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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable G. Thomas Cooper, Circuit Court Judge

DAMON T. BROWN

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2017-001635

MOTION TO AMEND JOHNSON PETITION FOR WRIT OF CERTIORARI ARGUMENT

I Damon T. Brown hereby filed this "motion to amend" to make changes to this Johnson Petition for Writ of Certiorari argument, in this State of South Carolina Supreme Court on this 20 day of February, 2018.

Damon T. Brown 2- -18
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Damon T Brown #357300
Kirkland Cor. Inst.
4344 Broad River Rd
Columbia, SC 29210

ARGUMENT

Petitioner's guilty plea was not Knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's erroneous advice that he was indicted for distribution of cocaine, third offense, and trafficking cocaine base, third offense, where his prior record only supported an enhancement to a second offense pursuant to S.C. Code Ann. 44-53-470, and where petitioner was prejudiced because if he would have known his charges could not be enhanced to a third offense he would have proceeded to trial.

Plea counsel erroneously advised Petitioner that he was indicted for distribution of cocaine, third offense, and trafficking cocaine base, third offense, when Petitioner's prior record did not support such an enhancement. Petitioner was prejudiced by counsel's erroneous advice because if he would have known the state could not enhance his charges to a third offense, he would not have pled guilty. Instead, he would have proceeded to trial. Where Petitioner's counsel failed to provide him with any Brady materials or evidence favorable to petitioner, before sentencing, violates the 14th U.S.C.A amendment of Due Process. Specifically in the indictments of the case at bar, 2012-GS-08-1108.

The difference "between a valid guilty plea and an invalid guilty plea lies in the Knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675, S.E. 2d 425, 427 (2009).

Counsel's performance was deficient, where had he provided petitioner with indictments well before plea negotiations, the petitioner would have been able to know and understand the charges before him and not just what counsel was or was not willing to tell him to illicit a plea under duress." The long standing test for determining the validity of a 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) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466, U.S. 668 (1984), to claims of the same against plea counsel.)

"The voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. The 6th U.S.C.A amendment requires effective assistance of counsel at critical stages of criminal procedures, not simply at trial. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial." Id. 59. Sentencing of petitioner is/was improper where the plea negotiated for petitioner without counsel providing all Brady materials prior to plea negotiations, prejudiced the petitioner under the 8th U.S.C.A. amendment. Parks v. Delo 33 F. 3d 933 (8th Cir. 1994). Because plea negotiations are treated as contracts and Brady materials is a right by Constitutional Law, counsel denied defendant Due Process

under Material Disclosure Laws. Brady v. Maryland 373 U.S. 83, 83 Sup. Ct 1173 (1959). "The voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33 528 S.E.2d 418, 420 (2000)).

Here, plea counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Specifically, plea counsel was ineffective because he erroneously advised Petitioner that the state could enhance his charges to a third offense and that, due to his prior record, pleading guilty to a second offense "was the best that could be done." App. 65, ll. 12-16. The State failed to meet the required standard for indictments, therefore depriving court of subject matter jurisdiction to even hear the case. This standard must be supported from the origin of the case and is a requirement of constitutional law, which prevents prejudice, bias, or malicious prosecution. However, a review of Petitioner's charges could only be enhanced to a second offense, not a third. See App. 88-93. "Absent a charge of every essential element of an offense, an indictment is invalid. When the words of a statute are used to describe the offense generally, they must be accompanied with such a statement of the facts and circumstances as will

inform the accused of the specific offense coming under the general description, with which he is charged." (quoting Hamling v. U.S. 418 U.S. 87, 117-118 (1974). The indictment or information in general under U.S. v. Wharton 840 F.3d. 163 and U.S. v. Kellum F.3d. 125 (2009) clearly provide that indictment error or variance of indictment, by or through illegal acts of construction, amendment of indictment, proves to be actual prejudice and warrants reversal of plea, conviction, and sentence. U.S. v. Mason 532 Fed Appex 432, 6th U.S.C.A amendment. Because of counsel's erroneous advice, Petitioner was prevented from making a voluntary and intelligent choice among the alternative courses of action available to him, rending his plea invalid. Consequently, providing an enhanced punishment and a sentence which" exceeds the maximum authorized by law.

The Fairness and adequacy of the procedures on accepting/ acceptance of pleas of guilty are of vital importance in Equal Justice to all in the courts and to protect a defendant who is in the position of pleading voluntarily with the nature of the charges against him. Meeks v. U.S. 298 F.2d. 204 (5th Cir. 1962), Stinson v. U.S. 316 F.2d 554 (8th Cir. 1963), U.S. v. Mastrapa 509 F.3d 652. The face of Petitioner's indictments provide no code or clear offense to which he was charged. The body of indictment provides no clear offense. Clearly defendant believed he was defending against a first offense under 44-53-375 (c)(1), his original charge, but accepted counsel's advice, without

any Brady materials, that a second offense was the best offer possible. The material elements and variance did alter the parts that compose the proper charging of a crime. Defendant's 14th U.S.C.A. amendment to Due Process and Constitutional Rights have been violated because an indictment is a critical document in criminal defense preperation that is grounded in constitutional and statutory principles. S.C. Const. Art. 1 § 11, State v. Gentry 343. S.C. 903, 610 (2005).

Moreover, Petitioner was undisputedly prejudiced. He asserted that he would not have pled guilty if he would have known his sentence could not be enhanced to a third offense. Instead, he would have proceeded to trial. App. 84, l. 22-85, l. 9. Consequently, there is a reasonable probability that, but for counsel's ineffective assistance, Petitioner would not have pled guilty and would have insisted on going to trial.

As a result of the invalid plea and the resulting prejudice, Petitioner's convictions should be reversed, and respectfully, the courts should resentence him as a first offender under 44-53-375(c)(1)(a), to which he was originally charged.

CONCLUSION

Petitioner respectfully requests this Honorable Court to grant his petition for writ of certiorari relief and permit full briefing on the issue presented.

Respectfully submitted,

Damon Brown

Damon Brown

Pro se Petitioner

This 20 day of February, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the "motion to amend Johnson Petition for Writ of Certiorari argument" in the above mentioned case have been served upon Daniel Shearhouse, clerk, at P.O. Box 11330, Columbia, SC 29211; and request for acknowledgement of service; on this 20 day of February, 2018.

Damon T. Brown

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