

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Charleston County  
Honorable Maite Murphy, Circuit Court Judge

---

JOHNNY TAMAR BROWN,

S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000738

---

PETITION FOR WRIT OF CERTIORARI

---

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

 ORIGINAL

RECEIVED

OCT 31 2018

**INDEX**

INDEX..... i

ISSUES PRESENTED.....1

STATEMENT.....2

ARGUMENT

    1. The PCR judge ruled properly in granting petitioner’s request  
    for a belated direct appeal in the case. ....3

    2. Trial counsel erred in failing to object to the state’s presentation  
    of PSANE nurse Katherine Fabrizio as an expert in sex cases, and  
    in failing to move for a mistrial when said nurse gave testimony  
    that bolstered the minor’s allegations and when the nurse gave  
    testimony that fell outside of the “time and place” parameters. ....4

CONCLUSION.....9

### **ISSUES PRESENTED**

1. The PCR judge ruled properly in granting petitioner's request for a belated direct appeal in the case.
2. Trial counsel erred in failing to object to the state's presentation of PSANE nurse Katherine Fabrizio as an expert in sex cases, and in failing to move for a mistrial when said nurse gave testimony that bolstered the minor's allegations and when the nurse gave testimony that fell outside of the "time and place" parameters.

## STATEMENT OF CASE

Petitioner Johnny Brown was found guilty of third degree criminal sexual conduct with a minor and two counts of first degree criminal sexual conduct with a minor per jury trial held during the April 2015 term of the Charleston County General Sessions Court before Judge Deadra L. Jefferson. Petitioner was sentenced to LWOP on both of the first degree criminal sexual conduct convictions and fifteen years (concurrent) on the remaining criminal sexual conduct conviction. App. 7-413. Charles Cochran represented petitioner at trial, and Debbie Herring-Lash appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal in his case.

On March 29, 2016, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court. App. 415-421. On June 23, 2016, the respondent filed a return requesting that a PCR hearing be held in response to petitioner's PCR action. App.422-424. Petitioner filed an Amended PCR application on December 3, 2017. App. 426.

A PCR hearing was convened on January 31, 2018, at Charleston County Courthouse before Judge Maite D. Murphy. App.428-463. Petitioner was present at the PCR hearing and represented by James Kristian Faulk and Assistant Attorney General Megan Harrigan Jameson appeared on behalf of the state. During the hearing, petitioner alleged that trial counsel erred in failing to file an appeal and in failing to object to nurse Katherine Fabrizio's testimony as an expert witness in the case.

On April 9, 2018, Judge Murphy issued an Order granting petitioner's request for a belated appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), but denied petitioner's remaining allegations of ineffective assistance of trial counsel in the case. App. 465-479.

Petitioner appealed Judge Murphy's Order. This petition follows.

## QUESTION I

The PCR judge ruled properly in granting petitioner's request for a belated direct appeal in the case.

In this case, petitioner requested a belated direct appeal. Trial counsel acknowledged the fact that petitioner wanted an appeal, but he admitted that he forgot to file the notice of appeal in petitioner's case because he had so many trials going on at that same time period. App. 432, lines 18-24; App. 457, 1.2-13. The PCR judge ruled in the Order as follows:

In the present case, there is no evidence that [petitioner] made a knowing and intelligent decision not to pursue a direct appeal... [and] [t]herefore, since [petitioner] did not knowingly and intelligently waive his right to appeal, he is entitled to a belated appellate review of the direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 135 (1974). App.478.

Trial counsel has a duty to make certain a client is fully aware of the right to appeal and ascertain whether his client desires an appeal, and then file an appeal if the client wishes to appeal. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Frasier v. State, 306 S.C.158, 410 S.E.2d 572 (1991). Here, trial counsel did not perform his duty with respect to petitioner's right to appeal. A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). If after an indigent client requesting an appeal the client wishes to appeal, then trial counsel must serve and file a notice of appeal. In Re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E. 483 (1991). Petitioner desired an appeal of his case and did not voluntarily waive his right to an appeal. Therefore, trial counsel erred in failing to take the appropriate steps to ensure petitioner's right to have his case reviewed on direct appeal.

## QUESTION II

Trial counsel erred in failing to object to the state's presentation of PSANE nurse Katherine Fabrizio as an expert in sex cases, and in failing to move for a curative instruction or mistrial when said nurse gave testimony that bolstered the minor's allegation and when the nurse gave testimony that fell outside the "time and place" parameters.

At the PCR hearing, trial counsel testified that the nurse's testimony regarding acceptance of the minor's nonverbal responses as showing truthfulness was error, and that he objected to the same as bolstering, but admitted in effect that he should have asked for a curative instruction, although he did not do so via an attempt not to draw any more jury attention to the matter. App. 433, l. 1 – p. 435, l. 14. No motion for a mistrial was made either in connection with this error.

At trial, Katherine Fabrizio testified on behalf of the state. Nurse Fabrizio testified that she was a PSANE (pediatric sexual assault nurse examiner) qualified nurse who examined the minor in question upon her report to the hospital. Fabrizio testified in effect that similarly situated minors are usually traumatized from sexual assaults and may not remember things, and that there are lots of reasons why they might forget to add something (App. 164, lines 8-22), and further explained specifically with respect to the minor in this case as follows:

- Q. And what was her demeanor like when you first met her?
- A. She seemed very quiet, very tearful, very much in shock. She just had this -- she --she could make eye contact for a short period of time, but she was in complete despair. She would look at me and tears would start coming down her eyes. And then she would look down and look at me, and tears would be coming down her eyes, and then she would look down. She was, basically -- nonverbal was what I put in my report. She would shake her head yes and shake her head no, and shrug her shoulders, and she cried.
- Q. Was she able to give you a history?

- A. By asking specific questions, that's sort of the way I did her history that night. And when a child is extremely traumatized, this is one way to get it, is to ask yes or no questions like, did he touch your breasts? Or did he kiss you? And -- and she was -- she was pretty -- I felt like she was pretty consistent with her shaking her head yes and no. She didn't shake yes to everything or no to everything. That can happen sometimes and then you can't really -- you don't know what is true and what is not true.

Defense Counsel: Objection.

The Court: Basis?

Defense Counsel: Bolstering.

The Court: Sustained. Tr. 165, l. 9-p. 166, l.12.

Indeed, the nurse's testimony was improper bolstering and counsel erred in failing to move for a mistrial or ask for a curative instruction after objecting to the improper testimony because the nurse's testimony was tantamount to her translation of the truth of the minor's sex claims to the extent that the minor was being truthful when she made positive body language movements that indicated yes answers via nodding to numerous probative questions asked by this nurse. Hence, the bolstering of the minor's sex claims by the nurse.

There are prohibitive limits on testimony in the context of improper bolstering and more plainly explained, the rule is that a witness may not give an opinion for the purpose of conveying to the jury whether he or she believes the victim. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010). In Smith, trial counsel was found ineffective for not objecting to testimony by the forensic interviewer that bolstered the victim's credibility via a "no reason not to be truthful" remark. In Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017), the Court found trial counsel ineffective in failing to object to the forensic interviewer's testimony that her role was to determine if the child knew the difference between the truth and a lie, and that her purpose was to find out if anything had happened, and to figure out what occurred, because all of this

conveyed to the jury that she believed the sex assault victim was telling the truth. Likewise, the nurse here sent a message that the minor's affirmative head nods represented her belief in the truth of the minor's allegations. as alleged.

Furthermore, the nurse in the case also testified that the minor stated that she used soap and took a bath after the alleged assault, and that this explained why she "didn't collect her clothes," which in turn meant that had the minor not bathed, then evidence of sexual assault would not have been washed away (App. 172, l. 1-24), as this implies that but for the minor's bathing, incriminating evidence linking petitioner to the assault would have been uncovered in her (nurse's) opinion; and that the state of the minor's hymen. App. 184, l. 3 – p. 187, l. 21. This exceeded parameters. Trial counsel objected to this line of questioning as falling outside the time and place rule, but failed to move for a mistrial or curative instruction in the matter. App. 170, l. 7-p. 172, l. 23. A well-settled exception to the hearsay rule applies in sexual misconduct cases where limited hearsay evidence is admissible to corroborate the victim's testimony only if limited to the time and place of the assault. State v. Dawkins, 346 S.C. 151, 551 S.E.2d 260 (2001). Trial counsel admitted that he should have objected to the testimony that exceeded time and place boundaries. App. 435, l. 18 – p. 436, l. 438, l. 21.

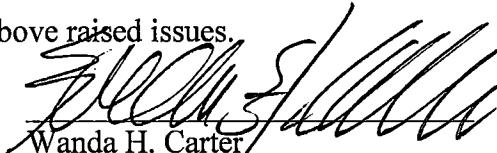
Finally, trial counsel erred in failing to object to this PSANE nurse as an expert. Nurse Fabrizio testified that she was a nurse practitioner who examines children for possible sexual assault via a sexual assault kit, and that she became a pediatric sexual nurse examiner by the International Forensic Nursing Association. App. 158, l. 6- p. 161, l. 6. However, at no point did said nurse mention how many exams she had conducted and how many times she had testified in court and when she was certified as a PSANE or the details of her training and certification requirements. During the PCR hearing, trial counsel in effect admitted that he should have

objected to the nurse's qualifications and her status as an expert because she testified outside her scope as a nurse, and that he should have objected to the testimony that exceeded the time and place boundaries. App. 435, l. 15 – p. 437, l. 8; App. 441, l. 3 – 449, l. 10. Trial counsel testified that jurors believe health care professionals and the solicitor referred to nurse Fabrizio's testimony during closing arguments, and hence the prejudice. App. 358, lines 4-20; App. 359, l. 24 – p. 360 l. 25. Trial counsel erred in failing to object to the nurse's qualifications and her status as an expert. The qualification of a witness as an expert lies in the discretion of the trial judge. State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990). Had the trial judge delved into the nurse's qualifications, it is likely she would not have been qualified as an expert.

The PCR judge ruled that Fabrizio would have been qualified as an expert witness based on her training, education, and experience and that there was no prejudice from Fabrizio's testimony because there was "overwhelming" evidence of guilt. App. 472-477. To the contrary, there was prejudice that resulted from Fabrizio's testimony because there was no overwhelming evidence of guilt in the case. This case hinged on the minor's testimony practically as there was no forensic evidence presented against petitioner and petitioner did not testify at trial. But for Fabrizio's testimony, which should have been excluded, there was insufficient proof of guilt beyond a reasonable doubt at petitioner's trial. Jackson v. Virginia, 443 U.S. 307 (1979). Trial counsel's failure to request a curative instruction or move for a mistrial per the errors associated with Fabrizio's testimony constituted ineffective assistance of trial counsel in violation of the Sixth Amendment, (See Strickland v. Washington, 466 U.S. 668 (1984)), such that but for the errors, a reasonable probability exists that the outcome of petitioner's trial would have been different.

**CONCLUSION**

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above raised issues.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

This 31st day of October, 2018.

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

---

JOHNNY TAMAR BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

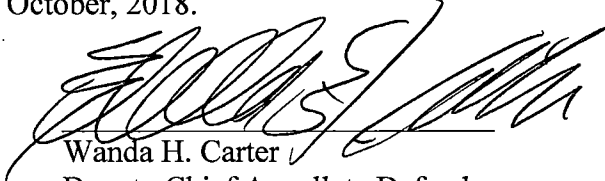
RESPONDENT

---

CERTIFICATE OF SERVICE

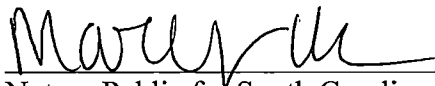
---

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Johnny Tamar Brown, #244979, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 31st day of October, 2018.



Wanda H. Carter  
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 31<sup>st</sup> day of October, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.