STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal From Charleston County
Court of Common Pleas
J. Derham Cole, Circuit Court Judge

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2005-CP-10-2277

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PAUL GRAY,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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## ISSUES PRESENTED

I. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PRESENT AN EXPERT WITNESS?

II. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO CALL PETITIONER'S MOTHER AS A WITNESS?

## STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the August 2001 term of the Charleston County Grand Jury for two counts of criminal sexual conduct (CSC) with a minor – 1st degree (2001-GS-10-4890, 4891) and lewd act upon a minor (2001-GS-10-4892). Leslie Sarji Locklair, Esquire, and David Wolf, Esquire, represented the Applicant. On October 14, 2002, the Applicant proceeded to trial at which he was found not guilty of one count of CSC with a minor –1st degree and found guilty of one count of CSC with a minor – 1st degree and lewd at upon a minor. The Honorable John Milling sentenced him to confinement for eighteen (18) years for CSC with a minor and eight (8) years suspended upon time served and five (5) years of probation for lewd act upon a minor. The sentences were to run consecutively.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Paul A. Gray, Op. No. 2004-UP-552 (S.C. Ct. App. filed November 1, 2004).

On May 26, 2005, Petitioner filed his first PCR application. (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). By Order of Dismissal dated October 3, 2008, Judge Cole denied and dismissed the application with prejudice. (App. 309-314).

On April 22, 2009, Petitioner filed a second PCR application, in which he requested a belated PCR appeal. (App. 316-328). 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 granted him a belated PCR appeal. (App. 333).

The Petitioner filed a Petition for Writ of Certiorari pursuant to Austin v. State and a separate Petition for Writ of Certiorari[1] on April 28, 2011. This return follows.

[1] Respondent agrees that Petitioner is entitled to a belated PCR appeal pursuant to Austin v. State.

## STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625. Second, counsel's performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

## ARGUMENT

## I. COUNSEL DID NOT ERR IN FAILING TO PRESENT AN EXPERT WITNESS.

The Petitioner contends that trial counsel erred in failing to present 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. Respondent respectfully submits that the PCR court properly dismissed this allegation.

At trial, counsel for the Petitioner cross-examined the State's expert witness, Allison Rogers, and challenged the witness' testimony as to normal characteristics of an abuse victim. Trial counsel was able to get the witness to admit, during an in-camera examination, that delayed disclosure is in no way used "as a diagnostic tool." (App. p. 168, l. 16 – 18). The trial judge commented, during the in-camera examination, that trial counsel "is conducting a very effective cross-examination of the witness." (App. p. 173, l. 18 – 19).

At the PCR hearing, trial counsel (Leslie Sarji Locklair, Esquire) testified that they never considered bringing in an expert witness. (App. p. 284, l. 16 – 17). Ms. Locklair testified that they tried to keep the State's expert from testifying, and they tried to attack the underlying science and probative value of the evidence. (App. p. 290, l. 18 – p. 291, l. 5).

Further, the Petitioner did not call an expert witness at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the PCR hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Petitioner's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his

burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). A Petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

The PCR court found that the Petitioner's "contention that an expert witness would have benefited his defense is purely speculative" and found "no prejudice in counsel's failure to hire an expert." (App. p. 312). Because the evidence supports the PCR court's finding, the Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

## II. COUNSEL DID NOT ERR IN FAILING TO CALL PETITIONER'S MOTHER AS A WITNESS.

The Petitioner contends that trial counsel erred in failing to present as a witness the babysitter (Petitioner's mother), who knew of the prosecutrix's motive to fabricate the sexual allegations against the Petitioner. Respondent respectfully submits that the PCR court properly dismissed this allegation.

At trial, counsel for the Petitioner used the theory that the "prosecutrix" had a motive to fabricate sexual allegations against the Petitioner. Trial counsel questioned the expert witness, on more than one occasion, on the possibility that a child would lie about sexual abuse in order to live with a different parent. (App. p. 172, l. 4 – 7; p. 188, l. 13 – 16; p. 191, l. 19 – 24).

At the PCR hearing, trial counsel (David Wolf, Esquire) testified that he would have called the Petitioner's mother (Ms. Buie) at trial had he thought she had any information that would be helpful to the Petitioner's case. (App. p. 294, l. 9 – 12). Mr. Wolf asserted that co-counsel and he did not feel that Ms. Buie was prepared to testify to personal knowledge as

opposed to her beliefs. (App. p. 291, l. 18 – p. 292, l. 10). At the PCR hearing, Ms. Buie testified that the victim made up the allegations because she wanted to live with her mother.

> Q: And what was the information you had that would have helped your son?
> A: There's nothing. I mean, my son did not touch her because I know it because she was crying and carrying on because she wanted to go live with her mother.

(App. p. 295, l. 17 – 21). Respondent submits that Ms. Buie's testimony would not have assisted Petitioner at trial.

The PCR court found that trial counsel articulated a reasonable trial strategy for not calling Ms. Buie as a witness at trial. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* 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). The Applicant has not shown that counsel was deficient in that choice of tactics. Accordingly, the Respondent respectfully submits that the Petitioner has not met his burden and that the Petition for Writ of Certiorari should be denied.

## CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied.

Respectfully submitted,

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July 13, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County

The Honorable J. Derham Cole, Circuit Court Judge

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PAUL GRAY,

PETITIONER,

v.

THE 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 **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 13th day of July, 2011

Anne R. Henley

ANNE R. HENLEY
LEGAL ASSISTANT