STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Florence County
Honorable D. Craig Brown, Circuit Court Judge

Opinion No. 2020-UP-038 (S.C. Ct. App. Filed February 12, 2020)

2016-GS-21-00122

THE STATE,

RESPONDENT,

V.

VANCE ROSS,

APPELLANT

APPELLATE CASE NO 2017-001045

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 27, 2020.

QUESTION PRESENTED

Did the Court of Appeals err in finding no error in the trial judge refusing to quash as unconstitutionally overbroad and vague an indictment alleging seven counts of criminal sexual conduct with a minor between February 1, 2013, and July 31, 2014, because the lack of specificity within the time frame failed to provide sufficient notice and the time frame was not narrowed as much as possible?

STATEMENT OF THE CASE

In January of 2016, the Florence County Grand Jury indicted Appellant, Vance Ross, for eight counts of criminal sexual conduct with a minor first degree and one count of criminal sexual conduct with a minor third degree, indictment #2016-GS-21-00122. On April 17, 2017, Appellant proceeded to jury trial on counts three through nine of the indictment before the Honorable D. Craig Brown. Thurmond Brooker represented Appellant at trial. David Richardson prosecuted the case. The jury found Appellant not guilty of count seven but guilty of the remaining six counts. Judge Brown sentenced Appellant to concurrent life sentences on each count. A timely notice of intent to appeal was filed on April 27, 2017, and the direct appeal perfected. On February 12, 2020, the South Carolina Court of Appeals affirmed the convictions. State v. Ross, Op. No. 2020-UP-038 (S.C.Ct.App. filed February 12, 2020). A timely petition for rehearing was filed and then denied on March 27, 2020. This petition for writ of certiorari follows.

REASON WHY CERTIORARI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari because the question presents a substantial constitutional issue dealing with an overbroad and vague indictment with a time frame that was not narrowed as much as possible and a lack of specificity within the time frame that failed to provide sufficient notice depriving Petitioner of his right to procedural due process.

ARGUMENT

The Court of Appeals erred in finding no error in the trial judge refusing to quash as unconstitutionally overbroad and vague an indictment alleging seven counts of criminal sexual conduct with a minor between February 1, 2013, and July 31, 2014, because the lack of specificity within the time frame failed to provide sufficient notice and the time frame was not narrowed as much as possible.

Prior to trial Petitioner moved to quash the indictment based on State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015). (R. pp. 8-38). In finding the indictments unconstitutionally overbroad in Baker, this Court discussed the constitutional and statutory requirements of an indictment and wrote: "An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles. *See* S.C. Const. art. I, § 11 ("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...."); S.C.Code Ann. § 17–19–10 (2014) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...."). " 411 S.C. at 588-89, 769 S.E.2d at 863.

The indictment in the present case contained nine counts. The State did not proceed on counts one and two. Counts three, eight and nine involve Minor #2 and counts four, five, six and seven involve Minor #1. Petitioner was found not guilty of count seven. All seven counts begin with the following language, "That Vance Ross did in Florence County, State of South Carolina, between the dates of February 1, 2013, and July 31, 2014, willfully and unlawfully commit the crime of Criminal Sexual Conduct with a Minor in the First Degree by engaging in sexual battery with a minor who is less than eleven (11) years of age, to wit: . . ." (R. p. 365-367). The individual counts then read as follows:

> Count Three: Victim Minor #2, whose date of birth is ****, by putting his penis inside of her mouth, in violation of Section 16-3-655(A)(1), S.C Code of Laws, 1976, as amended.
>
> Count Four: Victim Minor #1, whose date of birth is ****, by putting his penis inside of her mouth, in violation of Section 16-3-655(A)(1), S.C Code of Laws, 1976, as amended.
>
> Count Five: Victim Minor #1, whose date of birth is ****, by putting his penis inside of her mouth, in violation of Section 16-3-655(A)(1), S.C Code of Laws, 1976, as amended.
>
> Count Six: Victim Minor #1, whose date of birth is ****, by putting his penis inside of her vagina and mouth, in violation of Section 16-3-655(A)(1), S.C Code of Laws, 1976, as amended.
>
> Count Seven: Victim Minor #1, whose date of birth is ****, by putting his penis inside of her vagina, anus and mouth, in violation of Section 16-3-655(A)(1), S.C Code of Laws, 1976, as amended.
>
> Count Eight: Victim Minor #2, whose date of birth is ****, by putting his penis in her vagina, in violation of Section 16-3-655(A)(1), S.C Code of Laws, 1976, as amended.
>
> Count Nine: Victim Minor #2, whose date of birth is ****, by putting his penis in her vagina, in violation of Section 16-3-655(A)(1), S.C Code of Laws, 1976, as amended.

(R. p. 365-367). There is no other reference in the counts of the indictment as to when during the eighteen-month time frame or where the alleged acts occurred.

Petitioner argued that the indictment lacked the specificity required by Baker. (R. p. 24, lines 9-20; p. 26, lines 8-15; p. 29, line 17 – p. 30, lines 1-12). Petitioner argued that the counts of the indictment could not be distinguished from one another. (R. p. 17, lines 4-17). Petitioner referenced double jeopardy (R. p. 14, lines 3-6) and argued, "And then, of course, is is that if he is acquitted – if he is equally acquitted of two or four of these offenses, then, of course, the question then becomes is is that if he's acquitted of Count 5, Count 6, Count 7, Count 8, you know, then is there sufficient enough information where he can recognize what he has been acquitted of or the Court can make a determination with what he has been acquitted of?

Absolutely none whatsoever." (R. p. 18, lines 3-10). Additionally, Petitioner argued that the time frame alleged had not been narrowed as much as possible. (R. p. 23, lines 8-21).

The judge denied the motion to quash the indictment stating:

> While the Court in Baker certainly drew the line on a six-year time limit, the Court did not overrule -- and I won't say a per se two-year or per se three-year timeline. The Court did say that these cases are to be looked at by looking at the entire surrounding circumstances existing pretrial to determine whether or not the defendant has been prejudiced, whether or not he's been taken by surprise, and hence unable to combat the charges against him.
>
> The defendant was indicted for each of these charges and offenses back in January of 2016, and I do not believe that it would be appropriate for this Court to quash those indictments in light of the fact that State v. Wade, State v. Tumbleston -- I believe those are still good law and the Court drew a hard and fast line, so to speak, on a six-year limit. But your objection is so noted.

(R. p. 38, lines 4-17). The trial judge erred. Neither the time frame alone nor the amount of time from indictment until trial alone is dispositive in determining the sufficiency of the indictment. The test as to the sufficiency of the indictment, as discussed below, centers on notice with specificity and considers a variety of factors including the timing of indictment, whether the circumstances of the case warrant an expanded time frame, length of the expanded time frame and whether the time frame was narrowed a much as possible. The indictment in the present case lacks the minimum specificity required in order to be sufficient. The lack of specificity within the time frame of the counts of the indictment failed to provide sufficient notice.

In Baker this Court relied on language from State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) in addressing the sufficiency of an indictment writing:

> If a defendant raises a timely challenge to the sufficiency of an indictment, the reviewing court is charged with: determining whether (1) *the offense is stated with sufficient certainty and particularity* to enable the court to know what judgment to pronounce, and *the defendant to know what he is called upon to answer* ***and*** *whether he may plead an acquittal* or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be

> charged. Gentry, 363 S.C. at 102–03, 610 S.E.2d at 500 (emphasis added). "In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances." State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct.App.2007). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

State v. Baker, 411 S.C. 583, 589, 769 S.E.2d 860, 863-64 (2015), reh'g denied (Apr. 9, 2015).

The indictment in the present case lacks the certainty and particularity to know what Petitioner was called upon to answer to each count **and** whether he may have plead an acquittal or conviction thereon. Without some distinguishing factor, for example a location, the offenses in these counts are not stated with sufficient certainly and particularity to enable the Petitioner to know the accusations and determine if he has a defense to one or more counts or if he should plead guilty to some counts and demand a jury trial on the others. Without more specificity, the six counts upon which Petitioner was convicted and the one count upon which he was found not guilty would not bar a subsequent prosecution.

In Baker the time frame in the indictment was expanded, right before trial, to cover a six year period. The Court held:

> Given the expansive time frame and lack of specificity as to this time frame, we can only conclude Baker was prejudiced by the defects in the indictments. Although we recognize the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases, the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles.
>
> Accordingly, we hold the trial judge erred in refusing to quash the indictments as the non-specific, six-year period covered in the indictments was unconstitutionally overbroad because it lacked specificity as to when the alleged acts occurred.

Baker 411 S.C. at 592, 769 S.E.2d at 865. The fact that the time frame in the present case is eighteen months, rather than six years, and was not expanded prior to trial does not render the

indictment sufficient. The indictment in the present case is insufficient like the indictment in Baker because it lacks the specificity required. The lack of specificity within the expanded time frame did not provide sufficient notice.

1. Counts involving Minor #1

Counts four, five, six and seven involve Minor #1. Counts four and five of the indictment are identical and both allege oral sex involving Minor #1. (R. p. 366). Count six alleges both oral and vaginal sex involving Minor #1. (R. p. 366). Count seven alleges oral, vaginal and anal sex involving Minor #1. (R. p. 366). The jury found Petitioner not guilty of count seven.

A. Thunderbird and Howard Johnson Motel

Minor #1 testified that vaginal sex took place at the Thunderbird Motel (R. p. 96, lines 4 – 14). Both Minor #1 and Minor #2 testified that Petitioner tried but was unsuccessful in putting his penis in Minor #1's mouth at the Thunderbird Motel.

During direct examination of Minor #1 the following took place:

Q: Okay. At any point in the Thunderbird, did he put his private part in your mouth?

A: Yes, sir.

Q: Okay. Tell us about that. Who was – who saw that happen? Who was there when that happened?

A: My sister.

Q: Okay. How did he – did he ask you to do that or did he force you? How did it happen?

A: He had forced me.

Q: Okay. Can you describe it to us? Like, what he actually did?

A: He – he had—he had tried –he had grabbed me. Then he had told me to get down on my knees and then he had tried to put it in my mouth and I had moved it away from my face.

Q: Did – did – did he ever actually get it into your mouth?

A: No.

Q: Never?

A: (Nonverbal response.)

(R. p. 95, lines 4-22). Minor #2 testified that Appellant tried to put his penis in Minor #1's mouth at the Thunderbird Motel but Minor #1 did not let him. (R. p. 138, lines 6-15). Minor #2 acknowledged, however, that she told an interviewer that she observed oral sex with Minor #1 while Minor #1 was in the shower with Petitioner at the Thunderbird Motel. (R. p. 158, lines 3-16).

Minor #2 testified that she observed anal sex involving Minor #1 one time at the Howard Johnson Motel. (R. p. 140, lines 5-15). The only count to include an allegation of anal sex is count seven which also included allegations of oral and vaginal sex. Petitioner was found not guilty of count seven.

B. Driveway at Grandmother's House

Minor #1 testified that vaginal sex took place in the in the car parked in the driveway at the grandmother's house. (R. p. 83, line 10 – p. 84, lines 16-20). Minor #2 testified that she observed both oral and vaginal sex involving Minor #1 in the driveway at the grandmother's house. (R. p. 145, lines 21- p. 146, lines 1-2). Minor #2 testified that the oral sex in the driveway with Minor #1 only happened one time. (R. p. 145, line 21 – p. 146, lines 1-2).

C. Acts Alleged in the Counts in the Indictment

Count six alleged both oral and vaginal sex and count seven alleged oral, vaginal and anal sex. Counts six and seven are the only counts to allege vaginal sex with Minor #1 and Petitioner was found not guilty of count seven. Because of the lack of specificity in counts six and seven of the indictment, it is impossible for Petitioner to determine if count six, the count of conviction, applies to the allegation of vaginal sex at the Thunderbird Motel or the allegation of vaginal sex in the driveway. It is impossible to determine upon which incident the jury based the guilty verdict. A court reviewing a double jeopardy claim in a subsequent prosecution would not be able to determine if Petitioner was convicted of the Thunderbird Motel allegation or the driveway at grandma's allegation. Equally important, a court reviewing a double jeopardy claim in a subsequent prosecution would not be able to determine what Petitioner was found not guilty of in count seven.

2. Counts Involving Minor #2

Counts three, eight and nine involve Minor #2. Count three is the only count that alleges oral sex involving Minor #2. Counts eight and nine are identical and both allege vaginal sex involving Minor #2.

A. Thunderbird Motel

Minor #2 testified that oral sex took place once at the Thunderbird Motel (R. p. 136, lines 11-19). Minor #2 testified that vaginal sex took place more than once but less than five times at the Thunderbird Motel. (R. p. 136, line 20 – p. 137, line 1).

B. Driveway at Grandmother's House

Minor #2 testified that oral sex took place more than once in the driveway. (R. p. 145, lines 10-15). Minor #2 testified that vaginal sex took place more than once but less than five times in the driveway at her grandma's house. (R. p. 146, lines 10-17).

C. Acts Alleged in the Counts in the Indictment

Count three is the only count that alleges oral sex involving Minor #2. (R. p. 365). Because of the lack of specificity in count three of the indictment, it is impossible for Petitioner to determine if the count applies to the allegation of oral sex at the Thunderbird Motel or the allegation of oral sex in the driveway. It is impossible to determine upon which incident the jury based the guilty verdict. S.C. Code Ann. § 17-23-10 provides, "In any plea of autrefois acquit or autrefois convict it shall be sufficient for any defendant to state that he has been lawfully acquitted or convicted, as the case may be, of the offense charged in the indictment." The charge contained in count three of the indictment, however, is nonspecific. Petitioner could state that he was previously convicted of count three, pursuant to S.C. Code §17-23-10, but, based on the non-specific nature of the charge in count three, a court in a subsequent prosecution would be unable to determine which incident the jury based the guilty verdict. The State could assert that the count three conviction was for the driveway incidents and nothing would bar a subsequent prosecution for the Thunderbird incident.

Counts eight and nine are identical and both allege vaginal sex involving Minor #2. Minor #2 testified that vaginal sex took place more than once but less than five times at the Thunderbird Motel. (R. p. 136, line 20 – p. 137, line 1). Minor #2 testified that vaginal sex took place more than once but less than five times in the driveway at her grandma's house. (R. p. 146, lines 10-17). Because of the lack of specificity in counts eight and nine of the indictment, it is impossible for Petitioner to determine if the counts apply to the allegations at the Thunderbird only, or the allegations in the driveway only or one of each. A court reviewing a double jeopardy claim in a subsequent prosecution would not be able to determine if Petitioner was convicted of the Thunderbird Motel allegations or the driveway at grandma's allegations.

Tumbleston and Wade both challenged the sufficiency of the indictment based on expanded time frames. Petitioner's challenge involves the expanded time frame and the lack of specificity in the counts of the indictment. This lack of specificity within the expanded time frame did not provide sufficient notice. The lack of specificity within the expanded time frame made it impossible for Petitioner to know what charges he must defend against and impossible for a subsequent court to determine upon what conduct Petitioner was convicted and acquitted barring subsequent prosecution.

In Tumbleston, the defendant moved to quash the indictments as insufficient because the indictments failed to allege the specific time of each offense intended to be charged. Tumbleston was indicted on four counts of criminal sexual conduct with a minor and one count of attempting a lewd act on a minor. Each indictment for criminal sexual conduct with a minor alleged a different sexual act: fellatio, cunnilingus, digital penetration and sexual intercourse. Tumbleston was found guilty of two counts of criminal sexual conduct with a minor and lewd act. The jury acquitted Tumbleston of indictment #2005-GS-10-807 alleging fellatio. The judge directed a verdict of not guilty on indictment #2005-GS-10-809 alleging digital penetration. Finding the indictments sufficient, this Court in Tumbleston wrote:

> Time is not a material element of either first-degree criminal sexual conduct with a minor or committing a lewd act on a minor. *See* S.C.Code Ann. §§ 16-3-655, 16-15-140 (2003 and Supp.2006). The State is not required to denote the precise day, or even year, of the accused conduct in an indictment charging criminal sexual conduct. Thompson, 305 S.C. at 501, 409 S.E.2d at 423. Indeed, indictments for a sex crime that allege offenses occurred during a specified time period are sufficient **when the circumstances of the case warrant considering an extended time frame**. Nicholson, 366 S.C. at 574, 623 S.E.2d at 103; . . .

376 S.C. at 101–02, 654 S.E.2d at 855 (emphasis added). The Court in Tumbleston found that the circumstances of the case warranted the broader time frame writing, "The stealth and

repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonably expect to recall the exact dates of the sexual abuse. B.J. verified the abuse began while she was in kindergarten, and she ensured the end of the abuse when she disclosed the offenses to her mother." Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855 (Ct. App. 2007).

In the present case, Petitioner does not argue that the indictment must allege the specific time of each offense. Instead, Petitioner argues that because the State alleged an eighteen-month time frame, the State should be required to show that the circumstances of the case warrant the broad time frame. No such showing was made. Additionally, each indictment in Tumbleston alleged a different sexual act during the extended time frame. No such distinction was made in the counts of the indictment in present case. Without some distinguishing factor, for example a location or a specific sexual act, the offenses in these counts are not stated with sufficient certainly and particularity to enable Petitioner to know what he is called upon to answer and whether he may plead an acquittal or conviction. Even if the Court had found that the circumstances of the case warranted the broad time frame alleged, the lack of specificity within the eighteen-month time frame did not provide sufficient notice.

In Wade the defendant urged the Court to adopt a *per se* rule that a two-year time period alleged in an indictment is unconstitutionally overbroad. This Court declined to adopt a *per se* rule and instead viewed the sufficiency of the indictment from a practical standpoint, with all the circumstances of the particular case in mind. In Wade the Court wrote:

> **In this case, the indictment time span was narrowed as much as possible under the circumstances.** The victim was eight years old at the time of trial. She testified that the sexual offense occurred on only one occasion. She was unable to pinpoint the exact date on which this offense took place. The defendant testified that he was in the vicinity of the victim at relatively few times. The defendant lived in Athens, Georgia for much of the time of the indictment period. He

> claimed that from March to May of 1984, he returned to North Augusta (where the victim resided) one night a week to visit his wife and children. After this, the defendant testified that he returned to North Augusta only four times through December of 1985. The first was Christmas Day in 1984; the second was over the July Fourth weekend in 1985; the third was a one day visit in August of 1985; and the fourth was for a wedding in October of 1985.

306 S.C. at 84, 409 S.E.2d at 783. (emphasis added).

Unlike Wade who was around the minor limited times, Petitioner was frequently around the minors during the eighteen-month time frame. Additionally, there were multiple allegations in the present case rather than the single allegation in Wade. Although the State was aware that the minors alleged that the incidents took place in two general locations, the State failed to link the locations to a more specific time frame. There is nothing to demonstrate that the State attempted to narrow the time span as much as possible as in Wade.

Petitioner is not asking for a *per se* rule in regard to broad time frames. Instead, the reading of Baker, in conjunction with Tumbleston and Wade, establishes that broad time frames may be constitutionally sound only when the circumstances of the case warrant a broad time frame, the time frame is narrowed as much as possible and the indictment provides enough detail to provide sufficient notice within the broad time frame. As noted by the South Carolina Supreme Court in Baker, "It is axiomatic that an indictment must include more than the elements of the charged offense." Baker 411 S.C. at 592, 769 S.E.2d at 865. The counts of the indictment in the present case included the elements of the offense but only included if the count involved Minor #1 or Minor #2 with unspecific overlapping allegations of oral and vaginal sex.. The indictment is not sufficient. Broad unspecified time frames should be the exception instead of the norm, should be justified by special circumstances, should be narrowed as much as possible and must provide enough specifics to provide sufficient notice. The State failed to demonstrate that special circumstances justified the broad time frame. There is nothing in the present record

to indicate that the time span was narrowed as much as possible. The lack of specificity within the expanded time frame did not provide sufficient notice.

In affirming the convictions and sentences the Court of Appeals wrote:

> As to issue one: State v. Tumbleston, 376 S.C. 90, 94, 654 S.E.2d 849, 851 (Ct. App. 2007) ("The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."); State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005) ("The indictment is a notice document. A challenge to the sufficiency of the indictment on the ground of insufficiency must be made before the jury is sworn . . . the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged."); S.C. Code Ann. § 16-3-655(A)(1) (2015) ("A person is guilty of [CSC] with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age . . . ."); Tumbleston, 376 S.C. at 101, 654 S.E.2d at 855 ("Time is not a material element of . . . first-degree [CSC] . . . . The State is not required to denote the precise day, or even year, of the accused conduct in an indictment charging [CSC]."); id. at 101-02, 654 S.E.2d at 855 ("[I]ndictments for a sex crime that allege offenses occurred during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame."); *id.* (holding a three-year time frame in an indictment for CSC was sufficient when the indictment adequately notified the defendant of the charges against him); State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991) (holding a two-year time frame in an indictment for CSC was sufficient in light of the surrounding circumstances of the case).

State v. Ross, Op. No. 2020-UP-038 (S.C.Ct.App. filed February 12, 2020).

The Court of Appeals overlooked the fact that the challenge to the counts in the indictment included more than just a challenge to the eighteen-month time frame. In addition to the fact that the State failed to show that the time frame had been narrowed as much as possible, the counts of the indictment lacked specificity and failed to provide the minimal notice required.

In Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005), this Court wrote:

> The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted. Gentry at 44–45; S.C.Code Ann. 17–19–20 (2003). This required notice is a component of the due process that is accorded every criminal defendant. See U.S. Const. amend. V; S.C. Const. art. I, § 3.

In Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), the United States Supreme Court discussed the criteria by which the sufficiency of an indictment in federal court is to be measured writing:

> These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'' and, secondly, " in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'

369 U.S. at 763–64, 82 S. Ct. at 1047. (citations omitted).

In the federal habeas case of Valentine v. Konteh, 395 F.3d 626, 630–31 (6th Cir. 2005), the Sixth Circuit Court of Appeals applied the criteria from Russell to a state court indictment writing, "While the federal right to a grand jury indictment has never been found to be incorporated against the states, *see* Hurtado v. California, 110 U.S. 516, 534–35, 4 S.Ct. 111, 28 L.Ed. 232(1884), courts have found that the due process rights enunciated in Russell are required not only in federal indictments but also in state criminal charges. See De Vonish v. Keane, 19 F.3d 107, 108 (2d Cir.1994); Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir.1992); see also Isaac v. Grider, 2000 WL 571959, at *4 (6th Cir.2000); Parks v. Hargett, 1999 WL 157431, at *3 (10th Cir.1999)." The Sixth Circuit went on to write:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. Cole v. Arkansas, 333 U.S.

> 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948); see also Jackson v. Virginia, 443 U.S. 307, 314, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("[A] conviction upon a charge not made ... constitutes a denial of due process."); In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense ... are basic in our system of jurisprudence."); Madden v. Tate, 1987 WL 44909, at *3 (6th Cir.1987) ("The Due Process Clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense.").

Valentine v. Konteh, 395 F.3d 626, 631–32 (6th Cir. 2005).

The Sixth Circuit Court of Appeals granted partial habeas relief finding, "While the indictment in this case did comply with the first prong of Russell by adequately setting out the elements of the charged offense, the multiple, undifferentiated charges in the indictment violated Valentine's rights to notice and his right to be protected from double jeopardy. The failure of the Ohio Court of Appeals to rectify these violations constitutes an unreasonable application of well-established constitutional law as announced by the Supreme Court." Valentine v. Konteh, 395 F.3d 626, 631 (6th Cir. 2005). The multiple unspecified counts of the indictment in the present case violated Petitioner's right to notice and right to be protected from double jeopardy. The indictment is unconstitutionally overbroad and vague because the time frame was not narrowed as much as possible and the lack of specificity within the broad time frame failed to provide sufficient notice depriving Petitioner of his right to procedural due process.

CONCLUSION

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

Respectfully Submitted,

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of April, 2020.