, Bar No. 5099
Address:
3614 Landmark Drive Suite D
Columbia, South Carolina 29204
phone: 803-738-8622 fax: 803-738-1600
e-mail: other:

Defendant's Attorney:
Matthew J. Friedman, Bar No.
Address:
P.O. Box 11549 Columbia, South Carolina
phone: 803-734-3737 fax:
e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Applicant / ☐ Respondent

1/18/12
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF BERKELEY)

MARQUITA SMITH, #323834) 2010-CP-08-2985

Applicant,)

v.)

THE STATE OF SOUTH CAROLINA)
 Respondent.)

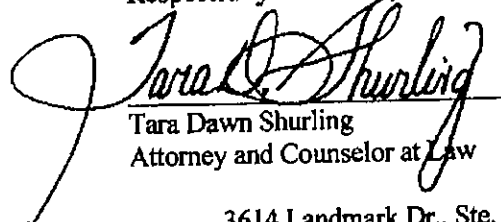
**MOTION TO SUPPLEMENT
 POST-CONVICTION RELIEF RECORD**

FILED
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 CLERK OF COURT
 COUNTY OF BERKELEY

NOW COMES the Applicant in the above captioned Post-Conviction Relief action, acting by and through her undersigned counsel, asking that the Post-Conviction Relief record in this matter be supplemented to include copies of a Rule 5 Motion and a Brady Motion, which were served on opposing counsel on August 16, 2006. These motions were served on Blair C. Jennings, Deputy Solicitor, by the Applicant's first defense lawyer; George B. Bishop, Jr., Esquire. A copy of these motions is attached hereto. The transmittal letter sent with these motions to Assistant Solicitor Jennings, a copy of which is also attached, clearly evidences that both motions were simultaneously served. These motions were contained in the file of the Applicant's trial lawyer; V. Craig Jones, Esquire. At the time of the Post-Conviction Relief hearing held on November 17, 2011, Counsel herein believed that these motions were filed and therefore, would be part of the Clerk of Court's file. Counsel has subsequently determined that these motions, while served, were not filed with the Office of the Clerk of Court. Counsel herein has discussed this matter with Counsel for the Respondent, Matthew J. Friedman, and he has consented to the Applicant's request that these motions, and the transmittal letter sent to the Assistant Solicitor Jennings, be added to the record in this Post-Conviction Relief matter as Applicant's Exhibit 1, 2, and 3. ¹ There were no exhibits introduced during the evidentiary hearing. Copies of these documents are so marked and attached hereto.

Accordingly, Counsel requests that copies of these motions be marked as Applicant's Exhibit 1 and Exhibit 2 and that they be accepted for filing with the Clerk of Court. In addition, Counsel asks that the transmittal letter sent to Assistant Solicitor Jennings with these Motions be marked and filed as Applicant's Exhibit 3.

Respectfully submitted,


 Tara Dawn Shurling
 Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
 Columbia, SC 29204
 803-738-8622
 803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 16th day of January, 2012.
 Columbia, SC

¹ The record in this case was held open for the submission of additional documentation by Post-Conviction Relief Counsel although admittedly, not these particular documents.



STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

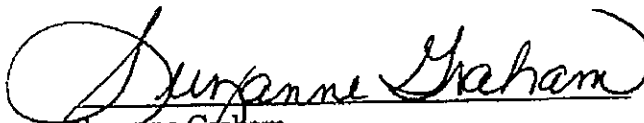
MARQUITA SMITH, #323834)
Applicant,)
v.)
THE STATE OF SOUTH CAROLINA)
Respondent.)

2010-CP-08-2985

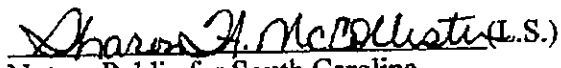
CERTIFICATE OF SERVICE

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CLERK OF COURT
BERKELEY COUNTY, SC

The undersigned hereby certifies that one copy of the Motion to Supplement Post Conviction Relief Record in the above-entitled case has been served upon opposing counsel, Matt Friedman, Assistant Attorney General, by U. S. Mail with correct postage to Post Office Box 11549, Columbia, SC 29211, this the 18th day of January, 2012.


Suzanne Graham
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 18th day
of January, 2012.


Notary Public for South Carolina
My Commission Expires: Jan. 16, 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)
)
 STATE OF SOUTH CAROLINA,)
)
 Plaintiff,)
)
 Versus)
)
 MARQUITA C. SMITH,)
)
 Defendant.)
)

IN THE GENERAL SESSIONS COURT

WARRANT NO.: J-725445

REQUEST FOR THE DISCLOSURE OF
 EVIDENCE IN COMPLIANCE
 WITH RULE 5

TO: HONORABLE BLAIR C. JENNINGS, DEPUTY SOLICITOR,
 BERKELEY COUNTY SOLICITOR'S OFFICE:

In compliance with Rule 5 of the South Carolina Rules of Criminal Procedure (1988), the Defendant hereby requests that the prosecution shall:

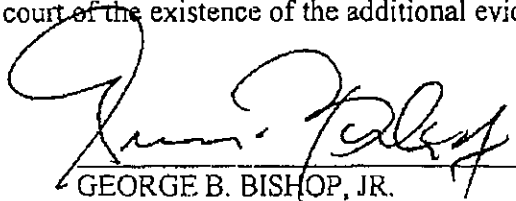
(a) Permit the Defendant to inspect and copy or photograph any relevant written or recorded statements made by the Defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the Defendant whether before or after arrest in response to interrogation by any person then known to the Defendant to be a prosecution agent;

(b) Furnish to the Defendant, such copy of his prior criminal record, if any, as is within the possession, custody or control of the prosecution, the existence which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution;

(c) Permit the Defendant to inspect and copy books, papers, documents, photographs, video recordings, tangible objects, building or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the Defendant;

(d) Permit the Defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial.

If, prior to or during trial, the prosecution discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the Defendant or the court of the existence of the additional evidence or material.



GEORGE B. BISHOP, JR.
Attorney for Defendant
223 East Main Street
P. O. Box 848
Moncks Corner, S.C. 29461

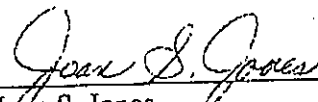
Moncks Corner, South Carolina
August 16, 2006.

CERTIFICATE OF MAILING

The undersigned does hereby certify that a true and correct copy of the Request
for the Disclosure of Evidence in Compliance with Rule 5, was mailed to:

HONORABLE BLAIR C. JENNINGS
DEPUTY SOLICITOR
BERKELEY COUNTY SOLICITOR'S OFFICE
300-B CALIFORNIA AVENUE
MONCK'S CORNER, SOUTH CAROLINA 29461

with sufficient postage affixed thereto, this 16th day of August 2006.


Joan S. Jones

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)

IN THE GENERAL SESSIONS COURT

STATE OF SOUTH CAROLINA,)
)
 Plaintiff,)

-VS-

WARRANT NO.: 1-725445

MARQUITA C. SMITH,)
)
 Defendant.)

**MOTION FOR BRADY AND OTHER FAVORABLE MATERIAL AND
 INCORPORATED MEMORANDUM OF LAW**

COMES NOW the Defendant, by and through undersigned counsel, and files this Motion for Brady and other favorable material and incorporated Memorandum of Law requiring the production of material to the Defendant within thirty (30) days of the receipt of this request or at least ten (10) days prior to trial. As grounds therefore, the undersigned would show as follows:

1. Under the United States Supreme Court decision in Brady vs. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) the Solicitor has the obligation to produce all Brady material for the Defendant well in advance of the scheduled trial date.
2. Defendant claims under Brady and its progeny, as well as, the language and spirit of Giglio v. United States, 405 U.S. 105, 92 S.Ct. 763 (1972); United States vs. Tashman, 478 F.2d 129 (5th Cir. 1973); and Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959); Alcounta v. Texas, 355 U.S. 28 (1957); Mooney v. Halliham, 294 U.S. 103 (1935); and Moore v. Illinois, 408 U.S. 786 (1962); that he/she is entitled to any and all records, memoranda and documents, as well as, a statement of the Circuit Solicitor and all appropriate state, federal, and local law agencies as to:
 - a. All statements by the Defendant, whether oral or written; if written whether signed or unsigned.

- b. All handwritten notes made by police or other investigating officers of their interview or conversation with the Defendant or any other witness.
 - c. Any oral, written, or recorded statements made by any person to the Solicitor's Office, Grand Jury, or any law enforcement agency in connection with this case.
 - d. A copy of all tape recordings, audio or video, made by a Defendant, witness, or any other person in connection with this case. If these tape recordings have been transcribed, then a copy of the transcribed conversation is also requested.
3. Any and all investigation reports, information, or material which tends to establish the Defendant's innocence, to mitigate punishment, or to impeach, discredit, or contradict the testimony of any witness whom the State will or may call at trial. Giles v. Maryland, 368 U.S. 66, 87 S.Ct. 793 (1967); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959); Giglio v. U.S., supra.
 4. The names and addresses of all witnesses interviewed by the Solicitor's Office or any other law enforcement agency who might establish the Defendant's innocence, mitigate punishment, or impeach, discredit, or contradict the testimony of any witness of the State whether or not the witness may testify at trial.
 5. Any and all photographs taken of the Defendant on any portion of his body.
 6. Any and all photographs taken at the scene of the alleged crime and/or the alleged victim or prosecuting witness.
 7. Any photographs that have been exhibited to any person for the purpose of establishing the identity of the perpetrator of the crime charged and the name and current address of the person or persons to whom the photographs were shown.
 8. Any scientific or medical report which tends to establish the Defendant's innocence, to mitigate punishment or to impeach, discredit, or contradict the testimony of any witness whom the State will or may call at trial. Ashley v. Texas, 319 F. 2d 80 (5th Cir.), cert. denied, 375 U.S. 931, 84 S.Ct. 331 (1963). This request shall include any reports by or to the State Law Enforcement Division (SLED) criminalistic laboratory, Federal Bureau of Investigation laboratories, County Sheriff's Department laboratory or any other law enforcement laboratory concerning an examination made by said laboratories and/or personnel thereof, of any physical, photographic, oral or written evidence concerning the investigation of this case.
 9. All reports from the State Law Enforcement Division (SLED), Sheriff's Department or any other law enforcement agency, including the Federal Bureau of Investigation, concerning fingerprints checked in connection with this case.

10. All records of arrests or criminal convictions of the Defendant or any co-Defendant and all State's witnesses in relation to this case, Giglio v. U.S., supra.
11. All "inconsistent" statements made by particular witness or between witnesses, whether written or oral, that is known to the Solicitor's Office or any other law enforcement agency.
12. Any statement or admission by a witness for or on behalf of the State with respect to the witness' memory or loss therefore.
13. Whether or not any witness called before the Grand Jury or who has or will give testimony to any investigative agency or at trial has ever been psychiatrically hospitalized or undergone psychiatric treatment, examination, mental status examination or care, and if so, a list of names and addresses of the psychiatrists, hospitals and copies of any and all relevant records or reports.
14. All notes or memoranda by psychiatrists or other medical or mental health examiners of their conversations with the Defendant.
15. Any and all plea bargains, promises, rewards, reductions, dismissals, agreements not to bring criminal charges, or any other inducements made to any witness herein, whether or not they have testified before any State or Federal Grand Jury or other investigative agency, and regardless of whether or not they will testify at trial.
16. Any offers or grants of immunity to any witness from loss of property, fine, forfeiture, prosecution or punishment in this case or any other case, related or otherwise.
17. In addition, Defendant requests copies of any and all memoranda, reports, and correspondence to and from the various law enforcement agencies of the United States and all state, county, municipal, and local law enforcement agencies regarding the investigation herein.
18. Any and all physical or tangible items in the possession, custody or control of or which could reasonably be brought within the possession, custody or control of the Solicitor's Office, State, Federal or Local law enforcement agency.
19. Defendant contends that this Court should specifically direct the Government in the spirit of fairness and equity, seek and produce for the Defendant, the documents, letters, records, and other items sought, irrespective of the State's determination of whether a witness' statement or a particular letter or exhibit can "help" the Defendant. The Defendant and his/her attorney, not the Solicitor, should be the

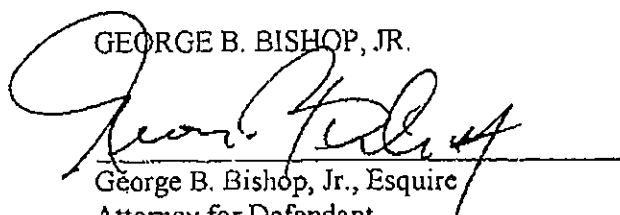
judge of his/her defense and the documents relevant thereto and necessary in support of same.

20. To the extent the Defendant is specifically required to demonstrate the materiality of the requested information, the Defendant submits that this requirement is satisfied in this motion. United States v. Agurs, 427 U.S. 97 (1976).
21. Recognizing that Brady v. Maryland, supra, and other authorities cited require that information favorable to the Defendant be made available, and further recognizing that a genuine disagreement may arise as to whether or not a particular item of evidence is favorable, it will be requested that the Court provide for an in camera inspection of the items sought to be discovered should you feel such items are not favorable to the Defendant. By permitting the Court to examine the items requested, the legitimate interests of the State will be protected in that no disclosure in excess of Brady, et al., will occur. Further, it will be requested of the Court that said Order will be a continuing one, and if, prior to or during the trial, the prosecution discovers additional evidence or material requested, the prosecution is hereby requested promptly to notify counsel for the Defendant of the existence of the additional evidence or material.

It is further requested that the prosecution promptly respond to the within requested by notifying counsel for the Defendant of the existence and availability of the information requested herein within thirty (30) days of the receipt of this motion and at least ten (10) days prior to trial.

WHEREFORE, the undersigned prays for such Order requiring production of the above listed materials and for that which is just and proper.

GEORGE B. BISHOP, JR.



George B. Bishop, Jr., Esquire
 Attorney for Defendant
 223 East Main Street/P.O. Box 848
 Moncks Corner, S.C. 29461
 (843) 761-8213/(843) 873-5875

Dated: August 16, 2006,
 at Moncks Corner, South Carolina

George B. Bishop, Jr., P.A.
Attorney at Law

Post Office Box 848
223 E. Main Street
Moncks Corner, SC 29461

August 16, 2006

(843) 761-8213
(843) 873-5875
Fax (843) 761-2776

Honorable Blair Jennings
Deputy Solicitor
Berkeley County Solicitor's Office
300-B California Avenue
Moncks Corner, South Carolina 29461

Re: **Marquita C. Smith**
Warrant No. I-725445

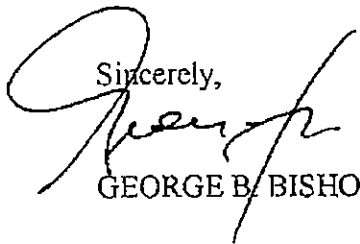
Dear Blair:

Please be advised that I represent Marquita C. Smith of Moncks Corner, South Carolina, regarding the above matter.

On behalf of my client, I am enclosing herewith the Request for the Disclosure of Evidence in compliance with Rule 5 and Motion for Brady, together with my Certificate of Mailing same in this matter.

With kind regards, I am

Sincerely,


GEORGE B. BISHOP, JR.

GBBjr/jsj

cc - Ms. Marquita C. Smith

**TARA DAWN SHURLING, PA**

Attorney and Counselor at Law
3614 Landmark Drive
Suite A
Columbia, South Carolina 29204

Christina Dixon Parnall
Associate Attorney

(803) 738-8622
Fax (803) 738-1600
E-Mail: tDSLAW@shurlinglaw.com

January 18, 2012

The Honorable Mary P. Brown
Clerk of Court of Berkeley County
300 California Ave.
Moncks Corner, SC 29461-

RE: Marquita Chemere Smith, 323834 v. State of South Carolina; 2010-CP-08-2985

Dear Ms. Brown:

Please find enclosed an original and two (2) copies of my Motion to Supplement Post-Conviction Relief Record in regards to the above referenced matter. If you would be so kind as to have a member of your staff file the original and return the two clocked copies to my office in the enclosed self-addressed stamped envelope provided for your convenience. If you should have any questions or concerns, please feel free to contact my office. Thank you for your time and attention to this matter. For now, I remain,

Sincerely,

A handwritten signature in cursive script that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: The Honorable Kristi Lea Harrington
Matthew J. Friedman, Assistant Attorney General
Marquita Smith, #323834
Namon and Rosemary Smith

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF BERKELEY)

MARQUITA SMITH, #323834)

Applicant,)

v.)

THE STATE OF SOUTH CAROLINA)

Respondent.)

2010-CP-08-2985

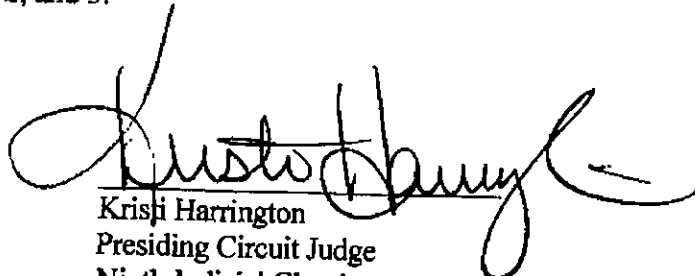
ORDER

FILED
 2012 JAN 27 PM 12:05
 HARRY P. BRUNY
 CLERK OF COURT
 BERKELEY COUNTY, SC

This matter is currently before the Court by way of an Application for Post-Conviction Relief dated August 24, 2010, and an Amended Application filed November 17, 2011. An evidentiary hearing was convened in this case on November 17, 2011. The record in this Post-Conviction Relief action was held open for additional material from Post-Conviction Relief Counsel. Post-Conviction Relief Counsel now requests that a Rule 5 Motion and a Brady Motion, served on the State on August 16, 2006, by the Applicant's first defense lawyer, George B. Bishop, Jr. be accepted for filing as **Applicant's Exhibits 1 and 2**. In addition, Counsel asks that the transmittal letter sent to Assistant Solicitor Jennings with these Motions on the date of service be marked and filed as **Applicant's Exhibit 3**. Counsel for the Respondent has consented to this request.

Having found Counsel's request to be reasonable on the facts of this case, this Court grants this request and directs the Clerk of Court to accept the documents in question for filing as Applicants Exhibits 1, 2, and 3.

IT IS SO ORDERED.


 Kristi Harrington
 Presiding Circuit Judge
 Ninth Judicial Circuit

This 21 day of January, 2012
 Berkeley County, South Carolina.

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Marquita Smith, #323834,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-08-2985

ORDER OF DISMISSAL

FILED
2012 FEB - 1 AM 10:33
HARRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 24, 2010 and amended on November 17, 2011. The Respondent made its Return on February 4, 2011. An evidentiary hearing into the matter was convened on November 17, 2011 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Tara Dawn Shurling, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on her own behalf at the PCR hearing. Applicant's trial counsel, V. Craig Jones, Jr., Esquire, appellate counsel Tricia A. Blanchette, Esquire, and co-defendant Kerry Hollins also testified at the hearing. This Court had before it the records of the Berkeley County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Record on Appeal, the Final Brief of Appellant, the Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction and sentence, the Petition for Rehearing and Petition for Rehearing *En Banc*, the Return to Petition for Rehearing, the Order Denying Petition for Rehearing, the Remittitur dated July 13, 2010, the PCR application and amended application, and the State's Return thereto.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Berkeley County. The Applicant was indicted at the August 2007 term of the Berkeley County Grand Jury for accessory before the fact of murder (2007-GS-08-1748) and accessory before the fact of armed robbery (2007-GS-08-1751). V. Craig Jones, Jr., Esquire, represented the Applicant. The Applicant proceeded to trial on August 27-30, 2007, after which a jury found her guilty as indicted. The Honorable Deadra L. Jefferson sentenced the Applicant to confinement for thirty (30) years for each conviction. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Tommy A. Thomas, Esquire, and Tricia A. Blanchette, Esquire, represented the Applicant on appeal. Following full briefing by both sides, the Court of Appeals affirmed the conviction and sentence. State v. Smith, Op. No. 4662 (S.C. Ct. App. filed March 24, 2010). The Court of Appeals denied Applicant's Petition for Rehearing and Petition for Rehearing *En Banc* by Order dated June 4, 2010. The Remittitur was issued on July 13, 2010.

ALLEGATIONS

The Applicant alleges she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
 - a. Failed to recognize errors during trial and make appropriate objections thereto.
 - b. Failed to conduct a sufficient investigation into Applicant's factual circumstances.
 - c. Failed to present witnesses who would testify favorably on Applicant's behalf at trial.
2. Ineffective assistance of appellate counsel in that counsel failed to present all meritorious issues on direct appeal to the South Carolina Court of Appeals.

In her amended application, Applicant raised the following grounds for relief:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery.
2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge when the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery.
3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her codefendants would ultimately commit heinous crimes far beyond the scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her.
4. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact.
5. Trial Counsel was ineffective for failing to fully present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges.
6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery.
7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing *and/or* the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties.
8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her codefendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit.
9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder.

10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she *was not present* during the commission of the principal offenses.
11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants.
12. Trial counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine codefendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense.
13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments.
14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story."
15. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit.
16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.
17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "*to commit a crime*," thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing *any* crime would make her mutually liable for all the acts committed by her co-defendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the hearing. This Court has further had the opportunity to

observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Appellate counsel Tricia A. Blanchette, Esquire, testified that she and her former employer Tommy Thomas, Esquire, represented Applicant on appeal. She testified that she and Mr. Thomas each read the trial transcript, looked for issues that were preserved for appeal, and debated which issues were the best issues to raise. She testified that she drafted an argument on the directed verdict issue, but she ultimately decided that it was not their strongest issue. Appellate counsel also testified that she and Mr. Thomas agreed with the trial court that guns were involved so strong arm robbery should not have been charged. She testified that she and Mr. Thomas discussed all the issues that were preserved and chose not to raise the issue about lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime."

Appellate counsel testified that she did not believe that Applicant's involvement was properly explained at trial, and she wished certain issues had been presented differently at trial. She testified that she believed the trial court gave an improper malice instruction under Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008), and she likely would have briefed that issue had trial counsel preserved the issue. She testified that she probably would have also briefed the issue that not all of the elements for accessory before the fact were met because Applicant was present at the restaurant and her friend's apartment, but trial counsel failed to preserve that issue. Appellate counsel testified that she did not believe the State laid the proper foundation in eliciting testimony from Kerry Hollins regarding the definition of a "lick," but trial counsel failed to object.

Trial counsel testified that he recalled researching accomplice liability law as it related to accessory before the fact. He testified that he did not object to Kerry Hollins' testimony about a "lick" because it was in Mr. Hollins' statement and it was his perception of what he thought a lick meant. Counsel testified that he assumed the State was asking for Mr. Hollins' opinion. He testified that Mr. Bolus, a co-defendant's attorney, followed up and got Mr. Hollins to admit that a lick could be a person rather than just a robbery. He testified that he did not consider objecting the first time "lick" was mentioned at trial.

Counsel testified that he did not ask Mr. Hollins if he knew there would be weapons involved because he did not know what Mr. Hollins would say, particularly since he was testifying against Applicant and looking to solidify a good plea deal. Counsel testified that he did not receive Mr. Hollins statement until three or four days before the trial, and he raised that issue in his motion for a continuance and severance. He testified that he did not ask Patricia Kennedy, Mr. Hollins' attorney, for permission to speak with him, but counsel assumed Ms. Kennedy would not have allowed him to speak with Mr. Hollins since he was a co-defendant who was testifying for the State.

Counsel testified that his goal was to break the chain of foreseeability and argue that Applicant did not know that guns would be involved or that the victim would get hurt. He testified that he asked for a jury charge on strong arm robbery, which was denied, but he did not ask for a charge on accessory before the fact to strong arm robbery. He asserted that there was testimony that several guns were involved and no one was charged with strong arm robbery. Counsel testified that he did not object to the State's closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story." He asserted that this trial was held before the Lowry decision came out, but he

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admitted that in retrospect he probably should have objected. Counsel testified that he did not want Applicant to testify because she would have been subject to cross-examination. He asserted that although Applicant did not have a prior record, one of the co-defendants had two pending murder charges at the time and if that came out the jury might have believed that it was foreseeable that someone would get killed in this robbery.

Counsel testified that Applicant was not present for the murder and armed robbery, but she was present at Tawana's house for the burglary and kidnapping so she could not be charged as an accessory for burglary and kidnapping. He testified that he discussed Applicant's statement with her numerous times. Counsel testified that he discussed the right to testify with Applicant and recommended that she not testify. He contended that he communicated the plea offers to Applicant and it was her decision to reject those offers.

Kerry Hollins, a co-defendant, testified that he is currently serving a sentence of eighteen (18) years for voluntary manslaughter at Lieber Correctional Institution. He testified that he is not currently represented by counsel. He asserted that he testified for the State at Applicant's trial. Mr. Hollins testified that he would have agreed to speak with Applicant's attorney prior to trial. He testified that Applicant told him that the victim sold drugs and had some money, but there was no discussion about an armed robbery, a murder, a break in, or a kidnapping. He testified that he assured Applicant that the victim would not be hurt. Mr. Hollins testified that he recalled testifying at trial that Applicant planned the robbery, that he did not want to be an active participant in the robbery but Applicant influenced him, that Applicant told him where the victim would be, and that after the victim was kidnapped Applicant told him to leave.

The Applicant testified that counsel told her she would lose last argument if she testified, but counsel did not tell her that they had already lost last argument when a co-defendant entered

a single piece of evidence. She testified that counsel also told her not testify because the prosecutors would eat her alive. She admitted that she never told counsel that she wanted to testify because they never discussed it from her perspective. Applicant testified that her statement was the truth. She asserted that she did not know the victim would be harmed. Applicant testified that she thought it would be a "snatch and grab" of some jewelry and some marijuana from the victim and that was it. She testified that a "lick" was a way to get money, and it could mean a robbery but she had never known it to mean armed robbery. She testified that she originally thought Mr. Hollins would do the "lick" by himself and then at some point she learned that "Manny" would be involved. She testified that she did not know co-defendant Gary Grant at all.

Ineffective Assistance of Trial Counsel

The Applicant alleges that she received ineffective assistance of trial counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry, 386 S.E.2d 624.

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Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 625 (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

This Court finds trial counsel's testimony is credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on several occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, and possible defenses or lack thereof.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet her burden of proof. This Court finds that counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that trial counsel was not ineffective for failing to object when the State elicited testimony that a "lick" meant an armed robbery. Counsel testified that he did not object

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because Kerry Hollins referenced a “lick” in his statement and he assumed the State was asking for Mr. Hollins’ opinion of what a “lick” meant. Mr. Hollins testified at trial that a “lick” was a robbery and that you need some kind of weapon to do a robbery. This Court finds that trial counsel had no basis to object to this testimony.

This Court finds that trial counsel made a proper direct verdict motion. Counsel argued that Applicant was too far removed from the circumstances, there was no common scheme or plan to commit armed robbery or murder, and it was not a natural and probable consequence that the murder would occur. A case should be submitted to the jury if there is any direct evidence or any substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006). When ruling on a motion for directed verdict, the trial court is concerned only with the existence or nonexistence of evidence, not its weight. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). Here, this Court finds that counsel zealously argued on Applicant’s behalf, but the trial court found that there was enough evidence to submit the case to the jury.

This Court finds that counsel properly made a motion for severance. Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right. Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001) (citing State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999)). There can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances that are presented to the court in each case. State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952); State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App.2005). A severance should be granted only when there is a serious risk that a joint

trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. Harris, 351 S.C. at 652-53, 572 S.E.2d at 273; Dennis, 337 S.C. 275, 523 S.E.2d 173. The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. Dennis, 337 S.C. at 281, 523 S.E.2d at 176. The rule allowing joint trials is not impugned simply because the co-defendants may present evidence accusing each other of the crime. Id. Here, the Applicant and her co-defendants did not present mutually antagonistic defenses. Trial counsel requested a severance to protect Applicant from being tried jointly with her co-defendants, but the trial court denied the motion.

This Court finds that counsel was not ineffective for failing to request a jury charge on accessory before the fact to strong arm robbery. Counsel requested a jury charge on strong arm robbery based on the fact that neither Applicant's statement nor Mr. Hollins' statement mentions weapons. However, the trial court declined to charge strong arm robbery because there was no evidence in the record that the incident took place without weapons. Accordingly, it is unlikely that the trial court would have charged accessory before the fact to strong arm robbery. This Court finds that Applicant was not prejudiced by counsel's failure to request such a charge.

This Court finds that trial counsel was not ineffective for failing to object to the trial court's jury instructions on accomplice liability and foreseeability. The trial court gave the standard charge on accomplice liability and "the hand of one is the hand of all." (ROA p. 716, line 2 – p. 717, line 20). The trial then stated as follows:

Ladies and gentlemen, the defendant Marquita Smith is charged with being an accessory before the fact of the felonies of murder and armed robbery. In order to prove beyond a reasonable doubt that the defendant, Marquita Smith, either

advised, agreed, urged, counseled, hired, or in some way aided and abetted – aided and abetted another person to commit a crime, and that the defendant was not present when the offense was committed.

Aid means to help, to promote the course or accomplishment of, to give support to, or to give assistance to. Abet means to encourage or appear to favor or support.

(ROA p. 718, lines 2-14). In its closing statement, the State argued that Applicant orchestrated the plan and used the word “robbery” in her own statement and that when you rob someone, it is entirely foreseeable that the person could be killed during the course of the robbery. (ROA p. 676, line 19 – p. 679, line 16). Trial counsel argued that there was a difference between the Applicant and her codefendants and that she is only responsible for the probable and natural consequences of her actions. (ROA p. 653, line 22 – p. 654, line 13). Counsel also argued that it was not foreseeable that the co-defendants would have kidnapped and murdered the victim. (ROA p. 669, line 12 – p. 671, line 24). The trial court addressed the jury as follows:

The case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for all defendants. The fact that you may find one defendant guilty or not guilty should not control your verdict as to the other defendants.

Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other; or you may acquit both or you may convict both or all. It will depend upon your view of the testimony and evidence.

You must take each defendant and consider the evidence as to that defendant and my instructions to you on the law. You will then write a separate verdict of guilty or not guilty for each individual defendant.

(ROA p. 720, lines 7-21). This Court finds that trial counsel has no basis to object to the trial court’s instructions on accomplice liability or foreseeability.

This Court finds that trial counsel made a proper opening argument. Counsel testified that the purpose of his opening statement was to provide an outline of how everything occurred.

He argued that it was the jury's duty to decide whether these crimes were committed and whether they were natural consequences of Applicant's actions. Counsel testified that he did not want to overemphasize the murder in his opening statement. This Court finds no deficiency in trial counsel's opening statement.

This Court finds that trial counsel was not ineffective for advising the jury during his closing statement that Applicant was not present for the principal offenses. The evidence produced at trial indicated that Applicant was present for the kidnapping and burglary, but she was not present for the murder and armed robbery. Because she was present for the burglary and the kidnapping, she was not charged with accessory before the fact to those offenses. Counsel's purpose in advising the jury that Applicant was not present for the murder and armed robbery was not to stipulate to an element of accessory before the fact, but rather to argue that Applicant was too far removed from those offenses and that those offenses were not foreseeable to her. This Court finds no deficiency in counsel's closing argument.

This Court finds that counsel properly cross-examined Kerry Hollins at trial. Counsel testified that Mr. Bolus, a co-defendant's attorney, followed up and got Mr. Hollins to admit that a lick could be a person rather than just a robbery. Counsel testified that he did not ask Mr. Hollins if he knew there would be weapons involved because he did not know what Mr. Hollins would say, particularly since he was testifying against Applicant and looking to solidify a good plea deal. He testified that he did not ask Patricia Kennedy, Mr. Hollins' attorney, for permission to speak with him, but counsel assumed Ms. Kennedy would not have allowed him to speak with Mr. Hollins since he was a co-defendant who was testifying for the State. This Court finds that counsel was able to cross-examine Mr. Hollins regarding some details of the incident as well as why he decided to testify against his co-defendants.

This Court finds that counsel was not ineffective for failing to discuss last argument with Applicant or advising her that she would preserve last argument by not testifying. Counsel did not recall whether or not he discussed last argument with Applicant. He testified that he and Mr. Bolus were surprised to lose last argument based on the third co-defendant entering one piece of evidence. However, this Court finds that counsel provided other reasons that he advised Applicant not to testify. He was concerned about how Applicant would handle cross-examination from two strong prosecutors who would try to confuse her. He was also concerned that if one co-defendant's pending murder charges came out then the jury might have believed that it was foreseeable that someone would get killed in this robbery. In addition, this Court finds that it was ultimately Applicant's decision not to testify. Applicant testified that she never told counsel that she wanted to testify. This Court finds that counsel's discussions with Applicant, or lack thereof, regarding last argument did not affect the outcome of the trial.

This Court finds that Applicant was not prejudiced by counsel's failure to object to the State's comment during closing argument that any time a victim is killed "in the course of another felony, then his death is murder. End of story." (ROA p. 693, lines 12-20). First, this Court finds that the State's closing did not shift the burden of proof for malice to the defendants. Moreover, even if counsel was deficient for failing to object, the Applicant was not prejudiced because the trial court properly charged the jury on malice and cured any potential defect. The trial court charged the jury as follows regarding malice:

I further instruct you that if one intentionally kills another during the commission of a felony, the inference of malice *may* arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with all of the other evidence in the case, and you *may* give it the weight that you decide it should receive.

(ROA p. 711, lines 5-12) (Emphasis added). This Court finds that the trial court's proper instruction cured any prejudice from the State's closing statement.

This Court finds that Applicant's allegation of ineffective assistance of trial counsel for failure to raise a Brady issue regarding Kerry Hollins' statement is without merit. As previously stated, during his motion for continuance and severance, trial counsel brought it to the court's attention that he had received Mr. Hollins' statement only three or four days before trial. In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. Here, the Applicant has failed to demonstrate that the State intentionally withheld the statement from trial counsel or that the statement was favorable to the Applicant.

Accordingly, this Court finds the Applicant has failed to satisfy both prongs of Strickland. Applicant's complaints concerning counsel's performance are hereby denied and dismissed.

Ineffective Assistance of Appellate Counsel

Applicant alleges that she received ineffective assistance of appellate counsel in that appellate counsel failed to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts, the lower court's failure to grant a jury charge on strong arm robbery as a lesser included offense of armed robbery, and the lower court's charge to the jury that the State

would only have to prove that the Applicant aided and abetted another person "to commit a crime." A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

This Court finds that appellate counsel and co-counsel are experienced appellate attorneys. This Court finds that appellate counsel properly chose to brief the issues that she and her co-counsel believed were the most meritorious. Appellate counsel testified that she and her former employer Tommy Thomas, Esquire, each read the trial transcript, looked for issues that were preserved for appeal, and debated which issues were the best issues to raise. She testified that she drafted an argument on the directed verdict issue, but she ultimately decided that it was

not their strongest issue. Appellate counsel also testified that she and Mr. Thomas agreed with the trial court that guns were involved so strong arm robbery should not have been charged. She testified that she and Mr. Thomas discussed all the issues that were preserved and chose not to raise the issue about lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime." This Court finds that Applicant has failed to show that appellate counsel's representation was deficient.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet her burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

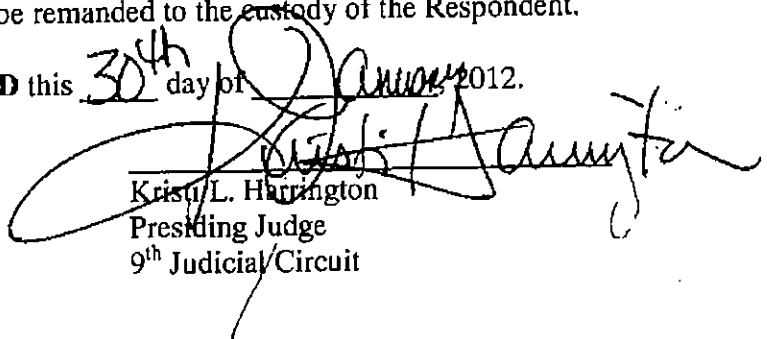
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during her trial or sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

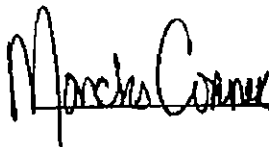
This Court advises the Applicant that she must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. Her attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 30th day of January 2012.


Kristi L. Harrington
Presiding Judge
9th Judicial Circuit

 Marcha Connor, South Carolina.

LAW OFFICE OF

**TARA DAWN SHURLING, PA**

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

Christina Dixon Parnall

Associate Attorney

(803) 738-8622

Fax (803) 738-1600

E-Mail: tDSLAW@shurlinglaw.com

February 16, 2012

The Honorable Mary P. Brown
Clerk of Court of Berkeley County
ATTN: OLLIE TUCKER
300 California Ave.
Moncks Corner, SC 29461-

RE: Marquita Chemere Smith, 323834 v. State of South Carolina; 2010-CP-08-2985

Dear Ms. Brown:

Attached is my Rule 59(e) Motion to Alter or Amend for filing in the above-captioned matter. In today's mail I am forwarding the original to be attached to the filed email copy. As I advised Ms. Tucker earlier today by phone, Matt Friedman has graciously consented to the filing of my emailed submission today. I would appreciate having a clocked copy of this motion returned to me in the envelope that will be included with the original motion. Please let me know what I owe your office for the copy of the motion, and I will remit payment right away. I am grateful for your assistance in this matter. If you should have any questions or concerns please feel free to contact my office. For now, I remain,

Sincerely,

A handwritten signature in cursive script that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures

cc: Matthew J. Friedman, Assistant Attorney General
Marquita Smith, #323834
Namon and Rosemary Smith

1076 OF SOUTH CAROLINA

COUNTY OF BERKELEY

Marquita C. Smith, 323834

☒ Applicant,

v.

The State Of South Carolina

☐ Respondent.

IN THE COURT OF COMMON PLEAS

CASE NO. 2010-CP-08-2985

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Tara Dawn Shurling, Bar No. 5099
Address:
3614 Landmark Drive Suite D
Columbia, South Carolina 29204
phone: 803-738-8622 fax: 803-738-1600
e-mail: other:

Defendant's Attorney:
Matthew J. Friedman, Bar No.
Address:
P.O. Box 11549 Columbia, South Carolina
phone: 803-734-3737 fax:
e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Applicant / ☐ Respondent

2/16/2012
Date submitted

SECTION III: Motion Fee

- ☐ PAID - AMOUNT:
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE:

CLERK'S VERIFICATION

Collected by: _____

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

Date Filed:
FEB 16 2012

CASE NO. 2010-CP-08-2985
MARY P. BROWN CLERK OF COURT
BERKELEY COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT
2010-CP-08-2985

MARQUITA SMITH, 323834

Applicant.

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

RULE 59(e) SCRPC, MOTION TO
ALTER OR AMEND

FILED

FEB 16 2012

CASE NO. 100
MARY P. BROWN CLERK OF COURT
BERKELEY COUNTY, SC

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving this Court pursuant to Rule 59(e), SCRPC, to alter or amend its Order of Dismissal filed February 1, 2012. The Application for Post-Conviction Relief in this matter was filed on August 24, 2010 and amended on November 17, 2011. The State filed its Return on February 4, 2011. An evidentiary hearing was convened on November 17, 2011, in which the State was represented by Assistant Attorney General Matthew J. Friedman and the Applicant was represented by Attorney Tara Dawn Shurling. In support of this motion, the Applicant would show unto this Honorable Court the following:

The Applicant respectfully submits that there are numerous items in this Court's Order that warrant correction.

1. With regards to the testimony of Appellate Counsel, Trisha Blanchette, this Court's Order overlooked the following points:
 - a. While Attorney Blanchette initially testified that she and her former boss, Tommy Thomas, decided that the failure of the lower court was not their strongest issue, she ultimately conceded that the Applicant had strong arguments for direct verdicts of acquittal on both the charge of accessory before the fact to armed robbery and the charge of accessory before the fact to murder. PCR Tr. p. 17, l. 7- p. 18, l. 21.

- b. Although Attorney Blanchette first testified that she and Attorney Thomas agreed with the trial court's position that a charge on strong armed robbery was not warranted because guns clearly were utilized in this case, she ultimately agreed that the real problem with this issue was defense counsel's failure to request a charge on accessory before the fact to strong armed robbery for the Applicant only, as opposed to a general charge on strong armed robbery. PCR Tr. p. 21, l. 3- p. 22, l. 6.
- c. While it is true that Attorney Blanchette testified that she and Attorney Thomas considered briefing trial counsel's object to the portion of the lower court's jury charge that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime" and decided not to raise the issue, the record is void of any reason for that decision save a vague implication that they agreed with what the lower court said about the instruction in response to trial counsel's objection. PCR Tr. p. 23, l. 12- p. 24, l. 7. After further questioning concerning this issue, Attorney Blanchette agreed with the Applicant's position that the charge as given created a danger that the jury would find her guilty of the indicted offenses if they concluded, as defense counsel admitted in opening arguments, that the Applicant assisted her co-defendants in the commission of "a crime" as opposed to the specific crimes of armed robbery and murder. PCR Tr. p. 24, l. 16- p. 25, l. 2. Despite this concession, Attorney Blanchette offered no explanation for the decision not to present this issue on direct appeal. PCR Tr. p. 25, ll. 2-6.

2. With regard to the PCR testimony of defense counsel, V. Craig Jones, Jr., this order either incorrectly states the content of his testimony *or* overlooks relevant portions thereof:
 - a. Paragraph 1, pg. 6 of this Order overlooks the following relevant testimony:
 - i. After reviewing the actual testimony of Kerry Hollins concerning the term “lick” with PCR Counsel, defense counsel acknowledged that after the testimony elicited by Attorney Bolus, Hollins followed up with more testimony which emphasized that the plan included weapons. PCR Tr. p. 50, ll. 1-8 and ROA p. 435, ll. 4-9.
 - ii. Defense counsel admitted that he wished he had “gone into that further” when addressing his failure to object to Hollis being allowed to define “a lick” as meaning an armed robbery. PCR Tr p. 60, ll. 15-16. He acknowledged that he should have requested a mistrial the first time the State elicited testimony defining “a lick” as an armed robbery. PCR Tr. p. 61, l. 19- p. 62, l. 2.
 - b. Paragraph 2, pg. 6 of this Order incorrectly states that defense counsel “testified that he did not ask Patricia Kennedy, Mr. Hollin’s attorney, for permission to speak with him, but counsel assumed Ms. Kennedy would not have allowed him to speak with Mr. Hollins since he was a co-defendant who was testifying for the State.” Defense counsel’s PCR testimony in fact reflects that he understood that Hollins would have had to make the decision concerning whether to speak with him. PCR Tr. p. 58, l. 5- p. 59, l. 15. He further admitted that he didn’t know whether or not Hollins would have been willing to talk to him. PCR Tr. p. 58, ll.

- 16-18. He did not ask Patricia Kennedy to *ask* her client if he was willing to speak to the Applicant's lawyer. PCR Tr. p. 61, ll. 12-15.
- c. With regard to defense counsel's failure to interview Hollins, this Order fails to note the following relevant testimony from the PCR hearing:
- i. Defense counsel, admitted that Hollins statement wasn't very divergent from the Applicant's statement. PCR Tr. p. 58, l. 21- p. 59, l. 19.
 - ii. Hollins testified that if he had been asked, he would have been willing to talk to defense counsel *even if* his own lawyer had recommended against it. PCR Tr. p. 108, l. 20- p. 109, l. 4.
 - iii. Hollins expressly testified that if defense counsel had asked him the same questions as PCR counsel did during the evidentiary hearing, he would have answered them the same way he did in the PCR hearing, and further, that he would have answered those questions the same way if they had been asked of him under oath at the Applicant's trial. PCR Tr. p. 112, ll. 15-24.
- d. Paragraph 3, p. 6 through paragraph 4, p. 7, of this Order neglects to reference the following PCR testimony relevant to the Applicant's decision not to testify at her trial.
- i. Defense counsel admitted that he did not anticipate losing the final argument when a co-defendant introduced evidence at trial. He acknowledged that he likely told the Applicant she could preserve her right to the final argument by not testifying. He conceded that, once the judge made it clear that all the defendants on trial had lost the right to final

arguments when one defendant introduced evidence, he probably did not discuss that ruling with her, and did not explain that she would no longer gain the right to the last argument by waiving her right to testify. PCR Tr. p. 88, l. 3-p. 90, l. 7.

- ii. While defense counsel did state that he did not want the Applicant to testify because it might come out that she knew one of her co-defendant's Manny, had two murder charges pending, PCR Tr. p. 91, ll. 2-14, he went on to acknowledge that there was no evidence she knew Manny other than having spoken to him once when Hollins handed Manny the phone during a call with the Applicant. PCR Tr. p. 92, ll. 4-23.
- iii. The explanation given by defense counsel for his advice to Applicant not to testify fails to explain why defense counsel could not have asked his client, the Applicant, what if anything she knew about Manny *in advance of this incident* prior to her making a decision about testifying.
- iv. The Applicant testified that defense counsel advised her that he did not want her to testify because "he didn't want the prosecutors to eat [her] alive because they would confuse [her]." PCR Tr. p. 120, ll. 2-8. She indicated, however, that she wasn't afraid to testify, and she had no intention of diverging from her statement to the police because it was true. PCR Tr. p. 120, l. 6- p. 121, l. 13 and PCR Tr. p. 126, l. 14- p. 127, l. 1.
- v. The Applicant expressly testified that the major reason she didn't testify was because her lawyer told her she would lose the last argument if she did, and her lawyer never explained to her that she had lost the last argument when a co-defendant introduced evidence.

- e. Paragraph 2, p. 11, of this Order states that "*it is unlikely that the trial court would have charged accessory before the fact to strong Arm Robbery*" having previously noted the trial court's conclusion that the charge of strong arm robbery wasn't warranted where there was "*no evidence in the record that this incident took place without weapons.*" The Applicant respectfully notes that the Order overlooks the fact that on the request for a charge on Accessory Before the Fact to Strong Arm Robbery the issue would not have been whether weapons were used, but rather, whether the Applicant *knew* guns would be utilized in this robbery.
- f. This Order, at p. 11-12, finds that defense counsel was not ineffective for failing to object to the accomplice liability charge given in this case. The Order neglects to address the Applicant's related claim that defense counsel was ineffective for failing to prepare and present to the lower court a proposed accomplice liability instruction concerning the law as it *pertained to charges of accessory before the fact*. In his PCR testimony, defense counsel offered no explanation for his failure to submit a proposed jury instruction on this crucial point. PCR Tr. 78, l. 8- p. 79, l. 4.
- g. In this Order, at paragraph 3, p. 13, the Court finds that defense counsel was not ineffective in his cross-examination of Hollins. Once again, this portion of the Order states that defense counsel did not think *Hollins' lawyer* would have let him interview Hollins pre-trial. As previously noted, this is an inaccurate statement of defense counsel's testimony. Further, this Order "finds that counsel was able to cross-examine Mr. Hollins regarding some details of the incident..." This Order fails to take into account the testimony of Hollins at the PCR hearing, and the

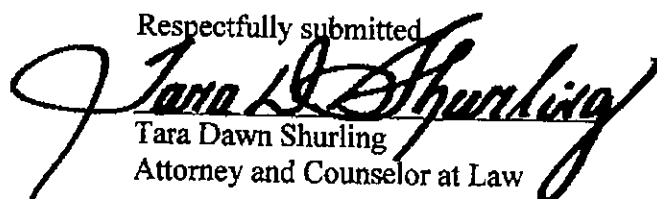
- e. Paragraph 2, p. 11, of this Order states that "*it is unlikely that the trial court would have charged accessory before the fact to strong Arm Robbery*" having previously noted the trial court's conclusion that the charge of strong arm robbery wasn't warranted where there was "*no evidence in the record that this incident took place without weapons.*" The Applicant respectfully notes that the Order overlooks the fact that on the request for a charge on Accessory Before the Fact to Strong Arm Robbery the issue would not have been whether weapons were used, but rather, whether the Applicant *knew* guns would be utilized in this robbery.
- f. This Order, at p. 11-12, finds that defense counsel was not ineffective for failing to object to the accomplice liability charge given in this case. The Order neglects to address the Applicant's related claim that defense counsel was ineffective for failing to prepare and present to the lower court a proposed accomplice liability instruction concerning the law as it *pertained to charges of accessory before the fact*. In his PCR testimony, defense counsel offered no explanation for his failure to submit a proposed jury instruction on this crucial point. PCR Tr. 78, l. 8- p. 79, l. 4.
- g. In this Order, at paragraph 3, p. 13, the Court finds that defense counsel was not ineffective in his cross-examination of Hollins. Once again, this portion of the Order states that defense counsel did not think *Hollins' lawyer* would have let him interview Hollins pre-trial. As previously noted, this is an inaccurate statement of defense counsel's testimony. Further, this Order "finds that counsel was able to cross-examine Mr. Hollins regarding some details of the incident..." This Order fails to take into account the testimony of Hollins at the PCR hearing, and the

many ways in which the same testimony would have been crucial to the defense if it had been offered at trial. *See*, PCR Tr. p. 106, l. 21- p. 118, l. 13.

- h. On page 14, paragraph 1, of the Order, it states that "it was ultimately Applicant's decision not to testify." The Applicant would respectfully note that the record of this PCR hearing does not support his finding. When asked who made the decision for the Applicant not to testify, defense counsel expressly stated, "probably it would have been mine." PCR Tr. p. 102, ll. 2-4.

For all the above reasons, the Applicant now respectfully asks that this Court might reconsider its decision in this case and amend its Order pursuant to Rule 59(e), SCRCP, to grant relief and remand the Applicant's case to the Berkeley County Court of General Sessions for a new trial. In the alternative, the Applicant would respectfully request that the Court issue an Amended Order of Dismissal addressing the factual points presented above and ruling upon the additional allegation raised and argued by the Applicant below but not addressed in the Order of Dismissal. The Applicant would assert that her request for an Amended Order is necessary in order to fully preserve her arguments for appellate review.

Respectfully submitted


Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

Attorney for the Applicant

This 16th day of February, 2012.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

MARQUITA SMITH, #323834)
Applicant,)
v.)
THE STATE OF SOUTH CAROLINA)
Respondent.)

2010-CP-08-2985

CERTIFICATE OF SERVICE
FILED

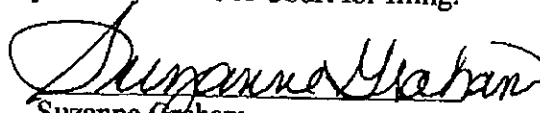
FEB 16 2012

CASE NO
MARY P. BROWN CLERK OF COURT
BERKELEY COUNTY, SC

The undersigned hereby certifies that a true copy of the Rule 59(e) Motion to Alter or Amend in the above matter has been served on the Honorable Kristi Lea Harrington, presiding judge, this 16th day of February, 2012, by mailing one (1) copy in a stamped envelope properly addressed to:

The Honorable Kristi Lea Harrington
Circuit Court Judge for the Ninth Circuit
P. O. Box 998
Moncks Corner, SC 29461

The original having been sent to the Berkeley County Clerk of Court for filing.


Suzanne Graham
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE ME this 16th day of
February, 2012.

Sharon H. McCallister (L.S.)
Notary Public for South Carolina

My Commission Expires: Apr. 16, 2017

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

MARQUITA SMITH, #323834)

Applicant,)

v.)

THE STATE OF SOUTH CAROLINA)

Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-08-2985

CERTIFICATE OF SERVICE

FILED

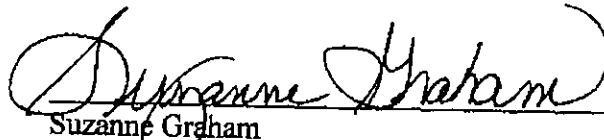
FEB 16 2012

CASE NO.
MARY P. BROWN CLERK OF COURT

The undersigned hereby certifies that a true copy of the Rubenstein v. Alter or Amend in the above matter has been served on opposing counsel this the 16th day of February, 2012, by mailing one (1) copy in a stamped envelope properly addressed to:

Matthew J. Friedman
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The original having been sent to the Berkeley County Clerk of Court for filing.



Suzanne Graham
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE ME this 16th day of
February, 2012.

Sharon H. McCollister (L.S.)
Notary Public for South Carolina

My Commission Expires Jan. 16, 2017



ALAN WILSON
ATTORNEY GENERAL

February 27, 2012

The Honorable Mary P. Brown
Berkeley County Clerk of Court
300 California Ave.
Moncks Corner, SC 29461

Re: Marquita Smith, #323834 v. State of South Carolina
2010-CP-08-2985

Dear Ms. Brown:

Enclosed please find the original Return and Motion to Dismiss Motion to Alter or Amend Pursuant to 59 (e) SCRCF of the Respondent in the above-captioned case for filing in your office.

Sincerely,

Matthew J. Friedman
Assistant Attorney General

MJF/arh

cc: Tara Shurling, Esquire

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

Marquita Smith, #323834,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-08-2985

RETURN AND MOTION TO DISMISS
MOTION TO ALTER OR AMEND
PURSUANT TO 59(e) SCRPC2012 FEB 28 PM 12:16
FILED
CLERK OF COURT
BERKELEY COUNTY, SC

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRPC, in which she asks the Court to alter or amend its Order dismissing his application for post-conviction relief (PCR). The Respondent would submit the following:

I.

This Court's Order of Dismissal filed on February 1, 2012, contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

II.

Applicant asks the Court to amend its Order of Dismissal to include numerous points and examples of testimony that she believed were overlooked by the Court. Respondent submits that the Court's Order properly and adequately addressed each issue and the relevant testimony.

To the extent that Applicant is requesting this Court to reconsider its decision and grant post-conviction relief, the Respondent submits that the request should be denied. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve

N/C

B

issues raised to but not ruled upon by the trial court). Applicant has failed to show that an allegation was properly raised but not ruled upon by the PCR Court.

III.

WHEREFORE, having made its Return and Motion to Dismiss, the State requests that the motion be denied.

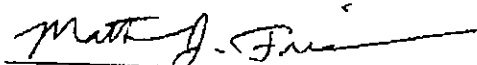
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
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February 27, 2012.

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

MARQUITA SMITH, #323834

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-08-2985

AFFIDAVIT OF SERVICE BY MAIL

2012 FEB 28 PM 12:16
 CLERK OF COURT
 BERKELEY COUNTY, SC

FILED

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss Motion to Alter or Amend Pursuant to 59(e) SCRCP** of the Respondent in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tara D. Shurling, Esquire
3614 Landmark Drive
Suite A
Columbia, SC 29204

DATED this 27th day of February, 2012

Anne R. Henley
 Anne R. Henley, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Marquita Smith, #323834,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-08-2985

AMENDED ORDER OF DISMISSAL

2012 APR 19 PM 4:51
 CLERK OF COURT
 BERKELEY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 24, 2010 and amended on November 17, 2011. The Respondent made its Return on February 4, 2011. An evidentiary hearing into the matter was convened on November 17, 2011 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Tara Dawn Shurling, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on her own behalf at the PCR hearing. Applicant's trial counsel, V. Craig Jones, Jr., Esquire, appellate counsel Tricia A. Blanchette, Esquire, and co-defendant Kerry Hollins also testified at the hearing. This Court had before it the records of the Berkeley County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Record on Appeal, the Final Brief of Appellant, the Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction and sentence, the Petition for Rehearing and Petition for Rchearing *En Banc*, the Return to Petition for Rehearing, the Order Denying Petition for Rehearing, the Remittitur dated July 13, 2010, the PCR application and amended application, and the State's Return thereto.

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An Order of Dismissal was filed on February 1, 2012, dismissing this action with prejudice. In light of the Rule 59(e) Motion to Alter or Amend filed by the Applicant on February 16, 2012, this Court has decided to issue this Amended Order of Dismissal with additional factual discussion to preserve the Applicant's claims for appellate review. However, upon considering the Motion to Alter or Amend filed by the Applicant, reviewing the aforementioned documents before the Court, and the testimony taken during the hearing on November 17, 2011, the Court finds that the grounds for the Motion to Alter or Amend are insufficient to alter the ruling originally issued. Therefore, it remains the order of this Court that the application for post-conviction relief is denied and dismissed with prejudice.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Berkeley County. The Applicant was indicted at the August 2007 term of the Berkeley County Grand Jury for accessory before the fact of murder (2007-GS-08-1748) and accessory before the fact of armed robbery (2007-GS-08-1751). V. Craig Jones, Jr., Esquire, represented the Applicant. The Applicant proceeded to trial on August 27-30, 2007, after which a jury found her guilty as indicted. The Honorable Deadra L. Jefferson sentenced the Applicant to confinement for thirty (30) years for each conviction. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Tommy A. Thomas, Esquire, and Tricia A. Blanchette, Esquire, represented the Applicant on appeal. Following full briefing by both sides, the Court of Appeals affirmed the conviction and sentence. State v. Smith, Op. No. 4662 (S.C. Ct. App. filed March 24, 2010). The Court of

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Appeals denied Applicant's Petition for Rehearing and Petition for Rehearing *En Banc* by Order dated June 4, 2010. The Remittitur was issued on July 13, 2010.

ALLEGATIONS

The Applicant alleges she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
 - a. Failed to recognize errors during trial and make appropriate objections thereto.
 - b. Failed to conduct a sufficient investigation into Applicant's factual circumstances.
 - c. Failed to present witnesses who would testify favorably on Applicant's behalf at trial.
2. Ineffective assistance of appellate counsel in that counsel failed to present all meritorious issues on direct appeal to the South Carolina Court of Appeals.

In her amended application, Applicant raised the following grounds for relief:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery.
2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge when the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery.
3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her codefendants would ultimately commit heinous crimes far beyond the scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her.
4. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact.
5. Trial Counsel was ineffective for failing to fully present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be

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- confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges.
6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery.
 7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing *and/or* the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties.
 8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her codefendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit.
 9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder.
 10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she *was not present* during the commission of the principal offenses.
 11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants.
 12. Trial counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine codefendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense.
 13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments.
 14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story."

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15. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit.
16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.
17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime," thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing any crime would make her mutually liable for all the acts committed by her co-defendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Appellate counsel Tricia A. Blanchette, Esquire, testified that she and her former employer Tommy Thomas, Esquire, represented Applicant on appeal. She testified that she and Mr. Thomas each read the trial transcript, looked for issues that were preserved for appeal, and debated which issues were the best issues to raise. She testified that she drafted an argument on the directed verdict issue, but she ultimately decided that it was not their strongest issue. Appellate counsel also testified that she and Mr. Thomas agreed with the trial court that guns were involved so strong arm robbery should not have been charged. She testified that she and Mr. Thomas discussed all the issues that were preserved and chose not to raise the issue about

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lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime."

Appellate counsel testified that she did not believe that Applicant's involvement was properly explained at trial, and she wished certain issues had been presented differently at trial. She testified that she believed the trial court gave an improper malice instruction under Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008), and she likely would have briefed that issue had trial counsel preserved the issue. She testified that she probably would have also briefed the issue that not all of the elements for accessory before the fact were met because Applicant was present at the restaurant and her friend's apartment, but trial counsel failed to preserve that issue. Appellate counsel testified that she did not believe the State laid the proper foundation in eliciting testimony from Kerry Hollins regarding the definition of a "lick," but trial counsel failed to object.

Trial counsel testified that he recalled researching accomplice liability law as it related to accessory before the fact. He testified that he did not object to Kerry Hollins' testimony about a "lick" because it was in Mr. Hollins' statement and it was his perception of what he thought a lick meant. Counsel testified that he assumed the State was asking for Mr. Hollins' opinion. He testified that Mr. Bolus, a co-defendant's attorney, followed up and got Mr. Hollins to admit that a lick could be a person rather than just a robbery. Defense counsel acknowledged that after the testimony elicited by Attorney Bolus, Hollins followed up with more testimony which emphasized that the plan included weapons. He testified that he did not consider objecting the first time "lick" was mentioned at trial. Defense counsel did admit that he wished he had "gone into that further" when addressing his failure to object to Hollis being allowed to define "a lick" as meaning an armed robbery. PCR Tr p. 60, ll. 15-16

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Counsel testified that he did not ask Mr. Hollins if he knew there would be weapons involved because he did not know what Mr. Hollins would say, particularly since he was testifying against Applicant and looking to solidify a good plea deal. Counsel testified that he did not receive Mr. Hollins statement until three or four days before the trial, and he raised that issue in his motion for a continuance and severance. He testified that he did not ask Patricia Kennedy, Mr. Hollins' attorney, to ask Mr. Hollins if he would speak with the Applicant's attorney. Defense counsel assumed Mr. Hollins would not speak with him, since he was a co-defendant who was testifying for the State. Defense counsel's PCR testimony in fact reflects that he understood that Hollins would have had to make the decision concerning whether to speak with him. He further admitted that he didn't know whether or not Hollins would have been willing to talk to him. With regard to defense counsel's failure to interview Hollins, defense counsel admitted that Hollins' statement wasn't very divergent from the Applicant's statement. Hollins testified that if he had been asked, he would have been willing to talk to defense counsel *even if* his own lawyer had recommended against it. Hollins expressly testified that if defense counsel had asked him the same questions as PCR counsel did during the evidentiary hearing, he would have answered them the same way he did in the PCR hearing, and further, that he would have answered those questions the same way if they had been asked of him under oath at the Applicant's trial.

Counsel testified that his goal was to break the chain of foreseeability and argue that Applicant did not know that guns would be involved or that the victim would get hurt. He testified that he asked for a jury charge on strong arm robbery, which was denied, but he did not ask for a charge on accessory before the fact to strong arm robbery. He asserted that there was testimony that several guns were involved and no one was charged with strong arm robbery.

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Counsel testified that he did not object to the State's closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story." He asserted that this trial was held before the Lowry decision came out, but he admitted that in retrospect he probably should have objected.

Counsel testified that he did not want Applicant to testify because she would have been subject to cross-examination. He asserted that although Applicant did not have a prior record, one of the co-defendants had two pending murder charges at the time and if that came out the jury might have believed that it was foreseeable that someone would get killed in this robbery. Defense counsel admitted that he did not anticipate losing the final argument when a co-defendant introduced evidence at trial. He acknowledged that he likely told the Applicant she could preserve her right to the final argument by not testifying. He conceded that, once the judge made it clear that all the defendants on trial had lost the right to final arguments when one defendant introduced evidence, he probably did not discuss that ruling with her, and did not explain that she would no longer gain the right to the last argument by waiving her right to testify. While defense counsel did state that he did not want the Applicant to testify because it might come out that she knew one of her co-defendant's, Manny, had two murder charges pending, he went on to acknowledge that there was no evidence she knew Manny other than having spoken to him once when Hollins handed Manny the phone during a call with the Applicant.

Counsel testified that Applicant was not present for the murder and armed robbery, but she was present at Tawana's house for the burglary and kidnapping so she could not be charged as an accessory for burglary and kidnapping. He testified that he discussed Applicant's statement with her numerous times. Counsel testified that he discussed the right to testify with

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Applicant and recommended that she not testify. He contended that he communicated the plea offers to Applicant and it was her decision to reject those offers.

Kerry Hollins, a co-defendant, testified that he is currently serving a sentence of eighteen (18) years for voluntary manslaughter at Lieber Correctional Institution. He testified that he is not currently represented by counsel. He asserted that he testified for the State at Applicant's trial. Mr. Hollins testified that he would have agreed to speak with Applicant's attorney prior to trial. He testified that Applicant told him that the victim sold drugs and had some money, but there was no discussion about an armed robbery, a murder, a break in, or a kidnapping. He testified that he assured Applicant that the victim would not be hurt. Mr. Hollins testified that he recalled testifying at trial that Applicant planned the robbery, that he did not want to be an active participant in the robbery but Applicant influenced him, that Applicant told him where the victim would be, and that after the victim was kidnapped Applicant told him to leave.

The Applicant testified that counsel told her she would lose last argument if she testified, but counsel did not tell her that they had already lost last argument when a co-defendant entered a single piece of evidence. The Applicant testified that defense counsel advised her that he did not want her to testify because "he didn't want the prosecutors to eat [her] alive because they would confuse [her]." She admitted that she never told counsel that she wanted to testify because they never discussed it from her perspective. She indicated, however, that she wasn't afraid to testify, and she had no intention of diverging from her statement to the police because it was true. The Applicant expressly testified that the major reason she didn't testify was because her lawyer told her she would lose the last argument if she did, and her lawyer never explained to her that she had lost the last argument when a co-defendant introduced evidence. Applicant testified that her statement was the truth. The Applicant asserted that she did not know the victim

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would be harmed. Applicant testified that she thought it would be a "snatch and grab" of some jewelry and some marijuana from the victim and that was it. She testified that a "lick" was a way to get money, and it could mean a robbery but she had never known it to mean armed robbery. She testified that she originally thought Mr. Hollins would do the "lick" by himself and then at some point she learned that "Manny" would be involved. She testified that she did not know co-defendant Gary Grant at all.

Ineffective Assistance of Trial Counsel

The Applicant alleges that she received ineffective assistance of trial counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry, 386 S.E.2d 624.

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 625 (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced

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the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

This Court finds trial counsel's testimony is credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on several occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, and possible defenses or lack thereof.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet her burden of proof. This Court finds that counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that trial counsel was not ineffective for failing to object when the State elicited testimony that a "lick" meant an armed robbery. Counsel testified that he did not object because Kerry Hollins referenced a "lick" in his statement and he assumed the State was asking for Mr. Hollins' opinion of what a "lick" meant. Mr. Hollins testified at trial that a "lick" was a robbery and that you need some kind of weapon to do a robbery. This Court finds that trial counsel had no basis to object to this testimony.

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This Court finds that trial counsel made a proper direct verdict motion. Counsel argued that Applicant was too far removed from the circumstances, there was no common scheme or plan to commit armed robbery or murder, and it was not a natural and probable consequence that the murder would occur. A case should be submitted to the jury if there is any direct evidence or any substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006). When ruling on a motion for directed verdict, the trial court is concerned only with the existence or nonexistence of evidence, not its weight. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). Here, this Court finds that counsel zealously argued on Applicant's behalf, but the trial court found that there was enough evidence to submit the case to the jury.

This Court finds that counsel properly made a motion for severance. Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right. Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001) (citing State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999)). There can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances that are presented to the court in each case. State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952); State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App.2005). A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. Harris, 351 S.C. at 652-53, 572 S.E.2d at 273; Dennis, 337 S.C. 275, 523 S.E.2d 173. The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant

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will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. Dennis, 337 S.C. at 281, 523 S.E.2d at 176. The rule allowing joint trials is not impugned simply because the co-defendants may present evidence accusing each other of the crime. Id. Here, the Applicant and her co-defendants did not present mutually antagonistic defenses. Trial counsel requested a severance to protect Applicant from being tried jointly with her co-defendants, but the trial court denied the motion.

This Court finds that counsel was not ineffective for failing to request a jury charge on accessory before the fact to strong arm robbery. Counsel requested a jury charge on strong arm robbery based on the fact that neither Applicant's statement nor Mr. Hollins' statement mentions weapons. However, the trial court declined to charge strong arm robbery because there was no evidence in the record that the incident took place without weapons. If the trial court had considered the charge from the perspective of whether the Applicant knew that weapons would be involved, it is still unlikely that the trial court would have charged accessory before the fact to strong arm robbery. This Court finds that Applicant was not prejudiced by counsel's failure to request such a charge.

This Court finds that trial counsel was not ineffective for failing to object to the trial court's jury instructions on accomplice liability and foreseeability. The trial court gave the standard charge on accomplice liability and "the hand of one is the hand of all." (ROA p. 716, line 2 – p. 717, line 20). The trial then stated as follows:

Ladies and gentlemen, the defendant Marquita Smith is charged with being an accessory before the fact of the felonies of murder and armed robbery. In order to prove beyond a reasonable doubt that the defendant, Marquita Smith, either advised, agreed, urged, counseled, hired, or in some way aided and abetted – aided and abetted another person to commit a crime, and that the defendant was not present when the offense was committed.

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Aid means to help, to promote the course or accomplishment of, to give support to, or to give assistance to. Abet means to encourage or appear to favor or support.

(ROA p. 718, lines 2-14). In its closing statement, the State argued that Applicant orchestrated the plan and used the word "robbery" in her own statement and that when you rob someone, it is entirely foreseeable that the person could be killed during the course of the robbery. (ROA p. 676, line 19 – p. 679, line 16). Trial counsel argued that there was a difference between the Applicant and her codefendants and that she is only responsible for the probable and natural consequences of her actions. (ROA p. 653, line 22 – p. 654, line 13). Counsel also argued that it was not foreseeable that the co-defendants would have kidnapped and murdered the victim. (ROA p. 669, line 12 – p. 671, line 24). The trial court addressed the jury as follows:

The case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for all defendants. The fact that you may find one defendant guilty or not guilty should not control your verdict as to the other defendants.

Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other; or you may acquit both or you may convict both or all. It will depend upon your view of the testimony and evidence.

You must take each defendant and consider the evidence as to that defendant and my instructions to you on the law. You will then write a separate verdict of guilty or not guilty for each individual defendant.

(ROA p. 720, lines 7-21).

The Applicant similarly alleged that defense counsel was ineffective for failing to prepare and present to the lower court a proposed accomplice liability instruction concerning the law as it pertained to charges of accessory before the fact. In his PCR testimony, defense counsel offered no explanation for his failure to submit a proposed jury instruction on this crucial point. The instruction given on accomplice liability or foreseeability were standard and appropriate and this

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Court finds that trial counsel was not deficient for failing to object to the trial court's instructions or failing to present a more appropriate accomplice liability instruction.

This Court finds that trial counsel made a proper opening argument. Counsel testified that the purpose of his opening statement was to provide an outline of how everything occurred. He argued that it was the jury's duty to decide whether these crimes were committed and whether they were natural consequences of Applicant's actions. Counsel testified that he did not want to overemphasize the murder in his opening statement. This Court finds no deficiency in trial counsel's opening statement.

This Court finds that trial counsel was not ineffective for advising the jury during his closing statement that Applicant was not present for the principal offenses. The evidence produced at trial indicated that Applicant was present for the kidnapping and burglary, but she was not present for the murder and armed robbery. Because she was present for the burglary and the kidnapping, she was not charged with accessory before the fact to those offenses. Counsel's purpose in advising the jury that Applicant was not present for the murder and armed robbery was not to stipulate to an element of accessory before the fact, but rather to argue that Applicant was too far removed from those offenses and that those offenses were not foreseeable to her. This Court finds no deficiency in counsel's closing argument.

This Court finds that counsel was able to properly cross-examine Kerry Hollins at trial. Counsel testified that Mr. Bolus, a co-defendant's attorney, followed up and got Mr. Hollis to admit that a lick could be a person rather than just a robbery. Counsel testified that he did not ask Mr. Hollins if he knew there would be weapons involved because he did not know what Mr. Hollins would say, particularly since he was testifying against Applicant and looking to solidify a good plea deal. He testified that he did not ask Patricia Kennedy, Mr. Hollins' attorney, if her

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client would speak with him, but counsel assumed Mr. Hollins would not speak with him since he was a co-defendant who was testifying for the State. Mr. Hollins' testimony at the PCR hearing indicates that he might have offered testimony beneficial to the defense at the Applicant's trial, if he had been properly examined by defense counsel. This Court finds that counsel was able to cross-examine Mr. Hollins regarding some details of the incident as well as why he decided to testify against his co-defendants.

This Court finds that counsel was not ineffective for failing to discuss last argument with Applicant or advising her that she would preserve last argument by not testifying. Counsel did not recall whether or not he discussed last argument with Applicant. He testified that he and Mr. Bolus were surprised to lose last argument based on the third co-defendant entering one piece of evidence. When asked who made the decision for the Applicant not to testify, defense counsel expressly stated, "probably it would have been mine." However, this Court finds that counsel provided other reasons that he advised Applicant not to testify. He was concerned about how Applicant would handle cross-examination from two strong prosecutors who would try to confuse her. He was also concerned that if one co-defendant's pending murder charges came out then the jury might have believed that it was foreseeable that someone would get killed in this robbery. In addition, this Court finds that it was ultimately Applicant's decision not to testify. Applicant testified that she never told counsel that she wanted to testify. This Court finds that counsel's discussions with Applicant, or lack thereof, regarding last argument did not affect the outcome of the trial.

This Court finds that Applicant was not prejudiced by counsel's failure to object to the State's comment during closing argument that any time a victim is killed "in the course of another felony, then his death is murder. End of story." (ROA p. 693, lines 12-20). First, this

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Court finds that the State's closing did not shift the burden of proof for malice to the defendants. Moreover, even if counsel was deficient for failing to object, the Applicant was not prejudiced because the trial court properly charged the jury on malice and cured any potential defect. The trial court charged the jury as follows regarding malice:

I further instruct you that if one intentionally kills another during the commission of a felony, the inference of malice *may* arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with all of the other evidence in the case, and you *may* give it the weight that you decide it should receive.

(ROA p. 711, lines 5-12) (Emphasis added). This Court finds that the trial court's proper instruction cured any prejudice from the State's closing statement.

This Court finds that Applicant's allegation of ineffective assistance of trial counsel for failure to raise a Brady issue regarding Kerry Hollins' statement is without merit. As previously stated, during his motion for continuance and severance, trial counsel brought it to the court's attention that he had received Mr. Hollins' statement only three or four days before trial. In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. Here, the Applicant has failed to demonstrate that the State intentionally withheld the statement from trial counsel or that the statement was favorable to the Applicant.

KLH
4/19/12

Accordingly, this Court finds the Applicant has failed to satisfy both prongs of Strickland. Applicant's complaints concerning counsel's performance are hereby denied and dismissed.

Ineffective Assistance of Appellate Counsel

Applicant alleges that she received ineffective assistance of appellate counsel in that appellate counsel failed to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts, the lower court's failure to grant a jury charge on strong arm robbery as a lesser included offense of armed robbery, and the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime." A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the

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presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

This Court finds that appellate counsel and co-counsel are experienced appellate attorneys. This Court finds that appellate counsel properly chose to brief the issues that she and her co-counsel believed were the most meritorious. Appellate counsel testified that she and her former employer Tommy Thomas, Esquire, each read the trial transcript, looked for issues that were preserved for appeal, and debated which issues were the best issues to raise. She testified that she drafted an argument on the directed verdict issue, but she ultimately decided that it was not their strongest issue. Appellate counsel also testified that she and Mr. Thomas agreed with the trial court that guns were involved so strong arm robbery should not have been charged. She testified that she and Mr. Thomas discussed all the issues that were preserved and chose not to raise the issue about lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime." This Court finds that Applicant has failed to show that appellate counsel's representation was deficient.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet her burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during her trial or sentencing

[Handwritten signature]
4/19/12

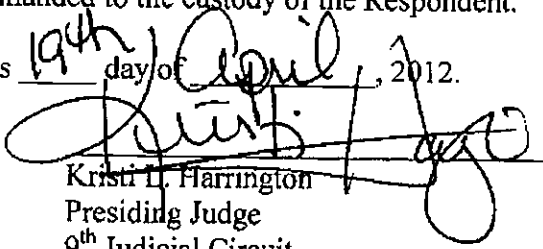
proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

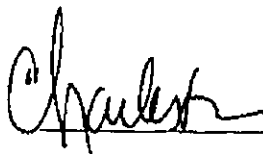
This Court advises the Applicant that she must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. Her attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19th day of April, 2012.


Kristi L. Harrington
Presiding Judge
9th Judicial Circuit

, South Carolina.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

20 12 CP - 08 - 1994

MARQUITA SMITH, 323834,)
 Applicant,)
)
 v.)
)
 THE STATE OF SOUTH CAROLINA,)
 Respondent.)

APPLICATION FOR
 POST-CONVICTION RELIEF

MAINTENANCE COURT
 CLERK OF COURT
 BERKELEY COUNTY, SC

2012 JUL 10 AM 11:20

FILED

INSTRUCTIONS -- READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, **the original** shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention: Camille Griffin Graham Correctional Institution
2. Name and location of Court which imposed sentence Berkeley County Court of General Sessions; 30-B California Avenue, Moncks Corner, SC 29461
3. Name(s) of co-defendant(s) (if any) Gary Grant, Jermaine Hartwell, Kerry Hollins
4. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2007-GS-08-1748: Accessory Before the Fact of Murder
 - (b) 2007-GS-08-1751: Accessory Before the Fact of Armed Robbery
 - (c) -

5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 30, 2007: 30 years imprisonment
 - (b) August 30, 2007: 30 years imprisonment (concurrent)
 - (c) _____
6. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list
- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Affirmed
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. March 24, 2010 (Opinion)
 - ii. July 13, 2010 (Remittitur)
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. State v. Marquita Smith, Op. No. 4662 (S.C.Ct. App filed March 24, 2010)
 - ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) PCR Attorney failed to perfect an appeal from order denying previous PCR Application docketed at 2010-CP-08-2985

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) An Order of Dismissal was filed on February 1, 2012. Following the filing of a Rule 59(e) Motion on behalf of the Applicant, an Amended Order of Dismissal was filed on 2010-CP-08-2985. PCR Counsel's paralegal did not recognize the second order to constitute a ruling on the pending 59(e) Motion. As a result, she failed to calendar the due date for the Notice of Appeal. Due to this clerical error, PCR Counsel failed to file a Notice of Appeal from the decision of the Court in this case. The Applicant now seeks a belated PCR Appeal through the guidelines and procedures set forth in Austin v. State, 305 SC 453, 409 S.E. 2d 395 (1991).

(b) _____

(c) _____

12. Prior to this application, have you filed with respect to this conviction:

(a) any petitions in a State Court under South Carolina law? Yes

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief? Yes

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
- i. Prior PCR action
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Berkeley County Court of Common Pleas
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
- i. Order of Dismissal
 - ii. Amended Order of Dismissal
 - iii. _____
 - iv. _____
- (d) the date of each such disposition:
- i. February 1, 2012.
 - ii. April 19, 2012
 - iii. _____
 - iv. _____
- (e) if know, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
 - ii. _____
 - iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

15. If you answered "yes" to (14), identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Previous Application raised collateral issues appropriate for review in a Post-Conviction Relief Application, as opposed to a direct appeal. The Applicant now seeks a belated appeal from the Orders of Dismissal filed in that case.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions, or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. V. Craig Jones, Jr., 225 Seven Farms Drive, Suite Suite 109, Charleston, SC 29492 .
- ii. Tommy A. Thomas and Tricia A. Blanchette PO Box 88, Irmo, SC 29063
- iii. Tara Dawn Shurling, 3614 Landmark Drive, Suite A, Columbia, SC 29204

(b) the proceedings at which each such attorney represented you:

- i. Trial and Sentencing
- ii. Appeal
- iii. Previous Application for Post-Conviction Relief

19. State clearly the relief you seek in filing this application. Seeks to have a belated PCR appeal granted pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991).

20. Are you now under sentence from any other court that you have not challenged? No

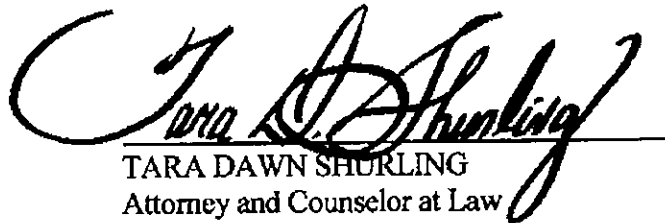
20 12 - CP - 08 - 1994¹¹¹⁷

STATE OF SOUTH CAROLINA

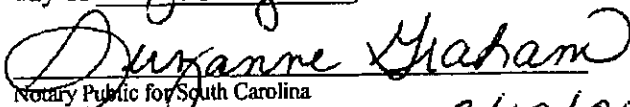
VERIFICATION

COUNTY OF BERKELEY

I, TARA DAWN SHURLING, *retained* counsel for the Applicant, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.


TARA DAWN SHURLING
Attorney and Counselor at Law

SWORN to and subscribed before me this 3rd
day of July, 2012.


Notary Public for South Carolina

My Commission Expires: 3/12/2013

FILED
2012 JUL 10 AM 11:20
MARY F. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

MARQUITA SMITH

Plaintiff,

vs.

STATE OF SC

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-08-01994

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff's Attorney:

Tara Dawn Shurling, Bar No. _____

Address:

3614 Landmark Drive, Suite A
Columbia, SC 29204

Phone: (803) 738-8622 Fax (803) 738-1600

E-mail: _____ Other: _____

Defendant's Attorney:

Ashleigh R. Wilson, Bar No. _____

Address:

Phone: (803) 734-4037 Fax _____

E-mail: _____ Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III)
- ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES ☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant _____ Date submitted _____

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: TS Date Filed: _____☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

2012 JUL 23 PM 4:12
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

11

B

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

MARQUITA SMITH, 323834,)
Applicant,)

2012-CP-08-1994

v.)

CONSENT ORDER

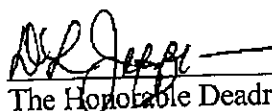
THE STATE OF SOUTH CAROLINA,)
Respondent.)

FILED
2012 JUL 23 PM 4:10
MARY P. BRUNN
CLERK OF COURT
BERKELEY COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 10, 2012. The Court is advised that the Respondent has waived its right to file a Return in this matter. The sole relief sought by the Applicant in this current Application is an Austin review previously filed Post-Conviction Relief action docketed at 2010-CP-08-2985. The Applicant's retained counsel, Tara Dawn Shurling, advises this Court that due to a clerical error in her office, she did not file a Notice of Appeal from the Order of Dismissal filed in this case on February 1, 2012 and the Amended Order of Dismissal filed on April 19, 2012.

Counsel filed a new Application for Post-Conviction Relief on behalf of this client in order to secure a belated PCR appeal through the guidelines and procedures set forth by the Supreme Court in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Counsel for the Respondent has consented to the sole relief sought in the current Application for Post-Conviction Relief by her signature below. Accordingly, this Application for Post-Conviction Relief is granted. The Applicant is hereby granted the opportunity to appeal the Order of Dismissal issued in her previous Post-Conviction Relief case docketed at 2010-CP-08-2985 by filing a Notice of Appeal from this Order.

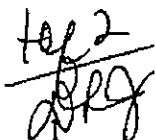
IT IS SO ORDERED.



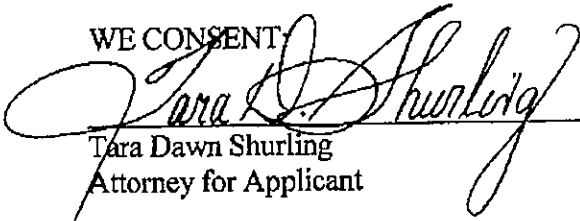
The Honorable Deadrea L. Jefferson
Chief Administrative Judge
Ninth Judicial Circuit

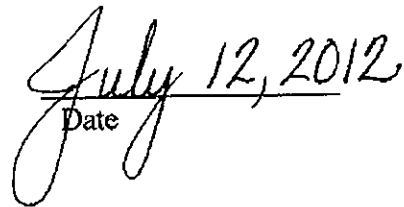
This 19th day of July, 2012.
Charleston, SC

Consent Signatures on Page 2

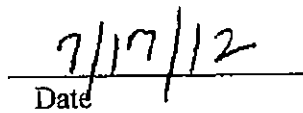
Page 2


WE CONSENT


 Tara Dawn Shurling
 Attorney for Applicant


 Date


~~Salley W. Elliott~~ Ashley R. Wilson
 Senior Assistant Attorney General
 Attorney for Respondent


 Date

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Kristy L. Harrington, Circuit Court Judge

Appellate Case No. 2012-212698

MARQUITA SMITH, 323834,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI

TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S. C. 29204
(803) 738-8622
(803) 738-1600 (FAX)

ATTORNEY FOR PETITIONER.

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Relevant Facts	8
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Conclusion	38

QUESTIONS PRESENTED

1. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery and where she was clearly prejudiced by this error by Trial Counsel?
2. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for neglecting to make a motion for a mistrial, and/or for failing to make a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery and where the record below supports her contention that she was prejudiced by Trial Counsel's failure to do so?
3. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for failing to fully present arguments and authority in favor of her Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Petitioner knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the Petitioner's knowledge and involvement and which were not readily foreseeable by her and where the record demonstrated that she was clearly prejudiced by this error both at trial and in her subsequent direct appeal?
4. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to fully present arguments and authority in favor of her Motions for Directed Verdicts where the evidence adduced at trial, including the Petitioner's own statement, established that she was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact to and where the record establishes that this failure by Trial Counsel prejudiced the Petitioner both at trial and in her subsequent direct appeal? .
5. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to fully present available arguments supporting her motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Petitioner was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Petitioner's charges and where the record below supports her contention that she was prejudiced by Trial Counsel's omissions in this regard?
6. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to specifically request a jury instruction on the charge of accessory before the fact to strong armed robbery and where the record before the lower court supported her claim that she was prejudiced by Trial Counsel's failure to do so?
7. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to research, and

present the trial court with, an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact and where the record below supported her contention that Trial Counsel's failure in this regard prejudiced her ability to receive a fair trial.

8. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of the Petitioner, separate from their findings concerning the liability of each of her co-defendants, and where the record below supports her assertion that she was significantly prejudiced by Trial Counsel's failure to enter an appropriate objection to the charge as given by the trial court.
9. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her assertion that Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Petitioner could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder and where she demonstrated to the lower court that she was prejudiced by this omission?
10. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for advising the jury in his closing argument that the Petitioner *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including the Petitioner's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Petitioner was on trial for; specifically that she *was not present* during the commission of the principal offenses and thereby irreparably prejudiced her ability to receive a fair determination of her guilt by the jury at her trial?
11. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Petitioner could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants and where the record below supported her claim that Trial Counsel's missed opportunity prejudiced the Petitioner at trial.
12. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel failed to provide the Petitioner with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby prejudiced her at trial by failing to elicit testimony from him which would have been extremely favorable to the defense.
13. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for advising the Petitioner that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments and where the record below establishes that this error by Trial Counsel significantly prejudiced the Petitioner in that it caused her to make a waiver of her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina Constitution.

which was not knowingly and voluntarily entered?

- 13 A. Did the lower court err in denying the Petitioner post-conviction relief based on her allegation that Trial Counsel was ineffective for advising her that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument where she meet her burden of proof with regard to her claim that Trial Counsel's advise was erroneous and caused her to make an unintelligent decision not to testify at her trial thereby violating her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina Constitution,
14. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story" and where she demonstrated that Trial Counsel's failure to object to this improper argument prejudiced her at trial by permitting the State to confuse the jury concerning the elements of the crime of accessory before the fact to murder and to dilute its burden of proof beyond a reasonable doubt?
15. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Petitioner's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit and where this issue would have been at least as strong, if not stronger, that the issues presented on direct appeal?
16. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.
17. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel failed to provide the Petitioner with effective assistance of counsel inasmuch as she failed to brief the meritorious issue of the lower court's charge to the jury that the State would only have to prove that the Petitioner aided and abetted another person "to commit a crime," and where this issue would have been at least as strong on direct appeal as the issues presented on appeal
18. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation, developed during her evidentiary hearing, that Trial Counsel was ineffective for failing to effectively argue a Rule 5, SCRCrimP, violation in his motion for a continuance and severance, where the State did not disclose a statement given by a co-defendant that had agreed to cooperate and be a witness for the prosecution at the Petitioner's trial.
19. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to interview a co-defendant who turned State's witness very shortly prior to trial, or in the alternative, for failing to

request a brief recess or continuance to do so and where she presented evidence which supported her claim that she was significantly prejudiced by Trial Counsel's failure to do so?

STATEMENT OF THE CASE

Procedural History

The Petitioner was indicted by the Berkeley County Grand Jury at the August 2007 term of court for accessory before the fact of murder (2007-GS-08-1748) and accessory before the fact of armed robbery (2007-GS-08-1751). On August 27-30, 2007, Petitioner proceeded to trial by jury where she was represented by V. Craig Jones, Esquire. She was found guilty as charged and sentenced to thirty (30) years imprisonment on each charge, to be served concurrently. A timely Notice of Appeal was filed on the Petitioner's behalf. She was represented on direct appeal by Tommy A. Thomas, Esquire and Tricia A. Blanchette, Esquire. The South Carolina Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Smith, 387 S.C. 619, 693 S.E.2d 415 (2010). Petitioner's subsequent Petition for Rehearing and Petition for Rehearing *en banc* were denied by Order dated June 4, 2010. The Remittitur was returned to the lower court by Order entered July 13, 2010.

Petitioner filed an Application for Post-Conviction Relief on August 24, 2010. The State filed its Return on February 8, 2011. An Amended Application for PCR was filed by the Petitioner's PCR Counsel, Tara Dawn Shurling, of the Richland County Bar, on January 13, 2012. An evidentiary hearing was convened in this matter on November 17, 2011 before the Honorable Kristi Harrington, presiding judge. A Memorandum of Law in Support of Application for Post-Conviction Relief was filed on January 4, 2012. A Motion to Supplement Post-Conviction Relief Record was filed on January 20, 2012. An Order authorizing Petitioner's Exhibits 1 and 2 to be accepted for filing was filed on January 27, 2012. By written Order filed February 1, 2012, the court denied and dismissed the Petitioner's Application for Post-Conviction Relief with prejudice. Petitioner filed a timely Rule 59(e) Motion to Alter or Amend on February 16, 2012. The State subsequently filed their Return and Motion to Dismiss 59(e)

Motion to Alter or Amend on February 28, 2012. With leave of court, both sides submitted Proposed Amended Orders to Judge Harrington on April 9, 2012.

An Amended Order of Dismissal was filed on April 19, 2012. While the Amended Order addressed some of the factual inadequacies noted in the Applicant's Rule 59(e) Motion, it did not alter the ruling originally issued. Due to a clerical oversight, Post-Conviction Relief counsel did not file a timely Notice of Appeal from the Orders of the lower court denying the Petitioner's Application for Post-Conviction Relief. Post-Conviction Relief Counsel filed a second Post-Conviction Relief application on behalf of the Petitioner on July 10, 2012 in which the sole issue was the Petitioner's request for a belated Post-Conviction Relief appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). A Consent Order granting the Petitioner's request for Austin review was filed on July 23, 2012. The Petitioner's Notice of Appeal was served on opposing counsel on August 6, 2012 and filed with this Honorable Court on August 8, 2012.

Evidence Before the Court

At the PCR hearing held in this case, the Petitioner presented her own testimony as well as testimony from Trial Counsel, V. Craig Jones, appellate counsel, Tricia Blanchette, and State witness, Kerry Hollins. The lower court had before it a transcript of the Petitioner's August, 2007 trial, a copy of the records of the Berkley County Clerk of Court regarding the subject convictions, and a copy of the Petitioner's records with the South Carolina Department of Corrections. In addition to this evidence and testimony, the lower court had before it copies of Petitioner's Exhibits 1 and 2.

Relevant Facts

The decision issued by the South Carolina Court of Appeals on direct appeal contains an extensive summary of the facts in this case. See, *State v. Smith, supra.*, found at App. pgs. 843 – 848. The Petitioner incorporates that factual summary by reference. Petitioner would specifically ask this Honorable Court to note the following relevant facts:

The Petitioner admitted, in a statement given to law enforcement, that she had offered up the name of her “cousin,” the Victim in this case, when co-defendant turned State witness, Kerry Hollins, indicated that he wanted someone to rob. App. Vol. II p. 545, ll. 15-18. She told Hollins that the Victim might have some money on his person. App. Vol. II p. 545, ll. 17-18. Two days later, on the night in question, Petitioner provided information to Hollins regarding the Victim’s whereabouts. App. Vol. II p. 546, l. 6-p. 547, l. 19. Petitioner was present with the Victim and a friend at that friend’s apartment, when Hollins and the Applicant’s other co-defendants arrived with the apparent intent of robbing the Victim. App. Vol. II p. 547, l. 20-p. 548, l. 7; p. 411, ll. 9-24. The Hollins and the other co-defendants overtook the Victim at the apartment and transported him to a secondary location. App. Vol. II p. 547, l. 20-p. 548, l. 7; App. Vol. I pp. 172-175. Petitioner was indisputably at or near the friend’s apartment complex when the incident was initiated. App. Vol. II p. 548, ll. 8-9. The victim was physically assaulted and fatally wounded by gunfire at the secondary location. App. Vol. I p. 385, ll. 15-24; p. 391, l. 21-p. 392, l. 13. Some testimony indicated that a co-defendant may have taken jewelry from the Victim during the course of these events. App. Vol. II p. 416, l. 18-p. 417, l. 1.

The Thursday prior to trial, Trial Counsel received his first notice that Hollins, a former co-defendant of the Petitioner, would be testifying against her at trial. He received this information from the public defender representing Hollins. It was that Public Defender, not the State, who sent Trial Counsel a copy of the previously undisclosed statement by Hollins. Based on that revelation,

and his untimely notification that the case was being called for trial, Trial Counsel moved for a continuance. App. Vol. I pp. 11-21. Trial Counsel also moved for a severance, claiming antagonistic defenses between the Petitioner and her co-defendants as well as an inability to fully cross-examine Hollins. These motions were denied. App. Vol. I pp. 11-21.¹ At the trial, Hollins testified, without objection, that the Petitioner provided the nickname of the Victim, "Kuku," as someone to set up "a lick" on. Hollins also testified that a "lick" meant a robbery and that a weapon was needed to do a "lick." App. Vol. II p. 403, l. 10-p. 404, l. 23.

During the State's presentation of its case, counsel for a co-defendant introduced a photo lineup as an exhibit, causing all the defendants on trial to lose the right to a last argument. App. Vol. I p. 334, l. 25-p. 336, l. 15. Despite this development, Trial Counsel did not present any testimony or evidence in the Petitioner's defense. In his PCR testimony, Trial Counsel admitted that he did not anticipate losing the final argument when a co-defendant introduced evidence at trial. He acknowledged that he likely told the Petitioner she could preserve her right to the final argument by not testifying. He conceded that, once the judge made it clear that all the defendants on trial had lost the right to final arguments when one defendant introduced an exhibit into evidence, he probably did not discuss that ruling with her, and did not explain that she would no longer gain the right to the last argument by waiving her right to testify. App. Vol. III p. 1003, l. 3-p. 1005, l. 7.

Trial Counsel asserted that he did not want the Petitioner to testify because it might come out that she knew that one of her co-defendants, Manny, had two murder charges pending, App. Vol. III p. 1006, ll. 2-14. He acknowledged however, that there was no evidence at trial that the Petitioner knew Manny other than brief testimony about her having spoken to him once when Hollins handed Manny the phone during a call with the Petitioner. App. Vol. III p. 1007, ll. 4-

¹ The trial court's rulings on these issues were challenged on direct-appeal.

23. Further, the explanation given by Trial Counsel for his advice to Petitioner not to testify failed to explain why he could not have simply asked his client, the Petitioner, what if anything she knew about Manny *in advance of this incident* prior to her making a decision about testifying.

In her PCR testimony, Petitioner asserted that Trial Counsel advised her that he did not want her to testify because "he didn't want the prosecutors to eat [her] alive because they would confuse [her]." App. Vol. III p. 1035, ll. 2-8. She stated however, that she wasn't afraid to testify, and she was not worried about the prosecution attacking her on the stand because she knew she had no intention of diverging from her statement to the police because it was true. App. Vol. III p. 1035, l. 6- p. 1036, l. 13 and - App. Vol. III p. 1041, l. 14- p. 1042, l. 1. The Petitioner expressly testified that the major reason she didn't testify was because her lawyer told her she would lose the last argument if she did. She clearly testified that that her lawyer did not subsequently explain to her that her situation had changed because she lost the last argument when a co-defendant introduced an exhibit into evidence. The Petitioner's testimony establishes that she would have testified if she had known that she had already lost the right to the final argument to the jury. Her PCR testimony further establishes that if she had testified at trial she would have made it clear to the jury that when she suggested her cousin as a mark for this crime, her expectation was, **"that they were going to snatch and grab some jewelry and maybe some weed or something and that was it."** App. Vol. III p. 1048, ll. 7 – 12. When asked whose decision it was for the Petitioner not to testify, Trial Counsel stated, **"probably it would have been mine."** App. Vol. III p. 1017, ll. 2-4.

Trial Counsel argued for a directed verdict of acquittal on the Petitioner's charges, but the motion was collectively denied along with the other motions for directed verdicts from the co-defendants based on the Court's determination that evidence existed to support the charges. App.

Vol. II pp. 559-563; 624-625. In her PCR testimony, Appellate Counsel, Trisha Blanchette, initially testified that she, and her former boss, Tommy Thomas, decided that the failure of the lower court to grant Petitioner's directed verdicts of acquittal was not their strongest issue. She ultimately conceded however, that the Petitioner actually had strong arguments for direct verdicts of acquittal on both her charges. App. Vol. III p. 932, l. 7- p. 933, l. 21.

At trial, Trial Counsel requested an additional instruction on the charge of strong arm robbery. He argued the complete lack of any evidence that the Petitioner knew weapons would be involved in support of this request. App. Vol. II p. 597, l. 5-p. 604, l. 1. During the charge conference, Trial Counsel requested an accomplice liability charge for the Petitioner. The State requested a felony-murder instruction, and the Court indicated that it would give an instruction on the felony-murder inference of malice. App. Vol. II p. 607, ll. 6-24. The State referenced the so-called felony-murder rule in its closing arguments, noting that any time a victim is killed **"in the course of another felony, then his death is murder. End of story."** App. Vol. II p. 693, ll. 16-20. Trial Counsel argued in his closing arguments that his client could not be held accountable for events that were not foreseeable results of the plans in which the Petitioner was involved. App. Vol. II pp. 653-674. Trial Counsel stressed the fact that his client *was not present* during the commission of the crimes charged to the principal actors. App. Vol. II pp. 653-674.

ARGUMENT

Standard of Review

This Application for Post-Conviction Relief generally raised numerous specific allegations of ineffective assistance of counsel in violation of the Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. The standard of review in a Post-Conviction Relief appeal is whether "any evidence of probative value" exists to support the Post-Conviction Relief court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The burden of proof is on the Petitioner in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Trial Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where Trial Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of Trial Counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions

which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (internal citations omitted).

The right to effective assistance of counsel extends to representation on direct appeal. Appellate Counsel must provide representation of such quality as to make the appellate proceedings fair. Evitts v. Lucy, 469 U.S. 387(1985). In Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999), this Honorable Court applied the Strickland standard to a claim of ineffective assistance of appellate counsel. In so ruling, this Court observed that the applicable standard on the issue of prejudice remains whether the defendant had established by a reasonable probability that the result of the proceeding would have been different. Although a defendant is entitled to effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004), citing, Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526(1990).

ALLEGATIONS

Counsel's Failure to Adequately Argue Petitioner's Pre-Trial Motions for a Severance and Continuance and his failure to seek a recess to interview co-defendant Hollins when a Continuance was denied.

Question 5, 18 and 19

Trial Counsel made a motion for a continuance at the onset of the Petitioner's trial, indicating that he received notice of the scheduled trial date only ten (10) days in advance. Counsel informed the judge that he had just discovered, the Thursday prior to trial, that a former co-defendant would be testifying against his client and that there was a previously undisclosed statement from that witness. App. Vol. I p. 11, l. 5-p. 13, l. 10. He additionally argued that he had not had adequate time to secure the attendance of two parties that he felt to be necessary witnesses in the Petitioner's defense. App. Vol. I p. 22, l. 19-p. 24, l. 4.

Trial Counsel also presented a motion for a severance, supported by the argument that he could not adequately highlight the disparity in culpability between co-defendants with extensive criminal backgrounds and his own client's clean record, if their prosecutions were not severed. App. Vol. I p. 14, l. 2-p. 15, l. 12. Counsel additionally argued that his last-minute notice of the fact that Hollins would be a witness for the State, deprived him of the opportunity to prepare to adequately refute Hollins' *anticipated* testimony that his client was the mastermind behind this entire plan. App. Vol. I p. 16, l. 25-p. 17, l. 5. What Trial Counsel failed to cover in his argument for a severance was the reality that jury instructions issued in a joint trial of the Petitioner and her co-defendants would inevitably be very cumbersome and complex. He failed to argue that the Applicant's joint trial with her co-defendant's would result in her inability to have a jury that was adequately and clearly charged on the difference between the findings necessary for her conviction as opposed to those required to convict her co-defendants.

The instructions necessary at a joint trial needed to adequately explain the different findings required for the jury to determine the co-defendant's guilt on their charges of armed robbery and murder charges *versus* those necessary for verdicts on the Petitioner's charges of *accessory before the fact of* armed robbery and murder. The required instructions would necessarily have to thoroughly explain the theory of accomplice liability as it applied to the Petitioner's accessory charges versus the principal offenses the co-defendants were charged with. Trial Counsel should have argued that there was a real possibility that a jury would be confused by the complicated legal differentiation between the standard to be applied to the Petitioner as opposed to that necessary to convict her co-defendants. He should have argued in favor of severance by noting that there existed a realistic probability that her jury would be incapable of applying the proper legal standard to the Petitioner's accessory charges versus the standard applicable to her co-defendants who were charged as principals.

While Trial Counsel argued for a severance based on his need to highlight the disparity between his client's background and the extensive criminal records of her co-defendants, he did not argue that it would be difficult for his client to have a jury adequately and clearly instructed on the applicable law in a joint trial. The Petitioner was clearly prejudiced in that this available argument would have supported the desired severance. South Carolina precedent provides that a severance should only be granted "when there is a serious **risk that a joint trial would compromise a specific trial right of a co-defendant** or prevent the jury from making a reliable judgment about a co-defendant's guilt." Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001)(emphasis in original). It is the Petitioner's position that the confusing jury instructions ultimately issued at her trial prevented the jury from making a reliable judgment about her guilt. The complex and confusing instructions necessary for the Petitioner to receive a fair trial were readily foreseeable and should have been argued as justification for a severance.

Likewise, the fact that it would be difficult for the trial court to tailor instructions which were fair and necessary for the Petitioner to receive a fair trial while also issuing an appropriate charge for her co-defendant's charges, should have been foreseeable and should have been argued as further justification for a severance.

The Petitioner has further argued that once Trial Counsel realized that the Court was not going to continue this trial to another day or term, he should have, *at the very least*, requested a brief recess in order to attempt to interview cooperating co-defendant Hollins. In the lower court the Petitioner argued that Trial Counsel was clearly ineffective for failing to do so since his own words in the trial record confirm that he felt incapable of adequately cross-examining this last-minute witness. App. Vol. I, p. 13, l. 3- p. 15, l. 18.

In his PCR testimony, Trial Counsel admitted that he did not ask the public defender representing Hollins if he could interview him prior to the beginning of the Petitioner's trial. App. Vol. III p. 976, ll. 12-15. Trial Counsel spoke with Hollins' attorney the week before the Petitioner's trial. That conversation addressed the fact that Hollins would be a witness for the State and therefore, presented an obvious opportunity to discuss a potential interview of Hollins prior to trial. App. Vol. III p. 1001, ll. 9-17.

The lower court erroneously found that Trial Counsel was not ineffective in his cross-examination of Hollins. In the initial Order of Dismissal the lower court noted that Trial Counsel did not think *Hollins' lawyer* would have let him interview Hollins pre-trial. App. Vol. III p. 1112. In his PCR testimony, Trial Counsel ultimately admitted that the decision, as to whether to talk to the Petitioner's lawyer, would have been up to Hollins to make. App. Vol. III. p. 972, l. 23 – p. 973, l. 15. Following the Petitioner's Rule 59(e) Motion, the Order was amended to acknowledge that Trial Counsel simply *assumed* Hollis would not speak with him because he was a cooperating co-defendant testifying for the State. App. Vol. III pgs. 1195-1196. The

decision of the lower court fails to take into account Trial Counsel's admission in his PCR testimony that he did not know whether Hollins would have been willing to speak with him or not. The Amended Order "finds that counsel was able to cross-examine Mr. Hollins regarding some details of the incident..." App. Vol. III p. 1196. The Amended Order of Dismissal however, totally fails to take into account the testimony of Hollins at the PCR hearing, and the many ways in which the same testimony would have been crucial to the defense if it had been offered at trial. *See*, App. Vol. III p. 1021, l. 21- p. 1033, l. 13. Likewise, the Order of Dismissal fails to take into account the fact that, in his PCR testimony, Trial Counsel admitted that Hollins' statement *wasn't very divergent from the Petitioner's statement*. App. Vol. III, p. 973, l. 21- p. 974, l. 19. The lower court failed to recognize that Trial Counsel had essentially admitted that the testimony of Hollins would have largely corroborated the Petitioner's version of the events.

In his PCR testimony Hollins testified that if he had been asked, he would have been willing to talk to the Petitioner's lawyer *even if* his own lawyer had recommended against it. App. Vol. III p. 1023, l. 20- p. 1024, l. 4. He testified that if the Petitioner's Trial Counsel had ever asked him the same questions as PCR counsel did during the evidentiary hearing, he would have answered them the same way he did in the PCR hearing, and further, that he would have answered those questions the same way if they had been asked of him under oath at the Petitioner's trial. App. Vol. III p. 1027, ll. 15-24. Hollins confirmed information that clearly would have been helpful to the defense, such as the Petitioner being unaware of any plan to bring guns in the robbery of the Victim and his admitted assurances to the Petitioner that the Victim would not be hurt. App. Vol. III p. 1025, l. 17- p. 1027, l. 14. Hollins' PCR testimony confirms that he would have willingly provided this information to Petitioner's Trial Counsel. App. Vol. III p. 1027, ll. 2-24. In his own PCR testimony, Trial Counsel acknowledged that he failed to ask for even

a brief recess to speak with Hollins and he admitted that he would have been more likely to receive that, than the continuance of the trial he requested. App. Vol. III p. 1001, l. 18-p. 1002, l. 6.

When Petitioner's Trial Counsel presented his arguments for a continuance and severance, he also failed to mention the Rule 5² violation that occurred in the State's failure to timely disclose the more recent statement of Hollins, who was testifying against his client. Counsel did not receive the statement, or notice of its existence, until the Thursday or Friday prior to trial, and even then, received the information from the attorney representing Hollins not the State. Rule 5(a)(1)(C) provides that upon request of the defendant, the prosecution has a duty to provide documents or items in the possession, custody or control of the prosecution which are material to the preparation of a defense or are intended to be used by the prosecution as evidence in chief. Rule 5(a)(1)(C), SCRCrimP. Furthermore, the duty imposed under this rule is a continuing duty to disclose as necessary. Rule 5(c), SCRCrimP. A motion requesting discovery under Rule 5 was prepared and served upon opposing counsel by the Petitioner's previous attorney, George Bishop, Jr. PCR Counsel obtained a copy of that motion from the file of Trial Counsel, Craig Jones. Copies of that motion and certificate of service were added to the PCR record as Petitioner's Exhibit 1, by way of a motion filed on the Petitioner's behalf and consented to by the Respondent.³ The Petitioner was also allowed to introduce as an exhibit, a copy of the discovery motions filed by Attorney Bishop on behalf of the Petitioner. App. Vol. III pgs. 1090 – 1099.

In the lower court the Petitioner argued that the State's failure to produce Hollins' most recent statement prior to trial was a violation of South Carolina Rules of Criminal Procedure and that Trial Counsel's failure to note this violation in support of his continuance request constituted

² Rule 5, SCRCrimP.

³ A copy of this motion was not introduced during the evidentiary hearing inasmuch as PCR counsel expected the motion to be included in the Clerk of Court records in this matter. It has subsequently been determined that, although the motion was served, it was apparently not filed with the Clerk of Court. For that reason, PCR counsel filed a motion to expand the PCR record to include a copy of the Rule 5 Motion and certificate of service. Counsel for the Respondent consented to this request.

ineffective assistance of counsel. At the evidentiary hearing, Trial Counsel admitted that he probably did not specifically reference this issue, and admitted that in retrospect, he wished that he had used words to specifically evoke a Rule 5 violation. App. Vol. III p. 971, l. 4-p. 972, l. 12. The Petitioner asserts that she was prejudiced by counsel's failure to add this to his arsenal of arguments in favor of a continuance. This Rule 5 violation so strongly supported that motion, that it could also have proven to be reversible error, if prejudice were shown to result from the violation. See State v. Landon, 370 S.C. 103, 108-109, 634 S.E.2d 660, 663 (2006). Trial Counsel had, indeed, stated that his preparation of a defense was impaired by this last-minute notice that a co-defendant had turned State witness and given a recent statement. However, Trial Counsel's failure to argue this ground as a basis for the continuance request, or at minimum to request a brief recess to attempt to interview Hollins, effectively waived that argument.

For the above reasons, the Court finds that Trial Counsel was ineffective in arguing his motions for a severance and continuance and in failing to seek even minimal time to interview Hollins. The lower court erred in ruling that the Petitioner was not entitled to the requested relief on these grounds.

Trial Counsel's Failure to Adequately Cross-Examine State Witness Hollins

Questions 1 and 2

Tied into the allegations addressed above, was the Petitioner's claim that Trial Counsel was ineffective for failing to fully cross-examine Hollins. Specifically, he failed to elicit testimony that would have been favorable to the defense. As noted above, Hollins' PCR testimony confirmed that the Petitioner was unaware of any plan for him, or anyone with him, to bring weapons when taking money from the Victim. He similarly confirmed that the Petitioner

was unaware that the victim might be harmed.⁴ Likewise, his testimony could have been used to confirm that the Petitioner was not privy to any plan to commit a burglary. Trial Counsel's claim that he was afraid to ask more questions of this witness fails on two fronts. First, he had the opportunity to interview Hollins and failed to pursue it. Second, Trial Counsel admits that the statement given by Hollins was largely consistent with his client's position. Therefore, he had the security of knowing that if Hollins significantly departed from that statement in his trial testimony, he could have impeached him with his prior statement.

The unclear and improper definition of the street term "lick" elicited from Hollins in his direct testimony was relied upon the State to create the inference that the Petitioner *was aware* that weapons would be involved. If Hollins had been adequately cross-examined, it is clear that Hollins' own testimony on cross-examination would have substantially challenged the State's position that the Petitioner was aware of plans to commit an *armed* robbery or even that she knew the perpetrators would be armed. In her PCR action, the Petitioner has argued that Trial Counsel should have had the benefit of knowledge gained from a pre-trial interview with Hollins to use to challenge the confusing or incongruent statements elicited from this witness on direct examination. As this failure to fully cross-examine Hollins is directly related to the failure to interview the witness prior to trial, and the Rule 5 violation, this issue must be evaluated in conjunction with the issues addressed above. The Petitioner respectfully submits that the lower court erred in failing to grant relief on this ground.

Testimony from State Witness Hollins' that a "Lick" Conclusively Meant an Armed Robbery

Questions 1, 2 and 12

⁴ Although the Petitioner was only charged with accessory before the fact to armed robbery and murder, the fact that a burglary and kidnapping ultimately occurred, for which her co-defendants were charged could have been considered by the jury in determining whether a murder was a readily foreseeable consequence of the activities the Petitioner participated in. Thus, testimony that the Petitioner had no knowledge of a plan to be armed while committing this robbery, or of any plan to kidnap or commit burglary, would have significantly diminished the chances that the jury would find that the victim's murder was a readily foreseeable consequence of the acts she knowingly participated in.

As previously noted, among the most damaging evidence against the Petitioner at trial came in the form of improper and patently misleading testimony from State witness Hollins. Hollins testified that the Petitioner had suggested the Victim for a “lick” and then, at the urging of the State, proceeded to define what a “lick” is commonly taken to mean. While Hollins initially defined a lick as signifying a *robbery*, he was subsequently led by the State to state that a “lick” necessitated the use of some type of weapon. App. Vol. II p. 403, ll. 10-20. Although *Counsel for a co-defendant, Attorney Bolus*, was able to get Hollins to admit, on cross-examination, that the term “refers to a robbery”, App. Vol. II p. 424, ll. 13-23, the damage from these assertions was reinforced when, on re-direct examination, the State once again lead Hollins into stating that a “lick” required “some type of weapon.” App. Vol. II p. 441, ll.10 – 15. After reviewing Hollins’ testimony concerning the term “lick” with PCR Counsel, Trial Counsel acknowledged that *after* the testimony elicited by Attorney Bolus, Hollins followed up with more testimony which emphasized that the plan included weapons. App. Vol. III p. 965, ll. 1-8. In his PCR testimony, Trial Counsel candidly stated that he wished he had “gone into that further” when addressing his failure to object to Hollis being allowed to define “a lick” as meaning an armed robbery. App. Vol. III p. 975, ll. 15-16. He conceded that he should have requested a mistrial the first time the State elicited testimony defining “a lick” as an armed robbery. App. Vol. III p. 976, l. 19- p. 977, l. 2.

The Petitioner asserts that her jury was all too likely to take at face value Hollins initial claim on direct-examination, and his repeated assertion on re-direct examination, that you need a weapon to hit a “lick” and fail to recognize the significance of his brief retreat from that position on cross-examination. Furthermore, this testimony was cited by the State as evidence supporting denial of the Petitioner’s request for a charge on a lesser offense of strong arm robbery. App. Vol. II. p. 598, l. 14-p. 599, l. 1. The prejudice arising from this testimony was exacerbated when during closing arguments the State emphasized this testimony by stating, “Defense would have you believe

she [Petitioner] didn't know it was going to be a robbery—she didn't know it was going to be an armed robbery.” The State wraps up that argument with, “Y’all know what a robbery is, what a lick is.” App. Vol. II p. 679, ll. 13-20.

The Petitioner testified at her own evidentiary hearing that the term a “lick” does not necessarily denote an armed robbery, or robbery at all. She testified that the term refers to various different means of getting money, or making quick cash. App. Vol. III p. 1043 l. 8-p. 1044, l. 3. This interpretation is consistent with the definition of a “lick” referenced in an unrelated 2008 Court of Appeals decision. See, State v. Page, 378 S.C. 476, 479, 663 S.E.2d 357, 358 (Ct. App. 2008) (witness testifies that “making a lick,” is slang for “coming up on some extra money, doing something to come up with some extra money some way or somehow”). It is evident from the trial record that counsel for a co-defendant recognized, and acted upon, the need to challenge Hollins’ initial characterization of a “lick” as being an armed robbery. The Petitioner’s counsel should have likewise recognized the impropriety of this witness giving meaning to a street term without any evidentiary foundation or basis. This Court finds that Trial Counsel was ineffective for failing to object each and every time that the State sought to introduce testimony that a “lick” signified an armed robbery and for failing to make a motion for a mistrial based upon the admission of this damaging testimony.

The Petitioner, being charged as an accessory before the fact, was more severely harmed by this testimony than any of the other co-defendants. Further, it is apparent from Hollins’ PCR testimony that properly questioned about this crucial issue, he would have yielded on his assertion that a “lick” required a weapon, or at minimum, would have clarified that the Petitioner had no knowledge that he and his co-defendants intended the use of weapons in the commission of this particular “lick.” In short, there is a big difference between Hollins’ trial testimony asserting that the term “lick” is universally understood to require a weapon and testimony which would have

clarified that he personally thought of a "lick" as a reference to an armed robbery

In a 1960 slander case⁵ before the Supreme Court of South Carolina, a married female plaintiff alleged that her supervisor had told her, among other things, to refrain from sexual relations with her husband when he stated the following slang term: "You go home and tell him he can't have any of that stuff tonight or any night." In reviewing the lower court's decision, the Supreme Court held that the defendant had conceded his agreement with the meaning ascribed to a slang term by the plaintiff, because the defendant had not objected to the Plaintiff's failure to offer proof as to the meaning of the term. Renew, 237 S.C. at 119, 115 S.E.2d at 666. In the instant case, Trial Counsel's failure to object each and every time the slang term was defined substantially prejudiced the Petitioner's defense and her case on appeal

The prejudice to the Petitioner arising when Hollins defined this term *as a robbery involving weapons* was so substantial that Trial Counsel was clearly remiss for not immediately objecting and/or moving for a mistrial. At bare minimum, Trial Counsel should have requested a curative instruction. Hollins' definition of this term was not only improperly admitted, but it was instantly prejudicial to the Petitioner. There was no other evidence presented that even suggested that the Petitioner was aware that weapons would be involved in this attempt to get money from the Victim. This is the testimony that the State hung its hat on, regarding the Petitioner's alleged knowledge that an *armed* robbery would take place. The Petitioner was greatly prejudiced by counsel's failures in this regard in that the jury could infer, solely from Hollins' definition of a "lick," that the Petitioner had volunteered her cousin for an armed robbery. Knowledge that this robbery would involve the use of weapons exponentially increased the chances that jury would conclude that the Victim's murder was a foreseeable consequence of a crime she knowingly was an accessory to. For all these reasons, the lower court erred in finding that the Petitioner was not entitled to a new trial on this

⁵ Renew v. Serby, 237 S.C. 116, 115 S.E.2d 664 (1960).

issue.

Trial Counsel's Directed Verdict Motions

Questions 3 and 4

Trial Counsel brought a motion for a directed verdict of acquittal on both of the charges against the Petitioner simply arguing that there was no evidence to support a charge of accessory before the fact to armed robbery. He further stated that there was no evidence of a common plan to commit armed robbery or murder and that; generally, murder was not a probable and natural consequence of the Petitioner's acts. App. Vol. II pp. 559-560. This argument in support of the Petitioner's directed verdict motions was inadequate and ineffective considering the fact that the totality of the evidence adduced at trial had completely failed to establish that the Petitioner knowingly participated in anything that put her on notice that her co-defendants would ultimately commit far more serious crimes than the crime she knowingly agreed to assist them in committing.

There was a total lack of evidence, other than Hollins' improper definition of a street slang term a "lick", to suggest that the Petitioner knew that weapons would be involved. Even that testimony spoke to *Hollins' understanding* of the street definition of that term, not the Petitioner's own knowledge of or agreement with that definition. As previously noted, at least one prior South Carolina case has addressed another definition of that term. Without any evidence to establish that the Petitioner *knew* weapons might be involved, it is implausible for the State to argue that murder and armed robbery were foreseeable results of her assistance to the co-defendants. The Petitioner was an inexperienced nineteen-year-old with no criminal history. She suggested the Victim as a potential target for some quick cash, however, the State did not demonstrate that the Petitioner had any knowledge from which she should have concluded that the victim's death was a foreseeable and probable consequence of her actions. Trial Counsel's brief argument in support of directed verdicts of acquittal for his client failed to highlight the State's failure to prove their case against the

Petitioner in a clear and organized fashion.

Trial Counsel also failed to utilize another important item in his arguments supporting the motions for a directed verdict. One of the elements required to find a person liable as an accessory before the fact is that the person is *not present* at the scene of the crime. The elements necessary to support an accessory before the fact charge are as follows: "(1) that the defendant advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) **that the defendant was not present when the offense was committed**; and (3) that the principal committed the crime." State v. Gentry, 363 S.C. 93, 97-98, 610 S.E.2d 494, 497 (2005) (quoting State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993)) (emphasis added).

It had already been established that the Petitioner was present at her friend's apartment, where the Victim was initially attacked and grabbed by the co-defendants. The testimony of the Petitioner's friend, and the Petitioner's own statement, established this fact. App. Vol. I pps. 137-141 and App. Vol. II p. 547, l. 20-p. 548, l. 7. Since the evidence did not clearly establish where, if anywhere, an actual robbery occurred, it is possible that she was present during the alleged act of robbery. At the very least, it was established that the Petitioner was present during one of the phases of the crimes that led to her accessory before the fact of armed robbery and murder charges. Most importantly, Trial Counsel could have argued that the Petitioner was present when the only crime she *knowingly* aided and abetted, a robbery, was initiated. This critical fact, which negated one of the elements necessary to convict the Petitioner on her charges, should have been argued in support of directed verdicts of acquittal.⁶

At the evidentiary hearing, Appellate Counsel acknowledged that the evidence demonstrated that the Petitioner was present for stages of the offenses. App. Vol. III p. 945, ll. 7-18. She verified that if Trial Counsel had presented this argument in his motions for a directed verdict, this issue

⁶ While this position initially seems counter productive inasmuch as it supports her being a principal, the fact remains that *she was not indicted as a principal* and therefore, was not at risk of being convicted as one at this trial.

would most likely have been included in the appellate brief as a meritorious ground for appeal. Unfortunately, she stated, the issue was not preserved for appellate review. App. Vol. III p. 946, l. 19-p. 947, l. 17. Thus, Trial Counsel's failure to make this well-supported argument in favor of directed verdicts of acquittal *not only* damaged the Petitioner's chances of the trial judge directing verdicts in her favor, but also eliminated any opportunity for appellate review of this issue as preserved error. Trial Counsel was ineffective in arguing the Petitioner's motions for a directed verdict of acquittal, and the Petitioner is entitled to relief on these grounds.

Presentation of a Defense

Questions 13 and 13A

When Trial Counsel realized that all co-defendants had lost their right to a final argument, he should have made this development clear to his client, who desired to testify on her own behalf. In the evidentiary hearing, Trial Counsel admitted that he probably did not advise the Petitioner that she had already lost her right to a final argument, and therefore, that this factor should no longer be considered in making the decision about whether she wished to exercise her right to testify at her trial. App. Vol. III p. 1004, l. 12-p. 1005, l. 7. He affirmed the possibility that he told her, at a point earlier in the trial, that they could retain last arguments if they did not put up a defense. App. Vol. III p. 1003, ll. 3-12. The Petitioner testified that she was not aware when the right to last arguments was lost, and that her reluctant decision not to testify was based on her desire to preserve final arguments despite her attorney's urging that the prosecution would "eat [her] alive" on the stand. App. Vol. III p. 1040, l. 3-p. 1042, l. 13.

While Trial Counsel did state that he did not want the Petitioner to testify because it might come out that she knew one of her co-defendants, Manny, had two murder charges pending. App. Vol. III p. 1006, ll. 2-14, he went on to acknowledge that there was no evidence she knew Manny other than having spoken to him once when Hollins handed Manny the phone during a call with the

Petitioner. App. Vol. III p. 1007, ll. 4-23. The explanation given by defense counsel for his advice to Applicant not to testify fails to explain why defense counsel could not have asked his client, the Applicant, what if anything she knew about Manny *in advance of this incident* prior to her making a decision about testifying.

Trial Counsel was clearly ineffective for not explaining to his client that she no longer had a right to final argument prior to resting her case without putting up a defense. In addition to this, the Petitioner maintains that Trial Counsel also erred in advising her that the prosecution would “eat her alive” if she testified, without any accompanying rationale. The record below supports this assertion. Trial Counsel admitted that the Petitioner was an articulate 19-year-old woman without a criminal record that could be used for impeachment. App. Vol. III p. 1005, l. 8-p. 1006, l. 1. The Petitioner testified at her evidentiary hearing that she did not intend to challenge her statement to police, and that she was not afraid to testify in her defense. App. Vol. III p. 1040, l. 3-p. 1041, l. 15. Trial Counsel was ineffective for failing to communicate to his client that she had already lost her right to a final argument, motivating her to give up her right to present a defense on the basis of a non-existent consideration. The Petitioner could have testified at trial, as she did in her evidentiary hearing, as to her personal definition of a “lick” and her lack of knowledge that the Victim would be harmed in any way. The Petitioner’s poised and articulate testimony at her PCR hearing demonstrated that she could have been an effective witness in her own defense at trial. App. Vol. III, p. 1034, l. 9 – p. 1053. The Petitioner respectfully asserts that the lower court erred in denying her relief on these grounds.

Jury Charge Issues

Questions 6, 7 and 8

Trial Counsel was correct in his determination that a strong arm robbery charge was more appropriate to the evidence presented at trial *regarding the plans of which the Petitioner had*

knowledge, than armed robbery, the offense charged to the principal actors. "Strong arm robbery is defined as the 'felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.' " State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996) (quoting State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987))

Where Trial Counsel erred was in his specific request for a jury charge on strong arm robbery. Since the charge against his client was accessory before the fact to armed robbery, Trial Counsel should have requested a charge on *accessory before the fact to strong arm robbery*, not strong arm robbery. Trial Counsel presented the lack of evidence that his client was aware that weapons would be involved as his basis for requesting the additional charge. While one may be able to infer from the record the actual charge needed for the Petitioner, it was crucial that Trial Counsel specifically request a charge on *accessory before the fact to strong arm robbery* and not just request an instruction on strong arm robbery. Obviously, the lower court could not have issued a jury charge for a crime that the indictment against the Petitioner would not sustain a conviction for. Further, by requesting a charge on the principal offense of strong armed robbery, Trial Counsel put the trial court in the position to rule that there was no evidence that the crimes committed by the Petitioner's co-defendants were committed without the use of a weapon and therefore, that the requested charge on the offense of strong armed robbery was not appropriate. On the other hand, had the proper charge of accessory before the fact to strong armed robbery been requested, the trial court could have issued that instruction without any fear that the jury would apply it to the co-defendants who were not entitled to receive a jury instruction on this lesser included offense. The lower court abused its discretion in denying the Petitioner relief on this ground.

Counsel needed to draw the Court's attention to the fact that his client's position differed greatly from that of her co-defendants, and that she was the only one charged as an accessory before

the fact. He also needed to emphasize the fact that his arguments for the additional charge were tailored to the lack of any evidence that *the Petitioner* knew weapons would be involved, from her perspective as an *accessory*, rather than a principal actor. Trial Counsel's ineffectiveness in failing to specify that he was seeking *an accessory before the fact* to strong arm robbery charge prejudiced his client, in that the Court was obviously focused upon the crimes *actually* committed by her co-defendants as opposed to what the evidence demonstrated the Petitioner had knowledge of. The Court, in denying the request, noted *that there was not any evidence that the robbery was, in fact, committed without weapons*. App. Vol. II p. 603, ll. 12-17. This statement demonstrates that the Court was not properly focused on the Petitioner's role in this robbery, as a result of Trial Counsel's failure to tailor the request to his client's charges. Absent the appropriate request to charge, the Court was understandably focused on what crime was ultimately committed. Trial Counsel did not make it clear that his client should be entitled to a lesser-included charge regardless of whether her co-defendants were or not nor did he make it possible for the trial court to give her the benefit of that charge without applying it to the co-defendants as well. During his testimony at the evidentiary hearing, Trial Counsel admitted that the correct request would have been for a charge on accessory before the fact of strong arm robbery. He stated that he hoped he would have mentioned that at some point in his argument, but notes that the whole strong arm robbery request was declined by the Court very quickly. App. Vol. III. p. 992, l. 15-p. 993, l. 1.

Trial Counsel similarly failed in that he did not present, at the jury charge conference, any requests to charge that would have set forth the law of accomplice liability *as it specifically relates to the crime of accessory before the fact*. He neglected to request a charge that would have instructed the jury that Petitioner could only be found guilty as an accessory before the fact for crimes that she *knowingly* aided and abetted the principals in the planning or committing *and/or* the commission of crimes that were the readily foreseeable consequence of acts she agreed to

participate in. Such a charge by necessity should have instructed the jury that the Petitioner's guilt as an accessory before the fact had to be determined based upon *her knowledge* of the case as distinguished from the knowledge of her co-defendants.

The trial transcript reflects that Trial Counsel began discussing an accomplice liability instruction *for his client* with the Court, but once he was informed that the Court would give a standard accomplice liability instruction, he failed to press farther, and request a charge on accomplice liability specifically tailored to his client's alleged involvement in this case. T App. Vol. II p. 605, l. 6-p. 606, l. 1. Counsel should have requested a charge which clearly instructed the jury that the Petitioner could only be found guilty as an accessory before the fact for crimes which she *knowingly* aided and abetted the principals in the planning or committing *and/or* the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by her and her co-defendants. The lower court erred in failing to recognize that Trial Counsel was deficient in this regard. The Petitioner should have been granted PCR on this ground.

In his charge requests, Trial Counsel was also ineffective for neglecting to request a jury instruction which required the jury to apply a separate foreseeability analysis to determine the liability of the Petitioner, apart from the findings made on the liability of each of her co-defendants who were charged as principals. This distinction was appropriate and necessary because the evidence adduced at trial demonstrated that what the Petitioner knew about the plan significantly differed from the knowledge of her co-defendants. Put simply, the Petitioner was entitled to have her guilt determined by what the jury concluded she should have foreseen as the readily foreseeable consequences of the acts she agreed to commit with her co-defendants. That determination properly required that the jury evaluate what was a "readily foreseeable consequence" based upon *the Petitioner's knowledge* at the time of the crime not, the knowledge of her co-defendants. The lower court should have additionally granted the Petitioner's requested relief on this ground.

Closing Arguments

Questions 10, 11 and 14

Trial Counsel failed to utilize the fact that his client *was present* during some portions of the underlying offenses not only in directed verdict motions, but also in closing arguments. Had he recognized the significance of this fact to the State's case on the accessory offenses, Trial Counsel could have argued this point as a reason for the jury to acquit his client. Not only did Trial Counsel fail to use this helpful fact, but he also argued against it. Trial Counsel stressed the fact that his client *was not present* at the scene of the crime in his closing arguments. App. Vol. II pp. 653-674. In doing so, he basically conceded one of the elements in the offenses his client was on trial for.

As stated previously, *infra*, Appellate Counsel confirmed that the denial of a directed verdict on this ground would have been an appealable issue if this argument had been made in support of the directed verdict. It certainly would have given the jury a possible basis for reasonable doubt to consider the fact that the evidence introduced by the State directly contradicted the Petitioner's status as an accessory before the fact.

In way of an explanation, Trial Counsel stated at the PCR hearing that he believed the Petitioner was not present during the crimes for which she was actually prosecuted.⁷ In support of this assertion he opined that if she had been present, she would have been charged as a principal. App. Vol. III p. 984, l. 25-p. 985, l. 17. This assumption did not justify Trial Counsel's failure to make appropriate arguments *at trial* since the Petitioner was only indicted as an accessory before the fact. At trial, there was no danger of her being convicted as a principal on the indictments as true billed. Trial Counsel clearly argued *against* the Petitioner's best interests by arguing that she

⁷ As a practical matter, this position ignores the fact that in many crimes all the principals are not present throughout every stage of a crime. For example, a so-called get away driver might help plan the armed robbery of a convenience store, case the scene before the co-defendants enter the place to be robbed and then leave and drive around the block while the co-defendants complete the armed robbery. No one well versed in criminal law would argue that his driver could not be a principal because he wasn't at the scene the moment guns were brandished and the case register emptied *if* there was evidence the driver knew his cohorts were armed and planned to use those weapons to commit a robbery.

was not present during portions of these crimes.

During the State's closing arguments, a statement was made referencing the felony-murder doctrine in a manner that was wholly inconsistent with South Carolina law. *See, Lowery v. State*, 376 S.C. 499, 657 S.E2d 760(2008). The Solicitor informed the jury that any time a victim is killed "*in the course of another felony, then his death is murder. End of story.*" App. Vol. II p. 693, ll. 16-20. Trial Counsel did not object to this statement. This statement should have been objected to on the basis that it was inconsistent with prevailing law on the permissible inference which may arise when a killing occurs during the commission of another felony. The prejudice from this statement is obvious. Strong armed robbery or common law robbery is a felony in South Carolina. S. C. Code Ann. § 16-1-90 (D). Therefore, if followed by the Petitioner's jury, this erroneous statement of the law could have resulted in a conviction for *accessory before the fact* of murder even the jury believed the Petitioner only knew about and participated in an *unarmed* robbery. A proper statement of the law concerning the felony murder inference would have been:

The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985) (overruled on other grounds). An inference of malice may arise, but the law does not provide that one is instantly liable for murder because a killing occurred during the commission of any felony.

Appellate counsel testified that she recognized, and marked in her notes, that the State's comment portrayed an improper malice instruction. App. Vol. III p. 940, ll. 7-20. She stated that they likely would have presented that issue on appeal, if it had been objected to and the objection overruled. App. Vol. III p. 941, ll. 5-9. Trial Counsel also acknowledged that this comment was not a correct statement of law. App. Vol. III p. 998, ll. 4-20. He further conceded that the

statement was prejudicial to the Petitioner and stated that given another chance, he would have objected to the comment. App. Vol. III p. 998, l. 21-p. 999, l. 6.

When this closing statement is considered in combination with the Court's standard felony murder inference instruction, it is logical that the jury found that the Petitioner admitting committing *some* felony and was therefore, was liable for the ensuing murder. Yet, the jury should have been focused upon determining not only if the inference of malice was appropriate, but also whether the murder was a foreseeable result of the crime the Petitioner agreed to assist in the commission of. The prejudice in this regard was very serious because it enhanced the likelihood that the Petitioner would be convicted on the basis of an incorrect application of the law to the facts. The likelihood that the jury would have found that murder was "a readily foreseeable consequence" of an unarmed robbery would have been far lower than the likelihood that they would conclude murder to be a readily foreseeable consequence of an armed robbery. However, where the jury was told by the prosecution that her agreement to commit a felony made her automatically guilty of the murder that flowed from her plan with her co-defendants, the outcome was virtually guaranteed. The Petitioner has demonstrated that Trial Counsel should have objected to this erroneous statement of the law and should have made a motion for a mistrial based upon the clear prejudice to the Petitioner caused by this improper closing argument. For the foregoing reasons, the lower court should have granted the Petitioner relief on these grounds.

Ineffectiveness of Appellate Counsel

Questions 15 and 17

This Court finds that Appellate counsel failed to raise two meritorious issues in the Petitioner's direct appeal: 1) that the lower court erred by denying the Petitioner's directed verdict motions on all charges and 2) that the lower court erred by charging to the jury that the State would only have to prove that the Petitioner aided and abetted another person "*to commit a crime*".

At the Petitioner's PCR evidentiary hearing, one of Petitioner's appellate attorneys acknowledged that if the transcript demonstrated that there were no direct or circumstantial evidence substantiating that the Petitioner knew that weapons would be involved, then the issue of the denial of the Petitioner's directed verdict motion on the accessory before armed robbery charge would have been a strong one. App. Vol. III p. 932, l. 23-p. 933, l. 4. Appellate counsel likewise acknowledged that if there were no evidence, direct or circumstantial, that there had been any discussion that the Victim would be harmed in any way, then the issue of the denial of the Petitioner's directed verdict motion on the accessory before murder charge would also have been a strong one. App. Vol. III. p. 933, ll. 11-21. Appellate counsel could not recall why the issue of the denial of the directed verdict motions was not presented, but she believed it was due to a determination that it was not one of the strongest issues. App. Vol. III. p. 929, l. 12-p. 930, l. 23.

As discussed previously, *infra*, the Petitioner maintains that there was no properly admissible evidence, direct or otherwise, demonstrating that the Petitioner knew that weapons would be involved or that the victim would be harmed in any way. This Court agrees. A defendant is entitled to a directed verdict where the State fails to produce evidence of the crime charged. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). The denial of the Petitioner's directed verdict motions on both of the charges would have been a strong issue on appeal and appellate counsel was ineffective for not briefing that issue.⁸ The Petitioner was prejudiced in that this issue was omitted from her direct appeal, lessening her probability of success on the merits.

During trial, Trial Counsel objected to language in the jury instructions stating that "the State must prove beyond a reasonable doubt that the defendant, Marquita Smith, either advised, agreed, urged, counseled, hired, or in some way aided and abetted—aided or abetted another person

⁸ As previously argued, the Petitioner believes that Trial Counsel should have more thoroughly argued the motion for directed verdicts of acquittal. Nevertheless, she argued that the lower court's failure to grant the motions, as made, should have been challenged on direct appeal.

to commit *a crime*..." App. Vol. II p. 718, ll. 5-9. Trial Counsel challenged the language "a crime" and maintained that the instruction might be read to mean that she could be found guilty as an accessory on the basis of *any crime* that she participated in the commission of, rather than the crimes she was actually charged with; accessory before the fact, armed robbery and murder. App. Vol. II p. 733, l. 17-p. 744, l. 23. This objection was noted and overruled by the Judge, who stated that the language was "self-explanatory." App. Vol. II p. 734, l. 15-p. 735, l. 10.

Appellate counsel acknowledged that this issue was not raised on direct appeal and further admitted, in the evidentiary hearing, that there is a "valid argument" that the language of that charge combined with Trial Counsel's earlier admission that his client had a role in these events, might imply that the Petitioner was liable for any offenses that occurred that night, based on her commission of "*a crime*." App. Vol. III. p. 939, l. 16-p. 940, l. 6. In closing arguments, Trial Counsel basically conceded that his client committed a bad act and should be held accountable; that she had done something "horrible" and "wrong" in volunteering the Victim. Of course, Trial Counsel followed up by maintaining that her actions did not amount to murder or armed robbery. App. Vol. II pp. 653-674.

Attorney Blanchette testified that she and Attorney Thomas considered briefing trial counsel's objection to the portion of the lower court's jury charge that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime" and decided not to raise the issue. The record is void however, of any explanation for that decision save a vague implication that they agreed with what the lower court said about the instruction in response to trial counsel's objection. App. Vol. III p. 938, l. 12- p. 939, l. 7. After further questioning concerning this issue, Attorney Blanchette agreed with the Applicant's position that the charge as given created a danger that the jury would find her guilty of the indicted offenses if they concluded, as defense counsel admitted in opening arguments, that the Applicant assisted her co-defendants in the

commission of “a crime” as opposed to the specific crimes of armed robbery and murder. App. Vol. III p. 939, l. 16- p. 940, l. 2. Despite this concession, Attorney Blanchette offered no explanation for the decision not to present this issue on direct appeal. App. Vol. III p. 940, ll. 2-6.

It is very plausible that the jury might understand Trial Counsel’s admission that the Petitioner had committed a wrongful act to be the crime that they could justifiably use to convict her as an accessory to the murder and alleged armed robbery that occurred that night. Alternatively, if the language had stated “the crime” or “the crimes,” the jury’s attention would have been focused upon the crimes actually attributed to the principal actors; armed robbery and murder. The Petitioner has maintained throughout that the evidence simply did not demonstrate that she aided or assisted others in the commission of armed robbery and murder. The trial court erred in overruling the Petitioner’s objection to the specific language of the charge and appellate counsel erred in not presenting this preserved issue on direct appeal.

The prejudice in this instance is apparent where these meritorious issues not presented to the Appellate Court in the Petitioner’s direct appeal were at least as strong, if not stronger, than the issues presented on direct appeal and, therefore, their submission on appeal would likely have changed the outcome of the Petitioner’s direct appeal. The lower court erred in declining to find that appellate counsel was ineffective for failing to raise these two meritorious issues which were preserved for appellate review at trial. Inasmuch as these issues were as strong, or stronger, than the issues which were presented in the Petitioner’s direct appeal, relief should have been granted on these grounds.

Failure to Argue in Opening that Murder was not a Foreseeable Consequence

Question 9

The Petitioner presented testimony at her evidentiary hearing that Trial Counsel failed to clearly and concisely state in opening arguments the reasons why the Petitioner could not be found

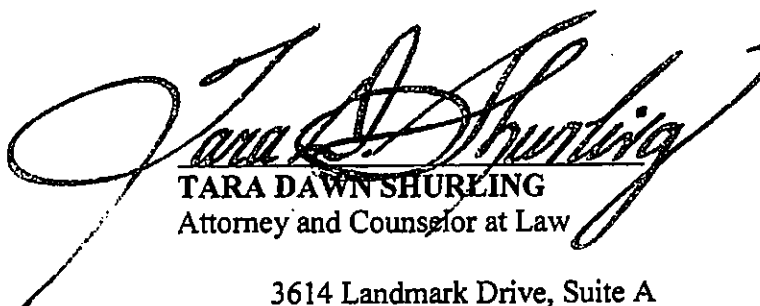
guilty as an accessory before the fact to murder, when the murder was not a foreseeable result of the plan in which she was involved. Trial Counsel did argue that the jury would have to find that the armed robbery was a foreseeable consequence of the plans in which she was involved, but he failed to make the logical extension of that argument to the accessory before the fact of murder charge. App. Vol. I, p. 125, l. 3- p. 126, l. 12. In the evidentiary hearing, Trial Counsel noted that he did not argue that the murder was not foreseeable in his opening arguments, and stated that he was "hoping not to over-emphasize." App. Vol. III p. 978, l. 22- p. 979, l. 6. He went on to state that he believed the State's strongest case to be on the accessory before the fact of armed robbery charge, but that he hoped the murder would seem to be an even less foreseeable result. Trial Counsel forthrightly admitted that that if he had the opportunity to do it over again, he would have included some argument pertaining to the accessory before murder charge in his opening arguments. App. Vol. III. p. 979, ll. 7-20.

Trial Counsel's argument against the accessory before the fact of armed robbery charge, and his failure to challenge the State's case on the accessory before the fact of murder charge, when the jury was well aware that there were two charges against the Petitioner, could have been seen as a silent admission of the weakness of the Petitioner's defense to that charge. Or, at best, it was a missed opportunity for Trial Counsel to expand his foreseeability argument to encompass all of the Petitioner's charges. Trial Counsel did not provide a strategic reason for mentioning one as opposed to both charges, and it can be concluded that this was not the result of a tactical or strategic decision. The Petitioner asserts that the lower court erred in failing to grant her relief on this ground in addition to the others discussed above.

CONCLUSION

For the reasons stated, the Petitioner asks this Honorable Court to grant the writ and allow full briefing on the issues summarized herein.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 23rd day of January, 2013.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Kristy L. Harrington, Circuit Court Judge

Case No. 2012-CP-08-1994
(Austin Review of 2010-CP-08-2985)
Appellate Case No. 2012-212698

MARQUITA SMITH, 323834,

PETITIONER,

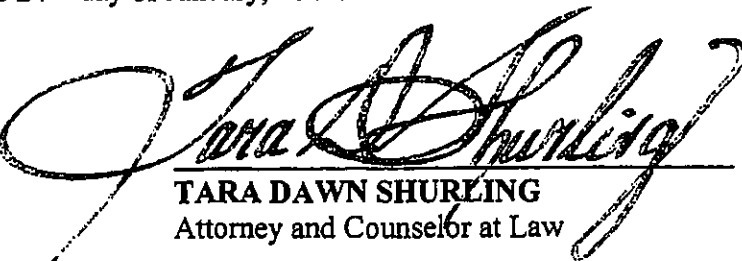
v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICATE OF SERVICE

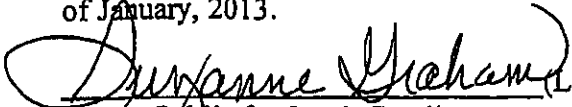
The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and the Motion for Leave to Exceed Page Limits in the above-entitled case has been served upon opposing counsel, Ashleigh R. Wilson, Assistant Attorney General, via U.S. Mail, postage prepaid, this 24th day of January, 2013.



TARA DAWN SHURLING
Attorney and Counselor at Law

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 24th day
of January, 2013.



Notary Public for South Carolina

My Commission Expires:

3/12/2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County
Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2012-212698

MARQUITA SMITH, #323834,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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<u>Englert, Inc. v. Netherlands Ins. Co.</u> , 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993).	6
<u>Gilchrist v. State</u> , 350 S.C. 221, 565 S.E.2d 281 (2002).	7
<u>Glasscock, Inc. v. U.S. Fidelity and Guar. Co.</u> , 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).	6
<u>Herring v. New York</u> , 422 U.S. 853 (1975).	22
<u>Jones v. Barnes</u> , 463 U.S. 745 (1983).	24, 25
<u>Lowery v. State</u> , 376 S.C. 499, 657 S.E.2d 760 (2008).	23
<u>Muir v. C.R. Bard, Inc.</u> , 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999).	6
<u>Smith v. Berry</u> , 231 Ga. 39, 200 S.E.2d 95 (1973).	17
<u>Smith v. NCCI, Inc.</u> , 369 S.C. 236, 631 S.E.2d 268 (2006).	28
<u>Southerland v. State</u> , 337 S.C. 610, 524 S.E.2d 833 (1999).	24
<u>State v. Adkins</u> , 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003).	13, 14
<u>State v. Anderson</u> , 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004).	7
<u>State v. Brown</u> , 277 S.C. 203, 284 S.E.2d 777 (1981).	17
<u>State v. Buckmon</u> , 347 S.C. 316, 555 S.E.2d 402 (2001).	7
<u>State v. Cannon</u> , 49 S.C. 550, 27 S.E. 526 (1897).	14
<u>State v. Castineira</u> , 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000) <u>aff'd</u> , 351 S.C. 635, 572 S.E.2d 263 (2002).	11, 12

<u>State v. Crowe</u> , 258 S.C. 258, 188 S.E.2d 379 (1972).	14
<u>State v. Curry</u> , 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006).	15
<u>State v. Dennis</u> , 337 S.C. 275, 523 S.E.2d 173 (1999).	10, 11
<u>State v. Ezell</u> , 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996).	13
<u>State v. Gillian</u> , 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004); <u>aff'd as modified</u> , 373 S.C. 601, 646 S.E.2d 872 (2007).	19
<u>State v. Halcomb</u> , 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009).	11
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<u>State v. Jenkins</u> , 278 S.C. 219, 294 S.E.2d 44 (1982).	9
<u>State v. Kelsey</u> , 351 S.C. 50, 502 S.E.2d 63 (1998).	14
<u>State v. Kennerly</u> , 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998), <u>aff'd</u> , 337 S.C. 617, 524 S.E.2d 837 (1999).	27, 28
<u>State v. Langley</u> , 334 S.C. 643, 515 S.E.2d 98 (1999).	14
<u>State v. Mattison</u> , 388 S.C. 469, 697 S.E.2d 578 (2010).	12
<u>State v. Mouzon</u> , 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1995), <u>aff'd</u> , 326 S.C. 199, 485 S.E.2d 918 (1997).	21, 22
<u>State v. Page</u> , 378 S.C. 476, 663 S.E.2d 357 (2008).	7
<u>State v. Saltz</u> , 346 S.C. 114, 551 S.E.2d 240 (2001).	9
<u>State v. Thompson</u> , 374 S.C. 257, 647 S.E.2d 702 (Ct. App. 2007).	7
<u>State v. Trotter</u> , 322 S.C. 537, 473 S.E.2d 452 (1996).	28
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Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997). 6

Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). 25

Other Authorities:

Rule 5, SCRCrimP. 27

QUESTIONS PRESENTED

1. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to object, failing to motion for a mistrial, and failing to request a curative instruction when the State elicited testimony that the term "lick" meant armed robbery?
2. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to fully present arguments in favor of the Petitioner's motion for directed verdict?
3. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to fully present arguments supporting the Petitioner's motion for severance?
4. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to request a jury instruction on accessory before the fact to strong arm robbery?
5. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to research and present the trial court with an appropriate request to charge the jury on the law of accomplice liability?
6. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to object to a jury instruction that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability for the Petitioner?
7. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to convey in a clear and organized manner the reasons the Petitioner was not guilty in his opening argument?
8. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for telling the jury in his closing argument that the Petitioner was not present during the principal offenses for which she was charged as an accessory?
9. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to argue to the jury in closing that the Petitioner could not be convicted of the charges for which she was charged as an accessory because she was present during one phase of the principal offenses committed by her co-defendants?
10. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to adequately cross-examine co-defendant, Karry Hollins?
11. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for advising the Petitioner that by not

presenting a defense on her behalf he would retain the last argument and that she should not take testify at trial to preserve last argument?

12. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to object to the State's closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, his death is murder. End of story"?
13. Did the lower court properly find the Petitioner failed to carry her burden of proving appellate counsel provided ineffective assistance of counsel for failing to brief the lower court's failure to grant directed verdict, the lower court's failure to grant a jury charge of strong arm robbery, and the lower court's charge that the State would only have to prove that the Petitioner aided and abetted another person "to commit a crime"?
14. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to argue a Rule 5 violation in his motion for continuance and severance?
15. Did the lower court properly find the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel for failing to interview Karry Hollins and for failing to request a brief recess or continuance to do so?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Clerk of Court for Berkeley County. The Petitioner was indicted at the August 2007 term of the Berkeley County Grand Jury for accessory before the fact of murder (2007-GS-08-1748) and accessory before the fact of armed robbery (2007-GS-08-1751). V. Craig Jones, Jr., Esquire, represented the Petitioner. The Petitioner proceeded to trial on August 27-30, 2007, after which the jury found her guilty as indicted. The Honorable Deadra L. Jefferson sentenced the Petitioner to confinement for thirty years for each conviction. The sentences were to run concurrently.

A timely Notice of Appeal was filed on the Petitioner's behalf and an appeal was perfected. On appeal, the Petitioner was represented by Tommy Thomas, Esquire, and Tricia A. Blanchette, Esquire. Following full briefing by both sides, the Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Smith, Op. No. 4662 (S.C. Ct. App. filed March 24, 2010). The Court of Appeals denied the Petitioner's Petition for Rehearing and Petition for Rehearing *En Banc* by Order dated June 4, 2010. The Remittitur was issued on July 13, 2010.

The Petitioner filed an application for post-conviction relief (PCR) on August 24, 2010 and amended on November 17, 2011. The Respondent made its Return on February 4, 2011. An evidentiary hearing into the matter was convened on November 17, 2011 at the Charleston County Courthouse. The Petitioner was present and presented by Tara Dawn Shurling, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

The Petitioner testified on her own behalf at the hearing. Petitioner's trial counsel V. Craig Jones, Jr., Esquire, appellate counsel Tricia A. Blanchette, Esquire, and co-defendant

Kerry Hollins also testified at the hearing. By Order dated January 30, 2012, the Honorable Kristi L. Harrington denied and dismissed with prejudice the Petitioner's application for post-conviction relief. On February 16, 2012, the Petitioner filed a Rule 59(e) Motion to Alter or Amend. The Respondent submitted a Return and Motion to Dismiss the Motion to Alter and Amend on February 27, 2012. An Amended Order of Dismissal dismissing the Petitioner's application was signed by Judge Harrington and filed on April 19, 2012.

The Petitioner filed a second application for post-conviction relief on July 10, 2012. By Order filed July 23, 2012, the Petitioner and Respondent consented to belated review of the Petitioner's previous PCR pursuant to Austin v. State. The Petitioner filed a Notice of Appeal on August 8, 2012. Petitioner filed a Petition for Writ of Certiorari on January 23, 2013. This Return follows.

ARGUMENT

Petitioner asserts the post-conviction relief court erred by finding she failed to carry her burden of proving ineffective assistance of both trial counsel and appellate counsel. The Respondent submits probative evidence exists to support the post-conviction relief court's findings. Thus, the Petition should be denied and the appeal dismissed.

In a post-conviction relief (PCR) action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1985); Butler, 286 S.C. 441, 34 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. The Respondent submits that the Applicant did not satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is any probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry, 300 S.C. 115, 386 S.E.2d 624.

As an initial matter, the Respondent asks this Court to dismiss the Petition for Certiorari and rule all issues presented on appeal abandoned as the Petitioner has failed to provide any arguments or supporting authority for the issues presented on appeal. South Carolina courts have held that "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). See also Muir v. C.R. Bard, Inc., 336 S.C. 266, 298-99, 519 S.E.2d 583, 600 (Ct. App. 1999) (holding an issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority); Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct. App. 1993) (holding a "one-sentence argument is too conclusory to present any issue on appeal"); Williams v. Leventis, 290 S.C. 386, 390, 350 S.E.2d 520, 523 (Ct. App. 1986) (holding an "argument [that] is embraced in a single sentence on the last page of [appellant's] brief [and] not supported by any authority whatever . . . may be viewed as effectively abandoned"). The Petition submitted to this Court contains conclusory statements based on citations from the record and sparse case citations which are not dispositive of the issues presented on appeal. Due to the lack of legal arguments presented in this Petition, the Respondent requests the issues presented be deemed abandoned and the Petition for Writ of Certiorari dismissed.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to object, failing to motion for a mistrial, and failing to request a curative instruction when the State elicited testimony that the term "lick" meant armed robbery.

The Petitioner alleges trial counsel should have objected to testimony elicited from co-defendant, Karry Hollins, by the State about the term "lick", meaning an armed robbery. The Respondent submits trial counsel's performance was not deficient because Hollins' testimony was not objectionable. At trial, Hollins testified a "lick" was a robbery and that one needed some type of weapon to do a "lick." (App. 403:12-16). Hollins testified further that the use of the word "lick" on the street meant armed robbery. (App. 404:9-12).

At the PCR hearing, trial counsel testified he did not object to Hollins' testimony that a "lick" was an armed robbery because it was his perception of the testimony that Hollins was testifying as to what he thought a "lick" was. (App. 962:13-16). The Respondent submits counsel's understanding of Hollins' testimony was valid. The record reflects Hollins was asked for his definition of a "lick" and specifically asked "when you're going to do a lick what do you need to do a lick?" (App. 403:14-16).

The Respondent submits the Petitioner's reference to the definition of the term "lick" in State v. Page is not dispositive on this issue. 378 S.C. 476, 663 S.E.2d 357 (2008). While there are several definitions of a "lick" as identified by South Carolina case law¹, these definitions are not controlling in this case since Hollins was questioned about **his** understanding of the term.

The Respondent submits further the Petitioner has failed to carry her burden of proving that but for counsel's alleged deficiency the outcome of her proceeding would have been

¹ See State v. Anderson, 357 S.C. 514, 516, 593 S.E.2d 820, 821 (Ct. App. 2004) (Appellant indicated the men could rob the victim by stating "that he had a lick"); State v. Thompson, 374 S.C. 257, 260, 647 S.E.2d 702, 704 (Ct. App. 2007) ("lick" defined as a target for a robbery); State v. Buckmon, 347 S.C. 316, 320, 555 S.E.2d 402, 404 (2001) ("get a lick" taken to mean there was going to be a burglary or a robbery); Gilchrist v. State, 350 S.C. 221, 224, 565 S.E.2d 281, 283 (2002) (a "lick" defined as to "rip somebody off").

different. Any prejudice that may have resulted from counsel's failure to object was cured by a line of questioning elicited by counsel for one of the Petitioner's co-defendants on cross-examination of Hollins. Counsel for the Petitioner's co-defendant, Gary Grant, got Hollins to waive on his testimony that a "lick" meant an armed robbery. Specifically, Attorney Bolus elicited testimony from Hollins that a "lick" could refer to a person who is going to get robbed. (App. 424:4-23). He also elicited testimony from Hollins that a "lick" referred to a robbery and that the Petitioner's statement "we got a lick" referred to a plan to rob. (App. 424: 13-23). The testimony elicited by Attorney Bolus adequately put before the jury the possibility that a "lick" could refer to a robbery without weapons or a person who was going to be robbed. Any deficiency that may have resulted from counsel's failure to object to this testimony was cured by the line of questioning by counsel for the Petitioner's co-defendant. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving trial counsel should have objected, moved for a mistrial, or requested a curative instruction based on Hollins' testimony about the definition of the term "lick".

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to fully present arguments in favor of the Petitioner's motion for directed verdict.

The Petitioner alleges trial counsel failed to fully argue the Petitioner's motion for directed verdict. Specifically, the Petitioner alleges trial counsel failed to highlight the State's inability to prove its case and the fact that the Petitioner was present during the commission of a phase of the crimes for which she was charged as an accessory. The Respondent submits trial counsel adequately argued the Petitioner's motion for directed verdict at trial.

In considering motions for a directed verdict, the trial judge must determine whether there is any evidence supporting the non-moving party and must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. State v. Jenkins, 278

S.C. 219, 294 S.E.2d 44 (1982). When ruling on a motion for directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001).

At the PCR hearing, trial counsel testified that the crux of his argument for directed verdict was the Petitioner did not know there was going to be an armed robbery and there was no evidence of common plan or scheme to commit armed robbery or murder. (App. 982:1-11 and 20-25). He testified further he did not need to specifically address whether the Petitioner knew guns were involved in the robbery. (App. 982:22-983:2). Trial counsel also testified he made no argument about the Petitioner being present during the armed robbery because had she been present, she would have been charged as a principal instead of as an accessory. (App. 985:6-9). He testified that after researching the issue he could find no case law that would support the argument that if the Petitioner was a part of any part of the plan that she would then be a principal to every part of the plan even if she remained at the scene once her co-defendant's left. (App. 988:5-10 and App. 989:17-19).

The Respondent submits trial counsel sufficiently argued that the Petitioner did not know about the armed robbery and murder her co-defendants planned to commit. The record reflects trial counsel argued to the court that the armed robbery and murder were not foreseeable consequences of the Petitioner's actions and that there was no evidence of a common plan and scheme. (App. 559:14-560:16). The record also reflects counsel researched the significance of the Petitioner's presence at the scene of the incident and properly concluded there was no legal argument to warrant highlighting the Petitioner's presence during the commission of a phase of the crimes. Despite zealous argument from counsel for all the defendants, the trial court found that there was evidence to submit the case to the jury.

The Petitioner has also failed to show that prejudice resulted from counsel's alleged deficiency since even if counsel made the arguments suggested by the Petitioner it is still unlikely the Petitioner's directed verdict motion would have been granted. If evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury, and not be resolved on directed verdict. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001). The record reflects the jury could have reached more than one reasonable inference about the Petitioner's involvement in the case. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to properly argue the Petitioner's directed verdict motion at trial.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to fully present arguments supporting a motion for severance.

The Petitioner alleges trial counsel in support of his motion for severance, should have argued the complex and cumbersome nature of the jury instructions that would be needed if the Petitioner was tried with her co-defendants. The Respondent submits counsel adequately argued the Petitioner's motion for severance prior to the start of trial.

Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses. Id. A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. Id. (citing State v. Holland 261 S.C. 488, 201 S.E.2d 118 (1973)). The trial court addresses motions for severance and separate trial at its discretion. Dennis at 282, 523 S.E.2d at 176. There is no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision

must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct. App. 2009).

The Respondent submits the argument presented by trial counsel was sufficient and properly advised the Court of the prejudice that would result if the Petitioner was tried with her co-defendants. In support of the Petitioner's motion for severance, trial counsel argued the Petitioner would be prejudiced by her co-defendants' substantial criminal background and her inability to address the co-defendants' collective criminal background. (App. 14: 11-24).

The Respondent submits further that the Petitioner has failed to show that prejudice resulted from either trial counsel's performance or the trial court's refusal to sever the Petitioner's case. Any prejudice that could have resulted was cured by the trial judge's cautionary instruction. In State v. Castineira, the Court of Appeals held that the defendant was not entitled to severance of his trial from his co-defendants where the trial court instructed the jury to consider each case separately and reach a verdict in each case and the defendant did not identify any prejudice resulting from trial court's refusal to sever his case from the others. 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000), aff'd, 351 S.C. 635, 572 S.E.2d 263 (2002). In Castineira, the jury was instructed as follows:

Now, you are to consider each case separately and write a verdict differently in each case. You may find all the defendants not guilty, one of the defendants guilty and the rest not guilty, or some guilty and not guilty. You are to consider each one separately and determine whether or not the State of South Carolina has proven a defendant guilty of this conspiracy beyond a reasonable doubt. Id. at 624, 535 S.E.2d at 452.

The Respondent submits the Court's ruling in Castineira is most persuasive and this Court should also consider the jury instruction given to the jury in the Petitioner's case as evidence that no

prejudice resulted from trial counsel's performance. Like in Castineira, the Petitioner's jury was given the following curative instruction:

The case of each defendant and the evidence and the law concerning the defendant should be considered separately and individually. Your verdict does not have to be the same for all defendants. The fact that you may find one defendant guilty or not guilty should not control your verdict as to the other defendants. Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other; or you may acquit both or you may convict both or all. It will depend upon your view of the testimony and evidence. You must take each defendant and consider the evidence as to that defendant and my instructions to you on the law. You will then write a separate verdict of guilty or not guilty for each individual defendant. (App. 720:7-21).

The Respondent submits this instruction like the instruction given in Castineira was sufficient to protect the individual rights of each defendant and to ensure that no prejudice resulted from a joint trial. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to properly argue the Petitioner's motion for severance at trial.

Probative evidence exists to support the lower court's ruling that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to request a jury instruction on the charge of accessory before the fact to strong arm robbery.

The Petitioner alleges trial counsel should have requested a jury instruction on accessory before the fact to strong arm robbery. The Respondent submits that any request made for the charge of accessory before the fact to strong arm robbery would have been futile since the Court denied trial counsel's request for an instruction on strong arm robbery.

The trial court is required to charge the current and correct law of South Carolina. State v. Mattison, 388 S.C. 469, 478-79, 697 S.E.2d 578, 583 (2010). The law to be charged must be determined from the evidence presented at trial. Id. At trial, counsel requested a jury instruction on strong arm robbery on the basis that there was no evidence presented that the Petitioner knew anything beyond a strong arm robbery would take place. (App. 597:5-598:12). The trial court

concluded a strong arm robbery jury charge was not appropriate because the evidence presented at trial indicated a weapon was used to commit the robbery (App. 603:12-17).

After the trial court concluded the evidence did not support a jury instruction on strong arm robbery, it is unlikely the court would have granted counsel's request for a jury instruction on accessory before the fact to strong arm robbery. The Petitioner has failed to show that counsel's request for a jury instruction on accessory before the fact to strong arm robbery would have been anything but futile. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry his burden of proving trial counsel was ineffective for failing to request a jury instruction on the charge of accessory before the fact to strong arm robbery.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to research and present the trial court with an appropriate request to charge the jury on the law of accomplice liability.

The Petitioner alleges trial counsel should have requested a charge that clearly instructed the jury that the Petitioner could only be found guilty as an accessory before the fact for crimes for which she knowingly aided and abetted the principals in and were readily foreseeable consequences of the acts agreed on by the defendants. The Respondent submits the jury instruction provided to the jury on accomplice liability was the standard charge given and sufficient to apprise the jury of the law on accomplice liability in South Carolina.

A charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996). The substance of the law is what must be charged to the jury, not any particular verbiage. Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which

might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

While the Petitioner insists counsel should have requested a charge which clearly stated the crimes committed must have been a readily foreseeable consequence of the acts agreed upon by the defendants, South Carolina courts have approved accomplice liability charges that lack language stating an accomplice's criminal act must be "a probable and natural consequence" of the accomplice's common plan. In State v. Langley, this Court approved an instruction stating that under "the hand of one is the hand of all" theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose". 334 S.C. 643, 515 S.E.2d 98 (1999). In State v. Kelsey, this Court approved a broader accomplice liability charge that stated, "if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both." 351 S.C. 50, 77, 502 S.E.2d 63, 76 (1998). In State v. Crowe, this Court approved the following charge for accomplice liability:

"[T]wo or more combine together to commit an unlawful act, such as robbery, and, in the execution of that criminal act, a homicide is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act." 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972).

This principle was stated in State v. Cannon: "The common purpose may not have been to kill and murder, but if it was unlawful, as, for instance, to break in and steal, and in the execution of this common purpose a homicide is committed by one, as a probable or natural consequence of the acts done in pursuance of the common design, then all present participating in the unlawful common design are as guilty as the slayer." 49 S.C. 550, 27 S.E. 526 (1897). The approval of this charge demonstrates that the "natural and probable consequence" language need

not be included in the charge if the charge as a whole adequately conveys the law. State v. Curry, 370 S.C. 674, 683-84, 636 S.E.2d 649, 654 (Ct. App. 2006).

While case law does not require “natural and probable consequence” language, it was included in the charge given to the jury during the Petitioner’s trial. At the Petitioner’s trial, the jury was given the following accomplice liability instruction:

Ladies and gentlemen, I instruct you that if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a **natural consequence of the acts** done in carrying out the common plan and purpose. (App. 716:18).

Ladies and gentlemen, the defendant Marquita Smith is charged with being an accessory before the fact of the felonies of murder and armed robbery. In order to prove these crimes, the State must prove beyond a reasonable doubt that the defendant, Marquita Smith, either advised, agreed, urged, counseled, hired, or in some way aided and abetted—aided or abetted another person to commit a crime, and that the defendant was not present when the offense was committed. Aid means to help, to promote the course or accomplishment of, to give support to, or to give assistance to. Abet means to encourage or appear to favor or support. (App. 718:2-14).

I further instruct you that a person is not liable for the acts of an accomplice the acts is a **natural or approximate – a natural or probable consequence of the plan**. (App.718:19-22).

The Respondent submits the accomplice liability jury charge given covers the law applicable to the Petitioner’s case. Specifically, the instruction apprises the jury that the State must prove beyond a reasonable doubt that the Petitioner aided or abetted another person to commit a crime and that acts of her co-defendants were a natural or probable consequence of the plan in which she took part. The Petitioner has failed to show how the accomplice liability instruction given was insufficient or that she was prejudiced by counsel’s failure to request additional instruction on accomplice liability. The Respondent submits there is probative evidence to support the lower court’s ruling that the Petitioner failed to carry her burden of proving trial counsel should have requested additional jury instruction on accomplice liability.

Probative evidence exists to support the lower court's ruling that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to object to a jury instruction that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability for the Petitioner.

The Petitioner alleges trial counsel should have objected to the accomplice liability jury instruction because it did not adequately convey to the jury the requirement that a separate foreseeability analysis be applied to determine the Petitioner's guilt. The Respondent submits this allegation is wholly without merit. As discussed in the preceding argument, the accomplice liability instruction given to the jury was sufficient. The jury was properly apprised of the distinction between liability for the Petitioner as an accomplice and liability for her co-defendants as principals. The record reflects the court instructed the jury as follows:

"Ladies and gentlemen, the defendant **Marquita Smith** is charged with being an accessory before the fact of the felonies of murder and armed robbery. In order to prove these crimes, the State must prove beyond a reasonable doubt that the defendant, **Marquita Smith**, either advised, urged, counseled, hired, or in some way aided and abetted—aided or abetted another person to commit a crime, and that the defendant was not present when the offense was committed...You must find that homicide was a natural or probable consequence of the plan." (App. 718:2-10 and 19-24).

The jury was properly advised of the law on accomplice liability and given the specific law applicable to the Petitioner which is reflected by the trial court's use of the Petitioner's name in the jury instruction. The Petitioner has failed to show counsel should have objected to the accomplice liability instruction and that prejudice resulted from this omission. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to convey in a clear and organized manner the reasons the Petitioner was not guilty in his opening argument.

The Petitioner alleges trial counsel failed to argue in his opening statement that murder was not a foreseeable consequence of the plans for which she was involved. The Respondent submits trial counsel adequately framed the issues of the case in his opening statement and articulated a valid reason for not highlighting the accessory before the fact to murder charge. An opening statement serves to inform the jury of the general nature of the action and defenses involved in a case so they will be better prepared to understand the evidence presented. State v. Brown, 277 S.C. 203, 204-05, 284 S.E.2d 777, 778 (1981) (citing Smith v. Berry, 231 Ga. 39, 200 S.E.2d 95 (1973)).

In counsel's opening statement, he tells the jury that they will be required to listen and determine what the Petitioner knew and didn't know at the time the plan took place. (App. 125:3-126:12). At the PCR hearing, trial counsel defined an opening argument as "an outline of your telling of the story of how things occurred or how it went." (App. 977:25-978:2). He testified further that in his opening argument he did not want to over-emphasize the accessory before the fact to murder. (App. 979:1-2). He testified he "felt that their strongest case was the armed robbery part" and he was "hoping that the murder would be a further unforeseen—even further unforeseen consequence from the robbery part." (App. 979:2-6).

The Respondent submits trial counsel's opening statement was sufficient to apprise the jury of the main crux of the Petitioner's case-- whether the armed robbery and murder were foreseeable to the Petitioner at the time she helped plan the robbery. The Petitioner has failed to show how counsel's opening argument in any way resulted in prejudice at trial. The Respondent

submits there is probative evidence to support the lower court's finding that the Petitioner failed to carry her burden of proving trial counsel's opening argument was insufficient.

Probative evidence exists to support the lower court's ruling that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for telling the jury in his closing argument that the Petitioner was not present during the offenses for which she was charged as accessory.

The Petitioner alleges trial counsel was ineffective for telling the jury in his closing argument that the Petitioner was not present during the principal offenses for which she was charged as an accessory. The Respondent submits trial counsel's closing argument and statement during closing about the Petitioner not being present at the scene were proper.

The record reflects during closing argument, trial counsel told the jury "[o]bviously, you can tell there is a difference between my client and the rest of the people charged with these crimes. She's charged with accessory. She's 19. She wasn't present. It's a little different circumstance." (App. 653: 22-25).

The Respondent submits this argument to the jury was not deficient because the evidence presented at trial was that the Petitioner was present for the burglary and kidnapping, but not present for the armed robbery and murder for which she was charged as an accessory. (App. 548:1-10). Further, trial counsel emphasized the Petitioner's absence to distinguish her from her co-defendants who were charged as principals and to support his argument that the Petitioner did not know an armed robbery and murder were going to take place when she arrived at the scene. The Petitioner has failed to show how counsel's performance resulted in prejudice. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving trial counsel's closing argument was improper.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to argue to the jury in closing that the Petitioner could not be convicted of the charges for which she was on trial because she was present during one phase of the principal offenses committed by her co-defendants.

The Respondent submits this allegation is wholly without merit. The facts presented at trial through the Petitioner's statement and trial counsel's testimony during the PCR hearing both show that the Petitioner was not present during the burglary and armed robbery. Trial counsel provided credible testimony that it was his belief the Petitioner was not present for the two crimes for which she was on trial as an accessory. (App. 985:11-12). The Petitioner presents no supporting basis for this allegation and fails to show that prejudice resulted from counsel's omission. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to argue the Petitioner's presence during the principal offense to the jury.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to adequately cross-examine co-defendant Karry Hollins.

The Petitioner alleges trial counsel failed to elicit testimony from Hollins that would have been favorable to the defense since Hollins' testimony at the PCR hearing confirmed the Petitioner was unaware the victim would be harmed and was not privy to any plan to commit a burglary. The Respondent submits trial counsel was able to adequately cross-examine Hollins at trial.

The purpose of cross-examination at trial is "to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." State v. Gillian, 360 S.C.

433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004), aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)).

At trial, counsel elicited testimony from Hollins on cross-examination about discrepancies between his written statement and his trial testimony, his incentive for testifying against the Petitioner, his presence in the house when the crime was taking place, and his being picked out of a photo line-up by one of the victims shortly after the incident.

At the PCR hearing, trial counsel gave credible testimony that he did not know what Hollins would say on the stand and did not want to ask Hollins if the Petitioner knew that there would be guns involved. He testified that if Hollins said the Petitioner knew guns would be involved they would be stuck with his testimony at trial. (App. 1015:7-14). Looking at what counsel knew at the time of trial, the Respondent submits counsel articulated a valid trial strategy for avoiding any testimony from Hollins about whether the Petitioner knew guns were involved without knowing what his response would be. The Respondent submits there is probative evidence to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of counsel for failing to adequately cross-examine Hollins.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for advising the Petitioner that by not presenting a defense on her behalf he would retain the last argument and that she should not take the stand in order to preserve final argument.

The Petitioner alleges trial counsel improperly advised the Petitioner that by not presenting a defense on her behalf they would retain the last argument and that in order to preserve final argument, the Petitioner should not take the stand to testify. The Respondent submits trial counsel's advice to the Petitioner was proper and the Petitioner's waiver of her right to testify at trial was done freely and voluntarily.

At the PCR hearing, trial counsel testified he did not recall discussing last argument with the Petitioner, but they could have discussed it. (App. 1002:14-20 and 1003:7-12). He testified further, preservation of last argument was not the basis for his advice to the Petitioner to not take the stand. (App. 1005:2-4). He testified he wanted the Petitioner to avoid being subject to cross-examination. (App. 1005:4-7). Counsel testified further if the Petitioner took the stand he was concerned that the State would question her on her knowledge of the co-defendants and their plan. (App. 1006:4-14).

The Respondent submits if counsel advised the Petitioner prior to the start of trial that by not presenting a defense she would retain last argument the advice was proper. In South Carolina, it is well established that where the defendant calls no witnesses and offers no evidence in his behalf, his counsel is entitled to have the concluding argument to the jury. State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), *aff'd*, 326 S.C. 199, 485 S.E.2d 918 (1997).

The Respondent submits any discussion between the Petitioner and counsel about last argument was not the sole basis for the Petitioner's decision not to testify. Counsel gave credible testimony that the basis for his advice to the Petitioner was not the preservation of last argument. He testified he was more concerned with what would come out if the Petitioner was subject to cross-examination. Counsel's testimony is corroborated by the Petitioner who testified one reason counsel gave her for not taking the stand was that the prosecutors were "strong-headed" and would confuse and eat her alive. (App. 1040:10-12).

The Respondent submits further even if the Petitioner's decision not to testify was based on this advice, she was put on notice that the last argument was lost during the trial and with that notice subsequently made a voluntary decision not to testify. The record reflects the Petitioner

was present at trial when the trial judge announced "if any of you present evidence, you lose last argument." (App. 499:8-9). Even after the court indicated the defendants had lost the last argument, the Petitioner still chose not to take the stand. The Petitioner was advised by the trial court that she had a right to testify (App. 583:5-9), her decision must be freely and voluntarily made, and the decision to testify or not to testify was hers alone (App. 584:10-13). After being advised by the Court, the Petitioner freely and voluntarily waived her right to testify at trial. The Respondent submits there is probative evidence to support the lower court's finding that the Petitioner failed to carry her burden of proving trial counsel provided erroneous advice and that the erroneous advice was the basis of her decision not to testify.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to object to the State's closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, his death is murder. End of story."

The Petitioner alleges trial counsel should have objected to the State's closing argument when the Solicitor told the jury "if the victim was killed in the course of another felony, then his death is murder, end of story." The Respondent submits the Solicitor's statement was proper and even if the statement was improper it was cured by the trial court's proper jury instruction.

"Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), aff'd, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853 (1975)).

The Respondent submits the Solicitor's statement was proper and within the bounds of the applicable law in this case. Further, the Solicitor's statement supported the State's view of the law as applied to the facts of the case and was within the range of argument allowed in a closing argument.

The Respondent submits further that any alleged improper statements of law during the Solicitor's closing were cured by the trial court's proper jury instructions on malice. The jury was instructed to abandon any preconceptions about the law (App. 699:24-700:5) and given the following instructions:

Malice aforethought may be express or inferred. These terms "express" and "inferred" do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. (App. 710:5-10).

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. (App. 710:17-19).

I further instruct you that if one intentionally kills another during the commission of a felony, the inference of malice may arise. (App. 711:5-7).

The Petitioner cites Lowery v. State in support of her argument that trial counsel should have objected to the Solicitor's statement during the State's closing. 376 S.C. 499, 657 S.E.2d 760 (2008). The Respondent submits Lowery is not dispositive on this issue as it was decided after the Petitioner's trial. The Petitioner's trial took place August 27-30, 2007. Lowery was not decided until February 11, 2008. This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Trial counsel would not have used Lowery as a basis for an objection to the Solicitor's statements as it had not been decided at the time of trial. The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to object to the Solicitor's closing argument.

Probative evidence exists to support the lower court's ruling that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of appellate counsel.

The Petitioner alleges appellate counsel should have briefed the failure of the trial court to grant the Petitioner's motion for direct verdict and the failure of the trial court to grant Petitioner's request for a jury charge on strong arm robbery. The Petitioner also alleges appellate counsel should have briefed the lower court's charge to the jury that the State would only have to prove that the Petitioner aided and abetted another person "to commit a crime." The Respondent submits appellate counsel thoroughly reviewed the record before concluding which arguments were the strongest to argue on appeal.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Jones, 463 U.S. at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but

for counsel's errors, there is a reasonable probability she would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Appellate counsel articulated valid reasons for failing to brief the appellate issues proposed by the Petitioner. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The United States Supreme Court concluded that no decision of the Court suggests that the "indigent defendant has a constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment decides not to present these points." Id. at 751. The Court opined further that "by promulgating a *per se* rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court seriously undermines the ability of counsel to present the client's case with counsel's professional evaluation." Id.

The Respondent submits that appellate counsel after review of the record concluded in her professional judgment that the issues presented on appeal were the strongest. At the PCR hearing, appellate counsel testified she and her former boss, Tommy Thomas, Esquire, read the Petitioner's trial transcript, made notes, issue spotted, and debated which issues were the best to present on appeal. (App. 930:5-14). Appellate counsel testified further she drafted a brief on the directed verdict issues, but ultimately they decided it was not "one of the best issues to present, even though it was preserved." (App. 930:18-23). Appellate counsel testified they did not choose to brief the issue related to the accomplice liability charge due of the court's response to trial counsel's objection and because she thought "it was clear as the Court said, that he was referring to – and let me use his language here—that it was clear that she was not charged with other

offenses and he was only referring to the charges she was –she had been charged with, only those charged offenses.” (App. 938:22-939:7). Appellate counsel reviewed each issue presented by the Petitioner and expressed her reasoning for failing to brief these issues. The Petitioner has failed to show why this Court should second guess appellate counsel’s professional evaluation of the Petitioner’s case on appeal.

The Respondent further submits that this Court should dismiss Petitioner’s “Issue #16” because the Petition is void of any argument in support of this issue. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).

The Petitioner’s intent to abandon the issue of appellate counsel’s failure to brief the lower court’s failure to grant a jury charge on strong arm robbery is further reflected in the argument section for the Petitioner’s ineffective assistance of appellate counsel allegation which states “Appellate counsel failed to raise two meritorious issues in the Petitioner’s direct appeal: 1) that the lower court erred by denying the Petitioner’s directed verdict motions on all charges and 2) that the lower court erred by charging the jury that the State would only have to prove that the Petitioner aided and abetted another person ‘to commit a crime’. (Petition 33). Respondent asks this Court to dismiss and consider the issue abandoned on appeal.

In the alternative, if the Court allows the Petitioner to pursue the issue of appellate counsel’s failure to brief the court’s denial of Petitioner’s request for a strong arm robbery charge, the Respondent submits appellate counsel’s performance was proper. Appellate counsel testified that they both agreed with the court’s denial of the Petitioner’s request for a strong arm robbery charge and decided it was not one of the strongest issues to raise in the case. (App. 935:1-8). The Respondent submits there is probative evidence to support the lower court’s ruling

that the Petitioner failed to carry her burden of proving appellate counsel provided ineffective assistance of counsel.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to argue a Rule 5 violation in his motion for continuance and severance.

The Petitioner alleges trial counsel should have argued a Rule 5 violation in support of the Petitioner's motion for continuance and motion for severance. The Respondent submits trial counsel could not have been ineffective for failing to argue a violation of Rule 5 when he made the trial court aware of the last minute receipt of Hollins' statement while arguing his pre-trial motions. Trial counsel told the trial court prior to the start of trial that he just received a statement from testifying co-defendant Hollins. Counsel told the court "[s]he called me on Thursday and stated her client was going to be testifying. And then stated—and I, you know, inquired as to what changed. And she said 'well, there's another statement'. Which I didn't have, which, I'm not sure if she lost it or—or what the issue was...She faxed it at 5:01 on Friday or on Thursday." (App. 12:20-13:7).

The Respondent also submits it is unlikely any further argument by trial counsel would have resulted in a different outcome since Petitioner has failed to show that facts existed to fully support an argument that the State violated Rule 5. The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings. State v. Kennerly, 331 S.C. 442, 453-54, 503 S.E.2d 214, 220 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999). Rule 5(a)(1)(C) requires:

Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant. Rule 5, SCRCrimP.

Once a Rule 5 violation is shown, reversal is required only where the defendant suffered prejudice from the violation. Kennerley, 331 S.C. at 454. (citing State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996); State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Ct.App.1992)).

The Petitioner has also failed to show that prejudice resulted from trial counsel's failure to explicitly argue a violation of Rule 5 when ultimately trial counsel obtained a copy of Hollins' statement prior to trial. See e.g. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (the defendant was not prejudiced by partial disclosure of an investigative summary since the information was available from other sources). The Respondent submits there is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to explicitly argue a Rule 5 violation in support of his pre-trial motions.

Probative evidence exists to support the lower court's finding that the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of trial counsel for failing to interview Karry Hollins and for failing to request a brief recess or continuance to do so.

The Respondent submits the issue of whether trial counsel was ineffective for failing to interview Karry Hollins and failing to request a continuance or brief recess to do so was not ruled on by the lower court below in the Amended Order of Dismissal. "Where an issue was raised in the lower court but not ruled upon by the trial judge, the plaintiff should have moved before the lower court to amend the judgment. Talley v. S. C. Higher Educ. Tuition Grants Comm., 289 S.C. 483, 347 S.E.2d 99 (1986). When the party makes no motion to obtain a ruling, the appellate court may not address the issue. Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (2006). The Respondent request that this issue be dismissed since it is not proper for appellate review.

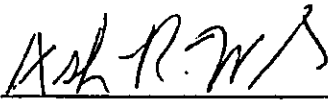
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: 
Ashleigh R. Wilson

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Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

June 3, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

The Honorable Kristi L. Harrington, Circuit Court Judge

MARQUITA CHEMERE SMITH,

PETITIONER/RESPONDENT,

v.

THE STATE OF SOUTH CAROLINA,

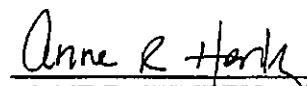
RESPONDENT/PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petitioner's motion to exceed page limits and Return to petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tara D. Shurling
3614 Landmark Drive
Suite A
Columbia, SC 29204

This 3rd day of June, 2013


ANNE R. HENLEY
LEGAL ASSISTANT

The South Carolina Court of Appeals

Marquita Smith, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212698

ORDER

Petitioner's application for post-conviction relief was denied by Judge Kristi L. Harrington. No notice of appeal was filed. Petitioner now seeks a writ of certiorari from an order issued by Judge Deadra L. Jefferson granting Petitioner a belated review of Judge Harrington's order pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

We grant the petition for a writ of certiorari from Judge Jefferson's order and proceed with an *Austin* review of Judge Harrington's order.

The petition for a writ of certiorari from Judge Harrington's order is denied.

H. B. De J.

A. Ke J.

James E. [Signature] J.

Columbia, South Carolina

FILED

July 23, 2014

cc: Tara Dawn Shurling, Esquire
Ashleigh Rayanna Wilson, Esquire

**-STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appellate Case No. 2012-212698

RECEIVED

AUG 08 2014

SC Court of Appeals

Marquita Smith,

Petitioner,

v.

State of South Carolina,

Respondent.

**PETITION FOR REHEARING
AND
REQUEST FOR REHEARING *EN BANC***

TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S. C. 29204

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ATTORNEY FOR PETITIONER

NOW COMES the Petitioner in the above captioned Post-Conviction Relief appeal, acting by and through her undersigned counsel, seeking rehearing *en banc* pursuant to Rule 219, SCACR. Petitioner's Post-Conviction Relief appeal addressed twenty allegations in support of her claim that her right to effective assistance of counsel prior to and during her trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was validated in the trial court. The Petition for Writ of Certiorari in this matter was denied by Order of this Honorable Court dated July 23, 2014 and attached hereto. Petitioner now prays that this Court might grant Petitioner the privilege of rehearing, and requests that the matter be reheard *en banc*.

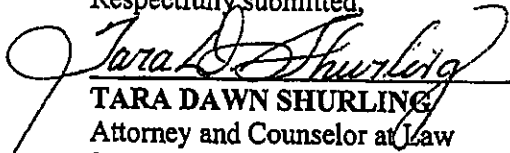
Petitioner respectfully submits that her Petition for Writ of Certiorari demonstrates that she meet her burden of proof with regard to multiple allegations of ineffective assistance of counsel. She now respectfully asks that this matter be reheard and that due to the gravity of the charges and sentence involved in her case, and the nature of the allegations raised that rehearing *en banc* be granted.

Alternatively, Petitioner would seek a full written opinion from this Honorable Court on the allegations raised in her case in order that she might have the ability to seek review of her case of her case by the Supreme Court of South Carolina.

CONCLUSION

For all the reasons set forth above, the Petitioner now asks for rehearing on the issues raised in her Petition for Writ of Certiorari and specifically requests rehearing *en banc*.

Respectfully submitted,


TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

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803-738-8622
803-738-1600 Fax
E-mail: tdslaw@shurlinglaw.com

This 6th day of August, 2014.

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellate Case No. 2012-212698

RECEIVED

AUG 06 2014

SC Court of Appeals

Marquita Smith,

Petitioner,

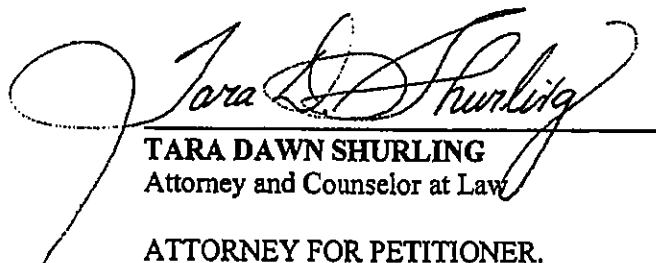
v.

State of South Carolina,

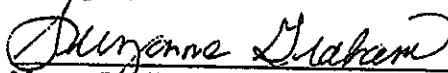
Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing and Rehearing *En Banc* in the above-entitled case has been served upon opposing counsel, Ashleigh R. Wilson, Assistant Attorney General, via U.S. Mail, postage prepaid, this 6th day of August, 2014.


TARA DAWN SHURLING
Attorney and Counselor at Law
ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 6th day
of August, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/24

AW
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The South Carolina Court of Appeals

Marquita Smith, Petitioner,

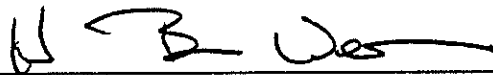
v.

State of South Carolina, Respondent.

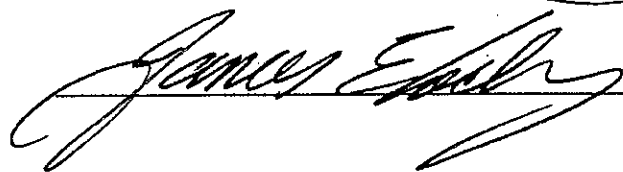
Appellate Case No. 2012-212698

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc: Tara Dawn Shurling, Esquire
Ashleigh Rayanna Wilson, Esquire
Alan McCrory Wilson, Esquire
The Honorable Deadra L. Jefferson

FILED

Sept. 18, 2014

LAW OFFICE OF

**TARA DAWN SHURLING, PA**

Attorney and Counselor at Law
3614 Landmark Drive
Suite A

E-Mail: tdslaw@shurlinglaw.com

Columbia, South Carolina 29204

(803) 738-8622
(Fax) (803) 738-1600

October 20, 2014

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

RE: Marquita Chemere Smith, 323834 v. State of South Carolina;
Case No. 2012-CP-08-1994 - (Austin Review of 2010-CP-08-2985)
Appellate Case No. 2012-212698

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of my Petition for Leave to File Petition of Writ of Certiorari to the South Carolina Court of Appeals and the Certificate of Service in the above-captioned case. I would appreciate your returning two (2) clocked copies of the Petition and the Certificate of Service in the enclosed self-addressed envelope. Thank you for your assistance in this matter. I remain,

Sincerely yours,

A handwritten signature in cursive script that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: ~~Ashleigh R. Wilson, Assistant Attorney General (w/enclosure)~~
Marquita Chemere Smith, 323834 (w/enclosure)
Namon & Rosemary Smith (w/enclosure)

**-STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appellate Case No. 2012-212698

Marquita Smith,

Petitioner,

v.

State of South Carolina,

Respondent.

**PETITION FOR LEAVE TO FILE
PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS.**

TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S. C. 29204

(803) 738-8622 PHONE
(803) 738-1600 FAX
tdslaw@shurlinglaw.com

ATTORNEY FOR PETITIONER

NOW COMES the Petitioner in the above captioned Post-Conviction Relief appeal, acting by and through her undersigned counsel, seeking leave to file a Petition for Writ of Certiorari to the South Carolina Court of Appeals in this Post-Conviction Relief matter. Petitioner served and filed her PCR appeal in this Honorable Court on August 8, 2012 in compliance with Rule 243, SCACR. Petitioner subsequently filed her Petition for Writ of Certiorari in this Honorable Court. Following the filing of Respondent's Return, said appeal was subsequently transferred to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR, by Order dated July 29, 2013. In her PCR appeal, Petitioner addressed approximately twenty allegations in support of her claim that her right to effective assistance of counsel prior to and during her trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was validated in the trial court. The Petition for Writ of Certiorari in this matter was denied by Order of the South Carolina Court of Appeals dated July 23, 2014 and attached hereto. Petitioner filed a Petition for Rehearing, and Request for rehearing *en banc*, on August 6, 2014. That petition was denied by the Court of Appeals on September 18, 2014.

Petitioner is mindful of the previous decisions of this Court finding that a Petitioner in her position may not seek review by this Honorable Court where a Certiorari Denial letter, or similar memorandum order, is issued. She is further aware that previous rulings of this Honorable Court have found that she, and similarly situated Petitioners, are prejudiced by denial of review by this Honorable Court where that denial of review doesn't stop a Petitioner from raising any of the issues decided by the Court of Appeals in a federal habeas action. See, *Haggins v. State*, 377 S.C. 135, 659 S.E.2d 170 (2008); *Missouri v. State*, 378 S.C. 594, 663 S.E.2d 480 (2008); *Ellison v. State*, 382 S.C. 189, 676 S.E.2d 671 (2009); *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728 (1999).

Notwithstanding the previous rulings of this Honorable Court, Petitioner now most respectfully prays that she might be granted leave to file a Petition for Writ of Certiorari seeking review of the Court of Appeals decision in her case. The Petition for Writ of Certiorari demonstrates filed in this case demonstrates that Petitioner meet her burden of proof in the circuit court and in the South Carolina Court

of Appeals with regard to multiple allegations of ineffective assistance of counsel. The case law of South Carolina is replete with examples of cases in which this Honorable Court has disagreed with, and indeed reversed, decisions of the South Carolina Court of Appeals. She respectfully submits that although her right to raise her Sixth Amendment claims in the U.S. District Court is preserved, under the current system she can never get back her right to have her PCR appeal heard by the highest Court in South Carolina. Petitioner asks this Court to take judicial notice of the fact that federal habeas corpus petitions pursuant to 28 U.S.C.A. § 2254 are won far less frequently than Petitioner for Writ of Certiorari before this Honorable Court. Under the current system, all PCR appeals are filed with this Honorable Court. An arbitrary number of those appeals are transferred to the Court of Appeals for review under this Court's authority pursuant to Rule 243 (l), SCACR. Once transferred to the Court of Appeals, Petitioner's right to have this Honorable Court *ever* review the collateral claims raised in the Court of Appeals may be forever barred depending upon *the format* in which the Court of Appeals decision is issued. Petitioner now respectfully asserts that this system deprives her, and others similarly situated, of the right to equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, as well as Article I, §3, of the Constitution of South Carolina. U.S. Const art. XIV, §1 and S.C.Const. art. I, §3.

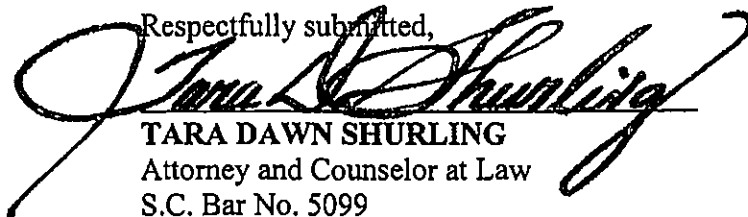
Petitioner would further most respectfully argue that the procedure as it currently is applied had a chilling effect on Petitioner, and others similarly situated, being able to obtain full written opinion in their PCR appeals heard by the South Carolina Court of Appeals. Petitioner does not suggest that the Court of Appeals would deliberately forego issuing a full written decision addressing its reasoning, and the authorities relied upon, in denying certiorari for the purpose of evading review by this Honorable Court. The fact remains however, that by issuing their decision in one of these abbreviated formats, the Court of Appeals may escape any chance of review of their decision by this Honorable Court. Whether unconscious or not, over time this policy will no doubt lead to fewer full written opinions by the Court of Appeals in PCR appeals thus depriving the Petitioner, and those similarly situated, insight as to the reasoning behind the Court's decision. Ultimately, this policy will not only deprive Petitioner, and others, of an

understanding as to why the Court of Appeals found that they did not deserve relief, but further, will deprive them of valuable insights which might be used to further refine the arguments presented in a subsequent habeas corpus petition in the United States District Court pursuant to 28 U.S.C.A § 2254.

CONCLUSION

For all the reasons set forth above, the Petitioner now asks for leave of this Honorable Court to submit for this Court's review a Petition for Writ of Certiorari to the South Carolina Court of Appeals addressing her claims of ineffective assistance of counsel as argued in the circuit court below and in the South Carolina Court of Appeals.

Respectfully submitted,


TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
803-738-8622
803-738-1600 Fax
E-mail: tdslaw@shurlinglaw.com

This 20th day of October, 2014.

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Kristy L. Harrington, Circuit Court Judge

Appellate Case No. 2012-212698

MARQUITA SMITH, 323834,

PETITIONER,

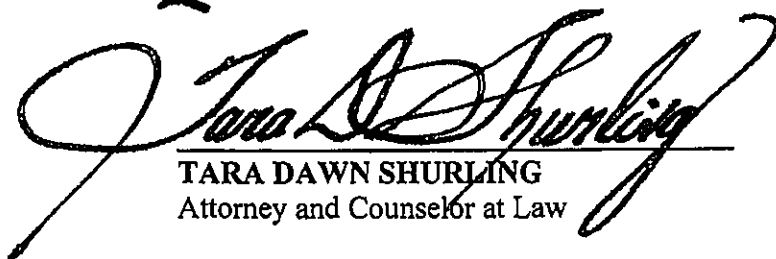
v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICATE OF SERVICE

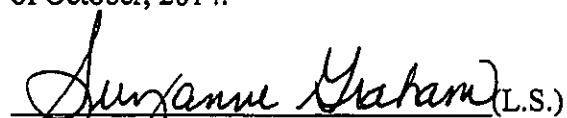
The undersigned attorney hereby certifies that a copy of the Petition for Leave to File Petition for Writ of Certiorari to the South Carolina Court of Appeals in the above-entitled case has been served upon opposing counsel, Ashleigh R. Wilson, Assistant Attorney General, via U.S. Mail, postage prepaid, this 20th day of October, 2014.



TARA DAWN SHURLING
Attorney and Counselor at Law

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 20th day
of October, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County
Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2014-002281

MARQUITA SMITH, #323834,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR LEAVE TO FILE A
PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS

Procedural History

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Clerk of Court for Berkeley County. The Petitioner was indicted at the August 2007 term of the Berkeley County Grand Jury for accessory before the fact of murder (2007-GS-08-1748) and accessory before the fact of armed robbery (2007-GS-08-1751). V. Craig Jones, Jr., Esquire, represented the Petitioner. The Petitioner proceeded to trial on August 27-30, 2007, after which the jury found her guilty as indicted. The Honorable Deadra L. Jefferson sentenced the Petitioner to confinement for thirty years for each conviction. The sentences were to run concurrently.

A timely Notice of Appeal was filed on the Petitioner's behalf and an appeal was perfected. On appeal, the Petitioner was represented by Tommy Thomas, Esquire, and Tricia A. Blanchette, Esquire. Following full briefing by both sides, the Court of Appeals affirmed the Petitioner's conviction and sentence. State v. Smith, Op. No. 4662 (S.C. Ct. App. filed March 24, 2010). The Court of Appeals denied the Petitioner's Petition for Rehearing and Petition for Rehearing *En Banc* by Order dated June 4, 2010. The Remittitur was issued on July 13, 2010.

The Petitioner filed an application for post-conviction relief (PCR) on August 24, 2010 and amended the application on November 17, 2011. The Respondent made its Return on February 4, 2011. An evidentiary hearing into the matter was convened on November 17, 2011 at the Charleston County Courthouse. The Petitioner was present and presented by Tara Dawn Shurling, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Office of the Attorney General represented the Respondent.

The Petitioner testified on her own behalf at the hearing. Petitioner's trial counsel V. Craig Jones, Jr., Esquire, appellate counsel Tricia A. Blanchette, Esquire, and co-defendant Kerry Hollins also testified at the hearing. By Order dated January 30, 2012, the Honorable Kristi L. Harrington denied and dismissed with prejudice the Petitioner's application for post-conviction relief. On February 16, 2012, the Petitioner filed a Rule 59(e) Motion to Alter or Amend. The Respondent submitted a Return and Motion to Dismiss the Motion to Alter and Amend on February 27, 2012. An Amended Order of Dismissal dismissing the Petitioner's application was signed by Judge Harrington and filed on April 19, 2012.

The Petitioner filed a second application for post-conviction relief on July 10, 2012. By Order filed July 23, 2012, the Petitioner and Respondent consented to a belated review of the Petitioner's previous PCR pursuant to Austin v. State. The Petitioner filed a Notice of Appeal on

August 8, 2012. On January 23, 2012, the Petitioner filed a Petition for Writ of Certiorari in this Court. On June 3, 2013, the Respondent filed a Return to Petition for Writ of Certiorari. This Court transferred this matter to the Court of Appeals which issued an order denying the petition on July 23, 2014. On August 6, 2014, the Petitioner filed a Petition for Rehearing and Request for Rehearing *En Banc*. The Court of Appeals denied this Petition on September 18, 2014. A Petition for Leave to File a Petition for Writ of Certiorari to the South Carolina Court of Appeals was filed on October 20, 2014. This Return follows.

Argument

The Respondent submits this Court should deny the Petitioner's Petition for Leave to File a Petition for Writ of Certiorari to the South Carolina Court of Appeals because this Court has expressly stated it will not entertain on appeal the denial of PCR Petition for Writ of Certiorari by the Court of Appeal. The Respondent submits the Petitioner's claims are without merit and this Court should deny this petition because the Petitioner is not entitled to review by this Court of a denial of petition for writ of certiorari.

In Haggins v. State, 377 S.C. 135, 137, 659 S.E.2d 170 (2008), this Court held it would not entertain petitions for writ of certiorari to review "letter denials" in post-conviction relief matters. In Missouri v. State, this Court extended its holding in Haggins and held this Court would not entertain petitions for writ of certiorari to review an order denying a petition for writ of certiorari in a post-conviction relief matter. 378 S.C. 594, 663 S.E.2d 480 (2008) holding modified by Ellison v. State, 382 S.C. 189, 676 S.E.2d 671 (2009). The Respondent submits this Court has explicitly stated it will not entertain denials of post-conviction relief petition for writ of certiorari. This Court should follow its holding in Missouri and refuse to entertain the Petitioner's denial of petition for writ of certiorari.

The arguments raised in the Petition seems to suggest that the Petitioner's case is in some way special or unique from other post-conviction relief cases in which the Court of Appeals denies a petition for writ of certiorari. However, there is nothing in the Petitioner's case which indicates it warrants any special treatment by this Court. There is also nothing to suggest that the Court of Appeals did not extend to the Petitioner's case the same thorough review it extends to all post-conviction relief cases it reviews. A decision by the Court of Appeals to grant or deny a writ of PCR certiorari is a matter committed to that court's discretion. Haggins, 377 S.C. at 136-37, 659 S.E.2d 170. The Court of Appeals in its discretion concluded the Petitioner's claims did not warrant briefing, oral argument, and the issuing of a formal opinion. The Respondent submits the Court of Appeals exercised its discretion in denying further review and the Petitioner has failed to provide any valid reason for this Court to depart from its holding in Missouri v. State.

Lastly, the Petitioner asserts this Court's refusal to entertain denials of petition for writ of certiorari in PCR cases "deprives her, and others similarly situated, of the right to equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, as well as Article I, §3, of the Constitution of South Carolina." The Respondent submits this Court addressed this very issue in Missouri v. State by holding "neither Haggins, nor our extension of Haggins herein, constitutes a violation of constitutional rights." Missouri v. State, 378 S.C. 594, 595-96, 663 S.E.2d 480, 481 (2008) holding modified by Ellison v. State, 382 S.C. 189, 676 S.E.2d 671 (2009).

Requiring the Court of Appeals to issue a full formal opinion in every case in which it denies a petition for writ of certiorari would abrogate the Court's discretion to decide which cases warrant briefing, oral argument, and a full formal opinion. The Respondent respectfully

asks this Court to deny this Petition and avoid carving out the unwarranted exception that the Petitioner is requesting.

Respectfully submitted,

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: Ash R. Wilson
Ashleigh R. Wilson

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

ATTORNEYS FOR RESPONDENT

November 10, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Berkeley County
The Honorable Kristi L. Harrington, Circuit Court Judge

MARQUITA SMITH

Petitioner,

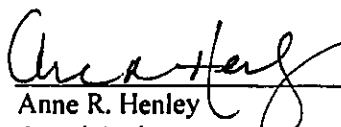
v.

STATE OF SOUTH CAROLINA,

Respondent.

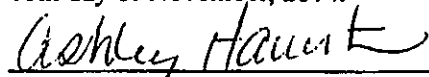
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Leave to File a Petition for Writ of Certiorari to the South Carolina Court of Appeals Has been served upon the respondent's attorney, Tara D. Shurling, this 10th day of November 2014.



Anne R. Henley
Legal Assistant

SWORN to before me this
10th day of November, 2014.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 3-18-23

AW
9

The Supreme Court of South Carolina

Marquita Smith, Petitioner,

v.

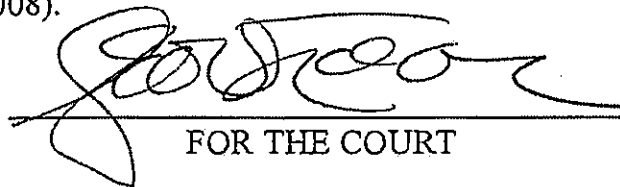
State of South Carolina, Respondent.

Appellate Case No. 2014-002281

Lower Court No. 2012-CP-08-01994

ORDER

Petitioner seeks leave to file a petition for a writ of certiorari to the Court of Appeals to review an order of that court granting petitioner's petition for a writ of certiorari from an order of the circuit court finding petitioner was entitled to an *Austin* review of the denial of her first application for post-conviction relief (PCR), but denying petitioner's petition for a writ of certiorari from the order denying petitioner's first PCR application. The State has filed a return in opposition to the petition for leave. The petition for leave to file a petition for a writ of certiorari to the Court of Appeals is denied. *Ellison v. State*, 382 S.C. 189, 676 S.E.2d 671 (2009); *Missouri v. State*, 378 S.C. 594, 663 S.E.2d 480 (2008); *Haggins v. State*, 377 S.C. 135, 659 S.E.2d 170 (2008).

 C.J.
FOR THE COURT

Columbia, South Carolina

December 4, 2014

cc:

The Honorable Jenny Abbott Kitchings

Tara Dawn Shurling, Esquire

Ashleigh Rayanna Wilson, Esquire

Alan McCrory Wilson, Esquire

The Honorable Mary P. Brown



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 05, 2015

The Honorable Mary P. Brown
PO Box 219
Moncks Corner SC 29461-0219

REMITTITUR

Re: Marquita Smith v. State
Lower Court Case No. 2012CP0801994
Appellate Case No. 2012-212698

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jenny A. Kitchings".

CLERK

Enclosure

cc: Tara Dawn Shurling, Esquire
Ashleigh Rayanna Wilson, Esquire
Alan McCrory Wilson, Esquire

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

United States District Court		District:
Name (under which you were convicted): Marquita Smith		Docket or Case No.:
Place of Confinement : Camille Griffin Correctional Institution 4450 Broad River Road, Columbia, S. C. 29210		Prisoner No.: 323834
Petitioner (include the name under which you were convicted) Marquita Smith		Respondent (authorized person having custody of petitioner) Warden Marian Boulware
v.		
The Attorney General of the State of: South Carolina		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Berkeley County General Sessions Court300 California AvenueMoncks Corner, South Carolina 29461(b) Criminal docket or case number (if you know): 2007-GS-08-1748 and 2007-GS-08-1751

2. (a) Date of the judgment of conviction (if you know):
- 08/30/2007

(b) Date of sentencing: 08/30/2007

3. Length of sentence:
- 30 years on each charge concurrent

4. In this case, were you convicted on more than one count or of more than one crime?
- ☒
- Yes
- ☐
- No

5. Identify all crimes of which you were convicted and sentenced in this case:
- 2007-GS-08-1748 Accessory
-
- before the fact of murder. 2007-GS-08-1751 Accessory before the fact of armed robbery.

6. (a) What was your plea? (Check one)

☒ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

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(Rev. 01/15)

Page 3

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: South Carolina Court of Appeals

(b) Docket or case number (if you know): 2007-GS-08-1748 and 2007-GS-08-1751

(c) Result: Court Affirmed judgments and sentences

(d) Date of result (if you know): 03/24/2010

(e) Citation to the case (if you know): State v. Smith, 387 S.C. 619, 693 S.E.2d 415 (2010).

(f) Grounds raised: 1. Whether the lower court erred by denying the Appellant's Motion for a Continuance.
2. Whether the lower court erred by denying the Appellant's Motion for a Severance and a Separate Trial.

(g) Did you seek further review by a higher state court? ☐ Yes ☒ No

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

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(Rev. 01/15)

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(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

_____(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☒ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Berkeley County Court of Common Pleas(2) Docket or case number (if you know): 2010-CP-08-2985(3) Date of filing (if you know): 08/24/2010(4) Nature of the proceeding: Application for Post-Conviction Relief(5) Grounds raised: See Attachment

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒ Yes ☐ No(7) Result: Application Denied(8) Date of result (if you know): 04/19/2012

(b) If you filed any second petition, application, or motion, give the same information:

- (1) Name of court: Berkeley Court of Common Pleas
- (2) Docket or case number (if you know): 2012-CP-08-1994
- (3) Date of filing (if you know): 07/10/2012
- (4) Nature of the proceeding: Second PCR Application
- (5) Grounds raised: Request for belated PCR appeal pursuant to Austin v. State 305 SC 453,
409 S.E.2d 395 (1991)
- _____
- _____
- _____
- _____
- _____
- _____
- _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result: Consent Order Granting Belated PCR Appeal

(8) Date of result (if you know): 07/23/2012

(c) If you filed any third petition, application, or motion, give the same information:

- (1) Name of court: N/A
- (2) Docket or case number (if you know): _____
- (3) Date of filing (if you know): _____
- (4) Nature of the proceeding: _____
- (5) Grounds raised: _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☒ Yes ☐ No

(2) Second petition: ☒ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

Ruling on First PCR Application appealed by way of appeal filed on Second PCR Application. App. pp.
1209-1210.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: See Attachment

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Attachment

(b) If you did not exhaust your state remedies on Ground One, explain why: Ground argued in circuit court PCR
action and in PCR appeal.

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(Rev. 01/15)

Page 7

(c) **Direct Appeal of Ground One:**(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No(2) If you did not raise this issue in your direct appeal, explain why: Not appropriate for PCR.(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PCR ApplicationName and location of the court where the motion or petition was filed: Berkeley County Court of Common Pleas, 300 California Avenue, Moncks, Corner, SC 29461.Docket or case number (if you know): 2010-CP-08-2985 and 2012-CP-08-1994.Date of the court's decision: 04/19/2012Result (attach a copy of the court's opinion or order, if available): PCR Application dismissed by Order filed April 19, 2012. Belated PCR appeal granted by Consent Order filed July 23, 2012.(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Supreme Court of South Carolina. Subsequently transferred to the South Carolina Court of Appeals.Docket or case number (if you know): App.No. 2012-212698 (Ct.App); App. No. 2014-002281(S.Ct.)Date of the court's decision: 07/23/2014Result (attach a copy of the court's opinion or order, if available): Certiorari granted on Petition for Writ of Certiorari on 2012-CP-08-1994. Granted review of 2010-CP-08-2985 and denied Certiorari on grounds raised therein.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

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(Rev. 01/15)

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(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: Attempted to seek review by Supreme Court of South Carolina
See, Ground Ten herein.

GROUND TWO: See Attachment.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Attachment

(b) If you did not exhaust your state remedies on Ground Two, explain why: Ground argued in circuit court PCR action and in PCR appeal.

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: Not appropriate for PCR.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PCR Application

Name and location of the court where the motion or petition was filed: Berkeley County Court of Common Pleas, 300 California Avenue, Moncks, Corner, SC 29461.

Docket or case number (if you know): 2010-CP-08-2985 and 2012-CP-08-1994.

Date of the court's decision: 04/19/2012

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Result (attach a copy of the court's opinion or order, if available): PCR Application dismissed by Orderfiled April 19, 2012. Belated PCR appeal granted by Consent Order filed July 23, 2012.(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Supreme Court of South Carolina. Subsequently transferred to the South Carolina Court of Appeals.Docket or case number (if you know): App.No. 2012-212698 (Ct.App); App. No. 2014-002281(S.Ct.)Date of the court's decision: 07/23/2014Result (attach a copy of the court's opinion or order, if available): Certiorari granted on Petition for Writ of Certiorari on 2012-CP-08-1994. Granted review of 2010-CP-08-2985 and denied Certiorari on grounds raised therein.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two : Attempted to seek review by Supreme Court of South Carolina. See, Ground Ten herein.

GROUND THREE: See Attachment

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Attachment

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(b) If you did not exhaust your state remedies on Ground Three, explain why: Ground argued in circuit court PCR action and in PCR appeal.

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why: Not appropriate for PCR.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PCR Application

Name and location of the court where the motion or petition was filed: Berkeley County Court of Common Pleas, 300 California Avenue, Moncks, Corner, SC 29461.

Docket or case number (if you know): 2010-CP-08-2985 and 2012-CP-08-1994.

Date of the court's decision: 04/19/2012

Result (attach a copy of the court's opinion or order, if available): PCR Application dismissed by Order filed April 19, 2012. Belated PCR appeal granted by Consent Order filed July 23, 2012.

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Supreme Court of South Carolina. Subsequently transferred to the South Carolina Court of Appeals.

Docket or case number (if you know): App.No. 2012-212698 (Ct.App); App. No. 2014-002281(S.Ct.)

Date of the court's decision: 07/23/2014

Result (attach a copy of the court's opinion or order, if available): Certiorari granted on Petition for Writ of Certiorari on 2012-CP-08-1994. Granted review of 2010-CP-08-2985 and denied Certiorari on grounds raised therein.

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

- (c) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: Attempted to seek review by Supreme Court of South Carolina. See, Ground Ten herein.

GROUND FOUR: through Ground Nine. See Attachment.

- (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Attachment.

- (b) If you did not exhaust your state remedies on Ground Four, explain why: Ground argued in circuit court PCR action and in PCR appeal.

- (c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No(2) If you did not raise this issue in your direct appeal, explain why: Not appropriate for PCR.

- (d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PCR Application

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Name and location of the court where the motion or petition was filed: Berkeley County Court of Common Pleas, 300 California Avenue, Moncks, Corner, SC 29461.

Docket or case number (if you know): 2010-CP-08-2985 and 2012-CP-08-1994.

Date of the court's decision: 04/19/2012

Result (attach a copy of the court's opinion or order, if available): PCR Application dismissed by Order filed April 19, 2012. Belated PCR appeal granted by Consent Order filed July 23, 2012.

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Supreme Court of South Carolina. Subsequently transferred to the South Carolina Court of Appeals.

Docket or case number (if you know): App.No. 2012-212698 (Ct.App); App. No. 2014-002281(S.Ct.)

Date of the court's decision: 07/23/2014

Result (attach a copy of the court's opinion or order, if available): Certiorari granted on Petition for Writ of Certiorari on 2012-CP-08-1994. Granted review of 2010-CP-08-2985 and denied Certiorari on grounds raised therein.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: Attempted to seek review by Supreme Court of South Carolina. See, Ground Ten herein.

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13. Please answer these additional questions about the petition you are filing:

- (a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☒ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: N/A

- (b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

No.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. N/A

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A

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16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: N/A

(c) At trial: Victor Craig Jones, Jr. Esq. P. O. Box 167, Columbia, SC 29202

(d) At sentencing: Victor Craig Jones, Jr., Esq. P. O. Box 167, Columbia, SC 29202

(e) On appeal: Tricia A. Blanchette, Esq. P. O. Box 12725 Columbia, SC 29211

(f) In any post-conviction proceeding: Tara D. Shurling, Esq. 3614 Landmark Drive, Suite A,
Columbia South Carolina 29204

(g) On appeal from any ruling against you in a post-conviction proceeding: Tara D. Shurling, Esq.
3614 Landmark Drive, Suite A, Columbia, SC 29204

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☒ No

18. **TIMELINESS OF PETITION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

See Attachment

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(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: Remand to State Court for vacation of judgments and sentences and a new trial.

or any other relief to which petitioner may be entitled.

s/Tara Dawn Shurling

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

Drafted and submitted by legal counsel, Tara Dawn Shurling.

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Answer to 11 (a) (5)

In her Application for Post-Conviction Relief filed August 24, 2010, the Applicant alleged that she was being held in custody unlawfully for the following reasons:

1. The Applicant received ineffective assistance of counsel prior and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.
2. The judgments and sentences against the Applicant were entered in violation of her rights to the due process of law and to the effective assistance of counsel.
3. The Applicant received ineffective assistance of counsel on direct appeal in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 14 of the South Carolina Constitution.

The Amended Application for Post-Conviction Relief, filed November 17, 2011, contained the following additional specific allegations:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery.
2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery.
3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her.
4. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact.
5. Trial Counsel was ineffective for failing to fully present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges.
6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery.

7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing *and/or* the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties.
8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her co-defendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit.
9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder.
10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she *was not present* during the commission of the principal offenses.
11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her co-defendants.
12. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense.
13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments.
14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story."
15. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal

offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit.

16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.
17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove the Applicant aided and abetted another person "*to commit a crime*," thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing *any* crime would make her mutually liable for all the acts committed by her co-defendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

At the evidentiary hearing convened in this case, the Applicant expanded one of her amended allegations, to include a claim that: defense counsel was ineffective for advising his client that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument. (added to amended allegation #13). At this hearing, the Applicant also specifically alleged that:

1. Defense Counsel was ineffective for failing to effectively argue a Rule 5, SCRCrimP, violation in his motion for continuance and severance, where the State did not disclose a statement of a co-defendant that had turned State witness.
2. Defense Counsel was ineffective for failing to interview the co-defendant turned State witness prior to trial, or in the alternative, for failing to request a brief recess or continuance to do so.

ANSWER TO 12, GROUNDS FOR RELIEF

GROUND ONE:

The State Court erred in failing to find that Petitioner received ineffective assistance of counsel, in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where she demonstrated that she was prejudiced by Trial Counsel's Failure to Adequately Argue Petitioner's Pre-Trial Motions for a Severance and Continuance and his failure to seek a recess to interview co-defendant Hollins when a Continuance was denied.

**Allegation 5- Amended Application for PCR
Allegations 18 and 19 Developed during PCR Hearing.**

SUPPORTING FACTS:

The record below confirms that Petitioner admitted, in a statement given to law enforcement, that she had offered up the name of her “cousin,” the Victim in this case, when co-defendant turned State witness, Kerry Hollins, indicated that he wanted someone to rob. App. Vol. II p. 545, ll. 15-18. She told Hollins that the Victim might have some money on his person. App. Vol. II p. 545, ll. 17-18. Two days later, on the night of the crimes, Petitioner provided information to Hollins regarding the Victim’s whereabouts. App. Vol. II p. 546, l. 6-p. 547, l. 19. Petitioner was present with the Victim and a friend at that friend’s apartment, when Hollins and the Applicant’s other co-defendants arrived with the apparent intent of robbing the Victim. App. Vol. II p. 547, l. 20-p. 548, l. 7; p. 411, ll. 9-24. Hollins and the other co-defendants overtook the Victim at the apartment and transported him to a secondary location. App. Vol. II p. 547, l. 20-p. 548, l. 7; App. Vol. I pp. 172-175. Petitioner was indisputably at or near the friend’s apartment, close by in the apartment complex, when the incident was initiated. App. Vol. II p. 548, ll. 8-9. The victim was physically assaulted and fatally wounded by gunfire at the secondary location. App. Vol. I p. 385, ll. 15-24; p. 391, l. 21-p. 392, l. 13. Some testimony indicated that a co-defendant may have taken jewelry from the Victim during the course of these events. App. Vol. II p. 416, l. 18-p. 417, l. 1. The testimony on this issue is not clear.

The Thursday prior to Petitioner’s trial, Trial Counsel received his first notice that Hollins, a former co-defendant of Petitioner, would be testifying against her at trial. He received this information from the public defender representing Hollins. It was that Public Defender, not the State, who sent Trial Counsel a copy of a previously undisclosed statement by Hollins. Based on that revelation, and his untimely notification that the case was being called for trial, Trial Counsel moved for a continuance. App. Vol. I pp. 11-21. Trial Counsel also moved for a severance, claiming antagonistic defenses between Petitioner and her co-defendants as well as an inability to

cross-examine Hollins. These motions were denied. App. Vol. I pp. 11-21.¹ At the trial, Hollins testified, without objection, that Petitioner provided the nickname of the Victim, “Kuku,” as someone to set up “a lick” on. Hollins also testified that a “lick” meant a robbery and that a weapon was needed to do a “lick.” App. Vol. II p. 403, l. 10-p. 404, l. 23.

Trial Counsel made a motion for a continuance at the onset of Petitioner’s trial, indicating that he received notice of the scheduled trial date only ten (10) days in advance. Counsel informed the judge that he had just discovered, the Thursday prior to trial, that a former co-defendant would be testifying against his client and that there was a previously undisclosed statement from that witness. App. Vol. I p. 11, l. 5-p. 13, l. 10. He additionally argued that he had not had adequate time to secure the attendance of two parties that he felt to be necessary witnesses in Petitioner’s defense. App. Vol. I p. 22, l. 19-p. 24, l. 4.

In addition to the request for a continuance, Trial Counsel also presented a motion for a severance, supported by the argument that he could not adequately highlight the disparity in culpability between co-defendants with extensive criminal backgrounds and his own client’s clean record, if their prosecutions were not severed. App. Vol. I p. 14, l. 2-p. 15, l. 12. Counsel additionally argued that his last-minute notice of the fact that Hollins would be a witness for the State, deprived him of the opportunity to prepare to adequately refute Hollins’ *anticipated* testimony that his client was the mastermind behind this entire plan. App. Vol. I p. 16, l. 25-p. 17, l. 5. What Trial Counsel failed to cover in his argument for a severance was the reality that jury instructions issued in a joint trial of Petitioner and her co-defendants would inevitably be very cumbersome and complex. He failed to argue that the Applicant’s joint trial with her co-defendant’s would result in her inability to have a jury that was adequately and clearly charged on the difference

¹ The trial court’s rulings on these issues, based on the limited arguments made below, were challenged on direct-appeal.

between the findings necessary for her conviction as opposed to those required to convict her co-defendants.

The instructions necessary at a joint trial needed to adequately explain the different findings required for the jury to determine the co-defendant's guilt on their charges of armed robbery and murder charges *versus* those necessary for verdicts on Petitioner's charges of *accessory before the fact of* armed robbery and murder. The required instructions would necessarily have to thoroughly explain the theory of accomplice liability as it applied to Petitioner's accessory charges versus the principal offenses the co-defendants were charged with. Trial Counsel should have argued that there was a real possibility that a jury would be confused by the complicated legal differentiation between the standard to be applied to Petitioner as opposed to that necessary to convict her co-defendants. He should have argued in favor of severance by noting that there existed a realistic probability that her jury would be incapable of applying the proper legal standard to Petitioner's accessory charges versus the standard applicable to her co-defendants who were charged as principals.

While Trial Counsel argued for a severance based on his need to highlight the disparity between his client's background and the extensive criminal records of her co-defendants, he did not argue that it would be difficult for his client to have a jury adequately and clearly instructed on the applicable law in a joint trial. Petitioner was clearly prejudiced in that this available argument would have supported the desired severance. It is Petitioner's position that the confusing jury instructions ultimately issued at her trial prevented the jury from making a reliable judgment about her guilt. The complex and confusing instructions necessary for the Petitioner to receive a fair trial were readily foreseeable and should have been argued as justification for a severance. Likewise, the fact that it would be difficult for the trial court to tailor instructions which were fair and necessary for Petitioner to receive a fair trial while also

issuing an appropriate charge for her co-defendant's charges, should have been foreseeable and should have been argued as further justification for a severance.

Petitioner has further argued that once Trial Counsel realized that the Court was not going to continue this trial to another day or term, he should have, *at the very least*, requested a brief recess in order to attempt to interview cooperating co-defendant Hollins. In the lower court Petitioner argued that Trial Counsel was clearly ineffective for failing to do so since his own words in the trial record confirm that he felt incapable of adequately cross-examining this last-minute witness. App. Vol. I, p. 13, l. 3- p. 15, l. 18.

In his PCR testimony, Trial Counsel admitted that he did not ask the public defender representing Hollins if he could interview him prior to the beginning of Petitioner's trial. App. Vol. III p. 976, ll. 12-15. Trial Counsel spoke with Hollins' attorney the week before Petitioner's trial. That conversation addressed the fact that Hollins would be a witness for the State and therefore, presented an obvious opportunity to discuss a potential interview of Hollins prior to trial. App. Vol. III p. 1001, ll. 9-17.

The lower court erroneously found that Trial Counsel was not ineffective in his cross-examination of Hollins. In the initial Order of Dismissal the lower court noted that Trial Counsel did not think *Hollins' lawyer* would have let him interview Hollins pre-trial. App. Vol. III p. 1112. In his PCR testimony, Trial Counsel ultimately admitted that the decision, as to whether to talk to Petitioner's lawyer, would have been up to Hollins to make. App. Vol. III. p. 972, l. 23 – p. 973, l. 15. Following Petitioner's Rule 59(e) Motion, the Order was amended to acknowledge that Trial Counsel simply *assumed* Hollis would not speak with him because he was a cooperating co-defendant testifying for the State. App. Vol. III pgs. 1195-1196. The decision of the lower court fails to take into account Trial Counsel's admission in his PCR testimony that he did not know whether Hollins would have been willing to speak with him or

not. The Amended Order “finds that counsel was able to cross-examine Mr. Hollins regarding some details of the incident...” App. Vol. III p. 1196. The Amended Order of Dismissal however, totally fails to take into account the testimony of Hollins at the PCR hearing, and the many ways in which the same testimony would have been crucial to the defense if it had been offered at trial. *See*, App. Vol. III p. 1021, l. 21- p. 1033, l. 13. Likewise, the Order of Dismissal fails to take into account the fact that, in his PCR testimony, Trial Counsel admitted that Hollins’ statement *wasn’t very divergent from Petitioner’s statement*. App. Vol. III, p. 973, l. 21- p. 974, l. 19. The lower court failed to recognize that Trial Counsel had essentially admitted that the testimony of Hollins would have largely corroborated Petitioner’s version of the events.

In his PCR testimony Hollins testified that if he had been asked, he would have been willing to talk to Petitioner’s lawyer *even if* his own lawyer had recommended against it. App. Vol. III p. 1023, l. 20- p. 1024, l. 4. He testified that if Petitioner’s Trial Counsel had ever asked him the same questions as PCR counsel did during the evidentiary hearing, he would have answered them the same way he did in the PCR hearing, and further, that he would have answered those questions the same way if they had been asked of him under oath at Petitioner’s trial. App. Vol. III p. 1027, ll. 15-24. Hollins confirmed information that clearly would have been helpful to the defense, such as Petitioner being unaware of any plan to bring guns in the robbery of the Victim and his admitted assurances to Petitioner that the Victim would not be hurt. App. Vol. III p. 1025, l. 17- p. 1027, l. 14. Hollins’ PCR testimony confirms that he would have willingly provided this information to Petitioner’s Trial Counsel. App. Vol. III p. 1027, ll. 2-24. Counsel should have been motivated to make every effort to interview Hollins pre-trial where the content of his statement to law enforcement, in and of itself, was beneficial to Petitioner’s defense. In his own PCR testimony, Trial Counsel acknowledged that he failed to ask for even a brief recess to speak

with Hollins and he admitted that he would have been more likely to receive that, than the continuance of the trial he requested. App. Vol. III p. 1001, l. 18-p. 1002, l. 6.

When Petitioner's Trial Counsel presented his arguments for a continuance and severance, he also failed to mention the Rule 5² violation that occurred in the State's failure to timely disclose the more recent statement of Hollins, who was testifying against his client. Counsel did not receive the statement, or notice of its existence, until the Thursday or Friday prior to trial, and even then, received the information from the attorney representing Hollins not the State. Rule 5(a)(1)(C) provides that upon request of the defendant, the prosecution has a duty to provide documents or items in the possession, custody or control of the prosecution which are material to the preparation of a defense or are intended to be used by the prosecution as evidence in chief. Rule 5(a)(1)(C), SCRCrimP. Furthermore, the duty imposed under this rule is a continuing duty to disclose as necessary. Rule 5(c), SCRCrimP. A motion requesting discovery under Rule 5 was prepared and served upon opposing counsel by Petitioner's previous attorney, George Bishop, Jr. PCR Counsel obtained a copy of that motion from the file of Trial Counsel, Craig Jones. Copies of that motion and certificate of service were added to the PCR record as Petitioner's Exhibit 1, by way of a motion filed on Petitioner's behalf and consented to by the Respondent.³ Petitioner was also allowed to introduce as an exhibit, a copy of the discovery motions filed by Attorney Bishop on behalf of Petitioner. App. Vol. III pgs. 1090 – 1099.

In the lower court Petitioner argued that the State's failure to produce Hollins' most recent statement prior to trial was a violation of South Carolina Rules of Criminal Procedure and that Trial Counsel's failure to note this violation in support of his continuance request constituted ineffective

² Rule 5, SCRCrimP.

³ A copy of this motion was not introduced during the evidentiary hearing inasmuch as PCR counsel expected the motion to be included in the Clerk of Court records in this matter. It was subsequently been determined that, although the motion was served, it was apparently not filed with the Clerk of Court. For that reason, PCR counsel filed a motion to expand the PCR record to include a copy of the Rule 5 Motion and certificate of service. Counsel for the Respondent consented to this request.

assistance of counsel. At the evidentiary hearing, Trial Counsel admitted that he probably did not specifically reference this violation. He acknowledged that he should have used words to specifically evoke a Rule 5 violation. App. Vol. III p. 971, l. 4-p. 972, l. 12. Petitioner asserts that she was prejudiced by counsel's failure to add this violation to the list of arguments supporting Petitioner's request for a continuance. Trial Counsel admitted that his preparation of a defense for Petitioner was impaired by this last-minute notice that a co-defendant had turned State witness and given another statement. Trial Counsel's failure to argue this ground as a basis for the continuance request, or at minimum to request a brief recess to attempt to interview Hollins, effectively waived that argument.

The record below establishes that Petitioner met her burden of proof in State collateral proceedings with regard to these allegations and further, that she has established that she was prejudiced by these errors and omissions of Trial Counsel regarding the deficient manner in which he argued his motions for a severance and continuance and his failure to seek even minimal time to interview co-defendant Hollins.

GROUND TWO:

The State erred in denying Petitioner relief where she clearly established that Trial Counsel was ineffective in his failure to adequately cross-examine state witness, co-defendant, Hollins.

Allegation 12. - Amended Application for PCR

SUPPORTING FACTS:

Tied into the allegations addressed in Ground One, is Petitioner's claim that Trial Counsel was ineffective for failing to fully cross-examine Hollins. Specifically, he failed to elicit testimony that would have been favorable to the defense. As noted above, Hollins' PCR testimony confirmed that Petitioner was unaware of any plan for him, or anyone with him, to

bring weapons when taking money from the Victim. He similarly confirmed that Petitioner was unaware that the victim might be harmed and had in fact been promised that he would not be. Although Petitioner was only charged with accessory before the fact to armed robbery and murder, the fact that a burglary and kidnapping ultimately occurred (for which her co-defendants were charged) could have been considered by the jury in determining whether a murder was a readily foreseeable consequence of the activities Petitioner participated in. Testimony that Petitioner had no knowledge of a plan to be armed while committing this robbery, or of any plan to kidnap or commit burglary, would have significantly diminished the chances that the jury would find that the victim's murder was a readily foreseeable consequence of the acts she knowingly participated in.

Hollins' testimony would have confirmed that Petitioner was not privy to any plan to commit a burglary. Trial Counsel's claim that he was afraid to ask more questions of this witness is not supported by the record. Trial Counsel had the opportunity to interview Hollins and failed to pursue it. In addition, Trial Counsel admitted in his PCR testimony that the statement given by Hollins was largely consistent with his client's position. Therefore, he had the security of knowing that if Hollins significantly departed from that statement in his trial testimony, he could have impeached him with his prior statement.

The unclear and improper definition of the street term "lick" elicited from Hollins in his direct testimony was relied upon the State to create the inference that Petitioner was *aware* that weapons would be involved. If Hollins had been adequately cross-examined, it is clear that Hollins' own testimony on cross-examination would have substantially challenged the State's position that Petitioner was aware of plans to commit an *armed* robbery or even that she knew the perpetrators would be armed. In his testimony at Petitioner's PCR hearing, Hollins confirmed that Petitioner had no idea guns were going to be involved. He acknowledged that after her

cousin was kidnapped, Petitioner sounded scared and surprised when she called him because, “she didn’t know that was going to take place.” App. p.103, ll. 7-22. In her PCR action, Petitioner argued that Trial Counsel should have had the benefit of knowledge gained from a pre-trial interview with Hollins to use to challenge the confusing or incongruent statements elicited from this witness by the prosecution on direct examination. As this failure to fully cross-examine Hollins is directly related to the failure to interview the witness prior to trial, and the Rule 5 violation, this issue must be evaluated in conjunction with other issues raised in separate grounds herein. Petitioner respectfully submits that the state courts erred in failing to grant relief on this ground.

GROUND THREE:

Trial Counsel violated Petitioner’s right to effective assistance of counsel, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, by his failure to properly respond to testimony from State Witness, co-defendant, Hollins’ that a “Lick” Conclusively Meant an Armed Robbery

Allegation 1 and 2, Amended PCR Application.

SUPPORTING FACTS:

On collateral review, Petitioner asserted that Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term “*a lick*” conclusively meant an armed robbery and demonstrated that she was clearly prejudiced by this error by Trial Counsel. She further argued that Trial Counsel was ineffective for neglecting to make a motion for a mistrial, and/or for failing to make a request for a curative charge, where the State, without a sufficient evidentiary basis, elicited testimony that the term “*a lick*” meant an armed robbery and also made a showing as to how she was prejudiced by Trial Counsel’s failure to do so. Among the most damaging evidence against Petitioner at trial came in the form of improper and

patently misleading testimony from State witness Hollins. Hollins testified that Petitioner had suggested the Victim for a “lick” and then, at the urging of the State, proceeded to define what a “lick” is commonly taken to mean. While Hollins initially defined a lick as signifying a *robbery*, he was subsequently led by the State to state that a “lick” necessitated the use of some type of weapon. App. Vol. II p. 403, ll. 10-20. Although *Counsel for a co-defendant, Attorney Bolus*, was able to get Hollins to admit, on cross-examination, that the term “refers to a robbery”, App. Vol. II p. 424, ll. 13-23, the damage from these assertions was reinforced when, on re-direct examination, the State once again lead Hollins into stating that a “lick” required “some type of weapon.” App. Vol. II p. 441, ll.10 – 15. After reviewing Hollins’ testimony concerning the term “lick” .with PCR Counsel, Trial Counsel acknowledged that *after* the testimony elicited by Attorney Bolus, Hollins followed up with more testimony which emphasized that the plan included weapons. App. Vol. III p. 965, ll. 1-8. In his PCR testimony, Trial Counsel candidly stated that he wished he had “gone into that further” when addressing his failure to object to Hollis being allowed to define “a lick” as meaning an armed robbery. App. Vol. III p. 975, ll. 15-16. He conceded that he should have requested a mistrial the first time the State elicited testimony defining “a lick” as an armed robbery. App. Vol. III p. 976, l. 19- p. 977, l. 2. This testimony was cited by the State as evidence supporting denial of Petitioner’s request for a charge on a lesser offense of strong arm robbery. App. Vol. II. p. 598, l. 14-p. 599, l. 1. The prejudice arising from this testimony was exacerbated when during closing arguments the State emphasized this testimony by stating, “Defense would have you believe she [Petitioner] didn’t know it was going to be a robbery—she didn’t know it was going to be an armed robbery.” The State wraps up that argument with, “Y’all know what a robbery is, what a lick is.” App. Vol. II p. 679, ll. 13-20.

Further, as addressed in Petitioner’s Ground Two, she met her burden of proof with regard to her allegation that Trial Counsel failed to provide Petitioner with reasonable professional

assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby prejudiced her at trial by failing to elicit testimony from him which would have addressed this issue and would have significantly strengthened Petitioner's defense.

GROUND FOUR:

Petitioner's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United State's Constitution, was violated at trial when Trial Counsel neglected to adequately argue her right to directed verdicts of acquittal based upon the insufficiency of the evidence presented by the prosecution.

Allegations 3 and 4, Amended Application for PCR.

SUPPORTING FACTS:

The state court erred in failing to grant Petitioner relief where Trial Counsel failed to adequately argue Petitioner's motions for directed verdicts of acquittal at trial. Trial Counsel brought a motion for a directed verdict of acquittal on both of the charges against Petitioner simply arguing that there was no evidence to support a charge of accessory before the fact to armed robbery. He further stated that there was no evidence of a common plan to commit armed robbery or murder and that; generally, murder was not a probable and natural consequence of Petitioner's acts. App. Vol. II pp. 559-560. This argument in support of Petitioner's directed verdict motions was inadequate and ineffective considering the fact that the totality of the evidence adduced at trial had completely failed to establish that Petitioner knowingly participated in anything that put her on notice that her co-defendants would ultimately commit far more serious crimes than the crime she knowingly agreed to assist them in committing.

There was a total lack of evidence, other than Hollins' improper definition of a street slang term a "lick", to suggest that Petitioner knew that weapons would be involved. Even that testimony spoke to *Hollins' understanding* of the street definition of that term, not Petitioner's own knowledge

of, or agreement with, that definition. Without any evidence to establish that Petitioner knew weapons might be involved, it is implausible for the State to argue that murder and armed robbery were foreseeable results of her assistance to the co-defendants. Petitioner was an inexperienced nineteen-year-old with no criminal history. She suggested the Victim as a potential target for some quick cash, however, the State did not demonstrate that Petitioner had any knowledge that her co-defendants would be armed. Therefore, there was no evidence that she was aware of facts from which she should have concluded that the victim's death was a foreseeable and probable consequence of her actions. Trial Counsel's brief argument in support of directed verdicts of acquittal for his client failed to highlight the State's failure to prove their case against Petitioner in a clear and organized fashion. In addition, Trial Counsel also failed to utilize another important item in his arguments supporting the motions for a directed verdict. One of the elements required to find a person liable as an accessory before the fact is that the person is *not present* at the scene of the crime. The record of Petitioner's trial confirms that Trial Counsel failed to argue this crucial point in support of his motions for directed verdicts of acquittal on behalf of Petitioner.

At trial it was established that Petitioner was present at her friend's apartment, where the Victim was initially attacked and grabbed by the co-defendants. The testimony of Petitioner's friend, and Petitioner's own statement, established this fact. App. Vol. I pps. 137-141 and App. Vol. II p. 547, l. 20-p. 548, l. 7. Since the evidence did not clearly establish where, if anywhere, an actual robbery occurred, it is possible that she was present during the alleged act of robbery. At the very least, it was established that Petitioner was present during one of the phases of the crimes that led to her accessory before the fact of armed robbery and murder charges. Most importantly, Trial Counsel could have argued that Petitioner was present when the only crime she *knowingly* aided and abetted, a robbery, was initiated. This critical fact, which negated one of the elements necessary to convict Petitioner on her charges, should have been argued in support of directed verdicts of

acquittal. This position initially seems counter productive inasmuch as it supports her being a principal. In truth, she *was not indicted as a principal* and therefore, was not at risk of being convicted as one at this trial.

At the evidentiary hearing, Appellate Counsel acknowledged that the evidence demonstrated that Petitioner was present for stages of the offenses. App. Vol. III p. 945, ll. 7-18. She verified that if Trial Counsel had presented this argument in his motions for a directed verdict, this issue would most likely have been included in the appellate brief as a meritorious ground for appeal. Unfortunately, she asserted, the issue was not preserved for appellate review. App. Vol. III p. 946, l. 19-p. 947, l. 17. Trial Counsel's failure to make this well-supported argument in favor of directed verdicts of acquittal *not only* damaged Petitioner's chances of the trial judge directing verdicts in her favor, but also eliminated any opportunity for appellate review of this issue as preserved error. On collateral review in state court, Petitioner met her burden of proof regarding these allegations concerning the ineffective manner in which Trial Counsel argued her motions for directed verdicts of acquittal.

GROUND FIVE:

Petitioner should have been granted relief in the state court where she established that Trial Counsel was ineffective for advising her that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments and further, where Trial Counsel was ineffective for advising her that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument.

Allegation 13, Amended Application for PCR

Allegation 13 A, amended application Allegation as Expanded During Her PCR Hearing.

SUPPORTING FACTS:

The record below establishes that these errors by Trial Counsel significantly prejudiced Petitioner in that it caused her to make a waiver of her right to be fully heard in her defense, as

protected by the Sixth and Fourteenth Amendments to the United States Constitution, which was not knowingly and voluntarily entered. When Trial Counsel realized that all co-defendants had lost their right to a final argument, he should have made this development clear to his client, who desired to testify on her own behalf. At Petitioner's PCR evidentiary hearing, Trial Counsel admitted that he probably did not advise Petitioner that she had already lost her right to a final argument, and therefore, that this factor should no longer be considered in making the decision about whether she wished to exercise her right to testify at her trial. App. Vol. III p. 1004, l. 12-p. 1005, l. 7. He affirmed the possibility that he told her, at a point earlier in the trial, that they could retain last arguments if they did not put up a defense. App. Vol. III p. 1003, ll. 3-12. As the PCR Court's Order acknowledged, when Trial Counsel was asked who made the decision for Petitioner not to testify, he expressly stated, "*probably it would have been mine.*" App. p. 1196, para. 2; App. p. 1017, ll. 2-4. Petitioner unequivocally testified that she was not aware when the right to last arguments was lost, and further, that her reluctant decision not to testify was based on her desire to preserve final arguments despite her attorney's threat that the prosecution would "eat [her] alive" on the stand. App. Vol. III p. 1040, l. 3-p. 1042, l. 13.

Trial Counsel testified that he did not want Petitioner to testify because it might come out that she knew one of her co-defendants, Manny, had two murder charges pending. App. Vol. III p. 1006, ll. 2-14. He went on to acknowledge, however, that there was no evidence Petitioner knew Manny other than having spoken to him once when Hollins handed Manny the phone during a call with Petitioner. App. Vol. III p. 1007, ll. 4-23. The explanation given by defense counsel for his advice to Applicant not to testify fails to explain why defense counsel could not have asked Petitioner what if anything she knew about Manny *in advance of this incident* before she was required to make a decision about testifying.

The testimony and evidence introduced on collateral review in state court established that

Trial Counsel was ineffective for not explaining to his client that she no longer had a right to final argument prior to resting her case without putting up a defense. In addition Petitioner argued below that Trial Counsel also erred in advising her that the prosecution would “eat her alive” if she testified, without any accompanying rationale. The record below supports this assertion where Trial Counsel admitted that Petitioner was an articulate 19-year-old woman without a criminal record that could be used for impeachment. App. Vol. III p. 1005, l. 8-p. 1006, l. 1. Petitioner testified at her PCR evidentiary hearing that she did not intend to challenge her statement to police, and that she was not afraid to testify in her defense. App. Vol. III p. 1040, l. 3-p. 1041, l. 15. Petitioner asserted that Trial Counsel was ineffective for failing to communicate to her that she had already lost her right to a final argument and thereby motivated her to give up her right to present a defense on the basis of a non-existent consideration. Petitioner could have testified at trial, as she did in her evidentiary hearing, as to her personal definition of a “lick” and her lack of knowledge that the Victim would be harmed in any way. Petitioner’s poised and articulate testimony at her PCR hearing demonstrated that she could have been an effective witness in her own defense at trial. App. Vol. III, p. 1034, l. 9 – p. 1053.

GROUND SIX:

Petitioner’s right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated in state court where Trial Counsel failed to request appropriate and necessary jury instructions on her behalf at trial and where he for failed to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of Petitioner , separate from their findings concerning the liability of each of her co-defendants.

Allegations 6, 7 and 8, Amended Application for PCR.

SUPPORTING FACTS:

On collateral review in the circuit court and on appeal, Petitioner asserted that the state court erred in denying her relief where the record below supports her assertion that she was significantly prejudiced by Trial Counsel's failure to request appropriate jury instructions in her case. She additionally argued that Trial Counsel was ineffective for failing to enter an appropriate objection to the charge as given by the trial court. The charge as given did not adequately convey to the jury the requirement that they apply *a separate* foreseeability analysis to determine the liability of Petitioner, independent from their findings concerning the liability of each of her co-defendants. Further, the record below would have supported her request for a jury instruction on the charge of accessory before the fact to *strong* armed robbery. The record below clearly supported Petitioner's claim that she was prejudiced by Trial Counsel's failure to research, and present the trial court with, an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. In addition, Petitioner met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of Petitioner, independent from their findings concerning the liability of each of her co-defendants. The record below also supported Petitioner's argument that she was significantly prejudiced by Trial Counsel's failure to enter an appropriate objection to the charge as given by the trial court.

Trial Counsel was correct in his determination that a strong arm robbery charge was more appropriate to the evidence presented at trial *regarding the plans of which Petitioner had knowledge*, than armed robbery, the offense charged to the principal actors. Where Trial Counsel erred was in his specific request for a jury charge on strong arm robbery. Since the charge against

his client was *accessory before the fact to armed robbery*, Trial Counsel should have requested a charge on *accessory before the fact to strong arm robbery*, not strong arm robbery. Trial Counsel presented the lack of evidence that his client was aware that weapons would be involved as his basis for requesting the additional charge. While one may be able to infer from the record the actual charge needed for Petitioner, it was crucial that Trial Counsel specifically request a charge on *accessory before the fact to strong arm robbery* and not just request an instruction on strong arm robbery. The lower court could not have issued a jury charge for a crime that the indictment against Petitioner would not sustain a conviction for. Further, by requesting a charge on the principal offense of strong armed robbery, Trial Counsel put the trial court in the position to rule that there was no evidence that the crimes committed by Petitioner's co-defendants were committed without the use of a weapon and therefore, that the requested charge on the offense of strong armed robbery was not appropriate. On the other hand, had the proper charge of *accessory before the fact to strong armed robbery* been requested, the trial court could have issued that instruction in a manner which eliminated any fear that the jury would apply it to the co-defendants who were not entitled to receive a jury instruction on this lesser included offense.

Counsel needed to draw the Court's attention to the fact that Petitioner's position differed greatly from that of her co-defendants, and that she was the only one charged as an accessory before the fact. It was his responsibility to emphasize the fact that his arguments for the additional charge were tailored to the lack of any evidence that *Petitioner knew* weapons would be involved, from her perspective as an *accessory*, rather than a principal actor. Trial Counsel's ineffectiveness in failing to specify that he was seeking an *accessory before the fact to strong arm robbery* charge prejudiced his client. The record of this trial demonstrates that the Court was obviously focused upon the crimes *actually* committed by her co-defendants as opposed to what the evidence demonstrated Petitioner had knowledge of. The Court, in denying the request, noted *that there was not any*

evidence that the robbery was, in fact, committed without weapons. App. Vol. II p. 603, ll. 12-17. This statement demonstrates that the Court was not properly focused on Petitioner's role in this robbery, as a result of Trial Counsel's failure to tailor his charge request to his client's charges. Absent the appropriate request to charge, the Court was understandably focused on what crime was ultimately committed. Trial Counsel did not make it clear that his client should be entitled to a lesser-included *charge regardless of whether her co-defendants were or not.* By failing to request the appropriate charge, he failed to make it possible for the trial court to give Petitioner the benefit of that charge without applying it to the co-defendants as well. Trial Counsel admitted in his PCR testimony that the correct request would have been for a charge on accessory before the fact of strong arm robbery. Trial Counsel stated that he hoped he would have mentioned that at some point in his argument, but notes that the whole strong arm robbery request was declined by the Court very quickly. App. Vol. III. p. 992, l. 15-p. 993, l. 1. His testimony fails to acknowledge that his failure to make the correct request to charge, resulted in an improper analysis of Petitioner's entitlement to such a charge by the trial judge.

Trial Counsel similarly failed in that he did not present, at the jury charge conference, any requests to charge that would have set forth the law of accomplice liability *as it specifically related to Petitioner and her charges of accessory before the fact.* He neglected to request a charge that would have instructed the jury that Petitioner could only be found guilty as an accessory before the fact for crimes that she *knowingly* aided and abetted the principals in the planning or committing *and/or* the commission of crimes that were the readily foreseeable consequence of acts she agreed to participate in. Such a charge by necessity should have instructed the jury that Petitioner's guilt as an accessory before the fact to murder and armed robbery had to be determined based upon *her knowledge* of the plan as distinguished from the knowledge of her co-defendants.

The trial transcript reflects that Trial Counsel began discussing an accomplice liability

instruction *for his client* with the Court, but once he was informed that the Court would give a standard accomplice liability instruction, he failed to press farther, and request a charge on accomplice liability specifically tailored to his client's alleged involvement in this case. App. Vol. II p. 605, l. 6-p. 606, l. 1. Counsel should have requested a charge which clearly instructed the jury that Petitioner could only be found guilty as an accessory before the fact for crimes which she *knowingly* aided and abetted the principals in the planning or committing *and/or* the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by her and her co-defendants.

Trial Counsel was also ineffective for neglecting to request a jury instruction which required the jury to apply a separate foreseeability analysis to determine the liability of Petitioner, apart from the findings made on the liability of each of her co-defendants who were charged as principals. This distinction was appropriate and necessary because the evidence adduced at trial demonstrated that what Petitioner knew about the plan significantly differed from the knowledge of her co-defendants. Put simply, Petitioner was entitled to have her guilt determined by what the jury concluded she should have foreseen as the readily foreseeable consequences of the acts she agreed to commit with her co-defendants. That determination properly required that the jury evaluate what was a "readily foreseeable consequence" based upon *Petitioner's knowledge* at the time of the crime not, the knowledge of her co-defendants.

GROUND SEVEN

Trial Counsel was ineffective for failing to make certain crucial closing arguments to the jury and for failing to object to inappropriate arguments made by the prosecution in the State's closing argument.

Allegations 10, 11 and 14, Amended Application for PCR

FACTS IN SUPPORT:

In her state collateral proceedings, Petitioner argued that Trial Counsel was ineffective for advising the jury in his closing argument that Petitioner *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including Petitioner's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes Petitioner was on trial for; specifically that she *was not present* during the commission of the principal offenses. In addition, Petitioner argued that Trial Counsel was ineffective for failing to specifically argue to the jury in closing that Petitioner could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her co-defendants. Petitioner met her burden of proof that her ability to receive a fair determination of her guilt by the jury was irreparably prejudiced at her trial due to these serious errors by Trial Counsel in his closing arguments to the jury.

Petitioner additionally argued that Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "*in the course of another felony, then his death is murder. End of story*". Petitioner demonstrated that Trial Counsel's failure to object to this improper argument prejudiced her at trial by permitting the State to confuse the jury concerning the elements of the crime of accessory before the fact to murder and resulted in a dilution of the State's burden of proof beyond a reasonable doubt.

Trial Counsel failed to utilize the fact that his client *was present* during some portions of the underlying offenses not only in directed verdict motions, but also in closing arguments. Had he recognized the significance of this fact to the State's case on the accessory offenses, Trial Counsel could have argued this point as a reason for the jury to acquit his client. Not only did Trial Counsel

fail to use this helpful fact, but he also argued against it. Trial Counsel stressed the fact that his client *was not present* at the scene of the crime in his closing arguments. App. Vol. II pp. 653-674. In doing so, he basically conceded one of the elements in the offenses his client was on trial for. Trial Counsel stated at the PCR hearing that he believed Petitioner was not present during the crimes for which she was actually prosecuted. In support of this assertion he opined that if she had been present, she would have been charged as a principal. App. Vol. III p. 984, l. 25-p. 985, l. 17. This assumption did not justify Trial Counsel's failure to make appropriate arguments *at trial* since Petitioner was only indicted as an accessory before the fact. At trial, there was no danger of her being convicted as a principal on the indictments as true billed. Trial Counsel clearly argued *against* Petitioner's best interests by arguing that she was not present during portions of these crimes.

During the State's closing arguments, a statement was made referencing the felony-murder doctrine in a manner that was wholly inconsistent with South Carolina law. The Solicitor informed the jury that any time a victim is killed "*in the course of another felony, then his death is murder. End of story.*" App. Vol. II p. 693, ll. 16-20. Trial Counsel did not object to this statement. This statement should have been objected to on the basis that it was inconsistent with prevailing law in South Carolina concerning the permissible inference which may arise when a killing occurs during the commission of another felony. The prejudice from this statement is obvious. Strong armed robbery or common law robbery is a felony in South Carolina. Therefore, if followed by Petitioner's jury, this erroneous statement of the law could have resulted in a conviction for *accessory before the fact* of murder even the jury believed Petitioner only knew about and participated in an *unarmed* robbery. Under South Carolina law, an inference of malice may arise from the use of a deadly weapon, but the law does not provide that one is instantly liable for murder because a killing occurred during the commission of *any felony*.

Appellate counsel testified that she recognized, and marked in her notes, that the State's comment portrayed an improper malice instruction. App. Vol. III p. 940, ll. 7-20. She stated that they likely would have presented that issue on appeal, if it had been objected to and the objection overruled. App. Vol. III p. 941, ll. 5-9. Trial Counsel also acknowledged that this comment was not a correct statement of law. App. Vol. III p. 998, ll. 4-20. He further conceded that the statement was prejudicial to Petitioner and stated that given another chance, he would have objected to the comment. App. Vol. III p. 998, l. 21-p. 999, l. 6.

The State Court's denial of relief on the basis of these errors was grossly improper and should be corrected by this Honorable Court.

GROUND EIGHT.

Failure of Trial Counsel to argue in opening statements that murder was not a foreseeable consequence of any agreement entered into between Petitioner and her co-defendants.

Allegation 9, Amended Application for PCR.

FACTS IN SUPPORT:

Petitioner argued in her PCR action that Trial Counsel failed to clearly and concisely state in opening arguments the reasons why Petitioner could not be found guilty as an accessory before the fact to murder, when the murder was not a foreseeable result of the plan in which she was involved. Trial Counsel did argue that the jury would have to find that the armed robbery was a foreseeable consequence of the plans in which she was involved, but he failed to make the logical extension of that argument to the accessory before the fact of murder charge. App. Vol. I, p. 125, l. 3- p. 126, l. 12. In his PCR testimony, Trial Counsel noted that he did not argue that the murder was not foreseeable in his opening arguments, and stated that he was "*hoping not to over-emphasize.*" App. Vol. III p. 978, l. 22- p. 979, l. 6. He stated that he believed the State's strongest case to be on the

accessory before the fact of armed robbery charge, but that he hoped the murder would seem to be an even less foreseeable result. Trial Counsel admitted, however, that if he had the opportunity to do it over again, he would have included some argument pertaining to the accessory before murder charge in his opening arguments. App. Vol. III. p. 979, ll. 7-20.

Trial Counsel did not provide a valid strategic reason for mentioning one charge as opposed to both charges. Petitioner asserts that the state court erred in failing to grant her relief on this ground in addition to the others addressed in this petition.

GROUND NINE.

Ineffective Assistance of Counsel on Direct Appeal.

Allegations 15 and 17, Amended Application for PCR

FACTS IN SUPPORT:

Petitioner asserted below that Appellate counsel failed to raise two meritorious issues in the her direct appeal: 1) that the lower court erred by denying Petitioner's directed verdict motions on all charges and 2) that the lower court erred by charging to the jury that the State would only have to prove that Petitioner aided and abetted another person "*to commit a crime*".

At Petitioner's PCR evidentiary hearing, Petitioner's appellate attorney acknowledged that if the transcript demonstrated that there was no direct or circumstantial evidence substantiating that Petitioner knew that weapons would be involved, then the issue of the denial of Petitioner's directed verdict motion on the accessory before armed robbery charge would have been a strong one. App. Vol. III p. 932, l. 23-p. 933, l. 4. Appellate counsel likewise acknowledged that if there were no evidence, direct or circumstantial, that there had been any discussion that the Victim would be

harm in any way, then the issue of the denial of Petitioner's directed verdict motion on the accessory before murder charge would also have been a strong one. App. Vol. III. p. 933, ll. 11-21. Appellate counsel could not recall why the issue of the denial of the directed verdict motions was not presented, but she believed it was due to a determination that it was not one of the strongest issues. App. Vol. III. p. 929, l. 12-p. 930, l. 23.

During trial, Trial Counsel objected to language in the jury instructions stating that "the State must prove beyond a reasonable doubt that the defendant, Marquita Smith, either advised, agreed, urged, counseled, hired, or in some way aided and abetted—aided or abetted another person to commit *a crime*..." App. Vol. II p. 718, ll. 5-9. Trial Counsel challenged the language "*a crime*" and maintained that the instruction might be read to mean that she could be found guilty as an accessory on the basis of *any crime* that she participated in the commission of, rather than the crimes she was actually charged with; accessory before the fact, armed robbery and murder. App. Vol. II p. 733, l. 17-p. 744, l. 23. This objection was noted and overruled by the Judge, who stated that the language was "self-explanatory." App. Vol. II p. 734, l. 15-p. 735, l. 10.

Appellate counsel acknowledged that this issue was not raised on direct appeal and further admitted, in the evidentiary hearing, that there was a "*valid argument*" that the language of that charge combined with Trial Counsel's earlier admission that his client had a role in these events, might imply that Petitioner was liable for any offenses that occurred that night, based on her commission of "*a crime*." App. Vol. III. p. 939, l. 16-p. 940, l. 6. In closing arguments, Trial Counsel basically conceded that his client committed a bad act and should be held accountable; that she had done something "*horrible*" and "*wrong*" in volunteering the Victim. Of course, Trial Counsel followed up by maintaining that her actions did not amount to murder or armed robbery. He *did not* explain why her actions would not support the crimes she was charged with. App. Vol. II pp. 653-674.

Appellate Attorney Blanchette testified that she and Attorney Thomas considered briefing trial counsel's objection to the portion of the lower court's jury charge that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime" and decided not to raise the issue. The record is void, however, of any explanation for that decision save a vague implication that they agreed with what the lower court said about the instruction in response to trial counsel's objection. App. Vol. III p. 938, l. 12- p. 939, l. 7. After further questioning concerning this issue, Attorney Blanchette agreed with the Applicant's position that the charge as given created a danger that the jury would find her guilty of the indicted offenses if they concluded, as defense counsel admitted in opening arguments, that the Applicant assisted her co-defendants in the commission of "*a crime*" as opposed to the specific crimes of armed robbery and murder. App. Vol. III p. 939, l. 16- p. 940, l. 2. Despite this concession, Attorney Blanchette offered no explanation for the decision not to present this issue on direct appeal. App. Vol. III p. 940, ll. 2-6. The prejudice in this instance is apparent where these meritorious issues not presented to the Appellate Court in Petitioner's direct appeal were at least as strong, if not stronger, than the issues presented on direct appeal and, therefore, their submission on appeal would likely have changed the outcome of Petitioner's direct appeal. On collateral review, Petitioner argued that the issues in question were as strong, if not stronger, than the issues which were presented in Petitioner's direct appeal. The state court erred in declining to find that appellate counsel was ineffective for failing to raise these two meritorious issues which were preserved for appellate review at trial.

GROUND TEN

The Supreme Court of South Carolina violated Petitioner's equal protection and due process rights, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, when it denied her the opportunity to file a Petition for Writ of Certiorari to the South Carolina Court of Appeals.

SUPPORTING FACTS:

Following the South Carolina Court of Appeals' denial of certiorari on July 23, 2014, Petitioner filed a Petition for Rehearing and Rehearing *En Banc* in the Court of Appeals on August 6, 2014. Rehearing was denied on September 18, 2014. Petitioner next filed a Petition for Leave to File Petition for Writ of Certiorari to the South Carolina Court of Appeals in the Supreme Court of South Carolina. Said petition was served on opposing counsel by mail and sent to the Supreme Court for filing under the time limits set by Rule 242 (c), SCRAP, on October 20, 2014. Inasmuch as the thirty days for filing pursuant to Rule 242 (c) ran on October 18, which was a Saturday, this Petition was timely filed when mailed for filing on the following Monday, October 20, 2014. Rules 262 (a) (2) and 263 (a), SCRAP. This petition was denied by the Supreme Court of South Carolina on December 4, 2014. Under the South Carolina Appellate Court Rules, all Post-Conviction Relief appeals are filed in the Supreme Court of South Carolina. Rule 243 (a), SCACR. The Supreme Court of South Carolina may transfer any PCR appeal to the South Carolina Court of Appeals pursuant to Rule 243 (l), SCACR. Under that provision, any review of a final decision of the South Carolina Court of Appeals shall be by Petition for Writ of Certiorari pursuant under Rule 242, SCACR.

In practice, some PCR appeals are transferred to the Court of Appeals while others are not. The South Carolina Rules of Appellate Procedure have not been changed to send all PCR appeals to the Court of Appeals. The Supreme Court of South Carolina has ruled that it will not review the actions of the South Carolina Court of Appeals in denying Certiorari in a PCR appeal where that decision is entered by way of a short form Certiorari denial order or letter. *Ellison v. State*, 382 S.C. 189, 676 S.E.2d 671 (2009); *Missouri v. State*, 378 S.C. 594, 663 S.E.2d 480 (2008); *Haggins v. State*, 377 S.C. 135, 659 S.E.2d 170 (2008). The practical effect of Haggins is to randomly cut off access to review by the highest state court for some PCR applicants. The

Supreme Court of South Carolina reverses the decisions of the South Carolina Court of Appeals on a fairly regular basis. This restriction on review of South Carolina Court of Appeals rulings in PCR matters, unconstitutionally deprives an arbitrarily selected group of individuals the same right enjoyed by others identically situated, to review by the highest court in the State. Petitioner would further submit that this restriction discourages the South Carolina Court of Appeals from issuing full opinions in PCR appeals. To put it plainly, by denying Certiorari and avoiding issuing an appellate decision providing the legal analysis and authorities relied upon in denying relief, the South Carolina Court of Appeals can make its judgment in these matters immune from review by the highest court in the state. Petitioner asserts this restriction is unconstitutional and should be addressed by this Honorable Court.

(b) If you did not exhaust your state remedies on Ground Five, explain why:

Following the denial of the Petition for Writ of Certiorari by the South Carolina Court of Appeals on July 23, 2014, Petitioner filed her Petition for Rehearing and Rehearing *En Banc* in the South Carolina Court of Appeals on August 6, 2014. South Carolina Court of Appeals denied those Petitions on September 18, 2014. Petitioner subsequently filed her Petition for Leave to File Petition for Writ of Certiorari to the South Carolina Courts of Appeals with the Supreme Court of South Carolina. Said Petition was timely served and placed in the U. S. Mail for filing on October 20, 2014 inasmuch as the deadline for filing in the Supreme Court of South Carolina fell on Saturday, October 18, 2014. In said Petition she presented the same ground advanced herein. Her Petition for Leave to File Petition for Writ of Certiorari to the South Carolina Court of Appeals was denied by Order of the Supreme Court of South Carolina filed December 4, 2014.

Questions c, d, and e

Responses the same as for Grounds 1-9.

Answer to Question 18 re: Timeliness of Petition:

Sentenced August 30, 2007.

South Carolina Court of Appeals Direct Appeal decision on March 24, 2010.

Petition for Rehearing and Petition for Rehearing *En Banc* dated April 1, 2010.

Orders denying Petition for Rehearing and Rehearing *En Banc* June 4, 2010.

Petitioner had 30 days until July 4, 2010, to file Petition for Writ of Certiorari in the Supreme Court of South Carolina.

Application for Post-Conviction Relief filed in the Court of Common Pleas August 24, 2010; Docket No. 2010-CP-08-2985.

July 4, 2010 to August 24, 2010 = 51 days

Order of Dismissal on 2010-CP-08-2985 February 1, 2012.

Rule 59 (e) Motion to Alter or Amend, SCRCP, February 16, 2012.

Amended Order of Dismissal filed April 19, 2012.

Application for Post-Conviction Relief requesting belated PCR appeal on 2010-CP-08-2985 pursuant to *Austin v. State* 305 S.C. 453, 409 S.E. 2d 395 (1991) docketed at 2012-CP-08-1994 July 10, 2012. (Filing date for Notice of Appeal missed when paralegal failed to enter Amended Order as ruling on 59(e) motion.

Amended Order of Dismissal, April 19, 2012- filing of second PCR for *Austin* Review, July 10, 2012 = 82 days

Consent Order granting belated Post-Conviction Relief appeal pursuant to *Austin* filed July 23, 2012.

Order of the South Carolina Court of Appeals denying Certiorari issued July 23, 2014.

Petition for Rehearing and Rehearing *En Banc* August 6, 2014.

Order of the South Carolina Court of Appeals denying Petition for Rehearing and Rehearing *En*

Banc September 18, 2014.

Petition for Leave to File Petition for Writ of Certiorari to the South Carolina Court of Appeals filed October 24, 2014.

Petition denied by Supreme Court of South Carolina on December 4, 2014.

Remittitur issued by South Carolina Court of Appeals on January 5, 2015.

Time between finality on Direct Appeal and filing of PCR

= 51 days

Time between Amended Order of Dismissal on PCR, April 19, 2012 and filing of PCR for *Austin* Review

= 82 days

Time between Remittitur from South Carolina Court of Appeals filing last action on PCR case, January 5, 2015 and filing date of Habeas Petition pursuant 28 U.S.C. § 2254

= 143 days

276 days

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Marquita Smith #323834,	)	C/A No. 8:15-2165-RMG-JDA
	)	
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
Warden Marian Boulware,	)	
	)	
Respondent.	)	

This is an action seeking habeas corpus relief under 28 U.S.C. § 2254. Petitioner is represented by counsel. Under Local Civil Rule 73.02(B)(2)(c) of the United States District Court for the District of South Carolina, pretrial proceedings in this action have been referred to the assigned United States Magistrate Judge.

PAYMENT OF THE FILING FEE:

Petitioner has paid the filing fee. [See Doc. 1.]

TO THE CLERK OF COURT:

The Clerk of Court shall serve the 28 U.S.C. § 2254 Petition [Doc. 1] and this Order upon Respondent. Rule 4 of the Rules Governing Section 2254 Cases also requires service on "the attorney general or other appropriate officer of the state." The Attorney General of the State of South Carolina and the General Counsel of the South Carolina Department of Corrections shall each receive copies of this Order and the 28 U.S.C. § 2254 Petition through the Electronic Case Filing System.

TO RESPONDENT:

Respondent shall file an answer or other response to the Petition as soon as reasonably possible but no later than **fifty (50) days** from the date of service. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, applicable to § 2241 habeas petitions through Rule 1(b), requires that "the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order" for petitions that are not dismissed upon initial review. See *Wyant v. Edwards*, 952 F. Supp. 348 (S.D.W. Va. 1997) (court has discretionary authority to fix time for response to habeas corpus petition). As a courtesy to the Court, please identify any pages missing from relevant portions of the state court record submitted in response to the petition and advise (1) whether an attempt has been made to locate the missing pages, and (2) the result of the attempt to locate. See Rule 5, Rules Governing Section 2254 Cases in the U.S. District Courts.

Respondent shall file all dispositive motions no later than **forty-five (45) days** after the answer is filed. With respect to dispositive motions by Respondent, this Order shall serve as a scheduling order.

IT IS SO ORDERED.

s/Jacquelyn D. Austin
United States Magistrate Judge

June 1, 2015
Greenville, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Marquita Smith, #323834,	)	C/A No. 8:15-2165-RMG-JDA
	)	
Petitioner,	)	
	)	
vs.	)	MOTION FOR SUMMARY JUDGMENT
	)	
Warden Marian Boulware,	)	
	)	
Respondent.	)	

The Respondent, above-named, by and through the undersigned attorneys, would respectfully move this Court, pursuant to Rule 56(b) F.R.C.P., for summary judgment based on the pleadings.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
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By: s/William Edgar Salter, III
ATTORNEYS FOR RESPONDENTS

September 23, 2015.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Marquita Smith, #323834,	)	C/A No. 8:15-2165-RMG-JDA
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
Warden Marian Boulware,	)	RETURN AND MEMORANDUM
	)	OF LAW IN SUPPORT OF MOTION
	)	FOR SUMMARY JUDGMENT
Respondent.	)	
	)	

Respondent hereby makes Return to the June 1, 2015 Rule to Show Cause filed by the Honorable Jacquelyn D. Austin, United States Magistrate Judge, and responds to the fifteen allegations in the Petition for Writ of Habeas Corpus prepared with the assistance of collateral counsel, Tara Dawn Shurling, Esquire. Respondent is entitled to summary judgment on her Ground One (A) because she procedurally defaulted on this claim in State court. Respondent is entitled to judgment on the remaining claims because Petitioner cannot meet her burden of proof under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Also, Petitioner has attempted to assert a curative error or cumulative prejudice analysis, which is contrary to Fourth Circuit Court of Appeals precedent. Respondent hereby makes the following showing unto this Court:

I. PROCEDURAL HISTORY

Petitioner, Marquita Smith, #323834 (Petitioner), is presently confined in the Graham Correctional Institution, of the South Carolina Department of Corrections (SCDC), as the result of her Berkeley County, South Carolina, convictions and sentence. The Berkeley County Grand Jury indicted her in August 2007 for accessory before the fact of a felony (murder) (2007-GS-08-

1748, **App. pp. 782-83**); accessory before the fact of a felony (burglary in the first degree) (07-GS-08-1749, **App. pp. 784-85**); accessory before the fact of a felony (kidnapping) (07-GS-08-1750, **App. pp. 786-87**); and accessory before the fact of a felony (armed robbery) (07-GS-08-1751, **App. pp. 788-89**). V. Craig Jones, Jr., Esquire, represented her in the trial court.

These charges arose from Smith's plot to rob her cousin, Dexter Perry. Kerry Hollins, Gary Grant, Kareem King and Jermaine Hartwell were also charged with various crimes, in connection with the case. Michael Tommy Bolus, Esquire, represented Grant; and N. Elliott Barnwell, Esquire, represented Hartwell. Ninth Circuit Solicitor Scarlett A. Wilson and Deputy Solicitor Blair Jennings prosecuted the case.

On August 27-30, 2007, Petitioner and co-defendants Grant and Hartwell were jointly tried before a jury, with the Honorable Deadra L. Jefferson presiding. The State tried Petitioner on the charges of accessory before the fact of murder and accessory before the fact of armed robbery. The State tried Grant for armed robbery (07-GS-08-314); four counts of kidnapping (07-GS-08-314 through -318); murder (07-GS-08-319); and two counts of burglary in the first degree (07-GS-08-342 & -345). The State tried Hartwell for two counts of burglary in the first degree (07-GS-08-343 & -347); four counts of kidnapping (07-GS-08-308 through -311); murder (07-GS-08-312); and armed robbery (07-GS-08-313).

Judge Jefferson denied Petitioner's pretrial motions for a continuance and for a severance. *See Ground One*. The jury convicted Petitioner, as charged, and Judge Jefferson sentenced her to concurrent terms of thirty years imprisonment for each offense. Grant and Hartwell were also convicted as charged. Grant received a life sentence for murder and concurrent thirty year sentences for the remaining convictions. Hartwell received concurrent thirty year sentences for each conviction. **App. pp. 1-780; 790-91.**

Petitioner timely served and filed a notice of appeal. Tommy Thomas, Esquire, and Tricia A. Blanchette, Esquire, represented her on direct appeal. On December 31, 2008, Petitioner (with the assistance of counsel) filed a Brief of Appellant, in which she presented the following issues:

1. Whether the lower court erred by denying the Appellant's motion for a continuance.
2. Whether the lower court erred by denying the Appellant's motion for a severance and a separate trial.

App. pp. 798-814. The State, represented by the undersigned, filed a Final Brief of Respondent on February 17, 2009. **App. pp. 814-42.**

On March 24, 2010, the South Carolina Court of Appeals filed an Opinion affirming her convictions and sentence. *State v. Marquita Smith*, Op. No. 4662 (S.C. Ct. App. filed March 24, 2010). **App. pp. 843-48.** This decision was published as *State v. Smith*, 387 S.C. 619, 693 S.E.2d 415 (Ct. App. 2010). Petitioner filed a timely Petition for Rehearing and Rehearing *En Banc*. **App. pp. 849-53.** At the Court's direction, the State made a Return to Petition for Rehearing. **App. pp. 854-64.**

The Court of Appeals filed two Orders denying the petition for rehearing and rehearing en banc on June 4, 2010. **App. pp. 865-67.** It sent the Remittitur to the Berkeley County Clerk of Court on July 13, 2010. **App. p. 868.**

Petitioner filed a *pro se* Post-Conviction Relief (PCR) Application (2010-CP-08-2985) on August 24, 2010. **App. pp. 869-75.** She raised the following allegations in her Application:

- 10(a). "The Applicant received ineffective assistance of counsel prior and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I. Section 14 of the South Carolina Constitution:
- 11(a). " Trial counsel failed to provide the Applicant effective assistance of counsel prior to and during her trial proceeding, inasmuch as

counsel failed to recognize errors which occurred during her trial and failed to make appropriate objections with supporting legal arguments relating thereto. Counsel's failure to make these objections may have changed the outcome of the Applicant's trial and deprived her of the opportunity to have these issues addressed on their merits on direct appeal.

- (b). " Trial counsel failed to conduct a sufficient investigation into the Applicant's factual circumstances and failed to present witnesses who would testify favorably on the Applicant's behalf at trial.
 - (c). Appellate counsel failed to present all potentially meritorious issues on direct appeal to the South Carolina Court of Appeals."
- 10(b). "The judgments and sentences against the Applicant were entered in violation of her rights to the due process of law and to the effective assistance of counsel."
- 10(c). "The Applicant received ineffective assistance of counsel on direct appeal in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution."

App. pp. 869-75. The State filed its Return on February 4, 2011. **App. pp. 883-88.**

With the assistance of collateral counsel, Tara Dawn Shurling, Esquire, Petitioner filed an Amended Application for Post-Conviction Relief on November 17, 2011. She raised the following claims in the Amended Application:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery.
2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery.
3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her codefendants would ultimately commit heinous crimes far beyond the

scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her.

4. Trial Counsel was ineffective for failing to folly present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact.
5. Trial Counsel was ineffective for failing to folly present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges.
6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery.
7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing and/or the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties.
8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her codefendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit.
9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder.

10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant was not present during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she was not present during the commission of the principal offenses.
11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants.
12. Trial counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine codefendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense.
13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments.
14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story."
15. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit.
16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.
17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime," thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing any crime would make her mutually liable for all

the acts committed by her co-defendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

App. pp. 879-82.

Collateral counsel, Ms. Shurling, filed a second Amended Application for Post-Conviction Relief on January 13, 2012, in which she raised the following allegations:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery.
2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery.
3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her codefendants would ultimately commit heinous crimes far beyond the scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her.
4. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact.
5. Trial Counsel was ineffective for failing to fully present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges.
6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery.

7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing and/or the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties.
8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her codefendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit.
9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder.
10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant was not present during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she was not present during the commission of the principal offenses.
11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants.
12. Trial counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine codefendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense.
13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments.

14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story."
15. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit.
16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.
17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime," thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing any crime would make her mutually liable for all the acts committed by her co-defendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

App. pp. 876-78.

The Honorable Kristi L. Harrington held an evidentiary hearing into these claims on November 17, 2011 at the Charleston County Courthouse. Petitioner was present at the hearing and Ms. Shurling represented her. Assistant Attorney General Matthew J. Friedman represented the State. Petitioner testified on her own behalf at the hearing. She also presented testimony from trial counsel, Mr. Jones, appellate counsel, Ms. Blanchette, and her co-defendant Kerry Hollins.

App. pp. 916-1058.

Ms. Shurling filed a Memorandum of Law in Support of Application for Post-Conviction Relief on Petitioner's behalf, which was dated January 3, 2012. **App pp. 1060-89.** She also filed a Motion to Supplement Post-Conviction Relief Record on January 20, 2012. This motion, to

which the State consented, augmented the record by including copies of trial counsel's pretrial motions under Rule 5, SCRCrim.P., and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). **App pp. 1090-99.**

Judge Harrington denied relief and dismissed the Application with prejudice in an Order of Dismissal filed on February 1, 2012. The Order of Dismissal addressed Petitioner's claims that trial counsel was ineffective for: (1) failing to object when the State elicited testimony that a "lick" meant an armed robbery; (2) not making a proper direct verdict motion; (3) not making a proper motion for severance; (4) failing to request a jury charge on accessory before the fact to strong arm robbery; (5) failing to object to the trial court's jury instructions on accomplice liability and foreseeability; (6) failing to make a proper opening argument; (7) telling the jury in closing argument that Petitioner was not present for the principal offenses; (8) failing to properly cross-examine Petitioner's co-defendant, Kerry Hollins; (9) failing to discuss last argument with Petitioner or advising her that she would preserve last argument by not testifying; (10) failing to object to the State's comment during closing argument that any time a victim is killed "in the course of another felony, then his death is murder. End of story;" and (11) failing to raise a *Brady* motion regarding Kerry Hollins' statement. The Order also addressed Petitioner's claims that appellate counsel was ineffective for failing to brief: (1) the issue of the lower court's failure to grant directed verdicts of acquittal on all counts; (2) the lower court's failure to grant a jury charge on strong arm robbery as a lesser included offense of armed robbery; and (3) the lower court's charge to the jury that the State would only have to prove that Petitioner aided and abetted another person "to commit a crime." **App. pp. 1100-17.**

On February 16, 2012, Petitioner filed a Motion to Alter or Amend under Rule 59(e), SCRCP. **App. pp. 1118-26.** Respondent submitted a Return and Motion to Dismiss the Motion

to Alter and Amend on February 27, 2012. **App. pp. 1127-29.** Both parties also submitted proposed Order for Judge Harrington's review. **App. pp. 1130-59** (Petitioner's proposed Order); **1161-80** (State's proposed Order).

Judge Harrington filed an Amended Order of Dismissal on April 19, 2012. Her Amended Order addressed the same allegations that she had addressed in the original Order of Dismissal, as well as Petitioner's claim that counsel was ineffective for not submitting a proposed request-to-charge on the law as it pertains to charges of accessory before the fact. **App. pp. 1181-1200.**

Petitioner filed a second PCR Application on July 10, 2012 (2012-CP-08-1994). The only issue that Petitioner raised in her 2012 Application was that PCR counsel was ineffective in failing to perfect an appeal from the Amended Order of Dismissal. **App. pp. 1201-06.** In an Order filed by Judge Jefferson on July 23, 2012, Petitioner and Respondent consented to belated review of the Petitioner's previous PCR, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) (setting forth the procedure to follow when a PCR applicant alleges that prior PCR counsel was ineffective in failing to perfect an appeal from an Order denying relief). **App. pp. 1201-06.**

Petitioner timely served and filed a notice of appeal. Ms. Shurling continued to represent her in collateral appellate proceedings. On January 23, 2013, Petitioner (with the assistance of Ms. Shurling) filed a Petition for Writ of Certiorari. She presented twenty issues on certiorari:

1. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery and where she was clearly prejudiced by this error by Trial Counsel?
2. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial

Counsel was ineffective for neglecting to make a motion for a mistrial, and/or for failing to make a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery and where the record below supports her contention that she was prejudiced by Trial Counsel's failure to do so?

3. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for failing to fully present arguments and authority in favor of her Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Petitioner knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the Petitioner's knowledge and involvement and which were not readily foreseeable by her and where the record demonstrated that she was clearly prejudiced by this error both at trial and in her subsequent direct appeal?
4. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to fully present arguments and authority in favor of her Motions for Directed Verdicts where the evidence adduced at trial, including the Petitioner's own statement, established that she was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact to and where the record establishes that this failure by Trial Counsel prejudiced the Petitioner both at trial and in her subsequent direct appeal?
5. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to fully present available arguments supporting her motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Petitioner was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Petitioner's charges and where the record below supports her contention that she was prejudiced by Trial Counsel's omissions in this regard?
6. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to specifically request a jury instruction on the charge of accessory before the fact to strong armed robbery and where the record before the lower court supported her claim that she was prejudiced by Trial Counsel's failure to do so?

7. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to research, and present the trial court with, an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact and where the record below supported her contention that Trial Counsel's failure in this regard prejudiced her ability to receive a fair trial.
8. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of the Petitioner, separate from their findings concerning the liability of each of her co-defendants, and where the record below supports her assertion that she was significantly prejudiced by Trial Counsel's failure to enter an appropriate objection to the charge as given by the trial court.
9. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her assertion that Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Petitioner could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder and where she demonstrated to the lower court that she was prejudiced by this omission?
10. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for advising the jury in his closing argument that the Petitioner was not present during the principal offenses where said position was contrary to the evidence adduced at trial, including the Petitioner's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Petitioner was on trial for; specifically that she was not present during the commission of the principal offenses and thereby irreparably prejudiced her ability to receive a fair determination of her guilt by the jury at her trial?
11. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Petitioner could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by

her codefendants and where the record below supported her claim that Trial Counsel's missed opportunity prejudiced the Petitioner at trial.

12. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel failed to provide the Petitioner with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby prejudiced her at trial by failing to elicit testimony from him which would have been extremely favorable to the defense.
13. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for advising the Petitioner that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments and where the record below establishes that this error by Trial Counsel significantly prejudiced the Petitioner in that it caused her to make a waiver of her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina Constitution, which was not knowingly and voluntarily entered?
- 13A. Did the lower court err in denying the Petitioner post-conviction relief based on her allegation that Trial Counsel was ineffective for advising her that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument where she meet her burden of proof with regard to her claim that Trial Counsel's [advice] was erroneous and caused her to make an unintelligent decision not to testify at her trial thereby violating her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina Constitution[?]
14. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story" and where she demonstrated that Trial Counsel's failure to object to this improper argument prejudiced her at trial by permitting the State to confuse the jury concerning the elements of the crime of accessory before the fact to murder and to dilute its burden of proof beyond a reasonable doubt?

15. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Petitioner's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit and where this issue would have been at least as strong, if not stronger, than the issues presented on direct appeal?
16. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Ann Robbery as a lesser included offense of Armed Robbery.
17. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel failed to provide the Petitioner with effective assistance of counsel inasmuch as she failed to brief the meritorious issue of the lower court's charge to the jury that the State would only have to prove that the Petitioner aided and abetted another person "to commit a crime," and where this issue would have been at least as strong on direct appeal as the issues presented on appeal.
18. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation, developed during her evidentiary hearing, that Trial Counsel was ineffective for failing to effectively argue a Rule 5, SCRCrimP, violation in his motion for a continuance and severance, where the State did not disclose a statement given by a co-defendant that had agreed to cooperate and be a witness for the prosecution at the Petitioner's trial.
19. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to interview a co-defendant who turned State's witness very shortly prior to trial, or in the alternative, for failing to request a brief recess or continuance to do so and where she presented evidence which supported her claim that she was significantly prejudiced by Trial Counsel's failure to do so?

On July 23, 2014, the South Carolina Court of Appeals filed an Order in which the Court

(1) granted the Petition for a Writ of Certiorari for *Austin* review; (2) conducted an *Austin* review

of Judge Harrington's Order; and (3) denied the Petition for Writ of Certiorari from Judge Harrington's Order. Petitioner filed a Petition for Rehearing, but the Court of Appeals denied her petition on September 18, 2014.

On October 20, 2014, Petitioner filed a Petition for Leave to File a Petition for Writ of Certiorari to the South Carolina Court of Appeals in the South Carolina Supreme Court. Respondent made its Return to her Petition on November 10, 2014. On December 4, 2014, the South Carolina Supreme Court filed an Order denying her motion. The Court of Appeals sent the Remittitur to the Berkeley County Clerk of Court on January 05, 2015.

Respondent attaches the following documents to this Return and incorporates these documents by reference:

1. Appendix, The Honorable Kristy L. Harrington, Circuit Court Judge¹;
2. Notice of Appeal dated September 7, 2007;
3. Notice of Appeal dated August 6, 2012;
4. Petition for Writ of Certiorari dated January 23, 2013;
5. South Carolina Court of Appeals' Order dated July 23, 2014;
6. Petition for Rehearing and Request for Rehearing *En Banc* dated August 6, 2014;
7. South Carolina Court of Appeals' Order denying Petition for Rehearing dated September 18, 2014;
8. Petition for Leave to File Petition for Writ of Certiorari dated October 20, 2014;
9. Return to Petition for Leave to File dated November 10, 2014;
10. South Carolina Supreme Court Order dated December 4, 2014;
11. Remittitur dated January 5, 2015; and
12. Page 401 from the Transcript of Record – August 27-30, 2007².

II. ALLEGATIONS

¹ The pages in the Appendix which are attached to this Return were received by the Attorney General's Office in this condition, and cannot be made more legible. Also, all handwritten markings in the Appendix were done before the undersigned obtained a copy of the Appendix.

² Page 401 from the Transcript of Record – August 27, 20, 2007 has been attached to this Return as it was inadvertently not included in the Appendix.

Petitioner raises the following allegations in his *pro se* Petition for Writ of Habeas Corpus:

GROUND ONE:

The State Court erred in failing to find that Petitioner received ineffective assistance of counsel, in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where [A] she demonstrated that she was prejudiced by Trial Counsel's Failure to Adequately Argue Petitioner's Pre-Trial Motions for a Severance and [B] Continuance and his failure to seek a recess to interview co-defendant Hollins when a Continuance was denied.

SUPPORTING FACTS:

[A]-[B]: Trial Counsel made a motion for a continuance at the onset of Petitioner's trial, indicating that he received notice of the scheduled trial date only ten (10) days in advance. Counsel informed the judge that he had just discovered, the Thursday prior to trial, that a former co-defendant would be testifying against his client and that there was a previously undisclosed statement from that witness. App. Vol. I p. 11, l. 5-p. 13, l. 10. He additionally argued that he had not had adequate time to secure the attendance of two parties that he felt to be necessary witnesses in Petitioner's defense. App. Vol. I p. 22, l. 19-p. 24, l. 4.

In addition to the request for a continuance, Trial Counsel also presented a motion for a severance, supported by the argument that he could not adequately highlight the disparity in culpability between co-defendants with extensive criminal backgrounds and his own client's clean record, if their prosecutions were not severed. App. Vol. I p. 14, l. 2-p. 15, l. 12. Counsel additionally argued that his last-minute notice of the fact that Hollins would be a witness for the State, deprived him of the opportunity to prepare to adequately refute Hollins' anticipated testimony that his client was the mastermind behind this entire plan. App. Vol. I p. 16, l. 25-p. 17, l. 5. What Trial Counsel failed to cover in his argument for a severance was the reality that jury instructions issued in a joint trial of Petitioner and her co-defendants would inevitably be very cumbersome and complex. He failed to argue that the Applicant's joint trial with her co-defendants would result in her inability to have a jury that was adequately and

clearly charged on the difference between the findings necessary for her conviction as opposed to those required to convict her codefendants.

The instructions necessary at a joint trial needed to adequately explain the different findings required for the jury to determine the co-defendant's guilt on their charges of armed robbery and murder charges *versus* those necessary for verdicts on Petitioner's charges of *accessory before the fact* of armed robbery and murder. The required instructions would necessarily have to thoroughly explain the theory of accomplice liability as it applied to Petitioner's accessory charges versus the principal offenses the co-defendants were charged with. Trial Counsel should have argued that there was a real possibility that a jury would be confused by the complicated legal differentiation between the standard to be applied to Petitioner as opposed to that necessary to convict her co-defendants. He should have argued in favor of severance by noting that there existed a realistic probability that her jury would be incapable of applying the proper legal standard to Petitioner's accessory charges versus the standard applicable to her co-defendants who were charged as principals.

While Trial Counsel argued for a severance based on his need to highlight the disparity between his client's background and the extensive criminal records of her co-defendants, he did not argue that it would be difficult for his client to have a jury adequately and clearly instructed on the applicable law in a joint trial. It is Petitioner's position that the confusing jury instructions ultimately issued at her trial prevented the jury from making a reliable judgment about her guilt. The complex and confusing instructions necessary for the Petitioner to receive a fair trial were readily foreseeable and should have been argued as justification for a severance. Likewise, the fact that it would be difficult for the trial court to tailor instructions which were fair and necessary for Petitioner to receive a fair trial while also issuing an appropriate charge for her co-defendant's charges, should have been foreseeable and should have been argued as further justification for a severance.

Petitioner has further argued that once Trial Counsel realized that the Court was not going to continue this trial to another day or term, he should have, at the very least, requested a brief recess in order to attempt to interview cooperating co-defendant Hollins. In the lower court Petitioner argued that Trial Counsel was clearly ineffective for failing to do so since his own words in the trial record confirm that he felt incapable of adequately cross-examining this last-minute witness. App. Vol. I, p. 13, 1. 3-p. 15, 1. 18.

GROUND TWO:

The State erred in denying Petitioner relief where she clearly established that Trial Counsel was ineffective in his failure to adequately cross-examine state witness, co-defendant, Hollins.

SUPPORTING FACTS:

Following Petitioner's Rule 59(e) Motion, the Order was amended to acknowledge that Trial Counsel simply assumed [Hollins] would not speak with him because he was a cooperating co-defendant testifying for the State. App. Vol. III pgs. 1195-1196. The decision of the lower court fails to take into account Trial Counsel's admission in his PCR testimony that he did not know whether Hollins would have been willing to speak with him or not.

Tied into the allegations addressed in Ground One, is Petitioner's claim that Trial Counsel was ineffective for failing to fully cross-examine Hollins. Specifically, he failed to elicit testimony that would have been favorable to the defense. ... Hollins' PCR testimony confirmed that Petitioner was unaware of any plan for him, or anyone with him, to bring weapons when taking money from the Victim. He similarly confirmed that Petitioner was unaware that the victim might be harmed and had in fact been promised that he would not be. Although Petitioner was only charged with accessory before the fact to armed robbery and murder, the fact that a burglary and kidnapping ultimately occurred (for which her co-defendants were charged) could have been considered by the jury in determining whether a murder was a readily foreseeable consequence of the activities Petitioner participated in. Testimony that Petitioner had no knowledge of a plan to be armed while committing this robbery, or of any plan to kidnap or commit burglary, would have significantly diminished the chances that the jury would find that the

victim's murder was a readily foreseeable consequence of the acts she knowingly participated in.

Hollins' testimony would have confirmed that Petitioner was not privy to any plan to commit a burglary. Trial Counsel's claim that he was afraid to ask more questions of this witness is not supported by the record. Trial Counsel had the opportunity to interview Hollins and failed to pursue it. In addition, Trial Counsel admitted in his PCR testimony that the statement given by Hollins was largely consistent with his client's position. Therefore, he had the security of knowing that if Hollins significantly departed from that statement in his trial testimony, he could have impeached him with his prior statement.

GROUND THREE:

Trial Counsel violated Petitioner's right to effective assistance of counsel, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, by his failure to properly respond to testimony from State Witness, co-defendant, Hollins' that a "Lick" Conclusively Meant an Armed Robbery.

SUPPORTING FACTS:

On collateral review, petitioner asserted that trial counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery and demonstrated that she was clearly prejudiced by this error by Trial Counsel. She further argued that Trial Counsel was ineffective for neglecting to make a motion for a mistrial, and/or for failing to make a request for a curative charge, where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery and also made a showing as to how she was prejudiced by Trial Counsel's failure to do so. Among the most damaging evidence against Petitioner at trial came in the form of improper and patently misleading testimony from State witness Hollins. Hollins testified that Petitioner had suggested the Victim for a "lick" and then, at the urging of the State, proceeded to define what a "lick" is commonly taken to mean. While Hollins initially defined a lick as signifying a robbery, he was subsequently led by the State to state that a "lick" necessitated the use of some type of weapon. App. Vol. II p. 403, 11. 10-20. Although Counsel for a co-defendant, Attorney Bolus, was able to get

Hollins to admit, on cross-examination, that the term "refers to a robbery", App. Vol. II p. 424, 11. 13-23, the damage from these assertions was reinforced when, on re-direct examination, the State once again lead Hollins into stating that a "lick" required "some type of weapon." App. Vol. II p. 441, 11.10 - 15. After reviewing Hollins' testimony concerning the term "lick" with PCR Counsel, Trial Counsel acknowledged that *after* the testimony elicited by Attorney Bolus, Hollins followed up with more testimony which emphasized that the plan included weapons. App. Vol. III p. 965, 11. 1-8. ... Trial Counsel candidly stated that he wished he had "gone into that further" when addressing his failure to object to Hollis being allowed to define "a lick" as meaning an armed robbery. App. Vol. III p. 975, 11. 15-16. He conceded that he should have requested a mistrial the first time the State elicited testimony defining "a lick" as an armed robbery. App. Vol III p. 976, 1. 19- p. 977, 1. 2.

GROUND FOUR:

Petitioner's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated at trial when trial counsel neglected to adequately argue her right to directed verdicts of acquittal based upon the insufficiency of the evidence presented by the prosecution.

SUPPORTING FACTS:

The state court erred in failing to grant petitioner relief where trial counsel failed to adequately argue Petitioner's motions for directed verdicts of acquittal at trial. Trial counsel brought a motion for a directed verdict of acquittal on both of the charges against Petitioner simply arguing that there was no evidence to support a charge of accessory before the fact to armed robbery. He further stated that there was no evidence of a common plan to commit armed robbery or murder and that; generally, murder was not a probable and natural consequence of Petitioner's acts. App. Vol. II pp. 559-560. This argument in support of Petitioner's directed verdict motions was inadequate and ineffective considering the fact that the totality of the evidence adduced at trial had completely failed to establish that Petitioner knowingly participated in anything that put her on notice that her co-defendants would ultimately commit far more serious crimes than the crime she knowingly agreed to assist them in committing.

GROUND FIVE:

Petitioner should have been granted relief in the state court where she established that trial counsel was ineffective for advising her that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments and further, where trial counsel was ineffective for advising her that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument.

SUPPORTING FACTS:

The record below establishes that these errors by trial counsel significantly prejudiced petitioner in that it caused her to make a waiver of her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, which was not knowingly and voluntarily entered. When trial counsel realized that all co-defendants had lost their right to a final argument, he should have made this development clear to his client, who desired to testify on her own behalf. At petitioner's PCR evidentiary hearing, trial counsel admitted that he probably did not advise Petitioner that she had already lost her right to a final argument, and therefore, that this factor should no longer be considered in making the decision about whether she wished to exercise her right to testify at her trial. App. Vol. III p. 1004, l. 12 –p. 1005, l. 7.

The testimony and evidence introduced on collateral review in state court established that Trial Counsel was ineffective for not explaining to his client that she no longer had a right to final argument prior to resting her case without putting up a defense. In addition Petitioner argued below that Trial Counsel also erred in advising her that the prosecution would "eat her alive" if she testified, without any accompanying rationale. The record below supports this assertion where Trial Counsel admitted that Petitioner was an articulate 19-year-old woman without a criminal record that could be used for impeachment. App. Vol III p. 1005, l. 8-p. 1006, l. 1.

GROUND SIX:

Petitioner's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated in state court where [A] Trial counsel failed to request appropriate and

necessary jury instructions on her behalf at trial and [B] where he for failed to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of petitioner, separate from their findings concerning the liability of each of her co-defendants.

SUPPORTING FACTS:

On collateral review in the circuit court and on appeal, Petitioner asserted that the state court erred in denying her relief where the record below supports her assertion that she was significantly prejudiced by trial counsel's failure to request appropriate jury instructions in her case. She additionally argued that Trial Counsel was ineffective for failing to enter an appropriate objection to the charge as given by the trial court. The charge as given did not adequately convey to the jury the requirement that they apply a *separate* foreseeability analysis to determine the liability of Petitioner, independent from their findings concerning the liability of each of her co-defendants. Further, the record below would have supported her request for a jury instruction on the charge of accessory before the fact to *strong* armed robbery.

GROUND SEVEN:

Trial counsel was ineffective [A] for failing to make certain crucial closing arguments to the jury and [B] for failing to object to inappropriate arguments made by the prosecution in the State's closing argument.

SUPPORTING FACTS:

[A]: In her state collateral proceedings, petitioner argued that trial counsel was ineffective for advising the jury in his closing argument that petitioner *was not present* during the principal offenses where said potion was contrary to the evidence adduced at trial, including petitioner's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes petitioner was on trial for; specifically that she *was not present* during the commission of the principal offenses. In addition, Petitioner argued that Trial Counsel was ineffective for failing to specifically argue to the jury in closing that Petitioner could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants. Petitioner met her burden

of proof that her ability to receive a fair determination of her guilt by the jury was irreparably prejudiced at her trial due to these serious errors by Trial Counsel in his closing arguments to the jury.

Trial Counsel failed to utilize the fact that his client *was present* during some portions of the underlying offenses not only in directed verdict motions, but also in closing arguments. Had he recognized the significance of this fact to the State's case on the accessory offenses, Trial Counsel could have argued this point as a reason for the jury to acquit his client. Not only did Trial Counsel fail to use this helpful fact, but he also argued against it. Trial Counsel stressed the fact that his client *was not present* at the scene of the crime in his closing arguments. App. Vol. II pp. 653-674. In doing so, he basically conceded one of the elements in the offenses his client was on trial for.

[B]: Petitioner additionally argued that Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder, End of story". Petitioner demonstrated that Trial Counsel's failure to object to this improper argument prejudiced her at trial by permitting the State to confuse the jury concerning the elements of the crime of accessory before the fact to murder and resulted in a dilution of the State's burden of proof beyond a reasonable doubt.

GROUND EIGHT:

Failure of trial counsel to argue in opening statements that murder was not a foreseeable consequence of any agreement entered into between petitioner and her co-defendants.

SUPPORTING FACTS:

Petitioner argued in her PCR action that trial counsel failed to clearly and concisely state in opening arguments the reasons why petitioner could not be found guilty as an accessory before the fact to murder, when the murder was not a foreseeable result of the plan in which she was involved.

GROUND NINE:

Ineffective assistance of counsel in Direct Appeal.

SUPPORTING FACTS:

Petitioner asserted below that Appellate counsel failed to raise two meritorious issues in her direct appeal: 1) that the lower court erred by denying petitioner's directed verdict motions on all charges and 2) that the lower court erred by charging to the jury that the State would only have to prove that Petitioner aided and abetted another person "*to commit a crime.*"

GROUND TEN:

The Supreme Court of South Carolina violated Petitioner's equal protection and due process rights, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, when it denied her the opportunity to file a Petition for Writ of Certiorari to the South Carolina Court of Appeals.

SUPPORTING FACTS:

Following the South Carolina Court of Appeals' denial of certiorari on July 23, 2014, petitioner filed a Petition for Rehearing and Rehearing *En Banc* in the Court of Appeals on August 6, 2014. Rehearing was denied on September 18, 2014. Petitioner next filed a Petition for Leave to File Petition for Writ of Certiorari to the South Carolina Court of Appeals in the Supreme Court of South Carolina. Said petition was served on opposing counsel by mail and sent to the Supreme Court for filing under the time limits set by Rule 242 (c), SCRAP, on October 20, 2014.

III. SUMMARY JUDGMENT

Respondent has filed a motion for summary judgment in this matter. "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (quoting Fed. R. Civ. P. Rule 56). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

To defeat a summary judgment motion, the non-moving party must “do more than simply show that there is some metaphysical doubt as to the material fact” to defeat a motion for summary judgment. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). Here, the records before the Court by way of this Return and Memorandum show that Petitioner is not entitled to any relief for the reasons discussed below.

IV. DISCUSSION

Respondent is entitled to summary judgment. The present habeas corpus petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Accordingly, the provisions of the AEDPA apply to this case. *Lindh v. Murphy*, 521 U.S. 320 (1997).

1. Petitioner has technically satisfied the exhaustion requirement.

“The exhaustion doctrine ... is ... codified at 28 U.S.C. § 2254(b)(1).” *O’Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S.Ct. 1728 (1999) (internal citations omitted). “Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court.” *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 787 (2011). “With certain narrow exceptions, federal courts cannot consider a claim at all, let alone accept new evidence relevant to the claim, if it has not been exhausted in state court. The exhaustion requirement thus reserves to state courts the first opportunity to resolve factual disputes relevant to a state prisoner’s claim. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1414 (2011) (citation and footnote omitted).³

³ The Court in *Pinholster* also noted that “a state prisoner must, as a general matter, properly exhaust his federal claims in state court to avoid having his claim defaulted on procedural grounds” *Id.* at 1414 n. 1.

“An exception is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief.” *Id.* See also *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (recognizing that, although not jurisdictional, the exhaustion requirement is strictly enforced; and that failure to exhaust remedies will be excused only where exhaustion requirement is expressly waived by the state or petitioner has technically complied therewith). As the Fourth Circuit Court of Appeals explained in *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994):

The exhaustion requirement can promote comity between the state and federal systems only if state courts actually have a meaningful opportunity to oversee their own operations. It is therefore required that a petitioner seeking federal habeas review make more than a perfunctory jaunt through the state court system, see *Picard v. Connor*, 404 U.S. 270, 275–76, 92 S.Ct. 509, 511–12, 30 L.Ed.2d 438 (1971), and habeas review in the federal courts will be available only after the state courts have been “provided a full and fair opportunity to review earlier state court proceedings,” [*Whittlesey v. Circuit Court for Baltimore County*, 897 F.2d 143, 145 (4th Cir.1990)]; see also *Picard*, 404 U.S. at 275–76, 92 S.Ct. at 511–12. Where questions concerning exhaustion arise, the petitioner bears the burden of demonstrating that state remedies have, in fact, been exhausted. See *Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir.1992); *Nadworny v. Fair*, 872 F.2d 1093, 1098 (1st Cir.1989).

Thus, the exhaustion requirement is met only if the federal claim has been “fairly presented” to the state courts, *Picard v. Connor*, 404 U.S. 270, 275 (1971), or no state remedy remains available. *Matthews*, 105 F.3d at 911. To fairly present a claim, a petitioner must “include reference to a specific federal constitutional guarantee, as well as a statement of facts that entitle the petitioner to relief.” *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996) (citing *Picard*, 404 U.S. at 271).

Here, Petitioner presents a total of fifteen claims in her Petition for Writ of Habeas Corpus. Of these claims, only her **Ground One (B)** was not exhausted. Although she did not exhaust this claim, she does not have any state court remedies available to her because any future

PCR application would be barred as successive under S.C. Code Ann. § 17-27-90 (1985) and *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), and because any future PCR application would be untimely under the one-year statute of limitations which governs the filing of PCR actions. S.C. Code Ann. § 17-27-45(A) (Supp. 2015). Therefore, the exhaustion requirement is technically satisfied.

2. Petitioner is not entitled to relief on her claims.

Despite Petitioner's compliance with the exhaustion requirement, she is not entitled to relief. The United States Supreme Court has described §2254(d) as "a provision of law that some federal judges find too confining, but that all federal judges must obey." *White v. Woodall*, 134 S.Ct. 1697, 1701 (2014). Also, the Court has repeatedly emphasized that "AEDPA's standard is intentionally 'difficult to meet.' " *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) (citing *White*, 134 S.Ct. at 1702) (quoting *Metrish v. Lancaster*, 133 S.Ct. 1781, 1786 (2013)).

Under AEDPA, "[f]ederal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision 'was contrary to' federal law then clearly established in the holdings of this Court, § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); or that it 'involved an unreasonable application of' such law, § 2254(d)(1); or that it 'was based on an unreasonable determination of the facts' in light of the record before the state court, § 2254(d)(2)." *Richter*, 562 U.S. at 100, 131 S.Ct. at 785.⁴ "[A]n 'unreasonable application of' those holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Woodall*, 134 S.Ct. at 1702. *See also Mitchell*

⁴ However, a state court need not rely upon, nor need it even cite, Supreme Court precedent in order to avoid resolving a petitioner's claims in a way that is "contrary to" or involves an "unreasonable application of" clearly established federal law. Rather, even state court orders summarily denying relief are entitled to AEDPA deference. *Richter*, 562 U.S. at 98-99, 131 S.Ct. at 784; *cf. Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 365 (2002).

v. Esparza, 540 U.S. 12, 17 (2003) (per curiam) (“A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous”); *Greene v. Fisher*, 132 S. Ct. 38, 43 (2011) (observing that AEDPA’s “standard of ‘contrary to, or involv[ing] an unreasonable application of, clearly established Federal law’ is difficult to meet, because [its purpose] is to ensure that **federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction**”) (citations omitted and emphasis added).

GROUND ONE

In **Ground One**, Petitioner claims that trial counsel was ineffective for not adequately arguing (A) the motion for a severance and (B) his motion for continuance on Petitioner’s behalf. Respondent is entitled to judgment on each claim: Respondent is entitled to judgment on the first claim because Petitioner cannot meet her burden of proof under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2054 (1984), and the deferential review of § 2254(d). In other words, Respondent submits that the state courts’ rejection of Petitioner’s claim of counsel’s ineffectiveness for not adequately arguing the motion to sever was not “contrary to” and did not involve an “unreasonable application of” clearly established United States Supreme Court precedent under § 2254(d)(1). *See also Richter*, 562 U.S. at 101, 131 S.Ct. at 787. Respondent is entitled to judgment on the second claim because it is procedurally defaulted.

1. The severance and continuance motions made by counsel.

Before jury selection, Petitioner’s trial counsel, Mr. Jones, moved for a continuance and a severance. Counsel argued that he did not receive notice of the trial date until Friday, August 17, 2007. He admitted that the case had been on the docket since August 2006. However, his recollection of his conversations with the prosecution was that “they were going to try the

principals, then try [Petitioner].” Counsel also asserted that the other defendants had received written notice of the trial day, whereas counsel had only received a telephone call ten days before trial. **App. pp. 11-12.**

Counsel further noted that, although the original indictments were “done in January,” the State added a charge of “burglary first.” This charge was not presented to the Grand Jury until August 22, 2007, and trial counsel had not received any correspondence about it. When asked if he had full discovery, counsel stated that he had originally been provided with Kerry Hollins’ initial statement from the Public Defender. When the Public Defender spoke to counsel “on Thursday,” she told him that Hollins was going to be testifying; and she alerted him to a second statement that Hollins had given, which dated August 4, 2006. Counsel admitted that he had obtained a copy of this statement on the same day. Hollins’ statement incriminated Petitioner. **App. pp. 12-13.**

When the trial judge surmised that counsel knew the substance of the prosecution’s case and that the allegations did not surprise counsel, counsel admitted that he did know the allegations. However, he claimed that there was a “twist” on the allegations because Hollins “says my client was in essence the principal actor and originator of this.” This was prejudicial because “if he’s lying about that, then . . . all of his statements may be false. And . . . the only way that I can flush that out” is to delve into the substantial criminal histories of the three co-defendants, including Hollins, as opposed to Petitioner. Counsel argued that he could not do this unless Petitioner’s case was severed from that of her co-defendants. Thus, he asserted that Petitioner would lose the “ability of a defense . . . or at least some mitigating factor.” **App. pp. 14-15.**

In response to further inquiry by the trial judge, trial counsel admitted that he could cross-examine Hollins, but he maintained that he could not elicit the collective nature of her co-defendants' criminal histories. The trial judge stated that he would not be able to get present this evidence, even if there was a severance. Counsel was unable to explain how he could get the co-defendants' rap sheets before the jury even if the trial judge granted a severance, and the trial judge noted that he could not compel any of Petitioner's co-defendants to testify, even if her trial was severed. While trial counsel hypothesized that the co-defendants could, in theory, testify on Petitioner's behalf, the trial judge expressed her doubt and Grant's counsel indicated that Grant would not do so. **App. pp. 15-16.**

Trial counsel then argued that there was "no way" that he could adequately refute Hollins' statement, given the short notice of the trial date that he received. Counsel acknowledged that "the trial has been on since August", but that it was not practical for counsel to prepare for trial the moment that he got the case. The trial judge observed that "as a practical matter, nobody gets six weeks notice," and she found that it was "not unusual" or "unbelievable" that he would have gotten a call ten days before trial because that was "the way it works." **App. pp. 16-17.**

Counsel, however, insisted that he had never had an important case in which he received such short notice of the trial date, and he re-emphasized his belief that the other defendants had received written notice. Also, he asserted that he had to discuss the new charge with Petitioner, since he had not prepared for it because he had not received notice that she would be charged with it. He again explained that he received notice of the new charge (which was accessory before the fact of burglary and not burglary as counsel inadvertently stated) on August 17th, the

case was presented to the Grand Jury on August 22nd, and a true billed indictment was returned on August 23, 2007. **App. pp. 17-21.**

He further argued that a severance was necessary to protect the interests of Petitioner and the other co-defendants. **App. p. 23.** Counsel stated that Petitioner had two witnesses who were unavailable for the trial. The first witness was an officer from the North Charleston Police Department, whom counsel planned to present as a witness to a prior simple assault by Hollins on Petitioner, Hollins' girlfriend at the time. Counsel had subpoenaed this officer on the Tuesday after he received notice of the trial. The other witness lived in North Carolina. Counsel had spoken to her on Tuesday, but "there wasn't any way that I could get jurisdiction" and "there's no way she could get down here for this." Counsel argued that he could not have subpoenaed the witnesses earlier because he did not have a trial date. **App. pp. 21-23.**

Deputy Solicitor Jennings noted that "I put . . . all five of these defendants . . . on our trial docket in which Judge Dennis held that meeting on Friday, June the 22nd. We faxed out notices like we always do." It was his recollection that Hollins' counsel was the only attorney physically present. "The case was originally docketed for August 6th and then based on peoples' schedules, we set it for this week." A formal letter was only sent to Mr. Bolus (Grant's attorney), and this was done at his request because he had other cases pending. **App. pp. 23-24.**

Deputy Solicitor Jennings further observed that in his conversations about the case, he had always said that he intended to try the case on August 27th, and he informed the trial judge that "we have attempted to work out a resolution with Ms. Smith, Mr. Hollins, and Mr. King, whereby they would plead guilty to some charge[s] and then testify." Only Hollins accepted that opportunity. Mr. Jennings noted that there were discussions about the trial date before the telephone call, but even the phone call gave Petitioner ten days notice. Also, she had given a

written statement admitting to the offenses with which she was charged, after receiving her *Miranda*⁵ rights, and Mr. Jennings did not understand how she could be prejudiced by Hollins' portrayal of her. Further, Mr. Jennings outlined the substance of the inculpatory statement.

He represented that Petitioner had refused to accept a plea bargain to the offense of accessory before the fact to armed robbery. This would have limited her exposure to between ten and thirty years. She had also refused a plea bargain to charges of accessory before the fact to voluntary manslaughter and accessory before the fact to kidnapping, with a sentencing range of between two and thirty years. At trial, she faced a possible life sentence of accessory before the fact to murder and the possibility of consecutive thirty year sentences for the other two charges. **App. pp. 26-27.**

Trial counsel agreed that the plea negotiations had been correctly represented. Counsel had explained the proposals to Petitioner, but he asked for permission to talk to her without her family present. **App. pp. 27-28.** The trial judge allowed counsel to speak with Petitioner privately, after briefly addressing Petitioner, herself. *See App. pp. 28-32; 35.*⁶

The trial judge denied both of Petitioner's motions. She specifically found that there was no basis to grant a continuance because the case had been pending on the docket for over a year. Also, she found that the case was placed on the trial docket at the June 22, 2007 hearing before Judge Dennis; that this was "more than substantial notice;" and that it was not unusual to get only three days notice of a jury trial, particularly when a case is as old as Petitioner's case. The

⁵ *See Miranda v. Arizona*, 384 U.S. 436 (1966). Mr. Jennings noted that she had given two false statements on the night of the incident and the inculpatory statement on August 4, 2007.

⁶ Petitioner ultimately refused to accept a plea bargain. **App. pp. 42-47.**

trial judge did “not find persuasive [counsel’s] argument regarding ... getting the witnesses here” because she found that Petitioner would “have more than adequate time” to obtain the presence of potential witnesses. Also, the trial judge noted that Petitioner would have the same problem in obtaining the witness from North Carolina even if a continuance was granted because the witness was outside of the trial court’s subpoena power. She found that this was an unfortunate but common occurrence. She likewise found that police officers also might be reluctant witnesses. **App. pp. 32-34.**

The trial judge further found that there had not been any indication that Petitioner would “not have a meaningful opportunity to cross-examine Mr. Hollins and to inquire into his credibility as a witness.” She expressly rejected trial counsel’s suggestion that he would not be able to fully explore his theory of defense. **App. p. 34.**

The trial judge likewise denied Petitioner’s motion for a severance. She observed that a severance motion is addressed to the trial court’s discretion. She further noted that the general rule permitting a joint trial applied “with equal force when a [defendant’s] motion is based on the likelihood that he and a co-defendant would present mutually antagonistic defenses.” She found that this was the essence of trial counsel’s motion; and that this was not sufficient to warrant a severance. Finally, she observed that criminal defendants “are not entitled to separate trials as a matter of right;” that a severance was not required because the co-defendants had different trial strategies or because evidence might be admissible only against one defendant and not others; and that a severance was not required merely because a co-defendant might present evidence when the defendant did not. **App. pp. 34-35.** She thereafter also denied Grant’s motion for a severance. **App. pp. 38-40.**

2. Events at the trial.

During Hartwell's cross-examination of prosecution witness Joe Alex Husser, one of the kidnapping victims and an eyewitness to the murder (**App. pp. 300-02**), Hartwell introduced a photographic lineup containing a picture of Hollins, whom Alex had identified as being involved in the kidnapping at the trailer of Alex's aunt and uncle. **App. pp. 335-40**. This was contrary to Hollins' testimony about his involvement in the case.

At the close of the State's case, the trial judge observed that the State would have the right to last argument. She overruled Grant's objection, which was argued against precedent, that Hartwell's introduction of the photographic lineup (Defense Ex. 1) should not deprive Grant of the right to last argument. **Tr. p. 631-32**. Both Petitioner and Hartwell joined in this objection. **App. p. 632**.

3. The direct appeal.

On direct appeal, Petitioner challenged both of the trial judge's rulings. The South Carolina Court of Appeals, however, rejected both claims. The Court upheld the trial judge's ruling on the motion for continuance as follows:

I. Continuance

Smith first claims the trial court erred by failing to grant her motion for continuance. We disagree.

The trial court's decision to deny a motion for continuance is a matter within the trial court's discretion. *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Therefore, this court will not reverse the trial court unless there was an abuse of discretion that resulted in prejudice. *Id.*

A. Adequate Notice

Smith argues the trial court should have granted the motion for continuance because the State failed to give adequate notice of the trial date. She also contends the trial court should have granted her motion because she was informed of a new charge, accessory before the fact of burglary, only one week before trial. We disagree.

Prior to trial on August 27, 2007, Smith made a motion for continuance and argued she did not receive notice of the trial date until August 17, 2007. However, she conceded the case had been on the docket since August 2006. The trial court stated Smith knew the substance of the State's case and that the accessory before the fact of burglary arose out of the same facts as the other charges. The trial court concluded there was no basis to grant a continuance, especially in light of the fact that the case had been on the docket for more than one year, Smith had substantial notice of the trial date, and she was not surprised by the new charge.FN2 We find no reversible error in the trial court's decision. *See State v. Motley*, 251 S.C. 568, 571, 164 S.E.2d 569, 570 (1968) (“When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal.”).

FN2/ Smith was tried on charges of accessory before the fact of murder and accessory before the fact of armed robbery; however, the State did not proceed with the accessory before the fact of burglary charge

B. Cross-Examination

Smith contends the trial court erred in denying her motion for continuance because she was unable to cross-examine Kerry Hollins, another individual charged in connection with the case. We disagree.

The trial court found nothing indicated Smith would not have a meaningful opportunity to cross-examine Mr. Hollins and to inquire into his credibility as a witness as to the weight the jury should give his testimony. The trial court also stated, “I have not heard anything that convinces me that you will not be able to fully explore your argument or your theory which is that your client was the least culpable in these alleged incidences.” We find no reversible error in the trial court's decision. *See State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (“Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth.”).

C. Witness Availability

Smith also argues the trial court erred by denying her motion for continuance because two witnesses were unavailable. We disagree

Rule 7(b), SCRCrimP, speaks to the subject of continuances in the context of unavailable witnesses. This Rule provides:

No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support

of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.

Rule 7(b), SCRCrimP.

In the present case, Smith did not comply with Rule 7(b) because she did not state under oath that the testimony of the witnesses was material to the support of her defense, the motion was not intended for delay, or due diligence had been exercised to secure the testimony of the witnesses. Thus, the trial court did not commit reversible error in denying the motion for continuance.

Smith, 387 S.C. at 622-24, 693 S.E.2d at 417-18.

The Court of Appeals rejected Petitioner's argument that the trial judge improperly denied her motion for a severance, reasoning as follows:

II. Severance

Smith next contends the trial court erred by denying her motion for severance. We disagree.

A motion for severance is left to the sound discretion of the trial court. *State v. Kelsey*, 331 S.C. 50, 73-74, 502 S.E.2d 63, 75 (1998). An appellate court will not disturb the trial court's ruling unless there is an abuse of discretion. *Id.*

A. Cross-Examination of Co-Defendant

The basis for Smith's motion for severance was her assertion that she would be unable to effectively cross-examine Hollins. Hollins was also charged in connection with the case but testified for the State. Prior to his testimony, Hollins made a statement that implicated Smith as the principal actor. Smith argues she could not effectively cross-examine Hollins on that statement without addressing the character and criminal history of Grant, Hartwell, and Hollins. We disagree.

The trial court expressed concern as to how Smith would be able to present the character and criminal history of each of the defendants even if a severance was granted. Smith was unable to explain how she would be able to present this evidence for the jury to consider. Additionally, the trial court specifically found Smith would have "a meaningful opportunity to cross-examine Mr. Hollins and to inquire into his credibility as a witness as to the weight the jury should give his testimony." The trial court also stated, "I have not heard anything that convinces

me that you will not be able to fully explore your argument or your theory which is that your client was the least culpable in these alleged incidences.” We see no reversible error in the trial court's decision to deny Smith's motion. *See id.* (holding the granting of a motion for severance is within the discretion of the trial court and its ruling on such a motion will not be disturbed on appeal unless an abuse of discretion is shown).

B. Closing Argument

Smith also argues the trial court should have granted the severance motion because she lost her right to have the last closing argument to the jury as a result of being tried together. We disagree.

In a criminal case in which a defendant is separately tried and introduces no testimony, she is entitled to the closing argument to the jury. *State v. Crowe*, 258 S.C. 258, 268, 188 S.E.2d 379, 384 (1972). When defendants are jointly indicted and any one of them introduces evidence, the State is entitled to the closing argument. *Id.* “The fact that, upon a trial of defendants jointly indicted, the introduction of evidence by one defendant may operate to deprive a co-defendant, who offers no evidence, of the right to the closing argument, to which such co-defendant would be entitled if tried separately, affords no ground upon which to order separate trials.” *Id.*

In the present case, Smith did not testify, but one of her co-defendants offered a photo lineup into evidence. The trial court admitted this lineup, and as a result, Smith lost her right to have the last closing argument to the jury. Based on *Crowe*, the trial court properly denied the motion for severance on this ground.

Smith, 387 S.C. at 624-26, 693 S.E.2d at 418-19.

A. Counsel's severance motion was constitutionally adequate.

The PCR judge rejected Petitioner's claim that counsel was ineffective in his handling of the motion for a severance, finding as follows:

This Court finds that counsel properly made a motion for severance. Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right. *Hughes v. State*, 346 S.C. 554, 552 S.E.2d 315 (2001) (citing *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999)). There can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances that are presented to the court in each case. *State v. McIntire*, 221 S.C. 504, 71 S.E.2d 410 (1952); *State v. Walker*, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). A severance should be

granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. Harris, 351 S.C. at 652-53, 572 S.E.2d at 273; Dennis, 337 S.C. 275, 523 S.E.2d 173. The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. Dennis, 337 S.C. at 281, 523 S.E.2d at 176. The rule allowing joint trials is not impugned simply because the co-defendants may present evidence accusing each other of the crime. Id. Here, the Applicant and her co-defendants did not present mutually antagonistic defenses. Trial counsel requested a severance to protect Applicant from being tried jointly with her codefendants, but the trial court denied the motion.

App. pp. 1192-93.

To establish that she received ineffective assistance of counsel, Petitioner must make a twofold showing. *See Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003). First, she must demonstrate that her attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*, 104 S.Ct. 2052 (citation omitted). *See also Richter*, 562 U.S. at 104, 131 S.Ct. at 787 (quoting *Strickland*).

The Court in *Richter* explained that:

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An

ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel's assistance after conviction or adverse sentence.” *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Richter, 562 U.S. at 105, 131 S.Ct. at 788.

Even if Petitioner proves deficient performance, she must also prove that she was prejudiced by her attorneys' ineffectiveness because “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. To prevail, she must prove “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S.Ct. 2052.

It is insufficient to prove “that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693, 104 S.Ct. 2052. Rather, “[c]ounsel's errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’ ” *Richter*, 562 U.S. at 104, 131 S.Ct. at 787-88 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). Applying these principles to the case at bar, Petitioner is not entitled to relief because she cannot meet her burden of proof under *Strickland* and § 2254(d).

First, the PCR judge's factual findings are supported by the record. As a result, they are not objectively unreasonable under § 2254(d)(2). *See also Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (“ ‘federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them’ ”) (citing *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843 (1983)); *Buckner v. Polk*, 453 F.3d 195, 204 n.8 (4th Cir. 2006) (the task of a reviewing court in habeas corpus “is not to decide the credibility issue *de novo* but to determine whether [the petitioner] has produced clear and convincing evidence that the [PCR] court's resolution of that issue was incorrect”). Nor has Petitioner rebutted the presumption that these findings are correct by clear and convincing evidence. § 2254(e)(1).

Second, although trial counsel's testimony (**App. pp. 957-1021**) comprises 64 pages of the 142 page PCR hearing transcript (**App. pp. 916-1058**), Petitioner did not ask counsel any questions related to her claim that he was ineffective for failing to adequately argue the motion for severance. Under these circumstances, she cannot overcome *Strickland's* “strong presumption” of reasonable performance. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (“[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy’ ”) (citation omitted). Since 1984, the Court has reiterated this “strong presumption” and has clearly held that it cannot be overcome by a silent record. *See Burt v. Titlow*, 134 S.Ct. 10, 17 (2013) (“It should go without saying that the absence of evidence cannot overcome the ‘strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance’ ”) (citing *Strickland*,

466 U.S. at 689, 104 S.Ct. 2052) *Richter*, 131 S.Ct. at 787 (quoting *Strickland*). See also *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001) (trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance); *Fretwell v. Norris*, 133 F.3d 621, 623-24 (8th Cir. 1998) (reversing the district court's grant of the writ based in part on counsel's inability to recall because this is contrary to the presumption of reasonable assistance); *Williams v. Head*, 185 F.3d 1223, 1227-28 (11th Cir. 1999) (where the record is unclear about what counsel did because of inability to recall due to the passage of time, the presumption that counsel did what should have been done and exercised reasonable judgment prevails).

Moreover, in spite of *dicta* in the South Carolina Supreme Court's Opinion in *State v. Bellamy*, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987), joint trials are generally favored because "[i]mproper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation *only if* it results in prejudice so great as to *deny* a defendant his ... right to a *fair trial*." *United States v. Lane*, 474 U.S. 438, 446 n. 8, 106 S. Ct. 725, 730 n. 8 (1986) (emphasis added). As the Court explained in *Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933 (1993):

There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials "play a vital role in the criminal justice system." *Richardson v. Marsh*, 481 U.S. 200, 209, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987). They promote efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.*, at 210, 107 S.Ct., at 1708. For these reasons, we repeatedly have approved of joint trials. See *ibid.*; *Opper v. United States*, 348 U.S. 84, 95, 75 S.Ct. 158, 165, 99 L.Ed. 101 (1954); *538 *United States v. Marchant*, 12 Wheat. 480, 6 L.Ed. 700 (1827); cf. 1 C. Wright, *Federal Practice and Procedure* § 223 (2d ed. 1982) (citing lower court opinions to the same effect).

Id. at 537-38, 113 S. Ct. at 937.

Therefore, a defendant must demonstrate more than the potential for prejudice. She must prove that actual prejudice resulted from the events as they unfolded during the trial. *Id.* See also *Lane*, 474 U.S. at 446 n. 8, 106 S. Ct. at 730 n. 8; *Herring v. Meachum*, 11 F.3d 374 (2nd Cir. 1993) (citing *Opper v. United States*, 348 U.S. 84, 94-95 (1954)). Further, “it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.” *Zafiro*, 506 U.S. at 540, 113 S. Ct. at 938.

In accordance with these principles and as a matter of state law, a defendant who alleges that she was improperly tried jointly must show actual prejudice before the Supreme Court will reverse a conviction. *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173, 176 (1999). The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood that the movant and his co-defendant will present mutually antagonistic defenses: *i.e.*, that they will accuse one another of committing the crime. *Dennis, supra*.

Contrary to Petitioner's complaint that the “jury instructions issued in a joint trial of Petitioner and her co-defendants would inevitably be very cumbersome and complex,” the instructions need not be cumbersome or complex and they were not in this case. More importantly, *Zafiro* makes clear that it does not violate the United States Constitution for a judge to deny a severance motion even when the defendant(s) merely claim prejudice generally from a joint trial, particularly if the trial judge gives appropriate limiting instructions to the jury because such instructions minimize any potential prejudice. 506 U.S. at 540-41, 113 S. Ct. at 938-39.

Another glaring flaw in Petitioner's argument is that “[a] jury is presumed to follow its instructions.” *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 733 (2000) (citing *Richardson*, 481 U.S. at 211, 107 S.Ct. at 1707). See also *United States v. Olano*, 507 U.S. 725, 740-741, 113 S.Ct. 1770 (1993) (“[we] presum[e] that jurors, conscious of the gravity of their

task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them' ") (citing *Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n. 9 (1985)); *Richardson*, 481 U.S. at 206, 107 S.Ct. at 1707 ("[It is] the almost invariable assumption of the law that jurors follow their instructions"). Indeed, in assessing prejudice for purposes of an ineffective assistance of counsel claim, the Court in *Strickland* observed that "a court should presume ... that the judge or jury acted according to law." 466 U.S. at 694, 104 S.Ct. at 2068.

Here, the trial judge thoroughly instructed the jury on the substantive law of the offenses with which the defendants were charged; the State's burden of proving each defendant guilty beyond any reasonable doubt; the presumption of innocence; principles of accomplice liability; and, that the defendants' failure to testify could not be considered against them in any fashion.

App. pp. 703-19. She likewise charged the jurors that:

. . . [T]here are three separate defendants in this case, each of whom is charged with different crimes.

The case of each defendant, and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for all defendants. The fact that you may find one defendant guilty or not guilty beyond a reasonable doubt should not control your verdict as to the other defendants.

Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other; or you may acquit both or you may convict both. It will depend upon your view of the testimony and evidence.

You must take each defendant and consider the evidence as to that defendant and my instructions to you on the law. You will write a separate verdict of guilty or not guilty for each individual defendant.

App. pp. 719-20.

She then instructed jurors of the individual charges faced by each defendant, and explained separate verdicts were to be returned as to each offense. “These instructions sufficed to cure any possibility of prejudice.” *Zafiro*, 506 U.S. at 541, 113 S. Ct. at 939. *See also State v. Castineira*, 341 S.C. 619, 535 S.E.2d 449 (Ct. App 2000), *aff’d*, 351 S.C. 635, 572 S.E.2d 263 (2002).

Finally, the manner in which Petitioner has briefed her claims, both in state court and before this Court, suggests that she is relying upon a cumulative prejudice or cumulative error analysis to support her claims for relief. However, the United States Supreme Court has never intimated, much less held, that a cumulative prejudice analysis is appropriate on *Strickland* claims. And, the Fourth Circuit Court of Appeals has expressly rejected the premise that an inmate can be entitled to relief based upon the cumulative effect of individual errors by trial counsel:

Next, Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error, *see Lockhart v. Fretwell*, 506 U.S. 364, 369 n. 2, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (“[U]nder *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance *and* (2) prejudice.” (emphasis added)). It would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See, e.g., Hoots v. Allsbrook*, 785 F.2d 1214, 1219 (4th Cir.1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). In fact, in *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir.1997), *cert. denied*, 522 U.S. 1058, 118 S.Ct. 715, 139 L.Ed.2d 655 (1998), this Court recently rejected a similar request to review the alleged errors of a trial court cumulatively rather than individually. *See id.* at 1364 (“Based on the findings of this court concerning the individual claims of error, we reject this claim.”).

To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now.⁹ In so holding, we are in agreement with the majority of our sister circuits that have considered the issue. For example, in *Wainwright v. Lockhart*, *853 80 F.3d 1226 (8th Cir.), *cert. denied*, 519 U.S. 968, 117 S.Ct. 395, 136 L.Ed.2d 310 (1996), the Eighth Circuit expressly held that an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation." *Id.* at 1233; *see also Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir.1995) (noting that cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors); *United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir.1994) (same); *United States v. Gutierrez*, 995 F.2d 169, 173 (9th Cir.1993) (same). *But see Williams v. Washington*, 59 F.3d 673, 682 (7th Cir.1995) (stating that "a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]"); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir.1991) (noting that a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions"). Accordingly, the district court did not err in refusing to grant habeas relief on this claim

Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998). *See also Meuller v. Angelone*, 181 F.3d 557, 586 n.22 (4th Cir. 1999) ("Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in *Fisher v. Angelone*, 163 F.3d [...at] 852-53 [...]"). *See also United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir. 1994); *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996); *Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir. 1995).

The Court of Appeals' reasoning in rejecting such an analysis is not only binding upon all lower federal courts in this Circuit, it is also legally correct. Before an alleged error may be considered as a factor contributing to cumulative prejudice, a reviewing court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction, a conclusion that is manifestly contrary to

the analysis set forth in *Strickland*. See *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2052 (“Unless a defendant makes both showings [i.e., both deficient performance and prejudice –] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable”).⁷

Therefore, Respondent is entitled to judgment on this claim.

B. Petitioner’s claim that counsel was ineffective for failing to adequately argue the continuance motion is procedurally defaulted.

Respondent submits that her claim that counsel did not adequately handle the request for a continuance is procedurally defaulted from this Court’s review under *Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S.Ct. 2546 (1991), and the independent and adequate state law doctrine. *Id.* A state procedural rule is “adequate” if it is firmly established and regularly or consistently applied by the state court, *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981 (1988), and “independent” if it does not depend on a federal constitutional ruling. *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087 (1985).

The Court explained in *Coleman* that:

We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district

⁷ While it is perfectly logical to consider the cumulative effect of failing to disclose evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), since the determination to be made is whether non-disclosure of evidence deprived the defendant of due process, see *Kyles v. Wheatly*, 514 U.S. 419, 115 S.Ct. 1555 (1985), the same is not true when focusing upon whether trial counsel rendered ineffective assistance of counsel. Alleged errors, which are not unconstitutional, individually, simply cannot be added together to create a constitutional violation. Following a cumulative error or cumulative prejudice analysis would result in a habeas corpus petitioner obtaining relief, even though no one alleged constitutional violation was prejudicial to her, simply by raising a large number of allegations, such as Petitioner has done in the present case. Stated mathematically, cumulative error analysis would allow a reviewing court to reach a conclusion that $0+0+0+0+0+0+0+0+0+0 = 1$. Obviously, this is a ludicrous result that is not mandated by *Strickland* or any other decision of the United States Supreme Court.

courts should address the claims of state prisoners in habeas corpus actions. The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds. *See Wainwright v. Sykes*, 433 U.S. 72, 81, 87, 97 S.Ct. 2497, 2503-2504, 2506-2507, 53 L.Ed.2d 594 (1977); *Ulster County Court v. Allen*, 442 U.S. 140, 148, 99 S.Ct. 2213, 2220, 60 L.Ed.2d 777 (1979). *See generally* [*Harris v. Reed*, 489 U.S. 255, 262 (1989)].

Coleman, 501 U.S. at 729-30, 111 S.Ct. 2546.

While Petitioner addressed this allegation in her post-hearing memorandum (**App. pp. 1068-72**), the PCR judge did not address this claim in the original Order of Dismissal. **App. pp. 1100-17**. Petitioner did raise this claim in her proposed Order (**App. pp. 1139-43**) but she failed to seek a ruling on it in her February 16, 2012 Motion to Alter or Amend under Rule 59(e), SCRPC. **App. pp. 1118-26**. When Judge Harrington did not rule on her claim in the April 19, 2012 Amended Order of Dismissal (**App. pp. 1181-1200**) Petitioner, again, did not move to alter or amend the judgment under Rule 59(e), in an effort to obtain a ruling on her present allegation.

The South Carolina Supreme Court has previously held that a losing party in a PCR case - like all losing parties in all other civil cases - must seek a ruling on any issue(s) that the party raised but which were not addressed in the Order of Dismissal. If the losing party does not file a Rule 59(e) motion, then the issue is not properly preserved for appellate review. *Marlar v. State*, 375 S.C. 407, 409, 653 S.E.2d 266, 266 (2007); *see also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that if the losing party raised an issue to the circuit court, but the court failed to rule upon it, the party must file a Rule 59(e) motion in order to preserve the issue); *Burgess v. State*, 402 S.C. 92, 94-95, 738 S.E.2d 264, 265-66 (Ct.App. 2013) (quoting *Marlar* and holding that the State's argument as to the insufficiency the PCR court's prejudice analysis under *Strickland* "[was] not preserved for appellate review

because the State failed to file Rule 59(e), SCRCP, motion asking the PCR court to specifically determine whether Burgess suffered prejudice as the result of his trial counsel's deficient performance"); *Smith v. State*, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct.App. 2012) (applying *Marlar* and holding that petitioner's argument was not preserved for appellate review because he failed to file Rule 59(e) motion).

Respondent submits that this is an independent and adequate state procedural rule. *Accord Bostick v. Stevenson*, 589 F.3d 160, 162-65 (4th Cir. 2009).⁸ Petitioner's PCR attorney

⁸ In *Marlar*, the PCR judge's order failed to specifically address any of the allegations raised by the inmate, although S.C. Code Ann. § 17 27 80 (2003), required the PCR judge to "make specific findings of fact and state expressly the conclusions of law relating to each issue presented." *Id.* at 408, 653 S.E.2d at 266. The state court of appeals rejected the State's argument that none of the inmate's allegations were preserved for appellate review because the inmate failed to make a Rule 59(e), SCRCP, motion to alter or amend the judgment to include specific findings of fact and conclusions of law. The court of appeals initially indicated that the order failed to comply with § 17 27 80 and that the case should be remanded for specific findings of fact and conclusions of law. *Id.* at 409, 653 S.E.2d at 266-67. However, the court of appeals focused on catch-all language in the order; and it reviewed state supreme court cases where the state supreme court had remanded PCR actions to the PCR judge for specific rulings although no Rule 59(e) motions had been filed, such as *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). Then, the court of appeals held that *Marlar*'s allegations were preserved for appellate review; and it addressed the merits of *Marlar*'s arguments. *Id.* at 409, 653 S.E.2d at 266-67.

The South Carolina Supreme Court reversed the state court of appeals' decision in *Marlar*. First, the Court explained that:

The cases this Court remanded for specific findings were unique cases in which the Court attempted to remind circuit court judges and parties that: (1) specific findings of fact and conclusions of law were required; and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review. Although the cases apparently have not accomplished the Court's goal, they do not change the general rule that issues which are not properly preserved will not be addressed on appeal. In fact, in *Pruitt*, this Court stated in a footnote, "In vacating and remanding in this case, we are not abandoning the general rule that issues must be raised to, and ruled on by, the post conviction judge to be preserved for appellate review. The extraordinary action we take today is necessary only because our opinion in *McCray [v. State]*, 305

clearly understood this procedural requirement. However, she did not comply with it as to this claim. As a result, the South Carolina Court of Appeals was procedurally barred from

S.C. 329, 408 S.E.2d 241 (1991)] is not being followed.” *Pruitt v. State*, 310 S.C. at 255, 423 S.E.2d at 128.

Marlar, 375 S.C. at 410, 653 S.E.2d at 267. The Court then held that “[b]ecause respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge.” *Id* at 410, 653 S.E.2d at 267.

In *Bostick*, the Court of Appeals rejected the State’s position, and the findings by the lower federal courts, that the failure to file a Rule 59(e), SCRCP, motion constituted an independent and adequate procedural bar to federal habeas review of Bostick’s ineffectiveness claim at the time of his Bostick’s 2001 state PCR proceedings. The Court based its rejection of the State’s position upon its conclusion that, at the time of his Bostick’s 2001 state PCR proceedings, the requirement was not consistently applied by the state’s courts. As a result, the Court found that his failure to comply with the rule did not prevent him from pursuing his claim in habeas.

The Court in *Bostick* found that “[i]t is quite clear to us that Rule 59(e) was not consistently applied by the South Carolina courts at the time of Bostick’s PCR proceedings. Indeed, in 2001 we explicitly noted that Rule 59(e) was inconsistently applied and that it was inadequate to preclude federal review. *Pearson v. Harrison*, 9 Fed.Appx. 85, 87 (4th Cir. 2001).” *Bostick*, 589 F.3d at 164. The Court, therefore, “decline[d] to hold Bostick responsible for failing to comply with a rule when, at the time his case was decided, the state courts did not distinguish, in any principled way, those cases in which it would apply the rule from those in which it would not. The district court’s award of summary judgment to the warden on the grounds that Bostick’s federal habeas claim was procedurally defaulted is therefore reversed.” *Bostick*, 589 F.3d at 165.

However, the Court of Appeals’ discussion of the issue in *Bostick* makes clear that the state supreme court has expressly and consistently required compliance with the Rule 59(e) requirement since the decision in *Marlar*, which was decided on November 5, 2007. Thus, it is regularly and consistently followed rule of state appellate procedure that - after November 5, 2007 - the state supreme court will not address issues, even in PCR, unless first presented to and ruled upon by the trial court. The Order in this case was filed well after November 5, 2007. Thus, the ineffectiveness issue was **not decided** by the state supreme court because of the failure of collateral counsel to comply with state court procedure. *See also Burgess*, 402 S.C. at 94-95, 738 S.E.2d at 265-66 (quoting *Marlar* and holding that the State’s argument as to the insufficiency the PCR court’s prejudice analysis under *Strickland* “[was] not preserved for appellate review because the State failed to file Rule 59(e), SCRCP, motion asking the PCR court to specifically determine whether Burgess suffered prejudice as the result of his trial counsel’s deficient performance”); *Smith*, 404 S.C. at 505, 745 S.E.2d at 384.

considering this allegation when she thereafter raised this claim in the Petition for Writ of Certiorari, beginning at p. 14, and her present claim is procedurally defaulted from this Court's review. *Coleman*, 501 U.S. at 729-30, 111 S.Ct. 2546.

Petitioner's procedural default of this claim can only be excused if she can demonstrate both cause for the procedural default and prejudice as a result of the alleged constitutional violation, or if she can demonstrate that failure to review the constitutional claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749-50, 111 S.Ct. 2546.⁹ Respondent submits that she cannot meet her burden to excuse the procedural default of his claim.

In particular, should Petitioner rely upon *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), in an effort to excuse the procedural default, her reliance will be misplaced. Generally, any errors of PCR hearing counsel cannot serve as a basis for cause to excuse a petitioner's procedural default of her claims. *See Coleman*, 501 U.S. at 752, 111 S.Ct. 2546. In *Martinez*, the United States Supreme Court established a "limited qualification" to the rule in *Coleman*. *See Martinez*, 132 S.Ct. at 1319. The *Martinez* Court held that inadequate assistance of counsel "at initial-review collateral review proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* at 1315.

However, it is doubtful that *Martinez* even applies the present case, where Petitioner did not qualify for the appointment of counsel but, instead, was represented by counsel of her

⁹ A prisoner may establish a fundamental miscarriage of justice by showing that a constitutional error probably resulted in the conviction of one who is actually innocent. *See, e.g., Deitz v. Money*, 391 F.3d 804, 808 (6th Cir. 2004). In order to raise a claim of actual innocence, a prisoner "must present[] evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup v. Delo*, 513 U.S. 298, 316, 115 S.Ct. 851 (1995). This standard applies when a prisoner presents a valid claim of constitutional error. *Id.* at 316, 115 S.Ct. 851.

choosing in state Post-Conviction proceedings. Although not expressly articulated in the *Martinez* opinion itself, it is clear that the Court's decision was predicated upon a desire to ensure that a claim of ineffective assistance of trial counsel is not procedurally defaulted from a federal habeas court's review, either through the absence of **appointed counsel** (altogether) in state post-conviction, or through the ineffectiveness of **counsel appointed** for an indigent inmate in post-conviction proceedings. *Cf. Martinez*, 132 S. Ct. at 1318 ("there are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage, but this decision is not without consequences for the State's ability to assert a procedural default in later proceedings. By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, **where counsel is constitutionally guaranteed**, the State significantly diminishes prisoners' ability to file such claims. It is within the context of this state procedural framework that counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default") (emphasis added). *See also id.* at 1319 ("Most jurisdictions have in place procedures to ensure counsel is **appointed** for substantial ineffective-assistance claims") (emphasis added); *id.* ("It is likely that most of the **attorneys appointed** by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, where that is so, the States may enforce a procedural default in federal habeas proceedings") (emphasis added); *id.* at 1319-20 ("An equitable ruling ... permits States a variety of systems for **appointing counsel** in initial-review collateral proceedings. And it permits a State to elect between **appointing counsel** in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings") (emphasis added). As a result, *Martinez* has no application to the present case, where Petitioner

is knowingly, voluntarily, intentionally and deliberately being represented by the same retained counsel who represented her in state PCR proceedings. *Id.*

Even assuming *arguendo* that *Martinez* does apply to this case, Petitioner still cannot meet her burden to excuse the procedural default of her claim.¹⁰ In describing its holding in *Martinez*, the Supreme Court has stated that:

[w]e ... read *Coleman* as containing an exception, allowing a federal habeas court to find “cause,” thereby excusing a defendant’s procedural default, where (1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law requires that an “ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding.”

Trevino v. Thaler, 133 S.Ct. 1911, 1918 (2013) (citing *Martinez*, 132 S.Ct. at 1318–19, 1320–21); see also *Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012) (summarizing the *Martinez* test to require the following: “a reviewing court must determine whether the petitioner’s attorney in the first collateral proceeding was ineffective under *Strickland*, whether the petitioner’s claim of ineffective assistance of trial counsel is substantial, and whether there is prejudice”).

To prevail, Petitioner must show more than the mere fact collateral counsel failed to raise potentially meritorious claims. She must show that no competent counsel, in the exercise of

¹⁰ Even if this Court determines that *Martinez* applies, it is clear that Petitioner is not indigent and would not be entitled to appointment of counsel in order to present claims that were defaulted through the ineffectiveness of her current attorney. *Accord Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013) (when the same counsel represents a habeas petitioner at both the state and federal levels, “and the petitioner requests independent counsel in order to investigate and pursue claims under *Martinez* in a state where the petitioner may only raise ineffective assistance claims in an ‘initial-review collateral proceeding,’ qualified and independent counsel is ethically required”).

reasonable professional judgment, would have omitted those claims. *Hittson v. GDCP Warden*, 759 F.3d 1210 (11th Cir. 2014). As the Eleventh Circuit Court of Appeals explained in *Hittson*:

To establish cause under *Martinez*, Hittson must demonstrate that state habeas counsel were themselves ineffective for failing to raise the four claims in his second amended § 2254 petition. This is a somewhat familiar inquiry, as petitioners have long been able to claim ineffective assistance of trial or appellate counsel to establish cause to excuse a procedural default caused by their trial or appellate counsel. See *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). As the Supreme Court has explained in that context, “[n]ot just any deficiency in counsel’s performance will do ... the assistance must have been so ineffective as to violate the Federal Constitution.” *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 1591, 146 L.Ed.2d 518 (2000) (citation omitted). While *Martinez* did not establish a constitutional right to counsel in state post-conviction proceedings, it did adopt the constitutional standard from *Strickland* as the standard governing petitioners’ claims that their post-conviction counsel’s conduct should excuse a procedural default. See *Martinez*, — U.S. at —, 132 S.Ct. at 1318.

Accordingly, Hittson must establish that his habeas counsel’s conduct “fell below an objective standard of reasonableness,” and that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694, 104 S.Ct. at 2064, 2068. Obviously the merits of the underlying ineffective-assistance claims have some bearing on both *Strickland* prongs; collateral counsel would clearly not fall below *Strickland*’s minimum competency requirements by deciding not to raise a meritless claim, and a petitioner would also not be prejudiced by his counsel’s failure to do so.

But the merits of the underlying claim is only a part of the *Strickland* analysis. With unlimited time and the benefit of hindsight, a petitioner can come up with any number of potentially meritorious ineffective-assistance claims that he now wishes his collateral counsel had raised. However, a petitioner does not establish constitutionally defective performance simply by showing that (a) potentially meritorious claims existed and (b) his collateral counsel failed to raise those claims. *Murray*, 477 U.S. at 486, 106 S.Ct. at 2644 (“[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.”). “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.” FN60 *Jones v. Barnes*, 463 U.S. 745, 751–52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983). “[A] *per se* rule that ... the professional advocate, [is not] allowed to decide what issues are to be pressed ... seriously undermines the ability of counsel to present the client’s

case in accord with counsel's professional evaluation.” *Id.* at 751, 103 S.Ct. at 3313.

FN60. “Even in a court that imposes no time or page limits ... [a] brief that raises every colorable issue runs the risk of burying good arguments ... in a verbal mound made up of strong and weak contentions.” *Barnes*, 463 U.S. at 753, 103 S.Ct. at 3313.

As we have explained, *Strickland* instructs courts to “indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance”—that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” 466 U.S. at 689–90, 104 S.Ct. at 2065–66. To overcome this presumption, a petitioner must “establish that no competent counsel would have taken the action that his counsel did take.” *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir.2000) (en banc).

Thus, to show that his habeas counsel failed to provide the level of representation required by *Strickland*, Hittson must show more than the mere fact they failed to raise potentially meritorious claims; he must show that no competent counsel, in the exercise of reasonable professional judgment, would have omitted those claims. Even assuming that the underlying ineffective-assistance claims are meritorious (which, as we explain in the following section, they are not), Hittson has not established that his state habeas counsel were incompetent for failing to raise them.

Hittson, 759 F.3d at 1262–63. (Emphasis added). In the present case, Petitioner cannot meet her burden of proof because her claim is frivolous.

Kerry Hollins testified at trial that he had been charged with accessory before the fact to armed robbery; accessory before the fact to kidnapping; accessory before the fact to burglary in the first degree; and accessory before the fact to murder, in connection with this case. He had spoken to the prosecutor approximately a week earlier. While his charges had not been resolved at that point, Hollins had agreed to testify truthfully. *App. pp. 396-97.*¹¹

¹¹ Additionally, he was convicted in 2004 of possession with intent to distribute marijuana. *App. p. 397.*

In August 2006, he was living with his mother in North Charleston South Carolina. He and Petitioner, his former girlfriend, had broken up in April or May of that year. Prior to August 2006, he had known Gary Grant, for several months. Also, he had known Jermaine "Manny" Hartwell for half of his life. The three of them sold cocaine together on Spruill Avenue, in North Charleston. **App. pp. 397-405.**

When asked how the plan resulting in the victim's murder of Dexter Perry arose, Hollins testified that:

Q Well, tell me ... how did this plan come about for this incident that involved Dexter Perry?

A **Marquita called me one day and was like, she "got a lick" and ---**

Q Now, tell me what's a "lick"?

A **A robbery.**

Q Okay. And ... **when you're going to do a lick**, what do **you need** to do a lick?

A **Some type of weapon.**

Q All right. Is there any confusion about that?

A No, sir.

Q I asked you **when Marquita Smith used the term "lick,"** what does **that mean?**

A **Armed robbery.**

Q Okay. An armed robbery. And when you use the word "lick" ... on the street, is there any confusion that that means an armed robbery?

A No, sir.

Q Okay. And who contacted you concerning a lick?

A Marquita.

Q Okay. And did she provide you with the name of a person who she could set up a lick on?

A Yes, sir.

Q And who was that?

A She gave me the name "KuKu."

Q And do you know who "KuKu" was?

A Not at the time.

Q Did she tell you who it was?

A She said it been her cousin.

App. pp. 403-04 (emphasis added). This conversation occurred on the day before the murder.

App pp. 404-05.

The next day, August 1st, Hollins, Grant, Hartwell and Kareem King met at a crack head's residence on Clement Avenue and discussed robbing Dexter Perry. All four men were armed with loaded handguns. Grant had both a .45 caliber semi-automatic pistol and a .357 revolver. Hartwell had a .9 mm semiautomatic, and King had a .32 revolver. Petitioner and Tawana Deas had met the victim and one of his friends at an area Ruby Tuesdays restaurant and she provided Hollins with information as to where the victim was. Petitioner later came to Clement Avenue and led her co-conspirators to the Hess Station on Highway 78 in Ladson,

South Carolina. She drove her car, while her co-defendants followed in a car driven by Hollins.¹²
App. pp. 402-03; 405-08.

Hollins testified that he would not have known where to locate the victim if Petitioner had not led him there. **App. p. 410.** Petitioner called the victim, in an effort to lure him to the Hess Station. However, he had already gone to Tawana's apartment. Because Hollins did not know where Tawana lived, Petitioner led him and their co-defendants to apartment complex in Goose Creek, South Carolina. Hollins parked his vehicle next to the building in which Tawana lived. Hollins remained in the car because Tawana would have recognized him, but King, Grant and Hartwell got out of the car and went to rob the victim. Each of the men was armed. While they did not wear anything to cover their faces, Tawana did not know any of them. **App. pp. 410-12.**

Petitioner called Hollins between three and five minutes later, and she told him to leave because Tawana was calling the police. Unaware of what had happened in the apartment, Hollins asked Petitioner why he should leave. She told him "they got my cousin." **App. pp. 411-13.**¹³

Hollins immediately drove away from the apartment complex and headed to Ladson. He called Hartwell to find out what had happened. Hartwell did not answer the phone call, but called Hollins minutes later and told Hollins to meet him at the Bada Bing club, in Ladson. Five or ten minutes after Hollins got to the shopping center where the club was located, King called and told him to meet King at the end of the parking lot because Hartwell had been shot. Hollins drove to the end of the parking lot and picked up King, but Grant and Hartwell were not with him. **App. pp. 413-15.**

¹² The car he was driving had been rented by his girlfriend, Chandra Chisholm. **App. pp. 409-10.**

¹³ He would not unknown to leave if Petitioner had not told him to do so. **App. p. 413.**

When Hollins later picked up Grant and Hartwell, he saw that Hartwell had been shot in the chest. Although Hartwell did not say where he was when he got shot, he did tell Hollins, "I think I 'stank the dog.'" This meant that Hartwell had shot the victim. Grant was wearing a bracelet and a ring that he told Hollins he had taken from the victim. From there, they went back to the house on Clement Avenue. When they got to the house, Grant through three cartridge casings into the bushes and he reloaded his .45 pistol. **App. pp. 415-17.**

Hollins left after approximately five minutes and drove towards Chisholm's residence on Ashley Phosphate Rd. On his way there, however, he was stopped by a highway patrolman and arrested. On August 4th, Hollins gave a statement to a detective from Berkeley County. **App. pp. 418-19.**

The following exchange occurred when Grant's attorney attempted Hollins to elicit, on cross-examination, that "a lick" did not mean armed robbery:

Q Okay. Now, Mr. Rollins, a **lick doesn't refer to just an armed robbery**, does it?

A **My understanding it is.**

Q Well, ... if you saw me on the road, it can also refer to the person, right? In other words, "He's the lick." If you point at me and say, "He's the lick," meaning I'm the person that's going to get robbed, right?

A Yes, sir.

Q Isn't that right?

A **Means a armed robbery.**

Q **He's the lick.**

A **He's the person going get robbed.**

Q Right. But if you and a couple of boys jump me, three to one, I'm still the lick. You don't have -- it doesn't refer to carrying a weapon necessarily. It refers to the robbery, right?

A It refers to a robbery.

Q A robbery. So that means if Ms. Smith or someone said, "We got a lick," that does not necessarily mean in her mind or anybody else's mind that it's an armed robbery. It just means "We got somebody to rob." That's the correct street slang; is it not?

A **The plan was to rob.**

Q To rob. **She did not discuss anything with you, though, about weapons or anything. It's just "We got a going to lick, he's the lick; isn't that correct?**

A Yes, sir.

Q Okay. Now, **who told you to say it was an armed robbery, though?**

A **That's what the plan was.**

Q **Your plan, but maybe not her plan or somebody else's plan. In your mind it was an armed robbery, right?**

A **I know what the plan was.**

Q Oh. Okay. Now, in your statement you said that, "Marquita called me one day and said she had a lick." That obviously refers to a noun, a person. She had a lick. It wouldn't make any sense, "She has a armed robbery." She has a lick, which means there's a robbery going down on somebody. And you said you wanted to know who it was, right?

A I didn't say I wanted to know who it was.

Q You gave the phone to Manny?

A Yes, sir.

App. pp. 424-25 (emphasis added).

Trial counsel, Mr. Jones, testified at the PCR hearing that he had been practicing law since 2001 (or six years before Petitioner's trial) and that approximately 70% of his practice was

criminal. He was been retained in this case. He met with Petitioner “a pretty good bit over the course of” his representation of her and counsel had discussed the testimony of potential witnesses with her. He felt that he had adequate time to prepare for trial, even that he would have liked more time to prepare for his cross-examination of Hollins. Hollins’ decision to testify against his client was part of his basis for requesting a continuance. **App. pp. 1008-09.**

Counsel felt that Hollins was a key witness against Petitioner. A problem that counsel had at trial was that he did not know to what version Hollins would testify because Hollins had not initially agreed to testify for the State, and counsel was surprised that Hollins would testify against Petitioner. **App pp. 962; 966-67; 986.** Counsel further explained that:

... I feel like and ... I reviewed this in light of the initial -- I found out about this in September, I think, and then began reviewing this November the 6th. So I am -- and then got your amended complaint, I guess, November the 9th. So I have not had a chance to totally review this thing from the standpoint kind of. But, if I remember right, I mean, we found out Kerry was going to testify... I guess the trial was starting on a Monday, maybe, like that Thursday or Friday and got his attorney to send us over his statement. Because we did not think that Kerry was testifying. All the way up until that point, Kerry had never -- he ended up, and I think there's some discussion in here -- I want to say something like two weeks before the trial, there was some discussion at that time that Mr. [Bulus] had gotten into -- he'd changed and decided at that point to testify. But we had not known he was going to testify at [trial], you know, before. The whole duration that we had the case, we thought it was going -- nobody was testifying. We thought everybody was going to clam up.

App. p. 968.

Counsel thought that he learned that Hollins had decided testified two or three days before trial and he thought that he may have stated the date in his motion for continuance, but he could not specifically remember the date at the time of the PCR hearing. **App. p. 969.** Even though Hollins was a co-defendant, counsel had not received a copy of his second statement. Counsel thought he had brought this to the trial judge’s attention, as a Rule 5, SCRCrim.P,

discovery violation, in connection with his continuance motion, even though he did not expressly refer to the Rule in his motion. Counsel had explained to the trial judge that the August 4, 2007 statement by Hollins not only incriminated Petitioner, it made her out to be the primary culprit in the case. **App. pp. 969-72.**

Counsel did not ask Hollins' attorney, Patty Kennedy, Esquire, for permission to talk to him because "one, we got it relatively quickly and ... since he was testifying for the State, I assumed he probably would not talk with me. I typically don't let my clients speak to a co-defendant if they're going to be a testifying witness. But I did not ask [counsel if I could speak to him]." While counsel could have asked Hollins' attorney for permission to speak with her client, counsel did not do so and he did not know whether or not Hollins would have, in fact, agreed to be interviewed by him. Additionally, counsel did not ask for a "brief delay" in order to speak with Hollins, and he agreed that a request for such a brief delay would have potentially been more likely to have succeeded than a motion for continuance. **App. p. 973; 1001-02.**

Kerry Hollins testified at the PCR hearing that he did not have any pending appeals by the time of Petitioner's PCR hearing. **App. p. 1022.** Hollins testified for the prosecution at Petitioner's trial. He claimed that he would have spoken to Petitioner's counsel prior to trial if counsel had asked to speak with him, and he was done so even if his own attorney had advised him not to do it. He further claimed that Petitioner did not know that he and whoever went with him would be using guns when they robbed the victim; that she had never discussed an armed robbery with him; that she never told him her cousin had large sums of money; that she did not discuss simply "snatching" the victim if he did not have drugs or money on him; and that she had not been present when a conversation about using guns occurred. However, she did tell Hollins

that her cousin dealt drugs. Hollins claimed that he would discuss these matters with trial counsel, if counsel had spoken to him before his testimony. **App. pp. 1023-28.**

Hollins' lack of credibility became readily apparent on cross-examination. He remembered testifying that Petitioner was the person who planned the robbery and that she told him where the victim could be found. He also remembered testifying that Petitioner had told him not to go into the house because if Tawana saw him, she would know that Petitioner was involved in the crime; and that after they had kidnapped the victim, Petitioner called and told him to leave. However, he professed that he had no memory of testifying that he did not want to be an active participant in the crime, but that Petitioner influence him to be involved. He also did not remember testifying that he had stayed in the car at Tawana's house because Petitioner had asked him to do so, but he admitted that he and Petitioner had been dating. **App. pp. 1029-30.**

Once again, Petitioner cannot show how trial counsel's performance was deficient or that she was prejudiced under *Strickland*. The PCR judge did not address this allegation in her Amended Order. However, she made a number of factual findings that are supported by the record and which are relevant to this Court's consideration of Petitioner's claim. Specifically, she found that:

Counsel testified that he did not receive Mr. Hollins statement until three or four days before trial, and he raised that issue in his motion for continuance and severance. He testified that he did not ask Patricia Kennedy, Mr. Hollins' attorney, to ask Mr. Hollins if he would speak with the applicant's attorney. Defense counsel assumed Mr. Hollins would not speak with him, since [Hollins] was a co-defendant was testifying for the State. Defense counsel's PCR testimony in fact reflects that he understood that Hollins would have had to make a decision concerning whether to speak with him. He further admitted that he didn't know whether or not Hollins would have been willing to talk to him. With regard to defense counsel's failure to interview Hollins, defense counsel admitted that Hollins' statement wasn't very divergent from the applicant's statement. Hollins testified that if he had been asked, he would have been willing to talk to defense counsel *even if* his own lawyer had recommended against it. Hollins expressly

testified that if defense counsel had asked him the same questions as PCR counsel did during the evidentiary hearing, he would have answered them the same way he did PCR hearing, and further, that he would have answered those questions the same way as they been asked of him under oath at that Applicant's trial.

App. p. 1187. Further, the PCR judge found that "trial counsel" testimony is credible." **App. p. 1191.**

Again, the PCR judge's factual findings, including her credibility determination, are supported by the record, and Petitioner has not rebutted the presumption that these findings are correct by clear and convincing evidence. § 2254(e)(1).

Seventy-five years ago, the United States Supreme Court explained that:

Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.

Avery v. Alabama, 308 U.S. 444, 446, 60 S. Ct. 321, 322 (1940). Subsequently, the Court further elaborated that:

Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. *See Chambers v. Maroney*, 399 U.S. 42, 53–54, 90 S.Ct. 1975, 1982–1983, 26 L.Ed.2d 419 (1970). Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, **broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.** *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964).

Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616 (1983) (emphasis added). *See also Hough v. Alabama*, 85 F.3d 1492, 1496-97 (11th Cir. 1996).

In the present case, counsel was not deprived of an opportunity to meet with Petitioner, discuss the case with her or to prepare adequately for trial. *Accord Avery*, 308 US at 446, 60 S.Ct. at 322. *See also Middleton v. Roper*, 498 F.3d 812, 816-17 (8th Cir. 2007) (upholding the denial of a continuance after the state disclosed 23 witnesses only three weeks before trial where many were previously identified, some were already known and several were minimal chain-of-custody witnesses); *Burton v. Renico*, 391 F.3d 764, 772 (6th Cir. 2004) (denial of a continuance, arguably wrong, does not necessarily make it unconstitutional and the circumstances of the case determine whether the denial is so arbitrary as to violate due process under *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849 (1964); and, actual prejudice must be shown). Rather, counsel's motion was predicated, in part, on Hollins' recent decision to testify on behalf of the State and the unavailability of two potential witnesses.

Contrary to the current allegation, a review of the motion for continuance as made by counsel (**App. pp. 11-23**) reflects that counsel made a constitutionally adequate request for continuance based upon the lack of adequate written notice of the trial date, the fact he received notice of the scheduled trial date only ten (10) days before trial; the fact Petitioner had only recently been indicted for the new offense of accessory before the fact of burglary (as opposed to the original substantive charge of burglary); the unavailability of two police officer witnesses; the recent disclosure of Hollins' August 4, 2007 statement to counsel; and counsel's inability to adequately cross-examine Hollins because of the late disclosure. Although counsel did not expressly state that he was asserting that the State violated Rule 5, SCRCrim.P., It is clear from

brought both his argument and the trial judge's ruling (**App. p. 34**) that the trial judge understood him to be asserting this as a basis for his motion.

Given the present record, Respondent submits that Petitioner failed to meet her burden of demonstrating deficient performance under *Strickland*. Also, she is not met her burden of demonstrating prejudice under *Strickland* because she has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. In other words, she has not proven that "[c]ounsel's errors [were] 'so serious as to deprive [her] of a fair trial, a trial whose result is reliable.' " *Richter*, 562 U.S. at 104, 131 S.Ct. at 787-88 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). First, she did not offer any other grounds upon which counsel could have successfully moved for continuance. Second, the South Carolina Supreme Court has stated that:

"Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." *State v. Whitener*, 228 S.C. 244, 264, 89 S.E.2d 701." *State v. Mayfield*, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959).

State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). The United States Supreme Court has likewise held that recantations are "properly viewed with great suspicion," *Dobbert v. Wainwright*, 468 U.S. 1231, 1233-34, 105 S.Ct. 34, 36 (1984). The Fourth Circuit Court of Appeals has also indicated that recantations are generally "received skeptically," *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975), and that "[w]here the circumstances surrounding the recantation suggest it is the result of coercion, bribery, or misdealing, the district court is justified in disregarding it," *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir.1973).

In the present case, Hollins' PCR testimony simply was not credible, since it directly contradicted his trial testimony.¹⁴ When he testified at trial, he was still facing charges in connection with the armed robbery and murder of Dexter Perry, whereas he was no longer facing those charges by the time of his PCR testimony. Also, he was vigorously cross-examined by his co-defendant Grant's attorney about whether a "lick" could mean something other than an armed robbery. Yet, Hollins refused to come off of his testimony on direct examination that a "lick" meant an armed robbery to him and that the plan devised by Petitioner was to commit an armed robbery of the victim.

Additionally, in addressing Petitioner's ineffectiveness claim, this Court must bear in mind that trial counsel was the third attorney to cross-examine Hollins. As a result, much of what Petitioner suggests could have been developed by trial counsel on cross-examination of Hollins, if counsel had spoken to Hollins prior to his testimony, was already before the jury through the cross-examination by co-counsel. Also, there was overwhelming evidence of guilt (*see Ground Four*), such that Petitioner cannot show any prejudice from counsel's alleged error. *See Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2068-69.

For the reasons set forth above, Respondent submits that Petitioner cannot excuse the procedural default of this claim.

GROUNDS TWO-THREE

In **Ground Two**, Petitioner asserts that trial counsel was ineffective for failing to adequately cross-examine Hollins. In **Ground Three**, she contends that trial counsel was ineffective because he did not "properly respond to testimony from State Witness, co-defendant,

¹⁴ The constitutional adequacy of trial counsel's cross-examination of Hollins is more fully discussed in **Grounds Two-Three**, *infra*.

Hollins that a "Lick" Conclusively Meant an Armed Robbery." Respondent submits that these allegations are frivolous and that the state courts' rejection of Petitioner's claims was not "contrary to" and did not involve an "unreasonable application of" clearly established United States Supreme Court precedent under § 2254(d)(1).

When trial counsel was asked whether there was any evidence that Petitioner knew that weapons were going to be involved in the crimes for which she was convicted, counsel testified that Hollins testified that she used the word lick, and Hollins testified that a "lick" was a robbery with a weapon. He did not think that there was any other evidence presented at trial indicating that she knew the weapons were going to be involved. Also, counsel's recollection was that "there was no discussion that she would have been aware that the intended to kidnap anybody" or commit a burglary. Counsel likewise testified that "I can't remember exactly what her statement was, but I don't believe that she ever thought they were going to harm him or intended to harm him." **App. pp. 959-60.**

Petitioner then asked counsel why he did not object to Hollins' testimony that Petitioner had set up a lick and to Hollins' definition of a lick as an armed robbery. Counsel replied "that was his statement of what was said to me. I mean, they asked him what was said and asked what he said, and that's what he heard and that's how he defined it." **App. p. 962.** When asked what evidentiary foundation there was for this testimony, counsel correctly replied, "I don't know that there was any evidentiary [foundation]. My perception of the testimony was he was saying what he thought it was. They had asked him to question and he had answered what he thought it was." **App. p. 963. See also App. p. 1010.**

Counsel explained that he did not follow up on Hollins' direct examination in this regard because Mr. Bolus, Grant's attorney, had cross-examined Hollins on this point and, in counsel's

estimation, Hollins had equivocated by admitting that a “lick” could be a person. **App. p. 964.** When Petitioner’s PCR attorney pressed counsel about why counsel had not questioned Hollins as to whether Petitioner had any idea weapons were going to be used in the case, counsel explained that:

I guess my concern at that point was if Hollins was getting up there testifying against Marquita, my concern then is, we knew he was adverse to our position, [and that he] was going to do whatever it took to solidify hopefully his bracket deal] and get a better deal. So my concern then is I didn’t know what he was going to say until he got up there and said, well, Marquita was in on it the whole time. She was in the car watching us load them only in a, guns and stuff like that, I didn’t have any way to contest that other than to put Marquita on the stand at that time. ... So I felt like we were able to do enough at that time to distinguish between what Marquita would have thought a lick was with this common plan and what [Hollins] thought a lick was.

... I never thought that Margarita you they were going to do what they [did] -- I believe the Marquita thought that they were going to snatch whatever money was owed him or may be jewelry for whatever off [of the victim], and not her him, pushed him down and run off. That’s what I truly believe she thought the whole time.

App. pp. 965-66.

Counsel agreed with Petitioner’s collateral attorney that Hollins’ statement was generally consistent with Petitioner’s account, with the exception of Hollins’ testimony that she had planned the armed robbery, *i.e.*, she had called and offered up the person to rob. **App. pp. 966-67.** He added, however, “Our problem was we just didn’t know what his version was going to be, because it was kind of a surprise that he testified.” **App. p. 967.**

At the PCR hearing, Petitioner testified that she understood the term “lick” to mean “[a] way to get money.” Asked by her attorney whether she had ever considered the term lick to mean a robbery or an armed robbery, Petitioner replied, “no, ma’am. I mean, *it could have meant*

robbery, but I never thought ... of it as an armed robbery. I always use it as a way to get money.” (Emphasis added). She denied ever intending it to mean armed robbery, and she agreed that it could also mean “a good place to break in and steal stereos” or “shoplift.” She likewise agreed that it could have other meanings. **App. pp. 1042-45.**

The PCR judge found that trial counsel’s testimony was credible. **App. p. 1191.** She denied relief on Petitioner’s second claim, finding that:

This Court finds that counsel was able to properly cross-examine Kerry Hollins at trial. Counsel testified that Mr. Bolus, a co-defendant's attorney, followed up and got Mr. [Hollins] to admit that a lick could be a person rather than just a robbery. Counsel testified that he did not ask Mr. Rollins if he knew there would be weapons involved because he did not know what Mr. Hollins would say, particularly since he was testifying against Applicant and looking to solidify a good plea deal. He testified that he did not ask Patricia Kennedy, Mr. Hollins' attorney, if her client would speak with him, but counsel assumed Mr. Hollins would not speak with him since he was a co-defendant who was testifying for the State. Mr. Hollins' testimony at the PCR hearing indicates that he might have offered testimony beneficial to the defense at the Applicant's trial, if he had been properly examined by defense counsel. This Court finds that counsel was able to cross-examine Mr. Hollins regarding some details of the incident as well as why he decided to testify against his co-defendants.

App. pp. 1195-96

The PCR judge denied relief on **Ground Three**, as follows:

This Court finds that trial counsel was not ineffective for failing to object when the State elicited testimony that a "lick" meant an armed robbery. Counsel testified that he did not object because Kerry Hollins referenced a "lick" in his statement and he assumed the State was asking for Mr. Hollins' opinion of what a "lick" meant. Mr. Hollins testified at trial that a "lick" was a robbery and that you need some kind of weapon to do a robbery. This Court finds that trial counsel had no basis to object to this testimony.

App. p. 1191.

Respondent submits that Petitioner is not entitled to relief because she has not proven that counsel’s performance was deficient under *Strickland* on either allegation. Initially, Respondent

submits that the PCR judge's factual findings are supported by the record. As a result, her findings are not objectively unreasonable under § 2254(d)(2). *See also Cagle*, 520 F.3d at 324 (“‘federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them’ ”) (citation omitted); *Buckner*, 453 F.3d at 204 n.8 (the task of a reviewing court in habeas corpus “is not to decide the credibility issue *de novo* but to determine whether [the petitioner] has produced clear and convincing evidence that the [PCR] court's resolution of that issue was incorrect”). Also, Petitioner has not rebutted the presumption that these findings are correct by clear and convincing evidence. § 2254(e)(1).

Respondent submits that Petitioner's suggestion that counsel should have objected to Hollins' testimony about what a lick meant to him is frivolous because, as correctly observed by trial counsel and correctly found by the PCR judge, Hollins testified that the term lick meant an armed robbery to him. Thus, there was no basis upon which trial counsel could have objected to his testimony.

In commonly accepted slang, the term “a lick” means robbing someone, whether or not armed. The urban dictionary defines “licks” as “noun, slang for robberies” and it gives the following example of the term used in proper context: “I rented a piece (firearm) for the licks.” <http://www.urbandictionary.com/define.php?term=lick>. Also, for over a decade, a number of cases in South Carolina and other jurisdictions throughout the United States have admitted similar testimony. *See, e.g., State v. Anderson*, 357 S.C. 514, 516, 593 S.E.2d 820, 821 (Ct. App. 2004) (In prosecution for murder, armed robbery, and conspiracy to commit armed robbery, Court observed that “According to Ross, he was hanging out in an apartment with Manick on the day of the incident. Ross claimed that Appellant arrived at the apartment and told them ‘that he

had a lick,’ indicating that the men could rob the victim”); *State v. Thompson*, 374 S.C. 257, 260, 647 S.E.2d 702, 704 (Ct. App. 2007) (in prosecution for armed robbery and other crimes, testimony was presented that “[o]n the morning of February 16, 2004, Thompson met with Wanda Harris and discussed whether she knew of a ‘lick.’ Harris testified a ‘lick’ is a target for a robbery. Later that day, Harris called Thompson and told him about a potential lick and asked him to meet her”); *United States v. Lanier*, No. 13-5703, 2015 WL 4758292, at *1 (6th Cir. Aug. 13, 2015) (“Shannon Wilson testified that he had told Lanier about this ‘lick’ (opportunity to commit a robbery) on Hampton Drive and that he believed there would be a kilogram or more of cocaine at the location”); *State v. Buckmon*, 347 S.C. 316, 320, 555 S.E.2d 402, 404 (2001) (“get a lick” taken to mean there was going to be a burglary or a robbery); *Gilchrist v. State*, 350 S.C. 221, 224, 565 S.E.2d 281, 283 (2002) (A “lick” defined as to quote rip somebody off”); *State v. Marshall*, 868 N.W.2d 201, 2015 WL 3613310, *2 n. 3 (Iowa Ct. App. 2015) (Table) (“An officer testified a ‘lick’ was a slang term for a robbery”); *Westbrooks v. State*, 145 So. 3d 874, 880 (Fla. Dist. Ct. App. 2014), reh’g denied (July 25, 2014) (“A witness testified that in a phone call with his friend Lemons, Westbrooks mentioned a ‘lick,’ or a robbery”); *Rivera v. Hardy*, No. 08 C 4382, 2011 WL 814006, at *1 (N.D. Ill. Feb. 22, 2011) (in a case involving a 38-count indictment for felony-murder based on aggravated vehicular hijacking and felony-murder based on armed robbery, as well as five counts for the armed robbery and aggravated vehicular hijacking, the Court stated, “In the transaction, known as a ‘lick,’ defendants lured Frederick and others to a specified location on the premise of selling them a large quantity of marijuana and then robbed Frederick and the others of the money while pretending to be police officers”); *Jones v. Jones*, No. 1:04CV309, 2007 WL 2219356, at *16 (W.D. Mich. July 30, 2007) (in prosecution for murder and armed robbery, “Duren Wyrick testified that petitioner accompanied

co-defendant Harris 15 to 30 minutes prior to the robbery, that Harris indicated that he wanted to 'hit a lick' (i.e., to rob something), and that petitioner 'snickered' and gave 'a little laugh' at Harris' comments"); *Pink v. State*, 104 P.3d 584, 587 (Okla. Cr.App. 2004) (in prosecution for robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon, witness "Lane testified that Pink told them that he had some 'licks,' meaning robberies, they could do to make some money. In particular, Pink told them that there was a Dollar General that they could rob, and Lane and Hellen indicated their willingness to do so").

Of course, the fact that the term in a "lick" may have been used by other persons to mean something other than an armed robbery is irrelevant, since Hollins and Petitioner, his former girlfriend, understood it to mean an armed robbery. Therefore, it was not "contrary to" or an "unreasonable application of" *Strickland* for the PCR judge to find that counsel's performance was objectively reasonable as to **Ground Three**.

Furthermore, Petitioner cannot show that counsel's cross-examination of Hollins was constitutionally inadequate. "Defense counsel are allowed a considerable breadth of discretion in choosing their trial strategies." *Fleming v. Kemp*, 748 F.2d 1435, 1451 (11th Cir. 1984). An attack on the effectiveness of counsel's cross-examination of a witness is a matter entrusted to the professional discretion of counsel. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 (where a defendant focuses on counsel's "strategic choices made after thorough investigation of law and facts," such choices "are virtually unchallengeable"); *United States v. Nersesian*, 824 F.2d 1294, 1321 (2nd Cir. 1987) ("Decisions whether to engage in cross-examination and if so to what extent and in what manner, are ... strategic in nature" and will not support an ineffective assistance claim"); *Yarrington v. Davies*, 779 F.Supp. 1304, 1308 (D. Kan. 1991), *aff'd*, 992 F.2d 1077 (10th Cir. 1993) (The extent of examination and cross-examination of witnesses is an area of trial

tactics left to the discretion of counsel); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Marzullo v. Maryland* standard was not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness); *United States v. Orr*, 636 F.3d 944, 952 (8th Cir. 2011) (“[W]e generally entrust ... matters of trial strategy[] to the professional discretion of counsel”) (internal citation and quotation marks omitted), *cert. denied*, ___ U.S. ___, 132 S.Ct. 758 (2011); *Blake v. United States*, 723 F.3d 870, 879 (7th Cir. 2013) (“counsel's performance is to be evaluated in light of the discretion properly accorded an attorney to develop appropriate trial strategies according to the attorney's independent judgment, given the facts of the case, at least some of which may not be reflected in the trial record”); *United States v. Mason*, 774 F.3d 824, 830 (4th Cir. 2014) (“Attorneys can be selective and strategic without risking an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. We have consistently made clear that we do not penalize attorneys for failing to bring novel or long-shot contentions”).

Notwithstanding Petitioner's claim to the contrary, Respondent submits that trial counsel provided constitutionally adequate representation with respect to the manner in which he cross-examined Hollins. While trial counsel did not object to this testimony by Hollins, he thoroughly cross-examined and impeached Hollins' testimony. Specifically, counsel's told to establish that Hollins had not been truthful when he said he never went into a trailer park where the victim lived, when other witnesses - whom he did not know and who did not know him - saw his girlfriend's car (with Florida license tags) driving away from the trailer park. He also could not explain why a BOLO had been issued for his girlfriend's car if he had not gone into that trailer park were the other witnesses claimed they had seen the car. **App. pp. 433-34.**

Counsel also cross-examined him, at length, about his version of the events resulting in the murder of the victim, as well as discrepancies between his trial testimony and his statements. Additionally, counsel confronted him with the testimony by Joe Alex Husser that he had pistol-whipped Husser at the Silver Box trailer park. **App. pp. 434-40.**

In counsel's closing argument, counsel stressed Mr. Husser's identification of Hollins as the man who attacked him and contrasted this with Hollins' claim that he was never there. Counsel likewise attacked the prosecution's failure to question Hollins about why Husser was able to identify him as a person who attacked Husser. **App. pp. 654-58.**

Counsel even so far as to suggest that:

if the State stands up here today and they tell you to believe Kerry Hollins, you think they would have intentionally put him up. And not put this other evidence in, that he was picked out at the scene. He think about it: if they get up here and they tell you, "Ladies and gentlemen, you need to believe Kerry Hollins because Kerry Hollins defined what a lick was. You need to believe Kerry Hollins."

App. p. 659. The remainder of counsel's closing argument was devoted to attacking the weakness in the prosecution's case and discrepancies between Hollins' description of the events and other evidence that had been presented by the prosecution. **App. pp. 659-72.**

Apparently, Petitioner asserts that trial counsel was ineffective for failing to cross-examine Hollins in the same manner as her collateral attorney would have done. This, however, does not show deficient performance under *Strickland* because "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. *See also Richter*, 562 U.S. at 106, 131 S.Ct. at 789 ("Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach"). *Strickland* only requires that "counsel make objectively reasonable choices." *Bobby*

v. *Van Hook*, 558 U.S. 4, 9, 130 S.Ct. 13, 17 (2009) (“the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices”). Respondent submits that counsel made objectively reasonable choices with respect to his decision. *Id.* See also *United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir. 1991); *United States v. Adamo*, 882 F.2d 1218, 1227 28 (7th Cir.1989) (same).

Petitioner also failed to prove any prejudice resulting from counsel’s failure to adequately cross-examine Hollins (Petitioner’s **Ground Two**) or from counsel’s failure to object (Petitioner’s **Ground Three**). As discussed in **Ground One (B)**, *supra*, Hollins’ PCR testimony simply was not credible, since it was contradicted by his trial testimony. When he testified at trial, he was still facing charges in connection with the armed robbery and murder of Dexter Perry, whereas he was no longer facing those charges by the time of his PCR testimony. Also, he was expressly cross-examined by his co-defendant Grant’s attorney about whether a “lick” could mean something other than an armed robbery. Although Grant’s attorney vigorously cross-examined him at length, Hollins refused to come off of his testimony on direct examination that a “lick” meant an armed robbery to him or that the plan devised by Petitioner was to commit an armed robbery of the victim.

Any claim that she was prejudiced by counsel’s performance necessarily ignores that both counsel for Hartwell (**App. pp. 419-29**) and counsel for Grant (**App. pp. 429-33**) vigorously cross-examined Hollins and impeached his credibility before Petitioner’s attorney cross-examined him. As correctly noted by counsel, Grant had some success in this regard, but Hollins had steadfastly maintained that the plan in this case was to commit an armed robbery and that this was what was meant by the word lick. As a result, any further attack on Hollins’ credibility by trial counsel on this point would have been merely cumulative to the cross-

examination by the co-defendants. Moreover, there was overwhelming evidence of guilt, such that Petitioner cannot show any prejudice from counsel's alleged error. *See Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2068-69. **See Ground Four.**

GROUND FOUR

Petitioner's **Ground Four** is that trial counsel was ineffective because he failed to adequately argue directed verdicts on Petitioner's behalf. She claims trial counsel's argument in support of the directed verdict motions should have included an argument that "the totality of the evidence adduced at trial had completely failed to establish that Petitioner knowingly participated in anything that put her on notice that her co-defendants would ultimately commit far more serious crimes than the crime she knowingly agreed to assist them in committing." Respondent submits that this argument is without merit and that the PCR judge's rejection of her claim was not "contrary to" and did not involve an "unreasonable application of" clearly established United States Supreme Court precedent under § 2254(d)(1). *See also Richter*, 562 U.S. at 101, 131 S.Ct. at 787.

In addition to the testimony of Kerry Hollins, the State presented evidence that Petitioner had given a custodial statement admitting her guilt as an accessory before the fact to murder and armed robbery. She began her statement, which the prosecution published to the jury, by saying that "[t]he whole time we have been together, Kerry [Hollins] has been in trouble. I love Kerry, but I am also afraid of him." **Tr. p. 545.** Then, she stated that:

"On Sunday, 7/31/2006, **Kerry** called me and **asked me if I knew someone we could rob.** At first I told him I didn't know anyone. Then Dexter came to my mind. I told Kerry Dexter is the only person I know who flashes money around. He asked me about how much, money did I think he has. I told him a lot. Try to find out how much. I called Dexter's phone and got Chris's number. Chris is Dexter's friend who likes me. Chris is always bragging about how much he and Dexter had. After talking with Chris, I told Kerry ... what Chris said.

"On the next day, Monday, 7/31/2006, **Kerry called me and asked me to ... set it up ... so he could rob Dexter and Chris.** I called Chris back and while we were talking, he asked me to go out with him that night. But I told him- 'no' because I didn't feel like it. I told Chris I would call him back later.

"On Tuesday, 8/1/2006, Kerry called me. 'Did you' find out anything else?' **I told Kerry that Chris said Dexter was back in town with a big pickup.** Chris and Dexter, Tawana and I made plans to go out to dinner. I told Kerry about the plans. Kerry told me that Dexter would not get hurt. Kerry told me to call him when we got to the place where we -- "we" being Chris, Dexter, Tawana, and I -- were going to eat, at Red Lobster.'

"I called Kerry when Tawana and I got to Red Lobster. I told ... [him] that we were there, but Chris and Dexter were not. Tawana and I waited inside, but Chris and Dexter never showed up. Tawana and I called Chris and Dexter and told them Red Lobster was closed. They and we decided to meet at Ruby Tuesdays on Ashley Phosphate Road. I called Kerry and told him that we were meeting Dexter and Chris at Ruby Tuesdays. Kerry said, 'Okay. We are coming there.'

"After we met with Chris and Dexter while we were eating, Kerry called me and asked me if Dexter had a lot of money. I told him 'yes.' Chris and Dexter and Tawana and I stayed at .Ruby Tuesdays for about an hour or so.

"When we left out of Ruby Tuesdays, Kerry and them went on to follow Dexter and Chris, and then robbed them. But something happened and they missed Dexter leaving. Kerry called me and asked me to show them where Dexter and ... Chris's hole was -- in parenthesis -- where he keep the drugs. I called Dexter and told him that Tawana wanted me to check and see if he was ... with another girl. So he gave me directions to where he was, at the Silver Fox trailer park.

"I called Kerry and told him the directions. He told me to go over there and he would follow me. I drove to the Silver Fox mobile home park and met with Dexter. We called Tawana, but she didn't answer the phone. Dexter told me he was going to Tawana's house, so I left.

"I called Tawana ... and told her Dexter was coming to her house and let him in. When Kerry called me, I told him Dexter had gone to Tawana's. I did not want to, but he talked me into coming to the Hess Mart on 78 and meeting with him.

"I went inside Tawana's and ... Dexter's. We were there about 10 minutes when Chris called Dexter and told him to come pick him up. Dexter and I were going to leave at the same time, but I walked out first. I got afraid and had -- and had second thoughts about it, so I told Dexter, 'Someone's out there.'

"Tawana told us ... it was probably one of her brothers, so Dexter went out anyway. As soon as he stepped out, they came running after him. Dexter made it back inside' and tried to shut the door, but they got in anyway. They pushed him down in the hallway -- they pushed me down on the way in." Sorry y'all. "They pushed me down on the way in.

"I got up and ran away and did not look back. I was running behind the apartments and so was Tawana. Tawana called the police. Later we spoke to the police. Kerry called me right after it happened, and Kerry could hear Tawana on the phone with the police, I hung up.

"Kerry kept calling me, asking me what the police were doing. After I found out Dexter had been shot, I tried to call Kerry, but it went to his voice mail."

Tr. pp. 545-48 (emphasis added).

Also, Tawana Deas testified that she had known Petitioner since high school, and that they were good friends until these crimes occurred. They would often get together and either go to dinner or go shopping. Tawana had met the victim, Dexter Perry, at a dance, and she was aware that he and Petitioner were related. She would see the victim two or three times a month. She had also met Hollins, Petitioner's boyfriend, through Petitioner. However she did not know King, Grant or Hartwell. **App. pp. 129-30.**

On the night of August 1, 2006, she and Petitioner were supposed to have dinner with the victim and Chris Nelson, his friend, at an area Red Lobster. After Tawana got off work that day, she ran an errand and finally met up with Petitioner around 9:00 p.m. They went to the Red Lobster, with Petitioner driving. However, the victim and Chris could not get there until after closing time for the Red Lobster. So, they decided to eat at a Ruby Tuesdays, and they met the victim and Chris there. Although Hollins "[o]bviously ... wasn't supposed to know where she was going," Petitioner got up from the table twice shortly after the victim arrived and spoke with him on his cell phone. He was at the McDonald's across the street. **App. pp. 130-34; 138.**

When they left Ruby Tuesdays, they followed the victim's car at Petitioner's suggestion. (Tawana did not know what the victim and Chris were going to do). Petitioner was on her cell phone while they followed the victim. However, after they lost sight of the victim, Tawana persuaded Petitioner to take her back to her aunt's house, so that she could get her own car. The victim called shortly after Tawana the back to her apartment, and he told her that he was coming over there. Tawana was on the phone with Petitioner by the time he arrived at her apartment. Petitioner then invited herself to come over and enjoin them. While Petitioner was at Tawana's apartment, she walked outside, alone, briefly. Later, Chris Nelson called the victim and asked the victim to pick him up from a girl's residence. **App. pp. 135-38.**

Petitioner and Tawana followed the victim out of the apartment when he left. As they were walking out, Petitioner asked Tawana

"Do people be out here this time of night?" And I said, "I don't know." Because really I be in my house by this time. So we talking, all three of us just together, whatever. And she says, "Something doesn't feel right. You need to go back in the house." So I'm like, "What," whatever.

Then she said that she -- she think she see ... somebody. So my brother and my cousins weren't there; they left to go to Wal-Mart. So I'm thinking that's just them coming back. So I look;. I'm like, "I don't see nobody."

And I look again, and there's somebody ducking -- where you can't see them -- there's somebody ducking down at the bushes on the left-hand side. And all you do is you look and you see somebody ducking down. So after I saw that -- after I saw that, then I went to run inside my house and Dexter was right behind me. And he got the door closed and I never looked back, and all you hear is the door gets kicked open. So I ... finish running up the steps. And I have a balcony door, and my brother smokes, and when he smokes I make him go outside and he locks the door.

App. pp. 140-41.

Tawana eventually unlocked the door leading to the balcony. She heard the victim say, "Y'all don't even have to do it like that," and someone else telling him, "Shut up. Shut up." So,

she jumped off of the balcony and ran towards the roadway because she did not want anyone to get her. She dialed 911 as she was running. She then hid until the police arrived in her apartment, and she never saw Dexter Perry again. Later that night, police photographed the inside of her apartment. There was blood on the carpet and tile, whereas there had not been any blood on the floor earlier. Also, the front door had been kicked in and there was debris present. **App. pp. 140-48.**

Odoner Cobbs lives in the Silver Fox trailer park, with his wife, Birdie, and his daughter, Amber. Chris Nelson is the Cobbs' nephew and he occasionally stayed with them. Another nephew, Joe Alex Husser, was staying at the Cobbs' trailer on August 1, 2006. Mr. Cobb knew the victim through Chris Nelson because they were best friends. **App. pp. 166-69.** Trial after midnight on August 2nd, as Mr. Cobbs was watching TV,

The door flied [sic] open and Dexter came slamming through the door with -- like I said, I never seen them before that night. Heavyset and dark skin and dread locks,, and [holding] the gun to Dexter.

They made me lie on the floor, and I keep trying to look up at them. I looked twice, and he told me if I look up at him again, he'd put the gun to my head and he'd blow my damn brains out.

App. p. 171.

The Cobbs had not given anyone permission to enter the residence. The victim entered first. He was followed by a "heavyset dark-skin[ed] dude" with dreadlocks and a light-skinned man. Except for the victim, all the men were armed with pistols, none of the men was wearing anything to cover their faces. While the light-skinned man remained in the room with the Cobbs and the victim, who were laying on the floor, the other two men went into the back bedroom. When the heavy-set man learned that Mrs. Cobbs was in the house, he brought her out of the

bedroom and into the front room. The Cobbs were also forced to lie on the floor. **App. pp. 172-75.**

At some point, the other men returned to the front room and they drug the victim into the back of the trailer. The victim kept telling them, "the money is backed there. It's back there. It's back there." Mr. Cobbs overheard one of the other men refer to the light-skinned man as "Manny." Eventually, the other men returned with the victim. When the victim began saying, "Manny, you don't hit me twice," Manny told him, that ain't all. I'm going to hurt you again." He then hit the victim with the butt of the gun again. After that, someone shot into the house from outside. The victim immediately got up and ran to the bedroom, with the heavy-set man chasing him. The men inside the trailer began shooting and they shot the victim before they ran out of the front door. **App. pp. 175-83.**

Once the men left, Mr. Cobbs saw that the victim had been shot in the chest and he tried to offer assistance until EMS arrived. The police soon arrived and Mr. Cobbs told them what had occurred. He also gave a description of the men. Mr. Cobbs was able to positively identify Grant as one of the assailants. **App. pp. 183-88; 200-02.** Ms. Cobbs' testimony corroborated that she go to bed at approximately 9:00 p.m. on August 1st, and she was awakened by, first, her husband asked her to come out of the bedroom, and then by a man whom she did not know directing her to go to the front of the trailer. **App. pp. 205-06.**

She then gave the following description of the harrowing events that occurred at her trailer:

So I go on out there and my husband said, "Sit right there. Do what they say to do," and I sat down and then I started getting nervous.

Then I started to say, "Oh my God, what's going on?" And I hold my head down and I could have saw my husband's foot were a pistol, a grey looking pistol point at him. And I just start getting real nervous.

But then I heard a voice say, "It's in the wall. It's in the wall. Tear up the wall." And I just start getting real nervous. And then I don't know how much time passed and then I heard gunshots. Glass from my front door screen door, I heard that, and, I don't know how I got on the floor. And I remember hearing gunshots, gunshots. And I said, "Oh, my God. Please don't shoot me. Please, don't shoot me."

And next voice I heard was my baby girl. She was pregnant. And she said, "Oh my God, they shot Mama." And I said, "No. No. ... I'm all right. Help me up." And her and her brother helped me up, and then she started screaming again and said, "Oh, they shot Dexter." And my husband went in the- room, I called 9-1-1, and the paramedics and the police department came out.

App. pp. 206-07. Ms. Evans also spoke with the police of following day and identified Grant from a photographic lineup. She also identified him at trial. **App. pp. 208-14.**

Chris Nelson testified that both he and the victim were selling marijuana in August 2006, and neither was gainfully employed. The men stayed at the Cobbs' trailer on the day of August 1st, but they met up with Petitioner and Tawana at Ruby Tuesdays that night because the victim was dating Tawana. **App. pp. 228-32.** While the others were eating, Petitioner stayed outside talking on her cell phone. Nelson testified that he found this was unusual. **App. p. 232.**

After dinner, the men returned to the Cobbs' trailer for approximately 30 minutes. The victim then drove Nelson to see a girl in Summerville. They were in Amber Cobbs' car, which they took without permission. Nelson later called the victim twice asking the victim to come pick him up, and the victim said he was on his way there. On the second call, Nelson heard Tawana's voice in the background. Because the victim never came, Nelson persuaded the girl he was with to take him to his grandmother's residence. Nelson waited for the victim between forty and forty-

five minutes, but the victim never arrived. So, Nelson walked back to the Cobbs' residence. **App. pp. 233-38.**

When he arrived, he saw Amber's car there, with the driver's-side door open. Also, there was blood in the car, and Nelson heard "a lot of racket and noise coming from the house." Nelson went around to the side of the house and looked in through a window that had an AC unit in it. He saw someone holding a gun on the victim and the victim was bleeding. The other man was asking the victim where the money was. The victim told the man he did not have any money.¹⁵ Although Nelson could not see Joe Allen, he did see his brother's leg and realized that his brother was lying on the floor. Nelson, who was unarmed, immediately ran to a relative's house for help. **App. pp. 238-43; 253-54; 285-86.**

Nelson told his relatives to call an ambulance and the police. He also obtained a .38 revolver and ran back to the Cobbs' trailer. When he reached the trailer, he saw someone going inside of it. He also saw a silver Pontiac parked across the street that did not belong there. Nelson was afraid that the men would kill everyone in the trailer, since the men were not wearing masks. Therefore, he fired three shots at the person going into the trailer. He did not know whether he hit the man but, after he fired those shots, he heard "[a] lot" of shots coming from the living room. Then, he ran back to the residence where he obtained the firearm. He dropped the gun into the grass as he was running because he was scared. When he reached the residence, he again asked his relatives to please call the police. **App. pp. 243-47; 253-54; 285-86.**

Once the intruders had left the Cobbs' trailer in the silver Pontiac, Nelson ran back to their residence. Everyone was okay, except for the victim, who had been shot and was "heavily

¹⁵ As soon as he heard the man asking the victim for money, he knew what they were looking for because he had \$1500.00 (hidden in a shoe under the bed) and marijuana in the room. Neither his money nor the marijuana was stolen. **App. pp. 258-59.**

bleeding.” The victim was also in pain. When Nelson asked the victim who shot him, “he said Manny did it.” Nelson had seen Manny on several occasions and he identified Hartwell as Manny. Nelson spoke with the police later that night and told him what he had witnessed. **App. pp. 247-52.**

Twenty-six year old Joe Alex Husser also testified to the events that occurred on the morning of August 2nd. He had gotten back to the trailer shortly after midnight on the 2nd and, after showering and talking to the mother of his child, he went to bed. Between 1:30 and 2:00 a.m., He heard a commotion and a loud bang. Although he initially sought that it was Nelson and the victim “fooling around,” he relies something was not right when he heard his uncle say, “Y’all got to take that ... out of here.” So, Alex got out of bed¹⁶ and walked down the hallway to see what was happening. As he approached the end of the hallway, he saw two black males on either side of the victim. Both men were armed and both were holding the victim. **App. pp. 297-303.**

The victim’s head was bleeding. Alex immediately threw up his hands because he was unarmed and wearing only his boxer shorts. The men ordered him not to look at them. One of the intruders pointed a gun in his face and asked where the money was. Alex did not know where the money was. So, he went through the house looking for money. He found a bag in a dresser, which he gave to the men. Upon discovering that the bag did not have money in it, one of the men pistol-whipped him from behind and he started bleeding. **App. pp. 303-05; 307.**

The men had the victim in the hallway, between the bathroom and bedroom, and they were asking him where the money was. The victim repeatedly told them to just “check around the room.” When Alex got on the floor at their direction, he also told them to “check around the

¹⁶ He had not fallen asleep and was awake when he heard the commotion.

room, ... check the walls[,] ... check underneath the bed, closet, whatever, you know. And that's when they started tearing up the room, looking around." At some point, the men through a cover over Alex's head. **App. pp. 305-06.**

The victim kept telling the men, "You ain't got to be doing this. And [those] guys ... was just telling him to shut up, you know, [and] pistol whipping him." Eventually, Alex heard five or six gunshots in the house. When he went to investigate, he did not see Amber, his uncle or the victim. Also, his aunt was yelling. Therefore, he ran down the street trying to find help. **App. pp. 307-10.**

When he realized that he was still only dressed in boxer shorts, he turned around and ran back to the front of the trailer park. As he was running back, he saw a "champagne-colored, [or] silver colored, Pontiac G4 ... coming from behind the trailer park, ... between Fred's and the trailer park." He had previously seen this vehicle, which had out-of-state tags, in the trailer park. Alex returned to the Cobbs' trailer in time to see family members help the wounded victim onto his aunt's bed. **App. pp. 310-12; 320.**

Alex overheard the victim tell Chris Nelson that Manny had shot him. Alex did not know who Manny was. Alex stayed there until the police arrived and he told them what he had witnessed. **App. pp. 312-15.** Police later showed Alex four photographic lineups. He was able to identify Hartwell, or Manny, from one of the lineups. Alex identified Hollins from a different photographic lineup (Defendant's Ex. 1). **App. pp. 315-24; 335-40.** Also, Alex had a wallet with money in it, but he could not find his wallet after the crimes. **App. pp. 306-07.**

Amber Cobbs, the remaining family member who was present on the morning of August 2nd, also testified. She remained in her bedroom throughout most of the ordeal. However, what

she heard generally corroborated the testimony of her parents and her cousin, Alex. **App. pp. 351-67.**

Trial counsel moved for a directed verdict on Petitioner's behalf at the close of the State's case. He asserted that "with regard to the armed robbery, again, the only evidence of ... the element of the taking away was the statement. Clearly there's ...[a] substantial credibility issue. He [Hollins] may have been there in the house and ... there was no attempt to even ascertain the credibility. They knew that way back when the identification came up." Also, counsel argued that Hollins' testimony that something was stolen was not corroborated. **App. p. 559.**

Counsel further argued that

And second would be -- I also ask to -- again, that's to the accessory of the armed robbery of my client with the same basic grounds and also to the accessory of the murder and -- and the probable and natural -- a probable and natural consequence of this matter. I'm not sure if I'm using the exact phrase of the -- of the accessory and all, but a common plan and a scheme.

But again, would -- there's no common -- there's no evidence of a common plan and scheme to commit armed robbery or to the murder. And it doesn't appear to be evidence that it was a probable and natural consequence that the murder would occur.

She ... did try to warn and ... I would argue that that's just too far removed from the circumstances. She couldn't even set it up at the restaurant in the right place, let alone for it to go further beyond that.

App. pp. 559-60.

After the trial judge heard additional arguments by the parties, she denied the directed verdict motions of all three defendants, as to all charges except for the charge of armed robbery:

THE COURT: I think that I can handle each of the motions collectively because they are basically the same motion, because each of the defendants is charged under accomplice liability. And the rules are very clear and the case law is very clear that when considering a motion for directed verdict, the Court is required to view the evidence and all reasonable, inferences in light most favorable to the State.

Court is concerned with the existence or nonexistence [of evidence], and not its weight, because the Court is not a fact-finder. The Court has to, however, determine that the evidence rises above merely a suspicion that an accused is guilty. A suspicion is one that implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. However, the Court is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

As it regards Marquita Smith, an indictment for -- 2007-1748, accessory before the fact of felony murder, the Court would find that likewise there is direct as well as substantial circumstantial evidence reasonably tending to prove her guilt, and the motion is denied.

I need to think about the armed robbery a little bit more. I'm concerned about it. I need to -- I need to roll that over in my mind a little bit and look back over my notes. And I'll reserve ruling on that.

App. p. 562, line 11 – p. 564, line 7.

In the course of subsequent *in camera* discussions, the trial judge made clear that she did not have any question that the original plan was to rob the victim. Her only question was whether or not there was more than a mere suspicion that an armed robbery had taken place. This was predicated upon her review of the prosecution's evidence that something was stolen. **App. pp. 579-80.** Before the jury was brought in the following morning, counsel for each defendant renewed the previously made directed verdict motion and these were denied. **App. pp. 624-25.** She also denied the directed verdict motions on the charge of armed robbery. **App. p. 625, line 8 – p. 628, line 11.**

In PCR, Petitioner alleged that trial counsel failed to highlight the State's inability to prove its case because the crimes that occurred were not reasonably foreseeable by her because

there was no evidence that she knew that guns were going to be involved, and she contended that he failed to point out that Petitioner was present during the commission of at least two of the crimes for which she was charged as an accessory.

Trial counsel testified that the crux of his directed verdict motion was that Petitioner did not know there was going to be an armed robbery, and that there was no evidence of a common plan or scheme to commit either armed robbery or murder. Further, he unintentionally failed to address whether Petitioner knew that guns would be involved in the robbery. However, he believed that his argument was broad enough to encompass guns, a knife or any other possible weapons. He did not think that she intended for weapon to be used and this was the basis of his argument. **App. pp. 979-83.**

Counsel also testified that after researching the issue, he made no argument about Petitioner being present during the burglary or the kidnapping because if she had been present, then she would have been charged as a principal, instead of as an accessory. **App. p. 985.** He also testified that after researching the issue he could find no case law that would support the argument that if Petitioner was a part of any part of the plan that she would then be a principal to every part of the plan even if she remained at the scene once her co-defendant's left. **App. pp. 983-89.**

As observed, the PCR judge found that trial counsel's testimony was credible. **App. p. 1191.** She thereafter rejected this allegation, finding that:

This Court finds that trial counsel made a proper direct verdict motion. Counsel argued that Applicant was too far removed from the circumstances, there was no common scheme or plan to commit armed robbery or murder, and it was not a natural and probable consequence that the murder would occur. A case should be submitted to the jury if there is any direct evidence or any substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Weston, 367 S.C.

279, 292-93, 625 S.E.2d 641, 648 (2006). When ruling on a motion for directed verdict, the trial court is concerned only with the existence or nonexistence of evidence, not its weight. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). Here, this Court finds that counsel zealously argued on Applicant's behalf, but the trial court found that there was enough evidence to submit the case to the jury.

App. p. 1192.

Again, Petitioner cannot meet her burden of proof. The PCR judge's factual findings, including the finding that counsel was a credible witness, are supported by the record and are not objectively unreasonable under § 2254(d)(2). *See also Cagle*, 520 F.3d at 324; *Buckner*, 453 F.3d at 204 n.8. Also, Petitioner has not rebutted the presumption that these findings are correct by clear and convincing evidence. § 2254(e)(1).

The PCR judge correctly denied relief because Petitioner cannot show either deficient performance or resulting prejudice under *Strickland*. To the contrary, the record reflects that: (1) trial counsel ably argued the position that she felt should have been argued; (2) there was more than sufficient evidence presented that Petitioner intended that an armed robbery occur to withstand a directed verdict motion; (3) it is a reasonable and foreseeable circumstance that someone may be murdered during the commission of an armed robbery; and (4) Petitioner's argument is predicated upon a misunderstanding of the *mens rea* requirement for accessory before the fact, as a matter of South Carolina law, since the State is not required to prove and the jury is not required to find that the defendant had a "specific intent" or "purpose," in order to convict the defendant of accessory before the fact of a felony.

A person is guilty as an accessory before the fact of a felony, if she "aids in the commission of a felony" or commissions a felony "by counseling, hiring, or otherwise procuring the felony to be committed." S.C. Code Ann. § 16-1-40 (2003). Thus, accessory before the fact

of murder requires a showing that the accused: (1) either advised and agreed, urged, or in some way aided some other person to commit the offense; (2) was not present when the offense was committed; and (3) that some principal committed the crime. *State v. Farne*, 190 S.C. 75, 1 S.E.2d 912 (1939). The State need only prove that some principal committed the crime at the behest of the accessory. *State v. Cox*, 287 S.C. 260, 335 S.E.2d 809 (Ct.App.1985), *affirmed as modified*, 290 S.C. 489, 351 S.E.2d 570 (1986); *see also State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976).

As the PCR judge correctly observed, a case should be submitted to the jury if there is any direct evidence or any substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648. When ruling on a motion for directed verdict, the trial court is concerned only with the existence or nonexistence of evidence, not its weight. *Cherry*, 361 S.C. at 593-94, 606 S.E.2d at 478. Also, “[i]n reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury.” *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). The South Carolina Supreme Court has held that the state standard is consistent with the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). *State v. Stokes*, 299 S.C. 483, 484, 386 S.E.2d 241, 241 (1989).

Contrary to Petitioner’s argument, Respondent submits that trial counsel ably argued the motion for directed verdict at trial. However, there was evidence presented that she had planned for an armed robbery to take place. Specifically, Hollins was adamant at trial that she had set up her cousin for a “lick” and that a lick meant an armed robbery. His testimony, standing alone,

was sufficient to withstand a directed verdict motion. *Id.* Additionally, the State presented evidence concerning Petitioner's actions on the night of August 1st, and those actions constituted circumstantial evidence that she was aware that the plan was for an armed robbery of the victim to occur.

For instance, both Tawana Deas and Chris Nelson testified that she was repeatedly using the telephone throughout the course of that evening and that she would leave their presence when she did so. Indeed, Tawana testified that Hollins was across the street from the Ruby Tuesdays while Petitioner, Tawana, Nelson and the victim had dinner, even though he was not supposed to know where they were. Petitioner also followed the victim when he left Ruby Tuesdays, until she lost sight of him.

Further, Hollins testimony was that Petitioner led him to where he ultimately found the victim. Also, he would not have known where the victim was if she had not told him. Any suggestion that she did not intend for an armed robbery to take place and for weapons to be used necessarily ignores Tawana's testimony as to what occurred immediately before the kidnapping. Petitioner first asked Tawana if people were normally out in the parking lot at that time of night. When Tawana said that she did not know, Petitioner said that she saw someone lurking in the bushes. Tawana then saw someone and Petitioner told Tawana to run for safety. Clearly, a reasonable inference from this testimony is that she knew precisely what was going to occur. And, it is unquestionably a very reasonable and foreseeable circumstance that someone may be murdered during the commission of an armed robbery.

Moreover, Petitioner's allegation misunderstands the *mens rea* for the crime of accessory before the fact to a felony in South Carolina because the State is not required to prove specific intent. In *State v. Phillips*, No. 2015-UP-100, 2015 WL 918162, at *1-2 (S.C. Ct. App. Mar. 4,

2015), the South Carolina Court of Appeals rejected the argument that the State was required to prove a specific intent in cases where the defendant is charged with accessory before the fact of murder. Although the Court did not address what level of intent is necessary, it expressly held that specific intent is not required. *Id.* The Court explained that:

A person is an accessory before the fact if he “aids in the commission of a felony” or commissions a felony “by counseling, hiring, or otherwise procuring the felony to be committed.” S.C. Code Ann. § 16–1–40 (2003). In charging the jury on the crime of accessory before the fact, the trial court tracked the statutory language of section 16–1–40. Phillips argues, however, the court erred in refusing to instruct the jury regarding the mental state required for the crime—that Phillips specifically intended for Allen to kill Roberts. The type of criminal intent that is required to prove a defendant guilty of a statutory offense is a question of legislative intent. *State v. Ferguson*, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990). When a criminal statute does not express a particular mental state, courts “look to common law and the development of the statute to determine whether the legislature intended the crime to require” a particular mental state. *State v. Jefferies*, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994).

Section 16–1–40 does not provide, and the State concedes South Carolina courts have not established, the mental state required to prove guilt as an accessory before the fact. Phillips argues the crime requires proof of a “purposeful” mental state, or specific intent. Our supreme court in *Jefferies* addressed a similar situation with respect to the statute criminalizing kidnapping, which contained no explicit mental state requirement. 316 S.C. at 18, 446 S.E.2d at 430; *see also* S.C. Code Ann. § 16–3–910 (1985). In that case, the appellant submitted proposed jury charges to the trial court that required the State to prove “specific intent” or “purpose.” 316 S.C. at 19, 446 S.E.2d at 431. The supreme court first examined the statutory development of the crime of kidnapping, which originally required two acts—the “act of carrying a [child] ... out of the State” and “the act of procuring the child.” 316 S.C. at 18 n. 5, 446 S.E.2d at 430 n. 5. The court held a mental state was implied in the original kidnapping statute, stating, “Implicit in the word ‘procure,’ as used in the statute, is taking possession of the minor with some degree of ... knowledge.” *Id.* The supreme court then rejected the appellant’s argument that the requisite mental state should be “purpose,” stating “‘[p]urpose’ is the highest level of *mens rea* known in criminal law and it is not required under the South Carolina kidnapping statute.” 316 S.C. at 19, 446 S.E.2d at 431. Instead, the court held only “knowledge” was required under the statute because the legislature intended “to require a lesser *mens rea* than ‘purpose.’” 316 S.C. at 19, 446 S.E.2d at 430–31.

In this case, we hold the General Assembly did not intend for the mental state of “purpose” to be an element of the crime. Similar to the court’s interpretation of the kidnapping statute in *Jefferies*, the words of section 16–1–40—“counseling, hiring, or otherwise procuring” the commission of a felony—imply a degree of knowledge to be guilty as an accessory before the fact. However, the State did not have to prove Phillips specifically intended that Allen commit the felony he “counsel[ed], hir[ed], or otherwise procur[ed]” Allen to perform—murdering Roberts. Instead, it was sufficient for the State to show a lesser degree of criminal intent.FN1 Our case law supports this conclusion, as decisions by our supreme court have never listed an intentional or purposeful mental state as an element of the crime. *See, e.g., State v. Bixby*, 373 S.C. 74, 75 n. 2, 644 S.E.2d 54, 55 n. 2 (2007); *Sellers v. State*, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005); *State v. Prince*, 316 S.C. 57, 64, 447 S.E.2d 177, 181 (1993). Because Phillips’ requested charge did not reflect South Carolina law, the trial court properly refused to instruct the jury that Phillips must have intended for Allen to kill Roberts to be liable as an accessory before the fact of murder.FN2

FN1/ We do not decide what level of intent was necessary for conviction.

FN2/ To the extent Phillips argues the trial court erred by not including in its charge any language regarding criminal intent, we find this argument not preserved. At trial, Phillips requested the trial court instruct the jury that Phillips “inten[ded] that a murder be committed by [Allen],” and Phillips neither requested a charge on a lesser mental state nor objected to the absence of such a charge. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (“Issues not raised and ruled upon in the trial court will not be considered on appeal.”).

In addition to *Jefferies* and *Phillips*, Respondent would note that The operative language used in defining accessory before the fact has not changed dramatically over time. For instance, an earlier version of S.C. Code Ann. § 16-1-40 enacted in 1902 states, “Whoever aids in the commission of a felony, or is accessory thereto before the fact, by counseling, hiring, or otherwise procuring such felony to be committed, shall be punished in the manner prescribed for the punishment of a principal felon.” Cr. C. ’02 § 634. That statute references an earlier “Act that Accessories in Murder and divers Felonies shall not have the benefit of Clergy[,]” which provides:

FOR the due punishment of such as command, counsel or hire any person or persons to commit, perpetrate or do any petty treason, wilful murder, or any of the offences in this present Act mentioned; [2] be it enacted, that all and every person and persons, that after the 1st day of March next coming **shall maliciously command, hire or counsel** any person or persons to commit or do any petty treason, wilful murder, or to do any robbery in any dwelling-house or houses, or to commit or do any robbery in or near any highway in the realm of England, or in any other the Queen's dominions, or to commit or do any robbery in any place within the marches of England against Scotland, or wilfully to burn any dwelling-house or any part thereof, or any barn then having corn or grain in the same; that then every such offender or offenders, and every of them, being outlawed thereof, or being thereof arraigned and found guilty by the order of the law, or being otherwise lawfully attainted or convicted of the same offence; or being arraigned thereof do stand mute of malice or forward mind, or do challenge peremptory above the number of 20 persons, or will not answer directly to such offence, shall not have the benefit of his or their clergy.

1712, II., 484 (emphasis added).

Respondent notes that the laws have consistently used words that denote both affirmative act and intent in defining what is necessary to be an accessory before the fact¹⁷ but the General Assembly no longer requires that one act “maliciously” in helping another to commit a crime to be guilty as an accessory before the fact. Respondent submits that the elimination of “maliciously” in conjunction with the consistent use of language that conveys both action and intent points to the legislature’s intent to require a lesser *mens rea* for liability than intent “that a murder be committed by another” for an accessory before the fact of murder, as well as a lesser *mens rea* for liability than intent “that an armed robbery be committed by another” for an accessory before the fact of armed robbery.

Thus, Petitioner cannot show either deficient performance or resulting prejudice from a manner which counsel argued the directed verdict motion. This allegation is without merit.

¹⁷ Indeed, the “counseling, hiring, or otherwise procuring” language has been consistent in the statute since 1902.

GROUND FIVE

Petitioner's next complaint is that trial counsel was ineffective because he advised her that "by not presenting a defense on her behalf[,] he would retain the right to make his closing argument after the prosecution made their final arguments and that "[w]hen trial counsel realized that all co-defendants had lost their right to a final argument, he should have made this development clear to his client, who desired to testify on her own behalf." Respondent submits that this argument is without merit and that the PCR judge's rejection of her claim was not "contrary to" and did not involve an "unreasonable application of" clearly established United States Supreme Court precedent under § 2254(d)(1). *See also Richter*, 562 U.S. at 101, 131 S.Ct. at 787.

In accordance with state court procedure, the trial judge conducted an on-the-record inquiry of whether Petitioner and/or any of her co-defendants would testify. *See State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991) (requiring trial judges to conduct on-the-record inquiry of whether defendant will testify). The trial judge explained both the right to testify and the right to not testify. In the course of this colloquy, Petitioner indicated that she understood the decision of whether or not she testified was solely hers to make and that no one else could make the decision for her; that she understood her decision to testify had to "be freely, voluntarily and intelligently made with the knowledge of the protections given to [her] by the Fifth Amendment and the consequences of [her] decision to testify;" that she had the right to discuss this matter with counsel; that she had discussed the matter with counsel; and that she did not wish to testify. **App. pp. 582-86.**

In spite of her own-the-record waiver at trial, Petitioner testified at the PCR hearing that counsel had advised her not to testify because "[there] were two strong-headed prosecutors that

just confuse me and they would have just ate me alive.” Counsel also told her that the defense would have the right to last argument if she did not testify. **App. pp. 1039-40.** She further claimed that she was willing to stand by her statement at trial, and that she would not have denied the truthfulness of any portion of her statement if she had testified. **App. pp. 1036; 1040.**

Although she recalled the conversation that the trial judge had with the attorneys after Hartwell’s attorney introduced Defendant’s Exhibit 1, she did not understand the significance of what the judge was saying. Also, counsel did not explain to her that they had lost the right to last argument because her co-defendant had introduced evidence. She was not afraid of testifying and supposedly had no problem telling the truth. The only reason she did not testify was because counsel had advised her not to do so. **App. pp. 1040-42.**

Trial counsel testified that he discussed the procedure involved in the trial with Petitioner. He did not recall discussing last argument with Petitioner because he did not know what the other co-defendants were one to do in the joint trial, but he stated that they could have discussed it because he and Hartwell’s attorney, Mr. Bolus, felt that their clients still have the right to closing argument. He and Mr. Bolus were also surprised that Grant introduced evidence. **App. pp. 1002-03.**

Yet, counsel clearly testified that his desire to have the benefit of the right to last argument was not the basis for advising Petitioner not to testify. Rather, he wanted Petitioner to avoid the prospect of being cross-examined because counsel feared that if Petitioner took the stand the State would question her on her knowledge of the co-defendants and their plan. He was also concerned that it might be revealed on cross-examination that one of her co-defendants had two pending murder charges at the time of trial. So, his discussions with her concerning her right to testify would not have been based upon the right to last argument. **App. pp. 1005-07,**

The PCR judge, who had found that counsel's testimony was credible (**App. p. 1191**), rejected this allegation as follows:

This Court finds that counsel was not ineffective for failing to discuss last argument with Applicant or advising her that she would preserve last argument by not testifying. Counsel did not recall whether or not he discussed last argument with Applicant. He testified that he and Mr. Bolus were surprised to lose last argument based on the third co-defendant entering one piece of evidence. When asked who made the decision for the Applicant not to testify, defense counsel expressly stated, "probably it would have been mine." However, this Court finds that counsel provided other reasons that he advised Applicant not to testify. He was concerned about how Applicant would handle cross-examination from two strong prosecutors who would try to confuse her. He was also concerned that if one co-defendant's pending murder charges came out then the jury might have believed that it was foreseeable that someone would get killed in this robbery. In addition, this Court finds that it was ultimately Applicant's decision not to testify. Applicant testified that she never told counsel that she wanted to testify. This Court finds that counsel's discussions with Applicant, or lack thereof, regarding last argument did not affect the outcome of the trial.

App. p. 1196.

Again, Respondent submits that Petitioner cannot meet her burden of proof under *Strickland* and § 2254(d). The PCR judge's factual findings are supported by the record and, as a result, are not objectively unreasonable. § 2254(d)(2). Also, Petitioner cannot meet her burden of overcoming the presumption of correctness of these findings by clear and convincing evidence. § 2254(e)(1).

In light of the trial judge's on-the-record colloquy with Petitioner, in which she admitted that she had been advised of and understood her right to testify; that she understood the decision of whether or not to testify was her decision, alone, to make; that the decision to testify had to be made knowingly and voluntarily; that she had discussed the matter with counsel; and that she did not wish to testify, she cannot meet her burden of proving deficient performance. *See Galowski v. Murphy*, 891 F.2d 629, 636 (7th Cir. 1989). *See also United States v. Eagle Thunder*, 873

F.Supp. 1362, 1382 (D.S.D. 1995); *Samayoa v. Ayers*, 649 F.Supp.2d 1102, 1158-60 (S.D. Cal. 2009), *aff'd*, 649 F.3d 919 (9th Cir. 2011) (finding no deficient performance based on claim of coercion by counsel where the petitioner failed to request to testify, and rejecting a claim that the mentally competent defendant lacked the wherewithal to challenge counsel's decision). Indeed, it may have been objectively unreasonable for the PCR judge to find that Petitioner's PCR testimony was credible, since it was at odds with her representations at trial. This necessarily meant that, if her PCR testimony was credible, her representation at trial were not true. Conversely, it also meant that if her representations to the trial judge were truthful, then her PCR testimony was necessarily false.

Additionally, there is no constitutional requirement that counsel explain the basis for advice that the defendant not testify. *Starkweather v. Smith*, 574 F.3d 399, 404 (7th Cir. (2009). Nevertheless, trial counsel provided her with objectively reasonable strategic reasons why she should not testify that were not predicated upon counsel having the right to last argument. These included counsel's concern that she would not fare well on cross-examination and that the jury could gain further information about the details of the plan to rob the victim if she had testified. Thus, counsel's performance in this regard was not deficient. *See Matylinsky v. Budge*, 577 F.3d 1083, 1097-98 (9th Cir. 2009) (finding no ineffectiveness where counsel was concerned about the petitioner's impeachment, about petitioner's flat affect, and about petitioner's desire to say how the victim of the brutal wife-murder instigated his attack, contrary to the defense); *Guzzardo v. Bengston*, 643 F.2d 1300, 1305 (7th Cir. 1981) (finding no deficient performance where counsel could have reasonably concluded that it would have been damaging to call the defendant because of problems with cross-examination); *Lott v. Attorney General, Florida*, 594 F.3d 1296, 1302 (11th Cir. 2010) (no deficient performance where defendant was impeachable with prior

convictions and had a bad temper; the court denying certificate of appealability); *Meyer v. Branker*, 506 F.3d 358, 373-74 (4th Cir. 2007) (not ineffective to not call defendant to testify as to remorse where counsel believed defendant could not convey remorse).

Finally, there cannot be prejudice under *Strickland* for two remaining reasons. First, there was overwhelming evidence of her guilt, discussed in **Ground Four**. *See Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2068-69. Also, testimony by her that was consistent with her custodial statement would not have provided a defense to the charges against her. *See Ground Four, supra*.

GROUND SIX

In **Ground Six**, Petitioner maintains that trial counsel was ineffective because he did not (A) “request appropriate and necessary jury instructions on her behalf at trial” and (B) because he did not “object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of petitioner, separate from their findings concerning the liability of each of her co-defendants.” Respondent submits that each of her claims are without merit and that the PCR judge’s rejection of these claims was not “contrary to” and did not involve an “unreasonable application of” clearly established United States Supreme Court precedent under § 2254(d)(1). *See also Richter*, 562 U.S. at 101, 131 S.Ct. at 787.

In the charge conference, counsel requested a jury instruction on strong arm robbery on the basis that there was no evidence presented that Petitioner knew anything beyond a strong arm robbery would take place. **App. pp. 597-98**. However, the trial judge ruled that a charge on strong arm robbery was inappropriate because the only evidence presented at trial was that

weapons were used to commit the robbery **App. p. 603**. Counsel did not request a jury instruction on the offense of accessory before the fact of strong arm robbery.

Trial counsel testified at the PCR hearing that he “would have logically moved to [request an instruction on accessory before the fact of strong arm robbery] at some point had we got in there, but I don’t think -- I think that -- you will argument of a strong arm got shot down pretty quickly anyway.” Counsel conceded, apparently in hindsight, that he should have requested instruction. **App. pp. 992-93**. When questioned as to why he did not prepare jury instructions on accomplice liability law as it pertained to charges of accessory before the fact, counsel responded “I don’t know. I really don’t know. I mean, I guess... there’s a standard one on there.... I mean, the record which showed that I did not, I did not.” **App. pp. 993-94**.

The PCR judge found that Petitioner had not met her burden of proof either as a result of counsel’s failure to request jury instructions or as to his failure to object to the charge that was given. Specifically, she found that:

This Court finds that counsel was not ineffective for failing to request a jury charge on accessory before the fact to strong arm robbery. Counsel requested a jury charge on strong arm robbery based on the fact that neither Applicant's statement nor Mr. Hollins' statement mentions weapons. However, the trial court declined to charge strong arm robbery because there was no evidence in the record that the incident took place without weapons. If the trial court had considered the charge from the perspective of whether the Applicant knew that weapons would be involved, it is still unlikely that the trial court would have charged accessory before the fact to strong arm robbery. This Court finds that Applicant was not prejudiced by counsel's failure to request such a charge.

This Court finds that trial counsel was not ineffective for failing to object to the trial court's jury instructions on accomplice liability and foreseeability. The trial court gave the standard charge on accomplice liability and “the hand of one is the hand of all.” (ROA p. 716, line 2 - p. 717, line 20). The trial then stated as follows:

Ladies and gentlemen, the defendant Marquita Smith is charged with being an accessory before the fact of the felonies of murder and armed

robbery. In order to prove beyond a reasonable doubt that the defendant, Marquita Smith, either advised, agreed, urged, counseled, hired, or in some way aided and abetted -- aided and abetted another person to commit a crime, and that the defendant was not present when the offense was committed.

Aid means to help, to promote the course or accomplishment of, to give support to or to give assistance to. Abet means to encourage or appear to favor or support.

(ROA p. 718, lines 2-14). In its closing statement, the State argued that Applicant orchestrated the plan and used the word "robbery" in her own statement and that when you rob someone, it is entirely foreseeable that the person could be killed during the course of the robbery. (ROA p. 676, line 19 - p. 679, line 16). Trial counsel argued that there was a difference between the Applicant and her codefendants and that she is only responsible for the probable and natural consequences of her actions. (ROA p. 653, line 22 - p. 654, line 13). Counsel also argued that it was not foreseeable that the co-defendants would have kidnapped and murdered the victim. (ROA p. 669, line 12 - p. 671, line 24). The trial court addressed the jury as follows:

The case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for all defendants. The fact that you may find one defendant guilty or not guilty should not control your verdict as to the other defendants.

Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other; or you may acquit both or you may convict both or all. It will depend upon your view of the testimony and evidence.

You must take each defendant and consider the evidence as to that defendant and my instructions to you on the law. You will then write a separate verdict of guilty or not guilty for each individual defendant.

(ROA p. 720, lines 7-21).

The Applicant similarly alleged that defense counsel was ineffective for failing to prepare and present to the lower court a proposed accomplice liability instruction concerning the law as it pertained to charges of accessory before the fact. In his PCR testimony, defense counsel offered no explanation for his failure to submit a proposed jury instruction on this crucial point. The instruction[s] given on accomplice liability or foreseeability were standard and appropriate and this Court finds that trial counsel was not deficient for failing to object to the trial court's

instructions or failing to present a more appropriate accomplice liability instruction.

App. pp. 1193-95.

Respondent submits that the PCR judge's factual findings surrounding the allegations in **Ground Six** are supported by the record. As a result, they are not objectively unreasonable under § 2254(d)(2). *See also Cagle*, 520 F.3d at 324; *Buckner*, 453 F.3d at 204 n.8. Also, Petitioner has not rebutted the presumption that these findings are correct by clear and convincing evidence. § 2254(e)(1).

A. Counsel's failure to request jury instructions.

"Strong armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. *State v. Gourdine*, 322 S.C. 396, 472 S.E.2d 241 (1996)." *State v. Rosemond*, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003). *See also* S.C. Code Ann. § 16-11-325 (2003) ("the common-law offense of robbery is a felony. Upon conviction, a person must be imprisoned not more than fifteen years"). "Armed robbery includes all the elements of strong arm robbery. *State v. Keith*, 283 S.C. 597, 325 S.E.2d 325 (1985) (armed robbery is commission of common law robbery while armed with a deadly weapon)." *State v. Muldrow*, 348 S.C. 264, 269, 559 S.E.2d 847, 850 (2002). "Under [S.C. Code Ann. § 16-11-330(A) (2003), the State may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object which a person present during the commission

of the robbery reasonably believed to be a deadly weapon.” *Muldrow*, 348 S.C. at 267-68, 559 S.E.2d at 850.

Respondent submits that Petitioner cannot show either deficient performance or prejudice resulting from counsel’s failure to request a jury instruction on the crime of accessory before the fact of strong arm robbery. The trial judge ruled that an instruction on strong arm robbery was improper because there was no evidence to support it, since the only evidence presented was that guns were used to carry out the robbery, and guns are deadly weapons. Her ruling on this point was correct. *Id.* at 269-70, 559 S.E.2d at 849.

Similarly, the only evidence presented at trial was that the agreement was to commit an armed robbery. As thoroughly discussed in **Grounds Two-Three**, Hollins’ testimony was clear: the agreement was to commit an armed robbery. **App. pp. 403-05**. Although Grant’s attorney cross-examined him, in an effort to shake his testimony, he remained steadfast and adamant that the plan he and Petitioner had conceived on the day before the murder was to commit a “lick,” which was a robbery with a gun or other deadly weapon. **App. pp. 424-25**.

Additionally, Tawana Deas’ testimony concerning Petitioner’s activities on August 1st constituted circumstantial evidence that the agreement that Petitioner had reached with Hollins was to commit an armed robbery. Otherwise, she would not have directed Tawana to get out of the area once Tawana realized someone was lurking in the bushes. A clear inference from this testimony is that Petitioner knew that an arm robbery was about to take place, as planned.

Likewise, Petitioner is not entitled to relief based upon trial counsel’s failure to submit a proposed jury instruction on the law of accomplice liability as it relates to the crime of accessory before the fact of a felony. As the PCR judge correctly observed, “[t]he instruction[s] given on accomplice liability [and] foreseeability were standard and appropriate.” *See App. p. 1194*.

Thus, counsel's failure to request a different instruction was neither deficient performance nor prejudicial under *Strickland* because, when taken as a whole, the trial judge's instructions adequately stated the law and there was no reasonable likelihood that a juror would have misapplied does instructions. *See State v. Buckner*, 341 S.C. 241, 534 S.E.2d 15 (Ct.App.2000) (holding jury charge is proper if, as a whole, it is free from error and reflects current and correct law of South Carolina); *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997) (jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error).

There is also no merit to Petitioner's claim that counsel should have requested a charge which clearly stated that the crimes committed must have been a readily foreseeable consequence of the acts agreed upon by the defendants. For the reasons argued in connection with her **Ground Four**, Respondent submits that her allegation is predicated under a misunderstanding of the *mens rea* for the crime of accessory before the fact of a felony. *See Phillips*, 2015 WL 918162, at *1-2; *Jefferies*, 316 S.C. at 18-19, 446 S.E.2d at 430-31. Moreover, South Carolina courts have approved accomplice liability charges that lack language stating an accomplice's criminal act must be "a probable and natural consequence" of the accomplice's common plan.

In *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), the Court approved an instruction stating that under "the hand of one is the hand of all" theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." In *Kelsey, supra*, the Court approved a broader accomplice liability charge that stated that "if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is

the act of both." 351 S.C. at 77, 502 S.E.2d at 76. In *State v. Crowe*, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972), the Court approved the following charge for accomplice liability:

[T]wo or more combine together to commit an unlawful act, such as robbery, and, in the execution of that criminal act, a homicide is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act.

In *State v. Cannon*, 49 S.C. 550, 27 S.E. 526 (1897), the Court stated that "'The common purpose may not have been to kill and murder, but if it was unlawful, as, for instance, to break in and steal, and in the execution of this common purpose a homicide is committed by one, as a probable or natural consequence of the acts done in pursuance of the common design, then all present participating in the unlawful common design are as guilty as the slayer." Because such an instruction did not accurately state South Carolina law, the trial judge would have been under no obligation to grant it and counsel's failure to make a request for such a charge cannot be prejudicial. See *Jefferies*, 316 S.C. at 19-20, 446 S.E.2d at 431 ("Because the charges requested by [defendant] ... included a level of *mens rea* not required under [the kidnapping statute], the trial judge correctly refused to give the requested charges"); *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996) ("[The defendant] sought only a specific intent ... charge. As that is not the law of this State, the charge was properly refused"). Also, "[t]he touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding, and 'in judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.' ' " *Lockhart v. Fretwell*, 506 U.S. 364, 370, 113 S. Ct. 838, 843 (1993) (citation omitted). See also *Strickland*, 466 US at 695, 104 S.Ct. at 2068.

Thus, neither the submission of accomplice liability instruction nor the charge of accessory before the fact to a felony required the type of limitation of culpability suggested by

Petitioner. As a result, she cannot meet her burden of proving either deficient performance or resulting prejudice.

B. Counsel's failure to object to the jury charge, as given.

Nor is Petitioner entitled to relief based upon counsel's failure to object to the trial judge's jury instructions, on the basis that they did not adequately convey the requirement that a separate foreseeability analysis must be applied to determine her guilt from that of her co-defendants. Again, her argument is predicated under a misunderstanding of the *mens rea* requirement for accessory before the fact of a felony. *See Phillips*, 2015 WL 918162, at *1-2; *Jefferies*, 316 S.C. at 18-19, 446 S.E.2d at 430-31. *See also Cannon, supra*. Because the instruction that she desired is contrary to State law, it was no obligation on the trial judge's part to give the instruction and counsel's failure to request the instruction was not deficient or prejudicial under *Strickland*. *See Jefferies*, 316 S.C. at 19-20, 446 S.E.2d at 431; see also *Fretwell*, 506 U.S. at 370, 113 S. Ct. at 843

The absence of prejudice on each of the claims in **Ground Six** is buttressed by the fact there was overwhelming evidence of Petitioner's guilt of the crimes for which she was convicted, such that there is no reasonable probability of a different result but for counsel's alleged error. *See Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2068-69. *See also Ground Four*.

GROUND SEVEN

Petitioner further contends that trial counsel was ineffective (A) because he did not "make certain crucial closing arguments to the jury" and (B) because he did not "object to inappropriate arguments made by the prosecution in the State's closing argument." Once again, Respondent submits that each of her claims are without merit and that the PCR judge's rejection of these allegations was not "contrary to" and did not involve an "unreasonable application of"

clearly established United States Supreme Court precedent under § 2254(d)(1). *See also Richter*, 562 U.S. at 101, 131 S.Ct. at 787.

A. Counsel's closing argument.

Petitioner complains about trial counsel's comment during closing argument that "Obviously, you can tell there is a difference between my client and the rest of the people charged with these crimes. She's charged with accessory. She's 19. She wasn't present. It's a little different circumstance." **App. 653**. Petitioner also contends that counsel was ineffective for not arguing in closing that she could not be convicted of the crimes charged because she was present during one phase of the principal offenses committed by her co-defendants.

The PCR judge denied relief on his claim. She found that:

This Court finds that trial counsel was not ineffective for advising the jury during his closing statement that Applicant was not present for the principal offenses. The evidence produced at trial indicated that Applicant was present for the kidnapping and burglary, but she was not present for the murder and armed robbery. Because she was present for the burglary and the kidnapping, she was not charged with accessory before the fact to those offenses. Counsel's purpose in advising the jury that Applicant was not present for the murder and armed robbery was not to stipulate to an element of accessory before the fact, but rather to argue that Applicant was too far removed from those offenses and that those offenses were not foreseeable to her. This Court finds no deficiency in counsel's closing argument.

App. p. 1195.

Respondent submits trial counsel's statement during closing about Petitioner not being present at the scene did not constitute deficient performance. First, a defense attorney does not and cannot reasonably decide on a reasonable theory of a defense in a vacuum. Rather, in order for counsel to reasonably decide on how to properly defend a client, he or she must take the prosecution's evidence into account. In the present case, Respondent submits that counsel could have, quite reasonably, determined that the prosecution's evidence, including Petitioner's

statement,¹⁸ and reasonable trial strategy was to admit those matters to which Petitioner had admitted in her statement and thereby maintain credibility with the jury, while presenting his theory of defense (that she may have set up her cousin to be robbed, she could not have reasonably foreseen what later occurred, since she did not wish to seek her cousin harmed) at the same time. *See Florida v. Nixon*, 543 U.S. 175, 191-93, 125 S.Ct. 551 (2004) (finding that counsel's concession of guilt in opening and closing argument in guilt phase of a capital was a reasonable trial strategy under *Strickland*); *Young v. Catoe*, 205 F.3d 750, 759-62 (4th Cir. 2000) (counsel's admission of the petitioner's guilt in a capital murder case did not constitute deficient performance where decision was based upon focusing on penalty phase and there was overwhelming evidence of guilt, where "counsel felt that the best way to save [Young's] life was if he gave the jury the appearance that he was willing for the truth to come out concerning the murder and was remorseful for his role in it"); *Bell v. Evatt*, 72 F.3d 421, 427-30 (4th Cir. 1995) (counsel's decision to concede defendant's guilt to kidnapping charge and pursue a verdict of guilty but mentally ill for murder and kidnapping charges was rational trial strategy aimed at reducing defendant's chances of receiving death penalty, given overwhelming evidence of guilt, and was strategy to which defendant consented, and thus fell within objective standards of reasonableness for counsel conduct and did not support ineffective assistance of counsel claim); *United States v. Leifried*, 732 F.2d 388, 390 (4th Cir. 1984) (counsel not ineffective for admitting defendant's guilt of individual drug offenses where evidence was overwhelming and concession's purpose was to persuade the jury that defendant was innocent of operating a continuing criminal enterprise). See also *Clozza v. Murray*, 913 F.2d 1092, 1099-1100 (4th Cir.

¹⁸ As discussed, the jury heard that Petitioner had given a custodial statement admitting her guilt as an accessory before the fact to murder and armed robbery. **App. pp. 545-48.**

1990) (finding that, while some remarks of complete concession may constitute ineffective assistance of counsel, tactical retreats may be reasonable and necessary within the context of the entire trial, particularly when there is overwhelming evidence of the defendant's guilt).

Respondent further submits that counsel's argument to the jury was not deficient under *Strickland* because the evidence presented at trial was that Petitioner was present for the burglary and kidnapping, but that she was not present for the armed robbery and murder for which she was charged as an accessory. **App. pp. 547-48**. Also, trial counsel emphasized Petitioner's absence in order to distinguish her from her co-defendants, who were charged as principals, and to support his argument that Petitioner did not know an armed robbery and murder were going to take place when she arrived at the scene.

Furthermore, Petitioner's contention that counsel was ineffective for not arguing in closing that she could not be convicted of the crimes charged because she was present during one phase of the principal offenses committed by her co-defendants is without merit. The facts presented at trial through Petitioner's statement and trial counsel's testimony during the PCR hearing show that Petitioner was not present during the burglary and armed robbery. Trial counsel provided credible testimony that it was his belief that Petitioner was not present for the two crimes for which she was on trial as an accessory. **App. p. 985**. As in State court proceedings, Petitioner has failed to present any supporting basis for her claim.

Moreover, Petitioner has failed to show how counsel's performance resulted in prejudice to her. Particularly in light of the overwhelming evidence of guilt, including her custodial statement admitting guilt to accessory before the fact of murder and armed robbery, she cannot show any conceivable prejudice from counsel's closing argument. *See Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2068-69.

B. The State's closing argument.

Petitioner also contends that trial counsel was ineffective for not objecting to these brief remarks by the Deputy Solicitor in closing argument:

In this case, or in any case, there's two types of malice. Express: If somebody says, "I'm going to kill you," obviously they're acting maliciously. There's also ways that you- can infer malice from a person's conduct. One way is the use of a deadly weapon. And in this case, significantly, it's a felony murder. The law says, and Judge Jefferson will charge you, if the victim was killed in the course of another felony, then his death is murder. End of story.

Burglary first, kidnaping, armed robbery, attempted armed robbery, all felonies. When you take somebody at gunpoint and they end up getting killed, it's murder.

App. p. 693.

When trial counsel was questioned by Petitioner's PCR attorney as to why he did not object to these comments, counsel replied, "[I]n retrospect, I would have objected to it." **App. p. 999.**

The PCR judge rejected this allegation. She found that there was no prejudice from counsel's failure to object:

This Court finds that Applicant was not prejudiced by counsel's failure to object to the State's comment during closing argument that any time a victim is killed "in the course of another felony, then his death is murder. End of story." (ROA p. 693, lines 12-20). First, this Court finds that the State's closing did not shift the burden of proof for malice to the defendants.

Moreover, even if counsel was deficient for failing to object, the Applicant was not prejudiced because the trial court properly charged the jury on malice and cured any potential defect. The trial court charged the jury as follows regarding malice:

I further instruct you that if one intentionally kills another during the commission of a felony, the inference of malice *may* arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with all of the other

evidence in the case, and you may give it the weight that you decide it should receive.

(ROA p. 711, lines 5-12)[¹⁹] (Emphasis added). This Court finds that the trial court's proper instruction cured any prejudice from the State's closing statement.

App. pp. 1196-97 (footnote added).

Petitioner is not entitled to relief. “[The] central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431 (1986) (citing *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160 (1975)). “To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another.” *United States v. Robinson*, 485 U.S. 25, 33, 108 S.Ct. 864 (1988). Therefore, a federal habeas petitioner is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974).

The standard in *Donnelly* is a very high standard for a defendant to meet. “‘[I]t is not enough that the remarks were undesirable or even universally condemned.’ ” *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464 (1986). *See also Parker v. Matthews*, 132 S.Ct. 2148, 2155 (2012) (“even if the comment is understood as directing the jury’s attention to inappropriate considerations, that would not establish that the Kentucky Supreme Court’s rejection of the *Darden* prosecutorial misconduct claim “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement”); *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). “In

¹⁹ The PCR judge's citations to the pages the Record on Appeal are to the same pages found in the Appendix.

order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." *United States v. Young*, 470 U.S. 1, 12, 105 S.Ct. 1038 (1985).²⁰ Finally, federal habeas courts must give "more leeway ... in reaching outcomes in case-by-case determinations" because of the very general nature of the *Darden* standard. *See Parker*, 132 S.Ct. at 2155.

In the present case, the PCR judge's factual findings are not objectively unreasonable under § 2254(d)(1). Also, Petitioner cannot meet her burden of overcoming the presumption of correctness of these findings by clear and convincing evidence. § 2254(e)(1). The PCR judge correctly reasoned that she did not need to address the deficiency prong because the Court in *Strickland* stated that "[t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

However, Respondent submits that trial counsel's performance was not deficient. First, counsel's testimony that, "in retrospect," he should have objected does not establish that his performance was deficient. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, ... and to evaluate the conduct from counsel's perspective at the time"). Petitioner also cannot show deficient performance from counsel's failure to object, since the Deputy Solicitor

²⁰ As the Supreme Court explained in *United States v. Robinson*, 485 U.S. 25, 33 n. 5 (1988): "[i]n *United States v. Young* and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor's personal opinion as to the defendant's guilt were improper, but we held that, in context, those statements did not necessitate reversal." Rather, in both cases, the Court held that the accused must prove that the remarks deprived him of due process. *Robinson*, 485 U.S. at 33 n. 5.

was merely attempting to state the proposition on which the trial judge more artfully and correctly instructed the jury: that an inference of malice may be drawn from the defendant's participation in other felonies. As such, the Deputy Solicitor's statement was proper, supported the State's view of the law as applied to the facts of the case and was within the range of argument allowed in a closing argument. See *State v. Norris*, 285 S.C. 86, 91, 328 S.E.2d 339, 342 (1985) (approving jury instruction that "If it was during the commission of a felony you can consider that as facts and circumstances from which malice can be inferred. You don't have to infer it, but you can"), *overruled on other grds.*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).²¹ See also *State v. Avery*, 333 S.C. 284, 294, 509 S.E.2d 476, 481 (1998) ("If a person intentionally kills another during the commission of a felony, malice may be inferred").

Petitioner cites *Lowery v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008), to support her claim that trial counsel should have objected to the Solicitor's comments. However, her reliance upon *Lowery* is misplaced for several reasons. First, Petitioner's suggestion that trial counsel should have anticipated *Lowery* is contrary to *Strickland*. Requiring counsel to anticipate future events that may occur after representation has ended would hold trial counsel ineffective based upon counsel's failure to utilize a crystal ball or to have Periclean foresight, both of which are inconsistent with *Strickland*.

It is a fundamental tenet in the evaluation of ineffective counsel claims that there must be a contemporary assessment of counsel's performance: *i.e.*, counsel's acts are to be judged as of the time counsel was required to act. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. See also

²¹ To the extent that the rule set forth in *Norris* permitted the jury instruction on the inference of malice from the use of a deadly weapon where there is evidence in the record that would support either a lesser-included offense to murder or self-defense, it has been overruled by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). However, there was no evidence of self-defense or evidence supporting the charge or lesser-included offense in this case.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As a result, counsel is not ineffective in failing to anticipate a change in the law that may or may not occur, *see Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (“[*Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986) (holding that evidence of good behavior in prison is admissible in mitigation as relevant to future adaptability where state relies upon future dangerousness)] was on appeal to the Supreme Court at the time of Kornahrens's trial, and Runyon testified that he was aware of that fact. Nevertheless, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law”); *United States v. McNamara*, 74 F.3d 514, 515-17 (4th Cir. 1996) (counsel cannot be considered ineffective for failing to anticipate changes in law), or to anticipate how a state appellate court will rule on a novel question of law. *E.g.*, *Richardson v. Branker*, 668 F.3d 128, 141-43 (4th Cir. 2012) (rejecting ineffective assistance of appellate counsel claim based upon counsel's failure to raise defendant's age as part of mitigation instruction on appeal from prisoner's capital murder conviction and death sentence, where state court's determination that age-based mitigation factor was unavailable was entitled to deference, and North Carolina law regarding availability of that factor was unsettled at time of prisoner's appeal).²²

Second, Petitioner's argument is in contravention of the admonition by the United States Supreme Court in *Donnelly* that “a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations,”

²² South Carolina decisions are equally clear that an attorney is not required to “be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.” *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (counsel not ineffective for failing to request *King* charge in drug possession case, where South Carolina Court of Appeals did not extend *King* to such drug cases until over a year after petitioner's trial).

Donnelly, 416 U.S. at 647, 94 S. Ct. at 1873, since her claim takes the Deputy Solicitor's argument out of context. The Deputy Solicitor was not arguing culpability under a theory of accomplice liability. Instead, she was arguing the inference of malice. Thirdly, the error in *Lowery* was at the trial judge instructed the jury on the County murder rule. The trial judge in this case did not commit that same error. Therefore, *Lowery* would not provide a basis for counsel to object to either the Deputy Solicitor's closing argument for the trial judge's jury instructions.

GROUND EIGHT

Petitioner further maintains that counsel was ineffective for not arguing "in opening statement that murder was not a foreseeable consequence of any agreement entered into between petitioner and her co-defendants." She contends that trial counsel should have conveyed "in a clear and organized manner the reasons the Petitioner could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder." Once again, Respondent submits that the state courts' rejection of this claim was not "contrary to" and did not involve an "unreasonable application of" clearly established United States Supreme Court precedent under § 2254(d)(1).

Contrary to Petitioner's claim, counsel told jurors, very early in his opening statement, that:

One thing that [the Deputy Solicitor] said and struck me was that she [Petitioner] contemplated this armed robbery. Ladies and gentlemen, part of this is y'all have got to decide whether there was an armed robbery and what she contemplated. Because [a] certain crime occurred doesn't necessarily mean that she contemplated it. And again, ... it's got to be a natural consequence.

... I would ask that y'all listen to all the facts, listened to all the witnesses, and Wilson to all the evidence. Aside from just proving that crimes occurred, you kind

of have a secondary [obligation] -- with accessory, a secondary function is that you've got to determine what she knew or should have known.

Ladies and gentlemen, I would ask that you would listen very carefully. I would ask that you would weigh in. People are held responsible for what they do. You don't hold them responsible for everything that happens after that. At some point it's just too far beyond what you can foresee.

App. pp. 125-26. Counsel concluded his opening by stating, "I would ask that you would just listen to the evidence or take what either side says, altered through your experience: 'If that were me, would I or should I have known?' " **App. p. 126.**

Trial counsel testified that he considers the purpose of an opening statement is to provide jurors with "an outline of your telling of the story of how things occurred or how it went." **App. pp. 977-78.** While he did not intentionally leave the charge of accessory before the fact to murder out of his opening statement, he was "hoping not to over-emphasize" it. However, counsel felt that the prosecution's "strongest case was the armed robbery part. I was hoping ... that the murder would be ... [an] even further unseen consequence from the robbery part." **App. pp. 978-79.**

The PCR judge rejected Petitioner's claim. As discussed, the PCR judge found that counsel was a credible witness. **App. p. 1191.** She thereafter rejected this specific claim as follows:

This Court finds that trial counsel made a proper opening argument. Counsel testified that the purpose of his opening statement was to provide an outline of how everything occurred. He argued that it was the jury's duty to decide whether these crimes were committed and whether they were natural consequences of Applicant's actions. Counsel testified that he did not want to overemphasize the murder in his opening statement. This Court finds no deficiency in trial counsel's opening statement.

App. p. 1195. Respondent submits that the PCR judge's findings are not objectively unreasonable under § 2254(d)(1). Also, Petitioner cannot meet her burden of overcoming the presumption of correctness of these findings by clear and convincing evidence. § 2254(e)(1).

Further, as a matter of South Carolina law, a defendant in criminal case is not entitled to in opening statement. *See State v. Southerland*, 316 S.C. 377, 384, 447 S.E.2d 862, 867 (1994) ("We find that section 16-3-20 does not give the defendant a statutory right to an opening statement at sentencing and that the trial judge did not abuse his discretion in refusing Southerland's request to make an opening statement at sentencing") *overruled on other grds*, *State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995); *State v. Brown*, 277 S.C. 203, 284 S.E.2d 777 (1981) (granting and timing of opening statements are matters within the discretion of the trial judge)). There is also no constitutional right to give an opening statement or oral argument apart from the right to provide a closing argument, *Herring v. New York*, 422 U.S. 853, 863 n. 13, 95 S.Ct. 2550, 2556 n. 13 (1975), and the failure of counsel to make an opening statement was rejected as ineffectiveness in a capital case in *Malicoat v. Mullin*, 426 F.3d 1241, 1260-61 (10th Cir. 2005).

Thus, "[t]he timing of an opening statement, and even the decision [of] whether to make one at all, is ordinarily a mere matter of trial tactics and in such cases will not constitute the incompetence basis for a claim of ineffective assistance of counsel. *See United States v. Murray*, 751 F.2d 1528, 1535 (9th Cir.1985); *see generally United States v. Salovitz*, 701 F.2d 17 (2^d Cir.1983) (explains place of the opening statement in modern trial practice)." *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985). *Hunt v. Nuth*, 57 F.3d 1327, 1332 (4th Cir. 1995) (finding trial counsel not ineffective for reserving his opening statement until after the

close of the State's case, and agreeing with the District Court that "such a decision is fundamentally tactical and 'within the range of reasonably competent representation' ").

Here, counsel's performance was not deficient because, even though counsel did not mention the accessory to murder charge in his opening statement, he unerringly focused the jury on the essence of Petitioner's defense: that she could not have reasonably foreseen what later occurred. The fact that her collateral attorney would have handled the opening statement differently does not show that trial counsel's performance was deficient under *Strickland*. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. *See also Richter*, 562 U.S. at 106, 131 S.Ct. at 789 ("Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach"); *Bobby*, 558 U.S. at 9, 130 S.Ct. at 17 (*Strickland* only requires that "counsel make objectively reasonable choices").

Further, there cannot be any conceivable prejudice from counsel's handling of the opening statement, since the trial judge instructed jurors that the arguments of counsel were not evidence and that jurors must base their decision on the evidence presented and the law charged. **App. p. 104.** Also, there was overwhelming evidence of guilt, including her custodial statement. *See Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2068-69.

GROUND NINE

Petitioner's ninth Ground again raises two claims. She asserts that appellate counsel was ineffective because she failed to challenge on direct appeal: (A) the trial judge's denial of Petitioner's directed verdict motions on all charges and (B) that the trial judge's jury instruction that the State could establish her guilt if it established that she aided and abetted another person

"to commit a crime." Respondent submits that the state courts' rejection of each claim was not "contrary to" and did not involve an "unreasonable application of" clearly established United States Supreme Court precedent under § 2254(d)(1).

Appellate counsel, Ms. Blanchette, explained at the PCR hearing how she determined which issues she felt were more likely to succeed (*i.e.*, the two issues actually raised on direct appeal). She and her former employer, Tommy Thomas, Esquire, read the transcript of Petitioner's trial, took notes, and spotted issues. They then debated which issues that they felt were best to present on direct appeal. Thereafter, Ms. Blanchette drafted a brief on the directed verdict issues, but they ultimately concluded that it was not "one of the best issues to present, even though it was preserved." **App. pp. 928-31.**

Ms. Blanchette testified that they chose not to brief the issue related to the accomplice liability charge in light of the trial judge's response to trial counsel's objection and because she thought "it was clear as the Court said, that he was referring to -- and let me use his language here -- that it was clear that she was not charged with other offenses and he was only referring to the charges she was -she had been charged with, only those charged offenses." **App. 938-39.**

The PCR judge denied relief on both claims. In pertinent part, she found as follows:

Applicant alleges that she received ineffective assistance of appellate counsel in that appellate counsel failed to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts, the lower court's failure to grant a jury charge on strong arm robbery as a lesser included offense of armed robbery, and the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime." A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the

failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that [she] was prejudiced by the deficiency. Thrift, 302 S.C. at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

This Court finds that appellate counsel and co-counsel are experienced appellate attorneys. This Court finds that appellate counsel properly chose to brief the issues that she and her co-counsel believed were the most meritorious. Appellate counsel testified that she and her former employer Tommy Thomas, Esquire, each read the trial transcript, looked for issues that were preserved for appeal, and debated which issues were the best issues to raise. She testified that she drafted an argument on the directed verdict issue, but she ultimately decided that it was not their strongest issue. Appellate counsel also testified that she and Mr. Thomas agreed with the trial court that guns were involved so strong arm robbery should not have been charged. She testified that she and Mr. Thomas discussed all the issues that were preserved and chose not to raise the issue about lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime." This Court finds that Applicant has failed to show that appellate counsel's representation was deficient.

App. pp. 1198-99.

The right to effective assistance of appellate counsel, and the *Strickland* standard for evaluating such a claim, was extended to appellate proceedings in *Evitts v. Lucey*, 469 U.S. 387, 396-98, 105 S.Ct. 830, 836-37 (1985), and further clarified in *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746 (2000). As the Fourth Circuit Court of Appeals stated in *United States v. Mason*, 774 F.3d 824, 828-29 (4th Cir. 2014):

The "right to effective assistance of counsel extends to require such assistance on direct appeal" as well as at trial. *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir.2000) (en banc) (applying the *Strickland* standard to claims of ineffective assistance of counsel during appellate proceeding). We likewise presume that appellate counsel "decided which issues were most likely to afford relief on appeal." *Pruett v.*

Thompson, 996 F.2d 1560, 1568 (4th Cir.1993). Effective assistance of appellate counsel “does not require the presentation of all issues on appeal that may have merit.” *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir.2008). As a general matter, “ ‘only when ignored issues are clearly stronger than those presented’ ” should we find ineffective assistance for failure to pursue claims on appeal. *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir.1986)).

Respondent submits that the PCR judge’s findings are supported by the record and are not objectively unreasonable under § 2254(d)(1). Also, Petitioner cannot meet her burden of overcoming the presumption of correctness of these findings by clear and convincing evidence. § 2254(e)(1). As the PCR judge correctly observed, appellate counsel provided objectively reasonable explanations for why she did not raise either of the contested issues on direct appeal. They were not simply disregarded or overlooked by her. Thus, Petitioner cannot show that appellate counsel ignored either issue. *See Mason*, 774 F.3d at 829. Additionally, Petitioner cannot show that the contested issues “are clearly stronger than those presented,” since neither issue is meritorious.

A. The trial judge’s denial of counsel’s directed verdict motion.

Though claims of insufficient evidence are cognizable on collateral review, a federal court’s review of such claims is ‘sharply limited.’ ” *Wilson v. Greene*, 155 F.3d 396, 405 (4th Cir. 1998), citing *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1992). Federal review of the sufficiency of the evidence to support a petitioner’s state court conviction is not meant “to consider anew the jury’s determination of guilt or to replace the State’s system of direct appellate review.” *Wilson*, 155 F.3d at 405-06. *See also Wright*, 505 U.S. at 292. Instead, a defendant is entitled to review only if “no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781 (1979).

In *Coleman v. Johnson*, 132 S.Ct. 2060, 2062 (2012) (per curiam), the Supreme Court emphasized that:

We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, “it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. **A reviewing court may set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.**” *Cavazos v. Smith*, 565 U. S. 1, ___ (2011) (per curiam) (slip op., at 1). And second, on habeas review, “**a federal court may not overrule a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was ‘objectively unreasonable.’**” *Ibid.* (quoting *Renico v. Lett*, 559 U. S. ___, ___ (2010) (slip op., at 5)).

(Emphasis added). See also *Cavazos v. Smith*, 132 S.Ct. 2, 4 (2011) (per curiam) (“it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial”); *Parker v. Matthews*, 132 S.Ct. 2148 (2012); *United States v. Tresvant*, 677 F.2d 1018 (4th Cir. 1982).

For the various reasons articulated in connection with Petitioner’s claim in **Ground Four**, Respondent submits that there was more than sufficient evidence to submit the charges against Petitioner to the jury. Therefore, there cannot be any conceivable prejudice from appellate counsel’s failure to raise this issue on direct appeal.

B. The trial judge’s jury instructions.

As discussed in **Ground Six**, Petitioner’s challenge to the trial judge’s jury instructions is without merit. For the reasons stated in connection with **Ground Six**, she cannot show any prejudice from appellate counsel’s failure to raise a challenge to those instructions on direct appeal.

GROUND TEN

Petitioner's remaining allegation proves the weakness of the preceding claims. Specifically, she claims that "[t]he Supreme Court of South Carolina violated Petitioner's equal protection and due process rights, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, when it denied her the opportunity to file a Petition for Writ of Certiorari to the South Carolina Court of Appeals." Although Petitioner couches her claim as a violation of "due process," Respondent submits that her allegation fails to state a claim upon which relief can be granted because she is complaining about a defect in the PCR proceedings and alleged defects in state post-conviction procedures are not cognizable in a federal habeas corpus action. *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) (holding that errors and irregularities in connection with state post-conviction proceedings are not cognizable on federal habeas review). *See also Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir. 1998) (rejecting claim as outside the scope of federal habeas corpus relief, because "[a] federal court 'shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C.A. § 2254(a)," and petitioner was "not currently detained as a result of a decision of the Virginia Supreme Court in the state habeas action"); *United States v. Dago*, 441 F.3d 1238, 1248 (10th Cir. 2006) ("[D]ue process challenges to post-conviction procedures fail to state constitutional claims cognizable in a federal habeas proceeding"); *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998) ("[B]ecause the constitutional error [the defendant] raises focuses only on the State's post-conviction remedy and not the judgment which provides the basis for his incarceration, it states no cognizable federal habeas claim").

Even if Petitioner was not complaining about State court PCR procedures, her allegation still would fail to state a claim upon which federal habeas corpus relief may be granted. She is

asking this Court to order the South Carolina Supreme Court to exercise its *discretionary* review on certiorari, when that Court has previously determined, as a matter of State court procedure, that it will not grant certiorari in cases where the South Carolina Court of Appeals has entered a letter order denying certiorari. *See Ellison v. State*, 382 S.C. 189, 676 S.E.2d 671 (2009); *Missouri v. State*, 378 S.C. 594, 663 S.E.2d 480 (2008). In other words, she is asking this Court to hold that the South Carolina Supreme Court misapplied its own rules. Thus, the requested relief is beyond the power of this Court to grant in federal habeas corpus, since it asks this Court to find that the South Carolina Supreme Court erroneously applied state law, as opposed to “the Constitution, laws, or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 479-80 (1991) (“In ruling that McGuire’s due process rights were violated by the admission of the evidence, the Court of Appeals relied in part on its conclusion that the evidence was “incorrectly admitted ... pursuant to California law.” Such an inquiry, however, is no part of a federal court’s habeas review of a state conviction. We have stated many times that ‘federal habeas corpus relief does not lie for errors of state law.’ Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States”) (citations omitted). *See also Wilson v. Corcoran*, 562 U.S. 1, 131 S.Ct. 13, 16-17 (2010) (per curiam); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843 (1983) (“[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state [law]”); *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir.1988) (affirming the district court’s dismissal of a habeas petition stating that the petition was “based exclusively on state law issues which are

merely ‘couched in terms of equal protection and due process’”) (quoting *Willeford v. Estelle*, 538 F.2d 1194, 1198 (5th Cir.1976)).

Respondent is therefore entitled to judgment on this patently frivolous allegation.

IV.

Each and every allegation contained within the Petition not previously admitted, qualified or explained is hereby denied.

CONCLUSION

WHEREFORE, having made Return, Respondent requests that the Petition be denied and dismissed.

Respectfully submitted,

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September 23, 2015.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA

MARQUITA SMITH, #323834	)	CASE NO. 8:15-2165-RMG-JDA
Petitioner,	)	
v.	)	REPLY AND MEMORANDUM
	)	OF LAW IN OPPOSITION TO MOTION
WARDEN MARIAN BOULWARE,	)	FOR SUMMARY JUDGMENT
Respondent.	)	
_____	)	

This matter is before the Court pursuant to Petition under 28 U.S.C. §2254 for a Writ of Habeas Corpus filed May 28, 2015. This Memorandum is submitted in Reply to the Respondent's Motion filed on September 23, 2015. The Petitioner now respectfully asserts that summary judgment is not appropriate for the reasons stated below.

I.

PROCEDURAL HISTORY

The procedural history set forth in the Return and Memorandum of Law in Support of Motion for Summary Judgment is substantially correct. See Return at pp. 1-16. The instant Petition was filed within one year of the finality of the judgment of conviction. Therefore, it is timely filed under 28 U.S.C. § 2254. Respondent has acknowledged that Petitioner's grounds were properly preserved for federal habeas review with the exception of Ground One B. Return, pgs.1 - 16. Respondent further acknowledges that Petitioner has exhausted all state remedies on each of her other grounds.

II.

GROUND FOR REVIEW

Petitioner's grounds for relief are accurately set for in Respondent's Return. Return, pgs.17 - 25.

III.

STANDARD OF REVIEW

When a habeas petitioner has properly presented a federal claim to the state court, but that state court does not decide the issue on the merits, the federal court must decide that issue *de novo*. See *Wolfe v. Johnson*, 565 F.3d 140, 161 (4th Cir. 2009) (quoting *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003)). However, if the state court has decided that issue on the merits, a petition for a writ of habeas corpus shall not be issued unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d). Thus, petitions for a writ of habeas corpus are subjected to a deferential standard of review. See *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770 (2011).

The deferential standard of review applies even when the state court fails to identify the prevailing federal standards and principles to address the claim. See *Fullwood v. Lee*, 290 F.3d 663, 677 (4th Cir. 2002). “AEDPA plainly sought to ensure a level of “deference to the determinations of state courts,” provided those determinations did not conflict with federal law or apply federal law in an unreasonable way.” *Williams v. Taylor*, 529 U.S. 362, 386 (2000). It is commonly understood that under AEDPA, a state court judgment is upheld unless a federal court becomes “firmly convinced” that there has been a violation of a federal constitutional right. *Id.* at 389. Even in cases where the judgment appears reasonable at first glance, the Court should deem it unreasonable, if “*thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional error.*” *Id.* (Emphasis added).

In order to prove a claim of ineffective assistance of counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*

A Petitioner, seeking habeas corpus relief, bears the burden of establishing that he or she is entitled to relief by showing that the state court failed to reasonably apply federal law, as determined by the United States Supreme Court, or by showing a clear failure of the state court to make a reasonable determination of the facts in light of the evidence adduced during the state court proceedings. *Carey v. Maulden*, 127 S.Ct. 649, 653-654 (2007).

IV. DISCUSSION

Relevant Facts

An analysis of each of the grounds raised by Petitioner requires a review of the following testimony as found in the record below. The decision issued by the South Carolina Court of Appeals on direct appeal contains an extensive summary of the facts in this case. See, *State v. Smith, supra*, found at App. pgs. 843 – 848. The Petitioner incorporates that factual summary by reference. Petitioner would specifically ask this Honorable Court to note the following specific relevant facts established in the record below:

The Petitioner admitted, in a statement given to law enforcement, that she had offered up the name of her “cousin,” the Victim in this case, when co-defendant turned State witness, Kerry Hollins,

indicated that he wanted someone to rob. App. Vol. II p. 545, ll. 15-18. She told Hollins that the Victim might have some money on his person. App. Vol. II p. 545, ll. 17-18. Two days later, on the night in question, Petitioner provided information to Hollins regarding the Victim's whereabouts. App. Vol. II p. 546, l. 6-p. 547, l. 19. Petitioner was present with the Victim and a friend at that friend's apartment, when Hollins and the Petitioner's other co-defendants arrived with the apparent intent of robbing the Victim. App. Vol. II p. 547, l. 20-p. 548, l. 7; p. 411, ll. 9-24. The Hollins and the other co-defendants overtook the Victim at the apartment and transported him to a secondary location. App. Vol. II p. 547, l. 20-p. 548, l. 7; App. Vol. I pp. 172-175. Petitioner was indisputably at or near the friend's apartment complex when the incident was initiated. App. Vol. II p. 548, ll. 8-9. The victim was physically assaulted and fatally wounded by gunfire at the secondary location. App. Vol. I p. 385, ll. 15-24; p. 391, l. 21-p. 392, l. 13. Some testimony indicated that a co-defendant may have taken jewelry from the Victim during the course of these events. App. Vol. II p. 416, l. 18-p. 417, l. 1.

The Thursday prior to trial, Trial Counsel received his first notice that Hollins, a former co-defendant of the Petitioner, would be testifying against her at trial. He received this information from the public defender representing Hollins. It was that Public Defender, not the State, who sent Trial Counsel a copy of the previously undisclosed statement by Hollins. Based on that revelation, and his untimely notification that the case was being called for trial, Trial Counsel moved for a continuance. App. Vol. I pp. 11-21. Trial Counsel also moved for a severance, claiming antagonistic defenses between the Petitioner and her co-defendants as well as an inability to fully cross-examine Hollins. These motions were denied. App. Vol. I pp. 11-21.¹ At the trial, Hollins testified, without objection, that the Petitioner provided the nickname of the Victim, "Kuku," as

¹ The trial court's rulings on these issues were challenged on direct-appeal.

someone to set up “a lick” on. Hollins also testified that a “lick” meant a robbery and that a weapon was needed to do a “lick.” App. Vol. II p. 403, l. 10-p. 404, l. 23.

During the State’s presentation of its case, counsel for a co-defendant introduced a photo lineup as an exhibit, causing all the defendants on trial to lose the right to a last argument. App. Vol. I p. 334, l. 25-p. 336, l. 15. Despite this development, Trial Counsel did not present any testimony or evidence in the Petitioner’s defense. In his PCR testimony, Trial Counsel admitted that he did not anticipate losing the final argument when a co-defendant introduced evidence at trial. He acknowledged that he likely told the Petitioner she could preserve her right to the final argument by not testifying. He conceded that, once the judge made it clear that all the defendants on trial had lost the right to final arguments when one defendant introduced an exhibit into evidence, he probably did not discuss that ruling with her, and did not explain that she would no longer gain the right to the last argument by waiving her right to testify. App. Vol. III p. 1003, l. 3-p. 1005, l. 7.

Trial Counsel asserted that he did not want the Petitioner to testify because it might come out that she knew that one of her co-defendants, Manny, had two murder charges pending, App. Vol. III p. 1006, ll. 2-14. He acknowledged however, that there was no evidence at trial that the Petitioner knew Manny other than brief testimony about her having spoken to him once when Hollins handed Manny the phone during a call with the Petitioner. App. Vol. III p. 1007, ll. 4-23. Further, the explanation given by Trial Counsel for his advice to Petitioner not to testify failed to explain why he could not have simply asked his client, the Petitioner, what if anything she knew about Manny *in advance of this incident* prior to her making a decision about testifying.

In her PCR testimony, Petitioner asserted that Trial Counsel advised her that he did not want her to testify because “he didn’t want the prosecutors to eat [her] alive because they would confuse [her].” App. Vol. III p. 1035, ll. 2-8. She stated however, that she wasn’t afraid to testify, and she was not worried about the prosecution attacking her on the stand because she knew she had no intention of diverging from her statement to the police because it was true. App. Vol. III p. 1035, l. 6- p. 1036, l. 13 and - App. Vol. III p. 1041, l. 14- p. 1042, l. 1. The Petitioner expressly testified that the major reason she didn’t testify was because her lawyer told her she would lose the last argument if she did. She clearly testified that that her lawyer did not subsequently explain to her that her situation had changed because she lost the last argument when a co-defendant introduced an exhibit into evidence. The Petitioner’s testimony establishes that she would have testified if she had known that she had already lost the right to the final argument to the jury. Her PCR testimony further establishes that if she had testified at trial she would have made it clear to the jury that when she suggested her cousin as a mark for this crime, her expectation was, **“that they were going to snatch and grab some jewelry and maybe some weed or something and that was it.”** App. Vol. III p. 1048, ll. 7 – 12. When asked whose decision it was for the Petitioner not to testify, Trial Counsel stated, **“probably it would have been mine.”** App. Vol. III p. 1017, ll. 2-4.

Trial Counsel argued for a directed verdict of acquittal on the Petitioner’s charges, but the motion was collectively denied along with the other motions for directed verdicts from the co-defendants based on the Court’s determination that evidence existed to support the charges. App. Vol. II pp. 559-563; 624-625. In her PCR testimony, Appellate Counsel, Trisha Blanchette, initially testified that she, and her former boss, Tommy Thomas, decided that the failure of the lower court to grant Petitioner’s directed verdicts of acquittal was not their strongest issue. She ultimately

conceded however, that the Petitioner actually had strong arguments for direct verdicts of acquittal on both her charges. App. Vol. III p. 932, l. 7- p. 933, l. 21.

At trial, Trial Counsel requested an additional instruction on the charge of strong arm robbery. He argued the complete lack of any evidence that the Petitioner knew weapons would be involved in support of this request. App. Vol. II p. 597, l. 5-p. 604, l. 1. During the charge conference, Trial Counsel requested an accomplice liability charge for the Petitioner. The State requested a felony-murder instruction, and the Court indicated that it would give an instruction on the felony-murder inference of malice. App. Vol. II p. 607, ll. 6-24. The State referenced the so-called felony-murder rule in its closing arguments, noting that any time a victim is killed **“in the course of another felony, then his death is murder. End of story.”** App. Vol. II p. 693, ll. 16-20. Trial Counsel argued in his closing arguments that his client could not be held accountable for events that were not foreseeable results of the plans in which the Petitioner was involved. App. Vol. II pp. 653-674. Trial Counsel stressed the fact that his client *was not present* during the commission of the crimes charged to the principal actors. App. Vol. II pp. 653-674.

GROUND ONE

The State Court erred in failing to find that Petitioner received ineffective assistance of counsel, in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where she demonstrated that she was prejudiced by Trial Counsel’s Failure to Adequately Argue Petitioner’s Pre-Trial Motion for a Severance .

Second Amended Application for PCR, Allegation 5.

Trial Counsel also presented a motion for a severance, supported by the argument that he could not adequately highlight the disparity in culpability between co-defendants with extensive criminal backgrounds and his own client's clean record, if their prosecutions were not severed. App. Vol. I p. 14, l. 2-p. 15, l. 12. Counsel additionally argued that his last-minute notice of the fact that Hollins would be a witness for the State, deprived him of the opportunity to prepare to adequately refute Hollins' *anticipated* testimony that his client was the mastermind behind this entire plan. App. Vol. I p. 16, l. 25-p. 17, l. 5. What Trial Counsel failed to cover in his argument for a severance was the reality that jury instructions issued in a joint trial of the Petitioner and her co-defendants would inevitably be very cumbersome and complex. He failed to argue that the Petitioner's joint trial with her co-defendant's would result in her inability to have a jury that was adequately and clearly charged on the difference between the findings necessary for her conviction as opposed to those required to convict her co-defendants. The Petitioner was clearly prejudiced in that this available argument would have supported the desired severance. South Carolina precedent provides that a severance should only be granted "when there is a serious **risk that a joint trial would compromise a specific trial right of a co-defendant** or prevent the jury from making a reliable judgment about a co-defendant's guilt." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001)(emphasis in original).

The instructions necessary at a joint trial needed to adequately explain the different findings required for the jury to determine the co-defendant's guilt on their charges of armed robbery and murder charges *versus* those necessary for verdicts on the Petitioner's charges of *accessory before the fact of* armed robbery and murder. The required instructions would necessarily have to thoroughly explain the theory of accomplice liability as it applied to the Petitioner's accessory charges versus the principal offenses the co-defendants were charged with.

Trial Counsel should have argued that there was a real possibility that a jury would be confused by the complicated legal differentiation between the standard to be applied to the Petitioner as opposed to that necessary to convict her co-defendants. He should have argued in favor of severance by noting that there existed a realistic probability that her jury would be incapable of applying the proper legal standard to the Petitioner's accessory charges versus the standard applicable to her co-defendants who were charged as principals.

While Trial Counsel argued for a severance based on his need to highlight the disparity between his client's background and the extensive criminal records of her co-defendants, he did not argue that it would be difficult for his client to have a jury adequately and clearly instructed on the applicable law in a joint trial. The Petitioner was clearly prejudiced in that this available argument would have supported the desired severance. South Carolina precedent provides that a severance should only be granted "when there is a serious **risk that a joint trial would compromise a specific trial right of a co-defendant** or prevent the jury from making a reliable judgment about a co-defendant's guilt." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001)(emphasis in original). It is the Petitioner's position that the confusing jury instructions ultimately issued at her trial prevented the jury from making a reliable judgment about her guilt. The complex and confusing instructions necessary for the Petitioner to receive a fair trial were readily foreseeable and should have been argued as justification for a severance. Likewise, the fact that it would be difficult for the trial court to tailor instructions which were fair and necessary for the Petitioner to receive a fair trial while also issuing an appropriate charge for her co-defendant's charges, should have been foreseeable and should have been argued as further justification for a severance.

When Petitioner's Trial Counsel presented his arguments for a severance, he also failed to mention the Rule 5² violation that occurred in the State's failure to timely disclose the more recent statement of Hollins, who was testifying against his client. Counsel did not receive the statement, or notice of its existence, until the Thursday or Friday prior to trial, and even then, received the information from the attorney representing Hollins not the State. Rule 5(a)(1)(C) provides that upon request of the defendant, the prosecution has a duty to provide documents or items in the possession, custody or control of the prosecution which are material to the preparation of a defense or are intended to be used by the prosecution as evidence in chief. Rule 5(a)(1)(C), SCRCrimP. Furthermore, the duty imposed under this rule is a continuing duty to disclose as necessary. Rule 5(c), SCRCrimP. A motion requesting discovery under Rule 5 was prepared and served upon opposing counsel by the Petitioner's previous attorney, George Bishop, Jr. PCR Counsel obtained a copy of that motion from the file of Trial Counsel, Craig Jones. Copies of that motion and certificate of service were added to the PCR record as Petitioner's Exhibit 1, by way of a motion filed on the Petitioner's behalf and consented to by the Respondent.³ The Petitioner was also allowed to introduce as an exhibit, a copy of the discovery motions filed by Attorney Bishop on behalf of the Petitioner. App. Vol. III pgs. 1090 – 1099.

To a certain extent, Petitioner's argument on this point is necessarily circular. In support of his Motion for Continuance, Trial Counsel argued that he had not had adequate time to secure the attendance of two parties that he felt to be necessary witnesses in the Petitioner's defense. App. Vol.

² Rule 5, SCRCrimP.

³ A copy of this motion was not introduced during the evidentiary hearing inasmuch as PCR counsel expected the motion to be included in the Clerk of Court records in this matter. It was subsequently determined that, although the motion was served, it was apparently not filed with the Clerk of Court. For that reason, PCR counsel filed a motion to expand the PCR record to include a copy of the Rule 5 Motion and certificate of service. Counsel for the Respondent consented to that request.

I p. 22, l. 19-p. 24, l. 4. He additionally argued that his last-minute notice of the fact that Hollins would be a witness for the State, deprived him of the opportunity to prepare to adequately refute Hollins' *anticipated* testimony that his client was the mastermind behind this entire plan. App. Vol. I p. 16, l. 25-p. 17, l. 5. Petitioner argues that Trial Counsel's failure to take adequate steps to interview Hollins in advance of Petitioner's trial, as will be discussed at length *infra*, resulted in his inability to effectively argument why Petitioner's need to produce testimony from Hollins supported her prayer for severance.

Respondent has argued that Petitioner has waived her assertion of this issue where PCR Counsel did not question counsel concerning his reasons for not advancing this argument in support of his continuance request. Respondent argues that this omission "might be considered sound trial strategy." Petitioner respectfully asserts that this argument is patently absurd. Trial Counsel made a Motion for Severance on behalf of Petitioner. Therefore, he obviously felt separation of Petitioner's trial from that of her co-defendants was in her best interests. To put it bluntly, there was no possible down side to doing a thorough job of arguing all the justifications for Trial Counsel's own motion. The authority relied upon by Respondent on this issue actually speaks directly to why summary judgment should not be granted on this ground. Petitioner acknowledges that "{i}mproper joinder does not, in itself, violate the Constitution, Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his ...right to a fair trial." *United States v. Lane*, 474 U.S. 438, 446 n. 8, 106 S.Ct. 725, 730 n. 8 (1986). For all the reasons argued herein, it is Petitioner's position that her inability to fully present her defense was clearly prejudiced by her joint trial with her co-defendants.

For the above reasons, Petitioner argues that Trial Counsel was ineffective in arguing his motion for a severance on behalf of Petitioner. The lower court erred in ruling that the Petitioner

was not entitled to the requested relief on this ground and the South Carolina appellate courts erred in affirming that ruling. Summary Judgment on this ground is not appropriate and should not be granted.

GROUND TWO

The State erred in denying Petitioner relief where she clearly established that Trial Counsel was ineffective in his failure to adequately cross-examine state witness, co-defendant, Hollins.

Allegation 12. - Second Amended Application for PCR

Tied into the allegations addressed in Ground One, is Petitioner's claim that Trial Counsel was ineffective for failing to fully cross-examine Hollins. Specifically, he failed to elicit testimony that would have been favorable to the defense. As noted above, Hollins' PCR testimony confirmed that Petitioner was unaware of any plan for him, or anyone with him, to bring weapons when taking money from the Victim. He similarly confirmed that Petitioner was unaware that the victim might be harmed and had in fact been promised that he would not be. Although Petitioner was only charged with accessory before the fact to armed robbery and murder, the fact that a burglary and kidnapping ultimately occurred (for which her co-defendants were charged) could have been considered by the jury in determining whether a murder was a natural and probable consequence of the activities Petitioner participated in. Testimony that Petitioner had no knowledge of a plan to be armed while committing this robbery, or of any plan to kidnap or commit burglary, would have significantly diminished the chances that the jury would find that the victim's murder was a readily foreseeable consequence of the acts she knowingly participated in.

To be very clear, Petitioner asserts that trial counsel should have taken adequate steps to secure an interview with Hollins before Petitioner's trial began. The Petitioner additionally argues that once Trial Counsel realized that the Court was not going to continue this trial to another day or term, he should have, *at the very least*, requested a brief recess in order to attempt to interview cooperating co-defendant Hollins. In the lower court the Petitioner argued that Trial Counsel was clearly ineffective for failing to do so since *his own words* in the trial record confirm that he felt incapable of adequately cross-examining this last-minute witness. App. Vol. I, p. 13, l. 3- p. 15, l. 18. Petitioner argues that Trial Counsel's failures in this regard obviously contributed to his failure to adequately cross-examine this crucial witness.

In his PCR testimony, Trial Counsel admitted that he did not ask the public defender representing Hollins if he could interview him prior to the beginning of the Petitioner's trial. App. Vol. III p. 976, ll. 12-15. Trial Counsel spoke with Hollins' attorney the week before the Petitioner's trial. That conversation addressed the fact that Hollins would be a witness for the State and therefore, presented an obvious opportunity to discuss a potential interview of Hollins prior to trial. App. Vol. III p. 1001, ll. 9-17.

The lower court erroneously found that Trial Counsel was not ineffective in his cross-examination of Hollins. In the initial Order of Dismissal the lower court noted that Trial Counsel did not think *Hollins' lawyer* would have let him interview Hollins pre-trial. App. Vol. III p. 1112. In his PCR testimony, Trial Counsel ultimately admitted that the decision, as to whether to talk to the Petitioner's lawyer, would have been up to Hollins to make. App. Vol. III. p. 972, l. 23 – p. 973, l. 15. Following the Petitioner's Rule 59(e) Motion, the Order was amended to acknowledge that Trial Counsel simply *assumed* Hollis would not speak with him because he was a cooperating co-defendant testifying for the State. App. Vol. III pgs. 1195-1196. The

decision of the lower court fails to take into account Trial Counsel's admission in his PCR testimony that he did not know whether Hollins would have been willing to speak with him or not. The Amended Order "finds that counsel was able to cross-examine Mr. Hollins regarding *some* details of the incident..." App. Vol. III p. 1196 (Emphasis added). The Amended Order of Dismissal however, totally fails to take into account the testimony of Hollins at the PCR hearing, and the many ways in which the same testimony would have been crucial to the defense if it had been offered at trial. *See*, App. Vol. III p. 1021, l. 21- p. 1033, l. 13. Likewise, the Order of Dismissal fails to take into account the fact that, in his PCR testimony, Trial Counsel admitted that Hollins' statement *wasn't very divergent from the Petitioner's statement*. App. Vol. III, p. 973, l. 21- p. 974, l. 19. The lower court failed to recognize that Trial Counsel had essentially admitted that the testimony of Hollins would have largely corroborated the Petitioner's version of the events.

In his PCR testimony Hollins testified that if he had been asked, he would have been willing to talk to the Petitioner's lawyer *even if* his own lawyer had recommended against it. App. Vol. III p. 1023, l. 20- p. 1024, l. 4. He testified that if the Petitioner's Trial Counsel had ever asked him the same questions PCR counsel asked did during the evidentiary hearing, he would have answered them the same way he did in the PCR hearing, and further, that he would have answered those questions the same way if they had been asked of him under oath at the Petitioner's trial. App. Vol. III p. 1027, ll. 15-24. Hollins confirmed information that clearly would have been helpful to the defense, such as the Petitioner being unaware of any plan to bring guns in the robbery of the Victim and his admitted assurances to the Petitioner that the Victim would not be hurt. App. Vol. III p. 1025, l. 17- p. 1027, l. 14. Hollins' PCR testimony confirms that he would have willingly provided this information to Petitioner's Trial Counsel. App. Vol. III p.

1027, ll. 2-24. In his own PCR testimony, Trial Counsel acknowledged that he failed to ask for even a brief recess to speak with Hollins and he admitted that he would have been more likely to receive that, than the continuance of the trial he did request. App. Vol. III p. 1001, l. 18-p. 1002, l. 6.

Hollins' testimony would have confirmed that Petitioner was not privy to any plan to commit a burglary. Trial Counsel's claim that he was afraid to ask more questions of this witness is not supported by the record. Trial Counsel had the opportunity to interview Hollins and failed to pursue it. In addition, Trial Counsel admitted in his PCR testimony that the statement given by Hollins was largely consistent with his client's position. Therefore, he had the security of knowing that if Hollins significantly departed from that statement in his trial testimony, he could have impeached him with his prior statement. Hollins PCR testimony undeniably establishes that he would have been willing to talk to Petitioner's Trial Counsel prior to this trial regardless of the advice of his own lawyer and further that he would have testified consistently with his PCR testimony had Trial Counsel asked him questions which afforded him the opportunity to do so.

The unclear and improper definition of the street term "lick" elicited from Hollins in his direct testimony was relied upon the State to create the inference that Petitioner was *aware* that weapons would be involved. If Hollins had been adequately cross-examined, it is clear that Hollins' own testimony on cross-examination would have refuted the State's position that Petitioner was aware of plans to commit an *armed* robbery or even that she knew the perpetrators would be armed. In his testimony at Petitioner's PCR hearing, Hollins confirmed that Petitioner had no idea guns were going to be involved. He acknowledged that after her cousin was kidnapped, Petitioner sounded scared and surprised when she called him because, "*she didn't know that was going to take place.*" App. p.103, ll. 7-22.

In her PCR action, Petitioner argued that Trial Counsel should have had the benefit of knowledge gained from a pre-trial interview with Hollins to use to challenge the confusing or incongruent statements elicited from this witness by the prosecution on direct examination. Trial Counsel has admitted, however, that Hollins' pretrial statement was largely consistent with Petitioner's own statement to law enforcement. Therefore, regardless of whether he interviewed Hollins in advance of this trial, he at minimum had information which provided a basis for a more thorough cross-examine of this key witness for the prosecution. Trial Counsel was ineffective for failing to further explore the crucial points addressed herein in his cross-examination of Hollins at trial. The prejudice arising from his failure to fully cross-examine Hollins was no doubt exacerbated by Trial Counsel's failure to interview this witness prior to trial, and the Rule 5 violation. Petitioner respectfully submits that the state circuit court erred in failing to grant relief on this ground and that the South Carolina Court of Appeals erred in affirming that decision.

GROUND THREE

Trial Counsel violated Petitioner's right to effective assistance of counsel, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, by his failure to properly respond to testimony from State Witness, co-defendant, Hollins' that a "Lick" Conclusively Meant an Armed Robbery
Second Amended PCR Application, Allegation 1 and 2

On collateral review, Petitioner asserted that Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "*a lick*" conclusively meant an armed robbery and demonstrated that she was clearly prejudiced by this error

by Trial Counsel. She further argued that Trial Counsel was ineffective for neglecting to make a motion for a mistrial, and/or for failing to make a request for a curative charge, where the State, without a sufficient evidentiary basis, elicited testimony that the term “*a lick*” meant an armed robbery and also made a showing as to how she was prejudiced by Trial Counsel’s failure to do so.

Among the most damaging evidence against Petitioner at trial came in the form of improper and patently misleading testimony from State witness Hollins. Hollins testified that Petitioner had suggested the Victim for a “lick” and then, at the urging of the State, proceeded to define what a “lick” is commonly taken to mean. While Hollins initially defined a lick as signifying a *robbery*, he was subsequently led by the State to state that a “lick” necessitated the use of some type of weapon. App. Vol. II p. 403, ll. 10-20. Although *Counsel for a co-defendant, Attorney Bolus*, was able to get Hollins to repeat, on cross-examination, that the term “refers to a robbery”, App. Vol. II p. 424, ll. 13-23, the damage from these assertions was reinforced when, on re-direct examination, the State once again lead Hollins into stating that a “lick” required “some type of weapon.” App. Vol. II p. 441, ll.10 – 15. After reviewing Hollins’ testimony concerning the term “lick” with PCR Counsel, Trial Counsel acknowledged that *after* the testimony elicited by Attorney Bolus, Hollins followed up with more testimony which emphasized that the plan included weapons. App. Vol. III p. 965, ll. 1-8. In his PCR testimony, Trial Counsel candidly stated that he wished he had “*gone into that further*” when addressing his failure to object to Hollis being allowed to define “a lick” as meaning an armed robbery. App. Vol. III p. 975, ll. 15-16. He conceded that he should have requested a mistrial the first time the State elicited testimony defining “a lick” as an armed robbery. App. Vol. III p. 976, l. 19- p. 977, l. 2. This testimony was cited by the State as evidence supporting denial of Petitioner’s request for a charge on a lesser offense of strong arm robbery. App. Vol. II. p. 598, l. 14-p. 599, l. 1. The prejudice arising from this testimony was

exacerbated when during closing arguments the State emphasized this testimony by stating, "Defense would have you believe she [Petitioner] didn't know it was going to be a robbery—she didn't know it was going to be an armed robbery." The State wraps up that argument with, "Y'all know what a robbery is, what a lick is." App. Vol. II p. 679, ll. 13-20. As noted previously in Ground Two, Trial Counsel had the opportunity to cross-examine Hollins about whether Petitioner was aware that weapons were going to be involved in this crime and neglected to do so.

The Petitioner testified at her own evidentiary hearing that the term a "lick" does not necessarily denote an armed robbery, or robbery at all. She testified that the term refers to various different means of getting money, or making quick cash. App. Vol. III p. 1043 l. 8-p. 1044, l. 3. This interpretation is consistent with the definition of a "lick" referenced in the South Carolina Court of Appeals decision in *State v. Page*, 378 S.C. 476, 479, 663 S.E.2d 357, 358 (Ct. App. 2008), wherein the Court referenced witness testimony that "making a lick," is slang for "coming up on some extra money, doing something to come up with some extra money some way or somehow."

Further, as addressed in Petitioner's Ground Two, she met her burden of proof with regard to her allegation that Trial Counsel failed to provide Petitioner with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Hollins, and thereby prejudiced her at trial by failing to elicit testimony from him which would have clarified the fact that Petitioner had no knowledge that weapons were to be involved in this crime

There was perhaps no more significant tissue at Petitioner's trial than the question of whether she knew her co-defendants were going to be armed when they robbed the victim. It is impossible to underestimate the damage done to her defense by the failure of Trial Counsel to strenuously object the first and every time, the State sought to boot strap the strength of their case

against Petitioner by leading Hollins into testimony in which he appeared to acknowledge that the term "lick" conclusively and exclusively meant an armed robbery. That error was compounded by Trial Counsel's failure to object to related arguments by the prosecution in closing arguments to the jury.

Petitioner respectfully submits that the state circuit court erred in failing to grant relief on this ground and that the state appellate court erred in affirming that decision. On the facts of this case, and record developed below, the Petitioner respectfully submits that summary judgment is not appropriate on this issue and should not be granted by this Honorable Court.

GROUND FOUR

Petitioner's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United State's Constitution, was violated at trial when Trial Counsel neglected to adequately argue her right to directed verdicts of acquittal based upon the insufficiency of the evidence presented by the prosecution.

Second Amended Application for PCR, Allegations 3 and 4

The state circuit court erred in failing to grant Petitioner relief where Trial Counsel failed to adequately argue Petitioner's motions for directed verdicts of acquittal at trial. The appellate court erred in affirming that denial. Trial Counsel brought a motion for a directed verdict of acquittal on both of the charges against Petitioner simply arguing that there was no evidence to support a charge of accessory before the fact to armed robbery. He further stated that there was no evidence of a common plan to commit armed robbery or murder and that; generally, murder was not a probable and natural consequence of Petitioner's acts. App. Vol. II pp. 559-560. This argument in support of Petitioner's directed verdict motions was inadequate and ineffective considering the fact that the

totality of the evidence adduced at trial had completely failed to establish that Petitioner knowingly participated in anything that put her on notice that her co-defendants would ultimately commit far more serious crimes than the crime she knowingly agreed to assist them in committing.

There was a total lack of evidence, other than Hollins' improper definition of a street slang term a "lick", to suggest that Petitioner knew that weapons would be involved. Even that testimony spoke to *Hollins' understanding* of the street definition of that term, not Petitioner's own knowledge of, *or agreement with*, that definition. Without any evidence to establish that Petitioner knew weapons might be involved, it is implausible for the State to argue that murder and armed robbery were foreseeable results of her assistance to the co-defendants. Petitioner was an inexperienced nineteen-year-old with no criminal history. She suggested the Victim as a potential target for some quick cash, however, the State did not demonstrate that Petitioner had any knowledge that her co-defendants would be armed. Therefore, there was no evidence that she was aware of facts from which she should have concluded that the robbery to be committed by her co-defendants would be accomplished through the use of deadly weapons . Accordingly, there was no evidence that Petitioner had a basis for believing murder to be a natural and probable consequence of the actions she knowingly participated in. Trial Counsel's brief argument in support of directed verdicts of acquittal for his client failed to highlight the State's failure to prove their case against Petitioner in a clear and organized fashion.

Trial Counsel also failed to utilize another important point in his arguments supporting the motions for a directed verdict. One of the elements required to find a person liable as an accessory before the fact is that the person is *not present* at the scene of the crime. The elements necessary to support an accessory before the fact charge are as follows: "(1) that the defendant advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) **that the**

defendant was not present when the offense was committed; and (3) that the principal committed the crime.” *State v. Gentry*, 363 S.C. 93, 97-98, 610 S.E.2d 494, 497 (2005) (quoting *State v. Smith*, 316 S.C. 53, 447 S.E.2d 175 (1993)) (emphasis added). The record of Petitioner’s trial confirms that Trial Counsel failed to argue this crucial point in support of his motions for directed verdicts of acquittal on behalf of Petitioner.

At trial it was established that Petitioner was present at her friend’s apartment, where the Victim was initially attacked and grabbed by the co-defendants. The testimony of Petitioner’s friend, and Petitioner’s own statement, established this fact. App. Vol. I pps. 137-141 and App. Vol. II p. 547, l. 20-p. 548, l. 7. Since the evidence did not clearly establish where, if anywhere, an actual robbery occurred, it is possible that she was present during the alleged act of robbery. At the very least, it was established that Petitioner was present during one of the phases of the crimes that led to her accessory before the fact of armed robbery and murder charges. Most importantly, Trial Counsel could have argued that Petitioner was present when the only crime she *knowingly* aided and abetted, a robbery, was initiated. This critical fact, which negated one of the elements necessary to convict Petitioner on her charges, should have been argued in support of directed verdicts of acquittal. At first blush, this position may seem counter productive inasmuch as it supports her being a principal. In truth, however, she *was not indicted as a principal* and therefore, was not at risk of being convicted as one at this trial. Thus, the fear of arguing a point which would have supported her being a principal, had she been so charged, does not support a reasonable basis for failing to make this important argument in favor of direct verdicts of acquittal.

At the evidentiary hearing, Appellate Counsel acknowledged that the evidence demonstrated that Petitioner was present for stages of the offenses. App. Vol. III p. 945, ll. 7-18. She verified that if Trial Counsel had presented this argument in his motions for a directed verdict, this issue would

most likely have been included in the appellate brief as a meritorious ground for appeal. Unfortunately, she asserted, the issue was not preserved for appellate review. App. Vol. III p. 946, l. 19-p. 947, l. 17. Thus, the record below establishes that Trial Counsel's failure to make this well-supported argument in favor of directed verdicts of acquittal *not only* damaged Petitioner's chances of the trial judge directing verdicts in her favor, but also eliminated any opportunity for appellate review of this issue as preserved error. On collateral review in state court, Petitioner met her burden of proof regarding these allegations concerning the ineffective manner in which Trial Counsel argued her motions for directed verdicts of acquittal. The state circuit court should have granted Petitioner relief on this ground. The South Carolina Court of Appeals erred in affirming the denial of relief on this ground where the record below clearly establishes that Trial Counsel was deficient for failing to argue these points in support of Petitioner's Motions for Directed Verdicts. Where these arguments strongly supported direct verdicts of acquittal on both grounds, the prejudice to Petitioner is obvious.

GROUND FIVE

Petitioner should have been granted relief in the state court where she established that Trial Counsel was ineffective for advising her that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments and further, where Trial Counsel was ineffective for advising her that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument.

Second Amended Application for PCR , Allegation 13 and

Allegation 13 A, amended application Allegation as Expanded During Her PCR Hearing.

The record below establishes that these errors by Trial Counsel significantly prejudiced Petitioner in that it caused her to make a waiver of her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, which was not knowingly and voluntarily entered. Petitioner submits that when Trial Counsel realized that all co-defendants had lost their right to a final argument, he should have made this development clear to his client, who desired to testify on her own behalf. At Petitioner's PCR evidentiary hearing, Trial Counsel admitted that he probably did not advise Petitioner that she had already lost her right to a final argument, and therefore, that this factor should no longer be considered in making the decision about whether she wished to exercise her right to testify at her trial. App. Vol. III p. 1004, l. 12-p. 1005, l. 7. He affirmed the possibility that he told her, at a point earlier in the trial, that they could retain last arguments if they did not put up a defense. App. Vol. III p. 1003, ll. 3-12. As the PCR Court's Order acknowledged, when Trial Counsel was asked who made the decision for Petitioner not to testify, he expressly stated, "*probably it would have been mine.*" App. p. 1196, para. 2; App. p. 1017, ll. 2-4. Petitioner unequivocally testified that she was not aware when the right to last arguments was lost, and further, that her reluctant decision not to testify was based on her desire to preserve final arguments despite her attorney's threat that the prosecution would "eat [her] alive" on the stand. App. Vol. III p. 1040, l. 3-p. 1042, l. 13. Thus it was clear that Petitioner waived her right to be fully heard in her defense, including her right to testify in her own defense, based upon the erroneous advice of counsel that she would preserve her right to the last argument before the jury if she did not put up any evidence in her own defense. It is equally clear from Petitioner's PCR testimony that she would have testified had she been made aware that her right to the final argument had been waived by the introduction of evidence by a co-defendant during the state's case in chief. It is important to note that even the experienced trial lawyers involved in this case were

apparently caught off guard by this ruling. It is therefore, unfair and unreasonable to suggest that Petitioner would know this fact without the benefit of accurate advice of counsel on this crucial point.

Trial Counsel testified that he did not want Petitioner to testify because it might come out that she knew one of her co-defendants, Manny, had two murder charges pending. App. Vol. III p. 1006, ll. 2-14. He went on to acknowledge, however, that there was no evidence Petitioner knew Manny other than having spoken to him once when Hollins handed Manny the phone during a call with Petitioner. App. Vol. III p. 1007, ll. 4-23. The explanation given by defense counsel for his advice to Petitioner not to testify fails to explain why defense counsel could not have asked Petitioner what if anything she knew about Manny *in advance of this incident* before she was required to make a decision about testifying.

The testimony and evidence introduced on collateral review in state court established that Trial Counsel was ineffective for not explaining to his client that she no longer had a right to final argument prior to resting her case without putting up a defense. In addition Petitioner argued below that Trial Counsel also erred in advising her that the prosecution would “eat her alive” if she testified, without any accompanying rationale. The record below supports this assertion where Trial Counsel admitted that Petitioner was an articulate 19-year-old woman without a criminal record that could be used for impeachment. App. Vol. III p. 1005, l. 8-p. 1006, l. 1. Petitioner testified at her PCR evidentiary hearing that she *did not* intend to challenge her statement to police, and that she was not afraid to testify in her defense. App. Vol. III p. 1040, l. 3-p. 1041, l. 15. Therefore, she had no reason to fear being cross-examined concerning inconsistencies between her statement to law enforcement and her trial testimony. On collateral review in the state circuit court, Petitioner asserted that Trial Counsel was ineffective for failing to communicate to her that she had already

lost her right to a final argument and thereby motivated her to give up her right to present a defense on the basis of a non-existent consideration. Petitioner could have testified at trial, as she did in her evidentiary hearing, as to her personal definition of a “lick” and her lack of knowledge that the Victim would be harmed in any way. Petitioner’s poised and articulate testimony at her PCR hearing demonstrated that she could have been an effective witness in her own defense at trial. App. Vol. III, p. 1034, l. 9 – p. 1053.

Petitioner met her burden of proof on this claim on collateral review in state circuit court. The state circuit court should have granted Petitioner relief on this Sixth Amendment ground. The South Carolina Court of Appeals erred in affirming the denial of relief on this ground. Summary Judgment is not appropriate on the facts of this case and the record developed below.

GROUND SIX

Petitioner’s right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated in state court where Trial Counsel failed to request appropriate and necessary jury instructions on her behalf at trial and where he for failed to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of Petitioner, separate from their findings concerning the liability of each of her co-defendants.

Second Amended Application for PCR, Allegations 7 and 8

On collateral review in the circuit court and on appeal, Petitioner asserted that the state court erred in denying her relief where the record below supports her assertion that she was significantly prejudiced by Trial Counsel’s failure to request appropriate jury instructions in her case. She additionally argued that Trial Counsel was ineffective for failing to enter an appropriate objection to

the charge as given by the trial court. The charge as given did not adequately convey to the jury the requirement that they apply *a separate* foreseeability analysis to determine the liability of Petitioner, independent from their findings concerning the liability of each of her co-defendants. Further, the record below would have supported her request for a jury instruction on the charge of accessory before the fact to *strong* armed robbery. The record below clearly supported Petitioner's claim that she was prejudiced by Trial Counsel's failure to research, and present the trial court with, an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. In addition, Petitioner met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of Petitioner, independent from their findings concerning the liability of each of her co-defendants. The record below also supported Petitioner's argument that she was significantly prejudiced by Trial Counsel's failure to enter an appropriate objection to the charge as given by the trial court.

Trial Counsel was correct in his determination that a strong arm robbery charge was more appropriate to the evidence presented at trial *regarding the plans of which Petitioner had knowledge*, than armed robbery, the offense charged to the principal actors. "Strong arm robbery is defined as the 'felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.' " *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996) (quoting *State v. Drayton*, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987))

Where Trial Counsel erred was in his specific request for a jury charge on strong arm robbery. Since the charge against his client was *accessory before the fact to armed robbery*, Trial

Counsel should have requested a charge on *accessory before the fact to strong arm robbery*, not strong arm robbery. Trial Counsel presented the lack of evidence that his client was aware that weapons would be involved as his basis for requesting the additional charge. While one may be able to infer from the record the actual charge needed for Petitioner, it was crucial that Trial Counsel specifically request a charge on *accessory before the fact to strong arm robbery* and not just request an instruction on strong arm robbery. The lower court could not have issued a jury charge for a crime that the indictment against Petitioner would not sustain a conviction for. Further, by requesting a charge on the principal offense of strong armed robbery, Trial Counsel put the trial court in the position to rule that there was no evidence that the crimes committed by Petitioner's co-defendants were committed without the use of a weapon and therefore, that the requested charge on the offense of strong armed robbery was not appropriate. On the other hand, had the proper charge of *accessory before the fact to strong armed robbery* been requested, the trial court could have issued that instruction in a manner which eliminated any fear that the jury would apply it to the co-defendants who were not entitled to receive a jury instruction on this lesser included offense. In other words the request to charge as advanced by Trial Counsel not only was not appropriate to the charge against Petitioner, but was virtually guaranteed not to be granted where all the evidence adduced at trial indicated that her co-defendants armed.

Trial Counsel was deficient for failing to draw the Court's attention to the fact that Petitioner's position differed greatly from that of her co-defendants in that she was the only one charged as an accessory before the fact. It was his responsibility to emphasize the fact that his arguments for the additional charge were tailored to the lack of any evidence that *Petitioner knew* weapons would be involved, from her perspective as an *accessory*, rather than a principal actor. Trial Counsel's ineffectiveness in failing to specify that he was seeking *an accessory before the fact*

to strong arm robbery charge prejudiced his client. The record of this trial demonstrates that the Court was obviously focused upon the crimes *actually* committed by her co-defendants as opposed to what the evidence demonstrated Petitioner had knowledge of. The Court, in denying the request, noted *that there was not any evidence that the robbery was, in fact, committed without weapons*. App. Vol. II p. 603, ll. 12-17. This statement demonstrates that the Court was not properly focused on Petitioner's role in this robbery, as a result of Trial Counsel's failure to tailor his charge request to his client's charges. Absent the appropriate request to charge, the Court was understandably focused on what crime was ultimately committed. Trial Counsel did not make it clear that his client should be entitled to a lesser-included *charge regardless of whether her co-defendants were or not*. By failing to request the appropriate charge, he failed to make it possible for the trial court to give Petitioner the benefit of that charge without applying it to the co-defendants as well. Trial Counsel admitted in his PCR testimony that the correct request would have been for a charge on accessory before the fact of strong arm robbery. Trial Counsel stated that he hoped he would have mentioned that at some point in his argument, but notes that the whole strong arm robbery request was declined by the Court very quickly. App. Vol. III. p. 992, l. 15-p. 993, l. 1. His testimony fails to acknowledge that his failure to make the correct request to charge, resulted in an improper analysis of Petitioner's entitlement to such a charge by the trial judge.

Trial Counsel similarly failed in that he did not present, at the jury charge conference, any requests to charge that would have set forth the law of accomplice liability *as it specifically related to Petitioner and her charges of accessory before the fact*. He neglected to request a charge that would have instructed the jury that Petitioner could only be found guilty as an accessory before the fact for crimes that she *knowingly* aided and abetted the principals in the planning or committing *and/or* the commission of crimes that were the readily foreseeable consequence of acts she agreed to

participate in. Such a charge by necessity should have instructed the jury that Petitioner's guilt as an accessory before the fact to murder and armed robbery had to be determined based upon *her knowledge* of the plan as distinguished from the knowledge of her co-defendants. Once again, the argument in support of this position is admittedly somewhat circular. As previously argued, Trial Counsel's deficient representation resulted in the Petitioner not testifying and the defense not cross-examining Hollins concerning her lack of knowledge of the intent of her co-defendants to be armed. Nevertheless, even in the absence of such testimony, the jury should have been instructed that, with regard to Petitioner, they had to find that the armed robbery and murder were the natural and probable consequences of the crimes Petitioner knowingly participated in the commission. of, in order to find her guilty of accessory before the fact to those offenses based upon a theory of accomplice liability. The shortcoming of the instructions given at Petitioner's trial was they failed to in any way to differentiate between the state's burden of proof with regard to Petitioner versus her co-defendants. It was Trial Counsel's job as an advocate to insure that the jury instructions given at this trial properly distinguished for the jury the findings they were required to make in determining Petitioner's guilt versus the guilt of her co-defendants. Trial Counsel was clearly deficient in his representation of Petitioner in this regard.

The trial transcript reflects that Trial Counsel began discussing an accomplice liability instruction *for his client* with the Court, but once he was informed that the Court would give a standard accomplice liability instruction, he failed to press farther, and request a charge on accomplice liability specifically tailored to his client's alleged involvement in this case. App. Vol. II p. 605, l. 6-p. 606, l. 1. Counsel should have requested a charge which clearly instructed the jury that Petitioner could only be found guilty as an accessory before the fact for crimes which she *knowingly* aided and abetted the principals in the planning or committing *and/or* the commission of

crimes which were the readily foreseeable consequence of the acts mutually agreed upon by her and her co-defendants. In other words, this jury needed to be instructed that a separate determination as to whether armed robbery and murder were the natural and probable consequences of the acts Petitioner actually agreed to commit was necessary and trial counsel neglected to request such an instruction.

An instruction making a distinction between the findings necessary to find the principals guilty of each other's acts under a theory of accomplice liability and the findings necessary to find Petitioner guilty under that legal theory was appropriate and necessary because the evidence adduced at trial demonstrated that what Petitioner knew about the plan significantly differed from the knowledge of her co-defendants. Put simply, Petitioner was entitled to have her guilt determined by what the jury concluded she should have foreseen as the natural consequences of the acts she agreed to commit with her co-defendants. That determination properly required that the jury evaluate what was a "readily foreseeable", or natural and probable consequence, based upon *Petitioner's knowledge* at the time of the crime not, the knowledge of her co-defendants.

Petitioner met her burden of proof with regard to this ground in the circuit court PCR action and relief should have been granted on these Sixth Amendment allegations. The South Carolina Court of Appeals likewise erred in affirming the denial of relief by the circuit court where Petitioner not only established counsel's failure to provide her with reasonable professional assistance of counsel as regards these allegations, by clearly has demonstrated that she was prejudiced by the errors and omissions of counsel such that she was deprived of a fair trial. Where she has established that there is a reasonable probability that the result at her trial would have been different, but for Trial Counsel's errors in regard to the errors addressed in this ground, she

should have been granted relief on state court. Summary judgment is not appropriate on the facts of this case and the record developed below in support of this ground.

GROUND SEVEN

Trial Counsel was ineffective for failing to make certain crucial closing arguments to the jury and for failing to object to inappropriate arguments made by the prosecution in the State's closing argument.

Second Amended Application for PCR, Allegations 10, 11 and 14

In her state collateral proceedings, Petitioner argued that Trial Counsel was ineffective for advising the jury in his closing argument that Petitioner *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including Petitioner's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes Petitioner was on trial for; specifically that she *was not present* during the commission of the principal offenses. In addition, Petitioner argued that Trial Counsel was ineffective for failing to specifically argue to the jury in closing that Petitioner could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her co-defendants. Petitioner met her burden of proof that her ability to receive a fair determination of her guilt by the jury was irreparably prejudiced at her trial due to these serious errors by Trial Counsel in his closing arguments to the jury.

Petitioner additionally argued that Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "*in the course of another felony, then his death is murder. End of story*". Petitioner demonstrated that Trial Counsel's failure to object to this improper argument prejudiced her at trial by permitting the

State to confuse the jury concerning the elements of the crime of accessory before the fact to murder and resulted in a dilution of the State's burden of proof beyond a reasonable doubt.

In state collateral proceedings, Petitioner demonstrated that Trial Counsel failed to utilize the fact that his client *was present* during some portions of the underlying offenses not only in directed verdict motions, but also in his closing arguments to Petitioner's jury. Had Trial Counsel recognized the significance of this fact to the State's case on the accessory offenses, Trial Counsel could have argued this point as a reason for the jury to acquit his client. Not only did Trial Counsel fail to use this helpful fact, but he also argued against it. Trial Counsel actually *stressed* the fact that his client *was not present* at the scene of the crime in his closing arguments. App. Vol. II pp. 653-674. In doing so, he basically conceded one of the elements necessary for both offenses his client was on trial for. Trial Counsel stated at the PCR hearing that he believed Petitioner was not present during the crimes for which she was actually prosecuted. In support of this assertion he opined that if she had been present, she would have been charged as a principal. App. Vol. III p. 984, l. 25-p. 985, l. 17. This assumption did not justify Trial Counsel's failure to make appropriate arguments *at trial* since Petitioner was only indicted as an accessory before the fact. At trial, there was no danger of her being convicted as a principal on the indictments as true billed. Trial Counsel clearly argued *against* Petitioner's best interests by arguing that she was not present during portions of these crimes.

During the State's closing arguments, a statement was made referencing the felony-murder doctrine in a manner that was wholly inconsistent with South Carolina law. *See, Lowery v. State*, 376 S.C. 499, 657 S.E2d 760(2008). The Solicitor informed the jury that any time a victim is killed "*in the course of another felony, then his death is murder. End of story.*" App. Vol. II p. 693, ll. 16-20. Trial Counsel did not object to this statement. This statement should have been objected to on

the basis that it was inconsistent with prevailing law in South Carolina concerning the permissible inference which may arise when a killing occurs during the commission of another felony. The prejudice from this statement is obvious. Strong armed robbery or common law robbery is a felony in South Carolina. . S. C. Code Ann. § 16-1-90 (D). Therefore, if followed by the Petitioner's jury, this erroneous statement of the law would likely have resulted in a conviction for *accessory before the fact* of murder even the jury believed the Petitioner only knew about and participated in an *unarmed* robbery

Therefore, if followed by Petitioner's jury, this erroneous statement of the law by the prosecution could have resulted in a conviction for *accessory before the fact* of murder even if the jury believed Petitioner only knew about and participated in an *unarmed* robbery. Under South Carolina law, an inference of malice may arise from the use of a deadly weapon, but the law does not provide that one is instantly liable for murder because a killing occurred during the commission of *any felony*, as the prosecution was allowed to tell Petitioner's jury, without objection by Trial Counsel.

Appellate counsel testified that she recognized, and marked in her notes, that the State's comment portrayed an improper malice instruction. App. Vol. III p. 940, ll. 7-20. She stated that they likely would have presented that issue on appeal, if it had been objected to and the objection overruled. App. Vol. III p. 941, ll. 5-9. Trial Counsel also acknowledged that this comment was not a correct statement of law. App. Vol. III p. 998, ll. 4-20. He further conceded that the statement was prejudicial to Petitioner and stated that given another chance, he would have objected to the comment. App. Vol. III p. 998, l. 21-p. 999, l. 6.

The State Court's denial of relief on the basis of these errors was grossly improper and should be corrected by this Honorable Court.

GROUND EIGHT

Failure of Trial Counsel to argue in opening statements that murder was not a foreseeable consequence of any agreement entered into between Petitioner and her co-defendants.

Second Amended Application for PCR, Allegation 9

Petitioner argued in her PCR action that Trial Counsel failed to clearly and concisely state in opening arguments the reasons why Petitioner could not be found guilty as an accessory before the fact to murder, when the murder was not a foreseeable result of the plan in which she was involved. Trial Counsel did argue that the jury would have to find that the armed robbery was a foreseeable consequence of the plans in which she was involved, but he failed to make the logical extension of that argument to the accessory before the fact of murder charge. App. Vol. I, p. 125, l. 3- p. 126, l. 12. Trial Counsel did not provide a valid strategic reason for mentioning one charge as opposed to both charges.

The Petitioner presented testimony at her evidentiary hearing that Trial Counsel failed to clearly and concisely state in opening arguments the reasons why the Petitioner could not be found guilty as an accessory before the fact to murder, when the murder was not a foreseeable result of the plan in which she was involved. Trial Counsel did argue that the jury would have to find that the armed robbery was a foreseeable consequence of the plans in which she was involved, but he failed to make the logical extension of that argument to the accessory before the fact of murder charge. App. Vol. I, p. 125, l. 3- p. 126, l. 12. In the evidentiary hearing, Trial Counsel noted that he did not argue that the murder was not foreseeable in his opening arguments, and stated that he was “hoping not to over-emphasize.” App. Vol. III p. 978, l. 22- p. 979, l. 6. He went on to state that he believed the State’s strongest case to be on the accessory before the fact of armed robbery charge, but that he

hoped the murder would seem to be an even less foreseeable result. Trial Counsel forthrightly admitted that that if he had the opportunity to do it over again, he would have included some argument pertaining to the accessory before murder charge in his opening arguments. App. Vol. III. p. 979, ll. 7-20.

Trial Counsel's argument against the accessory before the fact of armed robbery charge, and his failure to challenge the State's case on the accessory before the fact of murder charge, when the jury was well aware that there were two charges against the Petitioner, could very well have been viewed as a silent admission of the weakness of the Petitioner's defense to the accessory before the fact of murder charge. Or, at best, it was a missed opportunity for Trial Counsel to expand his foreseeability argument to encompass all of the Petitioner's charges. Trial Counsel did not provide a strategic reason for mentioning one as opposed to both charges, and it can be concluded that this was not the result of a tactical or strategic decision. The Petitioner asserts that the state circuit court erred in failing to grant her relief on this ground and that the South Carolina Court of Appeals erred in affirming that ruling. Once again, Petitioner asserts that Summary Judgment is not appropriate on this ground and urges this Honorable Court not to grant Respondent's request.

GROUND NINE

Ineffective Assistance of Counsel on Direct Appeal

Second Amended Application for PCR , Allegations 15 and 17,

Petitioner asserted below that Appellate counsel failed to raise two meritorious issues in the her direct appeal: 1) that the lower court erred by denying Petitioner's directed verdict motions on

all charges and 2) that the lower court erred by charging to the jury that the State would only have to prove that Petitioner aided and abetted another person “*to commit a crime*”.

At Petitioner’s PCR evidentiary hearing, Petitioner’s appellate attorney acknowledged that if the transcript demonstrated that there was no direct or circumstantial evidence substantiating that Petitioner knew that weapons would be involved, then the issue of the denial of Petitioner’s directed verdict motion on the accessory before armed robbery charge would have been a strong one. App. Vol. III p. 932, l. 23-p. 933, l. 4. Appellate counsel likewise acknowledged that if there were no evidence, direct or circumstantial, that there had been any discussion that the Victim would be harmed in any way, then the issue of the denial of Petitioner’s directed verdict motion on the accessory before murder charge would also have been a strong one. App. Vol. III. p. 933, ll. 11-21. South Carolina law recognizes that a defendant is entitled to a directed verdict where the State fails to produce evidence of the crime charged. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Appellate counsel could not recall why the issue of the denial of the directed verdict motions was not presented, but she believed it was due to a determination that it was not one of the strongest issues. App. Vol. III. p. 929, l. 12-p. 930, l. 23.

During trial, Trial Counsel objected to language in the jury instructions stating that “**the State must prove beyond a reasonable doubt that the defendant, Marquita Smith, either advised, agreed, urged, counseled, hired, or in some way aided and abetted—aided or abetted another person to commit a crime...**” App. Vol. II p. 718, ll. 5-9. Trial Counsel challenged the language “*a crime*” and maintained that the instruction might be read to mean that she could be found guilty as an accessory on the basis of *any crime* that she participated in the commission of, rather than the crimes she was actually charged with; accessory before the fact, armed robbery and

murder. App. Vol. II p. 733, l. 17-p. 744, l. 23. This objection was noted and overruled by the Judge, who stated that the language was “self-explanatory.” App. Vol. II p. 734, l. 15-p. 735, l. 10.

In her testimony at Petitioner's evidentiary hearing on collateral review, Appellate counsel acknowledged that this issue was not raised on direct appeal and further admitted that there was a “*valid argument*” that the language of that charge, combined with Trial Counsel's earlier admission that his client had a role in these events, might imply that Petitioner was liable for any offenses that occurred that night, based on her commission of “*a crime*.” App. Vol. III. p. 939, l. 16-p. 940, l. 6. In closing arguments, Trial Counsel basically conceded that his client committed a bad act and should be held accountable; that she had done something “*horrible*” and “*wrong*” in volunteering the Victim. Of course, Trial Counsel followed up by maintaining that her actions did not amount to murder or armed robbery. He *did not* explain why her actions would not support the crimes she was charged with. App. Vol. II pp. 653-674. Clearly, Appellate Counsel should have briefed this issue on direct appeal and was deficient for failing to do so.

Appellate Attorney Blanchette testified that she and Attorney Thomas considered briefing trial counsel's objection to the portion of the lower court's jury charge that the State would only have to prove that the Petitioner aided and abetted another person “to commit a crime” and decided not to raise the issue. The record is void, however, of any explanation for that decision save a vague implication that they agreed with what the lower court said about the instruction in response to trial counsel's objection. App. Vol. III p. 938, l. 12- p. 939, l. 7. It is important to note that, after further questioning concerning this issue, Attorney Blanchette agreed with the Petitioner's position that the charge as given created a danger that the jury would find her guilty of the indicted offenses if they concluded, as defense counsel admitted in opening arguments, that the Petitioner assisted her co-defendants in the commission of “*a crime*”, any crime, as opposed to the specific crimes of armed

robbery and murder. App. Vol. III p. 939, l. 16- p. 940, l. 2. Despite this concession, Attorney Blanchette offered no explanation for the decision not to present this issue on direct appeal. App. Vol. III p. 940, ll. 2-6.

The prejudice in this instance is apparent where these meritorious issues not presented to the Appellate Court in Petitioner's direct appeal were at least as strong, if not stronger, than the issues presented on direct appeal and, therefore, their submission on appeal would likely have changed the outcome of Petitioner's direct appeal. On collateral review, Petitioner argued that the issues in question were as strong, if not stronger, than the issues which were presented in Petitioner's direct appeal. The state court erred in declining to find that appellate counsel was ineffective for failing to raise these two meritorious issues which were preserved for appellate review at trial. Petitioner most respectfully submits that the South Carolina Court of Appeals violated her Sixth Amendment right to effective assistance of counsel by affirming that denial.

GROUND TEN

The Supreme Court of South Carolina violated Petitioner's equal protection and due process rights, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, when it denied her the opportunity to file a Petition for Writ of Certiorari to the South Carolina Court of Appeals.

Following the South Carolina Court of Appeals' denial of certiorari on July 23, 2014, Petitioner filed a Petition for Rehearing and Rehearing *En Banc* in the Court of Appeals on August 6, 2014. Rehearing was denied on September 18, 2014. Petitioner next filed a Petition for Leave to File Petition for Writ of Certiorari to the South Carolina Court of Appeals in the Supreme Court of South Carolina. Said petition was served on opposing counsel by mail and

sent to the Supreme Court for filing under the time limits set by Rule 242 (c), SCRAP, on October 20, 2014. Inasmuch as the thirty days for filing pursuant to Rule 242 (c) ran on October 18, which was a Saturday, this Petition was timely filed when mailed for filing on the following Monday, October 20, 2014. Rules 262 (a) (2) and 263 (a), SCRAP. This petition was denied by the Supreme Court of South Carolina on December 4, 2014.

Under the South Carolina Appellate Court Rules, all Post-Conviction Relief appeals are filed in the Supreme Court of South Carolina. Rule 243 (a), SCACR. The Supreme Court of South Carolina may transfer any PCR appeal to the South Carolina Court of Appeals pursuant to Rule 243 (l), SCACR. Under that provision, any review of a final decision of the South Carolina Court of Appeals shall be by Petition for Writ of Certiorari pursuant under Rule 242, SCACR.

In practice, some PCR appeals are transferred to the Court of Appeals while others are not. The South Carolina Rules of Appellate Procedure have not been changed to send *all* PCR appeals to the Court of Appeals. The Supreme Court of South Carolina has ruled that it will not review the actions of the South Carolina Court of Appeals in denying Certiorari in a PCR appeal where that decision is entered by way of a short form Certiorari denial order or letter. *Ellison v. State*, 382 S.C. 189, 676 S.E.2d 671 (2009); *Missouri v. State*, 378 S.C. 594, 663 S.E.2d 480 (2008); *Haggins v. State*, 377 S.C. 135, 659 S.E.2d 170 (2008). The practical effect of *Haggins* is to randomly cut off access to review by the highest state court for *some* PCR Petitioners. The Supreme Court of South Carolina reverses the decisions of the South Carolina Court of Appeals on a fairly regular basis. This restriction on review of South Carolina Court of Appeals rulings in PCR matters, unconstitutionally deprives an arbitrarily selected group of individuals the same right enjoyed by others identically situated, to review by the highest court in the State. Petitioner would further submit that this restriction discourages the South Carolina Court of Appeals from

issuing full opinions in PCR matters. Under these rulings, by denying Certiorari in such a short form order or letter which does not provide the legal analysis and authorities relied upon in denying relief, the South Carolina Court of Appeals can make its judgment in these matters immune from review by the highest court in the state. Petitioner asserts this restriction is unconstitutional and should be addressed by this Honorable Court.

Respondent argues that Petitioner's argument on this issue raises a claim which is not appropriate for habeas review inasmuch as the issues addresses a defect in the PCR procedures employed in South Carolina. In support of this position, Respondent cites to *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988), for the proposition that errors and defects in state post-conviction procedures are not cognizable in a federal habeas corpus action. Respondent's reliance upon *Bryant* is misplaced and Respondent's arguments overly simplify Petitioner's position. Petitioner is not advancing a procedural argument addressing some error in the manner in which her post-conviction relief action was handled in state court. She is arguing that the decisions of the South Carolina Supreme Court, on this issue, prejudice a randomly selected group of PCR Petitioners, of which she is a part, by denying them the same access to review of their collateral claims by the highest appellate court in the state afforded others identically situated as them.

V.

CONCLUSION

For all the reasons set forth herein, Petitioner submits that she has met her burden of proof by demonstrating significant federal constitutional violations in her case. She submits that in each instance, the state court findings below reflect "an unreasonable determination of the

facts in light of the evidence presented” at her trial and/or an unreasonable application of clearly established federal law. *Harrington, supra*.

Wherefore, Petitioner submits that Respondent’s Motion for Summary Judgment should be denied and Petitioner should be granted relief in the form of a remand for a new trial.

Respectfully submitted,

s/Tara Dawn Shurling
Tara Dawn Shurling (#6146)
Attorney and Counselor at Law

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ATTORNEY FOR PETITIONER

This 13TH day of January, 2016.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA

MARQUITA SMITH, #323834	)	CASE NO. 8:15-2165-RMG-JDA
	)	
Petitioner,	)	
	)	
v.	)	
	)	CERTIFICATE OF SERVICE
	)	
WARDEN MARIAN BOULWARE,	)	
	)	
Respondent.	)	
_____	)	

I, Tara Dawn Shurling, attorney for Marquita Smith, #323834, certify that I have electronically served the Reply and Memorandum of Law in Opposition to Motion for Summary Judgment on the individual listed below by electronically filing the same.

PERSON SERVED: William Edgar Salter, III, Senior Assistant General
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

S/ TARA DAWN SHURLING
Attorney for Marquita Smith, #323834

Columbia, South Carolina

January 13, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Marquita Smith,	)	C/A No. 8:15-cv-02165-RMG-JDA
	)	
Petitioner,	)	
	)	
v.	)	<u>REPORT AND RECOMMENDATION</u>
	)	<u>OF MAGISTRATE JUDGE</u>
Warden Marian Boulware,	)	
	)	
Respondent.	)	
	)	

This matter is before the Court on Respondent's motion for summary judgment. [Doc. 14.] Petitioner is a state prisoner who seeks relief under 28 U.S.C. § 2254. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review post-trial petitions for relief and submit findings and recommendations to the District Court.

Petitioner, proceeding with the assistance of counsel, filed this Petition for writ of habeas corpus on May 28, 2015. [Doc. 1.] On September 23, 2015, Respondent filed a motion for summary judgment and a return and memorandum to the Petition. [Docs. 13, 14.] Petitioner filed a response in opposition on January 13, 2016. [Doc. 23.]

Having carefully considered the parties' submissions and the record in this case, the Court recommends Respondent's motion for summary judgment be granted.

BACKGROUND

Petitioner is confined in the South Carolina Department of Corrections at Camille Griffin Correctional Institution pursuant to orders of commitment of the Berkeley County Clerk of Court. [Doc. 1 at 1.] In August 2007, Petitioner was indicted for accessory before the fact of a felony (murder), accessory before the fact of a felony (burglary first degree),

accessory before the fact of a felony (kidnapping), and accessory before the fact of a felony (armed robbery). [App. 782–89.¹] On August 27, 2007, represented by V. Craig Jones, Petitioner and two co-defendants proceeded to a jury trial. [App. 1–781.] The trial court denied Petitioner’s pretrial motions for continuance and for severance [App. 31–35], and the State tried Petitioner on the charges of accessory before the fact of a felony (murder) and accessory before the fact of a felony (armed robbery) [App. 55]. On August 30, 2007, the jury found Petitioner guilty on both charges. [App. 745.] She received a sentence of thirty years imprisonment on each charge, to run concurrently. [App. 778–79.]

Direct Appeal

Petitioner filed a notice of appeal. [App. 795; Doc. 13-6.] Tommy A. Thomas and Tricia Blanchette filed a brief of appellant on Petitioner’s behalf in the South Carolina Court of Appeals, dated December 3, 2008, raising the following issues:

1. Whether the lower court erred by denying the Appellant’s motion for a continuance.
2. Whether the lower court erred by denying the Appellant’s motion for a severance and a separate trial.

[App. 801.] The South Carolina Court of Appeals affirmed the conviction in an opinion that was submitted on December 1, 2009, and filed on March 24, 2010. [App. 843–48.] Petitioner filed a petition for rehearing and rehearing en banc [App. 849–53], which the South Carolina Court of Appeals denied on June 4, 2010 [App. 865–67]. Remittitur was issued on July 13, 2010. [App. 868.]

¹The Appendix can be found at Docket Entry Numbers 13-1 through 13-5.

PCR Proceedings***First PCR Application***

On August 24, 2010, Jeremy A. Thompson filed an application for post-conviction relief ("PCR") on Petitioner's behalf. [App. 869–75.] The PCR application alleged Petitioner was being held in custody unlawfully based on the following grounds:

- (a) The Applicant received ineffective assistance of counsel prior and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.
- (b) The judgments and sentences against the Applicant were entered in violation of her rights to the due process of law and to the effective assistance of counsel.
- (c) The Applicant received ineffective assistance of counsel on direct appeal in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

[App. 871.] In support of these grounds, Petitioner alleged the following facts:

- (a) Trial counsel failed to provide the Applicant effective assistance of counsel prior to and during her trial proceeding, inasmuch as counsel failed to recognize errors which occurred during her trial and failed to make appropriate objections with supporting legal arguments relating thereto. Counsel's failure to make these objections may have changed the outcome of the Applicant's trial and deprived her of the opportunity to have these issues addressed on their merits on direct appeal.
- (b) Trial counsel failed to conduct a sufficient investigation into the Applicant's factual circumstances and failed to present witnesses who would testify favorably on the Applicant's behalf at trial.

- (c) Appellate counsel failed to present all potentially meritorious issues on direct appeal to the South Carolina Court of Appeals.

[/d.] The State filed a return dated February 3, 2011. [App. 883–88.] On November 17, 2011, represented by Tara Dawn Shurling (“Shurling”), Petitioner amended her PCR application to raise the following claims²:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term “a lick” conclusively meant an armed robbery.
2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term “a lick” meant an armed robbery.
3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her.
4. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the

²The amended PCR application was inadvertently filed in Charleston County; it was subsequently refiled in Berkeley County on January 13, 2012. [Doc. 13-1 at 3 (index of Appendix, indicating same); *see also* App. 879–82 (amended PCR application, filed in Charleston County); App. 876–78 (amended PCR application, filed in Berkeley County).] The amended PCR application was served on opposing counsel on November 15, 2011, and fully addressed at the PCR hearing. [Doc. 13-1 at 3.]

commission of a phase of the crimes for which she was charged with being an accessory before the fact.

5. Trial Counsel was ineffective for failing to fully present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges.
6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery.
7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing *and/or* the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties.
8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her co-defendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit.
9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder.

10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she *was not present* during the commission of the principal offenses.
11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants.
12. Trial counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense.
13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments.
14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story."
15. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit.
16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery.

17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "*to commit a crime*," thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing *any* crime would make her mutually liable for all the acts committed by her co-defendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

[App. 879–82 (emphases in original).]

A hearing was held on November 17, 2011, and Petitioner was represented at the hearing by Shurling. [App. 916–1059.] On January 4, 2012, Petitioner filed a memorandum of law in support of her PCR application. [App. 1060–89.] On January 20, 2012, she filed a motion to supplement the PCR record. [App. 1090–99.] On February 1, 2012, the PCR court filed an order denying and dismissing the PCR application with prejudice. [App. 1100–17.] Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. [App. 1118–26.] The State filed a return to the motion on February 27, 2012 [App. 1127–29], and both parties submitted proposed orders to the PCR court [App. 1130–80.] On April 19, 2012, the PCR court filed an amended order denying and dismissing the PCR application with prejudice. [App. 1181–1200.]

Second PCR Application

On July 10, 2012, Shurling filed a second PCR application on Petitioner's behalf. [App. 1201–06.] The PCR application alleged the following as the only ground:

- (a) PCR Attorney failed to perfect an appeal from order denying previous PCR Application docketed at 2010-CP-08-2985

[App. 1203.] In support of the ground, Petitioner alleged the following facts:

- (a) An Order of Dismissal was filed on February 1, 2012. Following the filing of a Rule 59(e) Motion on behalf of the Applicant, an Amended Order of Dismissal was filed on 2010-CP-08-2985. PCR Counsel's paralegal did not recognize the second order to constitute a ruling on the pending 59(e) Motion. As a result, she failed to calendar the due date for the Notice of Appeal. Due to this clerical error, PCR Counsel failed to file a Notice of Appeal from the decision of the Court in this case. The Applicant now seeks a belated PCR Appeal through the guidelines and procedures set forth in *Austin v. State*, 305 SC 453, 409 S.E. 2d 395 (1991).

[*Id.*] On July 23, 2012, the PCR court filed a consent order granting a belated appeal pursuant to *Austin v. State*, 409 S.E.2d 395 (S.C. 1991).³ [App. 1207–08.]

³As the Supreme Court of South Carolina has explained,

This Court has allowed successive PCR applications where the applicant has been denied complete access to the appellate process. Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or “one bite at the apple.” This “bite” includes an applicant’s right to appeal the denial of a PCR application, and the right to assistance of counsel in that appeal.

An *Austin* appeal is used when an applicant is prevented from seeking appellate review of a denial of his or her PCR application, such as when an attorney fails to seek timely review.

* * *

Austin appeals are considered “belated appeals” and are used to rectify unjust procedural defects, such as when an attorney does not file a timely appeal.

Odom v. State, 523 S.E.2d 753, 755–57 (S.C. 1999) (citations and footnote omitted).

A notice of appeal was filed and served. [App. 1209–10.] Shurling filed on Petitioner's behalf a petition for writ of certiorari in the Supreme Court of South Carolina, dated January 23, 2013. [Doc. 13-8.] The petition asserted the following issues:

1. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery and where she was clearly prejudiced by this error by Trial Counsel?
2. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for neglecting to make a motion for a mistrial, and/or for failing to make a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery and where the record below supports her contention that she was prejudiced by Trial Counsel's failure to do so?
3. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for failing to fully present arguments and authority in favor of her Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Petitioner knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the Petitioner's knowledge and involvement and which were not readily foreseeable by her and where the record demonstrated that she was clearly prejudiced by this error both at trial and in her subsequent direct appeal?
4. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to fully present arguments and

authority in favor of her Motions for Directed Verdicts where the evidence adduced at trial, including the Petitioner's own statement, established that she was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact to and where the record establishes that this failure by Trial Counsel prejudiced the Petitioner both at trial and in her subsequent direct appeal?

5. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to fully present available arguments supporting her motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Petitioner was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Petitioner's charges and where the record below supports her contention that she was prejudiced by Trial Counsel's omissions in this regard?
6. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to specifically request a jury instruction on the charge of accessory before the fact to strong armed robbery and where the record before the lower court supported her claim that she was prejudiced by Trial Counsel's failure to do so?
7. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to research, and present the trial court with, an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact and where the record below supported her contention that Trial Counsel's failure in this regard prejudiced her ability to receive a fair trial.
8. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was

ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of the Petitioner, separate from their findings concerning the liability of each of her co-defendants, and where the record below supports her assertion that she was significantly prejudiced by Trial Counsel's failure to enter an appropriate objection to the charge as given by the trial court.

9. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her assertion that Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Petitioner could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder and where she demonstrated to the lower court that she was prejudiced by this omission?
10. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for advising the jury in his closing argument that the Petitioner *was not present* during the principal offenses where said position was contrary to the evidence adduced at trial, including the Petitioner's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Petitioner was on trial for; specifically that she *was not present* during the commission of the principal offenses and thereby irreparably prejudiced her ability to receive a fair determination of her guilt by the jury at her trial?
11. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Petitioner could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants and where the record below

supported her claim that Trial Counsel's missed opportunity prejudiced the Petitioner at trial.

12. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel failed to provide the Petitioner with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby prejudiced her at trial by failing to elicit testimony from him which would have been extremely favorable to the defense.
13. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for advising the Petitioner that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments and where the record below establishes that this error by Trial Counsel significantly prejudiced the Petitioner in that it caused her to make a waiver of her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina Constitution, which was not knowingly and voluntarily entered?
- 13A. Did the lower court err in denying the Petitioner post-conviction relief based on her allegation that Trial Counsel was ineffective for advising her that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument where she meet her burden of proof with regard to her claim that Trial Counsel's advise was erroneous and caused her to make an unintelligent decision not to testify at her trial thereby violating her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina Constitution,
14. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was

ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story" and where she demonstrated that Trial Counsel's failure to object to this improper argument prejudiced her at trial by permitting the State to confuse the jury concerning the elements of the crime of accessory before the fact to murder and to dilute its burden of proof beyond a reasonable doubt?

15. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Petitioner's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit and where this issue would have been at least as strong, if not stronger, than the issues presented on direct appeal?
16. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Ann Robbery as a lesser included offense of Armed Robbery.
17. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel failed to provide the Petitioner with effective assistance of counsel inasmuch as she failed to brief the meritorious issue of the lower court's charge to the jury that the State would only have to prove that the Petitioner aided and abetted another person "*to commit a crime*," and where this issue would have been at least as strong on direct appeal as the issues presented on appeal.

18. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation, developed during her evidentiary hearing, that Trial Counsel was ineffective for failing to effectively argue a Rule 5, SCRCrimP, violation in his motion for a continuance and severance, where the State did not disclose a statement given by a co-defendant that had agreed to cooperate and be a witness for the prosecution at the Petitioner's trial.
19. Did the lower court err in denying the Petitioner post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to interview a co-defendant who turned State's witness very shortly prior to trial, or in the alternative, for failing to request a brief recess or continuance to do so and where she presented evidence which supported her claim that she was significantly prejudiced by Trial Counsel's failure to do so?

[*Id.* at 3–6 (emphases in original).] On July 23, 2014, the South Carolina Court of Appeals granted the petition for writ of certiorari with respect to Petitioner's second PCR application and proceeded with an *Austin* review of the denial of the first PCR application. [Doc. 13-9.] Upon review, the court denied the petition for writ of certiorari from the denial of Petitioner's first PCR application. [*Id.*] Petitioner filed a request for rehearing and request for rehearing en banc [Doc. 13-10], and the South Carolina Court of Appeals denied the petition for rehearing on September 18, 2014. [Doc. 13-11.] On October 24, 2014, Petitioner filed in the Supreme Court of South Carolina a petition for leave to file a petition for writ of certiorari to the South Carolina Court of Appeals. [Doc. 13-12.] The Supreme Court of South Carolina denied the petition on December 4, 2014 [Doc. 13-14], and the South Carolina Court of Appeals issued the remittitur on January 5, 2015 [Doc. 13-15].

Petition for Writ of Habeas Corpus

Petitioner filed this Petition for writ of habeas corpus on May 28, 2015. [Doc. 1.]

Petitioner raises the following grounds for relief, quoted substantially verbatim, in her Petition pursuant to 28 U.S.C. § 2254:

GROUND ONE: The State Court erred in failing to find that Petitioner received ineffective assistance of counsel, in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where she demonstrated that she was prejudiced by Trial Counsel's Failure to Adequately Argue Petitioner's Pre-Trial Motions for a Severance and Continuance and his failure to seek a recess to interview co-defendant Hollins when a Continuance was denied.

GROUND TWO: The State erred in denying Petitioner relief where she clearly established that Trial Counsel was ineffective in his failure to adequately cross-examine state witness, co-defendant, Hollins.

GROUND THREE: Trial Counsel violated Petitioner's right to effective assistance of counsel, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, by his failure to properly respond to testimony from State Witness, co-defendant, Hollins' that a "Lick" Conclusively Meant an Armed Robbery.

GROUND FOUR: Petitioner's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated at trial when Trial Counsel neglected to adequately argue her right to directed verdicts of acquittal based upon the insufficiency of the evidence presented by the prosecution.

GROUND FIVE: Petitioner should have been granted relief in the state court where she established that Trial Counsel was ineffective for advising her that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments and further, where Trial Counsel was ineffective for advising her that she should not take the stand in order to preserve the opportunity to make the

final argument to the jury after the State's closing argument.

GROUND SIX: Petitioner's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated in state court where Trial Counsel failed to request appropriate and necessary jury instructions on her behalf at trial and where he for failed to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of petitioner, separate from their findings concerning the liability of each of her co-defendants.

GROUND SEVEN: Trial Counsel was ineffective for failing to make certain crucial closing arguments to the jury and for failing to object to inappropriate arguments made by the prosecution in the State's closing argument.

GROUND EIGHT: Failure of Trial Counsel to argue in opening statements that murder was not a foreseeable consequence of any agreement entered into between petitioner and her co-defendants.

GROUND NINE: Ineffective Assistance of Counsel on Direct Appeal.

GROUND TEN: The Supreme Court of South Carolina violated Petitioner's equal protection and due process rights, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, when it denied her the opportunity to file a Petition for Writ of Certiorari to the South Carolina Court of Appeals.

[Doc. 1-1 at 3–30.] As stated, on September 23, 2015, Respondent filed a motion for summary judgment. [Doc. 14.] On January 13, 2016, Petitioner filed a response in opposition. [Doc. 23.] Accordingly, the motion for summary judgment is ripe for review.

APPLICABLE LAW

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). A fact is “material” if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is “genuine” if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant’s position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Ross v. Commc’ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989). “Only disputes over

facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Further, Rule 56 provides in pertinent part:

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Accordingly, when Rule 56(c) has shifted the burden of proof to the non-movant, he must produce existence of a factual dispute on every element essential to his action that he bears the burden of adducing at a trial on the merits.

Habeas Corpus

Generally

Because Petitioner filed the Petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Williams v. Taylor*, 529 U.S. 362, 410 (2000). “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision,” and “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Moreover, state court factual determinations are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Procedural Bar

Federal law establishes this Court’s jurisdiction over habeas corpus petitions. 28 U.S.C. § 2254. This statute permits relief when a person “is in custody in violation of the Constitution or laws or treaties of the United States” and requires that a petitioner present his claim to the state’s highest court with authority to decide the issue before the federal court will consider the claim. *Id.* The separate but related theories of exhaustion and procedural bypass operate to require a habeas petitioner to first submit his claims for relief to the state courts. A habeas corpus petition filed in this Court before the petitioner has

appropriately exhausted available state-court remedies or has otherwise bypassed seeking relief in the state courts will be dismissed absent unusual circumstances detailed below.

Exhaustion

Section 2254 contains the requirement of exhausting state-court remedies and provides as follows:

- (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
 - (A) the applicant has exhausted the remedies available in the courts of the State; or
 - (B) (i) there is an absence of available State corrective process; or
 - (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
- (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
- (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
- (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254. The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. *Id.* § 2254(b)(1)(A). “To satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state’s highest

court.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997). Thus, a federal court may consider only those issues that have been properly presented to the highest state courts with jurisdiction to decide them.

In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds for relief be stated in the direct appeal or PCR application. S.C. App. Ct. R. 203; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767, 770 (S.C. 1976). If the PCR court fails to address a claim as required by S.C. Code Ann. § 17-27-80, counsel for the applicant must make a motion to alter or amend the judgment. S.C. R. Civ. P. 59(e). Failure to do so will result in the application of a procedural bar to that claim by the Supreme Court of South Carolina. *Marlar v. State*, 653 S.E.2d 266 (S.C. 2007).⁴ Further, strict time deadlines govern direct appeal and the filing of a PCR application in the South Carolina courts. For direct appeal, a notice of appeal must be filed and served on all respondents within ten days after the sentence is imposed or after receiving written notice of entry of the order or judgment. S.C. App. Ct. R. 203(b)(2), (d)(1)(B). A PCR application must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

⁴In *Bostick v. Stevenson*, 589 F.3d 160 (4th Cir. 2009), the Fourth Circuit found that, prior to the Supreme Court of South Carolina’s November 5, 2007 decision in *Marlar*, South Carolina courts had not uniformly and strictly enforced the failure to file a motion pursuant to Rule 59(e) as a procedural bar. 589 F.3d at 162–65. Accordingly, for matters in which there was a PCR ruling prior to November 5, 2007, the Court will not consider any failure to raise issues pursuant to Rule 59(e) to effect a procedural bar.

If any avenue of state relief is still available, the petitioner must proceed through the state courts before requesting a writ of habeas corpus in the federal courts. *Richardson v. Turner*, 716 F.2d 1059, 1062 (4th Cir. 1983); *Patterson v. Leeke*, 556 F.2d 1168 (4th Cir. 1977). Therefore, in a federal petition for habeas relief, a petitioner may present only those issues that were presented to the Supreme Court of South Carolina through direct appeal or through an appeal from the denial of a PCR application, regardless of whether the Supreme Court actually reached the merits of the claim.

Procedural Bypass

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner seeks habeas corpus relief based on an issue he failed to raise at the appropriate time in state court, removing any further means of bringing that issue before the state courts. In such a situation, the petitioner has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. See *Smith v. Murray*, 477 U.S. 527, 533 (1986). The United States Supreme Court has stated that the procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. See *id.* Bypass can occur at any level of the state proceedings if a state has procedural rules that bar its courts from considering claims not raised in a timely fashion. *Id.*

The Supreme Court of South Carolina will refuse to consider claims raised in a second appeal that could have been raised at an earlier time. See S.C. Code Ann. § 17-27-90; *Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991). Further, if a prisoner has failed to file a direct appeal or a PCR application and the deadlines for filing have passed, he is barred from proceeding in state court. S.C. App. Ct. R. 203(d)(3), 243. If the state courts

have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. See *Reed v. Ross*, 468 U.S. 1, 11 (1984); see also *Kornahrens v. Evatt*, 66 F.3d 1350, 1357 (4th Cir. 1995). As the United States Supreme Court explained:

... [State procedural rules promote] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case.

Reed, 468 U.S. at 10–11.

However, if a federal habeas petitioner can show both (1) “‘cause’ for noncompliance with the state rule” and (2) “‘actual prejudice resulting from the alleged constitutional violation[,]” the federal court may consider the claim. *Smith*, 477 U.S. at 533 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). When a petitioner has failed to comply with state procedural requirements and cannot make the required showing of cause and prejudice, the federal courts generally decline to hear the claim. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Further, if the petitioner does not raise cause and prejudice, the court need not consider the defaulted claim. See *Kornahrens*, 66 F.3d at 1363.

If a federal habeas petitioner has failed to raise a claim in state court and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in the state courts and in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). Absent a showing of cause and actual prejudice, a federal court is barred from considering the claim. *Wainwright*, 433 U.S. at 87. In such an instance, the exhaustion requirement is technically met, and the rules of procedural bar apply. *Teague v. Lane*, 489 U.S. 288, 297–98 (1989); *Matthews*, 105 F.3d at 915 (citing

Coleman, 501 U.S. at 735 n.1; *Teague*, 489 U.S. at 297–98; *George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990)).

Cause and Actual Prejudice

Because the requirement of exhaustion is not jurisdictional, this Court may consider claims that have not been presented to the Supreme Court of South Carolina in limited circumstances—where a petitioner shows sufficient cause for failure to raise the claim and actual prejudice resulting from the failure, *Coleman*, 501 U.S. at 750, or where a “fundamental miscarriage of justice” has occurred, *Carrier*, 477 U.S. at 495–96. A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim, where the novelty of the constitutional claim is such that its legal basis is not reasonably available to the petitioner’s counsel. *Id.* at 487–89; *Reed*, 468 U.S. at 16. Absent a showing of “cause,” the court is not required to consider “actual prejudice.” *Turner v. Jabe*, 58 F.3d 924, 931 (4th Cir. 1995). However, if a petitioner demonstrates sufficient cause, he must also show actual prejudice to excuse a default. *Carrier*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error. *Engle v. Isaac*, 456 U.S. 107, 134–35 (1982).

DISCUSSION

Non-Cognizable Ground

In Ground Ten, Petitioner argues the Supreme Court of South Carolina violated Petitioner’s equal protection and due process rights when it denied her the opportunity to file a petition for writ of certiorari to the South Carolina Court of Appeals. [Doc. 1-1 at 28.] However, a “petitioner’s scattershot claims of errors in the state habeas proceedings are

not cognizable in this court.” *Miller v. Johnson*, No. 7:06-cv-00611, 2007 WL 1725617, at *14 (W.D. Va Jun. 12, 2007); see *Wright v. Angelone*, 151 F.3d 151, 159 (4th Cir. 1998) (“[W]e agree with the district court that this claim, a challenge to Virginia’s state habeas corpus proceedings, cannot provide a basis for federal habeas relief.”) (citing *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) (holding that errors and irregularities in connection with state post-conviction proceedings are not cognizable on federal habeas review)); see also *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998) (“Moreover, because the constitutional error [the petitioner] raises focuses only on the State’s post-conviction remedy and not the judgment which provides the basis for his incarceration, it states no cognizable federal habeas claim.”). Accordingly, federal habeas relief is unavailable with respect to Ground Ten.

Procedurally Barred Ground

Procedural default is an affirmative defense that is waived if not raised by respondents. *Gray v. Netherland*, 518 U.S. 152,165–66 (1996). If the defense is raised, it is the petitioner’s burden to raise cause and prejudice or actual innocence; if not raised by the petitioner, the court need not consider the defaulted claim. *Kornahrens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995). Here, Respondent argues Ground One(B)⁵ is procedurally defaulted and that Petitioner cannot overcome the default of these grounds because she cannot establish cause and prejudice or a miscarriage of justice. [Doc. 13 at 47–67.] The Court agrees Ground One(B) is procedurally barred.

⁵Respondent contends Petitioner’s Ground One raises two separate claims: that trial counsel was ineffective for failing to adequately argue (A) the motion for a severance and (B) the motion for a continuance. [Doc. 13 at 29.]

In Ground One(B), Petitioner alleges trial counsel was ineffective for failing to adequately argue Petitioner's pre-trial motion for a continuance and for failing to seek a recess to interview co-defendant Hollins when the motion for a continuance was denied. [Doc. 1-1 at 3.] This claim was raised to the Supreme Court of South Carolina in Petitioner's petition for writ of certiorari but was not addressed in the PCR court's amended order of dismissal. Petitioner failed to file a Rule 59(e) motion after the amended order of dismissal to preserve the issue for appeal; therefore, it is procedurally barred from federal habeas review, see *Marlar*, 653 S.E.2d 266, absent a showing of cause and actual prejudice, see *Coleman*, 501 U.S. 722 (stating that if an issue is not properly raised to the state's highest court and would be procedurally impossible to raise now, then it is procedurally barred from federal habeas review); *Wainwright*, 433 U.S. at 87; *Matthews*, 105 F.3d at 915.

The existence of cause must ordinarily turn on whether the petitioner can show some objective factor external to the defense impeded counsel's or the petitioner's efforts to comply with the state's procedural rule. *Carrier*, 477 U.S. at 488. *But see Martinez v. Ryan*, --- U.S. ---, ---, 132 S. Ct. 1309, 1315 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."). Petitioner acknowledges that Respondent contends Ground One(B) is procedurally defaulted [Doc. 23 at 1], but fails to provide any argument to establish cause and prejudice [see Doc. 23]. Accordingly, because Petitioner has not established cause for the default of his ground, Ground One(B) is procedurally barred from consideration by a federal habeas court and should be dismissed.

Merits of Remaining Grounds

Under the AEDPA, a federal court may not grant habeas relief unless the underlying state court decision was contrary to or an unreasonable application of federal law, as determined by the United States Supreme Court, 28 U.S.C. § 2254(d)(1), or based on an unreasonable determination of the facts before the court, *id.* § 2254(d)(2). The Supreme Court has held the “contrary to” and “unreasonable application of” clauses present two different avenues for relief. *Williams*, 529 U.S. at 405 (“The Court of Appeals for the Fourth Circuit properly accorded both the ‘contrary to’ and ‘unreasonable application’ clauses independent meaning.”). The Court stated there are two instances when a state court decision will be contrary to Supreme Court precedent:

A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court’s clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Id. at 405–06. On the other hand, a state court decision is an unreasonable application of Supreme Court precedent when the decision “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” *Id.* at 407–08; see also *Richter*, 562 U.S. at 102 (“Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. . . . It bears repeating that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.”). Finally, a decision cannot be contrary to

or an unreasonable application of Supreme Court precedent unless applicable Supreme Court precedent exists; without applicable Supreme Court precedent, there is no habeas relief for petitioners. *Virnieks v. Smith*, 521 F.3d 707, 716 (7th Cir. 2008) (citing *Lockhart v. Chandler*, 446 F.3d 721, 724 (7th Cir. 2006); *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006)); see *Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008).

Ground One(A)

In Ground One(A), Petitioner argues trial counsel was ineffective for failing to adequately argue Petitioner's pre-trial motion for a severance. [Doc. 1-1 at 3.] More specifically, Petitioner contends trial counsel failed to argue that jury instructions issued in a joint trial of Petitioner and her co-defendants would inevitably be very cumbersome and complex and that Petitioner's joint trial with her co-defendants would prevent a jury from being adequately and clearly charged on the difference between the findings necessary for her conviction as opposed to those required to convict her co-defendants. [*Id.* at 5–7.]

When evaluating a habeas petition based on a claim of ineffective assistance of counsel, assuming the state court applied the correct legal standard—the Supreme Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984)—“[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard.”⁶

⁶In *Strickland v. Washington*, the United States Supreme Court established that to challenge a conviction based on ineffective assistance of counsel, a prisoner must prove two elements: (1) his counsel was deficient in his representation and (2) he was prejudiced as a result. 466 U.S. 668, 687 (1984). To satisfy the first prong, a prisoner must show that “counsel's representation fell below an objective standard of reasonableness.” *Id.* at 688. To satisfy the second prong, a prisoner must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 692. The Court cautioned that “[j]udicial scrutiny of counsel's performance

Richter, 562 U.S. at 101. “A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.” *Id.*; see also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (stating judicial review of counsel’s performance is “doubly deferential when it is conducted through the lens of federal habeas”). Even if a state court decision questionably constitutes an unreasonable application of federal law, the “state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, in such situations, the habeas court must determine whether it is possible for fairminded jurists to disagree that the arguments or theories supporting the state court’s decision are inconsistent with Supreme Court precedent. *Id.*

Here, the PCR court addressed trial counsel’s performance under the standard set forth in *Strickland*. [App. 1190–98.] With respect to Ground One(A), the PCR court found,

This Court finds that counsel properly made a motion for severance. Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right. Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001) (citing State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999)). There can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances that are presented to the court in each case. State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952); State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent

must be highly deferential,” and “[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689.

the jury from making a reliable judgment about a co-defendant's guilt. Harris, 351 S.C. at 652–53, 572 S.E.2d at 273; Dennis, 337 S.C. 275, 523 S.E.2d 173. The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. Dennis, 337 S.C. at 281, 523 S.E.2d at 176. The rule allowing joint trials is not impugned simply because the co-defendants may present evidence accusing each other of the crime. Id. Here, the Applicant and her co-defendants did not present mutually antagonistic defenses. Trial counsel requested a severance to protect Applicant from being tried jointly with her co-defendants, but the trial court denied the motion.

[App. 1192–93.]

The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Thus, the Court concludes the PCR court's decision was not contrary to or an unreasonable application of applicable Supreme Court precedent.

Further, the record supports the PCR court's decision, which demonstrates the PCR court's decision was not an unreasonable application of *Strickland*. Petitioner has presented no evidence to support her speculation that the trial court would have granted the motion to sever if trial counsel had argued the jury instructions issued in a joint trial of Petitioner and her co-defendants would inevitably be cumbersome and complex. Nor has Petitioner established prejudice. The trial court specifically instructed the jury that the co-

defendants were charged with different crimes and that each co-defendant's case must be considered separately and individually. [App. 719–20]; see *State v. Dennis*, 523 S.E.2d 173, 176 (S.C. 1999) (finding a trial judge did not abuse his discretion by denying a motion to sever and noting the judge gave a cautionary instruction). Therefore, Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of applicable Supreme Court precedent, and Petitioner is not entitled to habeas corpus relief based on this ground.

Ground Two

In Ground Two, Petitioner argues trial counsel was ineffective for failing to adequately cross-examine State witness, co-defendant Kerry Hollins ("Hollins"), to elicit testimony that would have been favorable to the defense. [Doc. 1-1 at 10.] More specifically, Petitioner alleges trial counsel failed to elicit testimony, similar to Hollins's PCR testimony, that Petitioner was unaware of any plan for Hollins, or anyone with him, to bring weapons when taking money from the victim and that Petitioner was unaware that the victim may be harmed. [*Id.* at 10–12.]

The PCR court addressed trial counsel's performance under the standard set forth in *Strickland*. [App. 1190–98.] With respect to Ground Two, the PCR court found,

This Court finds that counsel was able to properly cross-examine Kerry Hollins at trial. Counsel testified that Mr. Bolus, a co-defendant's attorney, followed up and got Mr. Hollins to admit that a lick could be a person rather than just a robbery. Counsel testified that he did not ask Mr. Hollins if he knew there would be weapons involved because he did not know what Mr. Hollins would say, particularly since he was testifying against Applicant and looking to solidify a good plea deal. He testified that he did not ask Patricia Kennedy, Mr. Hollins' attorney, if her client would speak with him, but counsel assumed Mr. Hollins would not speak with him since he was a

co-defendant who was testifying for the State. Mr. Hollins' testimony at the PCR hearing indicates that he might have offered testimony beneficial to the defense at the Applicant's trial, if he had been properly examined by defense counsel. This Court finds that counsel was able to cross-examine Mr. Hollins regarding some details of the incident as well as why he decided to testify against his co-defendants.

[App. 1195–96.]

The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Thus, the Court concludes the PCR court's decision was not contrary to or an unreasonable application of applicable Supreme Court precedent.

Further, the record supports the PCR court's decision, which demonstrates the PCR court's decision was not an unreasonable application of *Strickland*. At the PCR hearing, in response to a question about why trial counsel did not question Hollins about whether, to his knowledge, Petitioner had any idea weapons were going to be used, trial counsel testified:

And I guess my concern at that point was if Hollins was getting up there testifying against [Petitioner], my concern then is, we knew he was adverse to our position, was going to do whatever it took to solidify hopefully his and get a better deal. So my concern then is I didn't know what he was going to say until he got up there and said, well, [Petitioner] was in on it the whole time. She was in the car watching us load them, you know, guns and stuff like that, I didn't have any way to contest that other than to put [Petitioner] on the stand at that time, and

which I just didn't think – so I felt like we were able to do enough at that time to distinguish between what [Petitioner] would have thought a lick was with this common plan and what [Hollins] thought a lick was.

[App. 965:13–66:2; see also App. 967:22–24, 1015:7–14.] Additionally, trial counsel testified that, although he did not ask Hollins whether Petitioner knew weapons were going to be used, other than using the term “lick,” neither Hollins’s statement nor his testimony at trial attributed to Petitioner knowledge that weapons would be used or of violence. [App. 974:5–19, 981:9–21.] Courts are instructed not to second guess an attorney’s trial strategy and tactics. *Stamper v. Muncie*, 944 F.2d 170 (4th Cir. 1991); see also *Fugate v. Head*, 261 F.3d 1206, 1219 (11th Cir. 2001) (“The decision as to whether to cross-examine a witness is a tactical one well within the discretion of a defense attorney.” (citation and internal quotation marks omitted)). Trial counsel testified to his reasons for this trial strategy, the PCR court found trial counsel’s testimony was credible, and that determination is entitled to deference. *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (citing 28 U.S.C. § 2254(e)(1)) (holding that for a federal habeas court to overturn a state court’s credibility judgment, the state court’s error must be stark and clear); see also *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (“28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.”). Moreover, Petitioner has failed to direct this Court to any legal authority to support her argument that trial counsel could have and/or should have conducted his cross-examination of Hollins differently. Accordingly, Petitioner has not established that the PCR court’s decision was contrary to or an unreasonable application

of applicable Supreme Court precedent, and Petitioner is not entitled to habeas corpus relief based on this ground.

Ground Three

In Ground Three, Petitioner argues trial counsel was ineffective for failing to properly respond to testimony from Hollins that a “lick” conclusively meant an armed robbery. [Doc. 1-1 at 12.] Petitioner contends trial counsel failed to object each time the State sought to introduce testimony that the street term a “lick” conclusively meant an armed robbery, failed to move for a mistrial, and failed to request a curative charge. [*Id.*]

The PCR court addressed trial counsel’s performance under the standard set forth in *Strickland*. [App. 1190–98.] With respect to Ground Three, the PCR court found,

This Court finds that trial counsel was not ineffective for failing to object when the State elicited testimony that a “lick” meant an armed robbery. Counsel testified that he did not object because Kerry Hollins referenced a “lick” in his statement and he assumed the State was asking for Mr. Hollins’ opinion of what a “lick” meant. Mr. Hollins testified at trial that a “lick” was a robbery and that you need some kind of weapon to do a robbery. This Court finds that trial counsel had no basis to object to this testimony.

[App. 1191.]

The PCR court’s denial of Petitioner’s ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Thus, the Court

concludes the PCR court's decision was not contrary to or an unreasonable application of applicable Supreme Court precedent.

Further, the record supports the PCR court's decision, which demonstrates the PCR court's decision was not an unreasonable application of *Strickland*. At the PCR hearing, in response to a line of questioning about why trial counsel did not object when the State elicited testimony that a "lick" meant an armed robbery, trial counsel testified, ". . . My perception of the testimony was he was saying what he thought it was. They had asked him the question and he had answered what he thought it was." [App. 963:7–9.] Trial counsel further testified, ". . . and I didn't follow up on that as much because Mr. [Bolus] followed back up there and got him to say that a lick was actually a noun and may be a person. So in my mind, again, is he then equivocated on what lick ment. And ---." [App. 964:17–21; see also App. 975:13–16.] As stated, courts are instructed not to second guess an attorney's trial strategy and tactics. *Stamper*, 944 F.2d 170; see also *Fugate*, 261 F.3d at 1219. Trial counsel testified to his reasons for this trial strategy, the PCR court found trial counsel's testimony was credible, and that determination is entitled to deference. *Cagle*, 520 F.3d at 324; see also *Marshall*, 459 U.S. at 434. Accordingly, Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of applicable Supreme Court precedent, and Petitioner is not entitled to habeas corpus relief based on this ground.⁷

⁷In the amended order of dismissal, the PCR court addressed this claim only with respect to Petitioner's allegation that trial counsel was ineffective for failing to object to the testimony; therefore, any claim that trial counsel was ineffective for failing to move for a mistrial or request a curative instruction is procedurally defaulted. Moreover, because the PCR court found trial counsel had no basis to object to the testimony [App. 1191], trial counsel likewise would have had no basis to move for a mistrial or request a curative

Ground Four

In Ground Four, Petitioner argues trial counsel was ineffective for failing to adequately argue Petitioner's right to directed verdicts of acquittal based on insufficiency of the evidence presented by the prosecution. [Doc. 1-1 at 14.]

The PCR court addressed trial counsel's performance under the standard set forth in *Strickland*. [App. 1190–98.] With respect to Ground Four, the PCR court found,

This Court finds that trial counsel made a proper direct verdict motion. Counsel argued that Applicant was too far removed from the circumstances, there was no common scheme or plan to commit armed robbery or murder, and it was not a natural and probable consequence that the murder would occur. A case should be submitted to the jury if there is any direct evidence or any substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Weston, 367 S.C. 279, 292–93, 625 S.E.2d 641, 648 (2006). When ruling on a motion for directed verdict, the trial court is concerned only with the existence or nonexistence of evidence, not its weight. State v. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 478 (2004). Here, this Court finds that counsel zealously argued on Applicant's behalf, but the trial court found that there was enough evidence to submit the case to the jury.

[App. 1192.]

The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Thus, the Court

instruction because of the testimony.

concludes the PCR court's decision was not contrary to or an unreasonable application of applicable Supreme Court precedent.

Further, the record supports the PCR court's decision, which demonstrates the PCR court's decision was not an unreasonable application of *Strickland*. Trial counsel moved for a directed verdict on both charges. [App. 559–60.] The trial court found there was direct and substantial circumstantial evidence reasonably tending to prove Petitioner's guilt with respect to the accessory before the fact of felony murder charge; thus, the trial court denied Petitioner's motion for directed verdict on that charge. [App. 563–64.] After reserving ruling on the accessory before the fact of armed robbery charge, the trial court also denied the motion with respect to that charge. [App. 628.] At the PCR hearing, trial counsel testified that he did not argue that Petitioner was present and, therefore, could not be liable as an accessory before the fact because if she had been present, she would have been charged as a principal rather than an accessory. [App. 985.] Moreover, Petitioner's argument here that "it is *possible* that she was present during the alleged act of robbery" [Doc. 23 at 21] is entirely too speculative to support a finding that trial counsel was ineffective for failing to argue Petitioner was present. Accordingly, Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of applicable Supreme Court precedent, and Petitioner is not entitled to habeas corpus relief based on this ground.

Ground Five

In Ground Five, Petitioner argues trial counsel was ineffective for advising Petitioner that by not presenting a defense trial counsel would retain the right to make his closing argument after the prosecution's and for advising Petitioner that she should not take the

stand in order to preserve the opportunity to make the final argument to the jury. [Doc. 1-1 at 16.] Petitioner argues that once trial counsel realized all co-defendants had lost their right to a final argument, he should have made this clear to Petitioner, who wanted to testify on her own behalf. [*Id.* at 17.]

The PCR court addressed trial counsel's performance under the standard set forth in *Strickland*. [App. 1190–98.] With respect to Ground Five, the PCR court found,

This Court finds that counsel was not ineffective for failing to discuss last argument with Applicant or advising her that she would preserve last argument by not testifying. Counsel did not recall whether or not he discussed last argument with Applicant. He testified that he and Mr. Bolus were surprised to lose last argument based on the third co-defendant entering one piece of evidence. When asked who made the decision for the Applicant not to testify, defense counsel expressly stated, "probably it would have been mine." However, this Court finds that counsel provided other reasons that he advised Applicant not to testify. He was concerned about how Applicant would handle cross-examination from two strong prosecutors who would try to confuse her. He was also concerned that if one co-defendant's pending murder charges came out then the jury might have believed that it was foreseeable that someone would get killed in this robbery. In addition, this Court finds that it was ultimately Applicant's decision not to testify. Applicant testified that she never told counsel that she wanted to testify. This Court finds that counsel's discussions with Applicant, or lack thereof, regarding last argument did not affect the outcome of the trial.

[App. 1196.]

The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme

Court but arrived at a result different from the Supreme Court precedent. Thus, the Court concludes the PCR court's decision was not contrary to or an unreasonable application of applicable Supreme Court precedent.

Further, the record supports the PCR court's decision, which demonstrates the PCR court's decision was not an unreasonable application of *Strickland*. At the PCR hearing, trial counsel testified that he did not put Petitioner on the stand because he did not want to subject her to cross-examination and because he was concerned that her testimony may reveal that one of her co-defendants had two pending murder charges and that may make it seem foreseeable that they might have used guns during the robbery. [App. 1005, 1006.] The Fourth Circuit Court of Appeals has held that "the advice provided by a criminal defense lawyer on whether his client should testify is 'a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance.'" *Carter v. Lee*, 283 F.3d 240, 249 (4th Cir. 2002) (quoting *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir. 1983)). In some circumstances, where defendants have followed trial counsel's advice but trial counsel was later found to have misinformed defendants with respect to the consequences of taking the stand, courts have found ineffective assistance of counsel. See, e.g., *Foster v. Delo*, 11 F.3d 1451, 1457–58 (8th Cir. 1993) (finding counsel provided ineffective assistance regarding the petitioner's right to testify at the sentencing phase of his case because the petitioner "had nothing to lose and everything to gain by testifying at the penalty phase," where his guilt had already been established, and "[h]is only chance to escape the death penalty required a plea for his own life, asking the jury for mercy, portraying himself as a human being"); *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987) (holding that a defendant was deprived of a meaningful opportunity to decide

whether to testify where counsel misinformed the defendant about the Government's use of prior convictions if defendant took the stand). However, here, the PCR court found that trial counsel provided other reasons why he advised Petitioner not to testify. Moreover, at the PCR hearing, Petitioner conceded she never told trial counsel that she wanted to testify. [App. 1047.] Finally, Petitioner has failed to direct this Court to any legal authority to support her argument that trial counsel was ineffective based on this advice or that Petitioner was prejudiced as a result. Accordingly, Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of applicable Supreme Court precedent, and Petitioner is not entitled to habeas corpus relief based on this ground.

Ground Six

In Ground Six, Petitioner argues trial counsel was ineffective for failing to request appropriate and necessary jury instructions and for failing to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of Petitioner, separate from their findings concerning the liability of each of her co-defendants. [Doc. 1-1 at 18.]

The PCR court addressed trial counsel's performance under the standard set forth in *Strickland*. [App. 1190–98.] With respect to Ground Six, the PCR court found,

This Court finds that counsel was not ineffective for failing to request a jury charge on accessory before the fact to strong arm robbery. Counsel requested a jury charge on strong arm robbery based on the fact that neither Applicant's statement nor Mr. Hollins' statement mentions weapons. However, the trial court declined to charge strong arm robbery because there was no evidence in the record that the incident took place without weapons. If the trial court had considered the charge from the perspective of whether the Applicant knew that weapons would be involved, it is still unlikely that the trial court would have charged accessory before the fact to strong

arm robbery. This Court finds that Applicant was not prejudiced by counsel's failure to request such a charge.

This Court finds that trial counsel was not ineffective for failing to object to the trial court's jury instructions on accomplice liability and foreseeability. The trial court gave the standard charge on accomplice liability and "the hand of one is the hand of all." (ROA p. 716, line 2 – p. 717, line 20). The trial then stated as follows:

Ladies and gentlemen, the defendant Marquita Smith is charged with being an accessory before the fact of the felonies of murder and armed robbery. In order to prove beyond a reasonable doubt that the defendant, Marquita Smith, either advised, agreed, urged, counseled, hired, or in some way aided and abetted – aided and abetted another person to commit a crime, and that the defendant was not present when the offense was committed.

Aid means to help, to promote the course or accomplishment of, to give support to, or to give assistance to. Abet means to encourage or appear to favor or support.

(ROA p. 718, lines 2-14). In its closing statement, the State argued that Applicant orchestrated the plan and used the word "robbery" in her own statement and that when you rob someone, it is entirely foreseeable that the person could be killed during the course of the robbery. (ROA p. 676, line 19 – p. 679, line 16). Trial counsel argued that there was a difference between the Applicant and her codefendants and that she is only responsible for the probable and natural consequences of her actions. (ROA p. 653, line 22 – p. 654, line 13). Counsel also argued that it was not foreseeable that the co-defendants would have kidnapped and murdered the victim. (ROA p. 669, line 12 – p. 671, line 24). The trial court addressed the jury as follows:

The case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for all defendants. The fact that you may find one

defendant guilty should not control your verdict as to the other defendants.

Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other; or you may acquit both or you may convict both or all. It will depend upon your view of the testimony and evidence.

You must take each defendant and consider the evidence as to that defendant and my instructions to you on the law. You will then write a separate verdict of guilty or not guilty for each individual defendant.

(ROA p. 720, lines 7-21).

The Applicant similarly alleged that defense counsel was ineffective for failing to prepare and present to the lower court a proposed accomplice liability instruction concerning the law as it pertained to charges of accessory before the fact. In his PCR testimony, defense counsel offered no explanation for his failure to submit a proposed jury instruction on this crucial point. The instruction given on accomplice liability or foreseeability were standard and appropriate and this Court finds that trial counsel was not deficient for failing to object to the trial court's instructions or failing to present a more appropriate accomplice liability instruction.

[App. 1193–95.]

The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Thus, the Court

concludes the PCR court's decision was not contrary to or an unreasonable application of applicable Supreme Court precedent.

With respect to Petitioner's argument that trial counsel failed to request an instruction on accessory before the fact to strong arm robbery, "[a]t the accessory's trial, . . . the State must prove that the principal is guilty or the accessory may not be convicted." *Sellers v. State*, 607 S.E.2d 82, 85 (S.C. 2005); *see also State v. Cox*, 351 S.E.2d 489, 493 (S.C. 1986) ("In *State v. Massey*, 267 S.C. 432, 229 S.E.2d 332 (1976) we held that an accessory could be convicted notwithstanding the *prior* acquittal of the alleged principal, or even notwithstanding the identity of the principal was unknown. That is, an accessory may be convicted as long as sufficient evidence is adduced to show that *some* principal committed the underlying substantive crime." (emphasis in original)); *State v. Price*, 294 S.E.2d 426, 428 (S.C. 1982) ("The requirement that the jury in the trial of the accessory must find as a fact the principal did actually commit the crime involved is still the rule."). Here, the trial court rejected trial counsel's proposed strong arm robbery instruction because it found there was no factual support for the instruction because the evidence at trial established the robbery took place with weapons. [App. 603.] Because the trial court concluded no evidence supported a charge on the underlying crime of strong arm robbery, a charge for accessory before the fact of strong arm robbery also would not have been proper. *See Sellers*, 607 S.E. 2d at 85. Further, with respect to Petitioner's argument that trial counsel should have requested a different instruction on accomplice liability and/or objected to the instructions given, the PCR court found that the trial court gave the standard charge on accomplice liability, and Petitioner has failed to direct this Court to any legal authority to support her argument that trial counsel should have requested a different

accomplice liability instruction. Accordingly, Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of applicable Supreme Court precedent, and Petitioner is not entitled to habeas corpus relief based on this ground.

Ground Seven

In Ground Seven, Petitioner argues trial counsel was ineffective for failing to make certain crucial closing arguments to the jury and for failing to object to inappropriate arguments made by the prosecution in closing argument. [Doc. 1-1 at 22.]

The PCR court addressed trial counsel's performance under the standard set forth in *Strickland*. [App. 1190–98.] With respect to Ground Seven, the PCR court found,

This Court finds that trial counsel was not ineffective for advising the jury during his closing statement that Applicant was not present for the principal offenses. The evidence produced at trial indicated that Applicant was present for the kidnapping and burglary, but she was not present for the murder and armed robbery. Because she was present for the burglary and the kidnapping, she was not charged with accessory before the fact to those offenses. Counsel's purpose in advising the jury that Applicant was not present for the murder and armed robbery was not to stipulate to an element of accessory before the fact, but rather to argue that Applicant was too far removed from those offenses and that those offenses were not foreseeable to her. This Court finds no deficiency in counsel's closing argument.

This Court finds that Applicant was not prejudiced by counsel's failure to object to the State's comment during closing argument that any time a victim is killed "in the course of another felony, then his death is murder. End of story." (ROA p. 693, lines 12-20). First, this Court finds that the State's closing did not shift the burden of proof for malice to the defendants. Moreover, even if counsel was deficient for failing to object, the Applicant was not prejudiced because the trial court properly charged the jury on malice and cured any

potential defect. The trial court charged the jury as follows regarding malice:

I further instruct you that if one intentionally kills another during the commission of a felony, the inference of malice *may* arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with all of the other evidence in the case, and you *may* give it the weight that you decide it should receive.

(ROA p. 711, lines 5-12) (Emphasis added). This Court finds that the trial court's proper instruction cured any prejudice from the State's closing statement.

[App. 1195–97.]

The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Thus, the Court concludes the PCR court's decision was not contrary to or an unreasonable application of applicable Supreme Court precedent.

Further, the record supports the PCR court's decision, which demonstrates the PCR court's decision was not an unreasonable application of *Strickland*. At trial, Detective Gerald Merrithew read Petitioner's statement, in which she stated that after the victim was pushed down in the hallway, she ran away and did not look back. [App. 548.] At the PCR hearing, trial counsel testified that he told the jury in closing argument that Petitioner was

not present during the armed robbery and murder because he was trying to break the chain of foreseeability to establish that it was not foreseeable that the victim would be taken to a random residence and executed. [App. 990.] Additionally, following closing arguments, the trial court instructed the jury on the law, including the following instruction:

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or grave bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. The following are examples of dead – are examples of instruments which may be deadly weapons: a pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a slingshot, metal knuckles, a razor, gasoline, a firebomb or Molotov cocktail, and lighter fluid. A gun may be a deadly weapon even if it is not operating.

I further instruct you that if one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with all of the other evidence in the case, and you may give it the weight you decide it should receive.

[App. 710:17–11:13.] Thus, Petitioner cannot establish that she was prejudiced by trial counsel's failure to object to the prosecution's closing argument. Accordingly, Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of applicable Supreme Court precedent, and Petitioner is not entitled to habeas corpus relief based on this ground.

Ground Eight

In Ground Eight, Petitioner argues trial counsel was ineffective for failing to argue in opening statements that murder was not a foreseeable consequence of any agreement entered into between Petitioner and her co-defendants. [Doc. 1-1 at 25.]

The PCR court addressed trial counsel's performance under the standard set forth in *Strickland*. [App. 1190–98.] With respect to Ground Eight, the PCR court found,

This Court finds that trial counsel made a proper opening argument. Counsel testified that the purpose of his opening statement was to provide an outline of how everything occurred. He argued that it was the jury's duty to decide whether these crimes were committed and whether they were natural consequences of Applicant's actions. Counsel testified that he did not want to overemphasize the murder in his opening statement. This Court finds no deficiency in trial counsel's opening statement.

[App. 1195.]

The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard, which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Thus, the Court concludes the PCR court's decision was not contrary to or an unreasonable application of applicable Supreme Court precedent.

Further, the record supports the PCR court's decision, which demonstrates the PCR court's decision was not an unreasonable application of *Strickland*. In his opening statement, trial counsel stated,

Ladies and gentlemen, we also met yesterday. My names Craig Jones and I represent Marquita Smith. And we -- certainly seems like she's the star in this show. You saw the solicitor walk right over here and point right in her face.

One thing that she said and struck me was that she contemplated this armed robbery. Ladies and gentlemen, part of this is y'all have got to decide whether there was an armed robbery and what she contemplated. Because certain crime occurred doesn't necessarily mean that she contemplated it. And again, the solicitor also -- it's got to be a natural consequence.

Well, I would ask that y'all listen to all the facts, listen to all the witnesses, and listen to all the evidence. Aside from just proving that crimes occurred, you kind of have a secondary -- with accessory, a secondary function is that you've got to determine what she knew or should have known.

Ladies and gentlemen, I would ask that you would listen very carefully. I would ask that you would weigh in. People are held responsible for what they do. You don't hold them responsible for everything that happens after that. At some point it's just too far beyond what you can foresee.

I would ask you keep an open mind, understand that this is a long, complicated deal. There are a lot of people, there's a lot of confusion in this, but the focus is: What did these people do? What did they know or should have known? And I would ask that you would just listen to the evidence or take what either side says, filter through your experience: "If that were me, would I or should I have known?"

[App. 125:3–26:9.] At the PCR hearing, trial counsel testified he was hoping not to over-emphasize, that he felt the prosecution's strongest case was the robbery, and he was hoping the murder would be an even further unforeseen consequence than the robbery. [App. 979.] Moreover, Petitioner has failed to direct this Court to any legal authority that trial counsel's opening argument was improper. Accordingly, Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of applicable

Supreme Court precedent, and Petitioner is not entitled to habeas corpus relief based on this ground.

Ground Nine

In Ground Nine, Petitioner argues appellate counsel was ineffective. [Doc. 1-1 at 26.] More specifically, Petitioner argues appellate counsel failed to raise two meritorious issues in her direct appeal: 1) that the lower court erred by denying Petitioner's directed verdict motions on all charges and 2) that the lower court erred by charging to the jury that the State would only have to prove that Petitioner aided and abetted another person "to commit a crime." [*Id.*]

As the Fourth Circuit Court of Appeals has acknowledged,

The "right to effective assistance of counsel extends to require such assistance on direct appeal" as well as at trial. *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc) (applying the *Strickland* standard to claims of ineffective assistance of counsel during appellate proceeding). We likewise presume that appellate counsel "decided which issues were most likely to afford relief on appeal." *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993). Effective assistance of appellate counsel "does not require the presentation of all issues on appeal that may have merit." *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir. 2008). As a general matter, "only when ignored issues are clearly stronger than those presented" should we find ineffective assistance for failure to pursue claims on appeal. *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

United State v. Mason, 774 F.3d 824, 828–29 (4th Cir. 2014).

With respect to Ground Nine, the PCR court found,

This Court finds that appellate counsel and co-counsel are experienced appellate attorneys. This Court finds that appellate counsel properly chose to brief the issues that she and her co-counsel believed were the most meritorious.

Appellate counsel testified that she and her former employer Tommy Thomas, Esquire, each read the trial transcript, looked for issues that were preserved for appeal, and debated which issues were the best issues to raise. She testified that she drafted an argument on the directed verdict issue, but she ultimately decided that it was not their strongest issue. Appellate counsel also testified that she and Mr. Thomas agreed with the trial court that guns were involved so strong arm robbery should not have been charged. She testified that she and Mr. Thomas discussed all the issues that were preserved and chose not to raise the issue about lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime." This Court finds that Applicant has failed to show that appellate counsel's representation was deficient.

[App. 1199.]

The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the PCR court applied the *Strickland* standard,⁸ which is the applicable Supreme Court precedent. Second, the record fails to demonstrate the PCR court confronted a set of facts that were materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from the Supreme Court precedent. Thus, the Court concludes the PCR court's decision was not contrary to or an unreasonable application of applicable Supreme Court precedent.

Further, the record supports the PCR court's decision, which demonstrates the PCR court's decision was not an unreasonable application of *Strickland*. At the PCR hearing,

⁸Although in the section of the PCR court's amended dismissal order dedicated to Petitioner's ineffective assistance of appellate counsel claims, the PCR court cited to South Carolina case law [App. 1198–99], it is clear the standard applied is the same as the standard in *Strickland* that was previously outlined in the PCR court's amended dismissal order [App. 1190–91].

when asked why she did not argue on appeal that the lower court erred by denying Petitioner's directed verdict motions on all charges, appellate counsel answered,

To best answer that question I can go through the process that Mr. Thomas and I used. We both read the transcript. We both made transcript notes and do what a lot of attorneys call issue spotting. All the issues that we thought were properly objected to or preserved for appeal, since we're a preservation State, we were looking to make sure they were all preserved. We both make a list. And then we have a series of, what we call, pow wow's, where him and I go back and forth and debate what are the best issues. When I worked at his firm, a majority of the writing fell as my responsibility. So what I would do is draft – start drafting a brief that we would go back and forth with and narrow down to our final issues. In this case, I do recall drafting an argument on that, but after some time, which we discussed yesterday, we just decided that was not one of our best issues. Not to say it wasn't meritorious, we just decided strategically that wasn't one of the best issues to present, even though it was preserved.

[App. 930:5–23.] As explained, effective assistance of appellate counsel does not require the presentation of all meritorious issues. *Mason*, 774 F.3d at 828–29 (citing *Lawrence*, 517 F.3d at 709). Additionally, Petitioner has failed to direct this Court to any legal authority to support her argument that the trial court's accessory instruction was error. Accordingly, Petitioner has not established that the PCR court's decision was contrary to or an unreasonable application of applicable Supreme Court precedent, and Petitioner is not entitled to habeas corpus relief based on this ground.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the Court recommends that Respondent's motion for summary judgment be GRANTED and the Petition be DENIED.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin

United States Magistrate Judge

July 25, 2016
Greenville, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA

Marquita Smith,	)	CASE NO. 8:15-cv-02165-RMG-JDA
	)	
Petitioner,	)	
v.	)	OBJECTIONS TO THE REPORT AND
	)	RECOMMENDATION OF THE
	)	MAGISTRATE JUDGE
Warden Marian Boulware,	)	
	)	
Respondent.	)	
	)	

This matter is before the Court pursuant to Petition under 28 U.S.C. §2254 for a Writ of Habeas Corpus filed May 28, 2015. On July 25, 2016, the Honorable Jacquelyn D. Austin, United States Magistrate Judge, issued a Report and Recommendation (“the Report”) in this matter, which recommended that the Respondent’s Motion for Summary Judgment filed September 23, 2015, be granted. The Petitioner would now respectfully submit the following objections to the Report. The Petitioner has attempted to keep her objections succinct. However, the Petitioner incorporates by reference any and all points raised in her Reply and Memo Opposing Summary Judgment in support of her claim that this Court should issue a writ of habeas corpus. For that reason, the Petitioner would object to the Report’s failure to adopt the reasoning set forth in her Reply with regard to the grounds raised for relief.

I.

PROCEDURAL BACKGROUND

The Petitioner has no objections to the procedural background set forth by the Report at Report and Recommendations, pp. 1-16.

II.

STANDARD OF REVIEW

Habeas Corpus

When a habeas petitioner has properly presented a federal claim to the state court, but that state court does not decide the issue on the merits, the federal court must decide that issue *de novo*. See *Wolfe v. Johnson*, 565 F.3d 140, 161 (4th Cir. 2009) (quoting *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003)). However, if the state court has decided that issue on the merits, a petition for a writ of habeas corpus shall not be issued unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d). Thus, petitions for a writ of habeas corpus are subjected to a deferential standard of review. See, *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770 (2011).

The deferential standard of review applies even when the state court fails to identify the prevailing federal standards and principles to address the claim. See *Fullwood v. Lee*, 290 F.3d 663, 677 (4th Cir. 2002). “AEDPA plainly sought to ensure a level of “deference to the determinations of state courts,” provided those determinations did not conflict with federal law or apply federal law in an unreasonable way.” *Williams v. Taylor*, 529 U.S. 362, 386 (2000). It is commonly understood that under AEDPA, a state court judgment is upheld unless a federal court becomes “firmly convinced” that there has been a violation of a federal constitutional right. *Id.* at 389. Even in cases where the judgment appears reasonable at first glance, the Court should

deem it unreasonable, if “*thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional error.*” *Id.* (Emphasis added).

In order to prove a claim of ineffective assistance of counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, Petitioner must show that but for counsel’s errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*

A Petitioner, seeking habeas corpus relief, bears the burden of establishing that he or she is entitled to relief by showing that the state court failed to reasonably apply federal law, as determined by the United States Supreme Court, or by showing a clear failure of the state court to make a reasonable determination of the facts in light of the evidence adduced during the state court proceedings. *Carey v. Maulden*, 127 S.Ct. 649, 653-654 (2007).

Summary Judgment

Summary judgment should not be granted unless, “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). Rule 56(c) mandates entry of summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed2d 265 (1986).

In determining if a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed2d 202 (1986). However, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 248.

III.

MERITS

GROUND ONE (A)

FAILURE TO ADEQUATELY ARGUE FOR SEVERANCE

The Report correctly sets forth the circuit court’s ruling on this issue. Petitioner agrees that the rules of court in South Carolina generally allow for joint trials. Petitioner recognizes, as found in the circuit court, that a severance is generally only required “where there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant’s guilt.” App. p. 1192-93, citations omitted.

The Report concludes that the PCR court’s decision on this issue did not represent an unreasonable application of the *Strickland* standard. Petitioner most respectfully disagrees. As Petitioner argued in her Reply to Respondent’s Motion for Summary Judgment (hereafter Reply), Trial Counsel should have argued that a severance was necessary based upon the high risk that her joint trial with her co-defendants would result in the jury not being able to clearly differentiate between the law as it pertained to Petitioner as an alleged accessory versus the law properly applied to her co-defendants who were charged as principals. The fact the jury

instructions in a case involving one defendant charged as an accessory and multiple co-defendants being prosecuted as principals would be unreasonably complex and confusing should have been readily foreseeable to Trial Counsel. The jury charge given at Petitioner's trial was in fact so confusing and inadequate as to prevent Petitioner's "jury from making a reliable judgment about [her] guilt." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001).

GROUND ONE (B)

FAILURE TO ADEQUATELY ARGUE FOR A CONTINUANCE

Respondent has asserted, and the Report agrees, that this issue is procedurally barred.

GROUND TWO

The State PCR court erred in denying Petitioner relief where she clearly established that Trial Counsel was ineffective in his failure to adequately cross-examine state witness, co-defendant, Hollins.

The state PCR court relied heavily upon Trial Counsel's assertions that he assumed Hollins would not speak with him since he was a co-defendant testifying for the state and "looking to solidify a good deal." App. p.1195-96. The Report finds that Trial Counsel's articulated reasons for his trial strategy were credible, and that his determinations with regard to his trial strategy were entitled to deference. *Cagle v. Branker*, 520 F.3r 320, 324 (4th Cir. 2008). The Report further concludes that Petitioner has failed to advance any legal authority to support her argument that Trial Counsel conducted his cross-examination of Hollins differently. Petitioner respectfully submits that the findings of the state PCR court, and the Supreme Court of South Carolina's decision to affirm that decision on appeal reveal an unreasonable application of the *Strickland* standard for accessing the merits of Sixth Amendment claims.

While the state PCR court initially relied on Trial Counsel's assumption that Hollins' lawyer would not have agreed to let him interview Hollins, in the Amended Order of Dismissal

issued in this case, that finding was changed to state that Trial Counsel simply assumed Hollins would not speak with him. App.Vol. III, p. 1112 and App.Vol. III, pgs. 1195-1196. In his PCR testimony Trial Counsel admitted that the ultimate decision as to whether Hollins would agree to talk to Trial Counsel would have been up to Hollins to make. App.Vol. III, p. 972, l. 23 – p. 973, l. 15. As noted in Petitioner’s Reply, Hollins’ PCR testimony clearly establishes that he would have agreed to speak with Trial Counsel regardless of his attorney’s advice, and that he would have given Trial Counsel the benefit of all the information reflected in his PCR testimony.

The PCR Court’s Order acknowledged that the testimony presented by Hollins during the PCR proceeding, “indicates that he might have offered testimony beneficial to the defense at [Petitioner’s] trial, if he had been properly cross-examined by Trial Counsel.” App.pp. 1195-1196. Petitioner now asserts that the state courts, as well as the Report, fail to address Trial Counsel’s admission in his PCR testimony that Hollins’ pre-trial statement to law enforcement was not very divergent from the Petitioner’s own statement. App.Vol III, p. 973, l. 21-p. 974, l. 19. Both the state courts, and the Report, fail to address the fact that Trial Counsel’s failure to thoroughly cross-examine Hollins was objectively unreasonable given the fact that Hollins’ pre-trial statement virtually mirrored the statement given by Petitioner. Therefore, if Hollins’ trial testimony had significantly conflicted with his earlier statement to the police, Trial Counsel could have impeached him with that statement. For that reason, Trial Counsel’s articulated fear that he did not know what Hollins would say if he cross-examined him more closely, simply does not hold water.

As South Carolina law recognizes, where Trial Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*,

308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that;

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

On the facts of this case, Trial Counsel's asserted reasons for not seeking to interview Hollins before his trial testimony constitute a valid trial strategy. His explanations for his failure to more thoroughly cross-examine Hollins as articulated in his PCR testimony were not objectively reasonable. The state court erred in finding that Petitioner was not entitled to relief on this Sixth Amendment ground and the appellate court erred in affirming that ruling. The Report reflects a failure to adequately factor in all of the arguments advanced by Petitioner in support of this claim. Summary Judgment is not appropriate on this issue and should not be granted inasmuch as a genuine dispute concerning material fact exists on this ground. *See, Celotex*, 477 U. S. at 324.

GROUND THREE

Trial Counsel violated Petitioner's right to effective assistance of counsel, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, by his failure to properly respond to testimony from State Witness, co-defendant, Hollins' that a "Lick" Conclusively Meant an Armed Robbery

Petitioner argues that Trial Counsel was ineffective for failing to object the first and every time the State sought to enhance the strength of their case against Petitioner by leading Hollins to testify that a "lick" conclusively and exclusively constituted an armed robbery. As argued in her Reply, Petitioner submits that the record below demonstrates both that this error

constituted ineffective assistance of counsel, and that Petitioner was prejudiced thereby particularly in light of the State's closing argument which exacerbated the harm to Petitioner. Petitioner respectfully asserts that the Report improperly concludes that the state courts properly found that Trial Counsel would have had no evidentiary basis upon which to object to this testimony. That position was and is contrary to existing state law. *See, State v. Page*, 378 S.C. 476, 479, 663 S.E.2d 357, 358 (Ct. App. 2008), wherein the Court of Appeals found that witness testimony that "making a lick," is slang for "coming up on some extra money, doing something to come up with some extra money some way or somehow." In addition, Petitioner would submit that Trial Counsel could and should have objected to testimony that addressed what Petitioner would have believed that term to mean. Summary Judgment should not be granted on this ground inasmuch as a genuine dispute concerning material fact exists on this ground. *See, Celotex*, 477 U. S. at 324.

GROUND FOUR

Petitioner's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United State's Constitution, was violated at trial when Trial Counsel neglected to adequately argue her right to directed verdicts of acquittal based upon the insufficiency of the evidence presented by the prosecution.

The findings on this issue found in the Report quote Petitioner as arguing in his Reply that, "it is possible that she was present during the alleged act of armed robbery." [Reply, Doc.23 at 21]. That quote is presented out of context and ignores the larger issue that the record demonstrates that Petitioner was present during some portion of the acts committed by her co-defendants in the course of the plan Petitioner was alleged to have taken part in. As Petitioner has argued below and in her Reply, where the evidence showed she was present during the course of some of the acts committed in furtherance of the plan, she could not properly be found guilty as an accessory.

Likewise, the Report notes with approval Trial Counsel's claim that he did not argue Petitioner was present for fear that she would end up charged as a principal. App. p. 985, Report, p. 37. This position overlooks that fact that Petitioner was in the middle of her trial as an accessory and could not therefore, have been convicted as a principal on an indictment charging her as an accessory. Petitioner respectfully asserts that the state courts erred in denying her relief on this Sixth Amendment claim. She submits that the Report erroneously concludes that the findings of the state court reflected a reasonable application of the *Strickland* standard. Summary Judgment is not appropriate on this issue and should not be granted inasmuch as a genuine dispute concerning material fact exists on this ground. *See, Celotex*, 477 U. S. at 324.

GROUND FIVE

Petitioner should have been granted relief in the state court where she established that Trial Counsel was ineffective for advising her that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments and further, where Trial Counsel was ineffective for advising her that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument.

As the Report indicated, the state PCR court acknowledged that Trial Counsel admitted that he surprised when he and Mr. Bolus (attorney for co-defendant Gary Grant), found out they had lost the right to the last argument when a third co-defendant entered an exhibit into evidence. As further noted in the Report, the state PCR court found in the Order of Dismissal that Trial Counsel admitted in his PCR testimony that the decision for Petitioner not to testify at trial was probably made by him, not Petitioner.

In her Reply, Petitioner challenged Trial Counsel's vague assertion that he made the decision for Petitioner not to testify for fear that, "if one co-defendant's murder charge came out then the jury might have believed that it was reasonable that it was foreseeable that someone would get killed in this robbery." App. p. 1196. Specifically, Petitioner noted that Trial Counsel

testified that he did not want Petitioner to testify because it might come out that she knew one of her co-defendants, Manny, had two murder charges pending. App. Vol. III p. 1006, ll. 2-14. He went on to acknowledge, however, that there was no evidence Petitioner knew Manny other than having spoken to him once when Hollins handed Manny the phone during a call with Petitioner. App. Vol. III p. 1007, ll. 4-23. The reason given by Trial Counsel for his decision not to put Petitioner on the stand fails to explain why he could not have asked Petitioner what if anything she knew about Manny *in advance of this incident* before she was required to make a decision about testifying.

Trial counsel admitted the possibility that he told Petitioner, at some point earlier in the trial, that they could preserve the right to a final argument if they did not put up a defense. App. p. 1003, 3-12. He admitted in his PCR testimony that he probably did not advise Petitioner that she had already lost her right to a final argument, and that losing the right to the final argument was no longer a factor in the decision concerning whether she should testify. App.p. 1004, l.1 – p. 90, l. 7. The Petitioner testified during her PCR hearing that she was not aware when the right to last arguments was lost, and that her reluctant decision not to testify was based on her desire to preserve final arguments not her attorney's insistence that the prosecution would "*eat [her] alive*" on the stand. App. Vol. III p. 1040, l. 3-p. 1042, l. 13. A fair review of Petitioner's testimony during her PCR proceeding indeed reflects that she handled herself well as a witness, she was able to answer questions appropriately and did not become flustered or fall apart during her strenuous cross-examination by Respondent during that proceeding. App. p.1034, l. 18 – p. Most significantly, Petitioner testified that she never intended to challenge her statement to police, and that she had not been afraid to testify in her defense. App. Vol. III p. 1040, l. 3-p. 1041, l. 15. Therefore, unlike many criminal defendants, she had no reason to fear being cross-examined concerning any inconsistencies between her statement to law enforcement and her trial testimony.

Contrary to the findings of the state court, and the finding and recommendations reflected in the Report on this issue, the record below supports Petitioner's claim that she would have exercised her right to testify in her own defense had she been aware that the right to the last argument had been lost. While Petitioner, like any criminal defendant, had a Fifth Amendment right to remain silent, she also had a Sixth Amendment right to be fully heard in her own defense. It is that right which was violated by the ineffective assistance of counsel she received from Trial Counsel on this important issue. Her failure to challenge Trial Counsel's decision not to put her on the stand was not voluntarily and intelligently made where it was the product of Trial Counsel's failure to fully and accurately advise her concerning the consequences of this important issue. Likewise, the record below establishes that Petitioner's testimony would have been valuable to the defense. Petitioner could have testified at trial, as she did in her evidentiary hearing, as to her personal definition of a "lick", the actual scope of her limited involvement in the plan carried out by her co-defendants and her lack of knowledge that the victim would be harmed in any way. Her waiver on the record of her right to present this crucial testimony was clearly motivated by the presence of a non-existent consideration; retention of the last argument to the jury. As argued by Petitioner in her Reply, it is unfair and unreasonable to suggest that Petitioner would have somehow known that she had lost the last argument without the benefit of accurate advice of counsel on this crucial point. This is particularly true where even the experienced trial lawyers involved in this case were apparently caught off guard by this ruling.

The PCR Court found that Trial Counsel had other reasons, besides retaining the last argument, for advising Petitioner not to testify. As discussed above, however, the two additional reasons actually expressed by Trial Counsel, are readily refuted by the record below. Trial Counsel's worries about what Petitioner might say concerning outstanding charges against one of

the co-defendants, Manny, could have been easily laid to rest by studying the discovery materials in this case and talking to his client. While on the subject of talking to his client, Petitioner submits that while Trial Counsel would not have had the benefit of Petitioner's PCR testimony in making this decision, he would have spent enough time with her preparing for trial to know that she was articulate and firm in relaying her knowledge, or lack thereof, of the actions of her co-defendants. The Report also found that "Petitioner conceded she never told trial counsel that she wanted to testify." Report, p. 40. A fair reading of the testimony cited in the Report, however, does not contain the clear concession found by the Magistrate Judge. On cross-examination, Petitioner was asked by Respondent, "[D]id you ever tell your attorney that you wanted to testify at trial? Petitioner's actual response to that inquiry was, "[W]e never discussed it. We never discussed it from—coming from me but from him." App. p. 1047, ll. 20-23. Petitioner respectfully submits that this testimony, although perhaps not as precise as some of Petitioner's other testimony, nevertheless conveyed the idea, as confirmed by Trial Counsel's own PCR testimony, that he decided Petitioner was not going to testify; the decision came from him.

Lastly, the Report claims that Petitioner failed to present any legal authority for her position that Trial Counsel was ineffective based on his advice or that she was prejudiced by that deficient representation. Petitioner respectfully disagrees. In her Reply, Petitioner asserted that she waived her right to be fully heard in her defense, including her right to testify in her own defense, based upon the erroneous advice of Counsel. Thus, Petitioner not only asserted that her right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments was violated by Trial Counsel's deficient performance, but she asserted that her fundamental constitutional right to be fully heard in her defense was violated by Trial Counsel's actions as well. The report itself cites to examples of findings by the Courts of Appeal for the Fourth, Sixth and Eighth Circuits which

establish that the erroneous advice of counsel concerning the consequences of testifying may constitute ineffective assistance of counsel. Report, p. 40.

The state court improperly denied Petitioner relief on this Sixth Amendment claim and the Supreme Court of South Carolina erroneously affirmed that decision. Petitioner respectfully asserts that the Report's recommendation on this ground should not be followed. Respondent's Motion for Summary Judgment on this ground should be denied inasmuch as Summary Judgment is not appropriate on this claim on the facts of this case. Summary Judgment is not appropriate on this issue and should not be granted inasmuch as a genuine dispute concerning material fact exists on this ground. *See, Celotex*, 477 U. S. at 324.

GROUND SIX

Petitioner's right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, was violated in state court where Trial Counsel failed to request appropriate and necessary jury instructions on her behalf at trial and where he failed to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of Petitioner, separate from their findings concerning the liability of each of her co-defendants.

The Report correctly sets forth the law in South Carolina concerning an accessory. Petitioner, however, asserts that the Report's interpretation of the application of that law to the facts of her case is not logical. Clearly, Petitioner can not be convicted as an accessory in South Carolina in the absence of evidence that someone, acting as the principal, committed the underlying crime. The question presented by the facts in Petitioner's case which required more precise jury instructions dealt with the jury's need to determine, as a threshold matter, what the evidence adduced at trial proved Petitioner knew or should have known. Contrary to the findings of the Report, Petitioner has fully articulated in her Reply the reasons why the charges given in her case

were inadequate and what additional instructions were necessary and appropriate of the facts of her case. The state court found that the charge as given was adequate noting that the trial court instructed the jury as follows:

The case of each defendant and the evidence and the law concerning that defendant should be considered separately and individually. Your verdict does not have to be the same for all defendants. The fact that you may find one defendant guilty should not control your verdict as to the other defendants. App.p. 720, ll. 7-12.

Petitioner respectfully submits that neither this portion of the trial court's jury charge, nor any other portion of the full charge given, adequately conveyed to the jury the fact that the foreseeability analysis they had been instructed on as a component of the law on accomplice liability, had to be engaged in for each defendant based only upon the evidence relevant to that defendant's knowledge at the time of the crimes for which he or she was individually charged.

With regard to Petitioner's assertion that Trial Counsel should have requested a jury charge of accessory before the fact to strong arm robbery, Petitioner asserts that said charge was necessary and appropriate under one reasonable interpretation of the evidence before the Court. If the jury concluded that Petitioner did act as an accessory to a robbery, there existed a high degree of probability that the jury would find her guilty of Accessory to Armed Robbery if they were not given the option of finding Petitioner guilty as an Accessory Before the Fact to Strong Arm Robbery. Rather than find Petitioner not guilty of any crime in connection with the robbery that occurred in this case, the jury was likely to find her guilty, as they did, of being an Accessory Before the Fact of Armed Robbery even if they did not conclude that she knew, or should have known, a deadly weapon would be involved in that robbery.

While Petitioner has not been able to find a particular case on point, the fact that such an instruction would have been appropriate with regard to Petitioner is readily apparent. It is

uncontested that Strong Arm Robbery is a lesser included offense of Armed Robbery. Logically therefore, an indictment for Accessory Before the Fact of an Armed Robbery would sustain a judgment for accessory to strong arm robbery. The state PCR court found an instruction on strong arm robbery was not appropriate where there was no evidence that the underlying offenses were committed without guns. The Order in the PCR action further found that Petitioner was not prejudiced by the failure of Trial Counsel to request such a charge. What the state court, and the Report before this Court, fails to address is that while there was no evidence that the homicide and armed robbery were committed by the principals without guns, there was also absolutely no evidence presented at trial which tended to establish Petitioner knew her co-defendant's would be armed when they committed this robbery. Therefore, the Report's assertion that *Sellers v. State*, 607 S.E.2d 82, 85 (S.C. 2005) is controlling on this issue is inaccurate.

Clearly, Petitioner could not be convicted of Accessory Before the Fact to Strong Armed Robbery absent evidence that some principal was guilty of a robbery in her case. The fact that the principals may have committed a robbery, with the additional factor that, unbeknownst to Petitioner, a deadly weapon was used to accomplish that robbery, would not bar the jury from finding that the only crime she knowingly agreed to participate in was an Accessory Before the Fact of a Strong Arm Robbery. The Order of Dismissal notes that a request for a charge on Strong Armed Robbery was denied by the trial court, as noted above, on the ground that there was no evidence the underlying crimes were committed without guns. App. p. 1110. From that finding, the PCR court concluded without support in this record, that the trial court would also have denied a request for a charge on Accessory Before the Fact to Strong Arm Robbery. Petitioner respectfully submits that, contrary to the findings of the PCR court, the fact that the trial judge denied a charge on Strong Armed Robbery in no way tends to establish that her Honor would have been equally likely to deny