STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

ANTHONY JEROME HEYWARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000733

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find plea counsel ineffective for failing to move to quash the indictment because it was true billed by the grand jury on May 10, 2010, but not filed with the clerk of court until June 2, 2010, and omitted the name of the witness who testified before the grand jury?

STATEMENT

In May of 2010, the Charleston County Grand Jury indicted Petitioner, Anthony Jerome Heyward, for trafficking cocaine in excess of 28 grams, and possession with intent to distribute within the proximity of a park, indictments #2010-GS-10-3194, 3195. On May 16, 2011, Petitioner appeared before the Honorable Deadra L. Jefferson and pled guilty to trafficking cocaine 10-28 grams, second offense. Marybeth Mullaney represented Petitioner at the guilty plea. Stephanie Linder prosecuted the case. Pursuant to negotiations between Petitioner and the State, Judge Jefferson sentenced Petitioner to twelve (12) years and the State dismissed the proximity charge. Petitioner did not appeal the conviction or sentence.

On April 18, 2012, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on November 7, 2017.[1] On February 2, 2018, an evidentiary hearing was held before the Honorable Maite D. Murphy. Christopher L. Murphy represented Petitioner at the PCR hearing. Rasheeda Cleveland represented the State. In a written order signed on March 29, 2018, Judge Murphy denied relief and dismissed the application. A timely notice of intent to appeal was served on April 19, 2018. This petition for writ of certiorari follows.

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[1] Footnote #1 in the Order of Dismissal indicates that the State did not receive a copy of the application until October 5, 2017. Footnote #2 in the Order of Dismissal indicates that the transcript from the guilty plea was no longer available due to the lapse in time.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for failing to move to quash the indictment because it was true billed by the grand jury on May 10, 2010, but not filed with the clerk of court until June 2, 2010, and omitted the name of the witness who testified before the grand jury.

Petitioner alleged that counsel was ineffective for failing to move to dismiss the indictment. (App. p. 21, line 16). During the PCR hearing Petitioner testified, "My indictment was defective on the face of the indictment because the charge wasn't filed with the clerk of court and assigned a permanent case number before presenting it to the Grand Jury." (App. p. 26, lines 10-13). The indictment was true billed by the Charleston County Grand Jury on May 10, 2010, but not filed with the clerk of court until June 2, 2010. (App. p. 2). The indictment also does not list the specific witness who testified before the grand jury but instead lists the Charleston City Police Department as the witness. (App. p. 2).

Plea counsel testified at the PCR hearing. When asked if she saw any basis for challenging the indictments she answered, "I did not, no." (App. p. 33, lines 22-24). In the order of dismissal the PCR judge wrote:

> Counsel also testified that she saw no basis for challenging the indictments and felt it was in Applicant [sic] best interest to take the plea deal. This Court finds that where an indictment is phrased substantially in the language of the statute that creates and defines the offense is ordinarily sufficient. Koon v. State, 358 S.C. 359 (2004). Moreover, an indictment is sufficient to convey jurisdiction if it apprises the defendant of the elements of the offense intended to be charged and informs the defendant of the circumstances he must be prepared to defend. Id. This Court further finds that the indictments in Applicant's case were sufficient and contained a docket number at the time they were presented to the Grand Jury.

The PCR judge erred. The indictment was not filed with the clerk of court until June 2, 2010, and the name of the witness who testified before the grand jury was not listed on the indictment. Plea counsel was ineffective for failing to move to quash the indictment.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v.

State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999), the South Carolina Supreme Court wrote:

> Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. Boykin *v.* Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Id. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. id.

In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970))). "The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59, 106 S.Ct. 366.

The guilty plea in the present case was not entered voluntarily, knowingly and intelligently because Petitioner was unaware of the ability to challenge the indictment. Counsel's failure to move to quash the indictment affected the outcome of the plea process. There is a reasonable probability that if Petitioner had been advised about challenges to the indictment, he would have made that challenge.

Rule 3(c), SCRCrimP, provides:

> Within ninety (90) days after receipt of an arrest warrant from the Clerk of Court, the solicitor shall take action on the warrant by (1) preparing an indictment for presentment to the grand jury, which indictment shall be filed with the Clerk of Court, assigned a criminal case number, and presented to the Grand Jury; (2) formally dismissing the warrant, noting on the face of the warrant the action taken; or (3) making other affirmative disposition in writing and filing such action with the Clerk of Court.

In State v. Edwards, 374 S.C. 543, 572–73, 649 S.E.2d 112, 127 (Ct. App. 2007), (reversed on the Batson issue in 384 S.C. 504, 682 S.E.2d 820 (2009)), the South Carolina Court of Appeals wrote:

> In State v. Culbreath, 282 S.C. 38, 316 S.E.2d 681 (1984) the South Carolina Supreme Court interpreted the rule requiring solicitors to act on a warrant within ninety days of its issue. The court agreed with and affirmed the trial court's holding that such a rule was administrative not jurisdictional. Id. Furthermore, the court stated a solicitor's delay does not within itself invalidate a warrant or prevent subsequent prosecution. Id. at 40, 316 S.E.2d at 681.
>
> Here, the trial court clarified:
>
> It's my view that Rule Three is a procedural rule. It deals with when the Magistrate must send the warrants over to the Clerk's office, when the Clerk's office must send the warrants to the Solicitor's office, and when the Solicitor is to present them to the Grand Jury. My view of that is that it is strictly procedural; that it is not substantive, it does not infer any substantive rights, and that is does not affect the jurisdiction of this Court nor the charges if the Rule is not followed.
>
> The trial court's analysis is consistent with South Carolina precedent interpreting Rule 3 SCRCrimP.

In State v. Culbreath, 282 S.C. 38, 39–40, 316 S.E.2d 681, 681 (1984), the case cited in Edwards, the South Carolina Supreme Court wrote:

> The question to be decided in this case is whether Circuit Court Rule 95, requiring a solicitor to take action on a warrant within ninety (90) days after its receipt by him, is jurisdictional so as to deprive the court of jurisdiction in cases where the solicitor fails to act within the ninety (90) day period. The rule itself is silent on the question. The trial judge refused to quash the indictment in this case because of the solicitor's failure to act upon the warrant within ninety (90) days, holding that Rule 95 was administrative and not jurisdictional. We agree and affirm.
>
> Rule 95 is an administrative rule adopted for the purpose of insuring an orderly and prompt disposition of cases in the Court of General Sessions. While the rule is designed to secure a prompt handling of cases, it was not intended to be the criterion for determining whether the constitutional guaranty of a speedy trial has been met.
>
> Therefore, the failure of the solicitor to act upon a warrant within ninety (90) days, as required by Rule 95, does not within itself invalidate a warrant or prevent subsequent prosecution. However, failure to comply with the Rule would subject a solicitor to contempt proceedings.

Although both Edwards and Culbreath find that the requirements of Rule 3(c), SCRCrimP are administrative and not jurisdictional, Culbreath found that a violation of the rule would subject a solicitor to contempt proceedings. Both cases were also decided before the Court decided State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), which held that S.C. Code § 1–7–330 vesting exclusive control of the criminal docket in the circuit solicitor violated separation of powers by impermissibly conferring judicial responsibilities upon a member of the executive branch. In light of Langford this Court should find that a violation of Rule 3(c), SCRCrimP, could result in dismissal of the indictment. Plea counsel should have moved to quash the indictment for the violation of the rule.

Additionally, the indictment is irregular on its face because the person who testified before the grand jury is not identified on the indictment. 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. While it does not appear that the solicitor was the sole witness before the grand jury in the present case, the identity of the witness is unknown because the witness listed on the indictment is the Charleston City Police Department. (App. p. 2). Trial counsel should have moved to quash the indictment. See State v. Jones, 312 S.C. 100, 439 S.E.2d 282 (1994).

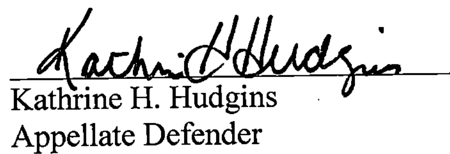
In State v. Thompson, 305 S.C. 496, 501-502, 409 S.E.2d 420, 424 (Ct. App. 1991) (internal citations omitted) (emphasis original), the South Carolina Court of Appeals wrote:

> 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."

There is clear evidence in the present case that the indictment is irregular on its face. The indictment does not comply with Rule 3(c), SCRCrimP, because it was not filed with the clerk of court prior to being presented to the grand jury and it is unclear if the 90 day time frame was met. Additionally, the indictment fails to identify the witness before the grand jury. Plea counsel was ineffective in failing to motion to quash the indictment. Petitioner was prejudiced by the deficient performance.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of November, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Jerome Heyward states:

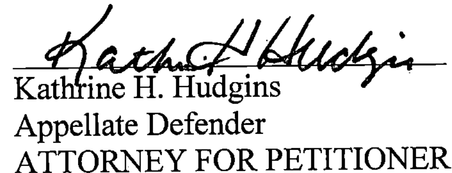
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Maite Murphy, which was held on February 2, 2018, 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 Anthony Jerome Heyward.

Respectfully Submitted,

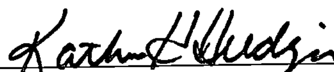


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of November, 2018.

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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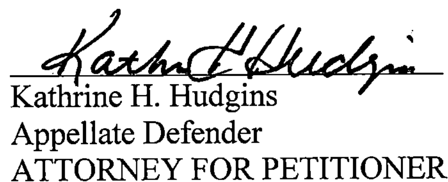
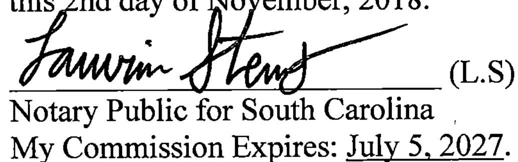
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Anthony Jerome Heyward, #345985, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 2nd day of November, 2018.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of November, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.