STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-002476

JAMARCUS DELEON FOSTER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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I. **Because the issue of Counsel misadvising Petitioner concerning his sentencing or charge classification was first raised in the petition for writ of certiorari, Petitioner failed to properly preserve the issue for appellate review.**

II. **Because Petitioner's only allegation was the State unlawfully changed his charge classification and admitted he was raising the issue only to protect the ability to file a writ in federal court, the PCR court properly dismissed Petitioner's case.**

III. **In the event the issue of whether Petitioner was misadvised concerning his sentencing or charge classification was properly preserved, Petitioner failed to present any evidence that he was misadvised by Counsel concerning his possible sentence or charge classification and the PCR court properly denied relief.**

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STATEMENT OF THE ISSUES

I. Did Petitioner fail to properly preserve the issue of ineffective assistance of counsel for Counsel allegedly misadvising Petitioner concerning his sentencing and charge classification?

II. Did the PCR court properly dismiss Petitioner's case as improper for post-conviction relief, when his only allegation was the State unlawfully changed his charge classification?

III. *In arguendo*, did the PCR court properly deny relief for Petitioner failing to present any evidence that he was misadvised by Counsel concerning his sentencing and charge classification?

STATEMENT OF THE CASE

Petitioner appeals the denial of his application for post-conviction relief on November 27, 2017. (App. p. 72). On June 5th, 2015, an undercover operative for the Cherokee County Sheriff's Department purchased 0.35 grams of methamphetamine from Petitioner Jamarcus Deleon Foster. (App. p. 33-34). On June 16, 2015, Petitioner again sold methamphetamine to an undercover operative working with the Cherokee County Sheriff's Department. (App. p. 24 – 25). The location of both purchases was Petitioner's home, located within one-half mile of Alma Elementary School in Cherokee County, South Carolina. (App. p. 25, 33).

During its September 2015 term, the Cherokee County Grand Jury indicted Petitioner for distribution of methamphetamine, 3rd or subsequent offense (2015-GS-11-0832) and distribution of methamphetamine within one-half mile of a school (2015-GS-11-0833).[1] (App. p. 76 – 81). These two charges resulted from the June 6, 2015, purchase and Petitioner was represented by his appointed attorney Michael Morin, Esquire ("Counsel"). (App. p. 11).

Petitioner was later indicted for distribution of methamphetamine, 3rd or subsequent offense (2016-GS-11-0987) and distribution of methamphetamine within one-half mile of a school (2016-GS-11-0988). (App. p. 84 – 87). The two subsequent indictments resulted from the June 16, 2015, purchase. (App. p. 84 – 87). Counsel was not appointed for the two subsequent indictments and Petitioner proceeded *pro se* on these two charges. (App. p. App. p. 15 – 16).[2]

On July 22, 2016, Petitioner appeared before the Honorable R. Keith Kelly of the South Carolina Circuit Court. (App. p. 1). The State was represented by Deputy Solicitor Kim Leskanic of the Seventh Circuit Solicitor's Office. (App. p. 1). Ms. Leskanic informed the court that the

[1] During the same grand jury term, Petitioner was also indicted for domestic violence in the second degree (2015-GS-11-0769). Petitioner entered a plea of not guilty to this single charge.

[2] Petitioner waived presentment to the grand jury on the indictments resulting from the June 16, 2015, purchase.

State had negotiated a plea agreement of eighteen years for all charges. (App. p. 24). Ms. Leskanic explained that Petitioner had been served with notice that the State was prepared to pursue a life without parole sentence following trial on indictments 2015-GS-11-0832 and -0833. (App. p. 24). Judge Kelly first accepted Petitioner's guilty plea to indictments 2015-GS-11-0987 and -0988. (App. p. 25). As a result of his *pro se* guilty plea, Petitioner was in violation of his active probation from prior convictions of distribution of crack cocaine and distribution of crack cocaine within one-half mile of a school. (App. p. 26). Judge Kelly then accepted guilty pleas for the remaining two indictments from Petitioner as he was being represented by Counsel. (App. p. 42). When asked by Judge Kelly if he was guilty of all offenses, Petitioners responded "I'm guilty of everything but the domestic violence." (App. p. 19).

Judge Kelly sentenced Petitioner to eighteen years of incarceration for both charges of distribution of methamphetamine, third offense, and ten years of incarceration for both charges of distribution of methamphetamine within one-half mile of a school. (App. p. 42). Each sentence was ordered to run concurrent with all other charges and his probation violations. (App. p. 42). Each sentencing sheet listed the charge as non-violent and serious offenses.[3] (App. p. 78, 82, 86, 89). During the plea hearing, the following exchange occurred:

> THE COURT: Is [Petitioner] on probation?
>
> MS. LESKANIC: I haven't done anything with probation, Your Honor. All of our charges are a negotiated sentence, concurrent.
>
> THE COURT: Concurrent?
>
> MS. LESKANIC: I haven't --

---

[3] Under S.C. Code § 16-1-60, distribution of methamphetamine, 3rd offense, is not specifically enumerated as a violent offense.

MR. MORIN: We haven't negotiated [probation], but I'm going to ask that, since [Petitioner]'s doing eighty-five percent of that.

(App. p. 9). Petitioner did not appeal his convictions or sentence.

On January 17, 2017, Petitioner filed an application for post-conviction relief. (App. p. 46). In his original application, Petitioner alleged he was unlawfully being held in custody for:

1. Entrapment
   a. "The informant was a sex-offender and the police sent him to my house where kids live"
2. Ineffective assistance of counsel
   a. "He knew the informant was committing a crime to get me to commit a crime"

Respondent made its return and partial motion to dismiss on July 19, 2017, requesting an evidentiary hearing. (App. p. 52). After being appointed counsel, Petitioner filed an amended application on July 27, 2017, alleging thirty-one new grounds of ineffective assistance of counsel. (App. p. 58).

On November 15, 2017, an evidentiary hearing was held on Petitioner's application before the Honorable G. Thomas Cooper, Jr., in Spartanburg County, South Carolina. (App. p. 62). Petitioner appeared and was represented by his appointed counsel Rodney W. Richey, Esquire. (App. p. 62). Valerie G. Giovanoli, Esquire, of the South Carolina Attorney General's Office represented Respondent. (App. p. 62). Petitioner was the only witness to testify at the hearing. (App. p. 63).

At the hearing, Petitioner testified he entered the Department of Corrections on an eighteen-year sentence for non-violent charges. (App. p. 66). Petitioner alleged that his charges were reclassified as "violent" on February 8, 2017, requiring him to serve eighty-five percent of the eighteen year sentence and adding six years to his incarceration. (App. p. 67). Petitioner did

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner asserts the PCR court erred by failing to find Petitioner's claim that Counsel was ineffective for misadvising Petitioner concerning the amount of time he was required to serve and that his charge was non-violent, when it was allegedly changed to violent by the South Carolina Department of Corrections. However, this issue was first raised in the Petitioner for writ of certiorari and was never properly alleged to the post-conviction relief court. *In arguendo*, should this Court find the issue preserved for review, the post-conviction relief court properly dismissed Petitioner's application, as Petitioner never alleged nor presented any evidence that he was misadvised by Counsel prior to entering his guilty plea.

I. Because the issue of Counsel misadvising Petitioner concerning his sentencing or charge classification was first raised in the petition for writ of certiorari, Petitioner failed to properly preserve the issue for appellate review.

In seeking certiorari, Petitioner asserts for the first time that Counsel misadvised him 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 failed to raise this allegation in his original application for post-conviction relief.[4] After amending his application to include thirty-one new allegations of ineffective assistance of counsel, Petitioner again failed to specifically question the advice of Counsel concerning his sentencing or parole eligibility. (App. p. 58). During the PCR hearing, Petitioner raised the sole issue of "that the State unlawfully changed his sentence." (App. p. 69).

Issue preservation requires that an issue be raised to and ruled upon by the trial judge; the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. Malloy v. Thompson, 409 S.C. 557, 561, 762 S.E.2d

[4] In his original application, Petitioner stated "he knew the informant was committing a crime to get me to commit a crime" as his grounds for ineffective assistance of counsel. (App. p. 46).

690, 692 (2014) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731(1998)). An issue cannot be raised for the first time on appeal. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Prior to filing the petitioner for writ of certiorari, Petitioner never specifically alleged Counsel misadvised him concerning his sentence and the classification of the charges he was facing. No allegation, raised during or prior the evidentiary hearing, was sufficiently clear to bring into focus the precise nature of the now alleged error of Counsel's erroneous advice. Therefore, the issue has not been properly preserved and this Court should deny certiorari.

II. Because Petitioner's only allegation was the State unlawfully changed his charge classification and Petitioner admitted he was raising the issue only to protect the ability to file a writ in federal court, the PCR court properly dismissed the case.

Petitioner asserts the PCR court erred in not allowing Foster's case to go forward as an ineffective assistance of counsel. Since Petitioner's lone allegation was not a cognizable claim for relief, the PCR court properly dismissed the application as being improper for PCR.

Petitioner proceeded on one allegation at his evidentiary hearing. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

Post-conviction relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Claims that affect only the duration of the sentence or quality of the inmate's confinement do not affect the validity of the conviction or sentence and therefore are considered non-collateral attacks on the conviction. Cooper v. State, 338 S.C. 202, 525 S.E.2d 886 (2000). A claim for time served is a non-collateral attack of a conviction and may only be pursued under the Administrative Procedures Act (S.C. Code Ann. §§ 1-23-10 to -160, 1-23-310 to -400, 1-23-500 to -660). Id. As stated in Cooper, by challenging the duration of the sentence, an applicant is in fact trying to enforce the sentence and is therefore not making a collateral attack on the conviction.

Petitioner testified "they changed my sentence from nonviolent to violent." (App. p. 67). When asked if this was his issue, Petitioner testified "yes, sir." (App. p. 67). Petitioner did not testify as to any other allegations or issues concerning his PCR application. While being questioned by the PCR court, PCR counsel admitted that Petitioner wanted this issue on the record in order to not affect his ability to file a writ in federal court, "because he didn't exhaust all of his state remedies." (App. p. 69). The record and testimony reflect it was Petitioner's desire to challenge the duration of his sentence after an alleged change in his classification by the South Carolina Department of Corrections. Therefore, the PCR court properly dismissed the application and certiorari should be denied.

III. In the event the issue of whether Petitioner was misadvised concerning his sentencing or charge classification was properly preserved, Petitioner failed to present any evidence that he was misadvised by Counsel concerning his possible sentence or his charge classification and the PCR court properly denied relief.

As stated above, Petitioner asserts Counsel rendered ineffective assistance of counsel when

he misadvised Petitioner concerning his charge classification and sentencing. Petitioner asserts that he was prejudiced, since he now must serve eighty-five percent of his sentence. Should this Court find the issue properly preserved, certiorari should be denied for Petitioner's failure to present any evidence that he was misadvised as to his possible sentence or the classification of his charges.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland,

466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Petitioner alleges that in February 2017, the South Carolina Department of Corrections changed the classification of his convictions from "non-violent" to "violent." Petitioner provides no documentation, or evidence other than his own testimony, of this change ever occurring. Petitioner never testified that he was advised by Counsel incorrectly as to the classification of his charges. Petitioner asserts that during his guilty plea proceeding, the sentencing sheets and plea judge all indicated that he was facing charges classified as "non-violent." Petitioner never testified that he would not have pleaded guilty and would have insisted on going to trial, if not for the alleged errors by his counsel.

Petitioner ignores the fact that his charges are correctly classified as "non-violent" charges. For the purpose of definition under South Carolina law, a nonviolent crime is all offenses not specifically enumerated in Section 16-1-60. S.C. Code Ann. § 16-1-70 (2018). The charges Petitioner pleaded guilty to are not specifically enumerated in S.C. Code Ann. § 16-1-60. Petitioner correctly asserts "manufacturing or trafficking methamphetamine" are included as violent crimes, but Petitioner has never pleaded guilty to either of those two crimes. The sentencing sheets and plea judge correctly indicated that Petitioner was charged with nonviolent crimes. Although Petitioner has provided no evidence in support, if Counsel advised Petitioner his charges were

nonviolent, Counsel would have been correct. Therefore, the assertion that Petitioner's classification was changed from nonviolent to violent by the Department of Corrections is not supported by any evidence and cannot be explained.

However, what may be explained is why Petitioner is required to serve eighty-five percent of his eighteen year sentence. Petitioner asserts he was prejudiced, because the violent charge of distribution of methamphetamine, 3rd offense, had consequences for his time in prison. During the guilty plea hearing, Counsel informed the court that Petitioner would already be serving eighty-five percent of his sentence as a result of his guilty plea.

Under South Carolina law, the classification of distribution of methamphetamine, 3rd offense, charge does not determine the parole-eligibility of the convicted person. It is undisputed that Petitioner pleaded guilty under S.C. Code Ann. § 44-53-375(B)(3) and was sentenced to a concurrent sentence of eighteen years. In reference to Petitioner's specific charge, Section 375(B) provides the following:

> Notwithstanding any other provisions of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which **all prior offenses were for possession of a controlled substance** pursuant to subsection (A), may have the sentence suspended and probation granted and is eligible for parole...**In all other cases, the sentence must not be suspended nor probation granted.**

S.C. Code Ann. § 44-53-375(B)(emphasis added).

Petitioner fails to account for two things in his request for certiorari. First, prior to entering his guilty plea with Counsel, Petitioner pleaded guilty to distribution of methamphetamine, 3rd offense, while proceeding *pro se*. Second, it was revealed at the guilty plea Petitioner has a prior conviction of distribution of crack cocaine, 1st offense, from 2011. This prior conviction is not "for possession of a controlled substance," as required for parole eligibility under Section 375(B). Therefore, when Petitioner pleaded guilty under Section 375(B)(3) while acting *pro se*, he was

ineligible for parole and required to serve eighty-five percent of his sentence. State v. Miller, 404 S.C. 29, 35 n.5, 744 S.E.2d 532, 536 n.5 (2013). See also S.C. Code Ann. § 24-13-150(A)(2018). Petitioner asserts the PCR court erred in not allowing his case to go forward, in light of such an obvious error based on statutory issues. The statutory requirements are clear and the only error is Petitioner's interpretation of the law.

Petitioner has failed to show any deficiency on behalf of Counsel or his advice to Petitioner. Petitioner has failed to show any prejudice he suffered as a result of any alleged deficiency. Petitioner has failed to meet his burden of proof and the PCR court properly denied relief. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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By: ______________________
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October 24, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-002476

Jamarcus Foster,..Petitioner,

v.

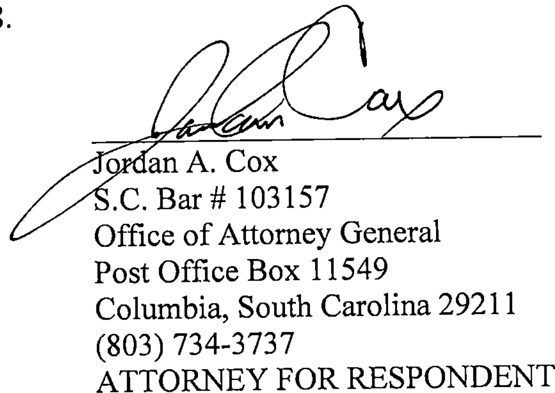
State of South Carolina,...Respondent.

CERTIFICATE OF SERVICE

I, Jordan A. Cox, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 24th day of October, 2018.



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ALAN WILSON
ATTORNEY GENERAL

October 24, 2018

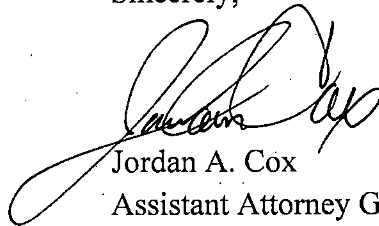
The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Jamarcus Foster, #335320 v. State of South Carolina**
Appellate Case No.: 2017-002476
Lower Court Case: 2017-CP-11-0047

Dear Mr. Shearouse:

Enclosed for filing please find an original and six copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,



Jordan A. Cox
Assistant Attorney General
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JAC/ck
Enclosures

cc: LaNelle C. DuRant, Esquire

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