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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Walton J. McLeod, IV, Circuit Court Judge

ORLANDO COLEMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001887

JOHNSON PETITION FOR WRIT OF CERTIORARI

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The post-conviction relief (PCR) court erred by finding trial counsel were not ineffective when counsel failed to object to the trial court *sua sponte* amending the indictments since the amendments changed the nature of the offense charged and constituted an impermissible comment on the facts, and where Petitioner was prejudiced by counsels' deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly objected to the amendments. 6

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ISSUE PRESENTED

Did the post-conviction relief (PCR) court err by finding trial counsel were not ineffective when counsel failed to object to the trial court *sua sponte* amending the indictments since the amendments changed the nature of the offense charged and constituted an impermissible comment on the facts, and where Petitioner was prejudiced by counsels' deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly objected to the amendments?

STATEMENT OF THE CASE

The state alleged that Petitioner sexually assaulted Minor on two occasions at the Pace's River Apartments in Rock Hill between May 13, 2011 and June 15, 2012 when Petitioner was between the age of sixteen and seventeen years old. At the time, Minor, who was between the age of six and seven years old, lived in an apartment at the complex with her mother, her younger brother, and her older brother. Petitioner also lived at Pace's River with his mother between May 2011 and November 2011.

Minor's older brother, B.P., was friends with Petitioner. Minor would play outside at the apartment complex with B.P., their three cousins (who for several months lived with Minor's family), Petitioner, and other children. Minor remembered one occasion when the children were in the breezeway of one of the apartment buildings. Minor alleged that her brother and cousins left for a period of time and she was alone with Petitioner's on the stairs. She claimed Petitioner told her to sit on his lap and when she did, he reached his hand into her pants and digitally penetrated her vagina. According to Minor, Petitioner stopped when her brother and cousins returned.

Months later, after Petitioner had moved away from Pace's River, Minor claimed Petitioner returned to the apartment complex and was playing outside with Petitioner's brother near the tennis courts. She claimed Petitioner again told Minor to sit on his lap and when she did so, he reached his hand into her pants and digitally penetrated her.

Minor eventually told her mother about the alleged assaults in September 2013 after Minor's family moved to a different apartment complex where Petitioner was also then living. App. 294, l. 8 – 311, l. 16.

A York County grand jury indicted Petitioner on February 26, 2015 for two counts of first degree criminal sexual conduct with a minor. App. 694-697. Petitioner's case was called to trial on January 12, 2015 before the Honorable J. Mark Hayes. App. 1. The trial was continued after pretrial matters were heard due to the prosecutor's sudden illness. Petitioner's case was called to trial again on March 16, 2015 before the Honorable Roger Couch, and a jury. App. 112. Assistant Solicitors Sharon O'Hayon and Erin Joyner represented the state. Ashley Anderson and Melissa Inzerillo represented Petitioner. App. 112.

Petitioner moved pretrial to quash the indictments arguing they were vague and overbroad in large part because they alleged a thirteen month period. During arguments on the motion, the assistant solicitor emphasized the lengths the state took to narrow down the timeframe as much as possible. Petitioner's trial counsel further complained the two indictments for first degree criminal sexual conduct were identical and it was impossible to determine which indictment corresponded to which alleged incident. App. 124, l. 18 – 128, l. 23. After finding the indictments were sufficient, the trial court *sua sponte* decided to amend the indictments to differentiate the two. He asserted:

> I am concerned with the fact that the two indictments, while the attorneys may be aware od what they refer to, basically are the same indictment. So therefore, I am going to amend the indictments only slightly so that the first in number . . . I'm just going to put in parenthesis under where it says criminal sexual conduct with a minor in the first degree, I'm going to refer to that as the staircase incident, and then under that, the same caption in the second indictment I'm going to put in parenthesis tennis court incident so that there is a clear indication as to which - - given the indictments the way they read, if I presented these to a jury and they were required to write separate verdicts on each indictment, I find them to be confusing as they now exist, and I think there needs to be some identification even for the jury as to which incident we're referring to in each of the indictments. . . . I do find that that amendment would not change the allegations themselves or the elements that the defendant is required to meet or the dates, but it would provide some differentiation between the indictments for clarity sake, so I will make that amendment myself.

App. 149, l. 18 – 150, l. 14. Trial counsel did not object to the amendments.

On March 18, 2015, the jury found Petitioner guilty as indicted. App. 490, ll. 6-17. He was sentenced to the mandatory minimum of twenty-five years imprisonment. He was also ordered to register as a sex offender and be subject to lifetime GPS monitoring. App. 498, l. 20 – 499, l. 2.

After briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions. State v. Coleman, 2018-UP-090 (S.C. Ct. App. filed February 21, 2018). App. 587-590. On July 26, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 591-597. The state filed a return to this application on July 22, 2019. App. 598-611. With the assistance of counsel, Petitioner filed an amended application on September 7, 2022 raising the claim argued in this petition. App. 612-613. The state filed an amended return on October 12, 2022. App. 614-628. An evidentiary hearing was convened on December 7, 2022 before the Honorable Walton J. McLeod, IV. App. 629. Assistant Attorney General Zachary Jones represented the state. Jonathan Waller represented Petitioner. App. 629.

Melissa Inzerillo, Petitioner's trial counsel, testified during the hearing that she viewed the amendment to the indictments are "a clarification" and not as the court commenting on the facts or attempting to "sway" the jury one way or another. She did not have any concerns with the indictments containing the court's "notations" being sent back to the jury during deliberations. App. 655, ll. 2-22.

Ashley Stopinski, also Petitioner's trial counsel, likewise testified that she was not concerned about the trial court's amendment of the indictments. She did not see the handwritten notations "as being an issue." Stopinski viewed the amendments as "more of a clarification for the jury" since absent the notations there was nothing to "distinguish the two indictments." She

saw the amendments as necessary "to make sure the jury was putting their verdict down on what they intended to" given that the jury could have found Petitioner guilty of one indictment but not the other. App. 658, l. 8 – 659, l. 22.

By order filed November 21, 2023, the PCR court denied Petitioner relief. App. 677-693. The court found Petitioner did not prove counsel was deficient for failing to object to the amendments to the indictments. The court determined the "minor amendments merely made necessary clarifications and distinguished the otherwise identical indictments, and did not result in any surprise to [Petitioner] (who knew from the outset that [Minor] was alleging the abuse occurred at those two locations), and did not alter the nature or any elements of the charged offense." App. 687. The court further concluded Petitioner "provided no explanation as to how his defense was prejudiced by the amendments." App. 688.

This petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief (PCR) court erred by finding trial counsel were not ineffective when counsel failed to object to the trial court *sua sponte* amending the indictments since the amendments changed the nature of the offense charged and constituted an impermissible comment on the facts, and where Petitioner was prejudiced by counsels' deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly objected to the amendments.

After trial counsel moved to quash the indictments arguing they were vague and overbroad, the trial court *sua sponte* decided to amend the indictments by handwriting on each the location where the alleged sexual battery took place according to Minor. On the first indictment, the court handwrote "staircase incident" and on the second indictment, the court handwrote "tennis court incident." Next to the handwritten notation on each indictment, the court placed its initials "RLC." App. 694-697. Trial counsel were ineffective for failing to object to these amendments since the amendments changed the nature of the offense charged in each indictment by specifying a specific location and constituted an impermissible comment on the facts by the court. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had correctly objected to the improper amendments.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"Amendments to an indictment are permissible if: (1) they do not change the nature of the offense; (2) the charge is a lesser included offense of the crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty." State v. Means, 367 S.C. 374, 385-286, 626 S.E.2d 348, 355 (2006) (citing State v. Myers, 313 S.C. 391, 438 S.E.2d 236 (1993); S.C. Code Ann. § 17-19-100 (trial court "may amend the indictment ... if such amendment does not change the nature of the offense charged")).

The amendments in this case undoubtedly changed the nature of the offenses and trial counsel were ineffective in failing to object. Without pleading the location of the alleged sexual batteries in the indictments, it was unclear what alleged assaults Appellant was charged with. See Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003) (reversing conviction for possession with intent to distribute marijuana within proximity of a school because substituting a school for the church named in the original indictment was not a scrivener's error, but changed the nature of the offense charged), *overruled on other grounds*, Gentry, 363 S.C. 93, 610 S.E.2d 494; State v. Lynch, 344 S.C. 635, 641, 545 S.E.2d 511, 514 (2001) (reversing conviction where trial court,

with regard to first degree burglary indictment, allowed aggravating circumstance to be changed from entering during the darkness to causing physical injury; amendment changed the nature of the offense charged because proof required for each aggravating circumstance was materially different), *overruled on other grounds*, Gentry, 363 S.C. 93, 610 S.E.2d 494; Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) (granting post-conviction relief where prosecutor verbally amended indictment for second-degree burglary to state that the burglary occurred at nighttime; amendment changed the nature of the offense charged by changing the classification from nonviolent to violent), *overruled on other grounds*, Gentry, 363 S.C. 93, 610 S.E.2d 494; Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996) (affirming grant of post-conviction relief where defendant was indicted for trafficking in cocaine weighing more than 100 grams and less than 200 grams, and defense counsel consented to an amendment of the indictment to an amount more than 200 grams, which changed the nature of the offense charged by increasing the penalty); Hopkins v. State, 317 S.C. 7, 10, 451 S.E.2d 389 (1994) (granting post-conviction relief and new trial where original indictment for felony DUI causing great bodily injury was amended to indictment for felony DUI causing death; amendment, which increased potential penalty from ten to twenty-five years, changed the nature of the offense charged), *overruled on other grounds*, Gentry, 363 S.C. 93, 610 S.E.2d 494.

"Amendments usually are permitted for purposes of correcting an error of form, such as a scrivener's or clerical error. Thus, a motion to amend an indictment should be granted when the proposed amendment does not change the nature of the offense or affect the sufficiency of the indictment." Means, 367 S.C. at 387, 626 S.E.2d at 356 (internal citation marks omitted). Certainly, amending an indictment to add the location of the alleged sexual battery, as was done in this case, is not merely correcting a scrivener's or clerical error. The amendments to

Petitioner's indictments clearly changed the nature of the offenses charged. Consequently, trial counsel were deficient by failing to object.

Moreover, the amendments deprived Petitioner of his statutory and constitutional rights to presentment, *i.e.*, to have a "grand jury consider his case and decide whether to issue a sufficient indictment." Means, 367 S.C. at 383, 626 S.E.2d at 353; See S.C. Code Ann. § 17-19-10; S.C. Const. Art. I, § 11 and Art. V, § 22. By amending the indictments to include "staircase incident" and "tennis court incident," the trial court denied Petitioner his constitutional and statutory rights to have the grand jury decide whether to issue sufficient indictments in compliance with § 17-19-30. Consequently, trial counsel were deficient by failing to object to the amendments on this ground.

Additionally, the trial court's handwritten notations on the indictments coupled with his initials constituted an impermissible comment on the facts and trial counsel should have objected to the amendments on this basis. "A trial judge must refrain from any comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of an accused, or any fact in controversy." Sosebee v. Leeke, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987) (citing State v. Smith, 288 S.C. 329, 342 S.E.2d 600 (1986) and State v. Kennedy,272 S.C. 231, 250 S.E.2d 338 (1978)). "It has long been recognized that even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in shaping the opinion of the jury." Id. (quoting State v. Pruitt, 187 S.C. 58, 61, 196 S.E. 371, 372 (1938)); see also State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980). The handwritten comment by the court on each indictment tended to indicate to the jury that the court believed Minor's allegations that

Petitioner committed a sexual battery against her at the “staircase’ and the “tennis courts.” Accordingly, trial counsel were deficient in failing to object.

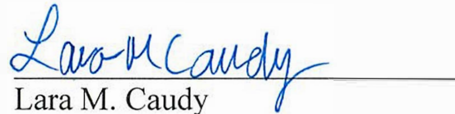
Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability the outcome of Petitioner’s trial would have been different if counsel had correctly objected to the improper amendments. There was no physical or forensic evidence against Petitioner nor any eyewitnesses. Accordingly, the credibility of Minor was crucial. The trial court’s handwritten amendments likely signaled to the jury that the court believed Minor was telling the truth given he labeled the indictments according to Minor’s allegations as to where the alleged sexual batteries occurred.

Respectfully, this Court should reverse the PCR court’s denial of relief and remand Petitioner’s case for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing. Petitioner ultimately requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of June, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Orlando M. Coleman states:

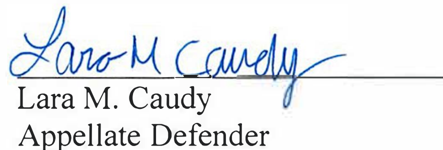
1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on December 7, 2022 before the Honorable Walton J. McLeod, IV, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Orlando M. Coleman.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of June, 2024.

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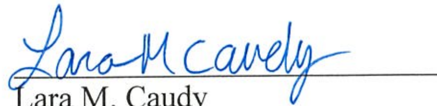
CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari 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."



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This 7th day of June, 2024.