

2010-167047

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Roger M. Young, Circuit Court Judge  
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PAUL GRAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE  
\_\_\_\_\_

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ISSUE PRESENTED

Trial counsel erred in failing to present as a witness the babysitter, who knew of the prosecutrix's motive to fabricate the sexual allegations against petitioner, and a defense expert witness to balance out and counter the state's expert witness, who testified in effect that delayed reporting corroborated sexual misconduct allegations, because the failure to challenge and offset this testimony meant that the jurors were left with the impression that delayed reporting is final or conclusive evidence of guilt in a criminal sexual misconduct case.

## STATEMENT

Petitioner Paul Gray was found guilty per jury trial of lewd act on a minor child and one count of criminal sexual conduct with a minor in the first degree during the October, 2002 term of the Charleston County General Sessions Court before Judge John Milling. Petitioner was sentenced to imprisonment for a period of eighteen years on the criminal sexual conduct conviction and eight years, suspended upon the service of five years probation, consecutive, on the lewd act conviction. App. 1-236. Petitioner appealed his convictions and sentences.

On appeal, appellate counsel raised the following issue:

The court erred in admitting expert testimony concerning the late reporting of the offenses in the case, since the probative value of it was substantially outweighed by the danger of unfair prejudice to appellant.

On November 1, 2004, the Court of Appeals issued an unpublished opinion finding that the expert testimony on late reporting did not constitute error because the behavioral characteristics of sexual assault victims can be admitted to prove that a sexual crime occurred, and that the testimony regarding delayed reporting in the case was more probative than prejudicial. App. 261-265. See State v. Gray, Unpublished Opinion No. 2004-UP-552 (S.C. November 1, 2004).

On May 26, 2005, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court. App. 266-272. The respondent filed a return dated October 14, 2005. App. 273-277. A PCR hearing was held on June 1, 2007, at the Charleston County Courthouse before Judge J. Derham Cole. App. 279-307. On October 3, 2008, Judge Cole issued an order of dismissal in the case. App. 309-314.

Petitioner did not enjoy the benefit of a PCR appeal of Judge Cole's order of dismissal issued in the case. See order of dismissal from the South Carolina Supreme Court with a finding that the "appellant [did not] provide a proof of service showing that the notice of appeal [had] been timely served on opposing counsel as required by Rules 227(b) and 203(b)(1) of the South Carolina Appellate Court Rules (SCACR)." App. 315.

On April 22, 2009, petitioner filed a second PCR application with the Charleston County Office of the Clerk of Court requesting a belated PCR appeal. App. 316-328. The respondent filed a return admitting that this issue was worthy of receipt of a hearing. App. 325-329. On June 28, 2010, a consent order containing all parties' signatures was issued. App. 331-334. In the consent order Judge Roger M. Young, Sr found that "petitioner did not knowingly and voluntarily waive his right to appeal his first PCR application" and went on to grant him a belated appeal. App. 333.

Petitioner appealed Judge Young's order. This petition follows.

## ARGUMENT

Trial counsel erred in failing to present as a witness the babysitter, who knew of the prosecutrix's motive to fabricate the sexual allegations against petitioner, and a defense expert witness to balance out and counter the state's expert witness, who testified in effect that delayed reporting corroborated sexual misconduct allegations, because the failure to challenge and offset this testimony meant that the jurors were left with the impression that delayed reporting is final or conclusive evidence of guilt in a criminal sexual conduct case.

At trial, the prosecutrix claimed that petitioner sexually assaulted her from January 2001 through April 2001 when she was eight years old. The prosecutrix testified that petitioner's mother babysat her after school and while she was there at her house, petitioner put her on a bed and lay on top of her. Then, on another occasion, the prosecutrix stated that petitioner put his hands in her panties, and that on yet another occasion, that the petitioner put his "private part" in her mouth. App. 13, l. 23 - p. 36A, l. 22.

Also at trial, social worker Laurie Allison Rogers testified that she interviewed the prosecutrix, who told her what happened in the case. In addition, Rogers stated delayed reporting in child abuse cases is common because children are embarrassed, or frightened no one will believe them, or that the family will be disrupted; but insisted that the delayed disclosure is consistent with the abuse. App. 177, l. 9 – p. 185, l. 12; App. 160, l. 3 – p. 161, l. 15.

Prior to trial, defense counsel objected to Rogers' testimony regarding late reporting since there was no real delay in reporting in this case, and because the defense had no intention of impeaching the prosecutrix with delayed reporting, and due to prejudice of this testimony as the same would suggest that delayed reporting in effect assign truthfulness and corroborative effect to

the sexual allegations, i.e. that delayed reporting is consistent with sexual assaults. App. 8, ll. 1-23; App. 172, l. 19 – p. 175, l. 4; App. 158, l. 15 – p. 159, l. 2; App. 10, ll. 1-17.

During the PCR hearing, petitioner testified in effect that he wanted his mother, who was the prosecutrix’s babysitter, and a defense expert in social work to testify in his defense at trial. App. 297, l. 19 – p. 299, l. 16.

Also during the PCR hearing, petitioner’s mother, Loretta Buie, who babysat the prosecutrix while she lived in McClellanville, testified that the prosecutrix wanted to live with her mother in Charleston rather than remain in McClellanville with her grandmother and in effect fabricated the allegations to achieve that goal. Buie stated that she relayed this information to someone from the public defender’s office, but that she was never called as a witness. App. 294, l. 18 – p. 296, l. 22.

Defense counsel testified during the PCR hearing also and in effect admitted error in not presenting a defense expert witness, and that in hindsight, she “wish[ed] that [she] had gotten an expert” because “it would have been relevant to [petitioner’s] defense.” App. 284, l. 12 – p. 285, l. 5; App. 287, l. 18 – p. 288, l. 16; App. 290, l. 18 – p. 291, l. 5; App. 293, ll. 1-8. Counsel also admitted that petitioner’s mother was not called as a witness either. App. 291, l. 18 – p. 292, l. 25.

In the order of dismissal, the PCR judge ruled that petitioner’s complaint regarding the failure to call witnesses lacked merit on the basis that counsel’s strategy in not calling petitioner’s mother was reasonable and that there was no proof absent mere speculation that a defense expert witness would have been beneficial in the case. App. 312.

A defendant has a right to present witnesses in his defense. Faretta v. California, 422 U.S. 806 (1975); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). See Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), where the Court held that trial counsel was ineffective in failing to call

as a defense witness a triage nurse who would have corroborated the defendant's lack of penetration defense on a sexual assault charge. See also Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992), where counsel erred in failing to call the emergency medical personnel who would have testified that the victim stated immediately after the attack that she did not know her assailant where the victim was the sole witness to the rape. Also, compare, Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), where the Court held that defense counsel performed deficiently in failing to hire an independent expert witness to assess the gun residue evidence, especially where there was evidence that the victim had the gun in question and was ready to fire, but the gun went off after the defendant grabbed it, and where the initial finding was that no gunshot residue appeared on the victim, but a subsequent finding on the question of whether gunshot residue was on the victim resulted in an inconclusive finding.

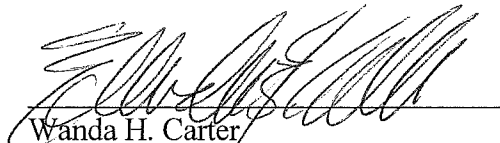
Here, a defense expert witness would have presented a more of a balanced and full presentation in reference to on all behavioral characteristics of victims of assault, including the one factor (delayed reporting) at issue, and that late reporting cannot always in all cases be consistent and corroborative of a prosecutrix's sexual assault allegations against a defendant. Also, petitioner's mother should have been called in order to show the prosecutrix's motive, which was a desire to move from McClellanville and relocate to Charleston with her mother, behind the fabrication of these allegations of sexual misconduct against petitioner.

Counsel's failure to call the favorable witnesses in question in this case constituted deficient legal representation in violation of the Sixth Amendment, and but for the same, a reasonable likelihood exists that petitioner's trial would have ended differently. Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the following argument, petitioner's petition should be granted in order to allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2011.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County  
Roger M. Young, Circuit Court Judge

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PAUL GRAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

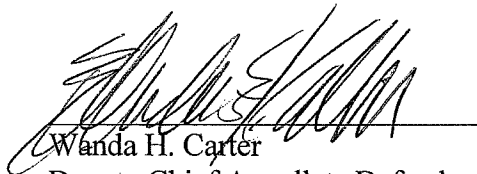
RESPONDENT

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CERTIFICATE OF SERVICE


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I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on Matthew J. Friedman, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 28th day of April, 2011.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of April, 2011.

  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 2, 2013.