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AUG 29 2016

S.C. SUPREME COURT

Honorable Daniel F. SHEAROUSE  
Clerk of Court  
P.O. Box 11330  
Columbia, SC 29211

August 24, 2016

Re: WRIT OF habeas Corpus  
2013-GS-26-4803

DEAR CLERK SHEAROUSE,

Please find the enclosed petition for WRIT OF habeas Corpus in the above reference action. Petitioner pray this court will entertain this petition and grant relief.

Sincerely,  
Greg. Green

cc: Attorney General's office

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THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

AUG 29 2016

Gregory Green # 196495  
Petitioner,

v.

STATE OF SOUTH CAROLINA  
Respondent.

Indictment No. 2013-65-26-4803  
S.C. SUPREME COURT

PETITION for WRIT of  
Habeas Corpus

This action comes before the Court by way of a Petition for WRIT of Habeas Corpus pursuant to S.C. Code Ann. 17-17-10. Petitioner has exhausted all state remedies and pray this Court will entertain this petition and grant relief for the following reason:

ISSUE PRESENTED

Trafficking first offense, pursuant to S.C. Code Ann. 44-53-370-(e)(3)(a) 1, is not a lesser included offense of trafficking second offense, pursuant to Code 44-53-370(e)(3)(a) 2, which deprived the Sentencing Court of Jurisdiction to impose the conviction and sentence entered on May 29, 2014.

## STATEMENT OF FACTS

Petitioner was indicted by the Horry County Grand Jury during the November, 2013 Term for trafficking in heroin, second offense Pursuant to S.C Code Ann. 44-53-370(e)(3)(a) 2. (2013-GS-26-4863). The STATE offered Petitioner a Plea to the lesser included offense of the offense charged in his indictment. Petitioner accepted the Plea offer in exchange for the STATE dismissing two pending charges. On May 29, 2014, Petitioner Signed the Sentence sheet indicating a Plea to a lesser included offense - trafficking first offense Pursuant to S.C Code Ann. 44-53-370(e)(3)(a) 1. As a result, Petitioner was sentenced to ten (10) years of imprisonment.

## PROCEDURAL BACKGROUND

On November 17, 2014 Petitioner filed a Pro se application for Post Conviction Relief (PCR) in Horry County. (2014-CP-26-7332). An Evidentiary hearing was held on February 11, 2016. The Honorable D. Craig Brown denied and dismissed Petitioner's application in its entirety. First, in a Form 4 Order filed February 11, 2016. By and Through PCR Counsel, Petitioner first sought to appeal Judge Brown's February 11, 2016 Form 4 Order dismissing his application. On March 16, 2016, the SOUTH CAROLINA Supreme Court vacated the February 11, 2016, Form 4 Order as non-complian-

With the specific findings of fact and conclusions of law requirement for PCR orders pursuant to S.C. Code Ann. 17-27-80. The SOUTH CAROLINA Supreme Court also dismissed the appeal without prejudice, and ordered the PCR Court to issue a written order that complies with S.C. Code Ann. 17-27-80. (Attachment); Green v. STATE, S.C. Sup. Ct. Order dated MAR. 10, 2016.

A Formal Order of Dismissal was served upon Petitioner's Counsel by the Attorney General's Office on March 23, 2016. By and through PCR Counsel, Petitioner filed a notice of appeal in regards to Judge Brown's formal order of Dismissal on March 25, 2016. On March 31, 2016, Petitioner filed a Pro se motion pursuant to Rule 59(e), SCRCP, requesting the PCR Court alter or amend its Order of Dismissal, where the Court's Order evaded the assignments of error presented in Petitioner's application. This Petition for Writ of Habeas Corpus follows.

## ARGUMENT

### I. LESSER included offense

Under the elements Test enunciated by the United States Supreme Court, S.C. Code Ann. 44-53-370(e)(3)(a) 1 is not a lesser included offense of Code 44-53-370(e)(3)(a) 2, which deprived the Sentencing Court of Jurisdiction to impose the conviction and Sentence entered on MAY 29, 2014.

In Schmuck v. United States, 489 U.S. 705, 715-21 (1989), the United States Supreme Court held:

"One offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense."

Applying the elements test analysis in Schmuck to the present case, Comports the conclusion the offense Petitioner pled to under S.C. Code Ann. 44-53-370(e)(3)(9) 1, is not a lesser included offense of the offense charged in his indictment.

First, under the elements test, the greater offense has to have at least "one additional element" to differentiate the two offenses. Here, the two offenses involved have "identical" elements. See Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932) (The test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.)

The Fundamental flaw in the State's theory is the mistaken belief that the "level of offense" is an element of the offense charged. Any argument whether Petitioner is a repeat offender is an offense element is foreclosed by the United States Court's decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct.

1219, 1222 (1998) (sentencing factor not element of offense charged); see also STATE v. Scirean, 337 S.C. 333, 529 S.E.2d. 71, 73 (S.C. Ct. App 2000) (Finding that 44-53-370 "contains Provision for sentence enhancement upon second ~~or~~ greater offense, [but] these Provisions are NOT elements of the offense.")

Second, there is no historical antecedent suggesting one trafficking offense is a lesser included offense of another trafficking offense.

In contrast, the Supreme Court of South Carolina held in Matthews v. STATE, "under this legislative scheme, we conclude that the legislature intended 'possession with intent to distribute' to be a lesser included offense of trafficking based upon possession." 300 S.C. 238, 241, 387 S.E.2d 258 (1990).

## II. THE Right to indictment by Grand Jury

Petitioner argues the Horry County Grand Jury did not return an indictment alleging a violation of trafficking in heroin first offense pursuant to S.C. Code Ann. 44-53-370(e)(3)(a) 1. STATE v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932) ("the Grand jury exists not merely to investigate and accuse, but acts as a curb on unbridled power of the sovereign.")

The Supreme Court of South Carolina has held that: "an indictment is a notice document that is required by the State Constitution and

Statute." Cf. STATE v. Smalls, 364 S.C. 343, 346, 613 S.E.2d 754, 756 (2005).

Petitioner asserts the offense to which he pled guilty is not a lesser included offense of the crime charged in his indictment, nor did he waive presentment to the grand jury. See Murdock v. STATE, 308 S.C. 143, 417 S.E.2d 543 (1992):

" Except for certain minor offenses, Circuit Court does not have jurisdiction to accept guilty plea unless there has been an indictment, waiver of indictment, or unless the charge is a lesser included offense of the crime charged in the indictment."

Murdock, was originally indicted for possession with intent to distribute LSD pursuant to S.C. Code Ann. 44-53-370(b)(1) (Supp. 1990). At the guilty plea proceeding, the indictment was amended to charge Murdock with possession of counterfeit LSD with intent to distribute pursuant to S.C. Code Ann. 44-53-370(a)(2) (Supp. 1990). This amended indictment was not presented to the grand jury nor was presentment waived. On review, this Court vacated the plea and remanded to the trial court because it found that the trial court lacked jurisdiction to accept the plea. The trial court could not hear the guilty plea unless there been an indictment on that charge, a waiver of indictment, or unless the charge was a lesser included offense of the crime charged in the indictment.

Petitioner argues the present case is sufficiently similar to Murdock. Petitioner's indictment was amended at the guilty plea proceeding from trafficking second pursuant to S.C. Code Ann. 44-53-370(e)(3)(a)2 to trafficking first offense pursuant to S.C. Code Ann. 44-53-370(e)(3)(a)1.

Since there was no indictment for trafficking first offense pursuant to S.C. Code Ann. 44-53-370(e)(3)(a)1, the Sentencing Court lacked Jurisdiction to accept the plea entered on May 29, 2014.

### CONCLUSION

Because trafficking first offense is not contained within Petitioner's indictment nor did he waive presentment, Petitioner's right to indictment by grand jury was violated. The authorities clearly establish the elements between the two offenses are identical, therefore, one trafficking offense is not a lesser included offense of the other. Since there was no indictment for trafficking first offense, the Sentencing Court did not have Jurisdiction to accept the plea. Therefore, Petitioner Pray this Court will grant this Petition for a Writ of Habeas Corpus so he can be reunited with his Family.

Respectfully submitted,  
Greg. Green

August 24, 2016

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THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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AUG 29 2016

S.C. SUPREME COURT

Gregory Green #196495  
Petitioner.

vs.

STATE OF SOUTH CAROLINA  
Respondent.

AFFIDAVIT OF SERVICE  
By MAIL

1. I am the Petitioner in the above captioned action.
2. Regular communication by mail exist throughout the STATE of SOUTH CAROLINA and this is a Profer circumstance of Service by mail.
3. I have this day served a copy of WRIT of habeas Corpus in the above caption matter on the following person by depositing same in the U.S mail.

Assistant Attorney General

Jessica E. Kinard, Esq  
Post Office Box 11547  
Columbia, SC 29211

Gregory Green  
Petitioner

Dated this 24<sup>th</sup> day of August, 2016

Gregory Green # 196495  
Tyger River CARR.  
208 Prisons Rd.  
Enoree, SC 29335

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AUG 24 2016  
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SUPREME COURT OF SOUTH CAROLINA  
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