THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Thomas A. Russo, Presiding Circuit Judge – Abbeville County

C/A No. 2016-CP-01-355

ALFONZO ALEXANDER (#250547),

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Alfonzo Alexander appeals the Order of Dismissal issued by the Honorable Thomas A. Russo on March 11, 2020. The Appellant received the Order on March 31, 2020, from the Abbeville County Clerk of Court. The Appellant timely filed a Motion to Reconsider on April 6, 2020. The State served its Return on May 4, 2020. However, Judge Russo never ruled on the Appellant's Motion prior to leaving the bench. This matter was heard in Laurens County on June 6, 2019.

THE HENDERSON LAW FIRM, P.C.
Trial Attorney for the Appellant

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November 20, 2020

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ABBEVILLE	)	FOR THE EIGHTH JUDICIAL CIRCUIT
	)	
Alfonzo Alexander, #250547,	)	
	)	
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	2016-CP-01-355
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief filed on December 28, 2016, by Alfonzo Alexander (Applicant) and later amended through his post-conviction relief counsel on May 8, 2019. The State (Respondent) filed a Return on May 22, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on June 6, 2019, at the Laurens County Courthouse. Applicant was present at the hearing and represented by Carson Henderson, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Patricia Bolen, Esquire (Counsel), Neil Henderson, Chris Wilkie, Raymond Vandiver, Larry Ashley, John Gray, and Assistant Solicitor Christopher "Cam" Morrow of the Sixteenth Circuit Solicitor's Office also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined to the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk of Court. In January 2013, the Abbeville County Grand Jury indicted Applicant for

possession of crack cocaine with intent to distribute within the proximity of a school or park (2013-GS-01-0014) and possession of crack cocaine with intent to distribute (2013-GS-01-0015). Public Defender Janna Nelson and Assistant Public Defender Patricia Bolen of the Eighth Circuit Public Defender's Office represented Applicant. Assistant Solicitors Yates Brown and Christopher "Cam" Morrow of the Eighth Circuit Solicitor's Office prosecuted the case.

On May 28-30, 2013, the State called Applicant's case to a jury trial before the Honorable Frank R. Addy, Jr. Applicant was not present for trial and was tried in his absence. The jury found Applicant guilty as indicted for possession of crack cocaine with intent to distribute. Applicant's charge of possession with intent to distribute within proximity of a school or park was dismissed on Counsel's directed verdict motion at the close of the State's case. As Applicant was not present for his sentencing, Judge Addy sealed Applicant's sentence until he returned to the court's jurisdiction. On September 18, 2013, Applicant appeared with Counsel before Judge Addy in Greenwood County. Judge Addy unsealed and published Applicant' sentence, which imposed a twenty-nine year sentence on Applicant.

Applicant filed a timely notice of appeal. Appellate Defender LaNelle Cantey Durant of the Office of Appellate Defense perfected the appeal. In his brief to the South Carolina Court of Appeals, Applicant raised the following issues:

I. Did the trial court err in denying Appellant Alexander's motion to suppress the crack cocaine based on a violation of his Fourth Amendment rights because there was no sufficient reliability of the anonymous call to conduct an investigative stop; the police did not have reasonable suspicion based on specific and articulable facts that Alexander was armed and dangerous before conducting a Terry frisk; and the police did not have cause to pull any objects from Appellant Alexander's pocket after the officer said nothing felt like a gun during the pat down?

II. Did the trial court err in qualifying Lieutenant John Gray of the Abbeville Police Department as an expert in the field of narcotics investigation which was not specialized knowledge outside the purview of the average juror and which did not meet the requirements of Rule 702, SCRE?

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction on October 14, 2015. State v. Alfonzo Alexander, Op. No. 2015-UP-485 (S.C. Ct. App. filed October 14, 2015). Applicant subsequently filed a petition for a writ of certiorari to the South Carolina Supreme Court. The Supreme Court denied the petition by order dated September 8, 2016. The Remittitur was returned on September 14, 2016.

SUMMARY OF FACTS

On August 12, 2012, at 1:16AM an anonymous call came in to 911 reporting gambling and drug distribution was taking place in apartment 401 at the Oakland Apartments on Virginia Street in Abbeville. Lt. John Gray and Officer Larry Ashley with the Abbeville Police Department responded to the apartment complex. Upon arrival, officers observed subjects sitting outside of the apartment and made contact. One of the subjects, Ella Brown (Brown), stated she lived in the apartment officers were responding to and officers explained the complaint they received through 911. At that time, Brown testified she "opened the door for him." (Trial Tr. 197.) Once inside, officers could smell marijuana, and observed nine adults and two children inside the residence, including Applicant. (Trial Tr. 155.) Officers noted there was a baggie of marijuana at Applicant's feet, and they observed baggies coming out of Applicant's pockets and a large wad of money in his hand. The officers conducted pat downs of the occupants for officer safety purposes. During the pat down of Applicant, officers felt a small square in one of his pockets and asked if they could remove the contents of his pocket. (Trial Tr. 156.) Applicant consented and the officer removed a small square digital scale, baggies, and a single baggie that contained suspected crack cocaine from his pocket. (Trial Tr. 156.) Lt. Gray collected the suspected crack cocaine, packaged it, and sent it to SLED for testing. (Trial Tr. 158-159.) SLED results showed the substance collected from Applicant's pocket was 6.8 grams of crack cocaine. (Trial Tr. 224.)

ALLEGATIONS RAISED

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
    a. Failed to object to trial judge Frank R. Addy, Jr.'s impermissible mandatory presumption charge to the jury that shifted the prosecutor's burden of proof
    b. Failed to object to trial judge's denial of his motion for a directed verdict of acquittal in order to preserve the issue for Appellate Court review.
    c. "Ms Bolen knew from the arrest report numerous witnesses that were present at the place of arrest during the encounter between Mr. Alexander and arresting officer Lt. Gray whom could have given key testimony that would have challenged Lt Gray's testimony that Mr. Alexander allegedly gave him consent to remove the contents from his pocket"
    d. "Failed to object to Judge Addy using his opinion of Officer Lt. Gray's testimony over the facts of Lt. Gray's testimony in the motion to suppress part of the trial in which Judge Addy states on pg. 106 in Trans. in response to Counsel's statement that Officer Lt. Gray testified that none of the things he felt, felt like weapons, that Lt. Gray didn't have the right to ask to pull anything out. Judge Addy said I understand. He continues to say I think the officer may not have known or apparently was not entirely sure what the 2 items were."

2. Conflict of Interest
    a. "Judge Frank Addy was bias and prejudice against the defense of Mr. Alfonzo Alexander and was a conflict of interest"

On May 8, 2019, Applicant, through counsel, amended his application to allege the following:

1. Counsel was ineffective for failing to file a motion to quash the indictments against him. The sole witness for the State listed on the two indictments was Neil Henderson, Abbeville Police Department. Applicant believes Mr. Henderson did not appear or testify before the Abbeville County Grand Jury on May 30, 2013. Upon information and belief, Mr. Henderson had no first-hand knowledge of the events surrounding Applicant's arrest on or about August 12, 2012.

2. Counsel was ineffective for failing to raise an objection to the arresting officers' actions pursuant to the Applicant's South Carolina constitutional right against unreasonable invasions of privacy under Article I, §10. The arresting officers did not have reasonable suspicion of illegal activity at the targeted residence prior to approaching the residence and asking the tenant to open the door so they could look inside.

On June 6, 2019, an evidentiary hearing was convened. Applicant proceeded with the hearing only on the allegations set forth in his amended application. Accordingly, these are the only allegations that will be addressed in this order.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Testimony of John Gray

During the evidentiary hearing, John Gray (Gray) testified. Gray testified he was a lieutenant with the Abbeville Police Department in August of 2012. Applicant introduced a Computer-Aided Dispatch (CAD) report of the 911 call that came in to dispatch on the night of the incident. (Plaintiff's Exhibit 3.) Applicant introduced the incident report of Applicant's arrest. (Plaintiff's Exhibit 4.) Gray testified the CAD report shows a 911 call coming in at 1:33AM and sixteen minutes later Gray and two other officers arrived on scene. Gray testified during that sixteen minutes, he did not do any investigation before he responded to the call. Gray testified he was familiar with Oakland apartments. Gray testified he had Officer Larry Ashley (Ashley) in the car with him and a female officer arrived on scene in her own patrol car. Gray testified he and Ashley approached the door together. Gray testified he did not know who made the 911 call. Gray testified he did not see anyone doing drugs, gambling, or trespassing when they approached the door. Gray testified he did not smell marijuana when he approached the door and did not hear any loud music. Gray testified he did not go before the grand jury to testify when Applicant's indictments were obtained.

On cross-examination, Gray testified the 911 call reported criminal activity was occurring inside the residence, not outside. Gray testified Ella Mae Brown (Brown) was the leaseholder of the residence and was sitting outside of the apartment when he and Ashley approached. Gray testified he did not have to knock on Brown's door as she was sitting outside of her residence and she opened the door to her residence and let him and Ashely inside. Gray testified Applicant did

not live at the apartment. Gray testified he did not obtain the arrest warrant for Applicant. Gray testified he briefed Lt. Vandiver (Vandiver) about the case at their shift change and he obtained the arrest warrant for Applicant. On re-direct, Gray testified Vandiver was not on scene the night Applicant was arrested.

Testimony of Larry Ashley

Ashley testified he was on scene at the Oakland Apartments the night of the Applicant's arrest. Ashley testified he rode with Gray that night and they responded to Oakland Apartments. Ashley testified they were dispatched to the apartment complex. Ashley testified he did not do any investigation before responding to the 911 call because he did not know if there was something to investigate. Ashley testified he did not call the number that called 911 because he did not have the phone number. Ashley testified he and Gray walked together toward the complex and did not see any criminal activity. Ashley testified he was sure Vandiver was not present at the scene. Ashley testified he did not appear before the grand jury in this case.

On cross-examination, Ashely testified the renter of the apartment was sitting outside of the residence. Ashely testified they explained why they were there and she consented to them going into her residence.

Testimony of Neil Henderson

Neil Henderson (Henderson) testified that he was employed as the Chief of Police for the Abbeville Police Department at the time of Applicant's arrest. Henderson testified he was not aware of the incident involving Applicant's arrest. Henderson testified he was not at the scene the night of Applicant's arrest. Henderson testified he has never seen Applicant before and was not familiar with the indictments. Henderson testified he did not appear before the grand jury in Applicant's case. Henderson testified he gave PCR Counsel names of people who may have

testified before the grand jury in Applicant's case. Henderson testified he told PCR Counsel Chris Wilkie (Wilkie) may have testified before the grand jury.

On cross-examination, Henderson testified Vandiver was a court officer with the Abbeville Police Department. Henderson testified a court officer is a liaison between the police department and the solicitor's office. Henderson testified at that time there were about twenty sworn officers with the Abbeville Police Department.

Testimony of Chris Wilkie

Wilkie testified he talked to Vandiver about this case and Vandiver told him he did not remember testifying before the grand jury in this case. Wilkie testified he was not present at the incident location where Applicant was arrested. Wilkie testified he does not recall whether or not he presented to the grand jury in this case, but that he has testified before the grand jury on two occasions, but does not recall if it was for Applicant's case.

Testimony of Applicant

Applicant testified he understands post-conviction relief can only grant him a new trial and that he cannot get a new sentence or moved to a new facility. Applicant testified wants to go forward with his application. Applicant testified he was at Brown's apartment that night and there was no illegal activity occurring outside of the apartment. Applicant testified Gray, Ashley, and a female officer were there that night. Applicant testified Vandiver was not there that night. Applicant testified he believes trial counsel was ineffective.

On cross-examination, Applicant testified he did not show up to his trial. Applicant testified he did not live at the apartment where he was arrested.

Testimony of Patricia Bolen

Patricia Bolen (Bolen) testified by phone during the post-conviction relief hearing. Bolen testified she has been practicing law since 2006, but moved to Virginia in 2017 and has since

become licensed to practice law in Virginia. Bolen testified she was a prosecutor in South Carolina for about four and a half years and then worked in the public defender's office. Bolen testified she was appointed to Applicant's case. Bolen testified, according to her notes, she met with Applicant in her office, talked to him over the phone, texted with him, and sent him letters during her representation. Bolen testified Applicant was out on bond while his case was pending. Bolen testified they reviewed his charges, SLED results, talked about the allegations being made against him by the State, discussed 4th Amendment issues, and discussed a resolution to his case. Bolen testified she discussed potential defenses in his case and reviewed everything about the case with Applicant. Bolen testified Applicant never wanted a trial.

Bolen testified she did review Applicant's indictments and did not see any facial irregularities. Bolen testified the indictment comported with the statutes Applicant had been charged with, and provided Applicant sufficient notice. Bolen testified the indictments were signed by the jury foreman and true billed. Bolen testified any motion to squash the indictment would have had to have been made prior to the jury being sworn in Applicant's case. Bolen testified if she had made a motion to quash the indictment, the State would have simply re-indicted Applicant after fixing the indictment. Bolen testified she does know Vandiver. Bolen testified Vandiver was the officer who got the arrest warrants in Applicant's case. Bolen testified Vandiver retired at some point in 2013 from the Abbeville Police Department.

Bolen testified the facts of Applicant's case was that he was at the Oakland Apartments at 1:00 a.m. or 1:30 a.m. and officers received a call that there was gambling and drug use going on at that apartment. Bolen testified officers responded and the older woman who rented the apartment was sitting outside when officers arrived. Bolen testified the woman let the officers into her apartment. Bolen testified officers went in and observed one bag of marijuana under the kitchen table and one bag by Applicant's feet. Bolen testified officers searched everyone and

found a plastic bag of crack cocaine on Applicant and arrested him. Bolen testified Applicant's version of the facts were that the woman gave cops permission to come inside and he was searched first and then handcuffed. Bolen testified no one was arrested for the marijuana. Bolen testified Applicant did not believe he had a right to privacy because he did not live at that apartment. Bolen testified she talked with Applicant about the weight of the drugs. Bolen testified Applicant wanted her to focus her efforts on getting him the best deal she could. Bolen testified there were a number of negotiations and Applicant was looking for something in the eight to ten year range. Bolen testified she received a final offer of a twelve year plea or ten to fifteen range. Bolen testified she conferenced with the judge and he told Bolen that he would not go lower than twelve. Bolen testified she always goes over with her clients their constitutional rights. Bolen testified Applicant told her she did not need to keep going over his constitutional rights with him but she told him it was important. Bolen testified Applicant was never interested in a trial and wanted a guilty plea.

Bolen testified she believes Applicant was aware of his court date and sent him a trial notice letter in late April. Bolen testified she met with Applicant on May 23, 2013, and told him he needed to come to court Tuesday, May 28, 2013, to take the plea. Bolen testified Applicant was notified in writing and verbally of his court date. Bolen testified she asked for a continuance when Applicant did not show up for his court date. Bolen testified the trial judge gave her the remainder of that day to find Applicant and issued a bench warrant for him. Bolen testified the trial judge told her the trial would start the next day. Bolen testified she spent a long time looking for him, trying to contact him, and visited apartments looking for him.

Bolen testified she filed a suppression motion prior to trial that was twofold. Bolen testified her motion challenged the response by officers to the anonymous 911 call because they did not have reasonable suspicion to approach the apartment and for patting down Applicant. Bolen testified she is familiar with Article I §10 of the South Carolina Constitution. Bolen testified she

did not argue her suppression motion under the privacy provision because it was not Applicant's home. Bolen testified Applicant told her it was not his house and she did not feel that argument had any merit.

Bolen testified she is familiar with the appellate records in this case. Bolen testified the denial of the suppression motion was appealed and it was affirmed by the higher court. Bolen testified she moved for a directed verdict on the proximity charge and that was granted.

On cross-examination, Bolen testified she went over the 4th Amendment issue with Applicant but Applicant told her he had no right to privacy because it was not his house. Bolen testified the trial judge did not rule on the South Carolina constitution issue because she did not raise it. Bolen testified she agrees that the indictment lists Henderson as the witness. Bolen testified she did not discuss Henderson's grand jury testimony with him.

On re-direct, Bolen testified she did not look into an indictment issue because the purpose of the indictment is to inform the defendant about what they are charged with and nothing on the face of the indictment looked invalid. Bolen testified she did not know who testified and does not believe she could have obtained that information.

On re-cross, Bolen testified she does not know whether or not Henderson testified. Bolen testified she agrees if she had called Henderson she could have found out that he did not testify, but all that would have happened is the State would have recalled the case thirty days later. Bolen testified that delay would not have helped Applicant because they made great efforts to find him, investigators were going around looking for Applicant, and she believes he did not want to be found.

Testimony of Christopher "Cam" Morrow

Christopher "Cam" Morrow (Morrow) testified at the post-conviction relief hearing. Morrow testified that he was one of the two prosecutors on Applicant's case. Morrow testified he

does not recall any issues with Applicant's indictments. Morrow testified the indictments were true billed and signed by the foreman. Morrow testified if the defense had successfully quashed Applicant's indictment, he would have obtained new indictments on Applicant. Morrow testified he cannot think of anything that would have prevented the State from being able to obtain indictments against Applicant in this case.

On cross-examination, Morrow testified the grand jury is secret so he wouldn't have thought to check witness's name. Morrow testified he is aware that the witness is supposed to have first-hand knowledge.

Testimony of Raymond Vandiver

Vandiver testified that he is a former lieutenant with the Abbeville Police Department. Vandiver testified in 2013 he was a shift supervisor and court officer. Vandiver testified that a court officer got all the cases together and statements. Vandiver testified part of the court officer's job is to testify before the grand jury. Vandiver testified the solicitor's office sends him a notification about when the grand jury is meeting. Vandiver testified he prepared for the grand jury by talking to officers who had personal knowledge about the cases he would be presenting and in some cases he testified for cases with which he was directly involved.

Vandiver testified in Applicant's case he obtained the arrest warrant and the indictments. Vandiver testified he talked to Gray about Applicant's case before testifying before the grand jury. Vandiver testified he was sworn in before he testified before the grand jury.

On cross-examination, Vandiver testified he is absolutely sure he testified before the grand jury in Applicant's case. Vandiver testified he was not present at the scene so he had no first-hand knowledge of the incident. Vandiver testified the solicitor swore him in before he testified for the grand jury. Vandiver testified he told the solicitor the indictment did not list his name, but the solicitor told him it would be alright. Vandiver testified he did all grand jury proceedings in

Abbeville, but he did not have first-hand knowledge in some cases. Vandiver testified he told the grand jury that he was not the person listed on the indictment, so the jurors in the grand jury knew he wasn't Neil Henderson. Vandiver testified the indictments went into each folder before he went to the grand jury and he gave that folder to the grand jury.

APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order 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. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 300 S.C. 115.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, and Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, Applicant's appellate records, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency on the part of Counsel and any prejudice therefrom. Each of Applicant's specific allegations are addressed below:

Counsel constitutionally ineffective for failing to make a motion to quash Applicant's indictments

Applicant alleges Counsel was ineffective for failing to make a motion to quash Applicant's indictments based on the belief that the witness listed on the indictment did not testify before the Abbeville County Grand Jury.

An indictment is valid under South Carolina law if it "contains the necessary elements of the offense intended to be charged and sufficiently apprised the defendant of what he must be prepared to meet." State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted). Here, Counsel testified Applicant's indictments appeared to be facially valid, true billed, and signed by the foreman. As Counsel testified, the indictments provided Applicant with sufficient notice of the crimes for which he was charged.

"South Carolina courts have held the sufficiency of an indictment must be viewed with a practical eye. All the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached." State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted). Here, it is undisputed that Applicant's indictments were presented to the Abbeville County Grand Jury and, although the name of the witness listed on the indictment was not the witness who testified before the grand jury, Vandiver testified at the post-conviction relief hearing that he was the officer who testified before the grand jury in Applicant's case. Vandiver testified he was a court officer and shift lieutenant with the Abbeville Police Department at that time and, as the court officer, it was his job to present cases to the grand jury. Vandiver testified he would be notified by the solicitor's office of the upcoming grand jury terms and he would prepare the cases that were to be presented to the grand jury. Vandiver testified, for cases he presented that he was not directly involved in, he would talk with officers who had first-hand knowledge of the case prior to presenting that case to the grand jury.

Vandiver testified he did not respond to the scene in Applicant's case, but was briefed by Gray at shift change regarding Applicant's case. Vandiver testified he obtained the arrest warrants for Applicant. Vandiver testified when he presented Applicant's case to the grand jury he informed the grand jury that he was Lt. Raymond Vandiver and not the listed witness, Neil Henderson, on the indictment prior to testifying.

The S.C. Code Ann. §14-7-1550 states:

> The foreman of the grand jury or acting foreman in the circuit courts of any county of the State may swear the 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.

As Vandiver testified, as the court officer for Abbeville Police Department, part of his duties was to present cases to the Abbeville County Grand Jury. Vandiver testified he was notified by the solicitor's office of when to appear for the grand jury proceedings and what cases to present. Although Vandiver's name did not appear on Applicant's indictments, the grand jury was aware of who Vandiver was because, as Vandiver testified, he told the grand jury his name and that he was not Neil Henderson prior to testifying. Vandiver also testified he was sworn in prior to providing testimony. Although Vandiver was not subpoenaed by the solicitor's office, it is evident from his relationship with that office, their communication regarding grand jury sessions and cases, and his job duties within the Abbeville Police Department that he would be considered bound over to appear before the grand jury.

Applicant's belief that a proper witness would have to have first-hand knowledge of the case in order to be properly before the grand jury is meritless. First-hand knowledge is not a requirement of S.C. Code Ann. §14-7-1550. "An indictment based upon hearsay testimony violates no right of appellant under Article 1, Section 17 (now Section 11) of the South Carolina Constitution. In fact, our decisions preclude inquiry into the factual basis for an indictment by the grand jury." State v. Williams, 263 S.C. 290, 210 S.E2d. 298 (1974) (citing Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417 (1961)). "An indictment returned by a legally constituted and unbiased grand jury, . . . , if valid on its face, is enough to call for trial of the charge on the merits." Id. at 296, 210 S.E.2d. at 301, (quoting Pittsburg Plate Glass Company v. United States, 360 U.S. 395 (1959)).

Applicant's allegation that Counsel was deficient for failing to make a motion to quash his indictments is also meritless. Applicant has failed to show this Court any actual abuse occurred during the grand jury proceeding, which Counsel could have used to justify quashing either of Applicant's indictments. "When a defendant timely moves to quash an indictment . . ., the [trial]

court must determine whether the defendant[']s constitutional right to have the criminal allegations against him weighed by a properly constituted grand jury has been violated." State v. Shands, 424 S.C. 106, 119, 817 S.E.2d 524, 531 (2018) (quoting Evans v. State, 363 S.C. 495, 510, 611 S.E.2d 510, 518 (2005)). "Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary." Shands, 424 S.C. at 120-121, 817 S.E.2d at 532 (quoting State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." Id. at 502, 409 S.E.2d at 424.

Here, Vandiver was briefed by Gray – the arresting officer - regarding Applicant's case, obtained the arrest warrants against Applicant, was in possession of the case file during the grand jury proceeding, was sworn in prior to testifying before the grand jury, and informed the grand jury who he was prior to providing the testimony that secured Applicant's indictments. Vandiver was clearly a proper witness to present Applicant's case to the grand jury and Applicant has failed to show any actual abuse of the grand jury proceeding occurred in this case.

Additionally, this Court finds Applicant has failed to meet his burden to prove prejudice under the Strickland analysis as he also failed to show this Court that the State would not have been able to re-indict Applicant had Counsel successfully quashed his initial indictments. At the post-conviction relief hearing, Morrow testified the State would have re-indicted Applicant had Counsel successfully quashed Applicant's original indictments. Counsel also testified the State would have re-indicted Applicant and he would have been called to trial at the next term of court in thirty days. Although Applicant argues that would have given Counsel additional time to locate Applicant, Counsel testified there was a considerable effort dedicated to locating Applicant for his trial and it was her belief that he did not want to be found, so the thirty days would not have changed Applicant being tried in his absence.

Further, had Counsel moved to quash the indictments, it is reasonable to believe the State could have located Vandiver to testify as to the regularity of the grand jury proceeding since the State was able to locate him for the post-conviction relief hearing nearly six years later. Henderson even testified there were only twenty sworn officers with the Abbeville Police Department at that time, so locating the officer who testified would have been a rather simple task, especially since they had an officer dedicated to presenting grand jury cases in their agency. Had Counsel moved to quash the indictments, the State could have presented Vandiver's testimony, and the trial court could have amended the indictment to reflect Vandiver's name and moved on with Applicant's case. Importantly, Applicant is not challenging the information contained in the indictment that substantiated Applicant's charges, only the name of the witness listed on the indictment. "An indictment may be amended provided such amendment does not change the nature of the offense charged." State v. Guthrie, 352 S.C. 103, 109, 572 S.E.2d 309, 313 (2002) (citing State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001), Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998) (finding that, under § 17-19-100, an indictment may be amended at trial only if amendment does not change nature of offense charged.)) Since such an amendment would not have changed the nature of Applicant's indictments, it is likely the trial court would have put Vandiver's name on the indictment at that time, especially since the grand jury was already aware that he was the witness before them at the time Applicant's indictments were issued.

Although Henderson's testimony shows an irregularity in Applicant's indictment, Applicant has failed to show how that irregularity impacted the grand jury's decision to issue the indictment in Applicant's case; especially since the grand jury knew the witness before them was not Henderson when they issued the indictment. Applicant has also failed to establish that the presentation of the evidence against Applicant during the grand jury process was not fairly or properly presented. See Commonwealth v. Silva, 455 Mass. 503, 512, 918 N.E2d 65, 77 (2009)

("The Commonwealth's presentation was sloppy in parts, but that sloppiness does not appear to have been designed to secure indictments, and the presentation to the grand jury appears to have been generally fair and balanced. In addition, the subjects of the defendant's claim of impairment probably had no impact or would have had no impact, on the decision to indict.")

In State v. Smith, 200 S.C. 188, 20 S.E.2d 726 (1942), the South Carolina Supreme Court addressed whether a jury panel should be quashed based upon Smith's contention that the venire was illegally drawn. In their holding the Court stated, "The defendant has not shown, or attempted to show, that he was prejudiced. . . . The drawing apparently was a public one, held at the proper time and place, and regularly conducted by the proper officers. Any irregularity has not affected the right of the defendant to a trial by a fair and impartial jury, nor prejudiced him in any way." Id. at 196-197, 20 S.E.2d 730. In Applicant's case, as Counsel testified, the indictment provided Applicant with sufficient notice of his charges, was true billed, and signed by the jury foreman. Applicant proceeded to a jury trial, which he has not alleged was unfair, on the same information that would have been presented to any subsequent grand jury by the *same witness that actually did testify* had Counsel been successful in quashing either of Applicant's indictments. Applicant has not shown how the irregularity would have impacted the grand jury's decision, or the State's ability to re-indict Applicant as he has not established that improper information was presented or Vandiver was not a proper witness to testify before the grand jury.

This Court finds the testimony of Counsel, Morrow, Vandiver, Henderson, and Gray with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing make a motion to quash his indictments. As Counsel credibly testified, she did not see a reason to challenge the indictments that appeared facially valid and provided Applicant with sufficient notice. Additionally, Applicant has failed to meet his burden to show how he was prejudiced by Counsel's alleged deficiency as Morrow testified the State

would have re-indicted Applicant for the charges had they been successfully quashed. Further, Vandiver's credible testimony shows the grand jury proceedings were regular and, although his name did not appear on the indictment, the grand jury knew who was testifying before them at the time they true billed Applicant's indictments. Therefore, Applicant has failed to meet his burden set forth in Strickland and this allegations must be denied and dismissed with prejudice.

Counsel was constitutionally ineffective for failing to raise an objection to the arresting officers' actions under S.C. Const. Art. I §10

Applicant alleges Counsel was ineffective for failing to use the privacy protections afforded to Applicant through the S.C. Const. Art. I §10 as grounds for suppression in her motion. However, Applicant's own testimony shows he was not a resident of the apartment where he was arrested and, therefore, had no reasonable expectation of privacy.

Beyond the protections afforded by the United States Constitution, the South Carolina Constitution provides its own protections to the state's citizens against unreasonable searches and seizures. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); see S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated[.]"); see also U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"). Primarily in order to guard against invasive technological advancements, the South Carolina Constitution also expressly protects our citizens from "unreasonable invasions of privacy." S.C. Const. art. I, § 10; see Forrester, 343 S.C. at 647, 541 S.E.2d at 842 ("[T]he drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches.").

Through the additional provision regarding invasions of privacy, "the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). Thus, "the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. However, the South Carolina Constitution by its express language only forbids searches, seizures, and invasions of privacy that are *unreasonable*. S.C. Const. art. I, § 10; see State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) ("It is only unreasonable searches and seizures that are prohibited."); see also Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]"). Accordingly, just like the search and seizure protections offered by the federal constitution, the touchstone of our state constitution's search and seizure protections is reasonableness. See Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."); see also Heien v. North Carolina, __ U.S. __, 135 S. Ct. 530, 536 (2014) ("To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.' " (citation omitted)).

Important in Applicant's case is his testimony that he did not live at the residence where the search occurred. Applicant was merely a temporary guest inside Brown's residence at the time she consented to law enforcement's search of her home. Under those circumstances, Applicant had *no* expectation of privacy—legitimate or otherwise—in the residence and, therefore, could not possibly meet his burden of establishing he had a reasonable expectation of privacy that was unlawfully violated. See State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987) (instructing a defendant seeking to challenge the propriety of a search or seizure must establish his own personal constitutional rights were violated by that search or seizure in order to be entitled to

the benefits of the exclusionary rule.) Accordingly, the trial judge's ruling refusing to suppress evidence discovered as the result of an allegedly unreasonable invasion of someone *other than* Applicant's state constitutional right to privacy was proper due to Applicant's lack of a reasonable expectation of privacy in Brown's residence. Cf. State v. Weaver, 374 S.C. 313, 326, 649 S.E.2d 479, 485 (2007) (Pleicones, J., concurring) ("Analysis of the facts of this case with our privacy provision in mind reveals no state constitutional violation. Although one's expectation of privacy in his automobile increases when that automobile is parked in the backyard of his private residence, [Weaver] in this case was not the owner of the Jeep that was seized. More importantly, the vehicle was not parked at [Weaver]'s residence. Our state constitution's provision protecting unreasonable invasions of privacy necessarily requires some analysis of the privacy interests involved when a warrantless seizure is made on private property. However, [Weaver] cannot show he had a reasonable expectation of privacy in the seized Jeep." (footnote omitted)).

Counsel further challenged the search by arguing the anonymous tip that sent officers to Brown's residence was not enough on its own for officers to approach the residence. (Trial Tr. 72-73.) Counsel argued law enforcement needed to corroborate the anonymous tip prior to questioning Brown because officers did not see any gambling or drugs upon arrival at her residence. (Trial Tr. 72-73.) However, this Court finds the trial court properly denied Counsel's suppression motion as law enforcement's actions were based on a consensual search of a residence where Applicant had no expectation of privacy. (Trial Tr. 80-81.)

The citizens of the United States—including the citizens of South Carolina—have extended an implicit license through deeply-ingrained customs and practices to their fellow citizens to approach their homes, knock on their doors, wait to be received, attempt to speak with them, and then depart absent some invitation to stay longer. Florida v. Jardines, 569 U.S. 1, 8 (2013). Historically, that implicit license has been extended to all manner of visitors and has granted door-

to-door salesmen, service providers, evangelicals, neighbors, *law enforcement officers*, and anyone else who might wish to do so an equal opportunity by which they can attempt to make contact with the residents of a home regardless of their particular motives for doing so. See id. at 9, n. 4 (recognizing "*all are invited*" to approach a home to speak with an occupant pursuant to the implicit license). Thus, even though every homeowner might not need—or even have the remotest desire—to buy a new vacuum cleaner or box of cookies, obtain assistance with yard maintenance, speak to a stranger who wants to discuss religion or some other topic, lend a cup of sugar, or chat with an officer of the law, a citizen of our state and country can permissibly approach a home and knock on the door in an effort to talk to someone inside solely by virtue of the implicit license derived from long-standing customs and practices. Id. at 8.

Traditionally, law enforcement officers-including those in South Carolina- have been fully entitled to avail themselves of that implicit license and, just like everyone else, have been permitted to approach a home to speak with someone residing inside regardless of their purpose for doing so, including if that purpose was to conduct a "knock-and-talk." See Kentucky v. King, 563 U.S. 452, 469-470 (2011) (recognizing law enforcement officers not armed with a warrant ordinarily do not violate an individual's constitutional rights by approaching a home and knocking on a door). Demonstrating that fact, the South Carolina Supreme Court expressly recognized law enforcement officers were *obviously* entitled to go to a person's home and door to interview that person through its decision in State v. Wright, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011), which was decided a year before officers approached Brown's residence in Applicant's case. Specifically, in Wright, law enforcement officers received an anonymous tip dogfighting was taking place at a mobile home, drove past the residence identified in the tip on a public road to investigate, and observed a large number of vehicles and shining spotlights at the residence. Id. at 440, 706 S.E.2d at 325. Based on their observations, the officers stealthily approached the home

in multiple vehicles by driving down a private dirt road and activated their headlights just as they neared the home. Id. at 440, 706 S.E.2d at 326. When they did so, the officers saw people and dogs running away along with a portable dogfighting pit that was being dismantled. Id. In response, the officers detained the people who attempted to flee, arrested Wright and his co-defendants, captured as many dogs as they could, and seized numerous items of evidence related to dogfighting that were found in plain view. Id. at 440-441, 706 S.E.2d at 326. Following their arrests, Wright and the others moved prior to trial to suppress the evidence due to the fact the officers seized it after making a warrantless entry onto private property, and the circuit court judge granted their suppression motions. Id. at 441, 706 S.E.2d at 326. Subsequently, the State appealed the circuit court judge's ruling, and the Supreme Court reversed. Id. at 446, 706 S.E.2d at 329. In reversing, the Supreme Court specifically found the officers' entry onto the private road and approach of the mobile home were constitutionally proper because the officers had investigative authority to enter the property *even if* the officers had not developed a reasonable basis for proceeding forward at the time they did so. Id. at 444-445, 706 S.E.2d at 328.

Notably, just three years *after* the officers approached Brown's residence, the South Carolina Supreme Court articulated a new rule in State v. Counts, 413 S.C. 153, 167, 776 S.E.2d 59, 67 (2015). In Counts, the Supreme Court held that law enforcement officers in South Carolina must possess reasonable suspicion in order to approach a residence for the purposes of conducting an investigative "knock-and-talk." Id. at 172, 776 S.E.2d at 70. Counts is distinguishable from Applicant's case because the appellant in Counts challenged whether the officers had reasonable suspicion to approach *his residence*, whereas Applicant was admittedly not in his own residence at the time officers approached Brown.

Additionally, because the Supreme Court's decision in Counts had not yet been issued at the time of the officers' actions in Applicant's case, it was not available to guide their actions. At

that time, the officers' actions did, in fact, comply with the relevant and applicable precedent on both "knock-and-talks" and the implicit license that has been extended to everyone, including the officers, by our state's citizenry through long-standing customs and practices. The officers in Applicant's case acted within the then-controlling precedent set by the South Carolina Supreme Court, the United States Supreme Court, and the Fourth Circuit Court of Appeals and it was, therefore, objectively reasonable for the officers in Applicant's case to believe they had the investigative authority to approach Brown's residence. Further, Counts was not available to Counsel to argue during her suppression motion either, although, because Applicant was not in his own home, it would not have provided much merit. Counsel is not required to be clairvoyant or anticipate changes in the law that were not in existence at the time of trial. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)).

This Court finds Counsel's testimony with respect to this allegation very credible. This Court finds Applicant has failed to establish how Counsel was deficient for failing to argue S.C. Const. Art. I, §10 in her suppression motion as Applicant did not have a right to privacy in Brown's residence and officers' actions were proper under the controlling precedent at the time of Applicant's arrest. Further this Court finds, Applicant has failed to show any resulting prejudice from the alleged deficiency. Based on the forgoing, Applicant has failed to meet his burden set forth in Strickland and these allegations must be denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 11th day of March, 2020

THOMAS A. RUSSO
Presiding Judge
Eighth Judicial Circuit

Florence, South Carolina

ALAN WILSON
ATTORNEY GENERAL

March 25, 2020

The Honorable Emily Yeargin McMahan
Clerk of Court, Abbeville County
Post Office Box 99
Abbeville, South Carolina 29620

Re: **Alfonzo Alexander, #250547 v. State of South Carolina**
2016-CP-01-0355

Dear Ms. McMahan:

Enclosed please find the original **Order of Dismissal**, signed by the Honorable Thomas A. Russo, in the above-captioned case for filing in your office. Please forward a **time stamped copy** back to our office for our file.

Sincerely,

Janell H. Gregory for JHG
Assistant Attorney General

JHG/ks
Enclosure(s)

cc: Carson M. Henderson, Esquire

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

COUNTY OF ABBEVILLE)

CASE NO.: 2016-CP-01-355

ALFONZO ALEXANDER (#250547),
Plaintiff,

vs.

STATE OF SOUTH CAROLINA,
Defendant.

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
CARSON M. HENDERSON, Bar No. 15348 Address: 109-B OAK AVENUE, GREENWOOD, S.C. 29646 Phone: 864-229-8000 Fax_____ E-mail: _____Other: _____	JANELL GREGORY, Bar No. _____ Address: P.O. BOX 11549, COLUMBIA, S.C. 29211-1549 Phone: 803-734-3970 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 1, 2020 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: _____
- ☐ 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)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ABBEVILLE)	EIGHTH JUDICIAL CIRCUIT
)	
ALFONZO ALEXANDER)	
(#250547),)	
)	
Applicant,)	**APPLICANT'S MOTION TO RECONSIDER**
)	
v.)	C/A No. 2016-CP-01-355
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	
)	

The Applicant Alfonzo Alexander, by and through his attorney of record, respectfully asks the Court to reconsider its Order of Dismissal dated March 11, 2020, wherein the Court dismissed the Applicant's PCR application. The Applicant's attorney received a signed but not filed copy of the Order by email from the Office of the Attorney General on Friday, March 27, 2020. The Applicant's attorney received a filed copy of the Order in the United States mail on Tuesday, March 31, 2020, from the Abbeville County Clerk of Court.

The Applicant submits that the Court should reconsider its Order and thereafter amend its Order as follows:

1. On page 3 under Summary of Facts, the second line indicates that 911 received information that drug distribution was taking place in Apartment 401. This isn't accurate. The report made to 911 indicated that "people [are] doing drugs" in Apartment 401. The 911 CAD Incident Detail is in evidence as Applicant's Exhibit 3.

2. On page 3 under Summary of Facts, the sentence which begins "Once inside" through the end of the paragraph on the page is not relevant to the issues raised by the Applicant in his PCR application and should be deleted from the Order.

3. On page 8 in the first full paragraph, the Order reads: "Bolen testified any motion to []quash the indictment would have had to have been made prior to the jury being sworn in Applicant's case." This is incorrect. In Evans v. State, 611 S.E.2d 510, 516, note 7 (S.C. 2005), our Supreme Court held as follows:

Although this case involves the state grand jury, we similarly conclude that challenges to the legality and sufficiency of the process of a county grand jury also must be made before the jury renders a verdict in order to preserve the error for direct appellate review.

We recognize that in Gentry, relying on Section 17-19-90, we held the sufficiency of an indictment must be challenged before the jury is sworn. In contrast, a challenge to the legality or sufficiency of the process of the grand jury must be made before the jury renders its verdict pursuant to Section 14-7-1140.

4. Beginning on page 13 under "Counsel constitutionally ineffective for failing to make a motion to quash Applicant's indictments," the Order provides the indictments were sufficient because Officer Raymond Vandiver, who testified before the grand jury, was notified by the solicitor's office of upcoming grand jury terms, prepared cases to be presented to the grand jury, talked to officers who had first-hand knowledge of the cases to be presented to the grand jury, informed the grand jury that he wasn't Neil Henderson prior to testifying, and identified himself to the grand jury as Raymond Vandiver prior to testifying. All of this misses the point. Officer Vandiver wasn't sworn in by the grand jury foreperson (he was sworn in by someone from the solicitor's office), and he had no first-hand knowledge of the events alleged in the indictments. Assume for the sake of argument that Officer Vandiver's name was listed on the indictments as a witness (or his name was added to the indictments by the trial judge, if trial counsel had raised the issue): this still doesn't undo the facts that he wasn't sworn in by the grand jury foreperson and that he had no first-hand knowledge of the underlying events. The uncontradicted facts indicate an actual abuse of the grand jury proceeding by the State.

5. Beginning on page 19 under "Counsel was constitutionally ineffective for failing to raise an objection to the arresting officers' actions under S.C. Const. Art. I, § 10," the Order provides that Applicant had no rights under this provision because he didn't live in Apartment 401 and therefore had no expectation of privacy while in Apartment 401. This is incorrect. Anyone inside of any home, regardless of whether he lives in the home, has reason to believe that the police won't approach the front door of the residence on a fishing expedition to conduct a knock and talk. This is a most reasonable expectation. State v. Counts, 776 S.E.2d 59 (S.C. 2015) was decided while the Applicant's case was on direct appeal and doesn't limit the privacy protection to a person in his own home. Rushan Counts was tried in August 2009. The Applicant was tried in May 2013. The Applicant's trial counsel should have known to raise the state constitutional privacy argument on the Applicant's behalf.

6. The Court erred by failing to address the structural error argument made by the Applicant in Paragraph XIII. of his proposed order.

RESPECTFULLY SUBMITTED.

THE HENDERSON LAW FIRM, P.C.
Attorney for the Applicant

By: _____
Carson M. Henderson
109-B Oak Avenue
Greenwood, S.C. 29646
Phone: (864) 229-8000
Facsimile: (864) 229-8001

Greenwood, South Carolina

April 1, 2020

#3

GOS W 05/06/20

ALAN WILSON
ATTORNEY GENERAL

May 4, 2020

The Honorable Emily Yeargin McMahan
Clerk of Court, Abbeville County
Post Office Box 99
Abbeville, South Carolina 29620

Re: **Alfonzo Alexander, #250547 v. State of South Carolina**
2016-CP-01-0355

Dear Ms. McMahan:

Enclosed please find the original **Return to Applicant's Motion to Reconsider** of the Respondent in the above-captioned case for filing in your office.

Sincerely,

s/ Brianna L. Schill

Brianna L. Schill
Assistant Attorney General

BLS/ks
Enclosure

cc: The Honorable Thomas A. Russo
Carson M Henderson, Esquire

STATE OF SOUTH CAROLINA COUNTY OF ABBEVILLE	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
Alfonzo Alexander, #250547, Applicant, v. State of South Carolina, Respondent.	2016-CP-01-355 **RETURN TO APPLICANT'S MOTION TO RECONSIDER**

The State making its return to Applicant's motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, filed on April 1, 2020, would respectfully show this Court:

I. Procedural History

Applicant is presently confined to the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk of Court. In January 2013, the Abbeville County Grand Jury indicted Applicant for possession of crack cocaine with intent to distribute within the proximity of a school or park (2013-GS-01-0014) and possession of crack cocaine with intent to distribute (2013-GS-01-0015). Assistant Public Defender Patricia Bolen (Counsel) of the Eighth Circuit Public Defender's Office represented Applicant. Assistant Solicitors Yates Brown and Christopher "Cam" Morrow prosecuted the case.

On May 28-30, 2013, the State called Applicant's case to a jury trial before the Honorable Frank R. Addy, Jr. Applicant was not present for trial and was tried in his absence. The jury found Applicant guilty as indicted for possession of crack cocaine with intent to distribute. Applicant's charge of possession with intent to distribute within proximity of a school or park was dismissed on Counsel's directed verdict motion at the close of the State's case. As Applicant was not present for his sentencing, Judge Addy sealed Applicant's sentence until he returned to the court's

jurisdiction. On September 18, 2013, Applicant appeared with Counsel before Judge Addy in Greenwood County. Judge Addy unsealed and published Applicant' sentence, which imposed a twenty-nine year sentence on Applicant.

Applicant filed a timely notice of appeal. Appellate Defender LaNelle Cantey Durant of the Office of Appellate Defense perfected the appeal. In his brief to the South Carolina Court of Appeals, Applicant raised the following issues:

I. Did the trial court err in denying Appellant Alexander's motion to suppress the crack cocaine based on a violation of his Fourth Amendment rights because there was no sufficient reliability of the anonymous call to conduct an investigative stop; the police did not have reasonable suspicion based on specific and articulable facts that Alexander was armed and dangerous before conducting a Terry frisk; and the police did not have cause to pull any objects from Appellant Alexander's pocket after the officer said nothing felt like a gun during the pat down?

II. Did the trial court err in qualifying Lieutenant John Gray of the Abbeville Police Department as an expert in the field of narcotics investigation which was not specialized knowledge outside the purview of the average juror and which did not meet the requirements of Rule 702, SCRE?

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction on October 14, 2015. State v. Alfonzo Alexander, Op. No. 2015-UP-485 (S.C. Ct. App. filed October 14, 2015). Applicant subsequently filed a petition for a writ of certiorari to the South Carolina Supreme Court. The Supreme Court denied the petition by order dated September 8, 2016. The Remittitur was returned on September 14, 2016.

Applicant filed his PCR application on December 28, 2016. Applicant later amended through his post-conviction relief counsel on May 8, 2019. The State (Respondent) filed a Return on May 22, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on June 6, 2019, at the Laurens County Courthouse. Applicant was present at the hearing and represented by Carson Henderson, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing,

Applicant testified on his own behalf. Counsel, Neil Henderson, Chris Wilkie, Raymond Vandiver, Larry Ashley, John Gray, and Assistant Solicitor Christopher "Cam" Morrow also testified. After reviewing the testimony presented at the PCR hearing and relevant portion of the record before the Court, the Court denied Applicant's PCR application with prejudice. Applicant timely filed this motion to reconsider pursuant to Rule 59(e), SCRCP on April 1, 2020.

II. Allegations Raised

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
    a. Failed to object to trial judge Frank R. Addy, Jr.'s impermissible mandatory presumption charge to the jury that shifted the prosecutor's burden of proof
    b. Failed to object to trial judge's denial of his motion for a directed verdict of acquittal in order to preserve the issue for Appellate Court review.
    c. "Ms. Bolen knew from the arrest report numerous witnesses that were present at the place of arrest during the encounter between Mr. Alexander and arresting officer Lt. Gray whom could have given key testimony that would have challenged Lt Gray's testimony that Mr. Alexander allegedly gave him consent to remove the contents from his pocket"
    d. "Failed to object to Judge Addy using his opinion of Officer Lt. Gray's testimony over the facts of Lt. Gray's testimony in the motion to suppress part of the trial in which Judge Addy states on pg. 106 in Trans. in response to Counsel's statement that Officer Lt. Gray testified that none of the things he felt, felt like weapons, that Lt. Gray didn't have the right to ask to pull anything out. Judge Addy said I understand. He continues to say I think the officer may not have known or apparently was not entirely sure what the 2 items were."

2. Conflict of Interest
    a. "Judge Frank Addy was bias and prejudice against the defense of Mr. Alfonzo Alexander and was a conflict of interest"

On May 8, 2019, Applicant, through counsel, amended his application to allege the following allegations of ineffective assistance of counsel:

1. Counsel was ineffective for failing to file a motion to quash the indictments against him. The sole witness for the State listed on the two indictments was Neil Henderson, Abbeville Police Department. Applicant believes Mr. Henderson did not appear or testify before the

Abbeville County Grand Jury on May 30, 2013. Upon information and belief, Mr. Henderson had no first-hand knowledge of the events surrounding Applicant's arrest on or about August 12, 2012.

2. Counsel was ineffective for failing to raise an objection to the arresting officers' actions pursuant to the Applicant's South Carolina constitutional right against unreasonable invasions of privacy under Article I, §10. The arresting officers did not have reasonable suspicion of illegal activity at the targeted residence prior to approaching the residence and asking the tenant to open the door so they could look inside.

On June 6, 2019, an evidentiary hearing was convened. Applicant proceeded with the hearing only on the allegations set forth in his amended application. Based on this, the Court indicated it would only address the allegations set forth in Applicant's amended application.

III. Applicant's Motion to Reconsider

In his motion to reconsider, Applicant requests the Court alter or amend its findings as to: (1) the factual summary, (2) Counsel's testimony in which Counsel testified a motion to quash the indictment in this case would had to have been brought prior to the swearing in of the jury, (3) the Court's findings pertaining to the sufficiency of the indictment, (4) the Court's findings regarding Applicant's claim of ineffective assistance of counsel for failing to make a motion to quash Applicant's indictments, and (5) an alleged failure to address the structural error contained in Applicant's proposed order. The order of dismissal issued by this Court on March 11, 2020, contains the findings of facts and conclusions of law regarding these issues as required by section 17-27-80 of the South Carolina Code (2014) and Rule 52(a), SCRCP, and amendment of the order is not necessary to support the Court's ruling. The Court correctly found Applicant had failed to meet his burden as to either deficiency or prejudice as to all issues raised in the motion to alter or amend; therefore, the motion should be denied as to these issues.

1. *First Issue Regarding Summary of the Facts – Statement Regarding Gambling and Distribution Taking Place*

Applicant requests the Court to alter or amend its Order as it pertains to the summary of the facts. Applicant argues that the following fact from the Order is not supported by the record:

> "On August 12, 2012, at 1:16AM an anonymous call came in to 911 reporting gambling and drug distribution was taking place in apartment 401 at the Oakland Apartments on Virginia Street in Abbeville."

In support of his argument, Applicant cites to an incident report, Applicant's exhibit 1 from the PCR hearing, which, according to Applicant, states law enforcement was informed that "people [were] doing drugs" in apartment 401 on the night of Applicant's arrest. However, Lieutenant John Gray of the Abbeville Police Department testified to the following at Applicant's trial:

> "We received a call from our dispatch, that at Apartment 401 in Oakland Apartments in Abbeville City, that there was some gambling, drug use, and sales going on inside that apartment."
>
> (Trial Tr. 152).

The record clearly supports the fact as stated in the summary of facts, and therefore, the Court should not alter or amend the Order as it pertains to this issue.

2. *Second Issue Regarding Summary of the Facts – "Irrelevant Portions"*

Applicant also requests the Court to alter or amend its Order by deleting a substantial portion of the facts section. In the challenged portion of the facts, the Court describes what occurred after law enforcement entered the apartment in question, including the discovery of marijuana in the home, and other signs of drug distribution, including a large amount of cash, digital scale, and baggies. Applicant simply argues this portion of the facts is "not relevant" to Applicant's PCR allegations.

A factual recitation is included in nearly every order, and opinion, authored by the courts of this state. The facts are a critical part of the case, and, as such, should remain in the order of

dismissal. The factual summary contained in the Order speaks to the evidence presented which ultimately lead to the conviction of Applicant, a conviction ultimately leading to the allegations brought by Applicant in this PCR action. This is particularly true in Applicant's case, where he made allegations regarding the Fourth Amendment, and the portion of facts he wishes to delete pertain to the drugs found in the home after the renter gave police consent to enter. A complete recitation of the fact is an essential part of a PCR Order, and therefore, the Court should not alter or amend the Order as it pertains to this issue.

3. *Counsel's Testimony Regarding Motion to Quash*

Applicant also requests the Court to alter or amend its Order by deleting the following statement in the summary of Counsel's testimony: "Bolen testified any motion to quash the indictment would have had to have made prior to the jury being sworn in in Applicant's case." Applicant alleges this is incorrect because, according to Applicant, a motion would had to have been filed prior to the rendering of the verdict, not prior to the swearing in of the jury.

As an initial matter, this portion of the Order merely reflects the testimony of Counsel, not a finding of fact or law. Any argument regarding whether a motion would had to have been filed before the swearing in of the jury, or whether it would had to have been made prior to the rending of the verdict was not specifically discussed in the findings of law, as it was not crucial to Applicant's argument. Moreover, contrary to Applicant's assertion, the alleged issue with Applicant's indictment reflects an allegation of an insufficient indictment, not an issue with the legality of the process of the grand jury. Applicant pled in his amended application and attempted to present evidence to suggest that the indictment was facially invalid because the witness listed on the indictment was not the person who testified before the grand jury, and because Vandiver, the presenting witness, did not have first-hand knowledge.

Applicant cites to Evans v. State[1], to support the argument that a motion could have been made until the rendering of the jury's verdict. However, Evans highlights situations in which a motion can be made until the rending of the verdict, which are not present in this case. As Evans enumerates, a challenge to the sufficiency or legality of the grand jury process includes issues with the process of the grand jurors, including, the selection of jurors based on discriminatory means, or an irregularity in the makeup or selection of grand juror. Evans, 611 S.E.2d at 519. None of these issues are present here, nor have they been pled or proven by Applicant. Applicant's issue in this case clearly concerns an alleged issue with the sufficiency in the indictment. Moreover, to the extent Applicant uses the lack of first-hand knowledge of the testifying witness in support of his argument, this argument is also meritless as Vandiver's testimony is not an irregularity in the grand jury process. As Vandiver credibly testified, he frequently presented to the grand jury in criminal cases, despite the fact that he did not always have first-hand knowledge of the crimes. It was common practice for Vandiver to present to the grand jury for cases in which Vandiver did not necessarily have first-hand knowledge, and this was widely known by the defense, court, and Solicitor's Office. Accordingly, the Court should deny Applicant's motion to reconsider as to this issue.

4. Vandiver's Lack of First-Hand Knowledge; Swearing In by Solicitor's Officer

Applicant also requests the Court alter its findings as to the allegation of ineffective assistance of counsel for failing to quash Applicant's indictment. Applicant re-asserts his allegation that Counsel should have made a motion because Vandiver did not have first-hand knowledge of the incident, yet testified before the Grand Jury and because Vandiver was not sworn in by the Grand Jury Foreman.

[1] Evans v. State, 611 S.E.2d 510 (S.C. 2005).

First, to the extent Applicant argues the Court should add findings as to whether Vandiver should have been sworn in by the Grand Jury foreman specifically, this argument is without merit. Applicant did not assert in his pleadings that Counsel was ineffective for failing to quash the indictment on the basis that Vandiver was not sworn in by the Grand Jury foreman, but rather someone from the Solicitor's Office.

Moreover, even if Applicant had properly pled this allegation, this allegation is without merit. As The S.C. Code Ann. §14-7-1550 states:

> The foreman of the grand jury or acting foreman in the circuit courts of any county of the State *may* swear the 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.

Although it is unclear from the record who specifically swore in Vandiver prior to his grand jury testimony[2], the South Carolina Code does not require a grand jury witness to be sworn in by the Grand Jury foreman, nor does Applicant cite to any case law suggesting this is a requirement. The record shows Vandiver was sworn in by an unspecified individual from the Solicitor's Office prior to his testimony, enabling Vandiver to provide truthful and accurate testimony.

Additionally, to the extent Applicant re-asserts his claim that Counsel was ineffective for failing to move to quash the indictment due to Vandiver's lack of first-hand knowledge, this argument is equally without merit. In its Order, the Court found first-hand knowledge of a witness is not a requirement in a grand jury proceeding. As the Court properly found, first-hand knowledge is not a requirement of S.C. Code Ann. §14-7-1550. "An indictment based upon hearsay testimony

[2] Vandiver testified he was sworn in by a "Solicitor's Officer." (PCR Tr. 85).

violates no right of appellant under Article 1, Section 17 (now Section 11) of the South Carolina Constitution. In fact, our decisions preclude inquiry into the factual basis for an indictment by the grand jury." State v. Williams, 263 S.C. 290, 210 S.E2d. 298 (1974) (citing Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417 (1961)). "An indictment returned by a legally constituted and unbiased grand jury, . . . , if valid on its face, is enough to call for trial of the charge on the merits." Id. at 296, 210 S.E.2d. at 301, (quoting Pittsburg Plate Glass Company v. United States, 360 U.S. 395 (1959)). The Court properly determined that a witness need not have first-hand knowledge of the crime. As the Court properly found in support of this finding as it applies to this case, Vandiver informed the grand jury that he did not have first-hand knowledge of the case, but did testify that he spoke with Henderson, the officer with first-hand knowledge, prior to testifying before the grand jury. Applicant has not cited to any legal authority in support of his argument that the testifying witness must have first-hand knowledge of the crime. Additionally, as the Court's Order discussed, Applicant has not and cannot prove prejudice because both the Assistant Solicitor and Counsel testified that if there had been any issues with the indictment, the Solicitor's Office would have fixed the issues and simply re-indicted Applicant. (PCR Tr. 48, 78). Accordingly, the Court should not alter or amend its Order as to this issue.

5. *Fourth Amendment Privacy Issue*

Applicant also requests the Court alter or amend its Order as to the allegation of failing to raise an objection as to an alleged Fourth Amendment violation based on Applicant's right to privacy in an apartment that he did not reside in. In his motion to reconsider, Applicant cites to State v. Counts[3] to support his assertion that he had a right to privacy in another individual's apartment such that the officers violated his right to privacy by engaging in an unlawful "knock

[3] 776 S.E.2d 59 (S.C. 2015).

and talk", and therefore, Counsel was ineffective for failing to attempt to challenge the evidence on that basis. Counsel would not have been ineffective for failing to raise any issue supported by this case because, as PCR Counsel has acknowledged, this was case not decided until after Applicant's trial took place[4]. Applicant's argument would require clairvoyance on Counsel's behalf and would have required her to foresee the future of legal jurisprudence.

However, it is a long-standing rule that an attorney is not required to be clairvoyant and anticipate or discover changes in the law which were not in existence at the time of trial. Harden v. State, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004) (citing Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994)). Typically the rule arises in PCR matters where an applicant alleges defense counsel was ineffective for failing to present *at all* an argument or law not recognized or in effect until after trial. See, e.g. Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992) (counsel not deficient in failing to argue battered spouse syndrome six years before its recognition in State v. Hill[5]); Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (counsel not deficient in failing to object to "reach the truth" jury instruction five years before its prohibition in State v. Daniels[6]); Winkler v. State, 418 S.C. 643, 653-54, 795 S.E.2d 686, 692 (2016) (counsel not deficient in failing to object to trial court's refusal to answer jury question about what would happen if they failed to reach a unanimous sentencing verdict, where no precedent existed at the time of trial to support such an objection). Based on this, Applicant has not and cannot prove deficiency, and therefore, the Court should not alter or amend its Order as to this issue.

[4] Applicant's trial took place on May 28-30, 2013, two years prior to the Counts decision.
[5] 387 S.C. 398, 339 S.E.2d 121 (1986).
[6] 401 S.C. 251, 737 S.E.2d 473 (2012).

6. Structural Error Argument

Applicant requests the Court amend or alter its Order by adding an allegation that Applicant's indictment was invalid due to a structural error: the name of the testifying witness did not match the name of the witness listed on the indictment. However, Applicant did not plead this allegation in this fashion. At the commencement of the PCR hearing, Applicant confirmed he was moving forward on his amended application, which specifically alleged:

> 1. Counsel was ineffective for failing to file a motion to quash the indictments against him. The sole witness for the State listed on the two indictments was Neil Henderson, Abbeville Police Department. Applicant believes Mr. Henderson did not appear or testify before the Abbeville County Grand Jury on May 30, 2013. Upon information and belief, Mr. Henderson had no first-hand knowledge of the events surrounding Applicant's arrest on or about August 12, 2012.
>
> 2. Counsel was ineffective for failing to raise an objection to the arresting officers' actions pursuant to the Applicant's South Carolina constitutional right against unreasonable invasions of privacy under Article I, §10. The arresting officers did not have reasonable suspicion of illegal activity at the targeted residence prior to approaching the residence and asking the tenant to open the door so they could look inside.

Based on this, Applicant framed his allegation as ineffective assistance of counsel for failure to quash the indictment on the basis that Henderson, the name listed on the indictment, was not the individual who testified at the grand jury proceedings, and was not alleged strictly as a structural error issue. The Court adequately addressed this allegation, as well as Applicant's coinciding allegation that Counsel was ineffective for failing to make a motion to quash on the basis that the testifying grand jury witness did not have first-hand knowledge of the crime.

The Court found, citing to State v. Guthrie[7] and State v. Shands[8] in support of its finding that Counsel was not deficient for failing to file a motion to quash the indictment on either basis. The Court found that an indictment is valid if contains the necessary elements of the offense intended to be charged and sufficiently apprised the defendant of what he must be prepared to meet, and found that, as Counsel testified, Applicant was provided sufficient notice of the charges against him. The Court further found that Applicant did not show any actual abuse in the grand jury process. In so doing, the Court adequately addressed Applicant's claim of ineffective assistance of counsel for failure to move to quash Applicant's indictments. For these reasons, the Court should not alter or amend its Order as to this issue.

[7] 352 S.C. 103, 572 S.E.2d 309 (2002)
[8] 424 S.C. 106, 817 S.E.2d 524 (2018).

VII. Conclusion

Based on the foregoing, Applicant's motion should be denied. This Court's ruling was legally correct and supported by the record, and this Court should deny Applicant's request to alter or amend its ruling. The Court properly ruled on all issues before it after ample opportunity for Applicant to present his issues. Therefore, the motion should be denied as to all issues.

Respectfully submitted,

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May 4, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	
	)	
	)	2016-CP-01-0355
	)	
ALFONZO ALEXANDER, #250547,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return to Applicant's Motion to Reconsider** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Carson M. Henderson, Esquire
The Henderson Law Firm, P.C.
109-B Oak Avenue
Greenwood, South Carolina 29646

DATED this the 4th day of May, 2020.

Kaitlyn S. Slice, Legal Assistant
For Respondent