

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Hon. R. Kirk Griffin, Circuit Court Judge

Case No. 2019-CP-08-01910

Marquita Smith,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Marquita Smith, Petitioner, appeals the Order of Dismissal issued by the Honorable R. Kirk Griffin on April 11, 2022, and filed on April 14, 2022. Petitioner, through counsel, received notice of the entry of the Order on April 14, 2022.

Date: April 22, 2022



Christopher R. Geel
Geel Law Firm, LLC
171 Church St., Suite 330
Charleston SC 29401
843-277-5080
Attorney for Petitioner

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

Marquita Smith, SCDC #323834,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2019-CP-08-01910

ORDER OF DISMISSAL

LEAH GULIBRI, CLERK OF COURT
BERKELEY COUNTY, SC

2022 APR 14 PM 2:47

FILED

This matter comes before this Court by way of a post-conviction relief (PCR) action commenced by retained counsel, Christopher R. Geel, Esquire, on behalf of Applicant Marquita Smith on July 29, 2019.

A hearing into the matter was convened before the undersigned on September 10, 2021, virtually, via Cisco WebEx Meetings. Applicant was present and represented by Christopher R. Geel. Assistant Attorney General Samantha J. Weidauer represented the State. Inmates Kareem King and Kerry Hollins testified on Applicant's behalf at the hearing. Applicant's trial counsel, V. Craig Jones, Jr., Esquire, also testified.

In addition to the pleadings in this action, this Court had before it a copy of the Berkeley County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; records from Applicant's direct appeal, including the trial transcript; and records from both of Applicant's prior post-conviction relief actions challenging her convictions and the subsequent appeal.

After hearing the testimony at the PCR hearing and a full review of the record, this Court finds Applicant's allegations regarding newly-discovered evidence are without merit. Therefore, for the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its August 2007 term, the Berkeley County Grand Jury indicted Applicant for accessory before the fact of murder (2007-GS-08-01748) and accessory before the fact of armed robbery (2007-GS-08-01751). On August 27, 2007, Applicant and two co-defendants, Gary Grant and Jermaine Hartwell, proceeded to a jury trial before the Honorable Deadra Jefferson. V. Craig Jones, Jr., Esquire, represented Applicant. Blair Jennings and Scarlett Wilson of the Ninth Circuit Solicitor's Office prosecuted the case. On August 30, 2007, the jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to concurrent sentences of thirty years' imprisonment for each charge.

Applicant filed a timely notice of appeal. Tommy A. Thomas, Esquire and Tricia A. Blanchette, Esquire, perfected Applicant's appeal presenting the following issue(s):

1. Whether the lower court erred by denying the [Applicant's] motion for a continuance.
2. Whether the lower court erred by denying the [Applicant's] motion for a severance and a separate trial.

On March 24, 2010, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. Marquita Smith*, Op. No. 4662 (S.C. Ct. App. filed March 24, 2010). This decision was published as *State v. Smith*, 387 S.C. 619, 693 S.E.2d 415 (Ct. App. 2010). Following the Court of Appeals Opinion, Applicant filed a Petition for Rehearing and Petition for Rehearing *En Banc*. The Court of Appeals denied Applicant's Petition for Rehearing and Petition for Rehearing *En Banc*. The case was remitted back to the circuit court on July 13, 2010.

On August 24, 2010, Applicant filed her first application for post-conviction relief alleging the following grounds for relief:

1. The Applicant received ineffective assistance of counsel prior and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution;
2. The judgments and sentences against the Applicant were entered in violation of her rights to due process of law and to the effective assistance of counsel; and
3. The Applicant received ineffective assistance of counsel on direct appeal in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14 of the South Carolina Constitution.

Respondent filed its return on February 3, 2011. Applicant filed an amended application for Post-Conviction Relief through retained counsel, Tara Dawn Shurling, on November 17, 2011, containing the following additional specific allegations:

1. Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery;
2. Trial Counsel was ineffective for neglecting to make a motion for a mistrial and/or a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery;
3. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the Applicant knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the Applicant's knowledge and involvement and which were not readily foreseeable by her;
4. Trial Counsel was ineffective for failing to fully present arguments and authority in favor of the Applicant's Motions for Directed Verdicts where the evidence adduced at trial, including the Applicant's statement, established that the Applicant was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact;
5. Trial Counsel was ineffective for failing to fully present available arguments supporting his motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the Applicant was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the Applicant's charges;
6. Trial Counsel was ineffective for failing to effectively request a jury instruction on the charge of accessory before the fact to strong armed robbery;

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7. Trial Counsel was ineffective for failing to research and present the lower court with an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact. Counsel should have requested a charge which clearly instructed the jury that the Applicant could only be found guilty as an accessory before the fact for crimes which she knowingly aided and abetted the principals in the planning or committing and/or the commission of crimes which were the readily foreseeable consequence of the acts mutually agreed upon by the parties;
8. Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they needed to apply a separate foreseeability analysis to determine the liability of the Applicant, separate from their findings concerning the liability of each of her co-defendants based upon what they should have readily foreseen as consequences of the acts they agreed with each other to commit;
9. Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the Applicant could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder;
10. Trial Counsel was ineffective for advising the jury in his closing argument that the Applicant was not present during the principal offenses where said position was contrary to the evidence adduced at trial, including the Applicant's own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the Applicant was on trial for; specifically that she was not present during the commission of the principal offenses;
11. Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the Applicant could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants;
12. Trial counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby neglected to elicit testimony from him which would have been favorable to the defense;
13. Trial Counsel was ineffective for advising the Applicant that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments;
14. Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story.";
15. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the Applicant's knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit;

16. Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery; and
17. Appellate Counsel failed to provide the Applicant with effective assistance of counsel inasmuch as she failed to brief the issue of the lower court's charge to the jury that the State would only have to prove that the Applicant aided and abetted another person "to commit a crime" thereby creating the risk that the jury would conclude that the Applicant's knowing assistance in committing any crime would make her mutually liable for all the acts committed by her codefendants regardless of whether those acts were proven to be known to her or readily foreseeable by her.

An evidentiary hearing was held on November 17, 2011. Ms. Shurling filed a Memorandum of Law in Support of Application for Post-Conviction Relief on Applicant's behalf, which was dated January 3, 2012. She also filed a Motion to Supplement Post-Conviction Relief Record on January 20, 2012. This motion, to which the State consented, augmented the record by including copies of trial counsel's pretrial motions under Rule 5, SCRCrim.P., and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

On February 1, 2012, the Honorable Kristi L. Harrington, issued an Order of Dismissal denying and dismissing the application with prejudice. Applicant subsequently filed a Motion to Alter or Amend pursuant to Rule 59(e) SCRCP on February 16, 2012. Respondent submitted a Return and Motion to Dismiss the Rule 59(e) Motion, after which Judge Harrington filed an Amended Order of Dismissal denying and dismissing the application with prejudice on April 19, 2012.

On July 10, 2012, Applicant filed a second PCR application alleging the following grounds for relief:

1. PCR Attorney failed to perfect an appeal from order denying previous PCR Application docketed at 2010-CP-08-2985.

In an Order filed by Judge Jefferson on July 23, 2012, Applicant and Respondent consented to belated review of Applicant's previous post-conviction relief matter pursuant to *Austin v. State*¹.

Applicant filed a timely notice of appeal and on January 23, 2013, Applicant, with the assistance of counsel, filed a Petition for Writ of Certiorari. In her Petition for Writ of Certiorari, she presented the following issues:

1. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for neglecting to object the first and every time the State sought to introduce testimony that the street term "a lick" conclusively meant an armed robbery and where she was clearly prejudiced by this error by Trial Counsel?
2. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for neglecting to make a motion for a mistrial, and/or for failing to make a request for a curative charge where the State, without a sufficient evidentiary basis, elicited testimony that the term "a lick" meant an armed robbery and where the record below supports her contention that she was prejudiced by Trial Counsel's failure to do so?
3. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for failing to fully present arguments and authority in favor of her Motions for Directed Verdicts where the evidence adduced at trial failed to establish that the crime in which the [Applicant] knowingly participated in any way put her on notice that her co-defendants would ultimately commit heinous crimes far beyond the scope of the [Applicant's] knowledge and involvement and which were not readily foreseeable by her and where the record demonstrated that she was clearly prejudiced by this error both at trial and in her subsequent direct appeal?
4. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to fully present arguments and authority in favor of her Motions for Directed Verdicts where the evidence adduced at trial, including the [Applicant's] own statement, established

¹ 305 S.C. 453, 409 S.E.2d 395 (1991). "The right to seek appellate review of the denial of PCR is expressly authorized by state law." *Id.*; S.C. Code Ann. § 17-27-100 (2014). 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.

- that she was present during the commission of a phase of the crimes for which she was charged with being an accessory before the fact to and where the record establishes that this failure by Trial Counsel prejudiced the [Applicant] both at trial and in her subsequent direct appeal?
5. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to fully present available arguments supporting her motion for a severance, specifically that the complex and cumbersome nature of the jury instructions that would be necessary and appropriate if the [Applicant] was tried with her co-defendants would be confusing to a jury and would create a very real danger that the jury would not properly apply all the law applicable to the [Applicant's] charges and where the record below supports her contention that she was prejudiced by Trial Counsel's omissions in this regard?
 6. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to specifically request a jury instruction on the charge of accessory before the fact to strong armed robbery and where the record before the lower court supported her claim that she was prejudiced by Trial Counsel's failure to do so?
 7. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to research, and present the trial court with, an appropriate request to charge the jury on the law of accomplice liability as it relates to the charge of accessory before the fact and where the record below supported her contention that Trial Counsel's failure in this regard prejudiced her ability to receive a fair trial?
 8. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to object to jury instructions that did not adequately convey to the jury the requirement that they apply a separate foreseeability analysis to determine the liability of the [Applicant], separate from their findings concerning the liability of each of her co-defendants, and where the record below supports her assertion that she was significantly prejudiced by Trial Counsel's failure to enter an appropriate objection to the charge as given by the trial court?
 9. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her assertion that Trial Counsel was ineffective for failing, in his opening argument, to convey in a clear and organized manner the reasons the [Applicant] could not be found guilty of either accessory before the fact to armed robbery or accessory before the fact to murder and where she demonstrated to the lower court that she was prejudiced by this omission?
 10. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for advising the jury in his closing argument that

the [Applicant] was not present during the principal offenses where said position was contrary to the evidence adduced at trial, including the [Applicant's] own statement, and where this erroneous closing argument supplied the jury with a basis for finding a necessary element of the crimes the [Applicant] was on trial for; specifically that she was not present during the commission of the principal offenses and thereby irreparably prejudiced her ability to receive a fair determination of her guilt by the jury at her trial?

11. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to specifically argue to the jury in closing that the [Applicant] could not be convicted on the charges for which she was on trial, where the evidence presented by the State established that she was present during one phase of the principal offenses committed by her codefendants and where the record below supported her claim that Trial Counsel's missed opportunity prejudiced the [Applicant] at trial?
12. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel failed to provide the [Applicant] with reasonable professional assistance of counsel in that he failed to adequately cross-examine co-defendant, Kerry Hollins, and thereby prejudiced her at trial by failing to elicit testimony from him which would have been extremely favorable to the defense?
13. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her claim that Trial Counsel was ineffective for advising the [Applicant] that by not presenting a defense on her behalf he would retain the right to make his closing argument after the prosecution made their final arguments and where the record below establishes that this error by Trial Counsel significantly prejudiced the [Applicant] in that it caused her to make a waiver of her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina Constitution, which was not knowingly and voluntarily entered?
- 13A. Did the lower court err in denying the [Applicant] post-conviction relief based on her allegation that Trial Counsel was ineffective for advising her that she should not take the stand in order to preserve the opportunity to make the final argument to the jury after the State's closing argument where she meet her burden of proof with regard to her claim that Trial Counsel's [advice] was erroneous and caused her to make an unintelligent decision not to testify at her trial thereby violating her right to be fully heard in her defense, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14 of the South Carolina Constitution?

14. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for neglecting to object to an improper closing argument in which the State told the jury that any time a victim is killed "in the course of another felony, then his death is murder. End of story" and where she demonstrated that Trial Counsel's failure to object to this improper argument prejudiced her at trial by permitting the State to confuse the jury concerning the elements of the crime of accessory before the fact to murder and to dilute its burden of proof beyond a reasonable doubt?
15. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant directed verdicts of acquittal on all counts where there was no direct evidence, or substantial circumstantial evidence, of the [Applicant's] knowing involvement in the principal offenses or that the crimes were readily foreseeable consequences of the acts she agreed to commit and where this issue would have been at least as strong, if not stronger, than the issues presented on direct appeal?
16. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel was ineffective for failing to brief the issue of the lower court's failure to grant a jury charge on Strong Arm Robbery as a lesser included offense of Armed Robbery?
17. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Appellate Counsel failed to provide the [Applicant] with effective assistance of counsel inasmuch as she failed to brief the meritorious issue of the lower court's charge to the jury that the State would only have to prove that the [Applicant] aided and abetted another person "to commit a crime," and where this issue would have been at least as strong on direct appeal as the issues presented on appeal?
18. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation, developed during her evidentiary hearing, that Trial Counsel was ineffective for failing to effectively argue a Rule 5, SCRCrimP, violation in his motion for a continuance and severance, where the State did not disclose a statement given by a co-defendant that had agreed to cooperate and be a witness for the prosecution at the [Applicant's] trial?
19. Did the lower court err in denying the [Applicant] post-conviction relief where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to interview a co-defendant who turned State's witness very shortly prior to trial, or in the alternative, for failing to request a brief recess or continuance to do so and where she presented evidence which supported her claim that she was significantly prejudiced by Trial Counsel's failure to do so?

On June 3, 2013, Respondent filed a Return to Petition for Writ of Certiorari. The Supreme Court of South Carolina subsequently transferred the matter to the Court of Appeals. On July 23, 2014, the South Carolina Court of Appeals filed an Order that granted the Petition for Writ of Certiorari for *Austin* review, conducted an *Austin* review of Judge Harrington's Amended Order of Dismissal, and subsequently denied the Petition for Writ of Certiorari. Applicant filed a Petition for Rehearing and Request for Rehearing *En Banc* on August 6, 2014. The Court of Appeals denied Applicant's petition for rehearing on September 18, 2014.

On October 20, 2014, Applicant filed a Petition for Leave to File a Petition for Writ of Certiorari to the South Carolina Court of Appeals in the Supreme Court. Respondent made its Return to Applicant's Petition on November 10, 2014. The Supreme Court filed an Order denying Applicant's motion on December 4, 2014. The Remittitur was returned to the circuit court on January 5, 2015.

Applicant filed a habeas petition on May 28, 2015, raising ten grounds for relief, nine of which allege that trial counsel or appellate counsel was ineffective. The Magistrate Judge recommended granting summary judgment on each of Applicant's grounds for relief. Applicant filed objections to portions of the Report and Recommendation. On September 16, 2016, the Honorable Richard Mark Gergel, United States District Judge, adopted the Report and Recommendation, granted Respondent's Motion for Summary Judgment, and dismissed the habeas petition with prejudice. The Court denied a certificate of appealability. Applicant filed a Notice of Appeal, appealing to the United States Court of Appeals for the Fourth Circuit the order by the District Court of South Carolina dismissing Applicant's Petition for Writ of Habeas Corpus. On November 28, 2016, Applicant filed an Informal Opening Brief of Petitioner-Appellant Marquita Smith Seeking Certificate of Appealability. On August 17, 2017, the United

States Court of Appeals for the Fourth Circuit issued an Unpublished Opinion. The Court denied a certificate of appealability, denied leave to proceed in forma pauperis, and dismissed the appeal. On September 8, 2017, the United States Court of Appeals for the Fourth Circuit issued its Mandate that its previous judgment take effect.

On July 29, 2019, Applicant, through counsel, submitted this third post-conviction relief application in which she requests relief based on newly-discovered evidence. Respondent filed its return and moved to dismiss the application as untimely because it was filed after the statute of limitations had expired, because it was successive to Applicant's prior post-conviction relief action, and because Applicant's allegations of newly-discovered evidence were without merit. A proposed conditional order of dismissal consistent with Respondent's return and motion to dismiss was concurrently submitted for the Court's consideration with its return. The Conditional Order of Dismissal was signed by the Honorable Jennifer B. McCoy on August 27, 2020, and was filed on September 3, 2020. On September 21, 2020, Applicant filed a document entitled "Motion to Reconsider Conditional Order of Dismissal". Thereafter, on May 12, 2019, The Honorable Roger M. Young, Sr., filed an Order Granting Applicant's Motion to Reconsider and requested Respondent set the matter for a hearing.

II. Issues Before This Court

In the instant application for post-conviction relief, Applicant alleges she is being held in custody unlawfully based on:

1. "New, after discovered evidence: Recantation of testimony of State's witness, Kerry Hollins (see attached affidavit)" and
2. "New, after discovered evidence of State's cooperative witness, Kareem King (see attached affidavit)"².

² Both allegations alleged in Applicant's application for post-conviction relief indicate, "see attached affidavit". Two affidavits were affixed to the application for post-conviction relief: one affidavit from co-defendant Kerry Hollins and one affidavit from co-defendant Kareem King.

To the extent the allegations set forth in Applicant's application can be construed as separate grounds for relief from the grounds stated at the PCR hearing, the Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

III. Testimony Presented at Evidentiary Hearing

Witness Kareem King's Testimony

Before Kareem King (King) testified, Respondent requested this Court apprise him of the possible consequences and ramifications of his anticipated testimony and ask whether he wanted counsel appointed on his behalf. Following questioning, this Court found King had been thoroughly advised of his rights and had made a voluntary and informed decision to proceed without counsel.

King testified he submitted an affidavit in September 2018 regarding the underlying facts in this case. King stated he was Applicant's co-defendant in the instant case and was in custody at the time of Applicant's trial and represented by counsel. King further testified he agreed to cooperate with the State during Applicant's trial when the State asked whether he would testify³. When asked whether the substance of his testimony at this evidentiary hearing would differ from prior statements given to law enforcement and what he would have testified to had he been called as a witness at Applicant's trial, King conceded his testimony would differ at this hearing.

When questioned about what happened the night of the incident, King testified that Kerry Hollins (Hollins) received a phone call; however, King stated he did not know who Hollins received the call from. King testified that following the phone call, Hollins called co-defendant Jermaine Hartwell (Hartwell) to tell Hartwell he knew where they could find someone to get drugs from and that they could "straighten out" their previous drug dealings. King later testified

³ Though King was on the State's witness list, the State did not call King as a witness at Applicant's trial.

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that the phone call Hollins received was in regards to Dexter Perry's (Victim) whereabouts. King testified that Hollins and himself next drove to pick up Hartwell and ran into co-defendant Gary Grant (Grant). King stated that Grant, Hollins, Hartwell, and himself then proceeded to Goose Creek, South Carolina, to meet up with Victim. When asked whether there was a plan to rob or shoot Victim, King testified there was not and stated Applicant had no involvement. When asked whether Applicant was at the apartment complex in Goose Creek, King testified he could not remember whether she was present.

King testified that after arriving in Goose Creek, Victim saw the group of men approaching and began to run. King testified Hartwell ran after Victim, the other men in the group followed, and Victim and Hartwell got into a "scuffle". Following the fight, King stated a discussion took place regarding Victim fixing a prior bad drug deal between himself and Hartwell. King testified Victim told the group of men he would make good on their recent drug deal by giving money and/or drugs to Hartwell. King further testified that Victim told the group he had someone in Ladson, South Carolina, that could "straighten out Hartwell". Regarding Victim's behavior during this time, King testified that when the men -- Victim, Hartwell, Grant, Hollins, and himself -- were leaving for Ladson, Victim appeared nervous. King elaborated and testified that Victim could not get the key in the door of Victim's car because he was nervous and therefore Hartwell drove while Victim gave directions to the aforementioned second location. King testified that when they arrived at the second location -- a trailer park in Ladson -- Victim, Grant, and himself went into the residence while Hartwell stayed outside with the car. King testified he was not in the trailer long when shooting outside occurred.

When asked on direct examination whether he believed he would be called to testify at trial, King stated he would not have been called because his attorney was out of town at the time

of Applicant's trial. King explained he was prepared to testify and would have cooperated with the State should he have been called as a witness at Applicant's trial. King testified he is currently serving a twenty-two year sentence for voluntary manslaughter for his involvement in this incident. On cross-examination, when asked whether he was aware his projected release date is April 2025, King stated he was. When asked whether he received less time as a result of his guilty plea, King stated that one co-defendant received less time than him but agreed that he received less time than the co-defendants that proceeded to trial. King testified he did not have a deal with the State prior to his co-defendants trial. King further testified he remembers the judge at his plea hearing telling him he had a right to go to trial. King stated that he remembered the State placing the facts of his case on the record during his plea and conceded that he agreed with those facts at the time of the plea. King testified he did not lie to the plea court, but agreed that his story has since changed. King stated that the testimony given at this evidentiary is the truth.

Witness Kerry Hollins' Testimony

Before Kerry Hollins (Hollins) testified, Respondent requested this Court apprise him of the possible consequences and ramifications of his anticipated testimony and ask whether he wanted counsel appointed on his behalf. Following questioning, this Court found Hollins had been thoroughly advised of his rights and had made a voluntary and informed decision to proceed without counsel.

Hollins testified he submitted an affidavit in September 2018 regarding the underlying facts in this case. Hollins stated he was Applicant's co-defendant in the instant case, was in custody at the time of Applicant's trial and represented by counsel. Hollins testified he cooperated with and testified for the State as a State's witness during Applicant's trial. He testified that at the time of Applicant's trial, he did not have a deal with the State. Hollins

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confirmed he is currently serving an eighteen year sentence for voluntary manslaughter for his involvement in this incident.

On direct-examination, when asked about the night of the incident, Hollins testified he was dating Applicant at the time and that Applicant, a friend of Applicant's, and Victim went to eat at Red Lobster that night. Hollins testified he received a call from Applicant while she was at dinner stating she needed money to pay for her food and go out. Hollins testified that when he arrived at Red Lobster to drop money off for Applicant, he realized Victim was there. Hollins testified he had prior knowledge Victim owed Hartwell for a bad drug deal. Hollins stated he then called Hartwell and told him where Victim was.

Following the phone call, Hollins testified he picked up Hartwell so they could to meet up with Victim to buy some drugs. Hollins testified King, Grant, Hartwell, and himself drove to an apartment in Goose Creek, South Carolina, where Victim was to make a deal. Hollins testified he dropped off the other men off at the apartment in Goose Creek to speak with Victim while he left to find a parking spot in the apartment's parking lot. Hollins stated he could not personally testify to what happened at the apartment in Goose Creek because he did not witness anything – his sole involvement was dropping off Hartwell, Grant, and King.

After Hollins dropped the other men off at the apartment and while Hollins was parking, he alleged all parties left with Victim to go to Ladson, South Carolina. Hollins testified he learned the men had left when King called him to tell him they were going to the trailer park in Ladson. When asked how he knew where the other men were going (what trailer park), Hollins testified that he used to go to the strip club behind the trailer park. Hollins stated he was the only one in his car on the way to Ladson, while everyone else was in the other vehicle with Victim.

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Hollins testified that when he arrived at the trailer park to meet the other men he heard shooting, he saw someone -- though he did not know who -- running around a trailer, and therefore turned his car around and left. Hollins testified that after leaving the trailer park, King called him and told him Hartwell had been shot. Hollins stated that he picked King and Hartwell up in his car on Highway 78; he further testified the two men had run to the shopping center that was near the trailer park and met up with them there.

Hollins testified he never got out of his car or went inside the trailer. Hollins stated he was never made aware of a plan to rob Victim or to shoot Victim, stated he did not have a gun during the incident, and stated Applicant did not set a robbery up. On cross-examination, when asked whether he remembered testifying at trial that Applicant planned the robbery, Hollins stated he did not remember. Hollins testified he did not remember much regarding his testimony at trial. Multiple questions were asked during cross-examination and Hollins denied remembering generally everything he testified to during Applicant's trial, including that: a 'lick' meant a robbery; Applicant contacted him concerning a 'lick'; everyone had weapons the night of the incident; and Applicant provided him with the name of the Victim as someone they could 'set up a lick on'.

When asked whether he remembered making a statement to the Sherriff's Office, Hollins replied that he remembered a detective taking a statement. Hollins stated that he did not write the statement; however, when he was shown State's Exhibit #1 (Kerry Hollins' Defendant Statement -- Berkeley County Sherriff's Office), he verified it was his signature on the statement. When questioned about the statement, Hollins testified he had been out for days at the time the statement was given and alleged the law enforcement officer who took the statement, put

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whatever he wanted to in the statement. Hollins testified that while he was there when the statement was written by the officer, he merely signed it.

Trial Counsel V. Craig Jones' Testimony

The State called Applicant's trial counsel, V. Craig Jones (Counsel), as a witness. Counsel testified he conferred with Applicant on several occasions prior to trial. Counsel testified that during meetings with Applicant they discussed the pending charges, the elements of the charges, the State's burden of proof, Applicant's constitutional rights, and possible defenses. Counsel testified it was Applicant's decision and Applicant's decision alone to proceed to trial rather than plead. Counsel testified that in preparation for Applicant's trial he spoke with co-defendants' counsels, law enforcement, and possible witnesses. When asked whether Applicant provided any witnesses to Counsel, he stated that he considered calling Tawana Deas as a defense witness but did not believe Ms. Deas, nor any of Applicant's co-defendants, would have been helpful.

Counsel testified that prior to trial Applicant's version of the facts were consistently the same – she set up the robbery, but she did not know Victim would be killed. Counsel stated Applicant told him she was in an abusive relationship with Hollins and was therefore coerced into giving him the information regarding the whereabouts of Victim. Counsel further testified that her story remained consistent with the statement she had previously given to law enforcement (State's Exhibit #2 – Marquita Smith's Defendant Statement – Berkeley County Sherriff's Office). Counsel stated that all witness statements given to law enforcement, including Hollins' statement, were taken at roughly the same time; therefore there was no knowledge between the co-defendants regarding what was being discussed in their respective interviews. Counsel testified that Hollins' initial statement corroborated Applicant's version of the facts and

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that the testimony presented at the instant evidentiary hearing from the two co-defendant witnesses (King and Hollins) was not consistent with his understanding of their version of the facts at the time of trial. Counsel additionally testified that the testimony given at the instant hearing from witnesses King and Hollins was different than their anticipated testimony for the State at the time of trial and that at the time of trial it would have been damaging to Applicant's case to call them as defense witnesses. Therefore, Counsel stated he decided not to call Applicant's co-defendants. Counsel stated that Applicant's overall defense was to prove to the jury that she was not an active player in this incident and there were only remote connections between the group who actually committed this crime and Applicant herself. Counsel stated that he wanted to distance Applicant from the crime, emphasizing that she was not at the trailer in Ladson where the incident took place.

IV. Standard of Review

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

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S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; *Buller v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland v. Washington* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687-88; *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the *Strickland* analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of

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competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. 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); cf. *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. *Strickland*, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Accordingly, counsel's performance will be considered to be deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been

different but for counsel's unprofessional errors. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625; see *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Richter*, 562 U.S. at 112.

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-90. Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; see *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

V. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsels, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised at the evidentiary and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Newly-Discovered Evidence

A person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of 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. S.C. Code Ann. § 17-27-45(C). To prevail, Applicant must show the newly-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

In her application, Applicant raises newly-discovered evidence claims via affidavits from co-defendants Kareem King and Kerry Hollins. In support of her claims, Applicant also offered the testimony of both King and Hollins at her evidentiary hearing.

Recantation

As an initial matter, this Court finds the testimony of Kareem King and Kerry Hollins is not credible. The determination of whether new evidence is credible for purposes of a new trial rests with the trial court. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, "our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." *State v. Mercer*, 381 S.C. 149, 168, 672 S.E.2d 556, 565 (2009) (citing *Porter*, 269 S.C. at 621, 239 S.E.2d at 643). "When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence." *State v. Deese*, 266 S.C. 534, 538 225 S.E.2d 175, 176 (1976) (citing *State v. Fowler*, 264 S.C. 149, 155, 213 S.E.2d 447, 450 (1975)).

The granting of a new trial based on after-discovered evidence is disfavored. *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). Moreover, "[w]here a motion for a new trial is based on recantation of testimony given at the trial, such recantation is looked upon with utmost suspicion." *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973) (internal quotation omitted); see also *State v. Porter*, 269 S.C. 618, 239 S.E.2d 641 (1977) ("Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.") (internal quotation omitted). "Where the circumstances surrounding the recantation suggest it is the result of coercion, bribery, or misdealing, the court... is justified in disregarding it." *Johnson*, 487 F.2d at 1279 (explaining trial court properly found recantation testimony not credible when it was given years after the defendant's conviction and

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"there was reason to suspect [the defendant] had exerted substantial pressure on [the witness] to withdraw his incriminating testimony").

In this case, Applicant offered the testimony of Kareem King and Kerry Hollins, both of whom were Applicant's former co-defendants. As to Kareem King, though King did not testify at Applicant's trial, he did testify at Applicant's evidentiary hearing. Importantly, King testified that his testimony at the evidentiary hearing was different than it would have been at the time of trial and that he would have cooperated with the State if he was called as witness at Applicant's trial. King testified that his projected release date is April 2025. King further testified that he agreed with the State's recitation of facts at his plea hearing but since that time his story has changed. Therefore, this Court finds King's testimony is unreliable and not credible because King is nearing the end of his active prison sentence and has incentive to now assist his once co-defendant.

As to Kerry Hollins, Hollins did testify at Applicant's trial. However, at the PCR evidentiary hearing, Hollins recanted his prior trial testimony which implicated Applicant. This Court finds Hollins' recanted testimony to be unreliable and less than credible as well. Hollins is also nearing the end of his active prison sentence, and has incentive to now assist his once co-defendant. Moreover, a review of the trial transcript shows substantial evidence admitted in the trial that contradicts Hollins latest testimony.

Additionally, Applicant gave a detailed statement, which was admitted into evidence at her trial that implicated her in setting up the robbery of Victim. Therefore, this Court finds Applicant has failed to prove that the newly-discovered evidence is such as would probably change the result if a new trial was had.

This Court finds both the testimony of King and the testimony of Hollins is entirely

insufficient to support Applicant's request for relief as newly-discovered evidence of recantation. As discussed above, in order for Applicant obtain a new trial based on newly-discovered evidence, he must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (internal citations and quotations omitted); *see also Hayden v. State*, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979) (setting forth the five factors to be analyzed when considering a newly-discovered evidence claim). In this case, the Court finds Applicant has failed to meet the first prong – the alleged "recantation" of King's anticipated trial testimony is so unreliable and less than credible that there is no reasonable probability it would change the result at a new trial. This Court further finds the recantation of Hollins prior testimony is so unreliable and uncredible that there is no reasonable probability it would change the result at a new trial.

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VI. Conclusion

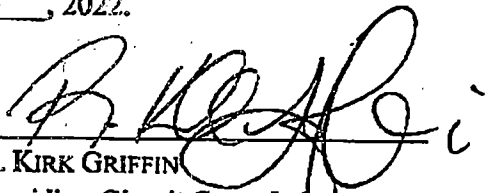
Based on the evidence presented at the PCR hearing and the record of the trial, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant her application for post-conviction relief. This Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Moreover, this Court finds the alleged newly-discovered evidence is not such that it would probably change the result if Applicant received a new trial. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 11th day of April, 2022.


R. KIRK GRIFFIN
Presiding Circuit Court Judge
Ninth Judicial Circuit

Sumter, South Carolina