

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 06 2019

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case Number 2018-000096

Jennifer McSharry,.....Petitioner,

v.

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

Rule 243(c), SCACR Explanation

By letter dated January 23, 2018, this Court requested an explanation pursuant to Rule 243(c), SCACR containing “sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper” when the “circuit court determined that this action is barred as being successive and/or being untimely under the statute of limitations.” Ms. McSharry, through counsel, responds as follows:

1) Although the order of dismissal purports to find this post-conviction relief (“PCR”) action to be successive and barred by the statute of limitations, that legal conclusion is not supported by the record because the court below convened an evidentiary hearing. Attached are the State’s proposed conditional order of dismissal (Applicant’s Exhibit 1), Ms. McSharry’s response (Applicant’s Exhibit 2), and the PCR judge’s email dated January 19, 2017 denying the state’s motion for summary dismissal

(Applicant's Exhibit 3). Although the PCR judge stated at the evidentiary hearing that he would still consider the procedural bars raised by the State, the PCR action proceeded forward, and Ms. McSharry received a full evidentiary hearing where she and other witnesses testified. Therefore, Ms. McSharry's case is distinguishable from the situation where the circuit court summarily dismissed the PCR application as successive or outside the statute of limitations.

2) Additionally, this Court has long recognized that an un-waived conflict-of-interest for PCR Counsel is sufficient grounds to excuse the procedural bars. *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987).¹ Ms. McSharry's prior PCR counsel also represented Lu Rene Kelso, who is Ms. McSharry's mother and co-defendant, during her PCR proceedings. A copy of Ms. Kelso's testimony from Ms. McSharry's jury trial is attached to establish the relationship between Ms. Kelso and Ms. McSharry. Although Ms. Kelso's PCR counsel was relieved prior to the evidentiary hearing, the written order dated November 11, 2003, a copy of which is attached, required PCR counsel "to act as standby counsel and to aid [Ms. Kelso] in the preparation of her case." Ms. Kelso's PCR case proceeded to an evidentiary hearing on February 9, 2005 and the order of dismissal, a copy of which is attached, was signed on March 10, 2005. Ms. McSharry's prior PCR case proceeded to an evidentiary hearing on April 20, 2005, and the order of dismissal, a

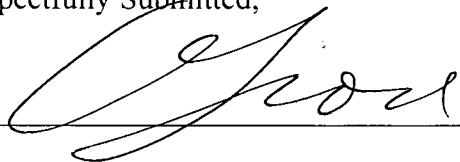
¹ Although *Carter* involved the same law firm representing the applicant at trial and during the PCR, it is difficult to imagine this Court distinguishing that situation from the current situation. This Court consistently finds sufficient cause to excuse the procedural bars in situations where the application is denied conflict free or qualified counsel. *Carter, Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999) (allowing successive PCR when applicant was denied right to counsel), and *Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016) (allowing successive PCR for applicant to challenge qualifications of prior PCR counsel in capital case).

copy of which is attached, was filed on May 9, 2005.² These orders of dismissal establish that Ms. Kelso and Ms. McSharry had the same PCR counsel. The order of dismissal denying Ms. McSharry's prior PCR application does not mention prior PCR counsel's conflict-of-interest or contain a waiver of that conflict. At Ms. McSharry's most recent evidentiary hearing on October 6, 2017, the State did not present any evidence Ms. McSharry was warned about her prior PCR counsel's conflict-of-interest or waived her prior PCR counsel's conflict-of-interest.³ *Carter* controls, and the procedural bars do not apply.

This Court, accordingly, should allow Ms. McSharry to file a petition for writ of *certiorari*.

Respectfully Submitted,

By



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Attorney for Jennifer McSharry

February 2, 2018
Greenwood, South Carolina

² Undersigned counsel's copy of the prior PCR order is missing the signature page.

³ Ms. McSharry additionally asserts that prior PCR counsel's conflict-of-interest was not waivable. See Nathan N. Crystal, "Ethics Watch: Conflict Waivers [Sic?]. A Primer," *S.C. Bar Magazine*, March 2009, pp. 8-9.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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FEB 06 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.

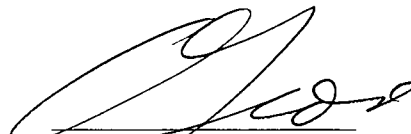
State of South Carolina,.....Respondent.

Certificate of Service

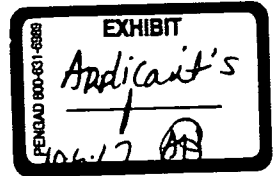
I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

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

February 2, 2018



E. Charles Grose, Jr.
The Grose Law Firm, LLC.
404 Main Street
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ALAN WILSON
ATTORNEY GENERAL

December 22, 2016

The Honorable R. Scott Sprouse
Chief Administrative Judge, 10th Circuit
P.O. Box 1277
Walhalla, SC 29691

FILED: CLERK'S OFFICE
ANDERSON SC
2017 OCT -9 AM 9:09
COMMON PLEAS AND
GENERAL SESSIONS

Re: Jennifer L. McSharry, #244026 v. State of South Carolina
2011-CP-04-1581

Dear Judge Sprouse:

Enclosed please find the original proposed **Amended Conditional Order of Dismissal** in the above-captioned case. If this Order meets your approval, please sign and forward to the Clerk's office and have her serve the order on all parties. If you have any questions, please feel free to contact me.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General

LAM/dgr
Enclosure(s)

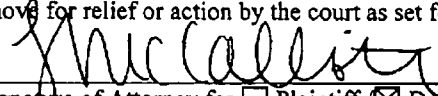
cc: E. Charles Grose, Jr., Esquire

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
 JENNIFER L. MCSHARRY, #244026)
 Plaintiff,)
 vs.)
)
 STATE OF SOUTH CAROLINA)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 TENTH JUDICIAL CIRCUIT

CASE NO: 2011-CP-04-1581

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: E. Charles Grose, Jr., Bar No. _____ Address: 404 Main Street Greenwood, SC 29646 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Lindsey A. McCallister, Bar No. _____ Address: PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> 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 <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	December 22, 2016 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ <input type="checkbox"/> EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> 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: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON)	
)	
Jennifer L. McSharry,)	Case No.: 2011-CP-04-1581
S.C.D.C. No. 244026,)	
)	
Applicant,)	
)	
v.)	AMENDED
)	CONDITIONAL ORDER OF DISMISSAL
)	
State of South Carolina)	
)	
Respondent.)	
)	

This matter comes before the Court by way of an application for post-conviction relief filed by Jennifer L. McSharry (Applicant) on May 12, 2011, with Amendments filed May 14, 2012, and November 13, 2012. Respondent made its Return, requesting the Application be summarily dismissed.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. 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 proceeded to trial before the Honorable H. Dean Hall and a jury. The jury found Applicant guilty of all charges on September 12, 1997. Judge Hall sentenced Applicant to imprisonment for concurrent terms of life for murder, 30 years each for armed robbery and burglary, and 5 years each for conspiracy and the weapons charge.

Applicant filed a timely notice of appeal, and an appeal was perfected 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 issued on January 5, 2000.

2000-GS-04-3030

Applicant filed her first application for post-conviction relief on November 14, 2000, (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 the Honorable Alexander S. Macaulay. Applicant was present at the hearing and represented by Nancy Jo Thomason, Esquire. Christopher L. Newton, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on her own behalf, and Bruce Byrholdt, Esquire, also testified. By written Order dated May 6, 2005, and filed May 9, 2005, Judge Macauley denied and dismissed the application. Applicant did not timely file a Notice of Appeal.

II. CURRENT APPLICATION

In her second and current post-conviction relief application, Applicant alleges she is being held unlawfully for the following reasons:

1. "The Eight 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."

Respondent made its Return and Motion to Dismiss on or about January 20, 2012, arguing the application should be dismissed as untimely, successive, and that Graham was inapplicable. Applicant filed a reply to Respondent's motion February 8, 2012.

By and through counsel E. Charles Grose, Jr., Esquire, Applicant amended her application by filing on May 14, 2012, then again by filing on November 13, 2012, alleging she is being held unlawfully for the following reasons:

1. "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."
2. "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)."
3. "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."
 4. "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)."

Applicant concurrently filed a "Motion to Stay Proceedings until the South Carolina Supreme Court decides *Aiken et. al. v. Byars*." 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. Applicant is proceeding with re-sentencing consistent with the ruling in Aiken and, 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, __ U.S. __, 132 S.Ct. 2455 (2012) were moot.

Also before this Court are the records of the Anderson County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's previous PCR action, and the records of this current PCR action.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Aiken v. Byars

Applicant's first allegation, that a juvenile "life without parole" sentence is unconstitutional, shall be dismissed. On November 12, 2014, the South Carolina Supreme Court held sentences of life without the possibility of parole that were imposed on juveniles violated the Eighth Amendment under Miller v. Alabama and that those individuals are entitled to resentencing pursuant to the United States Constitution. Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). The South Carolina Supreme Court specifically ordered "any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion *in the court of general sessions where he or she was originally sentenced.*" Id. at 545, 765 S.E.2d at 578 (emphasis added). Applicant has properly complied with Aiken's procedure in the court of general sessions. As such, Applicant's first allegation is not properly heard in this PCR action, and this allegation shall be summarily dismissed.

B. Failure to State a Claim – Ineffective Assistance of PCR Counsel

Applicant's allegations of ineffective assistance of PCR counsel shall be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. Applicant alleges she is entitled to relief on grounds that her prior PCR counsel was ineffective. Ineffective assistance of PCR counsel is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of her original application, she may not make successive applications based on ineffective assistance of PCR counsel. Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

Pursuant to Rule 12(b)(6), SCRPC, Applicant's claim of ineffective assistance of PCR counsel shall be dismissed for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

Austin v. State

Within her claim of ineffective assistance of PCR counsel, Applicant alleges she did not knowingly and voluntarily waive her right to appellate review of her prior PCR hearing. "The right to seek appellate review of the denial of PCR is expressly authorized by state law." Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C. Code Ann. § 17-27-100). "A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived." Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citations omitted). Even if the

PCR court determines the applicant did not freely and voluntarily waive her appellate rights, the applicant must still petition the South Carolina Supreme Court to determine “whether he was prejudiced by his failure to obtain review of a meritorious issue.” Odom, 337 S.C. at 263, 523 S.E.2d at 756 (1999).

However, in this case, the Court finds Applicant’s Austin claim should be dismissed as barred by the equitable doctrine of laches. Although the statute of limitations does not apply to Austin claims, the doctrine of laches may still bar the action. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). Requiring reasonable diligence “guards the state’s legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available.” Id. (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2nd Cir. 1979)). Where an Applicant for post-conviction relief fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of laches, which is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). “Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute laches.” Id.

Applicant seeks review of her first PCR hearing more than eleven years after its denial. Applicant has not provided any explanation or justification for the delay in seeking review of her previous post-conviction relief hearing. This Court finds that the delay affects the availability of

evidence to review Applicant's claims and prejudices Respondent. McElrath at 283, 277 S.E.2d at 890. Because of the delay, witness memories and physical evidence will have naturally faded and degraded. *See, e.g., Bray*, 366 S.C. at 140, 620 S.E.2d at 745 (affirming PCR judge's ruling that laches barred belated review of denial of PCR seven years after PCR hearing was held). Moreover, because of Applicant's failure to timely challenge her conviction, the tape recordings of Applicant's PCR hearing have likely been destroyed. *See* Rule 607, SCACR ("[A] court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five years . . . and the court reporter may reuse or destroy the tapes after the expiration of that period."); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for reconstruction of record noting such remedy "would undoubtedly be futile considering the passage of over ten years' time" when the delay was caused by appellant). As a result, Applicant's delay in bringing this action has affected the availability of evidence for this Court to review her claims and has prejudiced Respondent in its ability to defend against such claims.

Therefore, Applicant's allegation pursuant to Austin v. State shall be summarily dismissed as barred by the equitable doctrine of laches.

C. Statute of Limitations

This Court finds that all of Applicant's remaining claims should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the Act requires as follows:

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. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was convicted on September 12, 1997, and the Remittitur from direct appeal issued on January 5, 2000. The current application was not filed until May 12, 2011 – well after the one-year statutory filing period expired. Therefore, this Court finds that the Application should be summarily dismissed as barred by the statute of limitations.

D. Successive

This Court finds that all of Applicant’s remaining claims should be summarily dismissed because they are successive to Applicant’s previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant relies on the U.S. Supreme Court cases of Missouri v. Frye, 132 S.Ct. 1399, 1408 (2012), and Lafler v. Cooper, 132 S.Ct. 1376, 1391 (2012), to support her argument that trial counsel was ineffective with respect to plea negotiations. However, these cases were decided in 2012, fifteen years after Applicant's original conviction, and Applicant has not made any showing that those cases were intended to apply retroactively. This Court declines to make such a finding. Although no South Carolina court has passed on this exact issue, courts within the Fourth Circuit and elsewhere have repeatedly declined to apply Lafler and Frye retroactively, holding that they do not pronounce a new constitutional rule. *See, e.g., 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)); 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.”).

Additionally, ineffective assistance of PCR counsel is not a ground for relief and not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of her original application, including an appeal, she may not make successive applications based on ineffective assistance of PCR counsel. Aice, 305 S.C. at 452, 409 S.E.2d at 395.

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)). The court also noted, “[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” Id. at 451, 409 S.E.2d at 395. Aice further held that “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ allowing for a successive PCR application under § 17-27-90.” Id. at 452, 409 S.E.2d at 394.

This Court finds that Applicant’s current allegations, except for her claims regarding ineffective assistance of PCR counsel which shall be dismissed on other grounds, were or could have been raised in the proceedings based on Applicant’s prior applications for post-conviction relief. The U.S. Supreme Court decisions of Lafler v. Frye and Missouri v. Cooper are not retroactive and do not constitute “sufficient reason” to allow Applicant to make successive claims of ineffective assistance of trial counsel. Further, this Court finds Applicant’s contention

that prior PCR counsel was ineffective is not a sufficient reason warranting a successive PCR application. Thus, this Court finds the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why she could not have raised her current allegations in her previous applications for post-conviction relief. She has failed to meet the burden imposed upon her, and this Court shall summarily dismiss the Application as successive to Applicant's previous PCR application.

E. Res Judicata

This Court finds that Applicant's second and third allegations are similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; *see also* Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all her allegations of ineffective assistance of trial counsel in her prior action. The finality of the previous Court rulings should be respected. Therefore, the Application shall be summarily dismissed as barred by the doctrine of *res judicata*.

CONCLUSION

Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss this Application with prejudice unless Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon her to show why this Order should not become final. Applicant,

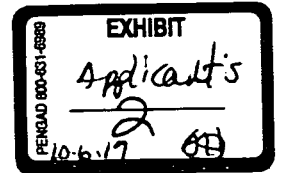
through her attorney, shall file any reasons she may have with the Anderson County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division
Attn: Lindsey A. McCallister, Esquire
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this _____ day of _____, 2016.

R. SCOTT SPROUSE
Chief Administrative Judge
Tenth Judicial Circuit

_____, South Carolina



The Grose Law Firm, LLC
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

December 27, 2016

Via email and US Mail

The Honorable R. Scott Sprouse
P.O. Box 1277
Walhalla, SC 29691

Re: *Jennifer L. McSharry v. State of South Carolina*
Case Number: 2011-CP-04-01581

FILED-CLERK'S OFFICE
ANDERSON SC
2017 OCT -9 AM 9: 09
COMMON PLEAS AND
GENERAL SESSIONS

Judge Sprouse:

By letters dated December 22, 2016, the State served its Amended Return and Motion to Dismiss and proposed Conditional Order of Dismissal. Pursuant to *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992) ("opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order"), Ms. McSharry objects to the proposed order.

As a threshold matter, Mr. McSharry agrees that her claims under *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012) are moot because of our Supreme Court's opinion in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), in which Ms. McSharry was one of the petitioners. Indeed, Ms. McSharry took this position in her status letter dated September 1, 2015, a copy of which is enclosed. Additionally, her re-sentencing is scheduled to occur before Your Honor on February 10, 2017.

In addition to the re-sentencing issue, Ms. McSharry's Second Amended Application for Post-Conviction Relief ("PCR") raises two issues regarding her trial counsel's failure to adequately advise her to accept the State's offer to plead guilty. Please allow me to elaborate.

First, Ms. McSharry asserts that *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012) are constitutionally binding decisions that entitle her to relief. The proposed conditional order of dismissal, relying on *In re Graham*, 714 F.3d 1181 (10th Cir. 2013), concludes that these cases do not apply retroactively because "they do not pronounce a new constitutional rule." Proposed order, p. 10. Other courts have reached a different conclusion. See e.g. *Winward v. Utah*, 792 Utah Adv. Rep. 51, 355 P.3d 1022 (2015) "we cannot conclude that *Lafler* and *Frye*

merely applied the principles of old cases to new facts"). Although *Winward* did not grant relief based on its interpretation of the Utah post-conviction relief statute, our state's statute is worded differently and provides for relief S.C. Code Ann. § 17-27-45(B).

Second, the Second Amended PCR Application alleges deficient performance by Ms. McSharry's initial PCR counsel for not assisting Ms. McSharry amend her PCR application to include trial counsel's failure to adequately advise her about accepting the guilty plea. If the State is correct that *Lafler* and *Frye* did not create a new constitutionally binding decision, then this Court must examine that failure under our state's procedures that allow for a successive application for post-conviction relief. In *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982), our Supreme Court held that a "unique" combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR proceeding. In *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), our Supreme Court allowed a successive PCR where initial PCR counsel was the same as trial counsel, *i.e.* due to the conflict of interest where trial counsel cannot raise ineffective assistance of trial counsel. More recently, in *Robertson v. State*, (S.C. S. Ct. Op. No. 27691) (filed December 14, 2016), our Supreme Court remanded for a determination of whether Robertson could establish prejudice under *Strickland*¹ resulting from initial PCR counsel not meeting the statutory qualifications to serve as counsel in a capital post-conviction relief case. Here, Ms. McSharry's initial PCR counsel operated under an actual, non-waivable conflict of interest. Ms. McSharry's PCR counsel has previously served as PCR counsel for Ms. McSharry's mother and co-defendant, Lu Rene Kelso.² Ms. McSharry and Ms. Kelso could not have been more adverse. Ms. Keso introduced Ms. McSharry to street drugs as a child and was the master-mind of the crimes for which both were ultimately convicted. Because of PCR counsel's initial conflict, Ms. McSharry did not receive her "one bite at the apple." *Odem v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (citing *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991)). This Court, therefore, should convene an evidentiary hearing to determine whether Ms. McSharry was prejudiced by initial PCR counsel's conflict of interest.

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

² "A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." *Freeman v. McAbee*, 280 S.C. 490, 313 S.E.2d 325 (1984). See *Kelso v. State*, Anderson County Case No. 2000-CP-04-02188, which can be found on the S.C. Judicial Department's Public Index at <http://publicindex.sccourts.org/Anderson/PublicIndex/CaseDetails.aspx?County=04&CourtAgency=04002&Casenum=2000CP0402188&CaseType=V&HKey=525275651071026987701021091077477114112516887105375098868637509889375010280835411053853750102865011910089120103517065>, with final disposition date of March 10, 2005. According to the order of dismissal, the evidentiary hearing is Ms. McSharry's initial PCR occurred on April 20, 2015.

By copy of this letter to Ms. McCallister, I am advising the State of this communication. I am also providing a copy to Ms. Huey as this letter references Ms. McSharry's re-sentencing hearing.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide more information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Ms. Jennifer McSharry
The Honorable Richard A. Shirley
Lindsey A. McCallister, Esquire (via email and US Mail)
Catherine T. Huey, Esquire (via email and US Mail)

Subject: McSharry v. State 2011CP0401581
Date: Thursday, January 19, 2017 at 2:59:50 PM Eastern Standard Time
From: Sprouse, R. Scott Law Clerk (Mary G. Holahan)
To: Lindsey McCallister (LMcCallister@scag.gov), Charles Grose



Mr. Grose and Ms. McCallister,

After reviewing the proposed Conditional Order of Dismissal for the above-referenced case, Judge Sprouse has decided to deny the motion and to set a hearing date for the PCR hearing. Judge Sprouse will preside over Ms. McSharry's resentencing hearing pursuant to Aiken v. Byars on February 10, 2017 in Oconee County. If both sides are able to arrange for the necessary parties to be there by then, the PCR hearing could take place after resentencing. If that does not allow for enough time, the hearing should be set during the next PCR term which begins February 27, 2017.

Let me know which dates are more agreeable.

Best,

Mary G. Holahan
Law Clerk to the Honorable R. Scott Sprouse
South Carolina 10th Judicial Circuit Court
P.O. Box 1277, Walhalla, SC 29691
rssprouselc@sccourts.org
Office: 864.638.4266 - Facsimile: 864.638.4267
Direct Line: 864.916.7308

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ANDERSON SC
2017 OCT -9 AM 9: 09
COMMON PLEAS AND
GENERAL SESSIONS

1 THE RECORD.

2 MS. KELSO: MY NAME IS LOU RENEE KELSO,
3 K-E-L-S-O.

4
5 DIRECT EXAMINATION BY

6 MR. BYRHOLDT:

7 Q MS. KELSO, I'M GOING TO ASK YOU TO SPEAK UP SO THIS
8 LAST GENTLEMAN IN THE JURY BOX CAN HEAR YOU.

9 MS. WHITE: YOUR HONOR, MAY WE APPROACH THE
10 BENCH?

11 THE COURT: YES.

12 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN
13 THE PRESENCE OF BUT OUT OF THE HEARING OF
14 THE JURY AND THE COURT REPORTER)

15 Q MS. KELSO, YOU ARE CURRENTLY HOUSED AT THE WOMEN'S
16 CORRECTIONAL INSTITUTE?

17 A YES, I AM.

18 Q YOU HAVE BEEN CONVICTED ON CERTAIN CHARGES, IS THAT
19 TRUE?

20 A YES, SIR.

21 Q AND YOUR CASE IS CURRENTLY ON APPEAL?

22 A YES, IT IS.

23 Q DO YOU UNDERSTAND THAT ANY - THAT YOU HAVE BEEN SWORN
24 TO TELL THE TRUTH AND THAT ANY TESTIMONY YOU GIVE
25 TODAY COULD BE USED AGAINST YOU IF YOUR CONVICTIONS

1 WERE OVERTURNED AND YOU WERE GRANTED A NEW TRIAL? DO
2 YOU UNDERSTAND THAT?

3 A YES, I DO.

4 Q IS IT YOUR INTENTION TODAY TO INVOKE YOUR FIFTH
5 AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION?

6 A NO, IT ISN'T.

7 Q YOU WERE CONVICTED IN A TRIAL, I BELIEVE IN THIS
8 COURTROOM?

9 A YES.

10 Q ON THE CHARGES OF MURDER?

11 A YES.

12 Q BURGLARY FIRST DEGREE?

13 A YES.

14 Q ARMED ROBBERY?

15 A YES.

16 Q CONSPIRACY?

17 A YES.

18 Q AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A
19 CRIME?

20 A CORRECT.

21 Q THE SAME CHARGES FOR WHICH YOUR DAUGHTER IS ON TRIAL
22 THIS WEEK?

23 A YES, SIR.

24 Q THE DAYS PRIOR TO LEAVING GEORGIA ON NOVEMBER 17TH,
25 1996, LAST YEAR, WHO HAD BEEN LIVING AT YOUR

1 RESIDENCE?

2 A MY CHILDREN. I HAVE THREE CHILDREN. AND MY BROTHER.
3 AND JENNIFER TITMAN.

4 Q COULD YOU SPEAK UP? I'M SORRY.

5 A OKAY. MY THREE CHILDREN.

6 Q AND THAT WOULD BE JENNIFER?

7 A AND JAMEY AND JEFFREY.

8 Q AND YOU HAVE A SON?

9 A YES.

10 Q AND JENNIFER TITMAN?

11 A AND JENNIFER TITMAN.

12 Q AND YOUR BROTHER?

13 A AND MY BROTHER.

14 Q DURING THE WEEK PRIOR TO NOVEMBER 17TH, OR INCLUDING
15 THAT WEEK, WERE YOU ENGAGED IN THE USE OF ILLEGAL
16 DRUGS, INCLUDING MARIJUANA AND COCAINE?

17 A YES, I WAS.

18 Q WAS YOUR DAUGHTER, LIKEWISE, USING ILLEGAL DRUGS?

19 A YES, SHE WAS.

20 Q IN YOUR HOME?

21 A YES, SHE WAS.

22 Q ON THE NIGHT OF THE INCIDENT OR THE NIGHT PRIOR,
23 STARTING THE NIGHT OF THE 16TH, INTO THE MORNING OF
24 THE 17TH, CAN YOU DESCRIBE TO THE JURY THE CONDITION
25 THAT YOU OBSERVED YOUR DAUGHTER IN?

- 1 A I DON'T THINK THAT HER AND JENNIFER WERE - I DON'T
2 THINK ANY OF US WERE REALLY - I KNOW WE WERE OUT FOR
3 DAYS. WE HAD BEEN GOING THROUGH A WHOLE LOT IN OUR
4 LIVES AT THAT POINT, AND IT SEEMED LIKE DRUGS WERE
5 VERY HEAVY IN OUR LIVES. I WAS DEALING COCAINE AT THE
6 TIME.
- 7 Q FOR THE DAYS PRIOR TO THAT, WERE YOU EATING REGULARLY?
- 8 A NO.
- 9 Q WERE YOU SLEEPING REGULARLY?
- 10 A NO.
- 11 Q WHAT WAS -
- 12 A NOTHING WAS NORMAL. WE DIDN'T HAVE A NORMAL LIFE, NO.
- 13 Q WHAT WERE YOU, JENNIFER TITMAN, AND YOUR DAUGHTER
14 JENNIFER MCSHARRY DOING?
- 15 A PRETTY MUCH SNORTING COCAINE.
- 16 Q LATE THE EVENING OF THE 16TH AND THE MORNING OF THE
17 17TH, DID YOU TALK TO YOUR DAUGHTER ABOUT GOING TO
18 SOUTH CAROLINA?
- 19 A I'D ALREADY THOUGHT ABOUT IT, AND I HAD TOLD HER THAT
20 I WAS GOING TO GO AND GET SOME MONEY THAT WAS OWED TO
21 ME.
- 22 Q AND IF YOU WOULD, TELL THE JURY WHAT YOU TOLD YOUR
23 DAUGHTER WAS GOING TO HAPPEN.
- 24 A I TOLD HER THAT I WAS GOING TO GO THERE AND WE DIDN'T
25 REALLY TALK A WHOLE LOT UNTIL WE WERE IN THE CAR

1 GOING, REALLY, OTHER THAN WE WERE JUST GOING TO GO
2 THERE AND GET SOME MONEY THAT WAS OWED TO ME BY MELVIN
3 MILLER, AND ON THE WAY DOWN THERE IS WHEN I TOLD
4 JENNIFER, MY DAUGHTER AND JENNIFER TITMAN THAT WHEN WE
5 GO THERE, I HAD HAD A WARRANT OUT FOR MY ARREST FOR
6 SOME REASON. I WAS SCARED TO GO DURING THE DAY
7 BECAUSE CALVIN MOORE, THE POLICE OFFICER, HAD KNOWN ME
8 VERY WELL AND COULD SPOT ME JUST LIKE ANYTHING.

9 AND I WAS AFRAID OF, BELIEVE IT OR NOT, BOUNCED
10 CHECKS. SO WE WENT AT NIGHT. THAT'S WHY WE WENT AT
11 NIGHT.

12 AND I HAD MADE THE COMMENT THAT WHEN WE GOT DOWN
13 THERE THAT I WOULD WANT THEM TO GO AND KNOCK ON THE
14 DOOR AND WAKE HIM UP AND SEE IF HE WAS ALONE, ASK TO
15 USE THE PHONE, JUST TO MAKE AN EXCUSE TO BE THERE, TO
16 SAY THAT WE WERE LOST OR SOMETHING LIKE THAT.

17 Q AND THAT WAS WHAT YOU ASKED YOUR DAUGHTER?

18 MS. WHITE: OBJECTION, LEADING. THIS IS HIS
19 WITNESS.

20 A YES.

21 Q IS THAT OR IS THAT NOT WHAT YOU ASKED YOUR DAUGHTER
22 JENNIFER AND JENNIFER TITMAN TO DO?

23 A THAT'S WHAT I DID ASK THEM TO DO.

24 Q DID YOU ASK THEM TO DO ANYTHING ELSE?

25 A NO.

- 1 Q APPARENTLY AT SOME TIME, YOUR DAUGHTER LEFT THE
2 RESIDENCE. DID YOU GO IN?
- 3 A I - THINGS WERE KIND OF HAZY AT THAT TIME. AS FAR AS I
4 KNOW THEY WERE NOT IN THERE WHEN I FINALLY DID GET IN
5 THERE, RONNIE AND JASON WERE BOTH IN THERE ALREADY. I
6 WAS THE LAST ONE TO ENTER.
- 7 Q WHEN YOU WENT IN THERE, MR. MILLER WAS IN THERE?
- 8 A YES.
- 9 Q YOU WERE IN THERE?
- 10 A YES.
- 11 Q BY BEING IN THERE, IN THE TRAILER?
- 12 A YES.
- 13 Q RONNIE AND JASON?
- 14 A THAT'S CORRECT.
- 15 Q WERE ANY OF YOU INJURED AT THAT POINT?
- 16 A NO.
- 17 Q DID AN ALTERCATION TAKE PLACE?
- 18 A YES, IT DID.
- 19 Q WERE YOU INJURED?
- 20 A YES, I WAS.
- 21 Q HOW WERE YOU INJURED?
- 22 A I WAS SHOT IN THE HAND WHEN I WENT TO GO REACH FOR THE
23 GUN.
- 24 Q WAS YOUR SHOOTING, DO YOU THINK YOUR SHOOTING WAS,
25 FROM WHAT YOU SAW, ON PURPOSE OR ACCIDENTAL?

- 1 A I'LL BE HONEST WITH YOU, MR. BYRHOLDT, I'M NOT REALLY
2 SURE. AT THAT TIME, IT WAS FAST. I WENT TO REACH FOR
3 THE GUN. IT HAD GOTTEN OUT OF HAND. IT WAS NOT WHAT
4 I HAD PLANNED TO DO AND EVERYTHING GOT TOO FAST OUT OF
5 HAND AND WHAT I MEAN BY THAT IS WHEN I WENT TO GO GET
6 THE GUN, IT WAS A CLOSE RANGE BETWEEN RONNIE AND MEL
7 AT THE TIME, AND I WAS RIGHT IN BETWEEN THEM.
- 8 Q WHY WERE THEY AT CLOSE RANGE?
- 9 A THE CAMPER WAS VERY SMALL.
- 10 Q WAS THERE A STRUGGLE BETWEEN THE TWO OF THEM?
- 11 A NO, NOT AT THAT TIME, THERE WASN'T. WHEN I WENT TO
12 GET THE GUN, IT SEEMED, RIGHT WHEN I WENT TO REACH FOR
13 THE GUN, THE GUN WENT OFF AND IT HIT MY HAND, WENT
14 THROUGH MY HAND.
- 15 Q ALL RIGHT.
- 16 A THEN I TURNED AROUND. THINGS WERE - I MEAN, I DIDN'T
17 PASS OUT, BUT THINGS WERE KIND OF FOGGY AND I TURNED
18 AROUND AND I HEARD TWO SHOTS. WHEN I TURNED BACK
19 AROUND THERE WAS NOBODY IN THE CAMPER.
- 20 Q DID YOU SEE THOSE SHOTS?
- 21 A NO, SIR.
- 22 Q DID YOU HEAR ANY STRUGGLING GOING ON?
- 23 A NO, SIR.
- 24 Q BETWEEN MR. MILLER AND THE PERSON WITH THE GUN?
- 25 A NO, SIR.

1 Q YOU SAW NO STRUGGLE?

2 A I SAW NOTHING. LIKE I SAID, WHEN I GOT SHOT, I TURNED
3 AROUND JUST OUT OF, I BELIEVE, INSTINCTS OR, I'M NOT
4 SURE. BUT WHEN THE GUN HIT ME, WHEN I GOT SHOT, I
5 JUST TURNED AROUND, AND WHEN I TURNED AROUND, THAT'S
6 WHEN IT SEEMED LIKE, WITHIN SECONDS - I'M SURE IT WAS
7 LONGER THAN THAT NOW - BUT WHEN I DID TURN BACK AROUND
8 THERE WAS NOBODY THERE. I HEARD TWO GUNSHOTS. I DID
9 NOT KNOW WHO WAS GOING TO COME BACK THROUGH THE CAMPER
10 OR IF IT WAS GOING TO BE RONNIE OR IF IT WAS GOING TO
11 BE MELVIN.

12 Q DID YOU HEAR ANY WORDS OF ANGER PASS BETWEEN RONNIE
13 AND MELVIN, EITHER WAY?

14 A NO, SIR.

15 Q WHO PUT THIS GROUP TOGETHER?

16 A IT WASN'T REALLY PUT TOGETHER. IT WAS ACTUALLY I
17 WANTED JENNIFER TITMAN TO COME BECAUSE I DIDN'T WANT
18 TO BE IN SOUTH CAROLINA WITHOUT - WITH ME DRIVING. I
19 WANTED ANOTHER DRIVER. BECAUSE LIKE I SAY, YOU KNOW,
20 I HAVE WARRANTS HERE. I WAS DEATHLY AFRAID OF BEING
21 LOCKED UP.

22 Q WAS THERE OR WAS THERE NOT AN AGREEMENT BETWEEN YOU,
23 YOUR DAUGHTER, RONNIE, JASON, AND/OR JENNIFER TO
24 ENGAGE IN ANY ILLEGAL ACTIVITY?

25 A WAS THERE AN AGREEMENT? NO, SIR.

1 Q DID YOU USE YOUR DAUGHTER TO GAIN ENTRANCE INTO MR.
2 MILLER'S HOME TO ROB HIM?

3 A NO, SIR. I DID USE MY DAUGHTER, I CAN SAY THAT. I
4 DIDN'T MEAN TO USE HER LIKE THAT, BUT I DID USE HER.

5 Q AND ON THE TRIP UP FROM GEORGIA TO SOUTH CAROLINA,
6 WHAT KIND OF CONDITION WAS SHE IN?

7 A STONED, LOADED.

8 Q DID SHE HALLUCINATE?

9 A YEAH. SHE TOLD ME THE NEXT DAY WHEN I WAS IN THE
10 HOSPITAL, SHE WAS THERE WITH ME. HER AND JENNIFER
11 TITMAN BOTH HAD TOLD ME THAT THEY HAD SEEN MEN JUMPING
12 OUT OF THE FREEWAY IN LITTLE THINGS AND THEY SAID THAT
13 THEY HAD SEEN QUITE A BIT. THAT THEY WERE
14 HALLUCINATING.

15 MR. BYRHOLDT: BEG THE COURT'S INDULGENCE.
16 (PAUSE).

17 Q LET ME HAND YOU WHAT'S BEEN MARKED INTO EVIDENCE AS
18 STATE'S EXHIBIT NUMBER 2 AND STATE'S EXHIBIT NUMBER 3
19 AND ASK YOU IF THOSE ITEMS BELONG TO YOU?

20 A YES, THEY DO.

21 Q AND, MS. KELSO, DID YOU ASK YOUR DAUGHTER TO GO TO
22 SOUTH CAROLINA WITH YOU THAT NIGHT?

23 A YES, I DID.

24 Q DID YOU ASK HER TO CHECK ON MR. MILLER IN THE HOUSE?

25 A YES, SIR.

1 Q AND WAS THERE EVER AN AGREEMENT TO ROB ANYBODY THAT
2 THIS LADY KNEW ABOUT?

3 A NO, THERE WASN'T. I WASN'T GOING TO ROB ANYBODY. THE
4 MAN OWED ME MONEY.

5 Q ON NOVEMBER 17TH OF 1996, MS. KELSO, WHAT KIND OF
6 MOTHER WERE YOU BEING?

7 A NOT A VERY GOOD ONE, SIR, NOT AT ALL.

8 Q WILL YOU ANSWER ANY QUESTIONS MS. WHITE OR JUDGE HALL
9 MAY HAVE FOR YOU?

10

11

CROSS EXAMINATION BY

12

MS. WHITE:

13

Q COCAINE IS NOT AN HALLUCINOGENIC DRUG, IS IT?

14

A I'M NOT REALLY SURE. I'M NOT A PHARMACIST.

15

Q WELL, WOULDN'T YOU THINK IT WAS A LITTLE UNUSUAL THAT
16 TWO PEOPLE ON THE SAME DRUG WOULD HAVE THE SAME
17 HALLUCINATION?

18

A I'M NOT REALLY SURE.

19

Q YOU SAID THERE WAS NO PLAN TO COMMIT A ROBBERY, IS
20 THAT CORRECT?

21

A NO, THERE WAS NO PLAN.

22

Q IF THERE WAS NO PLAN TO COMMIT A ROBBERY, MA'AM, WHY
23 DID YOU AND MR. JORDAN AND JASON GET OUT OF THE CAR
24 AND HAVE THE TWO YOUNG GIRLS DRIVE UP IN THE MIDDLE OF
25 THE NIGHT TO THE VICTIM'S HOUSE?

1 A I DON'T REMEMBER IT LIKE THAT.

2 Q WELL, WHY DID YOU TAKE OFF YOUR SHOES THAT MAKE NOISE?

3 A THEY WERE HURTING ME. THAT'S WHY I TOOK MY SHOES OFF.

4 Q SO YOU LEFT THEM BEHIND THE VICTIM'S CAR?

5 A YEAH.

6 Q WELL, WHY DIDN'T YOU JUST WALK UP TO YOUR CAR THAT WAS
7 PARKED RIGHT THERE?

8 A THEY WERE RIGHT NEXT TO EACH OTHER.

9 Q I'M SORRY?

10 A THEY WERE RIGHT NEXT TO EACH OTHER.

11 Q WELL, I KNOW. THAT'S MY POINT.

12 A I DON'T KNOW.

13 Q WHY DIDN'T YOU JUST WALK UP? WHY WOULD YOU LEAVE THEM
14 IN THE PITCH DARK BEHIND SOMEONE'S CAR? WAS IT
15 BECAUSE YOU WERE AFRAID THE VICTIM WOULD SEE YOU?

16 A NO.

17 Q NO, IT WASN'T BECAUSE OF THAT?

18 A NO.

19 Q WELL, WHY DID YOU CUT HOLES IN THE STOCKING MASK ON
20 THE WAY UP THERE?

21 A I DIDN'T HAVE A SKI MASK.

22 Q I'M SORRY?

23 A I SAID I DIDN'T HAVE A SKI MASK.

24 Q WELL, WHY IS IT THAT RON JORDAN HAD A GUN OUT ON THE
25 WAY UP THERE?

- 1 A I NEVER SAW THE GUN.
- 2 Q ARE YOU AWARE THAT DURING THE INVESTIGATION, ALL OTHER
- 3 FOUR DEFENDANTS GAVE FULL STATEMENTS?
- 4 A I GUESS SO.
- 5 Q AND YOU DENY -
- 6 A I THINK, I'M NOT REALLY SURE.
- 7 Q - THAT RON JORDAN AND THE OTHERS -
- 8 A EXCUSE ME?
- 9 Q WELL, WHY WOULD YOU GO TO COLLECT MONEY AT THREE A.M.?
- 10 A LIKE I SAID, IT WAS LATE WHEN WE LEFT OUT ANYWAY, BUT
- 11 I WAS GOING AT NIGHT BECAUSE I DIDN'T WANT TO BE SEEN
- 12 DURING THE DAY.
- 13 Q WELL, WHY DIDN'T YOU KNOCK ON THE DOOR AND SAY,
- 14 'WHERE'S MY MONEY?'
- 15 A WELL, BECAUSE I HAD MADE A FEW PEOPLE MAD THERE BY
- 16 CUTTING THEM OFF FROM COCAINE, AND A LOT OF PEOPLE
- 17 WERE MAD AND A LOT OF PEOPLE TURN ON YOU, AND I WASN'T
- 18 REALLY SURE WHETHER HE HAD COMPANY OR IF HE DIDN'T
- 19 HAVE COMPANY.
- 20 Q WELL, A LOT OF PEOPLE WEREN'T OUT AT HIS HOUSE.
- 21 A WELL, A LOT OF TIMES THERE ARE.
- 22 Q AND SO HE HAD A PHONE. WHY DIDN'T YOU JUST CALL HIM
- 23 AND TELL HIM?
- 24 A I TRIED TO CALL HIM AT ONE TIME.
- 25 Q WELL, WHY DID Y'ALL CUT THE LINE?

1 A I DIDN'T KNOW THAT THERE WAS A LINE CUT.

2 Q BUT YOU WERE JUST GOING TO GO GET THIS MONEY?

3 A YES, MA'AM.

4 Q WHY DID YOU HAPPEN TO PICK THE TWO PEOPLE OUT OF THE
5 FIVE THAT WERE THE YOUNG FEMALES THAT WOULD BE LEAST
6 SUSPICIOUS?

7 A I DIDN'T REALLY PICK ANYBODY LIKE THAT. IT WAS NOT
8 LIKE THAT.

9 Q DO YOU REMEMBER GETTING RONNIE JORDAN AND TELLING MR.
10 JORDAN THAT YOU NEED A CRIME PARTNER?

11 A NO. I CAN COMMIT A LOT OF CRIMES IN ATLANTA, GEORGIA,
12 IF THAT WAS THE CASE.

13 Q DO YOU REMEMBER TELLING RONNIE JORDAN THAT YOU NEEDED
14 TO DO THIS BECAUSE A GUY OWED YOU MONEY AND HE
15 DESERVED TO DIE?

16 A NOT AT ALL. THAT'S A LIE.

17 Q YOU CHANGED CARS SO THAT THE POLICE WOULDN'T PULL YOU
18 OVER FOR THE TAIL LIGHT, DIDN'T YOU?

19 A THAT'S NOT TRUE.

20 Q WHY DID YOU CHANGE CARS?

21 A IT WAS THE HEADLIGHT WAS OUT.

22 Q AND YOU CHANGED CARS SO YOU WOULDN'T GET PULLED OVER
23 BY THE POLICE, DIDN'T YOU?

24 A I CHANGED CARS BECAUSE THE HEADLIGHT WAS BROKE OUT.
25 THE LIGHT BEAMS WAY OUT. YOU CAN'T DRIVE WITHOUT

1 HEADLIGHTS.

2 Q IF YOU WEREN'T PLANNING ON COMING UP HERE AND
3 COMMITTING A CRIME, WHY DIDN'T YOU JUST TELL YOUR
4 FRIEND FROM WHOM YOU BORROWED THE CAR WHERE YOU WERE
5 GOING?

6 A I DON'T REMEMBER THAT I DIDN'T.

7 Q WHY DID YOU TELL HER YOU WERE GOING SHOPPING INSTEAD
8 OF SAYING YOU WERE COMING TO BORROW SOME MONEY?

9 A I DON'T REMEMBER TELLING HER THAT.

10 Q AND WHILE YOU WERE DRIVING, YOU GOT A SKI MASK OUT AND
11 CUT HOLES, ISN'T THAT RIGHT?

12 A WHILE I WAS DRIVING, NO, MA'AM.

13 Q DIDN'T YOU DO THAT IN FRONT OF RONNIE JORDAN?

14 A NO, MA'AM.

15 Q NOW, WHEN YOU ALL CAME IN AND YOU SAID YOU WERE THE
16 THIRD IN, ISN'T THAT TRUE?

17 A WELL, I WAS THE LAST ONE TO COME INTO THE TRAILER.

18 Q AND AT THAT POINT, RONNIE JORDAN HAD THE GUN TO MR.
19 MILLER'S HEAD, IS THAT CORRECT?

20 A HE HAD THE GUN TO HIM. I DON'T REMEMBER IT BEING TO
21 HIS HEAD.

22 Q AND HE AND JASON WERE PILFERING AROUND IN THE TRAILER?

23 A NO.

24 Q AND YOU DID, TOO, DIDN'T YOU?

25 A NO, THAT'S NOT TRUE. IT WAS JASON THAT WAS DOING THE

1 PILFERING IN THE TRAILER.

2 Q AND YOU TOLD HIM TO GO TO THE NEXT TRAILER AS WELL?

3 A THAT'S NOT TRUE.

4 Q TO MAKE SURE NO ONE WAS THERE, ISN'T THAT CORRECT?

5 A THAT'S NOT TRUE.

6 Q DO YOU DENY THAT?

7 A I DENY THAT.

8 Q OH, WELL, OKAY. ONCE YOU REALIZED THAT IT WAS AN
9 ARMED ROBBERY, WHY DO YOU FIGURE THAT THEY DECIDED TO
10 DO AN ARMED ROBBERY WITHOUT TELLING YOU ABOUT THIS?

11 A I DON'T THINK THAT THERE WAS A DECISION PROCESS BEING
12 MADE AT ALL. I THINK, MS. WHITE, THAT THINGS GOT OUT
13 OF HAND REALLY FAST. I DON'T THINK IT WAS A PLANNED
14 ROBBERY. I DON'T THINK IT'S ANYTHING LIKE YOU'RE
15 SAYING IT WAS LIKE, NO, MA'AM.

16 Q SO YOU JUST HAPPENED TO PUT A SKI MASK ON BECAUSE -

17 A AS I SAID, I DIDN'T HAPPEN TO DO ANY OF THAT. IT
18 WASN'T LIKE THAT.

19 Q WHY DID RONNIE JORDAN, THOUGH HE HAD NEVER MET THIS
20 MAN AND DIDN'T KNOW WHERE HE LIVED, WHY WOULD HE JUST
21 HAPPEN TO PULL OUT A GUN AND RUN IN SCREAMING ABOUT A
22 ROBBERY?

23 A I'M NOT SURE. I'M NOT REALLY SURE. THAT'S NOT EVEN
24 TRUE. I WAS THERE. AND THAT'S NOT TRUE, WHAT YOU'RE
25 SAYING. I CAN TELL YOU THAT MUCH.

1 Q OH, IT'S NOT TRUE?

2 A IT'S NOT TRUE THAT HE WAS YELLING ROBBERY. I BELIEVE
3 THE BOY THOUGHT AT THAT TIME HE WAS DOING ME A FAVOR.
4 I'M NOT REALLY SURE, TO BE HONEST WITH YOU.

5 Q WHY DO YOU THINK HE WOULD BE DOING YOU A FAVOR BY
6 ROBBING SOMEONE?

7 A I'M NOT SURE. I DON'T SEE THE ROBBERY PART IN THERE,
8 BUT I THINK THAT DEMANDING THE MONEY PART WAS.

9 Q AND NOW, AS YOU ALL WERE TRYING TO GET HIM TO GO TO AN
10 A.T.M. MACHINE, THAT'S WHEN THE VICTIM BEGAN
11 STRUGGLING, DIDN'T HE, WHEN HE SAW THE CAR OUT THERE
12 AND SAW THESE PEOPLE?

13 A NO, MA'AM.

14 Q AS HE STEPPED OUT THE DOOR, THAT'S WHEN IT BEGAN,
15 DIDN'T IT?

16 A NO, MA'AM.

17 Q AND AT THAT POINT, YOU WERE THE ONE HOLDING HIS ARM
18 BACK?

19 A NO, MA'AM, I NEVER TOUCHED MELVIN MILLER AT ALL.
20 NEVER.

21 Q WHEN HE WAS STRUGGLING FOR THE GUN?

22 A NO, MA'AM.

23 Q YOU NEVER FORCED HIS OWN ARM BEHIND HIS BACK?

24 A NO, MA'AM. IT WAS ME THAT WAS GOING FOR THE GUN, NOT
25 HIM.

- 1 Q AND IN FACT, AFTER THE SHOOTING, YOU RAN INTO THE CAR,
2 DIDN'T YOU, AND SAID THAT YOU WERE GLAD HE HAD BEEN
3 SHOT, HE DESERVED IT?
- 4 A THAT'S NOT TRUE. THAT IS NOT TRUE.
- 5 Q BECAUSE HE WOULDN'T GIVE YOU THE MONEY?
- 6 A THAT IS NOT TRUE. ABSOLUTELY NOT. I HAVE NO REASON
7 TO LIE HERE TODAY. I'VE GOT TWO HUNDRED AND FORTY-
8 FIVE YEARS, MS. WHITE, AND I'M NOT GOING TO BURN IN
9 HELL, SO I'M NOT GOING TO SIT UP HERE AND LIE TO YOU
10 OR THIS JURY OR ANYONE ELSE.
- 11 Q YOU HAVE -
- 12 A I'M ALREADY SOMEWHERE I'D REALLY RATHER NOT BE.
- 13 Q NOW, AFTER THAT, YOU WENT TO WHAT, THE EMERGENCY ROOM
14 TO HELP THE VICTIM, OR DID YOU CALL THE POLICE, OR WHO
15 DID YOU CALL?
- 16 A NO, I DID NOT. NO, I DID NOT.
- 17 Q WHO DID YOU CALL, EXACTLY?
- 18 A I CALLED THE WOMAN THAT I BORROWED THE CAR FROM.
- 19 Q WELL, NOW, THAT WAS THE NEXT DAY. I'M TALKING ABOUT
20 THAT NIGHT AFTER YOU HAD SEEN THE VICTIM SHOT AND
21 LYING THERE.
- 22 A NO, I NEVER SAW HIM. I NEVER SAW HIM. I NEVER SAW
23 HIM.
- 24 Q YOU KNEW HE WAS SHOT, OBVIOUSLY. YOU HAD TO WALK OUT
25 OVER HIS BODY, DIDN'T YOU?

1 A NO, I DID NOT WALK OUT OVER HIS BODY, NO, MA'AM, IT
2 WAS NOT LIKE THAT.

3 Q WELL, LET'S PUT IT THIS WAY, LET'S SKIP OVER THAT.
4 WHICH AGENCY DID YOU CALL -

5 A I CALLED NONE.

6 Q - TO COME HELP YOUR FRIEND?

7 A I CALLED NONE, ABSOLUTELY, I DIDN'T CALL ANY. I
8 PANICKED.

9 Q NOW, LET'S GO TO JASON CONLEY.

10 JASON WASN'T ORIGINALLY GOING TO COME, WAS HE?
11 HE JUST HAPPENED TO COME BY THAT NIGHT?

12 A YES, HE DID.

13 Q AND THE PLAN THAT YOU PLANNED WITH HIM AND THE OTHERS
14 WAS THAT THE GIRLS WOULD LET YOU KNOW THAT THE VICTIM
15 WAS THE ONLY ONE THERE, THEY WOULD GIVE SOME KIND OF
16 SIGNAL AND THEN YOU THREE WOULD GO IN, BUST THROUGH
17 THE DOOR, AND POKE THE GUN AT HIM? WASN'T THAT THE
18 PLAN?

19 A I DON'T REMEMBER ANYTHING LIKE THAT. NO, I DO
20 REMEMBER THE GIRLS WERE GOING TO GO IN AND COME BACK
21 OUT AND TELL US, BUT I DON'T REMEMBER SIGNALING US TO
22 BUST THE DOOR IN. WE'RE TALKING ABOUT A TEENY, TINY
23 MOBILE HOME YOU CAN PULL BEHIND A CAR.

24 Q SO YOU THOUGHT THIS CAMPER THAT WAS PITCH DARK WOULD
25 BE FULL OF PEOPLE, EVEN THOUGH -

1 A USUALLY HE HAD COMPANY. YES, USUALLY HE DID HAVE
2 COMPANY AND IT USUALLY WAS PEOPLE THAT I KNEW.

3 Q AND I GUESS MOST OF THOSE PEOPLE PROBABLY WALKED,
4 CONSIDERING HE LIVED WAY OUT IN THE COUNTRY.. THEY
5 DIDN'T HAVE CARS THAT THEY WOULD PARK AROUND HIS
6 CAMPER?

7 A I'M NOT REALLY SURE. A LOT OF PEOPLE DON'T HAVE
8 VEHICLES. A LOT OF THEM DO GO ON THEIR OWN.

9 Q AND THEN THE JENNIFERS WERE SUPPOSED TO GO IN. ONE
10 WAS GOING TO BUST THROUGH THE DOOR AFTER THEY CAME
11 OUT. RON WAS GOING TO BUST IN THE DOOR AND POINT THE
12 GUN AT HIM?

13 A NO.

14 Q ISN'T THAT CORRECT?

15 A NO, MA'AM.

16 Q NOW, AFTER THE SHOOTING OCCURRED, DO YOU REMEMBER
17 LAUGHING ABOUT IT WITH YOUR DAUGHTER AND JASON CONLEY
18 AND RON JORDAN?

19 A I DON'T THINK SO. MY HAND WAS BLOWN WIDE OPEN. I
20 DON'T REMEMBER LAUGHING AT ALL. I'VE NOT LAUGHED
21 SINCE THEN.

22 Q AND YOU ALL TOOK THE SHOTGUN, IS THAT RIGHT?

23 A NO, WE ALL DIDN'T. JASON DID.

24 Q YOU WERE ALL TOGETHER WHEN THAT WAS TAKEN, IS THAT
25 CORRECT?

1 A NO, I DIDN'T EVEN KNOW THE SHOTGUN WAS THERE UNTIL WE
2 GOT TO RAY HENDERSON'S HOUSE. THAT'S WHEN I KNEW A
3 SHOTGUN WAS THERE, ALONG WITH HIS WALLET. I DIDN'T
4 KNOW ANYTHING ABOUT THAT UNTIL WE GOT TO RAY
5 HENDERSON'S HOUSE.

6 Q YOU TOOK THE MONEY FROM THE WALLET, DIDN'T YOU?

7 A NO, MA'AM, THAT WAS JASON CONLEY.

8 Q ALL RIGHT, LET'S GO TO JENNIFER TITMAN. DO YOU RECALL
9 ON THE WAY UP THERE ASSIGNING HER THE ROLE OF GOING IN
10 WITH YOUR DAUGHTER?

11 A YES, I DO.

12 Q DO YOU AGREE THAT ANY OF THE FIVE OF YOU COULD HAVE
13 JUST SAID, 'WE DON'T WANT ANY PART OF THIS,' AT ANY
14 TIME, ISN'T THAT RIGHT?

15 A IT WASN'T LIKE THAT. IT JUST WAS NOT LIKE THAT.

16 Q WELL, YOU WOULD AGREE THERE WAS A NEIGHBOR SIXTY FEET
17 AWAY, THAT IF SOMEBODY HAD WANTED TO GO STOP SOMETHING
18 THEY COULD HAVE GONE FOR HELP NEXT-DOOR, MADE A PHONE
19 CALL AND STOPPED IT AT ANY TIME, IS THAT RIGHT?

20 A I DON'T THINK THEY REALLY KNEW THERE WAS ANYBODY
21 THERE.

22 Q WELL, THEY COULD HAVE CHECKED. THAT'S AN IDEA, ISN'T
23 IT?

24 A THAT'S ONE OF MANY.

25 Q ANY OF YOU COULD HAVE NOT PARTICIPATED IN THIS IF YOU

1 HAD WANTED TO, ISN'T THAT TRUE?

2 A I DON'T THINK THAT IT WAS LIKE THAT. LIKE I SAY, IT
3 WASN'T A PLANNED THING TO WHERE YOU COULD SAY WELL,
4 LET'S NOT GO THROUGH THIS PLANS. IT WASN'T PLANNED
5 LIKE THAT.

6 Q WELL, A CLUE MIGHT HAVE BEEN WHEN RONNIE JORDAN CAME
7 IN THE DOOR, PUT THE GUN TO THE MAN'S HEAD AND STARTED
8 SCREAMING AT HIM -

9 A AS I TELL YOU, I WAS NOT IN THERE AT THE TIME. THE
10 TWO GIRLS WERE NOT IN THERE AT THE TIME. I WAS NOT IN
11 THERE AT THE TIME. I CAME IN AFTERWARDS.

12 Q WHEN DID THEY USE MR. HENDERSON'S PHONE? HE HAS A
13 PHONE, DOESN'T HE?

14 A THEY DIDN'T USE IT, I DID.

15 Q WHY DIDN'T YOU USE THE PHONE TO CALL EMERGENCY
16 SERVICES?

17 A THEY DIDN'T USE IT, I DID. I DON'T THINK THEY WERE IN
18 A STATE OF MIND. THEY HAD BEEN FOR DAYS ON COCAINE,
19 THE TWO YOUNG CHILDREN.

20 Q THAT WAS VOLUNTARY CHOICE, TO USE COCAINE, WASN'T IT?

21 A I DON'T KNOW THE ANSWER. I'M NOT REAL PROUD OF IT,
22 MS. WHITE.

23 Q THEY VOLUNTARILY CHOSE TO DO THAT, DIDN'T THEY?

24 A I DON'T KNOW, SHE JUST TURNED SEVENTEEN. THAT'S KIND
25 OF HARD TO SAY, AND I AM HER MOTHER. IT'S NOT A VERY

1 GOOD INFLUENCE, IF YOU ASK ME.

2 Q DID YOU SAY THAT YOU CALLED MELVIN MILLER ABOUT THIS
3 LOAN?

4 A IT'S BEEN A WHILE, YES.

5 Q IS IT A LONG DISTANCE TELEPHONE CALL?

6 A YES, IT'S BEEN QUITE SOME TIME.

7 Q HOW FAR AHEAD OF THIS WAS IT?

8 A OH, IT'S BEEN A LONG TIME. I CAN'T EVEN TELL YOU.

9 IT'S BEEN A LONG TIME.

10 Q IT WOULDN'T HAVE SHOWN UP ON HIS PHONE RECORDS, WOULD
11 IT, A FEW MONTHS AROUND THIS, THEN?

12 A NO, NO.

13 Q SO YOU WEREN'T THE ONE IN CHARGE HERE, IS WHAT YOU ARE
14 SAYING?

15 A OH, I DIDN'T SAY THAT. I DON'T THINK ANYONE WAS IN
16 CHARGE. YOU'RE MAKING IT SOUND LIKE I WAS A MA BARKER
17 DEAL. IT'S NOT ANYTHING LIKE THAT.

18 Q SO IT'S JUST NOBODY'S FAULT, REALLY?

19 A I'M NOT SAYING I HAVE NO RESPONSIBILITY. I'M DOING
20 TWO HUNDRED AND FORTY-FIVE YEARS, MS. WHITE. I THINK
21 I'M DOING MY SHARE, I REALLY DO.

22 Q MY QUESTION, THEN, IF YOU'RE NOT RESPONSIBLE -

23 A I'M RESPONSIBLE.

24 Q - AND RONNIE JORDAN'S NOT RESPONSIBLE, WHO KILLED
25 MELVIN MILLER?

1 MR. BYRHOLDT: OBJECT, YOUR HONOR,
2 ARGUMENTATIVE. THERE'S NO REASON FOR THAT.

3 A RONNIE JORDAN DID.

4 THE COURT: JUST A MINUTE. I'M GOING TO
5 OVERRULE THE OBJECTION AND INSTRUCT THE WITNESS TO
6 ANSWER THE QUESTION.

7 A RONNIE JORDAN KILLED HIM.

8 Q AND COULD RONNIE JORDAN HAVE KILLED HIM, MA'AM, IF YOU
9 DID NOT GIVE HIM DIRECTIONS TO HIS HOUSE AND IF SHE
10 DID NOT GO IN AND FIND OUT THAT HE WAS ALONE TO -

11 A I'M NOT RESPONSIBLE FOR RONNIE JORDAN. I'M NOT
12 RESPONSIBLE FOR HIM. FROM WHAT I UNDERSTAND, HE HAS A
13 LONG RAP SHEET, TOO.

14 Q NO FURTHER QUESTIONS.

15 THE COURT: REDIRECT?

16

17 REDIRECT EXAMINATION BY

18 MR. BYRHOLDT:

19 Q WHEN JENNIFER MCSHARRY, YOUR DAUGHTER, AND WHEN
20 JENNIFER TITMAN LEFT THE HOUSE, NONE OF THIS HAD
21 STARTED YET, IS THAT TRUE?

22 A THAT'S CORRECT.

23 Q NOTHING FURTHER.

24 THE COURT: DOES ANYONE OBJECT TO THE WITNESS
25 BEING EXCUSED?

FILED-CLERK'S OFFICE OF THE COURT OF COMMON PLEAS
 STATE OF SOUTH CAROLINA ANDERSON SC
 COUNTY OF ANDERSON 2003 NOV 21 A TENTH JUDICIAL CIRCUIT
 10:43

Lu Rene Kelso,
 Plaintiff,
 vs.
 State of South Carolina
 Defendant.

GENERAL PLEAS AND SESSIONS No: 00-CP-04-02188

Plaintiff made a Motion to this Court to proceed pro se. If Plaintiff wishes to proceed pro se she may do so. Nevertheless, Plaintiff's counsel, Nancy Jo Thomason, is Ordered to act as standby counsel and to aid Plaintiff in the preparation of her case.

A TRUE COPY
 NOV 21 2003
Caryn M. Phillips
 CLERK OF COURT

Plaintiff also made a Motion to Continue this case so that she can properly prepare for trial. Plaintiff's Motion to Continue this case is hereby granted. This case will be continued to the June, 2004 term of Post Conviction Relief Hearings.

IT IS SO ORDERED.

Anderson, South Carolina
11/20, 2003

J.C. Nicholson, Jr.
 The Honorable J.C. Nicholson, Jr.
 Presiding Judge

of a Firearm During the Commission of a Violent Crime (97-GS-04-93), and Criminal Conspiracy (97-GS-04-92). Harold Lowery, Esquire, represented the Applicant. On May 5-8, 1997, the Applicant went to trial and was found guilty as indicted. The Honorable Henry F. Floyd sentenced the Applicant to confinement for two terms of Life without parole for murder and burglary, and two terms of Five (5) years for the firearm and conspiracy convictions. All sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court affirmed the Applicant's conviction and sentence. State v. Kelso, Op. No. 99-MO-059 (S.C. Sup. Ct. filed August 19, 1999).

In her current application for post-conviction relief, the Applicant alleges that she is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Conflict of interest.

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

At the hearing, the Applicant testified that Harold Lowery, her trial counsel, had a conflict of interest because Richard Thompson, a member of Lowery's law firm, had represented her husband during their divorce, which was ongoing during the trial. She admitted that her signature appeared

on a conflict waiver form from Lowery's file, but did not recall signing it or discussing it with Lowery. She stated that she would not have waived the conflict had she understood it. The Applicant also claimed that she had told Lowery to call Ronnie Jordan, a codefendant, as a witness and to interview Jennifer Titman, a codefendant and State's witness. She said Lowery had told her that he did not interview Titman. The Applicant did not think Lowery had properly and fully cross-examined Titman because of his failure to interview her prior to trial. She believed also that Jordan would have been a good witness. Finally, the Applicant claimed that Lowery never really explained the application of the "hand of one, hand of all" theory under which the State proceeded.

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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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. Butler, Id. The Applicant must overcome this presumption 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, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117,

385 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." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court does not find the Applicant's testimony to be credible on the issues in this case. First, the Applicant waived the conflict of interest that she now raises in writing. She admitted that her signature appears on the waiver form. This Court also finds that her trial counsel had no reason to call Ronnie L. Jordan, her codefendant, which would have outweighed the importance of receiving the final argument to the jury. Further, Jordan did not testify, and the Applicant's speculation as to his value to her case does not constitute probative evidence. Regarding the testimony of Jennifer Titman, this Court notes that Lowery's cross-examination filled roughly forty pages of the trial transcript and highlighted Titman's history of mental problems, her drug use, and her multiple statements to the police in the case.

Based on the above findings, the Applicant has failed to carry her burden of proof. Trial counsel's performance did not fall below reasonable professional standards. Further, the Applicant suffered no prejudice as a result of any alleged errors. There is no reasonable probability that the result of the proceeding would have been different but for the any alleged errors.

CONCLUSION

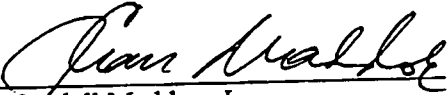
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant her application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that she must file and serve a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Her attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 10 day of March, 2009.



J. Cordell Maddox, Jr.
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

AS4

TRUE COPY

2000-CP-04-3030

MAY 09 2005

Jennifer L. McSharry, # 244026,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

Cathy M. Phillips
Clerk of Court

ORDER OF DISMISSAL

FILED - CLERK'S OFFICE
ANDERSON COUNTY
2005 MAY - 9 8:09
COMMON PLEAS COURT
GENERAL SESSIONS

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 14, 2000. The Respondent made its Return on September 20, 2004. An evidentiary hearing into the matter was convened on April 20, 2005, at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by Nancy Jo Thomason, Esquire. The Respondent was represented by Christopher L. Newton of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on her own behalf. Bruce Byrholdt, Esquire, testified on behalf of the State. This Court also had before it the records of the Anderson County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to the Anderson County Clerk of Court's orders of commitment. The Anderson County Grand Jury indicted the Applicant at the July 1997 term of General Sessions for Murder (97-GS-04-124), Armed Robbery (97-GS-04-1691), Burglary in the

1. *[Signature]*
[Signature]

First Degree (97-GS-04-1693), Criminal Conspiracy (97-GS-04-1692), and Possession of a Firearm During the Commission of a Violent Crime (97-GS-04-1694). The Applicant was represented on the charges by Bruce Byrholdt, Esquire. On September 12, 1997, the Applicant went to trial by jury and was found guilty as indicted. The Honorable H. Dean Hall sentenced the Applicant to confinement for a term of life for murder, two terms of thirty (30) years for armed robbery and burglary, and two terms of five (5) years for on the conspiracy and firearm convictions. The sentences were to run concurrently. A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Joseph L. Savitz, III, Esquire. The South Carolina Supreme Court affirmed the Applicant's conviction and sentence. State v. McSharry, Op. No. 99-MO-093 (S.C. Sup. Ct. App. filed November 19, 1999).

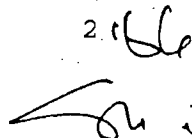
In her current application for post-conviction relief, the Applicant alleges that she is being held in custody unlawfully for the following reasons:

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

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

At the evidentiary hearing, the Applicant testified that her trial counsel failed to object to the jury instruction on accomplice liability. She stated that he also failed to request a jury instruction on constructive possession relating to the firearm. The Applicant further testified that her trial counsel

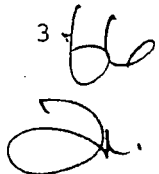
2. 

failed to request a mistrial due to a juror becoming ill during part of the trial and did not emphasize during his presentation of the case that her statements were coerced. She stated that her appellate counsel failed to raise the issue of the trial court's failure to grant a directed verdict on the firearm charge and should have raised numerous instances of hearsay. The Applicant admitted that she could not point to any specific instances of hearsay that appellate counsel failed to address, as someone else prepared her application on her behalf.

Trial counsel Bruce Byrholdt, Esquire, testified that he had no legal objection that could be made to the accomplice liability charge. He stated that there were no legal grounds to request a constructive possession charge on the firearm indictment. Byrholdt further testified that he had no grounds to move for a mistrial, because the trial court properly handled the sick juror issue. He stated as well that he could not recall any particularly damaging instances of hearsay. Byrholdt also said that he fought to keep out the statements in the Jackson v. Denno hearing, but could not keep them out.

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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300

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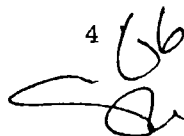
S.C. 115, 386 S.E.2d 624 (1989).

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, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court does not find the Applicant's testimony to be credible on the issues in this case. Trial counsel's testimony is found credible. First, this Court finds no objectionable error in the trial court's instruction on accomplice liability. The "hand of one, hand of all" legal doctrine is the law in South Carolina. There was no legal ground for trial counsel to request a jury instruction on constructive possession. The State proceeded against the Applicant under the "hand of one, hand of all" theory; therefore the State was not required to show that she was in either constructive or actual possession of the firearm. This Court finds no error in trial counsel's presentation of the Applicant's case; her statements were admissible, and the trial court found them so. This Court finds no legal grounds to support any motion for a mistrial in this record.

Given the above findings, the Applicant has failed to carry her burden of proof. Trial counsel's performance did not fall below reasonable professional standards. Furthermore, the Applicant suffered no prejudice. There is no reasonable probability that the result of the trial would have been different but for any alleged errors of trial counsel.

To show ineffective assistance of appellate counsel, an applicant must show that counsel's

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performance was deficient and that he was prejudiced as a result. Gilchrist v. State, Op. No. 25973, 2005 WL 949285 (S.C. Sup. Ct. filed April 25, 2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). To show prejudice, an applicant must show that, but for counsel's errors, he would have prevailed on appeal. Anderson. Here, the issues the Applicant alleges that her appellate counsel should have raised are meritless. The Applicant has not shown any instances of hearsay so prejudicial that its admission would constitute reversible error. Further, the Applicant's directed verdict claim relating to her firearms charge is legally deficient. The State charged her under the "hand of one, hand of all" theory. Therefore, the State only had to prove that one of her codefendants possessed a firearm and that she was an active participant in the crime. The State made out a *prima facie* case for the Applicant's direct involvement and for the use of a firearm in the crime. Therefore, the directed verdict issue would not have resulted in a reversal or vacation of her conviction.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

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