THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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.

Reply to State's Return to Petition for Writ of *Certiorari*

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IN REPLY

I. Procedural Bars.

Although the order of dismissal purports to find this post-conviction relief ("PCR") action to be successive and barred by the statute of limitations, those legal conclusions are not supported by the record because the court below convened an evidentiary hearing. The PCR judge singed the State's proposed order.[1] The order of dismissal, Section III(A), A. 1062-66, 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 (A. 1091-95) and her Rule 59(e), SCRCP motion (A. 1091-95), 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." The order of dismissal, Section 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

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[1] The procedure followed by the court below denied Ms. McSharry an opportunity to have her PCR application adjudicated by a judicial officer. "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). The court below did not do that, but rather delegated the responsibility of drafting the order to the Attorney General's Office. The reasoning in the State's 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. In capital cases, this Court "strongly encourage[s] 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). The admonition in *Hall* is consistent with the court's responsibility to "safeguard the rights of litigants," *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012), and should be followed in all PCR cases.

determine whether Robertson's prior post-conviction counsel met the qualifications set forth in the capital post-conviction relief statute. The State's return does not address *Carter* and *Odem*; nor does it address the legal proposition for which Ms. McSharry cited *Robertson*. 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. These facts are conclusively established by documents included in the record. *See* A. 750-74.

The State's Return, at p. 12, argues, "[T]his Court should find [Ms. McSharry's] argument [that] her *Aiken v. Byars*[3] resentencing hearing triggered a new timeline for compliance with the statue of limitations is nor preserved because it was not raised to or ruled on by the PCR court." This fact is a procedural reality under S.C. Code Ann. § 17-27-45(A), supported by *Magwood v. Patterson*, 561 U.S. 320, 331 (2010). *See* Petition for Writ of *Certiorari*, at 10. The State does not argue a different interpretation of the law.

The conclusion Ms. McSharry's PCR "application is time barred and improperly successive" results from an error of law. Ms. McSharry did not get a full and fair "bite at the apple."

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[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.

[3] *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

II. Prejudicial Deficient Performance.

The State's Return, at pp. 16-17, points to the colloquy between trial counsel, Ms. McSharry, and the trial judge (A. 460-63), to establish Ms. McSharry's desire to proceed with the jury trial. However, "the voluntariness of a guilty plea [on, in this case, the decision not to plead guilty] 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. This colloquy, standing alone, is not dispositive on the issues raised in this post-conviction relief hearing.

The State argues Ms. McSharry "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." State's Return, at p. 17 (citing A. 988) (emphasis supplied in State's Return). The full context of Ms. McSharry's response reveals she was "confused by it," had "never been in trouble before," and "didn't realize" how her "part" in the crime would be judged under the law. Significantly, the State does not cite any statutory or case law supporting its contention that the Solicitor's opening statement should replace defense counsel's obligation to fully and correctly advise his client. Nor could it justify such a rule under the Sixth Amendment to the United States Constitution or Article I,

[4] *Harres* and *Lambert* involved voluntariness of a guilty plea. These cases, nevertheless, mandate consideration of the trial and post-conviction record.

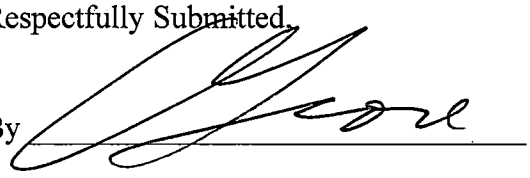
Section 14 of the South Carolina Constitution. This Court should decline the State's invitation to create such a rule.

The State argues, "Counsel testified *he felt* [Ms. McSharry] understood the implications of turning down the twenty-five year offer." State's Return, at p. 18 (citing A. 1018-19) (emphasis added). The State does not cite any authority for the proposition that trial counsel's "feeling" is sufficient. This Court has "never required an attorney to be clairvoyant." *Bowman v. State*, 422 S.C. 19, 35, 809 S.E.2d 232, 241 (2018) (citing *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016)). Trial counsel no longer had his file, and his memory was contradicted by the record, meaning his "feeling" is not supported by the record. *See* Petition for Writ of *Certiorari*, at pp. 7-8.

CONCLUSION

For the reasons set forth in the petition for writ of *certiorari* and this return, this Court should grant the writ and consider the issues presented.

Respectfully Submitted,

By 

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Certificate of Service

I certify that I have served a copy of the Reply to the State's Return to the Petition for Writ of *Certiorari* on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

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February 4, 2019

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

Re: *Jennifer McSharry v. State of South Carolina*
Appellate Case Number 2018-000096

Dear Mr. Shearouse:

Enclosed please find Ms. McSharry's Reply to the State's Return to her Petition for Writ of *Certiorari*, along with a certificate of service.

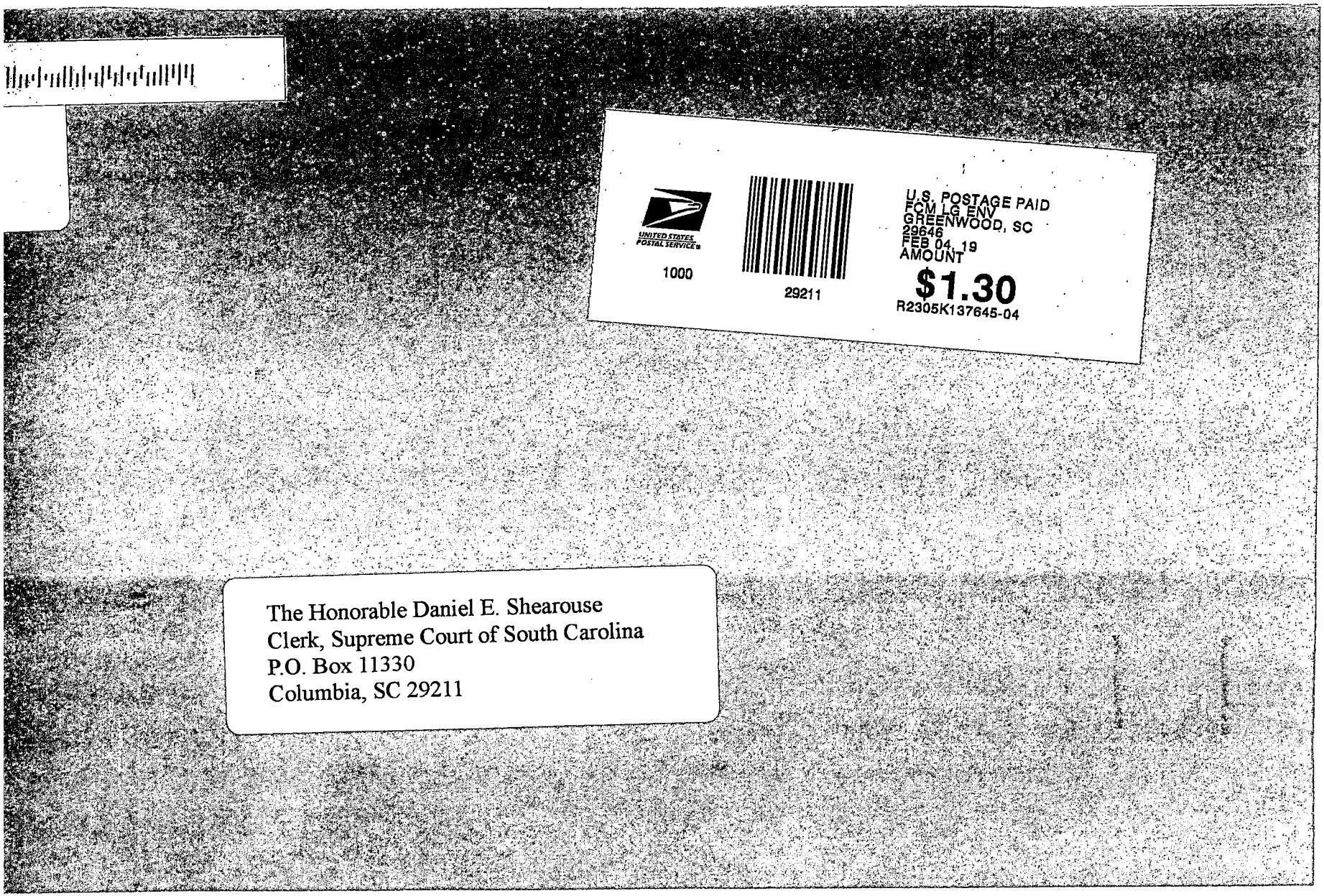
Thank you for your attention to this matter. If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Ms. Jennifer McSharry
Lindsey McCallister, Esquire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