8-20-2012

Mr. Thurston M. Bolton
McCormick Corr Inst.
386 Redemption Way
McCormick SC 29899

Daniel E. Shearouse
Clerk of Court
S.C. Supreme Court
Post Office Box 11330
Columbia S.C. 29211

Re: Bolton V. State
Appellate Case No. 2011-203851

Dear Clerk of court:

You will find enclosed the petitioners petition for writ of Certiorari for filing with the court. Please clock stamp this petition and return to me A copy.

With Kind Regards,

Thurston M. Bolton Pro Se

RECEIVED
AUG 23 2012
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI to Charleston County
DeADRA L. Jefferson, Circuit Judge

THURSTON M. BOLTON

V. PETITIONER

STATE OF SOUTH CAROLINA RESPONDENT

PETITION FOR WRIT OF CERTIORARI

Thurston M. Bolton Pro Se.

Breen R. Stevens

Appellate Defender

South Carolina Commission

On Indigent Defense

Division of Appellate

Defense P.O. Box 11589

Columbia SC 29211-1589

(803) 734-1343

Attorney for Petitioner

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WHETHER THE PCR COURT ERRED IN FINDING COUNSEL PERFORMANCE WAS NOT DEFICIENT IN COUNSEL EMPLYING A INVALID TRIAL STRATEGY.

STATEMENT

Petitioner Thurston Bolton was indicted by the Charleston County grand jury for first degree criminal sexual conduct (CSC 1st), And Kidnapping. App. 6, ll. 13-16; App. 411. His case proceeded to trial before the Honorable R. Markley Dennis and a jury from August 31 through September 1, 2009. Petitioner was represented by Ted Smith (Counsel) and Mary Ford, while the State was represented by Peter McCoy and Adam Young. App. 1. The jury Acquitted Petitioner of CSC 1st, but convicted him of Kidnapping. App. 320, ll. 1-12. The trial court imposed A sentence of 20 years incarceration without registration as a sex offender upon release.

App. 326, ll. 1-9; App. 480

Petitioner initially appealed his conviction and sentence to the South Carolina Court of Appeals. However, Petitioner dropped his direct appeal by affidavit on June 18, 2010. App. 328. His case was dismissed on June 24, 2010, and remittitur was sent on July 14, 2010. App. 329 — App. 330.

Petitioner filed his application for post-conviction relief on August 9, 2010, asserting multiple grounds of ineffective assistance of counsel. App. 334; App. 338 — App. 352. An evidentiary hearing was held before the Honorable Deadra L. Jefferson on September 14, 2011. Petitioner was represented by David Holton, while the State was represented by Matthew Friedman. App. 408.

Petitioner alleged, that counsel was deficient where counsel failed to properly cross-examine the complaining witness about a prior inconsistent statement that she and the petitioner engaged in oral sex. Specifically, counsel asked complaining witness was there any mention of any oral sex between complaining witness and petitioner. The complaining witness stated No. That her statement does not say that. App. 111, ll. 15-22. However the complaining witness states to the sexual assault examiner on the night of the incident that she had preformed oral sex on the petitioner and that petitioner

had preformed oral sex on her. App. 374, 3rd section. Oral copulation

Further counsel made a decision to not cross-examine the complaining witness on the issue of oral sex. App. 442, ll. 11-14.

The PCR court held that this issue could have been used to impeach her but in this instance the net affect would have been a nullity since petitioner was acquitted of the CSC 1st charge. App. 462, ll. 9-17, and App 474. 2nd paragraph Yet. The PCR court states that Especially where credibility is such a crucial issue in this case. App. 458. ll. 21-22.

Whether the PCR Court erred in finding counsel's performance was not deficient in counsel's failure to provide a defense for petitioner's kidnapping indictment.

Petitioner alleged, that counsel was deficient in counsel's failure to provide a defense for petitioner's kidnapping indictment. Specifically, counsel states that he has a trial strategy that was placing emphasis on his closing Argument. App. 447. 11. 10-13. Counsel further states that in his closing Arguments that the objective facts was stated most in his Argument. App. 447. 11. 14-17. Those objective facts was the main focus of his defense for petitioner. However when counsel is asked does each time he bring up these facts does he link them to petitioner's kidnapping indictment and ask the jury to find his client not guilty

of the Kidnapping counsel states that he does not. App. 447. ll. 18-22.

Further, counsel could have told petitioner that it was imperative and crucial that petitioner testify because the kidnapping indictment had a MINIMAL element that only petitioner's testimony could have discredited. Instead counsel admits that he told petitioner when it comes to advising him to testify that he thought that it was PROBABLY a good Idea for petitioner to testify. But counsel also admits that it would have been VALUABLE testimony. App. 446. ll. 7-17, and App. 446. ll. 16. Petitioner testifys that he did not testify at his trial because of the facts of his past record and the fact that he did not want to go against

his counsel trial strategy. App. 430.11.4-15 Counsel states that he did tell petitioner that if he did not testify or present evidence counsel would have had last Argument. App. 449.11.15-18. Counsel could have introduced the sexual assault examiner's medical report into evidence that could have went to impeach complaining witness testimony. App. 370-379.

Regarding petitioner's claim that counsel failure to present a defense to his kidnapping indictment the PCR court find counsel presented an adequate defense to the offense of kidnapping in light of the facts adduced at trial. In his

closing argument, counsel noted that the victim had been in the car with applicant before, that he never charged her for rides that there was no force or coercion to get her into the car, and that they had been out to dinner before. (Tr. 295:3, and 297:23.) This court finds counsel adequately represented applicant of both charges. App. 476, second paragraph.

STATEMENT

WHETHER THE PCR COURT ERRED IN FINDING COUNSEL'S PERFORMANCE WAS NOT DEFICIENT IN COUNSEL EMPLYING A INVALID TRIAL STRATEGY.

PETITIONER Alleged, that counsel WAS deficient where counsel emplyed a invalid trial strategy. Specifically, counsel states that his trial strategy was to have last closing Argument. App. 41.11.25, And App. 42.11.1-2. The trial judge had Already ruled in petitioner's trial that what the Attorneys say or argue cannot be used as evidence. App. 41.11.23-25, App. 42.11.1-16, App. 263.11.21-25, And App. 264.11.1-8.

The PCR court finds counsel made a valid strategic decision not to call any witnesses or present any evidence to preserve last closing Argument App. 473.11. 3rd paragraph. This petition follows.

ARGUMENT

THE PCR COURT ERRED IN FINDING COUNSEL'S PERFORMANCE WAS NOT DEFICIENT WHERE COUNSEL FAILED TO PROPERLY CROSS-EXAMINE THE COMPLAINING WITNESS ABOUT A PRIOR INCONSISTENT STATEMENT THAT SHE AND THE PETITIONER ENGAGED IN ORAL SEX.

COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY DEFICENT FOR FAILURE TO PROPERLY CROSS-EXAMINE THE COMPLAINING WITNESS ABOUT A PRIOR INCONSISTENT STATEMENT THAT SHE AND THE PETITIONER ENGAGED IN ORAL SEX. DURING CROSS-EXAMINATION COUNSEL ASKED COMPLAINING

WITNESS AS FAR SEX GOES IN THIS PARTICULAR CASE, YOU NEVER MENTION ANY ORAL SEX IN this CASE; did you? The complaining WITNESS STATES NO. It doesn't say that in here. App. III, 11.15-22.

HOWEVER the complaining WITNESS STATES to the SEXUAL ASSAULT EXAMINER ON the night of the INCIDENT that she had preformed ORAL SEX ON the petitioner AND that the petitioner had preformed ORAL SEX on her. "Emphasis Added". App. 374.

ORAL Copulation of genitals:

	NO	YES
of patient	☐	☑
of ASSAILANT	☐	☑

this ACT of ORAL SEX WAS CONSENSUAL. "Emphasis Added".

FURTHER COUNSEL MADE A DECISION to NOT CROSS-EXAMINE the complaining WITNESS ON the ISSUE of ORAL SEX. App. 442, ll. 11-14.

The PCR court held that this ISSUE could HAVE BEEN USED to IMPEACH HER but IN this INSTANCE the NET AFFECT would HAVE BEEN A NULLITY SINCE PETITIONER WAS ACQUITTED of the (CSC 1st) CHARGE. App. 462, ll. 9-17, AND App. 474, 2nd PARAGRAPH. YET, THE PCR COURT STATES that ESPECIALLY WHERE CREDIBILITY is such A CRUCIAL ISSUE IN this CASE. App. 458, ll. 21-22.

The petitioner would like to point out that the PCR court assertion that this issue is of nullity is err because petitioner was on trial for (CSC 1st) and Kidnapping at the same trial so if the complaining witness statement could have been impeached on the (CSC 1st degree) indictment then it could have been impeached on the petitioners Kidnapping indictment.

As a result, petitioner was prejudiced by counsel's failure to bring this to the attention of the jury. A defendant has the right to the effective assistance of counsel under the Sixth

AMENDMENT to the UNITED STATES CONSTITUTION. MILLER V. STATE, 379 S.C. 108, 115, 665 S.E. 2d 596, 599 (2008).

TO PROVE INEFFECTIVE ASSISTANCE of COUNSEL, A DEFENDANT MUST SHOW THAT his ATTORNEY'S PERFORMANCE WAS deficient AND that HE WAS PREJUDICED thereby. STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052 (1984).

IN the PRESENT CASE the CIRCUMSTANCES is that the petitioner AND complaining WITNESS is the ONLY WITNESSES PRESENT at the TIME of this ALLEGE incident. THE CASE IS A CASE of credibility AND ALL TANGIBLE EVIDENCE is to the benefit of the petitioner. THE

complaining witness credibility is of the utmost importance.

Hence the sexual assault examiner notes indicate that the complaining witness had told her that oral sex had happened between the complaining witness and petitioner. This testimony as to complaining witness statement on the night of the incident would have been crucial both as substantive evidence that oral sex did happen and as evidence to impeach complaining witness credibility. State v. Pauling, 503 S.E.2d 468.

The petitioner was prejudiced by counsel not pursuing this line of questioning by the complaining witness. The likelihood would be that if counsel had pursued this line of questioning the complaining witness credibility could have very well been impeached. "Emphasis added".

The standard is whether counsel's performance prejudiced petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E. 2d 624, 625 (1989).

Further, the petitioner would like to point out the complaining witness credibility status. Complaining witness

testifys to defense counsel that she was being choked throughout the whole time that she was in petitioner's house. App. 109, ll. 24-25; and App. 110. ll. 1-2. complaining witness also testifys that she was at the petitioner's house for two hours. App. 111. ll. 1-14. The sexual assault examiner testifys that she did not find any evidence that complaining witness had been choked App. 128, ll. 1-6. Further her voice was not hoarse and her voice was normal at the time of the examination. App. 375 Strangulation Assessment: Throat hoarseness? ☐ YES ☑ NO VOICE at time of exam: Normal. The complaining witness further testifys that she had been slapped "three" times by the petitioner. (And that it hurt.) App. 108. ll. 10-15. Further complaining witness states that the petitioner slapped her "2" times in her face. App. 372. Ten[th] sentence. "He slapped me in the face "2" times. App. 373. METHODS EMPLOYED: Physical Blows ☐ NO ☑ YES Slapped in face x 2. App. 388. Third Sentence He then slapped me

"twice." Complaining Witness cannot state how many times she was slapped consistently. The sexual assault examiner testifys that she found no bruising, or injuries on the complaining witness. App. 128, ll. 7-25, App. 129, ll. 1-25, App. 130, ll. 1, App. 376, and App. 377. The complaining witness also testifys that she was fighting the petitioner back the whole time during this alleged incident. App. 106, ll. 6-9. Sexual assault examiner testifys that she took fingernail scraping from the complaining witness. App. 130, ll. 20-25, and App. 131, ll. 1. The results of those fingernail scrapings was that no DNA profile foreign to complaining witness was developed App. 381, under ITEMS ANALZED: Fingernail scrapings 1. 7. App. 382 Fourth paragraph. The complaining witness states that petitioner foreed his penis into her vagina two times. App. 80, ll. 3-5, and App. 81, ll. 20-22. Also complaining witness states to the sexual assault examiner that the petitioner did not use a condom. App. 374. 7th paragraph "Contraceptive or lubricant used: Condom used NO ☒ YES ☐ From the vaginal swabs their were semen indicated. App. 380. Serology Analysis 1. 3. Under Items submitted:, And

Results of examinations: App. 381, DNA Analsis, Items analyzed: 1.3 vaginal swabs. The results indicate that there were no DNA profile foreign to complaining witness developed. App. 282, Fourth paragraph. Complaining witness states that the petitioner threaten her by saying that he had a gun! App. 109. ll. 12-21, and App. 373 Methods employed: Types of weapons NO ☐ YES ☒ gun. Further down this page when the complaining witness is asked verbal threats of harm NO ☒ YES ☐. The complaining witness states here that there were no verbal threats of harm. (Emphasis added) Complaining witness testifys that the petitioner by force made the complaining witness take her clothes off. App. 77. ll. 16-20. Petitioner would like to point out App. 77. ll. 20, By force He made me take them off! After complaining witness states that petitioner makes her take off her clothes then she states that the petitioner takes her clothes off. App. 77, ll. 21-25, and App. 78. ll. 1-2 the petitioner would like to further point out that the

Complaining witness testified that she had called the petitioner to come and pick her up from the citadell mall on the day of the incident. App. 99, ll. 13-23. Here the complaining witness does not state anything about her being forced or threaten in anyway while she was riding to the petitioners house. "Emphsis Added". When the petitioner and complaining witness arrived at petitioner house she was asked was she forced or threaten to come in petitioner's house and she states No. I went in on my own. "Emphsis Added". App. 100. ll. 17-25, and App. 101. ll. 1-5. The complaining witness stated to the sexual assault examiner that there were no other witnesses to this incident. App. 373. Last paragraph. The petitioner would like to fucther point out that the only evidence to support his kidnapping conviction is the complaining witness testimony. Lastly the petitioner was acquitted of the CSC 1st degree in spite of complaining witness testimony at trial App. 320. ll. 1-6. "Emphsis Added". Triage nurses testimony as to victim's statement shortly after assault would have been crucial both as substantive evidence that sexual battery did not occur and as evidence to impeach victim's credibility. State v. Pauling 503 S.E.2d 468.

ARGUMENT

WHETHER THE PCR COURT ERRED IN FINDIND COUNSEL'S PERFORMANCE WAS NOT DEFICIENT IN COUNSEL'S FAILURE TO PROVIDE A DEFENSE FOR PETITIONER'' KIDNAPPING INDICTMENT.

Counsel's performance was constitutionally deficient in counsel's failure to provide a defense for petitioner's kidnapping indictment. Specifically, counsel states that he had a trial strategy that was placing emphasis on his closing argument. App. 447. 11. 10-13. Counsel further states that [illegible] closing arguments that the objective facts was stated most in his Arguments App. 447. 11. 14-17. Those objective facts was the main focus of his defense for petitioner. However when counsel is Acked does each time he bring up these facts does he link them to petitioner's kidnapping indictment And Ask the jury to find his client not

guilty of the kidnapping counsel states that he does not. App. 447. ll. 18-22. Counsel was ineffective for not putting the complaining witness clothes into evidence. App. 442. ll. 8-10. The petitioner's jury requested to see the clothes. App. 317. ll. 12-15. The state indicating that the clothes were rip off the complaining witness could have been discredited. App. 268 ll. 20-22. The clothes being put into evidence for the jury could have shown that the clothes were not ripped like the state had stated and it could have been used to impeach the complaining witness credibility. As a result petitioner was prejudiced by this and counsel's failure to do these acts sufficiently undermines the confidence in the outcome of petitioner's trial. Arnette v. State, 413 S.E. 2d 803. A defendant has the right to the effective assistance of counsel under the six Amendment to the U. S. constitution. Miller v. State 379 S.C. 108, 115, 665 S.E. 2d 596, 599 (2008) Strickland v. Washington, 466. U.S. 668, 104 S. Ct. 2052 (1984). Further counsel could have told petitioner that it was imperative and crucial

that he testify because the kidnapping indictment had a minimal element that only petitioner's testimony could have discredited. Instead counsel admits that he told petitioner when it comes to advising him to testify that he thought that it was "PROBABLY" a good idea for petitioner to testify. App. 446. ll. 7-17. But counsel admits that it would have been valuable testimony. 446. ll. 11. Petitioner testifys that he did not testify at his trial because of the facts of his past record and the fact that he did not want to go against his counsel trial strategy. 430. ll. 4-15. After it appeared that the trial judge was not going to allow petitioner's prior record to be heard by the jury if the petitioner testified petitioner stated that he did not have a fresh conversation with his counsel about him testifying App. 430. ll.

16-25, App. 431. 11. 1-4. Counsel Advise prejudiced petitioner and was constitutionally deficient, as it fell well below an objective standard of reasonableness. Strickland, 466 U.S. at 690, 104 S. Ct. 2066. Lastly, counsel states that he did tell petitioner that if counsel did not present evidence or if the petitioner did not testify then counsel would have last argument. App. 449. 11. 15-18. Had counsel introduced the sexual assault examiner's medical report that could have been used to impeach complaining witness credibility and testimony. App. 370-379. This non presentment of these records by counsel prejudiced petitioner. Counsel's preformance prejudiced petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable prob-

Ability is a probability sufficient to undermine confidence in the outcome of trial. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). Hence, counsel states that they were a defense by him contained in both testimony and his closing argument. App. 448. ll. 18-24. Petitioner points out that the trial testimony states that petitioner did commit the kidnapping and counsel's closing argument which was based on the objective facts does not link the petitioner's kidnapping indictment to those objective facts. ("Emphasis Added." App. 447. ll. 14-22. Counsel's failure to link objective facts to petitioner's kidnapping charge prejudiced petitioner and if that link was established petitioner could have been relieved of criminal responsibility. "Emphasis Added". Davenport v. State, 389 S.E.2d 649.

ARGUMENT

WHETHER THE PCR COURT ERRED IN FINDING COUNSEL'S PERFORMANCE WAS NOT DEFICIENT IN COUNSEL EMPLYING A INVALID TRIAL STRATEGY.

Counsel's performance was constitutionally deficient where counsel employed a invalid trial strategy. Further counsel states that his trial strategy was to have last closing Argument. App. 441. 11. 25, And App. 442. 11. 1-2. As a result petitioner was prejudiced by counsel's failure to emply a valid strategy, and it sufficiently undermines the confidence in the outcome of petitioner's trial.

A defendant has the right to the effective assistance of counsel under the Sixth amendment to the United States constitution. Miller v. State, 379 S.C. 108, 115,

665 S.E. 2d 596, 599 (2008) Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

IN THE PRESENT CASE, COUNSEL Admits that he employed a strategy that he would have last closing Arguments. The petitioner contends that his counsel strategy was erroneous and that strategy prejudiced petitioner, and as a result petitioner was convicted of a kidnapping charge that he is in fact innocent of. App. 416.11.21-25, and App. 417.11.2.

FURTHER, COUNSEL must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State 454 S.E. 2d 312 (1995).

First counsel states that his trial strategy was to have last closing Argument. App. 441.11.25, And App 442.11.1-2. Then Counsel states that he advised petitioner that it was probably a good idea that

petitioner testifys at his trial. App. 446 11. 7-11. Here counsel states that he advised petitioner to go against his trial strategy. Emphasis added.

Accordingly, it is the rule of the court that a defendant can not testify and counsel still have last closing argument. Petitioner contends that no one that is conscionable would believe that if counsel's trial strategy was to have last closing Argument why would he advise petitioner to testify knowing that would make him lose last closing Argument and his trial strategy.

Where counsel articulates a strategy it is measured under an objective standard of reasonableness. Roseboro v. State. 454 S.E. 2d 312 (1995).

In the present case, it is unrea-

sonable for counsel to want us to believe that he employed a strategy that was for him to have last closing argument and then state that he advised petitioner to testify as that would have gone against his trial strategy.

Hence, counsel's performance was constitutionally deficient, as it fell well below an objective standard of reasonableness. Strickland, 466, U.S. at 690, 104 S. Ct. 2066.

Further, petitioner was prejudiced by counsel's trial strategy. The standard is whether counsel's performance prejudiced petitioner to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence

in the outcome of trial. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

In the case at bar, ordinarily, Arguments of counsel may not be considered as evidence in deciding factual issues. The court cannot consider facts appearing only in Arguments of counsel. Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 Ct. App. 1986).

Petitioner Argue that counsel was ineffective for not employing a valid trial strategy after the trial judge had stated that counsel's Argument can not be used as evidence. App. 41. ll. 23-25, App. 42. ll. 1-16, App. 263, ll. 21-25, And App. 264, ll. 1-8.

Therefore, petitioner was prejudiced by this invalid strategy employed by counsel and had counsel employed a different strategy like placing the medical report into evidence which shows complaining witness untruthfulness App. 370, through 379, and really advising petitioner to testify then petitioner's outcome would have been different. Terry v. State, Opinion No. 27033 Aug 29, 2011.

CONCLUSION

Accordingly, Petitioner Thurston M. Bolton Pro Se, state that he is Actually innocent and respectfully request that this Honorable Court grant his Petition for Writ of Certiorari; reverse the PCR's court order of Dismissal, and vacate, reverse his imposition of his conviction for Kidnapping with orders to dismiss.

This 15th day of August 2012.

Respectfully Submitted,

Thurston M. Bolton Pro Se.
Petitioner