No. _____

In The
Supreme Court of the United States

ALBON C. DIAMOND, III,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal, First District, State Of Florida

PETITION FOR A WRIT OF CERTIORARI

PAUL M. HAWKES
3785 Wentworth Way
Tallahassee, FL 32311-3730
(850) 212-3067
hawkes.paul@gmail.com
Counsel of Record

MARK V. MURRAY
LAW OFFICES OF
MARK V. MURRAY
317 E. Park Ave.
Tallahassee, FL 32301-1513
(850) 907-3301
mvm@capitalcityattorney.com
Counsel for Petitioner

TERRY P. ROBERTS
LAW OFFICE OF
TERRY P. ROBERTS
P.O. Box 12366
Tallahassee, FL 32317
(850) 590-8168
fairdayincourt@outlook.com
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED FOR REVIEW

Whether the Sixth Amendment's guarantee of effective attorney representation in a criminal felony prosecution (applicable against the State of Florida by virtue of the due process clause of the Fourteenth Amendment) requires a finding of ineffective assistance of counsel where Petitioner properly presented a claim of ineffective assistance that his trial attorney failed to put forth **any medical testimony** in a case where the ***only evidence*** supporting conviction for a ***life felony sexual abuse*** claims was the testimony of the alleged victim, where the trial attorney's articulated strategy was to hope that the jury observed Petitioner's apparent physical weakness and conclude that he was physically unable to commit the described sexual acts, where the trial attorney was provided with medical records showing Petitioner's severe debility prior to trial, and where a neurologist testified in the postconviction evidentiary hearing that given the medical records available at the time of trial, any medical doctor would testify that it was **medically impossible** for Petitioner to commit the crimes in the manner described by the alleged victim, testimony that would have impeached the sole witness against Petitioner if it had been presented at trial, or whether lower courts are free to characterize such unreasonable decisions as "strategic decisions" protected by *Strickland*.

LIST OF PARTIES IN PROCEEDING BELOW

1. Albon C. Diamond, III, Petitioner
2. State of Florida, Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The *per curiam* affirmance (a decision without written opinion) of the First District Court of Appeal of Florida (App. 1) can be found at *Diamond v. State*, 2018 Fla. App. LEXIS 8042 (Fla. 1st DCA June 7, 2018), but because it is a decision without written opinion, it is not incorporated by the Southern 3d Reporter. The First District Court of Appeal's June 25, 2018 order (App. 3) denying rehearing by way of written opinion is found at *Diamond v. State*, 2018 Fla. App. LEXIS 11479 (Fla. 1st DCA June 25, 2018), but it is not reported in the Southern 3d Reporter. The opinion of the Hon. J. Scott Duncan of the First Judicial Circuit Court in and for Escambia County, Florida is not reported.

JURISDICTION

The opinion and judgment of the First District Court of Appeal of Florida was entered on June 7, 2018. (App. 1). The First District Court of Appeal denied Petitioner's timely motion for written opinion, a rehearing motion under Rule 9.330(a), Fla. R. App. P. (2018), on June 25, 2018. (App. 3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).[1] Petitioner

[1] Petitioner did not seek review with the Supreme Court of Florida. In Florida, the Supreme Court of Florida "does not have jurisdiction to review a district court's *per curiam* decision on direct appeal. *Jackson v. State*, 926 So. 2d 1262, 1265 (Fla. 2006). Thus, because filing a petition for writ of discretionary review with the Supreme Court of Florida would have been futile, it was not necessary in order to receive 90 additional days for the time

is timely filing this petition for certiorari by third-party commercial carrier on September 5, 2018. *See* Sup. Ct. R. 13.1, 29.2, and 30.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the

---

in which Petitioner could have filed a petition for writ of certiorari with the Supreme Court of the United States." *See Gilding v. Sec'y, Dep't of Corr.*, 2012 U.S. Dist. LEXIS 70975, at *7-8 (case 6:10-cv-1727-Orl-31DAB) (M.D.F.L. 2012); *Dombrowski v. Florida*, 2017 U.S. Dist. LEXIS 205880, at *6 (S.D.F.L. Dec. 13, 2018) (*per curiam* affirmance from a district court of appeal in Florida constitutes a decision from the "highest court of a State in which a decision could be had" under Florida law).

> privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE[2]

Petitioner, a retired former U.S. Naval officer with no criminal history, suffered a stroke in February 2007. (App. 7). In 2009, the two sons of Petitioner's adopted daughter accused Petitioner of sexually abusing them between April 1 and October 15, 2007. (App. 12). Though Petitioner supplied his trial attorney with his medical records and claimed that he was physically unable to engage in actions that the child who accused him of eight of the nine acts claimed he had performed, the trial attorney did not introduce expert medical testimony or Petitioner's medical records because his strategy was to hope that the jury would look at Petitioner and see that he was telling the truth when he testified that he was too frail to commit the alleged acts. (App. 10-11).

On July 1, 2010, Petitioner was found guilty after jury trial of two counts of lewd and lascivious molestation (offender 18 years or older, victim less than 12 years of age) (counts one and two); three counts of

[2] Citations herein are to the single-volume 57-page appendix being submitted with this Petition. For example, "App. 1" refers to page 1 of the appendix.

sexual battery (offender 18 years or older, victim less than 12 years of age) (counts three, four, and six); one count of battery of child by throwing, tossing, projecting or expelling certain fluids or materials (count five); one count of lewd or lascivious battery (encourage or force or entice victim under 16 years of age) (count seven); one count of failure to protect minors from obscenity (count eight); and one count of lewd or lascivious conduct (count nine). (App. 2-3). Petitioner was adjudged guilty and sentenced as a sexual predator to a mandatory life sentence. (App. 3). On December 15, 2011, the First District Court of Appeal for the State of Florida affirmed the Petitioner's convictions and sentences in a decision without a written opinion. *Diamond v. State*, 75 So.3d 721 (Fla. 1st DCA 2011).

In his postconviction motion, Petitioner argued that his trial counsel was ineffective in failing to call a physician such as a neurologist to impeach the child victim who had accused him of eight of the nine acts, and he called a neurologist who testified at the hearing that while the neurologist could not rule out that Petitioner could achieve an orgasm or erection, he could confirm that it would have been medically impossible for Petitioner to engage in physical acts on his hands and knees in the manner described by the main alleged victim. (App. 6-9).

The lower court found that because the neurologist could not have ruled out that Petitioner had the ability to speak (entice), open his mouth, and achieve an erection, the failure to call a medical expert to testify that it was medically impossible for Petitioner to

mount the child victim from behind on his hands and knees as claimed by the main victim did not constitute ineffective assistance of counsel under the Sixth Amendment. (App. 12-14). Petitioner appealed the denial of postconviction relief to the First District Court of Appeal, but that court affirmed in a decision without written opinion. (App. 1). Petitioner moved for rehearing in the form of a written opinion to enable him to proceed to the Supreme Court of Florida, but the First District denied that motion. (App. 37-42).

REASONS FOR GRANTING THE WRIT

This Court has recognized that

> the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. . . . Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. . . . 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. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel. . . ." Counsel . . . can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance. . . ."

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. . . . A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 684-688 (1984) (internal citations omitted). Where the sole evidence of criminal sexual abuse is the testimony of the alleged victim, and where unrebutted expert medical testimony would have stated that Petitioner was physically unable to commit the acts in the manner described by that victim, and where the trial attorney had been presented with medical records prior to trial but failed to procure medical testimony, and where the articulated defense strategy was to hope that the jury concluded that Petitioner was physically unable to commit the described acts based on visually observing him in court and that, therefore, the victim was not credible, the failure to present the expert medical testimony should

constitute ineffective assistance under this standard as a matter of law. Put more simply: where a trial attorney is aware that he can impeach the testimony of a criminal defendant's accuser with unrebutted expert testimony, presentation of that evidence is not inconsistent with the attorney's reasonable trial strategy, and the State's case could not be proven without the accuser's testimony being accepted by the jury as credible, the Sixth and Fourteenth Amendments should require that he present such evidence to the jury in order to be deemed "effective" counsel.

The First District Court of Appeal's decision rejecting this argument conflicts with *Strickland*'s demand for a fair trial and conflicts with the principles discussed in *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985) (affirming postconviction relief under *Strickland* where counsel failed to present evidence on criminal defendant's behalf) and *Hardwick v. Crosby*, 320 F.3d 1127, 1186 (11th Cir. 2003) (rejecting state court findings accepting trial attorney's failure to present "critical" evidence where it was not reasonable to conclude that the testimony would harm the case; granting postconviction relief under *Strickland*). Though this Court has been understandably reluctant to lay down bright-line rules in the realm of *Strickland* claims, the difficulty in obtaining postconviction or collateral relief in such cases[3] provides an important question of federal

[3] The First District's website, www.1dca.org, now displays the types and numbers of dispositions for the past 12 months, and these *per curiam* affirmances—unreviewable by the Supreme Court of Florida—far outnumber the number of written opinions.

law that has not been, but should be, settled by this Court. Any effective attorney should impeach a main witness with unrebutted expert testimony if the testimony is available and consistent with the overall trial strategy. Such a ruling would help trial attorneys by cementing at least one standard of effective assistance under the Sixth Amendment, and it would reduce fact-intensive, docket-clogging litigation in the lower courts.

A bright-line rule would help define—on a national scale—what a "strategic decision" under *Strickland* is. The Florida courts' reading of what constituted valid strategic decisions that were shielded from criticism under *Strickland* requires new guidance from this Court.

This Court should clarify that "decisions" to refrain from investigating expert testimony based on a hunch that useful evidence from an expert witness is rarely forthcoming—especially when that hunch is proven false at a postconviction evidentiary hearing—should not be protected as "strategic." As this Court stated in *Strickland*, a "fair assessment of attorney performance requires that every effort be made to

---

Further, while the First District reversed and remanded for further fact-finding in a handful of postconviction cases, Petitioner cannot find a **single example** of a written opinion from the First District Court of Appeal for the 12 months between September 1, 2017 and September 1, 2018 where the court entered a written opinion that actually ruled in a criminal defendant's favor on the merits of a *Strickland* postconviction motion despite the fact that the court reports that 58% of the total 5,466 filings in the previous 12 months were criminal in nature.

eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time" of trial, not at the time of the postconviction hearing. *Strickland*, 466 U.S. at 689. In a case where, as here, the trial attorney reviewed Petitioner's medical records but declined to consult a physician and did not investigate the medical testimony, this Court should take the opportunity to clarify that a decision cannot be considered "strategic" until an attorney investigates the potential evidence or testimony that is ultimately shown to impeach a main witness. Counsel's statement that he read Petitioner's medical records but did not consult a physician as a potential witness because doctors "rarely say exactly what" you want them to say at trial did not constitute "strategy"; it constituted a failure to investigate. (App. 10).

This Court should clarify that failure to impeach the main witness against a criminal defendant with unrebuttable medical testimony or other expert testimony is deficient even if the physician's testimony leaves open some remote possibility that the crime could have been technically committed in some other manner that was not alleged by the State in its case. The State never alleged that Petitioner lay passively on a bed and had acts committed upon him; the State and the main witness alleged that Petitioner committed physical acts on his hands and knees and while mounting the victim from behind, something ruled out as medically impossible. The finding (at App. 10-12) by the Florida court that failure to impeach the main

witness's claim of detailed physical acts was not deficient because it did not rule out that the crimes were committed in a manner other than the manner alleged by the sole witness/victim should not be allowed to stand.

Further, this Court could take the opportunity to clarify that "strategy" cannot include the hope that a jury would rely on facts not in evidence to acquit a criminal defendant. While the Florida court found that the attorney's strategy was to prove medical inability to commit the alleged acts, the trial attorney's decision to hope that the jury observed Petitioner's frail state for themselves (App. 11) should be clarified as "unreasonable" as a matter of law where no provision of the Florida evidence code allowed a jury to rely on its own physical observations of a person to make its own conclusions or diagnoses. The jury was not permitted to rely on its observations of Petitioner's physical state as evidence. An attorney's hope that a jury will rely on information that is not admissible as evidence should be not be excusable as "strategic."

Lower courts should receive new guidance on the limits of what decisions are protected as "strategic" under *Strickland*. The Florida courts' reading of *Strickland*'s protection for "strategic" decisions renders this Court's holding in *Strickland* toothless. A bright-line rule should be created that requires attorneys, if they wish to avoid a finding of ineffective assistance, to impeach main witnesses with expert testimony if there is a basis to conclude that the attorney knew about the basis for impeachment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL M. HAWKES
3785 Wentworth Way
Tallahassee, FL 32311-3730
(850) 212-3067
hawkes.paul@gmail.com
Counsel of Record

MARK V. MURRAY
317 E. Park Ave.
Tallahassee, FL 32301
(850) 907-3301
mvm@capitalcityattorney.com
Counsel for Petitioner

TERRY P. ROBERTS
LAW OFFICE OF
TERRY P. ROBERTS
P.O. Box 12366
Tallahassee, FL 32317
(850) 590-8168
fairdayincourt@outlook.com
Counsel for Petitioner