

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

William H. Seals, Circuit Court Judge

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ANTONIO D. PATTERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002198

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PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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## **ISSUES PRESENTED**

I. Trial counsel erred in dissuading petitioner from testifying at his 1<sup>st</sup> degree CSC trial when petitioner's defense was that he was not guilty as charged, which meant that petitioner was denied an opportunity to present a complete defense in his case, particularly since there were no eyewitnesses and there was no incriminating forensic evidence submitted by the state.

II. Trial counsel erred in failing to request a charge on the lesser offense of second degree criminal sexual conduct in the case.

## STATEMENT

Petitioner Antonio Diergo Patterson was found guilty of first degree criminal sexual conduct (2006-GS-10-9248) per a jury trial held during the September 2010 term of the Charleston County General Sessions Court before Judge Deadra L. Jefferson.<sup>1</sup> Petitioner was sentenced to imprisonment for a period of twelve years. Attorneys Reese Stidham and Ted Smith represented petitioner at trial and Assistant Solicitor Jennifer Shealy and James Stack appeared on behalf of the state. App. 1-446. Petitioner appealed, but his conviction and sentence were affirmed on appeal. See State v. Patterson, Op. No. 2013-UP-254 (S.C. June 19, 2013). Note also that petitioner pled guilty to third degree criminal sexual conduct (2006-GS-10-4311) at the close of the trial.

On February 25, 2014, petitioner filed a PCR action with the Charleston County Office of the Clerk of Court. App. 448-454. The respondent filed a return dated May 22, 2015, requesting that a hearing be held in response to petitioner's PCR action. App. 455-459.

A PCR hearing was held on January 11, 2017, at the Charleston County Courthouse before Judge William Seals. App. 461-511. Petitioner was represented by Chris Murphy, and Assistant Attorney Alicia Olive appeared on behalf of the state. On September 14, 2017, Judge Seals issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 512-522.

Petitioner appealed Judge Seals' Order of Dismissal. This petition follows.

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<sup>1</sup> Petitioner was also tried on the charge possession of a weapon during the commission of a violent crime, but the jury found him not guilty on this charge.

## QUESTION I

. Trial counsel erred in dissuading petitioner from testifying at his 1<sup>st</sup> degree CSC trial when petitioner's defense was that he was not guilty as charged, which meant that petitioner was denied an opportunity to present a complete defense in his case, particularly since there were no eyewitnesses and there was no incriminating forensic evidence submitted by the state.

At trial, the prosecutrix testified that she was present at petitioner's place at the same time a "cook out" was being held nearby on April 9, 2006, where she and petitioner ate food, drank gin, and smoked marijuana. Apparently, petitioner's sister and brothers and other family members were nearby and enjoying the festivities as well. At some point, the prosecutrix testified that she wanted to leave and go home, but was informed by petitioner then that he desired sex at that time. The prosecutrix stated that after she informed petitioner that she did not want to have sex, petitioner went upstairs and then came back downstairs holding a gun, and proceeded to take her to the bathroom; and even though she escaped, he stopped her and put her arm behind her back, took her to another room, pulled her pants down, and put on a condom, and "put his penis in her vagina" while she was bended over the arm of a chair. Afterwards, she stated that she was hysterical and crying and ran out looking for help and found a house close by where the occupants inside allowed her to use their phone to call police to report the incident. App. 83, l. 1 – p. 109, l. 25. The prosecutrix gave a statement to police about the incident and petitioner was subsequently arrested in connection with the incident.

Petitioner did not testify at trial. However, petitioner's nephew (Emanuel Patterson) and brother (Timothy Patterson) both testified at trial and stated that they saw no disturbance and did not see the prosecutrix leave the cookout upset and in tears. App. 314, l.14 - p. 318, l. 17; App. 339, l.19 – p. 343, l. 25.

During the PCR hearing held in the case, petitioner testified that the trial strategy was that he was innocent because he maintained he did not have sex with the prosecutrix. App. 467, l. 11 – p. 468, l. 6. Petitioner added that counsel discouraged him from testifying in his defense at trial and advised him not to testify. Petitioner stated that if he had testified, then he would have presented exculpatory evidence, i.e., forensic reports where no DNA was identified on a condom found at the scene, and that the DNA found on the carpet did not belong to the prosecutrix. App. 469, l. 9 – p. 470, l. 16; App. 473, l. 16-19. Petitioner explained that “[he] had a DNA test and [that the prosecutrix] had DNA testing...and there was no match on the DNA that was found.” App. 470, l. 16-18. In addition, petitioner stated that counsel advised him not to testify because of his prior charge (CSC third charge) even though there was no conviction on that particular charge, which was only pending at that. App. 471, l. 13 – p. 473, l. 15; App. 475, l. 21 – p. 476, l. 22.

Trial counsel testified at the PCR hearing and explained that consent was the defense theory of the case, i.e. that they cooked out, drank, smoked, and had sex, and that he didn’t recall advising petitioner not to testify, but that the evaluation of him (petitioner) established that he would not have presented well as a witness. App. 489, l. 1 – p. 490, l. 24; App. 492, l. 16-18. Actually, counsel admitted that he did advise petitioner of the importance of testifying and getting his story out there. App. 490, l. 5-9; App. 493, l. 7-10.

The PCR judge ruled that petitioner did not establish ineffective assistance of counsel regarding his right to testify at trial because counsel conferred with petitioner regarding this matter and allowed petitioner to make the decision to whether he should testify at trial. App. 519 – 522.

Petitioner's right to testify at trial should not have been stifled by counsel. A defendant in a criminal case has the right to take the witness stand and testify in his or her behalf under the due process clause of the Fourteenth Amendment, which guarantees that no one shall be deprived of liberty without due process of law, and under the compulsory process clause of the Sixth Amendment that grants the defendant the right to call witnesses, and under the Fifth Amendment's privilege against self-incrimination. State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), citing to Rock v. Arkansas, 483 U.S. 44 (1987), and Faretta v. California, 422 U.S. 806 (1975). In Rivera, the Court reversed because the defendant's was denied his right to testify in his defense at trial (despite the position that **“preventing [the defendant] from testifying may have been an advantageous strategic decision ... [because this position]..had no basis in the law”**) and that the denial of the right to testify at trial could not have been harmless as it was considered structural error. In addition, a defendant has a right to present his defense at trial. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (2001).

Petitioner's decision not to testify, which was obviously influenced by the advice of trial counsel, constituted error that prejudiced petitioner. First, there was no meeting of the minds with respect to the defense theories in the case. For example, counsel explained at the PCR hearing was that the defense was that consensual sex occurred (See. App 489, lines 5-11), but at trial, counsel argued that there was insufficient evidence of 1<sup>st</sup> CSC as charged (App. 369, l. 24 – p. 370, l.9). Petitioner's position at the PCR hearing was that no sex with the prosecutrix occurred and that there was proof of the same because no forensic evidence established that he had sex with her.<sup>2</sup> Also, petitioner was advised that he would be impeached with his pending

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<sup>2</sup> No semen was found on the carpet samples and the accused's DNA had not been found on either of the two condoms found at the scene. See Robin Taylor's testimony at App. 249, l. 20 – p. 271, l. 11.

sex charge, but petitioner had not been convicted on the same so it did not qualify as a prior crime and there was insufficient proof qualifying it as a bad act. For all of these reasons petitioner was prejudiced by not testifying at trial based on counsel's misadvice, which in turn constituted ineffective assistance of counsel in violation of the Sixth Amendment. See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). Also, but for this error outlined above, petitioner would have testified at trial, and a reasonable probability exists that the outcome of his trial would have been different had he testified at trial.

## QUESTION II

Trial counsel erred in failing to request a charge on the lesser offense of second degree criminal sexual conduct in the case.

The prosecutrix testified that petitioner held her arm behind her back when the incident she described occurred (App. 102, l 5 – p. 103, l. 6) and as a result, the question became whether it was the alleged gun or the alleged arm holding that was used to accomplish the act of sex. Thus, a jury question became whether aggravated force under 1<sup>st</sup> degree CSC<sup>3</sup> was used or aggravated coercion and 2<sup>nd</sup> degree CSC<sup>4</sup> was used in the case. The test for determining if a crime is a lesser offense is whether the greater offense includes the elements of the lesser. Knox

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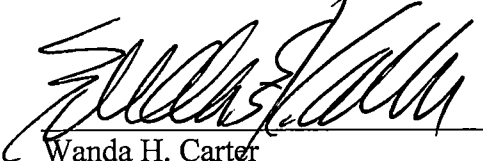
<sup>3</sup> (1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:  
(a) the actor uses aggravated force to accomplish sexual battery.  
(b) the victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act.  
(c) The actor caused the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance a controlled substance analogue, or any intoxicating substance. S.C. Code Ann. Section 16-3-652

<sup>4</sup> (1) A person is guilty of criminal sexual conduct in the second degree if the actor uses aggravated coercion to accomplish sexual battery. S.C. Code Ann. Section 16-3-653.

v. State, 340 S.C. 81, 530 S.E.2d 887 (2000). Here, the facts supported a charge on the lesser offense of 2<sup>nd</sup> degree CSC. Note that 3<sup>rd</sup> degree CSC is not a lesser offense of 1<sup>st</sup> degree CSC. State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000). Counsel erred in violation of the Sixth Amendment in failing to request a jury charge on the lesser offense of 2<sup>nd</sup> degree CSC, because but for the omission in this regard, a reasonable likelihood exists that the outcome of petitioner's trial might have been different. See Strickland v. Washington, supra.

### **CONCLUSION**

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the above-raised issues.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable William H. Seals, Circuit Court Judge

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ANTONIO D. PATTERSON,

PETITIONER

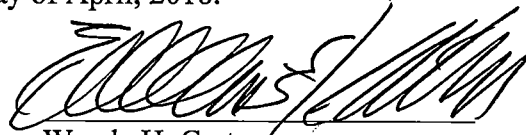
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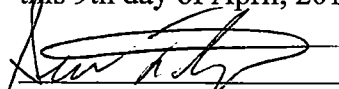
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Rasheeda Cleveland, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Antonio D. Patterson, #342594, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 9th day of April, 2018.



Wanda H. Carter  
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 9th day of April, 2018.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: 10/30/2022