

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT.

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SC SUPREME COURT

Certiorari to Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

CLARK D. THOMAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002286

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in finding that Petitioner abandoned the allegation that trial counsel was ineffective for not asking the judge to instruct the jury with the lesser included offense of criminal domestic violence when there was evidence in the record from which the jury could find Petitioner guilty of the lesser included offense rather than the offense of criminal domestic violence of a high and aggravated nature?
2. Did the PCR judge err in refusing to find trial counsel ineffective for making extremely disparaging comments about Petitioner in his opening statement and closing argument, describing Petitioner as immoral and sexually deviant?
3. Did the PCR judge err in refusing to find trial counsel ineffective for not reviewing medical records which contradicted Petitioner's wife's testimony that Petitioner hit her in the face and chipped her teeth?
4. Did the PCR judge err in failing to make findings of fact that the kidnapping offense did not include a sexual element?

STATEMENT

On December 11, 2006, the Charleston County Grand Jury indicted Petitioner Thomas for kidnapping and CDVHAN, indictments #06-GS-10-12295, 12296. On February 13, 2007, the Charleston County Grand Jury indicted Petitioner for criminal sexual conduct first degree. On July 7, 2008, Petitioner proceeded to jury trial before the Honorable Deadra L. Jefferson. Michael T. Bolus represented Petitioner at trial. Nathan Williams prosecuted the case. The jury returned a verdict of not guilty of criminal sexual conduct first degree. The jury convicted Petitioner of kidnapping and CDVHAN. Judge Jefferson sentenced Thomas to 10 years for CDVHAN and 20 years concurrent for kidnapping. A timely notice of intent to appeal was filed on July 11, 2008, and the direct appeal perfected. On August 8, 2012, the South Carolina Court of Appeals dismissed the appeal. State v. Clark David Thomas, 2012-UP-486 (S.C.Ct.App. August 8, 2012).

On December 21, 2012, Petitioner filed an application for post conviction relief. (App. p. 835). The State filed a return on October 1, 2013. (App. p. 841). Petitioner filed an amended application for post conviction relief and memorandum in support on August 29, 2014. (App. p. 847). On December 8, 2014, an evidentiary PCR hearing was held before the Honorable J.C. Nicholson. Tristan M. Shaffer represented Petitioner at the PCR hearing. Ashleigh R. Wilson represented the State. On May 18, 2015, Petitioner filed a motion to relieve Tristan M. Shaffer as counsel. (App. p. 1091). In a written order filed June 2, 2015, Judge Nicholson denied post conviction relief and dismissed the application. (App. p. 1117).

On June 12, 2015, attorney Tristan M. Shaffer filed a motion to reconsider and motion to alter or amend order of dismissal. (App. p. 1143). On June 15, 2015, Petitioner filed a *pro se* motion to alter or amend a judgment to include specific findings of fact and conclusions of law. (App. p. 1147). On July 12, 2015, attorney Orin G. Briggs filed a memorandum of law on Rule

59(e) motion. On July 14, 2015, a hearing was held before Judge Nicholson. Orin Briggs represented Petitioner at this hearing. Rutledge Johnson represented the State. Attorney Tristan M. Shaffer was also present. During the hearing Judge Nicholson relieved Attorney Shaffer. (App. pp. 1192-1193; written order filed November 24, 2015, App. p. 1228) and Attorney Briggs argued the Rule 59(e) motion. (App. pp. 1195-1211). On August 11, 2015, the State filed a return to the Rule 59(e) motion. (App. p. 1213). On August 31, 2015, Attorney Briggs filed a reply to the State's return. (App. p. 1220). In an order filed October 9, 2015, Judge Nicholson denied the Rule 59(e) motion. (App. p. 1230). A timely notice of intent to appeal was served on November 5, 2015. This petition for writ of certiorari follows.

ARGUMENTS

1. The PCR judge erred in finding that the allegation that trial counsel was ineffective for not asking the judge to instruct the jury with the lesser included offense of criminal domestic violence when there was evidence in the record from which the jury could find Petitioner guilty of the lesser included offense rather than the offense of criminal domestic violence of a high and aggravated nature was abandoned.

The jury found Petitioner guilty of criminal domestic violence of a high and aggravated nature and kidnapping, both charges involving his wife. Petitioner testified at trial that the night before his arrest he and his wife took drugs and participated in consensual sex involving bondage, duct tape, shackles, handcuffs and electrical shock from a stun gun. (App. pp. 612-615). During the course of the evening Petitioner began to suspect that his wife had again been unfaithful. (App. p. 616, lines 21-25; p. 620, lines 16-22). Petitioner testified that the next morning, as he was driving with his wife in the van, he told her that he believed the relationship was over. (App. p. 621, lines 1-22). Petitioner testified that his wife started “flipping out” and jumped out of the van and took off “running, screaming and freaking out.” (App. p. 621, line 23 – p. 622, lines 1-13).

Officer Chris Talbot with the North Charleston Police Department testified at trial that he received a call from dispatch reporting that a concerned citizen saw a female jump out of a van and a white male ran after her. (App. p. 299, lines 3-15). The officer responded to the reported location and found a van partially blocking a lane of traffic. (App. p. 300, line 2 – p. 301, lines 1-19). The officer parked his patrol car behind the van and walked under the bridge to try and locate the occupants. (App. p. 302, lines 3-12). The officer testified, “...[A]s I start walking I observed the defendant and the victim walking, coming back toward me, and the defendant was carrying the victim and she was kicking. I believe she was screaming something. And she, she appeared very frustrated.” (App. p. 302, line 25 – p. 303, lines 1-7).

During the charge conference the judge asked, "Now, will there be any requests for any lesser included charges such as C.D.V.?" (App. p. 673, lines 14-17). Trial counsel responded, "No." (App. p. 673, line 18). The judge again asked, "None for the record?" (App. p. 673, lines 19-20). Trial counsel again responded, "No." (App. p. 673, line 21).

In the initial application for post conviction relief Petitioner alleged that trial counsel was ineffective because, "Defense counsel improperly requested that the Court not charge the lesser included offense of criminal domestic violence for the jury to consider." (App. p. 836). Petitioner also alleged that trial counsel was ineffective in not requesting the lesser included offense of criminal domestic violence in the amended application for post conviction relief. (App. p. 849).

During the PCR hearing PCR counsel asked Petitioner, "You had raised the issue about objecting because he had not raised the lesser included charge of CDV. What facts make you think that you would be entitled to just a CDV charge?" (App. p. 1041, lines 14-17). When Petitioner did not respond, PCR counsel asked, "Was it the fact that there was a – that you had testified that the tasing was consensual and the officer testified he saw you grab her was that your basis for requesting a CDV charge?" (App. p. 1041, lines 19-22). Petitioner agreed that everything that took place the night before was consensual. (App. p. 1041, line 23 – p. 1042, lines 1-9).

Trial counsel testified at the PCR hearing:

But I imagine when you're doing that much drugs it's probably a lot of slapping and shouting and struggling but that wasn't really the big issue. The CDV was such a small charge compared to a high and aggravated – such a small charge compared – I was looking at a 30 year CSC charge and a 20 or 30 year kidnapping. And that's small potatoes; I wasn't worried about a CDV.

But I would have loved that if that had been the – that's my goal to get him out of the kidnapping and the CSC and get him convicted if it's going to be anything—not get him convicted but if the jury doesn't like what they hear get him on the high and aggravated CDV. I think it's a year minimum up to 10 years and that's not too bad.

(App. p. 1072, lines 4-18).

In the order of dismissal the PCR judge listed the all of the allegations made in both the initial and amended applications, including the allegation that trial counsel was ineffective in failing to request the lesser include offense of criminal domestic violence. (App. p. 1119; p. 1120). The PCR judge, however, found that Petitioner abandoned the allegation that trial counsel was ineffective in failing to request the lesser include offense of criminal domestic violence. The PCR judge wrote, "This Court finds the Applicant failed to present evidence, argument, or testimony on several of the Applicant's numerous claims raised in his original and amended applications. Therefore, this Court finds any allegations not addressed in this order are deemed abandoned by the Applicant. This Court finds at the evidentiary hearing, the applicant pursued relief solely on the following claims: . . ." (App. p. 1120). The PCR judge then listed allegations of ineffective assistance of counsel a. thru j. and Brady violations a. and b. (App. p. 1121). The allegation that trial counsel was ineffective in failing to request the lesser included offense of criminal domestic violence was not included in the PCR judge's list of claims pursued. The PCR judge erred.

In Petitioner's *pro se* motion to alter or amend he notes that the PCR judge failed to make findings of fact and conclusions of law in regard to the allegation that trial counsel was ineffective in failing to request the lesser included offense of criminal domestic violence. (App. p. 1154). The allegation that trial counsel was ineffective in failing to request the lesser included offense of criminal domestic violence is also addressed in the memorandum of law on Rule 59(e) motion filed by Attorney Briggs. (App. pp. 1180-1181). The PCR judge denied the motion to alter or amend in a form order without addressing the issues raised. The PCR judge erred.

The allegation that trial counsel was ineffective in failing to request the lesser included offense of criminal domestic violence was not abandoned. Petitioner raised the allegation in both

the initial and amended applications for post conviction relief. The issue was raised at the evidentiary hearing during Petitioner's testimony and the testimony of trial counsel. When the PCR judge erroneously found the issue abandoned in the order of dismissal, Petitioner properly filed a motion to alter or amend.

S.C. Code Ann. § 17-27-80 provides, "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." In Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) the South Carolina Supreme Court wrote:

The cases this Court remanded for specific findings were unique cases in which the Court attempted to remind circuit court judges and parties that: (1) specific findings of fact and conclusions of law were required; and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review. Although the cases apparently have not accomplished the Court's goal, they do not change the general rule that issues which are not properly preserved will not be addressed on appeal. In fact, in Pruitt, this Court stated in a footnote, "In vacating and remanding in this case, we are not abandoning the general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review. The extraordinary action we take today is necessary only because our opinion in McCray [v. State, 305 S.C. 329, 408 S.E.2d 241 (1991)] is not being followed." Pruitt v. State, 310 S.C. at 255, 423 S.E.2d at 128.

In Marlar this Court found that the issues were not preserved for appellate review because Marlar failed to file a Rule 59(e) motion. In the present case the judge was required to make findings of fact and conclusions of law in regard to the allegation that trial counsel was ineffective in failing to request the lesser included offense of criminal domestic violence. The issue was properly raised in the PCR applications and during the evidentiary hearing. Unlike in Marlar, Petitioner in the present case filed a Rule 59(e) motion. This Court should reverse the finding by the PCR judge that the issue was abandoned and remand to allow the PCR judge to make findings of fact and conclusion of law in regard to trial counsel's failure to request the lesser included offense of criminal domestic violence.

2. The PCR judge erred in refusing to find trial counsel ineffective for making extremely disparaging comments about Petitioner in his opening statement and closing argument, describing Petitioner as immoral and sexually deviant.

During opening statement and closing argument trial counsel portrayed Petitioner as an immoral hard core drug addict and a sexual deviant. Trial counsel told the jury:

Ladies and gentlemen, this case is about degradation of these people, degradation that began about when they married, when they became drug addicts. It's about people, how low that people can get when they're under the influence of, shooting heroin, shooting crack cocaine, taking Xanaxes, taking hydrocodone which is Lortabs, shooting and taking methadone. You put that stuff together, let me tell you, you're going to hear about nasty sex. I don't [sic] who's sexually adventuresome in this courtroom and who isn't, but there are some people that are deviants and they do it together, and you may not like me telling you this, but that's what you're going to hear for the next couple of days. It's a whole lot of one thing. Two people completely obliterated on drugs, they do strange things and I think you all read newspapers and heard incidences about how can people be doing that? Well, it happens.

(App. p. 125, line 6 – p. 126, lines 1-14). Later in opening statement trial counsel told the jury:

So I'm asking you, ladies and gentlemen, it's going to get nasty in here. I don't make up the facts. I'm sure Mr. Williams, [the prosecuting attorney] he will do his best to show that the facts show that my client's guilty, but when you go back into the jury room the only thing you have in your stomach is a sense of revulsion and like you don't want to hear no more of this well, you know something? That doesn't equate to guilt. That doesn't mean my client's guilty of anything. That just means we're dealing with two people that lost their morality, lost their humanity, and degraded themselves. It all stems from drugs, and you will hear a lot about that. Both these people are drug addicts. Both have cleaned up several times, and she's been cleaned up.

(App. p. 131, line 13 – p. 132, lines 1-13). Trial counsel also told the jury:

So keep an open mind. People do strange things to each other sexually these days and times. And it doesn't mean that this courtroom is the place where ultimate justice is going to be served. It may be another place, but people do a lot of strange things to people in this country and around the world. I don't like some of those things and I sit around reading my newspapers saying how can people, you know. They're going to be judged and all that, but I can't send them to jail unless they

committed a crime. And that's what you have to do today and I appreciate your attention.

(App. p. 133, line 5 – p. 134, lines 1-2).

In closing argument trial counsel told the jury:

Ladies and gentlemen, thank you for your interest and attention. I know it's not, it's not the best two days that you'll ever spend in your life. This kind of stuff is on T.V. every night if you care to watch it on some channel. Our country has reached the state of Sodom and Gomorrah, drugs, perverted sex, all kinds of stuff. Unfortunately – well fortunately or unfortunately some of the stuff used to be against the law, you couldn't do certain things to people. Now we've reached our enlightened age, I guess, right before the end of times that if people, consenting adults, would want to do something, it doesn't matter how sick or revolted it may make you feel, if it's consensual it's not a crime. You may think it should be a crime, and lot of people, you know, will beat on the Bible about it and all that, but you have to decide first of all was there a consent here.

(App. p. 695, line 5 – p. 696, lines 1-11). Later trial counsel told the jury, "But, you know, then you got to say well, do we convict David Thomas based just on morality? We don't like his morals? We don't like their sexual activities? You can't do that. You'd be violating your oath again." (App. p. 705, lines 13-20). Trial counsel went on to tell the jury:

I know this is an ugly case. It, it just smells. It's just, the whole thing, and I know how people, you get together as civilized human beings in a courtroom and have to listen to this kind of stuff, but that's what we have to do. That's where our society has gone, and you have to decide, as low as this case is, how bad it stinks, and the way these people act and the way they take the drugs and the way they have their sex, whatever, does that mean someone goes to jail for a long time? Well, if it's a crime, that's what you've got to do. You've got find somebody who – you've got to convict him, send him to jail, if that's what you find.

(App. p. 706, line 25 – p. 707, lines 1-22). Trial counsel then discussed the fact that some enjoy choking during sexual acts and then he told the jury:

[T]he only point is when we lose our sensitivities as human beings, our normal sex, when we start going down this, this, this road that goes nowhere, we end up, that's all there is to it, at the end of the highway, and it's not a good place to be. I'm glad that Rachel Crowley has come back to reality, to the world. I hope she stays that way. Drug addiction is a heck of a thing. I'm not sure David Clark Thomas is ever

going to beat the situation, you know. He's in his forties. And I don't know. It may be too late for him. I hope it's not too late for Rachel.

(App. p. 714, lines 1-21). This was the very last thing trial counsel told the jury before the State gave closing argument.

In the initial application for post conviction relief Petitioner alleged that trial counsel was ineffective because, "Defense counsel made negative statements regarding the defendant during trial which were excessive and extreme and could not be reasonably considered to be within his trial strategy. In doing so, defense counsel was ineffective in his closing argument." (App. p. 836). Petitioner also raised the allegation in the amended application. (App. p. 849).

During the evidentiary hearing Petitioner testified that trial counsel portrayed him as a monster. (App. p. 1039, lines 11-19). Petitioner testified he was never consulted about trial counsel making negative statements as part of a trial strategy and Petitioner never consented to trial counsel making such statements. (App. p. 1040, lines 18-23). During the evidentiary hearing trial counsel testified:

I had to portray it a certain way that this is the way they were because of their drug addiction. And when I call it immoral behavior and what was going on I still think its immoral behavior but I'm not the judge of that. But the jury had to hear something about why these people would even get to the point where the people being tied up, people being tased and this and that they had to believe something that hey, if he's says it was consensual maybe it was. But that's the only way to get them to come around and that was my theory.

And these comments in this yes, if you take them out of context it makes me look like I'm trying to convict my client. I'm not trying to convict him. I'm trying to get the jury to sympathize with both sides; these two people needed help. And he knew that was going to be the strategy. He knew, in spite of what he said today he knew that was going to be the strategy.

(App. p. 1063, line 23 – p. 1064, lines 1-14). In summation PCR counsel argued that trial counsel's purported trial strategy of portraying Petitioner and his wife as horrible people was not a valid trial strategy. (App. p. 1082, line 20 – p. 1083, line 1).

In the order of dismissal the PCR judge wrote:

This Court finds valid trial counsel's testimony that he chose to portray the victim and Applicant in a somewhat negative light and as drug addicts in his statements as a way to explain to the jury the victim and applicant's unusual sexual activities. This Court finds since counsel articulated a valid strategic basis for his statements about the applicant at trial, this Court will not second guess counsel's trial tactic. This Court finds counsel's performance was not deficient in this regard. This Court finds the Applicant has failed to carry his burden of proving trial counsel provided ineffective assistance of counsel by making certain statements about the Applicant during opening and closing arguments.

(App. p. 1138). The PCR judge erred. The PCR judge's finding that trial counsel portrayed Petitioner in a "somewhat negative light" is a vast understatement. Trial counsel repeatedly portrayed Petitioner in an extremely negative light. Arguing that the sexual activities between Petitioner and his wife involving bondage, duct tape, shackles, handcuffs and electrical shock from a stun gun were all consensual activities is a valid trial strategy. Attributing their sexual activities to drug addiction may have been a valid trial strategy. Describing Petitioner as immoral and a sexual deviant, however, is not a valid trial strategy.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by

counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in making extremely disparaging comments about Petitioner in his opening statement and closing argument, describing Petitioner as immoral and sexually deviant. The deficient performance was not part of a **valid** trial strategy. An attorney's performance is not immunized from 6th Amendment challenge by simply labeling the actions as "trial strategy." Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984). In Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) this court wrote:

Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial. See Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001)(Counsel's failure to object to prejudicial hearsay because he did not want to "confuse or upset the jury" was not valid strategy); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992)(Trial counsel's failure to object to judge's comments inviting jury to prematurely discuss the case was not "strategic" where error of law involved and such comments are inherently prejudicial).

While the present case involves prejudicial comments made by trial counsel rather than a failure to object to prejudicial comments, the analysis should be the same. Trial counsel's portrayal of his client as immoral and sexually deviant was inherently prejudicial. Trial counsel's performance was deficient and, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different

3. The PCR judge erred in refusing to find trial counsel ineffective for not reviewing medical records which contradicted Petitioner's wife's testimony that Petitioner hit her in the face and chipped her teeth.

At trial Petitioner's wife testified that Petitioner hit her in the face and chipped a couple of her teeth. (App. p. 158, lines 20-24). Officer Talbot testified that he thought the wife had a "busted lip." (App. p. 309, lines 4-5). The wife's medical records from the emergency room, however, note no injuries to her face or teeth. The records were introduced in evidence during the evidentiary hearing, marked as Defendant/Applicant's #1. (App. pp. 1240-1250). In the initial application for post conviction relief Petitioner alleged ineffective assistance of counsel because, "Defense counsel failed to investigate and obtain the medical, dental and toxicology records of the victim generated after this alleged incident. Accordingly, these documents were not used by defense counsel for impeachment purposes." (App. p. 836). In the amended application for post conviction relief Petitioner alleged ineffective assistance of counsel because, "Defense counsel was ineffective when he failed to object to the alleged victim's testimony that she had to have her teeth fixed as a result of allegedly having been struck in the mouth by Applicant during the alleged incident and had been undergoing mental health counseling, therapy and a 12 Step Program when there were no records to corroborate these claims. Defense counsel was also ineffective when he failed to preserve this issue for appellate review. The result of defense counsel's ineffectiveness was to violate Applicant's right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and South Carolina law." (App. pp. 851-852).

During the evidentiary hearing trial counsel admitted that he did not review the medical records prior to trial. (App. p. 1075, lines 10-13). Trial counsel testified that he "wasn't worrying about a chipped tooth." (App. p. 1075, line 24). When asked if he thought it would have been at

least helpful to bring up the chipped tooth, trial counsel replied, "I don't know. I really don't know. You know 30 taser marks on a person's body and all that testimony from the doctor and her and the officers that's almost laughable when you're talking about a chipped tooth." (App. p. 1076, lines 3-7).

In the order of dismissal the PCR judge wrote:

The Applicant alleges counsel was ineffective for failing to impeach the victim with her medical records. This Court finds this allegations [sic] is wholly without merit. This Court finds the victim's medical records as presented by the Applicant (Applicant's Exhibit 1) do not contradict the victim's testimony and it is unlikely counsel could have used the record as effective impeachment material. At trial the victim testified that Applicant tased and hit her all over her body over the course of the incident. (Trial Tran. 147-161). The victim also testified that the Applicant chipped her tooth. (Trial Tran. 159). The medical records presented by the Applicant essentially corroborated the victim's version of her injuries.

(App. p. 1136). While the medical records show marks from a stun gun, the medical records do not show any injury to her mouth or teeth. The issue in regard to the lack of evidence of any injury to the face or teeth was raised in the memorandum of law in support of Rule 59(e) (App. p. 1179) and during the post evidentiary hearing held on July 14, 2015. (App. p. 1198). The PCR judge erred in finding that the medical records corroborated the wife's testimony that Petitioner chipped her teeth.

In the order of dismissal the PCR judge wrote, "This Court finds it is unlikely impeaching the victim on these records would have resulted in a different outcome at trial since Officer Talbot who first encountered the victim and the applicant on the side of the road and Dr. Theodore Paraschos who treated the victim in the emergency room both testified about the victim's extensive injuries. (Trial Tran. 307-309; 438-455)." (App. p. 1137). First, the emergency room doctor did not testify that the wife had chipped teeth. Second, while Officer Talbot testified that he thought she had a "busted lip," trial counsel failed to properly challenge this testimony and question if this

information was included in the officer's report because trial counsel was "not worried about the chipped tooth."

Trial counsel was ineffective for not reviewing medical records which contradicted Petitioner's wife's testimony that Petitioner hit her in the face and chipped her teeth. Petitioner was prejudiced by the deficient performance. The defense was based on consent. Credibility of the wife's testimony was a crucial factor to be determined by the jury. The medical records contradicting her testimony that Petitioner hit her in the face and chipped her teeth reflect that her testimony was not credible. See Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470 (1998).

There is a reasonable probability that, but for counsel's failure to review and use the medical records, the result of the proceedings would have been different.

4. The PCR judge erred in failing to make findings of fact that the kidnapping offense did not include a sexual element.

Trial counsel failed to ask the trial judge to make a finding that the kidnapping did not include a criminal sexual offense. The trial judge did not make any finding in regard to the kidnapping charge. In the initial application for post conviction relief Petitioner alleged ineffective assistance of counsel because, "Defense counsel failed to request that the judge, in her discretion, consider not requiring the Defendant to register on the Sex Offender Registry." (App. p. 837). In the amended application for post conviction relief Petitioner alleged, "Defense counsel was ineffective when he failed to seek during sentencing the stipulation that because Applicant was found not guilty of the criminal sexual conduct offense, his conviction of kidnapping did not require that he register as a sex offender. Defense counsel was also ineffective when he failed to preserve

this issue for appellate review. The result of defense counsel's ineffectiveness was to violate Applicant's right to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and South Carolina law." (App. pp. 850).

During the evidentiary hearing PCR counsel asked Petitioner, "Now did Mr. Bolus [trial counsel] ever argue against your classification as a sex offender based off the kidnapping charge?" (App. p. 1045, lines 10-12). Petitioner responded, "No." (App. p. 1045, line 13). PCR counsel then asked, "Would you have wanted him to do that?" (App. p. 1045, line 14). Petitioner responded, "Absolutely." (App. p. 1045, line 15).

In the order of dismissal the PCR judge wrote:

The Applicant alleges counsel was ineffective for failing to argue his kidnapping conviction should not have subjected the Applicant to the sex offender registry since he was acquitted of the sex offense. This Court finds counsel was not in effective in this regard. S.C. Code Section 23-3-430(15), requires a person convicted of kidnapping to register for the sex offender registry unless the court makes a finding on the record that the offense did not include a criminal sexual conduct offense or attempted criminal sexual offense. This Court finds a conviction for a sexual offense is not a prerequisite for sex offender registry by a person convicted of kidnapping. This Court finds that sex offender registry is a statutory requirement associated with a conviction for the offense of kidnapping. This Court finds counsel was not ineffective in this regard. This Court finds this allegation is wholly without merit.

(App. p. 1137). The PCR judge erred.

In Hazel v. State, 377 S.C. 60, 63-64, 659 S.E.2d 137, 139 (2008) this Court wrote:

Section 23-3-430 has been through many changes since its enactment in 1994. In the beginning, the statute provided that a person convicted of kidnapping shall be referred to as a sex offender. § 23-3-430(8) (Supp.1995). The statute was amended in 1996 and kidnapping was deleted from the listing of offenses that require one to register as a sex offender. § 23-3-430(C) (Supp.1996). In 1998, the statute was again amended and kidnapping was re-added as one of the enumerated offenses. An exception was added to state that if the court makes a finding on the record that the offense did not include a criminal sexual offense, then a defendant

convicted of kidnapping would not be required to register as a sex offender. § 23-3-430(C)(15) (Supp.1998).

The statute was again amended in 1999. This amendment rewrote the kidnapping subsection to state that a person convicted of kidnapping a person eighteen years of age or older would be required to register as a sex offender. The exception was again included and stated that no registration *64 would be required if the court made a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense. § 23-3-430(C)(15) (Supp.1999).(footnote omitted).

In Thompson v. State, No. 2014-001984, 2016 WL 806159, at *3 (S.C. Mar. 2, 2016) this

Court wrote:

In Hazel v. State, we held that a person convicted of kidnapping could not challenge whether he was required to register as a sex offender until the date of his release from prison, because that issue is entirely dependent on the sex offender registry statute in existence at that time. 377 S.C. 60, 64, 659 S.E.2d 137, 139 (2008) (detailing the history of the sex offender registry as it related to kidnapping offenses).

While the Court found that Thompson could not challenge whether he was required to register as a sex offender until the date of his release from prison, the Court found Thompson was entitled to a remand to determine if his kidnapping conviction did not involve a sexual element. Petitioner submits that the PCR judge should be able to make findings as to whether Petitioner's kidnapping offense involved a sexual element in the same way the lower court was directed, on remand, to make findings in Thompson. The fact that Petitioner's claim is made in the context of post conviction relief and Thompson's claim was made through a motion for declaratory judgment should not prevent the PCR judge from making the requested findings. This is true especially in light of this Court's writing in Thompson that, "While it is permissible—and even encouraged—for the sentencing court to determine the character of any kidnapping offenses at that time, the defendant is entitled to a meaningful opportunity to be heard on the matter at some point, because the civil consequences follow immediately after

conviction, and not merely upon his release from prison.”(footnote omitted). Thompson v. State, No. 2014-001984, 2016 WL 806159, at *3 (S.C. Mar. 2, 2016).

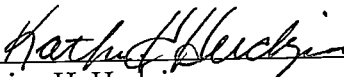
Counsel submits that a judge at a post conviction relief hearing should be able to make findings as to whether a kidnapping charge contains a sexual element even though registration on the sexual offender registry has been held to be a collateral consequence of sentencing and therefore trial counsel is not ineffective in failing to ask the trial court to make a determination as to whether the kidnapping is sexual in nature. Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (Ct. App. 2008). First, just as the defendant in Thompson was entitled to a meaningful opportunity to be heard, Petitioner is entitled to a meaningful opportunity to be heard and the matter can be efficiently resolved by the PCR judge on remand.

Second, the collateral consequence analysis, as discussed in Williams v. State, is questionable in light of the United States Supreme Court’s decision in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). In Padilla the United States Supreme Court wrote, “We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under Strickland, 466 U.S., at 689, 104 S.Ct. 2052.” 599 U.S. at 365, 130 S.Ct. at 1481. The Court did not decide if the distinction between direct and collateral consequences was an appropriate distinction because deportation, the penalty at issue in Padilla, is unique and severe. Given that the United States Supreme Court has never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under Strickland, this Court should not make that distinction with regard to the sexual offender registry.

CONCLUSION

Based on the question presented in issue one, this Court should remand the case back to the PCR judge for findings of fact and conclusion of law in regard to the allegation that trial counsel was ineffective for failing to request the lesser included offense of criminal domestic violence. Based on the questions presented in issues two and three, this Court should grant the petition for writ of certiorari to allow further briefing on the issues. Based on the question presented in issue four, this Court should remand the case back to the PCR judge for a finding of whether or not Petitioner's kidnapping conviction had a sexual element.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of May, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

CLARK D. THOMAS,

PETITIONER,

V.

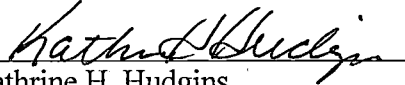
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002286

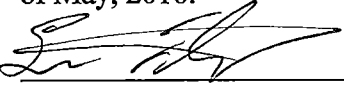
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 18th day of May, 2016.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of May, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.