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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

Appellate Case Number 2018-000096

Jennifer McSharry,..... Petitioner,

v.

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

**Petition for Writ of *Certiorari***

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## QUESTIONS PRESENTED

### *Question I*

Did the PCR court err by concluding Jennifer McSharry's current PCR action is successive and barred by the statute of limitations when her re-sentencing constituted a new judgment within the meaning of S.C. Code Ann. § 17-27-45(A) and, alternatively, because Ms. McSharry's current PCR action falls within long recognized exceptions to these procedural bars?

### *Question II*

Did the PCR court err when it failed to grant Jennifer McSharry a new trial because her trial counsel's affirmative mis-advise about her chances of being found not guilty at trial influenced her decision to reject the State's twenty-five year plea offer and proceed to trial?

## STATEMENT OF THE CASE

This case arises out of an incident occurring on November 17, 1996, when Jennifer McSharry was 17 years old.<sup>1</sup> The State indicted Mr. McSharry for murder, armed robbery, criminal conspiracy, burglary in the first degree, and possession of a firearm during the commission of a violent crime. A. 673-82. The State tried Ms. McSharry before the Honorable H. Dean Hall and a jury from September 8-12, 1997. Druanne White represented the State. Bruce Byrholdt represented Ms. McSharry. The jury convicted Ms. McSharry on all counts on September 12, 1997, and Judge Hall sentenced her to concurrent sentences of life in prison without the possibility of parole for murder, 30 years for armed robbery, 5 years for conspiracy, 30 years for burglary in the first degree, and 5 years for possession of a firearm during the commission of a violent crime. A. 667-68, 683-87. This Court affirmed the convictions and sentences. *State v.*

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<sup>1</sup> Ms. McSharry was 17 years old, both at the time of the offenses and her jury trial. A. 979, lines 14-24.

*McSharry*, S.C.S.Ct. Unpublished Op. No. 1999-MO-093 (filed Nov. 19, 1999). A. 721-23.

Ms. McSharry filed her first application for post-conviction relief (“PCR”) on November 14, 2000. A. 760-68. The State filed its return on September 20, 2004. The Honorable Alexander S. Macaulay convened an evidentiary hearing on April 20, 2005. Nancy Jo Thomason represented Ms. McSharry.<sup>2</sup> Christopher L. Newton represented the State. By written order filed on May 9, 2005, Judge Macaulay denied Ms. McSharry’s PCR application. A. 770-74. There was not an appeal.

On May 11, 2011, Ms. McSharry filed a second PCR application seeking the benefit of *Graham v. Florida*, 560 U.S. 48 (2010). A. 775-79. The State filed its return and motion to dismiss on January 23, 2012. A. 780-85. On February 7, 2012, Ms. McSharry responded to the State’s motion to dismiss and moved to stay further proceedings until the Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012). A. 786-887. Ms. McSharry amended her PCR application on May 10, 2012 seeking the benefit of *Missouri v. Frye*, 566 U.S. 134 (2012) and *Lafler v. Cooper*, 566 U.S. 156 (2012). A. 888-97. Ms. McSharry amended her PCR application again on November 8, 2012 seeking the benefit of *Miller*. A. 898-908.

After the decision in *Miller*, Ms. McSharry was one of “fifteen inmates who were sentenced to life without parole as juveniles [to] petition [the South Carolina Supreme] Court for resentencing in light of the United States Supreme Court’s decision in *Miller*.” *Aiken v. Byars*, 410 S.C. 534, 536–37, 765 S.E.2d 572, 573 (2014). Ms. McSharry

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<sup>2</sup> Clerk of Court records reflect Carolyn E. Galloway was appointed to represent Ms. McSharry, by written order dated March 16, 2001, during her prior PCR case. A. 769.

moved to stay this PCR proceeding on November 13, 2012, pending the outcome of *Aiken*. A. 909-36. The State consented to this motion by return filed on November 27, 2013. A. 937-38. This Court convened oral arguments in *Aiken* on January 8, 2014 and issued an opinion on November 12, 2014, establishing re-sentencing procedures for juveniles sentenced to life imprisonment without the possibility of parole. This Court stayed its decision in *Aiken* until July 23, 2015 while the State sought review by the Supreme Court of the United States. After this Court lifted the stay in *Aiken*, the petitioners and those similarly situated had one year to file a motion for re-sentencing. A. 728-29.

On March 18, 2016, Ms. McSharry moved the General Sessions Court for a re-sentencing hearing pursuant to *Aiken*. A. 724-29. By written order dated May 27, 2016, the Honorable Costa M. Pleicones, then Chief Justice of this Court, assigned the Honorable R. Scott Sprouse exclusive jurisdiction to preside over Ms. McSharry's re-sentencing hearing. A. 740-41. On February 10, 2017, Judge Sprouse convened a re-sentencing hearing. Catherine Huey represented the State. Charles Grose represented Ms. McSharry. Judge Sprouse re-sentenced Ms. McSharry to 30 years imprisonment for murder, concurrent with the other sentences imposed by Judge Hall. A. 749.

On December 28, 2016, the State filed an amended return and motion to dismiss Ms. McSharry's second amended PCR application. A. 941-54. On October 6, 2017, Judge Sprouse convened an evidentiary hearing. Charles Grose represented Ms. McSharry. Anthony J. Mabry and Lindsey A. McCallister represented the State. At the call of the case, Ms. McSharry advised the Court that she would be proceeding only on

the allegation of ineffective assistance of counsel for deficient advice regarding her decision to plead guilty or have a jury trial, as alleged in her second amended application:

10(b) 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."

"[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. Presuming [the accused] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence [the person] accordingly, or to leave the convictions and sentence from trial undisturbed.

*Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012).

11(b) At one point prior to trial, the State offered McSharry a fifteen year sentence for voluntary manslaughter. This offer, however, included McSharry testifying against Kelso. At the time of the offer, the prosecution was threatening to seek the death penalty against Kelso. The State made additional plea offers during McSharry's trial, which also included reducing the charges to voluntary manslaughter. McSharry, however, did not understand the legal principles necessary to make an informed decision. Trial counsel not properly educating McSharry about the relevant legal principles influenced her decision not to plead guilty to a lesser offense. Had trial counsel properly educated McSharry about the relevant legal principals, then she would have plead guilty.

A. 903-04. Ms. McSharry's second amended PCR application further alleged that her prior PCR counsel "had an actual conflict of interest," "did not conduct any investigation at all," and "failed to advise McSharry and assist her in preparing an amended PCR application." A. 905-06.

At the beginning of the evidentiary hearing, the State renewed its motion to dismiss based on the statute of limitations and the bar against successive PCR applications. After hearing arguments, Judge Sprouse took the motion under advisement. A. 962-70. Ms. McSharry, Jeffery McSharry, and Mr. Byrholdt testified during the hearing. At the conclusion of the hearing, Judge Sprouse asked for proposed orders. A. 1033.

By written order dated November 21, 2017, Judge Sprouse dismissed Ms. McSharry's PCR application. A. 1055-78. On December 1, 2017, Ms. McSharry served her Rule 59(e), SCRPC motion. A. 1079-98. By written order dated December 18, 2017, Judge Sprouse denied Ms. McSharry's Rule 59(e) motion. A. 1099.

This petition for writ of *certiorari* follows.

#### **STATEMENT OF FACTS**

At trial, Ms. McSharry's re-sentencing hearing, and the PCR evidentiary hearing, it was undisputed that Ms. McSharry was not the trigger-person and that State's theory of her guilt was based on the legal principle of accomplice liability. *See, e.g.*, A. 976, lines 2-5. During the initial investigation of this case, Ms. McSharry waived her *Miranda* rights and provided a statement that was introduced during her jury trial by the Solicitor to establish her guilt. A. 344-50. *See also* Ms. McSharry's PCR testimony, A. 973-76. Ms. McSharry's statement established that she and her co-defendants formed a plan to drive from Georgia to Anderson County, South Carolina to rob the victim. Rene Kelso (Ms. McSharry's mother) claimed the victim owed her money. They planned to force the victim to go to an A.T.M. machine and withdraw money. They planned to take his guns and any money in his pocket. Ms. McSharry was aware that her co-defendant Ronnie

Jordan had a gun. The plan called for Ms. McSharry and Jennifer Titman (also a juvenile) to trick their way into the victim's camper to find out if any other people were there. After doing this, the two teenage girls returned to the car. Ms. Kelso, Mr. Jordan, and Janson Conley went inside the victim's camper. Ms. McSharry and Ms. Titman were in the car when Mr. Jordan shot and killed the victim. The co-defendants attempted to conceal the crimes. At trial, the defense called co-defendants Jennifer Titman, A. 465-522, and Rene Kelso (Ms. McSharry's mother), A. 539-62, both of whom corroborated Ms. McSharry's statement and provided further evidence of Ms. McSharry's guilt. *See also* A. 1022-32.

During the PCR evidentiary hearing, Ms. McSharry testified the prosecution's pre-trial offer was "15 years" and it required her "to testify against [her] mother." At the time the State was seeking the death penalty against Ms. McSharry's mother. Even with the dysfunctional relationship between the two, Ms. McSharry testified she "couldn't" participate in the State seeking the death penalty against her mother. A. 976-78.<sup>3</sup>

The Solicitor engaged in plea negotiations during trial. The State's first offer was a 30-year sentence. The State subsequently offered a 25-year sentence, which included the murder charge being reduced to voluntary manslaughter. During her jury trial, Ms. McSharry thought she understood accomplish liability—*i.e.* the legal principal involving the hands of one hands of all—but she did not. She explained:

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<sup>3</sup> Ms. McSharry does not seek the re-extension of this fifteen-year offer. During the evidentiary hearing, PCR counsel acknowledged "that not wanting to testify against someone you love in a death penalty trial would be a reason to reject an offer from [t]he State." A. 1012, lines 6-15. Ultimately, Ms. Kelso was sentenced to life imprisonment without the possibility of parole. A. 846-55.

I felt like because it was undisputed of my role, that there was no way that they could find me guilty of actual murder, being I was in the car. I didn't understand that I was considered the trigger person as well.

A. 20-22.

In addition to being influenced by her youth,<sup>4</sup> Ms. McSharry testified her communications with her trial lawyer were detrimental to her decision-making process.

She explained:

It was a gamble. Every time we would speak [trial counsel] would tell me that we would roll the dice. And after we win this thing we'll go out and drink a beer. So, you know, I really didn't think 30 years was a deal if he's expecting to go home and celebrate.

A. 980-82.

Since her jury trial, Ms. McSharry learned the real meaning accomplish liability. Ms. McSharry testified she would have accepted the guilty plea if she had properly understood that legal concept. A. 982-83

Jeff McSharry is Ms. McSharry father. He testified at the evidentiary hearing and corroborated his daughter's testimony. Mr. McSharry did not recall the 30-year offer, but he remembered the 25-year offer. Because Mr. McSharry felt the trial was going poorly for his daughter, he told trial counsel "that he needs to talk to [Ms. McSharry] and tell her to take the plea." Mr. McSharry never heard trial counsel recommend that Ms. McSharry accept that offer. A. 1005-08

Trial counsel testified at the evidentiary hearing. He no longer has his file from representing Ms. McSharry, and the intervening years clouded his memory. For example, while trial counsel recalled that Mr. Kelso's testimony was damaging to Ms. McSharry,

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<sup>4</sup> *Miller* recognized that, because of youth, a juvenile might have an "inability to deal with police officers or prosecutors (including on a plea agreement) or [an] incapacity to assist [her] own attorneys." 567 U.S. at 477-78.

he recalled Ms. Kelso cutting a deal with the Solicitor and testifying against Ms. McSharry. He also thought Ms. Keslo had not gone to trial at the time of Ms. McSharry's trial. The record, however, establishes that Ms. Kelso was tried by the Honorable Henry F. Floyd and a jury from May 5-8, 1997, which is four months before Ms. McSharry' trial.<sup>5</sup> The record also reflects the defense called Ms. Kelso as a witness during Ms. McSharry's jury trial. Trial counsel could not recall the disposition of the other co-defendants' cases. A. 539-62, 1022-32.

### STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” 466 U.S. 668, 688 (1984). “The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). “If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy.” *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). “Decisions made in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

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<sup>5</sup> “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. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984). *See* the written order of the Honorable Cordell Maddox, Jr., dated March 10, 2005, dismissing Ms. Kelso’s PCR application, in *Kelso v. State*. A. 755-59.

The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). “In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury.” *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government’s case ...,” and “we must consider the totality of the evidence before the jury.”)). “In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Id.* “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Id.* 422 S.C. at 189, 810 S.E.2d at 844. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

On appeal, this Court “defer[s] to a PCR court’s findings of fact and will uphold them if there is any evidence in the record to support them.” *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). “Questions of law are reviewed *de novo*, and [this Court] will reverse the PCR court’s decision when it is controlled by an error of law.” *Id.*

## ARGUMENTS

### *Question I*

**Did the PCR court err by concluding Jennifer McSharry’s current PCR action is successive and barred by the statute of limitations when her re-sentencing constituted a new judgment within the meaning of S.C. Code Ann. § 17-27-45(A) and, alternatively, because Ms. McSharry’s current PCR action falls within long recognized exceptions to these procedural bars?**

As a threshold matter, this Court must address the State’s contention that Ms. McSharry’s current PCR application is successive and barred by the statute of limitations. Ms. McSharry’s re-sentencing constituted a new “judgement” within the meaning of S.C. Code Ann. § 17-27-45(A), meaning she had one year starting February 10, 2017 to file a PCR action. *See also Magwood v. Patterson*, 561 U.S. 320, 331 (2010) (for federal *habeas corpus* purposes, “resentencing led to a new judgment, and his first application challenging that new judgment cannot be ‘second or successive’”). Because of the unusual procedural history of Ms. McSharry’s case, the current PCR action was already filed when she was resentenced. Even though contesting the underlying conviction, the current PCR action became a challenge to the new judgment. This action, therefore, is neither successive nor barred by the statute of limitations.

Alternatively, the procedural bars do not apply to Ms. McSharry’s current PCR case. In most PCR cases, this Court “refuse[s] to excuse the pleading and issue-preservation requirements that apply in all civil cases.” *Mangal v. State*, 421 S.C. 85, 97,

805 S.E.2d 568, 574 (2017). This Court does not relax the procedural requirements on the grounds that initial PCR counsel was ineffective. *Aice v. State*, 305 S.C. 448, 488, 409 S.E.2d 392, 393 (1991). Nevertheless, “*Aice* acknowledged that there may be ‘unique’ circumstances, where a PCR counsel’s assistance could be challenged in a successive application.” *Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016) (quoting *Aice*, 305 at 451, 409 S.E.2d at 394). S.C. Code Ann. § 17-27-90 grants an applicant the opportunity to “point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly.” *Aice*, 305 S.C. at 450, 409 S.E.2d at 394. *Aice* recognized that our state’s PCR procedures “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” 305 S.C. at 452, 409 S.E.2d at 395 (quoting *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)).

Three opinions from Court are instructive on what constitutes “sufficient reasons” to allow a successive PCR application for Ms. McSharry. First, in *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), Carter was represented at the PCR hearing by a member of the same law firm as the lawyer that had represented him during his jury trial. This Court held, “Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.” *Id.* 293 at 530, 362 S.E.2d at 21. Second, in *Odom v. State*, this Court held, “Odom never received a complete ‘bite at the apple’ because both of his PCR applications were summarily dismissed before he was appointed legal counsel.” 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999). Third, in

*Robertson*, this Court remanded for a hearing to determine whether Robertson’s PCR counsel met the requirements to serve as counsel in a capital PCR case pursuant to S.C. Code Ann. § 17-27-160. Thus, this Court has held no counsel, conflicted counsel, and unqualified counsel to be “sufficient reason” to allow a successive PCR application. Assistance of counsel, after all, is the cornerstone of our state’s PCR procedure. Rule 71.1, SCRPC provides:

If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

*And see* S.C. Code Ann. § 17-27-90 (providing, “All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application”). This Court, therefore, distinguishes cases where the applicant had no counsel, conflicted counsel, or unqualified counsel, such as in *Carter*, *Odem*, and *Robertson*, from cases where the applicant had ineffective PCR counsel, such as in *Aice* and *Mangal*. In the former category, the applicant did not get a “bite at the apple” with assistance of counsel. In the latter category, the applicant got opportunity to get a “bite at the apple” with the assistance of counsel.<sup>6</sup>

A review of the trial and PCR records in Ms. McSharry’s case and the PCR record in *Rene Kelso v. State*,<sup>7</sup> establishes that Ms. McSharry’s case falls in the category of a

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<sup>6</sup> An applicant receiving ineffective of PCR counsel still has an opportunity to seek review of “substantial claims” in a federal petition for writ of *habeas corpus* pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). *See Mangal, Robertson, and Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377 (2013).

<sup>7</sup> *See* fn. 5, *supra*, regarding judicial notice of court records.

PCR applicant that had no counsel, conflicted counsel, or unqualified counsel, such as in *Carter, Odem, and Robertson*. Ms. Kelso is Ms. McSharry's mother and co-defendant. Ms. Kelso introduced Ms. McSharry to illegal drug use at a young age. Ms. Kelso involved Ms. McSharry and another teenager in these crimes. Much of Ms. McSharry's sentencing mitigation flows from her childhood, including but not limited to the manner in which Ms. Kelso raised her, and Ms. Kelso involving her daughter in these crimes. Nancy Jo Thomason represented both Ms. Kelso and Ms. McSharry.<sup>8</sup> Although Ms. Thomason was relieved as counsel for Ms. Kelso prior to her evidentiary hearing,<sup>9</sup> Ms. Thomason had formed an attorney-client relationship with Ms. Kelso and was court ordered to remain standby counsel for Ms. Kelso. Under the attorney client relationship, Ms. Thomason owed Ms. Kelso a duty of loyalty, even after completion of her case. Rule 407, SCACR, Rule 1.9, RPC. Even prior to *Miller and Aiken*, co-defendants' relative degree of culpability could be considered in sentencing. *See Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed.2d 1140 (1982) (identical treatment of robbers and their accomplice, and attribution to accomplice of culpability of those who killed victims, was impermissible under Eighth Amendment). In a PCR claim that become moot after her re-sentencing, Ms. McSharry alleged that prior PCR counsel should have raised trial counsel's failure to investigate, develop, and present evidence to mitigate the sentence. *See* Second amended PCR application, ¶¶ 10(c) & 11(c), A. 904-06. Raising

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<sup>8</sup> Ms. Kelso filed her PCR application on August 21, 2000. The evidentiary hearing occurred on February 9, 2005. The order of dismissal issued on March 10, 2005, just 40 days prior to Ms. McSharry's evidentiary hearing. A. 755-59.

<sup>9</sup> *See* written order of the Honorable J.C. Nicholson, Jr., dated November 20, 2003, *Kelso v. State, supra*. The order of dismissal in Ms. Kelso's case reflects Ms. Thomason fulfilled this obligation. A. 754.

this claim is significant because Ronnie Jordan, the actual shooter, received less time than Ms. McSharry (prior to her re-sentencing).<sup>10</sup> Presenting that claim necessarily involved taking a position adverse to Ms. Kelso. Ms. Thomason, therefore, had an actual conflict of interest. *See, e.g., Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008) (held that plea counsel's simultaneous representation of both defendant and her husband during guilty pleas which arose out of related offenses constituted a conflict of interest).<sup>11</sup> Judge Macaulay's order filed on May 9, 2005 does not reflect a Ms. McSharry waived the conflict of interest. A. 770-75. This Court should hold prior PCR counsel's conflict of interest is "sufficient reason" to allow this PCR action to proceed. *See Carter, supra*. Ms. McSharry has not had her one bite at the apple. *See Odem, Aice, supra*.<sup>12</sup>

### *Question II*

**Did the PCR court err when it failed to grant Jennifer McSharry a new trial because her trial counsel's affirmative mis-advise about her chances of being found not guilty at trial influenced her decision to reject the State's twenty-five year plea offer and proceed to trial?**

Ms. McSharry contends she is entitled to the benefit of *Missouri v. Frye* and *Lafler v. Cooper* as binding constitutional decisions that "impose upon state criminal

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<sup>10</sup> Ronnie Jordan, who actually shot and killed the victim, pleaded guilty to murder on May 19, 1997 and was sentenced to fifty-five years imprisonment for murder, fifty-five years for burglary first degree, thirty years for armed robbery, five years for possession of a firearm during the commission of a violent crime, and five years for criminal conspiracy. *State v. Jordan*, Anderson County Indictment Numbers 1997-GS-04-00958 – 00962. A. 856-65.

<sup>11</sup> Some conflicts of interest are so fundamental that the conflict cannot be waived or consented to by the client. Nathan N. Crystal, "Ethics Watch: Conflict Waivers [Sic?], A Primer," *S.C. Bar Magazine*, March 2009, pp. 8-9.

<sup>12</sup> Ms. Thomason did not assist Ms. McSharry to amend her PCR application as contemplated by Rule 71.1(d) and S.C. Code Ann. § 17-27-90. Ms. McSharry testified she met Ms. Thomason on the day of her prior PCR evidentiary hearing. A. 983-84.

proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively.” S.C. Code Ann. § 17-27-45(B). The State contends *Fryer* and *Lafler* merely applied *Strickland* and, therefore, are not new, constitutional decisions contemplated by § 17-27-45(B). The State provided case law from other jurisdictions supporting its position, A. 963-64, but neither this Court nor the Supreme Court of the United States has addressed this issue. If Ms. McSharry is correct, then she has established grounds—in addition to her prior-counsel’s conflict of interest—to invoke this Court’s jurisdiction in the current PCR application. If the State is correct, then trial counsel’s alleged deficient performance was a ground for relief that Ms. McSharry could have included in her original PCR application, meaning the legal principles set forth in *Frye* and *Lafler* could have been considered in Ms. McSharry’s prior PCR hearing if she had conflict-free counsel. Under either parties’ approach, this Court can consider the legal principles set forth in *Frye* and *Lafler*. After all, South Carolina has long held “that the Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered ultimately is rejected.” *Judge v. State*, 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996), *overruled on other grounds by Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000). *See also Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009), *abrogated by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (ordering new sentencing hearing because trial counsel never communicated State’s plea offer); *Kerrigan v. State*, 304 S.C. 561, 406 S.E.2d 160 (1991) (held that trial court was ineffective in failing to inform defendant that if he went to trial,

he could have requested charge on lesser offense of use of vehicle without permission, and might have been convicted of lesser offense).

Here, Ms. McSharry testified she did not understand the legal principle of accomplice liability. Mr. McSharry corroborated her daughter's testimony. The trial record corroborates their testimony. "[A] court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions." *Lafler*, at 171. Significantly, during the investigation of these crimes, Ms. McSharry waived her right to remain silent and made a statement admitting to her role in the crimes. Ms. McSharry, accordingly, has always accepted responsibility for her actions. She simply did not understand the applicable legal principles. Had trial counsel properly advised Ms. McSharry about the legal principle of accomplice liability, then Ms. McSharry would have accepted the State's plea offer and pleaded guilty. Ms. McSharry, therefore, has established both deficient performance and prejudice.<sup>13</sup>

The inquiry does not end there. "In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a

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<sup>13</sup> At the PCR hearing, the State pointed to the colloquy between trial counsel, Ms. McSharry, and the trial judge, A. 460-63, 992-94, 1001-02, to establish Ms. McSharry's desire to proceed with the jury trial. However, "the voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984) (quoting *Lambert v. State*, 260 S.C. 617, 619, 198 S.E.2d 118, 119 (1973)).<sup>13</sup> This colloquy does not contain trial counsel's advice to Ms. McSharry; nor does the colloquy establish Ms. McSharry's understanding of her trial counsel's advice. This colloquy, therefore, is not dispositive on the issues raised in Ms. McSharry's PCR application.

reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.” *Frye*, at 148. Here, every reason exists to think that the trial court would have accepted the guilty plea. Plea negotiations continued during Mr. McSharry’s jury trial. Two of her co-defendants—Jason Conley<sup>14</sup> and Jennifer Titman<sup>15</sup>—entered guilty pleas for voluntary manslaughter. Ms. Titman, also a juvenile at the time of the crime, played a role in the crimes that was very similar to Ms. McSharry’s role.

*Lafler* provides guidance regarding the proper remedy:

In some situations, it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge’s sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

566 U.S. at 171. Under the unique circumstances of this case, the proper remedy is for this Court to vacate the conviction and sentence for murder, vacate then sentences for first-degree burglary and armed robbery, require the State to re-extend the 25-year plea offer (including reducing the murder charge to voluntary manslaughter), and remand Ms. McSharry’s case to the Court of General Sessions to impose concurrent 25-year sentences for voluntary manslaughter, first-degree burglary and armed robbery.

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<sup>14</sup> Mr. Conley was sentenced to fifteen years imprisonment. *State v. Conley*, Anderson County Indictment Number 1997-GS-04-00064. A. 868-69.

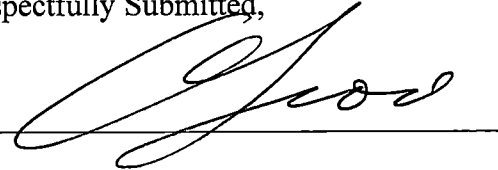
<sup>15</sup> Ms. Titman was sentenced to fifteen years, suspended on the service of seven years, to be followed by five years of probation. *State v. Titman*, Anderson County Indictment Number 1997-GS-04-00175. A. 866-67.

**CONCLUSION**

For the foregoing reasons, this Court should grant the writ and consider the issues.

Respectfully Submitted,

By

A handwritten signature in black ink, appearing to read "E. Charles Grose, Jr.", is written over a horizontal line.

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August 20, 2018.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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Case No. 2011-CP-04-01581

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Jennifer McSharry,..... Petitioner,

v.

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

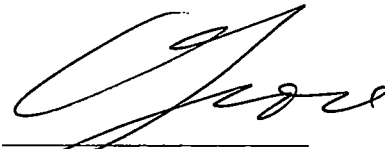
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**Certificate of Service**

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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

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