CASE NO. 18-8003
IN THE UNITED STATES SUPREME COURT
October 2018 Term

ANTHONY J. DANNOLFO,

Petitioner,

vs.

MARK S. INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

(Combined and Restated)

1. Whether the decisions of the state and federal courts in this case conflict with this Court's holding in North Carolina v. Alford, 400 U.S.25, 91 S.Ct. 160 (1970) when the competent and credible evidence presented at the state court evidentiary hearing refuted Petitioner's allegation that he would have accepted the State's plea offer but for his counsel's misadvise?

INTERESTED PARTIES

The only parties to this proceeding are named in the caption of the case.

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CITATION TO OPINIONS BELOW

Petitioner seeks discretionary review over the unreported decisions in Dannolfo v. Secretary, Florida Department of Corrections, No. 18-12460-E (11th Cir. Nov. 19, 2018) and Dannolfo v. Julie Jones, No. 18-cv-80239-WPD (S.D.Fla. May 22, 2018).

JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1254(1). Respondent acknowledges § 1254(1) states that decisions of the appellate courts may be reviewed by this Court by writ of certiorari granted on the petition of any party to any civil or criminal case. However, Petitioner fails to set out a compelling reason of similar character to the reasons for this Court to grant jurisdiction as those included in Rule (10)(a) of Part III of the Rules of the Supreme Court. Respondent maintains that there is no such compelling reason presented in this case.

STATUTORY PROVISIONS INVOLVED

The issue presented in this case involves 28 U.S.C. § 2254(d), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE AND FACTS

A jury found Petitioner guilty of trafficking in oxycodone and he was sentenced to twenty years in prison for his crime committed on February 19, 2009. Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal. The Fourth District affirmed Petitioner's conviction in Dannolfo v. State, 103 So. 3d 170 (Fla. Dist. Ct. App. 2012).

Petitioner subsequently filed a Rule 3.850 post-conviction motion. The trial court summarily denied most of the Rule 3.850 motion, but it set an evidentiary hearing on ground One. Ground One alleged Petitioner's trial counsel was ineffective because he misadvised Petitioner to reject a plea offer prior to trial. Petitioner claimed his trial counsel stated that "they would beat the case at trial" and that "the State would not be able to prove its case against the Defendant."

At the evidentiary hearing, Petitioner's trial counsel (Harris Printz) testified that he believed the State had a strong case against Petitioner. Mr. Printz never told Petitioner the State had a weak case or that Petitioner would be acquitted at trial. Petitioner told his version of events to Mr. Printz, i.e., Petitioner picked up prescription pills from his doctor and that the confidential informant (the CI) took the pills and conducted the drug transaction without Petitioner's knowledge.

Petitioner faced a maximum of thirty years in prison if convicted and the State offered a plea deal of three years in prison prior to trial.

Mr. Printz discussed the plea deal with Petitioner and advised that he would have only 260 days left to serve if he took the State's plea offer. Mr. Printz thought the offer was a good one and he advised Petitioner that he should accept it. Petitioner stated he would not accept the offer and that he wanted to go to trial because he was not guilty. Petitioner was an active participant in his case and consistently maintained his innocence throughout it. Petitioner thought he could beat the charge against him and would not accept the State's plea offer.

Petitioner testified that he was an active participant in his defense and maintained his innocence throughout the case. Petitioner admitted that he maintained his innocence throughout this case. Petitioner claimed he was advised to reject the State's three-year plea deal by Mr. Printz. Petitioner, a twenty-three time convicted felon, maintained that he told the truth during the evidentiary hearing and that Mr. Printz lied when he testified.

Twenty months after Petitioner was arrested, he claimed Mr. Printz told him there was a good chance he would win at trial. Mr. Printz purportedly told Petitioner that Officer Crane-Baker corroborated Petitioner's version of events, i.e., Petitioner and the undercover officer were nowhere near the vehicle at the time the drug transaction occurred. Mr. Printz made this statement based on his understanding of

Officer Crane-Baker's deposition. Mr. Printz also stated, based upon the pertinent deposition, that the undercover officer only heard one side of the telephone conversations that arranged the drug deal. Petitioner claimed that he rejected the State's three-year plea offer based upon Mr. Printz's misadvise. Petitioner previously rejected the State's three-year plea offer when Mr. Printz first came to see Petitioner on September 7, 2010.

Mr. Printz thought, after taking Officer Crane-Baker's deposition, that he would provide favorable testimony for the defense. Mr. Printz believed that Officer Crane-Baker would testify that Petitioner was nowhere near the vehicle when the CI was given the pill bottle and was surprised when he testified to the contrary at trial. Mr. Printz believed Officer Crane-Baker's trial testimony was inconsistent with his deposition testimony but was unable to point to any such inconsistency at trial. Mr. Printz did not recall the supplemental report filed by the undercover officer, which stated he could hear both sides of the telephone conversations that arranged the drug deal.

The trial court denied the ineffective assistance of counsel claim set forth in ground One. The trial court found the competent and credible evidence presented at the evidentiary hearing refuted Petitioner's self-serving allegation that he would have accepted the State's plea offer "but for his counsel's misadvise." The trial court specifically found that Mr. Printz's testimony was credible and rejected Petitioner's

testimony that Mr. Printz misadvised him to decline the State's plea offer. Petitioner appealed the denial of his Rule 3.850 motion to the Fourth District, which affirmed the trial court's ruling in a per curiam opinion. Dannolfo v. State, 236 So. 3d 1082 (Fla. Dist. Ct. App. 2017).

Petitioner then filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 which claimed, among other things, that Petitioner would have accepted the State's pretrial plea offer in this case if he had not been misadvised by Mr. Printz. The federal district court denied Petitioner's claims and noted on the "plea offer" issue that (1) the state trial court conducted an evidentiary hearing and found there was no competent, credible evidence that Petitioner would have accepted the plea offer but for counsel's advice, and (2) the state trial court concluded there was competent and credible evidence that refuted Petitioner's self-serving assertions. The federal district court also found that Petitioner had not overcome the presumption of correctness, by clear and convincing evidence, in the state trial court's findings after an evidentiary hearing.

Petitioner subsequently sought a certificate of appealability (COA) from the Eleventh Circuit Court of Appeals on all four issues he raised in the petition for writ of habeas corpus. The Eleventh Circuit denied Petitioner's request for a COA. In the denial of the COA, the Eleventh Circuit specifically noted on the "plea offer" issue that Petitioner did not demonstrate "by clear and convincing evidence that the

state court's factual finding that he would not have accepted the three-year plea deal, regardless of counsel's advice, was unreasonable."

REASONS FOR DENYING THE WRIT

THE DECISIONS OF THE STATE AND FEDERAL COURTS IN THIS CASE DO NOT CONFLICT WITH NORTH CAROLINA V. ALFORD, 400 U.S. 25 (1970) BECAUSE THE COMPETENT AND CREDIBLE EVIDENCE PRESENTED AT THE STATE COURT EVIDENTIARY HEARING REFUTED PETITIONER'S ALLEGATIONS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AND THAT PETITIONER WOULD HAVE ACCEPTED THE STATE'S PLEA OFFER BUT FOR TRIAL COUNSEL'S MISADVISE.

Federal habeas corpus relief cannot be granted under § 2254(d) unless a Petitioner shows the state court decision (1) was contrary to clearly established federal law set forth by the Supreme Court, (2) involved an unreasonable application of clearly established federal law set forth by the Supreme Court, or (3) was based on an unreasonable determination of facts in light of the record before the state court. Harrington v. Richter, 131 S.Ct. 770, 785 (2011). Petitioner failed to demonstrate that the state court decisions in this case were contrary to, or an unreasonable application of, clearly established federal law set forth by this Court. Furthermore, Petitioner did not show that the state court's decisions were based upon an unreasonable determination of facts in light of the record before the state court. The state court records show that trial counsel was not ineffective because he advised Petitioner to accept the plea offer. Accordingly, the Court should deny the petition

for writ of certiorari because Petitioner did not satisfy the burden necessary for federal habeas corpus relief under § 2254(d) .

"Performance Prong" - Trial Counsel did not Misadvise Petitioner

Petitioner's Rule 3.850 motion alleged that trial counsel (Mr. Printz) was ineffective because he misadvised Petitioner to reject a plea offer prior to trial. Petitioner claimed Mr. Printz stated they would beat the case at trial and the State would not be able to prove its case against Petitioner. Mr. Printz, however, testified at the evidentiary hearing that he advised Petitioner to accept the plea offer. Petitioner rejected Mr. Printz's advice and would not accept the offer. Petitioner stated he wanted to go to trial because he was not guilty of the trafficking offense. The state trial court found Mr. Printz's testimony credible on this issue and rejected Petitioner's testimony as incredible.

"Title 28 U.S.C. § 2254(d) gives federal habeas corpus courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state court, but not by them." Marshall v. Lonberger, 459 U.S. 422, 434 (1983). Thus, the Court must give deference to the state trial court's determination that Mr. Printz advised Petitioner to accept the plea offer and that his performance was not deficient. Petitioner seeks review in this Court based solely upon arguments involving the "prejudice prong" in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under Strickland, it is unnecessary to address the "prejudice prong" when a

defendant makes an insufficient showing on the "performance prong." Id. at 697; Carter v. Johnson, 131 F.3d 452, 463 (5th Cir. 1997)("Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim."). Thus, the Court should deny the petition for writ of certiorari because Petitioner made an insufficient showing on the "performance prong" below and he does not challenge that portion of the ruling before this Court. Michael v. Crosby, 430 F.3d 1310, 1319 (11th Cir. 2005)("we need not address the prejudice prong if we find that the performance prong is not satisfied.").

"Prejudice Prong" – Petitioner Failed to Prove Prejudice

Petitioner contends the decisions of the state and federal courts in this case conflict with North Carolina v. Alford, 400 U.S. 25 (1970) and somehow foreclosed his ability to prove prejudice under Strickland. To support his argument, Petitioner essentially asks this Court to reweigh the evidence presented to the state trial court and interpret it in a light most favorable to him in order to manufacture a purported conflict with Alford. The Court should reject such an invitation because the law is clear that "a federal habeas court may not simply disagree with the state court's factual determinations." Thatsaphone v. Weber, 137 F.3d 1041, 1046 (8th Cir. 1998).

Contrary to Petitioner's assertions, the decisions of the state and federal courts in this case do not conflict with Alford and Petitioner was not foreclosed from

proving he was prejudiced under Strickland. The decision in Alford involved a situation where a defendant maintained his innocence but pled to second-degree murder to avoid the death penalty. The defendant subsequently claimed his plea was involuntary because he maintained his innocence and pled to avoid the death penalty. This Court rejected the defendant's argument and noted "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." Alford, 400 U.S. at 37. The instant case, in contrast, involves a situation where Petitioner maintained his innocence and rejected his counsel's advice to enter a plea agreement. Thus, Alford is readily distinguishable from Petitioner's case and no conflict sufficient to warrant certiorari exists.[1]

Petitioner presented his own self-serving testimony at the evidentiary hearing to support his claim of prejudice, but his testimony was rejected by the state trial court as incredible. Again, federal habeas corpus courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state

[1] Lafler v. Cooper, 132 S.Ct. 1376 (2012) is also distinguishable because trial counsel in that case was ineffective, which led the defendant to decline a plea offer and proceed to trial. Mr. Printz, in contrast, was not ineffective in this case because he advised Petitioner to take the plea offer. Petitioner declined the plea offer because he proclaimed his innocence, claiming he was simply a drug addict. The state court's factual findings are presumed correct under § 2254(e)(1) and Petitioner has not overcome the presumption of correctness in this case.

court, but not by them." Lonberger, 459 U.S. at 434. Petitioner's testimony was also refuted by the records. For example, the attorney notes reflected that Petitioner thought he could beat the case from the outset, before any depositions were taken. Mr. Printz's notes reflected that when he met with Petitioner in person, he would not accept the plea offer. Petitioner also told Mr. Printz what happened and maintained his innocence. This competent and credible evidence refuted Petitioner's self-serving assertions. The federal district court properly found that Petitioner had not overcome the presumption of correctness, by clear and convincing evidence, in the state trial court's findings. Accordingly, Petitioner's assertion that he was somehow foreclosed from proving prejudice under Strickland is without merit.

Eleventh Circuit's Order does not Create Conflict

Petitioner contends the Eleventh Circuit's denial of a COA in this case held "that Dannolfo couldn't legally establish that he would have accepted the plea offer due to his previous protestation of innocence, irrespective to this Supreme Court's precedence in North Carolina v. Alford and the misadvice itself." The Eleventh Circuit never stated Petitioner could not legally establish prejudice under Strickland due to his prior claims of innocence. Instead, the factual findings of the state court destroy Petitioner's factual premise. The Eleventh Circuit denied a COA in this case because "[t]he state post-conviction court concluded that counsel had not performed deficiently, and Mr. Dannolfo had failed to establish prejudice. Mr. Dannolfo has

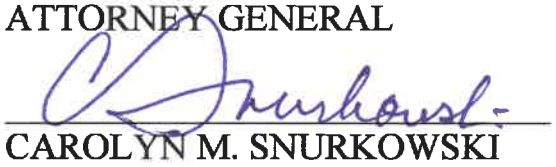
not demonstrated by clear and convincing evidence that the state court's factual finding that he would not have accepted the three-year plea deal, regardless of counsel's advice, was unreasonable." Thus, there is no conflict between the Eleventh Circuit's denial of a COA and the Sixth Circuit's decision in Griffin v. United States, 330 F.3d 733, 738 (6th Cir. 2003)(defendant's trial counsel never conveyed a five-year plea offer from the government; "Griffin's repeated declarations of innocence do not prove, as the government claims, that he would not have accepted a guilty plea."). In fact, the Eleventh Circuit previously stated that while a defendant's "denial of guilt surely is not dispositive on the question of whether he would have accepted the government's plea offer, it is nonetheless a relevant consideration." Osley v. United States, 751 F.3d 1214, 1224 (11th Cir. 2014). There is no instability in this area of the law, and the cases Petitioner cites do not stand for the proposition that a defendant's prior declarations of innocence are dispositive to Strickland's prejudice prong. Humphress v. United States, 398 F.3d 855, 859 (6th Cir. 2005)(during evidentiary hearing on ineffective assistance of counsel claim, the defendant would not definitively say whether he would have plead instead of going to trial but for counsel's misadvice; "Humphress's evasive answers preclude a finding that there is a reasonable probability that he would have chosen to plead guilty."); Comrie v. United States, 455 Fed. App'x 637 (6th Cir. 2005)(defendant failed to satisfy "performance prong;" defendant's testimony at the

evidentiary hearing that he "would have pled no contest" rather than admitting his guilt, along with his continued assertions of innocence, undercut the claim that he would have accepted the plea offer). Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

Based upon the foregoing arguments and authorities, the petition for writ of certiorari should be denied because there is no conflict between the Eleventh Circuit's order in this case and Alford, Lafler, Griffin, or any other case cited in the petition for writ of certiorari.

Respectfully submitted,
ASHLEY MOODY
ATTORNEY GENERAL



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