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January 19, 2018

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

RECEIVED

JAN 23 2018

S.C. SUPREME COURT

Re: *Jennifer McSharry v. State of South Carolina*  
Case No. 2011-CP-04-01518

Dear Mr. Shearouse:

Enclosed please find Ms. McSharry's Notice of Appeal in the post-conviction relief case, along with a certificate of service. Also enclosed are the orders of the Honorable R. Scott Sprouse filed on November 27, 2017 and December 21, 2017.

Also enclosed please find copies of my letter of this date ordering the transcript of the PCR evidentiary hearing.

Please note that I will be representing Ms. McSharry on this appeal.

Thank you for your attention to this matter. If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,

  
E. Charles Grose, Jr.

cc: Ms. Jennifer McSharry  
Lindsey McCallister, Esquire  
Clerk of Court, Anderson County

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

JAN 23 2018

APPEAL FROM ANDERSON COUNTY  
Court of General Sessions  
R. Scott Sprouse, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2011-CP-04-01581

Jennifer McSharry,.....Petitioner,

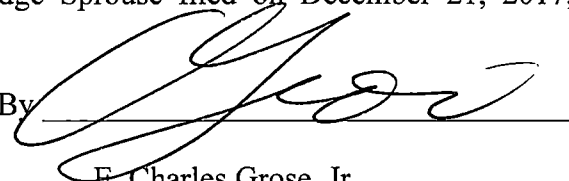
v.

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

**Notice of Appeal**

The petitioner, Jennifer McSharry, appeals the order of the Honorable R. Scott Sprouse, dated, November 21, 2017, dismissing her application for post-conviction relief. This appeal is taken from the order of Judge Sprouse filed on December 21, 2017, denying her Rule 59(e), SCRPC motion.

By



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*Attorney for Jennifer McSharry*

January 19, 2018  
Greenwood, South Carolina

Other Counsel of Record:

Lindsey McCallister, Esquire  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

JAN 23 2018

APPEAL FROM ANDERSON COUNTY  
Court of General Sessions  
R. Scott Sprouse, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2011-CP-04-01581

Jennifer McSharry,.....Petitioner,

v.

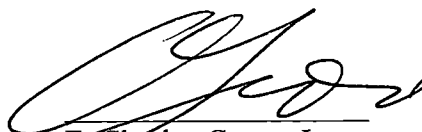
State of South Carolina, .....Respondent.

**Certificate of Service**

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Lindsey McCallister, Esquire  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

January 19, 2018



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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ANDERSON )

Jennifer McSharry, )  
 )  
Applicant, )

v. )

State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-04-1581

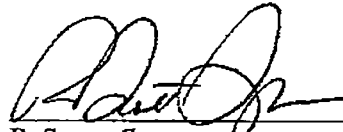
ORDER DENYING APPLICANT'S MOTION  
FOR RECONSIDERATION

PRESIDING JUDGE:  
DATE OF HEARING:  
PLAINTIFF'S ATTORNEY:  
DEFENDANT'S ATTORNEY:  
COURT REPORTER:

R. SCOTT SPROUSE  
OCTOBER 6, 2017  
LINDSEY MCCALLISTER  
E. CHARLES GROSE, JR.  
APRIL HERRON

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Defendants' Motion pursuant to Rule 59, SCRCP, <sup>1</sup> is DENIED.

AND, IT IS SO ORDERED.

  
R. SCOTT SPROUSE  
Judge, Tenth Judicial Circuit

Walhalla, South Carolina

December 18, 2017

FILED-CLERK'S OFFICE  
ANDERSON SC  
2017 DEC 21 AM 10:48  
COMMON PLEAS AND  
GENERAL SESSIONS

<sup>1</sup> The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

STATE OF SOUTH CAROLINA )  
COUNTY OF ANDERSON )

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

Jennifer McSharry, #244026, )

C. A. No. 2011-CP-04-1581

Applicant, )

v. )

State of South Carolina, )

Respondent. )

**ORDER OF DISMISSAL**

COMMON PLEAS AND  
GENERAL SESSIONS

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FILED CLERK'S OFFICE  
ANDERSON SC

This matter is before this Court on the above captioned second (2<sup>nd</sup>) or successive application for post-conviction relief (PCR) filed by Applicant, Jennifer L. McSharry (hereinafter "Applicant") on May 12, 2011 after an evidentiary PCR merits hearing on October 6, 2017 Applicant's first (1<sup>st</sup>) PCR application (C.A. # 2000-CP-04-3030) was denied and dismissed by Circuit Court Judge Alexander Macauley on May 9, 2005 (Order of Dismissal, C.A. # 2000-CP-04-3030).

**I. PROCEDURAL HISTORY**

Applicant was indicted at the July 1997 term of the Anderson County Grand Jury for murder (1997-GS-04-00124), armed robbery (1997-GS-04-1691), criminal conspiracy (1997-GS-04-1692), burglary in the first degree (1997-GS-04-1693), and possession of a weapon during the commission of a violent crime (1997-GS-04-1694). Bruce Bryholdt, Esquire, represented Applicant. Applicant was arrested and indicted for the substantive offenses based on the legal principles of accomplice liability or "the hand of one is the hand of all."

***The Trial and Sentencing***

Applicant proceeded to a jury trial before the Honorable H. Dean Hall. At its conclusion, the jury found Applicant guilty of all charges on September 12, 1997. Applicant was found

*RSS*

guilty of the substantive offenses under the legal principles of accomplice liability or “the hand of one is the hand of all.” Judge Hall sentenced Applicant to imprisonment for concurrent terms of life without parole for murder, 30 years each for armed robbery and burglary 1<sup>st</sup> degree, and 5 years each for conspiracy and the weapons charge.

*Relevant Facts Proved at Trial*

On Saturday, November 16, 1996, Applicant; her mother Lou Rene Kelso (hereinafter “Kelso”); and friends Jennifer Titman (“Titman”) and Ronnie Jordan (“Jordan”), were at Kelso’s home in Clayton, Georgia. (Tr. p. 470-71). Kelso told Applicant and Titman that Kelso’s ex-boyfriend, Melvin Miller, owed her \$10,000, and she needed to go collect it because she owed money to other people herself. (Tr. p. 344). Kelso, Titman, and Applicant borrowed a car from a friend, then picked up Jordan and another friend, Jason Conley (“Conley”). (Tr. pp. 127, 345). Kelso then drove the group to Anderson County, South Carolina from Georgia, and they all formulated a plan on the drive to South Carolina. (Tr. pp. 344-45). Kelso instructed Applicant and Titman to pretend to be lost and in need of a phone as a way to get inside Miller’s home. (Tr. p. 345). Applicant was also supposed to ascertain how many people were in the residence, and then return to the car to let the other co-conspirators know. (Tr. pp. 345-46, 354). The plan was to rob Miller and force him to withdraw money from an ATM. (Tr. p. 345). Kelso and the others [including Applicant] agreed they would kill Miller if he resisted, and everyone in the car was aware Jordan was armed with handgun. (Tr. pp. 345, 354-55).

When the group arrived at Miller’s property in Anderson County, S.C., Applicant and Titman knocked on Miller’s door, told him they were lost, and he invited them in to use the phone. (Tr. p. 355). Applicant then left the trailer saying she needed to get cigarettes from the car, and Jordan, Kelso, and Conley rushed in. (Tr. p. 347, 356). Applicant and Titman waited in

the car. (Tr. p. 347-48). A few minutes later, as Miller was being lead out of the house, Applicant heard gunshots, and Applicant saw Jordan shoot Miller. (Tr. p. 348). Kelso was also shot accidentally during this exchange, and Jordan had to carry her back to the car. (Tr. p. 348, 357). The entire group then left and returned to Georgia leaving Miller at his residence where he died as a result of the burglary, armed robbery, and the gunshot wound. (Tr. p. 349).

Once back in Clayton County, Georgia, Kelso went to the emergency room to seek treatment for the gunshot wound to her hand. (Tr. p. 350). The group decided Kelso would tell hospital staff she was shot accidentally, but she gave inconsistent stories to police investigating the gunshot wound. (Tr. pp. 111-17, 350). A few days later, Titman sought medical treatment for mental health issues and told hospital staff what had happened. (Tr. p. 133, 488-89). The hospital staff then contacted police. (Tr. p. 489). Eventually, Applicant was apprehended by police and gave a detailed statement regarding her involvement and role in the crimes, including her understanding Miller would be shot if he resisted. (Tr. pp. 335-59). Applicant was ultimately charged with murder, armed robbery, first-degree burglary, conspiracy, and possession of a weapon during the commission of a violent crime based on accomplice liability.

### ***The Direct Appeal***

Applicant appealed her convictions and sentences and was represented by Joseph L. Savitz, III, Esquire, of the South Carolina Office of Appellate Defense. By Opinion decided November 19, 1999, the South Carolina Supreme Court affirmed Applicant's convictions and sentences. State v. McSharry, Op. No. 1999-MO-093 (S.C. 1999). The Remittitur was issued on January 5, 2000.

***The First PCR Action***  
(2000-CP-04-3030)

Applicant filed her first application for post-conviction relief (PCR) on November 14, 2000 (C.A. # 2000-GS-04-3030). She alleged the following grounds for relief in her application:

1. Ineffective assistance of trial counsel;
2. Ineffective assistance of appellate counsel.

Respondent made its Return on September 20, 2004, and an evidentiary hearing into the matter was convened on April 20, 2005, before Judge Macaulay. Applicant was present at the hearing and represented by Nancy Jo Thomason, Esquire. Applicant had previously been represented in this action by Carolyn Galloway, Esquire. Christopher L. Newton, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on her own behalf, and Bruce Bryholdt, Esquire, also testified. By written Order dated May 6, 2005, and filed May 9, 2005, Judge Macaulay denied and dismissed the application. Applicant did not timely file a notice of appeal.

***The Second PCR Action***  
(C. A . # 2011-CP-04-1581)

Applicant filed the current second or successive PCR Application on May 12, 2011. Respondent made its Return and Motion to Dismiss the current second PCR application on or about January 20, 2012, arguing the application should be dismissed as untimely pursuant to the South Carolina statute of limitations for PCR actions and improperly successive under South Carolina law. Applicant filed a Reply to Respondent's motion on February 8, 2012.

Applicant subsequently filed amendments to the second PCR Application on May 14, 2012, and November 13, 2012. On November 13, 2012, Applicant also filed a "Motion to Stay Proceedings until the South Carolina Supreme Court decided Aiken et. al. v. Byars." Applicant was 17 at the time she was convicted and sentenced to life without parole for murder.

Respondent filed a Return to the Motion to Stay on November 27, 2013, agreeing the matter should be held in abeyance. The Supreme Court of South Carolina decided Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), on November 12, 2014, and lifted the stay on its implementation on July 23, 2015.

Respondent then submitted an Amended Return and Motion to Dismiss and Amended Conditional Order of Dismissal to this Court on December 22, 2016. Applicant submitted her response on December 27, 2016. This Court declined to issue the Amended Conditional Order of Dismissal and instructed the State to set this matter for a hearing.

#### *The Re-Sentencing Hearing*

On February 10, 2017, before a PCR evidentiary hearing could be scheduled, Applicant received a resentencing hearing consistent with the ruling in Aiken v. Byars before this Court, and her sentence was reduced from life imprisonment for murder to thirty years' incarceration. Applicant's sentences of thirty years each on her convictions for first-degree burglary and armed robbery and five years each for conspiracy and the possession of a weapon were run concurrent with the sentence for murder. As a result of the re-sentencing hearing pursuant to Aiken v. Byars, Applicant is now serving an aggregate sentence of 30 years with credit for the time she has previously served both awaiting trial and in the South Carolina Department of Corrections.

#### *The Second PCR Hearing*

The PCR evidentiary hearing on the remaining allegations of the second PCR Application was convened on October 6, 2017, at the Anderson County Courthouse before this Court. Applicant was present at the hearing and was represented by E. Charles Grose, Jr., Esquire. Respondent was represented by Senior Assistant Attorney General Anthony Mabry and Assistant Attorney General Lindsey A. McCallister of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on her own behalf and presented testimony from her father, Jeff McSharry. Bruce Byrholdt, Esquire (Counsel), testified for the State. After reviewing all the evidence and testimony presented, this Court finds Applicant has failed to establish any constitutional deprivations or other grounds for relief and denies this second successive application for post-conviction relief.

## II. ALLEGATIONS

In her current second PCR application, Applicant alleged she is being held unlawfully for the following reasons:

1. "The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide."
2. "Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide."
3. "Since dismissal of prior PCR, new developments in the law entitle Applicant to a new sentencing hearing. Applicant relies on Graham v. Florida, \_\_ U.S. \_\_, 130 S.Ct. 2011 (2010), deciding on May 17, 2010."

Applicant amended her application on May 14, 2012, then again on November 13, 2012, alleging she is being held unlawfully for the following reasons:

- A. "Unconstitutionality of Juvenile Life without Parole Sentence"
  - a. "The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole. S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole[.]"
  - b. "The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide. S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not actually commit the homicide."

- c. "The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not receive an individualized sentencing hearing during which all available mitigation evidence is considered. S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not receive an individualized sentencing during which all available mitigation evidence is considered."
- B. "Ineffective Assistance of Trial Counsel (Plea Negotiations)"
- a. "Trial counsel failed to properly inform McSharry of the legal principals relevant to her making an informed decision on whether to plead guilty or proceed with a jury trial, including properly educating her about South Carolina's rule of accomplice liability often referred to as the 'hand of one, hand of all.'"
  - b. "[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.' Missouri v. Frye, 132 S.Ct. 1399, 1408 (2012). When trial counsel's deficient performance leads the client to reject the prosecution's plea offer, '[t]he correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement. [. . .]' Lafler v. Cooper, 132 S.Ct. 1376, 1391 (2012)."
- C. "Ineffective Assistance of Trial Counsel (Sentencing Hearing)"
- a. "Trial counsel failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment."
  - b. "Trial counsel failed to retain an expert witness to perform a psychiatric examination of McSharry, testify at the sentencing hearing, and provide relevant and available mitigation evidence."
- D. "Ineffective Assistance of Post-Conviction Counsel"
- a. "Her PCR counsel, Nancy Jo Thomason, had an actual conflict of interest. In addition to representing McSharry, Thomason previously represented [co-defendant] Kelso during her PCR."
  - b. "PCR counsel did not conduct any investigation at all and, therefore, failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment."
  - c. "PCR counsel failed to retain an expert witness to perform a psychiatric examination of McSharry to discover the evidence that trial counsel should have presented the sentencing hearing, and provide relevant and available mitigation evidence."

- d. "PCR counsel failed to advise McSharry and assist her in preparing an amended PCR application."
- e. "McSharry wanted to appeal the denial of her PCR, but PCR counsel failed to file a Rule 59(e), SCRCP motion or file the required notice of appeal. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)."

By letter dated September 1, 2015, and filed September 11, 2015, Applicant, through counsel, informed the Anderson County Clerk of Court that the portions of her application based upon Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012), are moot. At the evidentiary hearing, Mr. Grose agreed much of the application is moot, except for the allegations regarding communication of the plea offer pursuant to Lafler v. Cooper, 566 U.S. 156 (2012), and Missouri v. Frye, 566 U.S. 134 (2012). Therefore, those moot allegations are denied and dismissed.

Prior to the hearing, Respondent submitted a Memorandum in Opposition to PCR detailing its arguments for dismissal, which this Court has now reviewed. At the call of the case, Respondent renewed its motion to dismiss all allegations as time barred and successive to Applicant's previous 1<sup>st</sup> PCR application. This Court took the motion under advisement and instructed the parties to proceed with calling their witnesses. Respondent renewed its motion to dismiss at the close of the Applicant's case and at the close of Respondent's case.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the record in its entirety, including the trial transcript, and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The 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.

### **A. This Application is Time Barred and Improperly Successive**

As an initial matter, this Court finds Applicant's PCR application is time barred and improperly successive. This Court finds Applicant was aware of all the facts necessary to allege ineffective assistance of counsel in Counsel's handling of the plea offers at the time of her first PCR, and Applicant failed to raise that allegation.

Applicant attempts to overcome the time and successiveness bars by arguing the United States Supreme Court cases of Lafler v. Cooper, 556 U.S. 156 (2012), and Missouri v. Frye, 556 U.S. 134 (2012), allow her to bring successive allegations regarding her guilty plea. However, this Court finds the United States Supreme Court decisions of Lafler and Frye did not announce a new rule of constitutional law or one retroactive to Applicant. Although no South Carolina court has passed on this exact issue, courts within the Fourth Circuit and elsewhere have repeatedly and uniformly declined to apply Lafler and Frye retroactively, holding they do not pronounce a new constitutional rule, but rather were a simple application of the Strickland standard. See, e.g., Wert v. United States, 596 Fed.Appx. 914, 917–18 (11th Cir. 2015) (“This Court held that Lafler did not announce a new rule of constitutional law because it merely was an application of the Sixth Amendment right to counsel, as defined in Strickland, to a specific factual context.”); Navar v. Warden Fort Dix FCI, 569 Fed.Appx. 139, 140 n.1 (3d Cir. 2014) (“We also agree with the District Court that neither Lafler nor Frye announced a new rule of constitutional law. . . . Each case merely clarified how Strickland . . . applies in the plea negotiation context.”); Gallagher v. United States, 711 F.3d 315, 316 (2d Cir.2013) (“Neither Lafler nor Frye announced ‘a new rule of constitutional law’: Both are applications of Strickland. . . . Moreover, even if Lafler or Frye did announce ‘a new rule of constitutional law,’ it was not ‘made retroactive to cases on collateral review by the Supreme Court.’ Neither

case contains any express language as to retroactivity, and we have been unable to locate any subsequent decision giving either of them retroactive effect.”) (internal citations omitted); In re Liddell, 722 F.3d 737, 738 (6th Cir. 2013) (“[A]s held by every other circuit to consider the issue, neither Frye nor Cooper created a “new rule of constitutional law” made retroactive to cases on collateral review by the Supreme Court.”) (citations omitted); In re Graham, 714 F.3d 1181, 1182 (10th Cir. 2013) (“To date, however, every circuit court to consider the question has held that Frye and Lafler do not establish a new rule of constitutional law.... We substantially agree with the reasoning of those decisions.”) (citations omitted); Buenrostro v. United States, 697 F.3d 1137, 1140 (9th Cir. 2012) (“[N]either Frye nor Lafler can form the basis for an application for a second or successive motion because neither case decided a new rule of constitutional law. The Supreme Court in both cases merely applied the Sixth Amendment right to effective assistance of counsel according to the test articulated in Strickland v. Washington . . . and established in the plea-bargaining context in Hill v. Lockhart . . .”); Collins v. Cartledge, No. 2:14CV1200-BHH-WWD, 2014 WL 8396824, at \*3 (D.S.C. Nov. 14, 2014), report and recommendation adopted, No. CIV.A. 2:14-1200-BHH, 2015 WL 1518144 (D.S.C. Mar. 30, 2015) (“Neither Lafler nor Frye created a new rule of constitutional law that is retroactive to cases on collateral review.”).

Because this Court finds Lafler and Frye neither announced a new constitutional rule nor applied it retroactively, Applicant cannot rely on these cases to defeat the statute of limitations or the prohibition on successive applications. Additionally, this Court finds, even if Lafler and Frye were to eliminate the bar on time barred or successive applications, Applicant has failed to meet her burden of proving Counsel was deficient or that she was prejudiced by any deficiency for the reasons stated herein below.

Applicant also attempts to overcome the statute of limitations and successiveness bar by alleging her first PCR attorney or attorneys were laboring under a conflict of interest. "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the [Applicant's]." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). Applicant alleges her first PCR attorney, Nancy Jo Thomason, had a conflict of interest because she previously represented Applicant's mother, at the mother's PCR hearing. However, Applicant failed to produce any credible evidence to prove Ms. Thomason's previous representation of Applicant's mother at her mother's PCR hearing caused Ms. Thomason to be laboring under a conflict of interest or divided loyalty when representing Applicant. At the PCR hearing, Applicant failed to call either of Applicant's first PCR attorneys as witnesses. Unless Applicant shows her previous PCR counsel actively represented conflicting interests, she has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). Applicant has the burden of proof to prove her allegations by a preponderance of the evidence. Butler v. State, 86 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1, SCRPC. Applicant failed to meet her burden of proof at the PCR hearing to establish either of her first PCR attorneys was acting under a conflict of interest at the time they represented her in the first PCR action.

Furthermore, the allegations Applicant raises against Counsel in this current application do not involve Applicant's mother, but rather the alleged failure of Counsel to advise her the "hand of one is the hand of all" when plea offers were made to her by the State. This Court finds this allegation has no merit, and Applicant cannot overcome the time and successiveness bars through this allegation. See S.C. Code Ann. § 17-27-45(A) ("An application for relief filed

pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.”); S.C. Code Ann. § 17-27-90 (“All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.”). Applicant was aware of all the facts necessary to allege ineffective assistance of counsel in Counsel’s handling of the plea offers at the time of her first PCR in 2000. This application was filed in 2011, and the amendment containing these specific allegations was not filed until 2012, some eleven years after the expiration of the statute of limitations. See Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996) (holding the statute of limitations shall apply to all applications filed after July 1, 1996).

Additionally, this Court finds, even this allegation or proof of this allegation were to eliminate the bar on time-barred or successive applications, Applicant has failed to meet her burden of proving Counsel was deficient or that she was prejudiced by any deficiency for the reasons stated herein below.

**B. Ineffective Assistance of Trial Counsel**

Applicant alleges Counsel failed to properly inform her of the legal principles of accomplice liability necessary to allow her to make an informed decision on whether to plead guilty or proceed with her jury trial. Specifically, Applicant claims Counsel did not properly

educate her about the “hand of one, hand of all” rule of accomplice liability such that she was unable to make an informed decision as to whether to plead guilty or proceed with trial.

In this PCR action, Applicant bears the burden of proving the allegations in her application by a preponderance of the evidence. Butler, 286 S.C. at 442, 334 S.E.2d at 814. 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.” Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)). The proper measure of performance is whether Counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove Counsel’s performance was deficient. Id. Under this prong, the Court measures Counsel’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced 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 117-18, 386 S.E.2d at 625.

At the PCR hearing, Applicant testified she was found guilty of murder, armed robbery, burglary, and possession of a weapon during the commission of a violent crime following a jury trial before Judge Dean Hall. Applicant testified she was originally sentenced to life without parole for murder, in addition to several concurrent sentences for the other charges. Applicant testified she was seventeen years old at the time of the crime and the time of the trial, and she had been living in Jonesboro, Georgia with her mom, cousin, sister, brother, and stepfather. Applicant further testified she was the only "juvenile" involved; her codefendants were all over eighteen years old.

Applicant testified her involvement was to knock on the victim's door and attempt to gain entry to his house by asking to use the phone, so her codefendants could then enter and take the money Applicant's mother, Lou Rene Kelso, believed the victim owed her. Applicant testified she knew the plan was to shoot the victim if he resisted. Applicant testified that once she was inside and saw the victim was alone, she gave the signal to her codefendants. She then returned to the car, and some of her codefendants entered the victim's residence. Applicant testified she heard a shot, and everyone except her mother ran back to the car. Applicant testified her mother had been shot accidentally, along with the victim. Another codefendant, Ronnie Jordan, went back into the house to retrieve Applicant's mother, and they all left the scene and returned to Georgia together. Applicant further testified these general facts were never in dispute between the State and the defense at trial, and she was never accused at any time from her arrest to her trial of being the person who actually fired the fatal shot.

Applicant testified several plea offers were made during the course of her case. Applicant testified the Solicitor first offered Applicant fifteen years, but Applicant testified she declined that offer because it required her to testify against her mother, and at that time, the State

was still seeking the death penalty against her mother. Applicant also testified this offer was made shortly after her arrest, and she was not yet represented by Counsel at the time that offer was made. Applicant testified she would not have accepted that offer under any circumstance as she was not going to testify against her mother when the State was seeking the death penalty against her mother.

Next, Applicant testified she was offered thirty years during her trial, which she also declined. Applicant further testified the State then offered to reduce the charge to voluntary manslaughter with a sentence of twenty-five years. Applicant acknowledged she testified on the record *in camera* during her trial regarding the plea negotiations, and she unequivocally stated she did not want Counsel to pursue any further plea deal and wanted a trial. The transcript reflects Counsel did not question Applicant regarding her understanding of the "hand of one, hand of all" concept or specify on the record what the plea offer was during the *in camera* testimony. Applicant agreed her testimony at the time *in camera* reflected her understanding she could receive up to life without parole if convicted by the jury. Applicant further acknowledged her testimony at the time indicated both her family and Counsel wanted her to accept the plea offer.

At the PCR hearing, Applicant testified she refused the twenty-five year plea offer made by the State and communicated to her through Counsel because she did not understand the concept and implications of "hand of one, hand of all" accomplice liability. Applicant testified she thought she understood the issue at the time, but she realizes now that she did not. Applicant testified because her role was undisputed, and everyone agreed she was in the car at the time the shot was fired, she did not understand she would be treated the same as if she had pulled the trigger. Applicant further testified she consulted with Counsel regarding the offer, and he told

her the State wanted to settle because of concerns with the jury. Applicant testified Counsel told her he thought she could win at trial, though she admitted Counsel did not make a guarantee. Applicant further testified Counsel told her they would celebrate after the trial, and this contributed to her decision to turn down the plea offer. Applicant testified she now fully understands the "hand of one, hand of all" concept, and she would have accepted the plea offer if she had known at trial what she knows now.

However, Applicant also testified at the PCR hearing that she never asked Counsel why she was charged with all of the crimes, including murder, given there was no dispute about who was the shooter. Applicant also testified she did not see Counsel until right before trial because she was out on bond and had returned to Georgia. Applicant also testified Counsel did not explain "hand of one, hand of all" to her using that exact term, but he did explain she could be found guilty under the theory of accomplice liability. Importantly, Applicant testified she heard the Solicitor explain "hand of one, hand of all" in her opening statement and understood the concept before the plea offers were made during her trial. Further, Applicant testified she had all of this information at the time of her first PCR action.

Applicant also testified she filed a previous PCR action from 2000 to 2005. Applicant testified she was represented by Nancy Jo Thomason, Esquire, at that PCR hearing, but only met Ms. Thomason the morning of the hearing. Applicant testified she had another attorney before Ms. Thomason, but she never met that attorney and did not know who it was. Applicant testified Ms. Thomason advised her she had no meritorious grounds for a PCR, and they never discussed amending the application Applicant filed. Applicant testified she did not raise the claim that the plea offer was not properly conveyed, i.e. that counsel did not properly explain "the hand of one is the hand of all," despite knowing then all of the facts she currently alleges. Applicant also

testified Ms. Thomason did not ask Applicant about her relationship with her mother or about her family background. Finally, Applicant testified Ms. Thomason did not call any witnesses at her first PCR except Applicant, even though Applicant's family members were available to be called as witnesses and testified at her trial.

At the PCR hearing, Applicant's father, Mr. McSharry, testified he was present at Applicant's trial in 1997 and at her resentencing hearing in February 2017. He further testified he remembered the plea negotiations during trial and recalled Counsel conveying the offer of twenty-five years to Applicant. Mr. McSharry testified that during the discussion regarding whether to accept the plea offer, Applicant indicated she believed the judge would not sentence her to more than thirty years, so she felt it was acceptable to take a chance at trial. Mr. McSharry also testified Applicant did most of the talking during the discussions, and Applicant said she wanted to "roll the dice." Mr. McSharry testified Counsel did not advise Applicant one way or another as to whether she should accept the offer, and his complaint with Counsel's conduct was that Counsel did not "force" Applicant to accept the plea offer. However, Mr. McSharry also confirmed Applicant's testimony that no one at any time ever accused Applicant of pulling the trigger, and neither he nor Applicant asked questions about the "hand of one, hand of all" concept because he understood it was an issue when the offer was received during trial. Mr. McSharry also testified he wanted his daughter to accept the plea offer because he understood "the hand of one is the hand of all" and believed Applicant would be convicted if she went forward to a jury verdict.

At the PCR hearing, Counsel testified he was unable to locate his file for this particular case probably because, in 2013, he left the firm he worked for during his representation of Applicant in 1997. However, Counsel testified he had a good memory of this case due to its

unique circumstances. Counsel testified Applicant was never accused of being the trigger person, and Applicant's criminal liability for the offenses was always based on accomplice liability.

Counsel confirmed the first offer for fifteen years made prior to trial was contingent on Applicant's testimony against her mother. Counsel testified he felt Applicant understood the implications of turning down the offer, and she wanted a trial. Counsel testified he called Applicant's mother as a witness during the trial to try to show that on the day of the crime Applicant did not know what she was getting into and was simply going along with what her mother told her to do. Counsel testified he was trying to put up any witnesses who could possibly be helpful because he knew Applicant did not have a defense to the charges.

Counsel testified he thought having Applicant's father present during plea negotiations would help convince Applicant to accept the offer, but it did not. Counsel testified it was unusual for this Solicitor to make offers, let alone multiple offers, but all he could do was relay the terms to Applicant, which he did. Counsel testified he felt the offer was fair and reasonable, but he could not force or coerce Applicant to accept it.

Counsel testified there was never any claim by the State or law enforcement, from the time of Applicant's arrest through her trial, that she was the trigger person, only that she was criminally responsible for the indicted offenses based on accomplice liability. Counsel further testified, as a result, he engaged in extensive discussions with Applicant regarding "the hand of one is the hand of all" and accomplice liability and gave examples to Applicant of how the concept works. Counsel testified these discussions were extensive and occurred both before trial and before the plea offer was made during the trial and during the final consultation during trial as to whether Applicant should accept the plea offer. Counsel further testified he told Applicant

she would be convicted if she proceeded with the trial to a jury verdict because there was no viable defense given her statement to police after the crimes admitting her role as a co-conspirator and co-perpetrator of the crimes. However, even though Counsel explained to Applicant accomplice liability, "the hand of one is the hand of all," that she would be convicted if she proceeded to a jury verdict, and encouraged her to accept the State's final plea offer, Applicant refused to accept the State's final plea offer.

Having reviewed the record and observed the testimony of all of the witnesses and judged their credibility, this Court finds credible Counsel's testimony he explained to Applicant accomplice liability and "the hand of one is the hand of all" numerous times, and explained Applicant would be convicted if she proceeded to a jury verdict. This Court also finds credible Counsel's testimony he encouraged Applicant to accept the State's final plea offer, but Applicant chose not to. Counsel's credible testimony is supported and corroborated by the trial transcript which shows that *in camera*, during the trial, Counsel informed the trial court of his attempt to obtain favorable plea negotiations on Applicant's behalf, and both Counsel and Applicant's family encouraged her to plead guilty to the State's final plea offer. However, the trial record shows that after being questioned by the trial court, Applicant wanted to proceed to a jury verdict. Counsel's testimony is also corroborated by the trial transcript which reveals the evidence of Applicant's guilt under accomplice liability was overwhelming, including her detailed confession to police of both her knowledge of the crimes before they were committed and her role in the perpetration of the crimes.

This Court also finds Applicant's testimony Counsel did not discuss with her accomplice liability and "the hand of one is the hand of all" to be not credible. It is undisputed from the time of her arrest and through her trial, no one ever contended Applicant was the shooter, but only

that she was guilty under the legal principles of accomplice liability. It strains credulity to believe she never asked Counsel how she could be charged with the substantive offenses when she did not pull the trigger, or that Counsel did not discuss with her accomplice liability and “the hand of one is the hand of all” given the State’s evidence and Applicant’s confession to police of her role in the crimes. This Court also does not find credible Applicant’s claims she did not understand accomplice liability or “hand of one is the hand of all” after extensive discussions with Counsel prior to and during trial and her admission she understood the legal principles after the Solicitor’s opening argument, which was given before the State’s final plea offer to Applicant. This Court also does not find credible Applicant’s claim Counsel informed her she would win if she proceeded to a jury verdict. This claim is undercut by both the trial record itself, Counsel’s credible testimony, and the testimony of Applicant’s father.

Based on the credible testimony of Counsel at the PCR evidentiary hearing and the record before the Court, this Court finds Counsel’s representation was not deficient in any regard nor was Applicant prejudiced by Counsel’s performance. It is undisputed by Applicant and her father that Counsel conveyed the plea offers made by the State during his representation. This Court also finds Counsel fully explained the concept of “hand of one, hand of all” to Applicant both before the trial began and once the final offer was received during Applicant’s trial. Applicant’s testimony confirms her understanding that accomplice liability and “hand of one, hand of all” were key issues in her case, and she was aware of this prior to receipt of the final plea offer from the State. Applicant testified she understood “the hand of one is the hand of all” after the Solicitor’s opening statement, which, importantly, was delivered before the final plea offer was made by the State during the trial. Further, Applicant’s father’s testimony confirmed he understood the concept during discussions with Counsel about whether or not Applicant

should accept the offer. Applicant's father also testified it was Applicant who said she wanted to "roll the dice" and proceed with trial rather than accept any plea offer, which is consistent with Applicant's sworn testimony at the time of trial. Finally, this Court finds credible Counsel's assertion Applicant understood the implications of turning down the plea offer, and Counsel cannot force or coerce his client to plead guilty if she does not wish to. Counsel can only advise the client of the plea offer, explain the law, and recommend whether not to accept the offer, which this Court finds Counsel did. This Court finds Applicant made an informed and knowing decision to decline the plea offer and proceed to a jury verdict. Therefore, this allegation is denied and dismissed.

### **C. Ineffective Assistance of PCR Counsel**

Applicant further alleges in this second and successive PCR application that her previous PCR counsel was ineffective because she failed to investigate Applicant's case; failed to develop and call appropriate witnesses during Applicant's first PCR hearing; and had a conflict of interest because she had previously represented Applicant's mother, a previous codefendant, in the mother's PCR. To the extent Applicant is raising these grounds as free-standing grounds entitling her to relief, this Court finds these allegations are procedurally barred by Martinez v. Ryan, 566 U.S. 1 (2012), and Robertson v. State, 418 S.C. 505, 795 S.E.2d 29, 37 (2016).

Ineffective assistance of PCR counsel is not a ground for relief nor is it a sufficient claim to warrant a successive application. The United States Supreme Court's ruling in Martinez held that attorney error amounting to ineffective assistance of counsel during an initial-review collateral proceeding may be sufficient "cause" to excuse a prisoner's procedural default in a federal habeas corpus proceeding, but has no bearing on an Applicant's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state PCR

application. The South Carolina Supreme Court in Kelly v. State has specifically held that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions. 404 S.C. 365, 745 S.E.2d 377 (2013).

Further, in Robertson v. State, 418 S.C. 505, 795 S.E.2d 29, 37 (2016), the South Carolina Supreme Court expressly declined to “create a state remedy that is the equivalent of the federal remedy established by Martinez.” Therefore, the South Carolina Supreme Court’s opinion in Aice v. State is still applicable to a claim raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (“The contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under 17-27-90.”). Aice went on to note that such a holding was in accord with the United States Supreme Court’s opinion in Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987) (finding there is no constitutional right to counsel for collateral review of a conviction). The South Carolina Supreme Court held the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). Based upon all the foregoing, the allegations concerning previous PCR counsel’s representation are denied and dismissed.

#### V. CONCLUSION

This Court finds Applicant’s allegations regarding ineffective assistance of trial counsel are time barred and improperly successive, and the United States Supreme Court decisions of Lafler and Frye do not operate to lift the time bar or successiveness bar on PCR applications. This Court also finds that Applicant failed to meet her burden of proof that her first PCR counsel was laboring under a conflict of interest during her representation of Applicant at the first PCR

hearing; therefore, Applicant cannot overcome the statute of limitations or successiveness bar through this allegation. In any event, after hearing the testimony and arguments from each side, this Court finds Counsel was not ineffective in failing to explain accomplice liability or “the hand of one is the hand of all” concept to Applicant, and as a result, this Court concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application. Additionally, this Court finds Applicant’s allegations regarding ineffective assistance of previous PCR counsel, to the extent they are raised as free-standing grounds allegedly entitling Applicant to relief, are procedurally barred in PCR. Therefore, this application post-conviction relief is successive, and it must be denied and dismissed with prejudice.


This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), Applicant has a right to appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on Applicant’s behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 21 day of November, 2017.

  
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THE HONORABLE R. SCOTT SPROUSE  
Presiding Judge  
Tenth Judicial Circuit

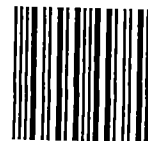
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