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SUPERIOR COURT  
OF GUAM

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**IN THE SUPERIOR COURT OF GUAM**

**ANTHONY PAUL MENDIOLA,**  
Petitioner,

vs.

**JOSEPH S. CARBULLIDO, Acting Director,**  
Department of Corrections,  
Government of Guam,  
Respondent.

**SPECIAL PROCEEDINGS CASE NO.:**  
**SP0039-18**

**DECISION AND ORDER**  
Re: Petition for Writ of Habeas Corpus

**INTRODUCTION**

This matter came before the Honorable Judge Anita A. Sukola on September 30, 2020, for a hearing on Petitioner Anthony Paul Mendiola's Petition for Writ of Habeas Corpus. Petitioner, Anthony Paul Mendiola ("Mendiola"), is represented by Attorney Terry E. Timblin, Esq. The Respondent, Joseph S. Carbullido ("Carbullido"), is represented by Assistant Attorney General Marrienne Woloschuk. After having considered the Parties' written submissions, the arguments of counsel, and the applicable law, the Court **DENIES** Petitioner's Writ of Habeas Corpus.

**BACKGROUND**

A Grand Jury indicted Petitioner Mendiola on May 7, 2013, imposing charges of, (1) Guilt by Complicity to Commit Attempted Murder (As a First Degree Felony), (2) First Degree Robbery (As a First Degree Felony), (3) Aggravated Assault (As a Second Degree Felony) and, (4) Burglary (As a Second Degree Felony). These charges stemmed from a home invasion on Nimitz Hill in April 2013. (Opp'n to Writ of Habeas Corpus, Ex.

1 1, July 30, 2020). Mendiola had his case severed from his co-defendants, and a jury trial  
2 began on November 18, 2013.

3 The People filed an amended indictment January 17, 2014, wherein Petitioner was  
4 charged with, (1) Second Degree Robbery (As a Second Degree Felony), (2) Third Degree  
5 Robbery (As a Third Degree Felony), (3) Assault (As a Misdemeanor), (4) Burglary (As a  
6 Second Degree Felony) and, (5) Theft (As a Misdemeanor). (Opp'n, Ex. 2, July, 2020).  
7 On January 22, 2014 the jury convicted Mendiola of, (1) Second Degree Robbery (As a  
8 Second Degree Felony), (2) Assault (As a Misdemeanor), and (3) Burglary (As a Second  
9 Degree Felony). (Opp'n, Ex. 3, July, 2020).

10 The trial court sentenced Mendiola to ten (10) years for the second degree robbery  
11 conviction, one (1) year for the assault conviction, and (10) years for the burglary  
12 conviction, all to run consecutively, totaling twenty one (21) years of imprisonment. *Id.*  
13 On March 19, 2018, Petitioner filed a petition for writ of habeas corpus. (Writ of Habeas  
14 Corpus, March 19, 2018). Petitioner argues that the second amended indictment, filed on  
15 January 17, 2014, was unlawful as it introduced new charges without a grand jury  
16 determination. (Amended Mem. P. & A., February 12, 2020). Specifically, he argues that  
17 the amended indictment unlawfully changed one charge, from Aggravated Assault (As a  
18 Second Degree Felony), to Assault (As a Misdemeanor), and he was represented by  
19 ineffective counsel because they did not object to the unlawful amendment. (Amended  
20 Mem. P. & A., Feb. 2020).

### 21 DISCUSSION

22 Title 8 of the Guam Code Annotated, Section 135.10 sets the standard for habeas  
23 corpus relief on Guam. A petitioner for a writ of habeas corpus is entitled to such relief if  
24 he can establish that he was unlawfully imprisoned or restrained of liberty. See 8 GCA §  
25 135.10. Mendiola argues that he was unlawfully imprisoned when he was convicted of an  
26 invalid Assault (As a Misdemeanor) charge, which was rendered fatally defective because  
27 it did not pass through a grand jury, and he was represented by ineffective counsel because  
28 they did not object to the unlawful amendment or raise the issue on appeal. (Amended  
Mem. P. & A., Feb. 2020). Therefore, Mendiola argues, he is entitled to habeas corpus

1 relief.

2 **i. The Amended Indictment Included a Different Offense that Did Not Pass**  
3 **Through a Grand Jury**

4 Under Guam law, an indictment can be amended without a grand jury if “no  
5 additional [or] different offense is charged and substantial rights of the defendant are not  
6 prejudiced.” 8 GCA § 55.20. See also 42 C.J.S., *Indictments* § 259 (2013) (“[A]dding an  
7 offense, is impermissible and must be resubmitted to the grand jury”). “Generally, only the  
8 grand jury, not the court or the prosecutor, can materially amend a criminal indictment.”  
9 *Guam v. San Nicolas*, 2013 Guam 21 ¶ 16 (quoting 42 C.J.S., *Indictments* § 259). A  
10 different offense, as contemplated in 8 GCA § 55.20, does not encompass a lesser  
11 included offense. Title 8, Guam Annotated Code, Section 105.58 provides, “the jury . . . .  
12 may find the defendant guilty of any offense, the commission of which is included in that  
13 with which he is charged.” 8 GCA § 105.58(a). Lesser included offenses are those with  
14 “proof of the same or less than all the facts required to establish the commission of the  
15 offense charged . . . . [or] it consists of an attempt or solicitation to commit the offense  
16 charged . . . . [or] it differs from the offense charged only in the respect that a less serious  
injury or risk of injury to the same person . . . . suffices to establish its commission” 8  
GCA § 105.58(b).

17 Petitioner Mendiola argues that the change of charges from Aggravated Assault  
18 (As a Second Degree Felony) to Assault (As a Misdemeanor) constitutes adding a new  
19 offense, and thus must be amended through the grand jury. This Court agrees. The original  
20 indictment categorized Petitioner Mendiola’s conduct during the incident as “recklessly  
21 cause[d] or attempt[ed] to cause serious bodily injury to another . . . . in circumstances  
22 manifesting extreme indifference to the value of human life, in violation of 9 GCA §§  
23 19.20(a)(1) and (b) and 4.60.” (Mem. P. & A., Ex. 1, July 30, 2020). Aggravated Assault  
24 as a Second Degree Felony, reads, in part, as follows:

25 **§ 19.20. Aggravated Assault; Defined & Punished.**

26 (a) A person is guilty of aggravated assault if he either recklessly or attempts to  
27 cause:

- 27 (1) serious bodily injury to another in circumstances manifesting extreme  
28 indifference to the value of human life;  
(2) serious bodily injury to another;  
(3) bodily injury to another with a deadly weapon.

1 9 GCA § 19.20(a).

2 Mendiola was charged in the original indictment under § 19.20(a)(1). In the  
3 amended indictment, filed January 17, 2014, Mendiola was charged under Title 9, Guam  
4 Code Annotated, Section 19.30, which reads, in part:

5  
6 **§ 19.30. Assault; Defined & Punished.**

(a) A person is guilty of assault if he:

- 7 (1) either recklessly causes or attempts to cause bodily injury to another;  
8 (2) recklessly uses a deadly weapon in such a manner as to place another  
9 in danger of bodily injury; or  
10 (3) by physical menace intentionally puts or attempts to put another in fear  
of imminent bodily injury.

11 9 GCA § 19.30(a).

12 Mendiola was charged in the amended indictment under § 19.30(a)(1). The original  
13 indictment charged Mendiola with “recklessly or attempts to cause *serious* bodily injury.”  
14 (Mem. P. & A., Ex. 1, July, 2020); 9 GCA § 19.20(a)(1) (emphasis added). The second  
15 indictment charged him with, “either recklessly causes or attempts to cause bodily injury”  
16 (Mem. P. & A., Ex. 1, July, 2020); 9 GCA § 19.30(a)(1). This clearly constitutes a lesser  
17 included offense under Title 8, Guam Code Annotated, Section 150.58(b), because it only  
18 differs “in respect that a less serious injury or risk of injury to the same person . . . .  
19 suffices to establish its commission” 8 GCA § 105.58(b). The charge, as originally  
20 written in the amended indictment, would not constitute a different offense and therefore  
21 could have been amended without a grand jury.

22 However a handwritten amendment on the amended indictment as it was presented  
23 to the jury read, “with the intent of promoting or assisting an assault did aid or induce [co-  
24 defendant] in intentionally putting or attempting to put [victim] in fear of bodily injury by  
25 physical menace.” (Amended Mem. at 6, Feb. 2020); (see also Mem. P. & A., Ex. 2, July,  
26 2020). This amendment clearly puts the charged crime under the ambit of §19.30(a)(3)  
27 and not §19.30(a)(1). The “aid or induce” language in the handwritten amendment, would  
28 constitute a lesser included offense, as it is “an attempt or solicitation” as contemplated by

1 Title 9, Section 105.58(b)(2). However, the use of “in fear of bodily injury by physical  
2 menace, does amount to a different crime, because it contains elements that the other does  
3 not. Therefore, the amendment of the indictment was an “additional [or] different  
4 offense.” 8 GCA § 55.20.

5 **ii. Petitioner Was Not Prejudiced by the Amended Indictment**

6 The analysis does not conclude with a finding that the indictment was a different  
7 offense. The statute also requires, for an allowance of an amendment of an indictment  
8 without a grand jury that the, “substantial rights of the defendant are not prejudiced.” 8  
9 GCA § 55.20. Mendiola argues that Section 55.20 is in the conjunctive and thus he need  
10 not show that prejudice existed, because the inclusion of a different offense is conclusive.

11 Section 55.20 is the same as Federal Rule 7(e) except for the conjunctive “and” is  
12 replaced by the alternative “or.” Compare 9 GCA § 55.20; Fed. R. Crim. P. Rule 7(e).  
13 Petitioner correctly argues that Federal authorities interpreting Rule 7(e) are not binding  
14 on this court, however, they are persuasive. See *People v. Diaz*, 2007 Guam 3 ¶ 14 n.4.  
15 Further, Mendiola has raised this issue for the first time in a collateral attack for habeas  
16 corpus relief as a claim for ineffective assistance of counsel.

17 Further, section 55.20 applies to direct proceedings. See *People v. Torres*, 2014  
18 Guam 8 ¶ 53. See also *People v. Riocone*, 2012 Guam 5 ¶ 7; *People v. Diaz*, 2007 Guam 3 ¶  
19 15. Courts have held that when considering habeas corpus petitions, “[e]rrors turing on the  
20 sufficiency of or amendments to an indictment are not reviewable in federal habeas corpus  
21 unless the indictment is constitutionally defective.” *Boothe v. Wyrick*, 452 F. Supp. 1304,  
22 1310 (W.D. Mo. 1978) (*citing Scalf v. Bennett*, 408 F.2d 325 (8th Cir. 1970)). “Habeas  
23 corpus can only be invoked with respect to indictments which are so fatally defective that  
24 under no circumstances could a valid conviction result.” *Johnson v. Beto*, 383 F.2d 197,  
25 198 (5th Cir. 1967). The claim of insufficiency of an indictment must be preserved at trial  
26 and cannot be raised for the first time on a collateral attack. Mendiola, therefore, cannot  
27 attack the form of the indictment and must rely on a claim for ineffective assistance of  
28 counsel.

A collateral attack for ineffective assistance of counsel must meet a two-prong test.

1 *People v. Meseral*, 2014 Guam 13 ¶ 45 (citing *Strickland v. Washington* 668, 686 (1984)).  
2 “The first prong requires that a defendant demonstrate that his trial counsel’s performance  
3 was deficient, and the second prong requires that a defendant must prove the deficient  
4 performance prejudiced his defense.” *Angoca v. Bitanga*, 2001 Guam 17 ¶ 8. Defendant  
5 must show that “counsel made errors so serious that counsel was not functioning as the  
6 ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Further, the  
7 Defendant must show, “there is a reasonable probability that, but for counsel’s  
8 unprofessional errors, the result of the proceeding would have been different.” *Id.*, 466  
9 U.S. at 687. “Counsel is not required to put forth every conceivable argument ‘regardless  
10 of merit.’” *Angoca*, 2001 Guam 17 ¶ 9 (quoting *Evitts v. Lucey*, 469 U.S. 387, 394  
11 (1985)).

12 Here, it is clear that counsel was deficient. The issue of the indictment  
13 amendments was not raised at trial or on appeal. *San Nicolas* was decided before the  
14 amended indictment was created and counsel should have been aware of its effect on the  
15 underlying criminal case before us. Thus, the first prong of the *Strickland* test is satisfied.  
16 However, the Defendant has offered no evidence to prove prejudice. “Actual  
17 ineffectiveness claims alleging a deficiency in attorney performance are subject to the  
18 general requirement that the defendant affirmatively prove prejudice.” *Strickland*, 466  
19 U.S. 668 at 693. Defendant has not carried that burden. Therefore, the second prong of the  
20 *Strickland* test fails, and the Petition for Writ of Habeas Corpus must be denied.

### 21 CONCLUSION

22 Based on the foregoing, Petitioner Mendiola’s Petition for Writ of Habeas Corpus  
23 is DENIED.

24  
25 SO ORDERED this 10/9/2020.

26  
27   
28 HONORABLE ANITA A. SUKOLA  
Judge, Superior Court of Guam