

March 28, 2019

Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

RECEIVED

APR 01 2019

S.C. SUPREME COURT

Re: Mildred Monica Montgomery vs. State of South Carolina  
C/A No: 2017-CP-21-2597

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Montgomery in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Samuel Key, South Carolina Office of Attorney General

Enclosures

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APR 01 2019

APPEAL FROM FLORENCE COUNTY  
D. Craig Brown, Circuit Court Judge

S.C. SUPREME COURT

2017-CP-21-2597

Mildred Monica Montgomery, # 372236,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Mildred Monica Montgomery, # 372236, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed March 27, 2019, issued by the Honorable D. Craig Brown, Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller  
Waller Law Group  
SC Bar No.: 76290  
1116 Blanding Street  
Suite 2B  
Columbia, SC 29201  
803-520-7278 (phone)  
jonathan@wallergroupsc.com  
ATTORNEY FOR PETITIONER

March 28, 2019

Other Counsel of Record:  
Samuel Key, Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3319

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APR 01 2019

APPEAL FROM FLORENCE COUNTY  
D. Craig Brown, Circuit Court Judge

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S.C. SUPREME COURT

2017-CP-21-2597

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Mildred Monica Montgomery, # 372236,

Appellant,

v.

STATE OF SOUTH CAROLINA,

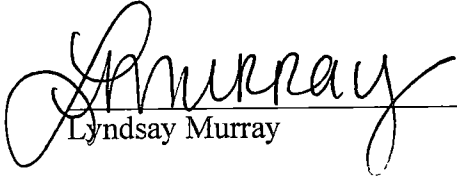
Respondent.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Samuel Key, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.

  
Lyndsay Murray

March 28, 2019

FILED

STATE OF SOUTH CAROLINA  
COUNTY OF FLORENCE  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2017CP2102597

Mildred Monica Montgomery	2019 MAR 27 AM 11: 52	South Carolina State Of
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PLAINTIFF(S) Submitted by:	DORIS POULOS O'HARA CCCP & GS FLORENCE COUNTY, SC	DEFENDANT(S) Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order; (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

**Note: Title abstractors and researchers should refer to the official court order for judgment details.**

**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

Circuit Court Judge

Judge Code

3/27/2019  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on **March 27, 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **March 27, 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED: A TRUE COPY  
Doris Poulos O'Hara  
CLERK OF COURT, C.P. & G.S.  
FLORENCE COUNTY, S.C.

Jonathan D Waller 1116 Blanding Street Suite 2B  
Columbia, SC 29201

Samuel Leonard Key Rembert C. Dennis Building 1000  
Assembly Street Columbia, SC 29201

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ATTORNEY(S) FOR THE PLAINTIFF(S)

---

ATTORNEY(S) FOR THE DEFENDANT(S)

*Doris P. O'Hara*

---

Court Reporter

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Doris Poulos O'Hara - Clerk of Court

**Court Reporter:**

**E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.**

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA )  
 COUNTY OF FLORENCE )  
 )  
 )  
 Mildred Montgomery, # 372236, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE TWELFTH JUDICIAL CIRCUIT

2017-CP-21-2597

**ORDER OF DISMISSAL**

2019 MAR 27 AM 11:27  
 DONIS FOULOS O'HARA  
 CLERK C.P. & G.S.  
 FLORENCE COUNTY, SC

**FILED**

The matter before the Court is an action for post-conviction relief (PCR). Mildred Montgomery (Applicant) commenced this PCR action September 22, 2017. Applicant alleged ineffective assistance of counsel and attacked the knowing and voluntary nature of her guilty plea.

The Court held an evidentiary hearing November 6, 2018, at the Florence County Courthouse before the undersigned. For the reasons stated below, the Court finds Applicant's allegations are without merit and concludes plea counsel was not ineffective. Therefore, the Court denies relief and dismisses the action with prejudice.

**FACTS & PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. In January 2017, the Florence County Grand Jury indicted Applicant for attempted murder and possession of a weapon during the commission of a violent crime (2017-GS-21-0039). Applicant's charges stem from an incident that occurred July 17, 2016. Applicant shot Jenny Smith.

Applicant, accompanied by a group of her friends, visited the Down Beat Club (Club). Smith, accompanied by a group of her friends, was also at the Club. At some point, the two groups

*DCP  
 P. 10/10*

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*Donis Foulos O'Hara*  
 CLERK OF COURT C.P. & G.S.  
 FLORENCE COUNTY, S.C.

converged inside the Club and a fist-fight erupted; allegedly, members of each group were spitting on members of the other group. Smith attempted to break up the fight; however, Applicant drew her gun and shot Smith. Smith survived. (Plea Tr. 6-7)

On April 10, 2017, Applicant pled guilty to the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) before the Honorable William H. Seals, Jr. Applicant was represented by Kevin Etheridge and John R. Etheridge, Jr. (Johnny Etheridge), both of The Gardner Law Firm. However, only Kevin Etheridge (plea counsel) was present to represent Applicant at her plea hearing. Deputy Solicitor John Jepertinger and Assistant Solicitor Lloyd Flores prosecuted the case. Applicant entered her plea pursuant to a negotiated eighteen-year sentence. The plea court accepted Applicant's plea and sentenced her as negotiated. Applicant did not appeal her conviction or sentence.

Applicant commenced this PCR action September 22, 2017. Jonathan D. Waller represented Applicant at the PCR hearing. Assistant Attorney General Samuel Key represented the State.

### ISSUES RAISED

Applicant alleges she is being held in custody unlawfully due to ineffective assistance of counsel and attacks the knowing and voluntary nature of her guilty plea. Applicant alleges:

1. Plea counsel failed to properly communicate with Applicant; and
2. Plea counsel failed to properly advise Applicant.

### PCR HEARING TESTIMONY

#### Applicant

Applicant testified at the PCR hearing she retained The Gardner Law Firm (Firm) to represent her. However, Applicant believed Johnny Etheridge would be the attorney from the Firm representing her in this case. Applicant testified she only spoke with Johnny Etheridge one time, by

phone, before she pled guilty. She stated Johnny Etheridge told her he would visit her, but he never did.

Applicant testified plea counsel appeared at her bond hearing to represent her. She stated plea counsel briefly discussed the ramifications of the bond hearing, and then she never saw or spoke with plea counsel again until the day she pled guilty. Applicant stated plea counsel advised her to plead guilty because she would lose at trial. Applicant stated the State offered a sentencing range from zero-to-twenty years in exchange for her plea just moments before she entered the court room. Applicant stated that when she asked plea counsel about the offer right before she was about to plead guilty, plea counsel told her the State's offer was for a negotiated eighteen-years.

Finally, Applicant recalled telling the plea court she was satisfied with plea counsel's representation. She recalled telling the plea court she was not threatened, and she recalled admitting she was guilty to the plea court.

Johnny Etheridge

Johnny Etheridge testified by phone at the PCR hearing. Johnny Etheridge stated the Firm was retained by Applicant's family to represent Applicant. He stated he did not meet with Applicant in person; however, he did speak to Applicant by phone two or three times. Johnny Etheridge explained he and plea counsel worked on the case together because he had mobility issues. He stated plea counsel would confer with him and get his opinion while handling the case. On cross, Johnny Etheridge testified he explained to Applicant he would work on her case with plea counsel because he and plea counsel work together on almost all cases they handle. Johnny Etheridge could not specifically recall going over the discovery with Applicant; however, he remembered reviewing all the discovery and discussing the State's evidence with plea counsel.

Johnny Etheridge recalled the State's plea offer. Johnny Etheridge testified the State agreed to reduce the charge from attempted murder to ABHAN with an eighteen-year negotiated sentence. Johnny Etheridge felt the State's offer was a good deal because of the facts of the case. Johnny Etheridge stated he felt Applicant would have received more time if convicted at trial. Finally, Johnny Etheridge stated he did not file an appeal because Applicant did not ask him to do so.

Plea Counsel

Plea counsel also testified at the PCR hearing. He stated he practiced at the Firm with his father, Johnny Etheridge. Plea counsel stated he first met Applicant at her bond hearing, after which she retained the Firm to represent her. Plea counsel stated he explained to Applicant that he and Johnny Etheridge work on cases together because Johnny Etheridge has mobility issues—plea counsel appears in court for his father.

Plea counsel stated he briefly met with Applicant before her bond hearing, but he could not recall meeting with her again before the day of her plea. Plea counsel's next recollection of meeting Applicant was the day of her plea. Plea counsel explained his discussion with Applicant that day mainly focused on the State's offer. Plea counsel stated he and Applicant decided to accept the ABHAN offer to prevent a strike from appearing on her record. Plea counsel stated he and Applicant briefly discussed the discovery, and they would have discussed it further if the case had gone to trial. Plea counsel could not recall if he ever received or viewed a video of the incident.

Plea counsel testified the only offer the day of Applicant's plea was a negotiated eighteen-year sentence to ABHAN. Plea counsel stated he advised Applicant to accept the State's offer. Plea counsel stated he discussed the elements of attempted murder and the elements of ABHAN, and ultimately let Applicant decide whether or not to accept the State's offer. Plea counsel stated he

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advised Applicant of her constitutional rights including her right to trial, the rights she waived in pleading guilty, and briefly discussed the facts underlying her plea.

Assistant Solicitor

The assistant solicitor who prosecuted Applicant's case briefly testified at the PCR hearing. The assistant solicitor could not recall if a zero-to-twenty open plea offer was ever made, and he did not recall discussing the case with anyone else who may have represented Applicant.

DISCUSSION

The issue before the Court is whether Applicant's guilty plea was the result of ineffective assistance of counsel. To establish ineffective assistance of counsel, the 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. *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).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). A defendant who enters a plea with the advice of counsel may only attack counsel's representation relating to the voluntary and intelligent nature of the plea. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). For a plea to be voluntarily and intelligently entered, "[The] defendant . . . must be aware of the nature and crucial elements of

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the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). To prove prejudice, the applicant must show a reasonable probability she would not have pled guilty and would have insisted on going to trial absent plea counsel’s alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

At the PCR hearing, Applicant and plea counsel agreed Applicant pled guilty with plea counsel’s advice. The Court finds Applicant pled guilty after being advised by plea counsel; therefore, the issue before the Court is whether Applicant’s plea was knowing and voluntary.

As mentioned above, Applicant alleges plea counsel was ineffective for: (1) failure to communicate with Applicant; and (2) failure to advise Applicant. For the reasons stated below, the Court finds Applicant’s allegations are without merit, denies relief, and dismisses the PCR action with prejudice.

**1. Failure to Communicate**

Applicant alleges Johnny Etheridge and plea counsel were ineffective for failure to properly communicate with her leading up to her guilty plea. Specifically, Applicant claims she only conferred with plea counsel two times (the day of her bond hearing and the day she pled guilty), and she believed Johnny Etheridge, not plea counsel, represented her. For the reasons stated below, the Court finds these allegations are without merit.

“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). Counsel must communicate all plea offers made by the State. *Davie v. State*, 381 S.C. 601, 610, 675 S.E.2d 416, 421 (2009), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). However, counsel is presumed to have adequately

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assisted and exercised reasonable professional judgment in making decisions in the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

Applicant has failed to show any deficiency of communication regarding Johnny Etheridge or plea counsel's representation. Johnny Etheridge credibly testified he spoke to Applicant by phone on two or three occasions, he explained to Applicant he and plea counsel worked on cases together, and that she retained the Firm's representation. Plea counsel explained he communicated all of the State's offers to Applicant and advised her to accept the State's offer because it prevented a strike on her record. Applicant may feel as though Johnny Etheridge and plea counsel did not communicate enough with her; however, it is apparent from Johnny Etheridge and plea counsel's testimonies that they reasonably communicated with Applicant.

The Court finds Applicant has failed to show any deficiency in regard to her ability to communicate with Johnny Etheridge or plea counsel. Further, Applicant has failed to show how she was prejudiced from either counsels' alleged lack of communication because plea counsel met and conferred with Applicant prior to Applicant's plea. Applicant stated she was satisfied with plea counsel's representation the day of her plea, she cannot now change her opinion through hindsight. Therefore, the Court denies relief and dismisses the allegation with prejudice.

## 2. Failure to Advise

Applicant claims the State offered an open plea deal for zero-to-twenty years' imprisonment. For the reasons stated below, the Court finds plea counsel was not ineffective for providing inadequate advice.

"[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman*, 337 S.C. at 599, 524 S.E.2d at 624. To prove prejudice, the

applicant must show a reasonable probability she would not have pled guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill*, 474 U.S. at 59.

The Court finds plea counsel was not deficient for failing to properly advise Applicant about a zero-to-twenty open plea offer. The Court finds Applicant's assertion the State made the open plea offer to be not credible. Johnny Etheridge, plea counsel, and the assistant solicitor all testified they could not recall an open plea offer ever being made to Applicant. All three recalled the offer being a plea to ABHAN with a negotiated sentence of eighteen-years. Further, Applicant has failed to show any prejudice from such alleged deficiency because she recalled the plea court advising her during her guilty plea. The plea court's colloquy shows Applicant knowingly and intelligently pled guilty to ABHAN with a negotiated eighteen-year sentence, and Applicant testified plea counsel informed her the offer was for a negotiated eighteen-year sentence right before the plea was entered. Applicant has failed to show how Johnny Etheridge or plea counsel were deficient in advising her. Further, the Court finds any such alleged deficiency was cured by the plea court's colloquy. *See Bennett v. State*, 371 S.C. 198, 205 n.6, 638 S.E.2d 673, 676 n.6 (2006) (noting counsel's deficiency can be cured by the presiding court's colloquy).

Finally, Applicant alleges she was never advised of her right to appeal her guilty plea. (PCR Application, Question 9). The Court finds this allegation is without merit. Even if plea counsel or Johnny Etheridge were deficient for failing to advise Applicant of her right to appeal, such alleged deficiency was cured by the plea court. *See Bennett, supra*. The plea court advised Applicant she had the right to appeal her guilty plea, and further advised she had ten days to appeal. (Plea Tr. 4). Applicant affirmed she was present when the plea court explained her right to appeal and also affirmed she understood the rights explained to her. (Plea Tr. 5). Therefore, any alleged deficiency on behalf of retained or plea counsel was cured by the plea court's colloquy.

Based on the foregoing, the Court finds neither plea counsel nor Johnny Etheridge were ineffective in advising Applicant. Therefore, the Court denies relief as to this allegation and dismisses the allegation with prejudice.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant relief. The Court finds plea counsel and Johnny Etheridge's representation was neither deficient nor prejudicial. Applicant pled guilty pursuant to the competent advice of plea counsel. The Court finds Applicant knew the meaning and consequences of pleading guilty to ABHAN and was fully aware of the negotiated eighteen-year sentence. Applicant's voluntariness is evinced by the plea transcript and testimony given at the PCR hearing.

The Court notes 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. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of relief. 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 the appropriate procedures for appeal.

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**THEREFORE:**

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

**AND IT IS SO ORDERED.**



D. CRAIG BROWN  
Presiding Judge  
Twelfth Judicial Circuit



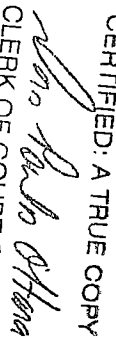
South Carolina

March 27, 2019.

**FILED**

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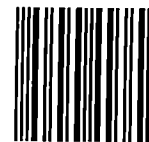
DORIS POULOS O'HARA  
C.C.P. & G.S.  
FLORENCE COUNTY, SC

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CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

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Columbia, SC 29201

Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

