STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

JAMES L. CARRIER,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2019-001090

Appeal from Greenwood County

Brian M. Gibbons, Post-Conviction Relief Judge

Opinion No. 6030

PETITION FOR REHEARING

On October 25, 2023, this Court reversed the circuit court's grant of Respondent's application for post-conviction relief (PCR). Carrier v. State, Op. No. 6030 (S.C. Ct. App. filed October 25, 2023) (Howard Adv. Sh. No. 42 at 12). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in reaching its decision.

On appeal, Respondent argued the PCR court correctly determined that trial counsel was deficient for failing to present irrefutable and undisputed evidence in support of his motion to quash, which would have shown that the witness listed on Respondent's indictments never

testified before the grand jury. Respondent further argued the PCR court correctly found that either (a) Respondent suffered prejudice as a result of counsel's deficient performance because his motion to quash would have been granted or (b) prejudice was presumed due to the structural error resulting from the state's abuse of the grand jury process.

In its published opinion, this Court emphasized in a footnote that the state did not contest on appeal the PCR court's finding that trial counsel's performance was deficient. Opinion at 16. Accordingly, this Court correctly held that finding is the law of the case and focused its analysis on the prejudice prong of the Strickland v. Washington, 466 U.S. 668 (1984) analysis. Opinion at 16.

This Court held the PCR court erred in concluding that the erroneous listing of Christopher Haden as the witness who presented the case to the grand jury on the indictment constituted structural error. The Court found "no authority declaring a misnomer on an indictment to be a structural error as a matter of law." Opinion at 17. Thus, the Court looked to the three categories in which structural errors tend to fall as identified by the United States Supreme Court in Weaver v. Massachusetts, 582 U.S. 286 (2017) to determine "whether a misnamed witness on an indictment is a structural error." Opinion at 17. The Court held the right to an indictment as well as the right to a grand jury are rights designed to protect against erroneous convictions and thus are not the sort of rights covered by the first Weaver category. Opinion at 17. Regarding the second category, which encompasses errors that result in effects too difficult to measure, this Court concluded "the effects of this error are not fatally difficult to measure" because the trial court could have modified the indictment or the state "could have simply obtained another indictment" if the trial court quashed one or both of them. Opinion at 18. Finally, addressing the third category, which includes errors that "always result in

fundamental unfairness," this Court held the "wrong name of a presenting witness listed on the indictment did not create any fundamental unfairness for Carrier [Respondent]."

Lastly, this Court held the PCR court erred in finding that even if the error was not structural, the flawed indictment still prejudiced Respondent because "(1) the indictment was legally sufficient as a matter of law, notwithstanding the misnomer; (2) an amendment to the indictment was likely more appropriate than quashing; and (3) the State likely would have obtained another indictment if the trial court had chosen to quash it." Opinion at 19.

For the reasons that follow, Respondent respectfully requests this Court grant rehearing and hold the PCR court correctly granted Respondent post-conviction relief because Respondent suffered prejudice as a result of counsel's deficient performance.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI. To prove ineffective assistance of counsel, Petitioner must establish that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Deficient Performance

The state did not contest on appeal the PCR court's finding that trial counsel's performance was deficient. The state failed to raise any concerns regarding the PCR court's findings of fact or conclusions of law governing the deficient performance prong of the Strickland analysis in its petition for writ of certiorari or in its brief of petitioner. Instead, the

entirety of the state's petition for writ of certiorari and its brief of petitioner focused on the PCR court's findings of fact and conclusions of law regarding prejudice. Accordingly, this Court correctly held the PCR court's finding that trial counsel's performance was deficient is the law of the case. See First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (explaining that "it is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling" and that "failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal" because "the unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

Prejudice

"No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed." S.C. Const. Art. I, § 11. "No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury." S.C. Code Ann. § 17-19-10. Thus, "within ninety (90) days after receipt of an arrest warrant from the Clerk of Court, the solicitor shall take action on the warrant by (1) preparing an indictment for presentment to the grand jury, which indictment shall be filed with the Clerk of Court, assigned a criminal case number, and presented to the Grand Jury." Rule 3, SCRCrimP. "The foreman of the grand jury or acting foreman in the circuit courts of any county of the State may swear the witnesses whose names *shall* appear on the bill of indictment in the grand jury room." S.C. Code Ann. § 14-7-1550 (emphasis added). "The grand jury of each county … shall consist of eighteen members, twelve of whom must agree in a matter before it can be submitted to the Court." S.C. Const. Art. I, § 22. In short, the solicitor prepares an indictment to be presented to the grand

jury, which hears sworn testimony from a witness about the facts and circumstances forming the basis of the indictment. The indictment must bear the name of the witness who testified before the grand jury, and at least twelve of the jurors must find probable cause that the defendant committed the crime in order to true-bill the indictment.

"A defendant has a constitutional right to demand that a grand jury which is properly established and constituted under law consider the criminal allegations against him." Evans v. State, 363 S.C. 495, 509, 611 S.E.2d 510, 518 (2005). "One who demands and is refused the right to be tried for crime charged against him only upon an indictment presented by a legal grand jury, in instances where such indictment is required, may thereafter justly take the position that he has been deprived of life, liberty or property without due process of law in violation of the state constitution." Id. (internal quotation marks omitted).

Had trial counsel presented evidence that Haden did not testify before the grand jury at any time, then there is a reasonable probability that the outcome of Respondent's trial would have been different. The state admitted in it is brief during the direct appeal that actual abuse of the grand jury process occurs when the witness whose name appeared on the indictments was not the witness who actually appeared. App. 464. The state would have been unable to proceed in this case on the useless piece of paper it represented was an indictment. As such, the trial court would have been required to quash the indictments. Thus, there is a reasonable probability the outcome of Respondent's trial would have been different.

Unlike this Court held, the erroneous listing of Christopher Haden as the witness who presented the case to the grand jury is not "a minor irregularity in the form of the indictment." Opinion at 21. Remarkably, this Court equated this abuse of the grand jury process to the truly technical irregularities in the grand juries challenged in State v. Orr, 189 S.C. 1, 199 S.E. 865

(1938) and State v. Jeffcoat, 26 S.C. 114, 1 S.E. 440 (1887). In Orr, the Supreme Court rejected a challenge to a grand jury based on some paper ballots having red lines while other had blue lines in contravention of a statute requiring ballots be on the same type of paper. In Jeffcoat, the Supreme Court rejected a challenge to a grand jury drawn before the effective date of a new statute changing the time for court to be held. In contrast, in this case, the state knowingly claimed Haden testified before the grand jury *twice* when it knew he had not thereby misleading the trial court, the jury, and Respondent. The fact that Haden was listed as the witness who testified before the grand jury on both the 2009 and the 2012 indictments is evidence that the error was not a mere scrivener's error or "misnomer" as this Court called it. It was deliberate abuse of the grand jury process by the state.

This Court also incorrectly determined that the trial court could have simply amended the indictment pursuant to S.C. Code Ann. § 17-19-100. Opinion at 22. This holding completely ignores the fact that the state did not know in 2012 nor does it know now who actually testified before the grand jury. Because the state did not know who supposedly testified before the grand jury, it could not have amended the indictment with the name of the correct witness. If the state did know who actually testified before the grand jury, it would have moved to amend the indictment before Respondent's 2012 trial when trial counsel initially moved to quash the indictment.

Moreover, this Court incorrectly accepted the state's argument that Respondent did not suffer prejudice because the state simply would have obtained another indictment and prosecuted Respondent with the new indictment. The state expressed no modesty or hesitancy in its certainty that it would have obtained another indictment. Reduced to its essence, the state asks this Court to abolish the grand jury system in South Carolina. Following the state's logic, no

error in the grand jury process, including the presentation of false and misleading information, would suffice to reverse a conviction because the state would always be able to get another indictment from the grand jury. Respondent respectfully requests this Court disabuse the state of its arrogant tyrannical viewpoint.

It is the duty of this Court to give the constitutional provision prohibiting the criminal trial of an individual except upon presentment of an indictment to a grand jury meaning. State v. Capps, 276 S.C. 59, 64, 275 S.E.2d 872, 874 (1981) (Lewis, J., dissenting). "The courts of South Carolina stand guard to see that the grand jury is not reduced to a mere plaything of prosecutors." State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991) (internal quotation omitted). The appellate courts must act with "zeal to insure that the grand jury continues to perform its historic function as a shield between the accused and the abuse of the prosecutorial power of the state." Id.

Chief Justice Lewis described when the grand jury becomes a mere plaything of prosecutors. Analyzing the issuance of indictments based solely on hearsay evidence, Chief Justice Lewis, the author of the opinion which permitted the use of hearsay for a grand jury indictment, later explained it was never the intention of this Court "to create a limitless haven for its routine use." State v. Capps, 276 S.C. 59, 67-68, 275 S.E.2d 872, 876 (1981) (Lewis, J., dissenting). "The deliberate use of hearsay testimony alone to obtain indictments is a questionable practice which seriously erodes the function of the grand jury." Id. at 68, 275 S.E.2d at 876. "It can be used to subject a defendant to the expense of a public trial solely on the basis of evidence which is generally inadmissible in a trial." Id.

"In order to provide more than lip service to the constitutional provision," Chief Justice Lewis explained that "an indictment cannot, as a matter of course, be acquired solely on oral

hearsay testimony." Id. Put bluntly, he explained "[t]he routine practice of one individual appearing before the proceeding to give his 'third hand' capsule version of facts which he has no direct knowledge without some other competent evidence, is insufficient." Id. "The drafters of Article I, § 11 as well as those citizens who voted for its implementation clearly intended the rights to a grand jury indictment to be meaningful because they incorporated it into such a solemn document, our State Constitution." Id.

Likewise, this Court should grant rehearing and affirm the PCR court's findings of fact and conclusions of law that Respondent either proved prejudice because his motion to quash would have been granted or that prejudice is presumed in order to provide *meaning* to the constitutional provisions and statutory scheme governing the grand jury process. To do anything less would allow the grand jury to become the prosecutor's "plaything" as it would be a sword for the prosecution instead of the shield between citizens and the government. During the trial, the direct appeal, the PCR hearing, and now the PCR appeal, the state has expressed repeatedly its view that the grand jury is nothing more than the prosecutor's plaything.

In fact, the state now argues that in order to obtain relief, Respondent must "show the testifying witness was an improper witness." BOP at 6. According to the state, Respondent is not entitled to relief because he "failed to show that the witness that did testify was not a proper witness with knowledge of Respondent's case." BOP at 6-7. The state requests this Court place an impossible burden upon Respondent – and all criminal defendants – in order to receive the constitutional guarantee to which all are entitled. It is impossible for Respondent to show the testifying witness before the grand jury was an improper witness because no one knows who testified before the grand jury. In fact, the solicitor in this case testified that it was, and is, "*frequently* the case that the witness on the indictment is not the witness for the grand jury."

App. 568, l. 25 – App. 569, l. 1 (emphasis added). The county grand jury system is one conducted in secret. State v. Whitted, 279 S.C. 260, 262, 305 S.E.2d 245, 246 (1983) (explaining that "investigations and deliberations of a grand jury are conducted in secret and are, as a rule, legally sealed against divulgence"), *overruled on other grounds by* State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998). There is simply no way for Respondent – or any criminal defendant – to know who testified before the grand jury. This is the reason the indictment *must* list the name of the witness.

Furthermore, the state requests another impossible burden in order for Respondent to show prejudice. The state argued that Respondent failed to show prejudice because "he failed to show that the state would not have been able to obtain a valid indictment against him for the charged offense." BOP at 7. This Court again erroneously accepted this argument in reversing the PCR court's order granting relief. Similarly, while conceding that Respondent proved "an irregularity in Respondent's indictment," the state argued that Respondent failed to show prejudice because he "failed to show how that irregularity impacted the grand jury's decision to issue the indictment in Respondent's case." BOP at 8. Again, these are impossibilities due to the secrecy of the grand jury proceedings.

No one would question that the grand jury system is a "basic, constitutional guarantee that should define the framework of any criminal trial." See Weaver v. Massachusetts, 137 S.Ct. 1899, 1907-1908 (2017). "[T]he defining feature of a structural error is that it affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself." Id. "A structural error 'def[ies] analysis by harmless error standards.'" Id. at 1907-1908 (quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991)).

According to the United States Supreme Court, structural errors fall into three broad categories. Id. at 1908. "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." Id. An example of this is the "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." Id. "Second, an error has been deemed structural if the effects of the error are simply too hard to measure," which includes when a defendant is denied the right to select his own attorney. Id. "Third, an error has been deemed structural if the error always results in fundamental unfairness." Id. This last category includes when a trial judge fails to give a reasonable doubt instruction. Id.

The defendant in Weaver was denied his right to a public trial, which the Court agreed was a structural error. Id. However, the Court determined that it was not a violation that always resulted in a denial of fundamental fairness. Id. at 1909. Thus, the Court concluded,

> when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes ... to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

Id. at 1911.

An indictment that falsely claims a witness presented sworn testimony to the grand jury in order for the grand jury to issue the indictment is a defect in the constitution of the trial mechanism which defies analysis by harmless error standards. Unlike this Court held, this error falls within all three categories expressed by the Supreme Court in Weaver as defining structural error. Placing the witness's name on the indictment is designed to protect the grand jury process as a whole. Furthermore, the effects of the error are simply too hard to measure because it is

impossible for anyone to prove whether a proper witness testified before the grand jury or whether the grand jury received evidence amounting to probable cause. Finally, knowingly placing the name of a person on an indictment purporting that person to having given sworn testimony to establish probable cause always results in fundamental unfairness. The state presented knowingly false information to the trial court and the jury when it called Respondent to trial on an indictment that incorrectly indicated Haden testified before the grand jury in order for the grand jury to find probable cause. The state should not benefit from its creation of fundamental unfairness.

Based on the foregoing, Petitioner respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming the PCR court's denial of his application for post-conviction relief.

Respectfully Submitted,

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of November, 2023.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon Zachary W. Jones, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 9th day of November, 2023.

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER