

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Florence County  
Court of Common Pleas  
William H. Seals, Jr., Plea Judge  
D. Craig Brown, Jr., PCR Judge

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**RECEIVED**

FEB 26 2020

S.C. SUPREME COURT

Appellate Case No. 2019 – 000526

Mildred Montgomery,

Petitioner,

v.

State of South Carolina,

Respondent.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

MICHAEL D. DAVIDSON  
Assistant Attorney General  
SC Bar No. 104114

Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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## **ISSUES RAISED ON CERTIORARI**

### **Petitioner's Question Presented**

Whether the PCR Court erred in denying relief, where Petitioner's plea was not freely, intelligently, and voluntarily made, where plea counsel failed to adequately communicate with and advise Petitioner of her constitutional rights, the elements of the charged offenses, the state's evidence against her, and the maximum penalties she faced, and where the colloquy between Petitioner and the plea judge failed to cure these deficiencies?

### **Respondent's Question Presented**

Whether the PCR court correctly found Petitioner knowingly and voluntarily pleaded guilty because where plea counsel adequately communicated with Petitioner and advised her of her constitutional rights, the elements of the charge, the State's evidence in the case, and the exposure she faced; further, the PCR court correctly found the plea court's colloquy cured any of plea counsel's alleged deficiencies?

## STATEMENT OF THE CASE

Applicant's charges stem from an incident that occurred on July 17, 2016. (App. 6.) Applicant shot Jenny Smith. (App. 6.) Applicant, accompanied by a group of her friends, visited the Down Beat Club (Club). (App. 6.) Smith, accompanied by a group of her friends, was also at the Club. At some point, the two groups converged inside the Club and a fist-fight erupted; allegedly, members of each group were spitting on members of the other group. (App. 6.) Smith attempted to break up the fight; however, Applicant drew her gun and shot Smith. Smith survived. (App. 6-7.)

In January 2017, Petitioner was indicted for attempted murder and possession of a weapon during the commission of a violent crime (2017-GS-21-0039). (App. 70.) John "Johnny" Etheridge, Esquire, and Kevin Etheridge, Esquire, represented Petitioner. Deputy Solicitor John Jepertinger and Assistant Solicitor Lloyd Flores of the Twelfth Circuit Solicitor's Office prosecuted the case.

On April 10, 2017, Petitioner appeared before the Honorable William H. Seals, Jr., and pursuant to negotiations between Petitioner and the State, pleaded guilty to the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). (App. 6.) Judge Seals accepted Petitioner's guilty plea and sentenced her to eighteen years imprisonment, pursuant to the negotiations. (App. 11.)

Petitioner commenced the underlying action for post-conviction relief (PCR) on September 22, 2017. (App. 10.) An evidentiary hearing was held on November 6, 2018, before the Honorable D. Craig Brown. (App. 23.) Petitioner was present and represented by Jonathan D. Waller. (App. 23.) Assistant Attorney General Samuel L. Key represented Respondent. (App. 23.) At the

PCR hearing, Applicant, Johnny Etheridge, Plea Counsel, and the Assistant Solicitor all testified. Their testimony is summarized below.

Mildred Montgomery, Applicant

Applicant testified at the PCR hearing she retained The Gardner Law Firm (Firm) to represent her. (App. 28.) However, Applicant believed Johnny Etheridge would be the attorney from the Firm representing her in this case. (App. 28.) Applicant testified she only spoke with Johnny Etheridge one time, by phone, before she pleaded guilty. (App. 28.) She stated Johnny Etheridge told her he would visit her, but he never did. (App. 28.)

Applicant testified plea counsel appeared at her bond hearing to represent her. (App. 29.) 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 pleaded guilty. (App. 29.) Applicant stated plea counsel advised her to plead guilty because she would lose at trial. (App. 35.) Applicant stated the State offered a sentencing range from zero-to-twenty years in exchange for her plea just moments before she entered the courtroom. (App. 34.) 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. (App. 37.)

Finally, Applicant recalled telling the plea court she was satisfied with plea counsel's representation. (App. 53.) She recalled telling the plea court she was not threatened, and she recalled admitting she was guilty to the plea court. (App. 53.)

Johnny Etheridge

Johnny Etheridge testified by phone at the PCR hearing. (App. 38.) Johnny Etheridge stated the Firm was retained by Applicant's family to represent Applicant. (App. 39.) He stated

he did not meet with Applicant in person; however, he did speak to Applicant by phone two or three times. (App. 39.) Johnny Etheridge explained he and plea counsel worked on the case together because he had mobility issues. (App. 39.) He stated plea counsel would confer with him and get his opinion while handling the case. (App. 39.) On cross-examination, 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. (App. 42.) 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. (App. 39–40.)

Johnny Etheridge recalled the State's plea offer. (App. 40.) Johnny Etheridge testified the State agreed to reduce the charge from attempted murder to ABHAN with an eighteen-year negotiated sentence. (App. 41.) Johnny Etheridge felt the State's offer was a good deal because of the facts of the case. (App. 41.) Johnny Etheridge stated he felt Applicant would have received more time if convicted at trial. (App. 41.) Finally, Johnny Etheridge stated he did not file an appeal because Applicant did not ask him to do so. (App. 41.)

*Kevin Etheridge, Plea Counsel*

Plea counsel also testified at the PCR hearing. (App. 42.) He stated he practiced at the Firm with his father, Johnny Etheridge. (App. 43–44.) Plea counsel stated he first met Applicant at her bond hearing, after which she retained the Firm to represent her. (App. 44.) Plea counsel testified 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. (App. 44.)

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. (App. 44.) Plea counsel's next

recollection of meeting with Applicant was the day of her plea. (App. 44.) Plea counsel explained his discussion with Applicant that day mainly focused on the State's offer. (App. 45.) Plea counsel stated he and Applicant decided to accept the ABHAN offer to prevent a strike from appearing on her record. (App. 45.) Plea counsel stated he and Applicant briefly discussed the discovery, and they would have discussed it further if the case had gone to trial. (App. 45.) Plea counsel could not recall if he ever received or viewed a video of the incident. (App. 46.)

Plea counsel testified the only offer the day of Applicant's plea was a negotiated eighteen-year sentence to ABHAN. (App. 47.) Plea counsel stated he advised Applicant to accept the State's offer. (App. 49.) 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. (App. 50.) Plea counsel stated he advised Applicant of her constitutional rights including her right to a trial, the rights she waived in pleading guilty, and briefly discussed the facts underlying her plea. (App. 50.)

Lloyd Flores, Assistant Solicitor

The assistant solicitor who prosecuted Applicant's case briefly testified at the PCR hearing. (App. 51.) 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. (App. 51.)

On March 27, 2019, the PCR court denied relief and dismissed the action with prejudice. (App. 68.) Petitioner appealed the denial of relief.

### STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value 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 review those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

## ARGUMENT

**The PCR court correctly found Petitioner knowingly and voluntarily pleaded guilty because, as the PCR court correctly found, plea counsel adequately communicated with Petitioner and advised her of her constitutional rights, the elements of the charge, the State's evidence in the case, and the exposure she faced; further, the PCR court correctly found the plea court's colloquy cured any of plea counsel's alleged deficiencies.**

Petitioner argues the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pleaded guilty. Specifically, Petitioner argues that plea counsel failed to adequately communicate with and advise Petitioner of her constitutional rights, the elements of the charged offenses, the State's evidence against her, and the maximum penalties she faced. Further, Petitioner argues that the plea court failed to cure these deficiencies. Respondent submits Petitioner knowingly, voluntarily, and intelligently pleaded guilty because she pleaded guilty after plea counsel adequately communicated with Petitioner and advised her of her constitutional rights, the elements of the charge, the State's evidence in the case, and the exposure she faced; further, the PCR court correctly found the plea court's colloquy cured any of plea counsel's alleged deficiencies. (App. 64.) Because Petitioner knowingly and voluntarily pleaded guilty, certiorari should be denied.

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 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 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 v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). “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). To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel’s alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

The PCR court correctly found Petitioner failed to show counsel was deficient for failure to properly communicate her leading up to her guilty plea. (App. 65.) The PCR court specifically found that Petitioner pleaded guilty pursuant to the competent advice of plea counsel because, at the PCR hearing, Petitioner and plea counsel agreed Petitioner pleaded guilty with plea counsel’s advice. (App. 64.) This finding is supported by Petitioner and plea counsel’s testimony from the PCR hearing. (App. 39.) The PCR court also found that Petitioner knew the meaning and consequences of pleading guilty to ABHAN and was fully aware of the negotiated eighteen-year sentence. (App. 67.) Plea counsel explained he communicated all of the State’s offers to Petitioner and advised her to accept the State’s offer because it prevented a strike on her record. (App. 45.) The PCR Court found plea counsel’s testimony to be credible. (App. 65.)

Lastly, the PCR court found that Petitioner’s voluntariness was evinced by the plea transcript and testimony given at the PCR hearing. (App. 65.) Any possible misconceptions on the defendant’s part can be cured by the plea court’s colloquy. *Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997). Here, the plea court’s colloquy shows Petitioner knowingly and intelligently pleaded guilty to ABHAN with a negotiated eighteen-year sentence. At the plea colloquy, Petitioner failed to inform the sentencing court that as a result of counsel’s representation, she did not understand the consequences of what her decision to plead guilty would be. (App. 5.)

Instead, Petitioner acknowledged that she was satisfied with her lawyer, that he answered all of her questions, and that he had done everything that she asked him to do, and Petitioner voluntarily stated that she was, in fact, guilty of the crime charged. (App. 5.)

Further, the PCR court found any such alleged deficiency was cured by the plea court's colloquy. (App. 66.) *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). Specifically, the plea colloquy shows that Petitioner knew of her Constitutional rights and understood the nature of the Constitutional rights she was waiving. (App. 4–5.) Therefore, Petitioner simply failed to show how she was prejudiced by any of plea counsel's alleged deficiencies.

Petitioner failed to prove plea counsel was deficient for failure to properly communicate with her leading up to her guilty plea. Similarly, Petitioner failed to prove any prejudice resulted from plea counsel's alleged deficiencies. Therefore, the PCR court correctly found plea counsel was not constitutionally ineffective and certiorari should be denied.

**CONCLUSION**

For the reasons stated above, this Court should deny certiorari because plea counsel was not constitutionally ineffective. Further, the plea court's colloquy cured any of plea counsel's alleged deficiencies; therefore, Petitioner cannot show prejudice. As such, certiorari should be denied.

Respectfully submitted,

ALAN WILSON  
Attorney General

MICHAEL D. DAVIDSON  
Assistant Attorney General  
S.C. Bar No. 104114

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

BY:   
ATTORNEYS FOR RESPONDENT

February 25, 2020

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO FLORENCE COUNTY  
Court of Common Pleas

William H. Seals, Jr., Plea Judge  
D. Craig Brown, Jr., PCR Judge

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Appellate Case No. 2019 – 000526

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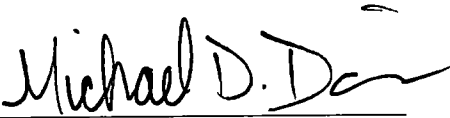
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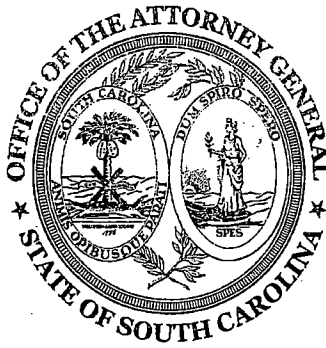
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The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara Mary Caudy  
S.C. Commission on Indigent Defense  
PO Box 11589  
Columbia, SC 29211-1589

This 25<sup>th</sup> day of February, 2020

  
Michael D. Davidson, Esquire  
Attorney for Respondent



ALAN WILSON  
ATTORNEY GENERAL

February 25, 2020

RECEIVED  
FEB 26 2020  
S.C. SUPREME COURT

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

**Re: Mildred Montgomery v. State of South Carolina**  
**Appellate Case No. 2019 – 000526**  
**Lower Court Case No. 2017-CP-21-2597**

Dear Mr. Shearouse:

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

Sincerely,

Michael D. Davidson  
Assistant Attorney General  
SC Bar No. 104114

MDD/kk  
Enclosures

cc: Lara M. Caudy, Esquire (2 copies)