

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Sumter County  
Brooks P. Goldsmith, Circuit Court Judge

\_\_\_\_\_  
Appellate Case No. 2016-002200  
\_\_\_\_\_

**RECEIVED**

MAR 06 2018

S.C. SUPREME COURT

DEXTER WALCOTT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

\_\_\_\_\_  
**AMENDED**  
**RETURN TO PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

ALAN WILSON  
Attorney General

JULIE A. COLEMAN  
Assistant Attorney General  
S.C. Bar No. 102214

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

ATTORNEY FOR RESPONDENT

**INDEX**

INDEX .....1

RESPONDENT’S ISSUES PRESENTED .....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW .....6

ARGUMENT

I. The PCR court did not abuse its discretion in denying Petitioner’s  
discovery motion for county grand jury impanelment documents. ....8

II. The PCR court fully addressed and correctly ruled on the merits of  
Petitioner’s allegations of ineffective assistance of counsel and  
prosecutorial misconduct. ....12

CONCLUSION.....15

## **RESPONDENT'S ISSUES PRESENTED**

- I.** Whether the PCR court abused its discretion in denying Petitioner's motion for discovery of county grand jury impanelment documents.
- II.** Whether the PCR court fully addressed and correctly ruled on the merits of Petitioner's allegations of ineffective assistance of counsel and prosecutorial misconduct.

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. His conviction arose from an incident where Petitioner and another individual kicked in the door of the victim's home after an argument about stolen property. Petitioner pointed a 9-millimeter pistol at the victim's head, and then lowered the gun and shot him in the leg. App. 73-74.

Petitioner was true bill indicted at the November 2013 term of the Sumter County Grand Jury for first degree burglary, possession of a weapon during a the commission of a violent crime, and first degree assault and battery (2013-GS-43-1017). Steven McKenzie, Esquire represented Petitioner. On June 12, 2014, Petitioner pled guilty to the lesser-included offense of second degree burglary (violent), first degree assault and battery, and possession of weapon during a violent crime before the Honorable R. Ferrell Cothran, Jr. Judge Cothran sentenced Petitioner without negotiations or recommendations to fourteen years' imprisonment for second degree burglary, ten years' imprisonment for first degree assault and battery, and five years' imprisonment for possession of a weapon during a violent crime with all sentences running concurrently. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed a timely application for post-conviction relief on February 18, 2015, and amended his application on November 9, 2015, and February 29, 2016. Petitioner alleged he was being held unconstitutionally based on the following allegations:

1. Ineffective Assistance of Counsel
  - a. Ineffective assistance of counsel for failing to object to indictment.
  - b. Counsel failed to obtain impaneling documents and supporting materials prior to trial.
2. Involuntary Guilty Plea
  - a. No factual basis for guilty plea rendering guilty plea involuntary.

3. Prosecutorial Misconduct
  - a. Indictment ineffective under Rule 3(c) etc...
  - b. Prosecution failed to comply with statutory law provisions Ann. 14-9-210.
  - c. Prosecutor knowingly and willingly caused false and misleading information to be printed and published in Applicant's indictment.
  - d. State unlawfully empaneled its grand jury outside the jurisdiction of the court of general sessions for illegal return of a true bill indictment.
  - e. Grand jury failed to be sworn.
  - f. State failed to comply with 17-25-10 as well as the Fifth Amendment.
4. Denial of Due Process
  - a. Violated rights etc...
5. Lack of Subject Matter Jurisdiction
  - a. Defective indictment
  - b. Indictment was not filed with clerk of court lacking personal jurisdiction to entertain the indictment.
6. Judicial Misconduct
  - a. Applicant further alleges judicial misconduct for allowing an illegal indictment.

An evidentiary hearing into the matter was convened on March 15, 2016, at the Sumter County Courthouse before the Honorable Brooks P. Goldsmith. Applicant was present at the hearing and was represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. At the evidentiary hearing, Petitioner testified on his own behalf. Respondent presented testimony from Steven McKenzie, Esquire (hereinafter "Plea Counsel"). The PCR court had before it a copy of the Sumter County Clerk of Court records, Petitioner's South Carolina Department of Correction records, the guilty plea transcript, the PCR application, and both amendments to the application. At the hearing, Petitioner moved to be provided with a copy of all documents pertaining to the empanelment of the grand jury which indicted him. Petitioner also moved for a continuance to allow time to obtain these documents. The PCR court denied both motions and

the matter continued forward for an evidentiary hearing. At the hearing, Petitioner testified on his own behalf. Respondent introduced testimony of Steven McKenzie, Esquire (Plea Counsel).

Following the hearing, Judge Goldsmith issued an Order of Dismissal signed on October 3, 2016, and filed on October 24, 2016, denying and dismissing the application with prejudice. Petitioner filed a timely Notice of Appeal of the denial of his post-conviction relief application on October 28, 2016. Petitioner's Appendix and Petition for Writ of Certiorari were filed on October 2, 2017. This Return to the Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCF; Butler, at 441, 334 S.E.2d at 814. Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance

must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

## ARGUMENT

### **I. The PCR court did not abuse its discretion in denying Petitioner's discovery motion for county grand jury impanelment documents.**

Petitioner argues the PCR court erred in denying Petitioner's motion for production of county grand jury impanelment documents, which he alleges were necessary to prove his post-conviction relief allegations. However, this issue is meritless, as the PCR court did not abuse its discretion in denying the motion.

The decision to admit affidavits, depositions, oral testimony, or other evidence at a PCR hearing is within the PCR court's discretion and will not be reversed absent an abuse of discretion resulting in prejudice to a party. McKnight v. State, 378 S.C. 33, 56, 661 S.E.2d 354, 365 (2008) (citing Simpson v. Moore, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006)). Additionally, the decision to grant applicants the opportunity to obtain evidence through a discovery order is within the PCR court's discretion and should not be reversed absent an abuse of discretion. See Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734 (1989) (holding a trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion).

Under South Carolina law discovery in non-capital post-conviction relief actions is only available if the court orders it upon a finding of good cause. S.C. Code Ann. § 17-27-150 provides:

A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

S.C. Code Ann. § 17-27-150(A) (1976). The statute clearly indicates leave to grant discovery in these instances is in the discretion of the PCR court. Accordingly, any assertion of error by the

PCR court in denying a discovery motion must be analyzed under an abuse of discretion standard. An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions, resulting in prejudice to a party. Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016); McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008).

In the present case, Petitioner alleges the PCR court abused its discretion in denying his motion for county grand jury impanelment documents because there was "no evidence that such documents do not exist and they were necessary to proving [his] PCR claims." PWC 9. At the evidentiary hearing, Petitioner asserted, as he asserts now, he was entitled to the documents under Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005). In Evans, this Court held an applicant challenging his state grand jury conviction on PCR may be allowed to obtain documents pertaining to the impanelment of the State Grand Jury in order to challenge the legality of his or her indictment. App. 40-41. The State brought to the PCR court's attention that Evans applies only to state grand jury cases, not county grand jury cases, and that county grand jury proceedings typically do not have any impanelment documents or records other than the resulting indictment. App. 41-46. After hearing argument from both parties, the court decided there was no good cause to grant discovery in this instance based on the State's argument that Evans only applies to state grand jury cases and that county grand juries do not have records to subpoena. App. 46.

Under section 17-27-150, it is the responsibility of the moving party to show good cause exists for leave to conduct discovery in PCR. Although Petitioner argues there was no proof that the grand jury documents do not exist, it was Petitioner's burden to prove that there was good cause to attempt to get these documents, and if he did subpoena these documents, he would have

a greater chance of succeeding on his allegations. The State was not required to prove the documents in question do not exist in order for the PCR court to deny the discovery motion.

The PCR court's ruling was proper because Petitioner failed to establish good cause for his discovery motion. In order to establish good cause, he must show some sort of evidence that the grand jury or the indictments in his case were improper. The regularity of proceedings in a court of general jurisdiction "will be assumed" absent evidence to the contrary. Pringle v. State, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986). The bar for this assertion is high; even a facial irregularity does not render an indictment invalid "where the indictment is in writing and published by the clerk." Anderson v. State, 338 S.C. 629, 632-33, 527 S.E.2d 398, 400 (Ct. App. 2000) (quoting State v. Bultron, 318 S.C. 323, 329, 457 S.E.2d 616, 619 (Ct.App.1995)). Here, the indictments against Petitioner were true-billed, signed by the foreman of the grand jury, facially proper, and published by the clerk of court. App. 105. Petitioner presented no evidence to indicate an error in his indictment that would give way to good cause for a discovery order to obtain grand jury impanelment documents.

The only argument Petitioner presented in support of his discovery motion was the allegation that the court calendar from the judicial website did not match the dates the foreman of the grand jury signed the indictment, so the grand jury could not have met. A printed copy of the judicial website calendar is not enough evidence to prove the grand jury never met, especially because the judicial calendar may not be an accurate representation of the way the grand jury properly operates within each individual county. This Court has held that the lack of a date written on an indictment does not invalidate the indictment or devoid the trial court of jurisdiction. Tate v. State, 345 S.C. 577, 581, 549 S.E.2d 601, 603 (2001) ("[W]e find there is no prejudice from counsel's conduct since the omissions in the indictments do not invalidate them.

In other words, the defect in the caption did not affect the trial court's subject matter jurisdiction over this case.")

Furthermore, the PCR court's reasoning that no county grand jury documents probably existed was a valid basis for his ruling. South Carolina law strongly supports the concept of secrecy in county grand jury proceedings. "The basic legal principles governing the operation of the grand jury in this State have become established over a period of many years. No principle has been followed more closely than that which protects the secrecy of the proceedings of the grand jury." Ex parte McLeod, 272 S.C. 373, 377, 252 S.E.2d 126, 128 (1979). "It has long been the policy of the law, in furtherance of justice, that the investigation and deliberations of a grand jury should be conducted in secret, and that for most intents and purposes all its proceedings are legally sealed against divulgence." Id. (citing State v. Rector, 158 S.C. 212, 155 S.E. 385, 390 (1930), overruled on other grounds by Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005)).

The longstanding history of secrecy in grand jury proceedings does not allow the use of court reporters to take a written record of county proceedings. Ex parte McLeod, 272 S.C. at 378, 252 S.E.2d at 128 ("[T]he presence or use of a court stenographer in proceedings before the grand jury is likewise not permissible."). The State Grand Jury began using court reporters to transcribe their proceedings with the implication of the legislative State Grand Jury Act. See S.C. Code Ann. § 14-7-1700. However, no such statutes exist for county grand juries, and traditionally no record of the proceeding is taken. There simply are no such records for an accused to obtain from a county grand jury. Accordingly, the PCR court's use of this argument as the basis for denial of the discovery motion is proper under South Carolina law.

The PCR court's ruling on Petitioner's discovery motion was properly based on the information and argument presented to him and on South Carolina case law. Accordingly, the

court did not abuse its discretion in denying the discovery motion, and its ruling should be affirmed.

**II. The PCR court fully addressed and correctly ruled on the merits of Petitioner's allegations of ineffective assistance of counsel and prosecutorial misconduct.**

Petitioner alleges the PCR court erred in ruling the issue of prosecutorial misconduct and the issue of whether Trial Counsel was ineffective for failing to obtain grand jury impanelment documents prior to trial were not proper for post-conviction relief. However, the Order of Dismissal fully addresses and rules on the merits of each of these allegations. Therefore, the PCR court's findings were not controlled by any errors of law and should be upheld.

Petitioner alleged in his action for post-conviction relief that Trial Counsel was ineffective for failing to obtain grand jury impanelment documents prior to trial. While the PCR court ruled in its Order of Dismissal that the issue was improper for post-conviction relief, it also addressed the merits of the issue and denied relief, finding in order to challenge the sufficiency of an indictment, an objection must be made before the jury is sworn in. S.C. Code Ann. §17-19-90 (2003); App. 98. Petitioner waived his right to challenge the indictments against him by pleading guilty to the crimes. Although Petitioner also frames the issue as one of ineffective assistance of counsel and prosecutorial misconduct, the PCR court correctly found there was no deficiency or prejudice under the Strickland test, and there was no prosecutorial misconduct based on the fact that the indictments properly put Petitioner on notice of the charges against him. App. 97. "An indictment is merely a notice document." State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005)). Petitioner was clearly on notice of the charges against him, and he proceeded to trial, sat through a portion of his trial, and then chose to plead guilty to the charges.

Furthermore, the PCR court correctly held there was no prejudice from any failure to challenge the sufficiency of the indictments even if Petitioner had proven there was a deficiency. The court explained: “Even if Plea Counsel had moved to quash the indictment and been successful, jeopardy does not attach until a jury is sworn or the plea judge accepts the guilty plea. Crist v. Bretz, 437 U.S. 28, 37 (1978); United States v. Hecht, 638 F.2d 651, 657 (3d Cir. 1981). Under this well-settled principle, the State would have been readily able to re-indict Applicant on the same charge.” App. 97. Based on these principals, even if Petitioner’s discovery motion had been granted, it is very unlikely he would have succeeded on his claims.

Although the PCR court addressed the issue as a direct attack on the sufficiency of the indictment under this specific subheading, the entire issue is addressed on the merits of ineffective assistance of trial counsel in the subheading immediately preceding this ruling, “Ineffective assistance of counsel for failing to object to indictment.” App. 95-97. The court held Trial Counsel “made no errors in advising [Petitioner] on the sufficiency of the indictment and [Petitioner] produced no evidence to support his allegations that the indictment is defective.” The court explained in detail why Trial Counsel was not deficient for failing to challenge the sufficiency of the indictments and why Petitioner could show no prejudice from counsel’s failure to do so. App. 98.

It must necessarily follow from this ruling that Trial Counsel could not be ineffective for failing to obtain documents to challenge the sufficiency of the indictment. Petitioner asserts the documents should have been obtained in order to raise an objection to the indictments, but the PCR court clearly ruled that Trial Counsel was not deficient for failing to object to the indictments and there was no resulting prejudice. App. 997. Therefore, the failure to obtain the documents he allegedly could have used to challenge the indictments cannot be deficient or

prejudicial, either. The PCR court clearly addressed and ruled upon the merits of this issue, and its findings should be upheld.

Secondly, Petitioner claims the PCR court erred in finding he was procedurally barred from raising an allegation of prosecutorial misconduct in his PCR action. Petitioner's assertion that prosecutorial misconduct is a proper issue for post-conviction relief is correct. However, the PCR court's ruling in the order of dismissal does not constitute reversible error, as the court fully addressed the merits of the allegation and considered the evidence presented at the evidentiary hearing in denying the allegation on the merits. After erroneously explaining prosecutorial misconduct was an improper claim for PCR, the PCR court ruled:

Regardless, it is [Petitioner's] burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). [Petitioner] has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed. [Petitioner] has presented no evidence to prove that any of the prosecutors involved in this case acted improperly in any manner or that they acted on this case with improper indictments. The records before this Court indicate that the indictments were properly true billed, the grand jury did meet and was sworn, and none of the information in the indictments was incorrect or improper. Therefore, these allegations of prosecutorial misconduct are meritless and should be dismissed.

App. 100.

The ruling was supported by the record before the court, including the transcript, the indictments, and the testimony from the evidentiary hearing. Therefore, because the PCR court did rule on the merits of the allegation and the ruling is supported by probative evidence, any possible error of law is harmless and this Court should affirm the PCR court's rulings.

**CONCLUSION**

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

Respectfully submitted,

ALAN WILSON  
Attorney General

JULIE A. COLEMAN  
Assistant Attorney General  
S.C. Bar No. 102214

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

March 6, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Sumter County  
Brooks P. Goldsmith, Circuit Court Judge

---

Appellate Case No. 2016-002200

---

DEXTER WALCOTT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

---


**CERTIFICATE OF SERVICE**

---

The undersigned hereby certifies that a true copy of the Amended Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Laura R. Baer, Esquire**  
**SC Commission on Indigent Defense**  
**Post Office Box 11589**  
**Columbia, South Carolina 29211-1589**

This 6<sup>th</sup> day of March, 2018.

  
CHANDRA E. SQUIREWELL  
Legal Assistant for Respondent



RECEIVED

MAR 06 2018

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

March 6, 2018

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

**Re: Dexter Walcott v. State of South Carolina**  
**Appellate Case No. 2016-002200**  
**Lower Court Case No. 2015-CP-43-434**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Amended Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Julie A. Coleman  
Assistant Attorney General  
SC Bar No. 102214

JAC/ces  
Enclosures

cc: Laura R. Baer, Esquire (2 copies)