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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

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JORGE RODRIQUEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001507

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PETITION FOR WRIT OF CERTIORARI

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## **ISSUES PRESENTED**

- I. Whether the PCR court erred in finding that trial counsel articulated a reasonable strategy for failing to interview Petitioner's mother, the "key witness" in the case?
- II. Whether evidence supports the PCR court's determination that Petitioner knowingly and voluntarily waived his right to file a direct appeal?

## STATEMENT

Petitioner was indicted at the June 12, 2020 term of the Spartanburg County grand jury for attempted murder and possession of a weapon during the commission of a violent crime. App. 496-97. His case was called to trial on October 11, 2022, before the Honorable J. Mark Hayes, II, and a jury. App. 1. Ricky Harris represented Petitioner. App. 1. Spenser Smith represented the state. App. 1.

### **Trial Facts**

Petitioner's defense at trial was self-defense and defense of others. The uncontroverted facts at trial were that, on Christmas 2019, Petitioner shot his brother, Bryant Rodriguez (Bryant), in the head. Three people witnessed what happened that night: Petitioner, Bryant, and their mother, Judith Nodine (Nodine). Petitioner did not testify at his trial, and Bryant is now disabled and unable to speak. The sole other witness, Nodine, testified as a state's witness.

Nodine testified that she was sleeping on the couch in her living room when she was awoken by Bryant shouting profanities at Petitioner, who was just entering the home. App. 71, ll. 6-9. Among the things Bryant yelled to Petitioner was that he had slept with Petitioner's girlfriend and that Petitioner's child was, in fact, Bryant's. App. 113, ll. 3-8; App. 113, l. 24 – 114, l. 2. Bryant became more and more belligerent, until Nodine attempted to stop him. App. 71, l. 25 – 72, l. 2. When Nodine stepped in, Bryant threw her to the ground. App. 72, ll. 1-2. When Petitioner witnessed this, he walked over to the living room to confront Bryant. App. 72, ll. 4-7. Nodine attempted unsuccessfully to separate the two several times. App. 72, l. 8. At some point, Bryant grabbed a glass, forty-ounce bottle of Bud Light beer and attempted to strike Nodine with it. App. 73, ll. 7-8. Then, Nodine heard a gunshot and saw that Bryant was bleeding from his head. App. 73, ll. 13-15. She turned to Petitioner who was holding a pistol and repeating

“What have I done? I’m sorry, mom.” App. 73, ll. 16-18. Petitioner ran from the house, and Nodine called 9-1-1. App. 73, ll. 19-20; 23-25. When the police arrived, Nodine was in a hysterical and inconsolable state, such that she was grabbing the officers and impeding their ability to assist Bryant. App. 55, ll. 1-5; 76, ll. 16-22. As a result, Nodine was taken into custody. App. 77, ll. 4-8.

Nodine gave multiple statements to law enforcement which the state used to impeach her trial testimony. In her first interview with law enforcement, which occurred briefly after the shooting, Nodine stated that she had gone to bed, woken up to a “thump” sound, and found Bryant laying on the floor, shot. App. 77, l. 23 – 78, l. 3. Nodine explained the inconsistency between this statement and her trial testimony by testifying that she was both confused and trying to end the interview faster so she could travel to the hospital to be with Bryant. App. 78, ll. 5-6; 14-16. Nodine’s second interview with law enforcement was later that day, after Nodine had been permitted to take a nap. App. 83, ll. 17-18. In her second statement, she again omitted that Bryant had attacked her with a bottle immediately prior to the shooting. App. 92, l. 23. She testified this was because it was “embarrassing” and because she was so used to Bryant acting belligerently drunk that she was “used to it.” App. 93, ll. 6-8. Trial counsel attempted to rehabilitate her credibility on cross-examination by having her explain that the entire event was traumatic, embarrassing, and painful. App. 98-99.

On redirect, the state played a few audio recordings from Nodine’s interview and a call between Nodine and an investigator. App. 119, l. 16; 122, l. 13; 124, l. 22. The state also called Wilson Gomez, who testified that Petitioner came to his home after the shooting. App. 171, ll. 4-5. Gomez testified that Petitioner told him, “he had got in an argument with his brother, and he accidentally pulled out his gun, not directly shoot him. It just discharged. It was fired.” App. 171,

ll. 18-20. Petitioner also told Gomez that he had put the firearm on Gomez's wife's property, at a place called "the farm." App. 172, ll. 6-20. During its closing argument, the state asserted at length that Nodine was lying in an effort to save Petitioner. App. 345-49.

The jury found Petitioner not guilty of attempted murder but guilty of the lesser-included assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. App. 398. Judge Hayes sentenced Petitioner to twenty years' imprisonment, suspended upon the service of ten years, followed by five years of probation for ABHAN, and five years' imprisonment for the firearm charge to run concurrently. App. 412. Petitioner did not appeal.

### **Post-Conviction Relief Proceedings**

Petitioner timely filed the present PCR action on May 26, 2023, asserting ineffective assistance of counsel. App. 414-420. An evidentiary hearing convened on February 18, 2025, before the Honorable R. Scott Sprouse. App. 434-486. Rodney Richey represented Petitioner, and Bryan T. Hall represented the state. App. 434. At the outset of the hearing, Petitioner told the PCR court he was going forward on three sub-allegations of ineffective assistance: (1) "failure to properly prepare and investigate prior to trial;" (2) "failure to present a reasonable defense;" and (3) "failure to file a direct appeal." App. 437, ll. 2-7.

Petitioner testified first at the PCR hearing. He testified that trial counsel told him he had ten days to file an appeal. App. 439, ll. 20-21. Petitioner testified that he said, "go ahead and do it" but that trial counsel had refused to until Petitioner paid him \$20,000. App. 439-40. He expected that his case would be appealed. App. 440, ll. 17-19. Trial counsel Harris testified that Petitioner never asked him to file an appeal and that he had informed Petitioner that he had ten days within which to tell trial counsel to file the appeal. App. 463, ll. 17-21. Had Petitioner

wanted to file an appeal, “he needed to tell [trial counsel] that in time for [trial counsel] to meet the 10-day deadline.” App. 463, ll. 19-21.

Trial counsel also testified that he spoke with Nodine during his investigation of the case and that her testimony would be “the key piece of evidence.” App. 468, ll. 1-4; 471, ll. 12-13. However, trial counsel did not “specifically interview” her because he “didn’t want to expose her, on cross-examination, to any kind of inquiry about to what extent her son...or her son’s lawyer influenced her testimony.” App. 468, ll. 1-9. Trial counsel’s view was that Nodine’s testimony “was going to be favorable or not.” App. 468, l. 15. He added on cross-examination that “regardless of what she said to me in my office or in her home or wherever I might have interviewed her about specifically her testimony, what really mattered was what she was going to say in court.” App. 473, ll. 6-10.

The PCR court dismissed the petition with prejudice. App. 487. As to trial counsel’s decision not to interview Nodine, the PCR court found his testimony that he did not want to expose her to potential cross-examination about his “influence” credible. App. 491. The PCR court further found that this was a reasonable strategic decision. App. 491. The PCR court further found that trial counsel credibly testified that Petitioner had not contacted him to request that he file a direct appeal and that Petitioner had therefore knowingly and voluntarily waived his right to appeal. App. 493.

Petitioner now petitions this Court for a writ of certiorari to review the PCR court’s decision.

## ARGUMENTS

### I.

The PCR court erred in finding that trial counsel articulated a reasonable strategy for failing to interview Petitioner's mother, the "key witness" in Petitioner's case.

The PCR court found that trial counsel reasonably failed to interview or prepare Petitioner's mother, the "key witness" in this trial. This was error. The PCR court's decision should be reversed.

"This Court has stated previously that criminal defense attorneys have a duty to undertake a reasonable investigation, which *at a minimum* includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (emphasis added) (citing, *inter alia*, *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). However, "strict adherence to that rule" is not required, so long as trial counsel's decision not to do so meets the "reasonableness" standard. *Id.* In that regard, this Court held "it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to." *Id.* at 456, 710 S.E.2d at 64-65. However, while interviewing "every potential witness," *id.*, might not be required, trial counsel should still undertake a competent investigation to meet the reasonableness standard. *Cf., e.g., McQueen v. Swenson*, 498 F.2d 207, 217 (8th Cir. 1974) ("the most able and competent lawyer in the world cannot render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense").

In support of the proposition that a defense attorney need not interview all potential witnesses, this Court cited three out-of-state cases which decided similar issues. *See Edwards*,

392 S.C. at 456, 710 S.E.2d at 65 (collecting cases). It is helpful to analyze these cited cases to determine where, precisely, the “reasonableness” line lies.

First, the *Edwards* Court cited to *Murray v. Griffith*, 243 Va. 384, 416 S.E.2d 219 (1992). In that case, a trial attorney did not interview a potential alibi witness because the defendant’s wife told him “there were hard feelings” between the witness and defendant’s family, “and they did not have much to do with each other.” *Id.* at 387, 416 S.E.2d at 220. The trial attorney believed “the witness could easily turn on” his client, and his testimony “would be, at best, cumulative and perhaps damaging at trial.” *Id.* (internal quotation marks omitted). Further, even if the alibi witness had testified credibly and exactly as expected, this fact would have been “to the prosecution’s advantage,” since the crime scene and the alibi location were “right next door.” *Id.* at 390, 416 S.E.2d at 222.

The next case relied upon by the *Edwards* Court was *Daniels v. State*, 296 Ga. App. 795, 676 S.E.2d 13 (2009). In that case, the Georgia Court of Appeals found that an attorney who “had not interviewed any of the witnesses” was not unconstitutionally defective. *Id.* at 799, 676 S.E.2d at 18. However, the defendant in that case did not assert that his trial counsel was defective in failing to investigate or prepare witnesses—like in this case—he asserted that trial counsel was “unprepared for trial.” *Id.* The trial counsel had “read the witnesses’ statements and had reviewed the state’s entire file containing information about the case,” and the trial counsel “had prior experience” with similar trials, knew the relevant law, and was not surprised by any of the evidence that the state presented at trial. *Id.* Accordingly, he was not found deficient.

Finally, the *Edwards* Court relied on *People v. Caballero*, 184 Mich. App. 636, 459 N.W.2d 80 (1990). In that case, however, the trial counsel *did* interview potential witnesses, he had just done so over the phone rather than in person. *Id.* at 641, 459 N.W.2d at 82. And while

the defendant there alleged that the attorney did not take notes during these phone calls, that allegation was refuted. *Id.*

The decision made by Petitioner's trial counsel in this case is not like any of the preceding cases. Nodine's testimony was "the *key piece of evidence*" in the case. App. 471, ll. 12-13 (emphasis added). It was not testimony that would have been wholly cumulative. *Contra, Murray*, 243 Va. at 387, 416 S.E.2d at 220. Nor was trial counsel reasonably avoiding a potentially harmful witness, since Nodine was called by the state during its case-in-chief. *Contra id.* And the American Bar Association Guidelines, which were cited favorably by this Court in *Ard*, make the duty to interview Nodine all the more obvious. *See Ard*, 372 S.C. at 332, 642 S.E.2d at 597 (citing American Bar Assn., *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1019 (2003) ("Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to: (1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself...(3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including...members of the client's immediate and extended family")).<sup>1</sup> This is not a case like those cited in *Edwards*, where a trial counsel did a diligent investigation and decided against using the evidence gathered therefrom in good faith. *See Murray*, 243 Va. at 387, 416 S.E.2d at 220. Rather, Petitioner's trial counsel's investigation was limited to speaking with Petitioner, reviewing the state's discovery,

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<sup>1</sup> While this particular law review article by the ABA is ostensibly for death penalty cases, it makes little sense to limit the application of these guidelines in particular to capital cases alone. Rather, the ethical duty to interview witnesses applies broadly to all criminal representation. *See infra*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 508 at 1.

and essentially nothing else. *See* App. 473, l. 25 (“I don’t think there’s anything to investigate”); App. 468, ll. 6-10 (explaining reasoning for not interviewing Nodine).

Nodine was a favorable witness to Petitioner. However, the jury apparently did not find her testimony credible. While there are, admittedly, several potential reasons for this, a reading of the transcript of Petitioner’s trial shows that Nodine did not appear as a credible witness. Rather, she frequently equivocated, giving several contradictory explanations for her prior inconsistent statements and frequently volunteered long narrative answers in response to simple questions<sup>2</sup> or gave testimony that was not responsive to questioning at all.<sup>3</sup> Sometimes when confronted with prior inconsistent statements, she refused to acknowledge them, coming off as borderline recalcitrant.

This could have been avoided by proper witness preparation, which trial counsel had a duty to do. *McGill v. Shinn*, 16 F.4th 666, 692 (9th Cir. 2021) (accepting that counsel is generally under a “duty to prepare witnesses for their testimony”); ABA Comm. on Ethics & Pro. Resp., Formal Op. 508 at 1 (Aug. 5, 2023) (“A lawyer’s role in preparing a witness to testify and providing testimonial guidance is not only an accepted professional function; it is considered an essential tactical component of a lawyer’s advocacy”); *id.* (“the failure adequately to prepare a

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<sup>2</sup> *See, e.g.*, App. 66, l. 22 – 67, l. 11. (Q. “At the time, going back to like the Christmas season of 2019, Jorge was living in the house with you; is that right?” A. “That is correct. All three of them, they were already living on their own. The first one who moved out from the house was Nicholas, as he is the oldest one. He graduate [sic] also from a degree of mechanical engineer. He moved out with a girlfriend. The second one was Jorge, who also graduated with honors for electronic engineering. Bryant, unfortunately, has been the one who has given me the most trouble. He didn’t want to study. He was too deep into alcohol. He was an alcoholic. Losing the job, getting in trouble. Getting charged. He has three charges of DUI.”).

<sup>3</sup> *See, e.g.*, App. 89, ll. 18-24 (Q. “I think your testimony for why you didn’t tell them about him swinging the beer bottle is that you were still too emotional. Is that what you said?” A. “Yes. And, I mean, it wasn’t the first time that Bryant tried to hit me. He always been very aggressive. He’s been pushing me from the stairs.” Q. “That’s not what I asked you. Thank you.”).

witness would in many situations be classified as an ethical violation”). Nodine’s long narrative answers could have been lessened or eliminated by preparation by trial counsel, instructing her to answer questions truthfully, but to only answer the questions that were asked. *See* William Hodes, *The Professional Duty to Horseshed Witnesses-Zealously, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343, 1361 (1999) (“lawyers never counsel witnesses to tell the whole truth. Witnesses are instead told—as they should be—to tell the truth in response to whatever questions are asked” (internal quotation marks omitted)). And effective witness preparation likely would have instructed Nodine to embrace the fact that she had made prior inconsistent statements and explain them, not deny making the statements only to have to explain them away later, in a less credible position as before. *See House v. Balkcom*, 725 F.2d 608, 619 (11th Cir. 1984) (trial counsel ineffective because, among other reasons, he did not “adequately prepared [his client] to give testimony,” leaving him to “ramble from subject to subject,” rather than “helping [defendant] recall facts and structure a logical way to recite the facts before the jury”).

Further, trial counsel’s reasoning for not interviewing Nodine was unreasonable. *Ingle v. State*, 348 S.C. 467, 474, 560 S.E.2d 401, 405 (2002) (trial counsel must articulate objectively reasonable strategy). Trial counsel’s reasoning for not interviewing Nodine—at least the reason that was credited by the PCR court—was that he did not want to subject her to cross-examination about “to what extent her son...or her son’s lawyer influenced her testimony.” App. 468, ll. 1-9; App. 491 (finding this to be a reasonable strategic decision). However, trial counsel also testified that this view of Nodine’s testimony was that it would either “be favorable or not,” and “regardless of what she said to me in my office...what really mattered was what she was going to say in court.” App. 468, l. 15; App. 473, ll. 6-10. This attitude about Nodine’s testimony, that no interview or preparation would have changed her in-court testimony, is not only objectively

incorrect, it has been rejected several times over. *See, e.g., Edwards*, 392 S.C. at 456, 710 S.E.2d at 64 (“criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses”); *Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (the same); American Bar Assn., *supra*, 31 HOFSTRA L. REV. at 1019 (counsel should seek out and interview eyewitnesses or anyone having relevant knowledge about a criminal defendant except in exceptional circumstances); ABA Formal Op. 508, at 1 (failing to adequately prepare witnesses can be unethical).

Trial counsel’s rationale also fails on its own terms. It is true that the state may have asked Nodine about the extent to which his interview influenced her testimony. However, this is not a valid concern for two reasons. First, the interview and witness preparation itself could have prepared Nodine for how to answer this question. Second, trial counsel could just as easily have asked this question of every single state’s witness, since they would have been interviewed and prepared by the police or solicitor’s office. In any event, failing to interview Nodine just to avoid one or two cross-examination questions about the interview falls well short of objectively competent representation.

For these reasons, trial counsel failed to interview and prepare Nodine, the “key witness” in the case, to testify. Likely as a result thereof, the jury did not credit her extremely favorable testimony. Further, trial counsel’s stated rationale for failing to do so was objectively unreasonable. For these reasons, trial counsel provided constitutionally deficient performance at trial, this Court should reverse the PCR court’s contrary decision and remand for a new trial.

## II.

The PCR court's finding that Petitioner knowingly waived his right to a direct appeal is not supported by evidence.

The PCR court's finding that Petitioner knowingly waived his right to a direct appeal is not supported by the evidence presented to it. This Court should grant certiorari and grant Petitioner a belated appeal.

Following a trial, trial counsel "must make certain the defendant is made fully aware of the right to appeal." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in [*Anders*]<sup>4</sup>." *Id.* (quoting *Turner*, 380 S.C. at 224, 670 S.E.2d at 374 (emphasis added)). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Clark v. State*, 396 S.C. 164, 168, 719 S.E.2d 708, 710 (Ct. App. 2011).

In *Clark*, the Court of Appeals granted a belated appeal to a defendant whose attorney informed him of the right to appeal but did not speak with him after he was sentenced. *Id.* at 167-68, 719 S.E.2d at 710. The *Clark* defendant testified that he asked his attorney to appeal the case, his attorney said that they did not speak after sentencing. *Id.* The lower court found the attorney's testimony credible and the defendant's not and denied the belated appeal. *Id.* The Court of Appeals reversed. *Id.* That court found that, "even considering the PCR court's credibility findings," there was no evidence that trial counsel had spoken to Petitioner after sentencing, and thus, could not have ascertained whether Petitioner wanted to appeal or not. *Id.* at 169, 710 S.E.2d at 710-11.

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<sup>4</sup> *Anders v. California*, 386 U.S. 738 (1976).

Here, trial counsel testified that he told Petitioner “after the jury verdict” about his right to appeal and “told him he needed to let me know if he wanted to appeal.” App. 480-81. Petitioner testified that he told trial counsel to appeal immediately after trial counsel informed him of his right to do so, App. 439, l. 23, and that he fully expected the case to be appealed. App. 440, ll. 18-19. The PCR court found trial counsel’s testimony credible in this regard and found that Petitioner waived his right to appeal. App. 493.

In other words, the PCR court found “Petitioner’s lack of request—after being advised of the appellate process—to be an ‘intelligent waiver’ of his right to appeal,” a position squarely rejected by the Court of Appeals in *Clark*. See 396 S.C. at 168, 719 S.E.2d at 710. It is not clear why trial counsel told Petitioner to “let him know” if he wanted to appeal rather than simply asking whether Petitioner wanted to appeal while the two were together in the courtroom immediately after the verdict. Especially since Petitioner would be taken into the custody of the Department of Corrections immediately after sentencing, and this fact may make it difficult to get into contact with trial counsel, something that Petitioner’s PCR counsel pointed out in his summation. App. 483, ll. 12-17.

The onus to request an appeal is not entirely on a petitioner; this Court’s case law shows that trial counsel has at least some duty to “ascertain whether or not” a petitioner wanted to appeal. See *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Trial counsel did not make an effort to ascertain whether Petitioner wanted to appeal; he told Petitioner to call him and then waited for the call. This is far from “mak[ing] certain” Petitioner was fully aware of his right to appeal. See *Turner*, 380 S.C. at 224, 670 S.E.2d at 374 (emphasis added).

For these reasons, the PCR court erred in holding Petitioner waived his right to appeal. This Court should grant him a belated direct appeal.

### **STATEMENT OF BELATED APPEAL ISSUES**

Pursuant to Rule 243(i)(2), SCACR, Petitioner offers the following issues on appeal should the Court allow a belated appeal:

I. Whether the trial court erred in twice refusing to declare a mistrial when the state told the jury it was its job to get justice for the victim because he cannot speak for himself, and when a state's witness commented on Petitioner's right to remain silent?

II. Whether the trial court erred in admitting several irrelevant photographs into evidence?

**CONCLUSION**

For the foregoing reasons, the petition for writ of a certiorari should be granted to allow full briefing on the issues.



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W. Chandler Norville  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30<sup>th</sup> day of September, 2025.