STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM LEXINGTON COUNTY
The Honorable Donald B. Hocker, Plea Judge
The Honorable William P. Keesley, Sentencing Judge
The Honorable Brooks P. Goldsmith, Post-conviction Relief Judge

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Case No.: 2020-000013

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State of South Carolina,

Respondent,

vs.

Destiny H. Mills,

Petitioner.

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# REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Did the post-conviction relief court err in denying Petitioner relief when her public defender provided ineffective representation by not informing her of her Fifth Amendment right to remain silent when she informed him that she was involved in dram shop litigation related to the accident from which her charge arose?

III. Did the post-conviction relief court err in denying Petitioner relief when the assistant solicitor on her case bifurcated her plea in order for her to be sentenced by a judge known to be harsh on crimes of this nature?

## RESPONDENT'S QUESTIONS PRESENTED

I. Did the PCR court correctly find Petitioner failed to prove that her defense attorneys were constitutionally ineffective for not moving to suppress the blood alcohol evidence when Petitioner decided to plead guilty before her attorneys had the opportunity to move to suppress?

II. Did the PCR court correctly find Petitioner failed to prove that Mauldin was constitutionally ineffective for not advising Petitioner of her right not to testify at a deposition in the victim's estate's dram shop litigation when Petitioner testified at the deposition without giving Mauldin the full opportunity to consider matter and properly advise Petitioner and when Petitioner failed to prove that there is a reasonable likelihood that the fact of her testifying at the deposition caused her to plead guilty?

III. Did the PCR court correctly find Petitioner failed to prove that she is entitled to post-conviction relief due to the fact that Petitioner's guilty plea hearing was bifurcated into one hearing where she entered her guilty plea and a second hearing where she was sentenced, with different judges presiding over each when Petitioner did not prove that the bifurcation was improper and that she suffered any prejudice?

## ARGUMENT

**I. The post-conviction relief court erred in denying Petitioner relief when her defense attorneys provided ineffective representation by failing to move to suppress the State's blood-alcohol evidence after the vial containing a blood sample for Petitioner to have independently tested was destroyed by a law enforcement officer, thus preventing her from asserting her statutory right to conduct her own investigation.**

The State argues that the hospital made an appropriate "reasonable effort" by drawing two vials of blood – one to test and one for Appellant. Reasonable effort is not the standard. Pipkin goes so far to say that even if the suspect refuses to have a second vial of blood drawn, their rights are violated because it prevents the ability for them to obtain an independent test without a second examination. State v. Pipkin, 294 S.C. 336, 338, 364 S.E.2d 464, 465 (1988). Respondent tries to distinguish the current matter from Pipkin because Appellant was properly advised of her independent testing rights and two vials were drawn. Though advising her of her independent testing right is required by statute, it is also required that "[t]he arresting officer shall provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests." S.C. Code Ann. §56-5-2950(D) (1972, as amended) The second holding of Pipkin specifically applies to this situation:

> Second, Pipkin's right to an independent test was compromised. He was entitled to have his blood alcohol content determined from the vial of blood taken. Instead, when [the arresting officer] appropriated the vial, Pipkin could only avail himself of an independent test by having a second sample of blood withdrawn. Indeed, this is precisely what Pipkin was advised by [the arresting officer].

Pipkin, 294 S.C. at 338, 364 S.E.2d at 465.

Respondent also argues against Appellant's points by referring to State v. Wilson, 296 S.C. 336, 337, 364 S.E.2d 464 (1988) (*per curiam*) by arguing that the blood alcohol evidence that would have been submitted at trial would be cumulative to other evidence produced. In Wilson, the appellant was not successful in having his blood sample independently tested to assess the alcohol level; however, he admitted that he drank a half pint of vodka and had a breathalyzer reading of 0.28. In the case at bar, Appellant admitted she drank 4 drinks in 5 hours, which is not necessarily enough to put her over the legal limit. There is testimony that her boyfriend was attempting to kiss her while she was driving, thus distracting her. (App. p.150, 7-10) There is no negative testimony in the record regarding her state of mind or behavior while at the hospital; in fact, Appellant recalled her records saying, both from EMS and the hospital, stating that she had clear speech, normal motor skills, alert and oriented to tine, place, etc. (App. p.105, 15-22) Her public defender, Mr. Mauldin, recalled that "it wasn't like [she was] a sloppy drunk." (App.141, 4-8) In fact, the only negative testimony regarding her behavior is from Mr. Wagoner, the solicitor, who recalls that the video from the hospital showed her to be "stunned and dazed" upon receiving the news that someone had died as a result of the accident. (App. p.117, 11-15) Certainly that reaction would be normal of a sober person upon finding out that someone died. Therefore, the fact that Appellant did not have the ability to independently test her blood is especially detrimental as there is no cumulative evidence that may overcome this requirement.

Because the ultimate determination in this matter is defense counsel's performance, we must analyze counsel's behavior. For this, Respondent relies on Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014) for the idea that a post-conviction relief court is required to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. Respondent initially begins its analysis by

considering whether Appellant's public defender was required to move for suppression of the blood alcohol evidence. Certainly, due to the timeline of the case and the portion of it when the public defender represented Appellant, the onus on him to move to suppress the evidence is less pressing than when she was closer to a plea or trial. Mr. Williams, Appellant's retained counsel, stated at the post-conviction that he would have moved to suppress the blood alcohol evidence if Appellant had gone to trial. (App. p.149, 16-22) Mr. Williams testified that he did not believe it would be successful based on his prior experience, as he had tried it before and lost. (App. p.149, 11-15)

Respondent interprets Mr. Williams' decision not to move to suppress the blood alcohol evidence as effective representation based on his experience and the fact that Appellant intended to plead guilty. For this, they cite the reasoning in Bagwell above. This does not take the full view of the facts into consideration, though. If defense counsel had moved to suppress the blood alcohol evidence, which was clearly handled in violation of case law and statute, there would have been no need for Appellant to plead guilty. As discussed above, the blood alcohol evidence is not cumulative to other evidence, nor is other evidence necessarily enough to convict. The blood alcohol evidence was the primary evidence used for entering Appellants plea so, at the very least, it should have been challenged. Failure to challenge this evidence absolutely altered Appellant's understanding of the case and her decision-making process regarding whether to plead. Because she was facing this evidence, a plea seemed more favorable; however, if she could have gone to trial knowing she would not have to face the blood alcohol evidence, she may have faced a more favorable and less prejudicial outcome.

**II. The post-conviction relief court erred in denying Petitioner relief when her public defender provided ineffective representation by not informing her of her Fifth Amendment right to remain silent when she informed him that she was involved in dram shop litigation related to the accident from which her charge arose?**

Respondent's argument centers around the idea that Petitioner's public defender, Mr. Mauldin, could not have been ineffective because "Petitioner failed to prove that there is a reasonable likelihood that Mauldin's performance with respect to his advice to Petitioner about the civil suit affected Petitioner's decision to plead guilty rather than proceed to trial." (RPWC, p.11) Respondent cites no case law in the argument on this topic, or in the entirety of its response to argument II. Regardless, there is discussion of whether Mauldin gave Petitioner adequate advice regarding her rights pertaining to the intersection of her criminal charges and the civil dram shop case.

Mauldin's testimony never waivers from the fact that he told Petitioner her cooperation in the case was a "let's wait and see thing:" "I think at the time it was kind of a let's wait and see thing. It wasn't a definite yes, cooperate or a definite no, not cooperate. If the lawyer had contacted me, I would have asked him if he had talked to the lawyer on the other side, you understand, to kind of get the lay of the land before any kind of advice was given on that." (App p.147, lines 16-21) Mauldin continually passes the blame to his client (Petitioner) by stating that she did not notify him of the subpoena and deposition. Not once in his testimony during the post-conviction relief hearing did he state that he advised her of her fifth amendment right to remain silent or the potential detriment of testifying. This is bolstered by Petitioner's testimony that Mauldin never advised her of her fifth amendment rights. (App. 88, line 14 – p.89, line 8) Even the solicitor, Mr. Wagoner, stated that it was his understanding that a defense attorney would advise their client to assert their fifth amendment rights if they were involved in a civil case. (App. p.118, lines 13-22)

In actuality, the deposition Petitioner provided hurt her case, both in her estimation and that of her second attorney, Mr. Williams who also testified he would never let a criminal client take a deposition. (App. p.160, lines 11-21) Petitioner testified the deposition was detrimental to her because the solicitor got a copy of the transcript and the deposing attorney testified at her sentencing hearing. (App. p.89, 12-24) This proves that the "wait and see" approach of Mr. Mauldin backfired – his idea that cooperating in civil cases often turns victims into allies proved to be actively detrimental to Petitioner. Again, Petitioner looks not only to the usual cases of Strickland and Cherry, but to Chief Justice Finney's dissent Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000) for the proposition that if a defendant is not informed of a constitutional right, a new trial must be granted.

**III. Did the post-conviction relief court err in denying Petitioner relief when the assistant solicitor on her case bifurcated her plea in order for her to be sentenced by a judge known to be harsh on crimes of this nature?**

Respondent's Return spends several paragraphs discussing State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) and how its existence should protect from the type of abuse and judge-shopping alleged by Appellant. However, the mere existence of case law, and even the existence of a system set up to prevent abuse, does not mean that it works. In fact, Respondent states that Appellant's allegations are insulting toward the court because she accuses the solicitor of wrongdoing. (RPWC, p.16) This is precisely what Langford sought to avoid – the appearance that the court and the solicitor's offices are inextricably linked or, even worse, the same entity.

Respondent is correct that Appellant cannot prove some sort of "nefarious allegiance to the State" on the part of Judge Keesley and, therefore, has difficulty proving that she refused a harsher sentence from Judge Keesley than she would have if Judge Hocker both heard the plea and issued

the sentence. What Appellant can prove, though, is the fact that this policy of having defendants plead in front of the trial judge they were scheduled before is unusual. Mr. Williams, a long-time defense attorney in the county, had never heard of this alleged policy before. (App. p.165, 7-9) Even Judge Keesley's chambers questioned why he was specifically being requested as the sentencing judge, and therefore makes it apparent that he had never heard of this policy, either. (App. p.235 – letter from Keesley's clerk) Mr. Williams felt so strongly about this issue that he asks for leave to present it at the post-conviction relief hearing. (App. p. 195, lines 11-14)

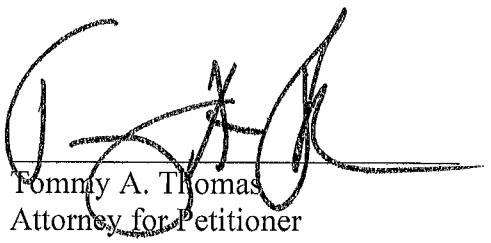
The solicitor's office also stated that part of their hurry to have Appellant plead was to ensure the plea was entered and she did not change her mind. (App. p.114, 3-7: "The reasoning for that in my opinion was to save the victims the anxiety of trial prep and also save the State from the anxiety of, you know, if she were to back out of the plea, we would have to go straight into the trial;" App. p.119, 12-14: "the effort we would still need to go through even if it pleads because we need to be ready to go in the event she backs out of the plea.") Appellant testified that she did not request for a bifurcating plea hearing. (App. p.103, 22-p.104, 1) However, there is absolutely no evidence that Appellant would back out of the plea. This testimony from Solicitor Wagoner is entirely self-serving in order to justify his decisions.

As mentioned in the petition, Appellant believes that judge-shopping was only one element of the solicitor's unusual and prejudicial behavior during her plea hearing. Mr. Williams testified that the solicitor's office ensured that media was present in the courtroom, there were representatives from MADD, and that the solicitor attempted to introduce the 911 tape after he concluded his presentation. Without saying so definitively, he also testified that he could not think of a reason for the solicitor to engage in these actions other than to get an enhanced sentence. (App. p.93, line 18 – p.94, line 18) Luckily, Mr. Williams vehemently objected to the entry of the 911

tape and Judge Keesley did not listen to it before passing his sentence. (App. p.165, 19-23) The totality of facts shows that the solicitor's office worked very hard in several ways to have Appellant receive the harshest sentence possible. The fact that they went so far as to find the harshest sentencing judge possible is only one portion of this equation.

## CONCLUSION

This Court must grant certiorari to consider the arguments and issues in order to remand or dismiss Petitioner's convictions. Petitioner requests the opportunity to further brief this issue if it will assist the Court.



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