STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

D. Craig Brown, Circuit Court Judge

ANTONIO TERRELL ROMEO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002415

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding petitioner admitted to defense counsel and law enforcement that he committed the crime where petitioner specifically denied committing the crime, and there was no evidence he possessed the requisite criminal intent?

STATEMENT

Petitioner was a high school graduate and the father of two children. App. 5, ll. 13-15; App. 22, ll. 11-13. He was employed at an industrial park until his plea and sentencing at the age of thirty-eight. App. 29, ll. 7-10; App. 5, ll. 11-12. Petitioner lived with his toddler-aged son and his son's mother, Ms. Witherspoon. App. 11, ll. 24-25; App. 15, ll. 3-10; App. 18, ll. 1-3; App. 102; App. 124. Ms. Witherspoon also had a fourteen-year-old daughter (the minor), who lived with them. App. 11, ll. 23-25; App. 12, ll. 11-13.

In 2015, the minor alleged that petitioner molested her on two occasions in September 2014. App. 11, ll. 17-19; App. 141 – 142. Petitioner was represented by Scott Lamar Robinson of Manning. App. 1; App. 91; App. 76, l. 10.

Petitioner's discovery documented that at the time of the minor's allegation against him, she was sexually active, had a sexually transmitted disease, had been referred to a behavioral health center, had a history of angry and aggressive behavior, smoked marijuana, and "would leave home at night."[1] App. 122 – 123.

Prior to claiming that petitioner molested her, the minor alleged that petitioner's cousin molested her in 2013. App. 78, ll. 17-25. DSS records showed the case involving alleged molestation by petitioner's cousin was "still under investigation" while petitioner's case was pending. App. 78, l. 9 – 79, l. 1.

Petitioner and the alleged victim gave "very similar" statements to authorities about how events unfolded. App. 29, ll. 13-15. The minor claimed petitioner "got so drunk . . ." that he came "to her in the night and that they had sexual contact on two different occasions." App. 29,

[1] Petitioner's discovery was made plaintiff's exhibit #1 at his post-conviction relief (PCR) hearing, and comprises pages 93 – 130 of the appendix.

ll. 20-22; App. 11, l. 24 – App. 12, l. 1. Petitioner agreed that the sexual contact occurred, but "said that it was **nonconsensual.**" App. 12, ll. 3-5 (emphasis added).

Petitioner said he had been drinking heavily, and awoke to the minor on one occasion performing oral sex on him and on another occasion to her on top of him. App. 102. In his written statement to law enforcement, petitioner said he was initially awakened by the minor performing oral sex on him, and "was ab[le] to stop her." App. 102. "I had a talk with her about what she done and she said she wouldn't do that no more . . ." but two weeks later: "**I woke up to [the minor] on top of me and my boxer was still on what the hell are you doing get off of me. I sat up and made her remove herself off of me and out of the room.**" App. 102 (emphasis added).

Petitioner added that the minor "is smart enough to know she place me in a bad situation with what she done and just thought I was going to let her do whateve[r] she wanted and when I caught her doing wrong sh[e] use what she done to me to her advantage." App. 103.

On April 4, 2016, Ms. Witherspoon, and the alleged victim, and petitioner drove to court together. App. 19, ll. 2-3. Petitioner pleaded not guilty, the trial began, and a jury was selected. App. 29, ll. 11-12. The court took a two-hour recess, and petitioner subsequently pleaded guilty to two counts of second degree criminal sexual conduct with a minor for a negotiated sentence, before the Honorable Howard P. King. App. 1; App. 3, ll. 13-20. Petitioner was represented by Scott Lamar Robinson; Warren Anderson appeared on behalf of the state. App. 1.

At the plea, petitioner told the court that he felt he "ha[d] no choice but to go this way because of the simple fact that I didn't, I didn't, I did not never molested anybody." App. 30, l. 24 – 31, l. 3. Petitioner continued: "there was some alcohol involved and **I can't help to what I wake up to . . .**" but that he felt he had "no choice" except to plead guilty because the minor had

come into the room and touched him. App. 31, ll. 3-8 (emphasis added). Defense counsel told the plea judge: "**[O]n[c]e he kind of realized what was going on there was no, he did not finish the act quite frankly**." App. 30, ll. 10-15 (emphasis added).

However, the court accepted the guilty plea and imposed a negotiated sentence of ten years' incarceration suspended upon the service of five years with five years of probation, and a lifetime requirement to register as a sexual offender. App. 31, ll. 13-23; App. 32, ll. 7-12; App. 25, ll. 17-20; App. 61, ll. 12-13; App. 61, ll. 16-18.

Petitioner did not appeal his guilty plea, but on July 6, 2016, he filed an application for post-conviction relief (PCR) alleging his guilty plea was involuntary because of ineffective assistance of counsel. App. 34 – 42. The state filed a return on May 17, 2017. App. 43 – 50. A hearing was held on July 24, 2017, before the Honorable D. Craig Brown. App. 51. Lance Boozer represented petitioner, and Julie Coleman appeared on behalf of the state. App. 51. The PCR court heard testimony from petitioner and from his defense counsel, Scott Robinson. App. 52.

At the PCR hearing, petitioner maintained his lack of criminal intent. "I was passed, I was asleep, very much asleep. And when this whole incident I was in the room unaware what was going on around me. I woke up and caught the so-called victim trying to perform, get off on me or whatever, at the time to fulfill her sexual desires." App. 72, ll. 13-18.

PCR counsel asked petitioner: "[W]hy did you choose to take that plea then?" App. 62, ll. 13-14. Petitioner explained that he only pleaded guilty: "Because I didn't have no defense. I didn't have, I didn't have no defense." App. 62, ll. 15-16. Petitioner believed he had no defense because defense counsel so advised him. Petitioner said the Friday before trial, he met with defense counsel. App. 62, ll. 16-20. "[W]hen I went in his office [counsel] said, what is your

defense, and I said I didn't do anything; and he said, well, that's not a defense. So I didn't have anything to go on." App. 62, ll. 20-12. "I didn't know, the only thing I went with what, went with what Mr. Robinson said." App. 74, ll. 14-16.

Defense counsel testified consistently with petitioner in this regard: "There was a handwritten statement from [petitioner] where, I guess, what he says never confessed. He and I have a little bit of difference of opinion. That may not have been his intention; but in my opinion, legally that more or less constituted a confession." App. 77, l. 25 – 78, l. 5. "[T]he problem from my point of view with his case was that his statement that made the victim guilty was really a confession. His statement was very similar to hers other than the difference between whether it was coerced or forced." App. 79, ll. 6-11. "The problem is, you know, there's no such thing as consensual sex with a 14 year old. And as you have already discussed with him, voluntary intoxication is not really a defense **so there was no denying the allegations**." App. 79, ll. 21-25 (emphasis added).

Defense counsel said that he and petitioner had a number of discussions about petitioner's belief that "he didn't do anything wrong, and that was what his statement was about in his mind." App. 80, ll. 14-18. "I think he believes that, but I don't think that is legally correct." App. 80, ll. 19-20. Although defense counsel agreed it was "after we picked a jury that he took the other plea," he was unable to articulate what his trial strategy would have been had petitioner not pleaded guilty: "[I]t's hard to say." App. 83, l. 25 – 84, l. 1; App. 86, l. 22 – 87, l.1.

On September 14, 2017, the PCR court filed an order of dismissal denying petitioner relief. App. 131 – 140. The court found counsel was not ineffective: "**[Petitioner] was well aware of the evidence against him, and admitted to Plea Counsel and to law enforcement in a written statement that he committed the crime.**" App. 137 (emphasis added). "This Court

finds that [petitioner] has not shown that he was prejudiced by any of Plea Counsel's actions as he has failed to show that he would not have pled guilty but would have gone to trial but for Plea Counsel's actions." App. 137. "This Court finds very credible Plea Counsel's testimony that [petitioner] understood everything at the plea and that it was solely [petitioner's] decision to plead guilty. [Petitioner] has failed to present any probative or credible evidence that he was coerced into pleading guilty." App. 138.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding petitioner admitted to defense counsel and law enforcement that he committed the crime where petitioner specifically denied committing the crime, and there was no evidence he possessed the requisite criminal intent.

The court erred by finding petitioner admitted committing the crime to law enforcement and defense counsel, because petitioner steadfastly maintained throughout his written statement to authorities and his remarks to the court and counsel that he awoke to the minor performing sex acts, and made her stop. App. 102. There was no evidence in the record that petitioner admitted committing the crime (which requires possessing criminal intent). App. 102 – 103. Counsel was deficient in advising petitioner he had "no defense" and there "was no denying the allegations."

The appropriate scope of appellate review is that "any evidence" of probative value is sufficient to support the post-conviction judge's factual findings. *Webb v. State*, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

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, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional

norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687).

"[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58. To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, Op. No. 27801 (S.C. Sup. Ct. filed May 23, 2018) (Davis Adv. Sh. No. 21 at 16).

"Criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense." *State v. Fennell*, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000) (citing *United States v. Bailey,* 444 U.S. 394, 402 (1980); McAninch & Fairey, *The Criminal Law of South Carolina* 1 (1996)). "A defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." *Id.*

"[O]rdinarily, in order to establish criminal liability, a criminal intent of some form is required." *State v. Ferguson*, 302 S.C. 269, 271, 395 S.E.2d 182, 183 (1990). Unless the legislature has designated an act or omission a crime regardless of fault (crimes referred to as strict liability offenses), "the mental state required to be proven by the State for a particular crime might be purpose (intent), knowledge, recklessness, or criminal negligence." *Id.* at 271-72, 395 S.E.2d at 183.

The legislature did not make second degree criminal sexual conduct with a minor a strict liability offense. Therefore, the state must prove beyond a reasonable doubt that the defendant intended to commit the act. Petitioner testified he felt he had no choice but to plead guilty because when he told defense counsel: "I didn't do anything," counsel told him that was not a defense. This advice was a distortion of the law and misleading. A defendant is not required to present an affirmative defense. Rather, it is the state who has the burden of proving the defendant committed all of the elements of the offense.

Defense counsel represented that no criminal intent needed to be proved by the state, when it did. To prove petitioner guilty, the state was required to prove beyond a reasonable doubt that he intended to engage in sexual batteries with the minor. A defendant's argument that he "did not have the requisite *mens rea* to commit any crime," is a legitimate reason for a finding of not guilty. *State v. Blurton*, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804-05 (2002).

Petitioner insisted in his statement to law enforcement that he was heavily intoxicated and asleep when the minor initiated the sex acts, and that he made her stop when he awoke. App. 102 – 103. Petitioner maintained this lack of criminal intent in his discussions with defense counsel, and in his testimony at the plea hearing, and in his testimony at the PCR hearing.

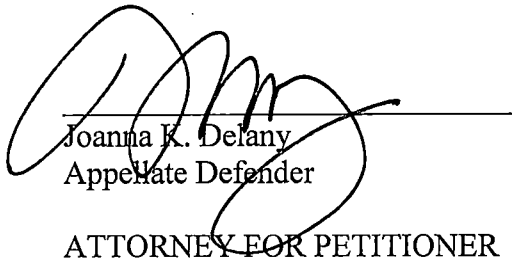
There is no evidence in the record that petitioner admitted to possessing criminal intent. Therefore, the PCR court erred in finding petitioner admitted to defense counsel and law enforcement that he committed the crime. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). Counsel was ineffective in advising petitioner he had "no defense" and there was "no denying the allegations" as petitioner always denied possessing criminal intent, and the burden of proof is upon the state. *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill v. Lockhart*, 474 U.S. 52

(1985). This advice deprived petitioner of "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill*, 474 U.S. at 56.

Counsel was unable to articulate any trial strategy he would have pursued, despite the fact that a jury had already been selected prior to petitioner's guilty plea. Counsel said petitioner's opinion that his statement did not constitute a confession was "legally" incorrect. App. 80, ll. 14-20. Petitioner testified he pleaded guilty because counsel told him he had no defense. Petitioner was prejudiced because but for counsel's deficiency, he would have declined to plead guilty, and instead continued with the trial. *Strickland*, 466 U.S. at 694; *Harden*, 360 S.C. at 408, 602 S.E.2d at 49.

CONCLUSION

By reason of the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of July, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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CERTIFICATE OF SERVICE

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 Julie Coleman, 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 Terrell Romeo, #336726, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 18th day of July, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of July, 2018.

Marie Newsom (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023