

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Orangeburg County  
Court of Common Pleas

Honorable Kristi Lea Harrington, PCR Judge  
Honorable Perry Buckner, Circuit Court Judge

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Appellate Case No. 2019-002027

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Donte Jarod Stokes,

Petitioner,

v.

State of South Carolina,

Respondent.

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

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**S.C. SUPREME COURT**

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## **ISSUES RAISED ON CERTIORARI**

### **Petitioner's Questions Presented**

- I. Did the PCR judge err in signing the order of dismissal that made findings of fact, conclusions of law and made findings as to witness credibility when he did not preside over the PCR hearing?
- II. Was trial counsel ineffective in failing to properly explain the no contest plea to murder and failing to object when the judge required an admission of guilt, rendering the plea involuntary?

### **Respondent's Counter-Statement of Question Presented**

- I. Petitioner's appellate argument that the PCR judge erred in signing the order of dismissal that made credibility determinations where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRCP, prior to signing the order, is wholly unpreserved for appellate review because the issue was never raised to nor ruled upon by the circuit court, thereby depriving both the circuit court to respond to these allegations and the judge an opportunity to rule on such allegations; however, regardless of any preservation issues, Petitioner's argument fails on the merits as the successor judge's actions were proper in signing the order of dismissal where the successor judge properly certified the record was before him, where Petitioner did not request that the witnesses be recalled pursuant to Rule 63, SCRCP, and where the credibility of the witnesses was not dispositive to the allegation raised.
- II. Petitioner's appellate argument that trial counsel was ineffective in failing to properly explain the no-contest plea to murder and failing to object when the judge required an admission of guilt, rendering the plea involuntary is wholly unpreserved for appellate review because Petitioner never presented any of his arguments to the circuit court; however, regardless of any preservation issues, Petitioner's argument still fails on the merits as the record supports that Petitioner's plea was freely and voluntarily entered as Petitioner understood what a no-contest plea was and Counsel's failure to object when the judge required an admission of guilt did not prejudice Petitioner.

## STATEMENT OF THE CASE

The Orangeburg County Grand Jury indicted the Applicant at the November 2012 term of General Sessions for Murder (2012-GS-38-1421). Jillian Ullman, Esquire represented the Applicant. Assistant Solicitor Don Sorenson of the First Circuit Solicitor's office prosecuted the case. On July 15, 2013, Applicant pleaded nolo contendere as indicted. The Honorable Perry Buckner sentenced the Applicant to thirty-eight (38) years imprisonment.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. By order dated September 16, 2013, the Court of Appeals dismissed the appeal based on Applicant's failure to provide a written explanation as to what issues could be reviewed. *See* Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was issued on October 3, 2013.

Petitioner commenced the underlying post-conviction relief (PCR) action on June 30, 2014. App. 39. In his PCR application, Applicant alleged ineffective assistance of counsel for Counsel's failure to investigate and alleged his plea was involuntary. Respondent made its return on January 31, 2019. App. 46. An evidentiary hearing was held on December 12, 2017, before the Honorable Kristi Lee Harrington. App. 51. Petitioner was present at the hearing and represented by Arthur Aiken, Esquire. App. 51. Assistant Attorney General Ruston W. Neely represented Respondent. App. 51. After the hearing, but prior to issuing a ruling, Judge Harrington retired from the Circuit Court bench. Subsequently, the PCR transcript was sent to Judge Dickson, Chief Administrative Judge for the First Judicial Circuit, for his review and to make a ruling on Petitioner's application. Am. App. 96-97. Judge Dickson reviewed the PCR transcript and signed an Order of Dismissal on April 2, 2020. App. 95. The Order of Dismissal was filed on April 23, 2020. App. 87. A Notice of Appeal was timely filed on May 13, 2020.

## **STATEMENT OF THE FACTS**

On June 21, 2012, Petitioner fatally shot Kathy Mack. Mack was a passenger in her boyfriend's utility van when they were suddenly cut-off by a white Ford Explorer that Petitioner was riding in. App 17. Petitioner and a co-defendant exited the white Ford wearing bandanas over their faces and carrying guns. App 18. They began firing into the utility van Mack and her boyfriend were in. App 18. Mack's boyfriend drove off, pulling their bullet-riddled van over after spotting several Santee police officers at a Bass Drive business. App 19. He ran toward the officers, screaming that his girlfriend had been shot. App 19. Mack was struck once in the head and twice in the upper arm and chest area. App. 19. As the boyfriend sought help for Mack, he pointed out to law enforcement a passing white SUV as the vehicle that forced him off the road. Law enforcement asked other agencies to be on the lookout for a white Ford Explorer. App. 19.

About an hour after the fatal shooting, law enforcement saw the white Ford Explorer traveling toward Orangeburg. App 19. The Ford Explorer was pulled over, and Petitioner and his co-defendants were taken into custody. App. 19–20. Two 9 mm rounds were recovered during an autopsy of the Mack's body. App. 20. Another 9 mm round was found inside the van along with a spent .380 caliber round. App. 20. Investigators found two .380 caliber shell casings at the site of the attack. App. 20. Petitioner told law enforcement he was carrying a 9 mm Ruger during the incident. App. 20. Petitioner's co-defendants also admitted that Petitioner was one of the shooters. App. 20.

## **STANDARD OF REVIEW**

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is *any* evidence in the record to support them. *Smalls*, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**I. Petitioner’s appellate argument that the PCR judge erred in signing the order of dismissal that made credibility determinations where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRPC, prior to signing the order, is wholly unpreserved for appellate review because the issue was never raised to nor ruled upon by the circuit court, thereby depriving both the circuit court to respond to these allegations and the judge an opportunity to rule on such allegations; however, regardless of any preservation issues, Petitioner’s argument fails on the merits as the successor judge’s actions were proper in signing the order of dismissal where the successor judge properly certified the record was before him, where Petitioner did not request that the witnesses be recalled pursuant to Rule 63, SCRPC, and where the credibility of the witnesses was not dispositive to the allegation raised.**

On appeal, Petitioner argues for the first time that the PCR judge erred in signing the order of dismissal that made credibility determinations where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRPC, prior to signing the order. However, Petitioner’s allegation was *never* raised to nor ruled upon by the post-conviction relief court, and therefore is not preserved for appellate review. Furthermore, regardless of any preservation issues, Petitioner’s allegation still fails on the merits because the successor judge properly signed the order of dismissal making findings of fact and conclusions of law which properly certified the record was before him, where Petitioner did not request that the witnesses be recalled pursuant to Rule 63, SCRPC, and where the credibility of the witnesses was not dispositive to the allegation raised. Accordingly, certiorari should be denied.

### **A. Issue Preservation**

The pleading and issue-preservation requirements that apply in all civil cases apply to post-conviction relief. *Mangal v. State*, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). Where an allegation is not raised in the application or at the hearing, it is procedurally barred on appeal. *See Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (rejecting an allegation that counsel

was ineffective for failing to object to the sentence as cruel and unusual where the allegation was “not raised in her application or at the hearing”); *Plyler v. State*, 309 S.C. 408, 409-10, 424 S.E.2d 477, 478 (1992) (rejecting an allegation that counsel was ineffective for failing to object to a burden-shifting malice charge where the issue “was neither raised at the PCR hearing nor ruled upon by the PCR court,” even where the charge was “diseased with burden-shifting presumptions”). In *Mangal*, this Court discussed in great detail circumstances in which this Court would consider excusing a procedural default and allowing review of a post-conviction relief claim. It noted: “There have been **rare cases** in which we have excused PCR applicants from procedural failures . . . .” *Mangal v. State*, 421 S.C. 85, 96, 805 S.E.2d 568, 573 (2017) (emphasis added). This Court noted the excusal of a procedural default is an “extraordinary action.” 421 S.C. at 96, 805 S.E.2d at 574. Significantly, *Mangal* is one of many cases in which the “extraordinary action” was not taken even though the issue was minimally addressed at the PCR hearing. The Court found the evidence presented by Mangal in support of excusing the procedural default did not justify the extraordinary relief. *See* 421 S.C. at 101, 805 S.E.2d 576.

In the *extraordinary* cases in which this Court has granted the action of excusing a procedural default, the issue was generally *presented* to the PCR court and a ruling was not obtained. For example, in *Fishburne v. State*, this Court excused Petitioner’s procedural default and remanded the case back to the PCR court to make findings of fact and conclusions of law on an issue *duly raised*, but not ruled on by the PCR court. 427 S.C. 505, 832 S.E.2d 584 (2019) (emphasis added). In *Fishburne*, the applicant raised the issue argued on certiorari *both* in his application for PCR and at the evidentiary hearing. 427 S. C. at 510, 832 S.E.2d at 586. Although Fishburne failed to make a Rule 59(e), SCRPC, motion requesting the issue be ruled upon by the PCR court, this Court overlooked Fishburne’s procedural default and remanded the case because

the PCR court's order contained no findings of fact or conclusions of law on one of Fishburne's primary PCR claims, which was *raised and heard*. 427 S. C. at 508, 832 S.E.2d at 585 (emphasis added); *see Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (If issues are not adequately addressed in an order, a Rule 59(e) motion must be filed in order to preserve the issues for appellate review.).

The case at bar presents no extraordinary circumstance similar to *Fishburne* and it is clearly distinguishable. In contrast to *Fishburne*, the issue Petitioner raises on certiorari was *never* even raised to the PCR court. Counsel for Petitioner was copied on the email communication with the judge's chambers sending the evidentiary hearing transcript. Petitioner's counsel made no request at that time for any witnesses to be recalled, nor did he make any objection to the successor judge making a ruling on the merits of Petitioner's allegation on this basis. Am. App. 96–98. Further, counsel for Petitioner was served with a copy of the filed Order of Dismissal and failed to move to alter or amend the Order of Dismissal pursuant to Rule 59(e), SCRPC, to address the issue now raised on appeal. Petitioner was given ample opportunity to request witnesses be recalled or object to the manner in which the successor court was making its decision; however, Petitioner essentially consented to the procedure followed by the successor judge by failing to raise any such objection prior to the Order of Dismissal being filed or after it was filed through a motion pursuant to Rule 59(e), SCRPC. Thus, unlike the extraordinary circumstances in *Fishburne*—where Fishburne duly raised the issue in his PCR application and presented testimony at his evidentiary hearing, but the circuit court never ruled upon the issue—Petitioner *never* raised his issue to the circuit court, and therefore deprived the court an opportunity to respond and rule.

While the PCR court is encouraged to be flexible in the use of its discretion with procedural requirements to reach the merits of substantial claims, *Mangal*, 421 S.C. at 99-100, 805 S.E.2d at

575-76, Petitioner needed to, at a minimum, ask the PCR court to exercise that discretion. Having failed to raise the issue at all, Petitioner cannot now ask this Court to grant him relief on a new issue. *See Hyman*, 278 S.C. at 502, 299 S.E.2d at 331 (1983) (“This point was not raised in her application or at the hearing and is not properly before us.”). Accordingly, this Court should deny the Petition for Writ of Certiorari and not excuse the clear procedural default in this case. It is not one of the “rare cases” justifying “extraordinary action.”

**B. Merits**

Regardless of any preservation issues, even if Petitioner’s allegation—that the PCR judge erred in signing the order of dismissal that made credibility determinations where the judge was a successor judge who did not preside over the PCR hearing and did not comply with the requirements of Rule 63, SCRCF, prior to signing the order—had been raised and ruled upon, it is still without merit.

Judge Harrington presided over Petitioner’s evidentiary hearing. Within six months after the hearing, Judge Harrington retired from the Circuit Court bench. Judge Dickson, Chief Administrative Judge for the First Circuit, subsequently reviewed the PCR transcript and the record. Judge Dickson signed an Order of Dismissal certifying that he reviewed the record and made credibility findings. Counsel for Petitioner was copied on the email sending the PCR transcript to Judge Dickson for review, made no objections to Judge Dickson making a ruling based on the PCR transcript, and did not request that any witnesses be recalled. Am. App. 96–98. Accordingly, the successor judge’s actions were proper in signing the order of dismissal where the successor judge properly certified the record was before him, where Petitioner did not request that the witnesses be recalled pursuant to Rule 63, SCRCF, and where the credibility of the witnesses

was not dispositive to the allegation raised. Accordingly, Petitioner is not entitled to a new PCR hearing and the Petition for Writ of Certiorari should be denied.

First, Petitioner argues that the PCR court did not properly follow the requirements of Rule 63, SCRCF, by failing to certify familiarity with the record. However, this argument is directly refuted by the record. As specifically noted in the Order of Dismissal, the successor court noted the following: “This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary hearing.” App. 89. This citation from the Order of Dismissal clearly indicates that Judge Dickson was familiar with the record and reviewed it in making his decision on this matter. Although there was no specific language stating “familiarity with the record,” the above citation clearly shows that the successor court was familiar with the record in this matter.

Second, Petitioner argues that the successor court did not follow the requirements of Rule 63, SCRCF, by failing to recall witnesses. However, the successor court did not need to recall witnesses where the court was able to review a copy of the PCR transcript and no request to recall witnesses was made by Petitioner’s counsel. Rule 63, SCRCF, states:

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

SCRCF 63. As noted in the citation to Rule 63, SCRCF, above, in a hearing without a jury the successor judge shall recall witnesses whose testimony is material if a party makes the request to

do so. Counsel for Petitioner was copied on the email communication with the judge's chambers sending the evidentiary hearing transcript and the proposed Order of Dismissal. Petitioner's counsel made no request at that time for any witnesses to be recalled, nor did he make any objection to the successor judge making a ruling on the merits of Petitioner's allegation on this basis. Am. App. 96–98. Further, counsel for Petitioner was served with a copy of the filed Order of Dismissal and failed to file any motion pursuant to Rule 59(e), SCRCPP challenging the ruling of the successor court. Petitioner was given ample opportunity to request witnesses be recalled or object to the manner in which the successor court was making its decision, Petitioner failed to make any such objection. Petitioner has failed to make any argument as to why a request to recall witnesses could not have been made at the time or why any issue was not properly preserved. Petitioner has failed on the merits in showing the successor Court erred by not recalling witnesses where no request to do so was ever made.

Third, Petitioner argues that the successor court made credibility findings where it should not have, without consent of the parties and without having been present for the testimony at the evidentiary hearing. Petitioner contends that credibility findings are incredibly important in PCR cases, the requirements of Rule 63, SCRCPP should be met, or if they cannot be met then a new PCR hearing should be held. Here, however, Petitioner has failed to show how the requirements of Rule 63, SCRCPP were not met or why a new PCR hearing would be necessary. The successor court properly followed the requirements of Rule 63, SCRCPP and a new PCR hearing is wholly unnecessary.

Petitioner further relies on state jurisprudence in support of the contention that the judge who views the witnesses is in the best position to make credibility determinations and that credibility determinations are extremely important in PCR appeals. The successor court used

language in the order of dismissal that it should not have such as “listened”, “heard”, and “observed.” App. 89. The language used by the successor court was improper for a court who made its decision based on the record, however, the findings are unnecessary to the ultimate holding and this Court has already held that it will not give deference to findings made by a judge who did not directly observe the witnesses. *See Drayton v. Evatt, supra* (matters of credibility are within the discretion of the PCR judge); *Cherry v. State, supra* (the PCR judge's findings should be upheld if supported by any probative evidence); *see Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (stating the reason appellate courts give “great deference to a [PCR court's] findings” is because the PCR court has “the opportunity to directly observe the [PCR] witnesses”). As this Court will not be giving deference to the credibility determinations of the successor court, any potential error would be harmless and a new PCR hearing would be wholly unnecessary.

Further, the successor court did not base its decision on the credibility, or lack thereof, of the witnesses. For Petitioner’s involuntary guilty plea claim, the successor court found that “the record fully supports the knowing and voluntary nature of [Petitioner]’s guilty plea.” App. 89. Specifically, the successor court found “The transcript reflects the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea.” App. 90. The successor court further explained its findings:

Having reviewed the pleadings, considered the applicable law, and reflected upon the plea transcript and testimony provided at the evidentiary hearing, this Court denies and dismisses Applicant’s allegation that his guilty plea was involuntary. Applicant’s assertion he didn’t go to trial because Counsel told him he could receive life imprisonment does not make his plea was involuntary. Likewise, Applicant’s assertion Counsel should have had more hope in his case is meritless. It is not counsel’s responsibility to tell their client what they want to hear, but to advise their client accurately. Here, the evidence against Applicant was also overwhelming. His own statement placed him at the incident scene firing the murder weapon.

Based on the record, this Court also finds the evidence against Applicant was overwhelming and any error of Counsel would not have prejudiced Applicant. Therefore, Applicant cannot prove prejudice where the evidence against her was overwhelming. *See Harris v. State*, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008).

This Court finds Counsel's advice was well within the range of competence required of defense attorneys. This Court also finds Applicant's guilty plea was voluntarily, intelligently, and knowingly made, just as the plea court found. Tr. 21. Therefore, this Court denies and dismisses this allegation.

App. 92–93.

Addressing Petitioner's claim of ineffective assistance of counsel for failure to investigate, the successor court found "Petitioner failed to show how further investigation by Counsel would have benefited Applicant at trial. Petitioner's assertion Counsel should have investigated further is purely speculative. Petitioner did not prove what Counsel would have found if she had hired an investigator sooner or done further investigation." App. 93.

The successor court's finding that Petitioner's plea was voluntarily given is supported significantly by the plea transcript and Petitioner's own testimony at the PCR hearing. Additionally, the successor court's finding that Petitioner did not prove what Counsel would have found if she had hired an investigator sooner or done further investigation on his claim of ineffective assistance of counsel for failure to investigate is supported significantly by Petitioner's own testimony at the PCR hearing. Therefore, any potential error by the successor court in making credibility determinations was harmless and certiorari should be denied.

**II. Petitioner’s appellate argument that trial counsel was ineffective in failing to properly explain the no-contest plea to murder and failing to object when the judge required an admission of guilt, rendering the plea involuntary is wholly unpreserved for appellate review because Petitioner never presented any of his arguments to the circuit court; however, regardless of any preservation issues, Petitioner’s argument still fails on the merits as the record supports that Petitioner’s plea was freely and voluntary entered as Petitioner understood what a no-contest plea was and Counsel’s failure to object when the judge required an admission of guilt did not prejudice Petitioner.**

On appeal, Petitioner argues for the first time that Counsel was ineffective in failing to properly explain the no contest plea to murder and failing to object when the judge required an admission of guilt, rendering the plea involuntary. However, this claim is not preserved for appellate review as the allegation was *never* raised to nor ruled upon by the post-conviction relief court. Nevertheless, even if the issue were properly preserved for appellate review, it still fails on the merits as the record supports that Petitioner’s plea was freely and voluntary entered as Petitioner understood what a no-contest plea was and Counsel’s alleged failure to object when the judge required an admission of guilt did not prejudice Petitioner.

**A. Issue Preservation**

The pleading and issue-preservation requirements that apply in all civil cases apply to post-conviction relief. *Mangal v. State*, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). Where an allegation is not raised in the application or at the hearing, it is procedurally barred on appeal. *See Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (rejecting an allegation that counsel was ineffective for failing to object to the sentence as cruel and unusual where the allegation was “not raised in her application or at the hearing”); *Plyler v. State*, 309 S.C. 408, 409-10, 424 S.E.2d 477, 478 (1992) (rejecting an allegation that counsel was ineffective for failing to object to a burden-shifting malice charge where the issue “was neither raised at the PCR hearing nor ruled upon by the PCR court,” even where the charge was “diseased with burden-shifting

presumptions”). In *Mangal*, this Court discussed in great detail circumstances in which this Court would consider excusing a procedural default and allowing review of a post-conviction relief claim. It noted: “There have been **rare cases** in which we have excused PCR applicants from procedural failures . . . .” *Mangal v. State*, 421 S.C. 85, 96, 805 S.E.2d 568, 573 (2017) (emphasis added). This Court noted the excusal of a procedural default is an “extraordinary action.” 421 S.C. at 96, 805 S.E.2d at 574. Significantly, *Mangal* is one of many cases in which the “extraordinary action” was not taken even though the issue was minimally addressed at the PCR hearing. The Court found the evidence presented by Mangal in support of excusing the procedural default did not justify the extraordinary relief. *See* 421 S.C. at 101, 805 S.E.2d 576.

In the *extraordinary* cases in which this Court has granted the action of excusing a procedural default, the issue was generally presented to the PCR court and a ruling was not obtained. For example, in *Fishburne v. State*, this Court excused Petitioner’s procedural default and remanded the case back to the PCR court to make findings of fact and conclusions of law on an issue duly raised, but not ruled on by the PCR court. 427 S.C. 505, 832 S.E.2d 584 (2019). In *Fishburne*, the applicant raised the issue argued on certiorari *both* in his application for PCR and at the evidentiary hearing. 427 S. C. at 510, 832 S.E.2d at 586. Although Fishburne failed to make a Rule 59(e), SCRPC, motion requesting the issue be ruled upon by the PCR court, this Court overlooked Fishburne’s procedural default and remanded the case because the PCR court’s order contained no findings of fact or conclusions of law on one of Fishburne’s primary PCR claims, which was raised and heard. 427 S. C. at 508, 832 S.E.2d at 585.

The case at bar presents no extraordinary circumstance similar to *Fishburne* and it is clearly distinguishable. In contrast to *Fishburne*, the issue Petitioner raises on certiorari was neither included in his original application nor raised to the PCR court. In fact, the only issues before the

PCR court were whether Counsel was constitutionally ineffective for failure to investigate and involuntary guilty plea because Counsel told Petitioner he would receive a life sentence if he went to trial. Petitioner did not amend his application, state additional allegations at the outset of the evidentiary hearing, move to conform the application to the testimony pursuant to Rule 15(b), SCRCP, or move to alter or amend the Order of Dismissal pursuant to Rule 59(e), SCRCP, to address the issue now raised on appeal. Although Petitioner raised an involuntary guilty plea issue at his PCR, the specific grounds in the issue Petitioner raises now was *never* raised to the PCR court. While the PCR court is encouraged to be flexible in the use of its discretion with procedural requirements to reach the merits of substantial claims, *Mangal*, 421 S.C. at 99-100, 805 S.E.2d at 575-76, Petitioner needed to, at a minimum, ask the PCR court to exercise that discretion. Having failed to raise the issue at all, Petitioner cannot now ask this Court to grant him relief on a new issue. *See Hyman*, 278 S.C. at 502, 299 S.E.2d at 331 (1983) (“This point was not raised in her application or at the hearing and is not properly before us.”).

It would be against the spirit of PCR to allow Petitioner to raise this new claim on certiorari. South Carolina case law is clear that successive PCR actions are heavily disfavored. *Aice v. State*, 305 S.C. at 450–51, 409 S.E.2d at 394 (1991) (“We have also stated our general reluctance to consider successive PCR applications.”); *see, e.g., Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980). This precedent is proverbially called the “one bite at the apple.” *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989).

Here, in raising this new claim for the first time on certiorari, Petitioner is attempting to “back door” a successive PCR claim. Petitioner was represented by PCR counsel, had a full evidentiary hearing, and never raised this issue to the PCR court. He had his full bite at the apple.

Accordingly, this Court should deny certiorari and not excuse the clear procedural default in this case. It is not one of the “rare cases” justifying “extraordinary action.”

**B. Merits**

Regardless of any issue preservation issues, even if Petitioner’s claim—that Counsel was ineffective in failing to properly explain the no contest plea to murder and failing to object when the judge required an admission of guilt, rendering the plea involuntary—had been raised and ruled upon, it is still without merit. The record supports that Petitioner’s plea was freely and voluntary entered as Petitioner understood what a no-contest plea was and Counsel’s failure to object when the judge required an admission of guilt did not prejudice Petitioner. Accordingly, this Court should deny certiorari.

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).

A plea of *nolo contendere*, when properly accepted, becomes an implied confession of guilt. *Lott v. U.S.*, 367 U.S. 421, 81 S. Ct. 1563, 6 L. Ed. 2d 940 (1961). Furthermore, a plea of *nolo contendere* is for all practical purposes a plea of guilty in the case in which it is pled. *Kibler v. State*, 267 S.C. 250, 227 S.E.2d 199 (1976); S.C. Code Ann. § 17-23-40 (1976); *State v. Munsch*, 287 S.C. 313, 338 S.E.2d 329 (1985). With respect to the validity of pleas to criminal charges, or the categorization of such pleas as guilty pleas or pleas of *nolo contendere*, the Constitution is concerned with practical consequences, not with the formal categorizations of law. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

While the plea is technically not an admission and does not require an express admission of the charge, it does in fact, like a demurrer, impliedly admit, for the purposes of the case, all the facts in the indictment or information which are well pleaded. *See U.S. v. Frankfort Distilleries*, 324 U.S. 293, 65 S. Ct. 661, 89 L. Ed. 951 (1945). The plea likewise admits the elements of the offense charged. *State v. Munsch*, 287 S.C. 313, 338 S.E.2d 329 (1985). The court should explain that the plea of *nolo contendere* has the same legal effect as a plea of guilty, except that such a plea may not be used against the defendant as an admission of guilt to the alleged act in a civil proceeding. *Kibler v. State*, 267 S.C. 250, 227 S.E.2d 199 (1976).

Here, Petitioner alleges Counsel was ineffective in failing to object when the plea judge required an admission of guilt after accepting the no contest plea to murder because Petitioner did not wish to admit guilt, and the failure to object to the judge requiring an admission of guilt rendered the no contest plea involuntary. However, the record refutes this allegation. Counsel did interrupt the judge when he asked "are you, in fact, Mr. Stokes, guilty of the offense of murder.

App. 14. The judge clarified, “I understand he’s pleading Nolo. I’m asking you, are you, in fact, guilty or are you pleading no contest to the offense of murder in Orangeburg County, on or about June 21, 2012? As I told you a plea of nolo has the exact same legal effect as a guilty plea. Do you understand?” App. 14. Petitioner answered “Yes, sir, Your Honor.” App. 14. The Judge then asked, “Are you, in fact, guilty of that?” App. 14. Petitioner responded, “Yes sir Your Honor.” App. 14.

Petitioner argues that he did not want to admit guilt; however, his plea of no contest implicitly admits factual guilt. Therefore, when the Court asked Petitioner if he was “in fact” guilty, the Court was simply affirming what Petitioner’s plea implicitly admitted: factual guilt. *U.S. v. Frankfort Distilleries*, 324 U.S. 293, 65 S. Ct. 661, 89 L. Ed. 951 (1945). Accordingly, Counsel was not allegedly deficient for failing to object, as Counsel had no reason to object. Furthermore, Petitioner cannot show any prejudice. Petitioner voluntarily admitted factual guilt when addressing the court through a letter, written by Petitioner, which Counsel read aloud into the record. In the letter, which was likely written and provided to Counsel prior to the plea occurring, Petitioner apologized for his role in the murder. The letter contradicts Petitioner’s claim he did not want to admit guilt as the apology implicitly admitted his factual guilt. Petitioner cannot meet his burden in showing he was prejudiced by the Court “forcing him to admit guilt” when the record shows he voluntarily admitted his guilt through the apology letter that Counsel read into the record during the plea hearing. Therefore, Petitioner failed to show how counsel’s failure to object was deficient and how it prejudiced him and as such, certiorari should be denied.

Second, Petitioner alleges counsel was ineffective in failing to properly explain the no contest plea. However, the record reflects that Counsel explained to Petitioner what a plea of no contest meant and that Petitioner understood. The judge directly asked Counsel if she had

explained to Petitioner that a plea of no contest or nolo contendere has the exact same legal effect as a guilty plea”. App. 7. Counsel answered affirmatively. App. 7. The judge then asked if Counsel believed Petitioner understood pleading no contest, to which Counsel answered affirmatively. App. 6–7. The judge later asked how he wished to plead, to which Petitioner stated “No contest.” App. 11. The record clearly reflects that Counsel explained to Petitioner what a plea of no contest meant and that Petitioner understood. Therefore, Petitioner cannot show how Counsel was deficient. Additionally, Petitioner cannot show any prejudice because any prejudice resulting from Counsel’s alleged deficiency was cured by the plea colloquy. *Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (Any possible misconceptions on the defendant’s part can be 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, Petitioner argues that his plea was involuntary because the plea colloquy fails to establish that Petitioner knowingly and intelligently entered the no contest plea when the judge failed to ask Petitioner about the strength of the State’s evidence and failed to ask Petitioner whether he believed the no contest plea was in his best interest. However, the record refutes that Petitioner’s plea was involuntary as Petitioner was 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. Therefore, Petitioner’s claim is without merit.

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant’s right to contest the validity of such a plea is usually, but not invariably, foreclosed. *See Blackledge*, 431 U.S. at 73–74. An applicant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between court and defendant, between court and defendant’s counsel,

or both.” *Roddy*, 339 S.C. at 34, 528 S.E.2d at 421. “[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874. Admissions “made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements.” *Id.* at 137-38, 654 S.E.2d at 874.

Petitioner argues that his plea was involuntary because the plea colloquy fails to establish that Petitioner knowingly and intelligently entered the no contest plea when the judge failed to ask Petitioner about the strength of the State's evidence and failed to ask Petitioner whether he believed the no contest plea was in his best interest. However, to be knowing and voluntary, the colloquy need not include what Petitioner argues. Rather, “[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). Here, the plea court’s colloquy shows Petitioner knowingly and intelligently pleaded no contest. Specifically, the plea colloquy shows that Petitioner knew of his Constitutional rights and understood the nature of the Constitutional rights he was waiving. App. 10–11. Petitioner was advised of the potential charges and sentences. App. 7–8. Petitioner affirmed no one was promising him anything or threatening him to make him plead no contest. App. 12. Petitioner affirmed he was satisfied with his attorney and that he was pleading freely and voluntarily. App 12–13. Based on Petitioner’s answers to the plea judge’s questions, the plea judge found the nolo contendere plea was freely and voluntarily entered into, he had the advice of competent counsel, and he was completely satisfied with his counsel. App. 21. The

PCR court likewise found from the plea transcript and the PCR hearing transcript that Petitioner's plea was voluntarily, intelligently, and knowingly made. App. 92–93.

The record clearly establishes Petitioner's plea was freely and voluntarily entered because he was aware of the nature of the charges against him 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 (1999). Therefore, this allegation is without merit and certiorari should be denied.

**CONCLUSION**

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

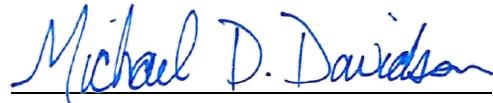
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