STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenwood County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 6030 (S.C. Ct. App. Filed October 25, 2023)

Lower Court Case No. 2014-CP-24-01526

JAMES L. CARRIER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001933

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 17, 2023.

QUESTION PRESENTED

Did the Court of Appeals err by reversing the PCR court's grant of Petitioner's application for post-conviction relief when the PCR court correctly determined (1) trial counsel performed deficiently by failing to present irrefutable and undisputed evidence in support of his motion to quash, which would have shown that the witness listed on the indictments never testified before the grand jury, and (2) that either Petitioner suffered prejudice as a result of counsel's deficient performance because his motion to quash would have been granted or prejudice was presumed due to the structural error resulting from the state's abuse of the grand jury process?

STATEMENT OF THE CASE

On May 11, 2009, Chris Haden, an investigator with the Greenwood County Sheriff's Department obtained a warrant for Petitioner's arrest for lewd act upon a child. App. 407. Haden served the warrant on June 23, 2009. App. 407. In accordance with Rule 3(c), SCRCrimP, the Solicitor for Greenwood County prepared an indictment for presentment to the Greenwood County grand jury on October 2, 2009. App. 411; Supp. App. 10-11. According to the indictment, Haden *actually* appeared before the grand jury and provided sworn testimony to allow the grand jury to consider the state's allegations. Supp. App. 10. Ultimately, the grand jury issued a true billed indictment against Petitioner (2009-GS-24-1146) based upon the purported sworn testimony of Haden. App. 411; Supp. App. 10-11.

Years later, on June 8, 2012, the Greenwood County Solicitor's Office prepared a second indictment for presentment to the grand jury. App. 406; Supp. App. 13-14. Again, according to the indictment, Haden *actually* appeared before the grand jury and provided sworn testimony to allow the grand jury to consider the state's allegations. Supp. App. 13. Ultimately, the grand jury true billed this indictment as well (2012-GS-24-116) based upon the purported sworn testimony of Haden. App. 406; Supp. App. 13-14.

Ten days later, on June 18, 2012, the state, represented by Elizabeth White and Andrew M. Hodges, called the case to trial on the second indictment before the Honorable D. Garrison Hill, then a circuit court judge. App. 1. Charles Grose represented Petitioner. App. 1. At that time, trial counsel moved to quash the second indictment because he was "*suspicious* that the new indictment [was] not valid on its face because … Haden [was] listed as the person who testified before the grand jury" but he was no longer employed by the Greenwood Sheriff's Office on the date of trial, just ten days after he allegedly testified before the grand jury. App. 54, ll. 1-12 (emphasis added). At the conclusion of the pretrial hearings, the parties agreed to continue the case. App. 218, ll. 10-22.

On July 17, 2012, the state, represented by Hodges and Matt Swilley, called the case to trial before Judge Hill. App. 221. Grose continued to represent Petitioner. App. 221. Prior to jury selection, trial counsel moved to quash the second indictment because "the witness listed on the [indictment as having] testified to the Grand Jury wasn't in the State of South Carolina when the Grand Jury met." App. 225, ll. 16-19. Trial counsel argued the indictment was "defective." App. 225, ll. 19-20. Counsel asserted "[f]or there to be any meaning to the constitutional provision of our State that entitles [Petitioner] to have his case presented to the Grand Jury, the presentment has to have some sort of meaning." App. 228, ll. 26.

In response and apparently unaware of the statutory scheme governing grand juries, the solicitor asked if there was "case law that says that the person who testifies in front of the Grand Jury has to be listed on the indictment?" App. 226, ll. 13-15. The attorneys representing the state claimed to not "know that there [was] even a requirement," and further claimed to be "not aware of any law that says it has to say that." App. 231, ll. 16-19. Cryptically, the state argued that "[s]omebody had to present testimony that convinced the Grand Jury that there was probable cause in this case." App. 231, ll. 1-5. Thus, the state concluded, the indictment was not "deficient." App. 231, ll. 4-5.

After hearing from the state and trial counsel on the motion to quash, Judge Hill ruled as follows:

> I share with you your concerns about the current status of the Grand Jury practice in our State. However, I don't know any authority that would require me to quash the indictment based on the identity of the witness. The indictment itself sets forth the allegations for listing a witness on the form, on the back of the indictment. If that is inaccurate, *without any further showing* would not be sufficient to render the indictment defective.

App. 231, l. 22 – 232, l. 13 (emphasis added). Thus, Judge Hill denied the motion to quash the indictment. App. 232, l. 13.

After initially indicating it could not reach a unanimous decision, the jury ultimately convicted Petitioner of lewd act upon a child. App. 386, ll. 19-21; App. 389, l. 21 – 390, l. 2. Judge Hill sentenced Petitioner to fifteen years imprisonment. App. 402, ll. 1-6.

Petitioner filed a timely notice of appeal, and was represented by Kathrine Hudgins on appeal. App. 412-443. One of the issues raised concerned the trial court's failure to quash the second indictment as defective because the state failed to establish the identity of the witness who testified before the grand jury. App. 412-443. In its responsive brief, the state argued the

indictment contained no facial irregularities and that Petitioner, who bore the burden of proof, failed to present any evidence of actual abuse of the grand jury proceedings. App. 444-486.

On October 22, 2014, the Supreme Court affirmed Petitioner's conviction in an unpublished opinion. State v. Carrier, 2014-MO-043 (S.C. Sup. Ct. filed Oct. 22, 2014); App. 503-504. The Court explained that the grand jury proceedings are presumed to be regular unless the defendant presents clear evidence to the contrary. App. 504. Further, the Court noted that "argument of counsel is not evidence and, standing alone, provides no support for a finding of fact." App. 504. Remittitur was sent on November 7, 2014.

Subsequently, Petitioner filed an application for post-conviction relief (PCR). App. 507-513. After counsel was appointed, Petitioner amended his application to include a claim that "trial counsel was ineffective for failing to call a witness or witnesses who would establish that indictment number 2012-GS-24-1166 (hereinafter "2012 indictment") was defective on its face because the witness listed on the indictment was not present for presentment to the Grand Jury." App. 521-522. The matter proceeded to a hearing before the Honorable Brian M. Gibbons on February 26, 2019. App. 523. Laura M. Saunders represented Petitioner, and Janell H. Gregory represented the state. App. 523. At the conclusion of the hearing, the PCR court stated it was granting Petitioner relief. App. 578, l. 16 – 579, l. 14. By order dated May 6, 2019, the PCR court formally granted Petitioner relief from his conviction and sentence. App. 581-596. The state filed a motion to alter or amend, which was denied by the court in a written order on May 28, 2019. App. 599-611

The state served its notice of appeal on July 5, 2019. Thereafter, the state filed a petition for writ of certiorari challenging the PCR court's findings of fact and conclusions of law regarding the prejudice prong of the analysis for reviewing ineffective assistance of counsel

claims. Petitioner filed his return on May 12, 2020. This Court transferred the case to the Court of Appeals pursuant to Rule 243(l), SCACR, on May 27, 2020. The Court of Appeals granted certiorari on August 18, 2022. After briefing and oral argument, the Court of Appeals reversed the PCR court's order granting Petitioner post-conviction relief. Carrier v. State, Op. No. 6030 (S.C. Ct. App. filed October 25, 2023) (Howard Adv. Sh. No. 42 at 12).

Petitioner filed a petition for rehearing on November 9, 2023. By order dated November 17, 2023, the Court of Appeals denied rehearing. This petition for writ of certiorari to the Court of Appeals follows.

ARGUMENT

The Court of Appeals erred by reversing the PCR court's grant of Petitioner's application for post-conviction relief when the PCR court correctly determined (1) trial counsel performed deficiently by failing to present irrefutable and undisputed evidence in support of his motion to quash, which would have shown that the witness listed on the indictments never testified before the grand jury, and (2) that either Petitioner suffered prejudice as a result of counsel's deficient performance because his motion to quash would have been granted or prejudice was presumed due to the structural error resulting from the state's abuse of the grand jury process.

Relevant Facts

As previously mentioned, Petitioner challenged on appeal the trial judge's refusal to quash the second indictment because the state failed to establish the identity of the witness who testified before the grand jury. App. 412-443. In response, the state argued Petitioner was not entitled to relief because trial counsel "repeatedly alleged Sheriff's Investigator Haden was not physically in the state and therefore could not have been a witness when the case was presented to the grand jury; however, [Petitioner] offered no evidence in support of his allegation." App.

460. According to the state, Petitioner's argument "actually amount[ed] to a claim of an irregularity in the proceedings by which the indictment was procured, which turn[ed] on his *unsupported* assertion that Chris Haden did not appear." App. 463-464 (emphasis added). The state argued Petitioner "did not present any actual evidence in support of his motion to quash" and therefore, the trial court properly concluded Petitioner failed to meet his burden. App. 464. The state explained that "actual abuse" of the grand jury process "would require either: (1) evidence rather than speculation that Haden was not present, or (2) consent, an admission, or some other acknowledgment from the state that Haden did not appear as a witness before the grand jury." App. 464. Although the state acknowledged that the solicitor "neither admitted nor denied" trial counsel's claim that Haden did not testify before the grand jury, the state maintained on appeal that Petitioner failed to prove Haden did not testify. See App. 460. During the PCR process, the state showed that it was well aware Haden did not testify before the grand jury. Yet, the state maintained on appeal that there was no evidence to support this contention.

During oral argument on direct appeal, former Chief Justice Toal stated that whether Haden was present and testified before the grand jury went to whether the indictment was proper. State v. James Carrier, 2014-MO-043 (S.C. Sup. Ct. filed Oct. 22, 2014) (oral argument held on Sept. 25, 2014 at 3:15) ("all that goes to whether the indictment was proper").[1] Justice Kittredge requested that appellate counsel provide the Court with evidence of the irregularity. Id. at 1:19. Justice Kittredge expressed his dissatisfaction with considering trial counsel's assertion that Haden had not testified as evidence, and he refused to accept appellate counsel's argument that the state's failure to deny the assertion was acquiescence. Id. at 1:35.

[1] The video from the oral argument may be found in the archives on the South Carolina Judicial Branch's website. https://media.sccourts.org/videos/2012-212777.mp4.

Former Chief Justice Toal also noted that the motion regarding the indictment at trial occurred during a separate proceeding and that there was nothing that prevented trial counsel from presenting some witness who could have verified Haden's lack of presence. Id. at 10:32. She explained that had trial counsel presented actual evidence to support his contention, then the appellate court would have had the benefit of the state proving who testified before the grand jury. Id. at 10:52. Former Chief Justice Toal indicated it was obvious that someone testified before the grand jury, but the question presented was who did so. Id. at 10:56. She opined that Haden's name on the second indictment was merely a scrivener's error such that Haden's name appeared on the first indictment, presumably properly to the former Chief Justice, and the second indictment was simply not changed to reflect the correct witness. Id. at 11:00. Thereafter, the former Chief Justice explained that trial counsel, who was "as experienced as they make them," knew well how to have a separate proceeding to put actual evidence up to challenge the regularity of a charging document. Id. at 11:18.

Continuing the argument it began in its brief and capitalizing on the questions from the Court to Petitioner's counsel on appeal, the state argued during the direct appeal that trial counsel failed to present a witness to support the "allegation or speculation" that Haden did not testify before the grand jury. Id. at 19:17. The state's lawyer noted that trial counsel actually called a solicitor as a witness during a different portion of the trial on an unrelated issue, which showed trial counsel was experienced and capable of calling a solicitor as a witness. Id. at 19:30. The state's lawyer even chided trial counsel for failing to object when the judge refused to hear from a bailiff who was attempting to inform the trial judge of how the grand jury process worked. Id. at 19:57. Repeatedly, the state faulted trial counsel for never putting up any witnesses or

presenting any evidence to "substantiate the claim" that Haden did not testify before the grand jury. Id. at 20:15.

Despite the state's argument on appeal that there was *no* evidence presented that Haden was *not* present during the grand jury proceeding, during the PCR hearing, the state *stipulated* that Haden was *not* employed with the Greenwood County Sheriff's Department at the time the 2012 indictment was presented to the grand jury. App. 533, ll. 7-15.[2] In fact, Haden's employment file showed Haden was hired on January 17, 2006, put in his two weeks' notice on September 10, 2009, and was last employed by Greenwood County on September 24, 2009. App. 536, ll. 10-23; Supp. App. 3-8. Haden informed the PCR court that not only did he *not* testify before the grand jury on June 8, 2012, regarding Petitioner's case, but that he *never* testified in front of the grand jury during the entirety of his tenure with the Greenwood County Sheriff's Department. App. 545, ll. 14-17; App. 545, l. 25 – 546, l. 2. Upon questioning by the Attorney General, Haden speculated that if the indictment bearing his name had been quashed, then Petitioner "would have most likely been reindicted." App. 547, ll. 1-9.

Trial counsel did not "have a good answer" as to why he did not obtain "any employment records or subpoena any witnesses" to testify that Haden was not employed by Greenwood County at the time the grand jury considered the indictment. App. 551, ll. 18-21. Counsel was "surprised that was even a contested issue" on appeal because he believed the solicitor's office informed him that Haden was no longer a Greenwood County employee. App. 551, ll. 18-24.

[2] The state's arguments at trial and on appeal regarding the lack of evidence that Haden did not testify before the grand jury when the state was well aware that he did not are difficult to square with the state's duty to act as a minister of justice. See Rule 3.4 cmt. 1, RPC, Rule 407, SCACR (providing that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice").

Despite having at least one month to obtain records and prepare to present evidence to support his contention that Haden could not have testified before the grand jury, trial counsel failed to do so. App. 551, l. 25 – 552, l. 15. Trial counsel admitted he should have obtained some evidence to support his motion. App. 552, ll. 16-22. He had no doubt that the presentation of evidence showing Haden was *not* a witness before the grand jury would have affected the trial judge's decision on the motion to quash the indictment. App. 552, l. 23 – 553, l. 1. Trial counsel noted that, during the oral argument on direct appeal, this Court was critical of his failure to create a record, and the ultimate decision on appeal showed the Court affirmed due to an inadequate record. App. 553, ll. 2-6.

Assistant Solicitor Elizabeth Phillips Taylor explained that "the way indictments were handled back then is based on the arrest date a list was generated. Someone in the office prepared all of the indictments - - a paralegal - - and they were submitted." App. 568, ll. 6-9. She claimed the prosecutors "rarely knew when [their] cases were going to indictment." App. 568, ll. 9-10. She explained it was "*frequently* the case that the witness on the indictment [was] *not* the witness for the grand jury." App. 568, l. 22 – 569, l. 1 (emphasis added). Further, the solicitor alleged other criminal defense attorneys had challenged the validity of the indictments based upon the witness identified on the indictment not being the witness who testified before the grand jury, but that no trial judge had ever granted a motion quash on that basis. App. 569, ll. 2.-9. Without the slightest hesitation, the solicitor indicated that if defense counsel had been successful in quashing the indictments, then she "*would have obtained* another indictment." App. 570, ll. 5-8 (emphasis added). Notably, she did not indicate she would have *sought* another indictment. Further, she had "no reason to believe" that the outcome of Petitioner's trial would

have been altered by the presentation of evidence that Haden had not testified before the grand jury because she would have obtained another indictment. App. 570, ll. 9-14.

At the conclusion of the PCR hearing, Petitioner argued trial counsel performed deficiently by failing to obtain the evidence necessary to prove his contention that Haden never testified before the grand jury despite his name appearing as the witness on the indictment. App. 571, l. 12 – 572, l. 13. Additionally, Petitioner argued he was not required to prove prejudice because the error committed by the state – abusing the grand jury process – was structural error. App. 574, ll. 4-7.

The state argued Petitioner failed to demonstrate prejudice because the indictment provided him with notice of the charge against him and that was all that was required. App. 577, ll. 3-23. Additionally, the state argued there was no prejudice because "if [defense counsel] had provided that information and had gotten these indictments quashed, as [the solicitor] testified, she would have had this presented before the grand jury again." App. 578, ll. 1-3. The state speculated that the grand jury "would be able to find probable cause in this case and provide another indictment." App. 578, ll. 4-8. Then the state claimed it was "obviously" "a scrivener's error and that would have changed." App. 578, ll. 8-10.

The PCR court found trial counsel failed to present or elicit the proper evidence during Petitioner's trial in order to quash the indictment for its failure to list the witness who actually testified before the grand jury and for its inclusion of a witness's name who did not testify. "Trial counsel admitted that he did not present the evidence necessary to prove his argument, and he admitted that this evidence was readily available and would have also proved Haden was not employed or present before the Grand Jury when either the original or direct indictment were

presented." App. 586. After making these findings of fact, the PCR court concluded trial counsel performed deficiently based on an objective standard of reasonableness. App. 587.

Next, the PCR court found there was "a reasonable probability that both indictments would have been quashed based upon the facial irregularity on both documents" and the statutory requirement that the names of the witnesses who appear before the grand jury appear on the indictment. App. 588 (citing S.C. Code Ann. § 14-7-1550). Regarding the state's claim that the solicitor would have simply obtained another indictment and that none of its indictments listed the witness who appeared before the grand jury, the PCR court explained that "[c]ourts should not 'perpetuate injustice resulting from the application of a doctrine in need of reevaluation, no matter how long or often it has been applied.'" App. 589 (quoting Langley v. Boyter, 284 S.C. 162, 180-181, 325 S.E.2d 550, 561 (Ct. App. 1984)).

In the alternative, the PCR court concluded that Petitioner was not required to show prejudice because the error was structural. App. 591-596. The court explained that allegedly "someone presented testimony to the grand jury" on two separate occasions "in order to indict [Petitioner]." App. 592. "The identity of that person or persons has now been proven to be unknown." App. 592. Yet, South Carolina statutory law requires the indictment to list the name of the person who testified before the grand jury. App. 592. Further, federal and state constitutional law require an indictment prior to prosecution. App. 592-593. The PCR court found the indictments contained "patently false" information in that both listed Haden as the witness before the grand jury. App. 593. Further, the court found "[t]he secretive nature surrounding grand jury procedures in our State, coupled with the false information in the indictments, make it highly unlikely that [Petitioner] could have received effective assistance of

counsel." App. 593. Thus, the court concluded "a structural error occurred during the indictment phase of [Petitioner]'s trial and therefore prejudice must be presumed." App. 593.

The PCR court rejected the state's argument that the listing of Haden's name was a mere scrivener's error. The court explained the state's argument "ignore[d] testimony from the state's own witness, Taylor, that it was not a 'scrivener's error' that led to this statutorily deficient indictment, rather it was the custom/practice of grand jury presentiments in the circuit." App. 593. Additionally, the court found the state's argument "ignore[d] the fundamental constitutional right affected by this deficient grand jury process." The PCR court explained that "[w]hen an indictment is presented, the accused 'may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined.'" App. 594 (quoting State v. Faile, 43 S.C. 52, 52, 20 S.E. 798, 801 (1895)). The right to a legal grand jury is one of the "'protections which are thrown around the prisoner by law" and "'must be held inviolate.'" App. 594 (quoting State v. Rector, 158 S.C. 212, 230, 155 S.E. 385, 392 (1930).

The PCR court found that "in cases involving a county grand jury in South Carolina, the indictment represents the only record by which a defendant can seek to assert his constitutional right to a legal grand jury process." "Given the importance of the right and the heavy burden imposed on challenges to the process, fundamental fairness dictates that we ensure what limited information we make available to defendants at least be accurate." Thus, the PCR court concluded, "[t]he error in both of the indictments coupled with the clear evidence that the witness did not testify before the grand jury on either occasion constitute[d] a fundamental and structural error." "The errors denied [Petitioner] a fundamental right protected under both the United States Constitution and the Constitution of the State of South Carolina." App. 595.

In its published opinion, the Court of Appeals emphasized in a footnote that the state did not contest on appeal the PCR court's finding that trial counsel's performance was deficient. Accordingly, the 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.

The Court of Appeals 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." 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." 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. Regarding the second category, which encompasses errors that result in effects too difficult to measure, the 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. Finally, addressing the third category, which includes errors that "always result in fundamental unfairness," the court held the "wrong name of a presenting witness listed on the indictment did not create any fundamental unfairness for Carrier [Petitioner]."

Lastly, the Court of Appeals held the PCR court erred in finding that even if the error was not structural, the flawed indictment still prejudiced Petitioner 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."

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI. In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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 v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner 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. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

However, "in certain limited circumstances 'prejudice in presumed' because prejudice 'is so likely that case-by-case inquiry … is not worth the cost.'" Lorenzen v. State, 376 S.C. 521, 529, 657 S.E.2d 771, 776 (2008) (quoting Nance v. Ozmint, 367 S.C. 547, 551, 626 S.E.2d 878, 880 (2004)) *overruled on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836

(2018).[3] "Prejudice is presumed when the defendant is completely denied counsel at a critical stage of his trial." Nance, 367 S.C. at 552, 626 S.E.2d at 880 (internal quotation omitted). Additionally, "per-se prejudice occurs if there has been a constructive denial of counsel," which "happens when a lawyer entirely fails to subject the prosecution's case to meaningful adversarial testing, thus making the adversary process itself presumptively unreliable." Id. (internal quotation marks omitted). Further, "instances when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of trial." Id. (internal quotation marks omitted).

Deficient Performance

The state did not contest on appeal the PCR court's finding that trial counsel's performance was deficient. Accordingly, the Court of Appeals correctly held that finding 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").

[3] The United States Supreme Court held that "the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error." Weaver v. Massachusetts, 582 U.S. 286, 294 (2017). Without deciding if the ultimate test was whether the attorney's errors rendered the trial fundamentally unfair, the Court held that because "not every public-trial violation will in fact lead to a fundamentally unfair trial," prejudice was not shown automatically. Id. at 300-301. However, the Court limited its decision to "the context of trial counsel's failure to object to the closure of the courtroom during jury selection." Id. at 294.

Despite the state's decision not to challenge the PCR court's ruling that trial counsel performed deficiently by failing to present evidence of abuse of the grand jury proceedings, Petitioner will address the matter briefly. "The regularity of grand jury proceedings is presumed absent clear evidence to the contrary." State v. Batchelor, 377 S.C. 341, 344, 661 S.E.2d 58, 59 (2008); Evans v. State, 363 S.C. 495, 514, 611 S.E.2d 510, 520 (2005). "[T]he burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated." Batchelor, 377 S.C. at 344, 661 S.E.2d at 59. "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual *abuse* as grounds for quashing an otherwise lawful indictment." State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991) (emphasis in original).

The Court of Appeals recently affirmed a trial court's denial of a motion to quash based upon the defendant's failure to "present clear evidence that there was an abuse of the grand jury proceedings in his case." State v. Shands, 424 S.C. 106, 119, 817 S.E.2d 524, 531 (Ct. App. 2018). Shands moved to quash the indictments against him because "the officer who testified at his grand jury hearing was not listed on his indictments and had no personal knowledge of his case." Id. In that case, the state explained that the solicitor's office would notify the individual law enforcement agencies when the grand jury would convene and the agencies would send a representative to present all indictments from that individual agency. Id. at 120, 817 S.E.2d at 531. The state was unable to say whether either of the two officers listed on Shands's indictments testified in front of the grand jury because it did not have a record of who testified. Id. The Court of Appeals held it was "unable to say there was a violation in Shands's case from the record presented." Id. "Without any clear evidence, Shands's argument that there was a grand jury abuse in this case is pure speculation." Id.

As previously discussed, during the direct appeal process, the state argued Petitioner failed to present "evidentiary support" for his claim that Haden did not testify before the grand jury even though his name appeared on the indictments. App. 444-486. Specifically, the state argued Petitioner's "argument actually amount[ed] to a claim of an irregularity in the proceedings by which the indictment was procured, which turn[ed] on his *unsupported* assertion that Haden did not appear. App. 463-464 (emphasis added). It was the state's contention that Petitioner "did not present any actual evidence in support of his motion to quash" although the state was well aware that Haden had not testified before the grand jury App. 464.

According to the state, "actual abuse would require either: (1) evidence rather than speculation that Haden was not present, or (2) consent, an admission, or some other acknowledgement from the state that Haden did not appear as a witness before the grand jury." App. 464.[4]

At the PCR hearing, Petitioner presented irrefutable evidence that Haden did not testify before the grand jury—ever. Further, the state *conceded* that Haden did not testify before the grand jury. Thus, Petitioner satisfied both hurdles identified by the state in order to show actual abuse of the grand jury process.

Additionally, on direct appeal, this Court affirmed the trial court's denial of Petitioner's motion to quash based upon trial counsel's failure to present evidence supporting his contention that Haden was not the person who testified before the grand jury. App. 503-504. The opinion

[4] Now that Petitioner satisfied what the state posited during direct appeal was necessary to establish abuse of the grand jury process, the state changed its argument as to what constitutes abuse of the grand jury process. Cf. App. 464 with BOP at 9. The state maintains now that Petitioner failed to show any actual abuse of the grand jury proceeding because he "has only been able to show the witness named on the indictment was not the witness who presented before the grand jury" and "has failed to show that the witness who did present to the grand jury was unknowledgeable about the facts of the case or in any way incapable of presenting the grand jury with the necessary information for making its probable cause determination. BOP at 9.

makes clear that this Court affirmed because the motion was "unsupported by evidence" and counsel's argument was not evidence and could not support a finding of fact. App. 503-504. Furthermore, during oral argument, the Court questioned appellate counsel on the failure of trial counsel to "put[] up some witness that could have verified Mr. Haden's presence or lack of presence." App. 590.

As the PCR court found, "it is now undisputed that Haden did not testify before the grand jury for both the 2009 and 2012 presents, and this evidence was available to trial counsel at the time of trial." App. 590. Trial counsel performed deficiently by failing to present this readily available evidence to support his motion to quash.

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).

> [O]ne 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 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 Petitioner'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 occurred 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 on the useless piece of paper it represented was an indictment. As such, the trial judge would have been required to quash the indictments. Thus, there is a reasonable probability that the outcome of Petitioner's trial would have been different.

Unlike the Court of Appeals 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." Remarkably, the Court of Appeals 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, this 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, this 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 Petitioner. 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 the Court of Appeals called it. It was deliberate abuse of the grand jury process by the state.

The Court of Appeals also incorrectly determined that the trial court could have simply amended the indictment pursuant to S.C. Code Ann. § 17-19-100. 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 Petitioner's 2012 trial when trial counsel initially moved to quash the indictment.

Moreover, the Court of Appeals incorrectly accepted the state's argument that Petitioner did not suffer prejudice because the state simply would have obtained another indictment and prosecuted Petitioner 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

asked the court to abolish the grand jury system in South Carolina. Following the state's logic, which the Court of Appeals erroneously accepted, 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. Petitioner 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 certiorari and hold Petitioner 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 trial, 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 argued before the Court of Appeals that in order to obtain relief, Petitioner must "show the testifying witness was an improper witness." BOP at 6. According to the state, Petitioner is not entitled to relief because he "failed to show that the witness that did testify was not a proper witness with knowledge of [Petitioner's] case." BOP at 6-7. The state requested the court place an impossible burden upon Petitioner – and all criminal defendants – in order to receive the constitutional guarantee to which all are entitled. It is impossible for Petitioner 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 – 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 Petitioner – 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 requested another impossible burden in order for Petitioner to show prejudice. The state argued Petitioner 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. The Court of Appeals again erroneously accepted this argument in reversing the PCR court's order granting relief. Similarly, while conceding Petitioner proved "an irregularity in [Petitioner's] indictment," the state argued Petitioner failed to show prejudice because he "failed to show how that irregularity impacted the grand jury's decision to issue the indictment in [Petitioner'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, 582 U.S. 286, 294-95 (2017). "The defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." Id. at 295 (quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991) (cleaned up). "A structural error 'defies analysis by harmless error standards.'" Id. (quoting Fulminante, 499 U.S. at 309).

According to the United States Supreme Court, structural errors fall into three broad categories. Id. at 295. "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. at 296. 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. at 297-98. However, the Court determined that it was not a violation that always resulted in a denial of fundamental fairness. Id. at 298. 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 300-01.

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 the Court of Appeals 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 Petitioner's 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.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant certiorari and order further briefing on the questioned presented. Petitioner ultimately requests this Court reverse the decision of the Court of Appeals and hold the PCR court correctly granted Petitioner post-conviction relief.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of December, 2023.

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Dec 21 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenwood County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 6030 (S.C. Ct. App. Filed October 25, 2023)
Lower Court Case No. 2014-CP-24-01526

JAMES L. CARRIER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-0019331

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 Writ of Certiorari to the Court of Appeals and a copy of the Supplemental Appendix in this case have been served on Zachary W. Jones, Esquire, at his primary email address listed in the Attorney Information System (AIS), and on the Court of Appeals, at its e-filing address, which is ctappfilings@sccourts.org, this 21st day of December, 2023.

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER