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.

Appendix, Volume III of III

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Volume II

[1] The transcript of the re-sentencing hearing has not been requested, and it is not relevant to the issues in the current PCR.

Volume III

A Right.

MR. MABRY: Just one moment, Your Honor. That's all I have, Your Honor.

THE COURT: Any redirect?

MR. GROSE: Yes, sir.

REDIRECT EXAMINATION

BY MR. GROSE:

Q Do you still have that transcript, Jennifer?

A Yes, sir.

Q Okay. I want to give you a second. Mr. Mabry asked you about beginning at 460. So, I'd like for you to look at 460, Line 5 and take an opportunity to read it all the way through to 463, Line 18, okay? Just take a minute and read it to yourself, okay?

A Okay. All right.

Q Are you done?

A Yes, sir.

Q If you flip back to 460 at Line 8, that's where Mr. Byrholdt begins talking and his address to The Court ends at 461 on Line 3. Anywhere in that did he ever put on the record what the plea offers had been?

A No, sir.

Q And I believe you testified earlier there was actually two offers extended during trial?

A Yes, sir.

Q And this doesn't say which offer, whether one or both had been extended, does it?

A No.

Q Okay. Then, on 461, there was some discussion between The Court and Mr. Byrholdt about questioning you; is that right?

A Yes.

Q Okay. And then on 462, beginning at really Line 3, when the question starts, going through Line 15 when Mr. Byrholdt says, That's all the questions.

On the next Page 463, did he ever question you about what the status of the plea negotiations were at that point?

A No.

Q Okay. Did he ever question you or put on the record, you know, what your understanding of the hands of one hands of all was?

A No, sir.

Q Okay. Was there ever any questioning about why you hadn't accepted any of the plea offers at that time?

A No, sir.

Q Okay. And I think Mr. Anthony, one of his last questions were was about your statement putting you right in the middle of criminal conspiracy; is that right?

A Yes.

Q Okay. Did you at the time that this colloquy was happening, on 460 to 463, did you understand the implications of your statement to accomplice liability, hands of one hands of all?

A No.

Q Okay. Mr. Anthony also asked some questions about the period of time from 2000 to 2005 when your PCR application was pending.

A Right.

Q Before I move on to that, your grandfather, he asked a question about your grandfather at trial. Was your grandfather a lawyer?

A No.

Q Okay. Are any of your family members lawyers?

A No, no, sir.

Q Okay. The period of 2000 to 2005, did any lawyer ever discuss with you about amending an application?

A No, not at all.

Q Now, since I have been representing you, we filed three versions of the application, right?

A Yes.

Q All right. Did you come up with all those ideas on your own?

A No, not one.

Q All right. Did you know anything, for example, about Graham vs. Florida before I told you about that?

A No.

Q Okay. Has your view of what a lawyer can do for you changed over time?

A Absolutely.

Q Can you explain that?

A I--

MR. MABRY: Object, I don't know the relevance of this question.

THE COURT: I sustain the objection.

BY MR. GROSE:

Q Okay. Do you feel like your prior PCR lawyers should have met with you and reviewed your family and educational background?

A Yes.

Q And do you feel like they should have discussed with you the record?

A Yes.

Q Do you feel like they should have helped you with amendments to your applications?

A Yes, sir.

MR. GROSE: That's all I have. Thank you, Your Honor.

THE COURT: All right.

MR. MABRY: Nothing further.

THE COURT: All right, thank you, ma'am, you can step down.

Call your--

MR. GROSE: I would call Jeff McSharry.

Jennifer, I'll get that and get it back to them. Thank you.

I keep calling Mr. Mabry, Mr. Anthony, I apologize for that.

THE COURT: I know who you were talking about.

THE CLERK: Right here please, sir. Just need for you to raise your right hand.

JEFF MCSHARRY, after being duly sworn, testified as follows:

THE CLERK: Take the stand please, sir, state your name.

THE WITNESS: My name is Jeff McSharry. Last name is M-C-S-H-A-R-R-Y.

DIRECT EXAMINATION

BY MR. GROSE:

Q Are you Jennifer's father?

A I am.

Q And where do you live?

A Currently live in the Bay area in California in Livermore.

Q All right. And how long have you lived there?
A It's been about the last four years.
Q All right. There was some testimony earlier from Jennifer that you had lived in Arizona, have you ever lived there?
A Lived there 23 years prior to that, yes.
Q And what is -- are you employed?
A I'm employed with IBM.
Q All right. And what do you do for IBM?
A I'm a manager there. We develop an operating system for the mainframe.
Q Okay. Now, were you at Jennifer's trial?
A I was.
Q Okay. And were you at her resentencing in February?
A This last February, yes.
Q Okay. The issue that we're here to talk about is regards to plea negotiations that came up during the trial. Do you have any recollection of that?
A I do have some, yes.
Q Okay. And what is your recollection?
A The one -- I don't remember the 30 year offer. I do remember the 25 year offer. And I remember being in the back room discussing it or hearing conversations about it with Jennifer and her attorney at the time. And her

thought at that point was she's only going to get 30 maximum anyway, why would you take a 25 year plea to just knock five years off? Might as well take a chance.

Q Okay. And who was suggesting to take a chance?

A Jennifer kind of did, was doing most of the talking, just kind of roll the dice thing. But her attorney was just kind of going along with whatever she said.

Q Okay. And did you ever hear him recommend that she should take the plea?

A He never recommended it but he never really told her one way or the other.

Q Okay. And what do you mean by that, one way or the other?

A He didn't say, yes you should or you shouldn't. He just kind of listened to whatever Jennifer wanted to do.

Q Okay. Did you try to talk to Mr. Byrholdt about what you thought happened?

A Absolutely.

Q And what did you tell him?

A I pretty much, I told him that he needs to talk to her and tell her to take the plea. And that what would he do if it was his daughter?

Q And what was his response?

A That he doesn't work for me.
Q Okay.
A He's working for Jennifer.
Q Okay. And did he, to your knowledge, ever advise her to take the plea?
A No.
Q Okay. How did you feel that the trial was going?
A I felt the trial was not going in Jennifer's favor.
Q And why was that?
A If I were a juror, there was no, you know, the way I saw it going, there was no real contesting anything she did. I mean, she had her statement there, they laid that out and that was about the only defense. There was several things -- I'm not an attorney so I don't know. I've watched attorney shows but several things that I thought should have been at least contested and brought up and discussed.
Q All right. Was -- never mind strike that question.

That's all I have, Your Honor.

THE COURT: Any questions?

THE WITNESS: Just very briefly, Your Honor.

CROSS-EXAMINATION

BY MR. MABRY:

Q Mr. McSharry, there was never any contention that your daughter pulled the trigger, that she was the person that actually shot the victim. Ever, was there?

A No.

Q No. And it was that she was part of this whole group that acted together?

A Correct.

Q And she was charged with all these crimes including murder. Did you ever ask her attorney how can she be charged with murder if she didn't pull the trigger?

A No, I understand what the hand of one hand of all is.

MR. MABRY: All right, thank you, sir.

THE COURT: All right, anything further of this witness?

REDIRECT EXAMINATION

BY MR. GROSE:

Q Are you convinced that Jennifer understood that at the time of her trial?

MR. MABRY: Objection. Can't speculate to what his daughter thought.

THE COURT: Sustained.

MR. GROSE: Nothing further.

THE COURT: All right, thank you, sir, you can

step down.

All right.

MR. GROSE: The Applicant would rest, Your Honor.

MR. MABRY: We move for a directed verdict, Your Honor, at this time for the same reasons we renewed our motion to dismiss. And that would be the -- obviously, testimony was that offers were communicated to her. Counsel can't coerce or force a person to take a plea. And she actually testified that at the beginning of the trial that the solicitor stated in her opening statement about the hand of one hand of all, she understood it. So, by the time she got two offers during the trial, she did understand the hand of is the one hand of all. And she said the first offer she got she wouldn't have accepted it anyway because she wasn't going to testify against her mother in a death penalty trial.

THE COURT: All right, Mr. Grose.

MR. GROSE: Several things, Your Honor. First, I think if they're renewing their motion to dismiss, I would just renew all of our same arguments as to why this hearing should go forward. Secondly, I think what The State is doing with their motion here is trying to minimize and remove the role of a lawyer

from the role of counselor and adviser to the client. What Ms. Druanne White said in opening statement about the law, arguments of counsel, open and closing, is not evidence in a case. Druanne White -- and we're not here to criticize Druanne White but she has no obligation to advise Ms. McSharry about the law or about what the options are. And quite frankly, solicitors misstate things a lot.

And so, if we begin relying on what a prosecutor says in opening statement as far as what a defendant, a client's, understanding of the law is, we might as well erase the Sixth Amendment from the Constitution. The cases don't henge on the communication of the offer. It's clear that that is one of the things that the Supreme Court said in one of those two cases, an offer was not communicated. But in the other case that was presented, it was the advice that was given with regard to whether to accept an offer or not accept an offer. Which was what led to the finding of ineffective assistance of counsel. And we believe that is what's going on in this situation.

The remedy, we're getting a little bit ahead but this goes to the 15 year offer. The remedy is to have plea offer extended, re-extended so the client could have an opportunity to accept it. We wanted to

go through the whole history of everything. We're not going to ask that the 15 year offer be re-extended as the remedy for the very reasons as to why she testified she didn't accept it. But we do think the 25 year offer--

THE COURT: But you agree that the 15 year offer was conditioned on testimony in a death penalty trial which everyone agrees did not happen?

MR. GROSE: It did not happen. And I would concede that not wanting to testify against somebody you love in a death penalty trial would be a reason to reject an offer from The State. So, we're not trying to go back to that. But I thought it was part of the whole story that has to be told. The 25 year offer is the one that we would go back to.

THE COURT: All right. How do you answer The State's argument that, and as was pointed out in your client's testimony, that her statement agreed that if the victim resisted, that he would be shot. I read through the statement that was put in the record that there was a firearm involved and she had knowledge of this. So, how do you address that understanding of the -- they're saying she understood the law based on the statement that she gave. So, how do you address that?

MR. GROSE: Judge, that -- the statement just reflects that she understands the facts of what happened. The statement was given to a law enforcement officer prior to her having any counsel. In fact, the testimony has been that, you know, a police officer and Deputy Solicitor White spoke with her earlier in the case with the 15 year offer before she, you know, without her lawyer being there. We're not criticizing that. I mean, you know, as long as they handled it right and I'm not saying that they didn't, there's no problem with them doing that. What I'm saying is, though, if you take that statement, and if I'm sitting in my office or I'm sitting in a holding cell with somebody talking to them and you take the statement, there ain't no rolling of the dice. You roll them every time. It's a house -- the house is going to win. With that statement, there was no chance that she was going to be acquitted of the murder, the burglary, the armed robbery and the conspiracy. No chance whatsoever.

So, for the only evidence in the record right now is rolling the dice. And, you know, they may come back and say, you know, jury nullification. But I'm sure this jury was charged, as all juries are charged, that they're not allowed to nullify the law.

They have to accept the law as given to them by The Court. So, when you take that statement and apply it to the law, a conviction of all these charges was guaranteed. And that's what the lawyer should have been telling her. And as the record stands right now, that was not the advice.

THE COURT: So, and I want to make sure I understand, we all agree the 15 year offer, that's not in play. Because that was based on facts that didn't ultimately exist. You had an initial offer of 30 years.

MR. GROSE: Uh-huh.

THE COURT: And then, a second offer of 25 years.

MR. GROSE: Yes, sir.

THE COURT: Okay. And your client, ultimately, has received a 30 year sentence. So, is the prejudice that she's claiming a PCR or lack of the 25 year offer versus the 30 year sentence she received? As you well know, she's got to show prejudice to prevail in a PCR.

MR. GROSE: Right.

THE COURT: And that's the necessary element in considering the directed verdict motion. Is that what you're putting on the table, those five years?

MR. GROSE: Yes, we are putting those five years on the table which really turns out to be about eight and a half years when you take into the account the 85 percent for voluntary manslaughter versus the day-for-day service of a 30 year sentence for murder.

THE COURT: Okay.

MR. GROSE: A potential of eight and a half, you know. The only -- but yes, to finish up on that question, I think her statement goes a long way as to making our point. The other thing is is I don't know if this was addressed in Mr. Mabry's motion or not, but with regards to the first PCR and amendments and that sort of thing, I would just want to refer, make a reference at this point to Rule 71.1(d) of the South Carolina Rules of Civil Procedure. Which the last two sentences of that deal with when counsel was appointed.

And says, Counsel shall be given the reasonable time to confer with the applicant. And counsel shall ensure that all available grounds for relief are included in the application. And shall amend the application if necessary.

And I think that rule goes back to, you know, the lawyer is supposed to do more than just put the client on the stand in a PCR and let them air their

grievances. Again, I'm not sure if he mentioned that in his motion but the testimony at this point is they're going to argue that the Frye and Lafler, even those though weren't decided, that was available to Ms. McSharry in the 2000 to 2005 timeframe. But that overlooks the obligation of counsel. And then when you add in the conflict, that's why we get pass directed verdict.

THE COURT: All right. Well, as The State's well aware, I've got to consider the evidence in the light most favorable to the nonmoving party. And it's not the weight of the evidence but the existence of evidence. So, I will deny your motion at this time.

Is The State ready to proceed? I know Mr. Byrholdt had a hearing downstairs.

MR. MABRY: We need to check and see if he's available.

THE COURT: All right, let's take a short break. Let me see the attorneys on the case after this. So, we'll take a short.

(WHEREUPON, a short break was taken.)

THE COURT: State ready to proceed?

MS. MCCALLISTER: Yes, sir, Your Honor, The State would call Bruce Byrholdt.

THE CLERK: Raise your right hand.

BRUCE BYRHOLDT, after being duly sworn, testified as follows:

THE CLERK: Take the witness stand, please, sir. State your name and spell your last name for the reporter, please.

THE WITNESS: Bruce Byrholdt. Last name is B-Y-R-H-O-L-D-T.

DIRECT EXAMINATION

BY MS. MCCALLISTER:

Q All right. Mr. Byrholdt, you represented Jennifer McSharry on these charges; is that correct?

A I did.

Q Okay. Do you recall the representation of her?

A Long time ago but I do recall.

Q Okay. How did you come to be involved? Were you appointed?

A I think -- I can't remember that.

Q Okay. Were you the first attorney on the case?

A I can't remember that.

Q Okay. Do you recall in the course of your representation of Ms. McSharry discussing any plea offers that The State may have made?

A Prior to the start of the trial, I mean, I was talking with, you know, the prosecutor, Druanne White, all

through trial preparation. And I remember at the beginning of the trial, there was a plea offer extended. I asked for a short break from Judge Hall and asked permission to go back into the Grand Jury chambers up on the fourth floor and was able to get Jennifer's father to come back there too. The offer was a reasonable offer, it was a very fair offer but it was contingent also upon her testifying against her mother which she didn't want to do. And I tried everything to get Jennifer to take the offer. But I can't force someone, you know, all I can do is relay an offer. And I even think I might have been able to knock a couple more years off that, you know, had there been any indication that I was, you know, she was not willing to testify against her mother. And did not want me to enter into plea negotiations any further.

Q Okay. And did you discuss with her, you know, the implications of turning down the plea offer and what that would mean?

A Yes.

Q Okay. And did you feel -- did she ask appropriate questions to you during that time? Did you feel she was understanding the offer and what it would mean to turn it down?

A Yes. I spent time with her dad, I spent time with her when she was at the jail before that going

over -- I mean, this was the hand of one hand of all case. It was a bad case where an old man got, you know, they got him to open the door, went in there and then, you know, a robbery and a killing ensued. She was not the trigger person but she had given a statement after her arrest and it was just -- she was going to get killed in that trial. And then worst than that, it ended up her mother testifying against her at trial. Which was just, you know, in all my years of practice I've never had a mother just turn around and testify and try to help herself.

Q Okay. Let met back up to what you said. You called this the hand of one hand of all case. Do you recall specific discussions with Ms. McSharry where you explained that concept to her?

A Extensive discussions explaining that. Because she -- how can I be convicted of murder when I didn't shoot anybody? And I didn't have a gun. And I gave her examples of someone, you know, goes into a store and you're sitting in the car, you're just a look out person, you know, they can try and put you in with everybody. And this one, all of the people in the car had an idea of what was going on. They may not have known the total extent of it but they knew they were engaging in activity that was against the law and there was going to be repercussions for it.

Q Okay. And so, you were aware of her statement and the extent of her involvement?

A Yes.

Q And that was never in contention?

A Never.

Q Okay. And you explained that to her?

A Yes.

Q That there was not really a way to contest her participation?

A Without a doubt.

Q Okay. And you explained the fact that without a way to contest her participation, that left her on the hook for all of it?

A For every charge.

Q And did you have those discussions with her before the plea offers were made?

A Oh yes, early on.

Q Okay. And did you discuss -- did you discuss that with her during your consultation about whether she should accept the plea offer or not?

A Yes.

MS. MCCALLISTER: I think that's all the questions I have, Your Honor.

THE COURT: All right.

MR. GROSE: Beg the Court's indulgence for just

a minute, please.

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. GROSE:

Q It's been a long time since this trial, hasn't it?

A Yes, sir, 1997.

Q And you recall me writing and asking for a copy of your file, don't you?

A Yes and we searched for it. I left that firm back in 2013. A lot of files were in a bank vault. We sent people over there to search for it and I could not locate anything. Lyman Chapman closed his practice shortly after I left. He's in a nursing home. And I've done everything that I could to try to find my file.

Q All right. So, the point I'm getting at is you don't have your file, correct?

A No, sir, I do not.

Q And so, you're having to testify off of memory?

A Yeah but my memory of that was such a tragic case.

Q Uh-huh.

A And the fact that her father had flown in from California, that doesn't happen all the time.

Q Right. You testified a few minutes ago that a

plea offer was extended after the trial started?

A At the beginning of the trial.

Q At the beginning of the trial?

A Yes, sir.

Q And that you went into the grand jury room?

A Yeah, fourth floor, the room -- if you go out the door, the first room on your right.

Q Okay.

A Right.

Q And that offer was contingent on Ms. McSharry testifying against her mother, Ms. Kelso?

A If I recall right it was 15 years but they wanted her to cooperate and be willing to testify against her mother.

Q Okay. Do you remember when Jennifer's trial was?

A The date?

Q Yeah.

A No.

Q If I showed you, I guess, the Order of Dismissal in the prior PCR at Page 2, I granted it wasn't a one day trial, September 12th of 1997, would you disagree with that?

A I can't disagree with that. I don't recall the date, it was a long time ago. She was 17 at the time. I

was a lot younger.

Q All right. And if I show you the Order of Dismissal in Ms. Kelso's file, which is, I believe, 2000-CP-04-2188 and show you that Ms. Kelso's trial was May 5th through 8th, 1997.

A Then I say those dates are wrong. Because they were tried -- I don't know when they were tried. But Jennifer was tried -- I would rely on the transcript rather than the Order.

Q Okay.

A But the transcript is usually certified by the court reporter when the trial was done.

Q Okay. So, your testimony is that Jennifer's trial was before her mother's trial?

A I can't recall.

Q Okay.

A All I know there was a plea offer made of 15 years. I think I told her father I might be able to budge them down to 12. And but she wanted a trial.

Q Now, you testified earlier that your recollection was that is that Jennifer's mother testified against her?

A That's my recollection. I may be wrong on that. But I mean, I rely on the transcript.

Q And certainly her testimony wasn't very helpful,

was it? Ms. Kelso's.

A Not at all.

Q Okay. Well, let's take a look at the transcript, if you don't mind. And if we look, I guess, we're looking at -- it's an index of September 9th, 1997. And it begins, I guess, with The State's case. Because on -- we're looking at Page 171 in the document that we're looking at and all of the people there are called by Ms. White; right?

A Right.

Q Okay. And on -- and it's got September 10th, 1997 on Page 172. And again, all of the people are being called by Ms. White?

A Yes.

Q Okay. The next Page, 173, September 10th, 1997, again, all the witnesses are being called by Ms. White?

A Yes, sir.

Q Then on Page 174, the only thing it says--

A State rests.

Q -- index September 11th, 1997, State rests. Then you flip over to 175, September 12th, 1997. And it has the witnesses that you called; is that right?

A Yes, sir.

Q All right. And one of the people that you called was Jennifer Titman, right?

A That's what the record says.

Q All right. And do you remember that she was a co-defendant?

A I don't remember everybody's name.

Q Okay. So, then you don't remember whether her testimony was helpful or harmful, do you?

A I'd have to look a transcript, sir.

Q Okay. But you did say that Ms. Kelso's testimony was not helpful to Ms. McSharry. And the record reflects that you called her as a witness, doesn't it?

A Do you have the second volume? Charles, I'll be wrong with that then. If I called her as a witness I was hoping she would help me then. Or I wouldn't have put her up. A 39. I did call her as a witness, I was hoping to show that, essentially, she was just doing what her mother was asking her to do and there was a lot of drug use involved, they had been up for a long period of time. And trying to show that Jennifer did not know the extent of what she was getting into.

Q Okay.

A That kind of refreshes my recollection. Like I said, I could not find my file.

Q All right.

A I've not seen these transcripts.

Q All right. And there was nothing to suggest any

involuntarily intoxication, was there?

A No.

Q Okay.

A None whatsoever. Nobody laced a drink or anything like that.

Q Okay. And all the evidence was voluntary intoxication?

A There was no -- no one ever brought up that I had been given something that I know what I was doing.

Q Right.

A That had never been discussed.

Q And voluntary intoxication, of course, is not a defense?

A It is not.

Q And that is something that judges routinely charge juries; is that correct?

A If you ask for it.

Q Or if The State asks for it?

A Right.

Q Yeah. And being up all night is not a defense, is it?

A No.

Q Okay. And being under the direction of somebody else is not a defense, particularly to murder?

A It's not a defense but it may try to lessen

the -- you know, I was looking for any help I could get. She was in a bad way, she wanted a trial.

Q Okay.

A It was against my advice to go to trial.

Q Right.

A But that was her right.

Q Okay. And it's fair to say that there, absent juror nullification, there was really no chance that Jennifer would be found not guilty in this trial?

A And that happens rare but it does happen every now and then.

Q And --

A I thought she was going to be convicted and she was kind of told of that fact.

Q All right.

A She was not going to walk. She was not going to get a free ride.

Q All right. All right. And sitting here today, you testified about the 15 year offer at the beginning of the trial right? Is that a yes?

A Yes. I'm sorry --

Q I forget to -- we're -- the lawyers are the worst witnesses when it comes to yes and no and shaking head --

A Yes, I thought with the extent of what was done

in this case, I thought 15 years was a very generous offer. And especially coming from Ms. White who didn't make offers very frequently.

Q All right. Do you recall sitting here today any other offers during trial?

A I think there was some offers made earlier on but they were extensive amounts of time.

Q Okay.

A But like I say, I remember going in that grand jury room and having the assistance of her father. I thought that might have made her accept the offer. It just didn't work.

Q All right. But sitting here you can't remember what any--

A Specifically no, sir, I can't.

Q Okay. And again, I'm not criticizing you because it's been a long time but we don't have benefit of your file?

A Like I say, we went through the office and the bank vault where all our old files are stored.

Q Okay. And we -- while you remember this case, I mean, we can agree that you're mistaken about who called Ms. Kelso?

A I was.

Q Yeah.

A That was long time ago.

Q Yeah.

A But I'm not mistaken about the plea offer because that was unusual but to have assistance when you get to talk to a client.

Q And you said it was unusual for Ms. white to make plea offers, do you recall--

A She was a hardline prosecutor.

Q All right. I know her and I had some cases with her. But do you know what she offered the co-defendants in this case?

A I would have -- it would have been in my file.

Q All right.

A Because we, you know, when I deal with multiple defendants, I want to make sure that my client gets the same kind of offer as everybody else.

Q Oaky.

A I mean, depending on their degree of culpability.

Q All right. And sitting here today you don't remember what the other co-defendants were offered?

A I do not.

Q Okay.

Beg the Court's indulgence for a moment.

You and I have been doing this for a long

time, haven't we?

A Yes, sir.

Q And we've seen some changes over the years, would that be fair to say?

A Uh-huh.

Q Is that a yes?

A Yes.

Q I do the same thing when I'm a witness. And one of the changes that we've seen is how the United States Supreme Court treats juvenile sentences; isn't it?

A There have been changes in the philosophy on treating juveniles and mentally deficient individuals.

Q All right.

A By the U.S. Supreme Court.

Q Right.

A And our State Supreme Court.

Q Right. And the developments with juveniles outside of the death penalty context have been since about 2010?

A Yes, sir.

Q Okay.

A 2010, 2012.

Q And the -- even, you know, banning the death penalty for juveniles, that didn't happen until after Jennifer's trial; is that fair to say?

A Yes.

Q Okay.

A I think it was early 2000.

Q And what the U.S. Supreme Court, one of the things that they were looking at, without going into all of the science, but sounds like you've read the opinions, one of the things that they were looking at was, you know, juvenile brain development, right?

A Yes.

Q And how juveniles process things, right?

A Yes, sir.

Q And like I say, we have been doing this for a long time and we didn't have benefit of some of those -- that guidance from the U.S. Supreme Court and our South Carolina Supreme Court in 1997; is that fair to say?

A That's fair.

Q Okay. And so, it would be fair to say that over the time that we have been practicing law and the time since Jennifer's trial, the legal landscape has changed tremendously with regard to 17 years old?

A It has changed.

Q Okay. It has changed.

A And, I guess, kind of on a case-by-case basis of what your presented with.

Q Right. Right.

Thank you, that's all I have.

THE COURT: Anything further from the witness?

MS. MCCALLISTER: Yes, sir, Your Honor, just briefly.

REDIRECT EXAMINATION

BY MS. MCCALLISTER:

Q Just to be clear, when you received a plea offer for Ms. McSharry, you conveyed that offer to her, correct?

A Yes, ma'am.

Q And you discussed with her the hand of one is the hand of all in helping her to make a decision whether the accept it or reject it?

A I did.

Q Okay.

That's all, thank you.

MR. GROSE: Nothing further.

THE COURT: All right, any objection to this witness being excused?

MR. GROSE: No, sir.

MS. MCCALLISTER: No, Your Honor.

THE COURT: Thank you, Mr. Byrholdt, you're excused.

MR. BRYHOLDT: Again, I apologize for everybody having to take off.

May I be excused, Your Honor?

THE COURT: Yes, sir.

Call your next witness.

MS. MCCALLISTER: We have no more witnesses.

THE COURT: Okay.

All right, anything further?

MR. GROSE: Not by way of witnesses, Your Honor.

THE COURT: I'll hear a brief summation.

Mr. Grose, since you're the moving party you can begin.

MR. GROSE: Would you rather do that or would you rather have us submit proposed orders?

THE COURT: I mean, I think I understand the issues. So, I'll allow each party to do that unless The State objects.

MR. MABRY: No, sir, I just wanted to renew my motion.

THE COURT: Yes, sir, noted for the record.

You've giving me a tremendous amount of material to look over. So, I'm going to consider that, read all these cases again, just to see how they apply to our present case. And I will have my law clerk notify you with a decision.

MR. MABRY: Yes, sir.

MR. GROSE: Your Honor, can I just, before the record goes off, give you one cite? And I'll put it

in the proposed order.

THE COURT: Yes, sir.

MR. GROSE: Or you can wait, it doesn't matter. I just want -- if you want to be looking at it. It would be Bobby, B-O-B-B-Y vs. Bies, B-I-E-S, 556 U.S. 825 from 2009. And that case actually benefited The State but it has some discussion about, you know, the change in the legal landscape. Which -- and I'll just leave it at that since we're submitting proposed orders.

THE COURT: Okay. Thank you.

MR. MABRY: Yes, sir, thank you, Your Honor.

MS. MCCALLISTER: Thank you, Your Honor.

MR. GROSE: Thank you, Your Honor.

(WHEREUPON, the proceedings were concluded.)

CERTIFICATE OF REPORTER

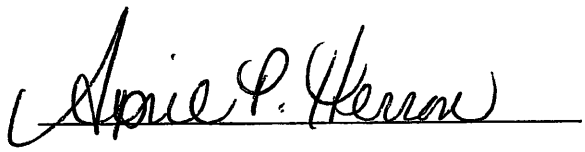
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Anderson County, South Carolina, on the Sixth day of October, 2017.

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

April 18, 2018



APRIL P. HERRON, Court Reporter

ALAN WILSON
ATTORNEY GENERAL

December 22, 2016

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

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

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

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:	Defendant's Attorney:
E. Charles Grose, Jr., Bar No. ____ Address: 404 Main Street Greenwood, SC 29646 Phone: ____Fax ____ E-mail: ____Other: ____	Lindsey A. McCallister, Bar No. ____ Address: PO Box 11549 Columbia, SC 29211 Phone: ____ Fax____ E-mail: ____Other: ____

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

SECTION I: Hearing Information

Nature of Motion: ____
Estimated Time Needed: ____ Court Reporter Needed: ☐ YES/☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order

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

Signature of Attorney for ☐ Plaintiff /☒ Defendant — December 22, 2016 Date submitted

SECTION III: Motion Fee

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

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: ____	JUDGE CODE ____ Date: ____

CLERK'S VERIFICATION

Collected by:____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
	)	
Jennifer L. McSharry, S.C.D.C. No. 244026,	)	Case No.: 2011-CP-04-1581
	)	
Applicant,	)	
	)	**AMENDED**
v.	)	**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 prole 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), SCRCP, 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 Fyre 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. Futher, 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,

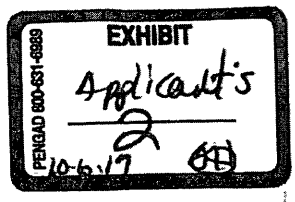
through her attorney, shall file any reasons she may have with the Anderson County Clerk of Court and shall serve opposing counsel at the following address:

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

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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

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.

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[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=52527565107102698770102109107747711411251688710537509886863750988937501028083541105385375010286501191008912010351706 5, 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

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
Jennifer McSharry, #244026, Applicant, v. State of South Carolina, Respondent.	)	C. A. No. 2011-CP-04-1581 **ORDER OF DISMISSAL**

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

I. PROCEDURAL HISTORY

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

The Trial and Sentencing

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

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

Relevant Facts Proved at Trial

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

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

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

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

The Direct Appeal

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

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

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

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

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

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

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

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

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

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

The Re-Sentencing Hearing

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

The Second PCR Hearing

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

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

II. ALLEGATIONS

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

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

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

A. "Unconstitutionality of Juvenile Life without Parole Sentence"

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

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c. "The Eighth Amendment's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not receive an individualized sentencing hearing during which all available mitigation evidence is considered. S.C. Constitution Article I, Section 15's prohibition against cruel and unusual punishment prohibits South Carolina from sentencing a juvenile to life imprisonment without the possibility of parole when the juvenile did not receive an individualized sentencing during which all available mitigation evidence is considered."

B. "Ineffective Assistance of Trial Counsel (Plea Negotiations)"
   a. "Trial counsel failed to properly inform McSharry of the legal principals relevant to her making an informed decision on whether to plead guilty or proceed with a jury trial, including properly educating her about South Carolina's rule of accomplice liability often referred to as the 'hand of one, hand of all.'"
   b. "'[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.' Missouri v. Frye, 132 S.Ct. 1399, 1408 (2012). When trial counsel's deficient performance leads the client to reject the prosecution's plea offer, '[t]he correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement. [. . .]' Lafler v. Cooper, 132 S.Ct. 1376, 1391 (2012)."

C. "Ineffective Assistance of Trial Counsel (Sentencing Hearing)"
   a. "Trial counsel failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment."
   b. "Trial counsel failed to retain an expert witness to perform a psychiatric examination of McSharry, testify at the sentencing hearing, and provide relevant and available mitigation evidence."

D. "Ineffective Assistance of Post-Conviction Counsel"
   a. "Her PCR counsel, Nancy Jo Thomason, had an actual conflict of interest. In addition to representing McSharry, Thomason previously represented [co-defendant] Kelso during her PCR."
   b. "PCR counsel did not conduct any investigation at all and, therefore, failed to investigate, develop, and present relevant mitigation evidence, available at the time of McSharry's trial that would have influenced the trial court to impose a sentence of less than life imprisonment."
   c. "PCR counsel failed to retain an expert witness to perform a psychiatric examination of McSharry to discover the evidence that trial counsel should have presented the sentencing hearing, and provide relevant and available mitigation evidence."

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

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

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

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety, including the trial transcript, and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. This Application is Time Barred and Improperly Successive

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

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

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

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

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

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

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

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

B. Ineffective Assistance of Trial Counsel

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

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

In this PCR action, Applicant bears the burden of proving the allegations in her application by a preponderance of the evidence. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove Counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)). The proper measure of performance is whether Counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove Counsel's performance was deficient. Id. Under this prong, the Court measures Counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Ineffective Assistance of PCR Counsel

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

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

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

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

V. CONCLUSION

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

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

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

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IT IS THEREFORE ORDERED:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant shall be remanded to the custody of Respondent.

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

THE HONORABLE R. SCOTT SPROUSE
Presiding Judge
Tenth Judicial Circuit

Walhalla, South Carolina

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
	)	Case No. 2011-CP-04-01581
Jennifer McSharry,	)	
Applicant,	)	
	)	**Rule 59(e), SCRCP Motion**
vs.	)	**and Proffer of Proposed Order Granting**
	)	**Post-Conviction Relief**
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

Pursuant to Rule 59(e), SCRCP, Jennifer McSharry moves this Court to reconsider its order dated November 21, 2017 and filed November 27, 2017, withdraw that order, and enter an order granting post-conviction relief ("PCR").[1] The following grounds support this motion.

1) The order of dismissal, Section III(A), concludes Ms. McSharry's PCR "application is time barred and improperly successive." As pointed out in Section III(A) of Ms. McSharry's proposed order, this case falls into the same category of cases as *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (conflicted counsel), *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999) (denial of counsel), and *Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016) (unqualified counsel), where the applicants did not get a full and fair "bite at the apple." Here, Ms. McSharry's prior PCR counsel had a non-waivable conflict of interest[2] because she also represented Ms. McSharry's mother who was also a co-defendant. The order of dismissal, Section

[1] A copy of Ms. McSharry's proposed order granting post-conviction relief is attached and incorporated by reference.

[2] Prior PCR counsel attended the evidentiary hearing but did not testify. There is no evidence in the record that Ms. McSharry waived the conflict of interest. Ms. McSahrry was entitled to sufficient time to consult with a conflict-free attorney that would advise her about her case and present all claims in an amended application. Rule 71.1, SCRCP and S.C. Code Ann. § 17-27-90.

III(C) cites *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) but did not address *Carter* and *Odem.* Although citing *Robertson*, the order overlooked the fact that *Robertson* was remanded for an evidentiary hearing to determine whether Robertson's prior post-conviction counsel met the qualifications set for in the capital post-conviction relief statute. Ms. McSharry did not get a full and fair "bite at the apple." The conclusion Ms. McSharry's PCR "application is time barred and improperly successive" results from an error of law.

2) As discussed in Ms. McSharry's proposed order, Section III(B), once the Court allows this PCR application to proceed because of prior PCR counsel's non-waivable conflict, it is not necessary for this Court to determine whether *Missouri v. Frye*, 566 U.S. 134 (2012) and *Lafler v. Cooper*, 566 U.S. 156 (2012) are new constitutional decisions. Under Ms. McSharry's theory, these cases provide additional grounds for allowing this application to proceed. Under the State's theory, these cases would be considered if Ms. McSharry is allowed to proceed because of prior PCR counsel's conflict of interest.

3) The factual finding in Section III(B) of the order of dismissal, at pp. 17-18, that trial counsel had a "good memory" of Ms. McSharry's case is without factual support in the record. As pointed out in Ms. McSharry's proposed order, Section III(C), trial counsel's memory of the trial was not consistent with the trial transcript and other court records.[3]

4) The factual finding in Section III(B) of the order of dismissal, at p. 18, that trial counsel called Ms. McSharry's mother as a witness (while correct) is not consistent with trial counsel's testimony at the evidentiary hearing. During the hearing, trial counsel initially testified

[3] The order of dismissal contains other factual errors. For example, at p. 14, the order states, "Applicant further testified she was the only 'juvenile' involved; her codefendants were all over eighteen years old." Ms. McSharry never testified she was the only juvenile. Co-defendant Jennifer Titman was fifteen at the time of the crimes.

that Ms. McSharry's mother cut a deal with the prosecution to testify against her daughter and that testimony was very damaging to Ms. McSharry. Given trial counsel's lack of memory of the trial, combined with the unfavorable impact of Ms. McSharry's mother's testimony, the order's findings regarding the reasons why trial counsel called this witness are not supported by the record.

5) The factual finding in Section III(B) of the order of dismissal, at p. 18, that *all* trial counsel could do is relay the terms of a plea offer to his client overlooks the professional obligations of counsel during plea negotiations to *advise his client*. *See Frye* and *Lafler, supra.*

6) The factual findings in Section III(B) of the order of dismissal, at pp. 18-19, that trial counsel "engaged in extensive discussions with Applicant regarding 'hands of one is the hand of all' and accomplice liability and gave examples to Applicant of how the concept works" and counsel encouraged Ms. McSharry to accept the state's final plea offer do not have factual support in the record.

7) Section III(C) of the order of dismissal does not apply *Frye* and *Lafler* to the facts of this case.

8) The order of dismissal, at p. 16, errs by relying on the colloquy between the trail judge and Ms. McSharry. As set forth in Ms. McSharry's proposed order, Section II, 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. Ms. McSharry has always accepted factgual responsibility for the role she played in these crimes. Every reason exists to believe she would have accepted legal responsibility for her role in the crimes but for trial counsel's deficient advice.

9) Once again, the order of dismissal, at p. 16, overlooks trial counsel's role in *advising his client* by shifting that responsibility to a seventeen-year-old to know what questions

to ask her attorney. *See Frye* and *Lafler, supra.* Remarkably, the order of dismissal then shifts the burden of explain the law to the Solicitor's opening statement. If this Court truly believes that Ms. McSharry should have based her understanding of the legal concepts involved in her case on the Solicitor's opening statement, then what happened at Ms. McSharry's trial is a complete breakdown of the criminal justice system. Additionally, the order stating Ms. McSharry should have relied on the opening argument of the Solicitor for legal advice is inconsistent with the Court's finding that trial counsel adequately advised Mr. McSharry about those same legal concepts.[4]

9) For the reasons set forth in Ms. McSharry's proposed order, this Court should grant Ms. McSharry post-conviction relief.

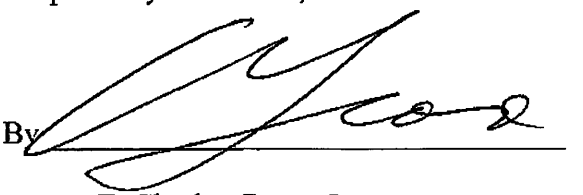
This Court should reconsider its order dated November 21, 2017 and filed November 27, 2017, withdraw that order, and enter an order granting post-conviction relief.

IT IS SO MOVED.

(signature on next page)

[4] This Court signed the Attorney General's proposed order without making any changes. "S.C. Code Ann. §17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated that responsibility to the Attorney General's Office. Although the Attorney General addressed the merits of each issue presented during the hearing, the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, §8. Addressing section 17-27-80 in the context of a capital post-conviction relief case, our Supreme Court "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

Respectfully Submitted,

By 

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December 1, 2017
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
	)	Case No. 2011-CP-04-01581
Jennifer McSharry,	)	
Applicant,	)	PROPOSED
	)	**Order Granting Post-Conviction Relief**
vs.	)	
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

This matter is before the Court on Jennifer McSharry's second amended application for post-conviction relief. For the reasons set forth below, the Court grants Ms. McSharry post-conviction relief.

I. PROCEDURAL HISTORY.

This case arises out of an incident occurring on November 17, 1996, when Ms. McSharry was seventeen years old. The State indicted Mr. McSharry for murder (1997-GS-04-124), 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 firearm during the commission of a violent crime (1997-GS-04-1694). 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, thirty years for armed robbery, five years for conspiracy, thirty years for burglary in the first degree, and five years for possession of a firearm during the commission of a violent crime. The South Carolina Supreme Court affirmed the convictions and sentences. *State v. McSharry*, S.C.S.Ct. Unpublished Op. No. 1999-MO-093 (filed Nov. 19, 1999).

Ms. McSharry filed her first application for post-conviction relief on November 14, 2000. (2000-CP-04-03030). 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.[1] Christopher L. Newton represented the State. By written order filed on May 9, 2005, Judge Macaulay denied Ms. McSharry's application for post-conviction relief. There was not an appeal.

On May 11, 2011, Ms. McSharry filed a second application for post-conviction relief seeking the benefit of *Graham v. Florida*, 560 U.S. 48 (2010). The State filed its return and motion to dismiss on January 23, 2012. Ms. McSharry amended her application for post-conviction relief 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). Ms. McSharry amended her application again on November 8, 2012 seeking the benefit of *Miller v. Alabama,* 567 U.S. 460 (2012).

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 moved to stay this post-conviction proceeding on November 13, 2012, pending the outcome of *Aiken*. She renewed that motion on May 15, 2013 after our Supreme Court agreed to hear *Aiken*. The State consented to this motion by return filed on November 27, 2013. Our Supreme 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. Our Supreme Court stayed its decision in

[1] Clerk of Court records reflect Carolyn E. Galloway was appointed to represent Ms. McSharry, by written order dated March 16, 2001, during her prior post-conviction relief case.

Aiken until July 23, 2015 while the State sought review by the Supreme Court of the United States. After our Supreme Court lifted the stay in *Aiken,* the petitioners and those similarly situated had one year to file a motion for re-sentencing.

On March 18, 2016, Ms. McSharry moved the General Sessions Court for a re-sentencing hearing pursuant to *Aiken.* By written order dated May 27, 2016, the Honorable Costa M. Pleicones, Chief Justice of the Supreme Court, granted this Court exclusive jurisdiction to preside over Ms. McSharry's re-sentencing hearing. On February 10, 2017, this Court convened a re-sentencing hearing. Catherine Huey represented the State. Charles Grose represented Ms. McSharry. This Court sentenced Ms. McSharry to thirty years for murder concurrent with the other sentences imposed by Judge Hall.

On December 28, 2016, the State filed an amended return and motion to dismiss Ms. McSharry's second amended application for post-conviction relief. On October 6, 2017, this Court 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.

Ms. McSharry's second amended application for post-conviction relief further alleged that her prior post-conviction relief 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."

The State renewed its motion to dismiss based on the statute of limitations and the bar against successive applications for post-conviction relief. After hearing arguments, the Court took those motions under advisement.

Ms. McSharry, Jeffery McSharry, and Mr. Byrholdt testified during the hearing.

II. FINDINGS OF FACT.

At both Ms. McSharry's re-sentencing hearing and the evidentiary hearing in this post-conviction relief case, the parties' presentation to the Court recognized the undisputed fact 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. During the 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. (Tr. 344-50). 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 where there. 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. The defense called co-defendants Jennifer Titman (Tr. 465-522) and Rene Kelso (Ms. McSharry's mother) (Tr. 539-62), both of whom corroborated Ms. McSharry's statement.

During the post-conviction evidentiary hearing, Ms. McSharry testified that, at the time of her trial, she did not understand she could be convicted of these crimes when she was not the person who shot the victim. She testified that, at the time of her trial, she did not understand the legal principle of accomplice liability. Ms. McSharry further testified that her trial counsel talked about celebrating after the jury returned not guilty verdicts. Ms. McSharry testified about two plea offers extended to her by the State. The first offer was prior to trial and involved a fifteen-year sentence conditioned on her testifying in her mother's jury trial. At the time, the State was considering seeking the death penalty for Ms. Kelso, although it ultimately did not. Ms. McSharry

testified she rejected this plea offer because she did not want to assist the State in seeking the death penalty against her mother.[2] The second plea offer, extended during trial, involved guilty pleas with a sentence of twenty-five years imprisonment. Ms. McSharry testified she rejected this offer because of her misunderstanding of the legal principal of accomplice liability. She further testified that, if she had known what she known now about accomplice liability, then she would have accepted that offer and pleaded guilty.

Jeffery McSharry, Ms. McSharry's father testified at the evidentiary hearing. Mr. McSharry was at his daughter's jury trial. Mr. McSharry recalled trial counsel saying Ms. McSharry had a 50-50 chance of being acquitted. Mr. McSharry thought the jury trial was going poorly for his daughter. Mr. McSharry expressed his concerns to trial counsel and asked trial counsel to get his daughter to accept the guilty plea offer, but trial counsel told him Ms. McSharry was his client, not him.

Trial counsel testified at the evidentiary hearing. He recalled the general facts of the case and confirmed the pre-trial and during-trial plea offers. Trial counsel did not have his file, and the intervening years have clouded his memory. For example, while trial counsel recalled that Mr. Kelso's testimony was damaging to Ms. McSharry, 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.[3] The record also reflects the defense called her as a witness during Ms. McSharry's jury trial. (Tr. 539-62).

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[2] Ms. McSharry does not seek the re-extension of this fifteen-year offer.

[3] "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). This Court has reviewed the written order of the Honorable

The State points to the colloquy between trial counsel, Ms. McSharry, and the trial judge, found at pp. 460-63, 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)).[4] 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. The Court, therefore, does not find this colloquy to be dispositive on the issues raised in this post-conviction relief hearing.

After considering both the trial record and post-conviction relief record, the Court finds that Ms. McSharry did not understand the legal principal of accomplice liability at the time she rejected the State's twenty-five-year plea offer. This Court further finds that, had Ms. McSharry understood the legal principle of accomplice liability, then she would have accepted the State's twenty-five-year plea offer.

Cordell Maddox, Jr., dated March 10, 2005, dismissing Ms. Kelso's application for post-conviction relief, in *Kelso v. State, supra.*

[4] This Court is aware *Harres* and *Lambert* involved voluntariness of a guilty plea. These cases, nevertheless, mandate consideration of the trial and post-conviction record. In would be an "abuse of discretion" for the Court to rely exclusively on the trial record. *Mangal v. State*, No. 2016-000610, 2017 WL 4583310, at *3 (S.C. July 19, 2017)

III. CONCLUSIONS OF LAW.

A. Procedural bars.

As a threshold matter, this Court must address the State's motion to dismiss Ms. McSharry's application for post-conviction relief because of the statute of limitations and the bar against successive applications for post-conviction relief.

This Court is aware that in most post-conviction relief cases, our Supreme Court "refuse[s] to excuse the pleading and issue-preservation requirements that apply in all civil cases." *Mangal v. State*, No. 2016-000610, 2017 WL 4583310, at *6 (S.C.S.Ct. July 19, 2017). Our Supreme Court does not relax the procedural requirements on the grounds that initial post-conviction relief 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 post-conviction relief 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 cases from our Supreme Court are instructive on what constitutes "sufficient reasons" to allow a successive post-conviction relief application. First, in *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), Carter was represented at the post-conviction relief hearing by a member of the same law firm as the lawyer that had represented him during his jury trial. Our Supreme 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*, our Supreme 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*, our Supreme Court remanded for a hearing to determine whether Robertson's post-conviction relief counsel met the requirements to serve as counsel in a capital post-conviction relief case pursuant to S.C. Code Ann. § 17-27-160. Thus, our Supreme Court has held no counsel, conflicted counsel, and unqualified counsel to be "sufficient reason" to allow a successive post-conviction relief application. Assistance of counsel, after all, is the cornerstone of our state's post-conviction relief procedure. Rule 71.1, SCRCP 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"). Our Supreme 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 post-conviction relief 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.

An applicant receiving ineffective of post-conviction relief 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).

After careful review of the trial and post-conviction record in Ms. McSharry's case and the post-conviction record in *Rene Kelso v. State*, Anderson County Case Number 2000-CP-04-02188,[5] this Court concludes that Ms. McSharry's case falls in the category of an 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.[6] Although Ms. Thomason was relieved as counsel for Ms. Kelso prior to her evidentiary hearing,[7] 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.

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[5] *See* fn. 3, *supra.*

[6] Ms. Kelso filed her application for post-conviction relief 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.

[7] *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.

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 claim that become moot after her re-sentencing, Ms. McSharry alleged that prior post-conviction 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). Raising this claim is significant because Ronnie Jordan, the actual shooter, received less time than Ms. McSharry (prior to her re-sentencing).[8] 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).[9] Judge Macaulay's order filed on May 9, 2005 does not reflect a Ms. McSharry waived the conflict of interest. This Court finds and concludes the conflict of interest is "sufficient reason" to allow this post-conviction relief action to proceed. *See Carter, supra.* Ms. McSharry has not had her one bite at the apple. *See Odem, Aice, supra.*[10]

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[8] 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.

[9] 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.*

[10] This Court also notes that Ms. Thomason did not assist Ms. McSharry to amend her application for post-conviction relief as contemplated by Rule 71.1(d) and S.C. Code Ann. § 17-

The State's motion to dismiss, therefore, is denied.

B. *Missouri v. Frye* and *Lafler v. Cooper.*

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 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 these cases merely applied *Strickland v. Washington,* 466 U.S. 668 (1984) and, therefore, are not new, constitutional decision contemplated by S.C. Code Ann. § 17-27-45(B). The State provided case law form other jurisdictions supporting its position, but our Supreme Court has not 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 a successive post-conviction relief 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 application for post-conviction relief, meaning the legal principles set forth in *Frye* and *Lafler* could have been considered in Ms. McSharry's prior post-conviction relief hearing if she had conflict free counsel. Because of the conclusion in Section III(A), *supra,* that Ms. McSharry has not received her "bite at the apple," this Court does not need to resolve this issue. Under either parties' approach, this Court can consider the legal principles set forth in *Frye* and *Lafler*.

C. Allegations of Ineffective Assistance of Counsel.

In determining whether trial defense counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth

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27-90. Ms. McSharry testified she met Ms. Thomason on the day of her prior post-conviction relief evidentiary hearing.

in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland,* the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688.

Once the defendant asserting ineffective assistance of counsel has established counsel's failure to comply with the prevailing professional norms, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

> 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. The totality of the evidence must be considered in deciding whether the defendant was prejudiced by counsel's errors.

"It is well settled that the [Sixth Amendment] right to the effective assistance of counsel applies to certain steps before trial," *Frye,* 566 at 140, including "to the plea-bargaining process." *Lafler,* 566 at 162. "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 162-63 (internal quotations omitted). Deficient performance is established when trial counsel advises his client "to reject the plea offer on the grounds [s]he could not be convicted at trial." *Id.* at 163. To establish prejudice, "a 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. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Id.* (internal quotations and citations omitted).

Here, Ms. McSharry credibly testified that she did not understand the legal principle of accomplice liability. Mr. McSharry corroborated her daughter's testimony. "[A] court may take account of a defendant's earlier expressed willingness, or unwillingness,

to accept responsibility for his or her actions." *Id.* 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.

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 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[11] and Jennifer Titman[12]—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

[11] Mr. Conley was sentenced to fifteen years imprisonment. *State v. Conley*, Anderson County Indictment Number 1997-GS-04-00064

[12] 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 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 the State to re-extend the twenty-five-year plea offer, vacate the sentence for first-degree burglary and armed robbery, and remand Ms. McSharry's case to the Court of General Sessions to impose the twenty-five year sentences.

This Court, therefore, grants Ms. McSharry's application for post-conviction relief, vacates the convictions for murder, first-degree burglary, and armed robbery, and remands this case to the Court of General Sessions for Ms. McSharry to enter guilty pleas to voluntary manslaughter, first-degree burglary, and armed robbery for concurrent sentences of twenty-five years imprisonment.

IT IS SO ORDERED.

R. Scott Sprouse
Presiding Judge, Tenth Judicial Circuit

_____, 2017
Walhalla, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON Jennifer McSharry, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT CASE NO.: 2011-CP-04-1581 ORDER DENYING APPLICANT'S MOTION FOR RECONSIDERATION

PRESIDING JUDGE:	R. SCOTT SPROUSE
DATE OF HEARING:	OCTOBER 6, 2017
PLAINTIFF'S ATTORNEY:	LINDSEY MCCALLISTER
DEFENDANT'S ATTORNEY:	E. CHARLES GROSE, JR.
COURT REPORTER:	APRIL HERRON

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

AND, IT IS SO ORDERED.

R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina

December 18, 2017

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 27 2018
S.C. SUPREME COURT

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

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 the Appendix 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
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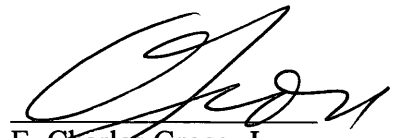
August 24, 2018



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