IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID. No. 0609010043
	)	
	)	
ERNEST CARLETTI,	)	
	)	
Defendant.	)	

Submitted: November 23, 2010
Decided: February 23, 2011

COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED.

Allison L. Texter, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Matthew R. Fogg, Esquire, Attorney for Defendant.

PARKER, Commissioner

This 23rd day of February, 2011, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. In November 2007, a Superior Court jury found Defendant Ernest Carletti guilty of two counts of rape in the first degree and one count of kidnapping in the first degree. The jury found Defendant not guilty of possession of a deadly weapon during the commission of a felony. The Superior Court sentenced Defendant Carletti to a total of 50 years at Level V, suspended after serving 33 years, followed by probation.

2. Defendant filed a direct appeal to the Delaware Supreme Court. On December 3, 2008, the Delaware Supreme Court concluded that Defendant's appeal was without merit and affirmed the Superior Court's convictions and sentences.[1] Defendant's petition for writ of certiorari to the United States Supreme Court was denied on May 18, 2009.[2] Defendant filed the subject motion for postconviction relief on May 17, 2010.

FACTS

3. The facts giving rise to these offenses, as set forth by the Delaware Supreme Court in its opinion on Defendant's direct appeal[3], are as follows: On the evening of May 21, 2003, J.S.[4], a nineteen-year old freshman at the University of Delaware, attended a party to celebrate the end of classes. She had two beers and left around 1:30 a.m. Before she left, J.S. called a friend to meet her along the way and accompany her back to her dormitory. When she did not see her friend at their designated meeting place, J.S. sat down and waited.

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[1] *Carletti v. State,* 2008 WL 5077746 (Del. 2008).
[2] *Carletti v. Delaware,* 129 S.Ct. 2387 (2009).
[3] *Carletti,* 2008 WL 5077746, at * 1-2.
[4] The initials represent a pseudonym assigned to the victim.

4. While J.S. was waiting, a dark-colored sedan pulled up and the driver, Carletti, propositioned her, offering $100 if she would put on handcuffs. J.S. refused, but Carletti persisted. Eventually, Carletti displayed what appeared to be a chrome handgun and pulled J.S. into the car. Once she was in the passenger seat, Carletti pushed J.S.'s face into her lap, blindfolded her with duct tape, handcuffed her hands behind her back, and shackled her ankles. He then drove for approximately twenty to twenty-five minutes, after which J.S. remembered getting out of the car, walking on gravel, then long grass, and then being dragged into a house. Once inside, she was taken down steps into a basement and placed on a couch after walking on a wooden floor.[5]

5. After being placed on the couch, J.S. testified that Carletti began to kiss her; when she resisted, he pinched her breasts and nipples. He then took her- still bound, shackled, handcuffed and blindfolded- from the couch to the floor. He placed her before him on her knees on the floor and, after putting on a condom, forced his penis into her mouth. J.S. resisted and Carletti grew impatient, eventually taking his penis from her mouth and returning her to the couch. Carletti then went upstairs for about five or ten minutes leaving J.S. alone in the basement. She heard the sound of Carletti and dogs walking above.[6]

6. J.S. testified that Carletti came back downstairs and began kissing her again, but she again resisted. He then removed the handcuffs, removed her jacket, and recuffed her. He also removed her shoes and replaced them with some sort of "heavy or rubbery shoes." Carletti again took her from the couch to the floor, placing her in a kneeling

[5] *Carletti,* 2008 WL 5077746, at * 1.
[6] *Id.*

position. He again forced his penis into her mouth, but again became frustrated because J.S. was resisting. He again removed his penis from her mouth.[7]

7. According to J.S.'s testimony, Carletti then took her from the floor and placed her on her stomach on a padded table- still bound, shackled, handcuffed and blindfolded. He then connected chains to the handcuffs and ankle shackles and placed something around her neck. She was hoisted up by the chains and a ball gag was placed in her mouth. As she hung from the chains by her hands and feet, she had difficulty breathing and could hear someone masturbating. At the same time, she heard Carletti give her orders, telling her to say "yes, master" to him. Eventually, unable to breathe, her head dropped. She was then released from the chains and dropped to the table.[8]

8. Carletti then took J.S. from the house- still bound, shackled, handcuffed and blindfolded- and put her back in the car. On the way back to campus, Carletti apologized to J.S., but told her not to tell anyone. He then removed the ankle shackles and the handcuffs, securing her hands behind her with duct tape and pushed her out the car. J.S. started to scream for help, tore herself out of the tape, and ran back to her dorm room and notified police.[9]

9. Thereafter, Carletti's fingerprint was recovered from the duct tape and it was determined that he had owned a black sedan in 2003. A walkthrough of Carletti's home corroborated a number of the details supplied by J.S. There was a gravel driveway, the basement of the house had wooden floors with area rugs, there was a padded weight bench, and there was an I-beam in the ceiling of the basement.[10]

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[7] *Id.*
[8] *Id.* at *2.
[9] *Id.*
[10] *Id.*

PROCEDURAL HISTORY

10. On September 18, 2006, Carletti was arrested and charged with six counts of rape in the first degree, one count of kidnapping, and one count of possession of a deadly weapon during the commission of a felony. He was indicted on October 2, 2006.

11. On November 28, 2006, Carletti moved for dismissal of five of the rape charges based on the multiplicity doctrine.

Counts I and II of the indictment charged Carletti with two acts of intercourse during which he caused physical injury in violation of 11 *Del. C.* § 773 (a)(1).

Counts III and IV charged Carletti with two acts of intercourse during the commission of a felony (kidnapping) in violation of 11 *Del. C.* § 773 (a)(2)(a).

Counts V and VI charged Carletti with two acts of intercourse during which he displayed or represented he possessed a deadly weapon in violation of 11 *Del. C.* § 773 (a)(3).

12. The Superior Court granted the motion in part.[11] The Superior Court ruled that Defendant's course of conduct could be separated into two separate acts of Rape First Degree, but those two acts could not be further subdivided within the same statute to create four additional counts of Rape First Degree. Consequently, Counts I, III and V were merged together; and Counts II, IV and VI were merged together.[12] The Superior Court dismissed Counts III, IV, V and VI merging those counts into Counts I and II, the two first degree rape charges based on physical injury caused during the acts of non-consensual intercourse.[13]

[11] *State v. Carletti*, 2007 WL 1098549, at *3 (Del.Super.)
[12] *Id.*
[13] *Id.*

13. In that same motion, Defendant also sought to dismiss Count VII of the indictment, the kidnapping first degree charge, which was denied.[14]

14. By letter dated June 13, 2007, the State requested that it be permitted to elect the theory of the case by which it desired to proceed. The State thought that the choice should be within the discretion of the prosecution and advised the Court that it preferred to proceed under the "rape while kidnapped" theory. In the June 13, 2007 letter, the State mistakenly identified the "rape while kidnapped" theory as being Counts V and VI, when in actuality it was charged in Counts III and IV.

15. On June 15, 2007, the Superior Court granted the State's request that it be permitted to proceed on the "rape while kidnapped charges" of the indictment. The Superior Court therefore dismissed Counts I and II and reinstated Counts V and VI, the counts (mistakenly) identified in the State's letter as being associated with the raped while kidnapped charges.[15]

16. The State prosecuted Defendant on the "rape while kidnapped" theory. It never wavered in its representation that it was prosecuting Defendant on the "rape while kidnapped" theory. Indeed, at an October 31, 2007 hearing, in the presence of Defendant's trial counsel, the Court expressly asked the State exactly which counts it was proceeding forward with, in light of the Court's decision on the multiplicity doctrine.[16] The prosecutor responded: "I don't have my full file with me. It is the counts that allege rape during the commission of a kidnap."[17]

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[14] *Id.*, at *3-4.
[15] Superior Court Docket No. 17.
[16] October 31, 2007 Motion Transcript, at *2-3.
[17] *Id.*

17. During opening remarks, the State repeatedly referred to the kidnapping theory of the counts of rape charged against Defendant. In his opening statement, the prosecutor read the rape while kidnapping charge set forth in the indictment to the jury. The prosecutor stated: "[T]he indictment reads, Ernest Carletti, on or about the 22nd day of May, 2003, in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with [J.S.], without her consent and it occurred during the course of a felony, to wit: Kidnapping First Degree as incorporated in this indictment."[18] The prosecutor continued: "So the elements in this case are that the State needs to prove is that the defendant intentionally engaged in sexual intercourse with [J.S.] without her consent and it happened during the course of kidnapping."[19] Thereafter, the State's presentation at trial was consistent with the "rape while kidnapped" theory of the charges.

18. On November 16, 2007, the Superior Court met and conferred with counsel regarding jury instructions, and realized that the "rape while kidnapped theory" being prosecuted was mistakenly identified in the June 2007 letter to the Court as being Counts V and VI when, in fact, it was actually charged in the indictment as Counts III and IV. The Court entered an Order, dated November 16, 2007, that consistent with the State's representation in its June 2007 letter that it was prosecuting the defendant on the "rape while kidnapped" charges, and consistent with the State's presentation at trial, it was essentially fixing the mistake and reinstating Counts III and IV and dismissing the other rape counts.[20] The closing arguments were held on November 19, 2007. Consequently, Defendant was able to close on the appropriate theory.

[18] November 13, 2007 Trial Transcript, at * 42-43.
[19] *Id.*
[20] Superior Court Docket No. 46.

19. On November 16, 2007, after the Superior Court met and conferred with counsel regarding jury instructions and the decision was made to correct the mistake and reinstate Counts III and IV- the rape while kidnapped charges, a conference was held on the record.[21] Defense counsel objected to the substitution of the charges and stated:

> On the one hand, if I had known that the State's theory was Counts III and IV, and that those counts lived, I don't believe my opening statement would have been any different, I don't believe that a single question of any witness that I called would have been different, nor do I believe I would have offered any evidence. That's the good news, any different evidence. The bad news is I would have counseled my client differently.
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> I would have counseled my client differently with regard to his decision whether or not to testify. Because I would have told him what he's walking into if he gets up there and reinforces the kidnapping, a 30 year. And I can tell you without any doubt in mind, this, it's up to you type situation, I would have thrown another huge wrinkle in the case. So there is definitive definite prejudice.
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> I don't think my client's performance on the stand because of one question and answer, just putting aside everything else, was stellar. Had I had to do it all over again and could see the future and saw what happened with regard to one of his answers, I would have said don't testify. And I can tell you very definitely there is a reasonable chance he may not have testified had I known that III and IV were to be the ones that lived.[22]

20. Later in the argument, Defendant's counsel stated:

> So analytically that puts us either, number one, the State should be held accountable for its error which was relied upon in good faith and reasonably by counsel. Or, two, defense counsel was not reasonable in relying upon that because he didn't see kidnapping, in which case I move for a

[21] November 16, 2007 Trial Transcript, at * 89-100.
[22] November 16, 2007 Trial Transcript, at * 92-93.

> mistrial under Rule 61. It's one or the other. He's paying the price. It's either their fault, my fault, or both fault, and he's paying the price, because he would have gotten different counseling.[23]

21. The Court noted that on a Rule 61 motion, Defendant would have to satisfy both prongs of *Strickland* and that given the facts of this case the Court did not know whether Defendant could meet that burden. However, the Court noted that it was not appropriate to engage in a Rule 61 analysis at that point in time.[24]

DEFENDANT'S RULE 61 MOTION

22. The time is now ripe for the Rule 61 analysis. The subject Rule 61 motion was filed on May 17, 2010.

23. In the subject motion, Defendant is not arguing that the State did not have the right to amend the indictment. Defendant concedes that the State had the right to so.[25] Defendant also does not dispute the fact that Defendant's trial counsel should have been aware of the rape charges that were being prosecuted.[26] Defendant acknowledges that Defendant's trial counsel should have known that the "rape while kidnapped" theory was being prosecuted. The issue presented in Defendant's Rule 61 motion is that he received ineffective assistance of counsel, because counsel was not prepared to defend the Defendant on the "rape while kidnapped charges", and that counsel's substandard representation resulted in prejudice to Defendant.[27]

[23] November 16, 2007 Trial Transcript, at *97.
[24] November 16, 2007 Trial Transcript, at *97-98.
[25] Defendant's Reply to the State's Response in Opposition to Defendant's Rule 61 Motion, at *8.
[26] *Id.*
[27] *Id.*

24. Before making a recommendation, the Commissioner enlarged the record by directing Defendant's trial counsel to submit an Affidavit addressing Defendant's claim. Thereafter the State filed a response to the motion and Defendant filed a reply thereto.[28]

25. To prevail on an ineffective assistance of counsel claim, the defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.[29] The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.[30]

26. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[31] Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[32] Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.[33]

27. In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel's performance should be reviewed from the defense counsel's perspective at the time decisions were being made.[34] It is all too easy for a court, examining counsel's

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[28] Super.Ct.Crim.R. 61(g)(1) and (2).
[29] *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).
[30] *Id.* at 687-88, 694.
[31] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[32] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).
[33] *Strickland v. Washington,* 466 U.S. 668, 689 (1984).
[34] *Stickland*, 466 U.S. at 688-89.

defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.[35] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting efforts of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided. [36]

28. Furthermore, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.[37]

29. When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.[38]

30. Turning to the subject action, Defendant contends that his trial counsel was ineffective for not recognizing that the "raped while kidnapped" theory rather than the "rape while displaying a deadly weapon" theory were the charges being prosecuted and that he suffered prejudiced as a result thereof.

31. First, it is important to emphasize that there was always a separate, independent charge of kidnapping first degree in the case. Defendant's trial counsel always knew that he had to defend this separate charge of kidnapping. The kidnapping first degree charge, in and of itself, is a serious charge. Kidnapping in the first degree is a Class B felony and carries a sentence of not less than 2 years up to 25 years to be served at Level V.[39] The indictment on the kidnapping first degree charge, Count VII, reads as follows:

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[35] *Stickland*, 466 U.S. at 688-89.
[36] *Stickland*, 466 U.S. at 688-89.
[37] *Strickland v. Washington,* 466 U.S. 668, 691 (1984).
[38] *Strickland,* 466 U.S. at 697.
[39] See, 11 *Del.* C. §783A; 11 *Del. C.* § 4205.

> ERNEST CARLETTI, on or about the 22nd day of May, 2003, in the County of New Castle, State of Delaware, did unlawfully restrain [J.S.] with the intent of violation and/or sexually abusing her and did not voluntarily release her unharmed prior to trial.[40]

32. Not only did this count stay intact throughout the entire proceedings, it independently referenced the sex acts and tied them to her kidnapping. This charge, in and of itself, put Defendant on sufficient notice that the charges of rape and kidnapping were intertwined. As a practical matter, Defendant's trial counsel knew that the two theories- rape and kidnapping, were intertwined.

33. Indeed, the Court noted that "it remains a fact in the case that at no point was the count number confused on the straight kidnapping. So kidnapping has always been in the case and has been kidnapping first degree. So to the extent that Mr. Hurley says he may have counseled his client differently, before his client took the stand, they must have had a conversation about the elements of kidnapping."[41]

34. In response to the Court's recognition that the kidnapping charge was always at issue in the case, Defense counsel responded that Defendant realized he would probably get convicted on the kidnapping charge (a 2 to 25 year sentence). Yet, Defendant was willing to accept a conviction on the kidnapping charge to avoid a 30 year mandatory sentence for rape.[42]

35. Defense counsel's representation that Defendant was willing to accept a conviction of the kidnapping charge to somehow avoid a conviction on the rape charges appears somewhat disingenuous. The kidnapping charge itself carried up to a 25 year sentence. Given the severity of the conduct giving rise to the charges, it was reasonable to

[40] Count VII of the Indictment.
[41] November 16, 2007 Trial Transcript, at * 95-96.
[42] November 16, 2007 Trial Transcript, at * 96-97.

expect that if there was a conviction only on the kidnapping charge, the sentence would likely be at the upper range. Moreover, the kidnapping and rape charges were intertwined. The kidnapping charge was not some mere misdemeanor charge which carried little or no jail time. To suggest that Defendant was willing to accept a conviction of up to 25 years to avoid a 30 year conviction on the rape charges stretches the realm of believability, especially since the kidnapping charge could only be proved by evidence of an unlawful restraint with an intent to violate the victim sexually.[43]

36. What really happened in this case is that, prior to taking the stand in his own defense, Defendant had always denied forcing the victim into his car.[44] For that matter, Defendant has also always denied brandishing a weapon at the victim.[45]

37. Although Defendant had admitted to using handcuffs and/or duct tape, Defendant explained that the complaining witness had expressly or tacitly consented before doing so. Defendant had admitted to pulling the complaining witness into the car but denied

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[43] Not to belabor this point, but once the kidnapping in the first degree charge is established, essentially so too (at a minimum) are the lesser-included rape charges. The jury was instructed on lesser-included offenses in the subject action, See- November 19, 2007 Trial Transcript, pgs. 69-76, and would likewise have been instructed on lesser-included offenses if the rape theory of "rape while displaying a deadly weapon" was pursued instead. In that case, the lesser-included offense of rape in the third degree, sexual penetration without the victim's consent during the commission of a crime which resulted in harm to the victim, would have been given. See, 11 *Del. C.* §771 (a)(2)(a).

A conviction on the kidnapping in the first degree, a finding that the victim was unlawfully restrained with an intent to sexually violate the victim which resulted in harm to the victim, virtually ensures convictions (at a minimum) on these lesser-included charges. Since rape in the third degree is a Class B felony, like the kidnapping in the first degree charge, Defendant if he was genuinely willing to accept a kidnapping conviction would in actuality be facing (at a minimum) up to 75 years incarceration (up to 25 years for the kidnapping conviction and up to 25 years for each of the rape convictions if convicted only of the lesser-included charges).

To suggest that Defendant was seriously willing to concede these convictions, facing up to 75 years imprisonment, to avoid a 30 year mandatory conviction (on rape first degree charges) calls into question the sincerity of that representation.

[44] Superior Court Docket No. 96- Affidavit of Joseph A. Hurley
[45] *Id.*

that he abducted her or otherwise forced her without her consent into the car.[46] Defendant told counsel that the only sexual activity he engaged in that evening was a single act of masturbation and he specifically denied having the complaining witness engage in fellatio with him. Defendant represented that he did not intentionally force the complaining witness to engage in any act of bondage that she would find distasteful and when he learned that she was not enjoying what he was exposing her to, he immediately desisted.[47]

38. Defendant made the decision to testify and upon doing so admitted, for the first time ever and to Defendant's counsel's surprise, that he had abducted the victim and forced her, without her consent, into his car.[48] Needless to say, Defendant's performance on the stand was less then stellar and in hindsight his decision to testify did not prove to be prudent.

39. In his Affidavit, Defendant's trial counsel denied that he was ineffective and/or that Defendant suffered any prejudice thereby denying him a fair trial.[49] Although Defendant's trial counsel believed the State was articulating a theory of rape associated with the display of a deadly weapon, instead of a rape while kidnapped theory, that confusion did not cause him to present his case any differently than he would have had he been cognizant of the State's theory other than his providing the defendant with "different counseling".[50]

40. Because Defendant had always denied kidnapping the victim as well as denied having displayed a deadly weapon, although Defendant's counsel's counseling would

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[46] *Id.*
[47] *Id.*
[48] November 16, 2007 Trial Transcript, at *63-67; Affidavit of Joseph A. Hurley.
[49] Superior Court Docket No. 96- Affidavit of Joseph A. Hurley
[50] *Id.*

have been different, it would have only differed in the respect that Defendant's counsel's dialogue would have focused on whether Defendant forced the victim into the car rather than whether he displayed a weapon. At the time of the discussion, which took place prior to Defendant taking the stand, the focus of the discussion would have differed somewhat but would not have shifted the decision in one direction or the other because Defendant had denied both the kidnapping and the display of the deadly weapon.

41. Defendant's trial counsel notes that defendant infers that "different counseling" means that counsel would have advised Defendant not to testify. That is not accurate. Defendant's trial counsel, who has been practicing law for more than 30 years, states he has yet to make a recommendation as to whether a defendant should testify.[51]

42. Defendant's trial counsel discusses the pros and cons of testifying and attempts to make an assessment, but without giving a recommendation. He always advises that the decision to testify is a personal decision that only the defendant can make.[52] In this case, Defendant's trial counsel told Defendant there was no way he could advise him whether or not to testify, that the Defendant had to rely on his own instincts and understand that if he went in front of the jury and came across as a liar, it would be a disaster. Defendant's trial counsel explained all the pros and cons to Defendant but made no recommendation whatsoever.[53]

43. Prior to taking Defendant's trial testimony, an in camera discussion was held on the record regarding the advice counsel gave his client about testifying.[54] The Court also engaged in a colloquy with Defendant about his election to testify. In that discussion,

[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] November 16, 2007 Trial Transcript, at * 47-52.

Defendant's trial counsel laid out the advices he gave to Defendant and detailed the pros and cons of testifying.[55] Defendant's trial counsel noted in that discussion that Defendant understood that he had already conceded there was some form of restraint, so the issue would be a question of degree.[56]

44. In the colloquy, Defendant's trial counsel stated: "[I] told him that there's no way I can tell him what is good for him or bad for him because I just don't know how it's going to turn out, and he has to rely upon his own instincts and understand that if he gets in front of the jury and he comes across as a liar, it is going to be a disaster. So I explained all of that to him and made no recommendation whatsoever. And I believe his decision is he wishes to testify."[57]

45. During the colloquy, Defendant acknowledged that his counsel's representations regarding counsel's advices were accurate.[58]

46. Also during the colloquy, the Superior Court reiterated the cons of testifying.[59] The Defendant was asked by the Court if he understood the possible penalties that he faced if convicted on I, II, or III or IV (the counts which included the rape while kidnapped theory).[60] The Court reviewed the perils of vigorous cross-examination and the benefits of his exculpatory statement to the police which was to be played by the State.[61] With all this information, notice of risk, and an offer to ask any further questions, Defendant stated: "I just want to have the opportunity to testify."[62]

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[55] November 16, 2007 Trial Transcript, at * 47-52.
[56] *Id.* at 48.
[57] *Id.* at 49.
[58] *Id.*
[59] *Id.* at 50-52.
[60] *Id.* at 50.
[61] *Id.* at 50-52.
[62] *Id. at 52.*

47. As Defendant's trial counsel points out, the State's case against the defendant was "awesomely formidable." "The combination of the testimony of the complaining witness, the physical evidence, the scientific evidence and the taped statements of the defendant spelled D I S A S T E R! The only chance the defendant had, as scant as it was, was to come across as someone who was honest and offer testimony consistent with what he previously indicated to counsel."[63]

48. It is important to emphasize that this was not a close case. The State's case against Defendant was overwhelmingly strong. Whether or not Defendant testified there appeared to be little likelihood that he could avoid conviction. Defendant's fingerprint was on the duct tape used to bind the victim. The victim's account of the kidnapping and rape was corroborated by the police. Moreover, Defendant, himself, had made significant inconsistent statements to the police. These taped statements, containing various significant inconsistencies, were played to the jury during trial.

49. As stressed in Defendant's trial counsel's Affidavit in response to Defendant's Rule 61 motion, Defendant never admitted to having forced the victim into his car either to the police or to his own counsel. Defendant's trial counsel did not know that Defendant would completely change his position when testifying at trial. All of Defendant's prior assertions were that the meeting between him and the victim was a voluntary courtship ending in consensual bondage. It was not until Defendant was subject to cross-examination at trial that he, for the first time ever, admitted that the meeting was not voluntary and that, in fact, he abducted the victim and forced her into the car without her consent.[64]

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[63] *Id.*
[64] November 16, 2007 Trial Transcript, at * 63-67.

50. Had Defendant, at any time prior to taking the stand and testifying, indicted to counsel that he had, in fact, abducted the victim, even under the "fog of confusion of exactly which counts were still vibrant", counsel would have indicated as one of the "cons" that Defendant was going to admit that he kidnapped the victim.[65] That conversation never occurred, not because of the "fog of confusion" of the rape theory, but because of the complete "turnaround" of Defendant's position.[66]

51. Although trial counsel's claimed confusion as to the rape theory that the State was prosecuting was "not his brightest moment", it was collateral to the outcome of the litigation.[67]

52. As previously discussed, there are two prongs to the *Strickland* test. The first is that there must be a showing that counsel's conduct fell below a standard of reasonableness, and the second prong is there must be a finding of prejudice as a result of the deficient performance. We will assume that Defendant has met the first prong of the *Strickland* test and has established that his counsel's confusion as to the rape theory that the State was prosecuting fell below the standard of reasonableness. It is establishing the second prong, that Defendant falls short.

53. Prior to taking the stand, for all intents and purposes, whether the State was proceeding on a "rape while kidnapped" theory or a "rape with a deadly weapon" theory, to the defense it was essentially a distinction without a real difference. Defendant denied brandishing a weapon and he denied having kidnapped the victim. The discussion between counsel and client would have only changed in the collateral sense in that Defendant's counsel would have advised that the focus on the rape charge was whether

[65] *Id.*
[66] *Id.*
[67] *Id.*

the victim got into the car voluntarily rather than the focus being on the presence or absence of a weapon. Since the kidnapping charge was a separate and independent charge in the case, whether the victim got into the car voluntarily was already an issue in the case. In fact, the possession of a deadly weapon during the commission of a felony was also a separate and independent charge in the case. Both issues- whether Defendant brandished a gun, and whether Defendant forced the victim into the car, were issues in the case irrespective of the rape theory that the State was proceeding on.

54. While the defendant would have received "different counseling" from counsel depending on the theory of the rape charges being pursued, since both the brandishment of the weapon and the abduction of the victim were denied, the decision as to whether or not to testify would not be affected irrespective of the theory. The State's case against the defendant was "awesomely formidable". Defendant's trial counsel believed that Defendant's only chance to avoid a certain conviction was to take the stand and come across as someone who was honest and offer testimony consistent with what he had previously indicated to counsel.[68] As an aside, even had he achieved these goals, in light of the strength of the State's case, it appears that in all likelihood Defendant was still facing a near certain conviction whether or not he testified.

55. Defendant's counsel never advised Defendant whether or not to testify. Defendant's counsel weighed the pros and cons of testifying and left the decision to Defendant. Irrespective of the rape theory that the State was proceeding on, the pros and cons would have remained the same if Defendant's testimony was consistent with what he had previously indicated to counsel.

[68] Superior Court Docket No. 96- Affidavit of Joseph A. Hurley

56. It was the change in Defendant's testimony, his admission on the stand of having abducted the victim and having forced her into the car, that may have tipped the scales and changed the decision as to whether Defendant should testify. Defendant's counsel was not aware, and did not know, that Defendant would make such an admission on the stand. Indeed, Defendant, for whatever his reasons, did a "180" on the stand, and that was not because of any lack of information resulting from deficient advice, but came from within.[69] Had Defendant's counsel been forewarned about Defendant's change in testimony, Defendant may have been counseled differently. Because Defendant's counsel was not forewarned, his advices and recommendations would not have differed no matter which of the rape theories the State was prosecuting.

57. Defendant's counsel's representation of Defendant did not result in prejudice to Defendant. It was not lack of information resulting from deficient advice that resulted in prejudice to Defendant. Defendant has failed to satisfy the second prong of the *Strickland* test and his Rule 61 motion must therefore be denied.

58. During the colloquy between the Court and Defendant, the Superior Court cautioned the Defendant: "So, if you are convicted, you understand that there's not going to be a lot of sympathy from the Court if you say, oh, I never should have taken the stand? I mean, this is your time to make that decision. I don't expect to be getting letters from you saying, oh, this is Mr. Hurley's fault, or this is my fault, or this is the Court's fault, this rests entirely on you?"[70] Defendant responded that he understood and that he wanted to testify.[71]

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[69] *Id.*
[70] November 16, 2007 Trial Transcript, at * 52.
[71] *Id.*

59. Defendant alone made the decision to testify. Given his testimony, the Court can see why he wishes he never took the stand. In light of the State's case, it appears that Defendant was facing a certain conviction whether or not he testified. Be that as it may, the prejudice that the Defendant may have suffered from taking the stand was due to his own making and not from deficient advice of counsel.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

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Commissioner Lynne M. Parker

oc: Prothonotary
cc: Joseph A. Hurley, Esquire