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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON PETITION FOR A WRIT OF CERTIORARI TO ABBEVILLE COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Post-Conviction Relief Judge
The Honorable Frank R. Addy Jr., Circuit Court Judge

Appellate Case No. 2021-000013

ALFONZO ALEXANDER, ... Petitioner,

v.

STATE OF SOUTH CAROLINA, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue Presented

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.

Respondent's Counterstatement of Issue Presented

Trial counsel was not ineffective for failing to move to quash the indictments against Petitioner, because the indictments contained the necessary elements of the offenses, and the police officer who testified before the grand jury gained sufficient knowledge of the circumstances of Petitioner's charge. Petitioner was not prejudiced because he enjoyed his constitutional right to presentment of an indictment to a grand jury, and the indictment could have been, or Petitioner could have been re-indicted and tried during the following term of court. Further, trial counsel stated a reasonable trial strategy in declining to quash the indictment.

STATEMENT OF THE FACTS

On August 12, 2012, at 1:16AM an anonymous 911 call reported gambling and drug distribution taking place in apartment 401 at Oakland Apartments on Virginia Street in Abbeville. ROA. p. 152, l. 3-12. Lt. John Gray and Officer Larry Ashley with the Abbeville Police Department responded to the apartment complex and observed three people sitting outside of the apartment. ROA. p. 153, l. 15- p. 154, l. 3. One of the subjects, Ella Brown, stated she lived in the apartment officers responded to and officers explained the complaint they received through 911. At that time, Ella Brown testified she "opened the door for him." ROA. p. 195, l. 23- p. 197, l. 12. Once inside, officers could smell marijuana, and observed nine adults and two children inside the apartment, including Petitioner. ROA. p. 154, l. 18- p. 155, l. 2. Officers saw a baggie of marijuana at Petitioner's feet, and they observed baggies coming out of Petitioner's pockets and a large wad of money in his hand. ROA. p. 155, l. 3-12. The officers conducted pat downs of the occupants for officer safety purposes. ROA. p. 155, l. 13-22. During the pat down of Petitioner, officers felt a small square in one of his pockets and asked if they could remove the contents of his pocket. ROA. p. 155, l. 23- p. 156, l. 11. Petitioner consented and the officer removed a small square digital scale, baggies, and a single bag that contained crack cocaine from Petitioner's pocket. ROA. p. 156, l. 12-24. SLED results showed the substance collected from Petitioner's pocket was 6.8 grams of crack cocaine. ROA. p. 223, l. 15- p. 225, l. 1.

STATEMENT OF THE CASE

In January 2013, the Abbeville County Grand Jury indicted Petitioner for possession of crack cocaine with intent to distribute (2013-GS-01-0015), and possession of crack cocaine with intent to distribute within proximity of a school or park (2013-GS-01-0014). Public Defender Janna Nelson, and Assistant Public Defender Patricia Bolen of the Eighth Circuit Public Defender's Office represented Petitioner. Assistant Solicitor's C. Yates Brown, and Christopher "Cam" Morrow of the Eighth Circuit Solicitor's Office prosecuted the case.

On May 28-30, 2013, the State called Petitioner's case to a jury trial before the Honorable Frank R. Addy, Jr. Petitioner was tried in his absence. The jury found Petitioner guilty as indicted for possession of crack cocaine with intent to distribute. Petitioner's charge of possession with intent to distribute within proximity of a school or park was dismissed on Counsel's directed verdict motion at the close of the State's case. Judge Addy sealed Petitioner's sentence. On September 18, 2013, Petitioner appeared with Counsel before Judge Addy in Greenwood County. Judge Addy unsealed and published Petitioner's sentence of imprisonment for a period of twenty-nine years.

Petitioner filed a motion to reconsider on September 26, 2013, arguing his sentence was substantially longer than any previous sentence he received for drug related charges, and substantially longer than the plea offer Petitioner has received prior to his trial. Petitioner further argued that this sentence is disproportionate to sentences in other drug crimes in the Eighth Circuit, and Petitioner should not be punished for failing to appear at his trial. Petitioner's motion to reconsider was denied on November 26, 2013.

Petitioner filed a timely notice of appeal. Appellate Defender LaNelle C. Durant of the Office of Appellate Defense perfected the appeal.

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

Petitioner subsequently filed an application for post-conviction relief on December 28, 2016. On May 18, 2017, the State filed its return and requested an evidentiary hearing be held on Petitioner's application for post-conviction relief. On May 8, 2019, Petitioner, through counsel, filed an amended application for post-conviction relief alleging Counsel was ineffective for failing to move to quash the indictments against Petitioner, because the witness who is listed on the indictment is not the same officer who testified before the grand jury. Petitioner further alleged Counsel was ineffective for failing to object to the arresting officer's actions pursuant to the State constitutional right against unreasonable invasions of privacy.

On June 6, 2019, an evidentiary hearing was held regarding Petitioner's application for post-conviction belief before the Honorable Thomas A. Russo. Petitioner was represented by Carson Henderson, Esquire. Assistant Attorney General Janell Gregory, Esquire represented the State. In an order filed on March 11, 2020, the PCR court denied Petitioner's application for post-conviction relief.

Petitioner filed a notice of appeal. Appellate Defender Victor Seeger filed a Petition for Writ of Certiorari and Appendix. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. *Id.* at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). Pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.*

ARGUMENT

Trial counsel was not ineffective for failing to move to quash the indictments against Petitioner, because the indictments contained the necessary elements of the offenses, and the police officer who testified before the grand jury gained sufficient knowledge of the circumstances of Petitioner's charge. Petitioner was not prejudiced because he enjoyed his constitutional right to presentment of an indictment to a grand jury, and the indictment could have been, or Petitioner could have been re-indicted and tried during the following term of court. Further, trial counsel stated a reasonable trial strategy in declining to quash the indictment.

The post-conviction relief court correctly found trial counsel was not ineffective for failing to move to quash the indictments against Petitioner. The post-conviction relief correctly found Lt. Vandiver was bound over to testify before the grand jury and provided the grand jury with sufficient information regarding the circumstances that lead to Petitioner's charges. Additionally, trial counsel stated a reasonable trial strategy which explained her decision to not move to quash the indictments against Petitioner. Further, Petitioner has failed to show how he was prejudiced by trial counsel's performance when Petitioner chose to not appear in court on May 28, 2013, to plead guilty, and instead was sentenced to twenty-nine years in prison following a trial in his absence. Petitioner has failed to establish how trial counsel's performance was deficient, or how the outcome of Petitioner's trial would have been different if trial counsel moved to quash the indictments against Petitioner.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164

(2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668. First, Petitioner must prove counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Id.*, at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.at 117-18, 386 S.E.2d at 625. As the Supreme Court of the United States explained in *Strickland*, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695, 104 S.Ct. at 2068-69, 80 L.Ed.2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 668.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." *Id.* at 690.

Counsel was not deficient for failing to investigate the circumstances giving rise to the indictments against Petitioner, and for not moving to quash the indictments against Petitioner, because the indictments were true billed by a grand jury, who heard the relevant evidence from an officer who was properly sworn in before the grand jury, who additionally was "bound over to appear before the grand jury" and the indictments are facially valid.

The South Carolina Constitution requires, "No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed..." S.C. Const. art. I, § 11. The South Carolina Supreme Court held an indictment is valid under South Carolina law if it "contains the necessary elements of the offense intended to be charged and sufficiently

apprised the defendant of what he must be prepared to meet." *State v. Guthrie*, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted).

Petitioner contends that the indictment against him was improper because the witness who was listed was not the witness who testified before the grand jury. Petitioner alleges it is improper for Lieutenant Raymond Vandiver to testify before the grand jury in this case as he was not the witness listed on the indictment, and he did not have firsthand knowledge of the events leading to Petitioner's arrest.

S.C. Code Ann. §14-7-1550 states:

> The foreman of the grand jury or acting foreman in the circuit courts of any county of the State *may* swear the witnesses whose names shall appear on the bill of indictment in the grand jury room. No witnesses shall be sworn except those who have been **bound over** or subpoenaed in the manner provided by law. In order to obtain attendance of any witness, the grand jury may proceed as provided by the South Carolina Rules of Civil Procedure and Sections 19-9-10 through 19-9-130.

S.C. Code Ann. §14-7-1550 (emphasis added).

At Petitioner's PCR hearing, Chief Henderson of the Abbeville Police Department testified he was listed as the witness on Petitioner's indictment. However he indicated he did not testify before the grand jury in this case. ROA. p. 397, l. 1-14. Chief Henderson further indicated that the Abbeville Police Department had a "court officer" who appeared before the grand jury to secure all of their indictments. ROA. p. 397, l. 23- p. 398, l. 6; p. 398, l. 1- p. 399, l. 10. At Petitioner's PCR hearing, Lieutenant Raymond Vandiver testified he was court officer for the Abbeville Police Department. ROA. p. 448, l. 6-9. Lt. Vandiver testified his job as court officer was to put cases files together, make folders that contained all of the police statements for the cases that were going to be presented to the grand jury, and to testify before the grand jury to secure indictments. ROA. p. 448, l. 10- p. 449, l. 2. Lt. Vandiver testified the solicitor's office would send him a list of

indictments, and Lt. Vandiver would use this list to pull the appropriate case folders to present to the grand jury. ROA. p. 448, l. 23- p. 449, l. 2. Lt. Vandiver testified he would review statements and incident reports, and speak with the officers who drafted incident reports to gain knowledge of the facts and circumstances surround a case prior to presenting it to the grand jury. ROA. p. 449, l. 3-22. Lt. Vandiver indicated he was sworn in each time he testified before the grand jury. ROA. p. 451, l. 12-21. On cross-examination, Lt. Vandiver testified he spoke with the a member of the solicitor's office prior to testifying before the grand jury, and informed the solicitor that he was not the witness who was listed on the indictment. ROA. p. 453, l. 3-16. Lt. Vandiver testified he was told by the solicitor that if he had knowledge of the case that he could go ahead and testify before the grand jury. ROA. p. 453, l. 16-21. Lt. Vandiver testified the grand jury was aware that he was not Chief Henderson, who was the name listed on the indictment, because he had testified before some of the same jurors for four years, and these jurors were familiar with him and his job with the Abbeville Police Department. ROA. p. 457, l. 10-18.

From Lt. Vandiver testimony it appears he was properly sworn in prior to testifying before the grand jury. Additionally, Lt. Vandiver testified he informed the grand jury he was not the witness who was listed on the indictment, and the grand jury was aware of Lt. Vandiver and his job with the Abbeville Police Department. Based on Lt. Vandiver's relationship with the solicitor's office, his communication with the solicitor's office regarding the cases that were to be presented to the grand jury, and Lt. Vandiver's job as court officer for the Abbeville Police Department, Lt. Vandiver would be "bound over" to appear before the grand jury when Petitioner's indictment was true billed. S.C. Code Ann. § 14-7-1550.

Although Lt. Vandiver testified at Petitioner's PCR hearing that he did not have firsthand knowledge of the case, firsthand knowledge is not a requirement to testify before the grand jury.

"An indictment based upon hearsay testimony violates no right of appellant under Article 1, Section 17 (now Section 11) of the South Carolina Constitution. In fact, our decisions preclude inquiry into the factual basis for an indictment by the grand jury." *State v. Williams*, 263 S.C. 290, 210 S.E2d. 298 (1974) (citing *Margolis v. Telech*, 239 S.C. 232, 122 S.E.2d 417 (1961)). "An indictment returned by a legally constituted and unbiased grand jury..., if valid on its face, is enough to call for trial of the charge on the merits." Id. at 296, 210 S.E.2d. at 301, (quoting *Pittsburgh Plate Glass Company v. United States*, 360 U.S. 395 (1959)). Lt. Vandiver testified he would have reviewed the incident report, and spoke with the officers who prepared the incident report while preparing to present this case to the grand jury. ROA. p. 449, l. 3-22. Lieutenant John Gray testified at Petitioner's PCR hearing that he was one of the officers who reported to the Oakland Apartments on August 12, 2012, the night Petitioner was arrested. ROA. p. 372, l. 18-25. Lt. Gray further testified he discussed Petitioner's arrest with Lt. Vandiver during a shift change on the morning Petitioner was arrested. ROA. p. 384, l. 19-20. Lt. Gray testified he briefed Lt. Vandiver on the arrest, and gave Lt. Vandiver a copy of the report at that time. ROA. p. 384, l. 21-24; ROA. p. 395, l. 11-16.

Based on the testimony of Lt. Gray, Lt. Vandiver was briefed on the events that led to Petitioner's arrest, and was provided with a copy of the incident report well in advance of Lt. Vandiver appearing before the grand jury. Though Lt. Vandiver did not have firsthand knowledge of the incidents leading to Petitioner's arrest, he was apprised of the facts necessary to testify before the grand jury in this case, and properly testified as a witness for the Abbeville Police Department.

Petitioner further asserts trial counsel would have been successful if she moved to quash the indictment in this case. However, even if trial counsel had moved to quash the indictments

there is not guarantee that the indictments would have been quashed, or that this would have had an effect on the outcome of Petitioner's trial. "When a defendant timely moves to quash an indictment . . ., the [trial] court must determine whether the defendant[']s constitutional right to have the criminal allegations against him weighed by a properly constituted grand jury has been violated." *State v. Shands*, 424 S.C. 106, 119, 817 S.E.2d 524, 531 (2018) (quoting *Evans v. State*, 363 S.C. 495, 510, 611 S.E.2d 510, 518 (2005)). "Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary." *Shands*, 424 S.C. at 120-121, 817 S.E.2d at 532 (quoting *State v. Thompson*, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." *Id.* at 502, 409 S.E.2d at 424. Additionally, this Court held that a minor error in an indictment should not be grounds to quash an indictment. The circuit court ordinarily should not quash an indictment when a defendant, in a timely motion made before the jury renders its verdict, asserts a truly minor irregularity in the grand jury process. *Evans v. State*, 363 S.C. 495, 513, 611 S.E.2d 510, 520 (2005).

At Petitioner's PCR hearing, Counsel testified the purpose of the indictment was to provide Petitioner with notice of what he has been charged with. ROA. p. 412, l. 9-14 Counsel further testified she read the indictment, and it comported with the statute that Petitioner was charged with, and the substance of Petitioner's indictment including the date, time, and the fact were all correct. ROA. p. 412, l. 9- p. 413, l. 2; 435, l. 15-22. Counsel further testified she did not see anything facially wrong with the substance of the indictment. ROA. p. 436, l. 14-15. Counsel testified that in addition to Chief Henderson, the Abbeville Police Department was listed as a witness on Petitioner's indictments, and she felt that any officer from the Abbeville Police Department was a

proper witness to testify before the grand jury in this case. ROA. p. 436, l. 9-13. Counsel also testified she did not feel she could determine who actually testified before the grand jury, in order to challenge the validity of the indictment, because the proceedings are secret. ROA. p. 436, l. 16-23. Counsel testified she did not feel moving to quash the indictment would change the outcome of this case. Counsel stated by quashing the indictment the case would have been delayed at most for thirty days. ROA. p. 413, l. 3- p. 414, l. 12; p. 438, l. 2-8.

The PCR court properly found Counsel was not deficient by not moving to quash the indictments against Petitioner after Counsel explained a strategic reason for this decision. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Strickland*, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (quoting *Massaro v. United State*, 538 U.S. 500(2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517). *See also Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.) Trial counsel's strategy is reviewed under "an objective standard of reasonableness." *Magazine v. State*, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004). *See also Dunn v. Reeves*, 141 S.Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel

took an approach that no competent lawyer would have chosen.") (citation and internal quotation marks omitted).

Petitioner also failed to show that trial counsel's performance prejudiced Petitioner. To satisfy the prejudice prong of *Strickland's* two part analysis, an applicant must demonstrate "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693). As the Supreme Court of the United States explained in *Strickland*, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695, 104 S.Ct. at 2068-69, 80 L.Ed.2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Rutland*, 415 S.C. at 577, 785 S.E.2d at 353 (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698).

In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. *See Strickland*, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before the jury.").

Petitioner argues that the court could have presumed prejudice in Petitioner's case. Petitioner asserts he established clear evidence of an abuse of the grand jury system in his case. Though Petitioner asserts it is improper to have Chief Henderson listed on Petitioner's indictments

when he did not testify before the grand jury, Respondent contends Petitioner's indictments were not obtained through an abuse of the grand jury system. The South Carolina Supreme Court held an indictment is valid under South Carolina law if it "contains the necessary elements of the offense intended to be charged and sufficiently apprised the defendant of what he must be prepared to meet." *Guthrie*, 352 S.C. at 108, 572 S.E.2d at 312.

> Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

S.C. Code Ann. § 17-19-20.

Counsel testified at Petitioner's PCR hearing that the indictments against Petitioner properly notified Petitioner of the charges that we has facing. ROA. p. 412, l. 2- p. 413, l. 2; p. 435, l. 17- p. 436, l. 18. Additionally, Solicitor Christopher "Cam" Morrow testified the indictments in Petitioner's case were true billed and signed by the foreman of the grand jury, and they correctly stated the charges and provided Petitioner with sufficient notice of the charges he was to be tried for. ROA. p. 443, l. 15-24. Applicant's indictments were true billed after the grand jury heard Lt. Vandiver testify regarding the underlying facts that led to Petitioner's charges.

At Petitioner's PCR hearing, Counsel speculated that if she moved to quash the indictment, the solicitor's office could have called the officer who testified before the grand jury to court and had him testify regarding the indictment, and the indictment could have been amended. ROA. p. 438, l. 9-13. "An indictment may be amended provided such amendment does not change the nature of the offense charged." *State v. Guthrie*, 352 S.C. 103, 109, 572 S.E.2d 309, 313 (2002) (citing *State v. Lynch*, 344 S.C. 635, 545 S.E.2d 511 (2001), *Granger v. State*, 333 S.C. 2, 507 S.E.2d 322 (1998) (finding that, under § 17-19-100, an indictment may be amended at trial only if

amendment does not change nature of offense charged.)) Since such an amendment would not have changed the nature of Applicant's indictments, it is likely the trial court would have put Vandiver's name on the indictment at that time, especially since the grand jury was already aware that he was the witness before them at the time Applicant's indictments were issued. Though Petitioner asserts he was prejudiced by Counsel's failure to move to quash the indictments, Petitioner has failed to present sufficient evidence to suggest that the court would have quashed Petitioner's indictments, that the indictments could not have been amended, or that Petitioner could not have been re-indicted and tried at the next term of court.

Petitioner also argues he was prejudiced in this case because he was sentenced to imprisonment for twenty-nine years after being tried in his absence, despite having a plea agreement in place for twelve years. Petitioner argues that if Counsel moved to quash the indictment, Petitioner would have had more time to be present for his trial date[1]. Petitioner states he would have entered a guilty plea at a later term of court and would have been sentenced to twelve years as opposed to the twenty-nine year sentence Petitioner received after he was found guilty. Petitioner willfully fled the state to avoid being sentenced, and did not return until he was captured by police in Florida nearly four months after his trial, so his reasoning is baseless.

Prior to the start of Petitioner's trial, Counsel moved for a continuance in Petitioner's case, or for a bench warrant to be issued for Petitioner, because Petitioner had failed to appear in court on May 28, 2013. ROA. p. 5, l. 22- p. 6, l. 1. Counsel indicated she had communicated with Petitioner extensively during her representation, and Petitioner never missed an appointment with Counsel. ROA. p. 6, l. 5-9. Counsel met with Petitioner the Thursday prior to his trial, and there

[1] At Petitioner's sentencing, he admits he was attempting to avoid going to prison until after his child was born. ROA. p. 306, l. 16- p. 307, l. 15.

was no indication that Petitioner would not show up to court on May 28, 2013. ROA. p. 10-15. Counsel believed Petitioner never intended for a trial to occur in this case, instead Petitioner's case could be resolved in twenty minutes via a guilty plea. ROA. p. 6, l. 23- p. 7, l. 7. During her motion for a continuance, Counsel argued that Petitioner was not adequately put on notice of his trial date. ROA. p. 8, l. 14-21. After the court questioned Counsel, Counsel stated she informed Petitioner during their last meeting that he needed to appear for court on May 28, 2013, to plead guilty or proceed to trial. ROA. p. 8, l. 22- p. 9, l. 8. Counsel further argued under *State v. Green*, 269, S.C. 657, 239, S.E.2d 485, (1977), that constructive notice of a trial date by defense counsel was not enough to put Petitioner on notice of his trial date. ROA. p. 9, l. 12- 24. Assistant Solicitor C. Yates Brown, Jr. informed the court that a trial docket for the week of May 27-31, 2013, was posted on the internet on May 7, 2013, and Petitioner's name was the first name listed on the trial docket notice. ROA. p. 11, l. 15-24. Additionally, Assistant Solicitor Brown indicated he received an email with the subject line "Trial Docket Plea" from Counsel on May 23, 2013, the day of her last meeting with Petitioner. ROA. p. 11, l. 25- p. 12, l. 6. Assistant Solicitor Brown claimed this email indicated Petitioner knew that he was on the trial docket. ROA. p. 11, l. 25- p. 12, l. 6. Assistant Solicitor Brown also referenced bond paperwork which Petitioner signed, that stated if Petitioner failed to appear in court, his case could be called to trial in his absence. ROA. p. 12, l. 6-9. The trial court denied Counsel's motion for a continuance, and issued a bench warrant for Petitioner. ROA. p. 14, l. 3- p. 17, l. 8. At the conclusion of Petitioner's trial, Judge Addy indicated he would seal Petitioner's sentence until Petitioner was located and brought before the court. ROA. p. 300, l. 7-12. Judge Addy further indicated that if Petitioner appeared in court before the end of the week that he would reconsider Petitioner's sentence. ROA. p. 300, l. 13- p. 301, l. 12.

At Petitioner's sentencing hearing on September 18, 2013, Assistant Solicitor Brown informed the trial court that Petitioner was located in Melbourne, Florida, where he was arrested and ultimately extradited back to South Carolina. ROA. p. 306, l. 2-10. In mitigation, Counsel stated Petitioner made a bad decision by failing to appear for court, and that Petitioner wished he could go back and accept the twelve year plea that had been offered to him. ROA. p. 306, l. 16-22. Counsel further indicated the reason Petitioner did not appear in court on May 28, 2013, was because he wanted to avoid going to prison so he could see his child's birth which was to occur on September 30, 2013. ROA. p. 306, l. 22- p. 307, l. 4. Petitioner testified he tried multiple methods to "buy time" to avoid going to prison, including offering to work with the Abbeville Police Department. ROA. p. 307, l. 8-12. Petitioner further testified because his attempts to avoid imprisonment failed, he panicked and fled the state. ROA. p. 307, l. 12-15.

At Petitioner's PCR hearing, Counsel testified she met with Petitioner in person on four occasions, including one final meeting on May 23, 2013. ROA. p. 410, l. 1-15. Counsel testified she sent Petitioner a letter on April 29, 2013, informing him that his court date was the week of May 27, 2013, and if he wanted to accept the twelve year plea offer he would need to be prepared to come to court at 9:00am on Tuesday May 28, 2013. ROA. p. 423, l. 1-16. Counsel testified when Petitioner failed to appear in court she had a law clerk with the public defender's office call Petitioner, but Petitioner's phone was disconnected. ROA. p. 424, l. 1-9. Counsel testified she proceeded to reach out to Petitioner's mom and sister, and she called all of the numbers she had for Petitioner since his phone had been disconnected. ROA. p. 425, l. 15- p. 426, l. 3. Counsel further testified she tried to locate Petitioner following the conclusion of his trial. In explaining her search for Petitioner, Counsel testified she went to his apartment to look for Petitioner; she attempted to speak with Petitioner's girlfriend; she spoke with another tenant at Petitioner's

apartment complex to see if anybody had seen Petitioner; she called Petitioner's sister again to get Petitioner to appear in court; and tried to text Petitioner again, however Petitioner never responded. ROA. p. 430, l. 16- p. 431, l. 13.

When asked by Petitioner's PCR counsel if moving to quash the indictments would provide her more time to find Petitioner, Counsel indicated she went through extensive efforts to locate Petitioner including reaching out to friends and family, driving around Abbeville looking for Petitioner, and attempting to call Petitioner, but she "developed the suspicion that Petitioner did not want to be found." ROA. p. 438, l. 19- p. 439, l. 14. Counsel indicated that moving to quash the indictment would have given her more time, but "whether he would have shown up or not, would be complete speculation." ROA. p. 439, l. 15-17. Counsel stated moving to quash the indictment may have given her an additional thirty days before Petitioner's case was called to trial, but Petitioner was not found until September of 2013, nearly four months later, when he was arrested in Melbourne, Florida. ROA. p. 439, l. 19-25.

Despite Petitioner's claim he would have appeared in court at a later date to plead guilty, Petitioner's claim is wholly speculative at best. Petitioner admitted he fled the state to avoid imprisonment, claiming he wanted to remain out of prison until at least the end of September, 2013 to see his child's birth. Counsel went through extensive efforts to attempt to locate Petitioner so that he could plead guilty on May 28, 2013, however Petitioner's actions led Counsel to believe that Petitioner did not want to be found. Petitioner now makes a *post hoc* assertion that he would have voluntarily appeared in court at a later time to plead guilty despite his assertions that the indictments against him were invalid.

Petitioner further states if his indictments were quashed, and he was re-indicted, that there is a higher likelihood that he would have been present for a later court date because he would have

had notice the State was going to call his case to trial. However, this assertions is without merit. Petitioner's phone had been disconnected by May 28, 2013, and Petitioner had no contact with Counsel until September of 2013 after he was extradited back to South Carolina. Petitioner fled the state and was located approximately four hundred and eighty miles away from Abbeville, South Carolina, in the city of Melbourne, Florida. Even if Petitioner's case was not called for trial the week of May 28, 2013, there is no cognizable way that Counsel or the State would have been able to provide Petitioner with notice of an impending trial date until at least September of 2013. Petitioner actively made the decision to forgo pleading guilty and receiving a twelve year sentence when he chose to not appear in court on May 28, 2013. Petitioner's own actions lead to him receiving a twenty-nine year sentence following the trial in his absence. Petitioner has argued that he was prejudiced when he received a twenty-nine year sentence when Petitioner had a plea offer of twelve years. However, it is complete speculation on Petitioners part to believe that if the indictments in his case were quashed, and he were re-indicted, that he would have received the same plea offer from the solicitor's office.

Petitioner has failed to establish how Counsel's performance was deficient by not moving to quash the indictments in his case. The indictments in Petitioner's case were true billed before a grand jury following the testimony of Lt. Vandiver, who had sufficient knowledge of the facts which led to Petitioner's arrest. Lt. Vandiver, a member of the Abbeville Police Department was sworn in, and presented these facts to a grand jury which ultimately true billed the indictments against Petitioner. Petitioner was properly notified of the charges he was facing, and the Petitioner could easily understand what he was being charged with. Counsel reviewed the indictments with Petitioner and found no evidence that the indictments were facially invalid. Further Counsel believed that any officer from the Abbeville Police Department could testify before the grand jury,

as the Abbeville Police Department was listed as a witness on the indictments. Additionally, Petitioner has failed to show how he was prejudiced by Counsel's decision to not move to quash the indictments. Though Petitioner asserts if the indictments were quashed there is a higher likelihood he would have appeared at a later court date, Petitioner was aware of the date and time that he was called to appear in court, but voluntarily chose to not appear. As a result of this decision by Petitioner, he was tried in his absence, and received a sentence of imprisonment for twenty-nine years. Therefore, Petitioner has failed to show his trial counsel was ineffective for failing to investigate the circumstances giving rise to the indictments against Petitioner, and for not moving to quash the indictments when Lt. Vandiver was not listed by name on the indictments.

CONCLUSION

For the foregoing reasons, this Court should deny this petition and affirm the decision of the PCR court. Should this Court grant certiorari, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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