

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Cherokee County

Honorable G. Thomas Cooper, Circuit Court Judge

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JAMARCUS FOSTER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER **RECEIVED**

JUN 18 2018

S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO 2017-002476

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PETITION FOR WRIT OF CERTIORARI

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LANELLE CANTEY DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**ORIGINAL**

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**ISSUE PRESENTED**

Did the PCR court err in failing to find that Petitioner Foster had a claim that was proper for PCR because his plea counsel was ineffective for misadvising Petitioner Foster concerning the amount of time he was required to serve and that his charge was non-violent when it was changed to violent by the Department of Corrections?

## STATEMENT

In September 2015, the Cherokee County Grand Jury indicted Petitioner Foster on the charges of distribution of methamphetamine third offense (2015-GS-11-0832); and distribution of methamphetamine within one-half mile of a school. App. 76 – App. 81. In June 2016, the grand jury indicted Petitioner Foster on the charge of domestic violence second degree. App. 90 – App. 91.

On July 22, 2016, Petitioner Foster appeared before the Honorable R. Keith Kelly and entered guilty pleas to the two indicted charges of distribution of methamphetamine and the proximity charge.<sup>1</sup> Foster was represented by Michael Morin on these two charges, and the state was represented by Kim Leskanic. App. 1- App. 4.

At the guilty plea, the solicitor told the court that the state had served Foster with a notice of life without parole (LWOP). The state had then extended a plea offer to Petitioner Foster on the two indicted charges. If Foster did not take the plea offer, then the state would go forward on the LWOP notice. The state explained that when Foster came for roll call the previous Monday, he was arrested for two new charges of distribution of methamphetamine and distribution of methamphetamine within the proximity of Alma Elementary School. He was representing himself on those new charges. App. 4, ll. 1 – 25; App. 6, ll. 3 – 5; App. 11, ll. 7 – 9.

Petitioner Foster agreed to take the negotiated plea sentence which was for eighteen years total which included the two indicted charges on which plea counsel represented him, and the two new charges on which Foster represented himself. App. 7, ll. 1 – App. 10, ll. 25. The state

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<sup>1</sup> The domestic violence charge was later dismissed. App. 73, Footnote 2.

told the court that he was asking for concurrent sentences since Foster would be doing eighty-five percent of his sentence. App. 9, ll. 12 – 20.

The judge accepted the negotiated sentence of eighteen years. App. 27, ll. 18 – App. 30, ll. 25. Petitioner Foster was on probation at the time of this plea for distribution of crack cocaine first offense and an accompanying proximity charge within a half mile of a school. The plea judge revoked his fifteen-year probation sentence and ran it concurrent with the other sentences for his guilty pleas. App. 42, ll. 1 – 23.

Petitioner Foster did not appeal his convictions or sentences. App. 73.

On January 17, 2017, Foster filed an application for post-conviction relief (PCR). The state filed a return and partial motion to dismiss on July 19, 2017. Petitioner Foster filed an amended PCR application on July 27, 2017. App. 58. An evidentiary hearing was held before the Honorable G. Thomas Cooper on November 15, 2017. Petitioner Foster was represented by Rodney W. Richey, and the state was represented by Valerie Giovanoli. App. 62. Foster's plea counsel, Michael Morin, did not testify at the PCR hearing. App. 63.

At the PCR hearing, Petitioner Foster testified that his only issue was that the Department of Corrections (DOC) changed his sentence in February 2017 from nonviolent to violent. Then he was required to serve eighty-five percent of his sentence which was an additional six years. He believed he was pleading guilty to nonviolent charges and that would be the sentence he would serve. App. 66, ll. 6 – App. 68, ll. 1.

The state told the court that PCR counsel had filed an amended PCR application with thirty-one allegations. However, those issues were not presented at the PCR hearing. App. 68, ll. 24 – App. 69, ll. 3.

The judge told PCR counsel that Petitioner's only issue was not an ineffective assistance of counsel issue. PCR counsel said that they understood that. However, Petitioner Foster wanted that issue on the record. Counsel said: "If he withdraws his case, it might affect his ability to do a writ in federal court because he did not exhaust all of his state remedies." App. 69, ll. 3 – 11. PCR counsel argued that the state unlawfully changed Foster's sentence. App. 69, ll. 11 – 14.

The judge then granted the state's motion to dismiss Foster's case because it was not part of his PCR application. PCR counsel stated that they were aware of what the outcome would be. App. 69, ll. 15 – 21.

On November 27, 2017, the PCR judge filed an order dismissing Petitioner Foster's PCR application with prejudice. App. 72 – App. 75. The judge found that Foster had not established any claims "that would warrant post-conviction relief." The judge wrote that "an ineffective assistance of counsel claim alleging that plea counsel had misadvised him regarding the amount of time he was required to serve was proper for PCR." However, the order provided that Foster neither pled such a claim in his PCR application nor alleged such in his testimony. His only complaint was about SCDC's action affecting his sentence. App. 74.

PCR counsel filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find that Petitioner Foster had a claim that was proper for PCR because his plea counsel was ineffective for misadvising Petitioner Foster concerning the amount of time he was required to serve and that his charge was non-violent when it was changed to violent by the Department of Corrections.

Petitioner Foster agreed to plead guilty to a negotiated plea agreement. He believed it was a nonviolent charge because the sentencing sheet had “nonviolent” marked. DOC changed this nonviolent to violent after he arrived at DOC. The record reflects that plea counsel made no objection.

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certain certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege.” State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant’s waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S.668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Where a defendant pleads guilty in exchange for trial counsel's promise of a certain sentence, and does not receive that sentence, his guilty plea is invalid. Craddock v. State, 327 S.C. 303, 491 S.E.2d 251 (1997).

Petitioner Foster signed four sentencing sheets which indicated that the charges were nonviolent. App. 78; App. 82; App. 86; App. 89. The plea judge told Foster during the plea that the charge in Indictment 2015-GS-11-0832, which was distribution of methamphetamine, was nonviolent but a serious charge. App. 12, ll. 16 – App. 13, ll. 10.

Again, on the second charge of distribution of methamphetamine in Indictment 2016-GS-11-0987, which was not presented to the grand jury, the judge told Foster that the charge was nonviolent. App. 14, ll. 14 – App. 15, ll. 12. On the two proximity charges, the judge told Foster those charges were nonviolent which was correct. App. 11, ll. 17 – App. 12, ll. 11; App. 15, ll. 13 – App. 16, ll. 11.

South Carolina Section 16-1-60 lists the crimes defined as violent. Manufacturing or trafficking methamphetamine as defined in Section 44-53-375 is included. The proximity charge is not listed. Therefore, the sentencing sheets for the two distribution charges were inaccurate and the plea judge erred in telling Foster those two charges were nonviolent. Section 44-53-375 (B)(3) was the statute under which Foster was indicted and the one that was not indicted both for distribution of methamphetamine. App. 78; App. 86.

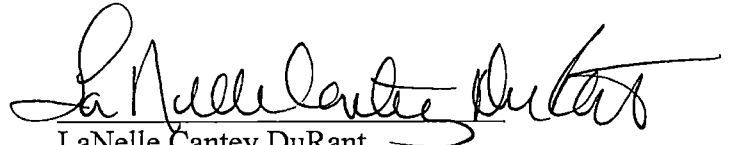
Plea counsel made it clear to the court that he represented Foster only on the charges that were indicted. Foster was *pro se* on the other two drug charges that were not indicted. App. 11, ll. 1 – 9.

Plea counsel was ineffective for not insuring that the sentencing sheets were accurate and for not objecting when the judge told Foster those charges were nonviolent. Plea counsel was ineffective for allowing his client, Foster, to sign a plea sheet with a negotiated sentence that did not comport with the law. Foster was prejudiced because his guilty plea was not knowingly entered. Petitioner Foster was prejudiced because the violent charge had consequences for his time in prison.

The PCR court erred in not allowing Foster's case to go forward as an ineffective assistance of counsel in light of such an obvious error based on statutory issues.

**CONCLUSION**

Based on the above, certiorari should be granted, petitioner's convictions and sentences reversed, and the case remanded.

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of June, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Cherokee County

Honorable G. Thomas Cooper, Circuit Court Judge

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JAMARCUS FOSTER,

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V.

STATE OF SOUTH CAROLINA,

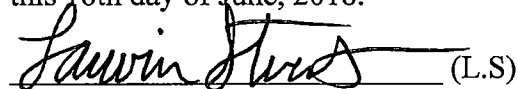
RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jordan Cox, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Jamarcus Foster, #335320, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of June, 2018.

  
LaNelle Cantey DuRant  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 18th day of June, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.