

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Berkeley County

William Jeffrey Young, Circuit Court Judge

BRIAN M. CURTIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001319

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

ISSUE PRESENTED

Trial counsel erred with respect to his delay in scheduling an expert to conduct a psychosexual evaluation of petitioner after the plea proceeding rather than before the plea proceeding, especially since the expert's report was unfavorable to the mitigation case presented at the sentencing hearing where petitioner requested a probation sentence instead of jail, because had the evaluation occurred before the plea, then counsel would have had sufficient time to secure a second expert's opinion, which more likely than not would have yielded a more favorable report and ultimately a more favorable case in mitigation at the sentencing hearing.

STATEMENT

Petitioner Brian M. Curtis pled guilty to second degree criminal sexual conduct with a minor during the April, 2012 term of the Berkeley County General Sessions Court before Judge Roger Young, Senior. App. 1 – 16. Petitioner was sentenced to imprisonment for a period of ten years at his sentencing proceeding held on August 16, 2012, before Judge Young. App. 17 – 36. Christopher P. Biering represented petitioner at the plea proceeding and sentencing hearing, and Assistant Solicitor Anne Williams appeared on behalf of the state at both sessions as well. Petitioner did not enjoy the benefit of a direct appeal in his case.

On August 15, 2013, petitioner filed a PCR application with the Berkeley County Office of the Clerk of Court. App. 39 – 45. The respondent filed a Return dated December 29, 2014, requesting that a hearing be held in the case. App. 46 – 49.

A PCR hearing was convened on April 20, 2015, at the Berkeley County Courthouse before Judge Jeffrey W. Young. App. 51 – 92. Petitioner was present at the hearing and represented by Rodney D. Davis, and Assistant Attorney General Joshua L. Thomas appeared on behalf of the state. On May 12, 2015, Judge Young signed an Order of Dismissal in the case therein denying petitioner's allegations of ineffective assistance of counsel in the case. App. 113 – 118.

Petitioner appealed Judge Young's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred with respect to his delay in scheduling an expert to conduct a psychosexual evaluation of petitioner after the plea proceeding rather than before the plea proceeding, especially since the expert's report was unfavorable to the mitigation case presented at the sentencing hearing where petitioner requested a probation sentence instead of jail, because had the evaluation occurred before the plea, then counsel would have had sufficient time to secure a second expert's opinion, which more likely than not would have yielded a more favorable report and ultimately a more favorable case in mitigation at the sentencing hearing.

During the plea proceeding, petitioner admitted to committing sexual battery upon a female who was fourteen years old during October 2011. Petitioner pled guilty to second degree criminal sexual conduct with a minor on April 4, 2012, per a plea agreement where he would receive no more than ten years imprisonment in exchange for his guilty plea in the case. App. 8, l. 21 – App. 11, l. 19; App. 12, l. 12 – 13.

The solicitor advised the plea judge of the facts of the case at the plea proceeding. Apparently, petitioner met the minor female on-line while pretending to be sixteen years of age, and subsequently their conversations turned to “sexual things,” and that petitioner later met with this female and “engaged in several different types of sexual battery,” which included oral sex between the two of them. App. 13, lines 1 – 20. Petitioner confessed to committing these acts. App. 14, lines 10 – 11.

After the plea proceeding, petitioner was evaluated by Dr. Burke, who was a psychosexual counselor, for the purpose of presenting a case in mitigation at the sentencing hearing in support of petitioner's request for a probation sentence instead of jail so that he could remain in society while undergoing intense counseling.

Petitioner's sentencing hearing was held on August 16, 2012. Petitioner's wife testified at the sentencing hearing. App. 25, l. 4 – p. 26, l. 19. Dr. Burke did not appear at the sentencing hearing to testify. Instead, Dr. Burke's reported findings were submitted to the sentencing judge for review. Petitioner addressed the sentencing judge and apprised him of the benefits of his counseling and treatment sessions with Dr. Burke. App. 32, l. 1 – p. 35, l. 5. Trial counsel requested a probation sentence, but the sentencing judge handed down a prison term of ten years with "no probation." App. 36, lines 14 – 17.

During the PCR hearing, trial counsel testified that petitioner's sentencing was deferred pending a psychosexual evaluation conducted by Dr. Burke in support of a "probationary sentence" request made at the sentencing hearing based on what was hoped to have been a favorable report from Dr. Burke regarding petitioner's ability to remain in society under intense counseling as opposed to serving an active prison sentence. Counsel testified, however, that Dr. Burke was not present to testify at the sentencing hearing because his report contained in effect numerous negative findings that would have "opened the door to less than favorable testimony about [petitioner's psychosexual evaluation had he testified] at the sentencing hearing." App. 60, l. 18 – p. 61, l. 3; App. 61, l. 11 – 19; App. 62, l. 23 – p. 63, l. 10; App. 69, l. 1 – 2; App. 80, l. 8 – 11. For example, the report revealed that petitioner had met older females on-line during his marriage and that as time passed, he contacted younger females on-line. App. 64, l. 15 – App. 65, l. 23. Also, petitioner scored high with respect to a risk group assessment for this type of internet use involving contact with minors. App. 66, l. 15 – p. 67, l. 7. Additionally, petitioner scored in such a manner that showed an interest in prepubescent girls. App. 67, l. 12 – P. 68, l. 8. In other words, Dr. Burke's report was problematic, unfavorable, and carried the type of negative weight that would not support petitioner's request for a probation sentence. App. 70, lines 15 – 22; App. 82, lines 3 – 20.

Petitioner testified during the PCR hearing and explained that his initial intake assessment with Dr. Burke occurred on March 22, 2012, which was on twelve days prior to his April 4, 2012 guilty plea proceeding. App. 86, l. 17 – p. 87, l. 19. Petitioner stated his PCR case/claim as follows:

My intentions were not to go to trial and my intentions were to – to hire a lawyer to help me most successfully mitigate my actions and to minimize the amount of time served so that I could get the help that I needed through counseling. App. 91, lines 6-10.

At the close of the PCR hearing, the PCR judge issued an oral ruling concluding that he “did not find that [counsel’s] performance was deficient.” App. 92, lines 2 – 6. In the subsequent written Order of Dismissal issued in the case, the PCR judge ruled that trial counsel’s strategy of employing Dr. Burke to evaluate petitioner and defer sentencing until the evaluation was complete in order to prove that petitioner could remain in the community without risk to anyone and pursue counseling in support of the request for a probation sentence instead of incarceration constituted an objectively reasonable strategy to achieve this sentencing goal and that as a result, counsel was not ineffective in his representation of petitioner.

Counsel’s failure to conduct reasonable investigations into mitigating circumstances would constitute ineffective assistance of counsel, particularly with respect to the duty to obtain expert witnesses for this purpose. See Wiggins v. Smith, 539 U.S. 510 (2003); William v. Taylor, 529 U.S. 362 (2000); Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2009). And although the cases cited above refer to death penalty cases where the issue of whether sufficient mitigation leads were followed prior to sentencing hearings; nonetheless, questions surrounding the presentation of sufficient mitigation and securing the proper experts are relevant to the instant claim in petitioner’s case also. In Council, the Court held that trial counsel’s failure to adequately investigate and present mental illness and competency issues as

strong mitigating evidence for the defendant was deemed ineffective assistance of counsel in that case. In Nance, the Court found ineffective assistance of counsel where counsel's mitigation case at sentencing lasted only seven minutes and where counsel failed to provide the jury with any insight concerning petitioner's mental illness.

Furthermore, even though this Court has held that a decision by counsel regarding the calling of experts will not be deemed ineffective if there was a legitimate trial strategy in existence; nevertheless, there must be a valid reason for the strategy. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

In the case at bar, trial counsel erred in employing the services of a psychosexual analysis expert, who presented unfavorable results regarding petitioner's placement in the community versus jail, after the plea rather than before the plea because there was no time left to secure a second psychosexual expert to evaluate petitioner and offer a second opinion that might have been more favorable prior to the sentencing hearing. Had counsel secured his expert **and the report** before the guilty plea proceeding held on April 4, 2012, then there would have been sufficient time to obtain the expert services of a second doctor to give a second opinion and more likely a favorable report regarding petitioner's ability to remain in society with counseling (rather than be jailed) and present a more favorable mitigation case in support of petitioner's probation sentencing request at the at the August 16, 2012 sentencing hearing. Again, note that the incidents occurred in October 2011, and that petitioner's initial contact with Dr. Burke occurred on March 22, 2012, but ceased until after the plea proceeding that was held twelve days later on April 4, 2012.

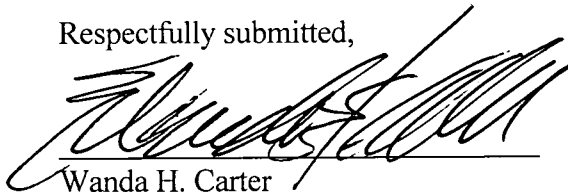
Thus, trial counsel's delay in seeking one expert to evaluate petitioner after the plea proceeding was not a reasonable or valid trial strategy in light of the goal of presenting the best case

in mitigation in support of the request for a probation sentence at the subsequent sentencing hearing because there was no time to secure a second expert to render a second opinion that was likely to have been more favorable to submit to the sentencing judge. But for counsel's error in failing to take early action by obtaining an expert in advance of the plea proceeding, a reasonable probability exists that there would have been sufficient time left to obtain a second expert to possibly offer a second psychosexual evaluation that might have been more favorable in order to present the best case in mitigation in support of the probation sentencing request made at the sentencing hearing. But for counsel's error in this regard, i.e. the failure to secure a second and more favorable evaluation due to time constraints, a reasonable probability exists that a better mitigation case could have been made and the outcome of petitioner's sentence would have been different. Counsel's poor trial strategy with regard to the issue outlined above constituted deficient legal representation in a criminal case involving a guilty plea in violation of the Sixth Amendment's guarantee of a defendant's right to competent representation in a criminal case. See also See Hill v. Lockhart, 474 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this petition be granted and full briefing allowed on the above raised issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of January, 2016.

STATE OF SOUTH CAROLINA

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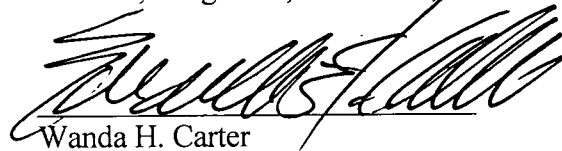
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE


I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Brian M. Curtis #352072, at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 20th day of January, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of January, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.