

NO.: _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

KELLY E. CULVER- Petitioner;

v.

DUSHAN ZATECKY – Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:

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Petitioner

QUESTIONS PRESENTED

The Sixth Amendment of the Federal Constitution provides safeguards for any person facing criminal prosecution assistance of counsel, and this right is guaranteed at all critical stages of the trial as well as all stages of direct review. The Fourteenth Amendment of the Federal Constitution guarantees due process of law..

The questions presented are whether trial counsel's failure to offer a contemporaneous objection during trial compromised Culver's Sixth Amendment right to competent counsel at the most critical stage of trial in turn, satisfying the Cause and Prejudice standard required to overcome procedural default¹ and whether the Indiana Supreme Court's departure from a straight-forward application of the *STRICKLAND*² standard in their ruling on Culver's ineffective assistance of trial counsel claim was in violation of his due process rights as guaranteed by the Fourteenth Amendment?

¹ *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

² *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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**IN THE
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PETITION FOR WRIT OF CERTIORARI**

Opinions Below

The opinion of the Indiana Supreme Court denying relief on direct appeal is published at Culver v. State of Indiana, 727 N.E.2d. 1067; 2000 Ind. Lexis 291 (Ind. 2000). Post-conviction relief denying relief is unpublished at Culver v. State, 55 N.E. 3d. 393, 2016 Ind. App. Unpubl. Lexis 474 (Ind. Ct. App, 2016). The district court's opinion denying Culver's Petition for Writ of Habeas Corpus and the United States Court of Appeals for the Seventh Circuit's order denying certificate of appealability are unpublished at Culver v. Zatecky, 2017 U.S. Dist. LEXIS 58789 (S.D. Ind. Apr. 18, 2017, (App. 1a)).¹

¹ Culver cites to the Appendix as "App" and to documents in the state court record as "Tr." And "for any documents on record with the district court as "Ret Ex."

STATEMENT OF JURISDICTION

The Seventh Circuit issued an order denying Certificate of Appealability on November 6, 2017. No Petition for rehearing was timely filed in this case. This Court has jurisdiction pursuant to under 28 U.S.C. § 1254.

PROCEDURAL, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution 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.

U.S. Const. Amend. VI.

The Constitution's Fourteenth Amendment States:

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 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.

U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

A. Introduction

Culver was arrested on May 11, 1997 and formally charged with murder on May 14, 1997, and the State ordered that Blood and Hair samples be taken from Culver, (Ret. Ex C, p. 4-5). An Officer Lewis had sent a box containing fourteen (14) items to the Federal Bureau of Investigation, (Ret. Ex C, p. 5). While Detective Lewis was present during the blood samples being taken from the victim, he was not present when blood samples were taken from Culver. Officer Lewis subsequently testified that he received a sealed box from Detective Gossett containing a vial of blood for Culver, (Ret. Ex C, p. 5). Det. Lewis then had items sent to FBI in Washington, D.C. where agent Ms. Smrz conducted DNA testing on the items, (Ret. Ex C, p. 5).

The trial date was set for October 27, 1997, and on October 15, 1997, the State moved for a continuance of the trial, , alleging: (1) Ms. Smrz from the FBI laboratory was unable to travel to Terre Haute, Indiana during the week of October 27, 1997 to testify at trial and (2) Culver had not provided the State with any discovery, Culver objected to the continuance but was granted over his objection and the trial court continued the trial until November 3 1997, (Ret. Ex C, p. 5-6).

On October 27, 1997, the Vigo County Prosecutor's Office informed defense counsel by fax, that the FBI had reached conclusions regarding the test samples, but the final report of the these conclusion would not be available until November 3, 1997 Culver never received any results until after commencement of the trial, and Culver never delayed or sought a continuance in this Cause, (Ret. Ex C, p. 6).

On October 31, 1997, Culver filed Defendant's Motion to Exclude Testimony relating to DNA expert's testimony and requested the Trial Court to exclude any and all State witnesses pertaining to the results or conclusions of tests performed by the FBI as well as other evidence

pertaining to the conclusions reached by the FBI Laboratory. In support of said motion, Culver alleged that defense counsel would not receive the final report of the FBI's conclusions or any information establishing how the results were reached before the day of trial. Culver anticipated the possible need to retain an expert to assist in evaluating the scientific evidence, which the use of at trial proved to cause extreme prejudice to Culver. The court denied and entered an order allowing petitioner to depose said DNA expert during trial. Selection of the jury began later that day, (Ret. Ex.C pg. 6).

B. The Trial Error-Ineffective Assistance of Counsel

Trial began on November 3, 1997 and during the course of the trial, the State offered into evidence State's Exhibit "40", which contained blood samples of the victim and the defendant, Culver objected to the chain of custody to said exhibit based on the State's failure to establish a continuous chain of custody. The State's DNA expert, Ms. Smrz, from the FBI, subsequently testified during trial which DNA was the State's primary evidence, all other evidence presented at this trial was circumstantial evidence, (Ret. Ex.C pg.7). Defense counsel failed to offer any other objection to the admittance of DNA evidence or expert testimony pertaining to DNA evidence or conclusions.

C. The Effect

Culver was sentenced to a term of Fifty-five (55) years aggravated by Ten (10) years for a total of Sixty-five (65) years in the Indiana Department of Corrections; Culver stated that he would Appeal, the Court appointed Matthew Effner and Daniel Weber to represent Culver on Appeal.

On June 25, 1998, Effner filed Appellate brief alleging the following:

- i. Trial court committed reversible error when it failed to exclude the testimony of Melissa Smrz, the State's DNA expert.

- ii. Failure to object to the DNA expert's testimony constituted ineffective assistance of counsel.
- iii. That the trial court erroneously admitted DNA evidence contained in State's Exhibit 40, that the requisite chain of custody was not established.
- iv. Trial court erred in denying Defendant's tendered voluntary manslaughter instructions.
- v. Trial court's sentencing statement was insufficient to justify an enhanced sentence. (*Culver v. State* 727 N.E.2d 1062; 2000 Ind. LEXIS 291).

D. The Indiana Supreme Court Error-Appellate Counsel Ineffectiveness

In their ruling on Culver's appeal, the Supreme Court applied an incorrect standard requiring Culver to prove more of a showing of trial counsel prejudice than the *Strickland* standard required. Appellate counsel failed to file a rehearing alleging this error on behalf of Culver. *Culver id.*

E. Post-Conviction Remedies Sought

On March 18, 2001, Culver filed a Petition for Post-Conviction Relief (PCR) alleging

- i. Ineffective Assistance of Trial and Appellate counsel,
- ii. Supreme Court requiring more of a showing of ineffective counsel than *Strickland* calls for.

On November 2, 2015 the Post-Conviction Court denied Culver's (PCR) for the following reasons: (1) Laches, claiming that Culver deliberately delayed the judicial process to the point that re-prosecution would be unsuccessful, (2) the Supreme Court did not hold Culver to a higher standard of ineffective counsel than what the *Strickland* standard requires, (3) trial and appellate counsel did not offer testimony in this matter, and (4) there is no credible evidence from which the (PCR) Court could conclude that either trial or appellate counsel's handling of Culver's case prejudiced him. Culver appealed his claims to the State's highest Court where the State Supreme Court affirmed his conviction and the ruling of the lower court, (Ret. Ex. M pg.11).

On July 7, 2016 Culver filed a Writ of Habeas Corpus under 28 U.S.C. § 2254 alleging the following grounds:

- a) The Trial Court committed reversible error when: (1) it admitted into evidence liquid blood samples allegedly taken from Culver and the victim, and (2) it allowed the testimony of a DNA expert regarding her findings concerning said blood samples, despite missing links in the chain of custody of said blood samples,
- b) The Trial Court infringed upon the substantial rights of Culver and committed reversible error when it failed to exclude the testimony of a DNA expert and related DNA evidence, the report on which was not provided to Culver until after commencement of the trial.
- c) Defense Counsel provided ineffective assistance of counsel to Culver when: (1) he failed to offer an objection at trial to DNA testimony and evidence, which served as the basis for a pretrial motion to exclude, which motion was denied by the Trial Court, and (2) he only offered an objection as to one missing link in the chain of custody of liquid blood samples offered into evidence by the State of Indiana and failed to specifically denote each and every other relevant objection to said chain of custody.
- d) The Trial Court erred in refusing to allow the jury to consider the lesser included offense of Voluntary Manslaughter.
- e) The Trial Court's sentencing findings were insufficient to justify enhancement above the presumptive sentence for murder.
- f) Appellate counsel provided ineffective assistance of counsel when: (1) he failed to litigate on direct review trial counsel's statements during voir dire that possibly conceded Culver's guilt, (2) failing to litigate on direct review trial counsel's failure to investigate the mental health background of Culver in order to present a viable defense during the guilt phase of trial and mitigating evidence during the penalty phase, and (3) failing to litigate in a rehearing the Supreme Court error of requiring Culver to prove more of a showing of trial counsel prejudice than the *Strickland* standard calls for.

On April 18, 2017 the Southern District Court of Indiana denied Culver's Habeas Corpus and Appealability, (Appdx. B). Culver then Motioned the United States Court of Appeals for the Seventh Circuit to issue Certificate of Appealability and that Court also declined to issue a Certificate of Appealability on November 6, 2017, "finding no substantial showing of denial of a

constitutional right,” (Appx. A). Culver now seeks review in this most Honorable United States Supreme Court.

REASONS FOR GRANTING THE WRIT

In the Southern Indiana District’s Court ruling of Culver’s 28 U.S.C. § 2254, the Court reasoned that Culver failed to demonstrate cause and prejudice for his trial counsel’s failure to offer a contemporaneous objection at trial to the admittance of DNA evidence and testimony, this is not true. Culver identified and presented, to the Indiana Supreme Court on appeal, a case on point with his in *Pemberton v. State*, 560 N.E. 2d.524 (Ind. 1990), where defense counsel in that case, argued in a pre-trial hearing that two (2) out-of-state confrontations between witnesses and victims and the defendant were impermissibly suggestive and testimony concerning identification of the defendant, which resulted from said procedures should be suppressed.

The motion to suppress was denied, and during trial statements were made along with in-court identifications of the defendant and testimony concerning two (2) out-of-court identifications. The defendant’s counsel made no objection to said testimonies and identifications during trial, and the Indiana Supreme Court ruled that “trial counsel fully and aggressively litigated the admissibility of the identification testimony on due process grounds during the pretrial hearing and then inexplicably failed to take the procedural step at trial to preserve the claim for appeal... There is no conceivable rational basis upon which to predicate a decision not to object. This in no way can be categorized as a strategic or tactical decision gone awry,” *Id.* At 526-527, (Ret Ex. C pg. 25).

Like *Pemberton Id.*, Culver’s trial attorney also filed a pretrial Motion to Exclude Testimony concerning the testimony of a DNA expert and related DNA evidence, (TR. Pg.37). After a hearing in which Culver’s attorney argued for exclusion of said testimony and evidence

(Tr. Pgs. 172-202), Culver's attorney did not make objections to said testimony or evidence during trial, and Culver was convicted in a case where the evidence was circumstantial and no eyewitnesses to the crime testified. Because Culver's attorney did not make an objection at trial to evidence which formed the basis of a pretrial motion to exclude, and because there is no rational conceivable basis upon which to predicate his decision not to object, Culver's attorney failed to meet the "performance component" of the *Strickland* test satisfying "cause" .

Furthermore, because the DNA testimony and evidence was extremely prejudicial to Culver, the "prejudice component" of the *Strickland* test was also met, and Culver was denied effective assistance of trial counsel. Culver was further prejudiced by counsel failing to object to the chain of custody of blood samples as to one missing link, satisfying "prejudice" under the *Wainright v. Sykes, supra* doctrine.

The Indiana Supreme Court applied an unreasonable application to the *Strickland* test in deciding Culver's case. *Pemberton Id.* was directly on point to Culver's circumstance and the Indiana Supreme Court had found in that case the *Strickland, supra* test was satisfied; however, the very Court under similar circumstances held Culver to a higher standard of *Strickland, supra*.

This was an unreasonable application of clearly established federal law, see 28 U.S.C. sec 2254 (d)(1), and *Penry v. Johnson*, 532 U.S. 782, 792 (2001), citing, *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) stating "a state court's decision is contrary to clearly established Supreme Court precedent if the state court either applies to a rule that contradicts the governing law set forth in Supreme Court cases' or confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless arrives at a result different from the precedent."

The second part of the questions presented concern the Indiana Supreme Court applying an incorrect standard in their ruling of Culver's ineffective assistance of counsel claim on direct appeal in violation of the Sixth and Fourteenth Amendments of the Federal Constitution. The United States Supreme court has established a two-part test to evaluate claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In *Culver v. State*, 727 N.E.2d 1062 at 1066 (Ind.2000), the first claim of ineffective assistance of counsel on direct appeal, the Indiana Supreme Court addressed was as follows: "we evaluate Sixth Amendment claims of ineffective assistance of counsel by applying the two-part test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness. The defendant must also show adverse prejudice as a result of the deficient performance. See *Brown v. State*, 698 N.E.2d. 1132, 1139-40 (Ind. 1998), *cert. denied*, 526 U.S. 1956, 119 S.Ct. 1367, 143 L.Ed. 2d 527 (1999)."

The second claim of ineffective assistance of counsel on Culver's direct appeal, the Indiana Supreme Court addressed was as follows: "to meet this test [the prejudice prong of *Strickland*], the defendant must show that the deficient performance was so prejudicial as to deny the defendant a fair trial. A defendant is denied a fair trial only when a conviction occurs as the result of a breakdown in the adversarial process rendering the trial result unreliable. *Culver* at 1069.

Here the Supreme Court of Indiana applied a more stringent standard to prove prejudice resulting from counsel's deficient performance in Culver's ineffective assistance of counsel claim. The Indiana Supreme Court decided Petitioner's direct appeal on April 10, 2000, on April

18, 2000, the United States Supreme Court in *Williams v. Taylor*, 120 S.Ct. 1495 at 1497 (2000), clarified that *Strickland* supra, provides sufficient guidance for resolving virtually all effective counsel claims, finding that the Virginia Supreme Court erred in their holding that *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.ct. 838, L.E.d.2d 180 (1993) modified or in some way supplanted *Strickland*.

The correct standard to evaluate a Sixth Amendment right to effective assistance of counsel claim, as clarified by *Williams v. Taylor* is as follows:

First, a defendant must show that defense counsel's performance was deficient. This requires showing that counsel's performance fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. The objective standard of reasonableness is based on "prevailing professional norms". *Strickland* supra.

Second, a defendant must show that the deficient performance prejudiced the defense. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland* supra.

By the Supreme Court relying on the language found in *Brown* supra, petitioner was required to not only prove the two prongs of *Strickland*, but also required to prove that he was denied a fair trial and that the conviction occurred from a breakdown in the adversarial process rendering the trial result unreliable which prejudiced defendant. The Supreme Court's departure from a straight forward application of *Strickland* is in err when counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him, as iterated in *Williams*, supra at 1497."

The United States Court of Appeals in a decision handed down around the time of Culver's Direct Appeal ruled in *Washington v. Smith*, 219 F.3d 620, 633 (7th Cir. 2000) that "state appellate court, like state court in *Williams v. Taylor*, erroneously believed that *Lockhart v. Fretwell*, 506 U.S. 364 (1993), had 'modif[ied] or supplant[ed] *Strickland* [v. *Washington*]'s prejudice test for ineffective assistance claims and consequently analyzed Washington's ineffective-assistance claim under the wrong standard." Indiana Appellate Courts can be easily traced back to *Games v. State*, 690 N.E.2d 211; 1997 Ind. LEXIS 227(Ind. 1997) for misapplying the same erroneous standard, and by the Indiana Supreme Court analyzing Culver's prejudice prong by citing to *Brown, supra*, the court inadvertently relied on *Lockhart, supra*, which is a direct misapplication of clearly established Supreme Court law.

The proposition that the courts require more of a showing of prejudice than the law calls for is in error and a violation of petitioner's Constitutional Rights, and Appellate counsel should have petitioned the Supreme Court for a rehearing on behalf of Culver so the court would have had an opportunity to address its applying the wrong standard to Culver's ineffective claim.

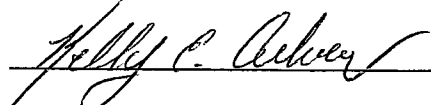
The district court's adverse ruling on this issue and the United States Court of Appeals for the Seventh Circuit denying certificate of appealability should be reversed for the foregoing reasons.

CONCLUSION

The petition for a writ of certiorari should be granted.

Executed on: January 26, 2018,

Respectfully submitted,



Petitioner / pro se