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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Cherokee County
The Honorable Robin B. Stilwell, Circuit Court Judge

Case No. 2017-001777

Alonzo C. Jeter, III, PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT.

INITIAL BRIEF OF PETITIONER (Amended)

Alonzo Columbus Jeter, III
PETITIONER/prose

Tyger River Correctional Institution
200 Prison Road
Enoree, South Carolina 29335

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II ARGUMENT AGAINST PRECEDENT - (Rule 217, SCACR), case of State v Wakefield, 323 SC 189, 473 SE2d 831 (1996), Regarding Church "Playgrounds" And Their Applicability To The S.C. Code Ann § 44-53-445, "Proximity" Statute. (A Church's "private" "playground" is not applicable)

STATEMENT OF THE CASE

Petitioner was charged with two counts of distribution of methamphetamine, third or subsequent offense (2015-GS-11-0461, 2015-GS-11-0463); two counts of distribution of methamphetamine within one-half mile of a park or school (2015-GS-11-0462, 2015-GS-11-0464), and one count of trafficking in methamphetamine 10-28 grams, third offense (2015-GS-11-0465). (Appx. pgs. 217-230)

Petitioner was represented by Christopher D. Kennedy, Esquire. On July 16, 2015, Appellant waived presentment to the grand Jury on all charges and pleaded guilty to the lesser included offenses of two counts of distribution of methamphetamine, second offense, and trafficking methamphetamine 10-28 grams, second offense. (App. pgs. 219, 225, 231) Appellant also pled guilty to two counts of distribution of methamphetamine within one-half mile of a park or school. (App. pgs. 222, 228)

Pursuant to a negotiated plea agreement, the Honorable Lee S. Alford sentenced Petitioner to 15 year concurrent sentencing terms for each count of distribution of methamphetamine and trafficking methamphetamine, and and 10 year concurrent sentences for each count of distribution of methamphetamine within one-half mile of a park or school.

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[1] Petitioner was also charged with possession of an ounce or less of marijuana (2014-GS-11-0591), second offense, and pleaded guilty to that charge in the same proceeding, receiving a sentence of time served. (Appx. p. 214-216) Appellant does not challenge that conviction.

Appellant did not appeal his guilty plea or sentence.

On April 28, 2016, Appellant filed an application for post-conviction relief (App. 26-37) wherein he stated he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel, in that:
   a. "Counsel failed to investigate and request continuence... Counsel could have discovered that the indictment(s) were not sufficient, among other things, if counsel would have not failed to investigate. A continuence would have given counsel more time to investigate, prepare for mitigation and bargaining, as well as time to discover the applicant's state of mind and needs."
   b. "Counsel failed to challenge insufficient indictments. Counsel failed to move to quash the insufficient indictments."
   c. "Counsel failed to present mitigating evidence and factors.
   d. "Counsel failed to obtain the original plea offer of seven (7) years."

2. Due Process Violation
   a. "My constitutional rights of due process under the Fourteenth Amendment, and applicable case law, was violated as counsel failed to request a competency hearing."

3. Lack of Subject Matter Jurisdiction
   a. "The court lacked subject matter jurisdiction to accept my guilty pleas."

Appellant also noted that he "Reserve the Right to Amend my Post-Conviction Relief Application." (App. p. 34, 35).

Appellant did contact his appointed PCR Counsel, Steven D. Epps, Esquire, by letter dated February 27, 2017, and asked that attorney Epps would amend his PCR application by adding, "Erroneously charged with 44-53-445 proximity - I should not have been charged with proximity to basketball goal located at a church. Attorney did not consult with me regarding a defense to the charges." (Supp. Appx. pgs. 4, 5). Appellant also informed PCR Counsel that, "I do not wish to vacate nor abandon any of the grounds that have already been asserted, which are also already in my PCR application." (Supp. Appx. pg. 4).

The State filed its Return on November 15, 2016. An evidentiary hearing into the matter was convened on March 20, 2017, at the Spartanburg County Courthouse before the Honorable Robin B. Stilwell. At the conclusion of the evidentiary hearing, the PCR Judge denied post-conviction relief with regard to Appellant's two charges for distribution of methamphetamine and took Appellant's claims as to the remaining charges under advisement. (App. p. 113).

On June 30, 2017, the PCR Judge held a hearing on a motion filed by the State to reopen the record in light of further investigation into Appellant's criminal record. (Appx. p. 121). Over objection, the PCR Judge did allow the State to present and add additional evidence in the record. (Appx. pgs. 123-124, 131-132). On July 24, 2017, Judge Stilwell signed an order denying relief. (Appx. pgs. 174-188).

Appellant filed a motion for reconsideration on August 8, 2017, pursuant to Rule 59, SCRCP. (App. p. 193-195)

The PCR court denied the motion on August 14, 2017. (Appx. p. 209). Appellant timely filed a Notice of Appeal on August 23, 2017, appealing the PCR court's denial of his application for post-conviction relief.

A merits petition for writ of certiorari was filed by Lanelle Durant, appointed counsel of the Office of Indigent Defense, on June 6, 2018. Appellant subsequently filed a motion requesting to proceed prose. Appellant's request was granted by the SCSupreme Court and he filed his prose petition for writ of certiorari on November 2, 2018. The State filed its Return on February 15, 2019. A Reply was filed by Appellant on March 6, 2019.

An Order was issued on October 19, 2020, granting the petition for writ of certiorari as to the proximity convictions.

Appellant argues as follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief Judge's findings. Cherry v State, 300 SC 115, 386 SE2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v State, 286 SC 441, 334 SE2d 813 (1985). The appellate court will defer to a post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law de novo, with no deference to trial courts. Smalls v State, 422 SC 174, 180-181, 810 SE2d 836, 839-840 (2018).

ARGUMENTS

I The PCR Court erred in finding that Plea Counsel was not ineffective for failing to provide adequate advice regarding the sell of a controlled substance within proximity of one-half mile of a playground, where the "playground" in question was a basketball goal which was property of a church and was located on the church's "private" grounds.

Relevant Facts

At the PCR evidentiary hearing, Appellant testified that the charges of distribution of a controlled substance within proximity of school, under S.C. Code Ann. §44-53-445, were based upon sales which occurred within one-half mile proximity of Macedonia Baptist Church. (Appx. p. 64).

Appellant testified that the church had a basketball goal, no playground, and no school was inside of the church. (Appx. p. 64,65). The indictments associated with the §44-53-445, proximity charges, indicated specifically that the charges were brought due to proximity of, "within one-half mile of Macedonia Baptist Church playground." (Appx. pgs. 221, 227). (Appx. pgs. 73-74)

Appellant testified that he was charged with two counts of proximity to Macedonia Baptist Church, and he should not have been charged with these charges. (App. p. 78 L. 18-19)

Plea Counsel testified that he didn't know anything about the church. (App. p. 85). Plea Counsel testified that it was his belief, "a church under the proximity statute complies with the half

mile. (Appx. p. 85).

Appellant testified that he had no access to a law book while he was being held within the Cherokee County Dedention Center as a pretrial detainee. (Appx. p. 143). Appellant testified that he didn't know the law concerning his charges and that was the purpose of his having an attorney. (App. p. 143). Appellant testified that therefore he had to just trust in the lawyer to know the law on everything. (Appx. p. 74, 65).

The PCR Judge would take under advisement the proximity charges. (Appx. p. 114). The PCR Judge ultimately signed an order denying the application for post-conviction relief on July 24, 2017.

Analysis

In its order denying post-conviction relief, the PCR Court set forth its findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80. In doing so, the PCR Court made its ruling under all areas in which Appellant's proximity issue was raised, which were (1) Failure to investigate and request a continuance. (Appx. p. 180); (2) Failure to challenge insufficient indictments. (Appx. p. 182-183); (3) Subject matter jurisdiction (Appx. p. 187).

In making its ruling the PCR Judge emphasizes as follows:

PCR Judge "And again, you might be right. I promise you, I'm not arguing with you. That's just my interpretation of the law. Take it up to the Court of Appeals, Supreme Court and argue with them that I was wrong. That's fair. That's fair.

Appx. p. 148-149

In as such, Appellant will argue and show below that the PCR Court did in fact abuse its discretion and error in not finding Plea Counsel ineffective with regard to the proximity charges as Plea Counsel failed to investigate the law and facts of the case and charges and thereby failed to provide accurate advise and properly mitigate the entire case globally due to his failures and ineffectiveness.

PLEA COUNSEL'S FAILURE TO INVESTIGATE

It is without question that Plea Counsel failed to investigate the matters of the proximity charges and the entire case globally. Plea counsel conceded within his own testimony at the PCR evidentiary hearing that he neglected to investigate any aspect of the facts, circumstances, or law regarding the proximity charges.

Plea Counsel unambiguously testified as follows when asked concerning his duty to investigate:

Julie Coleman: Okay. Um, alright, let's see. What kind of test, what kind of investigation did you do?

Christopher Kennedy: Um, well initially before the second set of charges, um, you know, we -- it was, we were in discussions about either having that case dismissed and when I say "we," the solicitor and I, either having that case dismissed or, you know, having some motion hearings to be try to deal with that, ---

Julie Coleman: Um-hum

Christopher Kennedy: --- he marijuana I think that they could have convicted him on the possession a marijuana charge.

Julie Coleman: Um-hum

Christopher Kennedy: Um, in terms of investigation I didn't know anything about the church but a church under the statute complies with the half-mile, um, you know, that that other than that, I mean, I reviewed all of the discovery, I looked at the, uh, his SLED report in terms of his past history of convictions.

Appx. p. 84-85

This testimony of Plea Counsel is extremely significant as it clearly reveals Plea Counsel's lack in his duty to investigate. Plea Counsel's testimony did not, because it could not, identify any instance wherein plea counsel investigated the proximity charge or any other issues of the case in totality, neither factually nor legally.

See Taylor v State, 404 S.C. 350, 359, 745 SE2d 97, 101 (2013) ("On appeal in a PCR action, this [c]ourt applies an 'any evidence' standard of review."); See also Putnam v State, 417 SC 252, 789 SE2d 594 (2016) (This Court "[is] constrained by [its] standard of review.")

The only evidence provided in the record is that PCR Counsel simply did not investigate this matter factually nor legally. In looking through the record of this case and ultimately to the PCR Court's Order wherein the PCR Judge provides the facts, findings and conclusions of law on which it bases its determination, this Court will find that there exists no evidence

in the record which supports the PCR Courts determination. This Court will find that it is an unreasonable determination as the PCR Court has abused its discretion.

"An abuse of discretion occurs in an evidentiary ruling when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v Gibbs, 431 SC 313, 847 SEad 495 (2020). Such is found in the PCR Court's order dismissing Appellant applicating and denying post-conviction relief.

Within the Order of Dismissal, (Appx. pgs. 174-188), there exists a 'Summary of Relevant Testimony' (Appx. pg. 177). In this portion of the PCR Courts Order, the testimony which the PCR Court found "relevant" with regard to support Plea Counsels investigation of the matter is actually only a contured up statement.

The 'Summary of Relevant Testimony' portion of the PCR Court's Order states, "Plea Counsel testified that, as part of his investigation, he went to the church playground in question and verified that it was within a half-mile of where Applicant was caught selling drugs." (App. p. 179)

Plea Counsel never testified that he went to the church "playground" in question. It is no mistake that the 'Summary of Relevant Testimony' consists of only a single sentence, as Plea Counsel testimony with regard to any investigation consisted of only a single sentence. Plea Counsel testified as follows:

> "Um, in terms of investigation I didn't know anything about the church but a church under the statute

Complies with the half mile, um, you know, that that other than that, I mean, I reviewed all of the discovery, I looked at the, uh, his SLED report in terms of his past history of convictions."

Appx. p. 85

Sadly, Plea Counsel then immediately defaults to the subject of a plea bargain.

Appellant emphasizes the statement of untruth, which is clearly not supported by Plea Counsel's testimony, was not inadvertently included within the PCR Court's Order. There needed to be "something" included regarding Plea Counsel's investigation, even if it had to be contrived up by the adversary. Otherwise the adversary would have no

In setting forth its Findings of Fact and Conclusions of Law regarding Appellant's Sixth Amendment violation due to Plea Counsel's Failure to Investigate, the PCR Court made the following finding:

"Plea Counsel credibly testified that he investigated this case as well as Applicant's criminal history. He stated that he drove to the church playground in question to verify that it was within a half-mile of the location Applicant sold the drugs." (Appx. p. 180)

This further illuminates the fact that the PCR Court based its decision upon an unreasonable determination in light of the facts that were presented at the PCR evidentiary hearing. This statement is clearly contradictory to the record of the PCR

evidentiary hearing.

See Robinson v State, 422 SC 78, 810 SE2d 32 (2018) (The Supreme Court of South Carolina finds troubling an order of the PCR court which contains findings that are flatly contradicted by the record.)

It is clear the PCR Court erred as it based its determination upon facts which were clearly not part of the record.

"Credibility findings are treated as factual findings." State v Johnson, 413 SC 458, 776 SE2d 367 (2015); See also Greene v Eagleton, C/A No. 4:15-cv-2043-DCN-TER (D.S.C. 2015) (PCR court's determinations regarding credibility are factual determinations).

"Findings of PCR Judge will not be affirmed on appeal when there is no probative evidence in record to support finding." Rayford v State, 314 SC 46, 443 SE2d 805 (1994); See, e.g., Miller v State, 379 SC 108, 665 SE2d 596 (2008) (PCR Granted as there was no probative evidence to support the PCR court's findings of fact and conclusions of law regarding counsel's effectiveness).

See State v Winkler, 388 SC 574, 698 SE2d 596 (2010) ("The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial Judge's ruling is supported by any evidence.)

It is undisputable the PCR court based its determination upon its unreasonable finding that Plea Counsel investigated Appellant's case. In denying and dismissing with prejudice Appellant's allegation of ineffective assistance of counsel for Plea Counsel's failure to investigate, the PCR Court makes clear in this regard as the Order of Dismissal states,

"Based on this testimony, this Court finds that Plea Counsel thoroughly investigated Applicant's case and was not ineffective in this regard. Therefore, this allegation is denied and dismissed with prejudice."

App. p. 180.

Also, in Conclusion, the PCR Order of Dismissal states:

"Based on all the foregoing, this Court finds and concludes that 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."

App. p. 188.

The PCR Court erred as Appellant has in fact established ineffectiveness. The PCR Court's decision must be reversed. See Ramirez v State, 419 SC 14, 795 SE2d 841 (2017) ("If the post-conviction relief court's conclusions are controlled by an error of law or are unsupported by the evidence, the decision must be reversed.")

FAILURE TO CHALLENGE INSUFFICIENT INDICTMENTS

Appellant initially filed his application for PCR without the benefit of counsel. (App. pgs. 31, 37). In stating the grounds on which Appellant based his allegation that he is being held in custody unlawfully and facts supporting the ground, Appellant submitted, "[Plea] Counsel failed to challenge insufficient indictments, Counsel failed to move to quash the insufficient indictment(s)." (App. p. 34).

Upon Appellant receiving a copy of the Respondent's Return to the PCR application and after a diligent attempt to comprehend the aspect of sufficiency of an indictment as a notice document and the circuit courts subject matter jurisdiction over criminal matters; Appellant sought that PCR Counsel would amend his PCR application to insure that the issue was sufficiently included in the PCR Application pursuant to Rule 71.1(d), SCRCP. Appellant sought to clearly present that, "I should not have been charged with proximity to basketball goal located at a church [and] Attorney did not consult with me regarding a defense to the charges." (See correspondence dated February 27, 2017)(Supp. Appx. p. 4,5)

Appellant ultimately testified that he was charged with two counts of proximity to Macedonia Baptist Church, and he should not have been charged with these. (Appx. p. 78 L. 18-19). Appellant testified that the church had a basketball goal, no playground, and that there was not a school inside of the church. (App. p. 64, 65).

The indictments associated with the proximity charges contained a caption which stated:

DISTRIBUTION OF METHAMPHETAMINE WITHIN ONE-HALF MILE OF PARK/SCHOOL. App. pgs. 220, 221, 226, 227

The body of the indictments read as follows:

> That Alonzo Columbus Jeter III, did in Cherokee County on or about January 12 & 14, 2015, distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute, a controlled substance, to wit: A quantity of Methamphetamine, a schedule II controlled substance, within one-half mile of Macedonia Baptist Church playground, South Carolina, such distribution not have been authorized by law, in violation of § 44-53-445. CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended

App. pgs. 221, 227

Plea Counsel testified that he did not see any basis for challenging the indictments. App. p. 96. Plea Counsel also testified that he discussed possible defenses and also the elements; albeit in this context Plea Counsel was speaking of other charges, not the proximity charges. App. p. 90.

The indictments were defective and insufficient on their face. In attempt to show the PCR Court why the indictments were insufficient and defective, Appellant testified that he "figured that they was callin' the pla--

the the basketball goal that was there a playground." "and I didn't know the law so I had to just trust in my lawyer." App. p. 74. Petitioner also testified that in attempting to discuss any possible defenses with Plea Counsel, "I told him that it wasn't right... and he said, he said but it was me, I sold the drugs and... that was the end of it, he he didn't ask me, uh, what happened or nothin', I didn't get to discuss or tell him the story or what happened." App. p. 73

This is significant as it aids to show the sheer importance that indictments are sufficient. Indictments are notice documents. State v Gentry, 363 SC 93, 610 SE2d 494 (2005)

Being that the indictment is a notice document, it is imperative that the indictment provides the defendant sufficient notice; as with such notice, the defendant can knowingly and intelligently plead an acquittal or conviction thereon. See State v Ervin, 333 SC 351, 510 SE2d 220 (1998).

State v Baker, 411 SC 583, 769 SE2d 860 (2015) ("An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles; State v Tabory, 262 SC 136, 202 SE2d 852 (1974) ("True test of sufficiency of indictment is whether it contains necessary elements of offense intended to be charged and sufficiently apprises defendant of what he must be prepared to meet.")

The indictments for the proximity charges failed the sufficiency test as they failed to "apprise the defendant of the elements of the offense." See State v Guthrie, 352 SC 103, 572 SE2d 309 (2002) ("The true test of the sufficiency of an indictment is not whether it could be made more definate and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.")

The omission of the elements proved to be critical as the omission of such served to deprive Petitioner of what the State would be required to prove. See State v Barksdale, 311 SC 210, 428 SE2d 498 (1993) ("State is required to prove every element of crime for which an accused is charged.")

Petitioner testified regarding the critical omissions as he explained how these omissions served to cause him to be uninformed as to the statutory elements which would provide basis for the charges. Petitioner emphasized, that's what they had on the warrants, a playground at Macedonia Church and that he figured they were calling the one basketball goal which was located at the church a playground. App. p. 74. Petitioner further testified that as it was presented on the warrants and indictments, it looked to be correct, albeit it was at a church, and he didn't know the law so he had to just trust plea counsel.

App. p. 74.

However, the indictments were infact insufficient, and being so Petitioner was not properly and adequately informed regarding the charges. The indictments failed to contain the crucial element which would have informed the Petitioner that the proximity charges would apply to only "public" playgrounds. Including this critical element within the warrants and indictments would have certainly caused Petitioner to argue that the basketball goal was not public as it was on the churches grounds, privately owned, and was not known and understood to be public.

As the indictment failed to contain this critical element on its face, it was therefore defective and insufficient. Plea Counsel was infact ineffective in failing to challenge the indictment in plea negotiations whereby he would have been able to effectively plea bargain, proffer this as mitigation in the plea negotiations, and ultimately move to quash the indictment or otherwise challenge the indictments.

See S.C. Code Ann. §17-19-90 ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards"); State v Massey, 430 SC 349, 844 SE2d 667 (2020) ("A motion to quash an indictment tests only the facial validity of the indictment")

The indictment further failed to include the statory element

of Knowledge. The mens rea or scienter requirement of "Knowledge" is an element under 44-53-445(B)(1).

This matter has been before the Court on previous occassions. In Brown v State, 343 SC 342, 540 SE2d 846 (2001), the Supreme Court of South Carolina held that, "To prove distribution of crack cocaine within the proximity of a school, the state must establish the following elements:... he knowingly distributed or delivered the crack cocaine." In State v Watts, this Court held that, "[T]he essential elements of the offense... were he knowingly distributed or delivered the crack cocaine [and] [T]he charge of distribution of crack cocaine within one-half mile of a school required the same proof with an additional element." In State v Ferguson, the Supreme Court of South Carolina determined that, "the State must show that a given defendant was at least criminally negligent when he/she manufactured, distributed, or dispensed a controlled substance in order to prove a violation of 44-53-370(a)." Ferguson, 302 SC 269, 395 SE2d 182 (1990).

Later, the Common Pleas Court in, Floyd v State, No. 02-CP-08-575 (Berkley Cty, Common Pleas Ct. 2003), 2003 WL 23279850; the court questioned whether the requirement of "necessary elements" means the law in South Carolina differentiates between certain elements that are deemed "Jurisdictional" and thus must be alleged in an indictment and other elements that are only necessary to be proven to obtain a conviction. The Floyd court deemed it must await guidance from the highest court of this state as to what

elements are in fact "necessary". In State v Gill, 355 SC 234, 584 SE2d 432 (2003), the defendant argued that the indictments must allege that he "Knowingly" distributed crack cocaine within proximity of school, and further argued that the trial court lacked subject matter jurisdiction to try him on the charge. This Court held that although Ferguson, Watts, and Brown lists "Knowingly" as an element the state must prove for the crimes... none of those cases addressed whether the "Knowingly" element must be alleged in the indictment in order to convey subject matter jurisdiction. This Court reasoned further, if the General Assembly intended a mens rea element in the crime... of distribution within proximity of a school to be necessary to convey jurisdiction, the requirement would have been listed in the statute. This Court ultimately further determined that "Knowingly" was not included by the South Carolina legislature as a statutory element for the crimes of distribution of crack cocaine and distribution of crack cocaine within proximity of a school.

As such, Petitioner will show this Court that in 1993 South Carolina Laws Act 184 (H.B.315), the South Carolina legislature did not include an "Knowledge" element within the 44-53-445 proximity statute.

However, the South Carolina Legislature did choose to include the "Knowledge" element within the 44-53-445 proximity statute by amending it by way of 2010 South Carolina Laws Act 273 (S.B.1154) in Section 39 of the act.

Thus, as the "Knowledge" element is statutory in nature the proximity indictments in the case at bar were facially

deficient and therefore insufficient, due to their failure to contain this knowledge element.

The deficiencies which resulted from the indictments failure to include the "public" and "knowledge" elements could have been avoided by phrasing both the heading and body of the indictment substantially in the language of the statute which creates and defines the offense. See State v Guthrie, 352 SC 103, 572 SE2d 309 (2002) ("An indictment passes legal muster if it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.")

It is clear that Petitioner made his claim that the indictment was insufficient. The examination and cross-examination of Petitioner at the PCR hearing was performed in an unorthodox fashion, i.e; the Petitioners issues were not covered and examined in an arranged order but rather the examiner and cross-examiner juggled the questions from issue to issue. Although the PCR Court and State attempted to conflate the issues and mix the concepts, as shown above Petitioner clearly demonstrated that the indictment was deficient on its face as he continually stated that the warrants (indictments) only stated Macedonia Church Playground and Petitioner was not informed as to the "public" element, and the lack of the basketball goal being a "playground". App. p 64 L 13 thru p. 65 Line 12 (PCR counsel questions regarding the indictments and

aids in conflating and mixing the concepts of (1) "public" not notified on the indictment, (2) basketball goal is not a playground (3) churches are not encompassed under the proximity statute) App.p. 104 L 18 thru p. 105 L 15 (PCR Counsel conflates and mixes the concepts in attempting to explain Petitioner's issue of insufficient indictment, Rule 71.1(d), SCRCP error and ineffectiveness of PCR Counsel).

However, PCR Counsel does attempt to provide his understanding, and in doing so he does explore the reasoning in Cutner v State that "the indictment's faulty on its face." App.p. 105 L 6.

This case and issues therein become extremely complex and complicated as the record will show that Petitioner has experienced both ineffective Plea Counsel and PCR Counsel. In conflating and mixing the concepts, the State during cross-examination questions, "you did not tell him that the church playground was not a public park or anything, is that correct?" App.p. 7 L 22.

In attempt to explain the insufficiency of the indictment, Petitioner responds, that what was on the warrant (indictment) distribution a playground at Macedonia Church. App.p. 73 L 25 thru p. 74 L 2. Further, Petitioner explains that he did not explain that the basketball goal was not "public" and that he didn't "know" that the churches basketball goal would be determined to be encompassed under the proximity statute. App.p. 74 L 17-21.

As Petitioner raised his claim regarding the sufficiency of the indictment in his PCR Application (App.p. 34), testified regarding

the same, notwithstanding ineffective PCR Counsel; The PCR Court did error in finding ① "that Plea Counsel was not ineffective for failing to challenge the indictments ② "Applicant was properly indicted and put on notice of his charges" (3) Plea Counsel credibly testified that he saw no basis for challenging the indictments" (4) "Applicant... knowingly and intelligently pled guilty to this offense". App. p. 182-183.

Knowingness and Voluntariness of Plea

The indictment and its process functions as one of many safeguards which are in place in interest of Due Process to ensure that a defendent knows and can intelligently choose how and which way he/she will proceed in the criminal case.

The indictment is a notice document and as such it is imperitive that the indictment provides not only notice of the crime charged but also all elements of the crime. This is such so that a defendent will know what elements and actions compose the crime and the defendants violation thereof. As an indictment fails to include the elements it also fails to provide proper and adequate notice and therefore is deficient and insufficient. As such and in its state of insufficiency the indictment is a failed safeguard in regards of a defendants knowingness.

Thus a defendants counsel serves as the next safeguard as he must be competent to know the law, investigate the law, and the facts relating to the matter. Petitioner testified that he did not have access to a law book nor the statute relating

to the proximity charge as he was in the detention center. App. p. 142,143. As the indictments failed to contain the critical elements of the charge and Petitioner had no access to a law book to discover these elements; Petitioner's only way of learning and becoming aware of the elements would be through Plea Counsel. This becomes a toxic mix which violates Petitioner's Sixth and Fourteenth Amendment Constitutional guarantees as it is clear Plea Counsel was ineffective in being ignorant of the law regarding the matters.

Simply, incompetent counsel cannot provide competent advise regarding the matters counsel is incompetent of. Plea Counsel testified that he discussed the elements with Petitioner. App. p. 90 L. 8-10. Plea Counsel testified that he was sure he discussed possible defenses with Petitioner, albeit he never stated what defenses and of what charges a defense was discussed. App. p. 90 L 1-3. However, "in terms of investigation, [Plea Counsel] didn't know anything about the church". App. p. 85 L. 12-13. Plea Counsel also testified that "a church under the statute complies with the half mile". App. p. 85 L 13-14.

See United States v Cauthorne, 878 F3d 458 (4th Cir. 2017) ("Counsel's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance as would support ineffective assistance of counsel claim."); Winston v Pearson, 683 F3d 489 (2012) ("Attorneys have duty to investigate, so as to enable client to make professional decisions; informed legal choices.")

As this Court is constrained to it's "any evidence" standard, the only evidence which exists is that the indictment nor Plea

nor plea counsel provided Petitioner the standard of notice with regard of the charge the elements and law so as to allow Petitioner to make a knowing, voluntary and intelligent choice regarding the charges. As Plea Counsel failed in this instance, this second safeguard died as well as Plea Counsel chose due to incompetency not to challenge the sufficiency of the indictment or applicability of the charge.

Even as the indictment fails, and Plea Counsel fails, further safeguards exists to ensure a defendant's knowingness, and sufficient notice. In the case of an indictment that has not been presented before the grand jury and thus has not had opportunity to deliberate regarding the indictment the elements of the charge and the facts of the case or charging document; the defendant is brought before the circuit court general sessions Judge.

In the case at bar as Petitioner was before the Judge on a guilty plea, the Judge then also served to be third safeguard with regard to Petitioner's knowingness. As such it is the Judges duty to ensure the knowingness and voluntariness by ensuring that there exists a proper factual basis for the charge and plea and also that Petitioner is apprised of the elements of the charge.

See Santobello v New York, 404 US 257, 92 S.Ct 495 (1971) (Sentencing Judge must develop, on the record, the factual basis for guilty plea...); Rollison v State, 346 SC 506, 552 SE 2d 290 (2001) (All that is required before a plea can be accepted is that the

defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea.); Boykin v Alabama, 395 US 238, 89 Sct 1709 (1969) (Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses and understanding of the law in relation to the facts. (citing McCarthy v US, 394 US 459, 89 Sct 1166 (1969).

The Judge whom should have served as an additional safeguard failed as during the plea proceeding, the facts which associated with the proximity charges were never discussed during plea. The State's recitation of the facts never included a discussion nor factual basis for the proximity charges nor did the plea Judge's colloquy ever discuss nor provide a factual basis or element discussion. Consequently, Petitioner was failed by this third safeguard and did enter a plea of guilty to the charges without understanding or knowledge of the crucial elements of the charges. App. p. 1-24. See, cf., Sellner v State, 416 SC 606, 787 SE2d 525 (2016) (South Carolina Supreme Court reversing conviction after sellner entered a guilty plea; the facts presented by the state did not include the requisite corroborating evidence to substantiate the charge).

The Judge as safeguard to due process certainly holds an important role at this Juncture. This is because should the facts not satisfy the elements and therefore provide a proper basis for the charge, the Judge has a duty to ensure the knowingness and voluntariness to the plea. See Berry v State, 381 SC 630, 675 SE2d 425 (2009) ("A defendant, for a host of legitimate reasons, may plead guilty to an offense for which a valid legal challenge may exist; the difference in such circumstances between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea) See also Robinson v State, 387 SC 568, 693 SE2d 402 (2010) ("It is well-settled that an individual may, as part of a plea bargain, plead guilty to a crime of which he is not guilty... [S]o long as the defendant understands the nature and elements of the charges [.]." (citing Rollison v State, 346 SC 506, 552 SE2d 290 (2001).

Also, equipped with this information the plea Judge can better determine in the interest of Justice, fairness and integrity of the Court whether to reject or accept the plea bargain whether it may be negotiation or recommendation. The plea Judge can also determine if he should deviate from the plea negotiation or recommendation. See State v Hamilton, 333 SC 642, 511 SE2d 94 (1999) ("In the context of plea negotiations, the decision to accept or reject a plea bargain agreement is within the sound discretion of the circuit Judge"); Roddy v State, 339 SC 29, 528 SE2d 418 (2000) ("Attorney's should advise defendants of the possibility that the plea Judge may deviate from the

Sentence recommendation in negotiated plea agreement.")

As the plea Judge did inform Petitioner that Petitioner had a Constitutional Right to have the charges (indictments) presented to the grand Jury and have the grand Jury "act" on them (App. p. 7,8); by giving up the right to a trial by Jury Petitioner also gives up the right to assert any legal defenses (App. p. 10), the State would have to prove you guilty beyond a reasonable doubt (App. p. 11); - The Plea Judge failed to inform Petitioner of the elements of the charges and inform Petitioner that the grand Jury would deliberate on such elements if Petitioner chose to have the indictments presented and the Jury of twelve would also deliberate on those elements if Petitioner chose to proceed to trial on the charges. See State v MC Intosh, 358 SC 432, 595 SE2d 484 (2004) ("the burden at all times remains upon the State to prove beyond a reasonable doubt every element of a crime with which the accused is charged.")

The Plea Judge in only advising Petitioner that the charges could be presented to the grand Jury and failing to inform Petitioner what the grand Jury would "act" like or do with regard to the elements of the charge; the Plea Judge hurriedly "[found] the defendant's decision to waive his right to have these charges presented to the grand Jury being made freely, voluntarily and intelligently."

This was error as this decision was in fact not made freely, voluntarily and intelligently. Nor was the plea to the charges made freely, voluntarily and intelligently. App.p.17. This is because neither was knowingly as Petitioner simply did not know the elements of the charge.

The Plea Judge as the third safeguard did not provide opportunity for an allocution statement which would have assisted in determing a factual basis existed and ensured the knowingness and voluntariness of the plea. See State v Quinn, 430 SC 115, 843 SE2d 355 (2020) ("An "allocution statement" is when, after pleading guilty, a defendant is offered a formal opportunity to address the court to express remorse and explain personal circumstances that might be considered in sentencing. Allocution statements assist the court in determining whether there is a sufficient factual basis to support the charge and the plea and whether the defendant's plea was "knowingly, voluntarily, and intelligently made."); See Taylor v State, 422 SC 222, 810 SE2d 862 (2018) ("[I]n many circumstances a plea court's standard colloquy will cover a multitude of deficiencies by counsel."); Robinson v State 422 SC 78, 810 SE2d 32 (2018), ("For a plea hearing to cure deficient advice, the plea hearing must unambiguously address and resolve the incorrect advice.

As Petitioner has shown, the plea was not knowingly and

intelligently entered nor were the indictments knowing and intelligently waived. App. p. 182, 183.

PREJUDICE

With regard to prejudice resulting from Plea counsel's errors and ineffectiveness regarding the proximity charges, the PCR Court determined, "Based on the strength of the State's evidence against Applicant, Plea Counsel strategically negotiated plea deals with the State and was able to obtain a negotiated sentence." App. p. 180; "Furthermore, Applicant can prove no prejudice because he knowingly and intelligently pled guilty to this offense and received a ten year sentence for these charges, which he is serving concurrently to his fifteen year sentence for the other offenses. Even if these indictments had been dismissed, Applicant would still be serving a fifteen year sentence, so there can be no prejudice." App. p. 183.

The PCR Judge also reasoned, "if you decide that there's prejudice on a trafficking and you decide that there is prejudice on a possession with intent to distribute in proximity but you decide there's no prejudice on the others, it really doesn't gain him anything substantially." App. p. 188.

As Petitioner has shown, counsel's failure to investigate the matters of this case and issues legally or factually and thus was incompetent and did not, because he could not, provide Petitioner competent advise, mitigate effectively during plea negotiations, nor defend and protect Petitioner's Constitutional rights before nor during the plea, amounts to a constructive denial of counsel.

Although generally a defendant must show that his counsel's

performance was deficient and prejudicial to prevail on a claim of ineffective assistance of counsel, in United States v. Cronic, 466 US 648, 104 S.ct 2039 (1984), the United States Supreme Court held that there are certain situations where the reliability of a trial becomes so questionable that the defendant need not show that he was actually prejudiced. Instead, prejudice is presumed.

The Court in Cronic held that prejudice is presumed if there has been a constructive denial of counsel. This happens when a lawyer "fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable. U.S. v Ragin, 820 F3d 609 (2016) (Citing United States v Cronic, 466 US 648, 104 S.ct 2039)

Prejudice should be presumed in the case at bar under Cronic. However, assuming arguendo Petitioner must show actual prejudice, Petitioner can meet this bar as well.

It is indeed troubling that the PCR Court as well as the trial Court would consider convictions de minimus simply because the charged conviction has a sentence which is less than other greater sentences which is sentenced concurrently. However, the Courts do realize that there is hidden agenda behind obtaining the conviction, if not they would simply nolle prosse the charges.

In the case at bar Petitioner was sentenced to two 10 year sentences for the proximity charges which would be served concurrently with 15 year sentences Petitioner received on other charges he was sentenced to the same day. Petitioner would show the trial court's posture with regard to the proximity

Charges.

The Court: Okay
And then on the proximity charge, that there was no specific negotiated sentence, but whatever sentence would run concurrently?

Mr. Sams: Yes, sir, since it doesn't carry above ten, just whatever the court would give concurrent with the fifteen.

The Court: There's two of those.

App. p. 14

As such, Petitioner was sentenced to the maximum sentence of ten years on both proximity charges, to run concurrent. App. p. 23. Similiarily, Petitioner also pled guilty to a charge of possession of marijuana, second offense. In sentencing Petitioner to time served on the marijuana charge the trial court considered, "No use -- its just a lot of extra paperwork... so this would be one less bit of paperwork to deal with, but he will be getting a time served sentence that's on his record."

The Court reveals the agenda which is to be sure that convictions are stacked on Petitioner's record. The court was more interested in placing the convictions on Petitioner's record than the actual time, and the same for the proximity charges. The proximity charges however were even more significant as they added "strikes" to Petitioner's record, as they are listed as "serious" offenses. "The importance of that classification is should you get three seperate serious offenses on you record... you could get a sentence of life without parole, the so-called Three-Strikes Rule." App. p. 12.

The PCR Court asserted that, "Plea Counsel strategically negotiated plea deals with the State." App. p. 180. As stated above and clearly shown by Appellant Plea Counsel's negotiations were ineffective as he entered into the negotiations without competency.

The record clearly shows that Plea Counsel did not have any strategy in negotiations. In choosing not to investigate the facts surrounding the proximity charges, the location and distance from the scene of the crime, the existance of the church, the non-existence of a school or "playground" at the church, the classification of the church and basketball as private rather than public, the statute itself and any caselaw; Plea Counsel could not effectively strategize because he was incompetent. See Wilson v Mazzuca, 570 F.3d 490, 502 (2d Cir. 2009) (omissions based upon "oversight, carelessness, ineptitude or laziness" cannot be explained as "trial strategy") (cited by Credell v Bodison, 818 F. Supp. 2d 928 (2011); Winston v Pearson, ("Counsel's lack of preparation and research cannot be considered the result of deliberate, informed trial strategy.")

As the Petitioner was not supposed to be charged with the proximity charges, the proximity charges served to be nothing more than illigitimate "stacked" charges and due to Plea counsel's laziness and incompetence he was not able to defend Petitioner against such and was not able to effectively negotiate against the State. The State simply used illigitimate "stacked" charged as leverage and it was Plea Counsel's duty

to defend and challenge such by subjecting the prosecution's case to meaningful adversarial testing. See Nance v Ozmint, 367 SC 547, 626 SE2d 878 (2006) - The United States Supreme Court has recognized that defense counsel must conduct a reasonable investigation "to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." (Citing Wiggins v Smith, 539 US. 510, 524-25, 123 Sct 2527 (2003) See Jeter v SCDOSS, App. Case No. 2019-001835).

Any "strategy" articulated by Plea Counsel was unreasonable as it does not meet the objective standard of reasonableness. Plea Counsel simply believed, "a church under the statute complies with the half mile". App. p. 85. And thus, Plea Counsel did not feel there was a need to investigate factually nor legally. It is clear by this testimony that Plea Counsel wasn't even considering the basketball gear or the private nature thereof. Plea Counsel believed the church alone, regardless if it had a school, playground, etc or not, was enough to satisfy the statute for proximity. App. p. 85. Importantly, Plea Counsel cited no case law nor statute to support his reasoning. cf. Weary v State, 2016 WL 916944.

As Plea counsel claimed to have a strategy it is unreasonable that Plea Counsel would choose to plea to two "serious" "strikes" all the while knowing that strikes are what cause and allow a life sentence. What's the difference, if any, between Catch-22, Hobson's choice, Sophie's choice, and Morton's fork? Plea Counsel made a mistake which resulted from

his laziness and incompetence due to his failure to perform any legal or factual investigation. This lax representation should not be determined strategic as the record is clear, there was no strategy. See State v Rice, 401 SC 330, 737 SE2d 485 (2013) ("As the Supreme Court has recognized, plea bargaining is the norm in our criminal justice system. See Missouri v Fry, ___ US ___, ___, 132 Sct 1399, 1407, 182 L.Ed.2d 379 (2012) (since 97% of federal convictions and 94% of state convictions result from pleas, plea negotiations are "almost always the critical point for a defendant").

Albeit the courts would seem to downplay the significance of have additional criminal convictions on a criminal record, Petitioner would show that if the conviction which the court would downplay as insignificant remains on the criminal record the collateral consequences which result therefrom are many, eg. employment opportunity denials, credibility, financial credit reduction in programming and rehabilitation opportunities, and much more. See Ball v United States, 470 US 856, 864-65, 105 Sct 1668 (1985) ("The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The seperate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored... Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment."); State v Greene, 423 SC 263, 814 SE2d 496 (2018) ("The fact that Appellant received a concurrent five-year sentence for involuntary manslaughter does

not change the result." "[T]he conviction itself is considered a punishment and that, too, must be vacated.")

Petitioner's case is distinguished from Roscoe. See Roscoe v State, 345 SC 16, 21, 546 SE2d 417, 419 (2001) (rejecting the defendant's argument that "all of his pleas [we]re affected by the [circuit court's] erroneous advice concerning the [maximum sentence for the] armed robbery charge," because the defendant "was properly advised and sentenced on the [remaining] charges, and he fail[ed] to demonstrate his pleas to these offenses were in any way affected by the mis-advice concerning armed robbery") See Jeter v SCDSS, App. Case No. 2019-001835 (pending, SCCt App).

Petitioner shows that the State and courts would attempt to downplay the convictions which are illigitimate "stacked" convictions, only until they can be further used to put the offender to death and the convictions which were illigitimately "stacked" would become significant for the State and Court as the charges would be used as enhancers and for strikes. See e.g., State v Golson, No. 2010-UP-347 (Ct. App. 2010). 2010 WL 1008 0085 (Stanley Golson was convicted of distribution of crack cocaine and distribution of crack cocaine within proximity of a school and was sentenced to life imprisonment without the possibility of parole); State v Williams, 380 SC 336, 669 SE2d 640 (2008) (Williams was convicted of distribution of crack cocaine and distribution of crack cocaine within proximity of a school and was sentenced to life imprisonment without parole).

In the case sub judice, Petitioner, albeit he had a criminal history, Petitioner had not been ever in his lifetime convicted of

any crime which was classified as a "violent" crime nor any crime which was classified a "serious" or "most serious."

This is significant as in its charge "stacking" the State and Petitioner's Plea Counsel would seemingly work in concert to ensure that from this one situation Petitioner would bear a record that resembled that of a menace to society. Simply put, the Petitioner was and is prejudiced due to Plea Counsel's ineffectiveness cumulatively in this case. The proximity adds two "serious" strikes that should not be.

See Missouri v Frye, 566 US 134, 132 Sct 1399 (2012) ("In order that the benefits of plea bargaining which include the potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing, can be realized, criminal defendants require effective counsel during plea negotiations!")

In satisfying prejudice, Petitioner shows that he did provide undisputed testimony and fact that he would not have pled guilty to the charges if it were not for Plea Counsel's erroneous advice. See App. p. 67 Lines 16-21. Hill v Lockhart, 474 US 52, 106 Sct 366 (1985); See also Strader v Garrison, 611 F2d 61 (4th Cir. 1979) ("Judgment of conviction must be vacated when it appears that a guilty plea would never have been tendered if defendant had been properly advised."); Stevens v State, 365 SC 309, 617 SE2d 366 (2005) (defendant would not have pled guilty **to each and every charge**); Padgett v State, 324 SC 22, 484 SE2d 101 (1997) (Defense counsel's failure to challenge indictment not reasonable trial strategy, where counsel did not articulate any strategy for not challenging indictment and did not know the distinction between the charge's elements and no factual basis for charge).

Further prejudice visited upon Petitioner as had Plea Counsel been competent with regard to the charges Plea Counsel could have sought to further bargain and redeem the prior seven year plea

offer on any remaining charges that Petitioner may not have wanted to challenge by trial by jury. Petitioner has been certainly prejudiced as this was certainly possible had Plea Counsel been competent in his representation. See Lafler v Cooper, 566 US 156, 132 Sct 1376 (2012) ("[A]ny amount of additional [incarceration] time has Sixth Amendment significance). Cf. Davie v State, 381 SC 601, 675 SE2d 416 (2009). Appellant's case and circumstance is relative to Davie in that the original plea offer was withdrawn based on counsel's failure to perform a factual or legal investigation and therefore Plea Counsel failed to seek and redeem the original plea offer. This Court could and should at the very least, pursuant to Davie, unring this bell by allowing Petitioner to return to the stance of the original 7-year plea offer with the opportunity to accept or decline the plea offer on any remaining charges that Petitioner may not challenge by trial by jury as had Plea Counsel negotiated or re-negotiated with competency, it is a high probability as the two serious strikes which results from two proximity charges would be realized as illigitimate, among other factors in this case in totality, the reenegotiations if performed effectively and competently would have provided the mitigating leverage which would have likely redeemed the 7-year plea. It is certain that the plea would have resulted in a lesser plea than the 15-year plea ultimately received by Petitioner with ineffective negotiations and assistance of counsel whom was incompetent regarding the charges and elements. App.p. 102 L. 2-7; App.p. 180.

It would be illogical to infer that were the two charges which were classified as "serious" "strikes" removed from the

equation, the results of the plea negotiations or guilty plea proceeding would not have been different. It would be also illogical to infer that being so, the amount of time bargained would not be reduced especially when the state would realize that the defendant is represented by competent Counsel whom is not derelict in his duties whom would subject the prosecution's case to meaningful adversarial testing.

Petitioner would not have pled guilty to to the proximity charges nor the other charges had plea counsel not been ineffective and directed in his representation. Plea Counsel was ineffective in several regards in this case as he committed cumulative errors. This case is tainted in totality, the bell has been rung and it rings loud and clear informing of Plea Counsel's remiss and ineffectiveness. This Court, in equity, should assist in bringing integrity to the Court and the Judicial system in this great country.

Writ of Certiorari should be granted and this Court should reverse the decision of the PCR Court and Petitioner's convictions should be vacated.

INEFFECTIVE PCR COUNSEL - RULE 71.1(d)

Petitioner shows, out of an abundance of caution, PCR Counsel's error and ineffectiveness. Petitioner is compelled to so at this juncture as the PCR Court's order of dismissal is an order which suffers from the straw-man fallacy. i.e., the author of the PCR Court's order has chosen to evade the

the Petitioner's meritorious claim of insufficient indictment and the clear fact that Plea Counsel was ineffective in failing to challenge the State's case by subjecting it to meaningful adversarial testing, e.g., challenging the sufficiency of the indictment, moving to quash, directed verdict, etc another challenge regarding the "Church" designation and applicability of such to the statute, the designation of one basketball goal as a "playground", and lack of the indictment to contain the elements of "public" and "knowing" such as to properly serve as a notice document and sufficiently inform Petitioner what he would be called upon to answer and all such elements the State would have to prove.

As the issue is novel and presents novel questions which are mixed of law and fact, the author of the PCR order chose to attempt to cloak and dilute the issue stating, "this challenge to the classification of the park is a factual argument against the state's evidence and not a challenge to the sufficiency of the indictment. Any factual challenge to this offense, meaning whether the church playground was public or private, was waived by Applicant when he chose to plead guilty." App. p. 182

The novelty of the issue, the mixed question of law and fact, does not exist alone in this case. PCR Counsel, through his professional legal training and experience, should have aimed to see and ensure that the issues regarding this matter were presented in such a way that the postures in which Petitioner would raise the issue would be seperated and not conflated. Both PCR Counsel and the State examined and cross-examined regarding the proximity issue in a manner which convoluted the issue. App. p. 64, 65, 73, 74. Plea Counsel should have exercised caution in his direct examination, App. 64, 65 and arguments App. p. 104, 105, as

he should have remained mindful that there has long been issue with conflating the concepts of sufficiency of an indictment, quashing such, direct verdicts, and subject matter Jurisdiction. See State v Gentry, 363 SC 93, 610 SE2d 494 (2005), bringing an end to the confusion explaining that Ex parte Bain, 121 US 1, 7 Sct 781 (1887) was the progenitor, State v Munn, 292 SC 497, 357 SE2d 461 (1987) adopted Bain's view. The United States Supreme Court, in United States v Cotton, 535 US 625, 122 Sct 1781 (2002), seperated and made a distinction between the concepts and Gentry, 363 SC 93, 610 SE2d 494 (2005) adopted the Cotton court's reasonings.

The South Carolina Supreme Court has recognized, "The United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases..." Fishburne v State, 427 SC 505, 832 SE2d 584 (2019); Turner v State, 384 SC 451, 682 SE2d 792 (2009) ("[T]he right to PCR Counsel arises from Rule 71.1, SCRCP, and not from the constitution.")

See S.C. Code Ann. § 17-27-90, "This statute forbids a successive PCR application unless an applicant can point to a "sufficient reason" why the... grounds for relief... were not raised properly." Rice v State, 305 SC 448, 409 SE2d 392 (1991).

Simply put, regardless of the posture of this case and issues therein, the ultimate questions are (1) Did Petitioner Knowingly, voluntarily, and intelligently plea with eyes open to the proximity charges. The answer is no. Was the PCR Court's determination supported by probative evidence. The answer is no. See Jivers v State, 304 SC 556, 406 SE2d 154 (1991) "[D]espite State's assertion that defendant knowingly and intelligently entered plea pursuant to favorable plea bargain, inasmuch as defendant did not make conscious and calculated decision "the conviction must be reversed"; State v Means, 367 SC 374, 626 SE2d 348 (2006) ("The primary purposes of an indictment are to put defendant on notice... i.e., to apprise him of the elements of the offense.

II ARGUMENT AGAINST PRECEDENT-(Rule 217, SCACR)
Case of State v Wakefield, 323 SC 189, 473 SE2d 831 (1996), Regarding Church "Playgrounds" And Their Applicability To The S.C. Code Ann. § 44-53-445, "Proximity" Statute.

Petitioner hereby makes an argument against this Court's ruling in the case of State v Wakefield, 323 SC 189, 473 SE2d 831 (1996), as there is danger this Court may look to its ruling in Wakefield in adjudicating the case at bar as Wakefield is significantly similar to the case sub judice. Petitioner submits his argument against precedent in the interest of judicial economy as it is danger not to address the case due to its precedent nature. This Court's ruling in Wakefield was not appealed and thus, although wrongfully decided, became precedent law on the matter. See Atl. Coast Builders & Contractors, LLC v Lewis, 398 SC 323, 329, 730 SE2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

Therefore, Petitioner submits this argument seeking that the Court would not look and lean to stare decisis on this case and matters thereof. See McLeod v Starnes, 396 SC 647, 723 SE2d 198 (2012) ("Stare decisis should be used to foster stability and certainty in the law, but not to perpetuate error."); Smith v Daniel Const. Co., 253 SC 248, 169 SE2d 767 (1969) ("There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment")

Procedural History And Relevant Facts of State v Wakefield

On November 12, 1992, Everette Leon Wakefield Jr., sold an amount of crack cocaine to an informant and agent of the South Carolina Law Enforcement Division (SLED) while at his residence at

333 Marion St. in Greenwood. A map of the area indicated that Macedonia Baptist Church and its playground was located approximately 500 feet away from his residence where he sold the drugs.

As a result of this sale, Wakefield was arrested on June 10, 1993. He was convicted of distribution of crack cocaine, pursuant to S.C. Code Ann. §44-53-375(B)(Supp. 1994), and distribution of crack cocaine within a one-half mile radius of a playground, pursuant to S.C. Code Ann. §44-53-445 (Supp. 1995). On appeal and upon finding the charges which Wakefield was charged and convicted of so closely connected that it was necessary to review both, this Court in Wakefield, affirmed the convictions finding and ruling that Wakefield's convictions were proper because there was no question that the drug sale did occur within a one-half mile radius of Macedonia Church's playground.

Analysis

As this Court made its ruling in Wakefield that the sale did occur within a one-half mile radius of Macedonia Church's playground and therefore Wakefield's conviction pursuant to S.C. Code Ann. §44-53-445 (Supp. 1995) was proper, this Court did not consider that S.C. Code Ann. §44-53-445 (supp. 1995) only applies to "public" playgrounds.[1]

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1 Wakefield committed this crime on November 12, 1992, therefore section 44-53-445 of the 1976 Code, as amended by Act 579, §2 of 1990 would have been the applicable statute. See Elmore v State, 409 SE2d 397 (1991); Pierce v State, 526 SE2d 222, 338 SC 139 (2000); State v Dawson, 402 SC 160, 740 SE2d 501 (2013); State v Varner, 310 SC 264, 423 SE2d 133 (1992); Nevertheless, both statutes contain the same relevant language "public" playground.

The statute states as follows:

"It is a seperate criminal offense for a person to distribute, sale, purchase, manufacture, or to unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university."

S.C. Code Ann. §44-53-445 (Supp. 1995)

It is clear that the South Carolina Legislature's intent is that the S.C. Code Ann. §44-53-445 (the proximity statute) would be only applied to and encompass "public" playgrounds and parks. Any private designation in which the Legislature intended to be encompassed by this proximity statute were specifically enumerated as the statute specifically included and stated within its language, "a public or private elementary, middle, or secondary school, ... or a public or private college or university."

Private playgrounds and parks would be ruled out by applying the principle of "Expressio unius est exclusion alterius" which means to express or include one thing implies the exclusion of another. Brown v State, 343 SC 342, 540 SE2d 846 (2001).

In Brown, daycare centers (which also would many times have playgrounds or parks), are not encompassed in this statute. The ruling in Brown would also mean all daycare owned property. See also State v Green, 350 SC 580, 567 SE2d 505 (2002), where "grounds" means all school-owned property contiguous to or surrounding the school's physical plant.

The playground in which Wakefield was convicted of the proximity criminal offense under SC. Code Ann. §44-53-445 (Supp. 1995), was not a "public" playground but was rather a private playground as it was owned by and on the property of Macedonia Baptist Church. As Macedonia Baptist Church is a private establishment, so is the playground

"private" which belongs to the church and is therefore on church's property.

See, e.g., Carthon v Pastor, 408 Fed. Appx. 779 (5th Cir. 2010) (A high school football game at a stadium owned by Calvary Baptist Church; Football stadium was private as it was owned by church); Cologne v Westfarms Associates, 192 Conn. 48, 469 A.2d 1201 (1984) (Property does not lose its private character merely because public is generally invited to use it for designated purposes); Ex parte Conger, 163 Tex. 505, 357 SW2d 740 (1962) (A denominational church is a private institution, and while building and maintenance of religious institutions are in the public interest and may be said to promote public welfare, they lie without domain of public uses and purposes); Prince v Massachussetts, 321 US 158, 64 S.ct 438 (1944) (Churches are private structures); St. James African Methodist Episcopal Church v Baltimore & O.R. Co., 114 Md. 442, 79 A. 35 (1911) (The cemetary was private because it belonged to the church); State v Vanderberg, 25 Or. App. 811, 550 P2d 1248 (1976) (Church is private property); Rhine v First Baptist Dallas Church, 2016 WL 6471941 (Plaintiff, Tracy Rhine, was on church's property which was private property); Kelley v St. Bartholemew's Episcopal Church, 2008 WL 3889872 (Defendants are a private church); Richardson v F.B.I., 2011 WL 1428968 (Conduct at churches is private conduct); First Congregational Church of Harwich v Eldredge, 2017 WL 3581629 (Cemetary property under church's control is private property).

Therefore, Petitioner submits, respectfully, that the private playground owned by and which was on the private property of Macedonia Baptist Church, whereby Wakefield was convicted of the proximity criminal charge, was not encompassed under

the proximity statute.

To further show the intention and significance of the South Carolina Legislature's specifically encompassing only "public" playgrounds and parks, Petitioner points to the language which Congress chose to use in 21 U.S.C.A. §860, for comparison. This statute states, in relevant portion:

> "Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility..."

21 U.S.C.A. §860

As this statute (21 USCA §860) does not distinct between "public" or "private" playground, Congress chose to reveal its intent by defining the term "playground" and included also its definition in the same subsection of §860. Specifically, 21 USCA §860(e)(1) states as follows:

> "The term "playground" means any outdoor facility (including any parking lot appurtenant thereto) intended for recreation, open to the public, and with any portion thereof containing three or more seperate apparatus intended for the recreation of children including, but not limited to, sliding boards, swing sets and teeter boards."

21 USCA §860(e)(1)

Cf., U.S. v Horsley, 56 F3d 50 (1995) (A posted sign which said, "This is not a public playground. Play at your own risk," was used by defendant to support his position that Jordan Park was

not a public playground. However, the conviction of distribution or manufacturing in or near schools, colleges, park, playgrounds, was held.) This was because 21 USCA §860, did not make a distinction between public or private playgrounds.

See also, U.S. v West, 671 F3d 1195 (2012) (Public park near where defendant engaged in illicit drug activity contained the three "seperate apparatus" necessary to constitute a "playground".); U.S. v Parker, 30 F3d 542 (1994) (mere surface paved with blacktop is not an "apparatus intended for the recreation of children" for purposes of the definition of "playground".)

In contrast, South Carolina's Code of Laws §44-53-445, the proximity statute, specifically provides that only "public" playgrounds are encompassed under the statute. Therefore, the Macedonia Baptist Church playground in Wakefield, is not encompassed under the proximity statute as it is not a "public" playground.[2]

The proximity statute specifies that it is applicable to "public" playgrounds. Legically applying the principle of "Expressio unius est exclusion alterius" as the Court rightfully should, there remains no question as to the proximity statute's applicability to churches or a church's private belongings whether it is termed "playground" or anything else. See Berry v State, 381 SC 630, 675 SE2d 425 (2009) (In construing a criminal

[2] The S.C. Legislature has not defined the term "playground" in its proximity statute nor 44-53-110 or any other articles under Chapter 53 of Title 44 of the South Carolina Codes of Law

Statute, courts are guided by the Rule of Lenity - the principle that any ambiguity must be resolved in favor of the accused.) See also, Martin v Lloyd, 700 F3d 132 (2012) (Where a statute imposes criminal penalties, the standard of certainty is higher, and the statute can be invalidated on its face as unconstitutionally vague under Due Process Clause even if it could conceivable have some valid application.)

The proximity statute rightfully deserves 'strict scrutiny' as the criminal offense is classified as a "serious" offense and a conviction of this offense provides an offender a "strike" in regards of South Carolina's 3-Strikes Laws, whereby an offender receives a sentence of life without the possibility of parole upon being convicted of three crimes labeled as "serious".

Simply put, the private "playground" which was private property of Macedonia Baptist Church was not, and is not, encompassed under the proximity statute. As such, Petitioner respectfully submits that the Court's ruling in Wakefield was in error in this regard.

See State v Blackmon, 304 SC 270, 403 SE2d 660 (1991) (The primary rule of statutory construction is that the Court must ascertain the intention of the legislature.); Keyserling v Beasley, 322 SC 83, 470 SE2d 100 (1996) ("[This Court] do[es] not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly. . . . [and must] follow the law and decisions heretofore set forth in this state.")

WHEREFORE, as Petitioner has provided this argument against this precedent, Appellant also seeks respectfully that

the ruling in Wakefield, to the extent of the proximity opinion, be abrogated and not be considered valid precedent case in regards to S.C. Code Ann. § 44-53-445's applicability to churches and churches' "private" "playgrounds".

McLeod v Starnes, 396 SC 647, 723 SE2d 198 (2012) ("Stare decisis is not an inexorable command; there is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right.")

Proctor v Whitlark & Whitlark, Inc., 414 SC 318, 778 SE2d 888 (2015) "[This] Court need not blindly adhere to established precedent.

CONCLUSION

Based on the above, the PCR Court's decision must be reversed and Petitioner be granted Post-Conviction Relief.

Respectfully submitted

Alonzo C. Deter, III
PETITIONER / pro se
Tyger River Correctional Institution
200 Prison Road
Enoree, South Carolina 29335

This 24th day of March, 2021.

RECEIVED
Mar 29 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Cherokee County
The Honorable Robin B. Stilwell, Circuit Court Judge

Case No. 2017-001777

Alonzo C. Jeter, III, PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Alonzo C. Jeter, III, #282902, hereby certify that I have served the Amended Initial Brief of Petitioner on the Respondent by placing a copy of the same inside of an postage prepaid envelope and placing said envelope in the hands of Tyger River Correctional Institution's mailroom personnel on this 24 day of March, 2021, for mailing via the United States Mail, addressed as follows: William H. Ray, Esquire, Assistant Attorney General, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549.

S/

Alonzo C. Jeter, III, #282902
Tyger River Correctional Institution
200 Prison Road
Enoree, South Carolina 29335

SWORN and Subscribed before me
this 24th day of March, 2021

Notary Public for South Carolina
My Commission Expires: Dec. 10, 2024

PROOF OF SERVICE

I, Alonzo C. Jeter, III, hereby certify that I have mailed the Original of: Amended - Initial Brief of Petitioner, Certificate of Service for the same, and Coverletter; to the South Carolina Commission on Indigent Defense, Division of Appellate Defense, by placing the same inside of a postage prepaid envelope and placing said envelope in the hands of Tyger River Correctional Institution's mail room personnel on this 24 day of March, 2021, for mailing via the United States Mail, addressed as follows: Mr. Scott Leverett, Administrative Assistant, SC. Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, South Carolina 29211-1589.

S/ _____
Alonzo C Jeter, III
Tyger River Correctional Institution
200 Prison Road
Enoree, South Carolina 29335
PETITIONER / prose

SWORN and Subscribed before me
this 24th day of MARCH 2021

_____
Notary Public for South Carolina
My Commission Expires: DEC. 10, 2024

March 24, 2020

Alonzo C. Jeter, III, #282902
Tyger River Correctional Institution
200 Prison Road
Enoree, South Carolina 29335

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: **Alonzo C. Jeter, III, v State**
Appellate Case No. 2017-001777

Dear Honorable Kitchings:

Enclosed for filing, please find the Amended - Initial Brief of Petitioner, along with a Certificate of Service for the same.

Enclosed, please also find an additional copy of these said documents along with a self-addressed stamped envelope. Please return to me file-stamped copies of these documents by way of the provided SASE.

Thank you for your assistance in this matter.

Sincerely,

Alonzo C. Jeter, III, #282902
Petitioner /Pro se

LEGAL MAIL

SCDC
Inmate
Packet

RECEIVED
Mar 29 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

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ALONZO C. JETER, III,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned, on behalf of the pro se petitioner, hereby certifies a true copy of the Amended Brief of Petitioner in the above-referenced case has been served upon William Harold Ray, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 29th day of March, 2021.

Scott Leverett
Administrative Assistant
SC Commission on Indigent Defense