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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County

Honorable Kristi F. Curtis, Circuit Court Judge

KYLE WAYNE WAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000547

PETITION FOR WRIT OF CERTIORARI

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

I.

Whether the PCR court erred where it denied Petitioner belated appellate review, where counsel did not file a notice of appeal after Petitioner's trial, and where there was no evidence Petitioner knowingly and intelligently waived his right to appeal, since absent an intelligent waiver by Petitioner, counsel was obliged to initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967)?

II.

Whether the court erred in denying post-conviction relief where counsel failed to specify to the trial court why it should direct a verdict of acquittal, since issue preservation principles require an issue to be raised to the trial court with sufficient specificity, and where Petitioner was prejudiced by counsel's deficient performance?

STATEMENT

Procedural history

During the November term of 2019, a Saluda County Grand Jury indicted Kyle Wayne Way, Petitioner, for third-degree criminal sexual conduct with a minor. App. 643 – 644. Petitioner was also charged with second-degree criminal sexual conduct with a minor. App. 7, ll. 8-13. Petitioner was tried before the Honorable Walton J. McLeod and a jury, from November 18 – 21, 2019. App. 1; App. 298; App. 521. Petitioner was represented by Andrew Bishop. Robbie McNair and Melanie Darko prosecuted the case. App. 1.

Petitioner was acquitted of second-degree criminal sexual conduct with a minor. He was convicted of third-degree criminal sexual conduct with a minor, and he was sentenced to serve a fifteen-year term of imprisonment. App. 563, l. 24 – 564, l. 11; App. 570, ll. 17-20; App. 643. No notice of intent to appeal was served.

On May 8, 2020, Petitioner filed an application for post-conviction relief (PCR). App. 572 – 578. On March 22, 2023, the State made its return, partial motion to dismiss, and motion for a more definite statement. App. 579 – 586. On October 4, 2022, and again on March 22, 2023, Petitioner filed amendments to his PCR application. App. 587 – 590. On April 4, 2023, a hearing was held on the matter before the Honorable Kristi F. Curtis.[1] Ashley McMahan represented Petitioner. Zachary Jones represented the State. App. 591. On February 26, 2024, the PCR court issued an order of dismissal. App. 627 – 642.

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[1] Undersigned counsel has confirmed with opposing counsel that due to a clerical error the PCR court did not have before it pages 84 and 87 of the November 20, 2019 (Day 3) transcript of Petitioner's trial. Because those pages were not part of the record that was before the PCR court, they have not been included in the Appendix. *See* Rule 243(f), SCACR.

Relevant facts

Petitioner admittedly exchanged "weird," but not sexual, text and Facebook messages with his half-sister (Minor 1). App. 63, ll. 18-24; App. 418, l. 25 – 421, l. 23; App. 352, ll. 2-18. In 2015, Minor 1 was thirteen and fourteen years old. App. 65, ll. 8-22; App. 74, l. 15 – 75, l. 2. Petitioner was approximately twenty-eight. Petitioner had a steady job at Velux, and he had no criminal record. Petitioner and Minor 1 had the same father (Father), who was an alcoholic and was violently abusive when drinking. The Department of Social Services (DSS) was involved with the family during Petitioner's childhood and during Minor 1's childhood. App. 404, l. 18 – 408, l. 22; App. 471, ll. 9-12; App. 567, l. 18; App. 103, l. 15 – 110, l. 25.

In May of 2015, Petitioner moved in with Minor 1's mother (Mother),[2] Minor 1, and Minor 1's younger siblings (Minor 2 and Minor 3). Petitioner moved in because Father was being released from "rehab" and an adult was needed to supervise Father around the children. (Father was to sleep in a camper in the yard.) Minor 1's older sister (Older Sister), lived with the children's grandmother (Grandmother) at the time. App. 404, l. 25 – 417, l. 18; App. 422, l. 11 – 425, l. 25; App. 67, l. 11 – 69, l. 20; App. 103, l. 15 – 104, l. 21. In October of 2015, Petitioner stopped living with the family shortly after Mother and Father lost custody of the children due to Father drinking and chasing the children around with a cane. App. 110, l. 14 – 112, l. 18.

Also in October of 2015, one of Minor 1's aunts (Aunt), became concerned about the relationship between Petitioner and Minor 1, and looked through Minor 1's cell phone. Aunt saw messages on the phone between Petitioner and Minor 1 in which they referred to each other as "husband and wife." Aunt contacted law enforcement and turned over Minor 1's phone. App. 279, l. 14 – 289, l. 15. Law enforcement found regularly occurring messages in which the

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[2] Minor 1's mother was Petitioner's stepmother. App. 177, ll. 3-4.

Petitioner and Minor 1 also referred to each other as boyfriend and girlfriend, talked about how much they loved each other, and talked about whether Minor 1 would wear Petitioner's ring, among other improper (but not sexual) things. Law enforcement also found a joint Facebook account shared by the two which showed them as getting married on March 13, 2015. App. 131, l. 1 – 134, l. 10; App. 328, l. 1 – 352, l. 18.

Minor 1 was forensically interviewed at a Children's Advocacy Center twice, once in May of 2016, and again in December of 2016. During the first interview she denied any sexual misconduct by Petitioner. The second interview was conducted after Minor 1 received counseling. During that interview, Minor 1 claimed she only had sex with Petitioner when she was forced or drugged. Both of these accounts were different from her trial testimony. App. 136, l. 25 – 138, l. 14; App. 323, l. 24 – 326, l. 8; App. 354, l. 24 – 355, l. 2. Minor 1 received a medical examination, which was normal. App. 312, ll. 1-14; App. 304, l. 1 – 305, l. 2; App. 316, l. 18.

Petitioner testified at trial as follows. Petitioner stated Minor 1 was threatening to run away from home, was being bullied at school, and was cutting herself. According to Petitioner, they were at the Relay for Life in Saluda in April of 2015, and Minor 1 stated to him that she had told her friends Petitioner was her seventeen-year-old boyfriend. Petitioner testified that he went "along with it," knowing it looked "weird," and that he and Minor 1 started an online and text message "fake relationship." Petitioner stated the messages were "role playing." App. 417, l. 12 – 421, l. 23; App. 457, ll. 18-20; App. 460, l. 25 – 463, l. 25.

Petitioner was adamant that he did not have a sexual relationship with Minor 1 or engage in sexual behavior with her. Petitioner stated he only pretended to have a relationship with Minor 1 via messaging and Facebook so that she could show people she had a boyfriend and

would not get bullied. Petitioner stated his judgment was clouded because he empathized with Minor 1 due to growing up in the same abusive household. Petitioner's testimony was consistent with his interview with law enforcement (and with his written statement), wherein he maintained it was a fake relationship due to Minor 1 being bullied, and that he had not committed any sexual misconduct.[3] App. 419, l. 18 – 448, l. 8; App. 466, ll. 5-23; App. 355, l. 13 – 361, l. 16.

In contrast, Minor 1 claimed at trial that Petitioner kissed her, and had sex with her on March 13, 2015, and that she told him to stop but he told her to be quiet. According to Minor 1, they had sex two or three times a week thereafter, in her bedroom. Minor 1 also alleged she performed oral sex on Petitioner. Minor 1 claimed they considered each other boyfriend and girlfriend and Petitioner gave her a ring. According to Minor 1, Petitioner monitored her cell phone and messaged two of her male classmates to stay away from her.[4] Minor 1 also alleged Petitioner slapped her when she tried to get space from him. App. 83, l. 6 – 99, l. 25; App. 140, ll. 17-19. Minor 1 claimed Petitioner threatened to kill her if she told anyone about the sexual abuse. App. 129, ll. 17-21.

Minor 1 claimed she lied during both of her forensic interviews because she did not know who would see the videotaped interviews and she did not want to be bullied. Minor 1 also alleged she lied because she was worried about her parents getting in trouble with DSS. Minor 1 admitted she was bullied before Petitioner was moved in, but she denied cutting herself. App. 145, l. 3 – 146, l. 10; App. 136, l. 25 – 138, l. 19; App. 143, ll. 10-20.

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[3] Captain Price, who interviewed Petitioner, alleged Petitioner verbally admitted he held hands with Minor 1 and kissed her twice. However, Price admitted Petitioner characterized the kisses as a "peck." App. 361, l. 17 – 362, l. 7; App. 365, ll. 5-13. Petitioner stated he did not tell Price he kissed Minor 1, but only that he had given the kids a "peck" when he thought he was leaving the home. App. 466, l. 24 – 467, l. 6; App. 487, l. 23 – 488, l. 19.

[4] In contrast, Petitioner testified he did not send the messages (which were from Minor 1's phone) to Minor 1's classmates. App. 435, l. 9 – 437, l. 7.

At trial, multiple family members claimed to have seen Minor 1 and Petitioner in bed together at different times—Father, Mother, and Minor 2. App. 101, ll. 3-17; App. 104, l. 17 – 105, l. 3; App. 114, l. 11 – 115, l. 21; App. 189, l. 7 – 191, l. 18; App. 389, l. 19 – 390, l. 17. However, none of these family members contacted law enforcement. A number of Minor 1's family members claimed they saw Petitioner and Minor 1 acting "inappropriately," such as by holding hands, and by being "touchy-feely" at a confirmation service for Minor 2. App. 185, l. 13 – 186, l. 16; App. 243, l. 12 – 244, l. 24; App. 261, l. 13 – 263, l. 19. Nevertheless, these family members did not separate Petitioner and Minor 1 or contact law enforcement despite this allegedly inappropriate behavior at church.[5]

At the conclusion of the prosecution's case, counsel moved that the court direct verdicts of acquittal. Counsel did not provide any reasons, argument, or law regarding this motion. Counsel simply stated, "Your Honor, at this point the defense would just move for a directed verdict." The solicitor argued Minor 1's testimony supported the charges and specified: "His statements to law enforcement about having kissed her, that alone could be the elements of CSC, third, as well as their ages." The court denied the motion. App. 399, l. 18 – 400, l. 12. Counsel renewed the motion at the conclusion of the defense's case. App. 519, ll. 3-9. In closing argument, the solicitor argued that Petitioner was guilty of one count of second-degree criminal sexual conduct with a minor based on Minor 1's testimony that Petitioner had sexual intercourse with her. The solicitor argued that Petitioner was guilty of one count of third-degree criminal sexual conduct with a minor based on Minor 1's testimony that Petitioner kissed her. App. 535, l. 14 – 536, l. 14.

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[5] Petitioner testified he did not behave improperly with Minor 1. For example, he denied "inappropriate behavior" in church, although he stated Minor 1 had her head on his shoulder at the christening. App. 437, l. 8 – 448, l. 6.

The jury deliberated for only half an hour, and it acquitted Petitioner of second-degree criminal sexual conduct with a minor but convicted him of third-degree criminal sexual conduct with a minor. App. 563, l. 5 – 564, l. 11.

As seen, no direct appeal was taken despite Petitioner pleading not guilty and having a trial. At the PCR hearing, it was undisputed defense counsel did not file or serve notice of intent to appeal. It was also undisputed defense counsel did not inform Petitioner of his right to appeal the conviction. Counsel stated he did not think there were meritorious issues for appeal, although he admitted he had never filed a notice of appeal in a general sessions case. Nevertheless, counsel did not comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967).[6] Petitioner testified that he would have wanted to appeal if he had known he could. App. 600, l. 24 – 601, l. 20; App. 614, ll. 21-25; 617, l. 15 – 618, l. 16.

Also at the PCR hearing, Petitioner proceeded upon the allegation that counsel's performance was deficient due to his failure to specify his argument to the trial court regarding his directed verdict motion. Petitioner testified that counsel "asked for it [a directed verdict] but he really didn't explain why he was asking for it." App. 607, ll. 15-21. Counsel agreed his directed verdict motion was "pro forma," and stated it was "more of a formality," "more of just to you know preserve it on the record," because in his opinion "there was an abundance of evidence." App. 616, l. 19 – 617, l. 1.

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[6] *Anders* provides that when counsel believes an appeal to be "wholly frivolous, after conscientious examination of it, he should so advise court and request permission to withdraw." *Anders v. California*, 386 U.S. 738, 744 (1967). However, that request must be accompanied by a "brief referring to anything in the record that might arguably support the appeal." *Id.* A copy of counsel's brief should be furnished to the defendant with time allowed to raise any points that he chooses, whereupon the court should proceed, after full examination of all proceedings, to decide whether the case is wholly frivolous, granting counsel's request to withdraw if it finds the case to be frivolous, and affording assistance of counsel to argue the appeal if it finds legal points arguable on their merits. *Id.*

In its order of dismissal, the PCR court found Petitioner's claim that counsel "was ineffective for failing to file a direct appeal or to consult with Applicant about the possibility of appeal" was "without merit." App. 631. The order of dismissal cited *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), but concluded as follows.

> At the evidentiary hearing, **Applicant admitted he never asked Counsel to pursue an appeal.** Counsel also testified that Applicant neither requested an appeal nor made any other indication that he wanted to challenge the conviction. Counsel further testified he did not see a basis for filing a notice of appeal because he could not see any meritorious issues for appeal. **Applicant did not present any nonfrivolous grounds that would have justified an appeal.** As 'evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal' is 'highly relevant' to the prejudice analysis, the Court finds Applicant has failed to meet his burden of proving prejudice from Counsel's failure to consult with him about filing an appeal. *Flores-Ortega*, 528 U.S. at 485. As the failure to prove prejudice is dispositive, the Court need not reach the deficiency prong. *Strickland*, 466 U.S. at 697. Accordingly, this allegation is denied and dismissed with prejudice.

App. 632 (footnote omitted) (emphasis added). The order of dismissal also included the following in a footnote: "Even where the post-conviction relief court finds an applicant was denied the right to a direct appeal due to the ineffective assistance of counsel, the court may not grant post-conviction relief on that basis. *Davis v. State*, 288 S.C. 290, 291 n. 1, 342 S.E.2d 60, 60 n. 1 (1986). Instead, the proper remedy is for the applicant to petition for belated review of direct appeal issues pursuant to the procedure set forth in *Davis*. *Id.* Therefore, even if Applicant had met his burden as to this allegation, the remedy he requested—a new trial—would not be available." App. 632.

The order of dismissal also addressed the allegation that defense counsel "failed to adequately argue the directed verdict motion at trial." App. 641. The order stated the court

found no deficiency and no prejudice. "Counsel testified at the evidentiary hearing that he made the directed verdict motion merely to preserve it on the record; he believed there was an abundance of evidence in the record to support the charges, so the motion was not likely to succeed. The Court agrees with Counsel's assessment of the evidence and finds that Applicant has failed to prove Counsel was deficient or that a directed verdict motion would probably have been granted but for Counsel's failure to more vigorously argue for it." App. 641.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR court erred where it denied Petitioner belated appellate review, where counsel did not file a notice of appeal after Petitioner's trial, and where there was no evidence Petitioner knowingly and intelligently waived his right to appeal, since absent an intelligent waiver by Petitioner, counsel was obliged to initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967).

Counsel's failure to file an appeal was deficient performance—he failed to consult with Petitioner about an appeal, he failed to file and serve notice of appeal, and Petitioner had received a fifteen-year term of imprisonment at trial.

The defendant has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to take an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Some decisions "are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018). A defendant must knowingly and intelligently waive the right to appeal from his conviction and sentence. *White v. State*, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974).

"Counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). After a client is convicted and sentenced, "[c]ounsel should give the client his professional judgment whether an appeal should be taken and ascertain whether the client wishes to appeal." *Matter of Anonymous Member of the Bar*, 303 S.C. 306, 307, 400

S.E.2d 483, 483 (1991). An attorney, even if retained only for purposes of trial, "must serve and file Notice of Appeal to protect the client's right to appeal." *Id.* "Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967)." *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008).

There was no evidence that Petitioner knowingly and voluntarily waived his right to appeal. In *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010), this Court found the PCR court erred in denying Simuel a belated appeal pursuant to *White v. State*, *supra*, where there was "no probative evidence that [trial counsel] informed Petitioner of his right to a direct appeal, nor [was] there any evidence that Petitioner waived his right to a direct appeal." In reversing the decision of the PCR court and granting Simuel a belated appeal, this Court explained: "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Id.* (internal quotations omitted) (quoting *Sheppard v. State,* 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)). Counsel was required to file an appeal in this case. There was no knowing and intelligent waiver of the right to appeal. Therefore, counsel was obliged to initiate the appeal or comply with the *Anders* procedure. *Turner v. State*, 380 S.C. at 224, 670 S.E.2d at 374; *Roe v. Flores-Ortega*, 528 U.S. at 480.

Additionally, there was no requirement Petitioner show he would prevail on appeal or that he asked for an appeal in order to be entitled to appellate review. The PCR court's failure to grant Petitioner belated appellate review because he did not show that there "were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal" was an error of law. Although the PCR court's order cited *Roe v. Flores-Ortega*, 528 U.S. at 485, for

this proposition, *Flores-Ortega* was in the context of a guilty plea. "Although not determinative, a highly relevant factor in this inquiry [whether to consult with the defendant about an appeal] will be whether the conviction follows a trial or a guilty plea[.]" *Roe v. Flores-Ortega*, 528 U.S. at 480. Petitioner was convicted at trial and received the maximum term of imprisonment. Any rational defendant would want to appeal.

The PCR court should have granted Petitioner a belated direct appeal. The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's constitutionally deficient performance deprived Petitioner of an appeal that he otherwise would have taken, and he has made out a successful ineffective assistance of counsel claim entitling him to an appeal. *Roe v. Flores-Ortega*, 528 U.S. at 484. There was no probative evidence that Petitioner knowingly waived his right to a direct appeal, and counsel did not make certain Petitioner was aware of his right to appeal. *Simuel*, 390 S.C. at 271, 701 S.E.2d at 740.

When the PCR court finds that an applicant is not entitled to appellate review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), the applicant may petition the South Carolina Supreme Court for a writ of certiorari. *Davis v. State*, 288 S.C. 290, 291, 342 S.E.2d 60 (1986). "*Davis* promulgates procedural guidelines for review of PCR cases in which a petitioner's knowing and intelligent waiver of the right to direct appeal is at issue. *White* permits consideration of the full trial record on this issue in conjunction with appellate review of the PCR proceeding under an exception to the prohibition against appellate courts considering appeals in the absence of notice of direct appeal given and timely served." *Smith v. State*, 309 S.C. 413, 414-15, 424 S.E.2d 480, 481 (1992). The PCR court misapplied the procedural guidelines laid out in *Davis*, 288 S.C. at 291, 342 S.E.2d at 60. Petitioner was clearly not seeking a new trial as

regards this PCR claim, but instead he sought belated appellate review pursuant to *White v. State* 263 S.C. 110, 208 S.E.2d 35. *Davis* is not a "gotcha" intended to bar relief to defendants who were denied appellate review of their trials due to the ineffective assistance of their counsel. Since Petitioner did not waive his right to appeal, counsel was obliged to pursue an appeal and he did not do so. Counsel's failure to initiate a direct appeal or comply with *Anders* constituted ineffective assistance of counsel. The PCR court should have granted Petitioner belated appellate review pursuant to *White v. State*. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668.

II.

The court erred in denying post-conviction relief where counsel failed to specify to the trial court why it should direct a verdict of acquittal, since issue preservation principles require an issue to be raised to the trial court with sufficient specificity, and where Petitioner was prejudiced by the deficient performance.

Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). An accused "is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged." *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004) (citing *State v. McHoney,* 344 S.C. 85, 544 S.E.2d 30 (2001); *State v. Brown,* 103 S.C. 437, 88 S.E. 21 (1916); *State v. Gore,* 318 S.C. 157, 456 S.E.2d 419 (Ct. App. 1995)). *Accord State v. Heath*, 370 S.C. 326, 330, 635 S.E.2d 18, 19 (2006) (same). Denial of a directed verdict motion is only proper where viewing the evidence in the light most favorable to the State, the evidence could induce a reasonable juror to find the defendant guilty. *State v. Pearson*, 415 S.C. 463, 474, 783 S.E.2d 802, 808 (2016).

"[W]hen there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict." *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). "In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408 (2013) (citing *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004)). *Accord State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009) (same). "[M]ere suspicion is insufficient to support [a] verdict." *Hernandez*, 382 S.C. at 625, 677 S.E.2d at 605. "[T]he court should not refuse to

grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." *State v. James*, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (Ct. App. 2004).

The crime for which Petitioner was convicted, third-degree criminal sexual conduct with a minor (CSCM 3rd), is codified in S.C. Code Ann. § 16-3-655(C), which provides,

> A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly **commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts**, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child. However, a person may not be convicted of a violation of the provisions of this subsection if the person is eighteen years of age or less when the person engages in consensual lewd or lascivious conduct with another person who is at least fourteen years of age.

(emphasis added).

In contrast, the crime for which Petitioner was acquitted, second-degree criminal sexual conduct with a minor (CSCM 2nd), is codified in S.C. Code Ann. § 16-3-655(B), which provides,

> A person is guilty of criminal sexual conduct with a minor in the second degree if:
>
> (1) the actor **engages in sexual battery** with a victim who is fourteen years of age or less but who is at least eleven years of age; or
>
> (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

(emphasis added). "Sexual battery" is defined as meaning "*sexual intercourse*, cunnilingus, *fellatio*, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (emphasis added).

The State alleged Petitioner was guilty of CSCM 2nd based on Minor 1's testimony that Petitioner had sexual intercourse with her. The State argued Petitioner was guilty of CSCM 3rd based on Minor 1's testimony that Petitioner kissed her. However, kissing is insufficient to qualify as a lewd or lascivious act. "Penal statutes are construed strictly against the State and in favor of the defendant." *State v. Fowler*, 322 S.C. 157, 162, 470 S.E.2d 393, 396 (Ct. App. 1996). "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." *State v. Hudson*, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999).

"'[L]ewd act upon a child' was previously codified in § 16-15-140 of the South Carolina Code (2003) (repealed 2012). The same conduct is now classified as criminal sexual conduct with a minor in the third degree. S.C. Code Ann. § 16-3-655(C) (2015)." *State v. Busse*, 439 S.C. 104, 111 n. 1, 886 S.E.2d 208, 212 n. 1 (2023). Although "lewd or lascivious act" is not defined by statute, it is clear that an obscene act is required. *See State v. Hardee*, 279 S.C. 409, 412–13, 308 S.E.2d 521, 524 (1983) ("The terms appellant asserts should be defined—lewd, lascivious, lust, passions, desires, arousing, appealing, gratifying, and sexual—are commonplace terms which are easily found in dictionaries and other source books."). "Lewd" is defined as: "Obscene, lustful, indecent, lascivious, lecherous." Lewd, Black's Law Dictionary (5th ed. 1979). "Lascivious" is defined as: "Tending to incite lust; lewd; indecent; obscene; sexual

impurity; tending to deprave the morals in respect to sexual relations; licentious." Lascivious, Black's Law Dictionary (5th ed. 1979). *Cf. State v. Dinkins*, 435 S.C. 541, 551, 868 S.E.2d 181, 186 (Ct. App. 2021) (No error in denial of directed verdict motion for third-degree CSC with a minor on the basis of lack of proof of intent given Child's testimony that Dinkins put his tongue in her mouth while she pretended to be asleep. This was evidence of conduct from which a jury could reasonably determine Dinkins's *intent* to arouse, appeal to, or gratify his own lust, passions, or sexual desires.). In this case, unlike *Dinkins*, Petitioner does not argue a directed verdict should have been granted on the basis of a lack of intent. Petitioner instead argues that kissing is not a lewd or lascivious act. The act of kissing is itself not obscene or indecent—it only becomes indecent is one of the parties is thirteen and the other is an adult, things which are separate elements of the offense. Whether kissing is an obscene and indecent act is a separate element from the age of the parties.[7]

Counsel should have specified this argument at the directed verdict stage to the trial court. If he had, the trial court would have been constrained to direct a verdict of acquittal for CSCM 3rd. If the trial court did not so rule, Petitioner would have prevailed on that issue on direct appeal. However, counsel's bald statement that "the defense would just move for a directed verdict" was insufficient to raise this argument with specificity to the trial judge and thus to preserve this issue for direct appeal (had counsel filed one). "There are four basic

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[7] Moreover, Minor 1's testimony that she performed oral sex on Petitioner does not provide an alternative basis for a conviction on CSCM 3rd since "fellatio" is explicitly included in the definition of a "sexual battery" for purposes of CSCM 2nd. S.C. Code Ann. § 16-3-655(B); S.C. Code Ann. § 16-3-651(h). If the General Assembly explicitly listed fellatio as a form of sexual battery for purposes of 16-3-655(B), it would have listed fellatio as a "lewd and lascivious act" for purposes of 16-3-655(C) if it so intended. *See, e.g., First Citizens Bank & Tr. Co., Inc. v. Blue Ox, LLC*, 422 S.C. 461, 471, 812 S.E.2d 418, 423 (Ct. App. 2018) ("the legislature knew how to provide for an exception had it desired to do so as evidenced by the 'fraudulent conveyance' exception in the preceding subsection").

requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) *raised to the trial court with sufficient specificity*." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)) (emphasis added).

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In determining whether an applicant has proven prejudice, the strength of the State's case is one significant factor to be considered, along with the specific impact of counsel's error and other relevant considerations. *Smalls v. State*, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018).

As discussed above, specifying the grounds for the directed verdict motion would have resulted in Petitioner being acquitted of the charge. Petitioner has established both error and prejudice, and the PCR court erred by denying post-conviction relief. *Strickland v. Washington*, 466 U.S. at 687.

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to direct a verdict of acquittal pursuant to Rule 19, SCRCrimP, where the State alleged Petitioner was guilty of third-degree criminal sexual conduct with a minor based on testimony that Petitioner kissed Minor 1, and where § 16-3-655 requires the State prove the commission or attempted commission of "a lewd and lascivious act," since kissing is not a lewd and lascivious act?

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on the issues.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of October, 2024.