LAW OFFICE OF TRICIA A. BLANCHETTE

March 18, 2014
VIA HAND DELIVERY

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

RE: James O. Senn v. State, App. Case No.: 2012-206229

Dear Sir:

For filing in the above referenced case, please find attached an original and six copies of a Petition for Rehearing, with Certificate of Service attached.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: J. Walt Whitmire, Assistant Attorney General
James O. Senn

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2009-CP-32-1771
App. Case No.: 2012-206229

James O. Senn,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

PETITION FOR REHEARING

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STATEMENT OF THE CASE

During the August 2005 term of the Lexington County Grand Jury, Petitioner was indicted for Trafficking in Ice, Crank or Crack, more than 400 grams (Indictment No.: 2005-GS-32-3212). App. p. 358. On February 13-14, 2006, Petitioner proceeded to trial in front of the Honorable William P. Keesley at the Lexington County Courthouse. Petitioner was represented by Robert T. Williams, Esquire. App. p. 1. On February 14, 2006, the jury found Petitioner guilty as indicted. App. p. 349. The Honorable William P. Keesley sentenced Petitioner to a term of twenty-five (25) years. App. p. 353.

A timely notice of appeal was filed and Petitioner's appeal was perfected by Kathrine H. Hudgins, South Carolina Commission on Indigent Defense. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion filed on February 12, 2009. State v. Senn, Op. No. 2009-UP-084 (S.C. Ct. App. filed February 12, 2009). App. p. 361.

On February 23, 2009, Petitioner filed an Application for Post Conviction Relief. The State submitted a Return on or about December 22, 2009. App. p. 364. On January 24, 2011, Petitioner filed an Amendment to Application for Post Conviction Relief, which added the following specific allegations to his original allegation of ineffective assistance of counsel:

1. Ineffective assistance of trial counsel for failure to prepare and investigate, specifically, but not limited to the following claims:

    a. Failure to provide to the Applicant and review with him the complete discovery materials prior to trial. Specifically, but not limited to, the SLED file and drug reports.

    b. Failure to conduct an independent investigation. Specifically, but not limited to, failure to determine how the State derived a weight from the drug evidence

c. Failure to ensure that the Applicant was fully advised regarding the plea offers and to ensure that the rejection of such offers were knowingly and understandably made by the Applicant.

d. Failure to advise the Applicant regarding the applicable statutes and mandatory sentencing provisions.

e. Failure to make the necessary arrangements to procure the testimony of Timothy Senn.

2. Ineffective assistance of trial counsel for failure to utilize an expert to investigate and testify regarding the drug evidence.

3. Ineffective assistance of counsel for failure to file and argue a Motion to Suppress the Evidence due to the handling, sampling, and testing of the drug evidence.

4. Ineffective assistance of trial counsel for failure to argue the Motion to Suppress Evidence, which was filed on January 9, 2006 , or raise any argument regarding probable cause for the traffic stop at issue.

5. Ineffective assistance of counsel for failure to properly prepare to cross-examine the State's experts regarding their qualifications and work in the case. Failure to ensure that the State's experts adhered to the rulings made by the Court regarding the scope and/or limits on their testimony.

6. Ineffective assistance of counsel for the failure to effectively handle the admission and explanation of the drug evidence, specifically regarding the weight of the drug evidence. Specifically, but not limited to the following:

    a. Failure to cross-examine the State's witnesses regarding the sampling procedure used and method for obtaining the weight of the drug evidence.

    b. Failure to enter contemporaneous objections when the State's witness testified regarding the drug amounts and mathematical equations.

7. Ineffective assistance of counsel for failure to properly address the Court's questions regarding the status of the law at issue and appropriate interpretation of such law.

8. Ineffective assistance of counsel for failure to present the testimony of Timothy Senn at trial.

9. Ineffective assistance of counsel for failure to move to have the juror (Mr. Klutz) removed due to his conversation with the extra juror (Mr. Curry).

10. Ineffective assistance of counsel for failure to make a viable argument for a directed verdict and a charge for the lesser included offense.

11. Ineffective assistance of counsel for failure to request a simple possession charge.

12. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal. Specifically, but not limited to the following:

    a. Failure to address the issue involving the extra juror and trial counsel's motion for a mistrial.

    b. Failure to address the qualifications and court's ruling on the State's experts.

An evidentiary hearing was conducted on January 31, 2011 at the Lexington County Courthouse in front of the Honorable R. Lawton McIntosh. App. p. 399. Petitioner was present and was represented by Tricia A. Blanchette, Esquire. Respondent was represented by A. West Lee, Assistant Attorney General. During the evidentiary hearing, counsel called Jeffrey M. Hollifield, Robert T. Williams, Sr., Esquire, and Petitioner to the stand. Petitioner's counsel also provided the court a sealed transcript of the deposition of Timothy Senn and twelve exhibits. During the evidentiary hearing, the court marked two court exhibits. The court also had before it a copy of the Application, Respondent's Return, Petitioner's Amendment, the records of the Lexington County Clerk of Court concerning the subject conviction, and Petitioner's records from the South Carolina Department of Corrections.

At the conclusion of the evidentiary hearing, the lower court took the matter under advisement. Thereafter, the State was instructed to submit an Order of Dismissal, which was signed by Honorable R. Lawton McIntosh on September 1, 2011. App. p. 602. On

September 23, 2011, Petitioner filed a Motion for Rehearing Pursuant to Rule 59(a), SCRCP, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP. App. p. 631. Respondent submitted a Return on October 27, 2011. App. p. 637. Via Form Four Order, the Honorable Lawton W. McIntosh denied Petitioner's Motion on December 2, 2011. App. p. 643.

On January 13, 2012, Petitioner filed a Notice of Appeal. On March 16, 2012, a Petition for Writ of Certiorari and Appendix were filed. On July 20, 2012, the State submitted a Return to Petition for Writ of Certiorari. On March 6, 2014, this Court denied the Petition for Writ of Certiorari via written Order, from which this Petition for Rehearing follows.

ARGUMENT

Pursuant to Rule 221, SCACR, Petitioner would respectfully request that this Court review the Petition for Writ of Certiorari, filed on March 16, 2012, and reconsider the decision entered on March 6, 2014 to deny the Petition for Writ of Certiorari without written explanation or opinion.

By way of the Petition for Writ of Certiorari, Petitioner argued that the lower court erred in finding that trial counsel's performance was not ineffective and prejudicial to the Petitioner in five separate arguments, which are summarized briefly below. Petitioner would ask this Court to reconsider the complete arguments set forth in the Petition for Writ of Certiorari before upholding the decision of the lower court that found that counsel's clear ineffective assistance was excusable. Petitioner submits that no probative evidence supports the findings of the PCR court; therefore, this Court must not uphold the findings of the lower court. See Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2002).

First, Petitioner argued that the lower court erred in excusing counsel's failure to utilize Timothy Senn as a trial witnesses under the guise of trial strategy. Specifically, the lower court found that "counsel articulated valid strategic reasons for not calling Timothy Senn," yet Timothy Senn testified that counsel never even contacted him to investigate or ascertain what testimony he could have provided at trial. App. pp. 623, 700. Petitioner submits, as is argued in detail in the Petition for Writ of Certiorari, that trial counsel's strategy, which was formulated without even speaking to the witness, fails under "an objective standard of reasonableness." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). At

the evidentiary hearing trial counsel admitted that Petitioner informed him that he was innocent, but it is clear from the record that he failed to call the one witness that could corroborate Petitioner's claims of innocence, which was highly prejudicial to Petitioner.

Secondly, Petitioner argued that the lower court erred in finding that trial counsel did not render ineffective assistance in advising Petitioner to reject the State's plea offer of three to ten years, non violent, when such advice was based upon an errant understanding of the State's evidence against Petitioner. At the evidentiary hearing, Petitioner explained that counsel advised him to reject the plea offer because the State had no weight for the drugs and in his experience there was "no way" Petitioner could be convicted with no weight for the drugs. App. pp. 419-21, 433. At the conclusion of the evidentiary hearing, the lower court concluded:

> Well, I think **all** the evidence shows, quite frankly, that Mr. Williams didn't know how they were going to establish a weight. I think he admitted that candidly from the stand. (emphasis added)

App. p. 599, lns. 12-15. As was argued in Petition in detail, this conclusion by the lower court begs the common sense question of how the court could find that trial counsel's assistance on the plea offer was not deficient or prejudicial to the Petitioner when all the evidence shows that trial counsel was clueless about the most important element of the State's case against Petitioner. As was found in Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010), Petitioner would submit that the prejudice of counsel's ineffective assistance is evidence from the mandatory twenty-five year sentence he is currently serving.

Thirdly, Petitioner argued that the lower court erred in finding that trial counsel was not ineffective regarding his preparation, investigation and trial performance involving the drug evidence and other related legal issues. Despite advising Petitioner

that no weight equaled no conviction, counsel failed to make a pre-trial motion or argument regarding the weight of the drug evidence or address with Petitioner, the State or the Court how the State planned to derive a total weight at trial. App. pp. 419, 455-6, 462. Only after the State moved to qualify Officer Stout as an expert did counsel make an argument regarding the weight of the drugs. Counsel argued that there was no weight in discovery, yet the State was attempting to use Officer Stout to establish a total weight App. pp. 93, 101, 446. Counsel's ignorance on this key element of proof, his failure to ascertain how the State would derive the total weight prior to trial, and his failure to utilize an expert, as was done at the evidentiary hearing for matters he clearly did not understand, amounts to ineffective assistance that not only prejudiced Petitioner in the plea process but also throughout his whole trial. Additionally, Petitioner argued in detail that counsel failed to make a motion for suppression of the drug evidence on the basis of probable cause for the traffic stop and failed to at a minimum impeach Officer Jones with his report of the stop. Also, trial counsel failed to even attempt to answer the court's serious concerns regarding the nature of the drug evidence and statute at issue and failed to ask for a simple possession charge even after the State admitted that if counsel's theory on the drug weight was correct "he could get a simple possession charge". App. p. 307, lns. 5-16. 543. A proper reading of the trial and evidentiary transcript shows that counsel was at best clueless, if not negligent, in ascertaining the way in which the State planned to establish the weight of the drug evidence. Furthermore, counsel failed to make motions to suppress the drug evidence, answer serious questions for the court or understand that his own theory amounted to a simple possession charge, which was not even requested. As was argued in the Petition in detail, Petitioner submits that counsel was ineffective

and he was highly prejudiced as a result of counsel's complete ignorance in handling the matters related to drug evidence as a whole.

Fourthly, Petitioner alternatively argued that counsel's representation taken as a whole demonstrates a complete breakdown of the adversarial process. In U.S. v. Cronic, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043 (1984), the Supreme Court of the United States made it clear that "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities not luxuries.'" Citing Gideon v. Wainwright, 372 U.S. 335, 334 (1963). The Supreme Court of the United States further reasoned as follows:

> "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." United States v. Morrison, 449 U.S. 361, 364 (1981). Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 446 U.S. at 343. Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743 (1967).

Cronic, 466 U.S. at 655-56, 104 S.Ct. at 2045.

In making this argument, Petitioner asks this Court to reconsider the three arguments set forth above and argued in detail in the Petition for Writ of Certiorari. Petitioner also asks this Court to reconsider the following additional issues that were addressed at the evidentiary hearing: 1) Counsel failed to ensure that the State's experts adhered to the rulings made by the court regarding the scope and/or limits on their testimony, 2) Counsel failed to move to have the juror (Mr. Klutz) removed due to his conversation with the extra juror (Mr. Curry), and 3) Counsel failed to make a viable

directed verdict argument. Taken as a whole, Petitioner submits that the trial record, along with the testimony and evidence presented at the evidentiary hearing, clearly demonstrate a complete breakdown in the adversarial process as detailed in Cronic.

Finally, Petitioner argued that that appellate counsel was ineffective for failing to raise all meritorious issues on appeal. Petitioner testified that trial counsel entered several objections to the qualifications of Officer Stout, which were overruled in part by the trial court. App. pp. 93-109, 444-449, 480. Petitioner also testified about trial counsel's motion for a mistrial due to a situation involving a man that wondered into the jury room and held a conversation with a juror, a conversation that the juror initially denied. App. pp. 468-471. Petitioner alleged that appellate counsel was ineffective for failing to raise these issues on appeal. App. pp. 170-225, 480. In response, the State did not call Katherine H. Hudgins, South Carolina Commission on Indigent Defense, to address why these issues were not raised on appeal.

Despite appellate counsel's failure to testify, the lower court held:

> Applicant alleges that appellate counsel was ineffective for failing to address the issue involving the extra juror and trial counsel's motion for mistrial on this matter; and for failing to address the qualifications and the Court's ruling on the state's expert. This Court finds that Applicant's allegations are without merit. This Court finds that a defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 821 (1985). "However, appellate counsel is not required to raise every non-frivoulous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel.

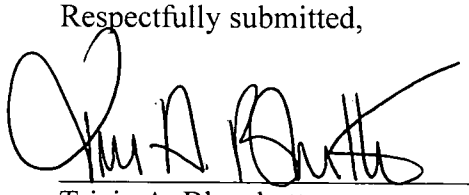
App. p. 628. Petitioner does not dispute the law relied upon by the lower court, but Petitioner does dispute that appellate counsel provided a strategic reason for her decision

to exclude issues on appeal. Since appellate counsel provided did not testify at the evidentiary hearing, there is **no** evidence in the record to support the lower court's ruling that appellate counsel provided a strategic reason for her decision to exclude issues on appeal. See Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). The record is **void** of an explanation by appellate counsel. Therefore, Petitioner submits that the lower court must be reversed pursuant to Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003), and Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

CONCLUSION

In consideration of the above stated arguments, the Petitioner respectfully requests that this Court conduct a full review of the previously submitted Petition for Writ of Certiorari and Appendix. The Petitioner would further urge this Court to reverse the Order filed on March 6, 2012 and allow the Petitioner to further brief the arguments or remand to the lower court for a new trial.

Respectfully submitted,



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This 18 day of March, 2014.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
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Honorable R. Lawton McIntosh, Circuit Court Judge

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App. Case No.: 2012-206229

James O. Senn,.....Petitioner,

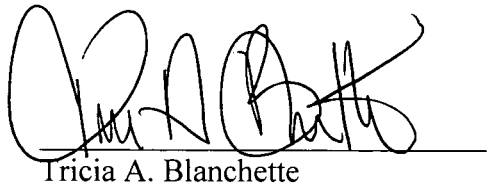
vs.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for the Petitioner, hereby certify that I that I hand delivered this 18th day of March 2014, a copy of a Petition for Rehearing, to J. Walt Whitmire of the Attorney General's Office, at:

Office of the Attorney General
ATT: J. Walt Whitmire, Ast. AG
1000 Assembly Street, Room 519
Columbia, SC 29201



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