STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable D. Craig Brown, Circuit Court Judge

DENNIS SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2015-002204

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel were constitutionally ineffective in derogation of petitioner's Sixth Amendment rights because they advised petitioner to plead guilty to drug charges before receiving test results that would have shown that some of the pills seized were not illegal?

STATEMENT

Petitioner was charged with multiple drug offenses in Lexington County and Aiken County. Petitioner was indicted in Lexington County for trafficking methamphetamine, 10-28 grams, third offense. App. 362. Petitioner waived jurisdiction and venue and on September 1, 2011, pled guilty in Aiken County before the Honorable Doyet A. Early, III. App. 1. Petitioner was represented on the Aiken County charges by Charles H. S. Lyons, III, and Michael D. Routzong. App. 1. John W. Carrigg, Jr. represented petitioner on the Lexington County charges. App. 1. Elizabeth Burkhalter Young represented the State. App. 1. Judge Early sentenced petitioner to concurrent terms of twenty years' imprisonment for trafficking methamphetamine, second offense, twenty years' imprisonment for possession with intent to distribute methamphetamine, twenty years' imprisonment for possession of pseudophedrine, two ten-year terms of imprisonment for manufacturing methamphetamine in the presence of a child, ten years' imprisonment for possession with intent to distribute marijuana, second offense, and twenty years' imprisonment for manufacturing methamphetamine. App. 41, ll. 3 – 23. Petitioner did not appeal. App. 363.

On May 23, 2012, petitioner filed PCR applications. App. 43. On April 9, 2014, petitioner moved to have his PCR consolidated in Aiken County. App. 58. On April 18, 2014, the PCR court ordered the cases consolidated for the purposes of a hearing. App. 65 – 69.

On January 13, 2015, a hearing was held on petitioner's applications in Aiken County before the Honorable D. Craig Brown. App. 70. Tricia A. Blanchette represented petitioner. App. 70. J. Walter Whitmire and Daniel F. Gourley represented the State. App. 70. The PCR court denied petitioner's applications. App. 329. Petitioner filed a motion pursuant to Rule 59(e). App. 349. On August 5, 2015, Judge Brown denied petitioner's Rule 59(e) motion. App.

358. On December 16, 2015, the court issued an Amended Order of Dismissal. App. 362. Supp. App. 1. This petition follows.

ARGUMENT

Petitioner was charged with drug crimes for substances that were not illegal drugs. Petitioner's attorneys did not know this fact before advising petitioner to accept a plea offer from the State. This plea offer included the dismissal of the charges related to the substances which were not illegal. Had petitioner known that part of the benefit of the bargain included dismissal of charges which could not be proved, he would not have accepted the plea offer. Therefore, petitioner's guilty plea was unknowing and involuntary.

Three separate incidents formed the basis of petitioner's charges. The Lexington charges stemmed from an incident at a CVS store on January 25, 2011. App. 88, ll. 15 – 21. App. 265. Petitioner entered the police incident report into evidence at the PCR hearing. App. 91, l. 21 – 92, l. 14. App. 265. According to the incident report, the police responded to CVS after petitioner and another man, John Hagleston ("Hagleston"), attempted to purchase ephedrine. App. 265. The police questioned and searched petitioner, found no contraband on his person, but found an item that a CVS employee alleged petitioner had shoplifted. App. 266. Petitioner was placed in investigative detention. App. 266. Petitioner and Hagleston both denied driving to CVS. App. 265-66.

The police noticed a Ford Explorer parked near the entrance to the CVS with keys in the ignition. App. 266. The police saw items associated with methamphetamine production in the Ford. App. 266. A check on the license tag revealed the truck belonged to petitioner's father. App. 266. The police obtained a search warrant. App. 266. Police found marijuana and methamphetamine. App. 268. Police also found 61 "suspected dosage units" of ecstasy and what they believed were over 600 Schedule II, III, and IV pills. As a result of the search, petitioner was charged with: (1) PWID Marijuana, third offense; (2) possession of drug

trafficking methamphetamine, third offense; (4) possession of ecstasy, third offense; and (5) possession of schedule II, III, IV controlled substance, third offense. App. 267. John Carrigg ("Carrigg") represented petitioner on these charges. App. 88, ll. 21 – 22.

One set of the Aiken charges related to a traffic stop on February 24, 2010. App. 19, ll. 2 – 6. The police pulled petitioner over for speeding and not using a turn signal. App. 19, ll. 3 – 17. Inside the car, the police found suspected marijuana, methamphetamine, crack cocaine, and psuedophedrine. App.19, l. 18 – 20, l. 22. Petitioner was charged with possession with intent to distribute methamphetamine, second offense, and possession of pseudophedrine, second offense. App. 3, ll. 12 – 22. Charles H. S. Lyons, III, ("Lyons") represented petitioner on these charges. App. 229, l. 12 – 232, l. 24.

The other set of Aiken charges related to a search of a residence on June 22, 2011. App. 24, l. 9 – 25, l. 6. After obtaining a search warrant, the police found materials for manufacturing methamphetamine. App. 24, l. 12 – 27, l. 4. Petitioner was charged with manufacturing methamphetamine, second offense; manufacturing methamphetamine within a half-mile of a school, two counts of manufacturing methamphetamine in the presence of a child, and possession of marijuana with intent to distribute. App. 6, l. 13 – 7, l. 1. Michael D. Routzong ("Routzong") represented petitioner on these charges. App. 6, l. 13 – 7, l. 21.

Petitioner pled guilty at a consolidated plea before Judge Early and received concurrent sentences that ultimately totaled twenty years' imprisonment. App. 41, ll. 1 – 23. Three charges from Lexington County were dismissed. App. 41, ll. 1 – 2. The charges that were dismissed related to the pills and suspected ecstasy found in the car at the CVS. App. 105, l.8 – 106, l. 12. At the guilty plea hearing, Judge Early asked what kind of pills were found and the solicitor

stated she did not have the results because she assumed the solicitor in Lexington planned to dismiss those charges. App. 23, ll. 11 – 15.

At the PCR hearing, petitioner testified he never saw any test results or drug analysis related to the ecstasy and pill charges. App. 106, ll. 13 – 18. Petitioner obtained from SLED their testing of these substances and the test results were presented at the PCR hearing. App. 106, l. 19 – 114, l. 19. The suspected ecstasy tablets tested negative for controlled substances. App. 108, l. 16 – 115, l. 9. App. 279-280. The other pills were visually examined and not tested. App. 121, ll. 17 – 22. App. 285-294.

At the PCR hearing, Carrigg admitted that he never saw the SLED test results. App. 154, ll. 5 – 12. Carrigg stated, "I saw them for the first time today." App. 154, ll. 8 – 12. He agreed that had he known the drugs were counterfeit, he "wouldn't have dealt on a charge that they couldn't have made." App. 155, ll. 5 – 11. He further stated that "dismissing a charge you can't make is nothing. That doesn't have any value to it." App. 155, ll. 5 – 11.

Even though Judge Early asked about the pills at the plea hearing, Lyons said informing the trial judge about defenses to charges that were being dismissed was "nonsense and so I wasn't going down that road." App. 238, l. 16 – 239, l. 18. On cross-examination, Lyons agreed that part of his strategy was to advise petitioner to plead guilty because of the three open cases and the possibility of life without parole. App. 245, l. 23- 249, l. 17. Routzong stated that he never received a drug analysis. App. 254, ll. 10 – 20.

Trial counsel were ineffective in advising petitioner to accept a guilty plea that was based in part on the dismissal of charges that could not be proved by the State. Simply put, petitioner did not receive the benefit of his bargain. This rendered petitioner's guilty plea unknowing and involuntary. "The longstanding test for determining the validity of a guilty plea is whether the plea

represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted).

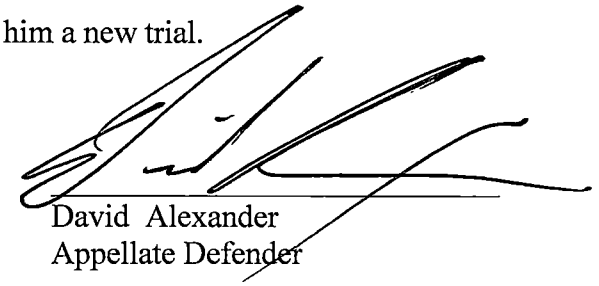
The South Carolina Supreme Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving ten years when, in reality, the defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. Hinson found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988) (petitioner pled guilty upon assurance that solicitor would not oppose probation, which the State ultimately vigorously opposed). As in these cases, plea counsel's failure to review the drug reports resulted in petititioner pleading without having correct, relevant information about all of his charges. Petitioner could have negotiated for a better deal had he known that the State could not prove some of his charges.

Petitioner can also prove prejudice. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove prejudice under Strickland in a plea context, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 132 S.Ct. at 1384. "[A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 130 S.Ct. at 1485. However, the primary focus remains on

whether petitioner's plea was involuntary and that he would not have otherwise pled guilty. Lockhart, 474 U.S. at 56-57. In Lockhart, the Court noted that prejudice could be shown if it would have caused plea counsel to change his recommendation. Id. at 59. Petitioner testified that had he known about the results of the drug testing, he "would have pushed forward with a trial." App. 124, ll. 1 – 9. This decision would have been rational had petitioner known all of the facts surrounding all of his charges. Therefore, petitioner has demonstrated prejudice under Strickland and Lafler. This Court should grant certiorari and reverse petitioner's convictions.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions and granting him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of September, 2016.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dennis F. Sanders states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's trial before the Honorable D. Craig Brown, which was held on January 13, 2015 (PCR hearing), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Dennis F. Sanders.

Respectfully Submitted,

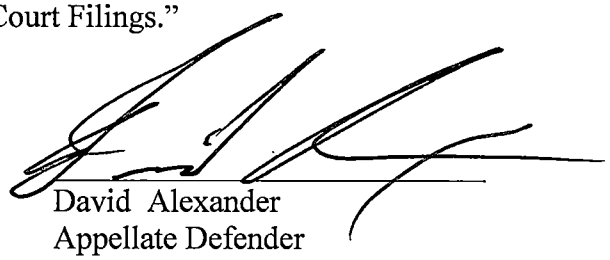
David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of September, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix and Supplemental Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Dennis F. Sanders, #245612, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 6th day of September, 2016.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of September, 2016.

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