STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-000096

Jennifer McSharry, #244026,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT'S QUESTIONS PRESENTED

I. Did the PCR court correctly find Petitioner's PCR application was time-barred and improperly successive where the only remaining claims at the time of the evidentiary hearing were an allegation trial counsel failed to properly convey a plea offer and Petitioner's first PCR counsel was ineffective due to a purported conflict of interest?

II. Did the PCR court correctly find, notwithstanding the procedural bar, trial counsel's representation was not deficient in any regard concerning his handling of the plea offer and his discussions with Petitioner regarding accomplice liability and South Carolina's "hand of one, hand of all" rule?

STATEMENT OF THE CASE

Jennifer McSharry (Petitioner) 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), first-degree burglary (1997-GS-04-1693), and possession of a weapon during the commission of a violent crime (1997-GS-04-1694). Bruce Bryholdt, Esquire (Counsel), represented Petitioner. Druanne White, Esquire, prosecuted the case on behalf of the State. Petitioner 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."

Petitioner rejected a plea offer of twenty-five years on voluntary manslaughter and elected proceeded to a jury trial before the Honorable H. Dean Hall and a jury. On September 12, 1997, the jury found Petitioner guilty of all charges. Judge Hall sentenced Petitioner to imprisonment for concurrent terms of life without parole for murder, thirty years each for armed robbery and first-degree burglary, and five years each for conspiracy and the weapons charge.

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

Petitioner filed her first PCR application 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. Petitioner

was present at the hearing and represented by Nancy Jo Thomason, Esquire. Petitioner had previously been represented by Carolyn Galloway, Esquire. Christopher L. Newton, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on her own behalf, and Counsel also testified. By written Order dated May 6, 2005, and filed May 9, 2005, Judge Macaulay denied and dismissed the application. Petitioner did not timely file a notice of appeal.

Respondent filed a second, successive PCR application on May 12, 2011, raising claims regarding the constitutionality of the life sentence she received as a juvenile. Respondent made its Return and Motion to Dismiss on or about January 20, 2012, arguing the application was untimely pursuant to the South Carolina statute of limitations for PCR actions and improperly successive under South Carolina law. Petitioner filed a Reply to Respondent's motion on February 8, 2012. Through counsel, Petitioner subsequently filed amendments to the second PCR application on May 14, 2012, and November 13, 2012. Raising claims regarding trial counsel's alleged failure to properly convey plea offers, ineffective assistance at sentencing, and ineffective assistance of Petitioner's first PCR counsel. On November 13, 2012, Petitioner also filed a "Motion to Stay Proceedings until the South Carolina Supreme Court decided Aiken et. al. v. Byars."[1] 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.

By letter dated September 1, 2015, and filed September 11, 2015, Petitioner, through counsel, informed the Anderson County Clerk of Court that the portions of her application based

[1] Petitioner was seventeen years old at the time she was convicted and sentenced to life without parole.

upon Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012), were moot. Respondent thereafter submitted an Amended Return and Motion to Dismiss and Amended Conditional Order of Dismissal seeking to dismiss all remaining allegations to the circuit court on December 22, 2016. Petitioner submitted her response on December 27, 2016. The circuit court declined to issue the Amended Conditional Order of Dismissal and instructed Respondent to set the matter for a hearing.

On February 10, 2017, before a PCR evidentiary hearing could be scheduled, Petitioner received a resentencing hearing in General Sessions consistent with the ruling in Aiken v. Byars, and her sentence was reduced from life imprisonment for murder to thirty years' incarceration. Petitioner'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 resentencing hearing, Petitioner is now serving an aggregate sentence of thirty years with credit for the time she has already served both awaiting trial and in the South Carolina Department of Corrections.

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 the Honorable R. Scott Sprouse. Petitioner 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, Petitioner testified on her own behalf and presented testimony from her father, Jeff McSharry. Counsel testified for the State. At the call of the case, counsel for Petitioner conceded all claims except the allegation regarding Counsel's handling of the plea offer were moot, and the PCR court therefore dismissed those allegations. The State renewed its Motion

to Dismiss, but the PCR court instructed the parties to proceed with the evidentiary hearing. Judge Sprouse ultimately denied and dismissed Petitioner's application by written order filed November 27, 2017. Petitioner's counsel filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, on December 7, 2017. Judge Sprouse issued an order denying the motion on December 21, 2017.

Petitioner then timely filed a notice of appeal of the denial of post-conviction relief on January 19, 2018. Through counsel, she submitted a Petition for Writ of Certiorari on August 20, 2018. This Return follows.

STATEMENT OF THE FACTS

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

When the group arrived at Miller's property in Anderson County, Petitioner and Titman knocked on Miller's door, told him they were lost, and he invited them in to use the phone. App. p. 355. Petitioner then left the trailer saying she needed to get cigarettes from the car, and Jordan, Kelso, and Conley rushed in. App. pp. 347, 356. Petitioner and Titman waited in the car. App. 347-48. A few minutes later, as Miller was being lead out of the house, Petitioner heard gunshots saw Jordan shoot Miller. App. p. 348. Kelso was also shot accidentally during this exchange, and Jordan had to carry her back to the car. App. 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 gunshot wound. App. p. 349.

Once back in Clayton County, Georgia, Kelso went to the emergency room to seek treatment for the gunshot wound to her hand. App. p. 350. The group decided Kelso would tell hospital staff she was shot accidentally, but she gave inconsistent stories to police investigating her injury. App. pp. 111-17, 350. A few days later, Titman sought medical treatment for mental health issues and told hospital staff what had happened in Anderson County. App. p. 133, 488-89. The hospital staff then contacted police. App. p. 489. Eventually, Petitioner 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. App. pp. 335-59. Petitioner 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 a theory of accomplice liability. App. pp. 65-66, 673-82.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. The PCR court correctly found Petitioner's PCR application was time-barred and improperly successive where the only remaining claims at the time of the evidentiary hearing were an allegation trial counsel failed to properly convey a plea offer and Petitioner's first PCR counsel was ineffective due to a purported conflict of interest.

The PCR court correctly found Petitioner's PCR application was time-barred and improperly successive. Petitioner 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 action, and Petitioner failed to raise that allegation. Additionally, Petitioner's claim regarding her first PCR counsel is not proper in a successive action.

A. Successive Allegation Against Trial Counsel

Petitioner 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, the United States Supreme Court decisions of Lafler and Frye did not announce a new rule of constitutional law or one retroactive to Petitioner. Although this Court has not 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 neither Lafler nor Frye announced a new constitutional rule nor applied it retroactively, Petitioner cannot rely on these cases to defeat the statute of limitations or the prohibition on successive applications.

Petitioner 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 action 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). At the hearing, Petitioner offered no excuse for her failure to comply with the statute of limitations or any evidence proving she did not have all the information necessary to raise this claim at the time of her first application in 2000. Therefore, the PCR court correctly found Petitioner's application was barred by the prohibition on successive applications and the statute of limitations.

B. Successive Allegation Against First PCR Counsel

Petitioner also attempts to overcome the statute of limitations and successiveness bar by alleging her first PCR attorney or attorneys were ineffective and laboring under a conflict of interest. As an initial matter, this Court should find Petitioner's argument her Aiken v. Byars resentencing hearing triggered a new timeline for compliance with the statute of limitations is not preserved because it was not raised to or ruled on by the PCR court. It is well settled that an issue which has not been presented to or passed upon by the trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). Petitioner did not raise this argument at the evidentiary hearing or in her Rule 59(e), SCRCP, motion. Therefore, she cannot raise it for the first time in her petition. Herron v. Century BMW, 719 S.E.2d 640 (2011) (holding an issue cannot be raised for the first time on appeal).

In any event, ineffective assistance of PCR counsel is not a sufficient reason to permit a successive application in state-level PCR proceedings, and therefore, the PCR court correctly

found this allegation is procedurally barred. See Martinez v. Ryan, 566 U.S. 1 (2012) ("[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."); Robertson v. State, 418 S.C. 505, 795 S.E.2d 29, 37 (2016) ("[B]ecause the PCR Act is a legislatively created scheme, any post-Martinez change to PCR proceedings must be instituted by the Legislature."). While 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, it has no bearing on Petitioner's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state PCR application. Indeed, this Court, in Kelly v. State, explicitly held 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, the South Carolina Supreme Court expressly declined to "create a state remedy that is the equivalent of the federal remedy established by Martinez." 418 S.C. at 521, 795 S.E.2d at 37.

Therefore, this 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). In Aice, this Court held the PCR rules "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 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)).

Petitioner alleges her first PCR attorney or attorneys were ineffective and laboring under a conflict of interest, such that she has met Aice's requirement of a "sufficient reason" for filing a successive claim. Specifically, Petitioner alleges one of the attorneys who represented her during her first PCR action, Nancy Jo Thomason, had a conflict of interest because she previously represented Kelso, Petitioner's mother, at Kelso's PCR hearing. "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the [Petitioner's]." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007).

Petitioner 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. At the evidentiary hearing in this matter, however, Petitioner did not call either of Petitioner's first PCR attorneys as witnesses, nor did she otherwise introduce any other credible evidence to show how Ms. Thomason's prior representation of Kelso would have caused Ms. Thomason to be laboring under a conflict of interest or divided loyalty when representing Petitioner. Kelso's PCR had been heard and denied, and an order of dismissal had been issued by the time Thomason appeared on Petitioner's behalf during Petitioner's first PCR. App. pp. 755, 770. What's more, Kelso moved to relieve Thomason prior to the evidentiary hearing in her case, so Thomason appeared only has stand-by counsel at that hearing. App. pp. 754-55. Furthermore, the allegations Petitioner now raises against Counsel in this current application do not involve her mother in any way, but rather the alleged failure of Counsel to advise her sufficiently as to the impact of the "hand of one is the hand of all" doctrine when plea offers were made to her by the State. App. pp. 889-908, 967.

Because Petitioner failed to meet her burden of proving her previous PCR counsel actively represented conflicting interests, the PCR court correctly found she has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. See 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) (finding "[u]ntil a defendant shows that his counsel has actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance arising from multiple representation"). "The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction." Id. at 359, 426 S.E.2d at 795. The PCR court correctly found this allegation has no merit, and Petitioner 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 Petitioner 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 Petitioner 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.").

Accordingly, Petitioner failed to meet her burden of proof at the evidentiary 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. Therefore, the PCR court correctly dismissed this allegation as improperly successive under Aice, and certiorari should be denied.

II. Notwithstanding the procedural bar, the PCR court correctly found trial counsel's representation was not deficient in any regard concerning his handling of the plea offer and his discussions with Petitioner regarding accomplice liability and South Carolina's "hand of one, hand of all" rule.

Petitioner 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, Petitioner 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.

At the PCR hearing, Petitioner testified the general facts of her involvement in these crimes, as detailed above, 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. App. p. 974-76. Petitioner further confirmed several plea offers were made during the course of her case, all of which she declined.[2] App. pp. 976-79. Plea negotiations were ongoing during the trial, and eventually the State offered to reduce the charge to voluntary manslaughter with a sentence of twenty-five years. App. pp. 462, 979, 993. Petitioner acknowledged she testified on the record during her trial regarding the plea negotiations, and in that testimony she unequivocally stated she did not want Counsel to pursue any further plea deal and wanted a trial. App. pp. 993-94. Importantly, Petitioner's testimony at the time reflected her understanding she could receive up to life without parole if convicted by the jury. App. p. 462-63, 1000. Petitioner

[2] Petitioner was first offered fifteen years, but 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. App. pp. 976-77, 992. Petitioner was next offered thirty years, which she also declined. App. pp. 978-79.

further acknowledged her testimony at the time indicated both her family and Counsel had advised her to accept the plea offer. App. pp. 460, 993, 998-99.

At the PCR hearing, however, Petitioner testified she refused the twenty-five year plea offer made by the State because she did not understand the concept and implications of "hand of one, hand of all" accomplice liability. App. pp. 980-81. Petitioner testified although 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. App. p. 980. Petitioner 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. App. pp. 982-83. However, Petitioner also testified at the PCR hearing 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. App. p. 986-88. Petitioner additionally agreed she heard the Solicitor explain "hand of one, hand of all" in her opening statement and understood the concept before the plea offer was made during her trial. App. p. 988 (emphasis added). Importantly, Petitioner testified she had all of this information at the time of her first PCR action, but did not raise a claim alleging Counsel was deficient in his advice regarding the plea offers or his explanation of accomplice liability. App. pp. 994, 996-98.

Petitioner's father, Jeff McSharry, also testified he was present at Petitioner's trial in 1997 and at her resentencing hearing in February 2017. App. p. 1006. He further testified he remembered the plea negotiations during trial and recalled Counsel conveying the offer of twenty-five years to Petitioner. App. p. 1006. Mr. McSharry testified that during the discussion regarding whether to accept the plea offer, Petitioner 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. App. pp. 1006-07. Mr.

McSharry also testified Petitioner did most of the talking during the discussions, and Petitioner said she wanted to "roll the dice." App. p. 1007.

In contrast, Counsel testified he felt Petitioner understood the implications of turning down the twenty-five-year offer, and she wanted a trial. App. pp. 1018-19. Counsel testified he thought having Petitioner's father present during plea negotiations would help convince Petitioner to accept the final, twenty-five-year offer, but it did not. App. p. 1028. Counsel further testified there was never any claim by the State or law enforcement, from the time of Petitioner'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. App. p. 1020. As a result, Counsel testified he engaged in extensive discussions with Petitioner regarding "the hand of one is the hand of all" and accomplice liability and gave examples to Petitioner of how the concept works. App. pp. 1019-20, 1032. Counsel testified these discussions were extensive and occurred before trial, before the plea offer was made during the trial, and during the final consultation during trial as to whether Petitioner should accept the plea offer. App. pp. 1020. Counsel further testified he advised Petitioner 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 coconspirator. App. p. 1020, 1027.

The PCR court found Counsel's testimony credible over Petitioner's and found Counsel was not deficient in his handling of the plea offer or his advice to Petitioner. App. pp. 1073-74. Therefore, the PCR court correctly denied relief notwithstanding its finding the allegations are also improperly successive and barred by the statute of limitations. Because there is credible evidence in the record in the form of Counsel's testimony and the trial transcript, certiorari should be denied.

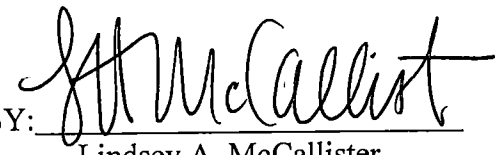
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's denial of relief. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
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January 28, 2019

STATE OF SOUTH CAROLINA

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S.C. SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
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The Honorable R. Scott Sprouse, Circuit Court Judge

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JENNFER L. MCSHARRY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, South Carolina 29646

This 28th day of January, 2019

Camille Henry

CAMILLE HENRY
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

January 28, 2019

RECEIVED
JAN 31 2019
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk – South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Jennifer L. McSharry v. State of South Carolina**
Appellate Case No. 2018-000096
Lower Court Case No. 2011-CP-04-1581

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey McCallister
Assistant Attorney General
SC Bar #79054

LAM/ch

cc: E. Charles Grose, Jr., Esquire