

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
Court of Common Pleas  
Alex Kinlaw, Jr., Post-Conviction Relief Judge  
Edward W. Miller, Trial Judge

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**RECEIVED**

JAN 16 2020

S.C. SUPREME COURT

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Appellate Case No. 2019-000072

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LORGIO MORALES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEY GENERAL

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### **PETITIONER'S STATEMENT OF THE ISSUE ON APPEAL**

- I. Whether the court erred where it found counsel provided effective representation where counsel did not file a notice of appeal after petitioner's trial, and where there was no evidence petitioner knowingly and intelligently waived his right to appeal, since absent an intelligent waiver by petitioner, counsel was obliged to initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967)?
- II. Whether the court erred where it found counsel provided effective representation despite counsel's failure to assert petitioner's right to a speedy trial, where drugs were found in 2012 but the state did not arrest petitioner until 2015 and did not try petitioner until 2018, since the delay violated petitioner's constitutional right to a speedy trial?

### **RESPONDENT'S STATEMENT OF THE ISSUE**

- I. Whether the post-conviction court properly found Counsel was not constitutionally ineffective for failing to file an appeal where Petitioner was aware of his right to appeal and failed to notify Counsel that he wished to pursue a direct appeal after his conviction?
- II. Whether the post-conviction court properly found Counsel was not constitutionally ineffective for failing to assert Petitioner's right to a speedy trial as the delay in Petitioner's trial was due in part to Petitioner's extradition from Florida and Petitioner failed to show how he was prejudiced by any delay as he was out on bond up until his trial and Petitioner failed to present any evidence showing the delay affected his ability to prepare and present his defense at trial?

## STATEMENT OF THE CASE

Lorgio Morales (Petitioner) is incarcerated with the South Carolina Department of Corrections pursuant to an order of commitment from the Greenville County Clerk of Court. During the February 2016 term, the Greenville County Grand Jury indicted Petitioner for tampering with utility meter for purpose of growing or manufacturing a controlled substance (2016-GS-23-3018), trafficking marijuana (2016-GS-23-3019), manufacturing marijuana (2016-GS-23-3020), and theft of electric current (2016-GS-23-4086). Scott D. Robinson, Esquire (Counsel) represented Petitioner. Assistant Solicitor Katryna B. Owens of the Thirteenth Circuit Solicitor's Office prosecuted the case.

On February 5, 2018, Petitioner proceeded to a jury trial before the Honorable Edward W. Miller. On February 6, 2018, the jury found Petitioner guilty as indicted. Following the verdict, Judge Miller sentenced Petitioner to imprisonment for ten years for tampering with utility meter for purposes of growing or manufacturing a controlled substance, twenty-five years for trafficking marijuana, twenty years for manufacturing marijuana, and time served for theft of electric current. All sentences were to run concurrent. Petitioner did not appeal his conviction or sentence.

Petitioner then filed his application for post-conviction relief on May 24, 2018, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
  - a. Counsel failed to investigate facts, evidence, and witnesses;
  - b. Counsel failed to have proper defense for physical evidence;
  - c. Counsel abandoned Applicant during trial;
  - d. Counsel failed to review discovery with Applicant;
  - e. Counsel failed to move for a mistrial after Assistant Solicitor Owens expressed her own opinion of Applicant's guilt;
  - f. Counsel failed to call witnesses on Applicant's behalf;
  - g. Counsel failed to request a preliminary hearing;
  - h. Counsel failed to challenge testimony of State's witnesses and failed to adequately object and preserve objections of the witnesses testimony;
  - i. Counsel failed to cross-examine the witnesses on their testimony;

- j. Counsel failed to move for pre-trial directed verdict;
- k. Counsel failed to move for a directed verdict at the end of the State's case and at the end of the entire case;
- l. Counsel failed to move to suppress evidence;
- m. Counsel failed to quash indictments;
- n. Counsel failed to provide a valid defense;
- o. Counsel failed to move for a speedy trial;
- p. Counsel failed to object to State's circumstantial evidence being introduced at trial;
- q. Counsel failed to file a direct appeal

On December 7, 2018 and December 12, 2018, Respondent received three letters from Petitioner amending his application to include the following allegations:

- 1. Ineffective Assistance of Counsel:
  - a. Counsel failed to establish chain of command with SLED in weight of material, and no report from SLED.
  - b. Counsel failed to challenge the destruction of evidence;
  - c. Counsel failed to give a mere presence charge to the jury and Counsel's charge was incomplete;
  - d. Counsel failed to properly prepare for trial because he took a year off for illness and came back to take Applicant's case.
  - e. Solicitor failed to establish an exact time frame in Applicant being present in the warehouse.

Mills Ariail, Jr., Esquire, represented Petitioner in his PCR action. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office represented Respondent. A hearing was held on December 17, 2018, at the Greenville County Courthouse before the Honorable Alex Kinlaw, Jr., circuit court judge. Petitioner proceeded on the following grounds for relief:

- 1. Ineffective Assistance of Counsel
  - a. Counsel failed to review discovery with Applicant;
  - b. Counsel failed to investigate Applicant's case;
  - c. Counsel failed to file a speedy trial motion;
  - d. Counsel failed to object to Assistant Solicitor Owens' inappropriate comment;
  - e. Counsel failed to challenge the search warrant and the search warrant return;
  - f. Counsel failed to move for pre-trial directed verdict;
  - g. Counsel failed to discuss the stipulations with Applicant;

- h. Counsel failed to file an appeal on Applicant's behalf;
- i. Counsel failed to provide a mere presence jury charge;
- j. Counsel advised Applicant to turn down ten year plea offer.

At the hearing, Petitioner testified on his own behalf. Counsel also testified. By order filed January 9, 2019, Judge Kinlaw denied and dismissed Petitioner's application for post-conviction relief finding Petitioner failed to meet his burden to prove Counsel was ineffective in any regard. Judge Kinlaw found credible Counsel's testimony that Petitioner did not ask him to file an appeal and, had Petitioner made such a request, Counsel would have filed an appeal. Judge Kinlaw also found Counsel was not ineffective for failing to file a speedy trial motion on Petitioner's behalf because the delay in Petitioner's case was partially due to Petitioner's extradition from Miami, FL. Further, Judge Kinlaw found Petitioner failed to prove any resulting prejudice as Petitioner was out on bond until the first day of his trial and Petitioner failed to show how the delay affected his ability to prepare and present a defense in his case. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

## STATEMENT OF FACTS

On April 23, 2012, deputies with the Greenville County Sheriff's Office responded to a request for assistance from Duke Power at a warehouse on Old Piedmont Highway. (App. 48.) Upon arrival, Duke Power explained to deputies that power was being diverted from lines into the warehouse and they needed assistance to cut the electricity. (App. 48.) Once power was cut, a wave of hot air left the warehouse that smelled of marijuana. (App. 49.) Deputy Reece entered the warehouse believing there was a risk of fire because he observed melting wires leading into the warehouse and felt heat emitting from the warehouse. (App. 37-38.) Deputy Reece entered the warehouse initially without a warrant due to exigent circumstances to clear it for safety reasons and discovered a grow room and living quarters. (App. 38-40.) Once the warehouse was cleared, Deputy Reece obtained a search warrant. (App. 39-40.) During the execution of the search, deputies found eight separate rooms of marijuana plants in various stages of growth, packing material, drying rooms, and living quarters. (App. 49.) Deputies processed the warehouse and recovered ninety fingerprints; thirty of those prints matched Applicant. (App. 85.) Deputies seized 687 plants that field-tested positive as marijuana, along with chemicals and equipment used to manufacture marijuana. (App. 199.) Deputies also seized 125 pounds of marijuana from boxes located in the living quarters of the warehouse. (App. 199.)

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 179, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 179, 810 S.E.2d at 840. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood, 338 S.C. at 109, 525 S.E.2d at 517; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 670. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

## ARGUMENT

### **I. The post-conviction court properly found Counsel was not constitutionally ineffective for failing to file an appeal where Petitioner was clearly aware of his right to appeal and failed to notify Counsel that he wished to pursue a direct appeal after his conviction.**

Petitioner alleges the post-conviction relief court erred in finding Counsel was not ineffective for failing to file an appeal on Petitioner's behalf because Petitioner did not knowingly and intelligently waive his right to appeal, and therefore, Counsel should have initiated an appeal to comply with Anders v. California, 386 U.S. 738 (1967). However, Petitioner was fully aware of his right to appeal and failed to request Counsel file an appeal on his behalf. According to Petitioner's own testimony, Petitioner did not attempt to request an appeal until after he transferred to Kirkland, despite being fully aware of his right to appeal. Counsel cannot be found to be deficient for failing to file an appeal he did not know Petitioner wanted to pursue. The post-conviction relief court properly found Counsel was not constitutionally ineffective and this Court should deny certiorari.

Counsel has a constitutionally-imposed duty to consult with defendant about appeal when there is reason to think either (1) that rational defendant would want to appeal (for example, because there are **nonfrivolous grounds** for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

Roe v. Flores-Ortega, 528 U.S. 470 (2000) (emphasis added). Although Petitioner claims there is no evidence Counsel made certain he was fully aware of his right to appeal, based on Petitioner's testimony, he was aware of his right to appeal as he made the decision to file an appeal after getting to Kirkland; however, he failed to inform Counsel of that decision. (App. 265.) Counsel credibly testified Petitioner never asked him to file an appeal. (App. 280.) Counsel also credibly testified had Petitioner requested an appeal, he would have filed one on his behalf. (App. 280.) Counsel

further testified there were **no meritorious grounds** for Petitioner to pursue on appeal. (App. 280.) In evaluating Counsel’s effectiveness, courts must “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct, and judicial scrutiny of counsel’s performance must be highly deferential.” Id. at 477, (citing Strickland, 466 U.S. at 688-690). Counsel’s performance was reasonable under the circumstances as it is reasonable to believe a defendant who is fully aware of his right to appeal, yet fails to request an appeal, and has no meritorious grounds to pursue on appeal, does not want to pursue an appeal.

Further, after Petitioner’s conviction, the trial court had the following exchange with Petitioner:

**Court:** All right. I want you to know that you have an absolute right to appeal this. You’ve got to let your attorney know as soon as possible so he can get the paperwork done. You understand this?

**Petitioner:** Yes, sir.

(App. 223.) Despite being informed of the time sensitivity, Petitioner failed to request Counsel file his direct appeal while in court with Counsel or before being transported to Kirkland where Petitioner claims he had “no way” to contact Counsel. (App. 265.)

Petitioner was fully aware of his right to appeal, however, failed to express to Counsel his interest in pursuing an appeal. Counsel acted reasonably under the circumstances as Petitioner failed to request an appeal, despite being told by the court to do so “as soon as possible,” and Counsel believed there were no meritorious grounds for Petitioner to pursue on appeal. Therefore, the post-conviction relief court properly found Counsel was not ineffective for failing to file an appeal. This Court should deny certiorari.

**II. The post-conviction court properly found Counsel was not constitutionally ineffective for failing to assert Petitioner's right to a speedy trial as the delay in Petitioner's trial was due in part to Petitioner's extradition from Florida and Petitioner failed to show how he was prejudiced by any delay as he was out on bond up until his trial and failed to present any evidence showing the delay affected his ability to prepare and present a defense at trial.**

Petitioner alleges Counsel was ineffective for failing to assert Petitioner's right to a speedy trial as Petitioner claims there was a delay in his trial that violated his constitutional right to a speedy trial. Petitioner asserts he was arrested in 2015 and not tried until 2018. However, the delay in Petitioner's trial was due, in part, to Petitioner's extradition from Florida to South Carolina. Additionally, Counsel credibly testified Petitioner was out on bond up until his trial, never requested Counsel file a speedy trial motion, and Counsel did not believe such a motion was necessary in Petitioner's case. Further, Counsel credibly testified Petitioner was "absolutely not" prejudiced by any alleged delay and Petitioner failed to present any evidence at the evidentiary hearing showing he was prejudice by any alleged delay in his case. (App. 283.) Therefore, the post-conviction relief court properly denied and dismissed this allegation and this Court should deny certiorari.

The Sixth Amendment of the United States Constitution provides that an accused shall enjoy a speedy trial. This constitutional right has been applied to the states, through the Fourteenth Amendment, in Klopfer v. North Carolina, 386 U.S. 213 (1967) and recognized by this Court in Wheeler v. State, 247 S.C. 393, 147 S.E.2d 627 (1966). The constitutional guarantee of a speedy trial affords protection only against unnecessary or unreasonable delay. State v. Chapman, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) (citing State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978); Wheeler v. State, 247 S.C. 393, 147 S.E.2d 627 (1966)). "[A] speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary

delay.” State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012), reh'g denied (Dec. 20, 2012) (citing Wheeler). “The clock starts running on a defendant’s speedy trial right when he is ‘indicted, arrested, or otherwise officially accused,’ and therefore we include the time between arrest and indictment. Id. (quoting United States v. MacDonald, 456 U.S. 1, 6 (1982)). “This right ‘is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.” State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) (citing United States v. MacDonald, 456 U.S. 1, 8 (1982)). Deprivation of the right to speedy trial does not *per se* prejudice the accused’s ability to defend himself. “In determining whether a defendant has been deprived of the right to a speedy trial, the court must consider four factors: 1) length of the delay; 2) reason for the delay; 3) the defendant’s assertion of the right; and 4) prejudice to the defendant.” Barker v. Wingo, 407 U.S. 514, 530, (1972). Analyzing Petitioner’s case under the Barker factors, Petitioner has failed to show this Court he was deprived of his right to a speedy trial.

Here, Petitioner was arrested in February of 2015, indicted in February of 2016, and his trial commenced in February of 2018. The State told the trial court, “[Petitioner] was extradited from Miami in 2015, which is one reason why this case is so old.” (App. 224.) “Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is arbitrary or unreasonable.” Pittman, 373 S.C. at 549, 647 S.E.2d at 156. During the evidentiary hearing, Counsel credibly testified Petitioner was in Miami for “a decent period of time” and he didn’t believe “there was a three year lapse between when they, initially, brought him up to Greenville to when they had the trial.” (App. 279, 283.) As this Court stated in Pittman, Petitioner’s contribution to the delay should be weighed in evaluating whether there

has been a violation of his Sixth Amendment right to a speedy trial. Pittman, 373 S.C. at 550, 647 S.E.2d at 155 (citing State v. Waites, 270 S.C. 104, 240 S.E.2d 651, 653 (1978)). Petitioner has failed to show any delay in his case was arbitrary or unreasonable.

Further, Counsel credibly testified Petitioner never asked him to file a speedy trial motion. (App. 279.)

The defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the right is being deprived; failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. at 532. Counsel also credibly testified he did not feel a speedy trial motion was necessary in Petitioner's case. (App. 279.)

Here, there are no allegations before this Court indicating the delay was intentional on behalf of the Solicitor's Office in order to hinder Petitioner's ability to present a defense to his charges.

The ultimate responsibility for the trial of a criminal defendant rests with the State. Therefore, the court should weigh heavily against the State any intentional delays to impede the defense. Where the reason for delay is more neutral, the court should weigh it less heavily against the State. A valid reason presented by the State may justify an appropriate delay. However, the Court must also consider and weigh the defendant's contribution to the delay in determining whether the defendant's Sixth Amendment rights have been violated.

Pittman, 373 S.C. at 549, 647 S.E.2d at 155. There was an extensive amount of evidence recovered from the marijuana grow operation inside the warehouse. The warehouse had eight rooms with marijuana plants in various stages of growth throughout the building. (App. 303.) Law enforcement recovered ninety fingerprints<sup>1</sup>, seized nearly 700 plants, along with chemicals,

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<sup>1</sup> Petitioner's fingerprints matched thirty of the ninety prints recovered by law enforcement.

equipment, and packing material. (App. 303-304.) “. . . [T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge. Barker, 407 U.S. at 531. Petitioner’s case is certainly not an “ordinary street crime” based on the extensive grow operation law enforcement discovered in the warehouse and the amount of evidence the State seized and processed. Counsel testified he has handled a lot of drug cases, but doesn’t recall handling one “this big.” (App. 281.)

Further, Petitioner has failed to show any alleged delay affected his ability to present a defense in his case. Counsel testified their defense strategy was a mere presence defense since Petitioner’s fingerprints were found inside the warehouse. (App. 289.) Counsel testified it was “the only strategy I really had in this case. I didn’t have an alibi. I didn’t have anyone that could come forward and say, oh, yeah, that’s somebody else. The fingerprints were the most important part of the case because there were so many fingerprints.” (App. 289.) The ability for Petitioner to assert a mere presence defense at trial was not harmed by any alleged delay in his trial. Petitioner did not present any testimony or evidence at the evidentiary hearing showing any witnesses or evidence he was unable to call or utilize because of an alleged delay in his trial.

Additionally, as state above, the right to a speedy trial “is designed to minimize the possibility of lengthy incarceration prior to trial[.]” State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) (citing United States v. MacDonald, 456 U.S. 1, 8 (1982)). Here, Petitioner testified he was out on bond for the majority of the time prior to trial. (App. 267.)

In analyzing Petitioner’s case under the Barker factors, Petitioner has failed to show he was denied his right to a speedy trial. First, Petitioner’s extradition from Florida was a factor his trial not being able to start until February 2018. Second, Petitioner’s case was a complex drug trafficking case involving an extensive amount of evidence, which could have attributed to any

alleged delay. Third, Petitioner failed to request Counsel file a speedy trial motion and Counsel credibly testified he did not feel a speedy trial motion was necessary. Finally, Petitioner failed to show how he was prejudiced by Counsel's failure to file a speedy trial motion, especially since Counsel credibly testified Petitioner was "absolutely not" prejudiced by any alleged delay in his trial. (App. 283.) As such, the post-conviction relief court properly denied Petitioner relief in this case and this Court should deny certiorari.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By:   
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January 16, 2020

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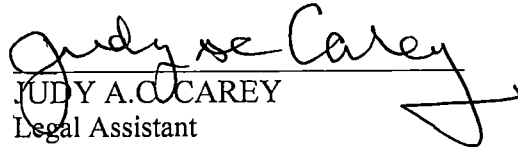
State of South Carolina, ..... Respondent.

CERTIFICATE OF SERVICE

I, Judy A.C. Carey, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Joanna K. Delany, Esquire  
SC Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589**

I further certify that all parties required by Rule to be served have been served. This 16<sup>th</sup> day of January, 2020.

  
JUDY A.C. CAREY  
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