STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Kershaw County
R. Knox McMahon, Plea Judge
Diane S. Goodstein, Post-Conviction Relief Judge

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S.C. SUPREME COURT

Appellate Case No. 2021-001307

LUCRUZ D. MCCLOUD,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Petitioner's Statement of the Issue

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by counsel's deficient performance in failing to advise Petitioner about the ability to challenge the search of the motel room and move to suppress the crack cocaine found as a violation of the Fourth Amendment?

Respondent's Counterstatement of the Issue

Whether the PCR court properly found Petitioner failed to meet his burden in establishing deficiency and prejudice in plea counsel's representation where plea counsel did not advise Petitioner of the possibility of challenging the drugs found in the hotel room because Petitioner failed to show plea counsel was unreasonable and thus deficient in failing to discuss an otherwise non-meritorious defense to the search, and therefore failed to meet his burden of showing that he was prejudiced by plea counsel's advice?

STATEMENT OF THE CASE

In February 2017, the Kershaw County Grand Jury indicted Petitioner, Lucruz D. McCloud, for Trafficking in Cocaine Base, 10 grams to 28 grams-3rd offense (2017-GS-28-0355) and Simple Possession of Marijuana (2017-GS-28-0356). (Amended App. pp. 25 – 28). On May 15, 2017, Applicant pleaded guilty to the lesser-included offense of Trafficking in Cocaine Base, 10 grams to 28 grams-2nd offense, and Simple Possession of Marijuana before the Honorable R. Knox McMahon. (Amended App. p. 6, ll. 6-16). Ronald Moak, Esquire, represented Petitioner and Brett A. Perry, Esquire, prosecuted the case. (Amended App. p. 1). Judge McMahon sentenced Petitioner to a negotiated fifteen-years' imprisonment for Trafficking in Cocaine Base, 10 grams to 28 grams-2nd offense, and thirty days' imprisonment for Simple Possession of Marijuana. (App. p. 29 – 30). Petitioner did not appeal his sentence or conviction. (Amended App. p. 43).

On August 18, 2017, Petitioner timely filed an application for post-conviction relief (PCR). (Amended App. pp. 31 – 37). Petitioner filed an amended application for PCR on May 13, 2019. (Amended App. pp. 38 – 41). In his amended application, Petitioner argued seven allegations to include:

> "[t]rial counsel failed to identify, investigate, research and make the [Petitioner] aware of the issues regarding the illegal search which could and should have been challenged during a jury trial or in pre-trial motions and failed to prepare for a jury trial and failed to advise the [Petitioner] that he should proceed to jury trial[.]"

(Amended App. p. 39). The State filed its Return on June 19, 2019, and an evidentiary hearing before the Honorable Diane S. Goodstein was held that same day. (Amended App. pp. 43 – 103). Kristy G. Goldberg, Esquire, represented Petitioner, and Assistant Attorney General Samuel L. Key represented the State. (Amended App. p. 48).

In an Order of Dismissal signed October 7, 2021, and filed October 27, 2021, Judge Goodstein denied relief and dismissed the application with prejudice. (Amended App. pp. 162 – 189). A timely Notice of Appeal was served on November 5, 2021. The Petition for Writ of Certiorari was filed on July 12, 2022.

This Return to Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

Petitioner's charges stem from an incident that occurred on October 24, 2016, at the Econo Lodge hotel on Highway 601 in Camden. Petitioner was on probation[1], out on bond in Fairfield County, with an active arrest warrant for additional drug charges in Fairfield County. (Amended App. pp. 118 – 119). Fairfield County Sheriff's Office contacted Kershaw County Sheriff's Office and asked them to keep a lookout for Petitioner due to his active arrest warrant. (Amended App. pp. 14 – 15). Kershaw County Sheriff's deputies made contact with Petitioner's girlfriend and, from her answers, were able to narrow down the hotels/motels they needed to search for Petitioner. (Amended App. p. 131).

Deputies learned Petitioner was staying at the Econo Lodge hotel after speaking with the clerk and Petitioner being positively identified by that clerk as an occupant of room 202. (Amended App. p. 131). Deputies reviewed video footage of Petitioner renting the room and signing paperwork to renew the room under his girlfriend's name. (Amended App. p. 131). Deputies went to the room and knocked on the door, but Petitioner was not inside at the time. (Amended App. p. 131). They found Petitioner in the breezeway just around the corner from the room, where he told officers his name was John John. (Amended App. p. 131). The deputies recognized Petitioner by sight, placed him under arrest, read him his Miranda[2] rights, and conducted a search of Petitioner's person. (Amended App. p. 131). Deputies found a small quantity of marijuana and a room key in his pocket. (Amended App. p. 131).

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[1] On December 8, 2014, Petitioner pleaded guilty to manufacturing and distribution of cocaine – first offense before the Honorable Brian M. Gibbons. Judge Gibbons sentenced Petitioner to fifteen years' imprisonment with the service of fourteen months and three years' probation. (App. pp. 118 – 120)

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Officers received permission from the hotel personnel[3] to walk a drug K-9 around the common areas of the entire second floor of the hotel. (Amended App. p. 131). The K-9 alerted the deputies to the presence of narcotics in room 202, which was Petitioner's room. (Amended App. p. 131). Deputies entered the room to secure it and observed a small amount of marijuana in plain view; they then exited the room to obtain a search warrant. (Amended App. p. 131). Upon execution of the search warrant, law enforcement found several pieces of evidence connecting Petitioner to the room, including men's clothing, a pizza box with his cell phone number and "John John" on it, and Airhead candy that matched the color of Petitioner's tongue. (Amended App. p. 131). Law enforcement found approximately 14.4 grams of crack cocaine on the room's kitchen sink. (Amended App. p. 131). Petitioner, post-Miranda warnings, admitted the drugs were his. (Amended App. p. 131).

[3] From the record, there is some discrepancy as to whether it was a clerk or the hotel owner that gave them permission to do the K9 sniff around the entire second-floor common areas. (App. p. 16, ll. 1 – 5; p. 131; p. 143; p. 151; Amended Petition for Writ of Certiorari p. 3, fn. 1).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court properly found Petitioner failed to meet his burden in establishing deficiency and prejudice in plea counsel's representation where plea counsel did not advise Petitioner of the possibility of challenging the drugs found in the hotel room because Petitioner failed to show plea counsel was unreasonable and thus deficient in failing to discuss an otherwise non-meritorious defense to the search, and therefore failed to meet his burden of showing that he was prejudiced by plea counsel's advice.

On appeal, Petitioner contends his guilty plea was rendered involuntary because plea counsel was constitutionally ineffective for failing to inform him of the ability to challenge the search of the hotel room and suppression of the drugs found in the hotel room. Specifically, Petitioner avers plea counsel should have recognized that the security sweep of the hotel room was in violation of his Fourth Amendment rights, and anything found as a result of that initial violation was the fruit of the poisonous tree. However, Petitioner's complaints are without merit. First, Petitioner testified the room was not his, and he cannot vicariously assert a Fourth Amendment violation where Petitioner disavowed any Fourth Amendment right to the room in his testimony. Second, Petitioner failed to show plea counsel was unreasonable and thus deficient in failing to discuss an otherwise non-meritorious defense to the search, and therefore failed to meet his burden of showing that he was prejudiced by plea counsel's advice. Lastly, Petitioner was on probation and had a diminished expectation of privacy.[4]

Petitioner's PCR counsel amended his post-conviction relief application and alleged, "Trial counsel failed to identify, investigate, research, and make the Applicant aware of issues regarding

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[4] See https://www.dppps.sc.gov/Offender-Supervision/Standard-Conditions-of-Probation (12. Unless I was convicted of or pled guilty or nolo contendere to a Class C misdemeanor or an unclassified misdemeanor that carries a term of imprisonment of not more than one year, I shall be subject to a search or seizure, without a search warrant, based on reasonable suspicions, of my person, any vehicle I own or am driving, and any of my possessions by: (1) any probation agent employed by the Department; or (2) any other law enforcement officer).

the illegal search which could and should have been challenged during a jury trial or in pre-trial motions and failed to prepare for a jury trial and failed to advise the Applicant that he should proceed to jury trial[.]" (Amended App. p. 39). The following testimony by Petitioner at his PCR evidentiary hearing is crucial to his allegation:

Petitioner:	Well, first, I was thinking that he never even looked at it to any -- investigate it. He never investigated nothing because if he would have seen, he would have seen that it was a problem with the search.
Question:	And what do you believe the problem with the search is?
Petitioner:	It's illegal.
Question:	Why was it illegal?
Petitioner:	Because -- let me go back to the page -- because when he -- when he would've looked at it, he would've seen that the **police officers went inside of a hotel room that's not registered to me, I got nothing to do with it**, and they went inside of the hotel room illegally with no search warrant.
Question:	And there's a copy of the hotel receipt within that discovery document, correct?
Petitioner:	Yes, ma'am.
Question:	And that shows that **the hotel room was not in your name**.
Petitioner:	**Yes, ma'am**.

(Amended App. pp. 64, l. 14 – 65, l. 8) (emphasis added). Yet, Petitioner also asserts that plea counsel was constitutionally ineffective for failing to discuss with him the potential suppression of the drug evidence found in that same hotel room he testified was not connected to him, he had nothing to do with it, and it was not in his name. Even if plea counsel informed Petitioner of the potential suppression and they had a suppression hearing, by Petitioner's evidence/testimony at the evidentiary hearing, he disavowed any Fourth Amendment protection by claiming he had nothing to do with the room, had no connection to it, and it was not in his name.[5]

[5] Assuming that Petitioner's testimony is the testimony he would have given or would give at a suppression hearing.

The Fourth Amendment provides certain personal and constitutional rights that may not be asserted vicariously. See Rakas v. Illinois, 439 U.S. 128, 139 (1978); Alderman v. United States, 394 U.S. 165, (1969); State v. Missouri, 352 S.C. 121, 572 S.E.2d 467 (Ct. App.2002). Anyone seeking to assert a Fourth Amendment violation and seek to suppress evidence based on that violation "must establish that his own Fourth Amendment rights were violated" by the search and seizure. State v. McKnight, 291 S.C. 110, 114–15, 352 S.E.2d 471, 473 (1987) (citing United States v. Salvucci, 448 U.S. 83 (1980)); see also Rakas, 439 U.S. at 138 ("'[R]ights assured by the Fourth Amendment are personal rights, [which] ... may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure.'").

A defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate a legitimate expectation of privacy in connection with the searched premises in order to have standing to challenge the search. State v. McKnight, *supra*; citing United States v. Salvucci, *supra*; Rawlings v. Kentucky, 448 U.S. 98 (1980); Combs v. United States, 408 U.S. 224 (1972). See, e.g., State v. Daniels, 252 S.C. 591, 167 S.E.2d 621 (1969); State v. Miller, Op. No. 3784 (S.C. Ct. App. filed April 26, 2004) (Shearouse Adv. Sh. No. 17 at 83) (noting where one does not have an expectation of privacy, he may not challenge the admission of evidence based on the violation of another's right to privacy); United States v. Sangineto-Miranda, 859 F.2d 1501, 1510 (6th Cir. 1988), citing United States v. Antone, 753 F.2d 1301, 1306 (5th Cir.), cert. denied, 474 U.S. 818 (1985) ("A defendant's legitimate presence on the searched premises, without more, is insufficient to establish standing."); also see United States v. Irizarry, 673 F.2d 554, (1st Cir. 1982) (seized evidence was admissible where defendant was merely present in hotel room and affirmatively sought to deny any connection with room or its contents).

Accordingly, this Court should deny Petitioner's writ of certiorari where, by his own admission, Petitioner suffered no Fourth Amendment violation because he cannot assert a Fourth Amendment violation where he disavowed any reasonable expectation of privacy.

Additionally, the PCR court correctly found Petitioner failed to present sufficient credible evidence that he had a meritorious defense to the search and therefore failed to meet his burden of showing that he was prejudiced by plea counsel's advice. On direct examination, plea counsel testified to the following regarding trial defenses and strategy:

> And – and this is what goes into the trial strategy had we went to trial because at the preliminary hearing, they testified they searched the room because they took a dog, and the dog alerted to that room, and they did enter the room prior to search warrant to make sure nothing got messed with while they got the search warrant.

(Amended App. p. 81, ll. 1 – 6). Petitioner avers that there was no evidence that anyone was in the room; however, Petitioner fails to shine light on the fact that there was no evidence of anyone in the room or not in the room. (PWC p. 4).

On cross-examination, plea counsel was asked whether he had any Fourth Amendment or privacy concerns about the police "eliciting [] information from the hotel regarding [Petitioner's] housing" to which he responded:

> Well, I've never – maybe I just never had anybody, when I was a prosecutor, challenge it. And I've never like, you know, crossed my mind to challenge it. When the officer comes up, like — like, "Hey. Can I see the guest registry," looking for a name, it's my understanding what they did was they showed him a picture of, like, a – I guess the Fairfield mugshot. "Have you seen this guy?" And the guy told him which room and they looked at security footage, like, 'cause they had on the wall, like, what he paid for it, and actually, like, pulled the video of him paying for it. And the name – - the name was different, but it was, "Yeah, that's -- that's the guy."

(Amended App. pp. 94, l. 22 – 95, l. 8). Plea counsel was then asked if any of that struck him as problematic that he could challenge at trial, to which he testified, "Not really, no." (Amended App. p. 95, ll. 9 – 11).

Importantly, plea counsel was asked whether he would have had an argument about police exceeding the scope of their authority by going into Petitioner's hotel room after he was arrested. (Amended App. p. 97, ll. 3 – 6). Plea counsel testified that it could have been an argument, but they did have a drug dog alert on the room. Plea counsel further testified that he could have argued about whether law enforcement went directly to the room or searched the entire second floor with the dog, and that would have been their best argument. (Amended App. pp. 97, l. 7 – 98, l. 1).

Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. Strickland v. Washington, 466 U.S. 668, 680 (1984). If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. Id. (quoting Washington v. Strickland, 693 F.2d 1243, 1252 (5th Circ. App. 1982)). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. Id. "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." Id. at 681 (quoting Washington v. Strickland, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at

the time of trial, or another avenue of defense existed. See McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); Arnette v. State, 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); Robinson v. State, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

Here, plea counsel testified that there could have been an argument to the initial search of the hotel room, but they had a drug dog alert on the room. That is the extent of the evidence provided by Petitioner at his evidentiary hearing. Furthermore, Petitioner has presented no evidence, except for his self-serving testimony, that but for plea counsel's advice, Petitioner would not have pleaded guilty and instead would have proceeded to trial. See Stalk v. State, 373 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (finding that "Hill[6] makes clear that this prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial").

Notably, at the time of Petitioner's arrest, Petitioner was on probation[7] stemming from two prior drug trafficking convictions that he pleaded guilty to on December 8, 2014.[8] In 2010, the South Carolina legislature passed The Reduction of Recidivism Act of 2010. In the Act, the General Assembly provided that "the conditions imposed, [upon the probationer] must include the requirement that the probationer must permit the search or seizure, without a warrant, *based on*

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[6] Hill v. Lockhart, 474 U.S.52 (1985).
[7] Amended App. p. 18; p. 118; p. 119.
[8] Respondent respectfully asks this Court, pursuant to Rule 201, S.C.R.E., to take judicial notice of Indictment numbers 2013GS2000127 and 2014GS2000176 as they are part of the public index.

reasonable suspicions, of the probationer's person, any vehicle the probationer owns or is driving, and any of the probationer's possessions . . . ." S.C. Code Ann. § 24-21-430. Those searches may be conducted by "(1) any probation agent employed by the Department of Probation, Parole and Pardon Services; or (2) any other law enforcement officer . . . ." S.C. Code Ann. § 24-21-430.

S.C. Code Ann. § 24-21-430 requires officers to have reasonable suspicion and "[t]he degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." United States v. Knights, 534 U.S. 112, 121 (2001). "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring, that an intrusion on the probationer's significantly diminished privacy interests is reasonable."[9] Id. Because of this, when a court is asked to evaluate the constitutionality of a warrantless search of a probationer, the analysis is not always straightforward. A court must balance "on the one hand, the degree to which [a search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed to promote legitimate government interests." Id. at 113.

When determining whether reasonable suspicion exists, courts must review the "totality of the circumstances" to ascertain whether the officer had "some minimal level of objective justification" to subject legal wrongdoing. United States v. Burkett, 612 F.3d 1103, 1107 (9th Cir. 2010). While requiring more than a "hunch,"[10] it requires "considerably less than proof of

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[9] While S.C. Code Ann.§ 24-21-430 does not provide a definition for "reasonable suspicions," the standard they wish applied is clear. At the top of the Parole and Pardon Act, the General Assembly specifically references U.S. v. Knights: "Whereas, as held by the United States Supreme Court in United States v. Knights, 534 U.S. 112 (2001), warrantless searches of probationers are allowed if based on reasonable suspicions ... " 2010 South Carolina Laws Act 151. The State, therefore, uses the reasonable suspicion standard from Knights as the General Assembly's intended standard.

[10] Terry v. Ohio, 392 U.S. 1, 27 (1968).

wrongdoing by a preponderance of the evidence," and falls below the probable cause standard of "a fair probability that contraband or evidence of a crime will be found." U.S. v. Sokolow, 490 U.S. 1, 7 (1989).

In U.S. v. Knights, because the officers knew Knights was on probation, that fact, as the Supreme Court said, was relevant to both sides of the balance-the degree of intrusion into the individual's privacy and the degree to which the intrusion is needed to protect legitimate governmental interests. The entire premise of Knights and the cases that have followed Knights is that probationers have given up the expectation of privacy enjoyed by those who are not on probation. Moreover, the Knights balancing test appropriately accounts for an officer's knowledge (or lack therefore in some settings) of the probationer's status.

Here, Petitioner was arrested pursuant to a valid arrest warrant for drug trafficking. Upon searching the Petitioner, officers located marijuana and a hotel room key on his person. Petitioner had a probation condition requiring him to submit to a search of his person, property, residence, or vehicle at any time with or without consent or a search warrant. Because Petitioner's terms of probation permitted warrantless searches, his expectation of privacy was significantly diminished. See State v. Edwards, 415 S.C. 401, 408, 782 S.E.2d 124, 128 (Ct. App. 2016) (quoting Knights, 534 U.S. 112 (2001) ("[A] warrantless search of a probationer's house based on reasonable suspicion did not violate his Fourth Amendment rights.").[11] Law enforcement had video of

[11] A special needs search in the probation or parole context is often determined to be reasonable because it is conducted pursuant to reasonable state regulations governing probation or parole. See Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (warrantless search of probationer's home valid because "conducted pursuant to a valid [state] regulation governing probationers"); see, e.g., U.S. v. Barner, 666 F.3d 79, 84-86 (2d Cir. 2012) (warrantless search of parolee's "storage room" valid because conducted in accordance with reasonable state parole policies regulations); U.S. v. Jones, 152 F.3d 680, 685-86 (7th Cir. 1998) (warrantless search of parolee's residence valid because conducted in accordance with reasonable state parole policies and regulations).

Petitioner paying for the hotel room, getting another hotel room key, and he was taken into custody where marijuana and a hotel room key were located on his person. At that point, and due to Petitioner's probation status, officers had the authority to search the hotel room with or without Petitioner's consent.

Accordingly, this Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

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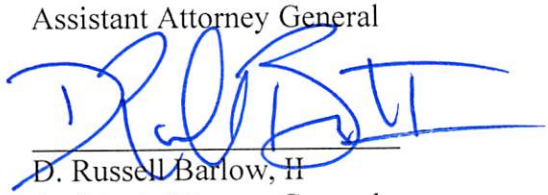

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