

STATE OF SOUTH CAROLINA
In the Supreme Court

ORIGINAL

On Writ of Certiorari to Greenwood County
Brian M. Gibbons, Post-Conviction Relief Judge
D. Garrison Hill, Trial Court Judge

Appellate Case No. 2019-001090

JAMES CARRIER,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

APPENDIX VOLUME II OF II

ALAN WILSON
Attorney General

LARA MARY CAUDY
Attorney for Respondent

JANELL H. GREGORY
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Columbia, SC 29211
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ATTORNEY FOR PETITIONER

ATTORNEY FOR RESPONDENT

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S.C. SUPREME COURT

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1 legislature has just codified or have just repealed lewd
2 act but made essentially the same thing on criminal sexual
3 conduct with a minor, third.

4 THE COURT: Does the State have any position about
5 that?

6 MR. HODGES: I know on this crime bill there was a
7 savings clause that indicated that if someone was
8 convicted under the law that they were charged with that
9 that was the law that applied to their particular case. I
10 have to look to see if there was a similar savings clause
11 in this amendment.

12 THE COURT: All right. Well, okay, Mr. Carrier, if
13 you can come on around here for sentencing.

14 MR. GROSE: Just in response to that, what he just
15 said. Sex offense registry is not supposed to be
16 construed and just glancing at it it does not look like it
17 was even required. I need to study it more but it does
18 not look like it requires with CSC with a minor, third.
19 So our argument is it shouldn't be required now
20 particularly since it is from lewd act, since the sex
21 offender registry is not cumulative or at least that is
22 what the government always tells us.

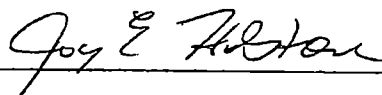
23 THE COURT: Mr. Carrier, your lawyer has done an
24 outstanding job for you and made compelling arguments
25 throughout the case and even just now about the sentence.

1 But the statutes limit what I can do and based on the fact
2 of your prior conviction and circumstances of this case
3 and what the legislature has made the law to be, the
4 sentence is that you be committed to the Department of
5 Corrections for a period of 15 years and have the
6 electronic monitoring, GPS, as prescribed by the statute.
7 Thank you.

8 MR. SWILLEY: Thank you, Your Honor.

9 (Whereupon, Court's Exhibit 4 was marked for
10 identification only.)

11 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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1 CERTIFICATE OF REPORTER
2
34 State of South Carolina)
5 County of Newberry)
6
78 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Greenwood, South
14 Carolina on the 17th day of July, 2012.15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.
17
1819 April 29, 2013
2021 
2223 Joy E. Holston, Court Reporter
24

25 My Commission expires: March 13, 2016

STATE OF SOUTH CAROLINA

COUNTY OF Greenwood
 STATE VS.
James Lloyd Carrier

AKA:

Race: CAU Sex: M Age: 38DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: [REDACTED]DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Sex / Lewd Act, committing or attempting lewd act upon child under 16 (June 4, 1in violation of § 16-15-0140 of the S.C. Code of Laws, bearing CDR Code # 2468

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☒ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Matthew S. Sledge 78750

Asst. Solicitor SC Bar# [REDACTED] Defendant Attorney for Defendant SC Bar# [REDACTED]

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed years
 and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
 of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.

☒ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47:9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCJA Surcharge)	\$5	\$
3% to County (if paid in installments)	\$	\$
TOTAL	\$	\$

Clerk of Court/ Deputy Clerk [Signature]

Court Reporter 404
 SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 12GS24-1166A/W#: 2012GS2401166Date of Offense: 1/1/1999 - 12/31/2003S.C. Code § : 16-15-0140CDR Code #: 2468

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

☒ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

Asst. Solicitor SC Bar# [REDACTED] Defendant Attorney for Defendant SC Bar# [REDACTED]

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

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 and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
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§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCJA Surcharge)	\$5	\$
3% to County (if paid in installments)	\$	\$
TOTAL	\$	\$

Other: GPS monitoring
per S.C. Code § 16-15-0140
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. G.

☐ Appointed PD or appointed other counsel
 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge [Signature]Judge Code: 2138Sentence Date: 7-18-12

IN THE COURT OF GENERAL SESSIONS
Indictment No.: 2012-GS-24-1166

Plaintiff,

Y.

Defendant.

VERDICT FORM

- ✓ GUILTY

NOT GUILTY

Christen A. Todd
Foreperson

ATTEST A TRUE COPY
Angela V. Thurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

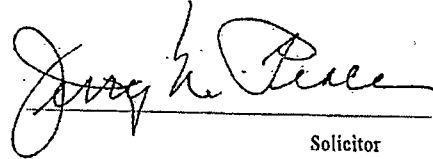
COUNTY OF GREENWOOD

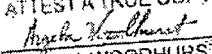
LEWD ACT
16-15-0140

At a Court of General Sessions, convened on the 8th day of June, 2012 the Grand Jurors of Greenwood County present upon their oath:

That James Lloyd Carrier, did in Greenwood County, state aforesaid, between the 1st day of January, 1999, and the 31st day of December, 2003, being over the age of fourteen (14) years, the said defendant did unlawfully, willfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, to wit: [REDACTED] date of birth: [REDACTED] with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the said defendant, or of the said child, [REDACTED] in violation of Section 16-15-140 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.


Solicitor

ATTEST A TRUE COPY

ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

ARREST WARRANT

M-075385 09-1146

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Greenwood

THE STATE
against

James L Carrier

Address:

Phone: _____ SSN: _____
Sex: M Race: W Height: 6 Weight: 135

DL State: SC DL #: _____

DOB: _____ Agency ORI #: SC0240000

Prosecuting Agency: Greenwood County Sheriff

Prosecuting Officer: Chris Haden - 0074

Offense: Lewd Act Upon a Child under 16

Offense Code: 2468

Code/Ordinance Sec: 16-15-0140

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant James Carrier
on 6-23-09

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
528 Monument Street
Room 114
Greenwood, SC 296462623

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Greenwood

Personally appeared before me the affiant Chris Haden whobeing duly sworn deposes and says that defendant James L Carrierdid within this county and state on or about 01/01/2003 violate the criminal laws of theState of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Greenwood)

in the following particulars:

DESCRIPTION OF OFFENSE Lewd Act Upon a Child under 16I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:In that James Lloyd Carrier did in the County of Greenwood approximately six years ago commit the offense of lewd act on a
minor by inappropriately touching a female juvenile about the breast and vagina area. A forensic interview was completed at
The Child's Place on 4-14-2009 of the female juvenile that was substantiated. This incident occurred at the residence of _____

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Greenwood

Affiant's Address 528 Edgefield StreetGreenwood, SC 29646-Affiant's Telephone (864)942-8600FILED GENERAL SESSIONS
8TH JUDICIAL CIRCUIT
GREENWOOD, SC
2009 JUN 26 PM 2 36

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY, ATTEN: A TRUE COPY

It appearing from the above affidavit that there are reasonable grounds to believe that _____

on or about 1/1/2003 defendant James L Carrier

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Greenwood as set forth below:DESCRIPTION OF OFFENSE: Lewd Act Upon a Child under 16Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable

Sworn to and subscribed before me

on 05/11/2009

Signature of Issuing Judge

C. Ryan Johnson

Judge Code: 7129Judge's Address Greenwood County CourthouseGreenwood, SC 29646-2634Judge's Telephone (864)942-8655Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 516

COPY

COMMITMENT

- ☒ Original Commitment
☐ Additional Charge(s)

TO: Director Greenwood County Detention Center

Date: 6/23/2009

You are hereby commanded by this Court to hold in your custody,

James L Carrier
(Defendant's name)

DOB: [REDACTED] Race: W Sex: M

[REDACTED]
(Address)

Bonding Company:

Case number	Charge	Trial Court	Bond Type	Amount
M075385	Lewd Act Upon a Child under 16	General Sessions	Cash Bond Surety Bond	\$150,000.00 \$150,000.00

ESTABLISHED COPY
[Signature]
ANGELA WOODHURST
JCCP AND GS
GREENWOOD COUNTY
S.C.

That you are commanded by this Court to continue custody of the named person until the person in custody is ordered to be released by a Judicial Officer.

Judge [Signature] Greenwood County, SC

408

Greenwood County Sheriff's Office
Victim Notification Information

Case Number: 09-7177

Court Information

State vs. James Carrier Warrant Number/Ticket Number M-075385

Offense(s) Lewd Act Upon A Child under 16

Victim Information

Name of Victim [REDACTED] Check if victim is deceased or ☒ a minor

Mailing Address [REDACTED]

Telephone Number (H) [REDACTED] (W) N/A (EMERGENCY)

Relative or Contact Person: GLENDA KAREN WASHINGTON (mother)

Their Mailing Address [REDACTED]

Their Telephone Number (H) [REDACTED] (W) N/A (EMERGENCY)

Additional Information/Comments [REDACTED]

Notification

☒ I do not wish to be notified when an arrest is made in this case. I understand this may be any time, day or night.

☐ I do ☒ I do not wish to be notified when a person arrested in this case appears for a bond hearing.

☒ I do not wish to be notified when the person arrested in this case appears for a preliminary hearing.

☒ I do not wish to be notified when a person arrested in this case appears in court for any plea, trial, or sentence.

By signing the blank provided below, I agree that I have received a copy of this **Victim Notification Information** form and that the information I have provided is correct. I understand that it is my responsibility to notify the appropriate agency (ies) of any change in my address and/or telephone number (s) so that law enforcement personnel may make reasonable attempts to notify me of arrest, detention, bonds and other pre-trial release hearings and/or procedures.

Completed By C. Hansen 6-25-09
Signature of person providing information Date

ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

STATE OF SOUTH CAROLINA)

COUNTY OF GREENWOOD)

James L Carrier)
Name of Defendant)

CHECKLIST

TRIAL COURT:

- ☒ GENERAL SESSIONS COURT
☐ MAGISTRATE COURT
☐ MUNICIPAL COURT

CASE NUMBER/CHARGE:

M075385 Lewd Act Upon a Child under 16

\$150,000⁰² 4/5

CHECKLIST FOR MAGISTRATE AND MUNICIPAL JUDGES

DIRECTIONS: Magistrate and Municipal Court Judges must use this checklist for ALL GENERAL SESSIONS and for ALL MAGISTRATE AND MUNICIPAL COURT CASES IN WHICH BOND HAS BEEN SET BY A JUDGE. The judge shall attach this checklist to the charging document (arrest warrant or uniform traffic ticket) when the defendant first appears before a judge for a bond hearing or first appearance, and complete the appropriate sections. Defendant must be provided a completed copy of this form.

☒ BAIL PROCEEDING/☐ FIRST APPEARANCE (NON-BAILABLE OFFENSES)

1. Form used at bail proceeding
 - a. Bond Form I (personal recognizance)
 - ☒ b. Bond Form II (surety, cash, percentage)
 - c. None (Non-Bailable Offense)
2. For cases in which bond was set, defendant was informed:
 - ☒ a. Warrant for arrest will be issued for violation of any condition of bail bond order.
 - ☒ b. His right and obligation to be present at trial and that trial will proceed in his absence if he fails to attend.
 - ☒ c. Failure to appear in court as required will result in institution of additional criminal charges. Failure to appear in connection with a felony, or while awaiting sentence after conviction, additional charge has penalty of not more than \$5,000 or imprisonment for not more than 5 years, or both. Failure to appear in connection with a charge for a misdemeanor for which the maximum possible sentence is at least one year, additional charge has penalty of not more than \$1,000 or imprisonment for not more than one year, or both. Failure to appear in court as required on any charge not specified above will result in the issuance of a warrant for defendant's arrest, as well as loss of any posted bond.
3. For cases to be tried in Court of General Sessions, defendant was informed of right to preliminary hearing if requested within ten (10) days:
 - ☒ a. Orally
 - ☒ b. In writing [NOTE: Defendant must be informed of right both orally and in writing]
4. ☒ Defendant was informed of the right to trial by jury.
5. In all general sessions cases, in all criminal domestic violence cases, and in all magistrate or municipal cases in which a prison sentence is likely to be imposed, defendant was informed of the following:
 - ☒ a. Charges against defendant and nature of the charges.
 - ☒ b. Right to counsel and right to court-appointed counsel if financially unable to employ counsel.
 - ☒ c. Defendant was informed orally and provided a copy of this form advising him of his right to obtain court appointed counsel if indigent (must meet federal poverty guidelines) and instructions on how to obtain court appointed counsel. In order to apply for court appointed counsel, defendant is required to appear before Clerk of Court located at Greenwood Courthouse for indigency screening. Defendant is responsible for a statutory fee of \$40.00 for indigency screening.
6. In all criminal domestic violence cases and any case where defendant is subject to an Order of Protection or Restraining Order, defendant signed and was provided a document explaining that entering the grounds or property of a domestic violence shelter in which the person's household member resides constitutes an additional misdemeanor charge and, if in possession of a dangerous weapon, an additional felony charge.

06-23-2009

First Appearance or Bond Hearing Date

JUDGE'S SIGNATURE

ATTEST A TRUE COPY
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

COUNTY OF GREENWOOD

LEWD ACT
16-15-0140

At a Court of General Sessions, convened on the 2nd day of October, 2009 the Grand Jurors of Greenwood County present upon their oath:

That James Lloyd Carrier, did in Greenwood County, state aforesaid, on or about the 1st day of January, 2003 being over the age of fourteen (14) years, the said defendant did unlawfully, willfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, to wit: [REDACTED] date of birth: [REDACTED] with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the said defendant, or of the said child, Lindsay Kaye Ferqueron, in violation of Section 16-15-140 of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

Gregory H. Pierce
Solicitor

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenwood County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CARRIER,

APPELLANT

APPELLATE CASE NO. 2012-212777

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

E. CHARLES GROSE JR.
Chief Circuit Defender Eight Judicial Circuit
Pro bono counsel

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to quash a subsequent defective indictment for lewd act, true-billed by the Greenwood County Grand Jury on June 8, 2012, when the State failed to establish the identity of the witness testifying before the Grand Jury in 2012?
2. Did the trial judge err in refusing to find the requirement of lifetime GPS monitoring unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment?
3. Did the trial judge err in refusing to grant a mistrial when the State asked a witness if the minor approached the witness "pertaining to the incidents with Mr. Carrier" in violation of the limitation to time and place exception to the hearsay rule found in Rule 801(d)(1)(D), S.C.R.E.?

STATEMENT OF THE CASE

In October of 2009, the Greenwood County Grand Jury indicted Appellant for lewd act, indictment #2009-GS-24-1146. On May 16, 2012, Appellant appeared before the Honorable J. Cordell Maddox and moved for a speedy trial. Attorney E. Charles Grose Jr. represented Appellant. Attorney Elizabeth P. White was present for the State. In a written order Judge Maddox ordered that the trial be called in June. (R. p. 374). In subsequent indictment on June 8, 2012, the Greenwood County Grand Jury again indicted Appellant for lewd act, indictment 2012-GS- 24- 1166.

On June 18, 2012, the State called the case to trial on the 2012 indictment before the Honorable D. Garrison Hill. Attorney E. Charles Grose Jr. again represented Appellant. Attorneys Elizabeth P. White and Andrew M. Hodges prosecuted the case. After the judge heard numerous motions in the case, both the State and the Defense agreed to continue the case to the July 16, 2012 term of court.

On July 17, 2012, the case was again called for trial. Attorney E. Charles Grose Jr. again represented Appellant at trial. Attorneys Andrew M. Hodges and Matt Swilley prosecuted the case. The jury returned a verdict of guilty and Judge Hill sentenced Appellant to 15 years. On July 30, 2012, Appellant filed a motion for new trial or in the alternative to reconsider the sentence. (R. p. 377). On August 9, 2012, Judge Hill, in a written order, denied the motion. (R. p. 409). A timely notice of intent to appeal was served on August 16, 2012. The appeal was filed in the original jurisdiction of the South Carolina Supreme Court based on a constitutional challenge to S.C. Code §23-3-540. This appeal follows.

STATEMENT OF FACTS

On March 31, 2009, the mother of the minor contacted the Greenwood County Sheriff's Office. Deputy Robert A. Grogan responded. The minor alleged that Appellant had sexually abused her six to seven years earlier at the home of her neighbor, Mariah Freel. Six to seven years earlier would have placed the incident date(s) in 2002 or 2003. The minor was sixteen when she talked to Grogan and would have been nine or ten at the time of the alleged incident(s). (Pre-trial hearing Tr. June 18-19, 2012, R. p. 62-69).

Grogan filed an incident report and turned the investigation over to Investigator Chris Hadden¹. Hadden arranged for Jessica Bell to interview the minor at The Child's Place, which is the statutorily mandated child advocacy center² and a division of the Sexual Trauma Center. The interview took place on April 14, 2009. The minor's allegation to Bell about the time and place of the incident was consistent with what she had told Grogan. The interviewers and counselors at the Sexual Trauma Center are part of an interdisciplinary team, including law enforcement and solicitors, organized to prosecute child sexual abuse cases. (Pre-trial hearing Tr. June 18-19, 2012, R. p. 70-99).

In May of 2009, Hadden obtained an arrest warrant charging Appellant with committing a lewd act on a minor. Based on the minor's allegations, the warrant alleged the incident took place on or about January 1, 2003. Hadden arrested Appellant on June 23, 2009. (Arrest Warrant, R. p. 375).

On October 2, 2009, the Greenwood County Grand Jury indicted Appellant for lewd act, indictment number 2009-GS-24-1146 [2009 indictment]. Consistent with the

¹ Hadden's name is spelled "Haden" in subsequent transcripts and on the indictments.

² See S.C. Code §63-11-310.

arrest warrant, this indictment alleged the incident occurred on or about January 1, 2003.
(2009 Indictment R. pp. 410)

On May 16, 2012, Appellant moved before the Honorable Cordell Maddox for a speedy trial. (May 16, 2012, R. p. 1-7). Judge Maddox ordered the charges found in the 2009 indictment to be called to trial before a jury on June 18, 2012. (Speedy trial Order, R. p. 374).

On June 5, 2012, in an e-mail to trial counsel, Assistant Solicitor Elizabeth P. White wrote:

I am having Mr. Carrier re-indicted for Lewd Act because there is an error in the original indictment. It should read "between the 1st day of January 1999 and the 31st day of December 2003."

(Defense Exhibit #4, R. p. 369). At the time, White offered no other explanation for the expanded time frame. On June 8, 2012, the Greenwood County Grand Jury again indicted Appellant for lewd act, indictment number 2012-GS-24-1166 [2012 indictment]. (2012 indictment. R. p. 412). The 2012 indictment expands the time frame from on or about January 1, 2003, alleged in the 2009 indictment, to between the 1st of January 1999, and the 31st day of December 2003. (2012 indictment, R. p. 413).

The assistant solicitor sent another e-mail on June 13, 2012 stating:

I found out that the victim has been seeing a counselor at Sexual Trauma. I intend to have the counselor testify. She won't/can't release her records without a Court order, so I propose having her come over some time [sic] this week so Judge Hughston can order her to produce her file. Thoughts?

(Defense Exhibit #4, R. p. 369):

On June 14, 2012, the Honorable Thomas L. Hughston, Jr. signed an order requiring disclosure of the counselor records. (Judge Hughston order, R. p. **). The records revealed that the assistant solicitor and the counselor, Susan Bentley, of the Sexual Trauma Center, had been preparing for trial for over a year. On July 18, 2011, Bentley "agreed to go to court" with the child and called the assistant solicitor. (Defendant's Exhibit #15, R. p. 371). The records also revealed allegations by the minor that she had been sexually abused by one of her mother's boyfriends. (Defendant's Exhibit #13, Supp. R. p. 1).

The State called Appellant's case to trial on June 16, 2012, and sought to proceed on the 2012 indictment. Appellant moved to be tried on the 2009 indictment. (Tr. June 18-19, 2012, R. p. 28-38; 176 – 197). Appellant submitted a written motion to try defendant on the original indictment. (Defendant's Exhibit #1, R. p. 349). The trial judge ultimately continued Appellant's case so Appellant could investigate the minor's allegations that she was sexually abused by one of her mother's boyfriends, Kenneth Shamburg. (R. p. 198, lines 8-22).

On July 17, 2012, Appellant moved to quash the 2012 indictment as defective based on the fact that the State failed to establish the identity of the witness who testified before the Grand Jury. Appellant again moved to be tried on the 2009 indictment. (July 17, 2012, R. p. 205-212). The trial judge denied the motion and allowed the State to proceed on the 2012 indictment. (July 17, 2012 R. p. 211, line 22 – p. 212, lines 1-13).

The jury found Appellant guilty on July 18, 2012. The Court immediately convened a sentencing hearing and sentenced Carrier to fifteen years imprisonment and ordered electronic monitoring, GPS, as prescribed by statute. (July 17, 2012, R. p. 347,

lines 1-6). Appellant informed the Court he would take the ten days allowed by Rule 29, SCRCrimP to make his new trial motions. In a written motion filed July 30, 2012, Appellant moved for a new trial or in the alternative moved for reconsideration of the sentence. (Motion for New Trial, R. p. 377). Appellant specifically renewed the objection to the defective indictment. (Motion for New Trial p. 4-8; R. p. 380-384). Appellant argued that the lifetime GPS monitoring requirement found in S.C. Code §23-3-540 was unconstitutional. (Motion for New Trial p. 22-30; R. p. 398-406). The Appellant also renewed the motion for a mistrial made during trial when the State asked a witness if the minor approached the witness "pertaining to the incidents with Mr. Carrier" in violation of the restriction to time and place exception to the hearsay rule found in Rule 801(d)(1)(D), S.C.R.E. (Motion for New Trial p. 12-13; R. p. 388-389). In a written order signed August 9, 2012, Judge Hill denied the motion. (Order Denying Motion for New Trial; R. p. 409).

ARGUMENT

1. The trial judge erred in refusing to quash a subsequent defective indictment for lewd act, true-billed by the Greenwood County Grand Jury on June 8, 2012, when the State failed to establish the identity of the witness testifying before the Grand Jury in 2012.

Prior to trial on July 17, 2012, and prior to swearing the jury³, Appellant moved to quash the 2012 lewd act indictment as defective and instead proceed on the 2009 lewd act indictment. (July 17, 2012, R. p. 205- 211). Appellant argued that the 2012 indictment was defective because the witness listed on the 2012 indictment, Chris Haden, formerly of the Greenwood County Sheriff's Department, was no longer with the Sheriff's Department, was not in the State of South Carolina on June 8, 2012, when the indictment was presented to the Grand Jury and could not have been the witness who testified before the Grand Jury. (July 17, 2012, R. p. 206, lines 2-12; p. 210, lines 18-25). The State did not argue that Haden testified before the Grand Jury on June 8, 2012. Instead, the State first responded asking, "Is there case law that says that the person who testified in front of the Grand Jury has to be listed on the indictment? I wasn't in the Grand Jury either but obviously probable cause was presented to the Grand Jury because they issued an indictment." (July 17, 2012, R. p. 206, lines 13-17). The State then again argued, "Your Honor, the indictment has been true billed, it was sent to the Grand Jury. Somebody had to present testimony that convinced the Grand Jury that there was probable cause in this case. I don't see where, I just don't see where it is deficient." (July 17, 2012, R. p. 211, lines 1-5).

³ "Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." S.C. Code §17-19-90. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Bayly v. State, 397 S.C. 290, 300, (fn. 6), 724 S.E.2d 182, 187 (fn. 6) (2012) ("Gentry merely concerned the appropriate time to raise a challenge to the sufficiency of an indictment.").

During the hearing Appellant and the trial judge specifically discussed State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981). (July 17, 2012, R. p. 208, line 14 – p. 209, lines 1-7). The judge, however, denied the motion stating:

Mr. Grose, 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 of 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. Of course, this all could be avoided if we did have recordings made of the Grand Jury proceedings. Certainly the State Grand Jury, I believe does that and I know the Federal Courts do it. And there have been many assaults on the Grand jury system in circuit court other than Justice Lewis' dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it.

July 17, 2012, R. p. 211, line 20 – p. 212 lines 1-13). The trial judge erred. The defective indictment constitutes an error of law requiring reversal.

"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. *See also* S.C. Code §17-19-10. Pursuant to Rule 3(c), SCR CrimP, the Solicitor's Office is responsible for preparing indictments for presentment to the Grand Jury. During the motion to quash the indictment as defective the State offered no evidence of the ordinary Grand Jury process or of the identity of the witness actually testifying before the Grand Jury.

In State v. Capps, 276 S.C. 59, 62, 275 S.E.2d 872, 873 (1981) the South Carolina Supreme Court wrote, "The practice of using a solicitor or other officer of the State, as the sole witness before the grand jury, to provide only a summary of the evidence could be abused and we strongly suggest it be abandoned unless no alternative is available." While the majority discouraged the practice of using the solicitor or other officer of the

State as the sole witness before the Grand Jury, the majority found no error in the trial judge's refusal to quash the indictment under those circumstances. In his dissent, however, Chief Justice Lewis wrote:

Therefore, I would hold that as a general rule an attorney performing a prosecutorial function may not additionally appear before the grand jury as a witness. While compelling reasons may dictate a rare exception be allowed to this general rule, I note no such showing in this case. The normal effort required in calling witnesses is insufficient. Since such evidence was the sole testimony in this case, it follows that the indictment should have been quashed. See U. S. v. Treadway, 445 F.Supp. 959.

Capps, 276 S.C. at 67, 275 S.E.2d at 875-876.

In State v. Anderson, 312 S.C. 185, 187, 439 S.E.2d 835, 836 (1993), the South Carolina Supreme Court revisited the State's continued practice of using the solicitor as the sole witness before the Grand Jury and held, "Because of the uncertainty and confusion that is taking place at all levels of the judiciary regarding this issue, we take this opportunity to explicitly prohibit the practice of prosecutors appearing as the sole witness before the grand jury." In order to comply with the requirement of Anderson and assure that the solicitor is not the sole witness before the Grand Jury, the State must candidly disclose the identity of the witnesses testifying before the Grand Jury.

In State v. Thompson, 305 S.C. 496, 501-502, 409 S.E.2d 420, 424 (Ct. App. 1991) (internal citations omitted) (emphasis original), the South Carolina Court of Appeals wrote:

Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary. Speculation about "potential" abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. In saying this, we yield to no one in our zeal to insure that the grand jury continues to perform its historic function as a

shield between the accused and abuse of the prosecutorial power of the State. The courts of South Carolina stand guard to see that the grand jury is not reduced to a "mere plaything of prosecutors."

The 2012 indictment is irregular on its face. It is undisputed that Investigator Haden was not in South Carolina and did not testify during the presentment of the 2012 indictment. At trial, the State contended it did not have to present any evidence whatsoever about the procedures surrounding the Grand Jury presentment or the identity of the testifying witness.⁴ This position is contrary the settled practice of taking testimony during an evidentiary hearing. *E.g. State v. Grim*, 341 S.C. 63, 67, 533 S.E.2d 329, 330-31 (2000) ("The court may conduct an evidentiary hearing to determine whether the indictment was true billed; or resubmit the indictment for grand jury consideration; or effect a waiver of presentment of the indictment to the grand jury and, again, entertain the defendant's plea; or simply allow withdrawal of the plea and proceed anew."); *Pringle v. State*, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) ("Here, there was testimony by the foreman of the grand jury that indicted petitioner that the regular procedure was to have the clerk publish the indictment in open court after the grand jury returned a true bill."); *State v. Bultron*, 318 S.C. 323, 329, 457 S.E.2d 616, 619-20 (Ct. App. 1995) ("During the hearing on [the] motion to quash the subject indictment, the State presented testimony from a Greenville County investigator whose employment duties include serving as

⁴ The State could not claim surprise by this motion. Although the June 2012 motion to be tried on the 2009 indictment centered on the State's Brady violations and untimely disclosure of the changed timeframe of the allegations, defense counsel called attention to the impossibility that Haden was the testifying witness. (June 18-19 2012, R. p. 33-34). The prosecution, therefore, had a month to prepare for this motion.

'docket coordinator' for the grand jury and assisting the grand jury in every meeting. The investigator testified the grand jury's regular procedure was to deliberate on the indictments presented to them and then publish their findings in open court."). The State, accordingly, could have called as a witness the foreperson of the Grand Jury or the person who actually testified before the Grand Jury.

Because Investigator Haden did not testify before the Grand Jury, the 2012 indictment is irregular on its face, revealing "*actual* abuse" of the Grand Jury process. Thompson 305 S.C. at 502, 409 S.E.2d at 424 (emphasis original). The State's complete failure to present any evidence of what actually transpired during the Grand Jury presentment is fatal. See Anderson v. State, 338 S.C. 629, 633, 527 S.E.2d 398, 400 (Ct. App. 2000) ("[T]he document bears no indications of whether the grand jury 'true billed' or 'no billed' it. Nor do we have any additional evidence before us . . . as to what action the grand jury took."). The trial judge erred in refusing to quash the defective 2012 indictment. The error requires reversal.

2. The trial judge erred in refusing to find the requirement of lifetime GPS monitoring unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

At sentencing the State noted that S.C. Code §23-3-540 requires mandatory lifetime GPS monitoring. (July 17, 2012, R. p. 340, lines 5-18). Appellant objected to imposing this condition. (July 17, 2012, R. p. 343-344). The trial judge ordered lifetime monitoring. In a written motion filed July 30, 2012, Appellant moved for a new trial or in the alternative moved for reconsideration of the sentence. (Motion for New Trial, R. p. 377). Appellant specifically argued that the lifetime GPS monitoring requirement found

in S.C. Code §23-3-540 was unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.. (Motion for New Trial, p. 22-30; R. pp. 398-406). In a written order signed August 9, 2012, the trial judge denied the motion. (Order Denying Motion for New Trial; R. p. 377). The trial judge erred.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const., S.C. Const. Am. VIII Art. I, §15. The Eighth Amendment to the United States Constitution is applicable to the states by reason of the Fourteenth Amendment. Robinson v. U.S., 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962). While the prohibitions of the Eighth Amendment are aimed at inhuman and barbarous penalties such as torture, the duration of punishment also falls within the purview of the amendment when the duration of imprisonment is so disproportionate to the offense that it shocks the moral sense of the community. See Am. Jur. 2d, Criminal Law, §§ 612, 614.

For example, in the seminal case on this issue, imprisonment of 12 to 20 years for falsifying a public document was held to constitute cruel and unusual punishment. Weems v. United States, 217 U.S. 349, 54 L.Ed.2d 793, 30 S.Ct. 544 (1910). Similarly, a sentence of life imprisonment without possibility of parole for the crime of forcible rape has also been held unconstitutional as to juvenile defendants. Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968). The “proportionality” bedrock of Eighth Amendment jurisprudence is equally important a principle as “evolving standards of decency” when determining whether a sentence constitutes cruel and unusual punishment. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (upholding 30-yr

sentence for 12-year-old who killed his grandparents with shotgun, then lied about it, after finding other courts had given similar sentences).

In Stockton v. Leeke, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1977) the South Carolina Supreme Court found that a ten year minimum sentence for safe cracking did not violate the prohibition of cruel and unusual punishment. The Court wrote, "Where, as here, we are considering the constitutionality of a punishment in the abstract, we are guided by two principles. First, the historical principle that the cruel and unusual punishment clause is designed to prevent inhuman and barbarous treatment. Second, that the sentence must not be grossly out of proportion with the severity of the crime. State v. Gamble, 249 S.C. 605, 155 S.E.2d 916 (1967), cert. den. 390 U.S. 927, 88 S.Ct. 862, 19 L.Ed.2d 988; Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)." Id. 269 S.C. at 462, 237 S.E.2d at 897.

"Although there are decisions to the effect that the provision against cruel and unusual punishment is applicable solely to the kind of punishment, and not to its amount or duration, according to the weight of authority, the punishment for a crime, while not cruel and unusual in kind, may be so severe as to fall within the meaning of this provision." State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273, 275 (1948).

S.C. Code §23-3-540 (A), the challenged statute in the present case, provides:

Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C), the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

The 2012 amendment to the statute substituted criminal sexual conduct with a minor third degree for lewd act. At the time of sentencing of Appellant and pursuant to S.C. Code §23-3-540(H), the monitoring requirement was for life with no means to petition the Court for removal.

In State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) a majority of the South Carolina Supreme Court held that a statutory provision that mandates lifetime satellite monitoring of certain child sex offenders without judicial review related to an assessment of an individual's risk of reoffending violates the Due Process Clause. The Court wrote:

Although we find the initial mandatory imposition of satellite monitoring under section 23-3-540(C) constitutional, we believe the final sentence of section 23-3-540(H) is unconstitutional, for it precludes judicial review for persons convicted of CSC-First or lewd act on a minor.^{FN6} The complete absence of any opportunity for judicial review to assess a risk of re-offending, which is beyond the norm of Jessica's law, is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending.

Dykes, 403 S.C. at 508, 744 S.E.2d at 510.

The challenge in Dykes was based on a violation of Due Process. As part of the Due Process analysis the majority wrote:

Our rejection of Dykes' fundamental right argument flows in part from the premise that satellite monitoring is predominantly civil. See Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (noting that whether a statute is criminal or civil primarily is a question of statutory construction). Where, as here, the legislature deems a statutory scheme civil, "only the clearest proof" will transform a civil regulatory scheme into that which imposes a criminal penalty. Id. at 92, 123 S.Ct. 1140 (quoting Hudson v. United States, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997)) (internal quotations omitted).

Dykes, 403 S.C. at 506, 744 S.E.2d at 509.

The challenge to the statute in the present case is based on a violation of the Eighth Amendment prohibition against cruel and unusual punishment. The South Carolina

Supreme Court addressed a similar challenge as applied to a juvenile in In re Justin B., 747 S.E.2d 774 (2013) where the Court found that while the Dykes opinion now required ten year judicial review of the monitoring requirement, the statute was civil in nature and not a violation of the Eighth Amendment. The Court wrote:

Application of the Mendoza-Martinez factors demonstrates that in addition to the fact that the General Assembly intended section 23-3-540 as a civil scheme for the protection of the public, the statute is also not so punitive in effect as to negate the intention to deem it civil. See, e.g., Kansas v. Hendricks, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (“[W]e will reject the legislature's manifest intent only where a party challenging the statute provides the ‘clearest proof’ that the ‘statutory scheme is so punitive in purpose or effect as to negate [the State's] intention’ to deem it ‘civil.’”) (citation omitted).

In re Justin B., 747 S.E.2d at 781-782.

The record in the present case provides the Court with additional information about the reality of electronic monitoring, as applied in South Carolina, which demonstrates that the statute, as applied, is so punitive in effect as to negate the State's intention to deem it civil, rendering the statute unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

Appellant filed an Appendix to the written motion for new trial or in the alternative for reconsideration of the sentence. (Appendix to Motion for new trial; R. p. 408). Included in the Appendix was a transcript from a probation violation hearing in State v. Anthony Nation. (Appendix p 1-14; Suppl. R. pp 6-19). Appellant relied on portions of that probation violation transcript in the motion for new trial.⁵ (Motion for new trial p. 23, R. p. 399).

⁵ “A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records.” Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); Rule 201, SCRE.

The probation agent in the Nation case testified that the electronic monitoring device is plastic, would fit in the palm of your hand and is attached to the ankle with a two inch strap. (App. p. 8, lines 6-10; Suppl. R. p. 11-15). The batteries in the device require charging on average of three hours per day but longer as the batteries age. (App. p. 6, line 19 – p. 7, p. 8 lines 1-5, Suppl. R. p. 11, 12). In order to charge the device, the individual being monitored must plug himself into an electrical outlet for at least three hours everyday. (App. p. 7, lines 1-5, Suppl. R. 12). The charging schedule is established by the Probation Department. (App. p. 7, lines 22-25, Suppl. R. 12). The State charges the offender \$20.00 per week for the GPS monitoring. (App. p. 8, 12-13, Suppl. R. 13). Twenty dollars a week is \$1,040.00 every year. If Appellant lives for thirty years after completing his sentence, then he will owe South Carolina \$31,200.00 for this electronic monitoring.

The realities of electronic monitoring, as discussed above, were not presented to this Court in In re Justin B., 747 S.E.2d 774 (2013). Appellant respectfully asks this Court to revisit the analysis used in In re Justin B. in light of the punitive realities of electronic monitoring now before this Court.

In finding that the South Carolina law requiring electronic monitoring of certain juveniles was a civil remedy this Court in In re Justin B relied on Smith v. Doe, 538 U.S. 84 (2003) and Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007). In Smith v. Doe, 538 U.S. 84 (2003), the United States Supreme Court, relying on the factors noted in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), found that the Alaska Sex Offender Registry Act requiring sex offenders, convicted prior to the Act's passage, to register with law enforcement was not an ex post facto violation because the Act was a civil remedy. The

statute, on its face, does not require these updates to be made in person.” 538 U.S. at 101. The Court reserved for another day “[w]hether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved.” Id. at 102.

Interestingly, the Alaska Supreme Court later found that the Act violates the protection against ex post facto laws afforded by the Alaska Constitution. Doe v. State, 189 P.3d 999 (Alaska, 2008). In Doe v. State, 189 P.3d 999, 1018 (Alaska 2008) the Alaska Supreme court wrote:

Summing up the effects under the seven factors, we conclude that ASORA's effects are punitive, and convincingly outweigh the statute's non-punitive purposes and effects. We recognize that several of the factors seem closely related, and that discussion of one may overlap discussion of another. Nonetheless it is not the mere number of factors that leads us to our conclusion, but our assessment of those factors and their relative weight. Six of those factors lead us to disagree, respectfully but firmly, with the Supreme Court's analysis and its ultimate conclusion that ASORA is not penal.

Other states have reached the same conclusion. Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 568, 62 A.3d 123, 143 (2013) (“The application of the statute has essentially the same effect upon Petitioner's life as placing him on probation and imposing the punishment of shaming for life, and is, thus, tantamount to imposing an additional sanction for Petitioner's crime.”); State v. Letalien, 2009 ME 130, 985 A.2d 4 (2009) (held retroactive application of SORNA of 1999 violated ex post facto prohibitions by increasing registration duty of certain offenders from 15 years to their entire lifetimes and imposing a quarterly in-person verification requirement, without affording an opportunity for relief from those duties at discretion of sentencing court.)

In Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007), another case cited by this Court in Justin B to support the finding that the South Carolina law requiring electronic monitoring of certain juveniles was a civil remedy, the United States Court of Appeals for the Sixth Circuit found that the Tennessee law authorizing the Tennessee Board of Probation and Parole to enroll a convicted sex offender into an electronic monitoring program, **during the course of probation or parole**, did not constitute an ex post facto violation. Tenn. Code Ann. §40-39-303 provides:

(a) Notwithstanding any other law, the board of parole may require, as a mandatory condition of release for any person convicted of a sexual offense as defined in § 40-39-301, that any person so released be enrolled in a satellite-based monitoring program for the full extent of the person's term of parole, consistent with the requirements of § 40-39-302.

(b) The board of parole may require, as a mandatory condition of release for any person convicted of a serious offense as defined in this chapter or for other offenders as the board deems appropriate, that the person be enrolled in a satellite-based monitoring program for the full extent of the person's term of parole, consistent with the requirements of § 40-39-302.

(c) Offender participation in a location tracking and crime correlation based monitoring and supervision program under this section shall be at the discretion of the department or as mandated by the board of parole and shall conform to the participant payment requirements stated in § 40-39-305 and be based upon the person's ability to pay.

Offender participation in the satellite monitoring program under Tennessee law is in the discretion of the department or board of parole and is only required during the term of parole. In contrast, pursuant to S.C. Code §23-3-540, the sentencing judge had no discretion and was required to order lifetime GPS monitoring for Appellant. The decision by this Court in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), allows

Appellant to petition for judicial review ten years after the commencement of electronic monitoring. The judicial review after ten years, however, does not cure the Eighth Amendment violation when considering the real effect of electronic monitoring.

The first step in the Eighth Amendment analysis is to determine the intent of the legislature in enacting the statute. If the intention was to enact a regulatory scheme that is civil and nonpunitive, the Court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. Kansas v. Hendricks, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

After finding that the intent of the Alaska legislature in enacting the Sex Offender Registry Act was to create a "civil, non-punitive regime," the Court in Smith v. Doe, 538 U.S. 84, 97 (2003) wrote:

In analyzing the effects of the Act we refer to the seven factors noted in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644(1963), as a useful framework. These factors, which migrated into our *ex post facto* case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses. See *id.*, at 168-169, and nn. 22-28, 83 S.Ct. 554. Because the Mendoza-Martinez factors are designed to apply in various constitutional contexts, we have said they are "neither exhaustive nor dispositive," United States v. Ward, 448 U.S., at 249, 100 S.Ct. 2636; 89 Firearms, 465 U.S., at 365, n. 7, 104 S.Ct. 1099, but are "useful guideposts," Hudson, 522 U.S., at 99, 118 S.Ct. 488. The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

The first Mendoza-Martinez factor is whether non-discretionary lifetime electronic monitoring is traditionally viewed as punishment. As noted by the dissent in Doe v. Bredesen, 507 F.3d 998, 1010 (6th Cir. 2007):

The practice of requiring sex offenders to wear global monitoring systems for the purposes of continuous monitoring is fairly new. The recent origin of satellite-based monitoring “suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing.” See Smith, 538 U.S. at 97, 123 S.Ct. 1140. However, a closer look at the satellite-based monitoring program, though new, shows that it bears a striking resemblance to historical forms of punishment.

In addressing whether the electronic monitoring was punitive, this Court in In re Justin B., 747 S.E.2d 774, 782 (2013) wrote:

Appellant failed to provide the Court with any evidence that the electronic monitoring device is immediately recognizable to the public, or would cause him to be identified as a sex offender to the exclusion of other reasonable and legitimate uses for electronic devices. Moreover, the Supreme Court has held that the lifetime registration requirement for sex offenders is non-punitive. Id. at 105–06, 123 S.Ct. 1140. Electronic monitoring does not provide the same broad public dissemination of a sex offender's status. Thus, it does not logically follow that this Court can deem this prophylactic and non-invasive mechanism punitive.

In light of the evidence now before this Court in regard to the reality of electronic monitoring, the device can no longer be characterized as merely “prophylactic” and “non-invasive.” As discussed by the dissent in Doe v. Bredesen, 507 F.3d 998, 1010 (6th Cir. 2007), the electronic monitoring requirement is far more intrusive than registration because with registration the information is disseminated only to those members of the public who choose to view the registry. The electronic monitoring device is on display at all times for the public including “co-workers, fellow worshipers at church, onlookers at the mall, diners at restaurants, patrons at gas stations, passengers on planes, trains, or buses, fans at sporting events, moviegoers at theaters, visitors at museums, sightseers, or any other person who may be at any conceivable location where Doe rightfully chooses to go within his probation limits” to view, whether they choose to or not. Doe v. Bredesen, 507 F.3d at 1011 (6th cir. 2007).

The requirement that the individual being monitored must charge the battery in the device by plugging himself into an electrical outlet for a minimum of three hours everyday meets the second Mendoza-Martinez factor of being an affirmative disability or restraint. Electronic monitoring promotes the traditional aims of punishment – retribution and deterrence, the third Mendoza-Martinez factor. The presence of a deterrent factor weighs in favor of a finding that the electronic monitoring requirement is punitive. Cutshall v. Sundquist, 193 F.3d 466, 476 (6th Cir. 1999).

As to the fourth Mendoza-Martinez factor of whether the non-discretionary mandatory lifetime requirement of electronic monitoring bears a rational connection to a non-punitive purpose, this Court in In re Justin B., 747 S.E.2d 774, 782 (2013) wrote, “The purpose of the registration and electronic monitoring scheme in the instant case is clear—to provide for the safety and welfare of the State's citizens, and eliminate information deficits which hinder law enforcement in their apprehension of those offenders. See S.C. Code Ann. § 23–3–400. These goals are a legitimate exercise of the State's police power, and Appellant fails to demonstrate that these objectives are mere pretext.” While providing for the safety and welfare of the State's citizens is certainly a legitimate and non-punitive purpose, the rational connection to requiring the electronic monitoring for all who fall within the statute without a showing for the need to protect and without providing any discretion weighs heavily in favor of finding the monitoring punitive.

In light of the registration and other requirements already imposed upon Appellant and without a showing of a specific need for protection of the public by requiring electronic monitoring of the Appellant, the requirement is excessive in respect

to the stated goal of providing for the safety and welfare of the State's citizens.

Additionally it is questionable how electronic monitoring serves the goal of public safety.

As noted by the dissent in Doe v. Bredeesen, 507 F.3d 998, 1012 (6th Cir. 2007):

It equally eludes me as to how the satellite-based monitoring program prevents offenders, like Doe, from committing a new crime. Although the device is obvious, it cannot physically prevent an offender from re-offending. Granted, it may help law enforcement officers track the offender (after the crime has already been committed), but it does not serve the intended purpose of public safety because neither the device, nor the monitoring, serve as actual preventative measures.

The fifth Mendoza-Martinez factor also weighs in favor of finding the requirement punitive.

The electronic monitoring requirement, as applied in South Carolina without discretion, is traditionally viewed as punishment, constitutes an affirmative disability or restraint by requiring the individual being to plug himself into an electrical outlet for at least three hours everyday and promotes the traditional aims of punishment of retribution and deterrence. The rational connection of the electronic monitoring requirement to the non-punitive purpose of public safety is tenuous because the requirement is mandatory and the judge has no discretion to determine if there is a need for electronic monitoring. The electronic monitoring requirement is excessive with respect to the non-punitive goal of public safety in light of the additional registration requirements. The non-discretionary lifetime electronic monitoring requirement is unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

3. The trial judge erred in refusing to grant a mistrial when the State asked a witness if the minor approached the witness "pertaining to the incidents with Mr. Carrier" in violation of the limitation to time and place exception to the hearsay rule found in Rule 801(d)(1)(D), S.C.R.E.?

During the direct examination by the State of Carolyn Travis, the minor's youth director, the State asked, "Did [minor] approach you pertaining to the incidents with Mr. Carrier?" (July 17, 2012, R. p. 296, lines 22-23). Appellant objected and moved for a mistrial. (July 17, 2012, R. p. 296, line 24 – p. 297, line 1). The judge denied the motion. The judge erred.

Rule 801(d)(1)(D) provides, "A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony in a criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to time and place of the incident . . ." In State v. Jeffcoat, 350 S.C. 392, 396, 565 S.E.2d 321, 3232 (Ct.App. 2002) the South Carolina Court of Appeals wrote:

The rule expressly allows other witnesses to testify the victim complained of the assault, but only as to "time and place"; it specifically circumscribes such testimony by "excluding details or particulars." State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993). Among the details which must be excluded under the rule is the identity of the alleged perpetrator. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).

The question, asked by the prosecutor was in direct violation of the rule because it included the identity of Appellant as the alleged perpetrator.

Appellant was prejudiced by the improper question. Credibility of the minor witness was a critical determination to be made by the jury. E.g. State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (Pleicones, J., dissenting) ("As in many CSC cases, this

case turned primarily on the veracity of the victim. In the instant case, while physical evidence indicated that the victim had been abused, no physical evidence other than the testimony of the victim connected Petitioner to the crime.”). In Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002) the South Carolina Supreme Court wrote, “As to the prejudice prong of Strickland v. Washington, supra, Sanchez was prejudiced by counsel's deficient performance because improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless. As stated in Jolly v. State, 314 S.C. at 21, 443 S.E.2d at 569, ‘it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.’” The improper question by the State constituted prejudicial corroboration testimony warranting a mistrial.

CONCLUSION

Based on the argument presented in issue one, Appellant's conviction should be reversed and the case remanded for trial on the 2009 indictment. Based on the argument presented in issue two, this Court should find the mandatory electronic monitoring requirement of S.C. Code §23-3-540 unconstitutional as a violation of the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution. Based on the argument presented in issue three, Appellant's conviction and sentence should be reversed.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

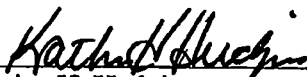
ATTORNEY FOR APPELLANT

This 27th day of May, 2014..

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 27th, 2014


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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenwood County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

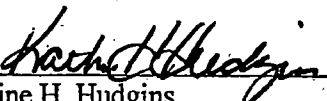
V.

JAMES CARRIER,

APPELLANT

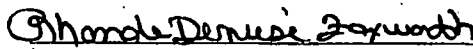
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of May, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of November, 2013.

 (L.S.).
Notary Public for South Carolina
My Commission Expires: October 17, 2021.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2012-212777

THE STATE, ...RESPONDENT

v.

JAMES CARRIER, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly denied Appellant's motion to quash his 2012 indictment for lewd act where the indictment contained no facial irregularities and where Appellant failed to present any evidence of actual abuse of the grand jury proceedings?
2. Whether Appellant's cruel and unusual punishment claim is preserved for appellate review where it was not raised to and ruled upon by the trial court, and to the extent it was preserved, whether the trial court did not impose cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution where: (1) GPS monitoring is not punishment, and (2) even if this Court now finds it is punishment, it is proportional to Appellant's?
3. Whether the trial court properly denied Appellant's motion for a mistrial where no evidence was introduced at trial in violation of the Rule 801(d)(1)(D) "time and place" exception to the hearsay rule?

STATEMENT OF THE CASE

On October 2, 2009, the Greenwood County grand jury indicted Appellant for lewd act. (09-GS-24-1146). (R.p.410-411). He moved for a speedy trial and on May 16, 2012, a hearing on the motion was convened at the Greenwood County Courthouse before the Honorable J. Cordell Maddox. Appellant was present and was represented by Eighth Circuit Public Defender E. Charles Grose, Jr., Esquire. The State was represented by Assistant Solicitor Elizabeth White of the Eighth Circuit Solicitor's Office. (R.p.1, R.p.410). At the conclusion of the hearing, Judge Maddox issued a written order directing that the case be set for trial to begin on the afternoon of June 18, 2012. (R.p.374). On June 8, 2012, Appellant was again indicted, via direct indictment, by the Greenwood County grand jury for lewd act. (12-GS-24-1166). (R.p.412-413).

On June 18, 2012, the case was called for trial before the Honorable D. Garrison Hill. Appellant was present and was again represented by Mr. Grose. The State was represented by Assistant Solicitor White and Assistant Solicitor Andrew M. Hodges. After hearing arguments and taking testimony on several motions, including Appellant's written "Motion for Court to Try Defendant on the Original Indictment," the parties agreed to continue the trial until the July 16, 2012, term of court. (R.p.8; p.28, lines 7-14; p.198, line 8-p.199, line 16; R.p.349-354).

On July 17, 2012, the trial was resumed before Judge Hill. Appellant was present and was again represented by Mr. Grose. The State was represented by Assistant Solicitor Hodges and Assistant Solicitor Matt Swilley. On July 18, 2012, at the conclusion of trial, Appellant was found guilty of lewd act. He was sentenced by Judge Hill to fifteen (15) years' imprisonment and was placed on mandatory electronic

monitoring [GPS monitoring] as required by the South Carolina Code. (R.p.346, line 23-p.347, line 7; R.p.414). On July 30, 2012, Appellant filed a post-trial motion for a new trial, or in the alternative, to reconsider the sentence. (R.p.377-407).¹ On August 9, 2012, Judge Hill issued a written order denying the motion. (R.p.409). On August 16, 2012, Appellant filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of the appeal. This Brief of Respondent (the State) follows.

¹ Although the motion was not served and filed until twelve days after imposition of the sentence, it appears it was timely because the tenth day after sentencing fell on Saturday, July 28, 2012. See Rule 29, SCRCrimP (“Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence.”).

STATEMENT OF FACTS

On October 2, 2009, the Greenwood County grand jury indicted Appellant for lewd act. The face of the 2009 indictment is signed by the foreman of the grand jury and includes the hand written words "True Bill." It lists "Chris Haden, Greenwood County Sheriff" as the witness before the grand jury. The body of the 2009 indictment alleges the crime was committed "on or about the 1st day of January, 2003." (R.p.410-411). On June 8, 2012, Appellant was directly indicted by the Greenwood County grand jury for lewd act. The face of the 2012 indictment is signed by the foreman of the grand jury and includes the hand written words "True Bill." It also lists "Chris Haden, Greenwood County Sheriff" as the witness before the grand jury. The body of the 2012 indictment alleges the crime was committed "between the 1st day of January, 1999, and the 31st day of December, 2003." (R.p.412-413). The 2009 indictment was nol prossed following Appellant's conviction under the 2012 indictment.

On June 18, 2012, when the case was initially called for trial, Appellant submitted a pretrial "Motion for Court to Try Defendant on the Original Indictment." (R.p.28, lines 7-14; R.p.349-354). He claimed surprise at the expanded time frame in the 2012 indictment, alleged Brady² violations, and argued it would violate due process to allow the State to go forward on that new indictment. Appellant's counsel added:

And I should probably throw in at this point that I'm suspicious that the new indictment is not valid on its face because this morning was the first I've had confirmed that Mr. Haden was not going to testify. Mr. Haden is listed as the person who testified before the grand jury during this term of court. And if he was not here – he certainly is not employed with the Greenwood Sheriff's Office now. If – if he was not here and he didn't testify in front of the grand jury, then that indictment becomes irregular. And so that's an additional problem that, you know, we may need to – to take into account.

² Brady v. Maryland, 373 U.S. 83 (1963).

(R.p.33, line 24-p.34, line 12). After offering testimony and arguments, the parties announced they had reached an agreement to continue the trial until the July 16, 2012, term of court. (R.p.198, line 8-p.199, line 16).

On July 17, 2012, when the trial resumed, Appellant advised the court that although the continuance resolved most of his concerns about the indictment, he was still moving to be tried solely on the 2009 indictment. He argued the 2012 indictment was defective because the witness listed was not in the state of South Carolina when the grand jury met. Appellant repeatedly alleged Sheriff's Investigator Haden was not present and therefore could not have been a witness when the case was presented to the grand jury, but offered no evidence in support of his allegation. Based on this unsubstantiated claim Appellant argued the indictment was not valid and should be quashed. The solicitor responded that since the indictment had been "true billed" by the grand jury, it was not deficient. (R.p.211, lines 1-5). The trial court ruled as follows:

Mr. Grose, 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 of 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. Of course, this all could be avoided if we did have recordings made of the Grand Jury proceedings. Certainly the State Grand Jury, I believe, does that and I know the Federal Courts do it. And there have been many assaults on the Grand Jury system in circuit court other than Justice Lewis' dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it.

(R.p.211, line 22-p.212, line 13). Appellant later renewed his motion to quash and the trial court again denied the motion. (R.p.269, lines 5-21). Ultimately, the jury was sworn and the trial proceeded on the 2012 indictment. (R.p.269, lines 21-22).

The State called the victim to the stand. She testified she grew up with her mother and brother in Greenwood County and lived next door to a neighbor with three boys. The victim and her brother went to their neighbor's house nearly every day from the time she was five years old until she was fifteen or sixteen, and she remembered Appellant also often coming to the neighbor's house from the time she was six or seven years old until she was eleven. The victim testified Appellant: "would make me touch him and he would touch me on my breast and vagina and make me kiss him and make me rub his penis." She said Appellant did this "pretty much every time he was there." The victim testified the abuse took place in various locations throughout the house and that Appellant told her it was okay because he loved her. She said Appellant once gave her a note saying that when she turned sixteen he would come get her because she would be old enough so that nobody could do anything about it. The victim didn't immediately report the incidents and first told somebody about the abuse two weeks before her sixteenth birthday when she started having scary dreams about Appellant coming back. (R.p.278, line 12-p.283, line 10). The victim described one particular incident that happened in her neighbor's bedroom while she and the three boys were playing video games. She said Appellant came into the room, sat next to her, reached under her clothes, and touched her vagina and her breast. (R.p.283, line 19-p.284, line 23).

Next the State called Carolyn Travis. Ms. Travis was the youth and children's director at the victim's church and supervised the victim's youth group from the time the

victim was eight or nine years old through the date of the trial. While Ms. Travis was on the stand the following exchange took place:

Q: Now, Ms. Travis, did [the victim], in 2009 did [the victim] approach you pertaining to the abuse she suffered?

A: Yes.

MR. GROSE: Your Honor, I object to the Solicitor characterizing as abuse that was suffered. That is an issue in dispute, Your Honor.

THE COURT: Just rephrase your question, Mr. Swilley.

Q: Did [the victim] approach you pertaining to the incidents with Mr. Carrier?

MR. GROSE: Your Honor, that is improper, asking about identity. The limitation is on time and place and I move for a mistrial, that is improper.

THE COURT: Overruled, go ahead.

(R.p.296, line15-p.297, line 2). Ms. Travis then testified the victim told her, in 2009, that the incident happened at the neighbor's house when the victim was five or six years old. Ms. Travis offered no testimony about the victim's statement beyond her report of the time and place of the incident. (R.p.297, line 3-p.298, line 19). Finally, the State called forensic interviewer Jessica Bell and counselor Susan Bentley in regard to the victim's statements as to the time and place of the lewd act. They each testified the victim said the incident happened around 2000 or 2001 at the neighbor's house. (R.p.299, line 18-p.305, line 12). Appellant was found guilty of lewd act.

After the verdict, the trial judge asked to hear the State's position on sentencing. The solicitor noted Appellant was currently on the sex offender registry due to a prior conviction in Kentucky for first-degree sexual abuse, and asked the court to impose the maximum sentence. The solicitor then stated: "based on the law in this State that Mr.

Carrier would be required to have lifetime GPS monitoring as part of his sex offender registry.” (R.p.340, lines 2-16). Appellant responded: “On a legal matter, and I will probably - will address this also in the posttrial motion. In the legal matter the State has already brought up a lifetime electronic monitoring. Our Supreme Court has recently cut back on that.” (R.p.343, lines 9-13). Appellant referenced a case “out of Greenville” where “the Court was required after finding a violation of probation, to order life with GPS monitoring.”³ He claimed this Court did not address a number of issues that were raised in that appeal, one of which was “sort of a due process issue” about “whether GPS is imposed without some kind of specific determination.” Appellant asked the trial court to find that a “hearing” or some other due process “mechanism” is required before the electronic monitoring could be extended beyond the length of the actual sentence imposed. He did not mention the Eighth Amendment and never argued imposition of lifetime electronic monitoring would somehow constitute cruel and unusual punishment. (R.p.343, line 12-p.344, line 17) (emphasis added). Appellant was subsequently sentenced by Judge Hill to fifteen (15) years’ imprisonment and was placed on mandatory electronic GPS monitoring as prescribed by statute. (R.p.346, line 23-p.347, line 7; R.p.414).

In his written motion Appellant first argued he was entitled to a new trial based on: (1) his pretrial objection to the 2012 indictment; (2) repeated violations of the time and place exception to hearsay evidence; (3) admission of improper testimony about identity; (4) court’s failure to declare a hung jury; and (5) insufficiency of the evidence. He next asked the trial court to reconsider his sentence on grounds that: (1) he was prejudiced by South Carolina’s lack of sentencing procedures and the trial court declining

³ Appellant appeared to be referring to State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013).

his request for a pre-sentencing report; (2) he was entitled to a reduction in sentence based on character references from friends and family; and (3) he might not be awarded credit for time served where it was not expressly ordered by the trial judge. Finally, Appellant asked the trial court to declare lifetime GPS monitoring unconstitutional arguing: (1) it is punitive; (2) that mandatory placement without judicial review related to an assessment of an individual's risk of reoffending violates due process; and (3) that it constitutes cruel and unusual punishment because it is disproportionate to the severity of his crime and because of the significant charges he would incur for use of the GPS monitor. (Motion for New Trial dated and filed July 30, 2012). On August 9, 2012, Judge Hill issued a written order denying the motion. (R.p.409). On August 16, 2012, Appellant filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief in support of the appeal. This Brief of Respondent (the State) follows.

ARGUMENT

I.

The trial court properly denied Appellant's motion to quash his 2012 indictment for lewd act where the indictment contained no facial irregularities and where Appellant failed to present any evidence of actual abuse of the grand jury proceedings.

Appellant argues the trial judge erred in refusing to quash his 2012 indictment for lewd act upon a child because the State failed to establish the identity of the witness testifying before the grand jury. He contends the name listed as the testifying witness is not correct, which renders the indictment "irregular on its face" and reveals "actual abuse" of the grand jury process. (Brief of Appellant p.14-p.15). The State disagrees and submits Appellant's argument is without evidentiary support and is contrary to the well-established law of South Carolina.

Standard of Review

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); Weathers v. State, 319 S.C. 59, 62, 459 S.E.2d 838, 839 (1995); State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996). The 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. Thus, the defendant must present competent evidence to support grounds asserted as the basis for a motion to quash an indictment. State v. Brownfield, 60 S.C. 509, 39 S.E. 2, 4 (1901). Facts merely alleged by a defendant may not be used as evidence to establish those facts, except with the consent of the State. Id. 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. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996); State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991). The circuit court's denial of a motion to quash an indictment will be reversed only for an abuse of discretion. Evans, 363 S.C. at 514, 611 S.E.2d at 520.

Discussion/Analysis

During the July 17, 2012, pre-trial motions hearing, Appellant argued the 2012 indictment was defective because the named witness was not in South Carolina when the grand jury met. Appellant 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, Appellant offered no evidence in support of his allegation. Assistant Solicitor Hodges neither admitted nor denied Appellant's claim. Instead, he explained he was not in the grand jury proceeding when the 2012 indictment was presented, but noted probable cause must have been presented to the grand jury because it issued an indictment. Appellant continued to argue the allegedly misidentified witness rendered the indictment "irregular" and that since there was "a problem on its face," the indictment was "defective" and should be quashed. (R.p.205, line 11-p.207, line 5).

The trial judge and Appellant then had a brief discussion about this Court's 1981 opinion in State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981), including the oft-cited dissent written by Chief Justice Lewis.⁴ Appellant acknowledged it was not the practice

⁴ In Capps, this Court criticized the practice of using a solicitor as the sole witness before the grand jury to provide a summary of the evidence, and strongly suggested the State abandon the practice unless no alternative was available. Id. at 62, 275 S.E.2d at 873. In State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), the Court reiterated the holding in Capps and prosecutors were again cautioned to avoid the practice of appearing as the sole witness before the grand jury. Id. at 391, 377 S.E.2d at 301. Finally, in State v. Anderson, 312 S.C. 185, 439 S.E.2d 835 (1993), the Court stated: "we take this opportunity to

in Greenwood County for the solicitor to be a witness before the grand jury, but nevertheless argued that since “we don’t know who was there,” this created “a problem with the four corners of the indictment” and that as a result the indictment was not valid. He argued, “I don’t think the State gets the benefit of the courts [sic] speculating about all of the possible things that could have been done for it to be done correctly.” The trial judge asked: “Why should you get the benefit of the speculation that Mr. Haden wasn’t here? I mean, I don’t know that.” Assistant Solicitor Swilley commented that since the indictment had been “true billed” by the grand jury, he could not see how it would be deficient. (R.p.208, line 14-p.211, line 21). The trial court ultimately ruled as follows:

Mr. Grose, 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 of 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. Of course, this all could be avoided if we did have recordings made of the Grand Jury proceedings. Certainly the State Grand Jury, I believe, does that and I know the Federal Courts do it. And there have been many assaults on the Grand Jury system in circuit court other than Justice Lewis’ dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it.

(R.p.211, line 22-p.212, line 13) (emphasis added).

On appeal, Appellant first recounts this Court’s decisions in Capps and Anderson and then asserts: “In order to comply with the requirement of Anderson and assure that the solicitor is not the sole witness before the Grand Jury, the State must candidly disclose the identity of the witnesses testifying before the Grand Jury.” (Brief of

explicitly prohibit the practice of prosecutors appearing as the sole witness before the grand jury.” Id. at 187, 439 S.E.2d at 836. Notably in Anderson, the assistant solicitor admitted a prosecutor had been the sole witness before the grand jury and acknowledged: “It has always been the practice of our office to do that.” Id. at 186, 439 S.E.2d at 835.

Appellant, p.13). However, Anderson says nothing about disclosing the identity of witnesses. Since Appellant never alleged the solicitor was a witness in the grand jury proceedings against Appellant, much less the sole witness, the Anderson prohibition is inapplicable to the facts in the present case. In any event, the face of the indictment clearly identifies a witness from the Sheriff's Department rather than an assistant solicitor.

Appellant nevertheless argues the indictment is "irregular on its face." He claims: "[i]t is undisputed that Investigator Haden was not in South Carolina and did not testify during the presentment of the 2012 indictment," and complains that "[a]t trial the State contended it did not have to present any evidence whatsoever about the procedures surrounding the Grand Jury presentment or the identity of the testifying witness." Appellant argues that position is "contrary to the settled practice of taking testimony during an evidentiary hearing." He relies on three cases in support of this argument;⁵ however, each of those cases involved a true facial irregularity on the indictment which left a doubt as to whether it had in fact been "true billed" by the grand jury. In Grim, the case was remanded for a hearing to determine whether the indictment was "true billed" because, although signed and dated by the foreman of the grand jury, it did not indicate the action taken by the grand jury. Grim, 341 S.C. at 65, 533 S.E.2d 329-30.

In Pringle, the indictment was stamped "True Bill," but wasn't signed by the foreman. Pringle, 287 S.C. at 410, 339 S.E.2d at 128. Pringle claimed the lack of a signature meant he was never indicted and, therefore, the trial court lacked subject matter

⁵ State v. Grim, 341 S.C. 63, 533 S.E.2d 329 (2000); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986); & State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995).

jurisdiction⁶ to try him. Id. Based on this facial irregularity, the State offered evidence that the regular indictment procedure was followed and the indictment was published in open court. This Court affirmed the denial of post-conviction relief and held: “While it is preferable for the grand jury foreman to sign the true bill, the foreman’s signature is not essential to the validity of the indictment when the indictment is in writing and published by the clerk.” Id. at 410, 339 S.E.2d 128 (citing State v. Creighton, 10 S.C.L. 256 (1 Nott & McCord 1818)).

Finally, in Bultron, as in Grim, the indictment was signed but was not otherwise stamped or marked as “true bill” or “no bill.” Bultron, 318 S.C. at 328, 457 S.E.2d at 619. Relying on Pringle, the Court of Appeals noted: “A facial irregularity in an indictment does not render the indictment invalid where the indictment is in writing and published by the clerk.” Id. Thus, the only two requirements for a facially valid indictment appear to be that it be signed by the foreperson, and that it be marked “true bill.” Likewise, the “settled practice of taking testimony” appears only to apply in cases where one of these two requirements is lacking, resulting in a true “facial irregularity.”

Although Appellant alleges the indictment is “irregular on its face,” this is simply not the case. On its face, the 2012 indictment: (1) is marked “true bill,” (2) is signed by the foreman of the grand jury, and (3) identifies “Chris Haden, Greenwood County Sheriff,” as a witness. Thus, Appellant’s argument actually amounts to a claim of an irregularity in the proceedings by which the indictment was procured, which turns on his

⁶ When Pringle was decided in 1986, confusion existed in South Carolina jurisprudence between the sufficiency of the indictment and the subject matter jurisdiction of the trial court. In State v. Gentry, 363 S.C. 93, 99, 610 S.E.2d 494, 498 (2005), this Court addressed that confusion and explained: “subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts only serves to confuse the issue.” Id. at 101, 610 S.E.2d at 499. The Court went on to hold that: “if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury it sworn and not afterwards.” Id.

unsupported assertion that Chris Haden did not appear. The State submits the trial court properly concluded Appellant failed to meet his burden to present evidence supporting his allegation regarding the grand jury proceedings. Batchelor, supra; Brownfield, supra. Appellant did not present any actual evidence in support of his motion to quash. He presumes Officer Haden did not testify before the grand jury in 2012, and argues the appearance of Haden's name on the 2012 indictment reveals "actual" abuse of the grand jury process. But actual abuse 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. Here, unlike in Anderson, there was no such admission or consent. Indeed, Assistant Solicitor Hodges simply noted he did not participate in the grand jury proceedings which resulted in issuance of the 2012 indictment.

Appellant argues it was incumbent upon the State to disprove his claims about officer Haden,⁷ but this is not what the law requires. Indeed, Appellate decisions preclude inquiry into the factual basis of an indictment by the grand jury, and the secrecy of grand jury proceedings are inviolate. Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974). The burden falls squarely upon on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated. Batchelor, supra. Here, Appellant failed to demonstrate actual abuse in order to quash the 2012 indictment. Other than sheer speculation, Appellant presented no evidence to substantiate his claim that the State acted

⁷ In a footnote, Appellant notes the State could not claim surprise by his motion to quash because defense counsel called attention to the issue during the previous hearing on June 18-19, 2012. He comments that the State had a month to prepare; however, Appellant fails to acknowledge he also had a month to prepare, yet did not produce any evidence to support his allegation that Investigator Haden was not present.

improperly in obtaining the 2012 indictment at issue. Therefore, the trial court did not abuse its discretion in refusing to quash the indictment, and that decision should be affirmed.

II.

Appellant's cruel and unusual punishment claim is not preserved for appellate review because it was not raised to and ruled upon by the trial court, and to the extent it was preserved, the trial court did not impose cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution where: (1) GPS monitoring is not punishment, and (2) even if this Court now finds it is punishment, it is proportional to Appellant's offense.

Appellant argues the trial judge erred in refusing to find the requirement of lifetime GPS monitoring unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment. He acknowledges this Court's recent decision in In re Justin B., 405 S.C. 391, 747 S.E.2d 774 (2013), which found GPS monitoring is not punishment, but contends the record in the present case provides additional information about the reality of electronic monitoring, and asks this court to revisit the analysis used in Justin B. The State submits Appellant's Eighth Amendment argument should be dismissed as unpreserved for appellate review because it was not timely raised to the trial judge, and alternatively denied and dismissed as without merit because Appellant has failed to demonstrate sufficient reason for this Court to consider a departure from its well-reasoned analysis in Justin B.

Issue not Preserved for Appellate Review

Under South Carolina law, an objection must be made on a specific ground. State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010). For an issue to be properly preserved, it has to be raised to and ruled on by the trial court. Id.; State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name of a legal doctrine in order for the issue to be preserved, but it must be clear the argument has been presented on that ground." Stahlnecker, 386 S.C. at 617, 690

S.E.2d at 570. Furthermore, to be timely for purposes of error preservation, an issue must be raised at trial and not for the first time in a post-trial motion. State v. Taylor, 399 S.C. 51, 63-64, 731 S.E.2d 596, 603 (Ct. App. 2012) (holding that an issue first raised in a post-trial motion is insufficient to preserve it for review on appeal where it was not first raised at trial). Here, Appellant's cruel and unusual punishment argument is not preserved for appellate review because that specific ground was first argued in his post-trial motion, and therefore was not timely raised to the trial court.

After the verdict, the solicitor noted: "Mr. Carrier would be required to have lifetime GPS monitoring as part of his sex offender registry." (R.p.340, lines 2-16). Appellant responded: "On a legal matter . . . the State has already brought up a lifetime electronic monitoring. Our Supreme Court has recently cut back on that." (R.p.343, lines 9-13). Appellant referenced a case "out of Greenville" where "the Court was required after finding a violation of probation, to order life with GPS monitoring." He claimed this Court did not address a number of issues that were raised in that appeal, one of which was "sort of a due process issue" about "whether GPS is imposed without some kind of specific determination." Appellant asked the trial court to find that a "hearing" or some other due process "mechanism" is required before the electronic monitoring could be extended beyond the length of the actual sentence imposed. He did not mention the Eighth Amendment and never argued imposition of lifetime electronic monitoring would somehow constitute cruel and unusual punishment. (R.p.343, line 12-p.344, line 17) (emphasis added). Appellant was subsequently sentenced by Judge Hill to fifteen (15) years' imprisonment and was placed on mandatory electronic GPS monitoring as prescribed by statute. (R.p.346, line 23-p.347, line 7;R.p.414).

On July 30, 2012, Appellant filed a post-trial motion for a new trial, or in the alternative, to reconsider the sentence. In his written motion Appellant asked in part that the trial court to declare lifetime GPS monitoring unconstitutional as a violation of his right to due process, and for the first time, as a violation of the constitutional prohibition against cruel and unusual punishment. Specifically, he argued: (1) GPS monitoring is punitive; (2) that mandatory GPS placement without judicial review related to an assessment of an individual's risk of reoffending violates due process; and (3) that GPS monitoring constitutes cruel and unusual punishment because it is disproportionate to the severity of his crime and because of the significant financial burden of having to pay for the use of the GPS monitor. (R.p.377). On August 9, 2012, Judge Hill issued a one-page written order finding: "these motions are without merit, and therefore denied." (R.p.409).

Because Appellant's Eighth Amendment cruel and unusual punishment argument was raised for the first time in his post-trial motion, it was not timely raised to the trial court and is not preserved for appellate review. Taylor, 399 S.C. at 63-64, 731 S.E.2d at 603. Likewise, the trial court's blanket written order denying the post-trial motions is not sufficient to constitute a "ruling" on a specific issue that was not timely raised to the trial court and does not save the argument from dismissal. In any event, even if this Court finds the Eighth Amendment issue is preserved, the States submits lifetime GPS monitoring cannot constitute cruel and unusual punishment because: (1) as determined in Justin B., it is not punishment, and (2) even if punishment, it is nevertheless proportional to Appellant's crime.

Standard of Review

All statutes are presumed constitutional, and if possible, will be construed to render them valid. Justin B., 405 S.C. at 395, 747 S.E.2d at 776. A statute will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt. Id. The party challenging the statute's constitutionality bears the burden of proof. Id.; In re Treatment of Luckenbaugh, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002).

Jessica's Law

The Sex Offender Accountability and Protection of Minors Act [the Act], also known in South Carolina as "Jessica's Law" was enacted in 2006, with an effective date of July 1, 2006. Pursuant to the original terms of the Act, any person convicted or adjudicated delinquent for the offenses of criminal sexual conduct in the first degree with a minor or committing or attempting a lewd act on a child under sixteen, with an offense date on or after July 1, 2006, was required to be ordered by the court to be monitored with an active electronic monitoring device for the duration of the time that individual was required to register as a sex offender. S.C. Code Ann. § 23-3-540(A) (2007). This provision was amended in 2012 by substituting references to criminal sexual conduct in the third degree for committing or attempting a lewd act upon a child under sixteen. S.C. Code Ann. § 23-3-540(A) (Supp. 2013).

GPS Monitoring is not Punishment

The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. Amend. VIII. Similarly, the South Carolina Constitution provides: “Excessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted . . .” S.C. Const. Art. I, § 15.⁸ A determination of whether GPS monitoring requirements constitute cruel and unusual punishment rests primarily on whether GPS monitoring is a punishment at all. Justin B., 405 S.C. at 395, 747 S.E.2d at 776.

Since the late 1800’s, the United States Supreme Court has focused on the legislative intent underlying the enactment of a statute in determining whether a statute is penal or civil. Doe v. Pataki, 120 F.3d 1263 (2nd Cir. 1997) (citing Hawker v. New York, 170 U.S. 189 (1989)). The Supreme Court articulated a two-step analysis in United States v. Ward:

First, we have set out to determine whether congress, in establishing the penalizing mechanism, indicated whether expressly or impliedly a preference for one label or the other. Second, where congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to the latter inquiry, we have noted that “only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.”

⁸ The State acknowledges this Court has the authority and responsibility to interpret the South Carolina Constitution, and that under certain circumstances our constitution may afford protections beyond those recognized by the United State Constitution. However, Appellant’s argument appears to be grounded solely on the cruel and unusual punishment clause of the Eight Amendment to the United States Constitution and not on State constitutional grounds. He makes a single reference to the South Carolina Constitution; however, he fails to make any argument as to how it might afford additional protection beyond existing Eighth Amendment jurisprudence.

448 U.S. 242, 248 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)). In considering the second step, the well-established practice in both federal and state courts in a variety of constitutional contexts has been to apply the factors enumerated in Kennedy v. Mendoza-Martinez⁹ to help make the determination of whether the statute in question was so punitive in effect as to overcome the legislative intent. See e.g., Smith v. Doe, 538 U.S. 84, 97-106 (2003) (ex post facto); Hudson v. United States, 522 U.S. 93, 104-05 (1997) (double jeopardy); Simmons v. Galvin, 575 F.3d 24, 44-45 (1st Cir. 2009) (ex post facto); Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997) (ex post fact and due process); John Does 1-4 v. Snyder, 932 F.Supp.2d 803, 811-13 (E.D. Mich. 2013) (ex post facto); In re Alva, 92 P.3d 311, 325-26 (Cal. 2004) (cruel and unusual punishment); State v. Trosclair, 89 So.3d 340, 351-57 (La. 2012) (ex post facto). These factors, however, are neither exhaustive nor dispositive; they only provide a framework for the analysis. Smith v. Doe, 538 U.S. at 97. Moreover, while the Supreme Court has not explained the relative weight to be afforded each factor, it has recognized that no one factor is determinative as they “often point in differing directions.” Hudson, 522 U.S. at 100-01.

Initially, the State submits a cruel and unusual punishment analysis is not required because this Court has already determined GPS monitoring is a civil remedy rather than punishment. Justin B., 405 S.C. at 408, 747 S.E.2d at 783. Appellant claims the record

⁹ 372 U.S. 144, 168-69 (1963). The factors are: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has been historically regarded as punishment; (3) whether it comes to play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment - retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. This analysis requires weighing of all of the above factors. Only a clear finding of congressional intent to punish under the factors will evidence a punitive effect. Id.

in the present case “provides the Court with additional information about the reality of electronic monitoring.” That additional information, however, consists solely of cherry-picked excerpts from a transcript of a probation violation hearing in State v. Anthony Nation, first provided to the trial court as an attachment to Appellant’s post-trial motion. As explained above, Appellant’s cruel and unusual punishment argument is not preserved for appellate review because it was not raised to the trial judge during trial. Because Appellant’s Eighth Amendment challenge is not preserved for review, the State submits any supplemental information submitted after his trial in an attempt to support that unpreserved challenge should not be considered by this Court. Without this “additional information” this Court has been presented with no new facts or different circumstances than it considered in Justin B. Thus, this Court has been given no legitimate basis on which to re-visit its earlier decision. In Justin B., the Court conducted a thorough analysis of GPS monitoring under the two-step process described in Ward, including application of the Mendoza-Martinez factors, and concluded GPS monitoring is simply not punishment. As a result, the Court properly determined it did not need to consider whether GPS monitoring constitutes cruel and unusual punishment. Justin B., 405 S.C. at 409 n.3, 747 S.E.2d at 783 n.3. The State submits that determination should stand.

To the extent this Court disagrees and concludes Appellant timely presented additional information and sufficient grounds to re-examine the constitutionality of GPS monitoring in South Carolina under the Eighth Amendment, the State submits that where, as here, the statute in question is so clearly intended to serve a legitimate, non-penal legislative purpose, the inquiry need not extend to consideration of the Mendoza-Martinez factors. First, the non-penal purpose of the Act is demonstrated by the

legislature's decision to include it in Article 7 of Chapter 3, Title 23, as an enhancement to the "Sex Offender Registry," which has already been determined to be non-punitive in nature. State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Second, the title of the Act itself reveals legislative intent. It is called the "Sex Offender Accountability and Protection of Minors Act," indicating it is aimed at protecting minors and making sex offenders accountable, not at punishing them further for their crimes. Third, the preamble to the Act explains its purpose was: "To amend Section 23-3-540, relating to the electronic monitoring of sex offenders, so as to establish the persons who shall or may be electronically monitored and to establish the procedures for monitoring these persons." In other words, the Legislature passed the Act to monitor particular sex offenders, not to punish them. Fourth, the device itself is defined as one that: "... actively monitors and records a person's location at least once every minute twenty-four hours a day and that timely records and reports the person's presence near or within a prohibited area or a person's departure from a specific geographic location." S.C. Code § 23-3-540(P) (2007 & Supp. 2013). This definition supports the legislative intent described by the location, title, and preamble to the Act. Finally, the primary effect of the law is to aid law enforcement efforts to investigate new crimes, which is clearly a non-punitive function of GPS monitoring. Based on these reasons, the State submits the Act's obvious purpose is not punitive; therefore, there it cannot constitute cruel and unusual punishment. See Smith v. Doe, supra; Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007); State v. Bare, 677 S.E.2d 518 (N.C. App. 2009), review denied, 702 S.E.2d 492 (N.C. 2010); Neville v. Walker, 878 N.E.2d 831 (Ill. App. 3d 2007), appeal denied, 897 N.E.2d 254 (2008).

In any event, the State submits that even under further analysis of the Mendoza-Martinez factors, Appellant, like Justin B., has not shown the “clearest proof” that the statutory scheme is so punitive either in purpose or effect as to negate the intention of the legislature. First, GPS monitoring does not involve an affirmative disability or restraint. GPS monitoring is not incarceration, or even home detention. Appellant is not subject to any physical restraint. There is virtually no restriction on Appellant’s liberty to travel, and nothing prevents him from changing jobs or residences. As long as he keeps the device charged, he is free to live, work, or travel as he chooses. Appellant contends the three hours of daily charging time referenced in the testimony from State v. Nation demonstrates GPS monitoring is an affirmative disability or restraint. But this claim smacks of disingenuity when one considers the myriad opportunities the average person has every day to charge the monitor while sitting or resting in close proximity to an electrical outlet. Appellant is not being denied movement at any specific time of the day. Therefore, the Act’s GPS monitoring requirement does not impose an affirmative disability or restraint.

Second, GPS monitoring is not similar to those sanctions that have historically been regarded as a punishment. Historical punishments involved more than the collection of information or the protection of public, instead promoting goals such as humiliation or shaming. Here, the device is neither intended to draw specific attention to the individual wearer, nor to invite public condemnation. As technology advances, the tracking device is destined to become smaller and less obtrusive. It is more akin to requiring an individual to provide a photograph, fingerprint, or DNA sample - a method of identification or tracking - than punishment. In Justin B., this Court noted: “[Justin

B.] has failed to provide the Court with any evidence that the [GPS] monitoring device is immediately recognizable to the public, or would cause him to be identified as a sex offender to the exclusion of other reasonable and legitimate uses for electronic devices.” Justin B., 405 S.C. at 406, 747 S.E.2d at 782. Here, Appellant has likewise failed to provide such information. Relying on the dissent in Bredesen, *supra*, he argues the GPS monitor is “on display at all times for the public.” Yet, the only additional information in the portion of the transcript from State v. Nation indicates the device is plastic, would fit in the palm of your hand, and has a strap that is two inches wide. (Motion for a New Trial, Attachment, p.8 [Nation Tr.p.52], lines 6-10). These characteristics comport with this Court’s analysis in Justin B., and its conclusions: (1) that “any resulting stigma is not a basic component of the regulatory scheme;” and (2) that “any unintended humiliation is a collateral consequence of a valid regulation.” Id.

Under the third factor, courts consider whether the statute “comes into play upon a finding of scienter.” Mendoza-Martinez, 372 U.S. at 169. Since Appellant’s mandatory GPS placement is a direct result of his conviction for lewd act, it necessarily incorporates the element of scienter; however, the scienter test is generally downplayed by courts when evaluating sex offender regulations. Bredesen, 507 F.3d at 1007; Trosclair, 89 So.3d at 352-53. Therefore, the third factor is of little value in Appellant’s case.

Fourth, use of a GPS device does not primarily promote the traditional aims of punishment: (1) retribution and (2) deterrence. While GPS monitoring may serve as a specific and general deterrent, it does not do so “to the exclusion of the provision’s civil goals.” Justin B., 405 S.C. at 407, 747 S.E.2d at 782. Indeed, promoting deterrence

does not take away from the legitimate, non-punitive purposes of protecting children and aiding in law enforcement.

Under the fifth factor, courts ask whether application of the statute necessarily depends on behavior which is already a crime. As with the third factor, placing Appellant on GPS monitoring is a direct result of his conviction for lewd act. Likewise, as with the third factor, this carries little weight in an analysis of Appellant's case because the regulatory scheme itself applies only to past conduct, which was a crime. Thus, criminal behavior is a necessary beginning point because recidivism is the statutory concern. Trosclair, 89 So.3d at 354.¹⁰

Sixth, as noted in Justin B., use of a GPS monitor clearly has a rational relationship to an alternative stated non-punitive purpose. That purpose is to protect children and to solve crime. A GPS monitor is not used solely for home detention. It is also used to monitor a person outside the home, allowing Appellant to move freely. In the future it can be used either to place him at a crime scene, or possibly confirm an alibi. Appellant acknowledges public safety and welfare are legitimate, non-punitive purposes for legislation, but contends there is no rational connection between those purposes and GPS monitoring. However, this Court has already concluded the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test. Dykes, 403 S.C. at 508, 744 S.E.2d at 510.

Seventh, and also as found in Justin B., there is no basis to conclude GPS monitoring is excessive in relation to the alternative stated non-punitive purpose. The burdens placed on Appellant by having to wear the device are far outweighed by the

¹⁰ By failing to mention either the scienter element or the criminal behavior element in Justin B., this Court appears to agree that they are not particularly germane to an analysis of the GPS monitoring statute.

purpose - to protect children and solve crime. Appellant may believe that mandatory lifetime monitoring makes the monitoring excessive; however, the State submits that children in the distant future are no less deserving of protection than children in the present. To the extent the GPS monitoring can actually accomplish its purpose, it can do so now or in the future. Statistical evidence demonstrates that sex offenders pose a high risk of re-offending. S.C. Code Ann. § 23-3-400 (Supp. 2013). Indeed, sex offenders pose a serious and increasing threat. McKune v. Lile, 536 U.S. 24, 33 (2002). This is why there is a national consensus for pursuing a “containment approach” to sexual deviance. In addition, and again as noted by this Court in Justin B., because Appellant is now entitled to seek judicial review of his continued compliance with the GPS monitoring requirements ten years after commencement of monitoring, Dykes, 403 S.C. at 508-09, 744 S.E.2d at 510, those requirements certainly cannot be considered excessive in relation to the purpose of the Act.

Thus, with the exception of the third and fifth Mendoza-Martinez factors, which, as explained above, should be given very little weight, the considerations here weigh heavily in support of concluding that the statutory scheme is not so punitive either in purpose or effect as to negate the intention of the legislature. Therefore, the State submits that even under a re-analysis of the Mendoza-Martinez factors in light of Appellant’s “additional information,” Appellant has not shown the “clearest proof” that the statutory scheme is so punitive either in purpose or effect as to negate the intention of the legislature. This Court should follow the precedent set in Justin B. and once again find GPS monitoring is not punishment, and therefore, not cruel and unusual punishment.

**Lifetime GPS Monitoring with the Possibility of Removal After Ten Years
Is Constitutionally Proportional Punishment for Lewd Act Upon a Minor**

Even if this Court chooses to reverse the precedent set in Justin B. and now finds GPS monitoring constitutes punishment, the State submits lifetime GPS monitoring with an opportunity to seek judicial review of continued compliance ten years after commencement of monitoring does not constitute cruel and unusual punishment, because it is proportional to Appellant's crime.

The United States Supreme Court notes that at its core the Eighth Amendment prohibits excessive sanctions. Atkins v. Virginia, 536 U.S. 304 (2002). Punishment is "excessive," and therefore prohibited by the Eighth Amendment, if it is not graduated and proportioned to the offense. Id. Thus, for Eighth Amendment purposes, the court conducts a proportionality analysis to determine whether the punishment is disproportionate to the crime committed. Atkins, 536 U.S. at 311 (instructing that it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense); Solem v. Helm, 463 U.S. 277 (1983). Likewise, in analyzing the prohibition against cruel and unusual punishment in the South Carolina Constitution, our courts have recognized the concept of requiring a sentence to be in proportion to the crime. State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001); Stockton v. Leeke, 269 S.C. 459, 237 S.E.2d 896 (1977). Indeed our Courts have held that a sentence, though not cruel and unusual in kind, may be so severe in duration as to be cruel and unusual. State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948). However, the prohibitions of the Eighth Amendment only forbid extreme sentences that are grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). What constitutes cruel and unusual punishment is an evolving standard and involves looking to how society presently views a particular

punishment. State v. Wilson, 306 S.C. 498, 509-510, 413 S.E.2d 19, 26 (1992); see Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590 (1958) (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

The clearest and most reliable expression of society’s contemporary values is derived from legislation enacted by the country’s legislatures. State v. Pittman, 373 S.C. 527, 563, 647 S.E.2d 144, 162 (2007). However, a reviewing court’s own judgment should also be employed by asking whether there is reason to disagree with the judgment reached by the citizenry and the legislature. Id. at 563, 647 S.E.2d at 163. The bar for cruel and unusual punishment is high. United States v. Juvenile Male, 670 F.3d 999 (9th Cir. 2012). In order to establish that evolving standards of decency preclude a particular punishment, the defendant bears the heavy burden of showing our culture and laws have emphatically and virtually universally rejected a particular sentencing practice. Id. at 565, 647 S.E.2d at 164. “It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it.” State v. Williams, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Ct. App. 2008).

Here, that burden has not been met by Appellant, either in an argument to the trial court, or in this appeal. Instead, Appellant simply asserts the duration of GPS monitoring coupled with the cost is so severe as to fall within the meaning of cruel and unusual punishment. The mere fact that the Legislature enacted a law requiring lifetime GPS monitoring for particular individuals who committed sex crimes against children is strong evidence that the alleged “punishment” is not excessive under community standards.

This is particularly true considering the nature of the “punishment” Appellant finds objectionable. As described in detail above, GPS monitoring is a far cry from incarceration, or any other traditional form of punishment. Indeed, as long as the person subject to GPS monitoring complies with requirements for maintaining functionality of the device, his or her liberty is virtually unrestricted. This not only weighs against finding that GPS monitoring is punishment, but also strongly weighs against finding it is disproportionate punishment to the crime. Indeed, ten years or more of GPS monitoring pales in comparison to fifteen years in prison, the maximum possible sentence for lewd act under former section 16-15-140 of the South Carolina Code. Additionally, the financial cost of GPS monitoring shrinks in significance when compared to the cost of incarceration, where the individual has an extremely limited opportunity to earn an income.

The State submits taking all of this into consideration, the Act’s mandate that Appellant be placed on lifetime GPS monitoring as a result of his conviction for lewd act upon a minor comports with currently prevailing standards of decency and does not violate the cruel and unusual punishment clauses of the United States and South Carolina Constitutions. This is particularly true where Appellant is constitutionally entitled to petition for judicial review and possible relief from GPS monitoring after ten years. Therefore, Appellant’s argument should be dismissed and the trial court should be affirmed.

III.

The trial court properly denied Appellant's motion for a mistrial where no evidence was introduced at trial in violation of the Rule 801(d)(1)(D) "time and place" exception to the hearsay rule.

Appellant argues the trial judge erred in refusing to grant a mistrial when the State asked a witness if the victim approached that witness "pertaining to the incidents with Mr. Carrier," because the question violated the time and place exception to the hearsay rule found in Rule 801(d)(1)(D), SCRE. He contends that regardless of what testimony was elicited in response, he was prejudiced by the improper question itself because the credibility of the victim was such a critical issue at trial. Appellant concludes by claiming: "the improper question by the State constituted prejudicial corroboration testimony warranting a mistrial." (Brief of Appellant, p.28). The State disagrees and submits Appellant's argument is without merit.

Standard of Review

"The decision to . . . deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). Indeed, a mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989); See also State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). Moreover, "[t]he granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other

way.” State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000). The burden is on the moving party to establish both error and prejudice. Wasson, 299 S.C. at 510, 386 S.E.2d at 256. Appellate courts favor the exercise of the wide discretion of the trial judge in evaluating a mistrial request. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988).

Rule 801, SCRE

The South Carolina Rules of Evidence define hearsay as: “[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. The Rules, however, further provide that:

A statement is not hearsay if . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant’s testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

Rule 801(d), SCRE.

Discussion/Analysis

Appellant argues: “the improper question by the State constituted prejudicial corroboration testimony warranting a mistrial.” (Brief of Appellant, p.28). However, despite the trial court overruling Appellant’s objection to asking about identity, Ms. Travis did not offer testimony as to any hearsay from the victim. This is because: (1) the declarant/victim testified at trial and was subject to cross-examination; (2) the statement was consistent with the declarant’s testimony; and (3) the statement was limited to the time and place of the incident. Since no improper evidence materialized as a result of the allegedly improper question, Appellant suffered no prejudice and the trial court

could not have abused its discretion in refusing to grant a mistrial. State v. Watts, 320 S.C. 377, 384, 465 S.E.2d 359, 364 (Ct. App. 1995); compare with State v. Sapp, 295 S.C. 484, 485-86, 369 S.E.2d 145, 145-46 (1988) (finding reversible error where the accused was unfairly prejudiced because the solicitor, over the accused's objection, was allowed to repeatedly cross-examine a witness in such a manner as to improperly force him to attack the veracity of another witness).

In any event, to the extent this Court considers the question itself rather than the testimony offered in response to that question, the State submits the question could not constitute improper corroboration because, though it identified Appellant, it did not reference a sexual assault, a time or place, or even whether the victim made a statement about the unspecified "incidents." Instead, the question was merely whether the witness was "approached" pertaining to "incidents" with Appellant. The victim could have "approached" Ms. Travis and not made a statement at all. Similarly, "incidents" could reference any number of occurrences, not necessarily the sexual assaults committed by Appellant. Thus, standing alone, the question asked by the assistant solicitor was not improper. Therefore, the trial court properly denied Appellant's motion for a mistrial, and that decision should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
May 19, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2012-212777

THE STATE,.....RESPONDENT

v.

JAMES CARRIER,.....APPELLANT.

CERTIFICATE OF COUNSEL

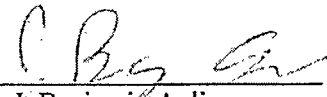
The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b),

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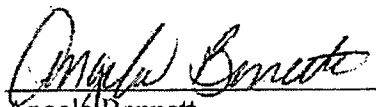
PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated May 19, 2014, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CARRIER,

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APPELLATE CASE NO. 2012-212777

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ARGUMENT IN REPLY

1. The trial judge erred in refusing to quash a subsequent defective indictment for lewd act, true-billed by the Greenwood County Grand Jury on June 8, 2012, when the State failed to establish the identity of the witness testifying before the Grand Jury in 2012.

On June 8, 2012, the State obtained a second indictment for lewd act expanding the time frame from the initial indictment, true billed on October 2, 2009, from on or about January 1, 2003, to between the 1st of January 1999, and the 31st day of December 2003. (2009 and 2012 indictments, R. p. 410-413). The witness listed on both indictments was Chris Haden. Appellant argued that the 2012 indictment was defective because the witness listed on the 2012 indictment, Chris Haden, formerly of the Greenwood County Sheriff's Department, was no longer with the Sheriff's Department, was not in the State of South Carolina on June 8, 2012, when the indictment was presented to the Grand Jury and could not have been the witness who testified before the Grand Jury. (July 17, 2012, R. p. 206, lines 2-12; p. 210, lines 18-25). The State never argued that Haden testified before the Grand Jury on June 8, 2012.

In the brief the State now argues that the challenge to the subsequent indictment must fail because Appellant failed to prove that Haden did not testify before the Grand Jury on June 8, 2012. At trial there was no dispute that Haden did not appear before the Grand Jury in 2012. Appellant argued, "They haven't said the Mr. Haden was here. They tired to get Mr. Haden back from West Virginia last month to try this case. This indictment was done on the eve of that trial. I was jumping up and down and complaining about how that indictment, you know, was late and then and then [sic]. I mean, I am not speculating and they are not saying he was there. They are just saying it doesn't matter. (July 17, 2012, R.

p. 210, lines 18-25). The State continued to argue that the indictment was not deficient while never stating that Haden, the witness listed on the indictment, testified before the 2012 Grand Jury and without ever informing the trial court who did testify before the 2012 Grand Jury.

Contrary to the State's assertion argued on appeal, Appellant presented evidence through trial counsel, as an officer of the Court, that Officer Haden did not testify before the 2012 Grand Jury. Trial counsel's assertion was not challenged by the State. The State acquiesced in the assertion that Haden was not present by failing to challenge and argue that he was present. The State should not be allowed to now argue that Appellant failed to prove that Haden was not present when that issue was not in dispute at trial. The dispute, as argued by the State at trial, was that the name appearing on the indictment does not matter.

Additionally, the trial judge did not find that Appellant failed to prove that Haden did not testify before the Grand Jury on June 8, 2012. Instead, the trial judge found that in order to quash the indictment he needed more than just an inaccurate name on the indictment. The trial judge wrote:

Mr. Grose, 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 of 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.** Of course, this all could be avoided if we did have recordings made of the Grand Jury proceedings. Certainly the State Grand Jury, I believe does that and I know the Federal Courts do it. And there have been many assaults on the Grand jury system in circuit court other than Justice Lewis' dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it. (emphasis added).

July 17, 2012, R. p. 211, line 20 – p. 212, lines 1-13). The trial judge ruled that he was without authority to quash the indictment based on the identity of the witness even when the witness listed as appearing before the Grand Jury is inaccurate. The trial judge erred. The inaccurate name appearing on the indictment, without any other information about who testified before the 2012 Grand Jury, renders the indictment defective and constitutes an error of law requiring reversal.

The issue before this Court and the question that was before the trial court is not whether Appellant failed to prove that Haden did not testify before the Grand Jury on June 8, 2012. The issue of whether Haden testified at the 2012 Grand Jury was not in dispute. At trial the State did not argue that Haden testified before the 2012 Grand Jury. As the Solicitor's Office, pursuant to Rule 3(c), SCRCrimP, is responsible for preparing indictments for presentment to the Grand Jury, it is presumed that the State knew that Haden did not testify before the 2012 Grand Jury and as a result did not argue that he testified before the 2012 Grand Jury. Instead, the State questioned if there was any requirement that the person's name who testified before the Grand Jury be listed on the indictment. The State asked, "Is there case law that says that the person who testified in front of the Grand Jury has to be listed on the indictment?"¹ (July 17, 2012, R. p. 206, lines 13-15). The State then argues that the fact that the witness listed on the indictment as

¹ The Grand Jury charges found on the South Carolina Judicial Department website provide "On the back of the indictments, the names of the witnesses for the State will be listed. You may call the witnesses before you for questioning. You do not have to examine all of them in every case, since in some cases the testimony of one witness may convince you that the accused should go to trial. If so, you do not have to examine the other witnesses. However, do not find a 'no bill' without examining all of the witnesses because the last witness may know facts which the others did not."

testifying before the Grand Jury did not in fact testify before the Grand Jury does not render the indictment deficient because, "Your Honor, the indictment has been true billed, it was sent to the Grand Jury. Somebody had to present testimony that convinced the Grand Jury that there was probable cause in this case. I don't see where, I just don't see where it is deficient." (July 17, 2012, R. p. 211 lines 1-5).

The right to indictment by a Grand Jury is an important right under both our State and Federal Constitutions. "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. *See also* S.C. Code §17-19-10. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. Const. Amend. V.

The trial judge in the present case properly called into question the current status of Grand Jury practice in South Carolina, specifically the practice of failing to record the proceedings of the Grand Jury. (July 17, 2012, R. p. 211, lines 20 – p. 212, lines 1-13). The trial judge said, "Of course, this all could be avoided if we did have recordings made of the Grand Jury proceedings. Certainly the State Grand Jury, I believe does that and I know the Federal Courts do it. And there have been many assaults on the Grand jury system in circuit court other than Justice Lewis' dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it." The judge, however, did not need an amendment to the Code to quash the indictment in the present case. Because Investigator Haden did not testify before the Grand Jury, the 2012 indictment is irregular on its face, revealing

"actual abuse" of the Grand Jury process. Thompson, 305 S.C. at 502, 409 S.E.2d at 424 (emphasis original). The judge had the authority and duty to quash the irregular 2012 indictment. The State could then seek a new indictment or proceed on the 2009 indictment. The failure to quash the indictment requires a new trial.

"A grand jury is not a prosecutor's plaything and the awesome power of the State should not be abused but should be used deliberately, not in haste." State v. Capps, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981). In State v. Thompson, 305 S.C. 496, 501-502, 409 S.E.2d 420, 424 (Ct. App. 1991) (internal citations omitted) (emphasis original), the South Carolina Court of Appeals wrote:

Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary. Speculation about "potential" abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. In saying this, we yield to no one in our zeal to insure that the grand jury continues to perform its historic function as a shield between the accused and abuse of the prosecutorial power of the State. The courts of South Carolina stand guard to see that the grand jury is not reduced to a "mere plaything of prosecutors."

Appellant does not merely speculate about the irregularity of the Grand Jury proceeding in the present case. It is undisputed that Haden, the witness listed as appearing before the 2012 Grand Jury, did not appear before the Grand Jury. The State presented no evidence that this was merely a scrivener's error, instead arguing that it simply did not matter. The 2012 indictment was sought in haste on the eve of trial. The error in the indictment constitutes grounds for quashing the indictment as an actual abuse of the Grand Jury proceeding. The failure to quash the indictment requires a new trial.

2. The trial judge erred in refusing to find the requirement of lifetime GPS monitoring unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

After the jury was excused the Appellant specifically moved, pursuant to Rule 29 SCRCrimP, to take the ten days allowed to file post trial motions. The State did not object to the filing of post trial motions. Appellant then moved for a pre-sentence report to assist the trial judge in imposing sentence. (July 17, 2012, R. p. 338 – 340). The judge denied the motion for a pre-sentence report. . (July 17, 2012, R. p. 340, lines 2-4). At sentencing the State noted that S.C. Code §23-3-540 requires mandatory lifetime GPS monitoring. (July 17, 2012, R. p. 340, lines 5-18). Appellant objected to imposing this condition. (July 17, 2012, R. p. 343-344). Appellant challenged the mandatory GPS monitoring without some kind of specific determination or hearing. (July 17, 2012, R. p. 344, lines 2-17). Counsel referenced the challenge in the Greenville case (State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013)) as a “sort of due process issue.” (July 17, 2012, R. p. 343, lines 13-24).

In a written motion filed July 30, 2012, Appellant moved for a new trial or in the alternative moved for reconsideration of the sentence. (Motion for New Trial, R. p. 377). Appellant specifically argued that the lifetime GPS monitoring requirement found in S.C. Code §23-3-540 was unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment. (Motion for New Trial, p. 22-30; R. p. 398-406). In a written order signed August 9, 2012, the trial judge denied the motion.

The State, relying on State v. Taylor, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012) argues that the Eighth Amendment challenge to mandatory GPS monitoring is not preserved for review by this Court. The State's reliance on Taylor is misplaced. In Taylor this Court wrote, "We find the issue of whether the crimes should have been considered one serious offense due to their close temporal proximity and inextricable connection is unpreserved because our review of the record reveals Taylor never raised it during trial." 399 S.C. at 63, 731 S.E.2d 603. At trial, Taylor moved to quash the State's notice of its intent to seek a sentence of life without parole not because the crime should be considered one offense but rather because the 1998 rape did not support a sentence of life without parole because it occurred prior to his predicate most serious offense, the 1999 rape.

In the present case Appellant challenged the mandatory GPS monitoring without some kind of specific determination or hearing. (July 17, 2012, R. p. 344, lines 2-17). Appellant then followed up with the unopposed post trial motion and specifically argued that the lifetime GPS monitoring requirement found in S.C. Code §23-3-540 was unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.. (Motion for New Trial pp. 22-30; R. p. 398-406). The post trial motion requested a specific hearing, as requested at sentencing, to determine if electronic monitoring was appropriate. (Motion for new trial p. 30, R. p. 406). The issue is preserved for review by this Court.

As discussed in Appellant's initial brief, the fact that the statute mandates electronic monitoring without an individualized determination is part of the argument challenging the statute as a violation of the Eighth Amendment. The electronic

monitoring requirement, as applied in South Carolina without discretion, is traditionally viewed as punishment, constitutes an affirmative disability or restraint by requiring the individual being to plug himself into an electrical outlet for at least three hours everyday and promotes the traditional aims of punishment of retribution and deterrence. The rational connection of the electronic monitoring requirement to the non-punitive purpose of public safety is tenuous because the requirement is mandatory and the judge has no discretion to determine if there is a need for electronic monitoring. The electronic monitoring requirement is excessive with respect to the non-punitive goal of public safety in light of the additional registration requirements. The non-discretionary lifetime electronic monitoring requirement is unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

3. The trial judge erred in refusing to grant a mistrial when the State asked a witness if the minor approached the witness "pertaining to the incidents with Mr. Carrier" in violation of the limitation to time and place exception to the hearsay rule found in Rule 801(d)(1)(D), S.C.R.E.?

During the direct examination by the State of Carolyn Travis, the minor's youth director, the State asked, "Did [minor] approach you pertaining to the incidents with Mr. Carrier?" (July 17, 2012, R. p. 296, lines 22-23). Appellant objected and moved for a mistrial. (July 17, 2012, R. p. 296, line 24 – p. 297, line 1). The judge denied the motion. The judge erred.

The State argues, "In any event, to the extent this Court considers the question itself rather than the testimony offered in response to that question, the State submits the question could not constitute improper corroboration because, though it identified

Appellant, it did not reference a sexual assault, a time or place, or even whether the victim made a statement about the unspecified 'incidents.'" (Initial Brief of Respondent p. 34).

The State, immediately prior to asking the youth director if the minor approached her pertaining to the incidents with Mr. Carrier, asked the youth director, "Now, Ms. Travis, did [minor], in 2009 did [minor] approach you pertaining to the abuse she suffered?" (July 17, 2012, R. p. 296, lines 15-16). The youth director responded, "Yes." Trial counsel objected and the trial judge instructed the State to rephrase the question. (July 17, 2012, R. p. 296, lines 17-21). The State then asked the improper question, "Did [minor] approach you pertaining to the incidents with Mr. Carrier?" (July 17, 2012, R. p. 296, lines 22-23).

Viewing the testimony in context, rather than in isolation, the testimony is improper corroboration testimony referencing "the incidents with Mr. Carrier" as alleged abuse suffered by the minor. The testimony is in direct violation of Rule 801(d)(1)(D) SCRE. The testimony warranted the granting of the mistrial motion.

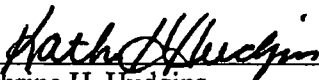
Appellant was prejudiced by the improper question. Credibility of the minor witness was a critical determination to be made by the jury. *E.g. State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (Pleicones, J., dissenting) ("As in many CSC cases, this case turned primarily on the veracity of the victim. In the instant case, while physical evidence indicated that the victim had been abused, no physical evidence other than the testimony of the victim connected Petitioner to the crime."). In *Sanchez v. State*, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002) the South Carolina Supreme Court wrote, "As to the prejudice prong of *Strickland v. Washington*, *supra*, Sanchez was prejudiced

by counsel's deficient performance because improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless. As stated in Jolly v. State, 314 S.C. at 21, 443 S.E.2d at 569, 'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" The improper question by the State constituted prejudicial corroboration testimony warranting a mistrial.

CONCLUSION

Based on the argument presented in issue one, Appellant's conviction should be reversed and the case remanded for trial on the 2009 indictment. Based on the argument presented in issue two, this Court should find the mandatory electronic monitoring requirement of S.C. Code §23-3-540 unconstitutional as a violation of the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution. Based on the argument presented in issue three, Appellant's conviction and sentence should be reversed.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

This 27th day of May, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 27th, 2014


Kathrine H. Hudgins
Appellate Defender

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

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CARRIER,

APPELLANT

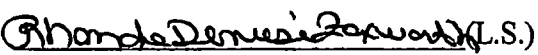
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of May, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 27th day of May, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

James L. Carrier, Appellant.

Appellate Case No. 2012-212777

Appeal from Greenwood County
D. Garrison Hill, Circuit Court Judge

Memorandum Opinion No. 2014-MO-043
Heard September 25, 2014 – Filed October 22, 2014

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia
and E. Charles Grose, Jr., of Greenwood, for Appellant.

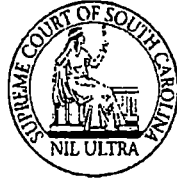
Attorney General Alan M. Wilson and Assistant Attorney
General J. Benjamin Aplin, both of Columbia and
Solicitor David M. Stumbo, of Greenwood, for
Respondent.

PER CURIAM: In this direct appeal, Appellant James Carrier appeals his conviction for lewd act. We affirm pursuant to Rule 220(b)(1), SCACR, and the

following authorities: Issue 1. *State v. Batchelor*, 377 S.C. 341, 344, 661 S.E.2d 58, 59 (2008) ("The regularity of grand jury proceedings is presumed absent clear evidence to the contrary; the burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated." (citations omitted)); *State v. Brownfield*, 60 S.C. 509, 515, 39 S.E. 2, 4 (1901) (finding that where a motion to quash an indictment is unsupported by evidence, "it cannot be held to have been erroneously denied." (quoting *Smith v. Mississippi*, 162 U.S. 592, 601 (1896))); *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (noting the argument of counsel is not evidence and, standing alone, provides no support for a finding of fact). Issue 2. *In re Justin B.*, 405 S.C. 391, 409, 747 S.E.2d 774, 783 (2013) (finding the GPS monitoring requirement is a civil remedy and its practical effects are non-punitive, concluding that electronic monitoring is not so severe as to violate the Eighth Amendment prohibition against cruel and unusual punishment, and reaffirming that all sex offenders subject to GPS monitoring may periodically petition for judicial review of the necessity of continued monitoring); *State v. Nation*, 408 S.C. 474, 481–82, 759 S.E.2d 428, 432 (2014) (expressly declining to overrule *Justin B.*). Issue 3. *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) ("[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." (citations omitted)); *State v. Kirby*, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

AFFIRMED.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**



RECEIVED

NOV 10 2014

ATTORNEY GENERALS

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

November 7, 2014

The Honorable Angela M. Woodhurst
Clerk of Court, Greenwood County
528 Monument St Rm 114
Greenwood SC 29646-2634

REMITTITUR

Re: The State v. James L. Carrier
Lower Court Case No. 2012-GS-24-01166
Appellate Case No. 2012-212777

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Brenda F. Shealy

CHIEF DEPUTY CLERK

cc:

Ernest Charles Grose, Jr., Esquire

Kathrine Haggard Hudgins, Esquire

John Benjamin Aplin, Esquire

David Matthew Stumbo, Esquire

FORM 5

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

STATE OF SOUTH CAROLINA

COUNTY OF Green Wood County

James L. Carrier 351607
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

2014 DEC 12 AM 11:21
IN THE COURT OF COMMON PLEAS

2014-CP-2401576
APPLICATION FOR

POST-CONVICTION RELIEF

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
CLOCKED
2014 DEC 12 PM 3:32

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Greenwood County Jail
2. Name and location of Court which imposed sentence Greenwood County Court House
528 Monument St. Greenwood, SC 29646
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-24-1146
 - (b) 2012-GS-24-1146
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) July, 18 2012 15 years
 - (b) _____

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S.C.

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Jury Trial
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. General Sessions
- ii. Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Case was Denied
- ii. The Court found that we did not meet our burden at trial
- iii. _____
- (c) the date of each such result:
- i. August 16, 2012
- ii. Heard September 25, 2014
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. The Court found that the GPS monitoring did not constitute cruel and unusual Punishment
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

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Angela Woodhurst
 ANGELA WOODHURST
 CCOP AND GS
 GREENWOOD COUNTY
 S. C.

- (a) no evidence
- (b) no profe
- (c) no wittiness
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) no evidence
- (b) no profe
- (c) no wittiness
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. direct Appeal In The Supreme Court
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Division of Appellate Defense 1330 Lady St, Columbia, SC
- ii. Supreme Court
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. To Appeal my Conviction and Sentence.
- ii. _____
- iii. _____

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Angela Woodhurst
 ANGELA WOODHURST
 COOK AND GS
 GREENWOOD COUNTY
 S.C.

- iv. _____
- (d) the date of each such disposition:
 - i. Filed October 22, 2014
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes! State

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. no evidence
- ii. no profe
- iii. no witness

(b) the proceedings in which each ground was raised:

- i. That they Had none of the above to be able to convicted,
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) N/A
- (b) N/A
- (c) N/A

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Angela Woodhurst
 ANGELA WOODHURST
 CCGP AND GS
 GREENWOOD COUNTY
 S. C.

17. Were you represented by an attorney at any time during the course of:

Revised 3/2003

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes Public Defender E. Charles Grose Jr.
- (c) your sentencing? Same as B
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Same as B and C
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? State Had nothing

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. E. Charles Grose Jr. of Greenwood (Public Defender)
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. at my trial
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application:

Wrongly Convicted. No proof, no evidence, no witness

20. Are you now under sentence from any other court that you have not challenged?

no.

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

STATE OF SOUTH CAROLINA

County of Greenwood

VERIFICATION

I, James L. Carrier, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

James L. Carrier

SWORN to and subscribed before me this 7th
day of November, 2014.
[Signature] (L.S.)
Notary Public of SC

My Commission Expires: 1-14-2019

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, James L. Carrier, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

James L. Carrier
Applicant

SWORN or affirmed to and subscribed before me this
7th day of NOVEMBER, 2014.
Robert Jones
Notary Public of SC

My Commission Expires: 1-14-2019

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S.C.

11:25:55 Monday, January 12, 2015

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 01/12/15
OMCOMITA RELEASE DATE SCREEN C056368
SCDC# > 351607 LOC: TYGER RIVER
CARRIER, JAMES LLOYD SCDC CLASSIFICATION...: VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: Y
SEXUAL PREDATOR...: PENDING
DNA STATUS...: COMPLETED
GPS REQUIREMENT...: Y
PREA DECISION...:
CURRENT SENTENCE: 015-00-000 CONSECUTIVE SENTENCE ...: N
015-00-000 CURRENT SENT START DATE: 07/18/2012
PROJECTED COMPLETION DATES
MAXOUT DATE: 01/18/2020 CURRENT EWC ..: 2 F 5
YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
INITIAL PAROLE DATE: 05/10/2015 NEXT PAROLE HEARING DATE: 05/10/2015

TOTAL GT DAYS EARNED: 000580 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ..: 000297 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS: 000000 CURRENT OR PRIOR SEX CONDUCT CONVICT
TOTAL EXTRA EARNED CREDITS ..: 000 SUPERVISED REENTRY DATE...: 00/00/00
TOTAL SERVICE TIME EARNED ..: 000902 ISS.....:

PFKEYS: 5:HISTORY OF DATE CHANGES

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 01/12/15

C0239

CARRIER, JAMES LLOYD FBI # 550558XA4 SID# SC01111490 SCDC # 351607

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ... TYGER RIVER CORR INST

SECURITY/CUST.: 2 MINIMUM IN

CURR INCARC SENT...: 15 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #...: [REDACTED]

DORM.....: U100102A

RACE....:W SEX...:M

PROJ MAXOUT DATE: 01/18/2020

PROJ PAROLE DATE: 05/10/2015

EWC JOB...: GENERAL WORKER

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 2F5 EEC LEVEL:

ASSIGNMENT...: YARD DETAIL

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 40 DATE OF BIRTH...: [REDACTED]

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE		
	YRS	MOS	DYS		START	V/NV	CATEGORY
LEWD ACT/CHILD UNDER 16	15	0	0	GREENWOOD	7/18/2012	N	4

PRIOR COMMITMENTS OVER 90 DAYS:

4/22/95 *SEX OFFENSES-NEC

1 YRS 0 MOS 0 DYS

DETAINEES (HOLD, WANTED, NOTIFY):

CODE NOT IN TABLE

HOLD

IRO

CATEG: 4

NO DETAINEES

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

10/19/12 DAMAGE, DESTROY PROP. VAL DROPPED

ADMIN

HISTORY OF MOVEMENTS:

DATE	LOCATION	STATUS	REASON
11/19/14	TYGER RIVER	INCARCERATED	ADMINISTRATIVE
11/19/14	KIRKLAND	INCARCERATED	MEDICAL
2/26/14	TYGER RIVER	INCARCERATED	ADMINISTRATIVE
9/18/12	ALLENDAL	INCARCERATED	ADMINISTRATIVE
7/20/12	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
GENERAL WORKER	02/27/14	0/0/0		2F5
HORTICULTURE TRAINEE	09/28/12	2/26/14	INSTIT TRANSFER	2F5
HORTICULTURE TRAINEE	09/25/12	9/27/12	MI ELIGIBLE FOR LEVEL 2	3F5

HISTORY OF EARNED EDUCATION CREDITS:

REC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
-----------------	------------	----------	--------------------

NO SCHOOL ASSIGNMENTS

***** END OF REPORT *****

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

James L. Carrier, #351607,

2014-CP-24-1526

Applicant,

v.

RETURN AND MOTION TO DISMISS

State of South Carolina,

Respondent.

The Respondent, making its Return to the application for post conviction relief (PCR) filed December 12, 2014 would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. The Applicant was indicted at the June 2012 term of the Greenwood County Grand Jury for Lewd Act (2012-GS-24-1166). He was represented by E. Charles Grose, Jr., Esquire. On July 18, 2012, the proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable D. Garrison Hill sentenced Applicant to confinement for fifteen (15) years.

A Notice of Appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Carrier, Memo. Op. No. 2014-MO-043 (Filed October 22, 2014). The Remittitur was issued on November 7, 2014.

Attached herewith and incorporated herein are the records of the Greenwood County Clerk of Court regarding the subject conviction(s), the Applicant's application, the Record on Appeal and the

Supplemental Record on appeal. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current application for PCR, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "No evidence"
2. "No profe(sic)"
3. "No wittiness(sic)"

The Respondent submits that this Application for post-Conviction Relief should be summarily dismissed because this applicant raises direct appeal issues that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

The Respondent also submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. 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; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. *Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.*

[Emphasis supplied.] S.C. Code Ann. § 17-27-20 (1976).

This application does not support a cognizable claim for post-conviction relief under any of the statutory grounds. Pursuant to Rule 12(b)(6), SCRPC, this Court should summarily dismiss this allegation because it does not state a claim for which relief may be granted.

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return and Motion to Dismiss, the State requests that the Applicant's current application for PCR be summarily denied and dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
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Telephone: (803) 734-3737

April 6, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

JAMES CARRIER, #351607

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

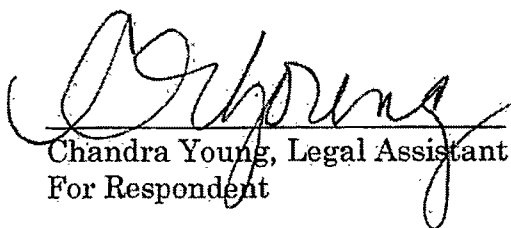
2014-CP-24-1526

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return and Motion to Dismiss in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Laura McCall Saunders
PO Box 731
Laurens, South Carolina 29360

DATED this 6th day of April 2015.


Chandra Young, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

JAMES L. CARRIER, #351607,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

CA# ~~2015-CP-36-0574~~

2014-CP-29-1526

**AMENDED PETITION FOR
POST-CONVICTION RELIEF**

COMES NOW, the Petitioner James L. Carrier, hereinafter "Petitioner", by and through his undersigned counsel files this Amended Petition for Post-Conviction Relief pursuant to South Carolina Code Annotated 17-27-10 et seq. and requests that his application for Post-Conviction Relief be granted for the following reasons:

1. Petitioner requests a new trial on the grounds of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and its progeny. Specifically, Petitioner alleges that trial counsel was deficient in his performance which caused the Petitioner to suffer prejudice for the following reasons:

- a. 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. Specifically, the witness listed on

the 2012 indictment, Chris Haden, formerly of the Greenwood County Sheriff's Department, was no longer with the Sheriff's Office at the time of presentment to the Grand Jury, and in fact, Hayden was not in the State of South Carolina on June 8, 2012, when the 2012 indictment was presented to the Grand Jury and therefore could not have been the witness who testified before the Grand Jury.

WHEREFORE, Petitioner respectfully prays for the aforesaid relief to include a new trial on the basis of ineffective assistance of trial counsel pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and for such other relief as the Court deems just and proper.

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Laura M. Saunders (SC #77957)

Attorney for the Petitioner James Carrier

October 17, 2018
Laurens, South Carolina

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENWOOD) IN THE COMMON PLEAS COURT
3
4 James Lloyd Carrier,)
5 Applicant,) TRANSCRIPT OF RECORD
6 -vs-) 2014-CP-24-1526
7 The State.) February 26, 2019
8 Greenwood, South Carolina
9
10

11 B E F O R E:

12 HONORABLE BRIAN M. GIBBONS, JUDGE
13
14

15 A P P E A R A N C E S:

16 LAURA M. SAUNDERS, ESQUIRE
17 Attorney for the Applicant

18 JANELL H. GREGORY, ESQUIRE
19 Attorney for the State
20

21 Linda D. Moffitt
22 Circuit Court Reporter
23
24
25

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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1 THE COURT: All right. What's the first case we have
2 this morning?

3 MS. GREGORY: The first case we have is Mr. Carrier,
4 James Carrier.

5 THE COURT: All right. Thank you.
6 Yes, ma'am.

7 MS. GREGORY: Okay. In October of 2009 Mr. Carrier
8 was indicted by the Greenwood County Grand Jury for lewd
9 act.

10 While the case was pending the solicitor's office
11 reviewed information regarding the timeframe the abuse took
12 place and sought a new indictment against Mr. Carrier
13 during the June 2012 term of the Greenwood County Grand
14 Jury.

15 On June the 18th of 2012 Mr. Carrier's case was called
16 to trial before Judge Hill, and defense counsel raised
17 numerous pretrial motions that led to the case being
18 continued until July 17th of 2012.

19 Mr. Carrier proceeded to trial on July 17th before
20 Judge Hill, and the jury found Mr. Carrier guilty as
21 indicted on the 2012 indictment. Judge Hill sentenced Mr.
22 Carrier to 15 years in prison.

23 Mr. Carrier filed a timely notice of appeal. An
24 appeal was perfected on his behalf. The South Carolina
25 Supreme Court affirmed Mr. Carrier's conviction and

1 sentence.

2 The remittitur was issued November 7th of 2014.
3 Mr. Carrier then filed a timely application for post
4 conviction relief on December 12th of 2014 alleging
5 ineffective assistance of counsel.

6 On October 17th of 2018 Ms. Saunders issued an amended
7 application indicating the sole issue being pursued on
8 P.C.R. was ineffective assistance of counsel.

9 As applicant alleges, trial counsel was ineffective
10 for failing to call a witness or witnesses who would
11 establish that the indictment No. 2012-GS-24-1166 was
12 defective on its face because the witness listed on the
13 indictment was not present for the grand jury proceeding.

14 Applicant is present today and is represented Ms.
15 Saunders.

16 THE COURT: All right. Thank you.

17 Ms. Saunders, are you ready to proceed?

18 MS. SAUNDERS: We are, Your Honor.

19 THE COURT: Can you make a -- do you want to make a
20 brief opening statement to me just to kind of tell me what
21 you believe the issue is concerning this matter before you
22 call your witness so I can kind of have an idea of the
23 general framework before I start leaping through all the
24 paperwork?

25 MS. SAUNDERS: I'm happy to, Your Honor.

1 THE COURT: Go ahead.

2 MS. SAUNDERS: I was appointed back in January of
3 2015, actually, to represent Mr. Carrier.

4 It has been a long time coming to get to this point.

5 I would say -- and I don't know if you heard the
6 timeline of the trial process in this case -- but the
7 record is a little bit jumbled because there was a motion
8 for a speedy trial filed by Mr. Grose in front of Judge
9 Maddox with one solicitor, and then there was jury
10 selection at a different date, a month later, with a
11 separate solicitor. And the second day there was a motion
12 to be tried filed by Mr. Grose on the record for a -- or a
13 motion to be tried on the original indictment.

14 The next day they came back and continued that motion
15 and then agreed to continue the case to the following month
16 in July of 2012.

17 They reconvened in front of Judge Hill where Andrew
18 Hodges and Mr. -- Assistant Solicitor Swilley and Charles
19 Grose were present. And I'm focusing only on, Your Honor,
20 the motion to proceed or be tried on the original
21 indictment portion of the record.

22 And he was ultimately convicted in July of 2012, Your
23 Honor.

24 The issue before you today is really narrow, and I
25 don't know if you recall, Your Honor, but we do have a

1 witness that needs to testify via telephone, and I have him
2 ready and waiting to testify when he comes -- when we're
3 ready for him.

4 Your Honor, Investigator Christopher Haden is the
5 witness listed on two indictments that involve Mr.
6 Carrier's case.

7 He was the investigator on the case. However, the
8 issue is that he was -- he left the sheriff's office in
9 September of -- excuse me -- let me make sure I get the
10 date correct for the record. He left approximately
11 September 24th of 2009.

12 I have somebody from Greenwood County here to testify
13 to the records in his employment file that I've obtained
14 via subpoena and shared with the other side. And I've got
15 her here to testify to the date of his hire and the date of
16 his resignation.

17 THE COURT: All right. I just want to make sure that
18 what we're proceeding on then is your amended petition for
19 post conviction relief that was filed back on
20 October 18th of 2018.

21 MS. SAUNDERS: That's correct.

22 THE COURT: So that's the only issue that's before
23 this Court to determine, whether or not there's any post
24 conviction relief to be granted.

25 MS. SAUNDERS: That's all. And it's based on

James Lloyd Carrier
Direct examination by Ms. Saunders

1 ineffective assistance of counsel. And I intend to
2 question Mr. Grose about that.

3 THE COURT: All right. Is that the state's
4 understanding as to what the applicant is proceeding on?

5 MS. GREGORY: Yes, sir.

6 THE COURT: All right. So anything else that was
7 filed in his prior application -- I haven't -- I'm not
8 going to focus on it since all we're proceeding on is what
9 you filed, right?

10 MS. SAUNDERS: Yes, Your Honor.

11 THE COURT: Okay. Sounds good.

12 All right. Are you ready to proceed with the calling
13 of a witness?

14 MS. SAUNDERS: I am.

15 THE COURT: You may call your witness.

16 JAMES LLOYD CARRIER, having
17 been first duly sworn, testified as follows:

18 MS. SAUNDERS: May it please the Court, Your Honor.

19 THE COURT: Yes.

20 DIRECT EXAMINATION BY MS. SAUNDERS

21 Q All right. Mr. Carrier, I just want to ask you a few
22 questions today to introduce this case.

23 Just state your name for the record.

24 A James Carrier.

25 Q All right. Where are you housed at in the Department

1 of Corrections?

2 A Kershaw Correction.

3 Q All right. How long have you been there?

4 A I've been there now a little over a year.

5 Q Okay. But how long have you been in prison?

6 A I've been in prison almost seven years, eight months.

7 Q Okay. And do you understand why you're here today?

8 A Yes.

9 Q Okay. And what is that reason?

10 A On the grounds that my lawyer did not prove the
11 detective was working on the police department at the time
12 of my court hearing --

13 Q Okay.

14 A -- and had changed the indictment.

15 Q All right. So you understand that I'm not here to
16 retry your case today, right?

17 A Yes, ma'am.

18 Q All right. And you understand, more importantly, that
19 if we were successful today -- and I think the judge will
20 probably tell you this as well -- that you could go back to
21 the county. You're not going to be released from prison if
22 you were to win on P.C.R., so to speak. Do you understand
23 that?

24 A Yes, ma'am.

25 Q Okay. So you would go back to the county and then

James Lloyd Carrier
Direct examination by Ms. Saunders

1 wait, retrial or some other -- other resolution to your
2 case, do you understand that?

3 A Yes, ma'am.

4 Q All right. So you want to proceed on P.C.R. today for
5 the reasons that we've stated to state -- say that
6 Mr. Grose didn't call the right witnesses or produce any
7 evidence regarding that investigator's not testifying in
8 front of the grand jury. You understand all of that,
9 right?

10 A Yes, ma'am.

11 Q And you still want to go forward today.

12 A Yes, ma'am.

13 Q Okay. Thank you. No further questions. Please
14 answer any questions that Ms. Gregory might have for you.

15 THE COURT: Any questions?

16 MS. GREGORY: No.

17 THE COURT: All right. Thank you, sir. You can step
18 down.

19 Is your telephone witness ready, do you think?

20 MS. SAUNDERS: Your Honor, I can call him, or I have a
21 records custodian from the county who is here to testify as
22 well.

23 THE COURT: well, I mean, it is your case. I'll let
24 you try it however you want to.

25 I mean, what -- what's the -- does the state object to

1 the witness? Do you want to call the records custodian
2 instead of?

3 MS. SAUNDERS: Well, I was going to call the records
4 custodian just to make sure we get those records in and
5 establish his date of hire and his date of employment.

6 THE COURT: Right.

7 Is that an issue for the state?

8 MS. GREGORY: It's not.

9 THE COURT: All right. Does the state stipulate then
10 that Investigator Haden was not employed with the Greenwood
11 County Sheriff's Department at the time of this indictment,
12 for the indictment at issue?

13 MS. GREGORY: Yes, sir.

14 THE COURT: That's a finding of fact. It's a
15 stipulated fact.

16 MS. SAUNDERS: Your Honor, I would still like to call
17 the witness.

18 THE COURT: You can call the witness just to protect
19 your record.

20 MS. SAUNDERS: Thank you very much.

21 THE COURT: All right.

22 MS. SAUNDERS: Your Honor, I call Edna Dixon to the
23 stand.

24 (Personnel action marked Applicant's Exhibit No. 1;
25 timeline marked Applicant's Exhibit No. 2.)

Edna Rita Dixon
Direct examination by Ms. Saunders

1 EDNA RITA DIXON, having been
2 first duly sworn, testified as follows:

3 MS. SAUNDERS: While she's approaching, Your Honor, I
4 have premarked one exhibit. Exhibit No. 1 is Applicant's
5 Exhibit -- excuse me -- Applicant's Exhibit No. 1 is the
6 records that we've identified from Mr. Haden's employment
7 filed with Greenwood County. We stipulate to those, as
8 well as just a brief timeline that I prepared.

9 THE COURT: All right. Any objection to those
10 documents?

11 MS. GREGORY: As long as they've redacted from his
12 personal information, no objection.

13 THE COURT: Okay. Any issue with that?

14 MS. SAUNDERS: They have been redacted.

15 THE COURT: All right. They've been redacted.

16 We'll go ahead and marked those then as Applicant's 1
17 and 2. Admitted into the record without objection.

18 MS. SAUNDERS: Thank you, Your Honor. May it please
19 the Court.

20 THE COURT: Your witness.

21 DIRECT EXAMINATION BY MS. SAUNDERS

22 Q Ms. Dixon, thank you for being here.

23 Would you please state your name for the record?

24 A Edna Rita Dixon.

25 Q Thank you. And what is your employment?

1 A I'm an H.R. analyst with Greenwood County.

2 Q All right. How long have you worked there?

3 A Since September 17th, 2018.

4 Q Okay. Have you ever testified in this capacity
5 before?

6 A No, ma'am.

7 Q Did you bring Mr. Haden's employment file with you
8 today?

9 A I did.

10 Q And you have that in your hand or on your person?

11 A Yes, ma'am.

12 Q All right. Are those records that are kept and stored
13 as part of regular course of your business?

14 A Yes, ma'am.

15 Q And y'all maintain those files according to your
16 system of filing?

17 A Correct.

18 Q And the file that you have today is the actual
19 employment file that's stored at Greenwood County H.R.

20 A It is.

21 Q Okay. Let me just ask you a few questions regarding
22 Mr. Haden's file.

23 I believe we have premarked particular pages that are
24 in that file as part of what we're going to submit into the
25 record as evidence today. So I would just like for you

1 to...

2 MS. SAUNDERS: Your Honor, if I may approach the
3 witness briefly.

4 THE COURT: Yeah.

5 Q I'll just use the ones that we've premarked --

6 A Okay.

7 Q -- just as long as they're true and correct copies of
8 what you have.

9 A Okay.

10 Q Could you please just indicate to me the approximate
11 date of hire of Mr. Haden?

12 A Yes. It is 1/17/2016.

13 Q Well, can you look at that?

14 A I mean, 2006. I'm sorry.

15 Q All right. So he was hired with the sheriff's office
16 in January of 2006.

17 A Correct.

18 Q Okay. And then I believe he took a long three years
19 if you look at the third page of your file. What does that
20 letter indicate?

21 A On September 10th of 2009 he submitted his 2-week
22 notice with his last date of employment to be
23 September 24th, 2009.

24 Q Okay. So your testimony is that in January of --
25 excuse me -- let me make sure I got the date right.

Edna Rita Dixon
Direct examination by Ms. Saunders

1 January 17th of 2006, that was his initial date of hire.

2 A Correct.

3 Q And then his date of resignation and termination from
4 the sheriff's office was September 24th of 2009.

5 A Correct.

6 Q All right.

7 MS. SAUNDERS: Thank you, Your Honor. I have no
8 further questions.

9 Q Please answer any questions that Ms. Gregory has for
10 you.

11 THE COURT: All right. Ms. Gregory.

12 MS. GREGORY: No questions, Your Honor.

13 THE COURT: Thank you, ma'am. You may step down.

14 THE WITNESS: Thank you.

15 THE COURT: Do you need her here still?

16 MS. SAUNDERS: No.

17 THE COURT: You are free to leave. You can head on
18 back to work. Thank you.

19 (Whereupon, the witness was excused.)

20 THE COURT: All right.

21 MS. SAUNDERS: All right. My next witness, Your
22 Honor, will be Mr. Jimmy Powers with Advanced Private
23 Investigations.

24 THE COURT: Okay.

25

Jimmy Powers
Direct examination by Ms. Saunders

1 JIMMY POWERS, having been
2 first duly sworn, testified as follows:

3 MS. SAUNDERS: May it please the Court.

4 THE COURT: Yes.

5 DIRECT EXAMINATION BY MS. SAUNDERS

6 Q Mr. Powers, would you state your name for the record?

7 A Jimmy Powers.

8 Q And what's your occupation?

9 A Private investigator.

10 Q How long have you had that position?

11 A Since 2007.

12 Q Do you own your own company?

13 A I do.

14 Q What's the company name?

15 A Advanced Private Investigations.

16 Q All right. So what is your previous employment prior
17 to becoming a private investigator?

18 A I was a police officer at Greenwood City Police
19 Department.

20 Q Okay. And then were you ever with the county?

21 A No.

22 Q Okay. But you did work for the city police
23 department.

24 A I did.

25 Q All right. Did you work with Mr. Haden at some point?

- 1 A I did.
- 2 Q Okay. And so was he an officer with Greenwood city?
- 3 A Yeah. He -- at one point he was a Greenwood city
- 4 officer, and then he went over to the county.
- 5 Q Okay. So it's your testimony that you've known
- 6 Mr. Haden for quite some time.
- 7 A I have.
- 8 Q When was the last time you worked with him?
- 9 A 2006.
- 10 Q Okay. So he left the city to come work for the
- 11 county.
- 12 A Well, I left the city in 2006.
- 13 Q Okay. So y'all both had a change of position in 2006.
- 14 A Yes.
- 15 Q All right. So you -- I had you appointed or asked
- 16 Judge Griffith to appoint you or a private investigator to
- 17 help me locate Mr. Haden, is that correct? Back in
- 18 January, correct?
- 19 A That's true.
- 20 Q All right. So when I contacted you, I didn't realize
- 21 that you would know him so well. But you were familiar
- 22 with Mr. Haden at the time I contacted you, correct?
- 23 A Yes, ma'am.
- 24 Q Can you -- can you verify or put on the record your
- 25 efforts to make contact with him?

1 A Actually, I did a -- I did a locator search through
2 one of my public records searches, and I immediately seen a
3 phone number that I recognized, and I called the phone
4 number and it was Chris Haden. He answered the phone.

5 Q So was the number that you called the number he had
6 when he lived here?

7 A Yes.

8 Q All right. And so the voice that you heard on the
9 phone, you're positive that that was Christopher Haden.

10 A Yes. And we -- we discussed some work, and I -- I
11 mentioned this case to him, and he was able to recall a
12 little bit about it.

13 Q Okay. So you're positive that the Christopher Haden
14 you contacted is the same person you worked with at the
15 city and the same person that worked for the county back in
16 this timeframe of 2006 to 2009.

17 A One hundred percent.

18 Q And he was familiar with that case when you spoke with
19 him.

20 A Yes, ma'am.

21 Q And you have no doubt in your mind that the
22 Christopher Haden you talked to is the same one we're here
23 to discuss today.

24 A One hundred percent.

25 Q Thank you. No further questions. You may answer any

1 questions Ms. Gregory has for you.

2 MS. GREGORY: No questions, Your Honor.

3 THE COURT: Thank you, sir.

4 MS. SAUNDERS: Your Honor --

5 THE COURT: We can do it.

6 MS. SAUNDERS: I have to call him from my cell phone.

7 THE COURT: That's fine. You can call him from your
8 cell phone.

9 For the record, I am allowing this witness to
10 participate via cell phone transmission with the state's
11 consent.

12 Correct?

13 MS. GREGORY: Yes, Your Honor.

14 THE COURT: Thank you.

15 Just take your time getting time him on the record.

16 And just put it near a microphone where maybe we all could
17 hear it and my court reporter can hear it specifically.

18 (Whereupon, contact was made with witness via cell
19 phone.)

20 THE WITNESS: This is Chris.

21 MS. SAUNDERS: Hey, Mr. Haden. This is Laura
22 Saunders. How are you doing?

23 THE WITNESS: Good. How are you?

24 MS. SAUNDERS: Good. Okay. I've got you on the
25 official record. We're actually in this hearing. So

Christopher Michael Hayden
Direct examination by Ms. Saunders

1 you've been allowed to testify via telephone. You
2 understand that, right?

3 THE WITNESS: Yes, ma'am.

4 MS. SAUNDERS: All right. So the clerk of court is
5 going to swear you in over the phone, so listen to her
6 carefully. If you have any trouble hearing me, let me
7 know.

8 THE WITNESS: Yes, ma'am.

9 CHRISTOPHER MICHAEL HADEN,
10 having been first duly sworn, testified as follows:

11 MS. SAUNDERS: All right. May it please the Court,
12 Your Honor.

13 THE COURT: Yes.

14 DIRECT EXAMINATION BY MS. SAUNDERS

15 Q Mr. Haden, okay, I'm going to ask you a series of
16 questions just to give the framework of who you are.

17 If you would, just state your name again for the
18 record. Your full name.

19 A It's Christopher Michael Haden, H-A-D-E-N.

20 Q Okay. And how long or where -- what is your address?

21 A It's 353 Robincrest Circle in Thaxton, T-H-A-X-T-O-N,
22 Virginia.

23 Q Can you say that address one more time? We may have
24 to repeat some things to make sure the court reporter gets
25 it.

1 A Yes, ma'am. It's 353 Robincrest Circle in Thaxton,
2 T-H-A-X-T-O-N, Virginia.

3 Q Thaxton, Virginia?

4 A Yes, yes, ma'am.

5 Q Okay. All right. So what is your current occupation?

6 A I am an investigator for the State of Virginia with
7 the Pulaski County Department of Social Services as a
8 C.P.S. investigator.

9 Q Okay.

10 THE COURT: Put the speaker up to the mic.

11 (Pause.)

12 Q All right. Thank you. We're just making sure we're
13 getting your testimony on tape.

14 A Yes, ma'am.

15 Q So you're a C.P.S. investigator with DSS in Virginia,
16 is that correct?

17 A Yes, ma'am.

18 Q All right. And if you don't -- well, give me your
19 occupation previous to that. Where were you?

20 A I was at the Bedford Wal-Mart in Bedford, Virginia, as
21 a protection manager.

22 Q Okay. What did you do prior to that?

23 A Before that I was in South Carolina as a detective.

24 I'm sorry. I was working as an investigator with the
25 Lander University Police Department.

1 Q Okay. So you were with Lander. And then prior to
2 your employment with Lander University, where did you work?

3 A At the Greenwood County Sheriff's Office.

4 Q Okay. Do you recall approximately the date that you
5 were hired with Greenwood County?

6 A I don't recall the exact date, but I know I departed
7 there September 24th of 2009.

8 Q Okay. Does that -- well, do you recall being hired in
9 January of 2006?

10 A That sounds about correct, yes, ma'am.

11 Q Okay. So what were your duties at Greenwood County
12 Sheriff's Office?

13 A In the initial, beginning, I was on uniform patrol
14 answering calls that came in through dispatch, and then I
15 was transitioned to the investigations division.

16 Q Okay. So let me just ask you about the case we're
17 here for today.

18 Do you recall the case regarding, involving, James
19 Carrier as a defendant?

20 A Yes, ma'am. I do.

21 Q Okay. And we're not here to discuss the facts in that
22 case necessarily. But do you recall the events leading up
23 to you having to go to a magistrate and obtain a warrant
24 against him?

25 A Yes, ma'am. I conducted an interview of the victim

1 child in which she was -- it was a forensic interview done
2 at a child's place there in Greenwood. And then I was able
3 to speak to Mr. Carrier as well based off the allegations
4 and disclosure.

5 Q Okay. But you actually went to a magistrate and got
6 an arrest warrant, correct?

7 A That's correct.

8 Q All right. So do you recall doing that closer to the
9 end of your employment, like it was during the last year of
10 your employment?

11 A Yes, ma'am.

12 Q Okay. So let me ask you this tying into the -- the
13 testifying before a magistrate.

14 Did you ever testify in front of the grand jury at any
15 point during your employment at the Greenwood County
16 Sheriff's Office?

17 A No, ma'am. I did not.

18 Q Okay. So did anybody particularly have that job with
19 the sheriff's office?

20 A We -- we -- yes, ma'am. We had a court liaison -- his
21 name was Brandon Strickland -- at the time who was actually
22 the liaison between the sheriff's office and the
23 solicitor's office appointed by Sheriff wideman at the
24 time.

25 Q Okay. But you -- it's your testimony today under oath

1 that you never testified before the grand jury, ever.

2 A No, ma'am.

3 Q Okay. So you submitted a letter of resignation in
4 September of 2009 that your last day would be
5 September 24th. That's correct?

6 A Yes, ma'am, that's correct.

7 Q And you never returned to work at the Greenwood County
8 Sheriff's Office in any capacity after that.

9 A No, ma'am. I did not.

10 Q All right. Thank you. That's all the questions I
11 have for you. But I'm going to let you answer any
12 questions that Ms. Gregory may have for you. Okay. She's
13 the attorney general you spoke with.

14 A Yes, ma'am.

15 CROSS-EXAMINATION

16 BY MS. GREGORY

17 Q Sorry. My voice has changed a little bit since we
18 talked, Mr. Haden.

19 When you left Greenwood County Sheriff's Office, what
20 happened to your cases?

21 A My -- the active cases were actually probably passed
22 on and distributed to the other investigators that were
23 there, but the ones that were closed by arrest were closed.

24 Q So the active cases would have been transferred?

25 A Yes, ma'am.

Christopher Michael Haden
Cross-examination by Ms. Gregory

1 Q Okay. And if the indictment had been quashed against
2 Mr. Carrier, because your name was on the indictment, what
3 would have happened to his charges?

4 A I'm not a hundred percent certain. I mean, I think
5 that they would probably went forward based off the
6 witnesses we set up with the solicitor's office and the
7 liaison between the sheriff's office.

8 Q Okay. So he would have most likely been reindicted?

9 A Yes, ma'am.

10 Q Okay. No further questions.

11 THE COURT: Any redirect?

12 MS. SAUNDERS: No redirect, Your Honor.

13 THE COURT: All right. Thank you, sir. That
14 completes your testimony.

15 THE WITNESS: Thank you, Your Honor. Y'all have a
16 good day.

17 THE COURT: All right.

18 Q Thank you, Mr. Haden.

19 A Thank you.

20 (Whereupon, contact via cell phone concluded.)

21 THE COURT: All right.

22 MS. SAUNDERS: Thank you for allowing us to do that,
23 Judge. That made it easier.

24 THE COURT: Yes, ma'am.

25 MS. SAUNDERS: My next witness will be Mr. Charles

Ernest Charles Grose, Jr.
Direct examination by Ms. Saunders

1 Grose, Your Honor.

2 THE COURT: Good.

3 ERNEST CHARLES GROSE, JR.,
4 having been first duly sworn, testified as follows:

5 MS. SAUNDERS: May it please the Court, Your Honor.

6 THE COURT: Yes.

7 DIRECT EXAMINATION BY MS. SAUNDERS

8 Q Mr. Grose, thank you for being here.

9 If you would, just state your name for the record.

10 A My full name is Ernest Charles Grose, spelled
11 G-R-O-S-E, Jr.

12 Q And what's your current occupation?

13 A I'm in private practice here in Greenwood.

14 Q All right. And just let's go back in time to
15 Mr. Carrier's case.

16 In what capacity did you represent him back in 2000 --
17 well, between 2009 and '12?

18 A I was the circuit defender for the Eighth Judicial
19 Circuit.

20 Q Okay. Do you -- would you -- if you will, briefly
21 describe the events leading up to trial of Mr. Carrier's
22 trial since it was a little -- it was so far back in time.

23 A I don't know sitting here today that I can remember
24 all of the events. But it appears that, you know, the
25 arrest was sometime in 2009.

1 My recollection was, is the case probably sat there
2 for a long time without a whole lot of activity. Sometime
3 in 2012, I think, that there were some motions that the
4 case was going to be called for trial. We got it
5 continued, and then it was tried.

6 Q Well, the only issue, like I informed the Court, is
7 that -- is this motion to be tried on the original
8 indictment. So that's all I'm really going to ask you
9 about today. But I'm curious. Why did you decide to make
10 that motion versus try and attempt to quash the indictments
11 all together?

12 A Well, knowing what I've learned today, which you told
13 me, informed me, this morning, I would have moved to quash
14 both indictments.

15 At the time I think I was under the mistaken
16 impression that Mr. Haden may still have been employed in
17 Greenwood and available for the grand jury. But you
18 informed me this morning about what your investigation had
19 uncovered, and I've heard the testimony this morning. So
20 there would have been -- there would have been no reason
21 and I would have moved to quash both indictments.

22 Q Okay. So I think -- so you didn't know until this
23 morning that both indictments are defective based on the
24 fact that Mr. Haden didn't work for the sheriff's office at
25 the time of either presentment.

1 A That is correct. Until today I didn't know that he
2 did not work there at the time of the first presentment.

3 Q Okay. But you knew something back at trial because
4 the record reflects that. You knew that he wasn't employed
5 at the time of certainly the second presentment, correct?

6 A Correct.

7 Q All right. So how did you find that out? Do you
8 recall any details?

9 A I don't recall specifically that I -- I likely had
10 some -- some general local knowledge, although by the time
11 of 2012 I was spending more time in Laurens County than
12 when I was -- before we went to the state system. And I
13 was spending time just here in Abbeville.

14 I also think that I had information from the
15 solicitor's office that Mr. Haden was not available as a
16 witness.

17 And of course the second indictment was done on the
18 eve of trial. And, you know, it would have been obvious
19 that he couldn't have been in South Carolina or likely was
20 not in South Carolina to testify in front of the grand
21 jury.

22 Q Do you remember who told you that though?

23 A I do not but I -- my recollection is that that
24 information would have come from the solicitor's office
25 when they were discussing witnesses that would be available

1 and not available for trial.

2 Q Okay. So that was back in May before you went in
3 front of Judge Maddox when you learned this information.

4 A I don't know if that was in May or if that was in --
5 in June. I think it was -- just looking at the dates of
6 the transcripts, it looks like there was one in -- in May,
7 one in June and one in July.

8 Q Okay. All right. So but that -- that was the basis
9 for your motion to be tried on the original indictment.

10 A Correct.

11 Q Supposedly, you learned that Mr. Haden was not
12 employed for the presentment of the second indictment,
13 correct?

14 A Correct.

15 Q All right. So let's just assume, since it's been so
16 long, that you knew this back in May of 2012.

17 A Uh-huh.

18 Q I've just got to ask you. Why didn't you get any
19 employment records or subpoena any witnesses to come
20 testify to that fact?

21 A I -- I don't have a good answer to that. And, in
22 fact, I'm surprised that was even a contested issue as I
23 believe that my information came from the solicitor's
24 office.

25 Q Okay. So you had about a month or almost more than a

1 month to prepare for finalizing your argument. And you
2 didn't subpoena anybody to come testify from either the
3 sheriff's office or the county to verify his employment or
4 nonemployment, correct?

5 A Correct.

6 Q And you didn't -- did you reach out to anybody at the
7 sheriff's office or the county to see, you know, about
8 getting those records?

9 A I did not.

10 Q And you didn't reach out to Mr. Haden himself.

11 A I -- for some reason Maryland is sticking in my mind,
12 but I think I heard Virginia today. I knew that Mr. Haden
13 was in another state. I don't believe I had any more
14 information than the state that he was in. So, no, I did
15 not reach out to him.

16 Q Okay. So do you admit for purposes of today's hearing
17 that you should have gotten some employment records to
18 support your motion?

19 A I do.

20 Q And --

21 A Or testimony or stipulation or something, the
22 equivalent, yes.

23 Q All right. So do you feel or do you admit that
24 without that, that that affected the outcome of your case?

25 A I don't think there's any doubt about that, because

1 Judge Hill didn't have enough information.

2 I was at the oral argument in this case where the
3 chief justice was critical of there not being more
4 information. And that certainly is what happened in the
5 written opinion, that the appeal was denied because I
6 didn't make an adequate record.

7 Q And so they basically in the oral arguments -- do you
8 recall that the issue was that there was a failure to
9 preserve it for appeal because there was no evidence put
10 into the record for them to evaluate?

11 A Yes. That's correct.

12 Q And without that there's no issue for them to
13 consider.

14 A That's correct.

15 Q Okay.

16 A That was their holding, yes.

17 Q So, I think if you recall -- I'm just going to refer
18 back to the trial transcript. Judge Hill when he was
19 trying to make a ruling on that...

20 MS. SAUNDERS: Your Honor, I believe it's page -- it
21 looks like page of the record on appeal -- it's page 211 of
22 the trial transcript from July 17th. It's page 11.

23 A You said page 11?

24 Q Of the July 17th day.

25 A I've got it.

Ernest Charles Grose, Jr.
Direct examination by Ms. Saunders

1 Q Okay. If you look at page 11, line 22, can you just
2 kind of read, and on to page 12, what Judge Hill said?

3 A I'm sorry. I'm looking at the June -- well, I'm
4 looking at something that's labeled July, but okay. I'm
5 with you. I'm sorry. I'm with you.

6 Q So if you scroll down to the bottom of that page and
7 on to the next page through line five, would you just read
8 into the record what Judge Hill said?

9 A Beginning at line 22 it says:

10 THE COURT: Mr. Grose, I share with
11 you your concerns about the current status
12 of the grand jury practice in our state.
13 However, I don't know any authority that
14 would require me to quash the indictment
15 based on the identity of the witness. The
16 indictment itself sets forth the
17 allegations for listing of a witness on
18 the form on the back of the indictment.
19 If that is inaccurate, without any further
20 showing, would not be sufficient to render
21 the indictment defective.

22 Do you want me to keep going?

23 Q You can.

24 THE COURT: Of course this all could
25 be avoided if we did have recordings made

1 of the grand jury proceedings. Certainly
2 the state grand jury, I believe, does
3 that. And I know the federal courts do
4 it. And there have been many assaults on
5 the grand jury system in circuit court
6 other than Justice Lewis' descent. There
7 has been no holding for amendment to the
8 code that would allow me to grant your
9 motion, which I think is a serious motion
10 and well thought out, and I respectfully
11 deny it.

12 Q Okay. I'll stop you right there.

13 A Okay.

14 Q Thank you.

15 So at that point did you think to ask for a little
16 more time to get some records from the -- regarding his
17 employment?

18 A I did not.

19 Q Did you think to cite the statute -- statutory
20 portions of the code or the statute that requires witnesses
21 to be sworn in by the grand jury foreperson?

22 A I -- honestly, I don't think I was familiar with that
23 section until after the trial.

24 Q Okay. So it appears from the record that the judge
25 was leaning towards agreeing with you had you submitted,

1 given him, more.

2 A He certainly was asking for more legal authority. And
3 there was a code section that I could have cited to him.
4 And I also subsequently learned at the time the circuit
5 court pattern of jury instructions were available on line.
6 And I should have cited to him the standard jury
7 instruction that's given to the grand juries.

8 Q All right. And I guess I've got it right here if you
9 want me to question you about that briefly.

10 A Okay.

11 Q Page six. Well, this is chapter two of the grand jury
12 charge.

13 A Uh-huh.

14 Q Are you familiar with that?

15 A I am. I haven't -- it's been a little bit since I've
16 looked at it but...

17 Q But have you -- well, I guess you can't listen in to
18 grand jury instructions.

19 A Oh, no. The -- the -- the jury instructions that
20 we're talking about are given in open court when a jury is
21 impaneled.

22 And since this trial I've listened to the jury
23 instructions. I probably had before the trial, but since
24 this trial I've paid attention to them with sort of a
25 different purpose, a different ear.

1 And I've listened to them in a number of counties and
2 multiple circuits. So that once the grand jury is selected
3 the judge gives these instructions in open court.

4 Q Okay. So I just want to know your position on the
5 grand jury process and how it affected Mr. Carrier's case.
6 Basically, just inform the Court of your position on that.

7 MS. GREGORY: Your Honor, I think -- objection. I
8 think that's inappropriate testimony. We are here for
9 about a specific indictment, not challenging the entire
10 grand jury system.

11 MS. SAUNDERS: Well, I think, Your Honor, it gives --
12 we need that testimony to give reason for the basis for his
13 motion to be tried on the original indictment. That was a
14 core issue at the --

15 THE COURT: Okay. I'll allow it.
16 Overruled.

17 MS. SAUNDERS: Thank you.

18 THE COURT: Let's pause for a second.

19 Let's all take a break. We need to take care of that
20 lady out there.

21 All right. We're going to take a quick recess.

22 You stand up, walk around and get your bearings.

23 Because I can't continue this proceeding with you
24 coughing out there like you are.

25 All right. We'll reconvene in about ten minutes.

Ernest Charles Grose, Jr.
Direct examination by Ms. Saunders

1 Okay.

2 (Whereupon, a recess was taken.)

3 THE COURT: Is she okay now? We'll resume.

4 Yes, ma'am.

5 MS. SAUNDERS: Thank you, Your Honor.

6 BY MS. SAUNDERS

7 Q I believe where we left off, Mr. Grose, is I was just
8 basically asking you to restate the question, what was the
9 basis of your motion back in July of 2012 at trial
10 regarding the grand jury process.

11 A It's -- it's my belief -- and I believe that the law
12 supports this -- that a -- a witness with personal
13 knowledge of the case has to testify in front of the grand
14 jury for -- to return a valid indictment.

15 The -- under the current law that can be a police
16 officer, and they can testify on hearsay. But the case --
17 and I forget which name of it is that upheld that --
18 indicates that the police officer in that case had
19 participated in the investigation and had personal
20 knowledge of the -- of the -- what happened in the
21 investigation, the facts of the case.

22 I also believe that based on the -- and some of this
23 is my belief today, that the -- but that the witness listed
24 on the indictment as testifying in front of the grand jury
25 should be -- whoever testifies should be listed on that

1 indictment. That certainly is confirmed by the jury
2 instruction that courts give today. And there's also a
3 statute section that talks about, you know, the witnesses
4 being subpoenaed and bound over for the grand jury process.

5 So in 2012 the indictment that they were proceeding on
6 that represented that Chris Haden was the sole witness
7 testifying in front of the grand jury was not true; and
8 therefore that means if anybody testified, somebody other
9 than him testified, and under the jury instruction that the
10 Courts give, the grand juries should be reporting that
11 witnesses who are not listed on the indictment are
12 testifying in front of them, although I'm not aware of that
13 happening, but it should -- that's if you follow the
14 judge's instructions that's what should happen.

15 Q Okay. So it was your position then, and still is
16 today, that if the witness on the document is not actually
17 the witness who testified that that document is inherently
18 defective.

19 A That document is not a valid document at that point
20 because the process has not been followed according to law.

21 Q Okay. And because of that defect in the trial
22 process, which is like the beginning of the trial process,
23 you feel that that document -- that indictment should have
24 been quashed.

25 A Yes.

1 Q Okay. And you should have been allowed to proceed on
2 the original indictment. That was your position then.

3 A That was my position then, but we now know from what
4 you presented here today that that indictment was not valid
5 either under the same theory.

6 Q All right. So if you had to do it all over again
7 would you have called the appropriate witnesses or
8 subpoenaed the appropriate document?

9 A You did it very well today and that's what I should
10 have done.

11 Q All right. Do you have anything else you'd like to
12 add for the Court before I turn you over to Ms. Gregory?

13 A Not unless you have any more questions.

14 Q No more questions. Thank you for your testimony.
15 Answer any questions Ms. Gregory has.

16 THE COURT: All right. Madam A.G.

17 MS. GREGORY: Thank you.

18 CROSS-EXAMINATION

19 BY MS. GREGORY

20 Q You've answered all of my questions. So excuse me
21 while I go through my list. But you said you learned that
22 Mr. Haden was not available through the solicitor's office,
23 right?

24 A I may have had some general knowledge of that, but my
25 recollection is, is that the solicitors had told me that he

1 was in another state and was not available.

2 I mean, there were some discussions about what
3 witnesses they were going to call. For example, there
4 was -- I have a recollection of thinking that they might
5 call some witnesses from Kentucky. And at some point they
6 told me that that wasn't going to happen. I don't remember
7 at what stage it was. So it would have been in those types
8 of discussions.

9 Q Okay. Do you still have that transcript in front of
10 you, or I can give you mine.

11 A I can -- yes, I do.

12 Q Okay. I think you have the record on appeal there.
13 Am I right?

14 A No. I -- I actually am looking at -- because I -- I
15 wasn't active in the appeal but because I assisted with the
16 appeal, I have the actual copies of the transcripts that
17 were ordered, so.

18 MS. GREGORY: May I approach, Your Honor?

19 THE COURT: Yes.

20 Q This is a really quick little line.

21 You had mentioned, you had testified, that they
22 contested it or you were surprised that they contested it.
23 You pointed out to the Court, correct, that you did not
24 contest it? If you would, look at what I underlined there.
25 It's on page 211.

Ernest Charles Grose, Jr.
Cross-examination by Ms. Gregory

1 A Yes.

2 THE COURT: Page 211 of the record on appeal. What
3 line?

4 A Yeah. And what it says --

5 THE COURT: What line?

6 MS. GREGORY: I'm sorry.

7 THE WITNESS: It's 14 and 15.

8 THE COURT: Okay.

9 A The -- I point it out that they are not denying it.

10 Q Right.

11 A Let's see. What I say is, "I mean they are not even
12 telling you, even making an effort to tell you who it
13 really was. But they are not denying that it wasn't
14 Mr. Haden."

15 Q Mr. Haden, right.

16 A And if you look at the opinion and if you look at the
17 comments in the oral argument by Chief Justice Toal, at the
18 time, and the cases that they cited in the opinion, me
19 stating that the representations that I made were not
20 sufficient for appellate review. And that's one of the
21 problems as to why the Supreme Court didn't reach the
22 merits of this issue.

23 Q Great. But it wasn't contested. When it was brought
24 up to Judge Hill, it was not contested by the state that
25 Chris Haden -- they never said that --

1 A Go look at the oral argument. Ben Aplek [sic]
2 certainly contested it. We never proved that and never
3 proved that Mr. Haden didn't testify in front of the grand
4 jury.

5 Q Okay. If you think -- I'm sorry.

6 A So to -- I don't think that the solicitor was actually
7 contesting, because they knew what the truth was, but they
8 also certainly weren't stipulating to it. They certainly
9 weren't saying I was right. They certainly weren't trying
10 to say who the real witness was. And your office certainly
11 relied on their silence in -- in the appeal.

12 Q And you challenge the timeframe also in the
13 indictments, is that correct? Because the 2009 indictment
14 had basically a 2-year timeframe of the alleged abuse where
15 the 2012 indictment had a nearly 5-year timeframe for the
16 alleged abuse.

17 A I don't remember the exact timeframes, but yes. They
18 were -- they were changing that information, yes.

19 Q Okay.

20 MS. GREGORY: No further questions, Your Honor.

21 THE COURT: All right. Any redirect?

22 MS. SAUNDERS: Briefly, Your Honor.

23 THE COURT: Yes.

24

25

1 REDIRECT EXAMINATION

2 BY MS. SAUNDERS

3 Q Back to that issue on page 211, I believe.

4 Mr. Grose, I think -- is it accurate to say that the
5 state didn't try to disprove what you were saying, what
6 your position was about Mr. Haden not being there? They
7 just said it didn't matter.

8 A That was their argument, and they certainly didn't
9 confirm the facts because if we -- for example, you had a
10 stipulation today. If we had had a stipulation from the
11 state that might have been enough to preserve it for
12 appeal. We didn't have that and so -- and they were
13 arguing that that didn't matter, yes.

14 Q Okay. And at oral arguments on appeal the issue kind
15 of morphed into this burden-shifting argument. Do you
16 recall that?

17 A What do you mean by burden shifting?

18 Q Well, that -- that the state was angry that you
19 were -- you were expecting them to disprove your position
20 in order to get the evidence in. Does that make sense?

21 A Yes, that -- that does -- that does make sense, yes.

22 Q Okay. But the core issue on appeal that was not able
23 to be fleshed out was that there was not any evidence,
24 physical or otherwise, put into the record at trial that
25 would allow them to address that.

1 A If they had the evidence that you presented today --
2 the documents and the testimony -- they would have reached
3 the merits of that issue in the direct appeal.

4 Q And you had every opportunity to get that evidence.

5 A I did, yes.

6 Q Thank you for your testimony.

7 THE COURT: All right. Any recross?

8 MS. GREGORY: Just one question, Your Honor.

9 RECROSS-EXAMINATION

10 BY MS. GREGORY

11 Q If you had not had the information about Deputy Haden
12 moving to Virginia, would you have had any other reason
13 other than the timeframe to challenge that indictment? It
14 was true billed, signed by the foreman.

15 A At that time -- the problem is -- is that the grand
16 jury process is a secretive process. And so if I'm looking
17 at an indictment that says that the only witness testifying
18 before the grand jury was the chief investigating officer,
19 who I know from discovery has personal information about
20 the case, that indictment would appear to be valid on its
21 face.

22 Q Right.

23 A What we had was information that indicated that it was
24 not a valid -- well, I guess it was still technically valid
25 on its face because it made that representation that turned

1 out to be false. But, you know, we had information
2 indicating that Mr. Haden could not have been the person
3 who testified in front of the grand jury.

4 I have since raised this issue more and I've worked on
5 it more, and I can't speak to what the process was when
6 Solicitor Peace was solicitor. Now that Solicitor Stumbo
7 is the solicitor, I think he goes out of his way to make it
8 hard for you to determine who was the actual witness that's
9 testified in front of the grand jury, because I've
10 questioned him under oath in a civil case where he's
11 testified that his office does not keep records of the
12 witnesses actually testifying in front of the grand jury.

13 Q So the indictments are valid on their face if you had
14 not the information about Chris Paden.

15 A It would. Yes. It would have been -- it -- would --
16 well, it would appear to be valid on its face. But that's
17 not the situation that we had. We had the situation where
18 we have evidence that Chris Haden wasn't there, and
19 therefore the indictment could not be valid.

20 MS. GREGORY: No further questions, Your Honor.

21 THE COURT: All right. Thank you, sir. You may step
22 down.

23 You may call your next witness.

24 MS. SAUNDERS: Your Honor, no further witnesses. We
25 rest our case.

Elizabeth Phillips Taylor
Direct examination by Ms. Gregory

1 THE COURT: I'm sorry. I don't think Ms. -- did you
2 have any additional questions?

3 MS. GREGORY: No, Your Honor.

4 THE COURT: Thank you.

5 All right. Anything further from the state then? The
6 applicant's rested.

7 MS. GREGORY: Yes. We have one witness, Your Honor.

8 THE COURT: All right. You may call your witness.

9 MS. GREGORY: We would call Elizabeth Taylor to the
10 stand.

11 ELIZABETH PHILLIPS TAYLOR,
12 having been first duly sworn, testified as follows:

13 DIRECT EXAMINATION BY MS. GREGORY

14 Q Good morning, Ms. Taylor.

15 A Good morning.

16 Q How long have you been practicing law?

17 A Approximately 16 years.

18 Q And what was your involvement in the Carrier -- in
19 Mr. Carrier's case?

20 A I was the second prosecutor assigned to the case. I
21 handled the first day of pretrial hearings when the case
22 was continued and then was supposed to call it for trial on
23 the actual trial date but I had a death in the family that
24 morning and Solicitor Hodges tried the case instead.

25 Q And was Mr. Haden involved in the case?

1 A He was the investigating officer.

2 Q And how did you -- did you obtain the indictments, the
3 2009 and the 2012?

4 A You talking about me specifically sending them?

5 Q Yes.

6 A No. They were -- the way indictments were handled
7 back then is based on the arrest date a list was generated.
8 Someone in the office prepared all of the indictments -- a
9 paralegal -- and they were submitted. So prosecutors -- we
10 rarely knew when our cases were going to indictment.

11 Q Okay.

12 A And I was not the prosecutor on the case when the
13 first indictment was obtained.

14 Q Okay. Do you have the indictments with you?

15 A I don't. I left them back there. I'm sorry, I
16 think -- other chair.

17 MS. GREGORY: May I approach, Your Honor?

18 THE COURT: Yes.

19 Q The allegation here is that the witness listed on
20 that -- on the front of the indictment -- was not the
21 witness who presented the case to the grand jury.

22 Is that the typical practice for the witness listed on
23 the front of the indictment to not present it to the grand
24 jury?

25 A It's frequently the case that the witness on the

1 indictment is not the witness for the grand jury.

2 Q Have indictments been challenged on this before?

3 A Yes.

4 Q Successfully?

5 A No, not successfully at the trial level. I've had
6 cases -- Mr. Grose has made the motion -- Ms. Nelson,
7 Mr. Wise, Patricia Buxton. Very good attorneys have made
8 an almost identical motion. And I have never seen a trial
9 judge grant it.

10 Q Looking at the indictment for the 2009, is it true
11 billed and signed by a foreman?

12 A It is.

13 Q Do you see any issues with that indictment as far as
14 providing notice to Mr. Carrier?

15 A I don't see any issues as far as providing notice.
16 The reason we did not go forward on this indictment is it
17 alleges a 1-day timeframe, which with cases like this and
18 the victim having been a child at the time and the nature
19 of the continuing disclosure, we would not have gone
20 forward with just a 1-day timeframe.

21 Q So the 2012 indictment was obtained for what reason?

22 A To conform the timeframe to what the victim was
23 actually alleging.

24 Q And looking at that indictment, the 2012, is that also
25 true billed and signed by the foreman?

1 A Yes, it is.

2 Q And it provides notice to Mr. Carrier as to what he's
3 charged with and the timeframe of the alleged abuse?

4 A It does.

5 Q Had Mr. Grose been successful in quashing either of
6 those indictments, or both, what would have happened?

7 A We would have obtained another indictment and gone to
8 trial.

9 Q Would it have changed the outcome of this case?

10 A I have no reason to believe that it would. The trial
11 was a very simple trial in terms of not a lot of witnesses.
12 The jury was only out, from my understanding, for a very
13 short amount of time. It was -- it was fairly cut and
14 tried once we got to trail.

15 MS. GREGORY: No further questions, Your Honor.

16 THE COURT: All right. Thank you.

17 Ms. Saunders.

18 MS. SAUNDERS: No questions, Your Honor.

19 THE COURT: All right. Thank you, ma'am. You may
20 step down.

21 The state call its next witness.

22 MS. GREGORY: We rest, Your Honor.

23 THE COURT: The state rests.

24 Anything in reply?

25 MS. SAUNDERS: Your Honor, no witnesses, but I would

1 like to make a brief --

2 THE COURT: Yeah. At this time I'll be glad to hear
3 arguments from both counsel regarding their positions.

4 Ms. Sanders.

5 MS. SAUNDERS: Your Honor, thank you. I appreciate
6 you allowing us to call the witness by phone instead of
7 having him come. This is an appointed case for me, so it
8 does save time and resources.

9 First framework for our argument is ineffective
10 assistance of counsel under Strickland vs. Washington and
11 its progeny in South Carolina.

12 You heard it. Mr. Grose is willing to admit it. He
13 had plenty of time to do it, and he didn't do it. He could
14 have called witnesses and subpoenaed documents to disprove
15 or to prove -- excuse me -- that Investigator Haden wasn't
16 working at the time that he should have made the motion for
17 the 2012 presentment.

18 THE COURT: All right. Well, let me stop you there,
19 because I'm going to interrupt you in the way the appellate
20 courts do because I --

21 MS. SAUNDERS: That's fine.

22 THE COURT: -- can't stand that. But I'm going to do
23 it to you now that I'm sitting on this side of the aisle.

24 All right. Well, I mean, he raised it. There's six
25 pages of the transcript where Mr. Grose talks about the

1 indictment being deficient.

2 So how was his performance deficient under the first
3 prong of Strickland?

4 MS. SAUNDERS: Well, the judge even said on page 211
5 and 212 in the record on appeal that without anything
6 further I can't even consider this motion -- without
7 anything further.

8 He was looking for more. It was obvious that he was
9 looking for more. And there was more that could have been
10 proven and they -- you know, they just -- the state
11 wouldn't admit that Haden wasn't there or employed by the
12 sheriff's office, and he couldn't prove it. And he admits
13 that he could have had he done a little more.

14 THE COURT: Okay.

15 MS. SAUNDERS: I mean, the information was available.

16 THE COURT: Talk to me about the second prong then.

17 MS. SAUNDERS: All right.

18 THE COURT: The second prong is but for the deficiency
19 there would have been a different result.

20 Well, you just heard the solicitor here testify, well,
21 if you'd -- if Judge Hill had quashed that we'd have just
22 continued the case to another term and got a new
23 indictment.

24 MS. SAUNDERS: Maybe they would have. I don't know
25 that.

1 And everybody that works in this system, Your Honor,
2 knows that something, an event like that, quashing an
3 indictment or potentially two defective indictments, can
4 change the course of a case in its entirety, can get him a
5 whole entire new jury with a whole entire new outcome.

6 But one big issue is that it didn't properly preserve
7 the record for appeal. And the Court wanted to go there.
8 I mean, I've got these sections tabbed saying exactly what
9 Chief Justice Toal and Justice Kittredge were saying in the
10 oral arguments on appeal.

11 They said, "You know, Mr. Grose is as experienced as
12 they make them. He knows well how to separate proceeding
13 in which you put actual evidence of the challenge or
14 regularity of a charging document, so that's what's got me
15 a little bit troubled. None of that was done."

16 And, Your Honor, Justice Toal went on to say, "well,
17 that secret nature wouldn't have prevented him from
18 subpoenaing somebody, even if it was a solicitor himself or
19 herself."

20 And again nobody was put up on the stand and no
21 evidence was taken.

22 And Justice Kittredge said, "That's just part of his
23 order from the bench, but to me as I read that" -- meaning
24 the transcript at trial -- "that's all he's got to go on,
25 is the face of the indictment because nothing else was put

1 forward."

2 They wanted it. They wished they had it. I think
3 they could have addressed the issue. But it didn't
4 preserve it. And I think that if you back up a little bit
5 in front of Strickland there's something that I think that
6 we need to look as a structural error at a critical phase
7 of trial.

8 I mean, I don't think anybody can argue with me that
9 the indictment process is a critical phase at trial. You
10 can get an arrest warrant, or you can skip that whole
11 process and go get somebody indicted. The solicitor can do
12 it or the sheriff's office can do it through the
13 solicitor's office. And because it was flawed from the
14 beginning -- and even Mr. Grose didn't even know that --
15 now we know that not only was the original indictment not
16 right.

17 The second indictment was wrong. And he was tried on,
18 ultimately on, the second one. But because of that
19 structural error, that requires a presumption of prejudice.

20 Prejudice can be presumed if a structural error is
21 made at a critical point in the trial even if there's
22 overwhelming evidence, even if, you know, it avoids all of
23 that. But even if you don't find it to be a structural
24 error, I think that it's clear that this failure to
25 preserve the record for appeal cost him an appeal.

1 And Ms. Hudgins had a good issue she could attack, but
2 she just didn't have the evidence she could. The Court
3 wanted the evidence, and Mr. Grose what wasn't able to
4 elicit it.

5 THE COURT: All right.

6 MS. SAUNDERS: Your Honor, if I may just briefly look
7 at my notes, you know, I think he was denied a fair trial
8 because he was forced to proceed on a defective document.

9 And the state's going to tell you it's a notice
10 document. No, it's not. It's much more serious than that.

11 You know, the indictment itself subjects somebody to
12 arraignment and going through the proceedings of getting a
13 public defender or hiring a private attorney, ultimately
14 being convicted or tried and convicted or found not guilty
15 or guilty. You know, you just never know.

16 But that document has a lot of power. And it's not
17 just to notify somebody that they're being charged with a
18 criminal offense. It's much more than that. If they're
19 being indicted, they've got to go turn themselves in or
20 somebody's going to go get them.

21 So that's just a critical, critical phase at trial.
22 And the code says, Your Honor, 14-7-1550, that the witness
23 must be sworn by the foreperson of the grand jury. They
24 can listen to more than one witness, but they've got to
25 have a witness, and that witness has to be sworn.

1 And the process is so secretive that we're not privy
2 to what's going on in there. All we have is this
3 indictment document that states who testified before the
4 grand jury. And not one, but two of these, in
5 Mr. Carrier's case were wrong from the very beginning. And
6 that process needs to change.

7 Your Honor, I think that because Mr. Grose didn't --
8 I'm jumping around. I'm going back to the presumption of
9 prejudice. Because Mr. Grose didn't call the right
10 witnesses, subpoena the right documents, he was denied
11 counsel at a critical stage of his trial, trying to -- you
12 know, he was effectively or constructively denied that.

13 THE COURT: So may not -- on the second prong may not
14 have prejudiced your client at the time of trial because he
15 did bring it up. But it ultimately prejudiced him by not
16 preserving the record on appeal.

17 MS. SAUNDERS: And, Your Honor, yes.

18 THE COURT: I understand.

19 MS. SAUNDERS: And I could be being creative with that
20 argument, but I'm not because the record on appeal or the
21 oral-argument record reflects that the Court was searching
22 for a reason to take up that issue. They were looking for
23 it.

24 THE COURT: Well, let me hear from the state. I'll
25 come back to you if I need to.

1 MS. SAUNDERS: Thank you, Your Honor.

2 THE COURT: Yes, ma'am.

3 MS. GREGORY: Yes. So as she surmised, it is a notice
4 document. And that's State vs. Gentry. I can provide you
5 with the citation if you want it.

6 But also the indictment performs two functions. It
7 showed -- informed the accused of what's charged against
8 him and to prevent double jeopardy in the future. And
9 that's State vs. Guthrie.

10 The indictment -- State vs. Guthrie also says the
11 indictment passes legal muster if it charges the crime
12 substantially, which it does in this case. Both
13 indictments. The only difference was the timeframe in the
14 second one was longer.

15 It charged him substantially with what he was going to
16 be called to answer for.

17 And the true test in the indictment, again, State vs.
18 Guthrie, is whether or not -- it's not whether or not it
19 could be made more definite or certain but whether it
20 contains the necessary elements of the offense intended to
21 be charged and sufficiently apprizes the defendant of what
22 he must be prepared to meet, which both of these
23 indictments do.

24 And looking at Strickland, even if Mr. Grose had
25 been -- although I do not think he was deficient, but even

1 if he had provided that information and had gotten these
2 indictments quashed, as Ms. Taylor testified, she would
3 have had this presented before the grand jury again.

4 And seeing as how he's convicted by a jury beyond a
5 reasonable doubt, I do believe a grand jury was -- would be
6 able to find probable cause in this case and provide
7 another indictment, which, again would have had all of the
8 same information except for the witness. Obviously, it
9 would have been a scrivener's error and that would have
10 changed.

11 So I do not believe that they've met their burden on
12 the Strickland prejudice prong, although I don't believe
13 Mr. Grose was deficient either. He did a phenomenal job of
14 pretrial motions. I just don't think they've met their
15 burden in Strickland.

16 THE COURT: You know, there's an old -- well, for lack
17 of a better description -- there's an old -- there's a
18 saying in the Bible that says the wise man built his house
19 upon the rock.

20 All right. And the rock of every -- of the criminal
21 justice process starts not with an arrest, not with a
22 warrant, but formal proceedings start with an indictment.
23 And, you know, I read Judge Hill's discussion when he was
24 considering this issue at the -- at the trial level. And,
25 you know, I see where he was going with that.

1 I'm going to go with my gut on this.

2 Based upon the totality of the circumstances given to
3 me and the testimony and evidence presented, I'm going to
4 grant the applicant's post conviction relief petition and
5 order that he be given a new trial.

6 All right. Ms. Saunders, I want you to prepare an
7 order consistent with your presentation today, as well as
8 your arguments presented. Submit it through opposing
9 counsel for her review. Then, of course, I will ultimately
10 sign it once it passes muster with me.

11 Then we'll see where this goes. Maybe this will be
12 the trigger that our appellate courts need to finally
13 address this issue in South Carolina, although I'm not
14 convinced the state will appeal. We'll see what happens.

15 All right. Thank you very much. That concludes this
16 hearing.

17 END OF REQUESTED TRANSCRIPT OF RECORD
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Greenwood County, South Carolina, on the 26th day of February 2019.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

March 2, 2019

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

JAMES L. CARRIER, #351607,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT
CA# 2014-CP-24-1526

**ORDER GRANTING
POST-CONVICTION RELIEF**

FILED OF 8th JUDICIAL CIRCUIT
2019 MAY 8 PM 1:18
CLERK OF COURT

HEARING DATE.....February 26, 2019
PRESIDING JUDGE.....The Honorable Brian M. Gibbons
ATTORNEY FOR APPLICANT.....Laura M. Saunders
ATTORNEY FOR RESPONDENT.....Janell H. Gregory
COURT REPORTER.....Linda Moffitt

This matter comes before this Court by way of an application for post-conviction relief filed on February 12, 2014 by James L. Carrier ("Applicant"). Respondent served a return on April 14, 2015. An evidentiary hearing was held on February 26, 2019, at the Greenwood County Courthouse. Applicant was present and represented by Laura M. Saunders, Esquire. Respondent was represented by Janell H. Gregory, Assistant Attorney General. Following testimony and a thorough review of the record this Court finds that Applicant is entitled to relief as detailed below.

I. FACTS AND PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was originally indicted by the Greenwood County Grand Jury during the October 2009 term of Court for Lewd Act under indictment number 2009-GS-24-1146. The 2009-GS-24-1146 indictment indicates that "Chris Haden, Greenwood County Sheriff" was the witness who presented the case to the grand jury.



Charles Grose ("Trial Counsel") was Applicant's Trial Counsel as Chief Public Defender for the Eighth Judicial Circuit. Trial Counsel filed a Motion for Speedy Trial and this Motion was heard on May 16, 2012, before the Honorable J. Cordell Maddox in Greenwood, SC. The parties agreed to set a date certain trial date for the week of June 16, 2012. On June 5, 2012, Solicitor Elizabeth White informed Trial Counsel that she was going to re-indict Applicant to expand the time frame in which the alleged Lewd Act occurred. Subsequently, Applicant was directly indicted by the Greenwood County Grand Jury during the June 2012, term of Court for Lewd Act under indictment number 2012-GS-24-1166. The 2012-GS-24-1166 indictment indicates that "Chris Haden, Greenwood County Sheriff" was the witness who presented the case to the grand jury.

Jury selection began on June 18, 2012, in Greenwood, SC. The Honorable D. Garrison Hill presided over the trial. Prior to jury selection, Trial Counsel moved to quash the second indictment and moved to require the Solicitor to try Applicant on the original indictment based upon Trial Counsel's belief that the witness listed on the second indictment was not employed by the Sheriff's Office at the time of presentment to the grand jury. Trial Counsel presented an argument to support his motion, but did not present any evidence to corroborate his assertion that the witness listed on the second indictment was not employed at the time of presentment. Trial Counsel's motion was denied and the trial ensued. Applicant was found guilty at trial on July 18, 2012. Applicant was sentenced to fifteen (15) years confinement for Lewd Act with lifetime GPS pursuant to SC Code Ann. § 23-3-540.

Applicant filed a timely notice of intent to appeal and the direct appeal was perfected. On appeal Applicant challenged the trial judge'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 as well as lifetime GPS monitoring and the judge's failure to grant a mistrial. In an unpublished opinion, after argument, the South Carolina Supreme Court affirmed Applicant's conviction. State v. James L. Carrier, 2014-MO-043 (S.C. filed October 22, 2014). In the opinion the Court specifically noted:

State v. Batchelor, 377 S.C. 341, 344, 661 S.E.2d 58, 59 (2008) ("The regularity of grand jury proceedings is presumed absent clear evidence to the contrary; the burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated." (citations omitted)); State v. Brownfield, 60 S.C. 509, 515, 39 S.E. 2, 4 (1901) (finding that where a motion to quash an indictment is unsupported by evidence, "it cannot be held to have been erroneously denied." (quoting Smith v. Mississippi, 162 U.S. 592, 601 (1896))); Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct.App.1993) (noting the argument of counsel is not evidence and, standing alone, provides no support for a finding of fact).

State v. Carrier, No. 2012-212777, 2014 WL 5390545, at *1 (S.C. Oct. 22, 2014).

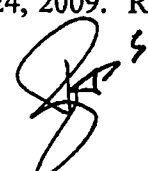
II. FINDINGS OF FACT

Applicant presented the following witnesses: Applicant James Carrier; Edna Dixon of the Greenwood County Department of Human Resources; Private Investigator Jimmy Powers of Advanced Private Investigations; telephone testimony of former Greenwood County Sheriff's Office deputy Christopher Haden and Applicant's Trial Counsel Charles Grose. The State presented testimony of Elizabeth White Taylor, formerly with the Greenwood County Solicitor's Office.

Applicant's case:

(1) Applicant James Carrier testified that he wished to proceed on his application for post-conviction relief and that he understood the nature of the proceedings before the Court.

(2) Edna Dixon testified that she is an employee of the Greenwood County Department of Human Resources and that Christopher Haden worked for the Greenwood County Sheriff's Office ("GCSO") from January 17, 2006 through September 24, 2009. Records from



Ms. Dixon's file indicating Haden's dates of employment were admitted into evidence without objection.

(3) Jimmy Powers testified that he was appointed as a private investigator on the case in January 2019 to assist counsel for Applicant in locating former GCSO Investigator Chris Haden. Investigator Powers testified that he was able to locate Haden, and verified that the Chris Haden he contacted was the same individual that worked for the GCSO on the James Carrier investigation. Investigator Powers testified that he also knew Chris Haden because they worked together at the City of Greenwood Police Department several years ago.

(4) Christopher Haden testified that he currently lives in Thaxton, Virginia and works for the Pulaski County Department of Social Services as a CPS investigator. Haden testified that he was previously employed by the GCSO from January 2006 through September 24, 2009. Haden testified that he did not testify before the grand jury in October 2009 or in June 2012. Haden testified that he never testified before the grand jury as an employee of the GCSO. Haden testified that the GCSO usually appointed one representative from their office to present testimony to the grand jury. Haden testified that he was not employed by the GCSO during either the October 2009 or the June 2012 terms of court for the grand jury.¹

(5) Trial Counsel was called by counsel for Applicant. Trial Counsel testified that after he had been notified that the State was planning to re-indict Applicant, but prior to the trial, he was made aware that Haden no longer worked for the GCSO and therefore was not the witness who testified before the grand jury for the direct indictment. Trial Counsel testified that this was the basis for his Motion to be Tried on the Original Indictment. Trial Counsel testified

¹ It is noted that at the February 26, 2019 hearing, the State stipulated that Haden was not employed with the Greenwood County Sheriff's Department at the time of the indictment in question. (PCR Transcript, p.11, 1.9-15, February 26, 2019).

A handwritten signature in black ink, appearing to be "J. R. R.", is located in the bottom right corner of the page.

that he did not subpoena any documents or witness(es) to prove his assertion that Haden was not the witness who presented before the grand jury, did not seek to have the State stipulate to this fact, and that he did not make an attempt to contact Haden prior to the trial. Trial Counsel testified that despite knowing the trial court cited a lack of legal authority to support granting his motion, Trial Counsel did not cite to S.C. Code 14-7-1550 or the standard grand jury charge, both of which require the name of the presenting witness to be on the bill of indictment. Trial Counsel also testified that had he called witnesses, presented documents or obtained a stipulation in support of his Motion, he would have been able to prove at trial that Haden was not employed by the GCSO at the time the original indictment was presented to the grand jury, and he would have learned that Haden was not employed by the GCSO at the time of direct-indictment. Trial Counsel testified that had he introduced the proper evidence, the indictments would have been quashed. Trial Counsel also testified that he attended the oral argument of Mr. Carrier's appeal before the South Carolina Supreme Court, and was familiar with the Supreme Court's decision denying that appeal based on Trial Counsel's failure to properly preserve the grand jury issue for appeal.

State's case:

(1) Elizabeth White Taylor testified on behalf of the State of South Carolina. Taylor testified that she was the Solicitor working for the Greenwood County Solicitor's Office during the time the case was indicted in 2009 and in 2012. Taylor testified that it was her intent to dismiss the original 2009 indictment charging Applicant with Lewd Act because she obtained a direct-indictment in June 2012 against Applicant prior to trial in order to expand the time frame in which the allegations occurred. Taylor testified that normally a list is generated based upon arrest date of Defendants, and that list is then presented to the grand jury during their assigned



terms of court. Taylor testified and that it is "frequently the case" that the witness listed on the indictment is not the person who actually presents to the grand jury. Taylor testified that she had cases where such a motion to quash has been made and never seen it granted. Taylor also testified that had either of the indictments charging Applicant been quashed, she would have obtained another direct-indictment against him.

Based upon the foregoing testimony, the PCR Court finds that Trial Counsel failed to present or elicit the proper evidence during Applicant's trial regarding his Motion to be Tried on the Original Indictment and therefore the record was unpreserved for appeal. 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.

Applicant claims that Trial Counsel was ineffective for not introducing the proper evidence at trial, and in turn Applicant suffered prejudice. Applicant also argues that a structural error occurred at a critical phase of his trial, and this in turn creates a presumption of prejudice or "Per se prejudice". The State argues that even if Trial Counsel's performance was deficient, Applicant does not make the required showing of prejudice because of an overwhelming evidence of guilt presented at trial along with the mere scrivener's errors on the indictments. This Court disagrees with the State and grants Applicant's application for post-conviction Relief for the following reasons.

III. LAW AND CONCLUSIONS OF LAW

This Court has previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing

McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

“There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991)). “Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Alexander, 303 S.C. at 541–42, 402 S.E.2d at 485).

Trial Counsel's Deficient Performance: Based on an objective standard of reasonableness, Trial Counsel's failure call witnesses, present evidence or obtain a stipulation in support of his Motion to be Tried on the Original Indictment constitutes deficient performance pursuant to Strickland. Trial Counsel admitted at the evidentiary hearing that he did not present any evidence to support his motion. (PCR Transcript, p.29, l.18 – p.30, l.22, February 26, 2019) Trial Counsel did not have an explanation for failing to introduce this evidence and simply stated that he had obtained the information from someone at the Solicitor's office, and that he expected his knowledge of the witness's unavailability to prove his argument. (PCR Transcript, p.29, l.18-24, February 26, 2019). Trial Counsel also failed to properly introduce and cite the statutes

governing the grand jury process in our state which requires the witness to be sworn prior to testifying before the grand jury. (PCR Transcript, p.33, l.19-24, February 26, 2019).

Resulting Prejudice: There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. While explaining that he shared Trial Counsel's "concerns about the current status of the grand jury practice in our state," the trial judge nonetheless indicated that "without any further showing" he was unable to make a ruling in Applicant's favor and he denied the motion. (PCR Transcript, p.32, l.9-21, February 26, 2019). It is clear this was due to Trial Counsel's failure to introduce evidence and cite the law.

Based upon the evidence presented at the evidentiary hearing by counsel for Applicant, the information regarding Haden's non-employment with the Greenwood County Sheriff's Office was readily available. This would have proven that Haden was not an employee of the Sheriff's Office at the time of presentment of not only the second indictment in 2012, but more importantly the original indictment which was presented in 2009. If Trial Counsel had procured this evidence, which was available at the time of trial, a Motion to Quash both indictments would have been warranted. (PCR Transcript, p.37, l.9 – p.38, l.5, February 26, 2019). This court finds that there is a reasonable probability that both indictments would have been quashed based upon the facial irregularity on both of the documents and a simple reading of the clear statutory language of S.C. Code Ann. §14-7-1550:

Authority of grand jury foreman to swear witnesses; procedures to obtain attendance witnesses.

The foreman of the grand jury or acting foreman in circuit courts of any county of the State may swear witnesses whose names shall appear on the bill of indictment in the grand jury room. No witnesses shall be sworn except those who have been bound over or subpoenaed in the manner provided by law. In order to obtain attendance of any witness, the grand jury may proceed as provided by the South Carolina Rules of Civil Procedure and Sections 19-9-10 through 19-9-130.

S.C. Code Ann. §14-7-1550, emphasis added.

As Trial Counsel pointed out to this court at the evidentiary hearing, such a motion would also be supported by the standard charge South Carolina courts routinely give grand juries:

On the back of the indictments, the names of the witnesses for the State will be listed. You may call the witnesses before you for questioning. You do not have to examine all of them in every case, since some cases the testimony of one witness may convince you that the accused should go to trial. If so, you do not have to examine the other witnesses. However, do not find a "No Bill" without examining all witnesses because the last witness may know facts which the others did not know. The Foreperson of the Grand Jury will swear the witnesses whose names appear on the bill of indictment. No witness may be sworn except those who have been bound over or subpoenaed in the manner provided by law.

PCR Transcript, p.34, 1.2-7, February 26, 2019, referring to the SC Judicial Department Grand Jury Charge, Chapter 2.

The State's assertion at trial through Taylor's testimony that she has seen other attorney's make "an almost identical motion" and "never seen a trial judge grant it" is not compelling given the now-known and stipulated facts supporting that the indictments in Carrier's trial violated the clear language of S.C. Code Ann. §14-7-1550. (PCR Transcript, p.47, 1.2-9, February 26, 2019). Courts 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." Langley v. Boyter, 284 S.C. 162, 180-81, 325 S.E.2d 550, 561 (Ct. App. 1984).

Based on the above, I find that Applicant has met his burden under Strickland in showing that 1) counsel's performance was deficient, and 2) that he was prejudiced by counsel's deficient performance during the trial of this matter, through Trial Counsel's deficient efforts to obtain and present evidence that would have reasonably resulted in the indictments against him being quashed.

Applicant also meets his burden under the Strickland test for an altogether separate reason: Trial Counsel's failure to call witnesses or present evidence to support his motion did not properly preserve the issue for appellate review. In the record on appeal, the court discussed their inability to address the issue surrounding Haden's identity because nothing else was put forward on the record. The Supreme Court denied Applicant's appeal, reasoning in part that the burden was on the defendant to challenge the sufficiency of an indictment, and argument by counsel is not considered evidence and by itself is not supporting for a finding of fact. Justice Toal reasoned:

[T]here wasn't anything to prevent Mr. Grose from putting up some witness that could have verified Mr. Haden's presence or lack of presence. And if that had been done, then we would also have the benefit of the State going into who did make the presentation before the Grand Jury, because that wasn't explored at all in this hearing, if it wasn't Mr. Haden, who was it?...

...

...Mr. Grose is as experienced as they make them. He knows well how to have a separate proceeding in which you put actual evidence up to challenge the regularity of a charging document so that's what's got me a little bit troubled. None of that was done....

...

...Well, that secret nature wouldn't have prevented him from subpoenaing somebody even if it was a solicitor himself or herself....

...

...Nobody was put up on the stand and no evidence was taken, Ms. Hudgins, so that's what we deal with here.

Transcript of Oral Argument at 12-13, The State v. James Carrier, No. 2012-212777 (S.C. October 22, 2014).

It is now undisputed that Haden did not testify before the grand jury for both the 2009 and 2012 presentments, and this evidence was available to Trial Counsel at the time of trial.

(PCR Transcript, p. 23, l.14-17, February 26, 2019). This critical evidence was not presented to the trial court making the issue in regard to the defective indictment unpreserved for appellate review. Trial Counsel's performance was deficient. There is a reasonable probability that had the appropriate evidence been elicited at trial, both indictments would have been quashed and/or the record would have been properly preserved for appeal. The Court believes that Applicant has met his burden and has made a showing of ineffective assistance of counsel and actual prejudice under the basic test set forth in Strickland.

B. STRUCTURAL ERROR

The United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967) first developed the "harmless constitutional error rule". Chapman reasoned that there are times when certain fundamental errors occur at trial which in turn assault the sanctity of a defendant's basic constitutional rights, and that these errors are inapplicable to the harmless error analysis and should be defined a constitutional, or structural, error. In Chapman, the Court reversed and remanded the state court convictions of two defendants based upon the prosecution's inappropriate references to the defendants' failures to testify. Id.

[D]espite the strong interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are "so basic to a fair trial that their infraction can never be treated as harmless error." State v. Rivera, 402 S.C. 225 at 247, 741 S.E.2d 694 (S.C., 2013). (quoting Chapman, 386 U.S. at 23, 87 S.Ct. 824). "These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards" and which "affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991) (citing Chapman v. California, 386 U.S. 18, 23 (1967)). "Without these basic protections, a criminal trial cannot

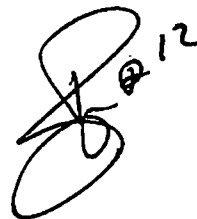


reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Id. at 310 (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986)). Essentially, an error is structural if it is "the type of error which transcends the criminal process." Rivera, 402 S.C. at 311 (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). "Some structural errors, like the complete absence of counsel or the denial of a public trial, are visible at first glance." Neder v. United States, 527 U.S. 1, 37, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). (Scalia, J., concurring in part and dissenting in part).

Applicant argues that Trial Counsel's failure to elicit the proper evidence at trial to support his motion to quash constitutes ineffective assistance of counsel under Strickland and this Court agrees. The Fulminante and Chapman inquiries, as discussed by our State Supreme Court in Rivera provide the framework for identifying the structural error that occurred in Applicant's trial. In Applicant's case, someone presented testimony to the grand jury in June 2009 and in October 2012 in order to indict Applicant. The identity of that person or persons has now been proven to be unknown. Haden testified that he did not testify before the grand jury in October 2009 or in June 2012. In fact, Haden testified that he never testified before the grand jury as an employee of the GCSO.

SC Code Ann. § 14-7-1550 requires the indictment to list the name of the person who testifies before the grand jury.

The Fifth Amendment to the United States Constitution states in part that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury..."

A handwritten signature, possibly "J. B. 12", is written in the bottom right corner of the page.

Article I, Section 11 of The South Carolina Constitution states, “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.” *See also* SC Code Ann. § 17-19-10.

Both the June 2009 and October 2012 indictments list Christopher Haden as the witness who testified before the grand jury. That information is patently false. The secretive nature surrounding grand jury procedures in our State, coupled with the false information in the indictments, make it highly unlikely that Applicant could have received effective assistance of counsel. Therefore, this Court agrees that under the structural error discussion laid out in Rivera, and more fully in cases such as Fulminante and Chapman, a structural error occurred during the indictment phase of Applicant’s trial and therefore prejudice must be presumed. In addition, Trial Counsel’s failure to elicit the appropriate evidence, which was available at the time, and at such a critical stage of Applicant’s trial, constitutes a constructive denial of counsel which in turn failed to preserve this structural error for appellate review.

The State argues that there was overwhelming evidence of Applicant’s guilt and that the error on the face of the indictment is a scrivener’s error. This Court disagrees.

The State attempts to portray this issue as merely a “scrivener’s error” that did not prejudice Mr. Carrier. (PCR Transcript, p.56, l.4-15, February 26, 2019). First, this argument ignores the 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 presentments in the circuit:

Q: The allegation here is that the witness listed on that—on the front of the indictment – was not the witness who presented the case to the grand jury. Is that the typical practice for the witness listed on the front of the indictment to not present it to the grand jury?

A: It's frequently the case that the witness on the indictment is not the witness for the grand jury.

(PCR Transcript, p.46, l.19 – p.47, l.1, February 26, 2-19, emphasis added).

Second, this argument ignores the fundamental constitutional right affected by this deficient grand jury process. When 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.” State v. Faile, 43 S.C. 52 (S.Ct.1895). “We are inclined to think also that 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 provisions of Section 5 of Article 1 of the Constitution, where the people of this State have made ‘Declaration of Rights.’” State v. Rector, 158 S.C. 212, 230 (S.Ct. 1930).

The South Carolina Supreme Court has noted that the right to a legal grand jury is one of the “protections which are thrown around the prisoner by law, must be held inviolate,” noting that “well founded objections impugning these essential safeguards, are entitled to, and must receive just consideration, when presented at the proper time.” Rector at 232, citing State v. Blackledge, 7 Rich. 327 (1854). In Rector, the South Carolina Supreme Court relied on Crowley v. United States, 194 U.S. 461 (1904), which held “It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment. It is his right, in the first place, to have the accusation passed upon before he can be called upon to answer the charge of crime, by a grand jury composed of good and lawful men.” Rector at 236, citing Crowley at 473.

The statutory requirement that the name of the actual witness who gives sworn testimony to a grand jury shall be listed on the indictment is not insignificant. The indictment subjects a defendant to the criminal process, making him subject to arrest, bond, trial by jury and in some cases, conviction of a crime and sentencing.

Case law imposes a high burden on defendants challenging their grand jury process. "Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary." State v. Griffin, 277 S.C. 193, 285 S.E.2d 193 (1981) (in absence of evidence grand jurors were not sworn, the Court held a presumption exists that grand jurors were sworn and, thus, upheld the indictment). 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 (1991).

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.

The error in both of the indictments coupled with the clear evidence that the witness did not testify before the grand jury on either occasion constitutes a fundamental and structural error under the clear directives set forth in Rivera, Fulminante and Chapman. The errors denied Applicant a fundamental right protected under both the United States Constitution and the Constitution of the State of South Carolina. The errors resulted in two indictments, which on their face, violate South Carolina law.



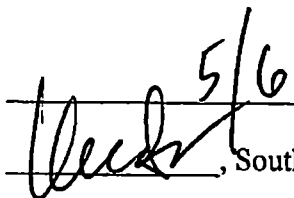
Conclusively, even the existence of overwhelming evidence against Applicant cannot subvert the fundamental nature of such an error that cuts straight to the pillars of our democracy, and the requirements of the law. The clear error in the indictments which accused Applicant of a serious crime, which subjected him to arrest and trial, demonstrate that Applicant's trial lacked a crucial and distinctive *constitutionally required* step.

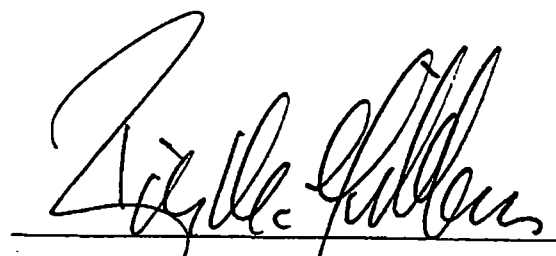
In consequence, Applicant experienced both a denial of effective assistance of counsel under the Sixth Amendment. Thus, prejudice is presumed in Applicant's case based upon a showing that the clear error and denial of such a fundamental right create a trial process that is presumptively unreliable.

CONCLUSION

For the foregoing reasons, Applicant's application for Post-Conviction Relief is hereby GRANTED and remanded for a new trial.

AND IT IS SO ORDERED.

 5/6, 2019
_____, South Carolina



The Honorable Brian M. Gibbons

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-24-1526

JAMES CARRIER #351607,

STATE OF SOUTH CAROLINA,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: LAURA M. SAUNDERS, ATTORNEY FOR PLAINTIFF

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

SCRPC Form 4C (02/2017)

Page 1 of 4

597

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

LAURA M. SAUNDERS

Po Box 731

Laurens, SC 29360

ATTORNEY(S) FOR THE PLAINTIFF(S)

JANELL GREGORY

PO Box 11549

Columbia , SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: LINDA MOFFITT

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[illegible]

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

James Carrier, #351607,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

2014-CP-24-1526

MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(e)

This matter comes before the Court by way of an application for post-conviction relief filed December 12, 2014 and amended October 18, 2018. Respondent made its Return and Motion to Dismiss on April 6, 2015. An evidentiary hearing was held on February 26, 2019, at the Greenwood County Courthouse. Applicant was present at the hearing and represented by Laura M. Saunders, Esquire. Respondent was represented by Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office. This Court issued an order granting post-conviction relief filed on May 8, 2019, and served on Respondent electronically May 11, 2019. Respondent now respectfully moves for the Court to reconsider its order granting PCR pursuant to Rule 59(e), SCRPC, based on the following:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. During the June 2012 term, the Greenwood County Grand Jury indicted Applicant for lewd act (2012-GS-24-1166). Eighth Circuit Public Defender E. Charles Grose (Counsel) represented Applicant. Assistant Solicitors Elizabeth P. White Taylor and Andrew Hodges of the Eighth Circuit Solicitor's Office prosecuted the case. On June 18, 2012, Applicant proceeded to trial before the Honorable D. Garrison Hill,

circuit court judge. On June 19, 2012, the jury found Applicant guilty as indicted. Judge Hill sentenced Applicant to imprisonment for fifteen years.

A Notice of Appeal was filed on Applicant's behalf and an appeal perfected by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense. The South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Carrier, Memo. Op. No. 2014-MO-043 (filed October 22, 2014). The Remittitur was issued on November 7, 2014.

Applicant filed his timely application for post-conviction relief on December 12, 2014, alleging that he was being held unconstitutionally based on the following allegations:

1. "No evidence"
2. "No profe(sic)"
3. "No wittiness(sic)"

Respondent filed its return and motion to dismiss for failing to state a cognizable post-conviction relief claim. On October 18, 2018, Applicant, through counsel, filed an amended application alleging:

1. Trial counsel was ineffective for failing to call a witness or witnesses who would establish that indictment number 2012-GS-24-1166 was defective on its face because the witness listed on the indictment was not present for presentment to the grand jury.

A post-conviction relief hearing was convened on February 26, 2019, at the Greenwood County Courthouse where applicant proceeded on the allegation in his amended application. On May 6, 2019, this Court signed Applicant's proposed order granting post-conviction relief finding Counsel was ineffective for failing to prove his assertion that the witness listed on the indictment was not present during the grand jury proceeding, which prejudiced Applicant; further, this Court found the error with Applicant's indictment was a structural error. This order was filed by the Greenwood Clerk of Court on May 8, 2019. Respondent received a copy of the order by electronic

mail on May 11, 2019, and on May 13, 2019, by U.S. Mail. This motion to reconsider, alter, and amend follows.

II. Argument in Support of Reconsideration

In granting relief, this Court found Counsel was deficient for failing to present evidence to the trial court that the witness listed on Applicant's indictment was not the witness who testified during the grand jury proceeding, which prejudiced Applicant as he proceeded to trial on that indictment. This Court further found Applicant met his burden set forth in Strickland because Counsel's failure to present evidence to support his motion to quash Applicant's indictments failed to preserve that issue for appeal, which prejudiced Applicant. Finally, this Court found the error with Applicant's indictment is a structural error. Respondent respectfully moves this Court to alter or amend the final order granting post-conviction relief based on the following reasons:

Failure to meet the burden to prove prejudice as set forth in Strickland¹

Respondent submits the Court erred in finding Applicant met the prejudice prong of his burden as set forth in Strickland as he failed to show the State would not have been able to obtain another indictment against him, thereby preventing him from proceeding to trial for lewd act.

An indictment is valid under South Carolina law if it "contains the necessary elements of the offense intended to be charged and sufficiently apprised the defendant of what he must be prepared to meet." State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted). Here, Counsel testified Applicant's indictments appeared to be facially valid. (PCR Tr. 43.) Applicant was provided sufficient notice of the crime for which he was being charged.

"South Carolina courts have held the sufficiency of an indictment must be viewed with a practical eye. All the surrounding circumstances must be weighed before an accurate

¹ Strickland v. Washington, 466 U.S. 668 (1984).

determination of whether a defendant was or was not prejudiced can be reached.” State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted). Here, it is undisputed that Applicant’s indictments were presented to the Greenwood County Grand Jury and, although the name of the witness listed on the indictment was not the witness who testified before the grand jury, Applicant has failed to show the testifying witness was an improper witness. As Haden testified during the PCR hearing, his cases would have been reassigned upon his departure and Applicant’s case would have continued to be investigated by the sheriff’s office. (PCR Tr. 24.) Applicant has failed to show that the witness that did testify was not a proper witness with knowledge of his case.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, courts measure an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, any 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.” Id. at 117-18, 300 S.C. 115. The South Carolina Supreme Court held, “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” Strickland, 466 U.S. at 697.

Here, Applicant has failed to meet his burden to prove prejudice under the Strickland analysis as he failed to show that the State would not have been able to obtain a valid indictment against him for the charged offense. At the PCR hearing, former Assistant Solicitor Taylor (Taylor) testified, had Counsel been successful in quashing either of Applicant’s indictments, she would have obtained another indictment on Applicant and proceeded to trial. (PCR Tr. 48.)

Former Sheriff Deputy Christopher Haden (Haden)² who was the lead investigator in Applicant's case and the witness named on both of Applicant's indictments also testified at the PCR hearing. During the PCR hearing, Haden testified that Applicant most likely would have been re-indicted had Counsel been successful in quashing either of Applicant's indictments. (PCR Tr. 25.) Haden testified upon his departure from the sheriff's office his active cases would have been reassigned to another investigator. (PCR Tr. 24.)

Although Haden's testimony shows an irregularity in Applicant's indictment, Applicant has failed to show how that irregularity impacted the grand jury's decision to issue the indictment in Applicant's case. Applicant has also failed to establish that the presentation of the evidence against Applicant during the grand jury process was not fairly or properly presented. See Commonwealth v. Silva, 455 Mass. 503, 512, 918 N.E2d 65, 77 (2009) ("The Commonwealth's presentation was sloppy in parts, but that sloppiness does not appear to have been designed to secure indictments, and the presentation to the grand jury appears to have been generally fair and balanced. In addition, the subjects of the defendant's claim of impairment probably had no impact or would have had no impact, on the decision to indict.")

In State v. Smith, 200 S.C. 188, 20 S.E.2d 726 (1942), the South Carolina Supreme Court addressed whether a jury panel should be quashed based upon Smith's contention that the venire being illegally drawn. In their holding the Court stated, "The defendant has not shown, or attempted to show, that he was prejudiced. . . . The drawing apparently was a public one, held at the proper time and place, and regularly conducted by the proper officers. Any irregularity has not affected the right of the defendant to a trial by a fair and impartial jury, nor prejudiced him in

² Former Deputy Christopher Haden is the witness listed on the indictment. Haden was the lead investigator in Applicant's case prior to leaving the sheriff's office. At the PCR hearing, Haden testified he did not present Applicant's case to the grand jury for either indictment obtained by the State against Applicant. (PCR Tr. 23-24.)

any way.” Id. at 196-197, 20 S.E.2d 730. In Applicant’s case, the indictment provided Applicant with sufficient notice of his lewd act charge, was true billed, and signed by the jury foreman. Applicant proceeded to a jury trial, which he has not alleged was unfair, on the same information that would have been presented to any subsequent grand jury had Counsel been successful in quashing either of his previous indictments. Applicant has not shown how the irregularity would have impacted the grand jury’s decision, or the State’s ability to obtain a future indictment as he has not established that improper information was presented or that a knowledgeable witness did not testify before the grand jury.

Additionally, Applicant failed to show any actual abuse of the grand jury proceeding, which would have resulted in either of his indictments being quashed. “When a defendant timely moves to quash an indictment . . . , the [trial] court must determine whether the defendant[’]s constitutional right to have the criminal allegations against him weighed by a properly constituted grand jury has been violated.” State v. Shands, 424 S.C. 106, 119, 817 S.E.2d 524, 531 (2018) (quoting Evans v. State, 363 S.C. 495, 510, 611 S.E.2d 510, 518 (2005)). “Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary.” Shands, 424 S.C. at 120-121, 817 S.E.2d at 532 (quoting State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991)). “Speculation about ‘potential’ abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment.” Id. at 502, 409 S.E.2d at 424.

Here, it is uncontested that Applicant’s indictments were presented to the grand jury, true billed, and signed by the foreman. Applicant has only been able to establish the witness named on the indictment was not the witness who presented before the grand jury; Applicant 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. Based on Haden's testimony, he was not the only person who would have been able to properly present this case before a grand jury and, although Applicant speculates that his indictment was obtained through the abuse of the grand jury process, he has failed to show that an improper witness presented his case to the grand jury.

It would appear from this Court's order that Applicant was also deemed to have met the prejudice requirement as set forth in Strickland because Counsel failed to preserve this issue for appeal. Although failure to preserve an issue for appeal is a proper post-conviction relief allegation, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 (“Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam’s PCR claim.”) (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal. “To warrant reversal, an appellant must show both error and resulting prejudice.” State v. Crocker, 366 S.C. 394, 408, 621 S.E.2d 890, 897 (2005).

Here, Applicant's claim that his indictments were not valid would not have been successful on appeal. The indictments provided notice of his charge, were true billed, and signed by the foreman of the grand jury. Applicant's contention that the wrong witness was listed on his indictment invalidates the otherwise valid indictment is not meritorious because Applicant has

failed to establish actual abuse; and the grand jury proceedings are presumed to be regular absent that showing.

Applicant has failed to show how he was prejudiced by Counsel's failure to quash his indictments or that his claim would have a reasonable probability to be successful on appeal. Therefore, Applicant has failed to meet his burden as set forth in Strickland.

Error in Indictment does not qualify as a Structural Error

This Court found the error in Applicant's indictment to be a structural error and found prejudice is presumed on Applicant's allegation. Respondent submits the Court erred in finding the error in Applicant's indictment is a structural error.

The United States Supreme Court has distinguished between trial errors and structural defects in the trial mechanism itself. State v. Jenkins, 412 S.C. 643, 773 S.E.2d 906 (2015). "Structural defects 'affect the entire conduct of the trial from beginning to end[.]'" Id. at 650-651, 773 S.E.2d at 909, (quoting Arizona v. Fulminante, 499 U.S. 279 (1991)). The United States Supreme Court has, "characterized . . . 'structural' [error] to 'a very limited class of errors' that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole." United States v. Davila, 569 U.S. 597, 611, (2013) (quoting United States v. Marcus, 560 U.S. 258, (2010)). The Court goes on to hold, "errors of this kind include denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt." Id. at 611. In United States v. Cotton, 535 U.S. 625 (2002), the United States Supreme Court found an error in an indictment did not fall within the "limited class" of structural errors. Cotton, 535 at 633. The Court held, ". . . even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity or public reputation of judicial proceedings." Id. at 632-633.

This Court's order states, "The Fifth Amendment to the United States Constitution states in part that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...'" (PCR Order 12.) However, the Fifth Amendment Indictment Clause does not apply to state criminal trials. Hurtado v. California, 110 U.S. 516, 538 (1884) (Fifth Amendment grand jury requirement is not binding on the states); Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

This Court's order also cites to Article I, Section 11 of the South Carolina Constitution as evidence that the error in Applicant's indictment was structural. As quoted in the order, the highlighted section of the South Carolina Constitution states, "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."

Here, as the order concedes, Applicant's indictments were presented to the Greenwood County Grand Jury. As Counsel testified during the PCR hearing, Applicant's indictments appeared to be facially valid; they were true billed and signed by the foreman, which would show the regularity of the grand jury process at the time Applicant's indictments were issued. (PCR Tr. 43.) "In the absence of evidence to the contrary, regularity of the proceedings of a court of general jurisdiction will be assumed." Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Although the incorrect witness was listed on the indictment, the indictment was issued with all of the indications of a regular proceeding. Applicant has not shown that the witness who did testify before the grand jury was improper, or that the State would be in some way precluded from obtaining another indictment against him for Lewd Act. Applicant has only established a technical error on the indictment as he has failed to show that no witness or an improper witness testified, or that he was not properly indicted by the grand jury. "Structural defects 'affect the entire conduct

of the trial from beginning to end'. . . Differentiating between structural and trial errors serves to 'enforce procedural safeguards while ensuring that inconsequential, technical errors do not result in a new trial.'" State v. Jenkins, 412 S.C. 643, 650-51, 773 S.E.2d 906, 909 (2015) (quoting State v. Chavis, 412 S.C. 101, 115, 771 S.E.2d 336, 343 (2015)).

Additionally, the indictment in Applicant's case could have been amended prior to trial had the name of the testifying witness been known. "An indictment may be amended provided such amendment does not change the nature of the offense charged." State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted). The limited class of structural errors set forth by the United States Supreme Court would not be able to be corrected by a simple amendment; the nature of those errors can only be addressed by initiating a new proceeding. Here, Applicant's proceeding would have been exactly the same except for the witness named on the indictment. The information contained in the indictment, counsel for Applicant, the evidence presented against Applicant, and the jury instructions in Applicant's case would have all remained the same. As the holding in Cotton established, an error in the indictment is not the kind of pervasive error the United State Supreme Court has identified in the narrowly tailored class of structural errors.

III. Conclusion

Applicant has failed to meet his burden to show how he was prejudiced by Counsel's representation. Based on testimony from Taylor and Haden at the PCR hearing, had Counsel successfully quashed either of Applicant's indictments, new indictments could have and would have been obtained. Applicant was found guilty beyond a reasonable doubt at trial, it is clear there was enough evidence to procure a third indictment against Applicant. Applicant has failed to establish any resulting prejudice from Counsel's deficiency because he has failed to show the State could not have obtained another indictment against him and proceed to trial.

Further, the error in Applicant's indictment is not a structural error. The error here, which could have been amended at the outset of trial had the testifying witness been known, is not identified by the United States Supreme Court as being a structural error, nor is it of the same class of errors enumerated by the United States Supreme Court. Accordingly, this Court should deny post-conviction relief.

For the reasons explained above, Respondent submits post-conviction relief was improperly granted and respectfully requests this Court to alter its judgment and deny Applicant's application for post-conviction relief.

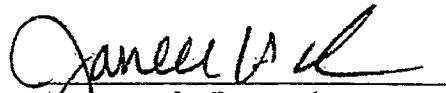
Respectfully submitted,

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May 17, 2019

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS

2014-CP-24-1526

JAMES CARRIER, #351607,

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

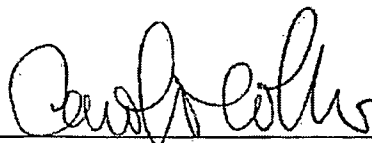
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Alter or Amend Pursuant to Rule 59(e)** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Laura M. Saunders, Esquire
The Law Offices of Laura M. Saunders, LLC
Post Office Box 731
Laurens, South Carolina 29360**

DATED this the 17th day of May, 2019.



Caroline Collins, Administrative Coordinator
For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

James Carrier,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

EIGHTH JUDICIAL CIRCUIT

Civil Action No.: 2014-CP-24-1526

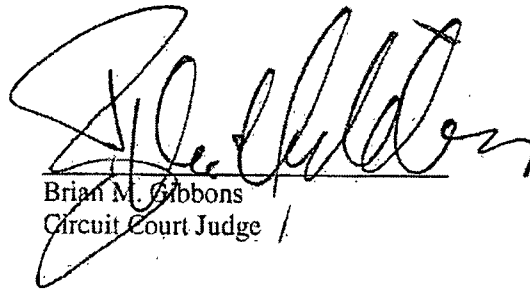
ORDER DENYING RESPONDENT'S
MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(e)

After having considered Respondent's Motion to Alter or Amend pursuant to Rule 59(e) in this case and after reviewing all of the submissions, applicable statutory law, case law and evidence presented, I respectfully deny Respondent's motion.

AND IT IS SO ORDERED.

Chester, SC

May 28, 2019


Brian M. Gibbons
Circuit Court Judge

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DEC 04 2019
S.C. SUPREME COURT