

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2020 JAN 15 AM 11:50

United States District Court
of Vermont

JANET JENKINS

v

KENNETH L. MILLER et al.

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Case No. : 2:12-CV-184

CLERK

BY KAW
DEPUTY CLERK

MOTION TO STAY PROCEEDINGS AND EXTENSION OF
TIME TO SECURE SUCCESSOR COUNSEL

The petitioner is a pro-se litigant and as such, "Pro-se pleadings are to be liberally construed , and must be held to less stringent standards than formal pleadings drafted by lawyers.", "and to raise the strongest arguments that they suggest.", Erickson v. Pardus, (S. Ct. 2007) quoting Estelle v. Gamble, (S. Ct. 1976); Haines v. Kerner, (S. Ct. 1972), Mcpherson v. Coombe, (2nd Cir. 1999), Williams v. Kullman, (2nd Cir. 1983).

STATEMENT

The petitioner would pray that this Most Honorable Court take the following facts into consideration and grant the requested relief for an extension of time to obtain new counsel.

STATEMENT OF FACTS

Petitioner Philip Zodhates was convicted of Conspiracy to International Parental Kidnapping 18 U.S.C. §1204. He was sentenced on March 22, 2017 by the Honorable Judge Richard J. Arcara in the United States District Court Western District of New York for a total of (36) thirty-six months and one

year of supervised release. The above referenced civil matter was filed by Janet Jenkins against petitioner on October 12, 2012, in the United States District Court of Vermont, honorable judge William K. Sessions Presiding.

ARGUMENT

Now comes petitioner Philip Zoghiates, Response Unlimited Inc., and Victoria Hyden, hereinafter "petitioner" are filing the above styled motion for extension of time to adequately find and retain new counsel. Due to the withdrawal of petitioner Philip Zoghiates Counsel Mr. Robert Hemley, without giving petitioner any advanced notice that he had made the decision to do so. Petitioner is requesting that this Most Honorable Court grant him the time to locate new counsel in this case. Petitioner has filed a §2255 Motion to Vacate or Correct Sentence in the District Court of the Western District of New York.¹ And in this filing he has alleged that his criminal trial and civil attorney Mr. Hemley rendered ineffective assistance of counsel. See attachment 1. And Attorney Hemley claims that due to this filing, he's motioned the Court for withdrawal. Even though he was in discussions with petitioner to remain as Counsel of Record in the civil case.² And led petitioner to believe he would do so by initiating the idea to have petitioner sign a No-Lawsuit-Disclosure-Agreement not to file civil action against him. To which petitioner did indeed sign. Petitioner filed his §2255 motion stating that attorney

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1. Where the case and its parties are at their final briefing stage before the Court renders its final decision. Unless the Court orders an evidentiary hearing for the purpose of producing additional information and/or evidence.
 2. Only if the Court deems it necessary petitioner has emails and letters pertaining to these discussions.

Hemley provided deficient performance that was prejudicial to him at the criminal proceedings. For the failure to make petitioner aware that there was an affirmative defense built into the statute of the charged offense. Which is the very defense petitioner, unaware of the the statute, was asking counsel to raise pertaining to the abuse of both the mother and her daughter at the trial. Thus attorney Hemley withdrew without petitioner's consent, and at a time that due to the petitioner's confinement, did so knowing that the petitioner is severely limited in his ability to obtain successor counsel. Thereby, because of this sudden and unannounced withdrawal, it will be prejudicial to petitioner for the proceedings to continue. Thus petitioner is asking the Court for counsel to remain as Counsel of Record, until new counsel makes their appearance in this case. "Withdrawal denied until new counsel made appearance.", Cola v. Coca-Cola, (U.S. Dist. Lexiz 88209)(1st Cir. May 23, 2019). Or as an alternative, petitioner requests that the instant motion for stay and extension of the time to secure replacement counsel until March 31, 2020 be granted. Petitioner is requesting for this extension and stay to felicitate to locate, interview, and retain a new legal team. And due to this being a complex civil case which dates back 8 years to 2012. And in addition due to petitioner being incarcerated, he is at a distinct disadvantage that makes it more difficult than other replacement of counsel cases. Thereby needing adequate time to search and retain new counsel. And in addition to this for preparation and readiness for trial. Also attorney Hemley suggested in his withdrawal that petitioner Mr. Zodhiates conduct a phone conference to discuss "the details" pertaining to the attorney client privilege. The details have been explained in Attachment 1. While petitioner Zodhiates welcomes any open dialog concerning this matter with the Court, and especially an evidentiary hearing. He believes it would only be appropriate

that he is represented by counsel for any such inquiry.

If this most Honorable Court would agree, any inquiry is unnecessary for what the petitioner is requesting. And subsequently will be deemed moot once new counsel makes their appearance.

CONCLUSION

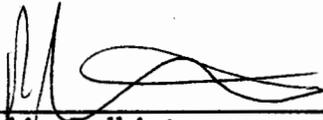
In conclusion, petitioner requests the March 31, 2020 date, which is adequate time to locate and retain replacement counsel and to be prepared and ready for trial. Given the complexities of this case this is sufficient and reasonable as to the allotment of time to complete this task. Without amassing any further undue stress and the uncertainty that attorney Hemley produced by his unannounced, abrupt, and unexpected withdrawal. And petitioner asks this Most Honorable Court to take these facts and the facts mentioned in Attachment 1 of this motion into consideration.

Sincerely and Respectfully Submitted,


Philip Zornates #18649-084

CERTIFICATE OF SERVICE

I, Philip Zodhiates, certify that I have mailed a copy of the attached motion to Judge William K. Sessions, U.S. District Court P.O. Box 998 Brattleboro, VT 05301. By placing it in the Ashland, KY Facility Inmate Mailing System on this the 9th day of January, 2020.



Philip Zodhiates, pro-se #18649-084
Federal Correctional Institution Ashland
P.O. Box 6001
Ashland, KY 41105

STATEMENT OF FACTS

Petitioner Philip Zodhiates was convicted of Conspiracy to International Parental Kidnapping 18 U.S.C. §371 and 18 U.S.C. §1204. He was sentenced on March 22, 2017 by the Honorable Judge Richard J. Arcara in the United States District Court Western District of New York for a total of (36) thirty-six months and one year of supervised release.

ARGUMENTS

Now comes Petitioner Philip Zodhiates hereinafter "Petitioner" pro-se and pursuant to Title 28 U.S.C. §2255(f)(1). Section (f)(1) of 2255 allows a convicted prisoner one year from the time his conviction becomes final to file for relief if his conviction was obtained in violation of the United States Constitution or the laws of the United States. In this case, Petitioner contends that his convictions were obtained in violation of the Sixth Amendment's prohibition against ineffective assistance of counsel. Herein Petitioner will demonstrate error which can be attributed to his counsel throughout the proceedings. After this demonstration, this Honorable Court will be asked to vacate the convictions and allow Petitioner the opportunity to have a trial with effective assistance from counsel. Petitioner is filing this supplemental motion to make the Court aware of additional factual information which was not previously presented and known to the Court in the initial motion. Frd. R. Civ. P. 15d. Dorsey v. Kelly, (2nd Cir. 1997) ("Petitioner adequately raised factual basis for ineffective assistance of counsel claim in pro-se supplemental brief.") Johnson v. Bryco Arms, (EDNY 2004) ("Amended complaint simply advanced additional details and it did not

include new claims or any other information from original complaint.") Capitol Records Inc v. Mp3tunes LLC, (SD NY 2009) ("Court had discretion and authority under Fed. R. Civ. P. 15. and plaintiff presented more testimony that if true, showed activities giving rise to suit.") Petitioner Mr. Zodiates files a 2255 motion with the Court claiming his counsel provided ineffective assistance in failing to put the Jury and the Court on notice of the affirmative defense adjacent with the charged offense. And also failing to put forth this defense as requested by Petitioner at trial. As previously stated in the original motion, Petitioner instructed defense counsel to argue at trial that a mother with her child were trying to get away from an abusive situation of sexual, physical, mental, and emotional abuse. Of both the mother and daughter. And this is what the Petitioner was told and therefore what he believed. United States v. McClennon, (10th Cir. 1993) (If Petitioner was misguided in seeking to prevent further harm from being committed does not matter, so long as there was a reasonable basis for what the Petitioner believed, and he acted reasonably under the circumstances as they existed at the time.) And Petitioner wanted counsel to inject this information as a defense into the trial. In the form of available evidence, calling witnesses, witness statements, expert testimony, etc. And specifically producing CPS Child Protective Services testimony and a pattern of abuse being investigated of other victims of Janet Jenkins testifying and counsel failed to do these things. United States v. Caro, (W.D. Va. 2015) citing Wiggins, 539 U.S. at 522-23 (2003) ("It is well settled that defense counsel must conduct a reasonable investigation and failure to present evidence cannot be justified as a tactical decision.") And long after trial had commenced unbeknown to Petitioner, the very defense he had asked his trial counsel to raise was attached to the charged statute as an affirmative defense. Also counsel even

knew that this defense was built into the statute before trial and still failed to raise it as insisted by Petitioner. Prior to trial defense counsel filed a pre-trial motion with this Court, See Docket No. 94 and Court order dated September 14, 2016. and counsel argued the very same statute, but only made mention to, 1204 a, "intent", pertaining to parental rights. And completely ignored the statute 1204(c)(2), affirmative defense that Petitioner unknowingly was requesting counsel to raise, that counsel knew or should have known about. And trial counsel should be held by this Court as ineffective for not doing so. The sixth Amendment of the United States Constitution guarantees the right to effective assistance of counsel in criminal prosecutions. See Padilla v. Kentucky, 559 U.S. 356, 364 (2010). Thus, where counsel is shown to have rendered ineffective assistance, an error of constitutional magnitude has occurred. In order to gain reversal of a conviction based on ineffective assistance of counsel, a convicted prisoner must show that, (1) his counsel's performance fell below an objective standard of reasonableness and (2) counsel's substandard performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668 (1984). When it comes to the performance prong of the test, counsel's performance is measured against prevailing professional norms. That is, the Court must determine whether the complained of acts or omissions of counsel comport with professional norms for attorneys. In regards to the prejudice prong, the burden is met by showing a reasonable probability that the outcome of the proceeding would have been different but for counsel's complained about conduct. A reasonable probability is a probability sufficient to undermine confidence in the outcome. And counsel provided substandard performance for it was not reasonable for counsel not to raise the affirmative defense in this case that was built into the statute Petitioner was charged with. Especially since counsel filed a pre-

trial motion and knew or should have known this was in the statute. And the Petitioner requested counsel to raise this very defense at the trial. And prejudice is clear in this case. Had trial counsel raised the provision in the statute that provides a defense to the charge Petitioner was charged with, to the Jury and the Court. That he thought he was helping a mother and her child in an abusive situation that; "Was fleeing and incidence of pattern of domestic violence", 18 U.S.C. §1204(c)(2). there is a reasonable probability that the Jury would have agreed with the Petitioner Mr. Zodhiates and the defense built into the statute. which would have resulted in an acquittal and found him not guilty of the charged offense. In addition, after Petitioner filed his 2255 motion alleging ineffective assistance of counsel. Trial counsel Robert Hemley contacted and requested the Petitioner Mr. Philip Zodhiates sign a No-Lawsuit-Disclosure-Agreement. To hold trial counsel harmless in the event Petitioner sought to seek and file monetary damages in a Civil Action Lawsuit. For failing to raise the obvious affirmative defense that counsel knew about, and Petitioner unknowingly instructed counsel to raise at trial. And in addition Petitioner sent attorney Mr. Hemley a letter and an affidavit asking him to sign. See Attachment "A" and "B". To which attorney Mr. Hemley refuse to sign, citing invoking attorney client privilege and needing an order from the Court. See Attachment "C". And Petitioner is puzzled as to why his refusal to sign the affidavit, when counsel know everything in it is truthful. If it were not true counsel would have denied it outright, but Petitioner claims have gone unrebutted. The Petitioner asks this Most Honorable Court for his conviction to be vacated or order a new trial. Or at the very least to hold an evidentiary hearing. And Petitioner may be entitled to an evidentiary hearing. Section 2255 provides that a Court shall hold an evidentiary hearing "unless the motion and the files and records

of the case conclusively show that the prisoner is entitled to no relief." To determine whether a hearing is necessary, the Court "must review the answer, any transcripts and records of prior proceedings, and any [additional materials submitted by the parties]" Rule 8(c). A hearing is generally warranted only where the Petitioner establishes a plausible claim. See Puglisi v. United States, (2nd Cir. 2009). The Second circuit has further described the standard for holding a §2255 evidentiary hearing as the following: In ruling on a motion under §2255, the District Court is required to hold a hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. §2255; See. e.g., Pham v. United States, (2nd Cir. 2003) (§2255 does not permit summary dismissals of motions that present facially valid claims). And Petitioner in this case has made a plausible and factual claim, that would grant him relief. As the government mentioned and Petitioner agrees, that an evidentiary hearing may be necessary and appropriate. And additionally Petitioner would like the Court to take into consideration the LY case. And is on point in this case which stated; "The Court was convinced that a manifest injustice would result from letting a guilty verdict stand. 18 U.S.C. 1204 affirmative defense was not available to defendant and the defendant was sufficiently prejudiced to warrant a new trial." United States v. Huong,Thi,Kim,Ly, (EDNY 7-22-2011) **AFFIRMED** 2nd Cir. 1-3-2013. And the Court further stated; "this definition implies that, for example, a husband can create fear of physical harm against his wife without laying a hand on her, perhaps through verbal threats, non-physical gestures, or psychological means. Defendant's proposed definition of emotional, sexual, or physical violence encompassed the broad definition of domestic violence and, therefore, was legally correct. The question is whether defendant was prejudiced by the failure to include the broad

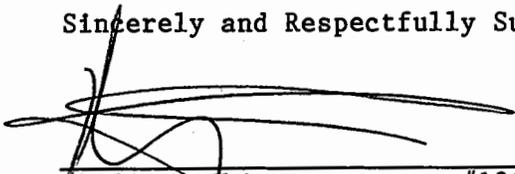
definition in the supplemental instruction to the Jury. The Court is convinced that the defendant was. Domestic violence is an essential element of the §1204(c)(2) affirmative defense. The supplemental instruction would have advised the Jury that domestic violence involves more than physical injury, including emotional and sexual violence." The defendant in the Ly case was prejudiced because the affirmative defense was not conveyed to the Jury. And in the present case, Petitioner was similarly prejudiced because his trial counsel failed to do the same. That is information the Jury of this defense, and that this defense is attached to the charge offense, as an affirmative defense. Wherefore Petitioner sentence and conviction should be set aside, and a new trial ordered. Also included with this motion is an affidavit from Petitioner. See Attachment "D". Kyles 514 U.S. at 435, ("The question is not whether the defendant would have more likely than not have received a different verdict with the [undisclosed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.")

CONCLUSION

In conclusion, Petitioner presented enough factual evidence to prove counsel's actions were not reasonable and fell below professional norms and thus performed deficiently. And the obvious prejudice that resulted is the unfairness of the Jury's ignorance that the Petitioner requested trial counsel to advance the very defense that was built into the statute Petitioner was charged with as an affirmative defense. Which would have likely resulted in an acquittal. And as a result in ineffective assistance of counsel. And

Petitioner asks this Most Honorable Court to grant the requested relief of vacating the conviction and ordering a new trial in the interest of fairness and justice.

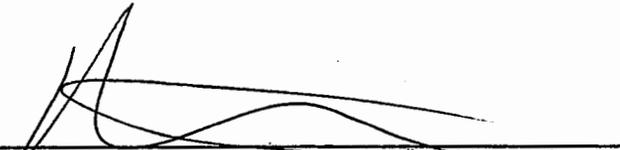
Sincerely and Respectfully Submitted,



Philip Zochiates, pro-se #18649-084

CERTIFICATE OF SERVICE

I, Philip Zodhiates, certify that I have mailed a copy of the attached motion to Judge Richard J. Arcara, 2 Niagara Square, Buffalo, NY 14202. And to Paul J. Van de Graaf A.U.S.A, P.O. Box 570, Burlington, VT 05402. By placing it in the Ashland Kentucky Facility Inmate Mailing System on this the 26 day of November, 2019.



Philip Zodhiates, pro-se #18649-084
FCI Ashland
Federal Correctional Institution
P.O. Box 6001
Ashland, KY 41105

Attachment A/A

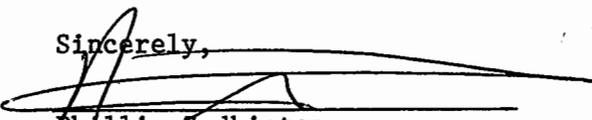
Attorney Robert Hemley
76 Saint Paul St.
7th floor
Burlington, VT 05401
United States

10-30-2019

Dear Mr. Hemley,

I am sending you this letter pertaining to the attached affidavit as it will be beneficial to the current criminal matter. And there is nothing that exposes you to any liability. As you are aware, I've already signed a No-Lawsuit-Disclosure with you that also assures of this fact. This affidavit is only to disclose the true facts which have taken place that would be beneficial to the criminal case. So if you would, please sign and mail it back to me as soon as you possibly can. Because as you already know, the Court can rule on the case at any time. I look forward to your expedited response within the next couple of days concerning this important matter. Thank you.

Sincerely,



Phillip Zodiates
FCI Ashland
Federal Correctional Institution
P.O. Box 6001
Ashland, KY 41105

Attachment 11/15

(5) Mr. Zodiates did insist to me that he believed the allegedly reported claims of sexual, physical, mental, and emotional abuse of both Isabella and Lisa Miller done by Janet Jenkins. Provided the best defense against Mr. Zodiates being guilty of a crime. I, without the intent to purposely do so, having reflected on matters, unfortunately told Mr. Zodiates that using this defense would show motive, and therefore should not be used. And I never advised that this was an affirmative defense likely to result in acquittal.

FURTHER AFFIANT SAYETH NOT.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 26, 2019.

Attorney Robert Hemley
76 Saint Paul St.
7th Floor
Burlington, VT 05401
United States

Attachment "B"

NOTICE AND ACKNOWLEDGEMENT

Petitioner acknowledges the fact that this affidavit is not signed by the affiant. This is the case because counsel lead petitioner to believe he would acknowledge the truthfulness of the claims made by signing the affidavit. However counsel refused to do so. Nevertheless, the claims are true and correct.

Attachment 11/2/19

gravel &
shea | ATTORNEYS AT LAW

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November 11, 2019

ATTORNEY-CLIENT COMMUNICATION
PRIVILEGED AND CONFIDENTIAL

Philip Zodhiates 18649-084
FCI Ashland
Federal Correctional Institution
P.O. Box 6001
Ashland, KY 41105

Re: Your Letter Dated October 30, 2019

Dear Philip:

I am in receipt of your letter dated October 30, 2019, which we received on November 5, 2019. As I am sure you know, throughout your engagement of our firm, we have scrupulously protected the attorney-client privilege. For that reason, among others, we have not offered our view of your section 2255 petition, and do not plan to do so unless ordered by the Court. I do not feel it would be appropriate to detail here the various reasons why I am unable to sign the affidavit you have presented.

I hope things are going as well as they can be under the circumstances.

Very truly yours,

GRAVEL & SHEA PC


Robert B. Hemley

RBH:lbb

Attachment D

(4) Attorney Hemley did not discuss the affirmative defense at any time before or during trial with me.

(5) I did insist to Attorney Hemley that the allegedly reported claims of sexual, physical, mental, and emotional abuse of both Isabella and Lisa Miller done by Janet Jenkins. Provided the best defense against me being guilty of a crime. And Attorney Hemley told me that this defense would show motive, and therefore should not be used. And I was never advised that this was an affirmative defense likely to result in acquittal.

(6) I also insisted that a Private Investigator be used as I understood there has been a pattern of abuse with other alleged victims of Janet Jenkins. And her day-care may have been forceable closed because of it. And Attorney Hemley failed to investigate.

FURTHER AFFIANT SAYETH NOT.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 26, 2019.



Philip Zodiates, pro se #18649-084
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P.O. Box 6001
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