STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Jun 21 2021

S.C. SUPREME COURT

Certiorari to Abbeville County

Honorable Thomas A. Russo, Circuit Court Judge

ALFONZO ALEXANDER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000013

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

Whether trial counsel provided ineffective assistance when she failed to investigate the circumstances giving rise to the indictments against Petitioner and move to quash them where the officer listed as the grand jury witness was not the officer who testified before the grand jury?

STATEMENT

During the January 2013 term, the Abbeville County Grand Jury indicted Petitioner for possession of crack cocaine with intent to distribute and possession of crack cocaine with intent to distribute within proximity of a playground. App. 310 – 314.

On May 28 – 30, 2013, Petitioner's trial proceeded before the Honorable Frank R. Addy Jr., and a jury. App. 1. Patricia Bolen and Janna A. Nelson represented Petitioner. Id. C. Yates Brown and Christopher Andrew Morrow represented the state. Id. Petitioner was not present. App. 5, ll. 3 – 10.

The trial court granted directed verdict on the possession of crack cocaine with intent to distribute within proximity of a playground. App. 247, l. 5 – 248, l. 17. However, Petitioner was convicted of possession of crack cocaine with intent to distribute. App. 288, ll. 2 – 8. Judge Addy sealed the sentence until Petitioner was present for sentencing. App. 300, ll. 15 – 23.

On September 18, 2013, Petitioner's sentencing hearing was held before Judge Addy. App. 303. Patricia Bolen represented Petitioner. Id. Yates Brown represented the state. Id. Petitioner was sentenced to twenty-nine years' imprisonment. App. 307, l. 16 – 308, l. 2.

Petitioner filed a motion to reconsider on September 26, 2013, where he argued, inter alia, that not being present at his trial should not have been a basis for his sentence. App. 315 – 317. Petitioner's motion to reconsider was denied on November 26, 2013. App. 318 – 319.

Petitioner filed a direct appeal on March 11, 2015. App. 320 – 336. In an unpublished opinion on October 14, 2015, the Court of Appeals affirmed Petitioner's conviction. App. 337 – 338; State v. Alexander, Op. No. 2015-UP-485 (S.C. Ct. App. filed October 14, 2015).

On December 12, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 339 – 358. On May 18, 2018, the state filed its return. App. 359 – 364. On May 6, 2019,

Petitioner filed an amended PCR application alleging that trial counsel provided ineffective assistance for failing to move to quash the indictments against him where the officer who testified before the grand jury, Vandiver, was different than the officer who was listed on the indictments, Henderson. App. 365 – 366.

On June 6, 2019, Petitioner's PCR hearing was held before the Honorable Thomas A. Russo. App. 367. Carson M. Henderson represented Petitioner. Id. Janell Gregory represented the state. Id.

In an order filed on March 11, 2020, the PCR court denied Petitioner relief. App. 461 – 485. The PCR court found that trial counsel did not provide ineffective assistance by failing to move to quash the indictments against Petitioner because the testifying officer was briefed by the arresting officer and "firsthand knowledge is not required" to testify before the grand jury. App. 473 – 479.

The PCR court also found that "although Vandiver was not subpoenaed by the solicitor's office, it [was] evident from his relationship with [the solicitor's] 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" such that the state's process comported with § 14-7-1550 of the South Carolina Code. App. 475. Furthermore, the PCR court determined Petitioner could not show how he was prejudiced by the testifying officer being different than the officer listed on the indictment. App. 476 – 479.

This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance when she failed to investigate the circumstances giving rise to the indictments against Petitioner and move to quash them where the officer listed as the grand jury witness was not the officer who testified before the grand jury.

Relevant Facts

During the night of August 12, 2012, a call was made to police about gambling and drug distribution in apartment 401 at the Oakland Apartments in Abbeville. App. 84, l. 24 – 85, l. 8. Officers Gray and Ashley responded to the call. App. 85, ll. 9 – 12; App. 356, l. 8 – 357, l. 15.

When the officers arrived at the apartment complex, they met with Ella Brown, the tenant of apartment 401, outside of the apartment complex. App. 85, l. 13 – 86, l. 4. The officers asked Brown if she would let them into her apartment. Id. Brown agreed and opened the door for them. Id.

When the officers entered the apartment, they allegedly "smelled marijuana" and saw several people inside, including Petitioner. App. 86, l. 5 – 87, l. 16. The officers stated they saw a "baggie of marijuana" at Petitioner's feet and more baggies coming out of his pockets. Id. The occupants of the apartment did not make any threatening actions and the call to police did not allege anyone in the apartment had a weapon; nonetheless, the officers patted down the people in the apartment for "officer safety purposes." Id.; App. 91, l. 24 – 92, l. 23; App. 155, l. 23 – 158, l. 3. The pat-down search of Petitioner produced $839 in cash, a small digital scale, several empty baggies, and a single baggie that contained a substance officer Gray suspected was crack cocaine. App. 87, l. 17 – 90, l. 3; App. 155, ll. 3 – 14; App. 157, ll. 6 – 13.

Gray seized the suspected crack cocaine and sent it to SLED for testing. App.158, l. 4 – 160, l. 7. The test results showed the substance was 6.8 grams of crack cocaine. App. 186, ll. 19 – 25; App. 224, ll. 4 – 19.

Petitioner's trial commenced on May 28, 2013; however, Petitioner was not present. App. 5, ll. 3 – 10. Trial counsel Bolen moved for a continuance. App. 5, l. 22 – 8, l. 18. Trial counsel explained a continuance would be proper because it was out of character for Petitioner to be missing where throughout her representation of Petitioner he was always prompt and actively participated in the defense. Id. She stated she believed "something actually happened to him." Id.

Trial counsel also argued a continuance was necessary for several additional reasons. She explained Petitioner planned to plead guilty rather than go to trial, the discovery evidence in this case was provided late as it was transferred the day before trial, and Petitioner was not given adequate notice of the trial date. Id. Regarding the inadequate notice of the trial date, trial counsel explained the only notice given to Petitioner was when she told Petitioner that his case could be called to trial during this term. Id. Trial counsel argued under State v. Green, 269 S.C. 657, 239 S.E.2d 485 (1977) constructive notice from defense counsel was not sufficient to put a defendant on notice of their trial date. Id.

The state responded that Petitioner's case was put on the Abbeville trial docket website on May 7th, 2013, three weeks prior to the trial date. App. 11, l. 9 – 12, l. 9. The state also asserted that there was an email sent from trial counsel the week before trial addressing the "tentative schedule" where Petitioner's "Trial Docket Plea," was scheduled. Id. There was also "bond paperwork" that Petitioner signed that showed he was aware his case could be called for trial. Id. Thus, according to the state, Petitioner knew his rights and his trial could proceed in his absence. Id.

The trial court denied the motion for a continuance and instead issued a bench warrant for Petitioner. App. 14, l. 3 – 17, l. 8. The trial proceeded in his absence and he was found guilty of possession of crack cocaine with intent to distribute. App. 288, ll. 3 – 11. Since Petitioner was not present at his trial, the trial court imposed a sentence and sealed it until Petitioner could be present. App. 290, l. 22 – 291, l. 8.

On September 18, 2013, Judge Addy unsealed the sentence. App. 307, l. 16 – 208, l. 2. After imposing a twenty-nine-year prison sentence, Judge Addy explained that the severity of the sentence, one-year shy of the maximum, was imposed, in part, because Petitioner failed to appear at his trial. Id.

Petitioner filed a PCR application where he argued trial counsel provided ineffective assistance by failing to move to quash the indictments because the witness that testified before the grand jury was not the officer listed as the witness on the indictment. App. 339 – 358; App. 365 – 366.

At the PCR hearing, Patrick Neil Henderson, the witness who was listed on the indictment, testified. App 310; App. 394, l. 20. Henderson was the chief of police in Abbeville. App. 395, ll. 2 – 9. Henderson stated that he did not testify before the grand jury in this case. App. 397, ll. 1 – 11. He explained that the "court officer" typically testified before the grand jury. App. 397, l. 23 – 398, l. 1. Henderson admitted he had no firsthand knowledge of Petitioner's case and reiterated that he did not appear before the grand jury. App. 398, ll. 7 – 18.

Officer Raymond Vandiver, the "court officer," testified at Petitioner's PCR hearing as well. App. 447, l. 10. Vandiver admitted he did not have any firsthand knowledge of the incident but claimed he spoke with arresting officer, Gray, before testifying to the grand jury. App. 448, l. 6 – 449, l. 22. Vandiver testified he was sure he was the witness who presented the case to the

grand jury. App. 452, ll. 21 – 25. Notably, Vandiver also testified that he pointed out to a solicitor that the indictments were defective because they had Chief Henderson's name on them. App. 453, l. 3 – 454, l. 25. Vandiver stated the solicitor, unconcerned about the defective indictments, told him to testify before the grand jury anyway. Id.

Trial counsel Bolen testified at the PCR hearing as well. App. 408, l. 19. She admitted that she never investigated into the identity of the witness who testified before the grand jury. App. 434, l. l. 25 – 435, l. 6. Trial counsel also admitted that she would have been successful had she moved to quash the indictments against Petitioner because the witness listed on the indictment did not testify before the grand jury which rendered the indictments defective. App. 437, l. 21 – 438, l. 16. However, trial counsel speculated that the state would have re-indicted Petitioner had trial court quashed the defective indictments. Id.; App. 412, l. 2 – 414, l. 12.

One of the solicitors in Petitioner's case, Christopher Morrow, testified at Petitioner's PCR hearing. App. 441, l. 5. He also speculated that the state would have reindicted Petitioner had the trial judge quashed the defective indictments. App. 443, l. 25 – 444, l. 9. However, Morrow admitted that it was improper to have Henderson's name listed on the indictments. App. 446, ll. 9 – 13.

In the order of dismissal, the PCR court found that Vandiver was "bound over to appear before the grand jury" such that the state's process comported with the statute, S.C. Code Ann. 14-7-1550. App. 475. The PCR court speculated that had trial counsel moved to quash the indictments against Petitioner, the state could have called Vandiver to testify that he testified before the grand jury and amend the indictments to show Vandiver's name. App. 476 – 477. In the alternative, the PCR court further speculated that the state could have reindicted Petitioner at

a later term of court. Id. Regarding prejudice, the PCR court also found that Petitioner failed to show how the irregularity in the indictments impacted his case. Id.

Discussion

The South Carolina Constitution states, "[n]o person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed." S.C. Const. Art. I, § 11. Due to that constitutional provision, "[n]o person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury." S.C. Code Ann. § 17-19-10. Regarding the testimony from witnesses to the grand jury, "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." S.C. Code Ann. § 14-7-1550 (emphasis added).

The indictment process in South Carolina begins with the solicitor preparing an indictment. The indictment is then presented to the grand jury, where the grand jury hears testimony from a sworn witness regarding the incident that served as the basis for the charges. Id. The indictment is required to bear the name of the witness who testified before the grand jury, and twelve of the eighteen jurors must find probable cause that the defendant committed the charged crime for the indictment to be true-billed. Id.; S.C. Const. Art. I § 22.

In South Carolina, "A defendant has a constitutional right to demand that a grand jury which is properly established and constituted under law consider the criminal allegations against him." Evans v. State, 363 S.C. 495, 509, 611 S.E.2d 510, 518 (2005). However, a defendant must challenge the legality and sufficiency of the process of the county grand jury before the jury renders a verdict in order to preserve the error for direct appellate review. See Evans, 510, 611

S.E.2d at 518, n.7; see also S.C.Code Ann. 14–7–1140. Upon a timely motion to quash an indictment, the circuit 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. Evans, at 509–10, 611 S.E.2d at 518. Failure to timely move to quash the indictments renders the issue unpreserved. Id.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI. To prove ineffective assistance of counsel, Petitioner must establish that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687 – 688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688.

Deficient Performance

In the present case, the indictments against Petitioner listed the name of a witness, Chief Henderson, who did not testify before the grand jury. App. 397, ll. 1 – 11; App. 398, ll. 7 – 18; App. 452, ll. 21 – 25. Since trial counsel failed to investigate as to whether Chief Henderson

testified before the grand jury, at the time of Petitioner's trial, the true identity of the witness who presented the case to the grand jury was unknown. App. 434, l. l. 25 – 435, l. 6. Had trial counsel investigated the indictments, she would have discovered they were defective because Vandiver was the witness who presented the case to the grand jury. App. 448, l. 6 – 449, l. 22; App. 452, ll. 21 – 25.

At the PCR hearing, trial counsel admitted she could have moved to quash the indictments and, due to the defect on the indictments, she would have been successful had she made the motion. App. 437, l. 21 – 438, l. 16; See S.C. Code Ann. § 14-7-1550. Solicitor Morrow also acknowledged that it was improper to have Henderson listed as the witness on the indictments when he did not testify before the grand jury. App. 445, l. 9 – 446, l. 13. Moreover, Officer Vandiver testified he told a solicitor about the error on the indictments, but the solicitor instructed Vandiver to testify before the grand jury anyway which illustrated the little regard the state had for the indictment process. App. 453, l. 3 – 454, l. 25.

The order of dismissal in this case wrongfully found that the state's indictment process satisfied S.C. Code Ann. § 14-7-1550. App. 454. The PCR court determined that the indictment process in this case was proper because the grand jury foreman knew Vandiver, Vandiver had a "relationship with [the solicitor's] office," there was communication between Vandiver and the solicitor's office regarding grand jury sessions, and Vandiver's job duties as the "court officer" made Vandiver "bound over to appear before the grand jury." App. 454 – 458. However, none of those considerations were consequential in this context.

The statute *mandates* the indictment must list the witness who testified before the grand jury. S.C. Code Ann. § 14-7-1550. Thus, it was inconsequential that Vandiver was the "court officer." App. 475– 479. It was inconsequential Vandiver had a relationship with the solicitor's

office because he regularly testified before the grand jury. Id. It was also inconsequential that the grand jury foreman knew Vandiver from prior cases. Id. The statute has no exceptions for allowing a witness who was not listed on the indictment to testify before the grand jury for any reason. Id. Moreover, the position as "court officer" does not render Vandiver "bound over to appear before the grand jury," and even if Vandiver's position did, the state's process still did not comport with the mandated process laid out in S.C. Code Ann. § 14-7-1550.

The requirements for the grand jury indictment process are well defined in South Carolina. The witnesses who testified before the grand jury *must be listed on the indictments.* State v. Capps, 276 S.C. 59, 68, 275 S.E.2d 872, 876 (1981) (Lewis, J., dissenting); S.C. Code Ann. § 14-7-1550. Accordingly, trial counsel provided deficient performance when she failed to investigate into the witness who testified before the grand jury and failed to move to quash the defective indictments against Petitioner because the motion would have been successful had trial counsel made it. Strickland, at 687 – 688.

Prejudicial Effect

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, at 694. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.; see also Nichols v. State, 308 S.C. 334, 337, 417 S.E.2d 860, 862 (1992) (applying the Strickland framework to an ineffective assistance of counsel claim in the context of a probation revocation hearing).

However, "in certain limited circumstances 'prejudice is presumed' because prejudice 'is so likely that case-by-case inquiry... is not worth the cost.'" Lorenzen v. State, 376 S.C. 521,

529, 657 S.E.2d 771, 776 (2008) (quoting Nance v. Ozmint, 367 S.C. 547, 551, 626 S.E.2d 878, 880 (2004)) rev'd on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).[1] "[P]rejudice is presumed when the defendant is completely denied counsel at a critical stage of his trial." Nance, 367 S.C. at 552, 626 S.E.2d at 880 (internal quotation omitted).

Structural errors are "defects in the constitution of the trial mechanism which defy analysis by 'harmless-error' standards, and deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.'" United States v. Gary, 954 F.3d 194, 204 (4th Cir. 2020), cert. granted, 141 S. Ct. 974 (2021) (citing Neder v. United States, 119 S.Ct. 1827, 1833 – 34 (1999) (quoting Rose v. Clark, 106 S.Ct. 3101, 3105 – 06 (1986)). Defects in the indictment process can be structural errors such that prejudice is presumed as well. The grand jury system is a "basic, constitutional guarantee that should define the framework of any criminal trial." See Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 – 08 (2017). "[T]he defining feature of a structural error is that it *affect[s] the framework within which the trial proceeds*, rather than being simply an error in the trial process itself." Id. (emphasis added)

"A defendant has a constitutional right to demand that a grand jury which is properly established and constituted under law consider the criminal allegations against him." Evans v. State, 363 S.C. 495, 509, 611 S.E.2d 510, 518 (2005).

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[1] The United States Supreme Court held that "the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error." Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 (2017). Addressing the issue before it, whether the structural error of a public trial violation required a showing of Strickland prejudice, the Court held because, "not every public-trial violation will in fact lead to a fundamentally unfair trial," in limited instances Strickland prejudice must be shown. Id. at 1911. Notably, the Court's decision was limited to "trial counsel's failure to object to the closure of the courtroom during jury selection." Id. at 1907.

> [O]ne who demands and is refused the right to be tried for crime charged against him only upon an indictment presented by a legal grand jury, in instances where such indictment is required, may thereafter justly take the position that he has been deprived of life, liberty or property without due process of law in violation of the state constitution.

Id. (internal quotation omitted).

However, a Petitioner must present evidence that an abuse of the grand jury process occurred, his allegation must not be speculative. "The regularity of grand jury proceedings is presumed absent clear evidence to the contrary." State v. Batchelor, 377 S.C. 341, 344, 661 S.E.2d 58, 59 (2008); Evans v. State, 363 S.C. 495, 514, 611 S.E.2d 510, 520 (2005). "[T]he burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury proceedings is predicated." Batchelor, 377 S.C. at 344, 661 S.E.2d at 59. "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual *abuse* as grounds for quashing an otherwise lawful indictment." State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991) (emphasis in original).

In State v. Shands, 424 S.C. 106, 119, 817 S.E.2d 524, 531 (Ct. App. 2018), the Court of Appeals affirmed a trial court's denial of a motion to quash the indictments because the defendant failed to "present clear evidence that there was an abuse of the grand jury proceedings in his case." Id. In Shands, the defendant moved to quash the indictments against him because "the officer who testified at his grand jury hearing was not listed on his indictments and had no personal knowledge of his case." Id.

In that case, the state explained that the solicitor's office would notify the individual law enforcement agencies when the grand jury convened, and each law enforcement agency would send one officer to testify before the grand jury on all indictments. Id. at 120, 817 S.E.2d at 531. The state could not confirm that either of the two officers listed on Shands' indictments testified

in front of the grand jury because it did not have a record of who testified. Id. However, Shands failed to present evidence that the witness who testified before the grand jury was not one of the two listed on the indictments. Id. Accordingly, the Court of Appeals held that Shands' argument was "pure speculation" because he did not present "clear evidence" there was a violation in the grand jury process. Id.

The Court of Appeals decision in Shands held that to show there was an abuse of the grand jury process a defendant must present evidence of abuse, rather than speculation. Id. The state must admit to the error or the defendant must present evidence that the witness listed on the indictment was not the witness who testified before the grand jury. Id.

Here, Petitioner has presented evidence for both of those requirements. Petitioner showed that the indictment had Chief Henderson's name on it and elicited testimony from Henderson at the PCR hearing that he did not testify before the grand jury. App. 310 – 314; App. 397, ll. 1 – 11. Additionally, Officer Vandiver admitted he was certain that he testified before the grand jury to procure the "true-billed" indictments in this case. App. 452, ll. 21 – 23. Furthermore, solicitor Morrow admitted at the PCR hearing that having a person other than the witness that testified before the grand jury listed on the indictments would be improper. App. 446, ll. 9 – 13. Accordingly, Petitioner satisfied both evidentiary hurdles to show that an abuse of the grand jury process occurred in this case.

The abuse of the grand jury process in this case constituted a structural error because trial counsel failed to subject the defective indictments "to meaningful adversarial testing, thus making the adversary process itself presumptively unreliable." Nance, 367 S.C. at 552, 626 S.E.2d at 880 (internal quotation omitted). "Even a fully competent trial counsel" could not provide effective assistance in this case because the defective indictments violated Petitioner's

"constitutional right to demand that a grand jury which is properly established and constituted under law consider the criminal allegations against him." Evans, at 509, 611 S.E.2d at 518. Accordingly, prejudice in this case should be presumed.

However, if this Court determines that the error in the grand jury process in this case was not structural, Petitioner showed he suffered actual prejudice as well. Trial counsel's failure to investigate the circumstances giving rise to the indictments and move to quash them prejudiced Petitioner because he came to an agreement with the solicitor's office to plead guilty to twelve years' imprisonment, but instead was tried in his absence where he was subjected to a much longer prison sentence. App. 5, ll. 3 – 10; App. 5, l. 22 – 8, l. 18; App. 307, l. 16 – 308, l. 2.

Petitioner had a plea agreement to a term of twelve years' imprisonment, and at Petitioner's sentencing hearing the trial court sentenced Petitioner to twenty-nine years' imprisonment, in part, because he was not present for his trial. App. 5, l. 22 – 8, l. 18; App. 307, l. 16 – 308, l. 2. Had trial counsel investigated into the defective indictments and moved to quash them, Petitioner would have had more time to be present for his trial date to enter a guilty plea. Since trial counsel would have been successful in quashing the indictments, the outcome of Petitioner's trial on May 28-30, 2013 would have turned out differently. Accordingly, Petitioner suffered prejudice because if trial counsel provided sufficient representation, Petitioner would have entered a guilty plea at a later court date and been sentenced to twelve years' imprisonment rather than the twenty-nine years' imprisonment imposed from his trial in absentia.

The state's arguments that Petitioner did not suffer prejudice from trial counsel's failure to investigate the circumstances that gave rise to the indictments and move to quash them were speculative. The state elicited testimony at PCR that had the indictments been quashed the solicitor would have reindicted Petitioner during the next term of court. App. 437, l. 21 – 439, l.

17; App. 412, l. 2 – 414, l. 12. That was pure speculation on the part of the solicitor because there was no telling whether Petitioner would have been reindicted during the next term of court or at a later term of court. Moreover, the solicitor's speculation also showed the disrespect the solicitor's office had for the indictment process because it assumed the grand jury would automatically reindict Petitioner.

The order of dismissal speculated that the solicitor would have called Vandiver to testify at Petitioner's trial to say he was the one who testified before the grand jury to cure the defective indictments, but there was no indication in the record that the solicitor would have called Vandiver to testify or that Vandiver was available to testify on such short notice. App. 477. The order of dismissal found that even if the indictments were quashed Petitioner would have been reindicted before he came back to South Carolina[2] four months later. App. 475 – 479. That was also speculation. Had the indictments been quashed there was no telling how the case would have proceeded. Since quashing the indictments would have postponed the trial, trial counsel would have had more incentive to locate Petitioner because she now had definite information about the trial date. Accordingly, it was more likely[3] that Petitioner would have been present for his later trial date to enter a guilty plea because he would have had notice the state was going to call his case to trial imminently.

Perhaps the strongest indication of prejudice to Petitioner in the present case was presented in the testimony of Vandiver at the PCR hearing. Vandiver testified that he told the solicitor about the error in the defective indictments, but *the solicitor told him to testify before the grand jury anyway*. App. 453, l. 3 – 454, l. 25. Such disregard for the grand jury process

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[2] Petitioner returned to South Carolina four months after the completion of the trial in absentia. App. 303; App. 305, ll. 1 – 16.

[3] The speculative nature of disproving or proving prejudice in this case evinces why the failure to move to quash the defective indictments was a structural error.

showed that proceeding to trial on the defective indictments was not an aberration or mistake but rather the result of the solicitor's office purposefully disregarding the constitutional rights of defendants and the constitutional requirements of the grand jury process in this state. In that light, the defective indictments here were not a ministerial, scrivener's error but a substantive error. See State v. Bultron, 318 S.C. 323, 329–330, 457 S.E.2d 616, 620 (Ct. App. 1995) (holding that failure to mark the indictment 'true bill' was a scrivener's error because the grand jury's docket coordinator testified the grand jury considered and acted on all indictments presented and returned no "no bills").

The constitutional prohibition on trying an individual for a crime except upon presentment of an indictment to a grand jury must have meaning for our court system to function properly. S.C. Const. Art. I, § 11; State v. Capps, 276 S.C. 59, 64, 275 S.E.2d 872, 874 (1981) (Lewis, J., dissenting). "The courts of South Carolina stand guard to see that the grand jury is not reduced to a mere plaything of prosecutors." State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991) (internal quotation omitted). The appellate courts must act with "zeal to [ensure] that the grand jury continues to perform its historic function as a shield between the accused and the abuse of the prosecutorial power of the state." Id.

Accordingly, in order to provide meaning to the constitutional provisions and statutory scheme governing the grand jury process, this Court should reverse the PCR court's order of dismissal and remand Petitioner's case for a new trial because he suffered prejudice from trial counsel's failure to investigate into the indictments and move to quash them, or because prejudice was presumed from the structural error inherent in the defective indictments. Throughout this case, the state showed that it viewed the grand jury process as its plaything. App. 453, l. 3 – 454, l. 25; Thomas, at 502, 409 S.E.2d at 424. Affirming the denial of relief in

this case would condone solicitor using the grand jury as a "plaything" as it would be a weapon for the state instead of a shield against wrongful convictions. See Thompson, at 502, 409 S.E.2d at 424.

The grand jury system is a "basic, constitutional guarantee that should define the framework of any criminal trial." See Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 – 08 (2017). "[T]he defining feature of a structural error is that it affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself." Id. An indictment that falsely claims a witness presented sworn testimony to the grand jury in order for the grand jury to issue the indictment is a "defect[] in the constitution of the trial mechanism which def[ies] analysis by 'harmless-error standards." See United States v. Gary, 954 F.3d 194, 204 (4th Cir. 2020) (internal quotations omitted). The state was aware the indictments were defective but nonetheless presented them to the grand jury, and trial court, when it called Petitioner to trial on indictments that incorrectly indicated Henderson testified before the grand jury. App. 432, l. 3 – 433, l. 25. The state should not benefit from its creation of fundamental unfairness.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to allow for further briefing on this issue.

Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of June, 2021.