ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 05 2019
S.C. SUPREME COURT

July 5, 2019

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

Re: **James L. Carrier, Respondent v. State of South Carolina, Petitioner**
Case No. 2014-CP-24-1526

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

The State is in possession of the post-conviction relief hearing transcript and have calendared the State's Petition for Writ of Certiorari and Appendix to be due September 3, 2019. If this date is incorrect or inconsistent with your records please contact me.

Sincerely,

Janell H. Gregory
Assistant Attorney General
SC Bar #103176

JHG/cc
Enclosures

cc: Laura M. Saunders, Esquire
South Carolina Department of Corrections
Greenwood County Clerk of Court
Solicitor David M. Stumbo
Office of Appellate Defense
Victim Advocacy Division

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2014-CP-24-1526

James L. Carrier, #351607, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Brian M. Gibbons, order dated May 6, 2019, and filed May 8, 2019, granting post-conviction relief to the Respondent. The State filed a timely motion to alter or amend pursuant to rule 59(e), which was denied in an order dated May 28, 2019, and filed June 3, 2019. The State received notice of this filed order June 6, 2019. A copy of the order on appeal is attached to this notice.

[SIGNATURE FOLLOWS]

Respectfully submitted,

ALAN WILSON
Attorney General

Janell H. Gregory
Assistant Attorney General
S.C. Bar # 103176

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

By: _____
Attorneys for the Petitioner

Columbia, South Carolina

July Sun, 2019

Other counsel of record:

Laura M. Saunders, Esquire
The Law Offices of Laura M. Saunders, LLC.
Post Office Box 731
Laurens, South Carolina 29360

RECEIVED

JUL 05 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENWOOD COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2014-CP-24-1526

James L. Carrier, #351607, ...Respondent,

v.

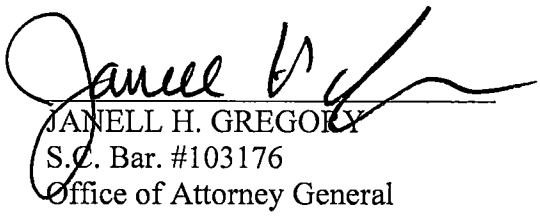
State of South Carolina, ...Petitioner.

PROOF OF SERVICE

I, Janell H. Gregory, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Laura M. Saunders, Esquire
The Law Offices of Laura M. Saunders, LLC.
Post Office Box 731
Laurens, South Carolina 29360

I further certify that all parties required by Rule to be served have been served this 5th day of July, 2019.



JANELL H. GREGORY
S.C. Bar. #103176
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
Attorney for the Petitioner

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**

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, l.9-15, February 26, 2019).

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 expect those who have been bound over or subpoenaed in the manner provided by law.
>
> PCR Transcript, p.34, l.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, l.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..."

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)
)
JAMES CARRIER #351607)
Plaintiff,)
vs.)
)
STATE OF SOUTH CAROLINA)
Defendant.)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

CASE NO.: 2014-CP-24-1526

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
Laura M. Saunders, Bar No. 77957 Address: PO BOX 731 LAURENS, SC 29360 Phone: 864-681-4444Fax 866-654-0282 E-mail: lmsaunders@hotmail.comOther: ____	Janell H. Gregory, Bar No. ____ Address: PO Box 11549 Columbia, SC 29211 Phone: 803-734-9603 Fax____ E-mail: ____Other: ____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: ____
Estimated Time Needed: ____ Court Reporter Needed: ☐ YES/☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

April 24, 2019
Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☒ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: LINDA MOFFITT
☐ Other: ____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: ____	JUDGE CODE ____ Date: ____

CLERK'S VERIFICATION

Collected by:____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-24-1526

JAMES CARRIER #351607,

PLAINTIFF(S)

STATE OF SOUTH CAROLINA,

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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

2168
Judge Code

5/6/19
Date

SCRCP Form 4C (02/2017)

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-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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.