

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

September 30, 2010

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**RE: State of Delaware v. Marvin T. Burton, Jr.  
Def. ID No. 0410003743 - Cr.A. S04-10-0231, 0645, 0646  
Letter Opinion**

Date Submitted: June 18, 2010

Dear Counsel:

This is my decision on Marvin T. Burton, Jr.'s remanded Motion for Postconviction Relief. Burton was convicted of Rape in the First Degree, Rape in the Second Degree and Unlawful Sexual Contact in the Second Degree. The victim was one of Burton's daughters. The crimes occurred at Burton's parents' house while the victim was living there and Burton and the victim's mother were living in a trailer behind his parents' house on their property. The Supreme Court affirmed Burton's convictions.<sup>1</sup> Burton filed a *pro se* Motion for Postconviction Relief. I denied it.<sup>2</sup> Burton filed a *pro se* appeal of my denial with the Supreme Court. He then retained two attorneys to represent him. Burton's attorneys submitted three affidavits to the Supreme Court that Burton did not submit to me. The

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<sup>1</sup> 907 A.2d 145, 2006 WL 2434914 (Del. 2006)(Table).

<sup>2</sup> 2008 WL 2359717 (Del. Super. June 3, 2008).

affidavits allege that the victim was not living at Burton's parents' house when he allegedly raped her there. The Supreme Court remanded the case to me to consider the information in the three affidavits.<sup>3</sup> I held an evidentiary hearing to hear testimony from the three people who submitted the affidavits and the two people who had submitted statements in support of Burton's *pro se* Motion for Postconviction Relief. I also heard testimony from Burton's trial counsel. The six people who testified at the evidentiary hearing were Marvin T. Burton, Sr., Vivian Burton, Stacie Brittingham, Eric Morris, Tionyell Cannon and E. Stephen Callaway, Esquire. Marvin Burton, Sr. is Burton's father. Vivian Burton is Burton's mother. Stacie Brittingham is Burton's sister. Eric Morris is Burton's cousin. Tionyell Cannon is the mother of another one of Burton's children. She is not the victim's mother. Callaway was Burton's trial counsel.

The victim, Carlesha Davis, testified that Burton raped her twice at his parents' house in the morning while she was living there in August 2004. Carlesha was the only witness to these rapes. Thus, even though there was other evidence that supported her testimony, her credibility certainly was at issue.

Burton alleges that if Callaway had properly interviewed his witnesses, Callaway would have learned that Carlesha had moved out of Burton's parents' house in July and was living with other people in August and September. This evidence would have, according to Burton, cast doubt on Carlesha's credibility by proving that it was impossible for him to have raped her at his parents' house because she was not living there. Burton also alleges that Carlesha recanted her allegations of sexual abuse and that Callaway

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<sup>3</sup> 968 A.2d 491, 2009 WL 537194 (Del. 2009)(Table).

would have discovered this if he had properly interviewed his witnesses. I have denied Burton's remanded Motion for Postconviction Relief, concluding that there is no merit to his allegations that Carlesha (1) was not living at his parents' house when he allegedly raped her there, and (2) recanted her allegations of sexual abuse.

### **Background**

Carlesha was 11-years-old when Burton sexually abused her. Burton is her father. Kesha Davis is her mother. Burton and Kesha were involved in a romantic relationship in 1992 when they were 25 and 16, respectively. He ended the relationship after Kesha became pregnant with Carlesha. Several years later Burton was convicted of two counts of Unlawful Sexual Intercourse in the Third Degree and sentenced to serve four and one-half years in prison. The victim was a 13-year-old girl. Carlesha had no contact with Burton until after he was released from prison in January 2004. Vivian Burton did not know that Carlesha was her granddaughter until after Burton was released from prison. Burton and Kesha resumed their relationship soon after he was released from prison.

Burton moved into a trailer behind his parents' house on their property after he was released from prison. The trailer was used primarily for storage and had only one bedroom. It did not have running water or air-conditioning. Kesha moved into the trailer with Burton. Carlesha moved into Burton's parents' house. Kesha and her three children had been staying with Kesha's aunt, Sharon Hernandez. When Kesha and Carlesha moved to Burton's parents' property, Kesha's other two children, Aaliyah and Zaire, remained with Sharon until they moved in with their father<sup>4</sup> in May 2004. Burton and Kesha

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<sup>4</sup> Burton is not the father of Aaliyah and Zaire.

did not spend nights in the house. They stayed in the trailer. Carlesha did not spend nights in the trailer. She stayed in the house. Carlesha spent some nights with her other relatives that summer, primarily those who had children her age.

Vivian Burton worked part-time cleaning houses one or two days a week. Marvin Burton, Sr. worked full-time at Kent-Sussex Industries. They both left in the morning for work. Thus, there were times when Vivian and Marvin Burton, Sr. were not at their home. Burton worked for a contractor who was renovating a school during the day and a cleaning service at night. His construction job eventually ended, leaving him only with the night job. Kesha cut hair during the day and also worked at the cleaning service at night.

Burton was convicted of improperly touching Carlesha's breasts with his hands and her buttocks with his penis and raping her vaginally with his fingers and penis. His sexual abuse of Carlesha escalated quickly over a short period of time. The improper sexual contact occurred one evening in Burton's parents' house at the end of the school year, possibly in May or June. Carlesha, Kesha and Burton were in the house. Carlesha and Burton were in the hallway near the bathroom. Kesha was in the living room. Burton touched Carlesha's breasts and hugged her so forcefully from behind that she could feel his penis rubbing against her buttocks through her clothing. When Kesha left the living room to check on Carlesha, she saw Burton hugging Carlesha from behind. Burton moved away from Carlesha after Kesha saw him.

The rapes occurred in the morning at Burton's parents' house in August. The first rape occurred while Carlesha was asleep in her bed. She woke up when Burton put his fingers in her vagina. This happened while Vivian Burton and Kesha were at work. Carlesha and Burton were alone in the house that day. The second rape occurred after

Carlesha had gotten out of bed and was getting ready to take a shower. Burton came into her room, pushed her onto the bed, removed her pajamas, got on top of her and put his penis in her vagina. Burton stopped after about five minutes and left the room. This also happened while Vivian Burton and Kesha were at work. Carlesha did not tell anyone about Burton raping her because he told her that he would get in trouble and go to jail and she would be sent away.

Burton and Kesha got married on September 1, 2004. However, their marriage quickly unraveled. Burton, who was a pastor of sorts, started calling and visiting his ex-wife regularly and counseling a teenage girl on the phone. Kesha got tired of this and moved to North Carolina with Carlesha and her other children around the middle of September. She and her children returned to Delaware to attend her brother's birthday party in October. During the trip home, Kesha asked Carlesha if she wanted to see Burton while they were in Delaware. Carlesha became upset and told Kesha about some of the things that Burton had done to her. This prompted Kesha to arrange a three-way cell phone call between Carlesha, Burton and Ronda Street, her cousin. She had Rhonda listen in on the conversation between Carlesha and Burton. Burton did not know that Rhonda was listening in on his conversation with Carlesha. He made a number of incriminating statements during the conversation that Rhonda heard, including telling Carlesha that she needed to change her story about him touching her. This led to an investigation by the police, more disclosures by Carlesha, the charges against Burton, and his trial.

### **The Trial**

The State's case against Burton rested largely on the testimony of Carlesha, Kesha, Rhonda, Karen Smail and Christopher Judge. Carlesha testified about Burton touching her

breasts with his fingers and her buttocks with his penis and placing his fingers and penis in her vagina at his parents' house. Kesha testified about seeing Burton "grinding" against Carlesha at his parents' house. Carlesha, Kesha and Rhonda testified about the three-way phone conversation with Burton where he made incriminating statements about sexually assaulting Carlesha. Karen Smail is the nurse who examined Carlesha. She testified that Carlesha's hymen was broken and that the results of her examination led her to believe that Carlesha had engaged in sexual activity. Christopher Judge is a records custodian for Verizon Wireless. His testimony linked the cell phone numbers belonging to Kesha, Burton and Rhonda to a three-way cell phone call on October 2, 2004.

Burton's defense was that he was never alone with Carlesha at his parents' house, that Carlesha had recanted her allegations of sexual abuse, and that Carlesha had spent some time with her other relatives that summer. His defense rested on the testimony of Vivian Burton, Stacie Brittingham, Katrina Morris and Tionyell Cannon. Burton used Vivian Burton's testimony to attack the two rape charges by attempting to show that he was never alone with Carlesha at his parents' house. Vivian Burton testified about Carlesha's living arrangements while Carlesha was at her house. Carlesha was never alone with Burton in her house the entire summer. She would be with both Burton and Kesha. If Vivian Burton left the house, Carlesha would not be left alone in the house by herself. She would be either with her mother or at a relative's house according to Vivian Burton.

Burton used Stacie Brittingham's testimony to attack the unlawful sexual contact charge by attempting to show that Carlesha had said that it did not happen. Stacie testified about a conversation she had with Carlesha about the "grinding incident." She has two children, Tiara and Melvin. Carlesha attended Tiara's birthday party and spent the

night at Stacie's house on Saturday, August 21, 2004. Kesha picked up Carlesha the next day. However, according to Stacie, before Carlesha left, Stacie and Kesha talked about the "grinding incident" in the hallway at Vivian Burton's house. Stacie testified that she asked Carlesha if this happened. Carlesha said that it did not according to Stacie. Kesha testified at the trial that Carlesha, when asked by Stacie if anything had happened with Burton, said that it did not. Carlesha admitted at the trial that she told Stacie and Kesha that Burton did not do anything to her, but she added that her denial was not true. She did not tell Kesha and Stacie the truth because she thought her siblings, which she had just gotten to know, would be mad at her if she got Burton, their father, in trouble.

Burton used the testimony of Katrina Morris and Tionyell Cannon to show that Carlesha had spent some time with them that summer. Katrina Morris testified about Carlesha spending some time with her and her husband, Eric Morris, at their house in the summer. They have four children and live approximately one-quarter of a mile away from Burton's parents' house. Carlesha used to come and "stay the night" with Katrina and Eric all the time during the summer of 2004. Carlesha had sleep-overs with Katrina's oldest daughter, Erica. During the Summer of 2004, from the time school got out in June until it started back in September, Carlesha spent "four or five nights straight" either the weekend before or after the 4<sup>th</sup> of July, and then three or four times after that "she spent a night or two" according to Katrina.

Tionyell Cannon testified about Carlesha spending time with her. She has three children, one of which, Jaquesha Burton, was fathered by Burton. Tionyell has never been married to Burton. Carlesha "spent the night" with her "maybe about six to ten times" during the Summer of 2004.

However, none of Burton's witnesses testified that Carlesha had moved out of his parents' house in July and was not living there in August and September.

### **Burton's Motion for Postconviction Relief**

\_\_\_\_\_ Burton alleged in his *pro se* Motion for Postconviction Relief that (1) Callaway "failed to interview and subpoena witnesses to have here and ready for the witness stand at trial;" (2) Callaway "failed to investigate and interview several witnesses movant wanted to testify for his defense;" (3) "he did give counsel a list of witnesses with addresses of those who wanted to testify for movant but counsel failed to contact the witnesses to use their testimony at trial;" (4) "counsel just subpoenaed witnesses without interviewing them to find out what they were supposed to testify to or that movant and the alleged victim was never alone due to the number of family members in the household;" and (5) "movant also wanted to testify that he was never left alone with any of the children due to the family being so huge." Burton never clearly stated in his Motion for Postconviction Relief what these witnesses would have said. However, he did allege that he was never alone with Carlesha or any children because the family was so large. Burton submitted two of his own statements with his Motion for Postconviction Relief and statements by Vivian Burton, Eric Morris, Katrina Morris, Stacie Brittingham and Tionyell Cannon. It is in Burton's and Vivian Burton's statements that Burton first clearly alleges that Carlesha was not living at his parents' house when he allegedly raped her there.

#### **A. Burton's Statements**

Burton submitted a five-page unnotarized handwritten affidavit and a thirteen-page unnotarized handwritten affidavit. In the five-page affidavit Burton stated that Carlesha did



not live at his parents' house during the month of August, that he was never alone in his parents' house with her, and that his parents' house was locked when they were not there and that he did not have a key to the house.

In the thirteen-page affidavit Burton stated that Carlesha did not stay at his parents' house in August and that she stayed with other people during August. The other people were Eric and Katrina Morris, Tionyell Cannon, Stacie Brittingham, and Sharon and Hugo Hernandez. He also stated that he was never alone with Carlesha or any other children at his parents' house and that he did not have a key to the house.

B. Vivian Burton's Two-Page Statement<sup>5</sup>

\_\_\_\_\_ The following is a portion of Vivian Burton's statement:

"The spring and summer of 2004 when Carlesha, my granddaughter, stayed at my house, she was never left at my house at any time when I was not home with Marvin when I went to work. I locked the house. No one stay there. Marvin, my son, didn't have a key to the house to get in. He was never there alone with Carlesha. When I work she was with her mother. Carlesha stop staying at my home in July. She was not there the month of aug. Carlesha stayed some were else. Marvin Burton, Jr., Lawyer Calway, never talked with me about my testimony before I took stand in Court on July 21."

C. The Joint Statement of Eric Morris, Katrina Morris and Vivian Burton

\_\_\_\_\_ Eric Morris, Katrina Morris and Vivian Burton submitted the following joint statement:

\_\_\_\_\_ "I received a subpoena to testify, as a witness, for the Defendant Marvin T. Burton, Jr. at his trial. The defense attorney did not speak with me to review the information that I had to offer in the case and no one from the defense attorney's office contacted me to discuss my testimony. I am confident, the information I have is crucial in case."

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<sup>5</sup> All quoted statements herein are set forth as originally written without correction.

#### D. Stacie Brittingham's Statement

\_\_\_\_\_ Stacie Brittingham submitted a one-page statement. It stated that Callaway did not interview her and that she had information crucial to the case that was not presented at trial, but she did not state what it was.

#### E. Tionyell Cannon's Statement

\_\_\_\_\_ Tionyell Cannon submitted a one-page statement. It stated that Callaway did not interview her and that she did "keep Carlesha for a while during the month of August and a weekend in September."

Of the six people who submitted statements in support of Burton's Motion for Postconviction Relief, only two, Burton and his mother, Vivian Burton, stated that Carlesha was not living at Burton's parents' house when Burton allegedly raped her there. Three of the witnesses, Eric Morris, Katrina Morris and Stacie Brittingham, stated that they had information that was crucial to the case, but they did not say what it was. The other witness, Tionyell Cannon, merely stated that Carlesha spent some time with her in August and September.

### **The Supreme Court Affidavits**

Burton submitted three affidavits to the Supreme Court.

#### A. Marvin Burton, Sr.'s Affidavit

Marvin Burton, Sr. submitted an affidavit stating that "he was not contacted, interviewed or subpoenaed concerning the fact that the alleged victim Carlesha Burton did not live in our residence from late July through September 2004."

#### B. Eric Morris' Affidavit

Eric Morris submitted an affidavit stating that "he was not contacted, interviewed or

called as a witness concerning the fact that the alleged victim Carlesha Burton did not live at Marvin Burton Sr. and Vivian Burton's residence from late July through September 2004." His affidavit added that, "I would have also testified that Carlesha Burton lived with me approximately three weeks during the end of July and August 2004 and she stayed with other individuals until the month of September 2004 when her family moved to North Carolina."

### C. Stacie Brittingham's Affidavit

Stacie Brittingham submitted an affidavit stating that "she was not contacted nor interviewed prior to the day of trial concerning her testimony offered at trial and the fact that the alleged victim Carlesha Burton did not live in her parent's residence from late July through September 2004. Such issue was never raised in questioning while she testified in defense of her brother."

The three affidavits, two of which were submitted by people who had given prior vague statements, Eric Morris and Stacie Brittingham, clearly state that Carlesha did not live at Burton's parents' house from late July to September.

## **THE EVIDENTIARY HEARING**

### A. Marvin Burton, Sr.'s Evidentiary Hearing Testimony

Marvin Burton, Sr. testified that Carlesha left his home after June and was not there in July and August of 2004. He did not know where Carlesha went when she left, but she could have gone to stay with Eric Morris, his nephew. He has never been to Eric's house and does not know his wife's name or how many children they have. Marvin Burton, Sr. could have told Callaway about this personally or in a letter, but he did not. He did not tell Callaway because he knew that his son was innocent based on the papers that his wife

had shown to him. The date in the papers was wrong. His wife also showed him some cell phone records, which he thought showed that his son was innocent. Marvin Burton, Sr. also testified that Burton was never alone with Carlesha in the house because someone else was always there. He knew this even though he worked during the day.

#### B. Eric Morris' Evidentiary Hearing Testimony

Eric Morris is Vivian and Marvin Burton Sr.'s nephew. He and Burton are cousins and worked together at night doing janitorial work. Eric and his wife had a barbeque at their house on July 4, 2004. Carlesha and other children came to the barbeque. She ended up staying two to three weeks. Carlesha would go to Vivian Burton's house to get her clothes. She left towards the end of July and stayed with her sister's mother. Carlesha did not stay with Eric in August. She did not go back to Vivian Burton's house. Burton saw his daughter while she was staying with Eric. Eric acknowledged that his affidavit was incorrect. It stated that Carlesha stayed with him in July and August. She did not stay with him in August. Eric did not know where Carlesha stayed in August. His wife lived with him and knew everything that he knew. However, he said that if his wife testified at the trial that Carlesha only spent a night or two with them three or four times after July 4<sup>th</sup>, then her testimony was incorrect. Carlesha testified at the trial that she spent a few days with the Morris family.

#### C. Stacie Brittingham's Evidentiary Hearing Testimony

Carlesha did not live at Vivian Burton's house from August 1 to September 15, 2004. She left Vivian Burton's house after school let out in June. Stacie Brittingham did not know where Carlesha went after she left Vivian Burton's house. She thinks Carlesha went to live

with Sharon Hernandez, her father's house,<sup>6</sup> and several other places. The basis of her knowledge is information from her mother, Vivian Burton, and going to Vivian Burton's house and not seeing Carlesha there. Stacie Brittingham was uncertain as to how often she went to Vivian Burton's house. She testified at the evidentiary hearing that her trial testimony about Carlesha living with Vivian Burton in the summer of 2004 and being there July and August was incorrect. She considers summer to be June, July and August. Carlesha stayed with Stacie Brittingham on her daughter's birthday, which was August 16, 2004. She did not know where Carlesha stayed the night before or after.

#### D. Vivian Burton's Evidentiary Hearing Testimony

Vivian Burton spoke to Callaway outside the Courtroom just before testifying at trial. They talked about when Carlesha lived with her. Vivian Burton told Callaway that Carlesha "came in the spring and left in the Summer of 2004." Vivian Burton had crucial information that she never discussed with Callaway. The crucial information was that (1) Carlesha stayed in Vivian Burton's house in the spring, (2) Carlesha was never left in Vivian Burton's house without Vivian Burton being there, (3) Vivian Burton locked her house whenever she left and Burton did not have a key to the house, (4) Burton lived in the trailer and only came into Vivian Burton's house when she and her husband were there, and (5) Carlesha would leave the house with her mother when Vivian Burton left the house. Vivian Burton treated Carlesha this way because she had just learned that Carlesha was her granddaughter and she did not want Carlesha to see any of her important documents, like her social security information and bills. She also knew that Tionyell Cannon had spoken to Carlesha and

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<sup>6</sup> Stacie was certainly not referring to Burton. Her reference to "father" is probably to the father of Kesha's other children, Aaliyah and Zaire.

that Carlesha told her that none of this happened. Vivian Burton came to some of Burton's pre-trial court appearances, but never spoke to or attempted to speak to Callaway. She did not think it was her place to speak to him. Callaway was representing Burton and Burton was talking to Callaway. No one stayed in Vivian Burton's house when she was not there. Vivian Burton acknowledged that she testified at the trial that "the only way she could have been there with him when I was at work is if Kesha had left." "When I left, Kesha and him were both there with her." "She was with both of them." Vivian Burton testified that she locked Burton, her own son, out of her house because she did not want Kesha and Carlesha in there. She also acknowledged that she testified at the trial that when she would leave her house there were "a few times" when Burton, Kesha and Carlesha were there. She explained this away at the evidentiary hearing by saying that she was sick and her blood sugar was very high. Carlesha left Vivian Burton's house around the first part of July. She was not there in August. Vivian Burton did know where Carlesha went after she left her house. She testified that Kesha told her the "grinding incident" did not happen. Vivian Burton dropped off the phone records at Callaway's office that Burton wanted her to take to him. There was nothing stopping her from writing Callaway a note with her critical information and giving it to him when she dropped off the phone records. Vivian Burton does not know why she did not do it. It could have been because her blood sugar was high. She was very sick at the time.

#### E. Tionyell Cannon's Evidentiary Hearing Testimony

Tionyell Cannon never spoke to Callaway before testifying at trial. Burton is the father of one of her children, Jaquesha Burton. Carlesha stayed with her most of August. Carlesha came to Tionyell's house before Tiara's birthday party, but Tionyell did not know

the exact date. It was at least a week and a couple of days. Carlesha spent the weekend at Tiara's house for her birthday slumber party. Tionyell did not know where Carlesha was staying before she came to stay with her. Carlesha came to live with Tionyell so that she could get to know her sister, Jaquesha, better. This left some period of time in August that Tionyell did not know where Carlesha was living. It could have been a week in August before Carlesha came to stay with Tionyell. Carlesha was living somewhere else before then. Carlesha came back after the slumber party and stayed until August 31, or September 1. Carlesha left Tionyell's house only for Tiara's birthday party. Tionyell was certain that Carlesha was with her on August 27 and 28. Carlesha testified at the trial that she spent three weekends with Tionyell.

#### F. Callaway's Evidentiary Hearing Testimony

Callaway and Burton discussed the evidence against him and what his defenses were going to be. Burton believed that (1) Carlesha had made up the sexual abuse allegations against him to get back at him for telling her mother that she was having sex with boys, (2) Kesha was using Carlesha to get him in trouble so that she could keep all of his property, and (3) the records of his cell phone conversations with Kesha would show that he could not have raped Carlesha because either (a) he was not alone with Carlesha because he and Kesha were together, or (b) that if he was alone with Carlesha because Kesha had gone to work, then he and Kesha were talking to each other on the cell phone so much that he did not have the opportunity to rape Carlesha. Burton was engaged in the case and wrote a number of letters to Callaway about it. Callaway asked Burton for a list of witnesses and got it.

Burton's witnesses were Katrina Morris, Eric Morris, Tionyell Cannon, Sharon

Hernandez, Hugo Hernandez, Yvonne Duffy, Stacie Brittingham, Vivian Burton, Marge Reeves, Reverend James Johnson, who was actually James Farmer, and Evelyn Burton. Marvin Burton, Sr. was not on Burton's list of witnesses and no one told Callaway that he was a possible witness. Callaway spoke to all of the witnesses before trial except for Eric Morris and Davon Johnson. Davon is Carlesha's half-brother. Burton alleged that Davon had sex with Carlesha at an overnight church revival on August 27 and 28, 2004. Callaway spoke to the Reverend about this. The Reverend said that it did not happen. Callaway did not know that these witnesses were given to him to prove that Burton could not have raped Carlesha at his parents' house in August because she had allegedly moved out the previous month. Everyone that Callaway spoke to indicated that Carlesha lived with Vivian Burton and other people during the spring and summer. Callaway felt that the majority of the witnesses were given to support Burton's belief that Carlesha had made up the sexual abuse allegations against him to get back at him for telling her mother that she was having sex with boys. This was the basis for Burton's *pro se* motion filed pursuant to 11 *Del.C.* § 3508. However, the witnesses were not able to substantiate Burton's allegations.

No one ever told Callaway that when Burton was living in the trailer that Carlesha was not living at his parents' house. Callaway was under the impression from his conversations with Burton and others that Carlesha was at his parents' house and Burton and Kesha were at the trailer. Callaway did know from these conversations that Carlesha spent "several nights" at other places.

Burton, Vivian Burton and others that Callaway talked to gave him the impression that Carlesha, even though moving around, lived at Burton's parents' house during the period covered by the indictment. Burton told Callaway that Carlesha lived with his mother



during the summer. This was why the phone records were so important to Burton. He believed they would show that when Kesha left and went to work, leaving he and Carlesha together, that Burton and Kesha were talking to each other on the phone until he left for work, leaving him with no time to sexually assault Carlesha. Burton never told Callaway that Carlesha was not accessible to him. There were periods of time when he was in the trailer and Carlesha was in his parents' house. Burton and Vivian Burton both told Callaway that Carlesha lived with Vivian Burton during the period of time from August 1, to September 15.

### **DISCUSSION**

In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.<sup>7</sup> First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.<sup>8</sup> Second, the defendant must show that the deficient performance prejudiced the defense.<sup>9</sup> Further, a defendant "must make and substantiate concrete allegations of actual prejudice or risk summary dismissal."<sup>10</sup> It is also necessary that the defendant "rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the 'distorting effects of hindsight when viewing

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<sup>7</sup> *Strickland v. Washington*, 466 U.S.668, 687 (1984).

<sup>8</sup> *Id.* at 687.

<sup>9</sup> *Id.* at 687.

<sup>10</sup> *State v. Coleman*, 2003 WL 22092724 (Del. Super. Feb. 19, 2003).

that representation.”<sup>11</sup> There is no procedural bar to claims of ineffective assistance of counsel.<sup>12</sup>

### **CARLESHA’S LIVING ARRANGEMENTS**

I have concluded that Burton’s allegation that Carlesha was not living at his parents’ house when he allegedly raped her there is not credible. My decision is based on (1) Burton’s failure to tell Callaway before the trial, and then during the trial, that Carlesha was not living at his parents’ house when he allegedly raped her there; (2) Vivian and Marvin Burton Sr.’s failure to tell Callaway before the trial that Carlesha was not living at their house when Burton allegedly raped her there; (3) conflicts between the trial testimony of Burton’s witnesses and his allegation that Carlesha was not living at his parents’ house when he allegedly raped her there; (4) conflicts between Burton’s other defenses and his allegation that Carlesha was not living at his parents’ house when he allegedly raped her there; (5) Burton’s failure to allege that Carlesha was not living at his parents’ house when he allegedly raped her there in his pre-trial attacks on her credibility; (6) the absence of testimony about where Carlesha was living in early August 2004; (7) the fact that the jury heard Carlesha offer conflicting testimony about where she lived in August and concluded that she lived at Burton’s parents house in August; and (8) serious doubts about the credibility of Burton’s witnesses and no doubts about Callaway’s credibility.

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<sup>11</sup> *Coleman*, 2003 WL 22092724, at \*2, quoting *Strickland*, 466 U.S. at 689.

<sup>12</sup> *Coleman*, 2003 WL 22092724, at \*1, citing *State v. Johnson*, 1999 WL 743612, at \*1 (Del. Super. Aug. 12, 1999); *State v. Gattis*, 1995 WL 790961, at \*3 (Del. Super. Dec. 28, 1995) at 7, *aff’d*, 637 A.2d 1174 (Del. 1997).

## **1. Burton's Non-Disclosure**

Burton did not tell Callaway before, or during, the trial that Carlesha was not living at his parents' house when he allegedly raped her there. He instead alleges that if Callaway had only interviewed his witnesses, Callaway would have learned that Carlesha had moved out of his parents' house in July and was living with other people in August and September. Burton does not allege that he told Callaway that Carlesha was not living at his parents' house when he allegedly raped her there and that his parents and others could have offered testimony supporting this allegation and that Callaway did nothing to follow up on this information. Instead, he alleges that Callaway should have interviewed his witnesses without being told the purpose of the interviews and figured all of this out on his own.

This is an odd argument for Burton to make because he was aware of Carlesha's living arrangements and certainly could have told Callaway that she was not living at his parents' house if she really was not living there during the time that the prosecutor alleged that he raped her there. The indictment alleged that Burton raped Carlesha sometime between August 1, 2004, and September 15, 2004. Callaway gave Burton a copy of the indictment long before the trial started. Thus, Burton was aware of the critical time period. Burton was also aware of Carlesha's living arrangements. Carlesha was no stranger to Burton. She was his daughter and he was living with her mother in a trailer behind his parents' house. He certainly knew where Carlesha was living. At the very least, if Carlesha was not living at Burton's parents' house when he allegedly raped her there, then he knew it and could have told Callaway. Burton had a clear view of his parents' house and, given the lack of running water in the trailer, had to be using the bathroom in his

parents' house. This would have brought him into contact with the people living there, giving him an idea of whether Carlesha was living there. Burton was also spending time with Carlesha, taking her to the beach, swimming pool, church functions, friends' and relatives' houses, and on motorcycle rides. Given Burton's relationship to Carlesha, his relationship with her mother, and his close physical proximity to his parents' house, it is simply inconceivable that he did not know that Carlesha was not living at his parents' house in August and September if she really was not living there then. Similarly, if it is true that Carlesha was not living at Burton's parents' house, then it is inconceivable that Burton would not tell Callaway that he had an excellent defense to the rape charges and that his mother, father, sister, cousin and others could offer testimony supporting it. If it is true that Carlesha was not living at Burton's parents' house, then it is even more inconceivable that Burton would sit at Callaway's side at trial and remain silent while Callaway questioned the very witnesses that Burton now says could have helped him about matters unrelated to his allegation that Carlesha was not living at his parents' house when he allegedly raped her there. Burton's failure to tell Callaway before, and during, the trial about what would have been an excellent defense to the rape charges strongly suggests that there was no such defense.

## **2. Burton's Parents' Non-Disclosure**

### **A. Vivian Burton's Non-Disclosure**

Vivian Burton did not tell Callaway before the trial that Carlesha was not living at her house when Burton allegedly raped Carlesha there. If Carlesha was not living at Vivian Burton's house when Burton allegedly raped Carlesha there, then she certainly knew it. Callaway testified at the evidentiary hearing that both Burton and Vivian Burton told him

that Carlesha was at Burton's parents' house during the time period alleged in the indictment, suggesting that Vivian Burton was also well aware of the critical time period. In any event, Vivian Burton went out of her way at the trial to testify that Burton was never in her house alone with Carlesha because either she was there or that she locked Burton out of the house when she left it. If Carlesha was not living there, then Vivian Burton could have easily mentioned this too. Vivian Burton was involved in Burton's defense. She went to the Courthouse when Burton was brought in from the prison for case reviews and other proceedings. Vivian Burton also went to Callaway's office to drop off the phone records that Burton thought would be helpful to his defense. Notwithstanding the fact that Vivian Burton was actively helping her son with his defense and had been to Callaway's office, she never approached Callaway with this information about Carlesha's living arrangements or sent him a letter about it. She readily admits that there was nothing stopping her from doing this. Vivian Burton explained her failure to disclose this critical information to Callaway, stating it was his job to defend Burton or that her high blood sugar prevented her from doing it. If it is true that Carlesha was not living at Vivian Burton's house, then it is inconceivable that Vivian Burton would not tell Callaway that Burton had an excellent defense to the rape charges. Vivian Burton's failure to do so strongly suggests that there was no such defense.

#### B. Marvin Burton, Sr.'s Non-Disclosure

Marvin Burton, Sr. did not tell Callaway that Carlesha was not living at his house when Burton allegedly raped Carlesha there. If Carlesha was not living at Marvin Burton, Sr.'s house when Burton allegedly raped Carlesha there, then he certainly knew it. While it is unclear from the record if Marvin Burton, Sr. knew when the prosecutor alleged that

Burton raped Carlesha at his house, his testimony at the evidentiary hearing suggests that he did. Marvin Burton, Sr. testified at the evidentiary hearing that his wife, Vivian Burton, showed him some documents that convinced him that Burton did not rape Carlesha. He felt this way because the date on one of the documents was wrong. His testimony took place in the context of Burton's allegation that Carlesha was not living at his parents' house when he allegedly raped her there. The indictment had the critical dates on it. Thus, it seems logical that Marvin Burton, Sr. also was well aware of the critical time period. Marvin Burton, Sr. has acknowledged that he could have told Callaway about Carlesha's living arrangements, but he never did. He did not talk to Callaway because he knew that Burton was innocent based on the information that Vivian Burton had shown him. If it is true that Carlesha was not living at Marvin Burton's Sr.'s house, then it is inconceivable that Marvin Burton, Sr. would not tell Callaway that Burton had an excellent defense to the rape charges. Marvin Burton Sr.'s failure to do so strongly suggests that there was no such defense.

### **3. Conflicting Trial Testimony**

Burton's witnesses offered testimony at trial that conflicts with his allegation that Carlesha was not living at his parents' house when he allegedly raped her there because their testimony puts Carlesha in his parents' house at the time.

#### **A. Vivian Burton**

Vivian Burton testified at trial that Burton was never alone with Carlesha in her house the entire summer because Carlesha's mother, Kesha, was there with her. If Carlesha was not alone in Vivian Burton's house with Burton because Kesha was there with her, then this puts Carlesha in Vivian Burton's house and it conflicts with Burton's

allegation that he could not have raped Carlesha at his parents' house because she was not living there.

#### B. Stacie Brittingham

Stacie Brittingham testified at trial that Carlesha was living at Burton's parents' house in July and August of 2004. She also testified that she saw Carlesha at Vivian Burton's house frequently during the summer of 2004 because Carlesha was living there. Stacie Brittingham knew this because she frequently dropped her children off at Vivian Burton's house so that she could take care of them. She testified at the evidentiary hearing that summer included June, July and August. Stacie Brittingham's trial testimony put Carlesha at Burton's parent's house at the very time that Burton now alleges she was not living there. Thus, it is inconsistent with Burton's allegation that he could not have raped Carlesha at his parents' house because she was not living there.

Stacie Brittingham also testified at the trial about a conversation she had with Carlesha about the "grinding incident" in the hallway at Vivian Burton's house that led to the unlawful sexual contact charge. This conversation took place after Tiara's birthday party. Tiara is Stacie Brittingham's daughter. Carlesha went to Tiara's birthday party and spent the night at Stacie Brittingham's house on Saturday, August 21, 2004. Kesha picked up Carlesha the next day. However, before leaving, Kesha talked to Stacie about the "grinding incident" in the hallway at Vivian Burton's house. Stacie then asked Carlesha if this happened. Carlesha told her that it did not. Stacie Brittingham testified at the trial that she did not think that Burton had done anything to Carlesha. This led to questioning by the attorneys outside the presence of the jury as to why she felt this way. Stacie described a phone conversation that she and her sister, Serena Burton, had with Kesha about the

“grinding incident.” She testified that they both said, “you need to leave from my mother’s house.” “You need to leave from my mother’s house and she did not.” “She didn’t take the initiative to leave until my sister threatened to report her to the State.” Thus, Stacie did not think that Burton was sexually abusing Carlesha because Kesha and Carlesha continued to live at his parents’ property after Kesha was aware of the allegation that he had sexually abused Carlesha. When the jury returned, Stacie testified that she told Kesha and Carlesha to move out and not to see Burton again. Stacie Brittingham’s testimony puts Carlesha in Vivian Burton’s house in August, which is inconsistent with Burton’s allegation that Carlesha had moved out in July.

#### **4. The Conflicting Defenses**

\_\_\_\_\_ Burton raised a number of defenses that conflict with his allegation that Carlesha was not living at his parents’ house when he allegedly raped her there. The defenses, by their nature, place Carlesha at Burton’s parents’ house at the time.

##### **A. Large Number of Family Members**

Burton argues in his *pro se* Motion for Postconviction Relief that he was never alone with Carlesha, or any other children, because of the large number of family members in the household. Presumably, there were so many people around that it would have been impossible for Burton to rape Carlesha without someone else seeing him do it. If Burton could not have raped Carlesha because there were so many other family members in his parents’ house, then Carlesha must have been with Burton in his parents’ house. Otherwise, this argument makes no sense.



## B. Burton was Never Alone with Carlesha

Burton and Vivian Burton repeatedly stated that (1) Burton was never alone with Carlesha in his parents' house, (2) Vivian Burton never left anyone alone in her house when she was gone, (3) Vivian Burton locked everyone out of her house when she left, and (4) Burton did not have a key to the house. These allegations are set forth in Burton's two handwritten statements and Vivian Burton's statement that were all attached to Burton's *pro se* Motion for Postconviction Relief. They are also set forth in Vivian Burton's trial and evidentiary hearing testimony. These arguments all put Carlesha in Burton's parents' house. If Burton could not have raped Carlesha at his parents' house because he was never alone with her in the house or locked out of the house, then Carlesha must have been with Burton in his parents' house or locked out of it. Otherwise, this argument makes no sense.

## C. Defense Strategy

Burton argued that he could not have raped Carlesha because he was either (1) not alone with Carlesha because Kesha was also there, or (2) if he was alone with Carlesha because Kesha was at work, then he was talking on the cell phone with Kesha so much that he did not have the opportunity to rape Carlesha. Burton believed that his cell phone records would support this defense. If Burton could not have raped Carlesha at his parents' house because either he was not alone with her in the house, or was too busy talking on the phone if he was alone with her in the house, then Carlesha must have been with Burton in his parents' house. Otherwise, this argument makes no sense.

Burton's arguments only make sense if they applied to a period of time not covered by his allegation that Carlesha had moved out of his parents' house before he allegedly

raped her there. That is not an issue in this case. The indictment alleged that Burton raped Carlesha twice sometime between August 1, 2004, and September 15, 2004. Burton's allegation that Carlesha moved out of his parents' house in July would, if true, provide a defense for this entire period of time. Thus, it does not make sense for Burton to also argue that he could not have raped Carlesha because (1) there were too many family members in his parents' house, or (2) he was locked out of his parents' house, or (3) he was in his parents' house, but was with Kesha, or (4) he was in his parents' house, but was talking on the cell phone with Kesha so much that he did not have the opportunity to rape Carlesha. Indeed, these arguments undermine Burton's allegation that Carlesha was not living at his parents' house when he allegedly raped her there. Carlesha was either in Burton's parents' house or not at the time in question. Burton can not credibly argue it both ways.

#### **5. Burton's Pre-trial Attacks on Carlesha's Credibility**

\_\_\_\_\_ Burton filed several *pro se* pre-trial motions attacking Carlesha's credibility. The motions did not argue that Carlesha was not credible because she had to be lying about Burton raping her at his parents' house because she had moved out of it before he allegedly raped her there.

#### **A. 11 Del.C. § 3508**

Burton filed a *pro se* motion pursuant to 11 Del.C. § 3508 setting forth details regarding Carlesha's alleged sexual activity with several young boys in an effort to attack her credibility by establishing a motive for her to falsely accuse him of raping her. Burton alleged that he caught Carlesha having sex with several young boys on August 20, 21, 22,

27 and 28, and September 1, 2004. Burton told Carlesha's mother about this. She then allegedly punished Carlesha by beating her with a belt named "Mr. Act Right" and hitting Carlesha with her fists. This, according to Burton, explains why Carlesha would make up the rape allegations against him in order to get back at him for getting her punished. Burton argued that this made Carlesha not credible. Burton does not argue in this motion that Carlesha was not credible because she had to be lying about Burton raping her at his parents' house because she had moved out of it and was living somewhere else when he allegedly raped her there. That certainly would have undermined her credibility much more than Burton's retaliation theory.

#### B. Inconsistent Statements

Burton filed a *pro se* 12-page document titled "Inconsistency of Statements and Credibility." Burton attacked Carlesha's credibility by pointing out inconsistencies in statements that she made to the police and Ralph Richardson, the Child Advocacy Center interviewer, regarding the two rape charges and the three-way cell phone conversation. Burton did this by lining up Carlesha's multiple statements on these matters and underlining what he considered to be her inconsistent statements. The statements that Burton wrote down contained repeated references to the rapes happening on the bed in Carlesha's bedroom room at Burton's parents' house. I find it extremely odd that Burton, in a pre-trial filing attacking Carlesha's credibility, sought to accomplish it only by pointing out minor inconsistencies in multiple statements that she gave to different people at different times instead of attacking her credibility by pointing out that Carlesha had to be lying about being raped at his parents' house because she had moved out of it and was living somewhere else when he allegedly raped her there. Given Burton's allegation that

Carlesha was not living at his parents' house when he allegedly raped her there, his failure to confront Carlesha's allegation that the rapes occurred on her bed at his parents' house is a serious omission by him.

#### **6. Carlesha's Living Arrangements in Early August**

Burton alleges that Carlesha was not living at his parents' house when he allegedly raped her there in August. His allegation would have been much more persuasive to me if he had presented witnesses who would have testified where Carlesha was living the entire month of August. Marvin Burton, Sr., Vivian Burton, Stacie Brittingham, Tionyell Cannon, Eric Morris, and Katrina Morris all testified about where Carlesha was living, but none of them knew where she was living the entire month of August. Marvin Burton, Sr., Vivian Burton, and Stacie Brittingham did not know where Carlesha was living in August. Eric Morris submitted an affidavit stating that Carlesha lived with him in August. However, he admitted at the evidentiary hearing that she left his house in July and did not live with him in August and that he did not know where she went. Tionyell Cannon submitted statements, an affidavit and testified at the trial and evidentiary hearing that Carlesha lived with her during some part of August. However, she acknowledged that Carlesha did not come to her house until about seven to ten days before Tiara's birthday party, which was on August 21, 2004. Even if you accept everything that Burton's witnesses testified to about where Carlesha was living, there are still approximately ten days in early August that are not accounted for, leaving Carlesha's whereabouts unexplained during that critical period of time.

## **7. Conflicting Testimony**

Carlesha offered conflicting testimony at trial about where she was living in July and August. She testified that she lived with Vivian Burton during the summer of 2004. Carlesha also testified that she lived with Sharon Hernandez during July and August. However, Carlesha did offer specific testimony about when and where the rapes occurred that makes it possible to resolve her conflicting testimony about where she was living in the summer. She testified that Burton raped her twice in the morning in her bedroom at Vivian Burton's house. Carlesha did not place an exact date on the when the rapes occurred, but she did testify that they occurred in the late summer after the "grinding incident" and before Tiara's birthday party. The "grinding incident" happened in May or June. Tiara's birthday party was on August 21, 2004. This put Carlesha in Vivian Burton's house in July and August. Obviously, given the jury's verdict, the jury resolved Carlesha's conflicting testimony about where she was living in the summer by relying on her more specific testimony about when and where she was raped than her general testimony about where she was living.

## **8. Credibility**

Burton's allegation that Carlesha moved out of his parents' house before he raped her there is supported by statements made by his parents, sister, cousin and cousin's wife, and the mother of one of his children. I did not find Burton's witnesses to be credible. Vivian Burton and Marvin Burton, Sr. are Burton's parents. Stacie Brittingham is his sister. They certainly had, as close relatives of Burton, a reason to help him. Eric Morris was Burton's cousin, friend and co-worker. He had, because of these relationships with Burton,

multiple reasons to help him. Tionyell Cannon was the mother of one of Burton's children. She also received financial support from him. These matters gave her a reason to help him. Vivian Burton and Marvin Burton, Sr. had, if you believe them, information that, if you believe it, was absolutely critical to Burton's defense. However, they did not tell Callaway about it. Their reasons for not telling him are unpersuasive. Vivian Burton testified that she did not tell Callaway that Carlesha had moved out of her house because either she thought it was his job to discover it on his own or because her high blood "sugar" somehow prevented her from doing it. Marvin Burton, Sr. testified that he did not tell Callaway that Carlesha had moved out of his house because he knew that his son was innocent based on documents that his wife had shown him. Both Vivian and Marvin Burton, Sr. readily acknowledged that they could have shared this important information with Callaway. Their failure to do something that would have been so helpful to their own son raised serious doubts in my mind as to their credibility. Vivian Burton also made conflicting statements in her two page statement that Burton attached to his *pro se* Motion for Postconviction Relief.

#### Vivian Burton's Two-Page Statement<sup>13</sup>

The spring and summer of 2004 when Carlesha, my granddaughter, stayed at my house, she was never left at my house at any time when I was not home with Marvin when I went to work. I locked the house. No one stay there. Marvin, my son, didn't have a key to the house to get in. He was never there alone with Carlesha. When I work she was with her mother. Carlesha stop staying at my home in July. She was not there the month of aug. Carlesha stayed some were else. Marvin Burton, Jr., Lawyer Calway, never talked with me about my testimony before I took stand in Court on July 21.

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<sup>13</sup> This is just a portion of the statement.

Within the same brief statement, Vivian Burton stated that Carlesha lived with her in the "spring and summer of 2004" and that she stopped staying at her home in "July." Summer certainly includes June, July and August. She never offered an explanation for these conflicting statements.

Stacie Brittingham's trial testimony conflicts with her evidentiary hearing testimony. She testified at the trial that Carlesha was living at Burton's parents' house in July and August. Stacie Brittingham testified at the evidentiary hearing that Carlesha did not live at Burton's parents' house from August 1 to September 15, 2004. When asked at the evidentiary hearing to explain this obvious discrepancy, she merely said that her trial testimony had been incorrect. I found her explanation unpersuasive. I also found unpersuasive her testimony about when the conversation regarding Carlesha's alleged recantation of the "grinding incident" took place. It was clear at the trial that it took place on August 21, 2004. At the evidentiary hearing, Stacie testified that she and her sister called Kesha and threatened to report her to a social service agency because Carlesha had been exposed to drugs. Stacie said that the whole purpose of this call was to force Kesha and Carlesha to move out of Burton's parents' house in June because Vivian Burton did not want Carlesha living there any longer. At the evidentiary hearing, Stacie clearly tried to move the call back to June. It was obvious to me that she had realized how important the timing of this conversation was and was trying to move it to a time earlier in the summer so that it would be consistent with Burton's allegation that Carlesha had moved out in July. I also thought Stacie's rationale for the conversation was unusual. I simply do not believe that she and her sister threatened to call a social service agency and make an allegation of child neglect for the purpose of getting their own brother's child

removed from his parents' house.

Eric Morris' evidentiary hearing testimony conflicts with both his wife's trial testimony and his own affidavit. Katrina Morris testified at the trial that during the summer Carlesha had sleep-overs with her oldest daughter. She testified further that, from the time school got out in June until September, Carlesha spent "four or five nights straight" either the weekend before or after the 4<sup>th</sup> of July, and then three or four times after that "she spent a night or two." Eric submitted an affidavit stating that Carlesha lived with him three weeks during the end of July and August 2004. Eric testified at the evidentiary hearing that Carlesha stayed at his home for two to three weeks after the 4<sup>th</sup> of July. He also testified that Carlesha left towards the end of July and did not stay with him in August. Thus, both his affidavit and evidentiary hearing testimony conflict with his own wife's trial testimony. Katrina had Carlesha staying with them three or four times for a night or two after the fourth of July, not the two to three weeks that Eric described. Katrina also never testified that Carlesha had moved in with them. Eric's evidentiary hearing testimony also conflicts with his affidavit. Eric's affidavit stated that Carlesha lived with him in July and August. He admitted at the evidentiary hearing that his affidavit was wrong and that Carlesha did not live with him in August. Eric's testimony also conflicts with Carlesha's trial testimony. She testified that she only spent a few days with the Morris family.

Tionyell Cannon's testimony at the evidentiary hearing conflicts with her own trial testimony and with Burton's other statements. Tionyell testified at the trial that Carlesha "spent the night" with her "maybe about six to ten times" during the summer of 2004. In Tionyell's statement that Burton attached to his *pro se* Motion for Postconviction Relief, she stated that Carlesha spent some time with her in August and September. She testified at



the evidentiary hearing that Carlesha spent most of August with her. Tionyell is certainly exaggerating her testimony to cover more time than she previously acknowledged. Burton stated in his Section 3508 motion that Carlesha was at an overnight revival with him and other family members on August 27 and 28, 2004. Tionyell was adamant while testifying at the evidentiary hearing that Carlesha stayed with her on August 27 and 28. Tionyell's testimony also conflicts with Carlesha's trial testimony. Carlesha testified that she spent three weekends with Tionyell.

Callaway testified at the evidentiary hearing that Burton, Vivian Burton and Stacie Brittingham did not tell him before the trial that Carlesha was not living at Burton's parents' house at the time Burton allegedly raped her there. Indeed, Burton and his mother told Callaway that Carlesha was living there at the time according to Callaway. I have no reason to doubt Callaway's credibility.

### **CARLESHA'S ALLEGED RECANTATION**

I have also concluded that Burton's allegation that Carlesha recanted her allegations of sexual abuse before the trial is not credible. Burton alleges that Carlesha recanted her allegations of sexual abuse by him before the trial and that Callaway should have discovered this. There are two problems with this. One, Carlesha's alleged recantation is not the subject of the Supreme Court's remand to me. The Supreme Court remanded the case to me to consider the information in the three affidavits that were prepared after I issued my decision on Burton's *pro se* Motion for Postconviction Relief. The three affidavits do not address Carlesha's alleged recantation. Two, the alleged recantation is nothing new. Stacie, Kesha and Carlesha testified about it at the trial. Carlesha admitted

that she told Stacie and Kesha that Burton did not do anything to her. She also testified at the trial that she lied about this because she did not want her siblings to get mad at her for getting their father in trouble. The jury heard this testimony and concluded that Carlesha's recantation was not credible.

### **CONCLUSION**

I have concluded that Burton has failed to prove a credible claim of ineffective assistance of counsel. There are far too many problems with Burton's allegations that Carlesha (1) was not living at his parents' house when he allegedly raped her there, and (2) recanted her allegations of sexual abuse. Burton and his parents did not tell Callaway that Carlesha was not living at Burton's parents' house when Burton allegedly raped her there. They also did not tell Callaway that there were a number of witnesses who could testify in support of this allegation. It does not make any sense for Burton and his parents to not tell Callaway about what would have been, if true, an excellent defense to the rape charges against him. Their failure to do so strongly suggests that the allegation is not true. The testimony of Burton's own witnesses at trial, his defense strategy and arguments that he made in his *pro se* Motion for Postconviction Relief all placed Carlesha in Burton's parents' house at the time that Burton allegedly raped her there. These conflicting facts, defenses and arguments simply cannot be reconciled with Burton's allegation that Carlesha was not living at his parents' house when he allegedly raped her there. Burton did not argue in his pre-trial attacks on Carlesha's credibility that she was not credible because she had to be lying about Burton raping her at his parents' house because she had moved out before he allegedly raped her there. His failure to do so strongly suggests

that Carlesha was not lying. There was no persuasive testimony about where Carlesha was living in early August, a critical time in the case. The jury has already heard Carlesha's conflicting testimony about where she was living in the summer of 2004 and concluded that she was living in Burton's parents' house in August. I did not find Burton's witnesses to be credible. Callaway testified that Burton and his mother told him that Carlesha was living at Burton's parents' house during the time period alleged in the indictment for the two rape charges. I have no reason to doubt Callaway's credibility. Given all of this it appears to me that Burton's allegation that Carlesha was not living at his parents' house when he allegedly raped her there is nothing more than an after-the-fact effort by Burton and his relatives to develop a defense to the rape charges against him after his original defenses failed. I certainly can not fault Callaway for not discovering a defense to the rape charges that did not exist, particularly since Burton and his mother led Callaway to believe that Carlesha was in fact accessible to him at his parents' house during the period of time set forth in the indictment for the two rape charges. Carlesha's alleged recantation was considered and rejected by the jury. Having concluded that Burton's allegations about Carlesha's living arrangements and recantation are not credible, I have concluded that Callaway's "failure" to investigate and raise them at trial did not prejudice Burton's defense. Therefore, I have denied Burton's remanded Motion for Postconviction Relief.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

cc: Audrey F. Bacino

