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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Doyet A. Early, III, Circuit Court Judge

TUNZY A. SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001970

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

The PCR court erred in finding that Petitioner knowingly and intelligently waived his constitutional right to a trial by jury where Petitioner's decision was based on the objectively unreasonable advice of his lead trial attorney and where neither co-counsel nor the trial court adequately advised Petitioner of the consequences of proceeding with a bench trial.

II.

The PCR court erred in allowing Petitioner's evidentiary hearing to proceed since PCR counsel had an actual conflict of interest as she had been retained by lead trial counsel Brenda Sanders, Petitioner's brother, and this conflict of interest compromised PCR counsel's representation as she admittedly failed to investigate Counsel Sanders' mental illness or past disciplinary infractions.

III.

The PCR court erred in finding that defense counsels provided effective assistance of counsel where neither counsel corrected the trial court's false belief that Counsel Sanders had the opportunity at the first trial to participate in the cross-examination of key State's witness Aurelien Vigier's through Counsel Williams when, in actuality, Counsel Sanders could not participate and the trial court's false belief was central to both its ruling and the Court of Appeals affirmance of Petitioner's conviction.

STATEMENT

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 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. App. 1 - 465. Brenda Sanders served as lead trial counsel and Daniel Williams of Barnwell served as co-counsel. App. 84, ll. 11-13. The defense filed a series of pre-trial motions, among them a motion for a change of venue on the grounds that pre-trial publicity and an unrelated murder prior to the start of trial rendered it impossible for Petitioner to be tired by an impartial jury. App. 7, l. 4 - 9, l. 17. The trial court denied the motion for a change of venue. *Id.*

Motion for a Bench Trial

Counsel Sanders then immediately moved for a bench trial. App. 81, ll. 10-18. The trial court was initially taken aback by Counsel's Sanders motion, "I haven't had the experience of having this happen to me before." App. 81, l. 22 - 82, l. 7. The trial court then briefly asked

Petitioner a series of leading questions about Counsel Sanders' request for a bench trial and noting that "you've been through one jury trial and that's why we're back here and you've observed the process where we've gone through at least the selection of a jury here today . . . And you understand that in that regard I will be the judge of the facts, as well as the judge of the law." App. 85, l. 24 - 86, l. 5.

The trial court did not explain that to convict Petitioner, all twelve jurors would have to unanimously find him guilty. Rather the trial court ended his inquiry by briefly explaining to Petitioner that if he did not testify at trial, the trial court would not consider his failure to do so when acting as the judge of the facts. App. 86, ll. 2-21.

The defense attorneys and the State indicated that they were satisfied with the court's colloquy. App. 86, l. 22 - 87, l. 6. The trial began with both sides waiving formal opening arguments and instead Counsel Williams and Solicitor De Grant Gibbons informally explained their respective theories of the case to the court. App. 90, l. 17 - 94, l. 7.

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. App. 294, l. 3 - 296, l. 8. Incredibly, Benning claimed that the .25 caliber pistol his mother identified in a pre-trial hearing as her gun was not actually his mother's gun. App. 296, ll. 16-22.

He stated that he did not see the shooting, but that Buckmon had confessed that he was the shooter. App. 287, ll. 3-10; App. 288, l. 12 - 290, l. 13. 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." *Id.*

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.[1] The day after giving testimony at the first trial, Staley's bond was reduced from $80,000 to $10,000 and, once released, he fled South Carolina. App. 184, ll. 8 - 18; App. 192, ll. 2-11. By the time of the second trial, Staley had been arrested on a bench warrant for failure to appear on his original CDVHAN charge and also faced new drug charges. *Id.* In the second trial, Staley altered his testimony and claimed that, "[Petitioner] didn't really state who shot her." App. 240, ll. 24-25.

The State did not call Benjamin or Odom at the second trial, but did notify Vigier, a French citizen, through his probation officer that he would be called to testify again. App. 11, ll. 2-16. Vigier then promptly fled South Carolina and could not be found for Petitioner's retrial. *Id.* Vigier had testified at the first trial that "[Petitioner] told me he killed a Chinese woman. . . . He shot her." 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. App. 454, l. 20 - 457, l. 18.

Admissibility of Jailhouse Informant Aurelien Vigier's Testimony from the First Trial

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. App. 442, ll. 18-24. After the first trial, the State dropped the pending charges against Vigier and

[1] 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. 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. Police found only a single .25 caliber shell at the crime scene.

recommended probation for simple assault.[2] App. 178, ll. 1-13. At Petitioner's retrial, the State sought to use the transcript of Vigier's testimony from the previous trial. App. 176, ll. 6-24.

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." App. 178, ll. 15-21. The State also conceded that his negotiations with Vigier would have been admissible to impeach his testimony had they disclosed them. *Id.*; App. 181, l. 13 - 182, l. 1.

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 benefits he received for his testimony. App. 167, l. 12 - 170, l. 18. The defense also argued that Petitioner's counsel of choice, Counsel Sanders, did not have the opportunity to confront Vigier. *Id.* The judge concluded there had been a "tacit understanding" between Vigier and the State and that he received a benefit for his testimony, but ruled against the defense and admitted Vigier's prior testimony into evidence. App. 228, l. 13 - 232, l. 17.

To support his ruling, the trial court specifically asked if Counsel Sanders had been present at counsel's table during Vigier's cross-examination. App. 181, ll. 4-12. **Counsel Williams stated that she had been at counsel's table during Vigier's testimony**. *Id.* The trial court also noted he would consider the generous terms of Vigier's deal "when I rule upon his credibility." App. 173, ll. 15-17.

The trial court then asked "***does anyone want to move for a mistrial based on the fact that the fact finder has information that the jury probably wouldn't have about this?"*** App. 175, l. 20 -

[2] Richard Brietbart represented Vigier. *See In re Breibart*, No. 2015-001982, 2015 WL 7566617 (S.C. Nov. 25, 2015).

174, l. 1 (*emphasis added*). The State happily posited that a mistrial motion would be improper, and that "that's the risk of the bench trial with the court, your honor." *Id.*

Petitioner himself denied any involvement in the murder and attempted robbery of Minh Chapman. In denying Petitioner's directed verdict motion, the judge expressly relied on the testimony of the jailhouse informants. App. 338, l. 16 - 339, l. 8.

Second Direct Appeal

Joseph Savitz again represented Petitioner on appeal. App. 466. 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. 466 - 475.

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). In denying Petitioner's appeal, the court held "We agree with the trial court that Sanders had such motive and opportunity" to adequately develop Vigier's testimony. App. 479. The court specifically referenced that "***Despite ample opportunity, the only question defense counsel*** asked Vigier about his communications with the solicitor's office was whether he was hoping to receive a deal from them." *Id.* (*emphasis added*)

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.

The application also alleged that the trial court had committed multiple errors by allowing himself, as the judge of the facts, to hear unreliable and perjured testimony. App. 480 - 509.

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[3] represented Petitioner and Assistant Attorney General Lance S. Boozer represented the State. By an Order of Dismissal 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. Supp. App. 1 - 9. On September 18, 2009, the State filed a Return requesting all allegations, except Petitioner's *Austin v. State*[4] claim, be summarily dismissed.

On January 29, 2010, an evidentiary hearing was held before the Honorable William Jeffery Young. 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.*

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[3] 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).

[4] 305 S.C. 453409 S.E.2d 395 (1991).

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. Petitioner moved to remand 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 Judge Baxley for the purpose of reconstructing the record of the evidentiary hearing. On August 8, 2007, Judge Baxley held a hearing, but was unable to fully reconstruct the missing portions of the transcript.

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. 510 - 511. The Supreme Court then remanded the matter to Judge Baxley for a *de novo* hearing on Applicant's original post-conviction relief application.

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. *Id.* 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. *Id.*

Evidentiary Hearing

On August 20, 2013, an evidentiary hearing was held before the Honorable Doyet Earley. App.527 - 737. 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.

Pre-Hearing Discussion of Conflict of Interest

Tara Shurling was retained by lead trial counsel Sanders to represent Petitioner in securing a belated appeal of his first PCR. App. 531, l. 5 - 547, l. 20. 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. 551, ll. 10-18.

The State also voiced concerns, "it's just sort of a smell test situation. I don't know what the -- how to handle it." App. 558, ll. 12-22. Nevertheless, PCR counsel assured the court that she had not changed her approach to the case as a result of being paid by Counsel 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. 552, l. 4 - 555, l. 12; *Cf*: 784 - 786.

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 conflict to Petitioner. App. 549, ll. 1-24.

Senior Assistant Attorney General David Spencer also noted that Counsel Sanders had contacted him before the evidentiary hearing in an effort to negotiate a consent order on behalf of Petitioner. App. 557, ll. 10-25. PCR counsel did not respond to this allegation.. Accepting PCR counsel's representations, the court then began the hearing without conducting a colloquy with Petitioner. App. 561, l. 16 - 562, l. 6.

Testimony of Appellate Counsel Joseph Savitz

Savitz testified that he previously won Petitioner's first appeal by arguing that the trial court erred by removing Counsel Sanders as Petitioner's attorney. App. 563, ll. 8-19. Savitz bemoaned that "in the second appeal they had waived the jury trial so it was a judge, bench trial. And when you do that it narrow your issues down. We had just basically a couple of issues that I thought I could raise." App. 564, ll. 18-25.

He also recalled that the only difference between the evidence against Petitioner and his two acquitted co-defendants was the testimony of the two jailhouse informants who had both received significant benefits for their testimony. App. 565, ll. 1-17. Savitz believed that the informant testimony, particularly Vigier's prior testimony, foreclosed on appealing the trial court's denial of a directed verdict. *Id.* Savitz recalled that Petitioner's conviction was based on "that thin a read." *Id.*

Because of the bench trial, Savitz only appealed the trial court ruling admissible Vigier's prior testimony on confrontation clause grounds. *Id.* Savitz stated that the trial court allowed the Vigier's testimony, in part, because it concluded that Counsel Sanders had the opportunity to participate in Vigier's cross-examination during the first trial through Counsel Williams. App. 570, l. 1 - 575, l. 19.

When asked, Savitz confirmed that if, in actuality, Counsel Sanders had not been able to participate via Counsel Williams because of either animosity between the two or because she was not physically able to confer with him during the examination than the trial court and, likely, the court of appeals would have ruled differently on the admissibility of Vigier's testimony. *Id.*

On cross-examination, Savitz again lamented the decision to proceed with a bench trial: "The judge had no opportunity to [access Vigier's demeanor] . . . And I thought waiving the jury

was also a mistake. . . I mean, that was part of the problem . . . We had a judge trial, bench trial, which didn't help even the issue I raised." App. 584, l. 13 - 585, l. 6.

Testimony of Co-Counsel Dan Williams

Williams recalled that there were six people present at counsel's table during Vigier's testimony: three defendants and three attorneys. App. 600, l. 2 - 601, l. 11. Counsel Williams did not remember specifically where Counsel Sanders was seated, but did not believe that she was at counsel's table. *Id.* Williams was adamant that, wherever she sat, Counsel Sanders "didn't participate" in Vigier's cross-examination. *Id.*

Williams recollected that Counsel Sanders called him on the Saturday before the trial started bcause, "she was thinking about proceeding with just a bench trial." App. 601, ll. 18-25. He claimed that he advised against it, "I told her at the time that I didn't believe it was [a] good idea" because he had never heard of a bench trial on murder charges. App. 602, l. 5 - 603, l. 17. Later on re-direct examination, he recalled that the trial court did not think a bench trial was a good idea either, but that the court incorrectly believed that the judge had to grant a bench trial if both parties agreed. App. 639, l. 16 - 640, l. 3.

Williams alleged that Counsel Sanders convinced her to conduct *voir dire* before deciding on whether to move for a bench trial. App. 603, ll. 1-17. Williams recalled "we picked a jury. And I was impressed with what, the strikes we got or the panel we got. It was fair. And then we decided - - ***she decided that she wanted to waive.***" *Id.* (*emphasis added*).

Williams indistinctly recalled that both attorneys "talked with Defendant. I talked to him and I can't sit here today and tell you I gave him an exhaustive [*sic*] reason of why he should go with a jury -- I mean, a jury as opposed to a bench trial." *Id.* When pressed about the details of his discussion with Petitioner, Williams stated that "probably" discussed the benefits and disadvantages of jury and bench trials, but he could not remember the specific "pros and cons" he explained to Petitioner. App. 604, l. 1 - 606, l. 24.

Without a recollection of what he told Petitioner, Williams could only speculate that he usually explains to his clients that, among other rights, a jury verdict has to be unanimous. *Id.* Counsel Williams did recall that "I've never had a situation in the past where we've been on the eve of trial and waived a jury before." App. 606, ll. 11-15;

Williams agreed that a judge sitting in a bench trial, unlike a jury, would know that Petitioner had been convicted in the earlier trial. App. 608, ll. 1-25. The court then briefly interrupted the examination and asked Williams if he had known of any non-jury murder trial where the defendant was acquitted; he replied he did not know of any. App. 609, ll. 19-23.

Williams confessed that he did not recall explaining to Petitioner how a bench trial would dramatically reduce the number of appealable issues. App. 611, l. 2- 613, l. 2. Counsel Williams did not recall arguing at trial that Counsel Sanders had not been able to provide direct input during Vigier's examination. App. 614, l. 2 - 612, l. 22. Williams conceded that Counsel Sanders was not at counsel's table, but was roughly twelve feet away sitting in the gallery, unable to participate in Vigier's cross-examination. *Id.*

Because it was a bench trial, Williams stated that he did not object to Vigier's testimony being introduced via the transcript from the first trial, instead of being read aloud at trial. App. 620, ll. 1-4. Likewise, he did not object to any of the State's many leading questions. App. 621, l. 17 - 622, l. 3. Williams then admitted that the defense agreed to waive extensive closing arguments because, "I don't know why I would need to argue an hour in front of a judge as opposed to a jury." App. 624, l. 1 - 625, l. 3. Williams also conceded that the defense attorneys never asked the judge to explain on the record the law he would be using to decide the case ("like a jury instruction"). App. 630, ll. 4-10.

Testimony of Lead Counsel Brenda Sanders

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. 649, ll. 20-24. Sanders further alleged that she did not receive any discovery from the Solicitor's office. App. 647, ll. 18-23. Sanders believed she "had very little control over the situation" and admitted she was "distraught" while representing her brother. App. 650, ll. 13-18; App. 658, ll. 10-22. Counsel Sander repeatedly stressed that she felt her "back was up against the wall" App. 676, ll. 6-10.

Counsel Sanders testified that she and Williams had a very contentious relationship, which hindered the defense, "the way I may have practiced in Michigan was different than what Mr. Williams believed should be done here." App. 653, ll. 4-22. Counsel Sanders stated that she was unable to participate in Vigier's cross-examination at the first trial because she was seated in the gallery. App. 654, l. 11 - 179, l. 17. Moreover, even when she was able to confer with Williams during breaks in the first trial, their fraught relationship meant that Williams frequently ignored her advice. *Id.*

Mirroring Williams, Counsel Sanders conceded that at the second trial Judge Barber ruled Vigier's prior testimony admissible in large part because he incorrectly believed Counsel Sanders was located at counsel's table and able to actively participate through Counsel Williams. App. 657, ll. 5-19. Agreeing with Appellate Counsel Savitz, Counsel Sanders also conceded that the Court of Appeals adopted Judge Barber's reasoning in their opinion denying Petitioner's appeal. *Id.* Like Williams, Sanders could not explain the defense team's failure to correct this critical misrepresentation about her inability to participate in Vigier's cross-examination. *Id.*

With respect to advocating for a bench trial, Counsel Sanders recalled that Petitioner was "very scared and he couldn't make up his mind." App. 659, ll. 3-10. She was primarily concerned about pre-trial publicity and "I just went on my experience in Michigan and then looking here in this jurisdiction, it's a little different." *Id.* at ll. 19-24. She conceded that advocating strongly for a bench trial was a bad idea. App. 182, l. 25 - 183, l. 4. She stated that the decision to seek a bench trial was hers, "I was his lawyer. I was advising him. I was the closest to him. I'm going to say that it was my decision." App. 660, ll. 6-8.

As with co-counsel Williams, Counsel Sanders could not recall the exact discussions the three had regarding the "pros and cons of a jury trial versus a bench trial." App. 660, l. 10 - 663, l. 13. When asked why the defense did not ask Judge Barber to place on the record the law that he would be considering when determining the verdict, Counsel Sanders admitted that not doing so was a mistake as the defense denied itself the chance to insure that the law applied by the judge was accurate. App. 666, l. 10 - 669, l. 2.

In defense of her actions, Sanders said she believed that Judge Barber would read out the law he would apply as this was standard practice in the Federal Court system, but she offered no justification for her failure to ask that Judge Barber do so. *Id.* "I think it was more presumed. Federal authority, you know, as I had with Mr. Savitz, there was federal authorities that I believe where he should have brought issues where the law was in our favor." *Id.* She provided no rationale as why she believed "federal authorities" were applicable to a state murder trial or on appeal.

Cross-Examination

On cross-examination, the State asked Counsel Sanders to expand on her reasons for seeking a bench trial. Counsel Sanders explained that she favored bench trial in her practice in

Michigan, "one thing about being familiar with the area is that you're familiar with the judge . . . [f]amiliar with the judge. In Michigan some judges have a track record of trying capital cases and bench trials and finding not guilty and some do not." App. 672, l. 21 - 673, l. 13.

She did not elaborate on how her Michigan experience and knowledge of Michigan judges' track records would support moving for a bench trial in South Carolina against the advice of local co-counsel and with a judge who had admittedly never presided over a bench murder trial. In an effort to bolster Counsel Sander's reasoning, the State asked her if she was aware that federal bench trials have a higher rate of acquittal than federal jury trials. App. 672, ll. 8-13.

Counsel Sanders stated that she was not aware of that, but that she knew "federal law is very favorable if it was followed in this case." *Id.* Again, she did not explain what "federal law" she believed was favorable or why South Carolina courts should follow this undetermined "federal law" in a state criminal trial. *Id.* Faced with this answer, the State refocused on pre-trial publicity. App. 674, ll. 9-20.

In response, Counsel Sanders stated that a newspaper reporter had testified at Petitioner's first trial about inculpatory comments made to him by one of the defendants. For unknown reasons, she believed that this testimony was perjured and that calling a reporter to testify was unethical. App. 685, ll. 2-9. She claimed - without any supporting evidence - that because of his participation in the first trial, this reporter, and the local media generally, were biased against Petitioner and their reporting was tainting potential jurors. App. 673, l. 2 - 674, l. 20.

Counsel Sanders further expounded 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, including Judge Barber. It was filled with inaccuracies and disputed in every way. The

witnesses contradicted themselves in every way. . . . I could not see anyone with a trained eye saying guilty." *Id.*

She further explained, "I thought we didn't have a choice given the - - I thought a bench trial where the authority would be followed and the law, yes, at the time, and backing up against the wall with all of this bad publicity and reporters everywhere. . . but because the other defendants were exonerated, I thought, again, that my brother would also be exonerated given the evidence." App. 676, ll. 5-10. "I thought a judge would say -- look at the unreliability of it and say, no way. This is too important. Too much importance in this case. These are capital offenses. Why would I rest my decision on two jailhouse informants that were in those circumstances and nothing connecting. Just like . . . with the other defendants." App. 685, ll. 2-9.

The State then asked if she had discussed the decision to seek a bench trial with Petitioner. App. 677, ll. 11-22. She responded that "my focus was more on Attorney Williams because he disagreed me." *Id.* With respect to her brother she advised, "I said, our back is up against the wall. Maybe we should just do a bench trial." *Id.* She feared that jurors would be prejudiced by a totally unrelated murder that occurred before Petitioner's second trial. App. 659, ll. 3-10; App. 676, ll. 5-10. .

Petitioner's Testimony

Petitioner stated that remembered his attorneys argued about whether to have a jury or bench trial and that his sister, Counsel Sanders, decided to move for the bench trial.[5] App. 693, l. 2- 694, l. 22. Petitioner would have proceeded with a jury trial had he been accurately advised as to the differences between the two trial formats. *Id.*

[5] Petitioner never completed high-school. He was arrested during his junior year, leaving him with a tenth grade education.

On cross-examination, Petitioner recalled that Counsel Williams' opposition to a bench trial was based on him having never heard of a murder bench trial being held. App. 694, l. 23 - 696, l. 22. Petitioner also testified that Counsel Sanders' was motivated to seek a bench trial out of rear of pretrial publicity tainting the jury pool. App. 699, ll. 1-16.

Testimony of De Grant Gibbons

Gibbons candidly admitted that the State's theory of the case changed between the first and second trials because the State was able to present Maurice Benning at the second trial. App. 709, ll. 18-25. Benning contradicted the stories of the jailhouse informants and identified Buckmon, not Petitioner, as the murderer. App. 710, ll. 3-17. Jailhouse informant David Staley also changed his testimony to reflect the State's new theory, that Buckmon was the shooter. App. 240, ll. 24-25.

Gibbons testified about law enforcement's inability to locate Vigier for the second trial. App. 716, ll. 3-20. Unlike at trial where he told Judge Barber that the State had tried to subpoena Vigier, Gibbons now stated that "I think the probation people bench warranted him." App. 715, ll. 7-12. Gibbons did not remember issuing any subpoena for Vigier. *Id.*

Order of Dismissal

Judge Earley denied Petitioner's application by an Order of Dismissal issued August 18, 2014. App. 738 - 777. 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. 764 - 768. The court noted that Sanders was concerned about getting a fair trial in Barnwell County because of the publicity surrounding an *unrelated* murder. *Id.*

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.772 - 776. Judge Early specifically found that appellate counsel Savitz, co-counsel Williams, and solicitor Gibbons were credible. App. 768. 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.*

The PCR court further held that the defense counsels were not ineffective for failing to adequately argue that Vigier's prior testimony should be inadmissible because Counsel Sanders did not have the opportunity to cross-examine him. App. 769 - 772. The court concluded that Counsel Williams had recalled reviewing the evidence in the case with Counsel Sanders and that Counsel Sanders was present for the trial. *Id.* Without addressing Williams' misstatement to the trial court regarding Counsel Sanders not being seated at counsels' table, the PCR court summarily held that Petitioner had failed to show that counsel's performance fell below professional norms. *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 to 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 still 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.*

Sanders' Removal from the Bench and Mental Illness

As detailed at length in Petitioner's Motion to Hold Appeal in Abeyance and to Remand for a New Evidentiary Hearing Based on After-Discovered Evidence filed with this Court on July 24, 2015, Counsel Sanders suffers from a severe mental illness.

On July 1, 2015, the Michigan Supreme Court removed Sanders from the bench concluding that she "suffers from a mental disability that prevents the performance of her judicial duties." App. 805 - 808. Of note, the Michigan Supreme Court held that Counsel Sanders irrationally believed

that sinister forces were conspiring to defame and harm her, "due to her delusions, Respondent could not interpret reality correctly and could not make rational decisions." *Id.* The judicial investigation into Counsel Sanders' mental fitness identified troubling incidents dating back to 2011, with the most bizarre behavior manifesting itself in 2012 - 2014. Supp. App. 1 - 97.

Post-Dismissal Actions of PCR Counsel

Following the denial of Petitioner's post-conviction relief application, PCR counsel tried to secure her appointment as Petitioner's appellate counsel in a series of letters to this Court. App. 784 - 786; Supp. App. 1 - 2. In her letter dated December 16, 2014, PCR counsel acknowledged for the first time that Counsel Sanders had been removed from the bench due to mental illness. App. 784 - 786.

Contradicting her earlier averments to the PCR court, PCR counsel admitted that he had not treated Counsel Sanders as she did other trial attorneys:

> ***Whether Mr. Sanders entered a knowing and voluntary waiver of his right to a jury trial was one of the key issues in this PCR action.*** At the time I was hired I was advised that Ms. Sanders was a judge with the 36th District Court in Detroit Michigan. I actually called her at her office on occasion, and she wrote me on her office letterhead at least once. ***I interviewed her carefully prior to the hearing in this case, and she appeared to candidly discuss with me what she recognized to be her oversights with regard to this decision in the trial court. I did not, as would be my usual practice, have a paralegal or investigator witness this interview. Given the fact that she was very forthright in acknowledging her errors and omissions, and that fact that she was a District Court Judge, I did not feel it was necessary.***
>
> ***At the PCR hearing held in this matter I was greatly surprised by the vague testimony given by Ms. Sanders, and by the fact that her testimony was not consistent with what she had previously told me.***

Id. (*emphasis added*).

Plea counsel attributed the discovery of Counsel Sanders' mental illness to her paralegal. Apparently, after the issuance of the Order of Dismissal, Counsel Sanders called her office while PCR Counsel was not there and invited PCR Counsel to call her back anytime. *Id.* This made the paralegal suspicious because Counsel Sanders had previously been hard to get in touch with, claiming a busy judicial schedule. *Id.* A cursory Google search by the paralegal revealed the disciplinary proceedings against Sanders. *Id.*

ARGUMENT

I.

The PCR court erred in finding that Petitioner knowingly and intelligently waived his constitutional right to a trial by jury where Petitioner's decision was based on the objectively unreasonable advice of his lead trial attorney and where neither co-counsel or the trial court adequately advised Petitioner of the consequences of proceeding with a bench trial.

In denying Petitioner relief, the PCR Court ruled that Counsel Sanders' advocacy for a bench trial was objectively reasonable and that Petitioner was thoroughly advised of the benefits of a jury trial; thus he made a knowing and intelligent waiver of his constitutional right to a jury trial.

Lead trial counsel Sanders' reasons for seeking a bench trial were not objectively sound and were patently unreasonable under prevailing professional norms. *See Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). Sanders' ineffectiveness was not cured by Counsel Williams' opposition to the bench trial. In equally inadequate was the cursory waiver colloquy conducted by the trial court, which at most, only established that Petitioner was voluntarily waiving his right to a trial by jury; it provided absolutely no evidence that Petitioner was knowingly and intelligently waiving a jury trial.

Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, the Petitioner must satisfy a two-prong test set forth in *Strickland.* "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

The second prong of the *Strickland* test requires a showing that the deficient performance of counsel prejudiced the petitioner to the extent that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Constitutional Right to a Jury Trial

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. 3, § 2. The Sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defense."

The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968). As the United States Supreme Court held:

> Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, ***but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.*** And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, ***with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.***

Patton v. United States, 281 U.S. 276, 312-313 (1930) *overruled on other grounds by Williams v. Florida*, 399 U.S. 78, 92 (1970).

A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both." *Moore v. State*, 399 S.C. 641, 732 S.E.2d 871 (2012) (*citing Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000)); *see also, Brannon v. State*, 345 S.C. 437, 548 S.E.2d 866 (2001). Whether there has been an intelligent waiver of a constitutional right must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464, (1938).

A. The brief colloquy conducted by the trial court did not cure the material misconceptions caused by Counsel Sanders' objectively unreasonable and constitutionally deficient advice.

The trial court was clearly surprised by lead trial counsel Sanders sudden motion to waive a jury trial, "[w]ell. I haven't had the experience of having this happen to me before." App. 81, l. 17 - 82, l. 3. Counsel Sanders' motion came immediately after the court's ruling on the final pre-trial motion with no apparent adjournment between *vior dire*, the pre-trial motions, and Counsel Sanders' decision to waive a jury trial. *Id.*

The State readily consented to a bench trial. The court then conducted a short colloquy with Petitioner, asking if he understood that he would sit as the judge of the facts and the law. App. 84, l. 3 - 84, l. 21. The court also observed that Petitioner had already been through one trial and assumed that this experience meant that Petitioner understood the trial process. *Id.* The court also noted that, while Petitioner might be at a disadvantage because lead counsel Sanders did not practice in South

Carolina, co-counsel Williams was "competent and experienced" local lawyer who would assist counsel Sanders. *Id.* Petitioner answered to each question with "Yes, sir." *Id.* [6]

Petitioner does not believe there is any South Carolina authority addressing under what circumstances the inaccurate advice of counsel to waive a jury trial would be cured by information conveyed in the court's waiver colloquy. *Bennett v. State*, 371 S.C. 198, 205 n. 6, 638 S.E.2d 673, 676 n. 6 (2006) ("where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant"). However, our courts have addressed this issue in the context of guilty pleas and other waivers of constitutional rights such as the right to counsel and the right to remain silent. *Holden v. State*, 393 S.C. 565, 713 S.E.2d 611 (2011) (counsel's erroneous advice as to sentencing cured by judge's colloquy accurately stating the sentencing range); *State v. McLauren*, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002) (applying ten factor test to determine if defendant understood the disadvantages of self-representation); *Cf. State v. Pierce,* 289 S.C. 430, 346 S.E.2d 707 (1986) (It is a violation of a defendant's Fifth Amendment rights for a judge to make comments on how a jury may or may not view a defendant's decision not to testify) *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991).

Nothing in the trial court's colloquy conveyed information to Petitioner that would cure the erroneous beliefs instilled in him by lead trial counsel Sanders' deficient advice. Despite finding the

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[6] *See Moore*, 399 S.C. at 641, n. 1, 732 S.E.2d at 874, n. 1 ("A 'colloquy' is defined as 'any formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights.' *Black's Law Dictionary* 221 (8th ed.2005). Colloquy has also been defined as a 'high-level serious discussion.' *Webster's Ninth New Collegiate Dictionary* 260 (9th ed.1989); see New World Dictionary 280 (2d ed.1976) (defining colloquy as a 'conversation, esp. a formal discussion; conference'). The exchange which took place in the instant case does not meet even a banal definition of colloquy, and falls far short of the 'high-level serious discussion' necessary to support the waiver of a defendant's constitutional right to a jury of his peers).

waiver highly irregular, the trial court never questioned why Petitioner was waiving his right to a jury trial. App. 81, l. 17 - 84, l. 21; *Sanders v. State*, 412 S.C. 611, 773 S.E.2d 580 (2015) (petitioner may challenge the effectiveness of counsel's conduct in advising petitioner to waive a constitutional right). By contrast, when accepting guilty pleas, trial courts must determine if there is a factual basis for the plea and the defendant must accept the factual basis put forward and admit guilt. *Wicker v. State*, 310 S.C. 8, 425 S.E.2d 25 (1992); *Cf: Ray. State*, 303 S.C. 374, 401 S.E.2d 151 (1991); *see also Anderson v. State*, 342 S.C. 54, 535 S.E.2d 649 (2000) (due requires a defendant must be advised of the constitutional rights he or she is waiving).

The closest the trial court came to countering the incorrect impression created by lead trial counsel Sanders, was noting that counsel Sanders did not practice in South Carolina and may "be at somewhat a little disadvantage of exactly what the law is in South Carolina." App. 84, l. 25 - 85, l. 4. The trial court then immediately posited that "Mr. Williams is certainly a competent, experienced trial lawyer. . . And he can assist her." App. 85, l. 5-9; *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004) (trial court impermissibly injected personal opinion into defendant's decision to waive jury for retrial of sentencing phase of capital murder trial). Thus, there was no probative evidence that the trial court's colloquy with Petitioner cured the misconceptions caused by Counsel Sanders' constitutionally deficient representation. *Sanders* 412 S.C. 611, 773 S.E.2d 580.

B. Petitioner did not knowingly and intelligently waive his constitutional right to a trial by jury as his decision was based on the objectively unreasonable advice of his lead trial counsel, Brenda Sanders.

Counsel Sanders performance was deficient, falling below professional norms, when she advised Petitioner that he should waive his constitutional right to a jury trial. The inadequacy of her representation prevented Petitioner from making a knowing and intelligent waiver of his right to a

jury trial. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (defendant makes an intelligent waiver when he "knows what he is doing and his choice is made with eyes open").

Counsel Sanders pressed Petitioner into waive a bench trial based on her objectively unreasonable and unsubstantiated fears that negative pre-trial publicity had tainted potential jurors. She also inexplicably and erroneously believed that the trial court sitting in a bench trial would apply unspecified but advantageous "federal law" in Petitioner's state murder trial. She further testified that she promoted a bench trial because of her experience as a lawyer in Michigan, where certain judges have track records of acquittals in bench trials. However, Judge Barber stated on the record he had never done a bench trial for murder before. App. 81, l. 17 - 82, l. 3.

Where a defendant's lead trial attorney strongly advocates that the accused waive his constitutional right to a trial by a jury of his peers in a murder; that attorney should do so cautiously and only for objectively valid reasons. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding 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"). A defendant cannot intelligently weigh the potential benefits and risks of a bench trial without competent, objective, and professionally reasonable advice. Regrettably, Counsel Sanders' waiver of Petitioner's right to a jury trial was very likely a manifestation of her life-consuming "paranoid delusions." App. 787 - 808; Supp. App. 3-97.

First, Counsel Sanders' irrational obsession with pre-trial publicity tainting the potential jurors was totally unsubstantiated and not objectively reasonable. She feared that jurors would be prejudiced by a totally unrelated murder that occurred before Petitioner's second trial. App. 659, ll. 3-10; App. 676, ll. 5-10. She also irrationally believed that Petitioner had been harmed - in some

indeterminate manner - by media coverage of his second trial as a local newspaper reporter had testified in Petitioner's first trial. *Id.* Counsel Sanders claimed - without any supporting evidence - that this reporter was dishonest, unreliable, and biased against Petitioner in order to generate newspaper sales. App. 673, l. 2 - 674, l. 20.

None of her stated concerns regarding pre-trial publicity were objectively reasonable or would, even if true, would justify advising a client to waive his constitutional right to a jury trial. Moreover, during *voir dire*, the jurors who reported that they had knowledge of Petitioner's case unanimously affirmed under oath to the court that their knowledge would not impact their ability to hear evidence and impartially render a verdict. App. 25, l. 1- 26, l. 1; *State v. Avery*, 374 S.C. 524, 649 S.E.2d 102 (Ct. App. 2007) (exposure to pretrial publicity does not automatically disqualify a juror; rather, relevant question is not whether community remembered the case, but whether jurors had such fixed opinions that they could not judge impartially the guilt of defendant).

Counsel Williams stated that he believed the jury selected for Petitioner's second trial was fair, "I was impressed with what, the strikes we got or the panel we got. It was fair." App. 603, ll. 1-17. Petitioner's co-defendant, Maurice Benning, was acquitted of all charges by a Barnwell Court jury in Petitioner's first trial, when Chapman's death was still in the community's collective memory. There was simply no probative evidence presented at the PCR hearing or in the record to support Counsel Sanders' paranoia regarding pre-trial publicity irredeemably tainting the jury pool.

Second, Counsel Sanders claimed that she forced a bench trial based on her inexplicable belief that Judge Barber would, for some reason, apply unspecified "federal law" in a state murder trial in a way that would work to Petitioner's advantage and on her experience practicing law in Michigan. App. 653, ll. 4-22; App. 671, l. 21 - 672, l. 13; App. 674, l. 9 - 676, l. 10. This bizarre explanation provided no evidentiary basis for the PCR court's conclusion that Petitioner knowingly

and intelligently waived his right to jury trial after receiving competent legal advice. *Sanders*, 412 S.C. 611, 773 S.E.2d 580.

A waiver of a constitutional right cannot be intelligently entered into when it is induced by the erroneous advice of counsel. *Id.*; *see also Ray*, 303 S.C. 374, 401 S.E.2d 151 (plea counsel ineffective for wrongly advising defendant that he would receive a mandatory sentence of life without parole if convicted at trial). Counseling Petitioner to waive a sacrosanct constitutional right because a vaguely defined and inapplicable body of law was in some way "very favorable" is objectively unreasonable, falling well below prevailing professional norms for a criminal defense attorney. App. 674, l. 9 - 676, l. 10; App. 672, ll. 4-13; *Murdock v. State*, 311 S.C. 16, 426 S.E.2d 740 (1992) (counsel ineffective for advising defendant to plead guilty when she did not commit any crime).

Counsel Sanders further alleged that her experience practicing law in Michigan led her to favor a bench trial because "one thing about being familiar with the area is that ***you're familiar with the judge . . . . In Michigan some judges have a track record*** of trying capital cases and bench trials and finding not guilty and some do not." App. 671, l. 23 - 672, l. 6 (*emphasis added*). Counsel Sanders was admittedly unfamiliar with the Barnwell County area and South Carolina law. App. 674, ll. 21-25; *Cf. Jacobs v. State*, 683 S.E.2d 368 (Ga. Ct. App. 2009) (defendant knowingly waived right to jury trial where counsel, who advised against a bench trial, assured defendant that he believed either potential judges would be fair).

In fact, the trial court noted that he had never conducted a bench trial for a murder before and expressed significant reservations about doing so. As with her inexplicable belief that favorable "federal law" would be applied in Petitioner's case, her knowledge of particular judges' bench trial track records in Michigan was totally irrelevant as to whether Petitioner should elect to have a bench

trial in front of Judge Barber in South Carolina. . App. 671, l. 21 - 672, l. 13; App. 674, l. 9 - 676, l. 10.

Counsel Sanders never provided a rational answer as to why she believed a judge, as opposed to twelve jurors, would find the State's reliance on self-serving jailhouse informants and the other circumstantial evidence less worthy of belief. Rather, she expressed a blind faith that anyone with a "trained eye" who followed - unspecified and inapplicable - federal "legal authority" would have found Petitioner not guilty while she believed that the entire jury pool lied under oath and was irredeemably tainted by pretrial publicity.[7] App. 659, ll. 3-10; App. 676, ll. 5-10; *see Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) ("labeling counsel's actions as 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges").

Prejudice

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Moreover, there is a reasonable probability that, but for Counsel Sanders' pressure to proceed with a bench trial, Petitioner would have continued with a jury trial.

At the evidentiary hearing, Counsel Sanders stated that it was her decision to seek a bench trial and that she pressured Petitioner into accepting her recommendation. App. 658, l. 10 - 660, l. 6. At Petitioner's trial, she is the one that moves to waive the jury. App. 81, ll. 17-18. Likewise, co-

[7] During *voir dire* every juror that acknowledged they had heard or saw something about Petitioner's case, affirmed under oath that they could set aside whatever publicity they had been exposed to and impartially judge Petitioner. App. 25, l. 1 - 26, l. 1; *see Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (jurors are presumed to follow instructions).

counsel Williams gave "highly credible" testimony confirming that counsel Sanders first mentioned electing a bench trial only two days before trial and that he was opposed to a bench trial. App. 803, l. 18 - 805, l. 17. Williams went so far as to categorize the decision to have a bench trial as Counsel Sanders': "she decided that she wanted to waive." App. 603, ll. 5-9. Petitioner also testified that Counsel Williams first brought up the possibility of a bench trial and made the decision to waive the jury. App. 699, ll. 1-16.

By waiving the right to a trial by jury Petitioner was unwittingly sacrificing the protections afforded to him by having separate judges of the law and the facts and insuring that the State would be allowed to present any and all evidence it had against Petitioner. *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) (rejecting a requirement that a judge at a bench trial must "affirmatively reject" incompetent evidence, "trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting").

A judge simply cannot realistically serve as a gatekeeper for himself against improper or unreliable evidence. *Id.* As the PCR court aptly noted when denying the State's motion to strike certain testimony "I understand what the allegations are. I'm trying it nonjury. I'm going to let it in." App. 649, ll. 5-11.

The bench trial also sharply limited Petitioner's potentially appealable issues. Appellate Counsel Savitz "credibly" testified that, based on his twenty-six years of experience in handling criminal appeals, the bench trial "really limited what we could in the appeal" and that it "didn't help even the issue I raised." App. 584, l. 2 - 585, l. 6. Similarly, many of the other allegations of ineffectiveness were a direct result of electing a bench trial such as counsels' decision to waive a full closing argument and counsels failure to request that the trial court place on the record the law it would apply in Petitioner's case. App. 775 - 776.

Counsel Sanders' objectively unreasonable advice, prevented Petitioner from intelligently waiving his right to a jury trial and all of the resulting protections a trial by a jury of his peers affords. Accordingly, this Court should reverse the decision of the PCR court and find trial counsel provided ineffective assistance as there is no probative evidence that Petitioner knowingly and intelligently waived his right to a jury trial. *Sanders,* 412 S.C. 611, 773 S.E.2d 580; *Roseboro v.* 317 S.C. at 294, 454 S.E.2d at 313.

II.

The PCR court erred in allowing Petitioner's evidentiary hearing to proceed since PCR counsel had an actual conflict of interest as she had been retained by lead trial counsel Brenda Sanders, Petitioner's brother, and this conflict of interest compromised PCR counsel's representation as she admittedly failed to investigate Counsel Sanders' mental illness or past disciplinary infractions.

Introduction

"This doesn't smell right to me." App. 74, ll. 10-18.

PCR Counsel was initially retained sometime in 2011 or 2012 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.*

PCR Counsel and Counsel Sander then negotiated a new fee amount and executed a new retainer agreement, which incidently was not signed or delivered until the day of the evidentiary hearing.[8] App. 542, l. 10 - 551, l. 8. Allegations of ineffectiveness were then raised against lead trial counsel Sanders for the first time, as she had not raised any grounds of ineffectiveness against herself in the earlier applications. App. 554, ll. 3-24.

At the evidentiary hearing, Senior Assistant Attorney General Spencer voiced serious reservations about this arrangement as did the court, which inquired "well, what we got here is, in effect, a trial lawyer PCRing herself by hiring you to say she was ineffective." App. 553, ll. 8-9. The PCR court summarized it concerns, "you are now claiming that the person that hired you was ineffective for a number of reasons." App. 546, ll. 17-24.

[8] At the evidentiary hearing, PCR counsel told the court that Counsel Sanders had paid all of the money due under their retainer agreement. However, Counsel Sanders' *pro se* bankruptcy application still listed PCR counsel as a creditor. Supp. App. 50 - 58.

In response, PCR counsel represented, as an officer of the court, that she had not changed her approach to the case in any manner as a result of being paid by Sanders. App. 549, ll. 1-24. PCR counsel further argued that the arrangement was not materially different than a public defender "falling on his sword" and admitting to shortcomings in his representation. App. 553, l. 6 - 555, l. 12.

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 and assured him that her only loyalty was to him. App. 689, l. 12 - 690, l. 14. Petitioner was not questioned by the court prior to the hearing.

Rather Petitioner was briefly asked a series leading questions by PCR counsel about his understanding of the conflict of interest before testifying and whether or not he "had the feeling that I had divided my loyalty between you and your sister?" App. 690, ll. 2-13. Petitioner was the second to last witness to testify. *Id.*

Discussion

Petitioner is entitled to a new PCR hearing since PCR counsel had a conflict of interest while representing Petitioner as a result of having been retained by lead trial counsel Sanders; PCR counsel had divided loyalties in light of counsel Sanders paying PCR counsel to represent Petitioner in a proceeding that would have required counsel Sanders to be found ineffective in order for Petitioner to receive relief. Given that Counsel Sanders' paranoid delusions and reported erratic behavior overlapped with PCR Counsel's nearly three year representation of Petitioner; it is unfortunately untenable for PCR Counsel to claim she was "greatly surprised" by Counsel Sanders' behavior at the evidentiary hearing. App. 784 - 785; Supp. App. 3 - 97.

Petitioner is unaware of any South Carolina case law directly addressing whether PCR counsel has an actual conflict of interest when retained by PCR applicant's trial attorney. Petitioner is also unaware of any federal or state case law from other states on point. However, adapting existing case law regarding ineffective assistance claims based upon conflicts of interest and regarding the hazards of dual representation; provides a framework for analyzing whether Petitioner should receive a new hearing. *See Gonzales v. State*, 412 S.C. 479, 772 S.E.2d 557 (2015); *see also Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987); *see also United States v. Nicholson*, 611 F.3d 191, 205 (4th Cir. 2010).

Actual Conflicts of Interest and Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to conflict-free counsel. *Mickens v. Taylor*, 535 U.S. 162, 168 (2002); *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). A PCR applicant must show that trial counsel had an actual conflict of interest that adversely affected his performance in representing him. *Cuyler*, 446 U.S. at 348; *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 691 (2007); *Fuller v. State*, 347 S.C. 630, 633, 557 S.E.2d 664, 665 (2001); *Thomas v. State*, 346 S.C. 140, 142, 551 S.E.2d 254, 255 (2001); *Jackson v. State*, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998); *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984).

In an actual conflict of interest, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to ascertain the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 446 U.S. at 692. Therefore, where an actual conflict of interest exists, Petitioner need not show prejudice resulting from that conflict, only that counsel did not pursue a reasonable strategy or tactic, in part, because of the active conflict of

interest. *Nicholson*, 611 F.3d at 205; *Gonzales*, 412 S.C. at 495, 772 S.E.2d at 566; *Cuyler*, 446 U.S. at 348-350;

Applying this test in Petitioner's case, Petitioner must show that PCR Counsel owed a duty or was influenced by a party with adverse interests to Petitioner. *Staggs*, 372 S.C. at 551, 643 S.E.2d at 692; *Fuller*, 347 S.C. at 633-634, 557 S.E.2d at 665; *Thomas*, 346 S.C. at 143-144, 551 S.E.2d at 256; *Jackson*, 329 S.C. at 354-355, 495 S.E.2d at 773; *Duncan* 281 S.C. at 438, 315 S.E.2d at 811. Petitioner must then show that the conflict of interest compromised his attorney's representation by demonstrating that an alternative strategy existed and that defense counsel's failure to pursue that strategy was linked to the actual conflict of interest. *Nicholson*, 611 F.3d at 205; *Gonzales*, 412 S.C. at 495, 772 S.E.2d at 566; *Cuyler*, 446 U.S. at 348-350;

PCR Counsel had an Active Conflict of Interest

The PCR court correctly concluded that PCR counsel's dependence on lead trial counsel Sanders to pay her retainer "doesn't smell right." App. 551, ll. 18. However, the PCR court erred in allowing Petitioner's evidentiary hearing to proceed in without conflict free representation as PCR Counsel's reliance on lead trial counsel Sanders to pay her retainer constituted an actual conflict of interest. *Carter,* 293 S.C. 528, 362 S.E.2d 20.

When defendants raise ineffective assistance of counsel claims, they must prove that their lawyer made a serious mistake that no reasonable lawyer would make, and that this unreasonable mistake prejudiced them. *Strickland*, 466 U.S. at 687. Post-conviction relief actions are not a formal adversarial proceeding against trial counsel. Nevertheless, a finding of ineffectiveness is obviously adverse to the professional interests of the trial attorney, particularly if the attorney is in private practice or is facing disciplinary proceedings, as Counsel Sanders was. Thus, this situation

presented PCR Counsel with a clear problem of divided loyalties. *Carter,* 293 S.C. 528, 362 S.E.2d 20.

Ethical rules are not necessarily determinative of a denial of the assistance of counsel. *Langford v. State*, 310 S.C. 357, 426 S.E.2d 793 (1993). However, in the absence of applicable case law, rules of professional conduct may serve as guides "by defining proper ethical conduct." *Id.*; *Strickland*, 466 U.S. at 688. Moreover, as the conflict of interest in Petitioner's case centers on whether PCR counsel's pecuniary interests inhibited her ability to zealously advocate for Petitioner, the South Carolina Rules of Professional Conduct addressing concurrent conflicts of interests and fee agreements are particularly informative.

"A concurrent conflict of interest exists if: there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client ***or a third person or by a personal interest of the lawyer.***" SCACR RULE 407, RPC 1.7. With respect to fee agreements, "a lawyer shall not accept compensation for representing a client from one other than the client unless:***(1) the client gives informed consent;(2) there is no interference with the lawyer's independence of professional judgment*** or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6." SCACR RULE 407 RPC 1.8(f).

Here, PCR counsel suffered from an actual conflict of interest because her reliance on lead trial counsel Sanders to pay her retainer inherently interfered with her ability to "advocate fearlessly and effectively on behalf" of Petitioner that counsel Sanders was ineffective for seeking a bench trial. *Gonzales*, 412 S.C. at 492-493, 772 S.E.2d at 565 (*citing Derrington v. United States*, 681 A.2d 1133 (D.C. 1996)). Moreover, because of the specific and highly unusual facts of this case, PCR counsel's conflict of interest adversely affected the presentation of Petitioner's PCR action.

The Conflict of Interest Adversely Affected PCR Counsel's Performance

The second prong of the *Cuyler* framework requires a showing that "some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." 446 U.S. at 348. In Petitioner's case, PCR counsel failed to bring to the court's attention lead trial Counsel Sanders' prior disciplinary sanctions from the Michigan Bar and the Michigan Judicial Tenure Commission for dishonest and unethical conduct. App. 778 - 783.

More troublingly, PCR counsel failed to notice Counsel Sanders' deteriorating mental health during her pretrial investigation. App.778 - 808. In the years and months leading up to Petitioner's August 20, 2013 evidentiary hearing, people who interacted with Counsel Sanders reported that her behavior became increasingly erratic and paranoid. Supp. App. 3 - 97. In contrast, PCR Counsel claimed that Counsel Sanders "appeared to candidly discuss with me what she recognized to be her oversights" and was reportedly "greatly surprised by the vague testimony" of Counsel Sanders at the evidentiary hearing. App. 784.

PCR counsel also missed other significant red flags regarding Counsel Sanders, such as the irate and vindictive tone of the PCR application that she filed on Petitioner's behalf and its notable omission of any allegations of ineffectiveness against herself. App. 480 - 521; App. 544, ll. 2-24. Further, PCR counsel seemingly ignored Counsel Sanders' efforts to circumvent her by trying to "work something out" with Attorney General's Office. App. 557, ll. 10-25.

In her December 16, 2014 letter to this Court, PCR counsel acknowledged that she had not interviewed Sanders as she would other trial attorneys. App. 784 - 786. She "did not feel it was necessary" to investigate as she would in her "normal practice" in a PCR case. *Id.* Her letter

directly contradicts her representations to the PCR court when discussing the conflict of interest. App. 553, l. 6 - 555, l. 12.

In response to the skepticism regarding PCR counsel's fee arrangement with Counsel Sanders, PCR counsel assured the court at length, "that I would not alter in any shape, form, or fashion what I would do on [Petitioner's] behalf just because [Counsel Sanders] had been involved in the payment of my fees." App. 549, ll. 1-24. Here, unlike the trial attorney in *Gonzales*, PCR counsel was very much aware of the conflict of interest, but repeatedly represented to the court that her preparation was unchanged. App. 549, l. 1 - 555, l. 12; *see Gonzales*, 412 S.C. 478, 772 S.E.2d 557 (adverse impact on counsel's performance cannot be shown without a showing that counsel recognized the conflict).

Petitioner's case illustrates the difficulty in ascertaining the precise effect on the defense of representation corrupted by conflicting interests. *Strickland*, 446 U.S. at 692. PCR counsel manifestly failed to investigate the background of lead trial counsel Sanders and simply accepted her justifications for seeking a bench trial after minimal questioning. She never pressed Counsel Sanders to explain why she believed federal authority was favorable or even applicable to Petitioner's state murder trial or why the media attention given to Petitioner's case would taint a jury pool. *See Roseboro v. State*, 317 S.C. at 294, 454 S.E.2d at 313. Regrettably, the only explanation of such failures is that PCR counsel's personal financial interest in maintaining a cordial relationship with Counsel Sanders compromised the independence of professional judgment when deciding how to investigate and pursue claims of ineffective assistance of counsel against Sanders.

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. Counsel 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.

Accordingly, exposing Counsel Sanders' mental illness and linking it to her irrational decision to seek a bench trial would have significantly strengthened Petitioner's PCR application. *Strickland*, 466 U.S. at 694 (A reasonable probability is a probability sufficient to undermine confidence in the outcome).

Petitioner's Waiver of Conflict of Interest was not Knowingly and Intelligently Made

Petitioner's only acknowledgement that PCR counsel had a conflict of interest by virtue of being retained by Petitioner's trial attorney came at the beginning of his testimony, *see infra*. There was no pre-hearing colloquy between Petitioner and the PCR court. Instead, the hearing began with PCR counsel expounding on how her preparation and approach in Petitioner's case was unaffected by her having been retained by lead trial counsel Sanders. App. 549, l. 1 - 555, l. 12. As detailed at length above, this was inaccurate.

Petitioner was the second to last witness to testify in a full day PCR hearing. The colloquy consisted of PCR counsel leading Petitioner through a series of answers about his satisfaction with her representation. App. 689, l. 12 - 690, l. 14. Warnings about the potential dangers of having PCR Counsel retained by the trial counsel who was the target of the PCR action were couched in misleading, indirect terms:

Counsel: [W]hen I was hired to represent you by your sister, later when it became apparent that we were going to be doing a new PCR instead of a PCR appeal, you and I had discussions about the fact that your sister had hired me; didn't we?

Petitioner: Yes, ma'am.

Counsel: And I assured you that the fact that she was the one paying my fee was not going to in any way affect my tenacity with regard to raising claims of ineffective assistance of counsel against her; is that true?

Petitioner: Yes, ma'am.

Counsel: But we discussed that and I explained to you that she had paid my fee and you agreed to have me be your PCR lawyer anyway; right?

Petitioner: Yes, ma'am.

Counsel: And you understand the argument the State's making that since she paid my fee, arguably there might have been a conflict if I felt some kind of loyalty to her instead of you. Do you understand that argument?

Petitioner: Yes, ma'am

App. 689, l. 12 - 690, l. 6.

This counsel led colloquy was a wholly inadequate substitute for a court led examination "specifically advising" Petitioner of the hazards of being represented by an attorney retained by his trial counsel. *Carter*, 293 S.C. at 530, 362 S.E.2d at 21-22. Therefore, Petitioner did not voluntarily, knowingly, and intelligently waive his right to conflict free counsel. *See Watts v. State*, 347 S.C. 399, 556 S.E.2d 368 (2001) (in a PCR action, if the record fails to demonstrate the petitioner made an informed choice to waive constitutional rights, with "eyes open," then the petitioner did not make a knowing and voluntary waiver, and the case should be remanded for a new trial); *Bridwell v. State*, 306 S.C. 518, 413 S.E.2d 30 (1992).

III.

The PCR court erred in finding that defense counsels provided effective assistance of counsel where neither counsel corrected the trial court's false belief that Counsel Sanders had the opportunity at the first trial to participate in the cross-examination of key State's witness Aurelien Vigier through Counsel Williams when, in actuality, Counsel Sanders could not participate and the trial court's false belief was central to both its ruling admitting his testimony and to the Court of Appeals affirmance of Petitioner's conviction.

Discussion

The PCR court ruled that Williams and Counsel Sanders failure to respond to the trial court's assumption that Counsel Sanders was able to participate in Vigier's cross-examination through Counsel Williams did not constitute ineffective assistance. App. 769 - 772. There was no probative evidence presented at the PCR hearing to support this finding as the trial judge based its ruling on the false belief that Counsel Sanders was at counsels' table during the first trial.

During the second trial, Williams argued that admitting Vigier's prior testimony violated Peitioner's right to confront and cross-examine witnesses because evidence developed since the first trial indicated that Vigier and the State had a "tacit understanding" about the benefits he would receive in exchange for implicating Petitioner. App. 176, l. 19 - 183, l. 12. Williams further argued that Petitioner's first conviction was overturned because he was wrongly deprived of his counsel of choice, Counsel Sanders. *Id.*

The trial court replied, "I understand that she wasn't deprived of the right to be at trial, she was deprived of the right to participate as an attorney . . . . Didn't she get to participate -- I mean sit at the counsel table." App. 181, ll. 4-12. Williams wrongly responded that Counsel Sanders had sat at counsel's table. *Id.* Counsel Sanders did not correct Williams' misstatement.

At the evidentiary hearing Counsel Williams "credibly" testified that there were six people at counsel's table during the first trial: three defendants and three attorneys. App. 600, l. 15 - 601, l. 6. Williams could not specifically remember where Counsel Sanders was sitting during the first

trial, he speculated that she may have been sitting on the row behind counsels' table or in the empty alternate jury box, but "[n]ow I don't know that she was right up there or not, to be honest with you." *Id.*

When pressed, Williams conceded that Counsel Sanders was not at counsels' table during the first trial and that she was not able to actively participate in Vigier's cross-examination. App. 616, ll. 5-24. Williams stated that she would not have been able to "whisper in my ear" or confer with him during Vigier's testimony. App. 617, l. 2 - 618, l. 8. Moreover, Williams testified that in the Barnwell County Courthouse where Petitioner was tried both times, there is a barrier behind counsels' table and the pews begin approximately twelve feet after the barrier. *Id.* Making it physically impossible for Counsel Sanders to participate in the cross-examination.

Counsel Sanders recalled that, at Petitioner's first trial, she sat in the first or second row of the pews. App. 654, l, 11 - 656, l. 17. Because of where she was seated, she was unable to communicate with Counsel Williams or Petitioner during the trial and she did not remember whether she and Counsel Williams discussed how to question Vigier. *Id.*

Counsel Sanders conceded that failing to bring to the court's attention at the second trial that she had not sat at counsels' table during the first trial was a mistake. *Id.* Appellate Counsel Savitz agreed, noting that the Court of Appeals largely adopted the trial court's reasoning that Petitioner had a similar opportunity to develop Vigier's testimony because Counsel Sanders had been able to participate through Williams. App. 572, l. 3 - 575, l. 19. In affirming Petitioner's conviction, the Court of Appeals emphasized this point, "[d]espite ample opportunity, the only question defense counsel asked Vigier about his communications with the Solicitor's office was whether he was hoping to receive a deal from them. App. 479

Deficient Performance

Defense counsels' collective failure to correct the trial court's misconception about Counsel Sanders' location and ability to participate in Vigier's cross-examination constituted a deficient performance falling well below professional norms. *See Strickland*, 466 U.S. at 687-88. Whether Vigier's prior testimony would be admissible turned on whether Petitioner had a sufficient motive and opportunity to develop the necessary testimony in the first trial. App. 478; RULE 804(b)(1), SCRE.

The trial court ruled that the testimony was admissible because Counsel Sanders had been able to participate through Williams as, the court believed, she was seated at counsels' table. App. 181, ll. 4-12. The Court of Appeals agreed and noted that defense counsel had the same motive when examining Vigier at the first trial as they would have in the second trial and had only asked a single question regarding Vigier's agreement with the prosecution. App.479.

At the evidentiary hearing, the defense attorneys' testimony should have precluded a finding that their failure to correct the trial court's misconception was an informed tactical decision as neither attorney provided a reason for failing to correctly inform the trial court.; *Stone v. State*, 294 S.C. 286, 363 SE.2d 903 (1988) (failure to request self-defense instruction was not an informed tactical decision); *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625.

Williams' recollection of meeting with Counsel Sanders, as a layperson, and discussing the case with her during adjournments does not compensate for him inexplicably agreeing with the trial court's erroneous belief that Sanders was at counsels' table and thus able to participate contemporaneously. App. 181, ll. 4-12; *see Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003) (court's invocation of the "strategic decision" doctrine to justify counsel's failures "resembles more a post hoc rationalization of counsel's conduct than an accurate description of [counsel's] deliberations").

Prejudice

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

Vigier's testimony was central to the State's case against Petitioner as he was the only jailhouse informant called by the State who never changed his story. Whether his prior testimony was admissible was a critical evidentiary ruling. *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (counsel ineffective for failing to call treating nurse who would have testified that victim did not recognize her assailant when victim claimed at trial she recognized defendant as her attacker).

The trial court ruled the testimony admissible **immediately** after Williams agreed with the court that Counsel was able to participate in Vigier's cross-examination by sitting at counsels' table. App. 181, ll. 4-12; *Roberts v. State*, 361 S.C. 1, 602 S.E.2d 768 (2004) (counsel ineffective for failing to refute testimony by jailhouse informant, to whom prisoner allegedly confessed, that their cells were no more than 10 feet apart; there was evidence that cells were between 35 to 100 feet apart); *see also Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (reasonable probability that the results would have been different had trial counsel introduced evidence disproving State's misleading theory of the case).

Moreover, the Court of Appeals affirmed Petitioner's conviction because they agreed with the trial court's incorrect, but uncorrected assumption that Petitioner had the same motive and opportunity when examining Vigier at the first trial as he would have in the second trial and defense counsel only asked a single question. App. 477 - 479. If either court had been informed that Counsel Sanders was limited to interacting as a layperson, with Counsel Williams, there is a reasonably

probability that the trial court would not have found Vigier's testimony admissible. App. 180, l. 9 - 182, l. 18.

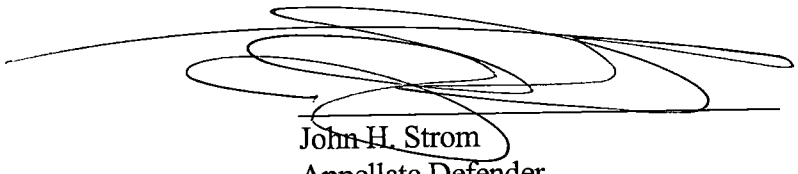
Likewise, the Court of Appeals would not have been able to dismiss Petitioner's argument by relying on the fact that Williams only asked Vigier one question about potential benefits for his testimony. App. 478. Implicit in the Court of Appeals' and the trial court's rulings is the belief that Counsel Sanders participated contemporaneously in the cross-examination. Therefore, if either defense attorney had brought to the trial court's attention that Counsel Sanders was not at counsels' table and was reduced to the role of a mere observer or a layperson in Petitioner's first trial, the ruling on the admissibility of Vigier's prior testimony may have been different.

Thus, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. at 688, 104 S.Ct. at 2062. Thus, the PCR judge erred in holding that counsel provided effective assistance of counsel. *Id.*

CONCLUSION

For the foregoing reasons, this Court should grant the petition with the ultimate relief of a new trial for Petitioner Tunzy A. Sanders.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of December, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Doyet A. Early, III, Circuit Court Judge

TUNZY A. SANDERS,

PETITIONER,

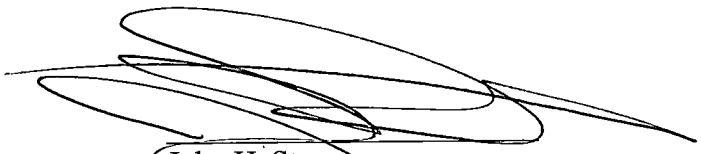
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

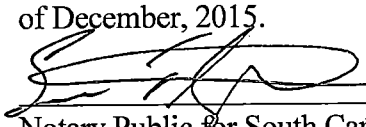
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Tunzy A. Sanders #255493, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 21st day of December, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of December, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.