STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Jasper County

Honorable Thomas A. Russo, Circuit Court Judge

PHILIP MONROE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001176

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation in petitioner's trial for trafficking cocaine where counsel admitted in his closing argument that petitioner was guilty of conspiring to manufacture and possess cocaine, since counsel's comments conceded guilt to trafficking and failed to "subject the prosecution's case to meaningful adversarial testing," and since the comments rendered petitioner's trial structurally deficient?

STATEMENT

On September 27, 2012, a Jasper County Grand Jury indicted petitioner for the offenses of trafficking in cocaine in the amount of ten to twenty-eight grams, and for possession with intent to distribute schedule IV drugs. App. 340 – 343. The indictment for trafficking alleged, inter alia, that petitioner "unlawfully and knowingly did . . . conspire to . . . manufacture . . . or did . . . attempt to possess . . ." between ten and twenty-eight grams of cocaine. App. 343.

Petitioner was tried before the Honorable Perry M. Buckner and a jury, from February 11 – 13, 2013. App. 1. Robert Hughes represented petitioner. Carra Henderson and Erin Vaux represented the state. App. 1.

Petitioner was pulled over by police officers when his car was seen going a foot or so into the wrong lane when he made a turn. App. 86, ll. 9-10. Petitioner and his passenger, Courtney Baniel (Baniel) quickly got out of the car, and a bag full of drugs fell from Baniel's lap to the ground, where it was spotted by the officers. App. 92, l. 15 – 93, l. 14; App. 108, l. 24 – 109, l. 1. The bag was later found to contain fifty-six tablets of Clonazepam, a schedule IV drug, and twenty-seven grams of cocaine. App. 159, ll. 12-16; App. 160, l. 24 – 161, l. 3.

Both men were arrested. Baniel, who was charged with the same offenses for which petitioner was tried, testified for the state at petitioner's trial. App. 113, l. 19 – 114, l. 1. Baniel claimed that he was unaware that drugs were in the car. App. 110, ll. 9-16. According to Baniel, when the police officers initiated the traffic stop, petitioner threw the drugs in Baniel's lap and told him, "Take these charges from me." App. 108, ll. 10-14. Baniel alleged petitioner threatened to kill Baniel's family if he did not do so. App. 108, ll. 20-21.

Petitioner was questioned by police officers on three occasions over the next few weeks, and eventually admitted the drugs were his. App. 127, ll. 16-19; App. 143, l. 25 – 144, l. 2; App. 145, ll. 10-18.

In opening statements, defense counsel told the jury that the case was a "he-said/she-said type case." App. 74, ll. 8-9. Strangely, however, despite framing the case as such during his opening statement, defense counsel effectively conceded petitioner's guilt to the trafficking charge in his closing argument. Counsel said that petitioner "is not guilty of trafficking. **He is guilty of conspiracy to manufacture crack cocaine**. That's not what he's on trial for." App. 194, ll. 23-25 (emphasis added). Counsel also commented that petitioner's statement to law enforcement was evidence of "**conspiracy to manufacture and possess**." App. 195, ll. 12-16. (emphasis added) "That's not what you're here for. You are here for trafficking." App. 195, ll. 17-18.

The trial court charged the jury, inter alia, that one who attempted and conspired to traffic cocaine was guilty of trafficking in cocaine. App. 211, l. 16 – 212, l. 1. The trial court also charged the jury that one who "knowingly attempted" to possess more than ten grams of cocaine was guilty of trafficking in cocaine. App. 211, l. 16 – 212, l. 1.

The jury convicted petitioner of trafficking, as indicted. App. 223, ll. 20-24. The jury also convicted him of possession of schedule IV drugs.[1] App. 223, ll. 15-19. Petitioner was sentenced to concurrent terms of imprisonment of twenty-seven years for trafficking in cocaine and six months for possession of a schedule IV drug. App. 240, l. 24 – 241, l. 8; App. 344 – 345.

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[1] The court granted petitioner a directed verdict on the offense of possession with intent to distribute schedule IV drugs and charged the jury on the lesser-included offense of possession of schedule IV drugs. App. 181, ll. 12-16.

After exhausting his remedies on direct appeal, petitioner timely filed an application for post-conviction relief (PCR). App. 279 – 285. A hearing was held before the Honorable Thomas A. Russo on October 13, 2017. App. 295. James Falk represented petitioner and Ruston Neely represented the state. App. 296.

Petitioner testified that he was alarmed when counsel conceded his guilt during closing arguments. Petitioner said he was "concerned," "because when [counsel] said that, I was not guilty for trafficking, but which I am guilty for aiding and abetting in manufacturing. But that's the same thing as trafficking. So he's telling that I still was, you know, guilty for trafficking." App. 304, ll. 8-14. "And if he would have said that, or tell me that that was part of his strategy, then I would have tell him, don't do that, because he's throwing me under the bus." App. 304, ll. 14-17.

Counsel was asked why he conceded in closing argument that petitioner was "guilty of conspiracy to manufacture." App. 318, ll. 8-10. Counsel claimed, "[t]he fact that he was not charged with conspiracy to manufacture would have got—would have forced the jury to do a not guilty on the trafficking." App. 318, ll. 11-13. "I was trying to, if nothing else, get a mistrial or a not guilty on the trafficking . . ." App. 318, ll. 16-17.

On May 3, 2019, the PCR court issued an order of dismissal. App. 333 – 339. The court found, inter alia, that petitioner's testimony lacked credibility and that counsel's testimony was credible. App. 336. The PCR court addressed the allegation that "counsel did not consult with [petitioner] before [c]ounsel adopted a strategy to advise the jury during closing argument that [petitioner] was not guilty of trafficking, but he was guilty of conspiracy to manufacture crack cocaine." App. 337.

The order of dismissal stated that "the strong weight of evidence to the [petitioner's] guilt, namely a video confession, required a creative strategy by [c]ounsel. Therefore, [c]ounsel's argument that [petitioner] was not guilty of the charged crime, but rather a different crime, was not deficient." App. 337. "[Petitioner] was also unable to provide an argument that would have been more suitable, given the facts of the case. Further, this [c]ourt finds there was overwhelming evidence of guilt, such that any deficiency of [c]ounsel did not prejudice [petitioner]." App. 337.

This petition for certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective representation in petitioner's trial for trafficking cocaine where counsel admitted in his closing argument that petitioner was guilty of conspiring to manufacture and possess cocaine, since counsel's comments conceded guilt to trafficking and failed to "subject the prosecution's case to meaningful adversarial testing," and since the comments rendered petitioner's trial structurally deficient.

Counsel conceded petitioner's guilt without petitioner's consent, after he had chosen to plead not guilty and exercise his right to a trial. This was ineffective assistance of counsel of such a magnitude that petitioner's trial was structurally deficient and prejudice is presumed.

In *Herring v. New York*, 422 U.S. 853 (1975), the United States Supreme Court recognized the importance of the closing argument to a criminal defendant. "The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor . . ." *Herring*, 422 U.S. at 860 (internal quotations omitted) (quoting *Yopps v. Maryland*, 178 A.2d 879, 881 (1962)).

Here, defense counsel effectively conceded petitioner's guilt when he said that petitioner was "not guilty of trafficking. **He is guilty of conspiracy to manufacture crack cocaine.**" App. 194, ll. 23-24 (emphasis added). Counsel added that the state had evidence of "**conspiracy to manufacture and possess.**" App. 195, ll. 12-16. Although counsel stated to the jury that petitioner was not guilty of trafficking, counsel's performance was irrational: counsel did tell the jury petitioner was guilty of trafficking because one who conspires to manufacture more than ten

grams of cocaine or attempts to possess more than ten grams of cocaine is guilty of the offense of trafficking under South Carolina law.

S.C. Code Ann. § 44-53-370(e)(2) provides that,

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or **conspires to** sell, **manufacture**, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession **or who knowingly attempts to become in actual or constructive possession of** . . . ten grams or more of cocaine . . . is guilty of a felony which is known as "trafficking in cocaine" . . .

(emphasis added).

Counsel's comments that petitioner had conspired to manufacture and possess cocaine were a concession that petitioner's conduct made him guilty under the statute that he was charged with violating; under the language in petitioner's indictment; and under the judge's instructions to the jury. The PCR court therefore erred when it concluded counsel's argument was not deficient because he argued petitioner was "not guilty of the charged crime, but rather a different crime." App. 337. As seen, counsel did admit petitioner's guilt of trafficking since the trafficking statute encompasses conspiracy to manufacture and attempt to possess.

Counsel's performance was deficient. The decision to admit guilt lies with the defendant alone. "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) (emphasis in original) (citing U.S. CONST. amend. VI). In *McCoy*, the United States Supreme Court explained that "the autonomy to decide that the objective of the defense is to assert innocence . . ." is a decision reserved for the defendant. *Id.* at 1508.

Here, petitioner pleaded not guilty and proceeded to trial. Petitioner's exercise of his right to a trial in this noncapital case established that he did not wish to concede guilt. Counsel's performance here, by conceding petitioner's guilt during the guilt phase of his trial, violated petitioner's Sixth Amendment right to the assistance of counsel for his defense.

Moreover, the PCR court erred when it concluded that counsel's performance was not deficient since "[petitioner] was [] unable to provide an argument that would have been more suitable, given the facts of the case." As the Supreme Court observed in *United States v. Cronic*, 466 U.S. 648, 656 n. 19 (1984), "even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." Counsel initially appeared to be pursuing that type of defense, as evidenced by his comment in opening statements that the case was a "he-said/she-said type case," which makes his subsequent concession of guilt bewildering. App. 74, ll. 8-9. Moreover, it was not counsel's place to concede petitioner was guilty.

Typically, to prove ineffective assistance of counsel, a defendant must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984). However, there are some "circumstances so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, *supra*, 466 U.S. at 658. One of those circumstances is when "counsel fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659.

In *Cronic*, the United States Supreme Court explained that no specific showing of prejudice is required where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, [because] then there has been a denial of Sixth Amendment rights that makes

the adversary process itself presumptively unreliable." *Id.* "In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided." *Id.* at 654 n. 11 (quotations omitted).

See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) (when counsel conceded in closing argument that there was no reasonable doubt that his client was guilty, that client did not have effective assistance of counsel.) In *Swanson*, the Ninth Circuit found that a defense lawyer's concession to the jury that there was no reasonable doubt of his client's guilt was ineffective assistance of counsel that "tainted the integrity of the trial." *Id.* at 1074. "A lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to 'subject the prosecution's case to meaningful adversarial testing.'" *Id.*, citing *Cronic,* 466 U.S. at 659.

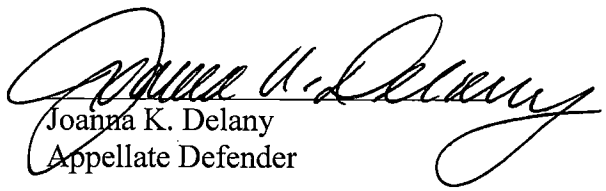
Here, prejudice should be presumed because counsel failed to require the prosecution prove petitioner's guilt to trafficking when counsel conceded that petitioner was guilty of events that made him guilty of trafficking. Counsel's performance thereby failed to subject the case to meaningful adversarial testing. *Cronic*, 466 U.S. at 658-59.

By conceding petitioner's guilt without his permission, counsel's deficient performance rendered petitioner's conviction structurally deficient. In *McCoy v. Louisiana*, 138 S. Ct 1500, 1506 (2018), trial counsel overrode the defendant's desire to maintain that he did not commit the murders for which he was on trial. The United States Supreme Court concluded that this was an error of such magnitude that prejudice was presumed. "Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." *Id.* at 1510-11.

"Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review." *McCoy v. Louisiana*, 138 S. Ct. at 1511. Here, where counsel admitted that petitioner was guilty of the elements of trafficking cocaine, counsel illegitimately overrode petitioner's plea of not guilty. Because counsel's deficient performance was a structural error, prejudice must be presumed.

CONCLUSION

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



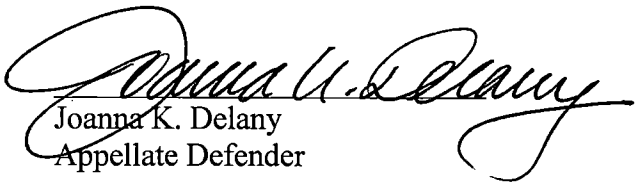
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of January, 2020.

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 Benjamin Limbaugh, 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 Philip Monroe, #354301, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 13th day of January, 2020.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of January, 2020.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.