

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO BARNWELL COUNTY
Court of Common Pleas

NOV 17 2014

The Honorable Doyet A. Early, Circuit Court Judge **S.C. Supreme Court**

TUNZY A. SANDERS, PETITIONER.

V.

STATE OF SOUTH CAROLINA, RESPONDENT,

**RETURN TO MOTION FOR APPOINTMENT OF OUTSIDE
COUNSEL**

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General

P.O. Box 11549
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(803) 734-3737

ATTORNEYS FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Petitioner was indicted at the July 20, 1998 term of the Barnwell County Grand Jury for Murder (98-GS-06-180). Petitioner was subsequently indicted at the January 11, 1999 term of the Barnwell County Grand Jury for Attempted Armed or Alleged Robbery (99-GS-06-078) and Criminal Conspiracy (99-GS-06-079). Petitioner was represented by Daniel Williams, Esquire. On January 11, 1999, Petitioner proceeded to trial and was found guilty as indicted. He was sentenced by the Honorable Gary E. Clary to confinement for a period of life for Murder, twenty years for Attempted Armed Robbery, and five years for Criminal Conspiracy. All sentences were to be served concurrently.

A timely notice of appeal was filed and an appeal was perfected on Petitioner's behalf. The South Carolina Supreme Court reversed and remanded the conviction due to the Honorable Brenda Sanders, Petitioner's sister and a licensed Michigan Attorney, not being allowed to represent Petitioner during his trial. State v. Sanders, Op. No. 25613 (filed July 3, 2000).

The case proceeded to re-trial on February 5-8, 2001. Petitioner was represented by Brenda K. Sanders, Esquire and Daniel Williams, Esquire.¹ Petitioner was found guilty of the charges. The Honorable James R. Barber, III, sentenced Petitioner to confinement for a period of thirty-five years for Murder, twenty-five years for Armed Robbery, and five years for Criminal Conspiracy.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed. State v. Sanders, 356 S.C. 214, 588 S.E.2d 142 (Ct. App. 2003). The Court of Appeals denied Petitioner's Petition for Rehearing on February 19, 2004. Petitioner filed a Petition for Writ

¹ Brenda K. Sanders is a member of the Michigan Bar and currently a summary court judge in Wayne County, Michigan. She was allowed to participate in Tunzy Sander's trial *viapro hac vice*.

of Certiorari in the South Carolina Supreme Court. The Petition was denied by order dated May 18, 2005. The remittitur was sent on May 19, 2005.

Petitioner filed an application for post-conviction relief (PCR) on May 11, 2006 (C.A. No. 2006-CP-06-0106). In his application, Petitioner asserted the following grounds for relief:

1. "Did the trial court err when it allowed the admission of Aurelein Vigier's prior testimony which violated Petitioner's Confrontation Clause rights because he was not afforded an opportunity to cross-examine the witness regarding 'subsequent revelations' pertaining to the State's alleged 'deal' with the witness?"
2. "Did the trial judge err in ruling appellant's cellmates were not government agents at the time Petitioner allegedly made incriminating statements to them?"
3. "Did the trial judge err in admitting testimony of David Staley and Aurelien Vigier who were jailhouse informants who had initiated contact with the Petitioner and who were acting as government agents at the time the alleged statements were made by the Petitioner?"
4. "Did the trial court err when it denied the Appellant's Motion to Quash Maurice Benning's testimony?"
5. "Did the Appellant's appeal counsel provide ineffective assistance of counsel by failing to address all of the issues in his Appeal to the Court of Appeals and the Supreme Court despite the fact that the Appellant specifically requested that he do so and Appellant's counsel failed to address said issues despite the fact that he addressed multi issues in the co-defendants case and prevailed on those issues in the Court of Appeals?"
6. "Did the trial court commit error by convicting the Appellant despite insufficiency of the evidence?"
7. "Did the Appellant's appointed appellate counsel provide ineffective assistance of counsel by failing to address the issue of the trial court's denial of the directed verdict in Appellant's case?"
8. "Did the trial court err in its admission of the ballistics evidence where it was unclear as to the type of bullet and the fact that the ballistics expert clearly indicated that he could not be sure that it came from the same gun?"
9. "Did the trial court err when it admitted testimony of jailhouse informants who were not trustworthy, had a history of testifying against other defendants and received great consideration for their testimony against the appellant in this case as well as for their

testimony against the co-defendants in their own cases? Should the appellant's conviction for murder, armed robbery, and criminal conspiracy be allowed to stand such unreliable evidence without corroboration from the physical evidence in the case?"

10. "Did the delay in revealing that Vigier and Staley had received deals from the State constitute a Brady violation as such information was only revealed at the second trial of the Petitioner-Sanders?"

Petitioner filed an amended application on June 8, 2006, asserting the following additional grounds for relief:

11. "Whether Petitioner's indictment for murder (98-GS-06-180) was defective because it did not state a place and time of assault and the place and time of the death of Minh Chapman pursuant to S.C. Code Ann. §17-19-30 (1985) thereby meaning that the Circuit Court lacked subject matter jurisdiction over the Petitioner at the time of Petitioner's trial?"
12. "Whether the indictments for Attempted Armed Robbery 99-GS-06-079 and Criminal Conspiracy – 99-GS-06-078 were defective thereby causing the Circuit Court to lack subject matter jurisdiction over the Petitioner at the time of Petitioner's trial."

The State made its Return on June 13, 2007. An evidentiary hearing was convened before the Honorable J. Michael Baxley on August 8, 2007, at which Petitioner was present and represented by Jane Matthews Moody, Esquire. In an order dated September 18, 2007, and filed October 4, 2007, Judge Baxley denied and dismissed the application with prejudice.

Subsequently, Petitioner filed a second application for post-conviction relief (C.A. No. 2009-CP-06-0146) on June 16, 2009. In his application, Petitioner asserted the following grounds for relief:

1. "Was PCR Attorney, Jane A. Moody, ineffective as counsel when she failed to communicate with Tunzy A. Sanders about his PCR Petition and PCR hearing?"
2. "Was PCR Attorney, Jane A. Moody, ineffective as counsel for the Petitioner, Tunzy A. Sanders, when she failed to communicate with the former attorney for the Petitioner, Tunzy A. Sanders, after being requested to do so on several occasions?"

3. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Petitioner, Tunzy A. Sanders, when she failed to notify the Petitioner of the scheduling of the PCR hearing in the Barnwell County Circuit Court?"
4. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Petitioner, Tunzy A. Sanders, when she failed to notify trial counsel, Brenda K. Sanders, of the scheduling of the PCR hearing and when she failed to call Brenda K. Sanders to testify at the PCR hearing for the Petitioner, Tunzy A. Sanders?"
5. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Petitioner, Tunzy A. Sanders, when she failed to file a timely notice of appeal on behalf of the Petitioner, Tunzy A. Sanders within 30 days of the Barnwell County Circuit Court's decision which was rendered on October 4, 2007?"
6. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Petitioner, Tunzy A. Sanders, when she failed to notify the Petitioner of the issuance of the Order Denying his PCR application until nine months after the Order had been entered by the Barnwell County Circuit Judge?"
7. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Petitioner, Tunzy A. Sanders, when she failed to adequately and individually address all of the issues outlined in the PCR Application of the Petitioner, Tunzy A. Sanders, when she was specifically requested to do so on behalf of the Petitioner, Tunzy A. Sanders?"
8. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Petitioner, Tunzy A. Sanders, when she failed to file a post-hearing motion with the Barnwell County Common Pleas Circuit Court requesting that Judge Baxter [sic] tender a ruling on each issue brought in the Petitioner's PCR Application for Relief despite the fact that the PCR Attorney, Jane Moody, was specifically requested to do so on behalf of the Petitioner, Tunzy A. Sanders?"

The Respondent made its Return on or about September 18, 2009, requesting all allegations except for Petitioner's Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) claim be summarily dismissed. An evidentiary hearing into the matter was convened on January 29, 2010, at the Aiken County Courthouse. Petitioner was represented by Christopher Moore, Esquire. Mary S. Williams, Esquire, of the South Carolina Attorney General's Office represented the Respondent. Counsels for both parties consented to the dismissal of his Application for post-conviction relief and the grant of an appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) with regard to C.A. No.

2006-CP-06-0106. By Order filed March 30, 2010, the Honorable William Jeffrey Young granted Petitioner's appeal pursuant to Austin v. State and denied his remaining allegations.

Subsequently, the court reporter informed Petitioner that a portion of the hearing on Petitioner's first post-conviction relief application (C.A. No. 2006-CP-06-00106) was missing from her tapes. Petitioner requested the matter be remanded to the circuit court for a de novo hearing on Petitioner's first post-conviction relief application. The South Carolina Supreme Court granted the petition and remanded the matter to the Honorable J. Michael Baxley for the purpose of reconstructing the record of the hearing. A hearing was held on August 8, 2007, before Judge Baxley. However, Judge Baxley informed the court that he could not fully reconstruct the missing portion of the transcript. Petitioner renewed his petition to remand for a de novo hearing on his first post-conviction relief application. By Order dated March 23, 2012, the South Carolina Supreme Court vacated the order dated September 18, 2007, denying and dismissing Petitioner's first post-conviction relief application and the order dated March 23, 2010, finding Petitioner was entitled to a belated review of the September 18, 2007. The South Carolina Supreme Court granted the Petitioner's petition to remand and remanded the matter to Judge Baxley for a de novo hearing on Petitioner's first post-conviction relief application.

In his application (C.A. No 2006-CP-06-106), Petitioner re-alleged the following grounds for relief:

1. "Did the trial court err when it allowed the admission of Aurelein Vigier's prior testimony which violated Petitioner's Confrontation Clause rights because he was not afforded an opportunity to cross-examine the witness regarding 'subsequent revelations' pertaining to the State's alleged 'deal' with the witness?"
2. "Did the trial judge err in ruling appellant's cellmates were not government agents at the time Petitioner allegedly made incriminating statements to them? Did the trial judge err in admitting testimony of David Staley and Aurelien Vigier who were jailhouse informants who had initiated contact with the Petitioner and

who were acting as government agents at the time the alleged statements were made by the Petitioner?"

3. "Did the trial court err when it denied the Appellant's Motion to Quash Maurice Benning's testimony?"
4. "Did the Appellant's appeal counsel provide ineffective assistance of counsel by failing to address all of the issues in his Appeal to the Court of Appeals and the Supreme Court despite the fact that the Appellant specifically requested that he do so and Appellant's counsel failed to address said issues despite the fact that he addressed multi issues in the co-defendants case and prevailed on those issues in the Court of Appeals?"
5. "Did the trial court commit error by convicting the Appellant despite insufficiency of the evidence?"
6. "Did the Appellant's appointed appellate counsel provide ineffective assistance of counsel by failing to address the issue of the trial court's denial of the directed verdict in Appellant's case?"
7. "Did the trial court err in its admission of the ballistics evidence where it was unclear as to the type of bullet and the fact that the ballistics expert clearly indicated that he could not be sure that it came from the same gun?"
8. "Did the trial court err when it admitted testimony of jailhouse informants who were not trustworthy, had a history of testifying against other defendants and received great consideration for their testimony against the appellant in this case as well as for their testimony against the co-defendants in their own cases? Should the appellant's conviction for murder, armed robbery, and criminal conspiracy be allowed to stand such unreliable evidence without corroboration from the physical evidence in the case?"
9. "Did the delay in revealing that Vigier and Staley had received deals from the State constitute a Brady violation as such information was only revealed at the second trial of the Petitioner-Sanders?"

Petitioner filed an amended application on June 8, 2006, asserting the following additional grounds for relief:

10. "Whether Petitioner's indictment for murder (98-GS-06-180) was defective because it did not state a place and time of assault and the place and time of the death of Minh Chapman pursuant to S.C. Code Ann. §17-19-30 (1985) thereby meaning that the Circuit Court lacked subject matter jurisdiction over the Petitioner at the time of Petitioner's trial?"

Petitioner amended Application on August 19, 2013 and filed August 21, 2013, asserting the following additional grounds for relief:

1. "Trial Counsel failed to adequately advise the Petitioner of all the potential disadvantages of a bench trial versus a jury trial."
2. "Trial Counsel's failure to thoroughly advise the Petitioner of the potential benefits of a jury trial resulted in the Petitioner's inability to make a knowing and voluntary waiver of his rights."
3. "Trial Counsel failed to provide the Petitioner the reasonable professional assistance of counsel where they failed to seek a continuance despite the fact that lead counsel, Brenda Sanders, was not properly notified that the Petitioner's case was scheduled for trial."
4. "Trial Counsel was ineffective for failing to adequately argue the facts in support of the Petitioner's motion to exclude from evidence a transcript of Aurelin Vigier's testimony from the Petitioner's trial where Attorney Sanders had no previous opportunity to cross-examine this witness."
5. "Trial Counsel Sanders was ineffective for failing to respond to the trial judge's assumption that she had the opportunity to have Attorney Williams pose any questions she deemed necessary to witness Vigier."
6. "Trial Counsel was ineffective for allowing a transcript of Witness Vigier's testimony from the Petitioner's first trial to be admitted without objection."
7. "Trial Counsel was ineffective for neglecting to object to a pattern of leading by the prosecution during their direct examination of State witnesses during the Petitioner's trial."
8. "Trial Counsel was ineffective for failing to object to hearsay testimony from Dr. Joel Sexton concerning what he was told concerning the type of ammunition used in this homicide."
9. "Trial Counsel was ineffective for failing to object to the Solicitor's misstatement of the testimony of Maurice Benning during the prosecution's summary of the evidence before the Court where the prosecutor erroneously advised the Court that Maurice Benning had testified that he heard a shot from the area around the restaurant where the record fails to support that claim."

10. "Trial Counsel was ineffective for failing to object to the Petitioner's sentence of 25 years for armed robbery where the Petitioner was in fact charged with Attempted Armed Robbery."
11. "Trial Counsel was ineffective for failing to point out to the Judge that the State did not rebut claim by the Petitioner that only one officer got of the car at the first Chinese Restaurant; a fact that was not disclosed in Gadson's testimony."

Petitioner submitted an additional amendment on August 19, 2013 and filed on August 22, 2013, asserting the following grounds:

12. Trial Counsel was ineffective for failing to request that the Trial Court publish on the record all of the law to be applied by the Court in reaching a decision on the Petitioner's case."
13. "Trial Counsel provided the Petitioner ineffective assistance of counsel when they waived the right to make a comprehensive closing argument summarizing the evidence and arguments in favor of the defense."

POSITION

Respondent is aware of Chief Appellate Defender Robert Dudek's motion to appoint outside counsel. Respondent would object to the appointment of outside counsel on the basis of a perceived conflict of interest due to Petitioner raising various claims of ineffective assistance of appellate counsel against then Chief Appellate Defender Joseph Savitz. Respondent submits that there is no conflict of interest. First, Mr. Savitz is no longer employed by Appellate defense, and the mere fact that he was once an employee of Appellate Defense should not disqualify the State of South Carolina's entire Office of Indigent Defense. Second, Petitioner's allegations of ineffective assistance of appellate counsel were found to be meritless. The Respondent submits that while a portion of the Order of Dismissal may have been devoted to the Petitioner's allegations of ineffective assistance of appellate counsel, this should not form the basis of any future attempt to conflict out the Office of Indigent Defense in an

attempt to obtain appointed private counsel for the purposes of any potential PCR appeal.

For example, a PCR Petitioner could save themselves or their family potentially tens of thousands of dollars by simply alleging a claim of ineffective assistance of appellate counsel in an effort to conflict out the Office of Appellate Defense, and instead require the State to pay for what should be a privately funded alternative to this State's Office of Appellate Defense. The Respondent also defers to this Court's memorandum dated January 21, 2009, regarding "Appointment of Counsel in Conflict of Interest Cases" to further support the Respondent's opposition to the appointment of outside counsel for the purposes of this PCR appeal.

CONCLUSION

For the reasons stated above, this Court should not allow non-meritorious claims of ineffective assistance of appellate counsel of former Chief Appellate Defender Joseph Savitz to disqualify the State of South Carolina's entire Office of Indigent Defence.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General

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By: 
ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
November 17, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Barnwell County
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The Honorable Doyet A. Early, Circuit Court Judge

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TUNZY A. SANDERS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

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

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 17th day of November, 2014



CAROLINE COLLINS
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

November 17, 2014

RECEIVED

NOV 17 2014

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

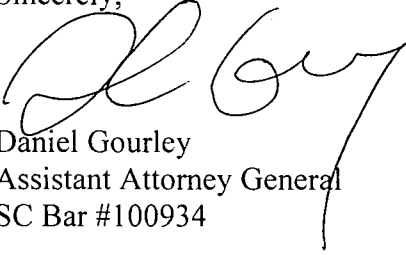
S.C. Supreme Court

RE: Tunzy A. Sanders v. State of South Carolina
Appellate Case No. 2014-001970
Lower Court Case No. 2006-CP-06-106

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Motion for Appointment of Outside Counsel** in the above mentioned case.

Sincerely,



Daniel Gourley
Assistant Attorney General
SC Bar #100934

DG/cc

cc: Robert M. Dudek, Esquire