NO. 19-6072

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

THOMAS JOSEPH EPPELSHEIMER,
Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Thomas Joseph Eppelsheimer ("Eppelsheimer"), Petitioner, was a club promotor at DarkSide in Dallas, Texas. DarkSide was a dance club that required patrons to be 17 years of age or older. Eppelsheimer met B.L. and H.S. at DarkSide. Both girls told Eppelsheimer they were 17. DarkSide required its patrons to verify their age by presenting valid photo identification. Eppelsheimer truly believed B.L. and H.S. were 17 years of age. One weekend, Eppelsheimer had consentual sexual intercourse with B.L. and H.S. Eppelsheimer later discovered that B.L. and H.S. were under the age of 17 and had used fake identification to enter DarkSide.

This case therefore presents the following questions:

1. Is Texas Penal Code §§ 21.11(a)(1), Indecency with a Child, and 22.011(a)(2), Sexual Assault of a Child, two statutory rape offenses that criminalize sexual contact and sexual intercourse based solely on the age of the participants, unconstitutional under the United States Constitution's Fifth Amendment right to Due Process of Law considering the statutes omit a consciousness of wrongdoing?

2. Was Eppelsheimer's trial attorney ineffective under this Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984) for advising Eppelsheimer to plead guilty to three counts of Sexual Assault of a Child and one count of Indecency with a Child even though he did not know the children were under the age of consent?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which Petitioner, Thomas Joseph Eppelsheimer, was the Petitioner before the United States District Court for the Northern District of Texas, Dallas Division, as well as the Applicant and Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Eppelsheimer is a prisoner sentenced to 80 years' imprisonment, four consecutive 20 year sentences, and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division ("Director"). The Director and her predecessors were the Respondents before the United States District Court, as well as the Respondent and the Appellee before the United States Court of Appeals for the Fifth Circuit.

Mr. Eppelsheimer asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Thomas Joseph Eppelsheimer, Petitioner, is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Joseph Eppelsheimer respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

On July 22, 2019, the United States Court of Appeals issued an Order denying Mr. Eppelsheimer's motion for reconsideration of the denial of a certificate of appealability. The July 22, 2019, Order is unpublished and attached as Appendix A.

On April 3, 2019, the United States Court of Appeals issued

an Order refusing to certify an appeal from the district court order denying Sixth Amendment ineffect-assistance-of-counsel ("IAC") relief. The April 3, 2019, order is unpublished and attached as Appendix B.

On May 18, 2018, the United States District Court for the Northern District of Texas issued a Judgment denying Mr. Eppelsheiner's petition for a writ of habeas corpus. The May 18, 2018, judgment is unpublished and attached as Appendix C.

On May 18, 2018, the United States District Court for the Northern District of Texas issued an Order accepting the findings, conclusions, and recommendation of the magistrate judge. The May 18, 2018, order is unpublished and attached as Appendix D.

On June 1, 2016, the Court of Criminal Appeals of Texas denied Mr. Eppelsheimer's applications for a writ of habeas corpus without written order. The June 1, 2016, denials are unpublished and attached as Appendix E.

JURISDICTION

The federal district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 and 2254. Under 28 U.S.C. § 2253, the United States Court of Appeals for the Fifth Circuit had jurisdiction over uncertified issues presented in the Application for a Certificate of Appealability ("COA"). This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1), over all issues presented to the Fifth Circuit under 28 U.S.C. § 2253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V provides that "No person shall be deprived of life, liberty or property without due process of

law."

U.S. Constitution, Amendment VI provides that "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

28 U.S.C. § 2253(c) provides that "A certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right."

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 U.S.C. § 2254. The standard for relief under the Anti-Terrorism and Effective Death Penalty Act is set forth in 28 U.S.C. § 2254(d)(1).

Section 21.11(a)(1) of the Texas Penal Code provides that "A person commits an offense if with a child younger than 17 years of age...the person engages in sexual contact with the child or causes the child to engage in sexual contact."

Section 22.011(a)(2) of the Texas Penal Code provides that "A person commits an offense if the person intentionally or knowingly causes the penetration of the...sexual organ of a child by any means."

INTRODUCTION

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must satisfy the court that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the context of a guilty plea, this Court has recognized that a defendant can satisfy the prejudice prong by demonstrating that, but for counsel's deficient performance, a reasonable probability exists that the defendant would not have pleaded guilty and instead insisted on a different proceeding. *Cf. Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985); *Kimmelman v. Morrison*, 477 U.S. 365, 387-91 (1986) (counsel ineffective if he failed to file a motion to suppress that probably would have been granted). This result obtains from a long line of precedent, which draws a clear line between constitutionally deficient performance that causes "a judicial proceeding of disputed reliability" and constitutionally deficient performance that causes "the forfeiture of a proceeding itself." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (citing *Smith v. Robbins*, 528 U.S. 259 (2000)); *Penson v. Ohio*, 488 U.S. 75 (1988); *United States v. Cronic*, 466 U.S. 648 (1984). Because an attorney who fails to advise his client that he could challenge his consciousness of wrongdoing deprives his client not only of "a fair judicial proceeding," but of the proceeding altogether, his conduct falls in the latter category and "demands a presumption of prejudice." *Id.*

The decisions below are wrong and troubling. While a plea waiver may substantially limit the scope of issues available to a defendant if he chooses to appeal, even the broadest waiver leaves open a number of significant issues, including those going to voluntariness or competence to enter the plea, ineffective assistance of counsel during the plea process, and the legality of the sentence imposed. It is undisputed on this record that Eppelsheimer's counsel did not discuss with Eppelsheimer that he could claim the lack of a culpable mental state for the child's age and present a mistake of fact defense.

The Court should grant certiorari.

STATEMENT OF THE CASE

On January 10, 2013, Eppelsheimer entered an open plea of guilty to three counts of Sexual Assault of a Child and one count on Indecency with a Child by Contact. The trial court assessed punishment at 20 years' imprisonment for each count in the Texas Department of Criminal Justice, Correctional Institutions Division. The trial court further ordered the sentences to run consecutively, which ultimately resulted in a combined sentence of 80 years.

Eppelsheimer filed four state applications for a writ of habeas corpus, one for each conviction and sentence, asserting that his guilty pleas were involuntary as a result of inadequate advice of counsel. The Court of Criminal Appeals of Texas subsequently denied Eppelsheimer's applications without written order on the findings of the trial court without a hearing. *See* Appendix E.

The federal district court also denied Eppelsheimer's claim. *See* Appendix C and D. The sole issue addressed by the district

court on this claim was whether Eppelsheimer's pleas were involuntarily and unknowingly entered. When conducting an analysis of the evidence, the district court erroneously ignored the facts that B.L. and H.S. presented fake identifications to gain access to a dance club that required its patrons to be 17 years of age or older to enter and that they also told Eppelsheimer several times that they were 17.

The United States Court of Appeals for the Fifth Circuit entered a judgment consisting of a blanket denial of Eppelsheimer's Application for a Certificate of Appealability. *See* Appendix B.

REASONS FOR GRANTING THE PETITION

In overruling the involuntary guilty plea issue raised by Mr. Eppelsheimer, the United States Court of Appeals for the Fifth Circuit has decided important questions of federal law that has not, but should be, settled by this Court. In addition, the Fifth Circuit has also decided important federal questions in a way that conflicts with relevant decisions of this Court.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS UNCONSTITUTIONAL UNDER THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE FOR THE TEXAS LEGISLATURE TO OMIT A CONSCIOUSNESS OF WRONGDOING FROM TEXAS PENAL CODE §§ 21.11 (a)(1), INDECENCY WITH A CHILD, AND 22.011(a)(2), SEXUAL ASSAULT OF A CHILD, WHICH ARE STATUTORY RAPE OFFENSES THAT CRIMINALIZE SEXUAL CONTACT AND SEXUAL INTERCOURSE BASED SOLELY ON THE AGE OF THE PARTICIPANTS.

"A person commits an offense [of Indecency with a Child by Contact] if with a child younger than 17 years of age...the person engages in sexual contact with the child or causes the child to engage in sexual contact." TEX. P. CODE § 21.11(a)(1). "A person commits an offense [of Sexual Assault of a Child] if the person intentionally or knowingly causes the penetration of the... sexual organ of a child by any means." TEX. P. CODE § 22.011(A)(2).

Eppelsheimer was convicted based on statutes that fail to require consciousness of wrongdoing. This violated Eppelsheimer's right to due process of law, as guaranteed by Amendments V and XIV to the United States Constitution. *See Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005).

It is unconstitutional for the Texas Legislature to authorize statutory rape offenses that omit a consciousness of wrongdoing when those statutes criminalize sexual contact and sexual intercourse based solely on the age of the participants. These statu-

tory offenses are facially unconstitutional because it deprives convicted persons of due process of law and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the United States Cosntitution.

Under Texas Penal Code § 6.02, Requirement of Culpability, a mental state regarding a victim's age is not required to be read into Texas Penal Code §§ 21.11 or 22.011. *See Grice v. State*, 162 S.W.3d 641 (Tex. App.-Houston [14th Dist.] 2005, pet. ref'd). Texas courts have consistently held the State need not show the defendant knew the victim was younger than 17 years of age. *See Johnson v. State*, 967 S.W.2d 848 (Tex. Crim. App. 1998); *see also Roof v. State*, 665 S.W.2d 490 (Tex. Crim. App. 1984), *Vasquez v. State*, 622 S.W.2d 864, 866 (Tex. Crim. App. 1981). The San Antonio court of appeals has rejected state and federal constitutional challenges to strict liability provisions for statutory rape [22.011(a)(2)(A)] based on lack of a culpable mental state for the child's age, precluding the defense of mistake of fact. *Bryne v. State*, 358 S.W.3d 745 (Tex. App.-San Antonio 2011, no pet.).

In Texas, it is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense. TEX. P. CODE § 8.06 (Entrapment). In this section "law enforcement agent" includes personnel of the state and local law enforcement agencies as well as of the United States and any person acting in accordance with instructions from such agents. TEX. P. CODE § 8.06(b).

In the case at bar, Eppelsheimer met B.L. and H.S. in an adult

dance club in Dallas, Texas, called DarkSide. The patrons of DarkSide were required to be 17 years of age or older and present valid identification to gain entry. Not only did Eppelsheimer assume B.L. and H.S. were at least 17 years of age, B.L. and H.S. told Eppelsheimer that they both were 17. H.S. even presented her fake identification to Eppelsheimer when requested to see it. In short, Eppelsheimer truly believed B.L. and H.S. were the age they claimed to be. In fact, there was substantial evidence to support Eppelsheimer's contention.

After having seen B.L. and H.S. at DarkSide on many ocassions, Eppelsheimer took them to his home one weekend and they all engaged in consentual sexual intercourse.

Eppelsheimer knew the legal age of consent in Texas was 17 years of age and he never had any intention of violating the law. It wasn't until he was arrested that he learned that B.L. and H.S. had falsely presented themselves as 17 to DarkSide employees and to Eppelsheimer. Based on these facts, Eppelsheimer did not have a consciousness of wrongdoing. He had been induced by B.L.'s and H.S.'s persuasion, which caused him to commit the charged offenses.

Had B.L. and H.S. been law enforcement agents or acting in accordance with instructions from such agents, Eppelsheimer could have claimed entrapment as a defense to prosecution. However, B.L. and H.S. were acting as adults on their own accord.

For the reasons stated above, Texas Penal Code §§ 21.11(a)(1) and 22.011(a)(2)(A) are unconstitutional because they dispense of a consciousness of wrongdoing. The Court should find the statutes unconstitutional and remand the cases for a new trial.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER EPPELSHEIMER'S TRIAL ATTORNEY WAS INEFFECTIVE FOR ADVISING EPPELSHEIMER TO PLEAD GUILTY TO THREE COUNTS OF SEXUAL ASSAULT OF A CHILD AND ONE COUNT OF INDECENCY WITH A CHILD EVEN THOUGH HE DID NOT KNOW THE CHILDREN WERE UNDER THE AGE OF CONSENT.

Eppelsheimer was convicted on the basis of a guilty plea that was the product of ineffective assistance of counsel. This violated Eppelsheimer's right to due process of law, and right to counsel, as guaranteed by Amendments V, VI, and XIV to the United States Constitution. *See Hill v. Lockhart*, 474 U.S. 52 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984).

Every criminal defendant is entitled to the effective assistance of counsel. U.S. CONST. amend. VI. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command... An accused is entitled ot be assisted by an attorney, whether retained or appointed who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. "Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obatin a fair decision on the merits." *Evitts v. Lucey*, 469 U.S. 387, 395 (1985). "Unless a defendant charged with a serious offense has counsel abel to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty." *Cuyler v. Sullivan*, 466 U.S. 335, 343 (1980).

Claims of ineffective assistance of counsel are governed by

this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the two-prong *Strickland* standard, a defendant must show that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense, resulting in an unreliable or fundamentally unfair outcome. *Strickland*, 466 U.S. at 687-88.

(a) Deficient Performance

Eppelsheimer's trial attorney advised him to plead guilty to each offense knowing that Eppelsheimer truly believed that B.L. and H.S. were 17 years of age—the age of consent in Texas. There was overwhelming evidence that Eppelsheimer was misled by B.L. and H.S. Both B.L. and H.S. were regular patrons of DarkSide, where one had to be at least 17 years of age to enter. They both told Eppelsheimer they were 17. The sexual contact and sexual intercourse between Eppelsheimer and B.L. and H.S. was consentual.

A competent attorney should have known that the charged offenses were unconstitutional based on the omission of a culpable mental state.

Based on the fact that Eppelsheimer believed B.L. and H.S. were 17 years of age, he did not have a consciousness of wrongdoing and that should have been the defense asserted by counsel. Eppelsheimer's attorney's advice to plead guilty was, without question, deficient performance.

(b) Prejudice

Eppelsheimer ultimately received an 80 year prison sentence, four 20 year sentences ran consecutively, for offenses that he had no consciousness of wrongdoing. He should have been acquitted.

Eppelsheimer's trial attorney violated the principles of *Strickland* and its progeny by committing an egregious error in the course of his representation of Eppelsheimer that was not the result of reasonable professional judgment and was outside the wide range of professional competent assistance. This error greatly prejudiced Eppelsheimer. The Court should grant certiorari, vacate the convictions, and remand the case for a new trial.

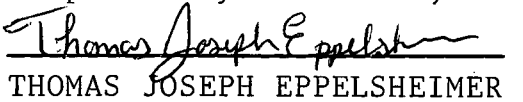
As a result, Eppelsheimer respectfully suggests that some guidance from the Supreme Court is warranted.

CONCLUSION AND PRAYER FOR RELIEF

Thomas Joseph Eppelsheimer respectfully prays that this Court grant this petition for a writ of certiorari to resolve the questions presented.

Dated: September 16, 2019.

Respectfully submitted,



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