STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Barnwell County
Doyet A, Early, III, Circuit Court Judge

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TUNZY SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001970

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**Petitioner's Reply to the State's Return and Amended Motion to Hold Appeal in Abeyance and to Remand for a New Evidentiary Hearing Based on After-Discovered Evidence Pursuant to Rule 60(b)(2) of the South Carolina Rules of Civil Procedure**

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## I.

## Petitioner's Reply to the State's Return

In its Return, the State summarily posits that lead defense counsel Brenda Sanders' severe mental illness had no bearing on her representation of Petitioner at trial. State's Return p. 5. More incredibly, the State generally asserts that Sanders' "paranoid delusions" – which Dr. Miller concluded directly impacts her ability to interpret reality and rationally respond to it – were irrelevant to Petitioner's PCR proceeding and by extension did not impact lead trial counsel Sanders' testimony at the PCR hearing. *Id.*; Supp. App. 34-35; Supp. App. 43, ll. 8-25.

In support of its argument that lead trial counsel Sanders' mental illness is irrelevant to Petitioner's PCR action, the State avers that, "the initial actions in the disciplinary proceedings and much of the allegations upon which the disciplinary proceedings are based on occurred after

Brenda Sanders' testified at [Petitioner's] PCR hearing. . . ". State's Return p. 5. From this statement, it appears that, at a minimum, the State agrees that lead trial counsel Sanders' mental illness qualifies as newly discovered evidence.

However, while the State correctly contends that evidence of lead trial counsel Sanders' "paranoid delusions" all date to after Petitioner's trial, the State precipitously ignores that Sanders' was **suspended from the practice of law** for forging client's signatures on court documents without their permission and using a fraudulent notary **only months** after serving as lead trial counsel in Petitioner's bench trial. App. 302. The State also ignores her meddling in Petitioner's direct appeal and her central, frequently neurotic, involvement in Petitioner's PCR. App. 1-30; Supp. App. 132-134.

As with the investigation by the Judicial Tenure Commission, she failed to cooperate with the Michigan Bar investigation and knowingly made false statements to investigators. *Id.* This misconduct, like many of her erratic actions later determined to be the result of mental illness, standing alone "would not be particularly significant". App. 374. However, such conduct becomes significant in light of its parallels to later behavior that Dr. Miller identified as manifestations of her mental illness. *Id.*; *see also* App. 45, ll. 15-20.

Finally, the State argues that this new discovered evidence is "merely impeaching". State's Return p. 5. This contention is misguided. In a PCR action, trial counsel is presumed to have rendered constitutionally adequate representation by having made all significant trial decisions for objectively valid reasons while exercising sound professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Lead trial counsel Sanders' mental illness with its attendant inability to accurately interpret reality deeply undercuts any presumption that she made

strategic trial decisions, for instance electing a bench trial in a murder case, in an objectively reasonable manner.

The State's proposed definition of "merely impeaching" would encompass virtually **any evidence** that impugns the trial attorney's stated rationale for making a strategic decision. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"). This would consign almost all evidence submitted in a typical PCR action to the category of impeachment evidence.

South Carolina has long recognized that counsel's mental health is relevant to whether counsel rendered adequate representation. *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (lead counsel suffered from numerous health problems, including alcoholism, and took medications which impaired his memory); *see: In the Matter of Hendricks*, 319 S.C. 465, 468, 462 S.E.2d 286, 287 (1995)(attorney disbarred, suffered from unspecified physical and mental impairments); *see also In re Chipley*, 254 S.C. 588, 176 S.E.2d 412 (1970)(attorney's paranoid schizophrenia manifested by "delusions of persecution, distortion of thinking and serious emotional and mental instability," rendered him unfit to practice law); *In the Matter of Howey*, 267 S.C. 430, 431, 229 S.E.2d 264, 265 (1976)(bi-polar disorder).

Accordingly, the State's argument that evidence of lead trial counsel Sanders' debilitating mental illness is "mere impeaching" is profoundly at odds with the purpose of post-conviction relief actions. S.C. Code Ann. § 17-27-20(A); *see also Williams v. Ozmint*, 380 S.C. 473, 671 S.E.2d 600 (2008) (a PCR proceeding may address any claims of constitutional violations relating to Petitioner's conviction).

## II.

## Amended Motion to Hold Appeal in Abeyance and to Remand for a New Evidentiary Hearing Based on After-Discovered Evidence Pursuant to Rule 60(b)(2) of the South Carolina Rules of Civil Procedure

The State argues that a motion, made under Rule 29(b) SCRCrimP, to remand Petitioner's case for a new hearing based on after discovered evidence is "wholly inapplicable" because post-conviction relief is a civil action. State's Return p. 6. Out of an abundance of caution, Petitioner respectfully requests that this Court accept Petitioner's amended motion so as to reflect that Rule 60(b)(2) SCRCP is the applicable rule under which the motion is being made.

However, the analysis is the same whether a motion for a new hearing based on after discovered evidence is made pursuant to Rule 29(b) SCRCrimP or pursuant to Rule 60(b)(2) SCRCP. Moreover, under the Uniform Post-Conviction Procedure Act, this Court has the authority to consider new evidence where there exists a sufficient reason excusing the applicant's failure to assert or to adequately present the evidence as grounds for relief. S.C. Code Ann. § 17-27-90.

Permitting amendment in this instance would serve the interests of justice, promote judicial economy, and insure the timely adjudication of the issues presented herein. Amending the motion does not prejudice the State as, regardless of the applicable procedural rule, Petitioner must show that the after-discovered evidence: "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008); *compare State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999)

Furthermore, Petitioner has made no changes to the factual recitation provided in the Petitioner's motion and duplicated below. Nor has Petitioner made any material changes to the legal arguments found in the original motion other than to substitute references to Rule 29(b) SCRCrimP with Rule 60(b)(2) SCRCP and to substitute *Spann*, 334 S.C. 618, 513 S.E.2d 98 with *Southeastern Housing Foundation*, 380 S.C. 621, 670 S.E.2d 680.

Therefore, Petitioner, Tunzy Sanders, respectfully amends his motion requesting that this Court hold his appeal in abeyance and remand for a hearing on a motion to take additional testimony based on after-discovered evidence in the circuit court so as to reflect that Rule 60(b)(2) SCRCP is the applicable rule under which the motion is being made.

**Introduction**

The after-discovered evidence in this case involves the diagnosis of Petitioner's lead trial counsel, Brenda K. Sanders ("Sanders")[1], as having a severe psychotic disorder. App. 331-341. On September 19, 2014, the Michigan Judicial Tenure Commission, the state body charged with investigating allegations of judicial misconduct, filed a formal complaint against Sanders alleging that she was mentally unfit to sit as a judge, had made misrepresentation to the Commission's examiners, and had fraudulently secured long-term medical leave. App. 317-330.

On December 8-10, 2014, a three day hearing was held before the Honorable Michael Sapala of the Wayne County Circuit Court serving as hearing Master and empowered to make findings of fact and conclusions of law on the Commission's allegations. App. 368-369. On January 6, 2015, Judge Sapala ruled that Sanders was seriously mentally ill; experiencing

[1]Sanders is Petitioner's sister and was licensed to practice law in Michigan. Since January, 2009 she has been a judge on Michigan's 36th District Court encompassing Wayne County and the City of Detroit.

psychotic, paranoid delusions that rendered her unfit to sit as a judge and unable to accurately interpret reality. App. 368-385.

Judge Sapala also ruled that Sanders failed to cooperate with investigators, made material misrepresentations to the Commission, and fraudulently secured long term medical leave. *Id.* The Judicial Tenure Commission adopted Judge Sapala's findings, but determined that Sanders was too mentally ill to have fraudulently requested leave given her complete break from reality. App. 316-403.

On July 1, 2015, the Michigan Supreme Court issued an Order removing Sanders from the bench. Supp. App. II 1 – p. 4.[2] The Court adopted the conclusions of the Judicial Tenure Commission finding that Sanders "suffers from a mental illness that prevents the performance of her judicial functions." *Id.*

## Procedural History

### Indictment, First Trial, and Direct Appeal

On January 11, 1999, a Barnwell County grand jury indicted Petitioner for murder, attempted armed robbery and conspiracy. Petitioner, then nineteen years old, stood trial with codefendants Michael Buckmon and Maurice Benning for the shooting of restaurant worker Minh Chapman during an attempted armed robbery.

The jury found Petitioner and Buckmon guilty as charged but acquitted Benning of everything except conspiracy. On appeal, the Supreme Court reversed Petitioners' convictions on the grounds that the trial court erred in removing Sanders as Petitioner's counsel because the State failed to show how she was a necessary witness. *See State v. Sanders*, 341 S.C. 386, 534 S.E.2d 696 (2000). On Buckmon's appeal, the Supreme Court ruled he was entitled to a directed verdict

[2] The July 1, 2015, Order was issued after the compilation of the Appendix and Supplemental Appendix.

on the attempted armed robbery and murder charges. *State v. Buckmon*, 347 S.C. 316, 555 S.E.2d 402 (2001).

**Second Trial and Direct Appeal**

Judge James R. Barber, III, presided at Petitioners' retrial on February 5–8, 2001. Brenda Sanders served as lead trial counsel and Daniel Williams of Barnwell served as co-counsel. At Counsel Sanders' instigation, Petitioner waived a jury trial. ROA p. 7, ll. 17 and 18.[3] Former co-defendant Maurice Benning, who in the two years between Petitioner's trials had been released from prison and subsequently arrested twice for burglary, now testified for the State. He stated that he did not see the shooting, but that Buckmon had confessed that he was the shooter. ROA p. 77, ll. 10–16; ROA p. 82, ll. 20 – p. 83, ll. 17. When asked if anyone other than Buckmon participated in the robbery, Benning demurred "Well, I guess [Petitioner], but [Petitioner] never said anything, [that] he was down with anything like that."

At Petitioner's first trial, the State's three jailhouse informers: David Staley, Toby Benjamin, and Aurelien Vigier; all claimed that Sanders had confided to them that he shot Chapman with a .22 caliber pistol.[4] ROA p. 49, ll. 1–12. After giving testimony at the first trial, Staley was able to secure a reduced bond and, once released, fled South Carolina. By the time of the second

[3] "ROA" refers to the Record on Appeal filed during Petitioner's appeal from his second trial, which is on file with the Court of Appeals. S.C. Ct. App. Opinion No.: 3684.

[4] Over the course of Petitioner's two trials, the State relied on five jailhouse informers: Benjamin, Vigier, Staley, Benning, and Maurice Odom. The testimony of each informant is problematic; all their stories about how Chapman was murdered and the alleged conspiracy that led to her murder were contradicted by physical evidence.

For example, Staley and Vigier testified that Petitioner confessed to shooting Chapman with a .22 caliber pistol. Chapman was actually shot with a .25 caliber pistol, but the initial autopsy incorrectly identified the fatal round as a .22. ROA p. 51, ll. 2 – p. 52, ll. 22. Staley provided additional testimony alleging that Petitioner told him that, after killing Chapman, he returned to the scene of the crime and littered the area with spent .25 caliber shell casings to confuse police. ROA p. 53, ll. 1-24. Police found only a single .25 caliber shell at the crime scene.

trial, Staley had been arrested on a bench warrant for failure to appear on his original CDVHAN charge and also faced new drug charges. In the second trial, Staley altered his testimony and claimed that, "[Petitioner] didn't really state who shot her." ROA p. 48, ll. 17–25.

The State did not call Benjamin or Odom at the second trial, but did send notice to Vigier, a French citizen, that he would be called to testify again. Vigier then promptly fled South Carolina and could not be found for Petitioner's retrial. Vigier had testified at the first trial that "[Petitioner] told me he killed a Chinese woman. . . . He shot her." ROA p. 206, ll. 15 –p. 208, ll. 16. Vigier also claimed Petitioner confessed to him that used a .22 caliber pistol and that three defendants also had a .25 caliber pistol with them that jammed.

At the first trial, Vigier was incarcerated for assault and battery with intent to kill, armed robbery, conspiracy, and possession of a weapon during the commission of a violent crime. After the first trial, the State dropped three of the pending charges against Vigier and recommended probation.[5] ROA p. 19, ll. 12–15. At Petitioner's retrial, the State sought to use the transcript of Vigier's testimony from the previous trial.

The solicitor admitted, while Vigier had not been given any express guarantees for testifying against Sanders at the first trial, "his cooperation would be considered when it came time for his case to go to court." ROA p. 29, ll. 15–20. The State also conceded that his negotiations with Vigier would have been admissible to impeach his testimony had they disclosed them. ROA p. 20, ll. 4–8.

Defense counsel objected to the introduction of Vigier's previous testimony on confrontation clause grounds because they did not have the opportunity to cross-examine Vigier on the understanding. ROA p. 19, ll. 10–21. The judge, while concluding that there had been a "tacit

[5] Richard Brietbart represented Vigier. *See In re Breibart*, 398 S.C. 123, 727 S.E.2d 740 (2012).

understanding" between Vigier and the State that he would receive some benefit from his testimony, ruled against the defense and admitted Vigier's prior testimony into evidence.

Petitioner himself denied any involvement in the murder and attempted robbery of Minh Chapman. ROA p. 132, ll. 3–5; ROA p. 141, ll. 19–23. In denying Petitioner's directed verdict motion, the judge expressly relied on the testimony of the jailhouse informants. ROA p. 115, ll. 16–24.

Joseph Savitz again represented Petitioner on appeal. App. 86. Petitioner raised a single issue on appeal; whether the trial court erred by allowing the prior testimony of Vigier to be put into evidence when the defense was unable to cross-examine him about the previously undisclosed tacit-understanding that existed between Vigier and the State. App. 87-103.

The South Carolina Court of Appeals affirmed Petitioner's convictions. *State v. Sanders*, 356 S.C. 214, 588 S.E.2d 142 (Ct. App. 2003). On February 19, 2004, the Court of Appeals denied Petitioner's Petitioner for Rehearing. Petitioner's Petition for Writ of Certiorari in the South Carolina Supreme Court was denied by an order dated May 18, 2005.

**First PCR Application and Evidentiary Hearing**

On May 11, 2006, Petitioner filed an application for post-conviction relief (PCR) alleging multiple grounds of ineffective assistance by co-counsel Williams and appellate counsel Savitz. App. 1-30. The 2006 PCR Application, completed by Sanders on Petitioner's behalf, accused every person involved in Petitioner's trial of having been ineffective, dishonest, or wrong; with the exception of herself – she disingenuously referred to herself only as Petitioner's "new attorney."

First, the trial court had erred in allowing himself –Sanders had, at a minimum, strongly advocated for a bench trial– to hear "erroneous" testimony from informers Vigier, Staley, and

Benning. App. 9-18. Second, she accused appellate counsel Savitz of deliberately sabotaging the appeal. App. 18-25. Sanders seemed particularly displeased with Savitz, referring to herself in the third person when noting that, "[Petitioner's] sister who is also attorney also personally called and requested that [Savitz] . . . address not just one issue but also all of the issues that were objected to in trial court. Appellant's counsel refused." App. 18. Sanders omitted that she had been Petitioner's lead trial counsel.

Third, Sanders purported that co-counsel Williams was ineffective for failing to sufficiently cross-examine Vigier in the first trial and for failing to preserve "several" unspecified issues for appeal in the second trial. *Id.* Again Sanders omitted that she was lead counsel for Petitioner's second trial. *Id.*

Finally, Sanders accused the solicitors of suborning perjury by allowing former co-defendant turned informer Maurice Benning to testify despite claims that he failed a lie detector test. App. 10. Sanders further averred that the solicitors were not diligent in attempting to locate Vigier. Sanders also claimed Vigier made a taped statement where he admitted to eavesdropping on Petitioner's telephone conversations with his attorneys and to having "read all of the statements gathered in [Petitioner's] case."[6] *Id.*

On June 13, 2007, the State filed a return. On August 8, 2007, an evidentiary hearing was held before the Honorable J. Michael Baxley. Jane M. Moody[7] represented Petitioner and Assistant Attorney General Lance S. Boozer represented the State. By an Order of Dismissal

[6] Counsel has been unable to locate any such recording and there is no mention of the recording in any of the trial transcripts.

[7] On April 26, 2010, Moody received a two year definite suspension from the practice of law. In October, 2007, two months after representing Petitioner in his evidentiary hearing, Moody abruptly stopped practicing law and became a high school teacher. Moody did not notify her clients, opposing counsel, or the courts. She made no arrangements to protect the interests of her clients. *In re Moody*, 387 S.C. 352, 353-354, 692 S.E.2d 906, 907 (2010).

filed on October 4, 2007, Judge Baxley denied Petitioner's application. A timely notice of appeal was not filed.

**Second PCR Application and *Austin* Appeal**

On June 16, 2009, Petitioner filed a second application for post-conviction relief asserting that PCR counsel was ineffective for failing to communicate with Petitioner and for failing to file a timely notice of appeal on behalf of Petitioner when asked to do so. App. 261-269. On September 18, 2009, the State filed a Return requesting all allegations, except Petitioner's *Austin v. State*[8] claim, be summarily dismissed. *Id.*

On January 29, 2010, an evidentiary hearing was held before the Honorable William Jeffery Young. *Id.* Christopher Moore represented Petitioner and Assistant Attorney General Mary S. Williams represented the State. Petitioner and the State consented to the dismissal of Petitioner's application and to the grant of an appeal pursuant to *Austin v. State*. Judge Young granted Petitioner's appeal pursuant to *Austin v. State* and denied the remaining allegations by an Order filed March 30, 2010. *Id.*

**Attempted Reconstruction of PCR Hearing Record**

Petitioner, now represented by Tara Shurling ("PCR counsel"), was informed by the court reporter for the August 8, 2007 evidentiary hearing that a portion of the hearing was missing from her tapes. *Id.* Petitioner moved to remand to the circuit court for a *de novo* hearing on Petitioner's first post-conviction relief application. *Id.*

The South Carolina Supreme Court granted the petition and remanded the matter to Judge Baxley for the purpose of reconstructing the record of the evidentiary hearing. On August 8,

[8] 305 S.C. 453409 S.E.2d 395 (1991).

2007, Judge Baxley held a hearing, but was unable to fully reconstruct the missing portions of the transcript. *Id.*

**First PCR Order of Dismissal Vacated and *De Novo* PCR Application**

On March 23, 2012, the South Carolina Supreme Court vacated the September 18, 2007 order denying and dismissing Petitioner's first post-conviction relief application and the order dated March 23, 2010 holding that Petitioner was entitled to a belated appellate review of the September 18, 2007 order. App. 31. The Supreme Court then remanded the matter to Judge Baxley for a *de novo* hearing on Applicant's original post-conviction relief application. *Id.* [9]

Petitioner re-alleged that appellate counsel was ineffective for failing to appeal the trial court's denial of a directed verdict in Petitioner's case and that the prosecution had committed a *Brady* violation for not disclosing deals that jailhouse informants received in exchange of their testimony. App. 33. On August 19, 2013, Petitioner submitted an amended, and a second amended application for post-conviction relief asserting multiple claims of ineffectiveness on the part of trial counsel. App. 33-48.

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[9] Tara Shurling was retained by lead trial counsel Sanders to represent Petitioner in securing a belated appeal of his first PCR. App. 71-74. Once the original Order of Dismissal was vacated, Shurling continued to represent Petitioner in the new PCR action. *Id.* At the evidentiary hearing, Judge Early noted that having Petitioner's PCR counsel paid by Petitioner's lead trial attorney, who is at risk of being found ineffective, "doesn't smell right to me." App. 74, ll. 10-18.

The State also voiced concerns. App. 78-83. Nevertheless, PCR counsel assured the court that she had not changed her approach to the case as a result of being paid by Sanders and argued that the arrangement was similar to a public defender writing a letter to a client identifying possible shortcomings in his representation. App. 75-76; *Cf:* Supp. App. 132-133.

PCR counsel did not request that the court question Petitioner to insure that he understood the conflict of interest. *See Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987). Instead, PCR counsel averred that she had thoroughly explained the issue to Petitioner. App. 77-83. Petitioner was only briefly asked leading questions by PCR counsel about his understanding of the conflict of interest before testifying. App. 212-213. **Petitioner was the second to last witness to testify.** *Id.*

On August 20, 2013, an evidentiary hearing was held before the Honorable Doyet Earley. App.50-244. Tara Shurling represented Petitioner. Senior Deputy Attorney General David Spencer and Assistant Attorney General Daniel Gourley represented the State. Joseph Savitz (appellate counsel), Brenda Sanders (lead trial counsel), Daniel Williams (co- counsel), DeGrant Gibbons (solicitor), and Petitioner all testified.

Sanders testified that she elected to pursue a bench trial for Petitioner because "the evidence was so scarce in [Petitioner's] case that anyone could look at it and say not guilty. . . It was filled with inaccuracies and disputed in every way." App. 197, ll. 13-20. Sanders was also concerned about pre-trial publicity tainting the jury pool. App. 195, ll. 9-15. In contrast co-counsel Williams believed that Petitioner had drawn a fair jury and advised against a bench trial since only one juror was needed for a mistrial. App. 129, ll. 11-24.

Despite being lead trial counsel, Sanders blamed co-counsel Williams for many of the defense's failings. She blamed him for her being unprepared for the case as he supposedly failed to relay scheduling information to her in a timely fashion. App. 123, ll. 20-24. Williams testified that he called her the day the case was placed on the trial docket, left a message, and later sent a follow-up facsimile. App. 165, ll. 4 – App. 167, ll. 10. Williams also stated that lead trial counsel Sanders had insisted on a speedy trial. *Id.* Sanders further alleged that she did not receive any discovery from the Solicitor's office. App. 171, ll. 15 – App. 172, ll. 23. Sanders believed she "had very little control over the situation" and admitted she was "distraught" while representing her brother. App. 173, ll. 13-18; App. 204, ll. 24 – App. 205, ll. 17.

Judge Earley denied Petitioner's application by an Order of Dismissal issued August 18, 2014. App. 261-301. The PCR court "rejects Counsel Sanders' contention that the decision to waive a jury trial was her decision and not [Petitioner's]. This Court also believes that her

testimony was biased in favor of her brother." App. 291. The court noted that Sanders was concerned about getting a fair trial in Barnwell County because of the publicity surrounding an *unrelated* murder. App. 272-273. The Order of Dismissal also stated that Sanders did not recall advising Petitioner that the trial judge would know about the guilty verdict in his first trial, while a jury would not be informed about the first trial. App. 276-279.

The PCR court ruled that Petitioner made a knowing and intelligent waiver of his right to a jury trial and that trial counsels were not ineffective for waiving "full" opening and closing arguments. App.271-275. Judge Early specifically found that appellate counsel Savitz, co-counsel Williams, and solicitor Gibbons were credible. App. 283. The court noted that counsel Williams had advised against a bench trial. *Id.* The court further ruled that counsels Williams and Sanders were not ineffective for failing to request a continuance despite lead trial counsel Sanders claiming Williams failed to send her notice of the upcoming trial. *Id.*

**Sanders' Suspension by Michigan State Bar**

On September 19, 2001, just seven months after Petitioner's second trial and during the pendency of his direct appeal, Sanders was suspended by the Michigan Bar for sixty days and assessed investigative costs. App. 302. Michigan Bar investigators determined that Sanders had forged the signatures of her clients on affidavits without their consent, had affidavits notarized by someone who was not a notary, and had knowingly made false statements Michigan Bar investigators. *Id.*

**Sanders Election to 36th District Court and First Judicial Disciplinary Proceeding**

On November 4, 2008, Sanders was elected to a six-year term as a judge on the 36th District Court in Wayne County, Michigan. App. 203-317. While a judicial candidate, Sanders filed to run for Mayor of Detroit in a special election for the remaining term of imprisoned, former Mayor

Kwame Kilpatrick. Sanders remained a candidate even after her judicial term began and remained on the ballot through Election Day. *Id.*

Sanders was an active campaigner, she appeared on a television debate show and answered a candidate questionnaire for a local paper. *Id.* The Judicial Tenure Commission filed a formal complaint against Sanders alleging that her participation in the mayoral election violated multiple sections of the Michigan Code of Judicial Conduct concerning improper political activity while a judge or judicial candidate and improper campaign conduct including the direct solicitation of contributions. *Id.*

The Commission issued a "Decision and Recommendation" to the Michigan Supreme Court recommending a forty-two day suspension without pay. *Id.* Sanders consented to the Commission's stipulation of facts and recommended punishment. *Id.* On Janurary, 27, 2010, the Michigan Supreme Court adopted the Commission's findings of facts and recommended punishment. *Id.*

## After Discovered Evidence

**Request for Medical Leave and Letter to U.S. Attorney's Office**

In September, 2013, Judge Sanders requested long-term medical leave stating that she was totally disabled by "infirmities" in both her right and left knees and that she needed to undergo two knee surgeries. On this basis, the Chief Judge of the 36th District approved her for medical leave starting September 20, 2013. App. 318, App. 358-359.

On December 20, 2013, the U.S. Attorney for the Eastern District of Michigan received a rambling, nonsensical letter from Judge Sanders requesting an investigation into a violent, wide-ranging conspiracy at the 36th District Court that was responsible for the deaths of two judges.[10]

[10] 36th District Court Judges Willie Lipscomb and George Chatman died as a result of a boating accident and apparent suicide, respectively. There was no suspicion of foul play.

App. 308-324. Sanders alleged that she was named local papers by the Chief District Judge as the prime suspect in both murders. *Id.*

Sanders averred that the Republican Party and the Michigan Supreme Court were colluding to evict her from her residence and that the Michigan Judicial Tenure Commission had conspired with the Michigan Supreme Court to slander her good name. *Id.* She purported that Chief Judge of the 36th District had moved her from the civil docket to the criminal docket to punish her for speaking out against corruption. *Id.*

Sanders stated that she feared for her personal safety and that she was afraid to undergo surgery because her doctors had been influenced by these malignant forces. *Id.* Finally, Sanders suspected that all of her communications, bank accounts, and personal records had been hacked and were being monitored. Sanders ended the letter stating that she had a concealed weapons permit and was armed at all times out of fear for her safety. *Id.*

**Second Suspension and Judicial Tenure Commission Investigation**

On January 21, 2014, the 36th District Court placed Sanders on paid administrative leave out of public-safety concerns. App.314. In March, 2014, the Michigan Judicial Tenure Commission requested that Sanders submit to an independent orthopedic medical examination and an independent mental examination. After multiple missed appointments, Sanders submitted to an examination by Dr. Stephen Mendelson, an orthopedic expert, who concluded that Sanders' suffered from age and weight related arthritis. App. 360-365.

Sanders did not require knee surgery. *Id.* Further, the orthopedic condition of her knees did not require a leave of absence. *Id.* Mendelson voiced concerns that Sanders' answers to questions about her medical history were, "scattered and tangential. She was evasive about answering very

simply questions of fact rather than matters of opinion. . . I did have concern regarding the level of her cognition and logical functioning." App. 362.

Based on the December, 2013 letter to the U.S. Attorney, the Commission also requested that Sanders undergo an independent mental health evaluation. Dr. Norman Miller, a board certified psychiatrist retained by the Commission, offered Sanders eleven appointment dates over a three month period. App. 345-346. Appointments were scheduled on three different occasions. *Id.* Sanders failed to show at any of the scheduled appointments. *Id.* On July 17, 2014, the Michigan Supreme Court instructed Sanders, via an order directed to an unnamed District Court Judge, to undergo a mental health examination within thirty days. App. 315-316. Sanders did not comply with the order.

**Judicial Tenure Complaint and Hearing before a Special Master**

On September 9, 2014, less than a month after the issuance of the Order of Dismissal in Petitioner's case, the Michigan Judicial Tenure Commission filed a Formal Complaint against Sanders alleging: (1) a lack of mental fitness, (2) fraud in securing long-term medical leave, (3) failure to cooperate with the Commission's investigation, (4) misrepresentations.[11] App. 317-330. On September 18, 2014, the Michigan Supreme Court suspended Judge Sanders without pay for failing to undergo a mental health examination pursuant to the July 17, 2014 order. App. 331.

The Michigan Supreme Court appointed the Judge Sapala, as the hearing Master to take evidence and make recommendations to the Tenure Commission regarding the formal complaint against Judge Sanders. A hearing before Judge Sapala was held on December 8, 9, and 10, 2014. Sanders failed to appear at the hearing. App. 368-369.

[11] In October, 2014, the Judicial Tenure Commission filed an amended formal complaint, making only minor changes in the allegations.

Testimony by Judge Kenneth King

Chief Judge of the 36th District Court Kenneth King, whom Sanders' claimed was integral in the conspiracy in her letter to the U.S. Attorney's Office, testified that no newspaper ever mentioned Sanders as a possible murder suspect. Judge King further testified that Sanders accused him of seeking a "political advantage" over her and blamed her clerk for the backlog of cases. *Id.* King noted that her allegations were "nonsensical" since she and King were running for re-election in the same slate of candidates. *Id.*

Judge King stated that he moved Sanders from the civil docket to criminal docket because she was unable to clear a large backlog of cases. App. 372-373.King also stated that Sanders' clerk had properly prepared court filings, but that Sanders had failed to rule on the cases. King further said that he had tried unsuccessfully to work with Sanders to reduce the backlog. *Id.*

Testimony of Judge David Zelenak

Judge David Zelenak, 25th District Court, presided over a landlord-tenant case involving Sanders when it was conflicted out of the 36th District. App. 374-376. Sanders was being evicted from her residence for non-payment of rent. Zelenak ruled for the plaintiffs. *Id.* The December, 2013 letter to the U.S. Attorney's Office, claimed that she was being evicted at the behest of a Michigan Supreme Court Justice and that the unnamed Justice's former law firm was handling the eviction. App. 318-323.

Sanders further alleged that the eviction was a fraudulent effort to slander her good name and that she had reported it to the FBI and Detroit Police. *Id.* She also alleged that the eviction was being handled on an expedited basis and filed a grievance with the Judicial Tenure Commission against Judge Zelenak. On the contrary, Judge Zelenak testified that the action was a simple eviction for non-payment of rent; that he went to great lengths to accommodate Sanders' purported medical

condition; and refused to evict her until the residence was brought up to code. *Id.* Judge Zelenak categorically denied conspiring with anyone to evict Sanders and noted that her behavior during the case was "erratic", "troubled", and "excited". *Id.*

Testimony of Brian Summerfield and Lt. Lori Ann Sabatini

Brian Summerfield was the attorney for the landlord. App. 376. He testified that Sanders claimed that his law firm and the landlord harassed her and that a representative of the landlord had broken into her house. *Id.*; App. 366. Sanders also filed a federal action against Summerfield's client alleging harassment, intimidation, garbage tampering, and unlawful entry. The case was dismissed.

At the hearing, Summerfield identified an email sent to him by Sanders in September, 2012 which contained bizarre allegations completely unrelated to the landlord-tenant action. App. 366; App. 376. Judge Sapala would note in his findings that, "the e-mail shows a disorganized, rambling, confusing account of events that may or may not have occurred but which, if they did, had no rational connection to [Sanders'] eviction case." *Id.*

Lt. Laurie Ann Sabatini of the Detroit Police testified that there were no records of the purported police reports Sanders referenced in the December letter to the U.S. Attorney's Office alleging that she was the victim of criminal behavior. App. 376-377. Furthermore, Sabatini's search found no evidence that Sanders had ever contacted law enforcement or that police had ever been dispatched to Sanders' home. *Id.*

Testimony of Ed Welch

Ed Welch, a repossession agent operating out of Augusta, Georgia, testified that on November 13, 2014 he traveled to Barnwell to repossess Sanders' Lexus. App. 383. Sanders was upset to learn that he car was being repossessed and demanded to see the court order. *Id.* After

Welch explained that he had the authority to repossess the vehicle, Sanders became irate and made "comments indicative of paranoia." App. 374.

Sanders accused Welch of being a member of the KKK and referred to the fact that her salary as a District Court judge was over $100,000 a year. Supp. App. 47, ll. 3-21. She attributed the repossession, not to her failure to make payments, but to a conspiracy by "honkies" to take her money and assets because she was too honest. *Id.* Sanders also threatened to sue Welch and his company. As Judge Sapala noted, "standing alone, Mr. Welch's testimony would not be particularly significant. However given the context in which her statements were made . . . they indeed become significant." App. 374.

Testimony of Dr. Norman Miller

Dr. Miller diagnosed Sanders as having "a psychotic disorder . . . [Sanders] had delusions. . . . A delusion is that belief that is fixed. It's false. It's incorrigible. It doesn't correspond to reality, meaning that it can't be altered by reality and meaning that it doesn't really explain reality." Supp. App. 34, ll. 10 – p. 35, ll. 11. Dr. Miller concluded that Sanders was "suffering from paranoid delusions," these caused her to feel intimidated, harassed, threatened when faced with faced with having to make rulings on cases, having to preside over hearings, or having to respond to the Commission's allegations. *Id.* Dr. Miller noted Sanders was "fearful, and -- as a result . . . she may act on irrational delusions to protect herself." Supp. App. 40, ll. 2-24.

In reaching his diagnosis Dr. Miller specifically highlighted Sanders' allegations in her December 20, 2013 letter to the U.S. Attorney. Dr. Miller posited that Sanders' paranoid delusions likely prevented her from attending any of the judicial disciplinary proceedings or court ordered independent medical examinations out of irrational fear:

> I wouldn't expect her to be able to appear [at the Special Master's Hearing] because of her persecutory delusions that her firmly fixed false beliefs that she is being persecuted by really everyone.
>
> I mean, she hasn't missed anyone. The people who evicted her, the banks or whatever evicted her, her superior, you know, Judge King, her -- who, you know, supervised her in the 36th District Court and her allegations against him, Judge Zelenak, the judge, I guess it's a probate judge, that conducted the eviction proceedings. She felt persecuted by him. I believe it's him. The Judicial Tenure Commission, she felt persecuted and feels persecuted by [Commission General Counsel Paul Fischer].

Supp. App. 43, ll. 8-25.

Also important to Dr. Miller's diagnosis were the multiple federal lawsuits Sanders' filed against those she believed conspired against her. Supp. App. 45, ll. 3 – p. 53, ll. 24. Dr. Miller noted, "as a result of the delusions, [individuals suffering from paranoia] make judgments that are entirely false and that are inflammatory and that are litigious and are combative and are retaliatory, as the documents I reviewed are replete with examples" App. 45, ll. 15-20. Dr. Miller also concluded that Sanders likely also experienced "grandiose delusions" leading her to believe that the law does not apply to her and that she is persecuted unjustly because she is important. Supp. App. 52, ll. 11-24.

Without interviewing Sanders, Dr. Miller was unable to pinpoint when she first exhibited paranoid delusions; the cause of her mental health problems; or whether her condition is treatable. App. 55, ll. 4-23. Dr. Miller did highlight Sanders 2007-2008 campaign for mayor of Detroit, during which she violated a number of rules of judicial conduct by campaigning while a judicial candidate and later while a sitting judge, as an early example of delusional thinking. Supp. App. 87, ll. 2 – p. 88, ll. 10. Dr. Miller ultimately concluded that, whatever the cause, Sanders has "paranoid delusions . . . [and] could have grandiose delusions. . . . [Sanders is]

impaired and she can't function. She can't function as an individual. This is an individual who is headed for a crash." Supp. App. 52, ll. 11 – p. 53, ll. 5.

**Special Master's Report on Findings of Fact and Conclusions of Law**

On January 6, 2015, Judge Sapala issued his findings. [12] Judge Sapala ruled that Sanders was unfit to serve as a judge due to her mental illness. App. 368-385. Specifically, the Special Master cited to: Dr. Miller's assessment, Sanders' conduct during her foreclosure action, her allegations against repossession agent Ed Welch, and Sanders' December 20, 2013 letter to the U.S. Attorney as evidence that Sanders suffered from debilitating paranoid delusions that do not correspond with reality. *Id.*

Judge Sapala also ruled that Sanders fraudulently secured long-term medical leave and that the condition of her knees would not have prevented her from performing judicial functions. App. 378-381. Judge Sapala further determined that Sanders made numerous misrepresentations to the Judicial Tenure Commission during their investigation and failed to cooperate. App. 381-383.

**Decision and Recommendation of Discipline**

On February 9, 2015, the Michigan Judicial Tenure Commission held oral arguments on objections to Judge Sapala's report by both the Commission examiners and Sanders' attorneys.

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[12] Sanders not only failed to appear at any Commission proceedings, but also alleged that her first attorney in the judicial disciplinary proceedings, Brian Einhorn, signed pleadings without her permission and forged documents to sabotage her defense. Supp. App. 45, ll. 23 – p. 46, ll. 11. Judge Sapala commended the high degree of professionalism shown by her appointed attorneys "under truly difficult circumstances." App. 370.

Sanders' allegations against her attorneys are reminiscent of the misconduct which resulted in her receiving a sixty-day suspension from the practice of law in September, 2001. App. 302. She was found to have forged her client's signatures on affidavits without their knowledge. *Id.* She also "knowingly made a false statement in her response to the Grievance Administrator's Request for Investigation." *Id.*

On March 20, 2015, the commission affirmed Judge Sapala's findings that Sanders "has a mental disability that prevents the performance of her judicial duties." App. 394-396. The Commission also affirmed that Sanders had committed misconduct by failing to cooperate with the investigation and by making intentional misrepresentations. *Id.*

The Commission recommended that Sanders "be prohibited from seeking judicial office until she demonstrates that she no longer suffers from a mental disability." App. 401-402. The Commission further recommended that Sanders reimburse the costs of the investigation. However, the Commission determined that Sanders did not commit fraud in securing long-term medical leave because Sanders "suffered from disabling mental illness throughout the time she was on leave". App. 395. Both the Commission examiners and Sanders' attorneys have appealed the Commission's findings. App. 404. On May 5, 2015, the Michigan Supreme Court denied the Commission's motion for oral argument and granted Sanders' motion to withdraw her petition. *Id.*

On July 1, 2015, the Michigan Supreme Court issued an Order removing Sanders from office. Supp. App. II 1 – p. 4. The Court adopted the conclusions of the Judicial Tenure Commission. The Order cited to Sanders' letter to the U.S. Attorney and Dr. Miller's testimony, "[t]he psychiatrist opined that Respondent's 'insight and judgment are too impaired because of her delusions, to render opinions not only in court but elsewhere, but particularly in court as a judge.'" *Id.* However, the Court determined that "under the unique circumstances of this case an award of costs . . . would not be appropriate." *Id.*

## Argument

Pursuant to Rule 60(b)(2) of the South Carolina Rules of Civil Procedure, "[On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). . ." Further, such a motion must be made "within a reasonable time . . . not more than one year after the judgment, order or proceeding was entered or taken . . ." Moreover, as with Rule 29(b) SCRCrimP, under Rule 60(b)(2) "during the pendency of an appeal, leave to make the motion must be obtained from the appellate court."

To prevail on a new trial motion, Petitioner must show the after-discovered evidence: "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008); *compare State v. Spann,* 334 S.C. 618, 513 S.E.2d 98 (1999)(applying Rule 29(b) SCRCrimP).

**Would Probably Change the Result of Petitioner's PCR Application**

In this case, the after-discovered evidence involves trial counsel Sanders' mental illness. Specifically, the onset – at an unknown date – of paranoid delusions "with no basis in reality" which ultimately precipitated Sanders removal from the Michigan 36th District Court as dangerously mentally ill and unfit to serve as a judge. App. 386-393.

This after-discovered evidence "would probably change the result" of Petitioner's PCR action because the revelation of lead trial counsel Sanders' incapacitating paranoid delusions challenges the fundamental presumption in a PCR action; that lead trial counsel rendered

adequate assistance and made all significant trial decisions for objectively valid reasons while exercising sound professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

Sanders' "paranoid delusions" directly impact her ability to interpret reality and rationally respond to it. If lead trial counsel Sanders' severe mental illness had been known at the time of Petitioner's PCR hearing, Sanders' strategic reasons for making certain trial decisions, *inter alia*: seeking a bench trial, her obsession with pre-trial publicity in an unrelated case, her recriminations towards other attorneys, and her accusations of not being provided with discovery materials or court dates, would have been examined in light of her mental illness and her inability to distinguish reality from her paranoid delusions. Such an examination would have revealed significant, troubling parallels between decisions she took while serving as lead defense counsel for Petitioner and analogous behavior, detailed in the Commissions' findings, later determined to have been manifestations of her mental illness.

At the evidentiary hearing, lead trial counsel Sanders testified that the weakness in the State's case was obvious and that she believed a judge would be more likely find for Petitioner than a jury. App. 280. While electing a bench trial for a murder charge is highly unusual, absent knowledge of Sanders' mental illness, PCR counsel could only argue that the decision was objectively unreasonable, not that it was the product of delusional, paranoid thinking.

Accordingly, the PCR court ruled that Sanders' advice for Petitioner to proceed with a bench trial, over the protests of counsel Williams, was objectively reasonable. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"). However, in light of

Sanders' severe mental illness, the decision to elect a bench trial now appears to be a manifestation of her irrational, life-consuming paranoia.

Her mental illness calls into serious question every decision she made as Petitioner's attorney. For instance, she argued in pretrial motions: that the State suborned perjury from jailhouse informers; that the State struck two jurors based on their race resulting in a jury not representative of Petitioner's "peers"; and that a change of venue was necessary. App. 135-136. Again, without knowledge of Sanders' mental illness, her combative language, unsubstantiated allegations of misconduct by the State, and unverified claims of community prejudice against Petitioner could be attributed to rhetorical flair.

When her mental illness is considered, these allegations look like further manifestations of her paranoia and delusional thinking. As a judge this paranoia led her to sequester all witnesses scheduled to appear before her regardless of whether they were testifying in the case immediately before the court or not – effectively closing her court to the public. App. 351-353. The same delusions compelled her to allege that a repossession agent was a 'klansman" seizing her car without due process; that the Republican Party and "honkies had taken everything from her"; and that the eviction proceedings against her were a conspiracy to ruin her reputation and punish her for speaking out against judicial corruption. App. 373-374.

Perhaps just as troubling as the impact of her mental illness on Petitioner's trial, is the impact her mental illness has had on Petitioner's PCR proceeding. Sanders prepared Petitioner's first PCR application, she did not raise a single allegation of ineffectiveness against herself. App. 1-30. She focused exclusively on the alleged malfeasance of appellate counsel; the supposed ineffectiveness of co-counsel Williams; alleged ethical violations by the State; and multiple

errors by the trial court. *Id.* In sum, everyone was either wrong, ineffective, or dishonest; except her. *Id.*

Of particular note is her allegation that Williams failed to communicate with her regarding upcoming trial dates. Williams testified that he called Sanders when Petitioner's second trial was placed on the docket and left a message. App. 166, ll. 18 – App. 167, ll. 10. Williams stated that he later sent a facsimile when she failed to return his call. Without knowledge of her mental illness, the absence of any allegations against herself and her allegations against appellate counsel and Williams seem self-serving, but plausible.

When considered in light of her mental illness, Sanders' allegations mirror the irrational behavior caused by her paranoid, psychotic delusions. For example, Sanders' efforts to deceptively blame her case backlog on her clerk and her well-documented practice of being deliberately hard to contact. Supp. App. 23 – p. 27; App. 353-356. Her PCR allegations echo her multiple, demonstratively false accusations of improper conduct leveled against individuals she felt threatened by. For example, her claims that a mortgage company sent someone to intimidate her, that her attorney forged her signature on pleadings, or that the Chief District Judge moved her to the criminal docket to gain a political advantage over her in an upcoming reelection. App. 372-373; Supp. App. 88, ll. 5-23.

To deny Petitioner a new evidentiary hearing in light of the after-discovered evidence of Sanders' severe mental illness would constitute "a denial of fundamental fairness shocking to the universal sense of justice." *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (citations and internal quotations omitted). Sanders was Petitioner's lead defense attorney. She made the decision to elect a bench trial, over the objections of co-counsel Williams. Sanders was also heavily involved in Petitioner's PCR action. Moreover, while the Michigan judicial disciplinary

hearings addressed Sanders' mental illness in depth, they were limited to evaluating the impact her illness had on her ability to be a judge.

Whether Sanders was laboring under psychotic, paranoid delusions at the time she represented Petitioner was beyond the purview of the proceedings as Sanders was elected to the bench in 2007.[13] However, Dr. Miller testified that as early as 2007-2008 Sanders was exhibiting delusional thinking by campaigning for mayor of Detroit in violation of multiple sections of the Michigan Judicial Canon. Supp. App. 87, ll. 2-20. Moreover, Sanders was temporarily suspended from the practice of law in September, 2001 for forging clients' signatures on court documents. App. 302. Her conduct then was extremely similar to her delusional allegations that her first attorney forged her signature on pleadings and submitted documents to the Commission without her approval. Supp. App. 45, ll. 7 – p. 46, ll. 18.

South Carolina courts have recognized that the mental health of defense counsel is a relevant factor in PCR actions. *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (lead counsel suffered from numerous health problems, including alcoholism, and took medications which impaired his memory; counsel's ineffective performance represented a complete breakdown in the adversarial process).

In addition, an attorney's mental impairment, may explain, but does not excuse wrongdoing or actions that prejudice a client. *Matter of Hendricks*, 319 S.C. 465, 468, 462 S.E.2d 286, 287 (1995); *see also Matter of Abney*, 316 S.C. 182, 185, 447 S.E.2d 848, 850 (1994). Attorneys are also obligated to withdraw from representation of a client where his or her

[13] Sanders also failed to cooperate with the 2001 investigation and made misrepresentations to investigators. *Cf: In the Matter of Perry*, 291 S.C. 124, 352 S.E.2d 479 (1987) (disbarring attorney who forged clients' signatures, substance abuse was not a mitigating factor); *In re Rivers*, 409 S.C. 80, 761 S.E.2d 234 (2014) (attorney disbarred, in part, for forging client's signatures on court filings).

physical or mental condition materially impairs the ability to represent the client. SCACR RULE 407; RPC 1.16; *see also In the Matter of Howey*, 267 S.C. 430, 431, 229 S.E.2d 264, 265 (1976)(bi-polar disorder precluded attorney from being able to exercise discretion and judgment necessary to practice law for duration of his illness).

Finally, it is clear that the after-discovered evidence is credible, probable, and worthy of belief. *See State v. Spann*, 334 S.C. 618, 513 S.E.2d 98 (1999) (granting motion for new trial where new evidence was discovered eighteen years after the original trial); *Cf. State v. Mayfied*, 235 S.C. 11, 109 S.E.2d 716 (1959) (trial court's denial of defendant's motion for a new trial on the basis of after-discovered evidence was affirmed where the *new evidence was not worthy of belief*) (emphasis added); *But Cf. State v. Fowler*, 364 S.C. 149, 213 S.E.2d 447 (1975) (finding defendant's motion for a new trial will be denied *where newly discovered evidence is incredible and improbable under all circumstances*) (emphasis added). Accordingly, the after-discovered evidence "would probably change the result" of Petitioner's PCR application.

**Discovered since Petitioner's PCR Hearing and Order of Dismissal**

The after-discovered evidence was not discovered until December, 2014. On December 16, 2014, PCR counsel Shurling wrote a letter to the Honorable Daniel Shearhouse, Clerk of the South Carolina Supreme Court, stating that counsel had been previously unaware of the judicial discipline proceedings against Sanders. Supp. 132-134. PCR counsel noted that during her representation of Petitioner, Sanders had been difficult to reach, claiming a busy schedule. Supp. App. 132-133.

Michigan's judicial disciplinary process is confidential until the filing of a formal complaint. Mi. R. Disc. Proc., MCR 9.221. Therefore, the first public notice of a disciplinary proceeding against Sanders would have been the formal complaint filed by the Commission's

examiners on September 9, 2014. App. 317-330. Prior to this date all matters concerning the Commission's investigation into Sanders' were anonymous or confidential. This includes the July, 2014 Michigan Supreme Court order ordering Sanders to submit to a mental evaluation. App. 299-300.

Moreover, the allegations of the formal complaint were denied by Sanders. App. 332-342. The Master's Findings of Fact and Conclusions of Law issued by Judge Sapala on January 5, 2015, would have been the first definitive, publicly available document detailing Sanders' mental illness, paranoid delusions and irrational behavior. Both the September 9, 2014 formal complaint and the January 5, 2015 Master's report were submitted after the issuance of the Order of Dismissal in Petitioner's case. Thus, the after-discovered evidence was not available to PCR counsel at the time of the evidentiary hearing, or by the time the Order of Dismissal was issued.

**Could Not in the Exercise of Due Diligence Have Been Discovered Prior to the Evidentiary Hearing**

The after-discovered evidence could not in the exercise of due diligence have been discovered by Petitioner prior to the August, 20, 2013 evidentiary hearing. At the time of the evidentiary hearing, Sanders had not even entered her fraudulent request for long-term medical leave. Her mental illness was not known to Michigan authorities.

While her previous disciplinary suspensions suggest Sanders had little regard for court rules or judicial ethics, without Dr. Miller's diagnosis, her infractions appear unrelated to her representation of Petitioner as lead trial counsel. Thus no amount of due diligence on the part of PCR counsel would have produced the after-discovered evidence, as counsel had no way of discovering that Sanders suffered from a debilitating paranoid delusions.

**Material to Petitioner's Case**

As to whether the after-discovered evidence is material to Petitioner's case, the subsequent revelation of Sanders' mental illness goes directly to the heart of the question at issue in a PCR action – whether counsel rendered adequate assistance and made all significant strategic decisions in an objectively reasonable manner while exercising sound professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813.

In PCR proceedings courts presume that trial counsel rendered constitutionally sufficient representation. *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989). Sanders' mental illness directly refutes that presumption. Consequently, the after-discovered evidence clearly has value and is extremely probative.

**Not Merely Cumulative or Impeaching Evidence**

The after-discovered evidence is absolutely not cumulative to any evidence offered by the State or by Petitioner. Sanders' existing mental illness was undiagnosed at the time of the evidentiary hearing. *Cf. Johnston v. Belk-McKnight Co. of Newberry*, 188 S.C. 149, 158, 198 S.E. 395, 399 (1938) ("[c]umulative evidence . . . supplements that which has already been testified"). Sanders suffered for years from paranoid delusions without those who regularly interacted with her realizing it. Even those who experienced her bizarre behavior failed to recognize that it was the result of a serious mental illness. Sanders' mental illness fundamentally impacted the effectiveness of her representation of Petitioner and resulted in Petitioner receiving constitutionally deficient representation.

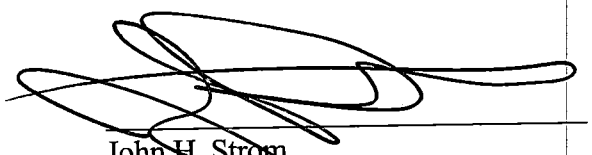
Additionally, the PCR court's order studiously avoids discussion of Brenda Sanders' role in counseling Petitioner to waive a jury trial in a murder case. *See Id.* at 158, 198 S.E. at 399 (finding "impeaching must mean that which is outside the evidence already given, and

impeaches that evidence; it may be by attacking the character, the motives, the integrity, or veracity of those who gave the testimony"). If this were a decision made from paranoid delusions – the reasons given for electing a bench trial are not inconsistent with this possibility – it could hardly be demonstrable effective assistance of counsel. Therefore, Petitioner respectfully requests that this Court grant this motion pursuant to Rule 60(b)(2), SCRCP.

**Conclusion**

WHEREFORE, for these additional reasons, counsel for Petitioner Tunzy Sanders respectfully requests that this Court remand the case to the Barnwell County Circuit Court for a full hearing on the effect this newly discovered evidence would have on Brenda Sanders' testimony at the PCR hearing and on the effectiveness of her representation of Petitioner as lead trial counsel. In addition, counsel for Petitioner respectfully requests that this Court also hold in abeyance the time limits on Petitioner's PCR appeal pending a ruling on this motion.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Barnwell County

Doyet A. Early, III, Circuit Court Judge

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TUNZY A. SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001970

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petitioner's reply to the state's return and amended motion in this case has been served on Daniel Gourley, Esquire this 14th day of August, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.