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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

PETITION FOR CERTIORARI FROM GREENWOOD COUNTY

Court of Common Pleas

The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

The Honorable Eugene C. Griffith, Jr., Plea Judge

Appellate Case No. 2020-000574

MAUNWELL ERVIN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI

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II. The PCR court erred in granting post-conviction relief, where no actual conflict of interest exists that would warrant post-conviction relief, where Ervin waived any complaints he might have had regarding the alleged conflict, where the adequacy of Plea Counsel’s representation of Ervin had not been negatively affected by the alleged conflict, and where Plea Counsel was not ineffective because Ervin did not have a valid double jeopardy defense under *Yeager* because possession of a weapon during the commission of a violent crime and trafficking in cocaine are separate and distinctive offenses.

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

- I. The PCR court erred in failing to determine the action was procedurally barred by the statute of limitations where Ervin's action is untimely pursuant to S.C. Code Ann. § 17-27-45.**

- II. The PCR court erred in granting post-conviction relief, where no actual conflict of interest exists that would warrant post-conviction relief, where Ervin waived any complaints he might have had regarding the alleged conflict, where the adequacy of Plea Counsel's representation of Ervin had not been negatively affected by the alleged conflict, and where Plea Counsel was not ineffective because Ervin did not have a valid double jeopardy defense under *Yeager* because possession of a weapon during the commission of a violent crime and trafficking in cocaine are separate and distinctive offenses.**

STATEMENT OF THE CASE

On December 9, 2010, officers from the Greenwood Drug Enforcement Unit and the Greenwood Special Weapons and Tactics (SWAT) team executed a lawful search warrant on a residence on Lawson Street in Greenwood. (App. 419). The SWAT team entered through the front door and upon entering the residence, officers located an individual, in the living room, ultimately identified as a Mr. Bush. (App. 419). Ervin was subsequently located in the hallway of the residence. Both Ervin and Mr. Bush were detained and placed in handcuffs. (App. 419). During the lawful execution of the search warrant, Greenwood County Officers found marijuana, pills, cocaine, and a firearm throughout the residence. (App. 419).

During the March 2011 term, the Greenwood County Grand Jury indicted Ervin for trafficking in cocaine base, 100 to 200 grams (2011-GS-24-785), trafficking in cocaine base within proximity of a school or park (2011-GS-24-786), possession of marijuana with intent to distribute (2011-GS-24-783), possession with intent to distribute marijuana within proximity of a school or park (2011-GS-24-784), possession of a controlled substance (2013-GS-24-293), and possession of a weapon during the commission of a violent crime (2011-GS-24-0708). Lauren Taylor, Esquire (Plea Counsel), represented Ervin. Deputy Solicitor Yates Brown of the Eighth Circuit Solicitor's Office prosecuted the case.

In January 2013, Ervin first went to trial on these charges. At the conclusion of this first trial, Ervin was acquitted on the possession of a firearm charge, and the jury was unable to reach a verdict on the remaining charges.

On July 23-24, 2013, Ervin proceeded to a jury trial on the remaining charges: trafficking in cocaine base (2011-GS-24-785), trafficking in cocaine base within proximity of a school or park (2011-GS-24-786), possession of marijuana with intent to distribute (2011-GS-24-783),

possession of marijuana with the intent to distribute within proximity of a school or park (2011-GS-24-784), and possession of a controlled substance (2013-GS-24-293)¹. The jury convicted Ervin of possession of a controlled substance, possession of marijuana with intent to distribute, and the possession of marijuana with intent to distribute within proximity of a school or park. The jury was unable to reach a verdict as to the trafficking in cocaine base and trafficking in cocaine within proximity of a school or park charges.

Ervin appealed and was represented by Appellate Defender Robert Pachak, who filed an *Anders* brief on his behalf. Following review pursuant to *Anders*, the South Carolina Court of Appeals dismissed Ervin's appeal. *State v. Ervin*, 2014-UP-427 (filed November 26, 2014). The Remittitur was sent December 12, 2014.

On April 11, 2016, Ervin appeared before the Honorable Eugene C. Griffith, Jr., and pled guilty to the lesser included offense of trafficking in cocaine (28-100 grams, 2nd offense). Pursuant to a recommendation, Ervin was sentenced to the mandatory minimum term of imprisonment for seven years. As a result of the guilty plea, the trafficking proximity charge (2011-GS-24-786) was dismissed. Ervin did not file a notice of appeal.

On June 27, 2017, Ervin filed a PCR application, alleging:

1. "Trial Counsel was ineffective for failing to raise a double jeopardy argument."
2. "Trial Counsel was ineffective in that she continued to represent me after I had filed a request that she be terminated as my attorney and after I had filed a Post-Conviction Relief action alleging she was ineffective in representing me at my trial."

¹ Ervin also filed a post-conviction relief action challenging his convictions arising from his second trial and, following a hearing before Judge Hayes, was also granted post-conviction relief for these convictions. The State appealed and this action is pending before this Court. (*Ervin v. State*, Appellate Case No. 2020-000530).

The State subsequently filed a Return and Motion to Dismiss, arguing that Ervin's application was barred by the statute of limitations. A hearing was held on March 2, 2018, before the Honorable J. Mark Hayes, II. Ervin was represented by C. Rauch Wise, Esquire. By Order dated August 27, 2018, and filed September 13, 2018, Judge Hayes found that Ervin's PCR application was not barred by the statute of limitations, and found that Ervin was entitled to a new trial on the basis that Plea Counsel failed to file a motion to dismiss Ervin's remaining charges based on double jeopardy².

The State filed a timely Motion to Reconsider Pursuant to Rule 59(e). A hearing on the State's motion was held on October 1, 2019. Counsel C. Rauch Wise, Esquire, again represented Ervin. By Order dated February 14, 2020, Judge Hayes denied the State's motion to reconsider. The State subsequently filed a Notice of Appeal.

² Additionally, although the PCR court's order solely discusses the alleged conflict of interest in its statute of limitations section, it is arguable whether the PCR court granted relief on the merits of the alleged conflict.

STANDARD OF REVIEW

When reviewing post-conviction relief decisions, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

I. The PCR court erred in failing to determine the action was procedurally barred by the statute of limitations where Ervin's action is untimely pursuant to S.C. Code Ann. § 17-27-45.

The PCR court incorrectly found that Ervin's PCR application was not barred by the statute of limitations due to Plea Counsel's alleged conflict arising out of Ervin's pending PCR action arising out of his previous trial, and because that alleged conflict allegedly prevented Ervin from discovering a double jeopardy defense pursuant to *Yeager*. More specifically, the PCR court found, pursuant to S.C. Code §17-27-45(C), Ervin's PCR application was not untimely because Plea Counsel's alleged conflict and *Yeager* defense constituted newly discovered evidence. However, the PCR court's finding was incorrect as Ervin's application was filed beyond the standard one year statute of limitations, and neither the alleged conflict nor the alleged *Yeager* defense constitute newly discovered such that it would allow Ervin to file his application beyond the generally applicable statute of limitations. Accordingly, this Court should grant certiorari and reverse the PCR court's erroneous finding that Ervin's PCR application was timely.

Generally, an application for relief filed 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). Pursuant to S.C. Code Ann. § 17-27-45(B), if an applicant's conviction is affected by a change in a legal standard or constitutional right that applies retroactively, an application may be filed not later than one year from the date on which the standard or right was determined to exist. Pursuant to S.C. Code Ann. § 17-27-45(C), if the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed within one year after the date of the actual discovery of the

facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. Additionally, the statute of limitations may be equitably tolled in certain instances, such as, when an applicant untimely files his application due to mental incompetency³, if the applicant asserts an applicant was denied his right to a direct appeal⁴, and if the applicant is alleging he is entitled to a belated PCR appeal⁵.

Ervin pleaded guilty to a lesser-included trafficking in cocaine offense on April 11, 2016, and therefore, his application must have been filed on or before April 12, 2017, in order to comply with the standard one-year statute of limitations pursuant to S.C. Code §17-27-45(A). However, Ervin filed his PCR application on June 27, 2017, beyond the standard one-year statute of limitations. Ervin did not allege, nor did the PCR court find, that Ervin was entitled to equitable tolling pursuant to *Ferguson, Austin, Wilson*, or under any other grounds. Additionally, Ervin did not allege, nor did the PCR court find, that Ervin's PCR action was timely pursuant to S.C. Code Ann. § 17-27-45(B).

The PCR court found Ervin's PCR application was not untimely because Plea Counsel's alleged conflict and *Yeager* defense constituted newly discovered evidence pursuant to S.C. Code §17-27-45(C). The PCR court erred in its finding, as neither the alleged conflict nor the *Yeager* defense constitute newly discovered evidence that they would enable Ervin to circumvent the generally applicable statute of limitations.

First, the record clearly establishes Ervin was aware of this alleged conflict, and therefore, the conflict cannot be used as a basis to find Ervin's PCR application was timely. Plea Counsel testified at the PCR hearing that she filed a motion to be relieved because the solicitor indicated

³ *Ferguson v. State*, 382 S.C. 615, 677 S.E.2d 600 (2009).

⁴ *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002).

⁵ *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (2003).

that he was planning on trying the case for a third time. (App. 479-481). Ervin also filed a motion to relieve Plea Counsel. (App. 481). Plea Counsel testified Ervin did not inquire as to the status of his motion to be relieved, and instead asked Plea Counsel questions related to his case. (App. 481). Additionally, Plea Counsel testified Ervin gave her no indication that he was concerned about the fact that she was representing him on the day of his plea. (App. 481). Accordingly, the evidence overwhelmingly establishes that Ervin was very aware of the purported conflict at the time of his plea, and accordingly, the allegation is untimely pursuant to Section 17-27-45.

Moreover, Ervin's testimony serves as an implicit waiver of the conflict, and therefore, the PCR court erred in using this alleged conflict as a basis for its finding that Ervin's application was timely filed. Ervin, being the individual who filed the PCR action, was clearly aware of the pending PCR action. Ervin informed the plea court he was pleading freely and voluntarily.⁶ (App. 423, ll. 21-23). Ervin testified at his guilty plea hearing that he was satisfied with Plea Counsel's services, and that he had enough time to speak with Plea Counsel regarding his case. (App. 423, ll. 15-20). Ervin had full knowledge of his pending PCR action against Plea Counsel at the time of his guilty plea, yet nevertheless proceeded to plead freely and voluntarily, to enjoy the benefit of the State's recommended mandatory minimum sentence and dismissal of his charge for possession with intent to distribute cocaine within proximity. Accordingly, Ervin implicitly waived any complaints he may have had regarding the alleged conflict, and therefore, the PCR court erred in using this alleged conflict as a basis to determine Ervin's PCR application was timely filed.

⁶ Ervin also confirmed at his plea hearing that he had not consumed drugs or alcohol within twenty-four hours prior to his guilty plea hearing and he did not suffer from any mental, physical, or emotional disabilities that would have prevented him from understanding what was occurring at his guilty plea hearing, thereby negating any possibility that he did not comprehend the questions he was being asked by the plea court. (App. 418).

Furthermore, for the reasons discussed below in Part II of this petition, the alleged double jeopardy defense is not a meritorious defense, and therefore, it cannot provide a basis for Ervin to overcome the statute of limitations. Accordingly, the PCR court erred in finding that Ervin's PCR application was not barred by the statute of limitations, and therefore, this Court should grant this Petition and reverse the PCR court's erroneous findings as it relates to the statute of limitations.

II. The PCR court erred in granting post-conviction relief, where no actual conflict of interest exists that would warrant post-conviction relief, where Ervin waived any complaints he might have had regarding the alleged conflict, where the adequacy of Plea Counsel's representation of Ervin had not been negatively affected by the alleged conflict, and where Plea Counsel was not ineffective because Ervin did not have a valid double jeopardy defense under *Yeager* because possession of a weapon during the commission of a violent crime and trafficking in cocaine are separate and distinctive offenses.

In its Order granting relief, the PCR court found no reasonable judge would have denied a motion to dismiss the trafficking charge and related proximity charge based on *Yeager*, and therefore, because Plea Counsel did not make such a motion, she was ineffective. However, the PCR court erred in making that finding because possession of a weapon during commission of a violent crime and trafficking in cocaine base are separate and distinct offenses which do not implicate double jeopardy and acquittal of possession of a weapon during commission of a violent crime does not preclude the State from prosecuting the offense of trafficking cocaine-base. Moreover, the record reflects Plea Counsel consulted with several other defense attorneys about a *Yeager* argument and ultimately concluded that *Yeager* did not apply to Ervin's case.

Additionally, it appears the PCR court might have made a finding on the merits regarding the alleged conflict of interest.⁷ To the extent the PCR court made such a finding on the merits,

⁷As mentioned above, although the PCR court solely discusses the alleged conflict of interest in the statute of limitations section of its Order, it is arguable whether the PCR court decided on the merits that Ervin was entitled to PCR relief based on Plea Counsel's alleged conflict, and therefore, in an abundance of caution, Petitioner will address this issue on the merits.

the PCR court erred in doing so, as there is no actual conflict that would warrant granting PCR relief, as Ervin waived any complaints he might have had regarding the alleged conflict, and as Plea Counsel's representation of Ervin had not been negatively affected by the alleged conflict of interest. The PCR court's findings and grant of relief are premised on errors of law and fact that require this Court to grant certiorari and ultimately reverse the erroneous grant of relief.

To establish ineffective assistance of counsel, the PCR Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the Petitioner sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

To prove prejudice, a PCR applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). A reasonable

probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687. *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 788 (2011). With respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985).

I. Plea Counsel Was Not Ineffective for Failing to File a Motion to Dismiss Based on a Yeager Defense

The PCR court erred by reversing the logical scheme that a defendant may not be convicted of possession of a weapon during the commission of a violent crime⁸ after being acquitted of the violent crime in question, proposing a defendant should be not guilty of the underlying violent crime only because he may not have used a firearm. “Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *State v. Brandt*, 393 S.C. 526 (2011) (citing *Blockburger v. United States*, 284 U.S. 299 (1932)). Possession of a firearm during the commission of a violent crime requires proof of the possession of a firearm. Trafficking crack cocaine **does not require proof of the possession of a firearm**. The statute for trafficking crack cocaine reads as follows:

A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited

⁸ The PCR court’s order erroneously refers to the charge as “possession of a firearm while engaged in a drug trafficking offense.”

in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as “trafficking in methamphetamine or cocaine base.”

S.C. Code Ann. § 44-53-375(C).

Nowhere in the statute is possession of a firearm mentioned, and it is **not an element** of this crime. Whether or not Ervin had a firearm was not dispositive in any way in regard to the elements of the trafficking, and an acquittal for a firearm offense does not foreclose any required element of drug trafficking. *See State v. Henley*, 428 S.C. 649, 659-660, 837 S.E.2d 639, 644 (Ct. App. 2019) (“Henley’s acquittal for larceny—the taking of the Dell computer—is not dispositive of whether the State could satisfy the elements necessary for a first degree burglary conviction. In *Yeager*, there could be no insider trading if, as found by the jury, there had been no fraud. But an acquittal for larceny does not foreclose any element necessary for a first degree burglary conviction.”). The State could still meet all elements of trafficking crack cocaine without proof of a firearm. Therefore, the PCR court erred as a matter of law by misinterpreting and misapplying *Yeager* to the present case, and therefore, the PCR court’s determination Plea Counsel was constitutionally ineffective for failing to file a *Yeager*-based motion to dismiss was controlled entirely by an error of law and must be reversed. *See Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

Moreover, the PCR court erred in its ruling by ignoring significant testimony from Plea Counsel at the PCR hearing indicating she discussed this case in light of *Yeager* with various attorneys and came to the conclusion *Yeager* was not applicable to Ervin’s case due to the distinctions between the two cases. (App. 461, l. 16-25; 481, l. 20- 482, l. 5). Plea Counsel was correct in her conclusion. “To decipher what a jury has necessarily decided [for double jeopardy purposes], we held that courts should ‘examine the record of a prior proceeding, take into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury

could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. *Id.* at 120. In this case, law enforcement executed a search warrant of a home being leased by Ervin where Ervin and another individual were occupying at the time of the search. Various quantities of contraband were found in different areas of the residence such as the kitchen and the bedroom Ervin was evidenced to be staying. There are multiple bases for the jury to have concluded a firearm did not belong to Ervin but various drugs did. In fact, this is supported by the very fact that while enough cocaine in total was found in the home to convict Ervin of trafficking 100 to 200g outright, the jury hung on the charge, evidencing potential doubts about which items belonged to which individual. Therefore, it is very likely a jury could have concluded enough drugs may have belonged to Ervin to justify a trafficking charge but perhaps the firearm did not belong to Ervin. Notwithstanding, the fact remains the two charges are distinct and do not implicate double-jeopardy or the holding of *Yeager*. Accordingly, Plea Counsel was not and could not be ineffective for not filing a motion to dismiss Ervin's charges based on a *Yeager* argument.

2. *Plea Counsel Did Not Provide Ineffective Assistance of Counsel Due to an Alleged Conflict*

Additionally, to the extent this Court interprets the PCR court's Order to include a finding of ineffectiveness regarding Plea Counsel's alleged conflict of interest, such a finding of ineffectiveness was error and must be reversed. "A defendant has the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution." *Strickland*, 466 U.S. at 684. "Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008) (quoting *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810

S.E.2d 836 (2018). A defendant who did not object at trial must show an *actual* conflict of interest adversely affected his attorney's performance. *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." *Staggs v. State*, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007). "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." *Langford v. State*, 310 S.C. 357, 426 S.E.2d 793 (1993).

The alleged conflict did not constitute an actual conflict and Ervin was not prejudiced by any alleged conflict. Unlike other cases where this Court has found an actual conflict, Ervin's case does not involve "divided loyalties." *Jordan v. State*, 406 S.C. 443, 752 S.E.2d 538 (2013), *citing* *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984) ("This Court has noted that an actual conflict of interest occurs: when a defense attorney places himself in a situation inherently conducive to divided loyalties."). In this case, Plea Counsel did not represent a theoretical co-defendant of Ervin's, thereby representing two individuals with adverse interests. Plea Counsel merely represented Ervin during a guilty plea hearing five months after Ervin filed a PCR application against Plea Counsel. The fact that Ervin filed a PCR application does not negate Plea Counsel's requirements to effectively represent her client under the Professional Rules of Conduct.

Moreover, as discussed above in Part I of this Petition, Ervin waived any complaints he might have had regarding the alleged conflict by entering his guilty plea. Accordingly, the alleged conflict does not constitute an actual conflict that warrants granting PCR relief.

Additionally, Ervin was not prejudiced by any alleged conflict as the alleged conflict did not negatively affect the adequacy of Plea Counsel's representation of Ervin. Ervin never alleged or testified as to how Plea Counsel's representation hindered his guilty plea as a result of the PCR

action he filed five months earlier. At no point did he suggest that Plea Counsel represented adverse interests. In fact, to the contrary, at the PCR hearing Plea Counsel testified she was aware of the pending PCR action filed against her, but the pending PCR action had no effect on her representation or opinion of Ervin “at all.” (App. 482, ll. 15-18). Plea Counsel also testified that she liked Ervin “a lot” and she worked very hard on his cases. (App. 482, ll. 20 – p. 38, l. 1). Accordingly, Plea Counsel’s alleged conflict did not constitute an actual conflict that would warrant PCR relief, and any alleged conflict did not affect the adequacy of plea Counsel’s representation. Therefore, this Court should grant this Petition and reverse the PCR court’s grant of post-conviction relief.

CONCLUSION

Based on the foregoing arguments, this Court should grant certiorari and reverse the PCR court’s finding that Ervin’s PCR application is not barred by the statute of limitations and reverse the grant of post-conviction relief.

Respectfully submitted,

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