

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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ORIGINAL

Certiorari to Williamsburg County

Honorable George C. James, Jr., Circuit Court Judge

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DENNIS WRIGHT,

RECEIVED

OCT 24 2017

PETITIONER

S.C. SUPREME COURT

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001243

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PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE

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**ISSUE PRESENTED**

1.

Did the PCR court err in not finding trial counsel ineffective for not cross examining the victim when Petitioner Wright's primary defense was that the elderly victim suffered from dementia and had problems with memory and identity of people at times?

2.

Did the PCR court err in not finding trial counsel ineffective for not investigating the victim's mental health when Petitioner's main defense was that the victim suffered from dementia?

## STATEMENT

In July 2009, the Williamsburg County Grand Jury indicted Dennis Wright for criminal sexual conduct (CSC) first degree, and abuse of a vulnerable adult. App. 561 – App. 566. Wright was living with an elderly woman for whom he was serving as her caretaker. He allegedly sexually assaulted her one night when they were alone. He was also charged with abuse of a vulnerable adult from this same incident. App. 34, ll. 12 – App. 35, ll. 6.

On October 14, 2010, Petitioner Wright proceeded to trial before the Honorable Clifton Newman and a jury. Wright was represented by Charles David Barr, and the state was represented by Kimberly Barr. App. 1. The jury returned verdicts of guilty as indicted on both charges. Judge Newman sentenced Petitioner Wright to twenty years for the CSC charge and five years for the abuse of a vulnerable adult with both to run concurrent. App. 387, ll. 2-14.

Petitioner Wright filed a notice of appeal. The South Carolina Court of Appeals affirmed Wright's convictions and sentences on July 11, 2010. State v. Wright, Op. No. 2012-UP-408 (Ct. App. filed July 11, 2012). App. 477.

On July 27, 2012, Petitioner Wright filed a post-conviction relief (PCR) application. App. 389 – App. 394. The state filed a return on January 15, 2013. App. 401. An evidentiary hearing was held April 13, 2015 before the Honorable George C. James, Jr. Wright was represented by Fulton Casey Dale Cornwell, and the state was represented by Daniel F. Gourley. App. 404.

At this first PCR hearing, Petitioner Wright testified that his trial counsel was ineffective failing to investigate his case. Wright stated that counsel did not interview several witnesses that Wright provided to him. App. 430, ll. 1 – App. 431, ll. 25. Trial counsel did not investigate the

possible DNA issue, and did not investigate the victim's mental health history of possible dementia. App. 412, ll. 1 – App. 414, ll. 19; App. 415, ll. 10 – App. 416, ll. 19; App. 478.

Petitioner also claimed that trial counsel did not cross examine the victim during the trial, and did not object to the state's closing argument when the solicitor argued religious comments. App. 427, ll. 2 – App. 428, ll. 3; App. 478.

Trial counsel testified at the PCR hearing that Petitioner Wright gave a statement to police where Petitioner said that he “may have penetrated the victim.” Trial counsel admitted that Wright had given him the names of several witnesses but none of them would have been helpful at trial. Trial counsel then explained that DNA was critical because there was no DNA evidence found in the case. The doctor who saw the victim said no rape kit was conducted because there was a time lapse between the incident and the report. Trial counsel felt that the absence of DNA was helpful to Petitioner Wright. App. 439, ll. 11-25; App. 441, ll. 1 -25.

Trial counsel admitted that he did not cross examine the victim because he believed that her direct testimony was very powerful and persuasive with no inconsistencies with her written statement. App. 480; App. 440, ll. 1-25.

On June 26, 2015, Judge James, the PCR judge filed an order denying Petitioner wright's PCR application and dismissing it with prejudice. App. 476 – App. 488. The PCR judge found trial counsel's testimony credible and Petitioner Wright's testimony not credible. App. 480. The judge also found Petitioner's claim that trial counsel was ineffective for not calling the witnesses that Petitioner provided meritless as none of the witnesses were called to testify at the PCR hearing. Therefore it was “mere speculation” as to what the witnesses would have said. The judge ruled that Petitioner failed to show any prejudice from trial counsel's performance. App. 483.

The judge wrote that Petitioner did not prove that trial counsel was ineffective for not investigating the DNA issue since no DNA was recovered from the incident. The judge found trial counsel's reason, that he did not want to find any DNA since Petitioner said he might have penetrated the victim, to be valid. App. 485. The judge also found that Petitioner did not prove that trial counsel was ineffective for not investigating the possibility that the victim might have been suffering from dementia. The judge wrote that trial counsel called a witness, Gloria Hannah who knew the victim well, to testify about the victim's mental health. App. 487.

The PCR judge found Petitioner Wright's claim that trial counsel was ineffective for not cross examining the victim, as meritless because this was trial strategy on the part of trial counsel. The judge found trial counsel's reasons for not cross examining the victim as valid since trial counsel found her testimony to be very powerful. App. 483 – App. 484.

The judge also held that Petitioner did not prove that trial counsel was ineffective for failing to object to the solicitor's closing argument regarding comments concerning religion. The PCR judge found the solicitor's comments to not be objectionable as it was a valid argument regarding the credibility of the victim. App. 486.

The judge denied Petitioner Wright's PCR application and dismissed it with prejudice. App. 488.

On November 23, 2015, Petitioner Wright filed a *pro se* notice of appeal of the PCR judge, Judge James, order of dismissal. Because PCR counsel failed to prove that the notice of appeal was timely served, the Supreme Court dismissed the appeal on March 1, 2016. App. 489 – App. 490.

On July 1, 2016, Petitioner Wright filed a second PCR application. App. 491 – App. 540. The state filed a return and partial motion to dismiss on March 3, 2017. App. 542 – App. 547.

An evidentiary hearing was held on March 27, 2017, before the Honorable D. Craig Brown, for the sole issue of whether Petitioner Wright was entitled to an appellate review of his first PCR action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Petitioner Wright was represented by Lance S. Boozer, and the state was represented by Julie A. Coleman. App. 549.

At the PCR hearing, the state explained that Petitioner Wright tried to appeal the denial of his first PCR but it was filed *pro se*, and the Supreme Court dismissed it. In his second PCR application, Wright was asking for a belated appeal pursuant to Austin v. State. Then the state moved to dismiss all allegations “beyond the scope of an Austin Review.” App. 551, ll. 1 – App. 552, ll. 4. The state was willing to consent to the belated review of his first PCR. App. 552.

The PCR judge issued an order on April 7, 2017 granting Petitioner Wright an appeal of his first PCR pursuant to Austin. The judge denied the second PCR and dismissed it with prejudice. App. 555 – App. 558.

This petition for a writ of certiorari pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) is filed simultaneously with a petition for a writ of certiorari.

## ARGUMENT

### 1.

The PCR court erred in not finding trial counsel ineffective for not cross examining the elderly victim when Petitioner Wright's primary defense was that the elderly victim suffered from dementia and had problems with memory and identity of people at times.

At the trial of Petitioner Wright's, the 89 year old widow, with whom Petitioner lived, testified that one night, Petitioner called her into his room to rub his back. When she did, she claimed that he grabbed her and put his penis in her vagina and rectum. App. 44, ll. 6 – App. 55, ll. 24; App. 59, ll. 19 – App. 60, ll. 18. The incident was reported on February 22, 2009 but had occurred a few days earlier. App. 151, ll. 2 – 3; App. 562. Because more than 72 hours had passed, a rape kit was not done. App. 156, ll. 17 – App. 159, ll. 2.

Investigator Pamela Lail testified at trial that Petitioner Wright gave a lengthy statement to law enforcement about this incident. According to the investigator, Petitioner said that the victim came into his room and “jumped on top of him.” He tried to push her off. He allegedly said that the sex “may have happened.” App. 167, ll. 1 – App. 169, ll. 24.

At trial, Michael Mouzon, the grandson of the victim, stated on cross-examination that Petitioner Wright remained at his grandmother's house after the incident. Michael admitted that he allowed Wright to stay there because Michael did not know what was the truth about the incident because he was not there. He also admitted that he did not do “that much digging” to determine the truth. Therefore, he left Petitioner Wright at his grandmother's house with her. App. 82, ll. 12 – App. 84, ll. 23.

Edie Mae Brooks, the niece of the victim, testified for the defense at trial that her aunt would appear to be disoriented at times. Sometime she remembered things and sometimes she did not. App. 286, ll. 1 – App. 288, ll. 25.

Gloria Hannah testified for the defense at trial. She lived very near the elderly victim. Shortly after this incident, she went with Wright to the victim's house to get his clothes. When they arrived, Ms. Hannah observed the victim grab at Petitioner's penis area. Then she heard the victim tell Wright that he was not leaving. App. 298, ll. 13 – App. 302, ll. 23; App. 308, ll. 24 – App. 309, ll. 5.

Petitioner Wright testified at his PCR hearing that the victim, Ms. Mouzon, had a history of dementia since 2002. She also had a history of accusing other people of harming her which included an accusation against her grandson. App. 428, ll. 2 – App. 429, ll. 16. Wright said that the victim had put her grandson Michael through the same thing thinking he was her husband. App. 456, ll. 1-25. Petitioner testified that his trial counsel said at trial following the victim's testimony, that he had no questions for the victim, Ms. Mouzon. App. 427, ll. 7-25.

Petitioner also explained that his statement was “not played the correct way.” He said the statement was voluntarily given but was redacted. App. 432, ll. 11-23. Wright said the statement played was not an accurate reflection of what he said. He explained that two different machines were used to tape his statement. Then the two had to be pieced together and it was not accurate. He told his trial counsel who did nothing about it. App. 459, ll. 1-25.

At the PCR hearing April 13, 2015, PCR counsel explained to the court that one of the main issues was “whether or not the lady was in her right state of mind, coherent, or able to recall events fully.” Counsel said that was the main defense in the case, and trial counsel never cross examined the victim on that issue. App. 416, ll. 12-25.

At the PCR hearing, trial counsel testified that he did not cross examine the victim because her testimony was very “persuasive” and she had not contradicted her prior statement. Then he said that the state did not have a “whole lot of evidence” and the “lady’s testimony was the most powerful.” He admitted that was “their principal evidence.” App. 440, ll. 1 – App. 441, ll. 25.

In Miller v. State, 379 S.C. 108, 665 S.E.2d 596 ( 2008), the Supreme Court held that the defense counsel’s failure to cross-examine the witness regarding similar armed robberies allegedly committed by her and the defendant’s nephew was ineffective assistance warranting PCR relief because the defendant’s entire defense rested on mistaken identity and third-party guilt. The Court reversed the case and granted relief to Miller’s armed robbery conviction.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The PCR court erred in not finding trial counsel ineffective for failing to cross examine the victim. Trial counsel admitted that the victim's testimony was the state's primary evidence. This created more reason for counsel to cross-examine her in order to discredit her story regardless of how persuasive or powerful counsel thought her testimony was. Counsel could have used that opportunity to try to bring out her problems with memory. The victim's mental state was a primary defense and counsel fell below reasonably effective assistance of counsel. Counsel's performance fell below the range of competence and professional norms required in criminal cases.

Petitioner Wright was prejudiced by counsel's failure to cross examine the lady because if the jury had seen some lack of memory or evidence of dementia, there was a reasonable probability that the outcome would have been different.

## ARGUMENT

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The PCR court erred in not finding trial counsel ineffective for not investigating the victim's mental health when Petitioner's main defense was that the victim suffered from dementia.

At the PCR hearing, trial counsel admitted that he did not investigate the issue of whether the victim had dementia and how that affected her memory. He admitted that he did not talk to people in her family about her mental state. Trial counsel said that "the woman didn't appear to have any dementia to him." App. 451, ll. 4-24. He was not aware of any past allegations that the lady suffered from dementia. App. 452, ll. 1 -3.

In Walker v. State, 407 S.C. 400, 756S.E.2d 144 (2014), the Supreme Court held counsel has a duty to make reasonable investigations or to make reasonable decision that makes particular investigations unnecessary. In Walker's case, trial counsel did not interview potential alibi witnesses, and the Court held that failure to try to contact them was unreasonable.

This same analysis applies to Petitioner Wright's case where trial counsel did not talk to potential witnesses about the mental state of an 89 years old victim who was the primary evidence in the state's case.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

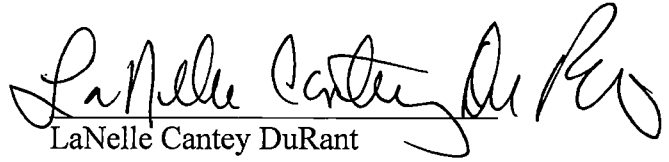
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A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In Ard v. Catoe, id. , the Supreme Court also held that a criminal defense attorney has a duty to investigate, but this duty was limited to reasonable investigation. However, for purposes of ineffective assistance of counsel, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

The PCR judge erred in not finding trial counsel ineffective for not investigating the mental health of the elderly victim. There was no evidence that trial counsel even conferred with an expert on dementia and this lady. He could have determine from an expert what questions he could ask the victim on cross-examination. Petitioner Wright was prejudiced by trial counsel ineffective performance as the victim's mental state and her memory were the main evidence against Petitioner and his main defense was that she had dementia.

**CONCLUSION**

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences reversed, and his case remanded for a new trial.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of October, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Williamsburg County

Honorable D. Craig Brown, Circuit Court Judge

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DENNIS WRIGHT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari pursuant to Austin v. State in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari pursuant to Austin v. State has been served on Dennis Wright, #343201, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 24th day of October, 2017.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 24th day of October, 2017.

Courtney Powers (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 2, 2027.